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Court of Appeals  
Division I  
State of Washington

**Case No. 72326-0-I**

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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ERIC AND PEGGY FLETCHER,

Appellants,

v.

NORTHWEST TRUSTEE SERVICES, INC., FREEDOM MORTGAGE  
CORPORATION, LOAN NETWORK, LLC, LOANCARE SERVICING  
CENTER, INC., MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. and DOE DEFENDANTS 1 through 20,

Respondents.

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**APPELLANTS FLETCHERS' OPENING BRIEF**

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## INTRODUCTION

The record in this case is replete with the Defendants' violations of the Consumer Loan Act ("CLA") and the Mortgage Broker Practices Act ("MBPA") relating to loan origination; and intentional acts constituting a refusal to adhere to the requirements of the Deed of Trust Act ("DTA"), which included intentional misrepresentations about the location and physical possession of the Fletchers' Promissory Note, the identity of the owner of loan and the authority to enforce the terms of the Note under the DTA and to make modifications to the loan. RCW 31.04, *et seq.*, RCW 19.146, *et seq.* and RCW 61.24, *et seq.* The purported foreclosing trustee, Northwest Trustee Services, Inc. ("NWTs") violated its duties under the DTA throughout the nonjudicial foreclosure process and therefore the Defendants' actions described herein supported the Fletchers' claims for violations of the Consumer Protection Act ("CPA"). RCW 19.86, *et seq.* The trial court ignored the facts of the case, the actions of the Defendants, including the false statements made to the Court, and entered orders that were in direct contravention of binding Washington case law.<sup>1</sup>

Under Washington law, it is clear that the Fletchers actually proved the facts underpinning their claims and that the Defendants committed every violation of the law as alleged by the Fletchers. Recent

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<sup>1</sup> Consistent with the decision in *Frias*, the Fletchers' direct claims under the DTA is invalid, but may be pursued using other statutes and legal theories, including the CPA.

Washington Supreme Court case law, and case law that was considered by the trial court, makes clear that the Fletchers may pursue a damages claim for the injuries that they suffered as a result of Defendants' violations of the Washington lending statutes (the CLA and the MBPA); the refusal to adhere to the requirements of the DTA; for breach of duties under the DTA, associated unfair or deceptive acts under the CPA, and the other misrepresentation that supported their claims. This is just as true in the absence of a completed foreclosure sale as it is after a sale. Moreover, the Fletchers' claims related to loan origination should have survived summary judgment because the factual allegations made by the Fletchers regarding the violations of the requirements of the CLA, MBPA and the DTA were not refuted and supported their claims for those violations.

Consistent with the language of the DTA and the CPA, this Court must hold, just as the Supreme Court recently held in *Frias v. Asset Foreclosure Services, Inc.*, \_\_\_ Wn.2d \_\_\_, 334 P.3d 529 (2014) and *Lyons v. U.S. Bank National Assoc.; et al.*, Case No. 89132-0 (WA Sup. Ct., October 30, 2014). *See also, Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013) that the Fletchers may pursue those claims. At the time that the Court entered judgment, the binding authority was embodied in *Walker*, and the trial court appears to have ignored completely the holding in that case. CP 287-388; 706-707;

1384-1385; 1579-1580; 1581-1584.

Washington state law is clear that a borrower may assert a damages claim for injuries caused by violations of the DTA, which may constitute claims under the CPA and other statutes using the standards that normally apply to those claims. *Frias*. The types of injury and damages proven by the Fletchers were incurred because of the numerous ways in which the Defendants did not comply with the requirements of the DTA are compensable as articulated by the Supreme Court in *Frias* and *Lyons*.

Contrary to the assertions of the Defendants, the Fletchers were injured by their actions during loan origination, the loan servicing and during the attempted non-judicial foreclosure. Their monetary damages were well articulated and documented, as was their injury, and they are entitled to relief, consistent with the findings in *Frias* and *Lyons*. CP 1-18; 537-538. The monetary damages included costs associated with the improper costs added to the loan balance, investigating their claims, parking and travel to engage in that investigation and to attend hearings, attorneys' fees paid to enjoin the foreclosure sale, and the filing fees and recoverable costs of litigation. The Defendants also demanded payment of fees that were not reasonable under the DTA and which were not owed because the attempted nonjudicial foreclosure was improper, which means no fees could be demanded for the foreclosure. This constitutes an

“injury” consistent with the holdings in *Frias* and *Lyons*. *Id.*

The decision by the trial court to dismiss the Fletchers’ claims is an implicit finding that the prohibitions on conduct embodied in the CLA and the MBPA, which are *per se* CPA violations should be ignored and that mortgage loan servicers and foreclosing trustees are free to violate the requirements of the DTA at every stage in an attempted nonjudicial foreclosure with complete impunity. Washington state case law makes clear that the trial court’s findings are inconsistent with the intent and purpose of the statutes, and would contravene the Supreme Court’s oft repeated assertion that the DTA must be strictly construed in favor of the homeowner with the intent to avoid a wrongful foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (Courts “are required, when possible, to give effect to every word, clause and sentence of a statute”). “[L]enders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower’s favor.” *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). Moreover, it contravenes recent Supreme Court case law that makes clear that homeowners who have suffered the types of injuries and damages demonstrated by the Fletchers are entitled to recovery.

#### **STANDARD ON REVIEW**

An appellate court should independently determine whether the

findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynbee, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980).

Here, the evidence provided by the Fletchers not only demonstrated that there are genuine issues of material fact that must be decided at trial, but that the Fletchers had proven the facts that supported their claims.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.*; *see also, Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Here, the record is clear that the Fletchers suffered “injuries” and incurred monetary damages, consistent with the requirements of the applicable law.

Therefore, the trial court did not apply the facts to the law in a manner that is consistent with the requirements of binding case law.

### **STATEMENT OF ISSUES**

The issues in this case are as follows:

1. The Fletchers demonstrated that the originating lender, Loan Network in conjunction with Freedom violated the requirements of the Consumer Loan Act and Mortgage Brokers Practice Act, which are *per se* violations of the CPA. The Fletchers proved that they were injured and suffered damages as a result of the violations in the form of additional costs included in the loan balance, which is in the money judgment

entered against them in the judicial foreclosure proceeding. They also paid a higher interest rate on the loan for years and which contributed to their inability to make monthly payments. Further, the balance of these charges were added to the Judgment entered against the Fletchers in the judicial foreclosure. Therefore, they were entitled to a finding that there genuine issues of material fact relating to a claim for a violation of the CPA based upon the CLA and MBPA violations.

2. The Fletchers demonstrated that all of the Defendants violated the requirements of the Deed of Trust Act in many ways and that these actions caused injury and damages to them. Their injury and damages were the improper review for a loan modification option and the initiation of a nonjudicial foreclosure that was without legal authority. The wrongful initiation resulted in them incurring monetary damages that were articulated and supported by documentary evidence. The Defendants also demanded monies from them that were not owed, for costs associated with the wrongfully initiated nonjudicial foreclosure. Thus, they were entitled to a finding that there are genuine issues of material fact relating to a claim for a violation of the CPA based upon the DTA violations.

First, the case law regarding violations of the CLA and the MBPA supporting claims for *per se* violations of the CPA, are those cases that outline claims for violations of the CPA. In spite of the fact that the Defendants failed to respond to any of these claims with any specificity and virtually ignored them entirely, the trial court improperly dismissed those claims. As a result, the entry of the Order dismissing those claims is mystifying. There had to be genuine issues of material fact that must be decided by a trial court given that the Fletchers' allegations and their evidence were effectively unrefuted.

Recent foreclosure opinions by the Washington Supreme Court and intermediate appellate courts which have followed and relied upon them make clear that under Washington law, a plaintiff may state a claim

for damages and injury relating to a breach of duties under the DTA and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property by pursuing claims for violation of the CPA.<sup>2</sup> These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As this Court emphasized in *Walker*, “No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.” *Walker*, 308 P.3d at 724.

The Supreme Court in *Frias* and *Lyons* articulated the standard for ascertaining damages in these cases. Citing to *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), and expanding upon that holding, the Supreme Court found that a borrower could suffer an injury based upon “unlawful debt collection practices, even when there is no dispute as to the validity of the underlying debt.” *Frias* at 538-39, citing to *Panag* at 55-56, n. 13. “[T]he injury requirement is met upon proof the plaintiffs' property interest or money is diminished because of the

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<sup>2</sup> See *Frias v. Asset Foreclosure Services, Inc.*, \_\_\_ Wn.2d \_\_\_, 334 P.3d 529 (2014); *Lyons v. U.S. Bank N.A.*, Case No. 89132-0 (WA Sup. Ct., October 30, 2014); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Rucker v. Novastar Mortg., Inc.*, 177 Wn.App. 1, 311 P.3d 31, (2013); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013).

unlawful conduct even if the expenses caused by the statutory violation are minimal." *Id.* The Court reiterated that consulting with an attorney "to dispel uncertainty" is compensable under the CPA. *Frias* at 538-39, citing to *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990). This is what the Fletchers did and for which they incurred costs, which were more than "minimal". CP 1-18; 537-538.

This Court may also look to *Walker*, *Frias* and *Lyons* for guidance in how to measure injury and damages under similar circumstances, especially since in this case, the actions of the Defendants are so egregious. As will be explained in detail below, the Defendants affirmatively misrepresented the identity of the owner of the loan and the noteholder, even during the first year of the litigation and did not respond to discovery on the subject until the Fletchers were forced to compel the production. CP 753-764; 764-827; 828-837; 838-840; 864-872; 873-874; 903-905; 948-960; 961-976; 977-982; 983-985. The Fletchers had to compel production of the information regarding the loan owner. *Id.* In fact, Freedom, the entity in whose name the nonjudicial foreclosure was initiated, was not the noteholder, it did not have physical possession of the Note and was not the loan owner. CP 1223-1319. Further, Freedom never had a single communication with any of the other Defendants, including the entity that actually initiated the nonjudicial foreclosure,

LoanCare, who also was never anything more than the loan servicer. *Id.* The fact that all communications were coming from LoanCare was known to the purported foreclosing trustee, NWTS, and it too acted to attempt to foreclose knowing it did not have the authority under the DTA to do so. NWTS just ignored the fact that LoanCare was not identified on the Beneficiary Declaration as the noteholder or loan owner and proceeded to try to foreclose anyway. *Id.* If this Court chooses to effectively endorse the actions of the Defendants in this case by affirming the trial court and ignore the injuries that the Fletchers have suffered as a result, it will have effectively gutted the requirements that any person or entity comply with the requirements of the DTA.

#### **STATEMENT OF THE CASE**

Mr. and Mrs. Fletcher bought their home in 2000 and when it was purchased, they did so with a loan from Norwest Mortgage. In the ensuing years, they refinanced the Residence a few times in order complete some work on the property and to deal with some of their household expenses. CP 1-11. In or about May 2008, the Fletchers were seeking to reduce their interest rate and monthly payment, looked into getting a loan from Loan Network. In connection therewith, the Fletchers provided their financial information to the loan officer, Armin Guzman. On the loan application, Ms. Guzman listed a Washington DFI loan

originator license number, however, DFI's records indicate Ms. Guzman applied for a license but abandoned the application. This means she was an unlicensed loan officer, which constitutes a *per se* violation of the CLA. RCW 19.146.200; 19.146.100. *Id.* Ms. Guzman assured the Fletchers that she could obtain more favorable loan terms for them, which would save them money. She also told them they needed to obtain a loan that was insured by the FHA, even though this would require them to pay a mortgage insurance premium. *Id.*

The Fletchers maintained they did not obtain loan disclosures from Ms. Guzman in advance of the loan signing, because they did not know what the costs of the loan would be before the signing. Included in the copy of the escrow file that the Fletchers only later obtained in discovery was documentation indicating that Loan Network falsely asserted it provided them with the disclosures required by law. CP 1-11. The monies paid to Defendant Loan Network included numerous demands for payment that were outlined in the Complaint and in later pleadings. The Fletchers maintained that these fees were greatly inflated and were completely unreasonable, and in fact, since they were not disclosed in advance, collection of the fees was a *per se* violation of the CPA. *Id.* Even worse, Loan Network was not entitled to a mortgage broker fee at all because Ms. Guzman was unlicensed and it did not actually broker the

loan. Instead, Loan Network was the mortgage lender, as indicated on the Note and Deed of Trust. RCW 19.146.200(1); 19.146.100. *Id.*

When the Fletchers signed the loan documents at the end of June 2008, the fees were included in the loan balance which has now been reduced to a judgment against them. CP 1-11. The signing was done at a remote location and not even at the offices of the escrow company. As a result, they paid additional costs of **\$175.00**, and they were also rushed through signing by the traveling notary. *Id.* The new loan did have a lower interest rate (from 10.625% to 8.021%). This was not the sort of interest rate reduction that the Fletchers were promised by the unlicensed loan officer. However, she assured them that if they took this loan and regularly made payments on it, they would be able to get a new loan with a much lower interest rate in the very near future. *Id.* The evidence later adduced indicated that Loan Network was being “sponsored” through the FHA loan program by Flagstar Bank, and after the Fletchers obtained the loan, all of their monthly statements came from Flagstar Bank. When this loan was paid off with a refinance, Flagstar Bank received the funds. CP 1-11; 961-976; 983-985.

The Fletchers made the required payments on the loan for about 10 months and then they got back in touch with Loan Network. Ms. Guzman was no longer there so they began working with another loan officer. The

Fletchers reminded Loan Network that they were supposed to have a much lower interest rate when obtained the loan in 2008 and they were back at Loan Network to get the promised lower interest rate. CP 1-11. On this second loan, Loan Network again did not provide the Fletchers with the required disclosures in the time frame required by state law but they were assured that they would not have any broker or loan charges assessed on the new loan. However, what Loan Network did not disclose to the Fletchers, or ever discuss with them, is that fees were being paid by the entity that was really funding the loan, Freedom, to Loan Network, and as a result, the Fletchers' interest rate was increased in order to pay the compensation to Loan Network. CP 1-11; 961-976; 983-985.

This second loan was also insured by FHA and the Fletchers had to pay more mortgage insurance premiums. The HUD-1 Settlement Statement provided to the Fletchers clearly indicates that Freedom is the "Lender". But this information is false, as all of the loan documents themselves, including the Promissory Note and the Deed of Trust signed by the Fletchers falsely asserts that Loan Network is the "Lender". The Note is payable to Loan Network and the Deed of Trust lists it as the "Beneficiary", but it is returnable after recording to Freedom in Fishers, Indiana. If Loan Network was actually the Lender, as is clearly asserted on the loan documents, it could not be paid a fee for allegedly brokering

the loan, even if it had properly disclosed the fees and charges in advance, as required by state and federal law. RCW 19.146.0201, 19.146.200(1), 19.146.100. CP 961-976; 983-985.

The new mortgage in 2009 carried an interest rate of 6% interest on a 30-year fixed loan – loan terms that should have been given to the Fletchers in the year prior. Instead, they were misled and deceived by the unlicensed loan originator at Loan Network into obtaining two loans instead of one, which cost them thousands of dollars extra in undisclosed and unearned charges added to the loan balance and caused them to pay more interest for the one year of the first loan.<sup>3</sup> CP 1-11. In addition, while the Deed of Trust identified Loan Network as the “Lender”, MERS was listed as the beneficiary “solely as nominee for Lender, as hereinafter defined, and Lender’s successors and assigns”. The record is clear that MERS has never been a “beneficiary” (RCW 61.24.005(2)) because it never held the Note. CP 455-458; 961-976; 983-985.

After entering into the loan, the Fletchers received statements from Freedom and made payments to it. However, in July 2009, Mr. Fletcher lost his job and they began to struggle financially. Mr. Fletcher was on and off unemployment over the course of the next few years and they got behind on their mortgage payments. Initially the Fletchers were able to

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<sup>3</sup> The Fletchers’ interest rate on the second loan would have been even lower except for the “yield spread premium” allegedly paid to Loan Network, the purported “Lender”.

make the mortgage payments, however, they knew that there would be problems in the future and called Freedom as soon as they heard about the layoff. CP 1-11. However, they were told that they could not even apply for a loan modification unless they were two (2) months behind. So, they skipped the payments for August and September in the hopes of getting a modification. When they tried to make payments in October and November, they were told that they could only make the payment if they paid the entire amount due and they could not do so. *Id.*

The Fletchers did submit a modification application from Freedom (their only contact) and eventually entered into a six (6) month forbearance agreement where they paid half of the regular payment. However, once that expired, they were still unable to make the regular payment and Freedom would not review them for any other modification, in spite of the obligations to do so on an FHA insured loan. CP 1-11. Instead, they heard from LoanCare when someone from that entity advised them by letter that they did not qualify for a loan modification because LoanCare could not create a payment that equaled 31% of their gross income without altering the terms of the loan too much. *Id.*

Eventually the copy of the Fletchers' Promissory Note and Deed of Trust that was produced in discovery included an Allonge which was signed by Scott Fletcher of Loan Network, making the Note payable to

Freedom. The second page of the Note includes an indorsement of the Note signed by Stan Moskowitz of Freedom. This indorsement is in blank. This is consistent with the information which was available on the website for MERS, which indicated that the “investor” who owned the Fletchers’ loan was Everbank. While Freedom and LoanCare tried to avoid confirming this information in discovery and withheld documents until compelled to produce them, the records did make clear that Everbank was the loan owner and the noteholder at the time that the foreclosure was initiated. CP 602-653; 753-764; 944-945; 1119-1121; 1211-1212; 1213-1214; 1223-1319; 1378-1379.

In spite of the fact that the loan was sold by Loan Network and then Freedom, NWTS, acting at the behest of LoanCare, falsely asserted that the owner of the Fletchers’ loan was Freedom on the Notice of Default. LoanCare employees signed documents associated with the foreclosure falsely asserting that Freedom performed certain actions that it had never performed. In fact, once the servicing was transferred to LoanCare, they never spoke with Freedom. *Id.* The Fletchers also contested the amounts that were claimed as being due in the Notice of Default as it did not appear as though there was any credits given for the payments that they made under the forbearance agreement. The Fletchers also contested the fees and costs assessed by the foreclosing trustee

because the attempted nonjudicial foreclosure was not in conformity with the requirements of the DTA and they also argued that the fees were inflated. *Id.*

On or about May 8, 2012 Veronica Davis, a purported Assistant Secretary of MERS, who is really an employee of LoanCare, signed an Assignment of Deed of Trust purporting to assign the interest in the Deed of Trust from MERS to Freedom. It was recorded in the records of King County, Washington on May 10, 2012. The Fletchers argued that because MERS was not a noteholder, it could not assign any interest in the Deed of Trust because it follows the Note, according to the requirements of Washington law. *Id.*

Also on or about May 8, 2012, another employee of LoanCare, purporting to be a Vice President of Freedom, signed the Appointment of Successor Trustee document under a purported limited power of attorney. This action is in direct violation of the requirements of the Washington Deed of Trust Act, which only allows the actual “beneficiary”, defined as the holder of the Note, to appoint a successor trustee. This document purported to appoint NWTS as the foreclosing trustee and it was recorded in the records of King County, Washington on May 10, 2012. CP 539-551; 552-553; 1223-1319. NWTS knew that this document was not signed by the actual noteholder and that it was only communicating with

LoanCare and not with Freedom. Further, NWTs knew that Everbank was the loan owner – the only entity with the authority to foreclose nonjudicially under Washington law. *Id.*

Nevertheless, NWTs generated a Notice of Trustee Sale (“NOTS”) document on May 29, 2012 which indicated that the foreclosing entity was Freedom, in spite of its knowledge of the actual entity that was foreclosing – LoanCare. The foreclosure sale was scheduled to take place on August 31, 2012. After retaining the services of a lawyer and paying her injunctive relief, the sale was enjoined. *Id.*

After avoiding providing truthful information about the Note for more than one year into the litigation, LoanCare finally admitted in the Goldberg Declaration, that the Fletchers’ Note was held by a Document Custodian, U.S. Bank, for Everbank, the owner of the loan. CP 1211-1212; 1378-1379. It was never in the possession of MERS or LoanCare, and had not been in the possession of Freedom since around the time of loan inception. *Id.*; 1223-1319. LoanCare was the subservicer and the Master Servicer was Freedom. *Id.* The LoanCare deponent, Ms. Bielby admitted in deposition, repeatedly, that it was LoanCare that had all of the knowledge about the loan servicing and that no information whatsoever was received from Everbank, the loan owner. CP 1223-1319, Bielsby Depo. 21:20-23:12. Ms. Bielby did not have specific knowledge about the

foreclosure process either. *Id.* 23:20-24:23. She was not sure of the date that LoanCare took over servicing, nor whether it was part of a bulk transfer of servicing or an individual loan transfer. *Id.* at 26:4-14. The Fletchers' loan was originally sold to Ginnie Mae in May 2009, and then taken back by Freedom in July 2010 (perhaps because of the actions taken against it by HUD in relation to its making of FHA loans.) The loan was then sold by Freedom to Everbank on August 2, 2010 and the deponent had not knowledge whatsoever about the reason for the sale and repurchase. *Id.* at 26:15-28:7. What matters though is that as of August 2, 2010, Everbank was the loan owner and the noteholder through the Document Custodian – not LoanCare nor Freedom, and it was the only entity with the legal authority under Washington law who could appoint a new trustee and initiate a nonjudicial foreclosure. *Id.*

Ms. Bielsby also admitted Freedom only had the Fletchers' Promissory Note for one day after this lawsuit was initiated in 2012 when it was requested from the Document Custodian, who was holding it as a custodian for Everbank. CP 1223-1319, Bielsby Depo. 28:7-30:15. Further, the deponent could not identify when the Allonge that was supposedly attached to the Note was executed and/or affixed to the Note nor when the indorsement in blank was completed so that the loan could be sold multiple times. *Id.* These facts make it clear that that NWTs and

LoanCare initiated the nonjudicial foreclosure sale and made false assertions in connection with that process and in direct contravention of the requirements of the DTA. And at all times, LoanCare maintained that it was acting as the agent for Freedom and/or Everbank, in spite of the fact that (1) the portions of the DTA under which it was acting do not expressly state that the actions may be performed by an agent;<sup>4</sup> and (2) the evidence adduced was clear that there was no principal who was directing the actions of the purported agent, LoanCare. Everbank, the actual owner of the loan as of August 2, 2010 ever instructed anyone from MERS or Defendant Freedom or Defendant LoanCare to perform any task. *Id.* at Bielsby Depo. 31:7-37:14; 39:2-45:1. There is no record whatsoever of there being any direction provided by a purported principal and in fact, LoanCare had no means at all of communicating with Everbank. It did not even communicate with Freedom about the loan or the pending foreclosure. *Id.* Similarly, LoanCare was entirely unconcerned with complying with FHA Guidelines. CP 1223-1319, Bielsby Depo. 45:7-56:8. There were assertions by the deponent who was reading from the screen notes that the Fletchers did not qualify for a loan modification, but there were no underwriting records which supported this conclusion produced, in spite of an agreement on the record during deposition that the

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<sup>4</sup> This is in contrast to several other portions of the DTA which expressly permit an “authorized agent” to act for the beneficiary. RCW 61.24.031,

records would be produced. *Id.* When discussing the referral to NWTS for foreclosure and the Notice of Default, Ms. Bielsby tried to avoid the fact that the NOD falsely listed Freedom as the loan owner. CP 1223-1319, Bielsby Depo. 60:4-65:1. She admits that the direction given to NWTS by LoanCare was to foreclose in the name of Freedom, and NWTS gave instructions for an Assignment to be executed to get it “out of the name of MERS”. *Id.* at Bielsby 64:20-69:16 given by LoanCare, the subservicer. There were no instructions given by Everbank. All instructions were exchanged between LoanCare and NWTS who were telling each other what to do, which shows NWTS’ affirmative collaboration in wrongfully foreclosing. *Id.*

The “Beneficiary Declaration”, which is supposed to be signed under penalty of perjury by the loan owner or “actual noteholder”, (RCW 61.24.030(7)) was signed by an employee of LoanCare, a supervisor in the foreclosure department who used the title of vice president only when she signed documents in connection with foreclosures. CP 1223-1319, Bielsby Depo. 69:16-91:24. While Ms. Bielsby did her best to avoid providing testimony about the fact that the Beneficiary Declaration was untrue, the evidence is clear. An employee of LoanCare signed the document under penalty of perjury asserting that Freedom was the holder of the note and owner of the loan. It was not and it had not been since

August 2, 2010. LoanCare's employee acting on its behalf committed perjury. Similarly, the Appointment of Successor Trustee document was not signed by the loan owner or even the noteholder. This entire attempt at foreclosure did not comply with any of the requirements of the DTA. It was a sham and a fraud and Freedom and LoanCare are liable. *Id.*

The facts discovered by the Fletchers are: (1) Everbank is the owner of the loan and the "holder" of the Promissory Note through its custodian, U.S. Bank, at the time that the foreclosure was initiated (the Note was transferred to counsel for the Defendants **after** this lawsuit was filed); (2) there is no written agreement whatsoever between Everbank, the loan owner and note holder and LoanCare; (3) there is no means of communication between Everbank and LoanCare and there has never been any communication about this loan or foreclosure between Everbank and LoanCare; (4) there is a written Limited Power of Attorney Agreement between LoanCare and Freedom (unsigned by LoanCare), but the testimony of LoanCare is clear that there was never any communication between Freedom and LoanCare about this loan. Therefore, there cannot be an "agency" relationship between any of the Defendants.

Freedom made false statements to the Court about its alleged "noteholder" and/or loan owner status during the first months of the litigation, when Everbank was always the loan owner and note holder. CP

586-591; 602-653; 944-945). In its Motion, Freedom argued to the Court that, “Freedom has exercised and hereby continues to exercise the option granted in the Note and Deed of Trust.....” and made other similar assertions, which was supported by Ms. Wise’s Declaration that was later shown to be false. CP 586-591; 602-653; 1223-1319. Freedom asserted that it had made advances for escrow on the loan, which was untrue. *Id.* Freedom asserted that it had acted to initiate a nonjudicial foreclosure through its “authorized agent, NWTS” ....., which was later shown to be untrue. *Id.* Freedom referenced and argued to the Court that it should rely upon the untruthful declaration of Ms. Wise, including the assertion that Freedom had executed the Beneficiary Declaration to indicate it was acting in conformity with RCW 61.24.030(7)(a), which was completely untrue. *Id.* The record is now clear about the roles and actions of all of the Defendants. CP 1223-1319, Bielby Depo. 21:20-23:12; 23:20-24:23; 26:4-30:15; 31:7-37:14; 39:2-45:1; 45:7-56:8; 60:4-65.1; 64:20-69:16; 69:16-91:24. The record is clear: the Defendants lied to the Court and it lied in conjunction with the nonjudicial foreclosure, which has only exacerbated the damages and injury suffered by the Fletchers.

The Fletchers proved that they incurred significant costs associated with investigating their claims, enjoining the foreclosure sale, and the defendants demanded monies from them that were not owed and which

have since been added to their loan balance because Freedom proceeded with a judicial foreclosure in retaliation against the Fletchers. CP 1-11; 537-538. Those money damages are recoverable from the Defendants, as well as their attorneys' fees and costs, under the CPA for these DTA violations. These same facts support the Fletchers' claims for negligent and intentional misrepresentation. Further, the costs of the loan that were charged to the Fletchers at loan inception in contravention of the requirements of the CLA and the MBPA constitute damages under the CPA. The loan fees have been included in the judgment that was entered against them in the judicial foreclosure action. There are genuine issues of material fact that remain unresolved and/or the Fletchers have proved the violations of the acts as more particularly described above. Summary judgment should never have been granted on any of their claims.

### **ARGUMENT**

**1. The Claims against NWTs should not have been dismissed as there are genuine issues of material fact that need to be determined by a trial court and those facts that were adduced in discovery proved the validity of the Fletchers' claims.**

The claims against NWTs were the first of the Fletchers' claims that were improperly dismissed. In *Bain v. Metro. Mrtg.*, 175 Wn.2d 83, the Supreme Court held that if the party initiating the foreclosure in its name never "held the promissory note" then it is not a "lawful

‘beneficiary’”. *Bain*, at 94. The *Bain* Court goes on to point out that numerous portions of the DTA lead to the conclusion “that the legislature meant to define ‘beneficiary’ to mean the actual holder of the promissory note or other debt instrument.” *Id.* at 94-96. By the time the litigation was concluded, the evidence was clear that the noteholder was a document custodian, who was holding it for the loan owner, Everbank. CP 1223-1319. Neither LoanCare nor Freedom held the Note at any time during the nonjudicial foreclosure process and every statement made to that effect was false. In addition, NWTS knew that Everbank was the loan owner and completely ignored that fact. *Id.* This was a direct violation of its duty of adherence to the requirements of the DTA. RCW 61.24.030(7).

The three questions sent to the Supreme Court in *Bain* included who may act as the “beneficiary” under the DTA; if the “beneficiary” must be the “note holder”, what is the effect of someone who is not a “note holder” initiating a foreclosure; and whether a plaintiff can pursue a claim for violation of the CPA, RCW 19.86, *et seq.*, if an entity falsely asserts it is a “beneficiary”. *Bain* at 84. The Court made clear that the plain language of the statute (“beneficiary” definition) means what it says and only “the actual holder of the promissory note or other instrument evidencing the obligation” has “the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.” *Id.*; RCW 61.24.005(2).

The Court did not determine the effect of such a misrepresentation. It provided some analysis but ultimately has left a determination of that question to the trial court. But the Supreme Court was also clear that a homeowner may pursue a claim for a violation of the CPA for violations of the DTA, “but it will turn on the specific facts of each case.” *Id.* Cases decided since then have been consistent with that case and has gone even further, as described below.

The *Bain* case was particularly focused on the use of MERS as the entity who was falsely claiming to be the “beneficiary”, but the decision and analysis would apply to any person or entity who falsely claims to be a “beneficiary”. *Id.* When analyzing the effect of its decision that the plain language of the DTA definition of “beneficiary” means what it says and that the entity initiating the foreclosure must be the “note holder”, the Supreme Court pointed out that in order to demonstrate who may initiate a foreclosure as the “beneficiary”,

[T]he equities of the situation would likely (though not necessarily in every case) require court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender’s successors. If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having “MERS” convey its interests would not accomplish this.

*Bain* at 100. While *Bain* was specifically dealing with MERS, the same

analysis would apply here to NWTS.

NWTS argued that it was entitled to rely upon the Beneficiary Declaration provided by the alleged “beneficiary” pursuant to the DTA and that it was not required to inquire further in spite of its knowledge of Everbank being the loan owner. CP 295-339; 340-343; 1223-1319.RCW 61.24.030(7) reads:

(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW 61.24.030(7). RCW 61.24.010(4) requires that the trustee has a duty of good faith to the borrower, beneficiary and grantor. Here, it is clear that NWTS breached that duty by first relying upon a purported Appointment of Successor Trustee document that was signed by someone other than the actual “beneficiary”, as evidenced by the plain language on the document, and without obtaining the purported limited power of attorney upon which LoanCare was allegedly relying. CP 340-343.

Further, it knew that there was another entity who owned the loan, Everbank. *Id.* The purpose of obtaining the “beneficiary declaration” is to obtain proof that the loan “owner” is also the “actual holder” of the Note. NWTS intentionally ignored this requirement in this case and in many others. RCW 61.24.030(7). *See, Lyons, supra; In re Meyer*, 506 B.R. 533, 540; 546-47 (Bkrcty. W.D. Wash. 2014). In *Lyons*, the Supreme Court sent the case back to the trial court because there was no proof that the assertion about the identity of the loan owner that was sufficient under the DTA requirements, thus demonstrating the entity that had the right to nonjudicially foreclose. *Id.* Here, we know that the loan owner, Everbank, had no role whatsoever in the attempted nonjudicial foreclosure nor did it have any communications at all with either Freedom or the loan servicer, LoanCare. In fact, LoanCare had no ability to communicate in any way with Everbank. CP 1223-1319.

The DTA’s strict requirements are especially important for the purported trustee to follow. RCW 61.24.030(4) provides, in part, that a nonjudicial foreclosure cannot be held unless all of its requirements have been met. This includes RCW 61.24.005(2) and 61.24.030(7). Thus, the DTA has specifically limited who may initiate a non-judicial foreclosure and that is solely and exclusively the “owner” and “note holder”. It is important to remember that no one is required to use the non-judicial

foreclosure process permitted under the DTA. But if they choose to do so, they must adhere to all of its requirements. It cannot “redefine” any portions of the statute in the DTA, as noted by the Court in *Bain*. The rights, duties and obligations contained in the DTA are governed by the definitions contained in and the requirements of the statute. “The Legislature has set forth in great detail how non-judicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.” *Bain* at 104.

The DTA has three objectives: (1) that the nonjudicial foreclosure process remains efficient and inexpensive; (2) that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) that the process promotes the stability of land titles. *Cox v. Helenius, supra*, at 387. *See also* RCW 61.24.030(6). “Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed on the trustee is exceedingly high.” *Id.* at 388-89. In *Cox*, the Supreme Court noted that even if the plaintiffs had not properly acted to restrain the sale, it would have nevertheless been voided because of the trustee’s action. *Id.* The *Cox* Court noted:

Washington courts do not require a trustee to make sure that a grantor is protecting his or her own interest. However, **a trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.** G. Osborne, G. Nelson & D. Whitman, *Real Estate Finance Law* § 7.21 (1979).

**The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike.**

Swindell v. Overton, 310 N.C. 707, 712, 314 S.E.2d 512 (1984) (emphasis added). See, Blodgett v. Martsch, 590 P.2d 298, 302 (Utah 1978) (“duty of trustee under a trust deed is . . . to treat the trustor fairly and in according with a high punctillo of honor”); McHugh v. Church, 583 P.2d 210, 213 (Alaska 1978); Spires v. Edgar, 513 S.W.2d 372 (Mo. 1974); Whitlow v. Mountain Trust Bank, 215 Va. 149, 207 S.E.2d 837 (1974); Woodworth v. Redwood Empire Sav. & Loan Ass’n, 22 Cal.App.3d 347, 99 Cal.Rptr. 373 (1971).

*Cox* at 389 (emphasis added). The Supreme Court has cited to *Cox* in every decision interpreting the DTA and it is still the foundation of non-judicial foreclosure law in Washington, even though the standard for the trustee has now been codified at RCW 61.24.010(4).

In the case of *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (Wash. 2007), the Supreme Court reiterated the obligations of a trustee in a foreclosure and reminded us of the requirements of the DTA, which include a requirement that it be “construed in favor of borrowers because of the relative ease with which

lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales." *Id.* at 915-916. Further, like the plaintiff in *Klem*, the Fletchers proved that NWTS' acts in contravention of DTA nonjudicial foreclosure procedures were unfair or deceptive under the CPA. *See Klem*, 176 Wn.2d 788-92 (trustee's failure to exercise independent discretion required by DTA is an unfair or deceptive act or practice under CPA). Referring specifically to improper language in a beneficiary declaration, the Court in *Lyons* held:

Because DTA provisions should be strictly construed, we find, consistent with *Beaton*, that the declaration at issue here does not comply with RCW 61.24.030(7)(a). On its face, **it is ambiguous whether the declaration proves Wells Fargo is the holder or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3-301.** But NWTS, as trustee, can still prove that Wells Fargo was the owner of the note in a way other than through the beneficiary declaration referenced in RCW 61.24.030(7)(a). Thus, there remains a material issue of fact as to whether Wells Fargo was the owner prior to initiating the trustee's sale. NWTS will need to furnish that proof but may not just rely on this ambiguous declaration.

*Lyons*, at 16 (emphasis added). The record is clear in this case. The Beneficiary Declaration is entirely false and NWTS knew that the language did not comply with the requirements of the DTA. NWTS also knew that there was another entity who was the loan owner and it did not ask for the Limited Power of Attorney that supposedly supported

LoanCare's authority to sign the document. It is now clear that the document was insufficient, but NWTS never asked for it. CP 1223-1319. NWTS is actively engaged in the business of non-compliance with the DTA, as evidenced by its actions herein and in other cases. The elements of the Fletchers' CPA claims based upon DTA violation are below.

**2. The Fletchers' Claims for Violations of the Consumer Protection Act Survive Summary Judgment Due to Unresolved, Material Questions of Fact and Evidence Supporting their Claims.**

The Fletchers proved a multitude of unfair or deceptive acts or practices, public interest impact, injury and causation to support their claims under the CPA, related to all of the Defendants' violations of the DTA requirements.

**a. Freedom and Loan Network Engaged in Unfair or Deceptive Acts or Practices by Originating an Unlawful Loan and Servicing it in an Injurious Manner.**

The Fletchers' CPA claim against Freedom (and Loan Network, who never answered the Complaint) is based upon both their involvement in the origination and servicing of their loan, and Freedom's role in the nonjudicial foreclosure sale process. Pointedly, Freedom never really addressed the Fletchers' origination and servicing related CPA claims in any of its briefing while the Fletchers provide uncontroverted proof of their claims. CP 37-73; 74-112; 295-339; 389-428; 584-599; 1065-1080. Thus, the Fletchers' claims related to loan origination should survive.

The Fletchers proved that Loan Network and Freedom engaged in unfair or deceptive act or practice in connection with loan origination and those are *per se* CPA violations. RCW 31.04.100 and RCW 19.146.100.

**The legislature finds that the practices governed by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. Any violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act or practice and unfair method of competition in the conduct of trade or commerce in violation of RCW 19.86.020.** Remedies provided by chapter 19.86 RCW are cumulative and not exclusive.

RCW 19.146.100. (Emphasis added). Violations of the MBPA are found at RCW 19.146.0201 and they include:

- (1) Directly or indirectly employ any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person;
- (2) Engage in any unfair or deceptive practice toward any person; . . .
- (7) Make, in any manner, any false or deceptive statement or representation with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan or engage in bait and switch advertising;

*Id.* The CLA, under which Freedom as licensed to operate in Washington, has the exact same provisions at RCW 31.24.07(1), (2) and (7). The Fletchers clearly outlined the ways in which Freedom, acting through its agent Loan Network, deceived and misled them about the proposed loan terms not just once, but twice. *Id.* They are entitled to relief under the

CPA against those Defendants. CP 537-538.

The uncontroverted facts show that Freedom compensated Loan Network with a yield spread premium payment, undisclosed to the Fletchers, in return for it offering them a higher interest rate on their 2009 loan than would otherwise be available. Freedom then steered the Fletchers toward a loan with more expensive FHA insurance, and made them pay fees that were overstated and for services that were not rendered. Freedom was also responsible for the 2008 Loan Network loan, for which there were no mandatory disclosures; was originated by an unlicensed loan officer; and involved unearned fees. CP 37-73; 74-112; 295-339; 389-428; 537-538; 584-599;1065-1080. Freedom and/or Loan Care advised the Fletchers to stop paying their mortgage if they hoped to get a loan modification when they financial hardships and then refused to work with them to avoid foreclosure after their forbearance agreement concluded and did not comply with FHA Servicing Guidelines. *Id.*

**b. The Defendants' unfair and deceptive acts related to the improper initiation of the nonjudicial foreclosure support their claims for violation of the CPA.**

The Fletchers' claims for violations of the CPA based upon violations of the DTA should not have been dismissed and the evidence described above and discovered by the Fletchers supports that conclusion. The Supreme Court has recently revisited and clarified how a CPA claim

may be proven in connection with a violation of the DTA in several cases, following its opinion in *Bain*, beginning with *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013):

To resolve any confusion, we hold that a claim under the Washington CPA 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* at 787. (Emphasis added). During the subsequent attempted nonjudicial foreclosure of the Fletchers' loan, Freedom purported to act as the beneficiary by, for example, allowing LoanCare and NWTs to list it as the "beneficiary" on the Notice of Default, by executing a false loss mitigation affidavit, and by allowing LoanCare to execute an Appointment of Successor Trustee document in its name, even though Everbank was the loan owner. CP 1223-1319.

**c. The actions of all of the Defendants in relation to violations of the requirements of the DTA constitute violations of the CPA.**

The basic and long-standing CPA elements are outlined in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Those elements are: "(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 their business or property;

(5) causation.” *Id.*

**i. The Fletchers proved the Defendants’ unfair and deceptive acts in support of their claims under the CPA.**

The Fletchers demonstrated that the Defendants did not include any truthful information in the foreclosure documents and that the entire process was run by LoanCare. CP 1223-1319. The Defendants have tried to minimize the deceptiveness of their actions and Freedom claimed that its admitted lack of any ownership interest in the Fletchers’ Note is of no significance, notwithstanding the DTA’s requirement that the beneficiary demonstrate itself to be the “owner” of the debt at issue at key points in the foreclosure process. RCW 61.24.030(7)(a). And thus, that they were not engaged in an “unfair or deceptive act”. CP 584-599; 1065-1080. This argument seeks to render the DTA language requiring that the beneficiary be the owner of the Note superfluous. The arguments advanced by NWTS and LoanCare mirrored the assertions by Freedom – that none of them violated the requirements of Washington law when they did not comply with the language of the DTA. *Id.* The Fletchers maintain that there is no support in Washington case law for their position and in fact, the pertinent law holds to the contrary.

The Washington Legislature meant what it said when it expressly required “[t]hat, for residential real property, before the notice of trustee’s

sale is recorded, transmitted, or served, the trustee *shall* have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust.” RCW 61.24.030(7)(a) (emphasis added).<sup>5</sup>

The legislature’s choice to impose the specific requirement that a foreclosing entity be the owner of the Note at issue is significant and must be given effect. *See Cox v. Helenius*, 103 Wn.2d at 388, (courts “are required, when possible, to give effect to every word, clause and sentence of a statute”); *accord, American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008)). Although a beneficiary may generally be the party defined as the “actual holder” of a Note, RCW 61.24.005(2), the legislature chose to impose specific requirements to demonstrate ownership of the Note at key points in the foreclosure process; these unique requirements are binding. *See In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (“Where the legislature uses certain statutory language in one instance, and different language in another, there is different legislative intent.”). “The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury

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<sup>5</sup> The beneficiary may *generally* satisfy the proof of ownership requirement by producing an unequivocal declaration asserting that it is the actual holder of the Note. RCW 61.24.030(7)(a). But a declaration to such effect does not satisfy the proof of ownership requirements where, as here, 1) the declaration is executed *not* by any purported beneficiary, but by an entity purporting to act on behalf of a “beneficiary” subject to unilateral powers conferred by a “Limited Power of Attorney,” and 2) the foreclosing entities *are aware that a third party actually owns the note*; the trustee’s relying on the declaration in such circumstances would violate its duty of good faith to the borrower under RCW 61.24.010(4). *See* RCW 61.24.030(7)(b).

occurs.”) *Hangman* at 785 (citing 60 Wash.L.Rev. 925, 944 (1985)).

The Defendants’ proffering of a “Limited Power of Attorney” document does nothing to substantiate its position that the trustee here was properly appointed. The Defendants argued that the Appointment of Successor Trustee document was signed by an “agent” of the “beneficiary.” CP 584-599; 1065-1080. Citing to *Bain v. Metro. Mortg. Grp., Inc.* for the proposition that “under Washington law, the use of agents is both accepted and widespread”), Freedom argued that its actions were in conformity with Washington law, but this Court must compare that language with RCW 61.24.010(2) (“[t]he trustee may . . . be replaced by the *beneficiary*”) (emphasis added) and *Bain*, 175 Wn.2d at 107 (“[w]e have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal”) (quotation marks and citation omitted) (emphasis in original. As *Bain* acknowledges, the DTA, in a few specific sections, allows beneficiaries to use an “authorized agent” to issue Notices of Default and make initial contact with the borrower to provide required information, RCW 61.24.031(1)(a), (b). The DTA further permits authorized agents to declare a trustee’s sale void, RCW 61.24.050(2); to notify a tenant of an impending foreclosure of rental property, RCW 61.24.143; and to attend a mediation session under certain circumstances, RCW 61.24.163(8)(a). But the remainder of the DTA, including the

section at issue regarding who may appoint a successor trustee, *does not empower an agent to act in the beneficiary's stead*. See *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (“Where the legislature uses certain statutory language in one instance, and different language in another, there is different legislative intent.”). The Supreme Court rejected this argument by MERS in *Bain* and this Court must do the same.

But even supposing that an agent *could* lawfully take such actions under the DTA, and even supposing that Freedom were the beneficiary or the owner, which it is not, material questions of fact prevented entry of summary judgment. CP 1223-1319. This is especially true since the evidence that was finally obtained made clear that not only was Freedom not the noteholder or the loan owner, it did not participate in any way in the foreclosure. There were no communications between LoanCare and anyone except NWTS about this nonjudicial foreclosure. *Id.*

The Court in *Bain*, at 175 Wn.2d at 107, also noted that “[w]e have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal”) (quotation marks and citation omitted) (emphasis in original). So, even if this Court were to accept the notion that an agent could execute the Appointment of Successor Trustee document, it could only do so if the Defendants could prove that there was an actual agency relationship, consistent with the Court’s description in *Bain*. Here, no

such relationship exists and in fact, the deposition testimony of Ms. Bielby makes clear that there was no principal exercising any control over LoanCare. *Id.* In fact, LoanCare was not communicating with anyone about this foreclosure. It did not communicate with Freedom and it did not even have any means of communicating with Everbank. In fact, it took affirmative steps to avoid even identifying Everbank as the loan owner on the Notice of Default, even though it is a specific requirement of the statute to identify the loan owner. RCW 61.24.030(8)(1). *Id.*

The “Limited Power of Attorney” does not evidence a principal-agent relationship as contemplated by *Bain*; rather, it purports to unilaterally grant LoanCare the blanket power “to act on behalf of [Freedom] *for the sole purpose of execution* [sic] *loan documents* with respect to any mortgage loan that is subject to the Subservicing Agreement dated February 1, 2010 between [Loancare] and [Freedom]” (emphasis added). *Bain*, 175 Wn.2d at 106, requires that ““an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, *with a correlative manifestation of consent by the other party to act on his behalf and subject to his control*”” (citing *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)) (emphasis added). The Limited Power of Attorney, signed *only* by Freedom’s CFO, Stan Moskowitz, provides no basis

whatsoever to conclude that LoanCare manifested consent to act on behalf and subject to the control of Freedom as *Bain* requires. (And of course, the actual loan owner is Everbank and if there was any principal with the power to appoint an agent, it would be that entity and not Freedom.) Rather, the Limited Power of Attorney suggests that Freedom sought to delegate its servicing responsibilities to LoanCare, in an unknown number of foreclosure proceedings in Washington State, without retaining any meaningful control or supervision over LoanCare's conduct—indeed, without binding LoanCare in any way, since the document is not signed by LoanCare. Any argument that LoanCare was an agent, not just an entity deputized to take actions convenient for Freedom and/or Everbank, who was not a party to the agreement, contravenes Washington law. In fact, Freedom disingenuously relied upon an undated blank endorsement of the Note, CP 602-653, and made the assertion that it “is the current beneficiary” in pleadings filed with the court. This statement was absolutely untrue. Freedom lied to the trial court. CP 1223-1319.

There cannot be any credible argument made that there was a principal who exercised control over LoanCare and there certainly is no evidence at all that Everbank participated in any fashion, such that it could be viewed as a principal. *Rucker* makes clear, following *Bain*, that when the Appointment of Successor Trustee document is not signed by the

“beneficiary” or note holder, it is invalid under the requirements of the DTA. *Rucker v. Novastar Mortg., Inc.*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2013 WL 5537301 \*12. The document in this case was signed by an employee of LoanCare upon its own authority. CP 1223-1319. LoanCare argued in its briefing that it was acting as an agent for Freedom, who was acting as an agent for Everbank, but presents no evidence in support of that position except the Limited Power of Attorney, which is discussed further below. CP 1065-1080.

Similarly, the deposition testimony regarding the Forbearance Agreements and the like that were sent to the Fletchers bear out their premise – that no one who was servicing this loan was interested in complying with the FHA Guidelines in order to prevent a foreclosure of the home. CP 1223-1319, Bielsby Depo. 45:7-56:8. There were blanket statements made by the deponent who was reading from the screen notes that the Fletchers did not qualify for a loan modification, but no underwriting records were ever produced. *Id.*

Similar to the facts in *Rucker*, the agreements between LoanCare and Freedom do not contain any language whereby Freedom is responsible for the actions of LoanCare. *Rucker*, at 14. The defendants in *Rucker* made the same sort of blanket argument as is made here – they have a document that says LoanCare can do whatever it wants to foreclose.

While Freedom and LoanCare have the right to create whatever documents they want to create as between themselves, that does not mean that those documents demonstrate a principal agency relationship that is in conformity with Washington law. There is not a single word in the Limited Power of Attorney document that evidences Freedom is accountable for the actions of LoanCare nor is it signed by LoanCare. *Id.*

The Servicing Agreement entered into between Freedom and Everbank specifically states that Freedom is an “independent contractor” repeatedly and at no place in the document says that it is an “agent” for Everbank. CP 1401-1556, Servicing Agmt., Article II, 2.01, p. 14 and Article III, p. 18. That same paragraph indicates that when Freedom has the loan documents, it holds them in a “custodial capacity.” The rest of Section II confirms this relationship, and Section VIII limits the liabilities between the parties. *Id.* There is nothing in the Servicing Agreement that provides for Everbank to exercise any control over Freedom, nor any subservicers. Simply put, there cannot be any agency relationship between Everbank, Freedom and LoanCare. No such intent was ever manifested and there were no communication between them about this loan. There is no agency relationship between these Defendants. *Id.*

Not only are there genuine issues of material fact that must be decided by the trial court, the record in this case is clear. Everbank was

the loan owner and the noteholder, through a document custodian. Freedom was the Master Servicer and LoanCare was the subservicer, and NWTS knew about these facts. CP 1401-1556. Thus, the Fletchers actually proved that these Defendants violated the requirements of the DTA and engaged in unfair and deceptive acts, CPA violations.

**ii. The actions of the Defendants which violated the DTA do effect the public interest and it occurred in trade and commerce.**

The public recording of documents is not an act lacking the capacity to deceive the public, no matter that it takes place in the context of an effort to foreclose on individual consumers' property. *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d at 117 (recorded assignments of MERS' interest in property constituted unfair or deceptive acts or practices because "characterizing MERS as the beneficiary has the capacity to deceive"). Furthermore, the point of the capacity to deceive requirement is not that substantial portions of the public have actual knowledge of, and actually are deceived by, the conduct underpinning any individual CPA plaintiff's injury; rather, the requirement is meant to ensure that only conduct tending to deceive a reasonable person is actionable under the CPA. *See Hangman Ridge*, 105 Wn.2d at 785, ("The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.") (citing 60 Wash.L.Rev. 925, 944 (1985)). In addition, the

Court in *Bain* affirmed that these actions occur in trade or commerce. *Id.*

**iii. Because the Fletchers Have Demonstrated Injury and Proximate Cause, the Defendants' Motion for Summary Judgment Should Have Been Denied.**

The CPA is always intended to be liberally construed in order to protect consumers such as the Fletchers. RCW 19.86.920 (“this act shall be liberally construed that its beneficial purposes may be served”); *Indoor Billboard*, 162 Wn.2d at 73; *see Klem*, 176 Wash.2d at 789 (“the deed of trust act ‘must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales”). The evidence shows that the Defendants have repeatedly disregarded the strict statutory scheme for conducting nonjudicial foreclosures in Washington on a regular basis.

Because the Fletchers have shown that they incurred legal fees in connection with investigating their claims and in the effort to enjoin the wrongful nonjudicial foreclosure of their home; lost time from work and commuting expenses in attending hearings in their case, and other injury, they have demonstrated injury and causation for their CPA claims. CP 537-538. “A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162

Wn.2d 59, 83, 170 P.3d 10 (2007). “To establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff’s ‘business or property.’” *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 63-64, 204 P.3d 885 (2009); *see also id.*, 57 (plaintiff “sufficiently alleged injury by stating he had to take time away from his landscaping business to consult with an attorney as a result of [the defendant’s] false representations”).

The Fletchers have, at the very least, created triable issues of fact as to whether the Defendants’ own conduct caused them injury in the form of the legal fees, missed time from work, and commuting expenses they incurred while pursuing injunctive relief to prevent the trustee’s sale of their home in 2012. CP 537-538. All of these injuries would not have been incurred were it not for the Defendants’ actions in causing the nonjudicial foreclosure process here to commence. Furthermore, Freedom and/or LoanCare, as the servicers and not the owners of the Note, lacked the same incentive to compromise and arrange a loan modification with the Fletchers that the actual owner of the Note, in conformity with FHA Guidelines. Accordingly, the Defendants’ conduct has proximately caused injury to the Fletchers, and their motions should have been denied.

### **3. The Fletchers' Claims for Intentional and/or Negligent Misrepresentation Should Advance to Trial.**

The numerous misrepresentations made to the Fletchers in the course of the foreclosure process have been laid out in detail. The Supreme Court has made clear that it has adopted the definition of negligent misrepresentation in the Restatement (Second) Torts:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). Similarly, when a court determines whether a party had a right to rely upon the representations made by another, it must engage in an analysis that involves consideration of the party's "diligence in ascertaining the facts for himself" and the "exercise of care and judgment in acting upon representations which run counter to knowledge within his possession or reach." *Rummer v. Throop*, 38 Wn.2d 624, 231 P.2d 313 (1951). Here, the Defendants did not rely upon representations of any third party, except in collusion with each other. Rather, they unilaterally made decisions to make false representations regarding the loan ownership and who had a right to attempt to foreclose nonjudicially.

Washington adopts the position of the *Restatement (Second) of Torts* (1977), Section 551, which provides that:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading .....

*Rest. (Second) of Torts, Section 551 (1977), cited with approval in Oates v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924 (1949); *Sigman v. Stevens-Norton*, 70 Wn.2d 915, 918-919, 425 P.2d 891 (1967) (relating to *Rest. (Second) of Torts*, Section 551(2)(a)); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964) (relating to *Rest. (Second) of Torts*, Section 551(2)(a)). Here, the Defendants actually went so far as to make false assertions to the Court about the identity of the noteholder and loan owner, Everbank to this Court. CP 602-653.

Similarly, Section 552 provides:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a

pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Rest. (Second) of Torts*, Section 552 (1977), cited with approval in *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002).

The suppression of a material fact which a party is bound in good faith to disclose is the equivalent of a false representation. *Oates*, 31 Wn.2d at 902. Here, the Defendants took affirmative actions to hide the identify of the noteholder and loan owner, and falsely asserted that it was Freedom. CP 602-653.

In order to prove a claim for fraud or intentional misrepresentation, a plaintiff must prove (1) the representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation and (9) damages suffered by the plaintiff. *West Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 206, 48 P.3d 997 (2002). Here, the Fletchers provided ample evidence of the specific misrepresentations that were made by the Defendants but the trial court ignored these documents and the deposition

testimony. This is apparently part of their regular course of conduct, as evidenced by the Limited Power of Attorney document used by LoanCare and Freedom and as evidenced by NWTs' actions in this case and in others, documented in published decisions, wherein it shirks even trying to maintain the veneer that it engages in anything more than processing of the paperwork that is required of it by loan servicers, in complete contravention of its duty of good faith under Washington law. RCW 61.24.010(4).<sup>6</sup> All of these Defendants were required to provide truthful information to everyone and especially to the Fletchers. This also included the purported foreclosing trustee, NWTs and the public at large regarding who had the legal authority to nonjudicially foreclose on their property, and they were required to comply with the provisions of the DTA. The Fletchers provided the trial court with ample evidence in support of their claims and summary judgment should have been denied.

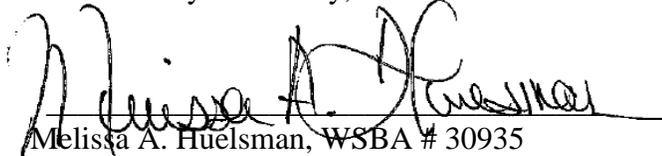
### **CONCLUSION**

For these reasons, the Fletchers ask this Court to reverse the decisions rendered by the trial court and remand the case for trial. In addition, because the Fletchers can prevail upon their claims for violations of the CPA, they are entitled to their attorneys' fees and costs on appeal.

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<sup>6</sup> The Court is directed to the factual record referenced in the opinions in *In re Meyer, supra* and *Lyons v. U.S. Bank, supra*.

Respectfully submitted this 27<sup>th</sup> day of January, 2015.

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a large, stylized initial "M".

Melissa A. Huelsman, WSBA # 30935  
Attorney for Appellants Eric and Peggy Fletcher

**CERTIFICATE OF SERVICE**

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

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

2. That on January 27, 2015, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

|   |  |
|---|--|
| Heidi Buck Morrison<br>Steve Linkon<br>John McIntosh<br>RCO Legal, P.S.<br>13555 SE 36 <sup>th</sup> St., Ste 300<br>Bellevue, WA 98006 | <input type="checkbox"/> Legal Messenger:<br><input type="checkbox"/> Same Day <input type="checkbox"/> Next Day<br><input checked="" type="checkbox"/> Electronic Mail<br><input type="checkbox"/> Federal Express<br><input type="checkbox"/> Other: _____     |
| United Guaranty Corporation<br>Corporate Office<br>230 N. Elm Street<br>Greensboro, NC 27401  | <input type="checkbox"/> Legal Messenger:<br><input type="checkbox"/> Same Day <input type="checkbox"/> Next Day<br><input type="checkbox"/> Electronic Mail<br><input type="checkbox"/> Federal Express<br><input checked="" type="checkbox"/> Other: U.S. Mail |

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

Dated January 27, 2015, at Seattle, Washington.

/s/ Carl Turner  
 Carl Turner, Legal Assistant