

COURT OF APPEALS NO. 73406-7  
KING COUNTY NO. 13-2-29758-2

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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FRANK BUCCI, in individual,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC., SUCCESSOR BY  
MERGER TO NORTHWEST TRUSTEE SERVICES PLLC FKA  
NORTHWEST TRUSTEE SERVICES, LLC, a Washington corporation;  
RCO Legal, P.S., Washington Professional Services Organization;  
JPMORGAN CHASE BANK, N.A. a national banking association; U.S.  
BANK, NATIONAL ASSOCIATION, a national banking association;  
SELECT PORTFOLIO SERVICING, INC., a Foreign Corporation  
registered in Washington,

Respondents.

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APPELLANT FRANK BUCCI'S OPENING BRIEF

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## I. INTRODUCTION

This case presents a dispute between Frank Bucci and (1) U.S. Bank, National Association, successor trustee to Bank of America, N.A., successor in interest to LaSalle Bank N.A., as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-0A6 (“USB as Trustee”); (2) Select Portfolio Servicing (“SPS”); (3) JPMorgan Chase Bank, N.A. (“Chase”); (4) Northwest Trustee Services Inc. (“NWTS”); and (5) RCO Legal, P.S. (“RCO”) that culminated in the Orders granting Respondents’ Motions for Summary Judgment, entered on February 27, 2015, March 27, 2015 and April 7, 2015. CP 1099-1100, CP 1839-1840, CP 1841-1842, CP 1843-1844, CP 1845-1848.

The central issue of the appeal is whether Respondents acted unfairly, deceptively, or negligently when they induced Mr. Bucci to fall behind on his payments to receive a loan modification without disclosing material information that only the Respondents possessed. CP 325-26; 1544-46. Further, instead of providing Mr. Bucci a modification, Respondents initiated foreclosure proceedings. *Id.* Moreover, Respondents dual tracked<sup>1</sup> Mr. Bucci. Finally, Respondents worked to achieve the

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<sup>1</sup> “Dual Tracking” means “[w]hen the servicer moves forward with foreclosure while simultaneously working with the borrower to avoid foreclosure Source: Consumer Financial Protection Bureau Press Release located at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-rules-establish-strong-protections-for-homeowners-facing-foreclosure/>

nonjudicial foreclosure without the requisite authority and violated multiple provisions of Ch. 61.24 RCW, the Deeds of Trust Act (“DTA”) constituting a multitude of unfair and deceptive acts. *see infra*.

In granting Respondents’ Motions for Summary Judgment, the Superior court erred by relying on inadmissible testimony of the Respondents’ attorney and overstepped its role by judging the credibility of testimony and evidence. CP 1844; 1099-1100. Additionally, the Respondents were not entitled to summary judgment when they did not meet their burden under CR 56(c) and when Mr. Bucci presented genuine issues of material fact regarding all elements of his claims under Ch. 19.86 RCW, the Consumer Protection Act (“CPA”) and negligence.

Accordingly, Mr. Bucci respectfully asks this court to reverse the Superior Court’s orders on summary judgment and remand this case for further proceedings.

## **II. ASSIGNMENTS OF ERROR**

The issues in this case are as follows:

1. The Superior Court erred by weighing the credibility of the parties’ evidence on summary judgment;
2. The Superior Court erred by admitting the declaration of the defendant's attorney;
3. The Superior Court erred in finding USB was the holder of Bucci’s

note under RCW 62A.3 when the note is not a negotiable instrument because it is a negative amortization note therefore it is not a fixed amount of money;

4. The Superior Court erred in dismissing Bucci's CPA claim against Respondents when:

- a. USB and SPS committed an unfair or deceptive act by initiating the nonjudicial foreclosure without the requisite authority;
- b. Chase committed an unfair or deceptive act by inducing Mr. Bucci to stop making his mortgage payments to receive a loan modification, by failing to give him a modification, by making material misrepresentations, by appointing NWTS to conduct a nonjudicial foreclosure without the requisite authority, and by not providing him a pre-foreclosure letter under RCW 61.24.031;
- c. NWTS conducted the nonjudicial foreclosure without meeting the requisites for sale and in violation of a trustee's duty of good faith;
- d. All respondents actions occurred in trade and commerce;
- e. Mr. Bucci submitted evidence that Respondents' actions affected the public interest and the DTA itself includes a specific declaration of public interest impact;
- f. the respondents actions were a proximate cause of Mr. Bucci's

injuries;

5. The Superior Court erred in dismissing Bucci's negligence claims
6. The Superior Court erred in finding HOLA pre-empted Bucci's claims against JPMorgan Chase.

### **III. STATEMENT OF THE CASE<sup>2</sup>**

On May 22, 2007, Mr. Bucci borrowed money from Washington Mutual Bank, FA (“WAMU”) to purchase his home, which is the subject of this appeal. CP 325 at ¶3. The transaction involved a negatively amortizing adjustable rate note. CP 224-29. After the housing market crashed in 2008, the value of Mr. Bucci’s home plummeted resulting in his home being significantly underwater. CP 325 at ¶4. In response, Mr. Bucci inquired about a loan modification with WAMU. Both WAMU and the subsequent servicer, Chase, advised Mr. Bucci that in order to qualify for a loan modification, Mr. Bucci would need to miss his payments. CP 325-26 at ¶¶5-8; 1544-45 at ¶¶3-4. Mr. Bucci relied on their advice and instead of providing Mr. Bucci with a modification, Chase, in conjunction with the other respondents, dual tracked Mr. Bucci. CP 324-328.

On August 16, 2013, Mr. Bucci filed a complaint against Respondents contesting the nonjudicial foreclosure initiated against him

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<sup>2</sup> The material facts of this appeal will be addressed with each corresponding issue, *infra*.

by the Respondents. Supp. CP 1-57.<sup>3</sup> Between January 30, 2015 and February 27, 2015, all parties moved for summary judgment. CP 203-219, CP 538-561, CP 1074-1098, CP 1101-1112, CP 1139-1163.

On February 27, 2015, the Superior Court granted SPS and U.S. Bank as Trustee's Motion for Summary Judgment. CP 1099-1100. SPS and U.S. Bank as Trustee's sought summary judgment on the theory they were the current holder of Mr. Bucci's negatively amortizing adjustable rate note because they brought the note to the hearing, endorsed in blank. CP 203-219.<sup>4</sup> The Superior court erroneously agreed. CP 1099-1100.

The remainder of the parties had their motions for summary heard on March 27, 2015. CP 1837-1838. Mr. Bucci's partial motion for summary judgment against NWTS was denied. CP 1839-1840.

On the same day, the Superior Court granted Chase's Motion for Summary Judgment dismissing all claims against Chase with prejudice. CP 1841-1842. Chase argued it was entitled to summary judgment because its actions, including the appointment of NWTS, were done as attorney-in-fact and authorized agent for Bank of America (BANA) and

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<sup>3</sup> A Supplemental Designation of Clerk's Papers has been filed with King County Superior Court and is pending Clerk's Action.

<sup>4</sup> There is no evidence in the record regarding which entity was a proper beneficiary of the Deed of Trust throughout the time period described in the complaint. Also, there is no evidence in the record establishing what entity had rights in the note, or what rights those included. See §§ D-E *infra*.

U.S.Bank as Trustees of the trust, who Chase argued were proper beneficiaries. CP 1078:27-1079:6; 1088:2-1089:16.

Lastly, the court granted NWTs and RCO's Motion for Summary Judgment dismissing all claims against them with prejudice. CP 1843-1844. NWTs implicitly conceded the equivocal beneficiary declaration it used as a basis for the nonjudicial foreclosure was defective and instead argued they had sufficient other evidence of the beneficiary's' identity in compliance with RCW 61.24.030(7). CP 549:17-552:1.

These March 27, 2015 orders collectively dismissed Mr. Bucci's entire case. *Compare* CP 1839-1844 *with* CP 1-57.

Confusingly, a couple weeks after all claims were dismissed against Chase and the other Respondents, the Superior Court filed a separate order which granted in part and denied in part Chase's Motion for Judgment on the pleadings ruling that the federal Home Owners Loan Act ("HOLA"), 12 U.S.C. § 1461, *et. seq.*, preempted Mr. Bucci's, "claims to the extent that they are predicated upon Plaintiff's allegation regarding computation of the amount due under Plaintiff's loan and Plaintiff's allegations regarding the calculation and assessment of loan-related fees, including late charges and servicing fees." CP 1845-1846.

Mr. Bucci timely filed his notice of appeal on April 21, 2015.

#### IV. ARGUMENT

##### A. Standard of Review Regarding a Summary Judgment Motion

A Superior Court's ruling on summary judgment is reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Appellate courts must perform an independent inquiry of all materials before the Superior Court to determine whether summary judgment was appropriate. *Id.* (citing *Mountain Park Homeowners Ass'n v. Tyings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)).

On a motion for summary judgment, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 687-688, 317 P.3d 987 (2014) (citing CR 56(c)). Summary judgment is proper only where there are no genuine issues of material fact. *Amalgamated Transit v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000); CR 56(c).

The moving party has the burden of establishing the absence of an issue of material fact beyond a reasonable doubt. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 611, 220 P.3d 1214 (2009) (citing *SAS Am., Inc. v. Inada*, 71 Wn. App. 261, 263, 857 P.2d 1047 (Div. I 1993)). A genuine issue of material fact exists where reasonable minds could differ on, or otherwise draw different conclusions from, the

facts controlling the outcome of litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 434, 437, 656 P.2d 1030 (1982)). The burden shifts to the non-moving party to demonstrate the existence of a material issue of fact only if the moving party establishes their “substantial burden” in showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 234, 770 P.2d 182 (1989) (Dore, J. concurring in part, dissenting in part).

In granting summary judgment, a court is declaring due process has been fulfilled as well as cutting off the non-moving party's constitutional rights to discovery, and to a jury trial. *See Putman v. Wenatchee Valley Med. Ctr., P.S.*, 1 Wn.2d 974, 979, 216 P.3d 374 (2009), Wash. Const, art. I § 21. To do this without violating Washington's Constitution, it must be beyond dispute that a reasonable person could not find in favor of the non-moving party. CR 56(c); *Folsom*, 135 Wn.2d at 663.

As will be explained *infra*, the Trial Court impermissibly admitted evidence, construed the facts in favor of the moving parties, and misconstrued the burdens of proof applicable to summary judgment.

**B. The Superior Court erred in weighing the credibility of the parties' evidence**

The Superior Court erred by weighing the credibility of the parties' evidence on summary judgment. The court reasoned as follows: "The -- when a defendant moves for summary judgment, he is entitled to put the put the plaintiff's evidence to the test." VP 92:21-23. In regards to Mr. Bucci's evidence, the Superior Court stated, "I do not have credible evidence in front of me in support of each element." VP 93:1-6. For example, in regards to one of the declarations filed by Mr. Bucci, the Superior Court held, "As far as the Johnson declaration, I reviewed it. I find the information provided has zero weight." VP 88:18-19.

When there is contradictory evidence, or the moving party's evidence is impeached, an issue of credibility is presented. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1997). The trial court should not resolve issues of credibility on summary judgment, but should reserve the issue of credibility for trial. *Id*; *see also Dunlap v. Wayne*, 105 Wn.2d 529, 536-7, 716 P.2d 842 (1986); *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P. 2d 966 (1963). "An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached." *Id*.

Here, SPS and U.S. Bank as Trustee requested summary judgment not on the basis that Mr. Bucci lacked sufficient evidence, but on the basis that their evidence entitled them to relief. CP 203-215. Specifically, SPS and U.S. Bank as Trustee relied on the declaration of their attorney, for the

proposition that U.S. Bank as Trustee was the holder of Mr. Bucci's note and beneficiary of his deed of trust, therefore all action taken commencing the nonjudicial foreclosure was lawful. CP 220-221. In response, Mr. Bucci introduced evidence contradicting the statements, as discussed *infra*, and requested the Court strike the declaration of SPS and U.S. Bank as Trustee's counsel as improper factual testimony. CP 294-323.

Instead of viewing the evidence in the light most favorable to Mr. Bucci to determine whether there was a genuine issue of material fact, the Superior Court improperly weighed the evidence and made rulings on the credibility of the parties' evidence. CP 1843-1844; VP. The proper role of the Superior Court was deciding if Mr. Bucci raised a genuine issue of material fact, which he did, not in deciding how much weight should be given to each party's evidence. *See Amend*, 89 Wn.2d at 129; *Balise*, 62 Wn.2d at 200. The Superior court conflated 1) the right of the respondents to test whether Mr. Bucci's could present evidence that raised a genuine issue of material fact with 2) whether or not Mr. Bucci's evidence was more or less credible than the Defendants' evidence. An error that should be reversed.

**C. The Court Erred in allowing testimony by the attorney for Respondents USB and SPS**

In support of its motion for summary judgment, SPS and U.S. Bank as Trustee submitted the declaration of their attorney, J. Will Eidson, which stated on the basis of personal knowledge, “The current holder of the Note and Deed of Trust is U.S. Bank N.A., as trustee . . .” CP 220-221 at ¶4. “After Bucci’s default under the Note and Deed of Trust, he communicated with Chase Bank, N.A. (“Chase”) on multiple occasions concerning a loan modification and short sale.” *Id.* at ¶5. “Also following Bucci’s default, Northwest Trustee Services, Inc. (“NWTS”) commenced, and terminated, a nonjudicial foreclosure proceeding in 2009, then again in 2010 and 2013.” *Id.* at ¶6.

Mr. Eidson, an attorney hired for litigation commenced in 2013, is prohibited by the Washington Rules of Professional Conduct (RPC) from testifying and could not have personal knowledge about events that occurred prior to being retained to defend this lawsuit.

**i. Attorneys are prohibited from testifying in cases where they are also advocates**

In response to Mr. Edison’s proffered testimony, Mr. Bucci put forth legal support that the RPCs prohibit attorneys from acting as witnesses in the same cases in which they are advocates. RPC 3.7(a). *Id.*

Comment 2 to RPC 3.7 explains the rationale behind the rule:

The tribunal has proper objection when the trier of fact may be confused or misled a by a lawyer serving as both advocate and witness. The opposing party has proper objection where

the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of proof.

While attorneys may testify regarding procedural and process facts, problems arise when attorneys testify regarding issues that go to the merits of the dispute:

The advocate-witness concern arises because lawyers become involved in the client's affairs in their status as lawyer. Lawyers may know facts because they have been involved in the planning of a deal or arrangement or the negotiation of a contract. They may know facts because of investigations undertaken as part of the representation. Lawyers may know process facts, such as what documents are ascertainable from discovery. Lawyers routinely make assertions of procedural and process facts and provide background information to judges without running afoul of the advocate-witness rule. Lawyers do not need to be sworn when asserting these process and background facts because they have an ethical obligation not to make false statements of fact or law to the judge. In these situations lawyers are making representations of fact that will likely affect the procedural presentation of the case, but do not go to the underlying merits. When lawyers have become intertwined with the merits, however, they begin to look more like a traditional fact witness. In these circumstances, any factual statements that a lawyer makes should be subject to the same vetting that all witnesses receive, including the requirement that the witness be sworn and subject to cross examination. Once the lawyer moves into the realm of functioning as both advocate and fact witness, distinct professional responsibility issues arise.

McMorrow, J. A. **The Advocate As Witness: Understanding Culture, Context and Client**, 70 Fordham L. Rev. 945, 946 (2001).

Mr. Edison, as the attorney for SPS and U.S. Bank as Trustee, inappropriately testified to facts, central to the case, in his declaration. CP 220-221. Mr. Eidson made representations coming the current note holder, communications between Mr. Bucci and Chase and the occurrence of multiple non judicial foreclosure action done by NWTs. *Id.*

Additionally, the prejudice RCP 3.7 is designed to prevent exists in this case because there is confusion regarding whether Mr. Eidson's statements that USB as Trustee holds the Note is proof that USB as Trustee has actual possession of the Note or a legal argument that USB as Trustee constitutes a "holder" under the law. Because Mr. Eidson is an advocate, under the Rules he cannot serve as a witness. RPC 3.7; *see also Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366-368, 966 P.2d 921 (Div. III 2013)(holding an attorney testifying regarding the contents of a police report was inadmissible, and the attorney could not testify regarding the contents of the report based on personal knowledge.)

**ii. Mr. Eidson's testimony was inadmissible**

Mr. Eidson made his declaration based on personal knowledge. CP 220-221. Yet many of statements concern events that occurred prior to the lawsuit, in which he was hired to defend or are hearsay. *Id.* Sworn

statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. CR 56(e). ER 602 states “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

Here, Mr. Eidson’s testimony was inadmissible under ER 602, ER 801, ER 802 and under CR 56(e) because he lacked personal knowledge. *See id.*; CR 56(e); *see also Burmeister*, 92 Wn. App. at 366-368; *Pollock v. Pollock*, 7 Wn. App. 394, 405, 499 P.2d 231 (Div. I 1972).

Additionally, Mr. Eidson never introduced any evidence of how he would have personal knowledge of activities that occurred between Respondents and Mr. Bucci before the case was started. CP 220-221.

**D. The Court Erred by finding US Bank to be the holder of a negotiable instrument and the beneficiary of of the deed of trust.**

To nonjudicially foreclose, the foreclosing entity must be a beneficiary under RCW 61.24.005(2). *Bain v. Metro Morg. Grp., Inc.*, 175 Wn.2d 83, 110, 285 P.3d 34 (2012); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 484, 488, 309 P.3d 636 (Div. I 2013); *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 14, 311 P.3d 31 (Div. I 2013).

“Beneficiary’ means the holder of the instrument or document evidencing

the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2).

Because the DTA does not define the term holder, courts look to the UCC for guidance. *Bain*, 175 Wn.2d at 104. In Washington, the term holder is defined under RCW 62A.1-201(21)(A) Ch. 62A.3 RCW. However, 62A.1-201 and Ch. 62A.3 apply only to instruments that are negotiable. 62A.1-201(21)(A) RCW 62A.3-102 (“This article applies to negotiable instruments). *See also Brown v. Washington State Department of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771 (2015) (whether a promissory note is subject to article of the UCC depends upon whether or not it is negotiable).

**i. Mr. Bucci’s Negative Amortization Note Is Not Negotiable and Cannot Grant “Holder” Status to Anyone Under RCW 62A.1-201(21)(A)**

Mr. Bucci’s negative amortizing note is not a negotiable instrument subject to RCW 62A.3-104(a) because it has a principle balance that increases.

A negotiable instrument is, *inter alia*, an unconditional promise or order to pay *a fixed amount of money*. RCW 62A.3-104(a) (emphasis added). RCW 62A.3-104(a) requires a fixed amount of money because negotiable instruments were intended to be as precise as a dollar bill in the amount of money it represents:

An indefinite obligation is obviously unadapted to the exigencies of commercial paper, which derives its peculiar qualities from the intended freedom and facility of its circulation, and the consequent necessity that it should carry upon its face unambiguous evidence of the maker's liability, *and should denote, with precision, how much the maker is bound to pay and the holder is entitled to receive.*

*Anderson v. Hoard*, 63 Wn.2d 290, 292-293, 387 P.2d 73 (1963)

(emphasis added) (citing *Farquhar v. Fidelity Ins., Trust & Safe Deposit Co.*, 13 Phila. 473, 474, 8 Fed. Cas. 1068 (C.C.E.D. Pa, 1878));

*Vancouver Nat. Bank v. Starr*, 123 Wash. 58, 62, 211 P. 746 (1923); *see*

*also* J.P.T., Annotation, *Negotiability of note as affected by provision*

*therein, or in mortgage securing the same for payment of taxes,*

*assessments, or insurance*, 45 A.L.R. 1074 (1926) (“The reason for this

rule is that negotiable paper is used as a substitute for money, and

therefore it must indicate precisely how much money it represents.”) To

determine whether a note contains an unconditional promise to pay a fixed

amount of money, Washington Courts analyze the note’s contents to

decide if the note’s holder could determine his or her rights, duties, and

obligations with respect to payment on the note without having to examine

any other document. *Anderson*, 63 Wn.2d at 292-293; *Vancouver Nat.*

*Bank*, 123 Wash. at 62; *Alpacas of America v. Groome*, 179 Wn. App.

391, 396-398, 317 P.3d 1103 (Div. II 2014).

Here, in Paragraph 1 of the Note the borrower promises to pay to \$1,530,000 (defined as “Principal”), plus interest, to the order of Lender, Washington Mutual Bank, F.A. CP 224. The Note, in a paragraph titled “Changes in My Unpaid Principal Due to Negative Amortization or Accelerated Amortization,” states the Principal may increase by paying less than the interest accrued during a month. CP 226.

*Since my payment amount changes less frequently than the interest rate, and since the monthly payment is subject to the payment limitations . . . my monthly payment could be less or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the maturity date in substantially equal payments. For each month my monthly payment is less than the interest portion, the Note Holder will subtract the monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal, and interest will accrue in the amount of this difference...*

CP 226 (emphasis added).

Under Paragraph 4(H) of the Note, the Principal may increase up to 115% of the original Principal for a range from \$1,530,000 to \$1,759,500. CP 226.

On its face, the Note is not a promise to pay a fixed amount of money because the money to be paid, the Principal, may change based on whether the borrower pays more than the interest accrued in a given pay period. The amount Bucci would pay, the Principal, is “fluctuating and

indefinite” and may only “be ascertained by looking to extrinsic circumstances,” of Bucci’s payment history. *Contra Anderson*, 63 Wn.2d at 292-293; *Vancouver Nat. Bank*, 123 Wash. at 62. Therefore, Bucci’s note is not negotiable. *Id.*; *see also* Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the UCC*, 48 Wake Forest L. Rev. 5, 29-30 (2013) (In a note with negative amortization “[t]he actual principal is never certain, rendering the note nonnegotiable”); Kathleen C. Engel and Thomas J. Fitzpatrick IV, *Complexity, Complicity, and Liability Up the Securitization Food Chain: Investor and Arranger Exposure to Consumer Claims*, 2 Harv. Bus. L. Rev. 345, 358, n.50 (2012) (“Arguably, loans with negative amortization could be for uncertain sums because the principal balance can increase over time...”).

In their Summary Judgment motion, SPS and U.S. Bank as trustee claimed the unpaid default on August 20, 2013 was \$1,890,334.87. CP 204:16-17.<sup>5</sup> This was over \$350,000 more than the original principle. *Compare id. with* CP 568 ¶1 (original principle was 1,530,000). While not clear what numbers SPS and U.S. Bank as Trustee are using to compute the total default, it is clear that on the Notice of Trustee’s Sale from 2009, NWTS listed the principal as \$1,607,986.49, a rise in principal of over \$77,000. CP 265, 267. There is simply no way of ascertaining the

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<sup>5</sup> SPS and U.S. Bank as Trustee provided no citation for this statement.

principal without looking to information outside of the four corners of the Note. Therefore, Respondents admit that the amount Mr. Bucci would be required to pay, the Principal, cannot be ascertained without reference to extrinsic documents or circumstances.

If a note makes it clear that negative amortization and capitalization will inevitably occur, that note does not contain a fixed amount of principal because the stated initial principal constitutes only a floor, and the principal cap operates like a credit limit. *Ralston v. Mortgage Investors Grp., Inc.*, 2010 WL 3211931, \*2 (N.D. Cal. 2010). Under the terms of the Note, negative amortization will inevitably occur.

The note is dated for May 27, 2007. CP 568. It provides, “up until the first day of the calendar month that immediately precedes the first payment due date set forth in section 3 of this Note, I will pay interest at a yearly rate of 7.529%. It further provides “until the first Change Date (as defined in Section 4 of this Note) I will pay interest at a yearly rate of 1.100%.” CP 568 at ¶2.

In paragraph four titled “Interest Rate and Monthly Payment Change” the note states, “[t]he interest rate I will pay may further change on the 1ST day of JULY 2007, and on that day every month thereafter. Each day is called a “Change Date”. CP 569 ¶4(A).

Following this, the note states “On each Change Date, my Interest rate will be based on an Index. The “Index” is the Twelve-Month Average, determined as set forth below, of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled ‘Selected Interest Rates (H.15)’ (the “Monthly Yields”).” CP 569 at ¶4(B).

The Note then states the “Note Holder will calculate my new interest rate by adding two and 50/100 percentage point(s) 2.500% (“Margin”) to the Current Index.” CP 569 at ¶4(C). Based on this formula the lowest interest rate that could possibly be applied to the outstanding principal balance of the loan is 2.5 percent.<sup>6</sup> However, Mr. Bucci’s payments for the period of July 2007 to July 2008 were based upon an interest rate of 1.1. 569 at ¶¶2, 4(E).

Additionally, the note states, “Changes in My Unpaid Principal Due to Negative Amortization of Accelerated Amortization, . . . For each month that the monthly payment is less than the interest portion, the Note Holder will subtract the monthly payment from the amount of interest portion and **will add the difference to my unpaid Principal**, and interest

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<sup>6</sup> Even if the Current Index, the “Twelve-Month Average” of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board,” was zero, the interest rate would be 2.5%.

will accrue on the amount of this difference at the current rate.” CP 570 at ¶4(G)(emphasis added).

In this case, negative amortization was guaranteed to occur because the payments for July 2007 to July 2008 on an interest rate of 1.1 percent, while at the same providing that the interest rate during that time period would be the index plus a margin of 2.5 percent. The actual rate of interest being charged on the unpaid principal balance is more than twice the rate of interest that was used to calculate the monthly payment amount. CP 569 at ¶4. Additionally, Mr. Bucci was charged an interest rate of 7.529% from May 27, 2007 through July 2007, despite having no payment due. CP 569 at ¶¶2-3. Per the terms of Paragraph G, this interest would have been added to his principal. CP 570 at ¶4(G).

Not only was negative amortization inevitable, the undisputed evidence shows it actually happened. The Notice of Trustee’s Sale from 2009, NWTS listed the principal as \$1,607,986.49, a rise in principal of over \$77,000. CP 265, 267. Again, this is not a fixed amount of money, a holder could not possibly tell that Mr. Bucci owed \$77,000 more than the original principal balance approximately two years after the Note was executed. Further, the fact that the Note lists a purported “maximum limit”

for the Principal does not make the Note negotiable; RCW 62A.3-104(a) requires a fixed amount of money, not a range of money.<sup>7</sup>

Accordingly, neither U.S. Bank as Trustee, or BANA as Trustee, could be a holder under Ch. 62A.1 or 62A.3 because Mr. Bucci's Note is not a promise to pay a fixed amount of money and is therefore not a negotiable instrument. *See* RCW 62A.3-102. This also means that the indorsement in blank relied on by Respondents has absolutely no legal effect. Therefore, there is no evidence in the record of any entity being able to enforce the note between Mr. Bucci and WAMU.

**ii. The Superior Court erred in holding U.S. Bank as Trustee was the beneficiary when the evidence showed it was not the holder of Bucci's Note.**

When a note is not negotiable, such as Bucci's note, there can be no holder under RCW 62A.3 or RCW 62A.1-201(21)(A). The Washington Supreme Court in *Brown* has recognized this important point: "A promissory note evidencing a home loan is often a negotiable instrument, making article 3 of the UCC applicable. RCW 62A.3-102. The promissory note at issue in this case is a negotiable instrument governed by article 3 of the UCC." *Brown*, 184 Wn.2d at 524. Because the promissory note in *Brown* was negotiable, the court only analyzed the effect of having an article III promissory note. *See generally id.*

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<sup>7</sup> Under the first paragraph and paragraph 4(H) of the Note, the Principal may increase up to 115% of the original Principal for a range from \$1,530,000 to \$1,759,500. CP 568-70.

However, when the promissory note is not a negotiable instrument, such as Mr. Bucci's note, any evidence attempting to establish holdership under Ch. 62A.3 RCW is a legal nullity and an illogical basis for a grant of Summary Judgment regarding beneficiary status under RCW 61.24.005(2). Accordingly, the Superior Court's ruling that U.S. Bank as the Trustee was the beneficiary of Mr. Bucci's non-negotiable note simply because their attorney who could not possibly have personal knowledge alleged they possessed it at summary judgment is not supported by the law. *See* RCW 62A.3-102; *see also Brown*, 184 Wn.2d at 524.

**E. The Superior Court erred in granting summary judgment on Bucci's CPA claims against all respondents.**

"To prevail on a CPA action, the plaintiff must prove an '(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.'" *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013); *citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The Supreme Court in *Klem* recently "resolve[d] any confusion" when it held:

that [an unfair or deceptive act or practice] under the Washington CPA may be predicated upon [1] a per se violation of statute, [2] an act or practice that has the capacity to deceive substantial portions of the public, or [3] an unfair or deceptive act or practice not regulated by statute but in violation of public interest.

*Klem*, 176 Wn.2d at 787.

It is a question of fact whether the defendant committed a specific action or practice. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 149–50, 930 P.2d 288 (1997). If the facts about a party's act or practice are undisputed, the court may decide if that act or practice was deceptive as a matter of law. *Id.* “Whether an action constitutes an unfair or deceptive practice is a question of law,” that appellate courts *de novo*. *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C.*, 168 Wn.2d 421, 442, 228 P.3d 1260 (2010).

#### **i. Deceptive Acts**

Liability may be predicated on deceptive acts. RCW 19.86.020. “To prove that an act or practice is deceptive, neither intent nor actual deception is required.” *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (Div. I 2010); *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 835, 355 P.3d 1100 (2015)(citing *Panag v. Farmers Inc. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009)(trial court erroneously dismissed CPA claim based upon alleged violation of DTA). “Even accurate information may be deceptive ‘if there is a representation, omission or practice that is likely to mislead.’” *Kaiser*, 161 Wn. App. at 719; *see also Panag*, 166 Wn.2d at 50. Importantly:

Deception exists “if there is a representation, omission or practice that is likely to mislead” a reasonable consumer. *Sun. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir.1986). “**In evaluating the tendency of language to deceive, the [FTC] should look not to the most sophisticated readers but rather to the least.**” *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174 (11th Cir.1985) (quoting *Exposition Press, Inc. v. Fed. Trade Comm'n*, 295 F.2d 869 (2d Cir.1961)).

*Panag*, 166 Wn.2d at 50 (2009) (brackets original) (emphasis added).

## **ii. Unfair Acts**

Liability under the CPA may be predicated on an unfair act. *Klem*, 176 Wn.2d at 782. The term unfair is not defined because “[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.” *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1984)).

Additionally, “an act or practice can be unfair without being deceptive.” *Klem*, 176 Wn.2d at 787. Similarly, a defendant's act or practice might be “unfair” if it “offends public policy as established ‘by statutes [or] the common law,’ or is ‘unethical, oppressive, or unscrupulous,’ among other things.” *Id.* at 786 (alteration in original) (quoting *FTC v. Sherry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S.Ct 898, 31 L.Ed.2d 170 (1972)).

## **iii. Violations of the DTA**

Violations of the DTA are unfair and often deceptive because they

offend the public policy of the DTA; one purposes of the DTA is to “provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 428, 334 P.3d 529 (2014). (citing *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985))). This is likely why the Supreme Court has consistently ruled that pre-sale violations of the DTA are compensable under the CPA. *Frias*, 181 Wn.2d at 432-33; *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014).

In regards to Bucci’s CPA claim premised on DTA violations, the Superior Court ruled, “However, alternatively, in looking at Chase’s Motion for Summary Judgment, as well as RCO, and Northwest Trustee Service, fundamentally they all require and look at violation of the Deeds of Trust Act. I find that no violation has occurred under the law.” VP 90:9-13. However, as laid out in the following sections, Respondents violated multiple provisions of the DTA in addition to committing unfair or deceptive actions outside the DTA’s purview. *See infra* § E(v)-(vi) .

**iv. Failure to disclose Material facts and misrepresentations of material facts are unfair or deceptive act under the CPA**

The CPA may be violated by failure to disclose material facts.<sup>8</sup>

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<sup>8</sup> In addition to the statutorily imposed duty put in place by RCW 19.86.020, which requires individuals and companies to refrain from “unfair or deceptive acts or practices,”

*Smith v. Sturm, Ruger & Co., Inc.*, 39 Wn. App. 740, 747-48, 695 P.2d 600, review denied, 103 Wn.2d 1041 (Div. III 1985). Misrepresentation or failure to disclose material terms violates the CPA. *Bain*, 175 Wn.2d 116 citing *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 305–09, 553 P.2d 423 (1976). As far back as 1982, Washington Courts held:

[O]ne who speaks must say enough to prevent his words from misleading the other party; one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. Present-day commercial transactions are not, as in past generations, primarily for cash; rather, modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank to disclose facts when dealing with the customer.”

*Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 459, 656 P.2d 1089, 1092 (Div. III 1982) (internal citations omitted); *See also*

*Morrow v. Bank of Am., N.A.*, 375 Mont. 38, 57, 324 P.3d 1167, 1184

(2014) (“Because Bank of America had access to its servicing records that

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there is also a common law duty which creates a duty to disclose information. *See. e.g. Alexander v. Sanford*, 181 Wn. App. 135, 325 P.3d 341 (Div. I 2014) review granted, 339 P.3d 634 (2014) (duty to disclose where a fiduciary duty exists in law or fact, or where a special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized knowledge and experience of the other, where a seller has knowledge of a material fact not easily discoverable by the buyer, or where there exists a statutory duty to disclose); *Favors v. Matzke*, 53 Wn. App. 789, 795, 770 P.2d 686, 689 (Div. I 1989);

the Morrrows did not, it also had a duty to disclose material information about its servicing of the Morrrows' loan." Moreover, "[h]aving provided the Morrrows with information about the repayment status of their existing loan, Bank of America had a duty to ensure the information was not misleading."<sup>9</sup>) *Barrett v Bank of America*, 183 Cal. App. 3d 1362, 229 Cal. Rptr. 16 (4th Dist, 1989) (Relationship of bank to its depositors and loan customers is based on trust and confidence and is at least quasi-fiduciary, giving rise to duty of disclosure of facts which may place bank at an advantage over customer);

**v. U.S. Bank and SPS committed an unfair deceptive act by initiating a nonjudicial foreclosure against Bucci when they were not the beneficiary**

Respondents' argument at summary judgment was based on U.S. Bank as Trustee and SPS being the current holder of Mr. Bucci's note. CP 221 at ¶ 4. However, by Respondents' own admissions, the nonjudicial foreclosure was initiated against Mr. Bucci on June 26, 2009 when NWTs received a referral to commence a non-judicial foreclosure against Mr. Bucci's home. CP 563 at ¶ 4. The referral required the foreclosure to be conducted in the name of Bank of America, National Association as Trustee as successor by merger to Lasalle Bank, National Association as

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<sup>9</sup> Mislead is defined as "to cause (someone) to believe something that is not true" <http://www.merriam-webster.com/dictionary/mislead> last visited February 24, 2016. Deceive is defined as "to make (someone) believe something that is not true" <http://www.merriam-webster.com/dictionary/deceive> last visited February 24, 2016.

Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust. *Id.* In support of its Summary Judgment Reply, U.S. Bank as Trustee and SPS submitted a declaration with an affidavit dated February 11, 2011, in an attempt to show U.S. Bank became the trustee of the trust in place of BANA at that time. CP 486-941. First, it was error for the court to consider new evidence submitted in a U.S. Bank as Trustee and SPS's reply. *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (Div. I 1991). Second, the affidavit did not establish that either BANA or U.S. Bank as Trustee were the beneficiary on June 26, 2009 or at any point throughout the nonjudicial foreclosure. *Id.* Additionally Respondents put forth no evidence that Bucci's loan was acquired or transferred into the trust. CP 203:23-204:21.

In response, Mr. Bucci submitted evidence that U.S. Bank as Trustee was not a holder because the note was not a negotiable instrument, as discussed *supra*, and in light of that fact they were not a holder, Respondents had not met their burden in establishing any chain of title that they were the beneficiary as required by *Bain*, 175 Wn.2d at 111 ("If the original lender had sold the loan, the purchaser would need to establish ownership of that loan, either by demonstrating it actually held the promissory note or by documenting the chain of transactions.")

In *Bain*, the Washington Supreme Court found that it was

deceptive to claim to be a beneficiary when an entity was not. *Bain*, 175 Wn.2d at 117. Here, Respondents' representations that BANA and U.S. Bank as Trustee were holders and beneficiaries of Mr. Bucci's note was deceptive because under Washington Law neither could be a holder of a non-negotiable instrument, i.e. a negatively amortizing note.

**vi. Chase committed an unfair or deceptive act by inducing Mr. Bucci to fall behind on this loan payments to get a loan modification**

After the housing market crashed in 2007, the Property unexpectedly and rapidly declined in value; Mr. Bucci estimates the Property's value declined by 50%. CP 325 at ¶4. Despite, the Property's devaluation, Mr. Bucci's monthly payments were actually increasing. *Id.* However, Mr. Bucci remained somewhat optimistic because when Mr. Bucci contacted WaMU on numerous occasions, Mr. Bucci was told that loan modifications were available. CP 325 at ¶5. At that point, Mr. Bucci was current on his monthly payments and had the ability to remain current on his monthly payments for some time. *Id.* When Mr. Bucci called WaMu, WaMu told him that he would not be considered for a loan modification unless he intentionally ceased making his monthly payments. *Id.* Mr. Bucci did not have an income because he was semi-retired from the construction industry and was not working. *Id.*

Later, Chase became the servicer of Mr. Bucci's loan and also

advised Bucci that he must miss payments to qualify for a loan modification. CP 1544-1545 at ¶3. Mr. Bucci was current on his loan at the time and the ability to stay current. CP 325 at ¶5. Mr. Bucci relied on WAMU and Chase's advice and missed his payments. CP 326 at ¶8; CP 1544-1545 at ¶3. Around this time, Chase was was representing itself as WaMu in its communications with Mr. Bucci. *Id*; CP 1549.

Unfortunately, the "modification" process proved to be a ruse. While Chase was advising Mr. Bucci to miss payments, on January 29, 2009, Bank of America, N.A. claiming to be trustee for the trust ("BANA as trustee"), executed a "Limited Power of Attorney" in which it appointed Chase to act as "Attorney-in-Fact." CP 287-293.

After Mr. Bucci had missed 3 months of payments at WAMU and Chase's advice and while he was being reviewed for a loan modification, NWTS as "duly authorized agent" for BANA as trustee executed a Notice of Default regarding the Property on June 28, 2009. CP 352-355; CP 393:21-23. Shortly thereafter, Chase, as attorney in fact for BANA as trustee, purported to appoint NWTS as successor trustee of the Deed of Trust on July 6, 2009. CP 348. Additionally, NWTS as "duly authorized agent" for BANA as Trustee executed a Notice of Trustee's Sale on August 13, 2009 listing WAMU as its client. CP 352-355.

During this time, Chase was still advising Mr. Bucci and soliciting

and accepting loan modification documents. CP 1544-1545 at ¶¶3-8.

Chase committed an unfair or deceptive act by inducing Mr. Bucci to fall behind and then dual tracking. Mr. Bucci by proceeding with foreclosure while working with Mr. Bucci for a loan modification.

Chase had all power and knowledge regarding whether it would provide Mr. Bucci with a loan modification once it told him to miss his payments; Chase controlled the application process. It was unfair for Chase to induce Mr. Bucci to default so that Mr. Bucci could modify his loan, while not disclosing material facts related to the modification process, and the parties involved, that only it possessed, and then not provide him with a loan modification. In addition, Chase acted deceptively by failing to disclose to Bucci that if he failed to make his payments, they would take his home and not provide him a loan modification. Chase had a duty to disclose these material facts. *Smith*, 39 Wn. App. at 747-48; *See also Tokarz*, 33 Wn. App. at 459.

Chase acted unfairly and deceptively when it actively conducted the nonjudicial foreclosure with the other respondents while still representing it was working to provide a modification. This behavior is known as “Dual Tracking”.<sup>10</sup> Compare CP 1459 at ¶4 (letter from

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<sup>10</sup> “[D]ual tracking,” is unlawful.” *Singh v. Fed. Nat. Mortgage Ass'n*, C13-1125RAJ, 2014 WL 504820, at \*5 (W.D. Wash. Feb. 7, 2014)(internal citation omitted). “To the extent that [the trustee] participated, it violated [RCW 61.24.010(4)]. To the extent that

WAMU/Chase stating “we believe your home loan may be eligible for a loan modification program”) *with* CP 563 at ¶4 (NWTS began the nonjudicial foreclosure process on June 26, 2009). These conflicting communications were unfair and deceptive, standing alone, and caused Mr. Bucci great confusion and time. CP 1545-1546 ¶¶ 7-11.

**vii. Chase committed an unfair or deceptive action when it appointed NWTS without authority**

Under the DTA, only a proper beneficiary has the power to appoint a successor to the original trustee named in the deed of trust. *Bavand*, 176 Wn. App. at 486. The question of whether a proper beneficiary has appointed a trustee is a question of fact for trial. *Rucker*, 177 Wn. App. at 7. When an unlawful beneficiary appoints a successor trustee, the actions of the purported trustee constitute material violations of the DTA. *Id.* at 14 (internal citations omitted).

Respondents conceded that Chase was nothing more than a prior loan servicer. CP 1078:9-11. Yet, Chase appointed NWTS as Successor Trustee on July 6, 2009. CP 348. “The undersigned present beneficiary warrants and represents that, as of the date this Appointment of Successor Trustee has been executed and acknowledged, it is the owner and holder of the obligation secured by the subject deed of trust and is not holding the

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[other entities were involved], they engaged in an unfair or deceptive practice within the meaning of the CPA.” *Id.*

same as security for a different obligation.” by “JPMorgan Chase Bank, National Association its attorney in Fact for Bank of America, National Association successor by merger to “LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust.” *Id.*

In its motion, SPS and USB argued that Chase through its power of attorney was authorized to appoint NWTS on behalf of the trust. SPS and USB included the power of attorney stating: “The substitution of trustee(s) serving under a Deed of Trust, in accordance with state law and the Deed of Trust.” CP 288. However, the DTA does not allow an agent to appoint a successor trustee. While it is true that the DTA does allow for the use of agents, the Legislature has specifically designated which acts may be performed by an agent of the beneficiary or an agent of the trustee in nonjudicial foreclosures. Under the principle of *expressio unius est exclusio alterius*, the Legislature did not intend for agents to appoint successor trustees. Accordingly, Chase violated the DTA by appointing NWTS when it was not a beneficiary.

Respondents argued that Mr. Bucci did not have standing to challenge this appointment. CP 478-479:3-26; 548:7-18; CP 548 11:7-CP 549 12:16. However, it is well established that borrowers like Bucci, have standing to challenge documents used to perpetuate nonjudicial foreclosure proceedings against their homes. *See eg Bavand*, 176 Wn.

App. 475 (challenging appointment of successor trustee); *Klem*, 176 Wn.2d 771 (challenging multiple foreclosure related documents related to notary fraud): *Walker v. Quality Loan Service Corp. of Wash.*, 176 Wn. App. 294, 308 P.3d 716 (Div. I 2013) (challenging appointment of successor trustee) *overruled on other grounds in Frias*, 181 Wn.2d at 429; *Lyons*, 181 Wn.2d 775 (challenging beneficiary declaration). Accordingly, Mr. Bucci had standing to challenge the Appointment of successor trustee.

**viii. NWTS and RCO committed an unfair or deceptive action by violating the DTA and relying on an equivocal declaration to begin a nonjudicial foreclosure against Mr. Bucci**

On or about January 30, 2009, Chase executed a Beneficiary Declaration as attorney in fact for BANA as trustee, in which Chase claimed:

Bank of America, National Association as successor by merger to “LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust is the actual holder of the promissory note or other obligation evidencing the above-referenced loan **or has requisite authority under RCW 62A.3-301 to enforce said obligation.**

CP 350. This equivocal declaration is not sufficient under RCW 61.24.030(7). In *Lyons*, Washington’s Supreme Court held NWTS’ use of an equivocal beneficiary declaration did not satisfy the proof requirement under RCW 61.24.030(7). *Lyons*, 181 Wn.2d 775.

In the proceedings below, NWTS argued the equivocal declaration

did not matter because NWTS had information that Bank of America as Trustee was the Noteholder. CP 1285:2-6. However, NWTS cited to a footnote for support, “The information and documentation included confidential, non-public data and documents such as a copy of the Note and loan payment history, which the foreclosing beneficiary would have in order to conduct a non-judicial process.” CP 1285:26 Accordingly, by NWTS own admission, it did not possess the information to validate Bank of America was the beneficiary.

In discovery Bucci asked NWTS to “Identify any documents you considered pursuant to RCW 61.24.030(7)(1) which states that the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” CP 1558:16-22. In response, NWTS stated: “NWTS refers Plaintiff to the Beneficiary Declaration. NWTS is producing a copy of its file for the foreclosure of Plaintiff’s property. To the extent other documents exist pursuant to this request, these would be found in the trustee’s file.” *Id.* NWTS’s file does not contain a copy of the Note. March 2, 2016 Exhibit (Trustee’s File).<sup>11</sup>

NWTS did not have “proof” that either Bank of America, N.A. as trustee for WaMu Trust or U.S. Bank, N.A. as trustee for WaMu Trust

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<sup>11</sup> The Trustee’s File is Dkt. 97M in King County Superior Court and was designated as a part of the Clerk’s Papers by Plaintiff. However, it did not get submitted with the original Clerk’s Papers and was submitted as an Exhibit to the Court of Appeals by King County Superior Court on March 2, 2016.

held the Note. The evidence at summary judgment showed that NWTS relied on an equivocal declaration, did not have a copy of Bucci's Note, or any other proof to comply with RCW 61.24.030(7), in its file when it recorded the three notices of trustee's sale. *See generally* Trustee's File; CP 1558:16-22 (NWTS admission that it relied on beneficiary declaration CP 1565:32-23). It was both unfair and deceptive for NWTS to continually send notice it would sell Mr. Bucci's home when it did not have the requisite proof that it had any authority to undertake the nonjudicial foreclosure.

**ix. NWTS committed an unfair or deceptive action when it violated its duty of good faith under RCW 61.24.010(4).**

In *Lyons*, Washington's Supreme Court adopted the Court of Appeals' ruling in *Walker*, 176 Wn. App. 294, requiring trustees to "adequately inform" themselves about "the purported beneficiary's right to foreclose, including, at minimum, a "cursory investigation; to adhere to its duty of good faith." *Lyons*, 181 Wn.2d at 787 quoting *Walker*, 176 Wn. App. at 309-10

NWTS violated this duty of good faith when it failed to perform a "cursory investigation" into whether JPMorgan Chase Bank, N.A. was Bank of America, N.A. as trustee for WaMu Trust's attorney-in-fact and whether BANA or U.S. Bank as Trustee were in fact proper beneficiaries within the meaning of RCW 61.24.005(2).

**x. Trade or Commerce**

““Trade” and “commerce” shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010. Importantly, the CPA was intended to be “construed broadly” in the determination of what constitutes the conduct of trade or commerce. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 173, 159 P.3d 10, 22 (Div. I 2007), *aff’d*, 166 Wn.2d 27, 204 P.3d 885 (2009). Acts done for the purpose of increasing profits are within the sphere of trade, are commerce, and are subject to the Consumer Protection Act. *State Farm Fire and Cas. Co. v. Huynh*, 92 Wn. App. 454, 962 P.2d 854 (Div. I 1998).

NWTS conceded this element in its motion for summary judgment. CP 1281:24-25. Additionally the other Respondents never contested the element. CP 1092-1095 (Chase did not dispute this element in moving for summary judgment in regards to Bucci’s CPA claim); CP 213-214 (SPS and U.S.Bank did not dispute this element in moving for summary judgment in regards to Mr. Bucci’s CPA claim). Accordingly, Respondents all waived their right to dispute this element was met. *See White*, 61 Wn. App. at 168.

**xi. The Superior Court misapplied the law regarding public interest impact and erred in finding no public interest impact**

With regard to the public interest impact, the Superior Court:

There is nothing before this court to support a finding that there is sufficient evidence to proceed this to trial under effect to the public. What I have is argument that this is a voluminous practice. I don't see anything in front of me that says there are other potential consumers who are similarly situated. I don't see anything in front of me to support that this is not a private cause of action that is based solely out of a contractual relationship.

VP 92:11-19. The Superior Court applied the wrong public interest legal analysis. A claimant may establish public interest impact a multitude of ways, not just by providing evidence of other similarly situated potential customers. RCW 19.86.093. RCW 19.86.093 provides that:

... a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3)(a) Injured other persons; **(b) had the capacity to injure other persons;** or **(c) has the capacity to injure other persons.**

(emphasis added). The statute is permissive in that it states five (5) ways a plaintiff may establish the public interest element.

Additionally, under the case law decided prior to the adoption of RCW 19.86.093 in 2009, an act or practice has been found to affect the public interest when it is part of a pattern or generalized course of conduct. *Eifler v. Shurgard Capital Management Corp.*, 71 Wn. App. 684, 861 P.2d 1071 (Div. II 1993). The public interest element has also been found when there is a likelihood that additional plaintiffs have been or will be

injured in same fashion as the plaintiff. *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d 805 (Div. II 2008) (sale of home affected the public interest); *Keenan v. Allan*, 889 F. Supp. 1320, 130 Lab. Cas. (CCH) P 33273 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996).

Finally, the DTA created a specific public declaration of public interest impact. Under S.H.B. No. 2770, the legislature announced findings in Laws of 2008, ch. 108, § 1, which provide “protecting our residents and our economy from the threat of widespread foreclosures . . . is in the public interest.” (emphasis added). These findings apply because the legislature amended RCW 61.24.030 in that very same Act. *See* Laws of 2008, ch. 108, § 22. For clarity, the legislature links to its public interest finding on its own webpage for RCW 61.24.030.<sup>12</sup> Here, NWTS’s reliance on an equivocal beneficiary declaration in violation of RCW 61.24.030(7) met the public interest impact per the legislative finding.

Additionally, Bucci put forth evidence, in the form of NWTS’ CR 30(b)(6) Designee’s deposition, that it was NWTS practice to solely rely on a beneficiary declaration without any additional investigation. *See eg.* CP 1243 at 29:14-22; CP 1246 at 40:22-25 42:12-13. Mr. Bucci also put forth that in 2013, NWTS completed approximately 4,000 nonjudicial

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<sup>12</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24.030> (view bottom of page for “Notes: . . . Findings -- 2008 c. 108: See RCW 19.144.005”) (last visited February 29, 2016)(emphasis in original).

foreclosures and started approximately 10,000. CP 1239 at 13:3-14:9.

In response, the Superior Court ruled that this evidence should be given “zero weight” because it was not relevant. Order granting Summary judgment, “As far as the Johnson declaration, I reviewed it. I find the information provided has zero weight.” VP 88:18-19. This admission of a party opponent demonstrated that NWTs, as a business practice, does not do a cursory investigation in any of the nonjudicial foreclosures that it conducts on thousands of Washington homeowners each year, and it is likely the other respondents’ acts and practices regarding those 10, 000 homeowners are similar to the way Mr. Bucci was treated.<sup>13</sup>

Respondents false representations that U.S. Bank as Trustee is the holder of Mr. Bucci’s negatively amortizing note affects the public. RCW 19.144.050 prohibits financial institutions from making or facilitating a loan with negative amortization.<sup>14</sup> Given that the Legislature has outlawed the creation of these loans respondents’ actions have a public impact.

**xiii. Respondents injured Mr. Bucci’s business and property**

To prove a CPA claim, Mr. Bucci were required to show injury to their “business or property” and “a causal link” . . . between the unfair or

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<sup>13</sup> At summary judgment all inferences should be made in favor of the non-moving party. *Camicia*, 179 Wn.2d at 687-688.

<sup>14</sup> RCW 19.144.010(8) defines “negative amortization” as “an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal.”

deceptive acts and the injury suffered. *Hangman Ridge*, 105 Wn.2d at 792-93. A minimal injury and “pecuniary losses occasioned by inconvenience may be recoverable as actual damages.” *Panag*, 166 Wn.2d at 57 (citing *Keyes v. Bollinger*, 31 Wn. App. 286, 296, 640 P.2d 871 (Div. I 1982); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (Div. I 1979)). Importantly:

“Injury” is distinct from “damages.” . . . Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill) . . . (proof of injury satisfied by “stowaway theory” where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles) . . . (damage to professional reputation) . . . (injury by delay in refund of money) . . . (loss of use of property).

*Panag*, 166 Wn.2d at 57-58 (internal citations omitted)(emphasis added).

Injury also includes the costs of investigation and the time needed to conduct the investigation in response to a misleading communication.

*Panag*, 166 Wn.2d at 40, 57–65; *see also Stephens*, 138 Wn. App. 151, affirmed on different issues in *Panag*, 166 Wn.2d 27. Postage incurred as a result of entities’ unfair or deceptive acts satisfy the injury requirement.

*Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097, 1115 (W.D.

Wash. 2012) (\$7.75 postage charge sufficient for a CPA injury); *see also*

*Panag*, 166 Wn.2d at 63 (money spent on postage was an injury). Stigma damages are also available. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677,

694-95, 132 P.3d 115, 124 (2006). “[D]istracted and loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct through this and other actions” are also sufficient injuries. *Walker*, 176 Wn. App. at 320.

At summary judgment, Mr. Bucci put forth evidence that he was forced to spend time and money investigating the parties in interest after receiving a Notice of Trustee Sale form NWTS stating Bank of America was the “beneficiary.” CP 1193-1194 at 57:5-61:14. Mr. Bucci was left so confused by what NWTS was stating and doing when Mr. Bucci had spent so much time and money working to get a loan modification after he was told to miss payments in order to qualify. *Id.* Mr. Bucci called Chase and NWTS to figure out to figure out what was going on and who held what interest in his loan. CP 1193 at 57:5-61:14. Mr. Bucci even spent time and money mailing a debt dispute letter. CP 1194 at 60:15-61:12.

After NWTS initiated the nonjudicial foreclosure, Mr. Bucci drove to the trustee’s sale in Factoria, scheduled for November 13, 2009. CP 1196 at 82:3-82:11. Additionally, prior to filing this action, Mr. Bucci drove from New Castle to Arlington for a consult with Scott E. Stafne to attempt to figure out what was going on. CP 327-328 at ¶12; CP 701 at 123:18-125:18. Mr. Bucci paid for this investigative consult before deciding to file a complaint against Defendants. *Id.* Mr. Bucci was forced

to accrue attorney fees as a result of NWTS stating that the only way Mr. Bucci could contest NWTS' action was by filing a lawsuit. CP 350-360.

Mr. Bucci was damaged because he incurred additional lost time and expenses as a result of being forced to remain in the home after being induced to default and the nonjudicial foreclosure instead of moving back to the east coast to be closer to his elderly mother. CP 1546 at ¶12.

**xiv. Respondent's actions were a proximate cause of Bucci's injuries**

Under the CPA, the defendant's actions must proximately cause plaintiff's injuries. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 277-78, 259 P.3d 129 (2011) (quoting *Indoor Billboard/ Washington Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 82, 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*, 166 Wn.2d 27. "Proximate cause" means a cause which in direct sequence produces the injury complained of and without which such injury would not have happened. WPI 310.07. ("There may be one or more proximate causes of an injury.")

Chase subjected Mr. Bucci to a drawn out and unreasonable modification process where Mr. Bucci would spend several hours every couple of months submitting applications, only for them to get rejected

and to be told conflicting information from Chase whenever he would follow up with a phone call. CP 326-28 at ¶¶9-13; CP 1544-1545. During this process, Mr. Bucci wondered whether he was negotiating with the proper party. *Id.* Although Mr. Bucci did everything he could to explore his option for relief, Respondents continued to nudge Mr. Bucci deeper and deeper into nonjudicial foreclosure.

The existence of multiple causes of an injury does not bar a CPA claim as long as Respondents' unfair and/or deceptive conduct is one proximate cause of the injury. *See* WPI 310.07. Mr. Bucci presented evidence that Respondents misrepresentations have a negative effect on the public and were a proximate cause of his injuries. Mr. Bucci was forced to spend considerable time and resources trying to get a modification and contest the nonjudicial foreclosure as a result of Chase telling him to miss his payments to cure his home being underwater. CP 326-328 at ¶¶9-13; CP 1544-1545.

**F. The Superior Court erred in granting summary judgment on Bucci's Negligence claims against the Respondents<sup>15</sup>**

The term "negligence" is defined as conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. *See e.g.* 16 Wash. Prac., Tort Law And Practice § 2:1 (4th ed.) . "The elements are duty, breach, causation, and

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<sup>15</sup> See CP 1481, 1485-1488, 1528-1529 for additional analysis.

injury.” *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 945 (2002)(citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)).

“Duty is an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985), quoting Prosser on Torts, § 53 (3d ed. 1964); By creating the risk of harm to others, the defendant is charged with a duty to use reasonable care to see that injury to others does not occur. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532 (2011). Foreseeability also determines the scope of the duty owed. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015). Additionally, “a statute may impose a duty that is additional to, and different from, the duty to exercise ordinary care.” *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (Div. II, 1996). Whether the duty of reasonable care is breached, along with causation and damages is for the trier of fact. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999).

Here, Respondents’ created a risk of harm to Mr. Bucci when they made errors, misrepresentations, and omissions to Mr. Bucci during the loan modification and nonjudicial foreclosure, as discussed *supra*. Respondents had a duty to use reasonable care to ensure this risk of harm, including Mr. Bucci losing his home and having to spend considerable

time, money, and resources would not occur. Additionally, because of the relationship between Mr. Bucci and Respondents, it was foreseeable that Bucci would reasonably rely on, and did reasonably rely on to his detriment, the information and representations of the Respondents. In sum, Respondents owed Mr. Bucci a duty of reasonable care.<sup>16</sup> The remaining elements of breach, causation, and damages are issues for a fact finder.

**G. The Superior Court Erred in Finding HOLA Preempted Bucci's Claims**

The Home Owners' Loan Act<sup>17</sup> ("HOLA") was intended solely for the benefit of homeowners who are in financial difficulties and any benefit to creditors is merely incidental. *McAllister v. Drapeau*, 14 Cal.2d 102, 92 P.2d 911, 915 (1939); *Richard R. Adams Co. v. Pacific States Sav. & L. Co.*, 34 Cal.App.2d, 94 P.2d 370, 373 (Cal. Ct. App. 1939); *Markowitz v. Berg*, 125 N.J. Eq. 56, 4 A.2d 410 (1939). The main and controlling purpose of the act is to assist small home owners who face loss of their homes because of the inability to meet the charges due on their mortgages. *McAllister*, 14 Cal.2d 102. Because HOLA does not give rise to a private

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<sup>16</sup> Independent Tort duty doctrine does not bar Mr. Bucci's tort theories. See CP 1529. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 165, 273 P.3d 965 (2012)(We [the Washington Supreme Court] have never applied the doctrine as a rule of general application outside of these limited circumstances." Indeed, in Eastwood we directed lower courts not to apply the doctrine to tort remedies "unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise.")

<sup>17</sup> 12 U.S.C.A. § 1461 et seq.

right of action, Congress could not have intended to preempt all state-law claims against lenders, but only those brought as a clandestine way of imposing requirements on lenders. *Henning v. Wachovia Mortg., FSB*, 969 F.Supp.2d 135 (D. Mass. 2013).

The Seventh Circuit held that a homeowner's claims against a mortgage servicer for breach of contract, promissory estoppel, fraudulent misrepresentation, and violation of Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) were not preempted, under field preemption theory, by HOLA or the Office of Thrift Supervision (OTS) regulations promulgated under HOLA, where savings provision in those regulations limited preemptive effect to state laws that conflicted with federal regulation, and disputes involving such basic common-law type remedies did not conflict with federal regulation. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

Moreover, Washington Courts have ruled matters of contract law, and laws that are generally applicable, like the CPA, are not preempted. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 104, 233 P.3d 861 (2010); *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 496, 334 P.3d 1120 (Div. III 2014); *See also Foley v. Wells Fargo Bank, N.A.*, 109 F.Supp.3d 317 (D. Mass. 2015) (HOLA does not preempt Massachusetts CPA statute claims, in mortgage loan modification context, where the

purported violation was based on breach of contract); *McAnaney v. Astoria Financial Corp.*, 665 F.Supp.2d 132 (E.D. N.Y. 2009) (Mortgagors' claim under NY law against mortgagees for breach of contract, alleging that collection of disputed fees was prohibited by their mortgage agreements, was not preempted by HOLA, since mortgagors' claim was a contract and commercial claim that did not more than incidentally impact lending operations.)

Further, a California homeowner's state law claim were not preempted when she alleged that her servicer made fraudulent misrepresentations, including: that she qualified for a loan modification based on her \$110,000 salary, that it would not accept any new payments until trial modification began, and that no foreclosure sale would be conducted while loan modification process was underway. *Plastino v. Wells Fargo Bank*, 873 F.Supp.2d 1179 (N.D. Cal. 2012). The claims were not preempted because the state law claims only incidentally affected lending and did not seek to impose additional requirements on the servicer, nor did they depend on contention that all homeowners were entitled to modifications. *Id.*

Even state-law claims against a national bank, which had merged with a federal savings bank (FSB) that originated the mortgagor's loan, had related to the "processing" or "servicing" of the mortgage loan and request for a loan modification, the mortgagee could not assert HOLA

preemption with respect to post-merger conduct. *Penermon v. Wells Fargo Bank, N.A.*, 47 F.Supp.3d 982 (N.D. Cal. 2014).

Mr. Bucci's claims predicated upon misrepresentation, unfair or deceptive acts, the computation of the amount due and the calculation and assessment of loan-related fees, including late charges and servicing fees are not preempted by HOLA because they are based on contract law, the CPA, and state common law, laws that are generally applicable, do not conflict with HOLA and are not attempting to impose lending regulations on Chase. Further, Chase cannot assert HOLA preemption with respect to its post-merger conduct. *Contra* CP 1845-1846.

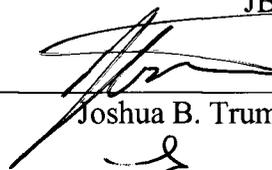
#### V. CONCLUSION

For the reasons stated herein, Mr. Bucci respectfully asks this court to reverse the Superior Court's orders on summary judgment and remand this case for further proceedings.

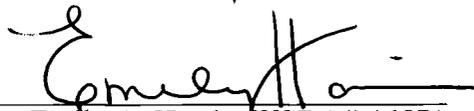
DATED this 3rd day of March, 2016 at Arlington, Washington.

Respectfully Submitted By:

JBT & Associates, P.S.



Joshua B. Trumbull, WSBA# 40992



Emily A. Harris, WSBA# 46571

**CERTIFICATE OF SERVICE**

I, Ashley Burns, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 3rd day of March, 2016, I caused to be served a true and correct copy of Appellant Frank Bucci's Opening Brief to respondents in the above title matter by causing it to be delivered to:

John Glowney J. Will Eidson Stoel Rives, LLP 600 University St, Suite 3600 Seattle, WA 98101 jeglowney@stoel.com jweidson@stoel.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> U.S. First Class Mail Postage Paid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic-Email
Fred Burnside Hugh R. McCullough Zana Z. Bugaighis Davis Wright Tremaine, LLP 1201 Third Ave Suite 2200 Seattle, WA 98101 fredburnside@dwt.com hughmccullough@dwt.com zanabugaighis@dwt.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> U.S. First Class Mail Postage Paid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic-Email

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<p>Joshua Schaer RCO Legal, P.S. 13555 SE 36th St Suite 300 Bellevue, WA 98006 jschaer@rcolegal.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> U.S. First Class Mail Postage Paid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic-Email</p>
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DATED this 3rd day of March, 2016 at Arlington, Washington.

  
Ashley Burns  
JBT & Associates, P.S.