FILED
SUPREME COURT
STATE OF WASHINGTON
8/5/2019 8:00 AM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 97495-1

Court of Appeals No 78439-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PETER SCHAUB, an individual, CLOUDY SKIES PROPERTIES, LLC, a Washington limited liability company,

Appellants,

v.

JPMORGAN CHASE BANK N.A.; BAYVIEW LOAN SERVICING, LLC; NORTHWEST TRUSTEE SERVICES, INC.; AND DOE DEFENDANTS 1-10.

Respondents.

APPELLANTS' AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS.

The Petitioners are PETER SCHAUB, an individual, and CLOUDY SKIES PROPERTIES, LLC, a Washington limited liability company (hereinafter collectively "Mr. Schaub"), who were the Plaintiffs in the original action under King County Superior Court Case No. 18-2-01588-0 SEA and are the Appellants in Court of Appeals, Division I, Case No. 78439-1-I.

II. COURT OF APPEALS DECISION.

Mr. Schaub seeks review by the Supreme Court of the Unpublished Opinion of the Court of Appeals filed July 1, 2019, a copy of which is attached hereto at ***Appendix "A"*** (hereinafter "subject decision" or "Unpublished Opinion").

III. ISSUES PRESENTED FOR REVIEW.

A. Whether the subject decision by the Court of Appeals properly applied the appropriate standard of review/burden of proof in its analysis of the April 21, 2015 letter from Respondent, BAYVIEW LOAN SERVICING, LLC (hereinafter "Bayview") (CP 77-78) in its finding that Mr. Schaub had no reasonable basis to rely on the patently ambiguous terms of the letter, contrary to existing precedent, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

B. Whether the subject decision affirming the trial court's dismissal of Mr. Schaub's claims against Respondent, JPMORGAN CHASE BANK N.A (hereinafter "JPMorgan") on November 3, 2017 and against

Bayview and Respondent, NORTHWEST TRUSTEE SERVICES, INC (hereinafter "NWTS") on March 2, 2018 pursuant to *CR 12(b)* was contrary to existing precedent in its implicit finding that that Mr. Schaub's Complaint failed to articulate claims against JPMorgan upon which relief could be granted, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

C. Whether the subject decision affirming the trial court was contrary to existing precedent by implicitly finding NWTS had the requisite authority to act on behalf of JPMorgan on the basis of a Power of Attorney recorded February 6, 2009 (Auditor's File No. 2009020601449) issued by Chase as a separate entity from JPMorgan, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

D. Whether the subject decision affirming the trial court was contrary to existing law and precedent where there was no evidence of an assignment or transfer of Mr. Schaub's Note to Bayview, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

E. Whether the subject decision affirming the trial court was contrary to existing precedent and violates the provisions of *RCW 61.24.040* where the Notices of Trustee's Sale of February 26, 2013, August 18, 2014 and January 15, 2015 and was defective in several material particulars, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

F. Whether the subject decision affirming the trial court was contrary to existing law and precedent where NWTS advertised the subject property as "hot" in violation of its duty of good faith to both grantor and

beneficiary under *RCW 61.24.010,* thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

G. Whether the subject decision affirming the trial court was contrary to existing law and precedent where it was undisputed that (1) Mr. Schaub submitted a facially complete loss mitigation application to Bayview thirty eight days prior to the scheduled trustee's sale utilizing forms selected and provided by Bayview on behalf of Mr. Schaub, pursuant to *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b);* (2) thirty-one days prior to the scheduled sale, Bayview issued a letter stating: "we have been unsuccessful in obtaining from you the following documents", but identified nothing as being necessary or required under HAMP guidelines to complete its review of Mr. Schaub's HAMP application, reasonably leading Mr. Schaub to believe (a) his loss mitigation application was facially complete within the terms of *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* and (b) the scheduled foreclosure set for May 22, 2015 would be discontinued; (3) Despite being in possession of a facially complete loss mitigation application more than 37 days prior to the scheduled sale date, neither JPMorgan nor Bayview directed NWTS to delay or cancel the sale pending review, denying Mr. Schaub the ability to cure the default (*RCW 61.24.040*) or file suit to stay the sale (*RCW 61.24.130*) prior to the sale date; (4) inuring to Mr. Schaub's injury and damage, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

H. Whether the subject decision holding that substantial evidence of a violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*)

(hereinafter "CPA") did not exist was clearly erroneous, thus meriting review of this Court under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4).*

I. Whether the subject decision holding that substantial evidence of a violation of the Consumer Loan Act (*RCW 31.04, et seq.*) (hereinafter "CLA") did not exist was erroneous, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4)*

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

IV. STATEMENT OF THE CASE.[1]

The facts plead in Appellants' Complaint (CP 1-84) and Amended Complaint (CP 271-356) are largely undisputed.

At all times relevant to this cause of action, Mr. Schaub was the owner of that certain real property commonly described as 6043 45th Avenue S.W., Seattle, King County, Washington, (hereinafter "subject Property").

On or about October 10, 2007 Mr. Schaub executed a Note and Deed of Trust in favor of JPMorgan. CP 19-42. Although a copy of the recorded Deed of Trust was plead and provided the trial court, no copy of the Note was ever provided the trial court by any party or otherwise made a part of the record. The 1-4 Family Rider attached to the Deed of Trust, specifically provides that: "with regard to non-owner occupied investment properties, the first sentence in Uniform Covenant 6 [to the Deed of Trust] concerning Borrower's occupancy of the Property is deleted." CP 36. Indeed,

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[1] See also Mr. Schaub's initial Petition for Discretionary Review of July 28, 2019, attached hereto as ***Addendum "B".***

at all times relevant to this cause of action, Respondents, and each of them, knew that the subject property was purchased for investment purposes and was not owner-occupied and this knowledge is imputed to all of the Respondents as this document provided the basis upon which all of the named Respondents obtained an interest in the subject Property.

On or about December 9, 2009, Mr. Schaub submitted a request for modification of his loan. CP 4. His initial application was conditionally approved by JPMorgan and Mr. Schaub was directed to make three payments of $1,192.00 beginning January 4, 2010. CP 4. It was Mr. Schaub's understanding that after JPMorgan received the three payments in a timely fashion, JPMorgan would provide Mr. Schaub a permanent modification agreement. CP 4. Mr. Schaub ultimately made ten payments of $1,192.00 to JPMorgan from January of 2010 to October of 2010, which JPMorgan acknowledged receiving. CP 4. Although Mr. Schaub complied with all of the stated terms and preconditions imposed upon him by JPMorgan to obtain a permanent loan modification agreement, JPMorgan breached its reciprocal agreement to modify the loan. CP 4. Moreover, JPMorgan has never properly accounted for the ten payments made by Mr. Schaub from January of 2010 to October of 2010. CP 4.

On or about September 22, 2010, JPMorgan executed an Assignment of Deed of Trust that purported to assign JPMorgan's interest in the Deed of Trust to "Chase Home Financial LLC" (hereinafter "Chase"). CP 44. The Assignment of Deed of Trust was prepared and executed by an "officer" of NWTS, purporting to act pursuant to a Power of Attorney granted

by JPMorgan. Significantly, JPMorgan did not release its interest in the Note or the payments due thereunder to Chase. Arguably, payments made by Mr. Schaub were distributed to JPMorgan.

On the same day NWTS executed an Appointment of Successor Trustee. CP 46. Curiously, this Appointment of Successor Trustee was executed by an "officer" of NWTS acting pursuant to the same Power of Attorney that was issued by JPMorgan.[2] This Appointment of Successor Trustee was apparently executed and filed for record in apparent ignorance of the fact that Chase was not the holder of the obligation and there is no indication in the record that JPMorgan was either aware of or authorized NWTS' appointment, in apparent violation of *RCW 61.24.010*.

On February 26, 2013, Heather Smith of NWTS executed a Notice of Trustee's Sale, setting sale of Mr. Schaub's home for July 12, 2013. CP 48-52. This Notice of Trustee's Sale was defective in several particulars: (1) although Ms. Smith executed the Notice of Trustee's Sale on February 26, 2013, her signature was not notarized until March 11, 2013; (2) the place of sale was designated as "the northwest corner of the ground level parking area located under the Pacific Corporate Center building, 13555 SE 36th Street in the City of Bellevue, State of Washington", which is private property, in apparent violation of *RCW 61.24.040(5)*.

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[2] At all times relevant to this cause of action, the Power of Attorney that provided NWTS authority to act on behalf of JPMorgan ("recorded 2/06/09 under Auditor's File No. 2009020601449") is the same instrument that purportedly provided NWTS authority to act on behalf of Chase, as separate entity. No Power of Attorney issued by Chase to NWTS has ever been produced. No explanation of this discrepancy has ever been provided.

At some time prior to March 11, 2013, Chase ceased to exist as a separate legal entity. CP 6.

On December 10, 2013, JPMorgan issued a second Assignment of Deed of Trust to Bayview. CP 54-56. Significantly, by this Assignment of Deed of Trust, JPMorgan again did not release its interest in the Note or the payments due thereunder to Bayview. Payments made by Mr. Schaub and collected by Bayview after this assignment were distributed to JPMorgan.

On or about June 26, 2014, Bayview "re-appointed" NWTS as successor trustee under the Deed of Trust. CP 58. At the time of this "re-appointment", Bayview was not the holder of the obligation by virtue of the fact that JPMorgan retained ownership of the Note. There is no indication in the record that JPMorgan was either aware of or authorized NWTS' appointment, in apparent violation of *RCW 61.24.010.*

On August 18, 2014, Nanci Lambert of NWTS executed another Notice of Trustee's Sale, wrongfully identifying Bayview as the "Beneficiary of the Deed of Trust", despite the fact that JPMorgan retained the subject Note as owner and holder of the obligation. CP 60-65. Bayview had no right or authority to foreclose the subject Property at the time said Notice of Trustee's Sale was executed. CP 6. Although Ms. Lambert executed the Notice of Trustee's Sale on August 18, 2014, her signature was not notarized until August 22, 2014. CP 64

On January 15, 2015, Vonnie McElligott of NWTS executed another Notice of Trustee's Sale, again wrongfully identifying Bayview as the "Beneficiary of the Deed of Trust", despite the fact that JPMorgan retained

the subject Note as owner and holder of the obligation. CP 67-71. Bayview had no right or authority to foreclose the subject Property at the time this Notice of Trustee's Sale was executed. CP 7. Although Ms. McElligott executed the Notice of Trustee's Sale on January 15, 2015, her signature was not notarized until January 16, 2015. CP 71.

In advertisements submitted to USA-Foreclosure.com., NWTS indicated and represented to prospective sale bidders that the subject real property was a "hot property", representing that a successful bidder at time of sale would realize and be enriched with a considerable amount of equity (property value over the beneficiary's initial bid) if purchased at time of sale, in violation of *RCW 61.24.010*. CP 210-224.

Shortly after receipt of NWTS' Notice of Trustee's Sale, Mr. Schaub requested loss mitigation/modification through Bayview. Bayview responded by selecting and providing Mr. Schaub a HAMP owner-occupied loss mitigation/loan modification package with blank forms and expressly induced him to complete the loss mitigation/loan modification package under the procedures and within the timeline set out under *12 CFR §1024,* despite Bayview's actual knowledge that the subject property was held for investment purposes and was not owner-occupied. CP 36.

On April 14, 2015, thirty-eight days prior to the scheduled sale, Mr. Schaub, through Brian Carl, a HUD approved housing counselor, submitted a complete HAMP loss mitigation application to Bayview, pursuant to *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)*. CP 74-75.

On April 21, 2015, thirty-one days prior to the scheduled sale, Bayview issued a letter stating: "we have been unsuccessful in obtaining from you the following documents", but identified nothing as being necessary or required to complete its review of Mr. Schaub's HAMP loss mitigation/modification application. CP 77. By virtue of the fact that Bayview did not identify any missing information or documents, Mr. Schaub reasonably believed that (a) his loss mitigation application was facially complete within the terms of *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* and (b) the scheduled foreclosure set for May 22, 2015 would be discontinued. Indeed, Mr. Schaub was specifically advised that while his modification package was being considered, his home would "not be referred to foreclosure" and any scheduled foreclosure sale "will not occur" pending Respondents' consideration of his modification package. CP 78.

Despite being in possession of a facially complete loss mitigation application more than 37 days prior to the scheduled sale date, neither JPMorgan nor Bayview directed NWTS to delay or cancel the sale pending review. CP 8.

On May 13, 2015, eight days prior to the scheduled sale, Bayview contacted Mr. Schaub's agent, Mr. Carl, by phone to request additional unspecified documentation related to the loss mitigation application. CP 8. Bayview email the list of documents the following day, seven days before the scheduled trustee's sale date. CP 8.

On May 22, 2015, NWTS proceeded with the sale of the subject Property for the sum of $383,000.00, in violation of assurances to Mr. Schaub and Mr. Carl that the procedures outlined in *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* would be followed. CP 80-81. At the time of sale, the subject real Property was valued at approximately $500,000.00. It is significant to note that the Trustee's Deed falsely asserts that (1) at the time of sale Bayview was "the holder of the indebtedness secured by the Deed of Trust"; (2) that the sale complied with all legal requirements and provisions of the Deed of Trust and the provisions of the Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA") sufficient to "convey all of the right, title, and interest in the real and personal property sold at the trustee's sale". CP 80-81.

On May 29, 2015, Mr. Brian Carl learned the subject Property had been sold and immediately contacted NWTS to address various violations of law associated with the sale of the subject Property and to request rescission of the trustee's sale. CP 9. However, despite Mr. Carl's efforts, NWTS refused to rescind the sale on June 16, 2015, as provided under *RCW 61.24.050(2).* CP 9.

On or about January 6, 2016, at minimal expense, Emerald City Ventures LLC., sold the subject Property to Hera McLeod for the sum of $530,000.00. CP 83-84.

On May 8, 2017, within the two years provided by *RCW 61.24.127*, Mr. Schaub filed this action, seeking damages for violation of Respondents' agreement to comply with the provisions of *12 CFR § 1024.41, RCW*

31.04.027 and *WAC 208-620-900(6)(b)*; *RCW 19.86, et seq*; unjust enrichment; fraud and misrepresentation; and NWTS' failure to materially comply with the provisions of *RCW 61.24, et seq.* CP 1-84.

On September 25, 2017, JPMorgan filed a Motion to Dismiss, pursuant to *CR 12(b)(6).* CP 85-104.

On October 17, 2017, Bayview and NWTS filed a Motion to Dismiss, or, Alternatively a Motion for a More Definite Statement, pursuant to *CR 12(b)(6)* or *CR 12(e).* CP 105-113. On November 3, 2017, the Honorable Barbara Linde granted JPMorgan's Motion to Dismiss. CP 260-262.

On November 14, 2017, Judge Linde granted in part and denied in part Bayview's and NWTS' Motion to Dismiss, providing Mr. Schaub leave to amend his Complaint to articulate claims for promissory estoppel and equitable estoppel, which he did on November 29, 2017. CP 270, CP 271-356. However, on March 2, 2018, Judge Linde granted Bayview's and NWTS' Motion to Dismiss. CP 392.

On March 29, 2018, Mr. Schaub filed his Notice of Appeal of Judge Linde's Orders of Dismissal, which was accepted on July 19, 2018.

On July 1, 2019, the Court of Appeals affirmed the trial court's dismissal of Mr. Schaub's claims. ***Appendix "A".*** Mr. Schaub now seeks this Court's discretionary review of the Court of Appeals Unpublished Opinion.

V. ARGUMENT AND AUTHORITY.[3]

A. Standard of Review

Dismissal of an action under *CR 12(b)(6)* is a question of law that appellate courts review *de novo*. *Tenore v. AT&T Wireless Services,* 136 Wn.2d 322, 329-330, 962 P.2d 104 (1998); *San Juan County v. No New Gas Tax,* 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

In considering motions to dismiss under *CR 12(b)(6)*, courts of this State may only dismiss an action if it appears beyond doubt that the plaintiff cannot prove any set of facts that would (a) be consistent with the complaint and (b) warrant relief. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987); *Havsy v. Flynn*, 88 Wn.App. 514, 945 P.2d 221 (1997); *Bavand v. OneWest Bank, FSB*, 176 Wn.App. 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*").

Courts on appeal must presume Mr. Schaub's claims to be true and should even consider a hypothetical situation conceivably raised by the complaint on a motion to dismiss under *CR 12(b). Bravo v. Dolsen Cos.,* 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl,* 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Cutler v. Phillips Petroleum Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994); *Tenore v. AT&T Wireless Services, supra; Bavand, supra.* Indeed, a court may choose to consider hypothetical facts that may not be included in the record. *Tenore v. AT&T Wireless Services, supra.*

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[3] See also Mr. Schaub's initial Petition for Discretionary Review of July 28, 2019, attached hereto as ***Addendum "B".***

CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Tenore v. AT&T Wireless Services, supra.* at pg. 330 (citing to *Hoffer v. State,* 110 Wn.2d 414, 420, 755 P.2d 781 (1988)); *Bavand.*

It is Mr. Schaub's contention that neither the trial court nor the Court of Appeals applied the proper burden of proof/standard of review to the facts of this case. Specifically, the Court of Appeals' analysis of the Bayview's letter of April 21, 2015 (CP 77-78) failed to apply the appropriate standard of review/burden of proof, by failing to construe the letter against the drafter (Bayview) and construing the terms and Mr. Schaub's understanding thereof, as articulated in his Complaint and Amended Complaint, in his favor. From this fundamental error, all others flow.

B. Ambiguity of Letter of April 21, 2015 (CP 77-78).

Analysis of Bayview's letter of April 21, 2015 (CP 77-78) was crucial to the Court of Appeals' decision to affirm the trial court. In analyzing Bayview's letter of April 21, 2015, the Court of Appeals concluded that no promise had ever been made to Mr. Schaub to discontinue the trustee's sale set for May 22, 2015. The Court of Appeals reached this conclusion through a tortured reading of the letter and failing to weigh the ambiguous and often conflicting terms of the letter against Bayview. To the extent the letter of April 21, 2015 presents conflicting terms that could be variously interpreted by the recipient, the letter was ambiguous. See *Viking*

Band v. Firgrove Commons 3, LLC, 183 Wn.App. 706, 713, 334 P.3d 116 (2014).

It is axiomatic that ambiguous language in any document must be construed against the drafter, in this case Bayview. Restatement (Second) of Contracts, §206 (1981); *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990) (hereinafter "*Berg*"); *Stephenson v. Kenworthy Grain & Milling Co.*, 186 Wash. 114, 56 P.2d 1301 (1936). While courts are generally encouraged to determine the objective intent of the parties in construing an ambiguous integrated agreement on summary judgment as in *Berg*, the trial court and the Court of Appeals here were not asked to construe an integrated contract on summary judgment, where there are no genuine issues of material fact in dispute. Rather, the trial court and the Court of Appeals were asked to construe a non-integrated/unilateral agreement based on specific statutory language found in *12 CFR § 1024* and *WAC 208-620, et seq.* issued in response to Mr. Schaub's HAMP loss mitigation/modification application on a motion to dismiss pursuant to *CR 12(b)* where there were a multitude of issues of fact in dispute. This, the Court of Appeals failed to do. As a result, the Court of Appeals erred on each and every issue raised and addressed thereafter.

The Court of Appeals concluded (1) that nowhere in the letter of April 21, 2015 does Bayview state that the application is complete (***Appendix "A"***, pg. 8); (2) that Bayview's promise to discontinue the trustee's sale was conditioned upon Bayview's receipt of all required documentation (***Appendix "A"***, pg. 9); and (3) that Mr. Schaub could not justifiably rely on the

Bayview's promise to forebear foreclosure in light of Bayview's request for additional information eight days before the foreclosure sale, there being sufficient time to stay the sale under *RCW 61.24.130.* (***Appendix "A"***, pg. 10). The letter does not state explicitly that the application was facially incomplete within the HAMP guidelines or as alleged by Mr. Schaub – the letter only suggests that Bayview wanted additional information by requesting additional documentation beyond what HAMP required. CP 7-8. Moreover, the Court of Appeals' conclusions ignore the fact that Bayview failed to identify a single missing piece of information, whether required information or not, and made no request for any additional required information. CP 77.

The first paragraph of Bayview's letter of April 21, 2015, merely refers to "the following documents: . . ." CP 77. There is no reference in this passage of "required documents" under HAMP. However, in the paragraph dealing with the discontinuance of the trustee's sale, the language changes to refer to "required documentation". CP 78. Clearly the two paragraphs in Bayview's letter of April 21, 2015 are referring to two different types of documents. At no time relevant to this cause of action did Bayview notify Mr. Schaub that his HAMP loss mitigation/modification application was missing any required documentation.[4] Indeed, by Bayview's failure to identify a single missing document to an otherwise facially complete

[4] It is important to note that at no time relevant to this cause of action did Mr. Schaub refuse to cooperate with Bayview in its review and underwriting of the HAMP loss mitigation/modification application or ignore any request for additional information. The use of the term "required" or "facially complete" refers to that information that is required to be provided under HAMP to trigger the statutory protections, including discontinuance of sale. Indeed, when requested to provide addition ("unrequired") information on May 14, 2015, Mr. Schaub's agent immediately began collecting the information requested, but the process was made moot by Bayview's sale.

application, the Court of Appeals should have presumed a complete application was before Bayview for review, as alleged by Mr. Schaub, given the use of the language in the April 21, 2015 letter and presumed the statutory protections would apply. *Cutler v. Phillips Petroleum Co., supra., Tenore v. AT&T Wireless Services, supra; Bavand, supra.* CP 77-78. Mr. Schaub resumed and believed his application to be complete, which the trial court and the Court of Appeals was obliged to presume to be true. CP 7-8.

Moreover, the Court of Appeals appears to confuse a facially complete HAMP loss mitigation/modification application with other documentation that might be requested by the lender. In this regard, the Court of Appeals failed to consider that hypothetically, Bayview's request for additional information exceeded what is required for a facially complete HAMP loss mitigation/medication application, the scope of which was not before the trial court. Hypothetically, if Bayview had requested information beyond what would normally have been required under HAMP for some undisclosed underwriting reason, that would not have necessarily meant that the application submitted to Bayview on April 14, 2015 was "incomplete" within HAMP guidelines and unworthy of the statutory protections. Certainly, Mr. Schaub had no reason to question Bayview's promise to discontinue the trustee's sale because he reasonably believed his application was complete and the additional information requested on May 13, 2015 was not required under HAMP or such that would otherwise trigger the "conditional" language cited by the Court of Appeals. CP 7-8. ***Appendix "A"***, pg. 10.

Finally, the Court of Appeals concludes that nothing in Bayview's letter of April 21, 2015 promises to discontinue the trustee's sale on receipt of a facially complete application, but this is simply wrong and a patent misreading of the letter. The language used in Bayview's letter of April 21, 2015 would lead any reasonable person to believe that if they submitted a facially complete HAMP loss mitigation/modification application within the terms of *12 CFR § 1024* and *WAC 208-620, et seq.,* as Mr. Schaub had, Bayview would not refer the property to foreclosure and would forebear the pending foreclosure "while [Bayview] consider[s] your [modification] request." CP 78. It was Mr. Schaub's understanding that Bayview had all required documentation, and Bayview provided Mr. Schaub nothing to the contrary. CP 7-8

C. Application of *12 CFR § 1024.41* and related statutes.

It was Mr. Schaub's well-founded understanding at all time relevant to this cause of action, based on Respondents' encouragement, choice of forms to be completed and Bayview's letter of April 21, 2015, that the provisions of *12 CFR § 1024* would apply to his loss mitigation/loan modification application, despite the non-owner occupied character of the subject property. CP 77-78 and CR 120-124.

While it is true that *12 CFR §1024.30(c)(2)* limits application of Reg. X remedies to "owner-occupied" properties, Bayview specifically invited and encouraged Mr. Schaub to apply for a loan modification and selected the specific HAMP loss mitigation/modification application to be used by Mr. Schaub knowing the property was "non-owner-occupied" rental

property (CP 120-124); sent Mr. Schaub correspondence that led him to reasonably believe his modification application was facially complete, without regard to the character of the property, and assured (promised) him that its foreclosure efforts would be stayed while his application was pending (CP 77-78); and failed to advise him that his application could not be considered within the terms of Reg. X in sufficient time for him to either cure the alleged default 11 days prior to the sale date under *RCW 61.24.040,* obtain refinance of the obligation or seek other remedies under *RCW 61.24.130.* By these acts, Respondents should be promissorily estopped from denying applicability of Reg. X or the related Washington provisions to Mr. Schaub's HAMP loss mitigation/modification application and denying their duty to have stayed their foreclosure efforts during their review of Mr. Schaub's application and, failing that, remain liable for loss of his rental property and loss of his equity and for violation of *12 CFR § 1024, WAC 208-620, et seq., RCW 31.04, et seq, RCW 19.86, et seq.* and *RCW 61.24, et seq.*

D. Application of Promissory Estoppel.

The elements of promissory estoppel are: (1) a promise that (2) the promisor should reasonably expect to cause the plaintiff to alter their position and (3) which does cause such a change in position (4) in justifiable reliance, (5) such that injustice requires enforcement of the promise. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 171–72, 876 P.2d 435 (1994). Promissory estoppel based on *Restatement of Contracts*, § 90 (1932) is well established under Washington law and serves as an additional basis for an action for damages. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259,

616 P.2d 644 (1980) (citing *Central Heat, Inc. v. The Daily Olympian, Inc.*, 74 Wn.2d 126, 443 P.2d 544 (1968); *Hill v. Corbett*, 33 Wn.2d 219, 204 P.2d 845 (1949.)).

Here, each element is present. Bayview promised Mr. Schaub that if he submitted a facially complete loss mitigation package based on forms Respondents themselves chose and without regard to the character of the property, his request would be considered and while under consideration, Defendants would forebear all foreclosure efforts. CP 7-8, CP 78. Mr. Schaub acted in good faith, providing Defendants all of the information requested in a timely fashion, and in so doing, lost out on the opportunity to apply for such assistance through other means and/or cure the default or enjoin the sale. Mr. Schaub reasonably believed his loss mitigation/modification application was complete because in its letter of April 21, 2015, Bayview did not identify any missing required information, documents or any other missing information whatsoever. CP 8, CP 77. Mr. Schaub reasonably and justifiably relied on Bayview's representations that the mitigation package selected by Respondents and timely submitted by him was the right one and reasonably believed the pending non-judicial foreclosure would be discontinued. CP 8, CP 78. Based upon Bayview's assurances of discontinuance of the pending non-judicial foreclosure and his reliance of those assurances, Mr. Schaub's position *vis-à-vis* the pending foreclosure changed, as he did not attempt to cure the alleged default, pursuant to *RCW 61.24.040,* seek to refinance the obligation or enjoin the pending sale, pursuant to *RCW 61.24.130.* When Mr. Schaub learned of the

foreclosure sale, it was too late for him to seek any other loss mitigation remedy and he was thus injured and damaged by virtue of the loss of his rental property and his approximately $147,000.00 in equity.

E. Attorney Fees and Costs.

In addition to all other relief requested herein, Mr. Schaub requests this Court award him his taxable costs and reasonable attorney fees pursuant to the terms of Paragraph 26 of the Deed of Trust (CP 32) and *RAP 18.1.*

VI. CONCLUSION

Based upon the foregoing, this Court should accept review of the subject decision, pursuant to *RAP 13.4(b)(1), (2)* and *(4)* to correct the manifest errors in the Court of Appeals' Unpublished Opinion of July 1, 2019.

REPECTFULLY SUBMITTED this 4th day of August, 2019.

KOVAC & JONES, PLLC

/s/ Richard Llewelyn Jones

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Attorney for Appellant

CERTIFICATE OF SERVICE

I, hereby certify that on August 4, 2019, I electronically filed the foregoing Petition for Discretionary Review with the Clerk of the Court using the CM/ECF system. The following parties were served in the manner indicated below:

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DATED this 4th day of August, 2019.

/s/ Richard Llewelyn Jones

Richard Llewelyn Jones (WSBA 12904)

APPENDIX A

FILED
7/1/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PETER SCHAUB, an individual, CLOUDY SKIES PROPERTIES, LLC, a Washington limited liability company, Appellants, v. JPMORGAN CHASE BANK N.A.; BAYVIEW LOAN SERVICING, LLC; NORTHWEST TRUSTEE SERVICES, INC., Respondents, and DOE DEFENDANTS 1-10, Defendants.	No. 78439-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 1, 2019

SMITH, J. — Peter Schaub and his closely held limited liability company, Cloudy Skies Properties LLC (collectively Schaub), lost a rental property in a nonjudicial foreclosure. Schaub brought various statutory and estoppel claims against JPMorgan Chase Bank N.A. (JPMorgan), Bayview Loan Servicing LLC (Bayview), and Northwest Trustee Services Inc. (NWTS) (collectively Respondents) related to the foreclosure. The trial court dismissed all of Schaub's claims under CR 12(b)(6). Because Schaub did not state any claims

on which relief can be granted, even if we presume that the facts alleged in his complaint are true, we affirm.

FACTS

Schaub executed a promissory note and deed of trust in favor of JPMorgan in October 2007, related to a rental property in Seattle. In December 2013, JPMorgan assigned the deed of trust to Bayview and the assignment was recorded the next month. In June 2014, Bayview executed and recorded an Appointment of Successor Trustee, naming NWTS as a successor trustee.

In January 2015, NWTS executed a Notice of Trustee's Sale of the Property scheduled for May 22, 2015. Schaub alleges in his complaint that the notice wrongfully identified Bayview as the beneficiary of the deed of trust because JPMorgan was still the holder of the note and therefore the actual beneficiary under the deed of trust. For this reason, Schaub alleges that Bayview had no right to foreclose the property.

On April 14, 2015, 38 days before the scheduled sale, Brian Carl, a housing counselor approved by the United States Department of Housing and Urban Development, submitted a loss mitigation application to Bayview on Schaub's behalf. Schaub alleges that the application was complete.

Shortly thereafter, Bayview sent Schaub a letter dated April 21, 2015, which stated that Bayview was "unsuccessful in obtaining from [Schaub] the following documents," followed by a blank line with no documents identified. The letter explained that Bayview was "unable to complete [its] review of [Schaub's] loan workout request without this information." The letter goes on to state,

"Incomplete Information Final Notice – Your request for a Home Affordable Modification cannot be completed as of April 21, 2015 because we have not yet received all of the requested documentation." (Boldface omitted.) In a separate section, the letter states, "After we receive all required documentation, we will process your request as quickly as possible. While we consider your request, your home will not be referred to foreclosure. Any scheduled foreclosure sale will not occur pending our determination." (Boldface omitted.) Schaub alleges that based on this letter, he "reasonably believed that his loss mitigation application was complete . . . and the scheduled foreclosure . . . would be stopped."

On May 13, 2015, eight days before the scheduled sale, Bayview contacted Carl and requested "a substantial amount of additional documentation related to the loss mitigation application." Schaub alleges that Bayview e-mailed Carl a list of requested documents, but his complaint does not state whether or not he provided those documents to Bayview.

On May 22, 2015, NWTS sold the Property to a third party. Schaub alleges that the trustee's deed falsely asserted that Bayview complied with all legal requirements and held the note secured by the deed of trust. Carl learned about the sale on May 29, 2015, and requested that NWTS rescind the sale because, among other reasons, Bayview had received a "facially complete loss mitigation application." NWTS refused to rescind the sale.

Schaub initiated this action against JPMorgan, Bayview, NWTS, and Doe Defendants 1-10 in May 2017. His complaint alleges actions for unjust enrichment and violation of chapter X, 12 C.F.R. § 1024, which implements the

Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 to 2617; the deeds of trust act (DTA), chapter 61.24 RCW; the Consumer Loan Act (CLA), chapter 31.04 RCW; and the Consumer Protection Act (CPA), chapter 19.86 RCW. No declarations related to these claims were filed by any party. JPMorgan moved to dismiss Schaub's claims against it under CR 12(b)(6), arguing that it had no liability to Schaub after it transferred its interest in the note and the deed of trust to Bayview. The trial court granted JPMorgan's motion.

Bayview and NWTS also moved to dismiss Schaub's claims under CR 12(b)(6), arguing that Schaub's claims failed because they were predicated on a violation of RESPA, which applies to owner-occupied properties, not rental properties. The trial court dismissed Schaub's RESPA, DTA, CLA, and CPA claims against Bayview and NWTS but granted Schaub leave to amend his complaint to allege promissory or equitable estoppel claims "*with particularity*."

Schaub then filed an amended complaint, which mirrored the original complaint but included a new claim against all parties for promissory and equitable estoppel. Bayview and NWTS moved for dismissal of the new claim under CR 12(b)(6), arguing that there was no promise or reliance. The trial court granted the motion. Schaub appeals.

ANALYSIS

Schaub argues that the trial court erred when it dismissed his RESPA, promissory estoppel, DTA, CLA, and CPA claims under CR 12(b)(6). We disagree.

Under CR 12(b)(6), the court may dismiss claims for "failure to state a claim upon which relief can be granted." Courts grant CR 12(b)(6) motions to dismiss "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (internal quotation marks omitted) (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), adhered to on recons., 113 Wn.2d 148, 776 P.2d 963 (1989)). "The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." Kinney, 159 Wn.2d at 842. We review a trial court's ruling to dismiss a claim under CR 12(b)(6) de novo. Kinney, 159 Wn.2d at 842.

Bayview and NWTS as Agents of JPMorgan

Schaub argues that the trial court erred in dismissing his claims against JPMorgan because he alleged that JPMorgan was the true holder of the note and Bayview and NWTS acted as agents for JPMorgan. Because we must presume the allegations in Schaub's complaint are true, we agree that dismissal of JPMorgan was not proper.

Here, the note is not part of the record, but Schaub alleges in his complaint that NWTS wrongfully identified Bayview as the beneficiary of the deed of trust in the Notice of Trustee's Sale and that JPMorgan retained the note "as owner and holder of the obligation." We presume that this allegation is true. Therefore, dismissal of Schaub's claims against JPMorgan on a theory that Bayview held the note, without proof of that fact, was error.

Furthermore, "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012). Therefore, we are not persuaded by JPMorgan's claim that it was no longer the holder of the note simply because it assigned its interest in the deed of trust to Bayview.

JPMorgan argues that the Notices of Trustee's Sale filed with Schaub's complaint show that Bayview was the holder of the note because they identify Bayview as the beneficiary of the deed of trust and RCW 61.24.030(7)(a) requires the trustee to verify that the beneficiary is the holder of the note before a sale. JPMorgan also argues that the language in the trustee's deed identifying Bayview as the assigned beneficiary is presumptively true because RCW 61.24.040(7) requires the trustee to verify a successor-in-interest's ownership. Again, because Schaub alleges that NWTS wrongfully identified Bayview as the beneficiary and we must presume that this allegation is true, JPMorgan's reliance on these documents is misplaced.

In short, the trial court erred by dismissing JPMorgan based solely on JPMorgan's assignment of the deed of trust. That said, for the reasons described below, the trial court did not err in dismissing Schaub's claims on their merits. Therefore, the ultimate dismissal of Schaub's claims against JPMorgan was proper.

Equitable Estoppel and RESPA Claim

Schaub argues that the trial court erred in dismissing his RESPA claim because the Respondents should be equitably estopped from arguing that Bayview had no duties to him under that statute. We disagree.

As an initial matter, Schaub does not dispute that the RESPA loss mitigation procedures apply to only owner-occupied properties. 12 C.F.R. § 1024.30(c)(2) ("The procedures set forth in §§1024.39 through 1024.41 of this subpart only apply to a mortgage loan that is secured by a property that is a borrower's principal residence."). For this reason, he cannot maintain a RESPA claim against Respondents.

To avoid the inapplicability of RESPA, Schaub relies on the doctrine of equitable estoppel and alleges that Bayview induced him to submit a loss mitigation application and then led him to believe that his application was facially complete and foreclosure would be prohibited in accordance with RESPA's loss mitigation procedures. Specifically, he alleges that foreclosure was not proper because he submitted a facially complete application more than 37 days before the sale, as required to stop foreclosure:

> *Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale . . .

12 C.F.R. § 1024.41(g).

But equitable estoppel is not available for offensive use by plaintiffs. Greaves v. Med. Imaging Sys., Inc., 124 Wn.2d 389, 397-98, 879 P.2d 276

(1994). As such, Schaub cannot rely on that doctrine to make an inapplicable statute suddenly applicable. Promissory estoppel is the proper doctrine for asserting such a claim. Greaves, 124 Wn.2d at 397-98. Therefore, the trial court properly dismissed Schaub's RESPA and equitable estoppel claims.

Promissory Estoppel

Schaub argues that the trial court erred in dismissing his claims of promissory estoppel. We disagree.

To prevail on a promissory estoppel claim, the plaintiff must prove:

> (1) a promise, (2) that promisor should reasonably expect to cause the promisee to change his position, and (3) actually causes the promisee to change position, (4) justifiably relying on the promise, (5) in such a manner that injustice can be avoided only by enforcement of the promise.

McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 117, 992 P.2d 511 (1999).

Here, the first element of estoppel is not met because Bayview did not make a promise not to foreclose. Schaub alleges that Bayview's April 21, 2015, letter indicated that Schaub filed a complete application and that it would therefore forebear all foreclosure efforts. But contrary to Schaub's claim, the letter did not state that his application was complete. Although the letter did not explain what specific documentation was missing from Schaub's application, it did inform him that Bayview could not complete its review because it had not received all requested documentation. And, it warned him that foreclosure may proceed if he failed to make his loan payments:

> We have been unsuccessful in obtaining from you the following documents:

> [blank]
>
> We are unable to complete our review of your loan workout request without this information.
>
> *If your loan is delinquent, collection/foreclosure activity currently in progress will continue to proceed during the review process of your request for a workout. This letter and the loan workout review process shall not waive any of our rights or your obligations under the note and other loan documents. In other words, you are responsible to continue making your loan payments.*
>
> . . . Even if we are able to approve you for a foreclosure alternative prior to a sale, a court with jurisdiction over the foreclosure proceeding (if any) or public official charged with carrying out the sale may not halt the scheduled sale.
>
> . . . .
>
> Incomplete Information Final Notice – Your request for a Home Affordable Modification cannot be completed as of April 21, 2015 because we have not received all of the requested documentation.

(Boldface omitted.) The letter then went on to explain the process that would occur going forward:

> After we receive all required documentation, we will process your request as quickly as possible. While we consider your request, your home will not be referred to foreclosure. Any scheduled foreclosure sale will not occur pending our determination.

(Boldface omitted.) Arguably, the language that "[a]ny scheduled foreclosure sale will not occur pending our determination" was a *conditional* promise not to foreclose. But as explained in that paragraph, foreclosure is postponed once the lender "receive[s] all required documentation." Furthermore, the letter stated that required documents were still missing from Schaub's application, so the conditional promise was not triggered. Therefore, Schaub has not satisfied the first element of estoppel.

Furthermore, Schaub has not alleged facts that satisfy the fourth element of estoppel: justifiable reliance. Specifically, Schaub states in his complaint that Bayview requested "a substantial amount" of additional documentation eight days before the scheduled foreclosure sale. This request for additional documentation, in combination with the letter stating that Bayview could not complete Schaub's loss mitigation application, should have put Schaub on notice that Bayview had not received "all required documentation" and that the foreclosure sale could proceed as scheduled. Therefore, he could no longer justifiably rely on any promise not to foreclose, especially given the fact that he still had time to enjoin the foreclosure sale under the DTA. RCW 61.24.130(2) (requiring a lawsuit to enjoin foreclosure be brought within five days of the sale).

Schaub argues that Bayview's conditional promise was triggered by his submission of a "facially" complete application. But nothing in the letter promises to stop foreclosure based on the receipt of a facially complete application. Additionally, Schaub does not explain what a "facially" complete application includes or how it differs from a complete application. Therefore, this argument is not persuasive.

Schaub next argues, for the first time in his reply brief, that it is not known whether the additional information requested by Bayview was necessary to complete the application or was simply "miscellaneous information to clarify information already received or replacement of information that had become stale." But "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon Conservancy v. Bosley, 118

Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, we do not consider this argument.

DTA

Schaub argues that the trial court erred in dismissing his DTA claims. We disagree.

The DTA "creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale." Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). "The act furthers three goals: (1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles." Albice, 174 Wn.2d at 567.

The DTA provides that "[a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130." Former RCW 61.24.040(1)(f)(IX) (2012). The lawsuit must be brought within five days of the sale. RCW 61.24.130(2) ("No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made."). The DTA also provides that "[f]ailure to bring such a lawsuit may result

in a waiver of any proper grounds for invalidating the Trustee's sale." Former RCW 61.24.040(1)(f)(IX).

In Albice, the Supreme Court held that "[t]he word 'may' indicates the legislature neither requires nor intends for courts to strictly apply waiver." Albice, 174 Wn.2d at 570. Therefore, waiver should be applied "only where it is equitable under the circumstances and where it serves the goals of the act." Albice, 174 Wn.2d at 570. Waiver is appropriate "where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." Albice, 174 Wn.2d at 569. "[I]n determining whether waiver applies, the second goal [of the DTA]—that the nonjudicial foreclosure process should result in is interested parties having an adequate opportunity to prevent wrongful foreclosure—becomes particularly important." Albice, 174 Wn.2d at 571. Allowing a borrower to delay asserting a defense until after a sale defeats the spirit and intent of the DTA. Albice, 174 Wn.2d at 570.

Here, Schaub's complaint alleges that he is entitled to remedies under the DTA because "[t]he misconduct alleged herein against Defendants constitutes: (1) fraud and misrepresentation; and (2) failure of NWTS to materially comply with the provisions of the DTA, for which Mr. Schaub is entitled to relief under RCW 61.24.127." On appeal, Schaub specifies that Bayview and NWTS violated the DTA in the following ways: the Assignment of Deed of Trust and Appointment of Successor Trustee in 2010 were improperly executed, the Notices of Trustee's Sales were improperly signed and notarized on different dates, the location of the

trustee's sale was not public, and the marketing of the Property was improper. But these alleged violations were all discoverable prior to the trustee's sale and Schaub does not allege that he did not have notice of them. Therefore, because Schaub "had actual or constructive knowledge of a defense to foreclosure prior to the sale" and he failed to use available presale remedies to enjoin the foreclosure sale, he waived his right to assert these defenses. Albice, 174 Wn.2d at 569.

Schaub argues that he "reasonably believed his remedies under the DTA would remain preserved" based on Bayview's alleged promise not to foreclose. But this is an estoppel argument. As described above, equitable estoppel is not available for offensive use by plaintiffs. Greaves, 124 Wn.2d at 397-98. Furthermore, his promissory estoppel claim fails because Schaub cannot show that Bayview promised not to foreclose or that he justifiably relied on that promise. Therefore, dismissal of his DTA claim was proper.

CLA

For the first time in his reply brief, Schaub argues that the trial court erred in dismissing his CLA claim. Although Schaub alleges that the claim was "thoroughly" addressed in his opening brief, the pages cited reference the CLA only in passing and include no argument as to how Respondents violated the CLA. Therefore, his argument is not persuasive and we hold that Schaub waived the right to challenge the dismissal of his CLA claim on appeal. See Hall v. Feigenbaum, 178 Wn. App. 811, 817, 319 P.3d 61 (2014) ("We deem an issue not briefed to be waived."); Cowiche Canyon Conservancy, 118 Wn.2d at 809

("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

CPA

Schaub argues that the trial court erred in dismissing his CPA claims. We disagree.

To prevail on a CPA action, the plaintiff must prove the following 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; [and] (5) causation.'" Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (first alteration in original) (quoting Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). A claim "may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." Klem, 176 Wn.2d at 787.

Similar to the claims addressed above, both of Schaub's per se and unfair practice CPA theories are based on the premise that Respondents violated their duty of good faith and committed an unfair practice by continuing the foreclosure of his property despite his submission of a facially complete loss mitigation application. Schaub's appellate briefing does not directly address the element of causation. Even so, under the facts alleged in his complaint, he cannot prove causation. Schaub received notice that Bayview needed more documents for his loss mitigation application eight days before the sale, which is within the time

required to enjoin the foreclosure under the DTA. Nevertheless, he did not pursue that available legal remedy to stop the sale. Therefore, Schaub's own conduct in failing to pursue a lawsuit under the DTA broke the chain of causation and caused his loss. Schaub cannot show that any alleged unfair practices by Respondents caused his damages and his CPA claim was properly dismissed.

Attorney Fees

All parties request attorney fees and costs on appeal based on RAP 18.1 and the attorney fee clause in the deed of trust. We grant Bayview's request for fees and costs and deny all other parties' requests for fees and costs.

Attorney fees may only be awarded at the appellate level when authorized by a contract, a statute, or a recognized ground of equity. Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Here, the deed of trust states:

> 26. Attorneys' Fees. Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceedings or on appeal.

(Boldface omitted.) Additionally, RCW 4.84.330 provides for prevailing party attorney fees where a contract has a one-sided attorney fee clause.

Here, Schaub is not the prevailing party and, therefore, is not entitled to attorney fees under RCW 4.84.330. Furthermore, although the deed of trust specifies JPMorgan as the "Lender," Bayview took the deed of trust by assignment from JPMorgan and acquired all of JPMorgan's rights and obligations, including the right to attorney fees. Therefore, JPMorgan is not

entitled to fees but Bayview is because JPMorgan assigned its interest in the deed of trust to Bayview. Finally, NWTS is not entitled to fees because the deed of trust provides fees to the lender only, not the trustee.

Citing Stryken v. Panell, 66 Wn. App. 566, 572, 832 P.2d 890 (1992), JPMorgan argues that it is entitled to attorney fees even though it is no longer a party to the deed of trust. But Stryken involved attorney fees in an action where a contract was found to be void, not where there was an assignment of the contract. Here, JPMorgan assigned its interest in the deed of trust to Bayview. For that reason, Stryken is not controlling.

We affirm and grant Bayview attorney fees and costs on appeal, subject to its compliance with RAP 18.1.

WE CONCUR:

APPENDIX B

I. IDENTITY OF PETITIONERS.

The Petitioners are PETER SCHAUB, an individual, and CLOUDY SKIES PROPERTIES, LLC, a Washington limited liability company (hereinafter collectively "Mr. Schaub"), who were the Plaintiffs in the original action under King County Superior Court Case No. 18-2-01588-0 SEA and are the Appellants in Court of Appeals, Division I, Case No. 78439-1-I.

II. COURT OF APPEALS DECISION.

Mr. Schaub seeks review by the Supreme Court of the Unpublished Opinion of the Court of Appeals filed July 1, 2019, a copy of which is attached hereto at ***Appendix "A"*** (hereinafter "subject decision" or "Unpublished Opinion").

III. OVERVIEW.

Confronted with the imminent non-judicial foreclosure of his non-owner-occupied rental property by Respondent, NORTHWEST TRUSTEE SERVICES, INC (hereinafter "NWTS"), Mr. Schaub reached out to Respondent, BAYVIEW LOAN SERVICING, LLC (hereinafter "Bayview"), servicer and agent for Respondent, JPMORGAN CHASE BANK N.A (hereinafter "JPMorgan"), seeking a modification of his Note and Deed of Trust. This was one of several property retention remedies that were available to Mr. Schaub at that time. These included curing the alleged default, seeking a loan modification and refinancing the subject

Property. At all times relevant to this cause of action, Bayview and JPMorgan knew that the subject Property was a non-owner occupied rental property as this information was clearly stated in Mr. Schaub's Deed of Trust and riders attached thereto.[1]

In response to Mr. Schaub's request, Bayview selected and sent Mr. Schaub a HAMP loss mitigation/modification application, which he dutifully completed by its terms with the assistance of Mr. Brian Carl of Parkview Services and submitted in a timely fashion. See CP 120-124. In the HAMP loss mitigation/modification application submitted, Mr. Schaub specifically identifies the property as "renter occupied", thus leaving no doubt as to the character of the subject Property. CP 120.

On April 21, 2015, Bayview sent Mr. Schaub a letter acknowledging receipt of his HAMP loss mitigation/modification application and stating that it would not be able to complete review of his "loan workout request" without obtaining additional documents. CP 77-

[1] Although the non-owner-occupied character of the subject Property was the excuse given by Respondents for the actions they took in this matter, the facts fail to support their claims. As an offer of proof, Mr. Schaub would testify at trial that at each time Mr. Schaub discussed the subject Property with any representative of the lender, he immediately made the loan officer aware of the fact that the property was a non-owner-occupied rental property. On the loan application filled out by Mr. Schaub for this re-finance loan, Mr. Schaub indicated that the property was a non-owner-occupied rental property. The Schedule of Real Estate Owned submitted by Mr. Schaub—required by the bank—showed that the property was a non-owner-occupied rental property, and showed how much monthly rent it generated. The profit-and-loss statements submitted by Mr. Schaub—required by the bank—showed that the property was a non-owner-occupied rental property. The tax returns submitted by Mr. Schaub—required by the bank—showed years of rental income on the property. A copy of the lease—required by the bank—clearly showed that the property was a non-owner-occupied rental property. The proof of a Landlord Insurance Policy on the property—which the bank required be submitted yearly—clearly indicated that the property was a non-owner-occupied rental property.

78. However, Bayview's form letter failed to identify a single piece of information or documentation that needed to be provided. CP 77. By Respondents' failing to identify a single piece of information or document, Mr. Schaub reasonably concluded that his HAMP loss mitigation/modification application was facially complete within HAMP guidlines. The letter does not indicate that Mr. Schaub is not eligible for a modification due to the fact that the subject Property is non-owner-occupied and the letter from Bayview goes on to promise Mr. Schaub that "while [Bayview, on behalf of JPMorgan] consider[s] your [loan workout] request, your home will not be referred to foreclosure. . . Any scheduled foreclosure sale will not occur pending our determination," in accordance with the statutory procedures outlined in *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)*. CP 78. Relying on these assurances and lulled into complacency, Mr. Schaub did nothing more - supplemented his application when specific information was requested and awaited Bayview's review of his loss mitigation/modification application. At no time did Bayview advise Mr. Schaub that the promises made to defer foreclosure in the April 21, 2015 letter would not apply to him because the subject Property was a non-owner occupied rental property. Had he been so advised in a timely fashion, Mr. Schaub could have cured all delinquencies 11 days prior to the sale date, pursuant to *RCW 61.24.040(f)* and *(g)*, sought refinance of the debt or restrained the trustee's sale, pursuant to *RCW 61.24.130.*

In detrimental reliance on Bayview's promises and assurances of deferral of foreclosure while Respondents reviewed Mr. Schaub's HAMP loss mitigation/modification application, Mr. Schaub lost his property at trustee's sale on May 22, 2015 and approximately $147,000.00 in equity.

Mr. Schaub has brought this action to recover his equity, in view of JPMorgan's and Bayview's fraud and misrepresentations. Moreover, Mr. Schaub believes the actions of all of the named Respondents violated the provisions of *RCW 19.86, et seq.* (hereinafter "CPA"). Although the trial court dismissed these claims, pursuant to *CR 12(b)(6),* Mr. Schaub requests this Court review his claims, *de novo,* and accept discretionary review of the Court of Appeals Unpublished Opinion of July 1, 2019. Justice demands no less.

IV. ISSUES PRESENTED FOR REVIEW.

A. Whether the subject decision by the Court of Appeals properly applied the appropriate standard of review/burden of proof in its analysis of the April 21, 2015 letter from Bayview (CP 77-78) in its finding that Mr. Schaub had no reasonable basis to rely on the patently ambiguous terms of the letter, contrary to existing precedent, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

B. Whether the subject decision affirming the trial court's dismissal of Mr. Schaub's claims against JPMorgan on November 3, 2017 pursuant to *CR 12(b)* was contrary to existing precedent in its implicit finding that that Mr. Schaub's Complaint failed to articulate claims against

JPMorgan upon which relief could be granted, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

C. Whether the subject decision affirming the trial court's dismissal of Mr. Schaub's claims against Bayview and NWTS on March 2, 2018 pursuant to *CR 12(b)* was contrary to existing precedent in its implicit finding that Mr. Schaub's Complaint failed to articulate claims against Bayview and NWTS upon which relief could be granted, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

D. Whether the subject decision affirming the trial court was contrary to existing precedent by implicitly finding NWTS had the requisite authority to act on behalf of JPMorgan on the basis of a Power of Attorney recorded February 6, 2009 (Auditor's File No. 2009020601449) issued by Chase as a separate entity from JPMorgan, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

E. Whether the subject decision affirming the trial court was contrary to existing precedent and violates the provisions of *RCW 61.24.040* where the Notice of Trustee's Sale of February 26, 2013 was defective in several particulars: (1) although Ms. Heather Smith executed the Notice of Trustee's Sale on February 26, 2013, her signature was not notarized until March 11, 2013; (2) the place of sale was designated as "the northwest corner of the ground level parking area located under the Pacific Corporate Center building, 13555 SE 36th Street in the City of Bellevue, State of Washington", which is private property, in apparent violation of *RCW*

61.24.040(5), thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

F. Whether the subject decision affirming the trial court was contrary to existing law and precedent where there was no evidence of an assignment or transfer of Mr. Schaub's Note to Bayview, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

G. Whether the subject decision affirming the trial court was contrary to existing precedent and violates the provisions of *RCW 61.24.040* where the Notice of Trustee's Sale of August 18, 2014 was defective in several particulars: (1) Bayview was wrongfully identified as the "Beneficiary of the Deed of Trust" despite the fact that JPMorgan retained the subject Note as owner and holder of the obligation; and (2) although Ms. Nanci Lambert executed the Notice of Trustee's Sale on August 18, 2014, her signature was not notarized until August 22, 2014, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

H. Whether the subject decision affirming the trial court was contrary to existing precedent and violates the provisions of *RCW 61.24.040* where the Notice of Trustee's Sale of January 15, 2015 was defective in several particulars: (1) Bayview was wrongfully identified as the "Beneficiary of the Deed of Trust" despite the fact that JPMorgan retained the subject Note as owner and holder of the obligation; and (2) although Ms. Vonnie McElliott executed the Notice of Trustee's Sale on January 15,

2015, her signature was not notarized until January 16, 2015, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

I. Whether the subject decision affirming the trial court was contrary to existing law and precedent where NWTS advertised the subject property as "hot" in violation of its duty of good faith to both grantor and beneficiary under *RCW 61.24.010,* thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

J. Whether the subject decision affirming the trial court was contrary to existing law and precedent where it was undisputed that: (1) thirty-eight days prior to the scheduled sale, Brian Carl submitted a facially complete loss mitigation application to Bayview with forms selected and provided by Bayview on behalf of Mr. Schaub, pursuant to *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b);* (2) thirty-one days prior to the scheduled sale, Bayview issued a letter stating: "we have been unsuccessful in obtaining from you the following documents", but identified nothing as being necessary or required under HAMP guidelines to complete its review of Mr. Schaub's HAMP application, reasonably leading Mr. Schaub to believe (a) his loss mitigation application was facially complete within the terms of *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* and (b) the scheduled foreclosure set for May 22, 2015 would be discontinued; (3) Despite being in possession of a facially complete loss mitigation application more than 37 days prior to the scheduled sale date, neither JPMorgan nor Bayview directed NWTS to delay or cancel the sale

pending review; (4) eight days prior to the scheduled sale, when Mr. Schaub's ability to cure the default (*RCW 61.24.040*) or file suit to stay the sale (*RCW 61.24.130*) had lapsed, only then did Bayview contact Mr. Schaub's agent, Mr. Brian Carl, by phone with a request for a substantial amount of additional information and documentation related to the loss mitigation application; (5) despite oral assurances to Mr. Schaub and Mr. Carl that the procedures outlined in *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* would be followed and the sale discontinued, NWTS wrongfully proceeded with the sale of the subject Property for the sum of $383,000.00 – a sum substantially less than market value, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4).*

K. Whether the subject decision holding that substantial evidence of a violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA") did not exist was erroneous, thus meriting review of this Court under *RAP 13.4(b)(1)* and *RAP 13.4(b)(4).*

L. Whether the subject decision holding that substantial evidence of a violation of the Consumer Loan Act (*RCW 31.04, et seq.*) (hereinafter "CLA") did not exist was erroneous, thus meriting review under *RAP 13.4(b)(1), RAP 13.4(b)(2)* and *RAP 13.4(b)(4)*

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

V. STATEMENT OF THE CASE.

The facts plead in Appellants' Complaint (CP 1-84) and Amended Complaint (CP 271-356) are largely undisputed.

At all times relevant to this cause of action, Appellant, PETER SCHAUB, either personally or through his closely held Washington limited liability company, CLOUDY SKIES PROPERTIES, LLC, was the owner of that certain real property commonly described as 6043 45th Avenue S.W., Seattle, King County, Washington, (hereinafter "subject Property").

On or about October 10, 2007 Mr. Schaub executed a Note and Deed of Trust in favor of JPMorgan. CP 19-42. Although a copy of the recorded Deed of Trust was plead and provided the trial court, no copy of the Note was ever provided the trial court by any party or otherwise made a part of the record. The Deed of Trust specifically provided that the agreement "shall be governed by federal law and the law of the jurisdiction in which the [Subject] Property is located". CP 29. The 1-4 Family Rider attached to the Deed of Trust, specifically provides that: "with regard to non-owner occupied investment properties, the first sentence in Uniform Covenant 6 [to the Deed of Trust] concerning Borrower's occupancy of the Property is deleted." CP 36. Indeed, at all times relevant to this cause of action, Respondents, and each of them, knew that the subject property was purchased for investment purposes and was not owner-occupied and this knowledge is imputed to all of the

Respondents as this document provided the basis upon which all of the named Respondents obtained an interest in the subject Property.

On or about December 9, 2009, Mr. Schaub submitted a request for modification of his loan. CP 4. His initial application was conditionally approved by JPMorgan and Mr. Schaub was directed to make three payments of $1,192.00 beginning January 4, 2010. CP 4. It was Mr. Schaub's understanding that after JPMorgan received the three payments in a timely fashion, JPMorgan would provide Mr. Schaub a permanent modification agreement. CP 4. Mr. Schaub ultimately made ten payments of $1,192.00 to JPMorgan from January of 2010 to October of 2010, which JPMorgan acknowledged receiving. CP 4. Although Mr. Schaub complied with all of the stated terms and preconditions imposed upon him by JPMorgan to obtain a permanent loan modification agreement, JPMorgan breached its reciprocal agreement to modify the loan. CP 4. Although acknowledging payment, JPMorgan has never properly accounted for the ten payments made by Mr. Schaub from January of 2010 to October of 2010. CP 4.

On or about September 22, 2010, JPMorgan executed an Assignment of Deed of Trust that purported to assign JPMorgan's interest in the Deed of Trust to "Chase Home Financial LLC" (hereinafter "Chase"). CP 44. The Assignment of Deed of Trust was purportedly prepared and executed by Todd Hendricks, an "officer" of NWTS, purporting to act pursuant to a Power of Attorney granted by JPMorgan.

Significantly, JPMorgan did not release JPMorgan's interest in the Note or the payments due thereunder to Chase. Arguably, payments made by Mr. Schaub and collected by Chase after assignment were not retained by Chase, but were distributed to JPMorgan or as otherwise directed or required by JPMorgan.

On the same day NWTS executed an Appointment of Successor Trustee. CP 46. What is curious about this Appointment of Successor Trustee is that it is purportedly executed by Ken Patner, an "officer" of NWTS, acting pursuant to the same Power of Attorney that was issued by JPMorgan.[2] This Appointment of Successor Trustee was apparently executed and filed for record by NWTS in apparent ignorance of the fact that Chase was not the holder of the obligation by virtue of the fact that JPMorgan retained ownership of the Note. There is no indication in the record that JPMorgan was either aware of or authorized NWTS' appointment, in apparent violation of *RCW 61.24.010*.

On February 26, 2013, Heather Smith of NWTS executed a Notice of Trustee's Sale, setting sale of Mr. Schaub's home for July 12, 2013. CP 48-52. This Notice of Trustee's Sale was defective in several particulars: (1) although Ms. Smith executed the Notice of Trustee's Sale on February 26, 2013, her signature was not notarized until March 11,

[2] At all times relevant to this cause of action, the Power of Attorney that provided NWTS authority to act on behalf of JPMorgan ("recorded 2/06/09 under Auditor's File No. 2009020601449") is the same instrument that purportedly provided NWTS authority to act on behalf of Chase, as separate entity. No Power of Attorney issued by Chase to NWTS has ever been produced. No explanation of this discrepancy has ever been provided.

2013; (2) the place of sale was designated as "the northwest corner of the ground level parking area located under the Pacific Corporate Center building, 13555 SE 36th Street in the City of Bellevue, State of Washington", which is private property, in apparent violation of *RCW 61.24.040(5).*

At some time prior to March 11, 2013, Chase ceased to exist as a separate legal entity. CP 6.

On December 10, 2013, JPMorgan issued a second Assignment of Deed of Trust to Bayview. CP 54-56. Significantly, by this Assignment of Deed of Trust, JPMorgan again did not release its interest in the Note or the payments due thereunder to Bayview. Payments made by Mr. Schaub and collected by Bayview after this assignment were not retained by Bayview but were distributed to JPMorgan or as otherwise directed or required by JPMorgan.

On or about June 26, 2014, Bayview "re-appointed" NWTS as successor trustee under the Deed of Trust. CP 58. At the time of this "re-appointment", Bayview was not the holder of the obligation by virtue of the fact that JPMorgan retained ownership of the Note. There is no indication in the record that JPMorgan was either aware of or authorized NWTS' appointment, in apparent violation of *RCW 61.24.010.*

On August 18, 2014, Nanci Lambert of NWTS executed another Notice of Trustee's Sale, wrongfully identifying Bayview as the "Beneficiary of the Deed of Trust", setting sale of Mr. Schaub's home for

December 26, 2014, despite the fact that JPMorgan retained the subject Note as owner and holder of the obligation. CP 60-65. Bayview was not the "beneficiary" of the obligation under Washington law and had no right or authority to foreclose the subject Property at the time said Notice of Trustee's Sale was executed. CP 6. Although Ms. Lambert executed the Notice of Trustee's Sale on August 18, 2014, her signature was not notarized until August 22, 2014. CP 64

On January 15, 2015, Vonnie McElligott of NWTS executed another Notice of Trustee's Sale, again wrongfully identifying Bayview as the "Beneficiary of the Deed of Trust", setting sale of Mr. Schaub's home for May 22, 2015, despite the fact that JPMorgan retained the subject Note as owner and holder of the obligation. CP 67-71. Bayview was not the "beneficiary" of the obligation under Washington law and had no right or authority to foreclose the subject Property at the time this Notice of Trustee's Sale was executed. CP 7. Although Ms. McElligott executed the Notice of Trustee's Sale on January 15, 2015, her signature was not notarized until January 16, 2015. CP 71.

In advertisements submitted to USA-Foreclosure.com., NWTS indicated and represented to prospective sale bidders that the subject real property was a "hot property" (noted by the flame next to the property listing), representing that a successful bidder at time of sale would realize and be enriched with a considerable amount of equity (property value over the beneficiary's initial bid) if purchased at time of sale. CP 210-224.

Shortly after receipt of NWTS' Notice of Trustee's Sale, Mr. Schaub requested loss mitigation/modification through Bayview. Bayview responded by selecting and providing Mr. Schaub a HAMP loss mitigation/loan modification package with blank forms and expressly induced him to complete the loss mitigation/loan modification package under the procedures and within the timeline set out under *12 CFR §1024,* despite Bayview's actual knowledge that the subject property was held for investment purposes and was not owner-occupied. CP 36.

On April 14, 2015, thirty-eight days prior to the scheduled sale, Brian Carl, a HUD approved housing counselor with Parkview Services, submitted a complete HAMP loss mitigation application to Bayview on behalf of Mr. Schaub, pursuant to *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)*. CP 74-75.

On April 21, 2015, thirty-one days prior to the scheduled sale, Bayview issued a letter stating: "we have been unsuccessful in obtaining from you the following documents", but identified nothing as being necessary or required to complete its review of Mr. Schaub's HAMP loss mitigation/modification application. CP 77. By virtue of the fact that Bayview did not identify any missing information or documents, Mr. Schaub reasonably believed that (a) his loss mitigation application was facially complete within the terms of *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* and (b) the scheduled foreclosure set for May 22, 2015 would be discontinued. Indeed, Mr. Schaub was specifically

advised that while his modification package was being considered, his home would "not be referred to foreclosure" and any scheduled foreclosure sale "will not occur" pending Respondents' consideration of his modification package. CP 78.

Despite being in possession of a facially complete loss mitigation application more than 37 days prior to the scheduled sale date, neither JPMorgan nor Bayview directed NWTS to delay or cancel the sale pending review. CP 8.

On May 13, 2015, eight days prior to the scheduled sale, Bayview contacted Mr. Schaub's agent, Mr. Brian Carl, by phone with a request for a substantial amount of additional documentation related to the loss mitigation application. CP 8. Relying on his experience negotiating loan modifications and statutory protections afforded to Mr. Schaub, in view of JPMorgan's prior approval of two similar loan modifications on the subject Property and other non-owner-occupied properties owned by Mr. Schaub, Mr. Carl agreed to work with Bayview. CP 8. Mr. Carl requested Bayview email the list of documents, which Bayview did, the following day, seven days before the scheduled trustee's sale date. CP 8.

On May 22, 2015, NWTS proceeded with the sale of the subject Property for the sum of $383,000.00, in violation of oral assurances to Mr. Schaub and Mr. Carl that the procedures outlined in *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)* would be followed. CP 80-81. At the time of sale, the subject real Property was valued at

approximately $500,000.00. It is significant to note that the Trustee's Deed falsely asserts that (1) at the time of sale Bayview was "the holder of the indebtedness secured by the Deed of Trust"; (2) that the sale complied with all legal requirements and provisions of the Deed of Trust; and (3) implicitly, that the sale complied with provisions of the Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA") sufficient to "convey all of the right, title, and interest in the real and personal property sold at the trustee's sale". CP 80-81.

On May 29, 2015, Mr. Brian Carl was made aware of the sale of the subject Property and immediately contacted Charles Katz, Senior Counsel at NWTS, to notify him that (1) Bayview had received a facially complete loss mitigation application; (2) advised him that Bayview was statutorily barred from "conducting a foreclosure sale"; and (3) because the sale was still subject to rescission, requested NWTS rescind the sale. CP 9. During the conversation, Mr. Katz was sufficiently versed in provisions of Title 12 of the Code of Federal Regulations (CFR), Reg. X, Subpart C that he was able to quote requirements to Mr. Carl and demand Mr. Carl prove Bayview had, in fact, received a facially complete loss mitigation application. CP 9. Mr. Carl emailed Mr. Katz the application, Bayview's acknowledgement and subsequent requests for documentation. However, despite Mr. Carl's efforts, Katz refused to rescind the sale on June 16, 2015, as provided under *RCW 61.24.050(2).* CP 9.

On or about January 6, 2016, at minimal expense, Emerald City Ventures LLC., sold the subject Property to Hera McLeod for the sum of $530,000.00. CP 83-84.

On May 8, 2017, within the two years provided by *RCW 61.24.127*, Mr. Schaub filed this action, seeking damages for violation of Respondents' agreement to comply with the provisions of *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b)*; *RCW 19.86, et seq*; unjust enrichment; fraud and misrepresentation; and NWTS' failure to materially comply with the provisions of *RCW 61.24, et seq.* CP 1-84.

On September 25, 2017, JPMorgan filed a Motion to Dismiss, pursuant to *CR 12(b)(6).* CP 85-104.

On October 17, 2017, Bayview and NWTS filed a Motion to Dismiss, or, Alternatively a Motion for a More Definite Statement, pursuant to *CR 12(b)(6)* or *CR 12(e).* CP 105-113.

On November 3, 2017, the Honorable Barbara Linde granted JPMorgan's Motion to Dismiss. CP 260-262.

On November 14, 2017, Judge Linde granted in part and denied in part Bayview's and NWTS' Motion to Dismiss, providing Mr. Schaub leave to amend his Complaint to articulate claims for promissory estoppel and equitable estoppel. CP 270.

On November 29, 2017, Mr. Schaub filed an Amended Complaint to clarify remedies under the doctrines of promissory estoppel and equitable estoppel, in compliance with Judge Linde's instructions. CP

271-356. As no discovery had been initiated by Mr. Schaub at this stage of the proceedings, there was little information available to add to the Amended Complaint to address Mr. Schaub's claims under the doctrine of promissory estoppel.

On December 12, 2017, Bayview and NWTS renewed their Motion to Dismiss, pursuant to *CR 12(b)(6)*. CP 357-368.

On March 2, 2018, Judge Linde granted Bayview's and NWTS' Motion to Dismiss. CP 392.

On March 29, 2018, Mr. Schaub filed his Notice of Appeal of Judge Linde's Orders of Dismissal. Review was accepted by the Court of Appeals on July 19, 2018.

On July 1, 2019, the Court of Appeals affirmed the trial court's dismissal of Mr. Schaub's claims. ***Appendix "A".*** Mr. Schaub now seeks this Court's discretionary review of the Court of Appeals Unpublished Opinion.

VI. ARGUMENT AND AUTHORITY.

A. Standard of Review

Dismissal of an action under *CR 12(b)(6)* is a question of law that appellate courts review *de novo*. *Tenore v. AT&T Wireless Services,* 136 Wn.2d 322, 329-330, 962 P.2d 104 (1998); *San Juan County v. No New Gas Tax,* 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

In considering motions to dismiss under *CR 12(b)(6)*, courts of this State may only dismiss an action if it appears beyond doubt that the

plaintiff cannot prove any set of facts that would (a) be consistent with the complaint and (b) warrant relief. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987); *Havsy v. Flynn*, 88 Wn.App. 514, 945 P.2d 221 (1997); *Bavand v. OneWest Bank, FSB*, 176 Wn.App. 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*").

Courts on appeal must presume Mr. Schaub's claims to be true and should even consider a hypothetical situation conceivably raised by the complaint on a motion to dismiss under *CR 12(b)*. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl,* 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) ("[A]ny hypothetical situation conceivably raised by the complaint defeats a *CR 12(b)(6)* motion if it is legally sufficient to support plaintiff's claim"); *Cutler v. Phillips Petroleum Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994); *Tenore v. AT&T Wireless Services, supra; Bavand, supra.* Indeed, a court may choose to consider hypothetical facts that may not be included in the record. *Tenore v. AT&T Wireless Services, supra. CR 12(b)(6)* motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Tenore v. AT&T Wireless Services, supra.* at pg. 330 (citing to *Hoffer v. State,* 110 Wn.2d 414, 420, 755 P.2d 781 (1988)); *Bavand.*

If materials outside of the complaint are submitted by either party, the motion to dismiss is generally converted to a motion for summary judgment. *Hansen v. Friend,* 59 Wn.App. 236, 797 P.2d 521 (1990); *Rodriguez v. Loudeye Corp.,* 144 Wn.App. 709, 189 P.3d 168 (2008); *Bavand, supra.* Summary judgment is appropriate only if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c); Bavand.* This Court reviews an order granting summary judgment *de novo. Michael v. Mosquera-Lacy,* 165 Wn.2d 595, 200 P.3d 695 (2009); *Bavand.* Although Bayview and NWTS filed a Request for Judicial Notice in support of their Motion to Dismiss that included the Declaration of Gerardo Trueba (CP 114-124), which may have justified application of *CR 56* at the trial court's hearings, the testimony of Mr. Trueba essentially corroborated the statements contained in Mr. Schaub's Complaint.[3]

Interpretation of a statute is a question of law reviewed *de novo. Wachovia SBA Lending, Inc. v. Kraft,* 165 Wn.2d 481, 488, 200 P.3d 683 (2009).

It is Mr. Schaub's contention that neither the trial court nor the Court of Appeals applied the proper burden of proof/standard of review to

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[3] In the Complaint, Mr. Schaub alleges that he submitted "a complete loss mitigation application to Bayview". CP 7-8. In his Declaration, Mr. Trueba provides a "redacted copy of [the] application, without any attachments. . ." CP 118. Mr. Trueba's Declaration does not contradict Mr. Schaub's allegation that he submitted a "facially complete loss mitigation application" within time proscribed by *12 CFR § 1024.41, RCW 31.04.027* and *WAC 208-620-900(6)(b),* and thus, presented no genuine issue of disputed material fact to the trial court. CP 8.

the facts of this case. Specifically, the Court of Appeals' analysis of the Bayview's letter of April 21, 2015 (CP 77-78) failed to apply the appropriate standard of review/burden of proof, by failing to construe the letter against the drafter (Bayview) and construing the terms and Mr. Schaub's understanding thereof, as articulated in his Complaint and Amended Complaint, in his favor. From this fundamental error, all others flow.

B. Ambiguity of Letter of April 21, 2015 (CP 77-78).

Analysis of Bayview's letter of April 21, 2015 (CP 77-78) was crucial to the Court of Appeals' decision to affirm the trial court. In analyzing Bayview's letter of April 21, 2015, the Court of Appeals concluded that no promise had ever been made to Mr. Schaub to discontinue the trustee's sale set for May 22, 2015. The Court of Appeals reached this conclusion through a tortured reading of the letter and failing to weigh the ambiguous and often conflicting terms of the letter against Bayview and in a manner presuming the truth of Mr. Schaub's allegations and in a manner favorable to Mr. Schaub. To the extent the letter of April 21, 2015 presents conflicting terms that could be variously interpreted by the recipient, the letter was ambiguous. See *Viking Band v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 713, 334 P.3d 116 (2014).

It is axiomatic that ambiguous language in any document must be construed against the drafter, in this case Bayview. Restatement (Second) of Contracts, §206 (1981); *Berg v. Hudesman*, 115 Wn.2d 657,

677, 801 P.2d 222 (1990) (hereinafter "*Berg*"); *Stephenson v. Kenworthy Grain & Milling Co.*, 186 Wash. 114, 56 P.2d 1301 (1936). While courts are generally encouraged to determine the objective intent of the parties in construing an ambiguous integrated agreement on summary judgment as in *Berg*, the trial court and the Court of Appeals here were not asked to construe an integrated contract on summary judgment, where there are no genuine issues of material fact in dispute, but were asked to construe a non-integrated/unilateral agreement based on specific statutory language found in *12 CFR § 1024* and *WAC 208-620, et seq.* issued in response to Mr. Schaub's HAMP loss mitigation/modification application on a motion to dismiss pursuant to *CR 12(b)*. Rather than being asked to determine if there were any material issues of fact in dispute, the trial court and the Court of Appeals were asked to determine if there were any set of facts (even un-plead hypotheticals) that would be consistent with the complaint and warrant relief. Instead of applying the standard of review/burden of proof appropriate to a motion to dismiss, the Court of Appeals used what appears to be the *Berg* formula to determine the intent of the parties and whether there were any material issues of fact in dispute by applying the parole evidence rule – what Mr. Schaub said about the letter and what his understanding of the HAMP application were. In so doing, the Court of Appeals failed to construe the April 21, 2015 letter against the drafter, failed to presume Mr. Schaub's claims to be true and found Mr. Schaub's reliance on the ambiguous language of the April 21, 2015 letter to be

unreasonable. As a result, the Court of Appeals erred on each and every issue raised thereafter.

According to the Court of Appeals, Mr. Schaub could not reasonably rely on the April 21, 2015 Bayview letter for several reasons - each of which is unfounded and spurious.

First, the Court of Appeals concludes that nowhere in the letter of April 21, 2015 does Bayview state that the application is complete. ***Appendix "A"***, pg. 8. This is true, but the letter does not state explicitly state that the application was incomplete either – the letter only suggests that Bayview wanted additional information by requesting additional documentation. However, one can only reach the conclusion that the Court of Appeals does by ignoring the fact that Bayview failed to identify a single missing document in Mr. Schaub's otherwise complete HAMP loss mitigation/modification application. CP 7-8, CP 77

Second, the Court of Appeals concluded that Bayview informed Mr. Schaub that it could not complete its review of Mr. Schaub's application because it had not received all requested information. ***Appendix "A"***, pg. 8. However, this conclusion ignored the fact that Bayview failed to identify a single piece of missing HAMP required information. CP 77. As discussed below, just because a lender requests additional information does not necessarily mean the application is "incomplete" within the HAMP guidelines or as alleged by Mr. Schaub. CP 7-8.

Third, the Court of Appeals concluded that Bayview's promise to discontinue the trustee's sale was conditioned upon Bayview's receipt of all required documentation. ***Appendix "A"***, pg. 9. However, again, this conclusion ignores the fact that Bayview failed to identify a single missing piece of required information or documentation within the HAMP guidelines and made no request for any additional required information. CP 77.

Fourth, the Court of Appeals asserted that Mr. Schaub could not justifiably rely on the Bayview's promise to forebear foreclosure in light of Bayview's request for additional information eight days before the foreclosure sale, there being sufficient time to stay the sale under *RCW 61.24.130.*[4] ***Appendix "A"***, pg. 10. But this ignored the language in the Bayview letter of April 21, 2015, promising not to refer the matter to foreclosure and to discontinue any scheduled sale pending Bayview's consideration of Mr. Schaub's HAMP loss mitigation/modification application. CP 78.

It is significant to note that the first paragraph of Bayview's letter of April 21, 2015, merely refers to "the following documents: . . ." CP 77.

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[4] The Court of Appeals apparently neglected to consider the fact that May 13, 2015 was a Wednesday and the list of documents and information was not provided to Mr. Carl until the next day, giving Mr. Schaub only seven days to seek remedy. Even if Mr. Schaub had known of Bayview's and NWTS' intent to conduct the sale regardless of Mr. Schaub's pending HAMP loss mitigation/modification application and got notice to NWTS pursuant to *RCW 61.24.130(2),* there would have been inadequate time to prepare the pleadings and no assurance the trial court would have had a calendar to hear the motion prior to sale. Of more importance is the fact that the conduct of Bayview and NWTS lulled Mr. Schaub into waiving his right to cure the alleged default under *RCW 61.24.040.*

There is no reference in this passage of "required documents" under HAMP. However, in the paragraph dealing with the discontinuance of the trustee's sale, the language changes to refer to "required documentation". CP 78. Clearly the two paragraphs in Bayview's letter of April 21, 2015 are referring to two different types of documents. At no time relevant to this cause of action did Bayview notify Mr. Schaub that his HAMP loss mitigation/modification application was missing any required documentation. Indeed, by Bayview's failure to identify a single missing document to an otherwise facially complete application, the Court of Appeals should have presumed a complete application was before Bayview for review, as alleged by Mr. Schaub, given the use of the language in the April 21, 2015 letter. CP 77-78. This is what Mr. Schaub presumed. CP 7-8. Mr. Schaub believed his application to be complete, which the trial court and the Court of Appeals was obliged to presume to be true. *Cutler v. Phillips Petroleum Co., supra., Tenore v. AT&T Wireless Services, supra; Bavand, supra.*

Moreover, the Court of Appeals appears to confuse a facially complete HAMP loss mitigation/modification application, within the terms of *12 CFR § 1024.41* and *WAC 208-620, et seq.*, with other documentation that might be requested by the lender. In this regard, the Court of Appeals failed to consider that hypothetically, Bayview's request for additional information exceeded what is required for a facially complete HAMP loss mitigation/medication application, the scope of

which was not before the trial court. Hypothetically, if Bayview had requested information beyond what would normally have been required under HAMP for some undisclosed underwriting reason, that would not have necessarily meant that the application submitted to Bayview on April 14, 2015 was "incomplete" within HAMP guidelines. Indeed, the Court of Appeals was obliged to presume that the HAMP loss mitigation/medication application was complete based on Mr. Schaub's alleged set of facts and express assertion that the application was "complete". CP 7-8. *Cutler v. Phillips Petroleum Co., supra., Tenore v. AT&T Wireless Services, supra; Bavand, supra.*

Mr. Schaub reasonably believed his loss mitigation/modification application was complete because in its letter of April 21, 2015, Bayview did not identify any missing information or documents. CP 77. Mr. Schaub had no reason to question Bayview's promise to discontinue the trustee's sale because he reasonably believed his application was complete and the additional information requested on May 13, 2015 was not required under HAMP or such that would otherwise trigger the "conditional" language cited by the Court of Appeals. CP 7-8. ***Appendix "A"***, pg. 10.

Finally, the Court of Appeals concludes that nothing in Bayview's letter of April 21, 2015 promises to discontinue the trustee's sale on receipt of a facially complete application, but this is simply wrong and a patent misreading of the letter. The language used in Bayview's

letter of April 21, 2015 would lead any reasonable person to believe that if they submitted a facially complete HAMP loss mitigation/modification application within the terms of *12 CFR § 1024* and *WAC 208-620, et seq.*, as Mr. Schaub had, Bayview would not refer the property to foreclosure and would forebear the pending foreclosure "while [Bayview] consider[s] your [modification] request." CP 78. It was Mr. Schaub's understanding that Bayview had all required documentation, and Bayview provided Mr. Schaub nothing to the contrary. CP 7-8

The Court of Appeals' analysis of Bayview's letter of April 21, 2015 was clearly erroneous and this matter should be remanded for further consideration or reversed.

C. Application of *12 CFR § 1024.41* and related statutes.

It was Mr. Schaub's well-founded understanding at all time relevant to this cause of action, based on Respondents' choice of forms to be completed and Bayview's letter of April 21, 2015, that the provisions of *12 CFR § 1024* would apply to his loss mitigation/loan modification application, despite the non-owner occupied character of the subject property. CP 77-78 and CR 120-124. *12 CFR § 1024.41*[5] provides, in pertinent part, as follows:

(b) *Receipt of a loss mitigation application.*

[5] These federal statutes are generally known as the Real Estate Settlement Procedures Act, or commonly "Reg. X".

(1) *Complete loss mitigation application.* A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

(2) *Review of loss mitigation application submission.*

(i) *Requirements.* If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.

(ii) *Time period disclosure.* The notice required pursuant to paragraph (b)(2)(i)(B) of this section must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.

(3) *Determining Protections.* To the extent a determination of whether protections under this section apply to a borrower is made on the basis of the number of days between when a complete loss mitigation application is received and when a foreclosure sale occurs, such determination shall be made as of the date a complete loss mitigation application is received.

* * *

(g) *Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first

notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option. (Emphasis added)

While not necessarily forming an independent basis for relief, it should be noted that the provisions of *12 CFR § 1024.41* are mirrored in Washington law. *WAC 208-620-900(6)(b)*[6] provides, in pertinent part, as follows:

(b) You must comply with all timelines and requirements for the federal HAMP or GSE modification programs if applicable, including denials and dual tracking prohibitions. If not using a HAMP or GSE loan modification program, you must:

(i) Develop an electronic system, or add to an existing system, the ability for borrowers to check the status of their loan modification, at no cost. The system must also allow communication from

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[6] *WAC 208-620-900* was promulgated under authority provided the Director of Financial Institutions (DFI) pursuant to *RCW 43.320.040* and *RCW 31.04.165*. It is the latter statutory basis for this authority that gives rise to the potential application of *RCW 31.04.027*. Specifically, the provisions of *RCW 31.04.027 (a) – (c)*, prohibit Respondents from directly or indirectly employing any scheme, device, or artifice to defraud or mislead any borrower, engaging in any unfair or deceptive practice toward any person or obtaining any property by fraud or misrepresentation. Bayview asserts that it is not required to comply with the provisions of *RCW 31.04, et seq.* But that would make sense only if Bayview were acting merely as a servicer/agent for JPMorgan, without rights to the Note, rather than the "holder" of the obligation, which they have asserted they were.

housing counselors. The system must be updated every ten business days. You have until April 1, 2013, to develop the system described in (a)(i) of this subsection. On and after April 1, 2013, you must be in compliance with (a)(i) of this subsection.

(ii) Review and make a determination on a borrower's completed loan modification application within thirty days of receipt.

(iii) Provide in the loan modification denial notice the reasons for denial and an opportunity for the homeowner to rebut the denial within thirty days. If the denial is due to the terms of an agreement between you and an investor, you must provide the name of the investor and a summary of the reason for the denial. If the denial is based on a net present value (NPV) model, you must provide the data inputs used to determine the NPV. Any loan modification denials must be reviewed internally by an independent evaluation process within thirty days of the denial determination or the mailing of the notice of denial to the borrower, whichever occurs earlier. See (b) of this subsection for additional requirements on borrower appeals.

(iv) Review and consider any complete loan modification application before referring a delinquent loan to foreclosure.

(v) Give a homeowner ten business days from your notice to them to correct any deficiencies in their loan modification application.

(vi) Stop the foreclosure from proceeding further if you receive a complete loan modification application. See (a)(viii) and (ix) of this subsection.

(vii) If the borrower accepts a loan modification verbally, in writing, or by making the first trial payment, you must suspend the foreclosure proceeding until such time as the borrower may fail to perform the terms of the loan modification.

(viii) Review and consider a complete loan modification application if received prior to thirty-seven days before a scheduled foreclosure sale. If you offer the borrower a loan modification, you must delay a pending foreclosure sale to provide the borrower with fourteen days in which to accept or deny the loan modification offer. If the borrower accepts a loan modification, you must suspend the foreclosure proceeding until such time as the borrower may fail to perform the terms of the loan modification.

(ix) Perform an expedited review of any complete loan modification application submitted between thirty-seven and fifteen days

before the scheduled foreclosure sale. If you offer the borrower a loan modification, you must delay a pending foreclosure sale to provide the borrower with fourteen days in which to accept or deny the loan modification offer. If the borrower accepts a loan modification, you must suspend the foreclosure proceeding until such time as the borrower may fail to perform the terms of the loan modification. (Emphasis added).

While it is true that *12 CFR §1024.30(c)(2)* limits application of Reg. X remedies to "owner-occupied" properties, it must be noted that Bayview specifically invited and encouraged Mr. Schaub to apply for a loan modification and selected the specific HAMP loss mitigation/modification application to be used by Mr. Schaub knowing the property was "non-owner-occupied" rental property (CP 120-124); sent Mr. Schaub correspondence that led him to reasonably believe his modification application was facially complete, without regard to the character of the property, and assured (promised) him that its foreclosure efforts would be stayed while his application was pending (CP 77-78); and failed to advise him that his application could not be considered within the terms of Reg. X in sufficient time for him to either cure the alleged default 11 days prior to the sale date under *RCW 61.24.040,* obtain refinance of the obligation or seek other remedies under *RCW 61.24.130.* By these acts, Respondents should be promissorily estopped from denying applicability of Reg. X or the related Washington provisions to Mr. Schaub's HAMP loss mitigation/modification application and denying their duty to have stayed their foreclosure efforts during their review of Mr. Schaub's application and, failing that, remain liable for loss of his

rental property and loss of his equity. Respondents handled Mr. Schaub's HAMP loss mitigation/medication application as if the subject Property was owner occupied and they should be estopped from asserting defenses that it was otherwise.

D. Application of Promissory Estoppel.

Respondents' arguments to the trial court and the Court of Appeals regarding the non-owner occupied character of the property were disingenuous and misplaced based upon application of the principles of promissory estoppel. Respondents knew since the loan was originally executed and at all times during the modification process that the subject Property was intended to be used as a rental. CP 19-24 and CP 120. Nevertheless they induced Mr. Schaub to follow the loss mitigation procedures for owner-occupied single family homes. When Bayview invited and encouraged Mr. Schaub to apply for loss mitigation, Bayview provided him with modification forms and at all times treated Mr. Schaub's application as if it was owner occupied.[7] It is too late now to pretend that it should have been done another way, based on Respondents' inducements and Mr. Schaub's detrimental reliance on the procedures outlined by Respondents during the loss mitigation/loan modification process.

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[7] See e.g. CP 77-78 wherein Bayview induced Mr. Schaub to follow the timelines set out in *12 CFR § 1024*.

The elements of promissory estoppel are: (1) a promise that (2) the promisor should reasonably expect to cause the plaintiff to alter their position and (3) which does cause such a change in position (4) in justifiable reliance, (5) such that injustice requires enforcement of the promise. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 171–72, 876 P.2d 435 (1994). Promissory estoppel based on *Restatement of Contracts*, § 90 (1932) is well established under Washington law and serves as an additional basis for an action for damages. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980) (citing *Central Heat, Inc. v. The Daily Olympian, Inc.*, 74 Wn.2d 126, 443 P.2d 544 (1968); *Hill v. Corbett*, 33 Wn.2d 219, 204 P.2d 845 (1949.)).

Here, each element is present. Bayview promised Mr. Schaub that if he submitted a facially complete loss mitigation package based on forms Respondents themselves chose and without regard to the character of the property, his request would be considered and while under consideration, Defendants would forebear all foreclosure efforts. CP 7-8, CP 78. Mr. Schaub acted in good faith, providing Defendants all of the information requested in a timely fashion, and in so doing, lost out on the opportunity to apply for such assistance through other means and/or cure the default or enjoin the sale. Mr. Schaub reasonably believed his loss mitigation/modification application was complete because in its letter of April 21, 2015 (essentially a form letter), Bayview did not identify any missing required information, documents or any other missing information

whatsoever. CP 8, CP 77. Mr. Schaub reasonably and justifiably relied on Bayview's representations that the mitigation package selected by Respondents and timely submitted by him was the right one and reasonably believed the pending non-judicial foreclosure would be discontinued. CP 8, CP 78. Based upon Bayview's assurances of discontinuance of the pending non-judicial foreclosure and his reliance of those assurances, Mr. Schaub's position *vis-à-vis* the pending foreclosure changed, as he did not attempt to cure the alleged default, pursuant to *RCW 61.24.040,* seek to refinance the obligation or enjoin the pending sale, pursuant to *RCW 61.24.130.* When Mr. Schaub learned of the foreclosure sale, it was too late for him to seek any other loss mitigation route and he was thus injured and damaged by virtue of the loss of his rental property and his approximately $147,000.00 in equity.

By allowing Respondents to use the non-owner occupied character of the subject Property as a defense to Mr. Schaub's claims, he will have no ability to recoup the loss of the equity he had in the subject Property, over and above the sums due JPMorgan on the Note, in the approximate amount of $147,000.00.

E. Claims against NWTS for violation of the DTA.

The three goals of the Washington deed of trust act are: (1) that the non-judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process

should promote stability of land titles. *Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 683 (1985) (emphasis added); *Country Express Stores, Inc. v. Sims,* 87 Wn.App. 741, 747-48, 943 P.2d 374 (1997). The second goal of the DTA is at issue here.

Respondents asserted to the trial court and the Court of Appeals that Mr. Schaub failed to articulate any claims against NWTS. This is false and a misreading of Mr. Schaub's Amended Complaint. Specifically, NWTS' preparation and execution of the Assignment of Deed of Trust of September 22, 2010; its self-serving preparation and execution of the Appointment of Successor Trustee on September 22, 2010 without apparent awareness or authorization by JPMorgan, the execution of Notices of Trustee's Sales that were signed and notarized on separated dates[8]; the designation of a private parking lot as the site of the public trustee's sale; and marketing the property as a "hot property" are all violations of various provisions of the DTA and NWTS' duty of good faith under *RCW 61.24.010*, for which NWTS should be held liable under *RCW 61.24.127(1)(c)* and as part of Respondents' scheme to deprive Washington homeowners a fair and transparent process by which they can retain their real properties. Indeed, NWTS acted as a necessary party in concert with JPMorgan and its agent, Bayview, to deprive Mr. Schaub the benefits of his loss mitigation/modification application. And, when

[8] See *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 794-795, 295 P.3d 1179 (2012).

NWTS was alerted to the situation, it refused to take reasonable actions to mitigate Mr. Schaub's damage, under *RCW 61.24.050(2).* See Paragraph 3.19 of the Complaint. CP 9.

Moreover, at hearing before the trial court and the Court of Appeals, Respondents noted that by failing to enjoin the trustee's sale pursuant to *RCW 61.24.130*, Mr. Schaub waived his rights under the DTA, citing *Frizzell v. Murry*, 179 Wn.2d 301, 313 P.3d 1171 (2013) (hereinafter "*Frizzell*"). However, Respondents' reliance on *Frizzell* is misplaced as the case is both factually and legally distinguishable from the present case.

Where there are irregularities in the foreclosure process, where the trustee has exceeded his or her authority or has used the authority for unlawful or inequitable ends, strict compliance with the DTA is waived. As noted in *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 177 (2012) (hereinafter "*Albice*"):

> The word "may" [in *RCW 61.24.130*] indicates the legislature neither requires or intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.

See also *RCW 61.24.040(1)(f)(IX); Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 783 (n.7), 295 P.3d 1179 (2012) (hereinafter "*Klem*"); *Schroeder v. Excelsior Management Group, LLC,* 117 Wn.2d 93, 297 P.3d 766 (2013) (hereinafter "*Schroeder*") and *Bavand.*

What is critical in determining whether a borrower has effectively waived his or her rights under *RCW 61.24.130* is whether the borrower was induced to forego exercise of his or her rights by the trustee or lender/servicer or whether the borrower knowingly "slept on their rights." Compare *Frizzell,* at pg. 308, with *Albice, Schroder,* at pgs. 100-101, *Bavand,* at pgs. 494-495.

Here, Mr. Schaub reasonably believed, based on Bayview's correspondence of April 21, 2015, that Respondents would forebear foreclosure activities while his HAMP loss mitigation/modification application was pending. CR 77-78. In reliance on these representations (promises), Mr. Schaub reasonably believed his remedies under the DTA would be preserved should JPMorgan and Bayview deny his application. He wasn't sleeping on his rights - he was actively pursuing the loss mitigation suggested by Respondents and was relying on Respondents' promises to forebear foreclosure, which they breached by selling the subject Property without providing him adequate notice so that he could either cure the alleged default, refinance the obligation or restrain the sale, pursuant to *RCW 61.24.130.* Under these circumstances, it would be inequitable to declare that Mr. Schaub knowingly waived his rights.

Indeed, Respondents lulled Mr. Schaub into believing they were reviewing his HAMP loss mitigation/modification application in good faith and that they would honor their promise to forebear all foreclosure proceedings while his application was being reviewed and considered,

without consideration of the non-owner-occupied character of the subject Property. In reliance on these representations, Mr. Schaub did not seek to cure the alleged default 11 days prior to the sale, seek refinance or seek to enjoin the sale under *RCW 61.24.130,* either of which he could have – and would have - done had Respondents notified him in a timely fashion that he was ineligible for the HAMP loss mitigation/modification process that Bayview had led him to believe, by its choice of the form and procedures, he was otherwise entitled to pursue. Under these circumstances, it would be inequitable to deny Mr. Schaub the ability to pursue claims against NWTS in tort or contract for fraud, misrepresentation and violation of the DTA, notwithstanding the statutory limitations imposed by *RCW 61.24.127.* Property owners must have remedies against trustees who act in concert with lenders and servicers who lure and deceive property owners into waiving their rights under the DTA.

F. Application of the CPA.

Mr. Schaub asserts that Respondents' misconduct violates the CPA and there is enough support for this assertion contained in the Complaint, which the Court of Appeals was obliged to presume to be true. *Cutler v. Phillips Petroleum Co., supra., Tenore v. AT&T Wireless Services, supra; Bavand, supra.*

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's

business or property, and (5) causation. See *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 780, 719 P.2d 531 (1986); *Klem*, at pg. 782; *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012) (hereinafter "*Bain*") and *Bavand.* The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis,* 103 Wn.2d 52, 691 P.2d 163 (1984).

Whether a particular business practice or act is unfair or deceptive is a matter of law. *Leingang v. Pierce County Medical Bureau, Inc.,* 131 Wn.2d 133, 150, 930 P2d 288 (1997). However, a plaintiff need not show the act or practice in question was intended to deceive, only that the act or practice has the "capacity to deceive" a significant portion of the public. *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009); *Bain,* at pg. 115-116. The *Bain* court specifically found a servicer's false representation that they are the beneficiary of a deed of trust with the right to foreclose to be a deceptive act. *Bain,* at pg. 116-117. Moreover, the *Schroeder* court held that any failure to comply with the DTA could satisfy the unfair or deceptive practice element of a CPA claim. *Schroeder*, at pg. 114.

As to the second and third element of a CPA claim, a plaintiff must establish the alleged act or practice occurred in trade or commerce and affected the public interest. As noted in *Trujillo v. NWTS*, 183 Wn.2d 820, 835-836, 355 P.3d 1100 (2015):

. . .Trujillo alleges, " Wells [Fargo] makes these unfounded claims to foreclose on defaulting borrowers as a routine part of its foreclosure activities on behalf of Fannie Mae. Its foreclosure activities are conducted in the course of trade and commerce and certainly impact the public interest." CP at 93. In a private action, a plaintiff can establish that the lawsuit would serve the public interest by showing a likelihood that other plaintiffs have been or will be injured in the same fashion. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (quoting *Hangman Ridge*, 105 Wn.2d at 790). The court considers four factors to assess the public interest element when a complaint involves a private dispute: (1) whether the defendant committed the alleged acts in the course of his/her business, (2) whether the defendant advertised to the public in general, (3) whether the defendant actively solicited this particular plaintiff, and (4) whether the plaintiff and defendant have unequal bargaining positions. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 791). The plaintiff need not establish all of these factors, and none is dispositive. *Id.* Trujillo's allegations satisfy the second and third elements because they relate to the sale of property, RCW 19.86.010(2), and they state that other plaintiffs have or will likely suffer injury in the same fashion. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 790). (Emphasis added)

Here, it is indisputable that Respondents' misconduct occurred in their trade. As to the public interest element, the misconduct involved the sale of Mr. Schaub's real property, which always has an impact on the public. *RCW 19.86.010; Bavand,* at pg. 508. Moreover, Respondents themselves chose the specific loan modification forms and program that Mr. Schaub applied for and which he completed and submitted within the time proscribed by *12 C.F.R. §1024 et seq.*, and thereafter promised to forbear foreclosure efforts while his application was pending. This scenario could be duplicated among the thousands of homeowners in Washington who have sought loss mitigation/modification of their loans through JPMorgan and Bayview since 2008. JPMorgan deceived Mr.

Schaub, through its agents, into applying for a loan modification that it now asserts it would not grant to owners such as him and it did this in the course of its mortgage lending business. The full extent of JPMorgan's and Bayview's loss mitigation/loan modification practices will require discovery, but it is anticipated that discovery will reveal that there are hundreds or thousands of borrowers in Washington State that are similarly situated to Mr. Schaub.

Respondents induced Mr. Schaub to apply for a HAMP loan modification using an application form and procedures they selected. Respondents were aware that the subject Property was held for investment/commercial purposes and was non-owner occupied, yet lulled Mr. Schaub into the loss mitigation/modification process of their choosing and leading him to believe they would, in fact, consider modifying his loan in good faith and would forbear foreclosure while his modification application was pending. CP 77-78. Respondents' misrepresentations, alluding to provisions of *12 CFR § 1024.41, RCW 31.04.027, RCW 61.24, et seq.* and *WAC 208-620-900(6)(b),* among others, were the means by which Mr. Schaub was injured and damaged – and were unfair and deceptive.

Alternatively, if the Court finds that Respondents, through their fraud and misrepresentations, denied Mr. Schaub his statutory rights under the DTA as argued above, Mr. Schaub should be entitled to argue a *per se* violation of the CPA, pursuant to *RCW 61.24.135.* Moreover, by

application of the equitable doctrine of promissory estoppel, the apparent violation of *RCW 31.04, et seq.*, which mirrors *12 CFR § 1024.41,* as alleged by Mr. Schaub, would also constitute a *per se* violation of the CLA, in which all but the elements of damage and proximate causation are presumed. See *RCW 31.04.208.* Certainly, in equity, Mr. Schaub should be entitled to the equivalent relief that *RCW 61.24.135* and *RCW 31.04.208* would provide him.

As to Mr. Schaub's damages, they are easily quantifiable. Had he not been lulled into pursuing the loan modification process suggested and encouraged by Respondents he could have pursued other retention options, as noted above. As it stands, Mr. Schaub lost in excess of $147,000.00 in equity, the difference between value of the property sold at auction (CP 81) and the value that the property obtained on resale (CP 83), as a direct and proximate result of Respondents' misconduct, from which they have been unjustly enriched.

As noted in *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412, 431, 334 P.3d 529 (2014) (hereinafter "*Frias*"):

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

be met even where the injury alleged is both minimal and temporary. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). (Emphasis added)

In *Frias*, the misconduct involved a lender's denial of a reasonable loan modification based on the lender's bad faith during an FFA mediation. Here, the misconduct is similar: the lender's and servicer's breach of a promise to forebear foreclosure pending a review of Mr. Schaub's timely filed loss mitigation/modification application.

The *Frias* court held that the borrower could proceed with her CPA claim against the lender because she plead injuries to her property that could be compensable under the CPA, noting that "loss of title or payment of illegal fees are sufficient, but not necessary, to plead an injury compensable under the CPA based on alleged DTA violations." *Frias,* at pg. 432. See also *Bavand,* at pg. 508.

As noted above, Mr. Schaub's damages are easily quantifiable. CP 81 and CP 83.

G. Attorney Fees and Costs.

In addition to all other relief requested herein, Mr. Schaub requests this Court award him his taxable costs and reasonable attorney fees pursuant to the terms of Paragraph 26 of the Deed of Trust (CP 32) and *RAP 18.1.*

VII. CONCLUSION

Based upon the foregoing, this Court should accept review of the subject decision, pursuant to *RAP 13.4(b)(1), (2)* and *(4)* to correct the manifest errors in the Court of Appeals' Unpublished Opinion of July 1, 2019.

REPECTFULLY SUBMITTED this 28th day of July, 2019.

KOVAC & JONES, PLLC

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August 04, 2019 - 1:39 PM

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