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DIVISION ONE

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No. 72326-0-I

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

ERIC AND PEGGY FLETCHER,

Appellants,

v.

NORTHWEST TRUSTEE SERVICES, INC., et al.,

Respondents.

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STATE OF WASHINGTON
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**RESPONSE BRIEF OF RESPONDENTS NORTHWEST TRUSTEE
SERVICES, INC., FREEDOM MORTGAGE CORPORATION,
LOANCARE SERVICING CENTER, INC., AND MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This matter arises out of Eric and Peggy Fletcher's (the "Fletchers") lawsuit seeking to avoid foreclosure on property secured by a loan they admit they obtained, and for which they admit default; a default spanning several years. The superior court granted motions for summary judgment on plaintiffs' claims against Defendants Freedom Mortgage Corporation ("Freedom"), Northwest Trustee Services, Inc. ("NWTS"), and granted a motion to dismiss in favor of Defendant LoanCare Servicing Center, Inc. ("LoanCare").

Plaintiffs' Complaint asserted claims for (1) Temporary Restraining Order and Preliminary Injunction, (2) damages under the Consumer Protection Act ("CPA"), (3) breach of duties under the Washington Deed of Trust Act ("DTA"), and (4) Intentional and/or Negligent Misrepresentation.

The summary judgments and dismissal of the claim for Temporary Restraining Order and Preliminary Injunction were appropriate because the non-judicial foreclosure was discontinued (cancelled) and Freedom obtained a judgment for judicial foreclosure. The Fletchers also defaulted on making the court ordered payments required as a condition for the restraining order.

The dismissal of all claims under the DTA was appropriate because there was no completed foreclosure sale. But Plaintiffs' contend they may pursue claims under the CPA for violations of the DTA. Plaintiffs' contentions are:

First, (1) they complain about a 2008 loan¹ made by Loan Network LLC and allege the loan broker, Armin Guzman, was unlicensed, the Fletchers did not receive loan disclosures, and the Fletchers paid inflated and unreasonable fees to Loan Network. Br. of App, pg. 14.

¹ The foreclosure was for a loan made in 2009.

Regarding the 2009 loan, the Fletchers complain about (2): the disclosures; that Loan Network did not disclose to them that fees were being paid by Freedom, to Loan Network, and the Fletchers' interest rate was increased to pay the compensation to Loan Network; Br of App, pg. 16. CP 7 (Complaint ¶ 2.9); The Fletchers should be eligible for a loan modification under the FHA required programs; CP 11 (Complaint ¶ 2.20); the loan would not have had such a high balance if not for the inflated charges added to both of the loans issued obtained in 2008 and 2009, and the inflated interest rates used on those loans. CP 11 (Complaint ¶ 2.20).

Concerning the foreclosure, the Fletchers complain:

(3) About April 25, 2012, The Notice of Default incorrectly stated the amounts due, did not credit payments made under the forbearance agreement, NWTS included inflated foreclosure fees and costs, and falsely asserted Freedom was the owner of the Fletchers' loan CP 10 (Complaint ¶ 2.15);

(4) About May 8, 2012, the beneficiary's loss mitigation declaration asserted the Fletchers were contacted to assess their financial condition and requested no meeting; whereas the Fletchers allege they were never advised they could request a meeting. CP 7 (Complaint ¶ 2.9);

(5) On May 10, 2012 MERS recorded the Assignment of Deed of Trust, but it could not be assigned by MERS, Br of App, pg. 20;

(6) On May 10, 2012, the Appointment of Successor Trustee could not be signed by Loan Care as agent for Freedom because Freedom did not hold the note, and NWTS knew this document was not signed by the noteholder Br of App, pg. 20-21;

(7) The beneficiary declaration was signed by Loan Care instead of the actual beneficiary; and

(8) The Notice of Sale indicating Freedom was the foreclosing entity was false, CP 11 (Complaint ¶ 2.19).

All of these claims failed because the evidence showed there was no violation of the DTA and the Fletchers proved no unfair or deceptive act or practice upon which to base a CPA claim. Claims concerning the 2008 loan are time-barred. The origination claims concerning the 2008 and 2009 loan should be asserted against the lender, Loan Network, rather than Freedom, who merely purchased the loan. There was no evidence offered linking Freedom to any of the alleged problems with the loan origination. The undisputed evidence shows that Freedom was the note holder during all relevant times. As a result, the documents all correctly identified Freedom as beneficiary; Freedom validly appointed NWTS as successor trustee; and NWTS therefore had authority to issue the foreclosure notices.

The Fletchers also failed to prove other CPA elements such as public interest, injury and causation of injury due to acts of Defendants, as the CPA requires. The final cause of action for negligent and/or intentional misrepresentation was properly dismissed as the Fletchers proved no misrepresentation, nor the other required elements for these claims.

By order entered March 12, 2014, the court granted Freedom's Motion for Summary Judgment on its counterclaim for judicial foreclosure. A Judgment and Decree of Foreclosure was entered July 9, 2014.

This Court should affirm the superior court's orders dismissing all claims against Freedom, NWTS and LoanCare.

II. STATEMENT OF ISSUES

The trial court correctly granted summary judgment for Freedom and NWTS, and the trial court correctly dismissed the complaint as to LoanCare. The Fletchers' do not appeal the judicial foreclosure judgment. Nor did they appeal the order dismissing claims against MERS.

III. STATEMENT OF THE CASE

A. The Fletchers Obtained a Loan From Loan Network LLC and Defaulted

In April of 2009, Loan Network LLC (“Loan Network”) made a \$284,598 loan to the Fletchers. CP 602-604 (Wise Decl.), CP 607-609 (the “Note”). The Note was secured by a Deed of Trust against their property at 26631 168th Pl. SE, Covington, WA 98042 (the “Property”). CP 602-604 (Wise Decl.), CP 610-617 (Deed of Trust). Loan Network sold the loan to Freedom Mortgage; the Note has an allonge specially indorsing it to “Pay to the order: Freedom Mortgage Corporation.” CP 602-604 (Wise Decl.), CP 607-609 (note and Allonge (at 609)). The Fletchers admit to receiving loan statements from Freedom and made payments to them. Br. of App. at 17. CP 8.

Apparently, soon after the loan was made, Mr. Fletcher lost his job and the family struggled financially. CP 8. In 2009, the Fletchers made the payments for June and July. No payments were made for the balance of 2009. In 2010, no payments were made January through May. CP 944-945 (Wise Decl.), CP 918-934 (Loan History). The Fletchers’ submitted a loan modification application to Freedom for June – November 2010, where the Fletchers’ paid one half of the regular mortgage payment. Br. of App. at 18. CP 1119-1121 (Bielby Decl.), CP 935-937 (forbearance agreement), CP 1105-1108 (forbearance agreement). Despite the forbearance ending in November, the Fletchers could not make a full mortgage payment for December 2010. *Id.*

The Fletchers’ concede they could not make the regular monthly payment after the forbearance expired. Br. of App, pg. 18. The Fletchers applied for a loan modification but were advised . . . “they did not qualify because LoanCare, Freedom’s loan sub servicer, reported they could not create a payment that equaled 31% of their gross income without altering the terms of the loan too much.” CP 9 (Complaint ¶ 2.13). In 2011, the Fletchers made no payments. In 2012, they made no payments through August, when, after years of missed payments, the Fletchers sued and asserted the foreclosure of their

Property was unjustified and unlawful. CP 944-945 (Wise Decl.), CP 918-934 (Loan History).

The Deed of Trust requires the Fletchers to either pay a portion of the annual real estate taxes to the lender, or to pay the real estate taxes directly. CP 610-617 (Deed of Trust, ¶¶ 2 and 7). The Fletcher's failed to pay the real estate taxes since 2010 to the present. CP 944-945 (Wise Decl., ¶4). Under RCW 84.64.050 King County could have sold the Property after 3 years of delinquencies. No sale occurred, however, because Freedom Mortgage paid the property taxes. CP 944-945 (Wise Decl., ¶4). The Deed of Trust contains a similar obligation regarding hazard insurance requiring the Fletcher's to maintain and pay for insurance to protect the lender's collateral. The Fletchers' failed to obtain insurance, so Freedom also paid insurance premiums for lender placed insurance. CP 944-945 (Wise Decl., ¶5).

On July 1, 2010, the loan was sold by Freedom to Everbank. CP1211-1212 (Goldberg Decl.). Freedom and Everbank entered into a Servicing Agreement dated July 1, 2010, whereby Freedom continued to be responsible for the loan. *Id.*, CP 1127-1208 (Servicing Agreement).²

B. Freedom Starts a Foreclosure Action.

1. The Fletchers' failure to make the August 2009 mortgage payment triggered a default entitling Freedom to Foreclose.

The Fletchers originally defaulted on the loan in August of 2009. They defaulted again after the forbearance agreement expired in November of 2010, and they could not make a full mortgage payment for December 2010.

² A loan servicer receives payments directly from the borrowers, posts these payments, generally oversees the loans, receives information from the borrowers, pays required taxes and insurance payments, collects on delinquent accounts, prepares statements, and otherwise administers the loan. As part of its servicing obligations, [the entity] may also be required to process foreclosures and bankruptcies. *bankruptcies. Homestreet, Inc. v. State, Dep't of Revenue*, 139 Wash. App. 827, 830, 162 P.3d 458, 459 (2007) rev'd, 166 Wash. 2d 444, 210 P.3d 297 (2009).

2. Freedom issues a Notice of Default.

About April 25, 2012, after three years of defaults in making their mortgage payments, Freedom sent the Fletchers a Notice of Default. CP 9-10 (Complaint ¶2.15).

3. Freedom possessed the Note when the Notice of Default issued.

When the Notice of Default was issued, the original Note was stored with document custodian US Bank Corporate Trust Service, 7851 Bayberry Road, Jacksonville, FL. 32256. CP 1211-1212 (Goldberg Decl.¶ 5). Freedom requested Everbank to release the original Note via a Request for Release of Documents, dated September 19, 2012. *Id.*, CP 1209-1210 (Request for Release of Documents). On September 24, 2012 the Note was sent to Freedom Mortgage at 907 Pleasant Valley Ave Suite 3, Mt. Laurel, N.J. 08054. The next day the Note was sent to Freedom's counsel RCO Legal at 13555 SE 36th St., Ste. 300, Bellevue, WA 98006. CP 1211-1212 (Goldberg Decl.¶ 5). The undersigned counsel have maintained physical possession of the Note, on Freedom's behalf, ever since. CP 600 (Morrison Decl.¶ 2).

4. To prove its possession of the Note, Freedom issued a Beneficiary Declaration to NWTs.

About May 8, 2012, Freedom's authorized agent, LoanCare, signed a Beneficiary Declaration (Note Holder) stating under penalty of perjury that Freedom Mortgage was the *holder* of the Fletchers' Note. The declaration recited "The Trustee may rely upon the truth and accuracy of the averments made in this declaration." CP 343 (Beneficiary Declaration (Note Holder)), CP 330 (same). CP 604 (Wise Decl. ¶¶ 7 and 8).

5. A Notice of the Assignment of Deed of Trust to Freedom was recorded in the county records.

On May 10, 2012, Mortgage Electronic Registration Systems, Inc., as nominee for Loan Network, LLC, executed an Assignment of Deed of Trust to provide notice that the beneficial interest under the Deed of Trust was assigned and transferred to Freedom Mortgage. The Assignment of Deed of Trust was recorded in King County on May 10, 2012. CP 328-329.

6. Freedom appoints NWTs as successor trustee to Process the foreclosure.

On May 10, 2012, Freedom, as the current beneficiary and holder of the Fletchers' Note, recorded an Appointment of Successor Trustee in King County as Auditor's File No. 20120510001167, appointing NWTs as Successor Trustee under the Deed of Trust. CP 332-333.

On May 30, 2012, after receipt of the Beneficiary Declaration (Note Holder), *supra* at III.B.(4), and under RCW 61.24.030(7)(a) and (b), NWTs recorded a Notice of Trustee's Sale in King County as Auditor's File No. 20120530001010, setting a foreclosure sale date of August 31, 2012. CP 340-343 (Stenman Decl.), CP 334-340 (Notice of Trustee's Sale).

C. After Years of Defaults, the Fletchers Sue to Enjoin the Foreclosure and the Sale is Cancelled.

Prior to the trustee's sale, on August 17, 2012, the Fletchers filed a complaint against Northwest Trustee, Freedom Mortgage, Mortgage Electronic Registration Systems, Inc. (MERS, the nominee for the lender under the deed of trust), and Loan Network, LLC (the originating lender) CP 1-18 (complaint).³ The Complaint asserted claims for (1) Temporary Restraining Order and Preliminary Injunction, (2) damages under the Consumer Protection Act ("CPA")⁴, (3) breach of duties under the Deed of Trust Act ("DTA")⁵, and (4) Intentional and/or Negligent Misrepresentation.

On August 20, 2012, the Court entered a restraining order enjoining the trustee's sale. CP 35-36. The order required the Fletchers to make monthly payments of \$2,200.00 to the Court registry. *Id.*

³ It is not clear if Loan Network was ever served. They have not appeared in the action.

⁴ Chapter 19.86 RCW

⁵ Chapter 61.24 RCW.

On October 22, 2012, NWTS recorded a Notice of Discontinuance of Trustee's Sale, terminating the nonjudicial foreclosure of the Fletchers' Property. CP 340-341 (Stenman Decl.), CP 339 (Notice of Discontinuance of Trustee's Sale).

The Fletchers fell behind on the Court ordered payments, paying just \$18,400 of the required \$35,200 as of November 2013.⁶ CP 1117-1118 (Linkon Decl.), CP 1116 (Case Financial History), CP 1088-1103 (Loan History), CP 1119-1121 (Bielby Decl.). The Fletchers' conceded they could not afford to make the payments. CP 1380-1381.

D. Freedom Counterclaims for Judicial Foreclosure.

On November 16, 2012, concurrent with its answer to the Fletchers' Complaint, Defendant Freedom filed a Counterclaim for Judicial Foreclosure. CP 247-278.

On September 17, 2013 the Fletchers' moved to amend the caption in the case to include LoanCare as a Defendant. CP 710-711. LoanCare opposed the motion as it was beyond the date in the civil case schedule to add new defendants and substantial discovery had occurred in the case. CP 715-726. The Court granted the Fletchers' motion to amend and added LoanCare as a defendant by order entered September 30, 2013. CP 862-863.

E. Northwest Trustee Services and MERS Prevail On Summary Judgment.

An order granting Summary Judgment in favor of NWTS was entered on February 25, 2013, dismissing the CPA, DTA and Intentional and/or Negligent Misrepresentation claims. CP 387-388. An order granting Summary Judgment in favor of MERS was entered on September 16, 2013; dismissing all claims against MERS with prejudice. CP 706-707. The First Cause of Action for Temporary Restraining Order and Injunction was dismissed as to LoanCare and Freedom by order entered February 24, 2014. CP 1384-1385.

⁶ Meanwhile, Freedom continued to pay the property taxes and insurance for the Property

By order entered March 12, 2014, the court granted LoanCare's motion to Dismiss the Fletchers' Complaint. CP 1579-1580.

F. The Court Granted Freedom's Motion for Summary Judgment on its Counter Claim for Judicial Foreclosure and on the Fletchers' Remaining Claims.

By order entered March 12, 2014, the court granted Freedom's Motion for Summary Judgment on its counterclaim for judicial foreclosure. CP 1581-1591. A Judgment and Decree of Foreclosure was entered July 9, 2014.⁷ CP 1587-1591. The outstanding balance of the Fletcher loan reflected in the judgment (exclusive of attorney fees and foreclosure costs) was: \$375,266.85, as of February 28, 2014. *Id.*, CP 1213-1214 (Bielby Decl.).

IV. STANDARDS OF REVIEW

In reviewing an order of summary judgment, the court engages in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Lybbert*, 141 Wash.2d at 34, 1 P.3d 1124.

The nonmoving party cannot meet that burden "by responding with conclusory allegations, speculative statements, or argumentative assertions." *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wash. App. 28, 36 (2000). *See also Meyer v. Univ. of Wash.*, 105 Wash.2d 847, 852 (1986) (same). If the nonmoving party "fails to make a showing sufficient to establish th *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wash. App. 28, 36 (2000).e existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial, then the trial court should grant the motion." *Young v. Key Pharms., Inc.*, 112 Wash. 2d 216, 225 (1989) (citation omitted).

⁷ No appeal was taken from the Judicial Foreclosure portion of the Judgment.

V. ANALYSIS AND ARGUMENT

A. It was Proper to Dismiss the DTA Claim Against All Defendants Because Without a Completed Nonjudicial Foreclosure Sale, No Claim For Damages Under the DTA is Available.

The trial court properly dismissed the DTA claim against all defendants, because absent a completed foreclosure sale, a plaintiff cannot bring a cause of action for monetary damages for alleged DTA violations. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 433, 334 P. 3d 529 (2014). The court in *Frias* concluded:

We hold that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions **where no foreclosure sale has been completed....**

181 Wash.2d at 417, 334 P.3d at 531. On October 22, 2012, NWTS recorded a Notice of Discontinuance of Trustee's Sale, terminating the non-judicial foreclosure of the subject Property. The DTA claims are barred.

B. There Were No Violations of The Deed of Trust Act.

Although they cannot bring a claim for damages under the DTA; a violation of the DTA is potentially actionable under the CPA. *Frias, supra*. An analysis of the DTA, demonstrating that no violations occurred, follows. Preliminarily, it is not enough to show a technical departure or violation of the DTA; rather, to be actionable, the violation must actually harm the debtor. *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (1988) (noting a “requirement that prejudice be established” where a “technical violation” of the DTA occurs and there was “no showing of harm to the debtor”).

C. Overview of Non Judicial Foreclosure.

A nonjudicial foreclosure is triggered by the borrower defaulting on their loan, such as by missing payments, not paying property taxes, or other defaults described in the loan agreement. The first step is a notice of default to the debtor, “**by the trustee,**

beneficiary, or authorized agent.”^{8 9} (emphasis added). Afterward the trustee issues a notice of trustee's sale setting the sale date. RCW 61.24.040.

1. The Fletchers’ claim that Freedom lacked standing to foreclose is wrong.

The Fletchers’ assert that Freedom could not initiate the non-judicial foreclosure because they allegedly did not *hold* the note and thus did not qualify as a “*beneficiary*” under the DTA. Br. of Appellants, pg. 27-28.¹⁰ The Fletchers’ argue that if Freedom was not a *beneficiary* (i.e. they did not *hold* the note) they could not initiate the nonjudicial foreclosure action.

Preliminarily, the Fletchers have no basis to contest that Freedom holds their loan because they expressly acknowledged this when they entered into the Forbearance Agreement. *supra*. (Freedom is identified as the “Lender”-CP 933; “Borrower agrees they have no defense, setoff or counterclaim with respect to the default or their obligation under the note.” (CP 934).

D. Under the DTA Freedom Holds the Note - This Makes Them a “Beneficiary.”

1. A “Beneficiary” is the “Holder” of the Note.

RCW 61.24.005(2) of the DTA defines “*beneficiary*” broadly as the *holder* of the instrument (i.e. the Note) or document evidencing the obligations secured by the deed of trust.” *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 88, 285 P. 3d 34 (2012) (*Bain*). The DTA does not define “*holder*” of a note. In *Bain*, the Washington Supreme Court considered what it meant to be a “*holder*,” and stated that it was being guided by the Uniform Commercial Code’s (“UCC”) definition of “*holder*.” *See Bain. Id.* at 104. (emphasis added).

⁸ In 2009, RCW 61.21.031, was amended to refer specifically to the beneficiary or its “authorized agent” with reference to the issuance of the notice of default.

⁹ A time line of the foreclosure events is attached to assist the court to visualize the foreclosure steps.

¹⁰ RCW 61.24.020 requires that only a deed of trust securing payments to a “*beneficiary*” may be foreclosed.

Here, the note was the instrument or document evidencing the obligations secured by the deed of trust. Thus, the **Note' s holder is the beneficiary** under the DTA.

2. Definition of "Holder" means one in possession of Note.

The UCC defines " holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1- 201(21)(A). The Note includes an allonge specially indorsing the note to "Pay to the order: Freedom Mortgage Corporation." CP 602-604 (Wise Decl.), CP 607-609 (note and Allonge (at 609)). Thus, the Note is payable to "an identified person that is the person in possession." RCW 62A.1- 201(21)(A).

3. Physical Possession is Not Required to be a "Holder" Under the UCC.

The Fletchers' argue that Freedom could not be a holder because the Note was physically held by a document custodian holding it for Everbank. Br. of App., pg. 28. Under the UCC there is no requirement of actual physical possession to be deemed a "holder" of a note. RCW 62A.3–201, cmt. A (under the UCC a holder may possess a note "directly or through an agent"); *see also In re Butler*, 512 B.R. 643, 653 (Bankr.W.D.Wash.2014) (citing *Ortega v. Nw. Tr. Servs., Inc.*, 179 Wash.App. 1033 (Wash.Ct.App.2014); (constructive possession found sufficient); *Wells Fargo Bank, N.A. v. Short*, 180 Wn. App. 1012 (2014)(holding that both the party having actual possession and the party having constructive possession are note holders). It is not necessary to have actual, physical, possession of the note to be a holder, because *constructive* possession suffices to make one a holder. *See, Gleeson v. Lichty*, 62 Wash. 656, 659 (1911) ("But, if we assume that the note was not in [defendant's] actual possession, it was clearly under his control, and therefore *constructively* in his possession."); RCW 62A.3-201 Official Comment No. 1 (one can possess a Note directly "or through an agent"); *State v.*

Spillman, 110 Wn. 662, 667 (1920) (constructive possession exists "where there is a right to the immediate, actual possession of property").¹¹

In applying this rule, the uncontroverted evidence showed the Note was held by document custodian US Bank Corporate Trust Service and Freedom could obtain the original note **upon request** (per the Servicing Agreement, *infra*), and Freedom did request and receive the Note, *supra*. Freedom is a "holder," and by definition is the "beneficiary." RCW 61.24.005(2) (DTA defines "beneficiary" broadly as the holder of the instrument).

4. Freedom was the Holder, and therefore the Beneficiary.

Freedom entered into a Servicing Agreement with Everbank that authorizes Freedom to commence foreclosure actions:

[I]n the event that any payment due under any Mortgage Loan . . . is not paid when the same becomes due and payable . . . , the Servicer (i.e. Freedom) shall or shall cause the Subservicer [LoanCare] to take such action as (1) the Servicer would take under similar circumstances with respect to a similar mortgage loan held for its own account for investment In the event that any payment due under any Mortgage Loan . . . remains delinquent . . . **to commence foreclosure proceedings** in accordance with applicable Regulations,"

¹¹ In *In re Phillips*, 491 B.R. 255 (Bankr. D. Nev. 2013), the bankruptcy court described the concept of *constructive possession* in great detail and collected authorities and concluded that possession as required by UCC Article 3 includes "constructive possession" based on the history of negotiable instruments generally and the present provisions of the Uniform Commercial Code. *Id.* at 264. Other cases are in accord. *Bankers Trust (Del.) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1194 (E.D. Va. 1994) (finding that after mortgages were pooled and deposited into trust, trustee had constructive possession based on its storage of the documents in a vault at its sister company's office and stating, "The statute sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's agent, or when the party otherwise **can obtain the instrument on demand.**") (emphasis supplied); *Lazidis v. Goidl*, 564 S.W.2d 453, 455 (Tex. Civ. App. 1978) ("[A] person may be the owner and holder of a note when the note is held by an authorized agent of the owner."); *U.S. Bank Natl. Assn. v. Gray*, 2013-Ohio-3340 (Ohio Ct. App. July 30, 2013)(The doctrine of constructive possession is consistent with UCC principles governing transfer of negotiable instruments).

See also Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes, at 5 (Nov. 14, 2011) ("UCC Report"), available at <http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf> (noting possession under "UCC Section 3-301 includes possession by a third party on behalf of the holder); RCW 62A.3-201, cmt. 1 ("[N]obody can be a holder without possessing the instrument, either directly or through an agent."); RCW 62A.9-313 Official Comment No. 3 (may possess through an agent).

See, CP 1127-1208 (Servicing Agreement, § 3.12 Liquidation of Mortgage Loans, pg. 26). (emphasis added).

The Servicing Agreement allows Freedom to **obtain the original note upon request**. Section 2.04 provides:

Upon the **request of the Servicer**, the Owner shall release, or shall cause the Custodian to release, as the case may be, to the Servicer any original mortgage loan documents necessary for the Servicer to carry out its obligations hereunder, not later than Five (5) Business Days after the Owner's receipt of such request.

See, CP 1127-1209 (Servicing Agreement, §2.03 (pg. 16))(emphasis added). An indicia of "holder" status is the ability to obtain the Note upon request. See, *infra*.

5. Freedom, as the Beneficiary, Was Authorized To Appoint NWTs as Successor Trustee; LoanCare Could Sign as Freedom's Agent.

Pacific Northwest Title was the original trustee under the Deed of Trust. CP 610-617 (Deed of Trust). Freedom wanted NWTs to process the foreclosure. RCW 61.24.010(2) authorizes the "beneficiary" to replace a trustee with a successor trustee. Freedom, as the current beneficiary and holder of the Fletchers' Note, recorded an Appointment of Successor Trustee appointing NWTs as Successor Trustee under the Deed of Trust. *supra*. CP 332-333

The Fletchers' allege two problems with the Appointment of Successor Trustee: (1) Freedom was not a beneficiary so it could not appoint NWTs as trustee; and (2) the Appointment was signed by LoanCare as attorney in fact for Freedom and this is improper as LoanCare was not the Beneficiary. Br. of App., at pg. 20, 30.

Only a lawful beneficiary has the power to appoint a successor to the original trustee named in the deed of trust. *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 486, 309 P. 3d 636 (2013). As discussed above, Freedom was a lawful beneficiary because it held the note. Thus, Freedom had authority to appoint a successor trustee.

The Fletchers' complain the Appointment of Successor Trustee was signed by an employee of LoanCare purporting to be a vice president of Freedom. CP 1-18 (Complaint

¶2.18). Nothing under Washington Law or the DTA, however, precludes Freedom from acting through its authorized agent, LoanCare. The Washington Supreme Court has expressly reaffirmed that "Washington law, and the deed of trust act itself, approves of the use of agents," including agents representing the holder of a Note. *Bain, Id.* at 106.¹²

Here, LoanCare was a subservicer for Freedom for the Fletcher loan. (CP 1336-1377, CP 1378-1379). LoanCare's authority to act for Freedom derives from two documents. First, an Amended and Restated Subservicing Agreement (Subservicing Agreement) between Freedom Mortgage and LoanCare, provides that LoanCare is to manage the foreclosure of delinquent loans (par. 2.5):

Upon the request and under the direction of Lender/Servicer in accordance with the Applicable Requirements and with counsel selected by Subservicer ... Subservicer **shall manage the foreclosure** or other disposition of title as to: (i) the declaration and recording of a notice of such default and the acceleration of the maturity of the Loans (ii) **the institution of proceedings to foreclose the Loan Documents** securing the Loan pursuant to the power of sale contained therein

See, CP 1336-1377 (Subservicing Agreement), CP 1378-1379 (Goldberg Decl.) (emphasis added).

The Subservicing Agreement demonstrates Freedom's **control** over LoanCare by the detailed instructions to LoanCare regarding its duties regarding the loans, including a "Compliance" provision at paragraph 2.2: "[i]n performing all of its obligations hereunder, Subservicer will comply with the Applicable Requirements¹³" Thus, the

¹² The Court of Appeals has, at least tacitly, recognized that an attorney-in-fact may act on behalf of the beneficiary in matters relating to the deeds of trust and Washington's Deed of Trust Act. *See, Jackson v. Quality Loan Service Corp. of Wa., Case No 72016-3-1, slip copy, at *3* (Wash. Ct. App. Div. I 2015) ("US Bank, the note holder, recorded an appointment of successor trustee" where the appointment was signed by US Bank's attorney in fact, JPMorgan Chase Bank"); *see also Summerhill Village Homeowners Assoc. v. Roughley, et al.*, 166 Wn. App. 625, at 627 - 628, 270 P.3d 639 (Div. 1 2012) (GMAC, as loan servicer and attorney-in-fact for Deutsche Bank, instituted foreclosure proceedings ... "). *and see, US Bank Nat'l Ass'n v. Woods*, 2012 WL 2031122 (W. D. Wash. 2012) (a declaration signed by Wells Fargo as "attorney in fact" for U.S. Bank was sufficient).

¹³ Applicable Requirements is defined at § 1.8 as the policies, procedures, laws and other authorities Subservicer will follow when performing under the Agreement.

requisite **control** of the agent by the principal was established. *See, Bain*, 175 Wn.2d at 107. ¹⁴

Second, Freedom provided LoanCare with a Limited Power of Attorney ("LPA"). CP 522-523. CP 816-817. CP 1244, 1246 (Bielby Depo.). Under the LPA, Freedom authorized LoanCare to execute any document necessary to foreclose, including (a) **substitution of trustee on Deeds of Trust**. CP 522-523. (LPA ¶ 2) (emphasis added). Thus, LoanCare was expressly authorized to execute on behalf of Freedom a substitution of trustee. CP 522-523 (LPA ¶ 2).

E. There Was No Violation of the Washington Consumer Protection Act and the Fletchers Failed to Show All of the Required Elements for a CPA Claim.

The CPA, in RCW 19.86 et seq., prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. The Fletchers base their CPA claims largely on the failure of NWTs, Freedom and LoanCare to comply with the DTA, *infra*.

The Fletchers' allegations for their CPA claim are set forth in paragraphs 3.7 - 3.10 of the Complaint. CP 1-18. ¹⁵

The Fletchers assert the following facts describe unfair and deceptive practices by the Defendants are actionable under the CPA:

(i) An earlier loan from 2008 ¹⁶ made by Loan Network, involved a supposedly unlicensed loan broker, Armin Guzman; the Fletchers did not receive required loan

¹⁴ The Fletcher's spend much time asserting Freedom lacked control over LoanCare, its agent, so an agency relationship could not exist. Br. of Appellant, pg. 42-44, 46. The Fletchers' ignore the SubServicing Agreement which plainly establishes the requisite control needed by a principal over its agent.

¹⁵ Fletchers assert that Freedom and its investor made numerous misrepresentations about the ownership of the Promissory Note and the "beneficiary" as defined by the Deed of Trust Act, as well as the identity of the owner of the beneficial interest in their Deed of Trust. *Id.* The CPA cause of action also incorporates 21 paragraphs of factual allegations plus the paragraphs comprising the Injunction cause of action. CP 1-18, ¶ 3.6.

¹⁶ The subject loan in this case was made in 2009.

disclosures; and the Fletchers paid inflated and unreasonable fees to Loan Network. Br. of App, pg. 14.

(ii) Regarding the 2009 loan, the Fletchers' assert: they did not received the disclosures; Loan Network did not disclose that fees were being paid by Freedom, to Loan Network, and the Fletchers' interest rate was increased to pay compensation to Loan Network; Br. of App, pg. 16. CP 7 (Complaint ¶ 2.9); the Fletchers should be eligible for a loan modification under the FHA required programs; CP 11 (Complaint ¶ 2.20); the loan would not have had such a high balance if not for the inflated charges added to both of the loans obtained in 2008 and 2009; and the interest rate was inflated. CP 11 (Complaint ¶ 2.20).

(iii) Concerning the foreclosure, the Fletchers complain: The Notice of Default incorrectly stated the amounts due; did not credit payments made under the forbearance agreement; NWTS included inflated foreclosure fees and costs; and [wrongly] asserted Freedom was the owner of the Fletchers' loan. CP 10 (Complaint ¶ 2.15);

(iv) The beneficiary loss mitigation declaration stated the Fletchers were contacted to assess their financial condition and requested no meeting; whereas the Fletchers allege they were never advised they could request a meeting. CP 7 (Complaint ¶ 2.9);

(v) The Assignment of Deed of Trust could not be assigned by MERS, Br of App, pg. 20;

(vi) The Appointment of Successor Trustee could not be signed by LoanCare as agent for Freedom because Freedom did not hold the note Br of App, pg. 20, and NWTS knew this document was not signed by the noteholder. Br of App, pg. 20-21;

(vii) The beneficiary declaration (Note Holder) was signed by LoanCare instead of the actual beneficiary and the language ignored the requirements of the DTA. Br of App, pg. 31 and 34; and

(viii) The Notice of Sale indicating Freedom was the foreclosing entity was false, CP 11 (Complaint ¶ 2.19)

None of these matters constitute a violation of the DTA or a false or deceptive act under the CPA.

Case law in Washington mandates that a plaintiff prove the following elements to recover under the CPA: (1) an unfair or deceptive act or practice; (2) the act or practice occurred in trade or commerce; (3) the act or practice impacts the public interest; (4) the act or practice caused injury to the plaintiff in his business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). Failing to meet any one of these elements is fatal to the claim's viability. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

The Supreme Court emphasized in *Bain*, a CPA plaintiff must do far more than **identify** an alleged unfair or deceptive act or practice to establish a violation; rather, they must "produce **evidence** on each **element** required to prove a CPA claim." *Bain*, 175 Wn.2d 83, 199.(emphasis added). The Fletchers offered no "evidence" of any "element" for the CPA claims.

1. The Fletcher's Did Not Prove an Unfair or Deceptive Act by Defendants

The CPA does not define the term "deceptive," but implicit in the definition of is the understanding that the practice misleads or misrepresents something of **material importance**." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn.App.210, 135 P.3d 499 (2006) (emphasis added). "Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wash. 2d 133, 155, 930 P.2d 288 (1997).

With one exception, the entirety of the conduct for which the Fletchers complain, did not involve a “per se” violation of the CPA.^{17 18} Where there is no ‘per se’ violation, the only way to establish a CPA claim is to show that Respondents engaged in conduct that has a capacity to deceive a substantial portion of the public. *Saunders*, 113 Wn.2d at 344 (quoting *Hangman Ridge*, 105 Wn.2d at 785-86). The Fletchers failed to meet their burden because each of the alleged unfair or deceptive acts on which the Fletchers rely relates to conduct directed at them personally, not the public. These acts do not, and cannot, have the capacity to deceive any other member of the public, let alone a substantial portion of the public. As shown, the acts upon which the Fletchers based their CPA claim were proper and/or performed in good faith under an arguable interpretation of existing law. No acts of Defendants constituted unfair conduct violative of the consumer protection law.

(i). Claims Concerning Origination of the 2008 Loan Are Time Barred.

The 2008 loan closed in June 2008. CP 5-6. The complaint was filed August 17, 2012. Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues. RCW 19.86.120. The complaint was filed after 4 years from the June 2008 loan closing so any claims arising from the origination of that loan are time barred.

(ii) Claims Concerning Origination of the 2009 Loan Need to be Asserted Against Loan Network, Not Freedom.

Loan Network, LLC (“Loan Network”) was identified as the “Lender” in the Note, CP 607-609 (Note), and in the Deed of Trust. CP 610 (Deed of Trust). Loan

¹⁷ The legislature has identified certain per se deceptive or unfair business practices under the CPA. *See e.g.* RCW 19.86.023. However, alleged wrongful initiation of foreclosure proceedings - where no sale occurs - is not a per se CPA violation. RCW 19.86.

¹⁸ Fletchers allege that (1) Ms. Guzman being an unlicensed loan originator; and (2) unreasonable loan fees collected by Loan Network, constituted per se violations of the CPA. Br. of App., pg. 13-14. There was no evidence of these acts occurring at all or any evidence linking them to Freedom, offered by the Fletchers – just conclusory statements.

Network sold the loan to Freedom Mortgage. CP 602-604 (Wise Decl.). Freedom was not a party to the loan's origination, it did not participate in executing the Note and Deed of Trust, and thus could not be liable for any loan origination claim. The Fletchers' allege Loan Network was Freedom's agent but they offered no evidence proving facts or linking Freedom to anything regarding the loan origination, the disclosures or to inflated charges. There was no evidence that Loan Network originated the loan in conjunction with Freedom. There was no evidence showing the Fletchers' paid higher interest than the rate they agreed to in the Note. The Fletchers' conclusory allegations and speculative statements establish no claim.

Further, the Fletchers' are estopped from asserting these claims against Freedom under the Forbearance Agreement wherein the Fletchers represented and warranted:

Borrower agrees that he has no defense, setoff or counterclaim with respect to the default or his obligations under the note and mortgage. Servicer, Lender and their successors and assigns are relying upon Borrower's representations in this Agreement and would not otherwise enter into this Agreement except for Borrower's representations, agreements and promises to pay.

See, CP 935-937 (Forbearance Agreement- Section 10).

The doctrine of equitable estoppel rests on the principle that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975). Three things must occur to create equitable estoppel: (1) an admission, statement or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Liebergessell v. Evans*, 93 Wn.2d 881, 888-89, 613 P.2d 1170 (1980). As the Forbearance Agreement recites, Freedom would not have entered into the agreement except for the Fletchers' representations they had no defense, setoff or counterclaim with respect to their obligations under the note and mortgage.

Regarding the claim the Fletchers should have been given a loan modification under the FHA required programs (CP 11 (Complaint ¶ 2.20), supports no CPA or any other claim. Individual borrowers lack standing to enforce HUD regulations or FHA guidelines.¹⁹ Under well-settled law, a lender has no contractual duty to modify a loan.²⁰ The Fletchers offered no evidence of any contractual obligation to provide them a loan modification. The Fletchers' could point to no HUD regulations or FHA guidelines that entitled them to a modification. And the Fletchers failed to prove that Freedom or LoanCare acted improperly by failing to offer a loan modification; the type of modification they were entitled to receive; or any facts demonstrating they even qualified for any modification. There is no CPA claim for failing to offer a loan modification.

(iii) The Notice of Default Was Not Unfair or Deceptive.

The Fletchers' allege the Notice of Default incorrectly stated the amounts due and did not credit payments made under the forbearance agreement, and NWTS included inflated foreclosure fees and costs. No evidence of any of these claims was presented. The Fletchers' have been in default on the loan over five years – and they offered no evidence of payments they made or that they paid any improper charges. The problem here is the opposite – the Fletchers' did not pay the loan – in this context the default figures in the Notice of Default were irrelevant to any damages.

(iv) The Loss Mitigation Declaration Was Not Improper.

RCW 61.24.031(2) requires that the Notice of Default include a declaration by the beneficiary or authorized agent that they tried to contact the borrower regarding loss mitigation and alternatives to foreclosure. The statute provides the trustee is entitled to rely on a declaration as evidence that the requirements of this section have been satisfied, and the trustee is not liable for the beneficiary's or its authorized agent's failure to comply

¹⁹ See, *Prudential Ins. Co. of America v. Jackson*, 270 N.J. Super. 510, 517 (App.Div. 1994) (noting " ... the mortgagee's violation of HUD regulations and guidelines respecting the averting of foreclosure did not create an affirmative cause of action in favor of the mortgagor. ... ").

²⁰ See, *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-570, 807 P.2d 356 (1991) ("the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.").

with the requirements of this section. *Id.* The Fletchers' complain the declaration provided to NWTS pursuant to this statute was false because no one told them they could request a meeting. CP 1-18 (Complaint ¶ 2.9). Plainly, the Fletchers were in contact with LoanCare regarding their financial condition as they entered into the forbearance agreement and later were advised that they did not qualify for a loan modification. The Fletchers do not dispute they were contacted to assess their financial condition. The Fletchers introduced no evidence about the inability to have a meeting and linking these facts to the required elements of causation or injury to establish a claim under the CPA.

(v) MERS's Assignment of the Deed of Trust Was Not Improper.

The Fletchers argue NWTS' initiation of a nonjudicial foreclosure on Freedom's behalf was improper because MERS's assignment of the deed of trust to Freedom was invalid. Br of App, pg. 20-21. Under the DTA, "a security interest follows the obligation it secures." *In re Butler*, 512 B.R. 643, 656 (Bankr.W.D.Wash. 2014). Thus, the deed of trust (the security interest) followed the note (the obligation the deed of trust secures) to Freedom. This is true regardless of whether the deed of trust was assigned properly. *See* 512 B. R. at 656. ²¹

Freedom was the note holder because they possessed the Note, *supra*, and the Note was indorsed payable to Freedom, and Freedom is the Note holder regardless of whether the deed of trust was assigned properly or at all. Thus, the validity of MERS's assignment of the deed of trust to Freedom did not affect Freedom's ability to have

²¹ In *Lynott v. MERS*, for example, the Court dismissed the plaintiff's CPA claims based on an assignment of the deed of trust from MERS to the then-note holder, U.S. Bank, arguing that, at the time of assignment, MERS could not have been acting as agent for the original note holder, who had gone bankrupt. No. 12-5572-RBL, 2012 WL 5995053, at *1 (W.D. Wash. Nov. 30, 2012). The court explained –

Plaintiff's claims arise from a fundamental misunderstanding of the law. U.S. Bank is the beneficiary of the deed because it holds Plaintiff's note, not because MERS assigned it the deed. Under Washington law, a beneficiary is by definition the party holding the note. . . . This rule, however, is merely the codification of the longstanding principle that 'the deed follows the debt.' The Washington Supreme Court reiterated this principle in *Bain* In sum, possession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact. Because U.S. Bank is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's default.

Id. at *2 (citations omitted).

NWTS initiate a foreclosure on Freedom's behalf. 512 B.R. at 656. Further, the DTA has no requirement that an assignment of a deed of trust be recorded in advance of the commencement of foreclosure.²²

(vi) The Appointment of Successor Trustee Was Proper.

RCW 61.24.010(2) authorizes the "Beneficiary" to replace a trustee with a successor trustee. Freedom, as the beneficiary and holder of the Fletchers' Note, recorded an Appointment of Successor Trustee appointing NWTS as Successor Trustee under the Deed of Trust. *supra*. CP 332-333. The Fletchers' complaint this document was signed on Freedom's behalf by LoanCare as Attorney in Fact under a Limited Power of Attorney. Br. of App., pg. 21. As discussed in section V.C. 5., *supra*, Freedom provided LoanCare with an LPA that expressly authorized LoanCare to a substitution of trustee on Freedom's behalf. CP 522-523.(LPA ¶ 2). Nothing under the DTA precludes Freedom from acting through its authorized agent, LoanCare. *Bain, Id.* at 106. This document was authorized and appropriate.

(vii) Freedom Could Initiate a Nonjudicial Foreclosure Under RCW 61.24.030(7) – It Was Not Necessary to Be the Owner of the Loan.

The Fletchers' argue that under RCW 61.24.030(7), Freedom lacked authority to initiate a nonjudicial foreclosure because Freedom was not both the owner and holder of the loan. Br of App, pg. 19.²³ This argument is based on the tenuous legal argument that a "holder" who is not an instrument's "owner" may not enforce the instrument. The Fletchers' are mistaken. "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument (citation), it is not necessary for the holder to first establish that he has some beneficial interest in the

²² The Washington DTA features a foreclosure driven by the holder of the obligation; this contrasts with the Oregon's statute, ORS 86.705(1), under which foreclosure is driven by the person designated in the deed of trust as the person for whose benefit a trust deed is given.

²³ The Fletchers ignore that the Note is endorsed "Pay to the order: Freedom Mortgage Corporation." CP 602-604 (Wise Decl.), CP 607-609 (note and Allonge (at 609)).

proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222-23 (1969). The Washington Court of Appeals has confirmed—in a decision that remains good law—that “[t]he holder of the note is entitled to enforce it, regardless of ownership.” *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wash.App. 484, 326 P.3d 768, 776 (Wash.Ct.App.2014); *see also Jackson v. Quality Loan Serv. Corp, supra, at *11*. This reading is based on a portion of the Washington UCC which states:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3–309 or 62A.3–418(d). A person may be a person entitled to enforce the instrument even though the person is **not the owner** of the instrument or is in wrongful possession of the instrument.”

RCW 62A.3–301 (emphasis added).

Though a Washington Supreme Court case, *Lyons v. U.S. Bank Nat. Ass’n*, touched on the issue of “holder” versus “owner” for negotiable instrument enforcement, this case did not overrule *Trujillo*, nor was a legal discussion between a “holder” or “owner” at issue in the case. 181 Wash.2d 775, 336 P.3d 1142 (Wash.2014) (en banc). Based on the current state of the law, a note holder is a beneficiary entitled to enforce the note. Defendant Freedom is, therefore, a “holder” and beneficiary as a matter of law.

RCW 61.24.030(7)(a) requires a trustee to have proof the beneficiary is the owner of the note. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note shall be sufficient proof as required under this subsection:

(7)(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 [of good faith] 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)(a)(b).

The note's *holder* is the person or entity entitled to enforce the note. *Trujillo*, 181 Wn. App. at 500. Conversely, the note's *owner* is the person or entity entitled to the note's economic benefits. 181 Wn. App. at 497.²⁴ Here, Freedom was the note's holder.

Under RCW 61.24.030(7)(a), a successor trustee needs proof that the beneficiary is the note's holder, not that the beneficiary is the note's owner, to initiate a nonjudicial foreclosure. *Trujillo*, 181 Wn. App. at 502.²⁵ Under RCW 61.24.030(7)(b), the declaration from Freedom's authorized agent was sufficient proof of Freedom's status as the note's holder for Freedom to initiate a nonjudicial foreclosure.

(viii) RCW 61.24.030(7)(b): Adequate Proof of Holder Status

As stated above, RCW 61.24.030(7)(b) allows the trustee to accept a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note as sufficient proof under this subsection. The Fletchers' argue that NWTs could not accept a declaration from Freedom's authorized agent (i.e. LoanCare) as proof that Freedom was the note's holder. Br of App, pg. 20.

There is no restriction on the beneficiary's attorney-in-fact signing the declaration. *See Knecht v. Fid. Nat. Title Ins. Co.* 2013 WL 7326111 (W.D. Wash. Mar.

²⁴ The term "owner" found in RCW 61.24.030(7)(a) has no statutory definition in either the DTA or Uniform Commercial Code as adopted in Washington. The Court should look to its common definition. *See Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 283, 313 P.3d 395, 400 (2013), citing *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994). To "own" is defined as "to have (something) as property; to legally possess (something)." *See* <http://merriam-webster.com> (Mar. 11, 2015); *see also* Black's Law Dictionary at 1130 (7th Ed. 1999) ("owner" is "one who has the right to possess, use, and convey something."); *Id.* at 1131 ("ownership" is the "right to possess a thing, regardless of any actual or constructive control."). This common definition perfectly comports with one of the requirements for being a note holder, i.e. a transfer of possession and indorsement. *See* RCW 62A.3-201(a) ("Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."). It also comports with the Supreme Court's holding in *Bain* because one must have possession if one is a "holder," or if one can document the chain of transactions. *See also* RCW 62A.9A-607(b) (transferee in possession can non-judicially enforce mortgage through recording); RCW 62A.3-203(b) & cmt. 2 (providing example of where transferor does not indorse the note, but nonetheless the person entitled to enforce the note can "account for possession of the unindorsed note by proving the transaction through which the transferee acquired.").

²⁵ The Washington Supreme Court accepted review of *Trujillo* on April 2, 2015.

11, 2013)²⁶; *US Bank Nat. Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. June 6, 2012).²⁷ A power of attorney is a written instrument by which one person, as principal, appoints another as agent and confers on the agent authority to act in the place of the principal for the purposes set forth in the instrument. *Bryant v. Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994); *see also Moss v. Vadman*, 77 Wn.2d 396, 463 P.2d 159 (1970) (en banc) (agency relationships are a long-established part of Washington common law). The DTA also expressly contemplates that the actions of the trustee or beneficiary will be performed by authorized agents. *Bain*, 175 Wash. 2d at 106 (“... nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents.”)

Accordingly, under RCW 61.24.030(7)(b), the declaration of a beneficiary's agent stating the beneficiary is the note's holder is **sufficient proof** that the beneficiary is the note's holder, unless the trustee has violated its duty of good faith in some other way.

Here, the Fletcher's demonstrated no way in which NWTS violated its duty of good faith as successor trustee. They argue that NWTS knew that the Note was owned by Everbank. Br. of App, pg. 20-21. The implication here is that NWTS could not rely on the declaration stating Freedom was the holder. But the Fletchers offered no evidence to prove that NWTS knew of Everbank. They offered no evidence to refute that Freedom held the Note (i.e. Freedom was the *holder*, as evidenced above. There was no reason

²⁶ In *Knecht*, the Hon. Judge Jones stated:

[a]n AHMSI representative signed the document in which DB [Deutsche Bank] purports to appoint Fidelity as a successor trustee, stating that AHMSI was DB's 'attorney in fact.' Mr. Knecht complains that there is no recorded power-of-attorney document establishing AHMSI's right to act on DB's behalf, but he points to no authority requiring AHMSI to record such a document. He also fails to establish his own standing to object to AHMSI's acting on DB's behalf.

²⁷ In *Woods*, the Hon. Judge Settle stated:

Lenders have submitted evidence to show that NWTS is in possession of a declaration signed by Wells Fargo as "attorney in fact" for U.S. Bank... Borrowers have failed to submit any evidence to show how Lenders have failed to show sufficient proof that the beneficiary is the owner of the promissory note secured by the deed of trust. Accordingly, *Borrowers' claim brought under RCW § 61.24.030(7)(a) is without merit.*

demonstrated why NWTs could not rely on the Beneficiary Declaration (Note Holder) or that the declaration was false.

2. The Fletchers Proved No Public Interest Impact As to Any Claim and Did Not Establish the Public Interest Element of the CPA.

A private dispute is not compensable under the CPA. The CPA element “**(3) the act or practice impacts the public interest**” requires Plaintiffs to show a likely impact on the public interest because of the actions alleged. It is “the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a **private dispute** to one that affects the public interest.” (emphasis added) *Hangman Ridge*, *supra.* at 784, 790; see also *McCrorey v. Fed. Nat. Mtg. Ass’n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) (CPA claim cannot be based on a “private wrong.”); *Tran v. Bank of America*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013) (“[t]he public interest in a private dispute is not inherent.”); *Burns v. McClinton*, 135 Wn. App. 285, 290-91, 143 P.3d 630 (2006) (CPA claim defeated because of no evidence that Wells Fargo’s actions had “the capacity to deceive a large portion of the public.”).

The Fletchers failed to meet their burden for this element because each of the alleged unfair or deceptive acts on which Fletcher relies relates to conduct directed at them personally, not the public. The Fletchers’ offered literally no evidence of how the public was affected regarding any of their claims. The issues with the 2008 and 2009 loans related to them – not the public at large. The foreclosure was directed to them personally – there was no proof that similarly situated consumers could be affected in the exact way as Plaintiffs

3. The Fletchers Failed to Prove They Suffered Any Compensable Injury Under the CPA Proximately Caused By Defendants.

(i) What Were The Injuries?

The entirety of the Fletchers’ “damages” was explained by Peggy Fletcher as (1) taking time off from her job to attend the hearings on the Motion for Temporary

Restraining Order, Motion for Preliminary Injunction, and Motion to Dismiss of Defendant Northwest Trustee Services, Inc.; (2) paying for gas for her car traveling to the hearings and for parking; and (3) paying attorney Huelsman \$4,000 as a retainer to fight the foreclosure. CP 525-538. None of these items are properly awardable under the CPA. None were proximately caused by Defendants.

An award under the CPA is strictly limited to damage “in... [a plaintiff’s] business or property....” RCW 19.86.090. Lost wages are not compensable under the CPA.²⁸ . Neither are litigation expenses,²⁹ or the cost of having to prosecute a CPA claim is sufficient to show injury to business or property. *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010). The Washington Supreme Court cited *Demopolis* with approval when it observed that the cost of consulting an attorney to institute a CPA claim is “insufficient to show injury to business or property.” *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 62 (2009).

(ii) No Injury was Proximately Caused by Defendants’ Conduct.

The Fletchers’ had to prove is a causal link between the alleged misrepresentation or deceptive practice and a purported injury. *Hangman Ridge*, 105 Wn.2d at 793. The Washington Supreme Court has clarified this link must be **one** of proximate cause. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007). “[T]he term ‘proximate cause’ means a cause which in direct sequence unbroken by any superseding cause, produces the injury [or] event complained of and without which such injury [or] event would not have happened.” *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 278, 259 P.3d 129, 137 (2011) (quoting 6

²⁸ See *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998).

²⁹ *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are not an “injury” under the CPA); *Massey v. BAC Home Loans Servicing LP*, No. C12-1314JLR, 2013 WL 6825309, at *8 (W.D. Wash. Dec. 23, 2013); (a “laundry list... including attorney fees, ‘wear and tear’ on [a] vehicle, and buying postage stamps, is inapposite.”). See also *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013), citing *Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D.Wash. Mar. 28, 2012) (“time and financial resources expended to... pursue a CPA claim do not satisfy the CPA’s injury requirement.”),

Washington Practice: Washington Pattern Jury Instructions; Civil 15.01 at 181 (5th ed. 2005)). If a claimed expense would have been incurred regardless of whether a CPA violation existed, causation is not established. *Panag, supra.* at 64. Plaintiffs failed to satisfy this requirement because they identified no injury they allegedly suffered that was proximately caused by any conduct of the Defendants.

In *Bain*, the Washington Supreme Court cited to *Bradford v. HSBC Mortg. Corp.*, 799 F.Supp.2d 625 (E.D. Va. 2011), for an example of an injury in the foreclosure context. 175 Wn.2d at 119. In *Bradford*, three different companies attempted to foreclose on a property after the borrower attempted to rescind a mortgage under the Truth in Lending Act. *Id.* All three companies claimed to hold the note. *Id.* Nothing like the harm in *Bradford* is alleged here. As the Ninth Circuit Court of Appeals recently held concerning a CPA claim in the foreclosure context:

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

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013).

The principal flaw in Fletchers' argument is they ignore that foreclosure occurred solely because they failed, for years, to pay their mortgage loan. This default led to the foreclosure. Any issues they had with the foreclosure itself are a mere sideshow to the consequences of their default. The Fletchers' Note provides that a Borrower's failure to pay a single payment is a "default."³⁰ The Fletchers' Deed of Trust obligated them to make their monthly payments, plus property taxes and insurance. CP 610-617 (Deed of Trust ¶¶ 2 and 4).³¹ Upon Default the lender may invoke the power of sale and cause the Property to be sold (i.e. foreclosed). *Id.* at ¶ 18. None of the actions of Defendants in processing the foreclosure could have harmed the Fletchers' because there would have

³⁰ "Default" is defined as the failure to make in full any monthly payment. CP 607-609 (Note ¶ 6(B)).

³¹ The Deed of Trust defines a "Default" as the failure to pay any monthly payment by the due date, or failing to perform any other obligation contained in the Deed of Trust for a period of 30 days. *Id.* at ¶ 9.

been no foreclosure absent their default (i.e. the “but for” cause of any injury was their loan default, not any act of Defendants).

Second, the Fletchers’ provided no evidence linking their injuries to improper conduct of Defendants. Any injuries associated with the foreclosure proceedings, including (1) taking time off from work; (2) paying for gas to travel to the hearings and for parking; and (3) paying attorney Huelsman \$4,000 as a retainer to fight the foreclosure, were caused solely by their own default. *See, e.g., Massey v. BAC Home Loans Servicing LP*, 2013 WL 6825309, at *8 (W.D. Wash. Dec. 23, 2013); *citing Babrauskas v. Paramount Equity Mortgage*, 2013 WL 5743903, *4 (W.D. Wash. Oct.23, 2013) (finding no injury under the CPA because “plaintiff’s failure to meet his debt obligations is the ‘but for’ cause of the default, and the threat of foreclosure); *McCrorey v. Fed. Nat. Mortg. Ass’n*, 2013 WL 681208 (W.D. Wash. Feb.25, 2013) (finding no injury under the CPA because “it was [plaintiffs’] failure to meet their debt obligations that led to a default, and the foreclosure”); *Peterson v. Citibank, N.A.*, 2012 WL 4055809 (Wash.Ct.App.2012) (Regardless of defendants’ conduct in processing the foreclosure, the borrowers’ property would still have been foreclosed upon based on their failure to make payments on the loan.).

The Fletchers proved no facts demonstrating how their alleged injuries flowed from the Respondents initiation of the nonjudicial foreclosure process, or from the documents used to process the foreclosure. Because no trustee’s sale occurred, the Fletchers’ could not have been injured by losing the property.

Awarding any damages to the Fletchers in this context would be a windfall to them; their lawsuit challenging the foreclosure operated to their advantage--they stopped their foreclosure and continued to live in their Property for years – for free. The Fletchers proved no facts showing that, but for Respondents’ conduct, The Fletchers would not have suffered these same injuries. The Fletchers’ do not contend that any action by Respondents caused or induced them to default on the loan.

F. It was Proper to Dismiss the First Cause of Action for Temporary Restraining Order or Injunction Against All Respondents Because The Sale Was Cancelled and The Fletchers Did Not Pay the Court Ordered Payments.

According to the complaint, the purpose of this cause of action was to stop "the pending foreclosure sale." CP 12 (Complaint ¶ 3.2). On October 22, 2012, a Notice of Discontinuance of Trustee's Sale was recorded in King County. The claim for injunctive relief seeking to restrain Freedom from foreclosing non-judicially, has been mooted by the cancellation and discontinuance of that sale.

A claim is moot if there is no longer a controversy between the parties. *State ex rel. Chapman v. Superior Court*, 15 Wn.2d 637, 131 P.2d 958 (1942). A claim is also moot if the question is merely academic, *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 442 P.2d 967 (1968) or if a substantial question no longer exists. *Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972). *Pentagram Corp. v. City of Seattle*, 28 Wash. App. 219, 223, 622 P.2d 892, 894 (1981). "A claim is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984). *In re Marriage of Horner*, 151 Wn. 2d 884, 891, 93 P.3d 124, 128, 2004 WL 1403306 (2004).

Fletcher asked the Court to permit that claim to proceed to trial based on the "capable of repetition, yet evading review" exception to the general principle that courts do not issue advisory opinions. First, the Washington Supreme Court has declined to adopt the doctrine. *See, Hart v. DSHS*, 111 Wn.2d 445, 451-52, 759 P.2d 1206 (1988). Second, there is no reasonable likelihood that the Fletchers will face an allegedly improper non-judicial foreclosure on the Property given Freedom has already foreclosed judicially.

Finally, the Fletchers fell behind on the court ordered payments, paying just \$18,400 of the required \$35,200 as of November 2013. CP 1117-1118 (Linkon Decl.), CP 1116 (Case Financial History), CP 1088-1103 (Loan History), CP 1119-1121 (Bielby

Decl.). The Fletchers' conceded they could not afford to make the payments. CP 1380-1381. The dismissal of this claim was appropriate.

G. The Fletchers' Claims for Intentional or Negligent Misrepresentation Fail as a Matter of Law.

The Fletchers assert the legal conclusion that all Defendants, including Freedom, LoanCare and NWTS intentionally misrepresented the identity of the true Note holder and its ability to foreclose on the Fletcher's loan. CP 17 (Complaint ¶ 3.18). They also allege that all of the Defendants have made numerous misrepresentations about the identity of the Note Holder, the identity of the foreclosing trustee and whether a foreclosure may be initiated at all. *Id.*

To prevail on a claim for misrepresentation, a plaintiff must prove each of the six elements of that claim by “clear, cogent and convincing evidence” that (1) defendant provided false information for his guidance in a business transaction; (2) the defendant knew or should have known that the information was supplied to guide plaintiff in that business transaction; (3) defendant was negligent in obtaining or communicating the false information; (4) plaintiff relied on defendant's false information; (5) plaintiff's reliance was reasonable; and (6) the false information was the proximate cause of plaintiff's damages. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007) (citing *Lawyers Title Insurance Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)).

The Fletchers' admit they defaulted in their mortgage payments and their loan documents allow for foreclosure upon a default. The Fletchers' admit they negotiated a loan forbearance with Freedom, as Lender, the same entity they now claim is not the beneficiary and holder of the Note. Freedom demonstrated that it held the Note, and Freedom recorded an appointment of NWTS as replacement trustee.

Besides the Fletchers' bare conclusions that all defendants made numerous intentional misrepresentations; the Fletchers failed to prove how they relied on this

allegedly false information, how such reliance was reasonable, and how the false information was the proximate cause of their damages. The Fletchers failed to prove they suffered any damages based on a statement of the Defendants; and they showed no clear, cogent, and convincing evidence supporting the required elements. *See* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleadings, but ... must set forth specific facts showing there is a genuine issue for trial"); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash. 2d 355, 359, 753 P.2d 517, 519 (1988) (plaintiffs "conclusory statements of fact will not suffice.").

The Fletchers' claim for misrepresentation fails for two additional reasons: 1) the undisputed evidence showed that Freedom did not misrepresent the identity of the Note holder (it is Freedom) and its ability to foreclose on the Fletcher's loan; and 2) the relationship of the parties is contractual; tort damages are not recoverable. The economic loss rule precludes tort remedies for misrepresentation. *Alejandre v. Bull*, 159 Wn.2d 674 (2007).³²

H. The Dismissal of All Claims Against NWTs Was Appropriate.

The Fletchers' asserted the Note holder was Everbank, not Freedom. Br. of App., pg. 28. They assert that NWTs knew that Everbank was the loan owner and this directly violates the DTA. *Id.* There was no evidence introduced showing any knowledge of NWTs about Everbank. The Fletchers' assert NWTs breached its duty of good faith by relying on the Beneficiary Declaration (Note Holder). But they introduced no evidence showing that NWTs had any reason to believe the Beneficiary Declaration was allegedly

³² The standard rule in Washington is that a breach of contract does not give rise to a tort claim unless a duty exists independent of the performance of the contract. *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 474, 17 P.3d 641 (2001) (citing *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 797 P.2d 477 (1990)). As is quoted repeatedly:

A breach of contract does not generally give rise to an action in tort. (citation). Only "if a duty exists independently of the performance of the contract" can a contract provide the basis for a tort claim. *Id.*

Dexheimer v. CDS, Inc., 104 Wn. App. 464, 474, 17 P.3d 641 (2001) (overruled on other grounds, *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003)).

false, or that the Fletchers' ever informed NWTS of their belief of this fact. The Fletchers' complain that the language of the Beneficiary Declaration did not comply with the requirements of the DTA, but offered no explanation or evidence why this is so. The Fletchers' asserted NWTS knew another entity owned the Note but there was no evidence of this offered. No CPA claim was proved against NWTS.

VI. CONCLUSION

For these reasons, the Court of Appeals should affirm the orders of the Superior Court.

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Respectfully submitted,

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Non-Judicial Foreclosure Timeline

