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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2016 JUL -1 PM 2:15

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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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.

APPELLANT FRANK BUCCI'S REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

A. The Superior Court erred by weighing the credibility of the parties' evidence on summary judgment 1

B. The Superior Court erred by admitting the testimony of the defendant's attorney 2

C. The Superior Court erred in finding the Bucci-WAMU note was negotiable when the note facially allows Mr. Bucci to borrow between $1,530,000 and 1,759,500.00 5

D. The Superior Court erred in granting USB, SPS, and Chase's motions for summary judgment that they were beneficiaries during 2009-2013 7

E. The Superior Court erred in dismissing Mr. Bucci's CPA claims against Respondents: 11

i. CPA claims based upon DTA violations do not require showing additional elements of materiality and prejudice 11

ii. Unfair or deceptive conduct in this case 12

a. The Superior court erred by granting NWTS' summary judgment when it relied on an equivocal declaration to initiate a nonjudicial foreclosure on Mr. Bucci in violation of the CPA 12

1. NWTS failed to adhere to their basic legal duties 13

2. NWTS attempts to manufacture proof it complied with its duties 15

(i) Appointment and Assignment 15

(ii) Trustee's Sale Guarantee 16

b. Unfair or deceptive conduct by USB, SPS, and Chase 18

iii. Public interest impact of Respondents' Actions 19

iv. Mr. Bucci established the injury element of his CPA claim at summary judgment 20

F. The Superior Court erred in dismissing Mr. Bucci's negligence claims 22

G. NWTS and RCO are not entitled to sanction for a frivolous appeal 23

H. Mr. Bucci has the legal right to challenge documents being used to take his home..... 25

I. The Superior Court erred in finding HOLA pre-empted Mr. Bucci's claims against JPMorgan Chase. 26

II. CONCLUSION 27

TABLE OF AUTHORITY

Washington Cases

Amend v. Bell,
89 Wn.2d 124, 570 P.2d 138 (1997) 1
Anderson v. Hoard,
63 Wn.2d 290, 387 P.2d 73 (1963) 7
Badgett v. Security State Bank,
116 Wn.2d 563, 807 P.2d 356 (1991) 22
Bain v. Metropolitan Mortg. Grp., Inc.,
175 Wn.2d 83, 285 P.3d 34 (2012) 8, 9, 18, 25
Balise v. Underwood,
62 Wn.2d 195, 381 P.2d 966 (1963) 1, 2
Bavand v. OneWest Bank, F.S.B.,
176 Wn. App. 475, 309 P.3d 636 (Div. I 2013) 8, 10, 25
Blair v. Northwest Trustee Services,
193 Wn. App. 18, ___ P.3d. ___ (Div. III 2016) 4
Brown v. Washington State Department of Commerce,
184 Wn.2d 509, 359 P.3d 771 (2015) 8, 9
Demopolis v. Galvin,
57 Wn. App. 47, 786 P.2d 804 (Div. 1 1990) 10, 11
Dunlap v. Wayne,
105 Wn.2d 529, 716 P.2d 842 (1986) 1
Elcon Constr., Inc. v. E. Wash. Univ.,
174 Wn.2d 157, 273 P.3d 965 (2012) 22
Fiore v. PPG Industries, Inc.,
169 Wn. App. 325, 279 P.3d 972 (Div. I 2012) 3
Frias v. Asset Foreclosure Servs., Inc.,
181 Wn.2d 412, 334 P.3d 529 (2014) 1, 11, 12, 21
Grimwood v. University of Puget Sound, Inc.,
110 Wn.2d 355, 753 P.2d 517 (1988) 3
Hangman Ridge Stables Inc. v. Safeco Title Ins. Co,
105 Wn.2d 778, 719 P.2d 531 (1986) 12, 19, 20
In re Marriage of Schnurman,
179 Wn. App. 634, 316 P.3d 514 (Div. I 2013) 24

Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.,
122 Wn. App. 736, 87 P.3d 774 (Div. I 2004) 3
Kinney v. Cook,
150 Wn. App. 187, 208 P.3d 1 (Div. III 2009) 23, 24
Klem v. Washington Mutual Bank,
176 Wn.2d 771, 295 P.3d 1179 (2013) 12, 14, 20
Lyons v. U.S. Bank Nat. Ass'n.,
181 Wn.2d, 775, 336 P.3d 1142 (2014) 11, 14, 16
Melville v. State,
115 Wn.2d. 34, 793 P.2d 952 (1990) 3
Miller v. U.S. Bank of Wash., N.A.,
72 Wn. App. 416, 865 P.2d 536 (Div. I 1994) 22
Panag v. Farmers Ins. Co. of Wash.,
166 Wn.2d 27, 204 P.3d 885 (2009) 1, 12, 21
Rucker v. Novastar Mortg., Inc.,
177 Wn. App. 1, 311 P.3d 31 (Div I 2013) 8, 10, 25
Rush v. Blackburn,
190 Wn. App. 945, 361 P.3d 217 (Div. I 2015) 19, 20, 21
Stephens v. Omni Ins. Co.,
138 Wn. App. 151, 159 P.3d 10 (Div. I 2007) 21
Tiffany Family Trust Corp. v. City of Kent,
155 Wn.2d 225, 119 P.3d 325 (2005) 24
Trujillo v. Northwest Trustee Servcies, Inc.,,
183 Wn.2d 820, 355 P.3d 1100 (2015) 13
U.S. Bank Nat'l Ass'n v. Ibanez,
458 Mass. 637, 941 N.E.2d 40 (Mass. 2011) 26
Vancouver Nat. Bank v. Starr,
123 Wash. 58, 211 P. 746 (1923) 7
Walker v. Quality Loan Service Corp.,
176 Wn. App. 294, 308 P.3d 716 (Div. I 2013) 14, 15, 21
Young v. Key Pharmaceuticals, Inc.
112 Wn.2d 216, 770 P.2d 182 (1989) 3

Federal Cases

Culhane v. Aurora Loan Services,
708 F.3d 282, 291 (1st Cir. 2013) 25, 26

Farquhar v. Fidelity Ins., Trust & Safe Deposit Co.,
13 Phila. 473, 8 Fed. Cas. 1068 (C.C.E.D. Pa, 1878).....7
In re Hip., Inc., 71 BR 643, 649 (Bank N.D. Tex 1987) 6
Lynott v. Mortg. Elec. Registration Sys., Inc.,
No. 12-cv-5572-RBL, 2012 WL 5995053 (W.D. Wash. Nov. 30, 2012)
..... 8

Other State Cases

Dernier v. Mortgage Network, Inc.,
2013 VT 96, P49 (Vt. 2013)..... 26

Statutes

RCW 19.86.093 19
RCW 31.04.027 23
RCW 31.04.165 23
RCW 31.04.208 23
Ch. 3A RCW..... 8
RCW 5.40.050 23
Ch. 61.24 RCW..... 14, 22
RCW 61.24.005(2)..... 7, 8
RCW 61.24.010(4)..... 18
RCW 61.24.030(7)..... 12, 16, 27
RCW 61.24.030(7)(a) 13
RCW 61.24.030(7)(b) 14
RCW 62A.1-201(21)(A) 9
RCW 62A.1-201.....9
Ch. 62A.3 RCW.....9
RCW 62A.3-102 8
RCW 62A.3-104(a)..... 7

Other Authorities

6A C.J.S. Assignments § 46 (1975)..... 10
6A C.J.S., § 49 10

45 A.L.R. 1074 (1926) 7
WPI 310.04 19
WPI 310.05 19

I. INTRODUCTION

All four respondents non-subtly intimate that a debtor has no rights or protections under the law. However, the Washington Supreme Court has spoken clearly that everyone in our community, especially debtors, are entitled to protections afforded them by law.

Mr. Bucci "can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt." ***Frias v. Asset Foreclosure Servs., Inc.***, 181 Wn.2d 412, 431, 334 P.3d 529, 538 (2014) (citing ***Panag v. Farmers Ins. Co. of Wash.***, 166 Wn.2d 27, 55-56 & n. 13, 204 P.3d 885 (2009)).

A. The Superior Court erred by weighing the credibility of the parties' evidence on summary judgment

The Superior Court erred when it gave zero weight to Mr. Bucci's evidence. VP 88:18-19; CP 1843-1844. Mr. Johnson's declaration was not testimony from Mr. Johnson. CP 1200-78. He was simply authenticating transcripts of prior admissible testimony of Respondent Northwest Trustee Services ("NWTS"). *Id.* At the summary judgment phase, a court cannot decide the weight of evidence or its credibility. ***Amend v. Bell***, 89 Wn.2d 124, 129, 570 P.2d 138 (1997); ***see also Dunlap v. Wayne***, 105 Wn.2d 529, 536-37, 716 P.2d 842 (1986); ***Balise v. Underwood***, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

B. The Superior Court erred by admitting the testimony of the defendant's attorney.

Respondents U.S. Bank, National Association ("USB") and Select Portfolio Servicing ("SPS") argue in their opening that they did not rely upon their counsel's declarations at summary judgment; yet, they go on to cite to their counsel's declaration as their basis for each fact identified in the very next section of their briefing, the relevant fact section. *See* USB/SPS's Answer at 2-3 citing CP 220.

Additionally, USB and SPS suggest that the testimony of their counsel was a moot point because the note was self-authenticating. USB/SPS's Answer at 7. However, their counsel testified, on the basis of personal knowledge, to facts beyond simply providing a note. *See* CP 220-221 at ¶¶ 4-6. USB and SPS's counsel made representations regarding the originality of their copy of the note, holdership, Mr. Bucci's alleged default, communications between Mr. Bucci and Chase, and the initiation of multiple nonjudicial foreclosures. *Id.* Their counsel also attempted to introduce a number of documents, including a 2009 power of attorney, on the basis of personal knowledge. *Id.* at ¶ 6-9. However, their counsel has no personal knowledge of what occurred prior to litigation in 2013. *See* CP 220 ¶ 1; CP 1849-1914.

Similar to the Washington Supreme Court's holding in ***Melville***, where

an attorney lacks personal knowledge and/or does not provide the necessary foundation for the business records exception to the hearsay rule, their affidavits hold no weight at summary judgment:[1]

> We do note plaintiff's failure to sufficiently establish facts to raise any genuine issue of material fact. In his memorandum opposing summary judgment plaintiff asserts extensive "facts." These are based upon an affidavit by plaintiff's lawyer who states that he has read various records files, reports and depositions. He asserts that the facts asserted from those sources are accurate. CR 56(e) requires affidavits to be made on personal knowledge. The source documents from which the lawyer drew his "facts" are not in the record. This hearsay affidavit does not meet the requirements of CR 56(e). The explicit, but plain standards of CR 56(e) must be complied with in summary judgment Proceedings.

Melville v. State, 115 Wn.2d. 34, 36, 793 P.2d 952 (1990) (citing ***Grimwood v. University of Puget Sound, Inc.***, 110 Wn.2d 355, 753 P.2d 517 (1988).

Ultimately, the purpose of evidence is "that the truth may be ascertained and proceedings justly determined." ER 102. To that end, all evidence should be original, authenticated, and relevant. ER 1002; ***Fiore v. PPG Industries, Inc.***, 169 Wn. App. 325, n. 4, 279 P.3d 972 (Div. I 2012); ***Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.***, 122 Wn. App. 736, 748-49, 87 P.3d 774 (Div. I 2004); ER 402.

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[1] If, and only if, evidence is admissible, does the issue of whether or not the presented evidence create a genuine issue of material fact. CR 56; ***see also Young v. Key Pharmaceuticals, Inc.*** 112 Wn.2d 216, 242, 770 P.2d 182 (1989).

Here, as indicated in their recitation of the facts supporting their summary judgment, Respondents USB and SPS relied solely on the declaration of their counsel in moving for summary judgment, without providing factual evidence of the claims made in his affidavit. *See* CP 203-215. These issues go to the heart of the dispute, which is why Washington's RPCs prohibit a lawyer from acting as a witness in the same case in which they are an advocate. RPC 3.7(a). They were made improperly in violation of RPC 3.7(a) and relied upon by the Superior Court in error.

Finally, as briefed below, production of a copy of the note on the day of summary judgement does not, and could not, establish that USB as Trustee was a holder or the beneficiary when Chase appointed NWTS the successor trustee on behalf of Bank of America when they initiated a nonjudicial foreclosure against Mr. Bucci in 2009, 2010, and 2013. CP 564 ¶ 7; 565 ¶¶ 15, 18. Respondents argument that production of the note in court years after the nonjudicial foreclosure was initiated automatically makes them the beneficiary years earlier is a fallacy. ***Blair v. Northwest Trustee Services***, 193 Wn. App. 18, *8, ___ P.3d. ___ (Div. III 2016). At most, producing a note in court determines the producing entity is in possession of that note on that day.

Additionally, even though the NWTS stated it provided its entire

trustee file, and that file did not contain a copy of the Bucci-WAMU note, Mr. Stenman testified under penalty of perjury that upon receiving the referral in 2009, NWTS was provided with a copy of the Note. *Compare* Trustee's File *with* CP 563 ¶ 5 & CP 573.

Further, during the course of this litigation Sunserayer Edwards submitted a "true and correct" copy of the note under the penalty of perjury. CP 922 ¶ 3. That copy of the note is "CERTIFIED TRUE EXACT COPY OF THE ORIGINAL." CP 927. Importantly, the copy of the note contains no endorsement. CP 932. Shortly before, J. Will Eidson submitted a "true and correct" copy of the note under the penalty of perjury. CP 220 ¶ 2. That copy of the note contains an indorsement. CP 229. In sum, multiple entities have claimed to submit "true and correct" copies of the note, each different from one another. *Compare* CP 932 *with* CP 229.

C. The Superior Court erred in finding the Bucci-WAMU note was negotiable when the note facially allows Mr. Bucci to borrow between $1,530,000 and 1,759,500.00

Counter to Respondents USB, SPS, and Chase's reframing of Mr. Bucci's argument, Mr. Bucci is not arguing that the current balance of the note must be evidenced and fixed from the face of the document. Mr. Bucci is arguing that the original principal balance of the note must be a fixed amount, not a range of possible amounts, on the face of document.

Mr. Bucci's note is similar to the note in the USB and SPS's citation to, ***In re Hip, Inc.***, where the court ruled the amount was not for a sum certain because the borrower could take out advances to increase the principal. USB/SPS's Answer at 11 n. 11 (citing ***In re Hip., Inc.***, 71 BR 643, 649 (Bank N.D. Tex 1987)). Because Mr. Bucci's note allows for increases in the principal,[2] the amounts of which are undeterminable from the face of the instrument, it lacks any "commercial certainty." *Compare id. with supra* n. 2 (citing CP 570 at ¶4(G)).

The Bucci-WAMU note allows Mr. Bucci to borrow between $1,530,000.00 and $1,759,500.00 **as principal**. CP 224. This is exactly the same as the non-negotiable promissory note discussed in ***In re Hip***, which stated "principal sum of TWO MILLION AND NO/100 ($2,000,000.00) DOLLARS, or so much thereof as may be advanced to the undersigned." ***In re Hipp***, 71 B.R. at 649. Mr. Bucci can access the available loan amount above $1,530,000.00 simply by not paying all the interest due whenever he chooses. CP 224. This is no different than any other requirement contained in the non-negotiable note in ***In re Hip*** that the borrower must comply with in order to get "advance[s]" up to $2,000,000.00. ***In re Hipp***, 71 B.R. at 649.

Accordingly, the Bucci-WAMU note is not an instrument for a fixed

[2] a.k.a. "the amount borrowed"

amount of money under the definition of negotiable instrument and Ch. 62A.1 RCW & Ch. 62A.3 RCW do not apply.[3] RCW 62A.3-104(a) (A negotiable instrument is, *inter alia*, an unconditional promise or order to pay a fixed amount of money.) (emphasis added).

Additionally, USB, SPS, and Chase's argument is destroyed by the fact that years after the note was executed, Respondents claimed Mr. Bucci's principal amount was a higher and different amount, than what is listed on the face of the note. The face of the note lists the principal amount as $1,530,000.00. CP 568. On the Notice of Trustee's Sale from 2009, NWTS listed the principal amount as $1,607,986.49, a rise in principal of over $77,000. CP 265, 267.

D. The Superior Court erred in granting USB, SPS, and Chase's motions for summary judgment that they were beneficiaries during 2009-2013.

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 erred by ruling that USB as trustee was

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[3] ***See 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 beneficiary of Mr. Bucci's non-negotiable note at the time Chase and NWTS initiated the nonjudicial foreclosure in 2009 simply because the attorney for USB and SPS presented a promissory note at a summary judgment hearing in 2015, as such a finding is not supported by the law. *See* RCW **62A.3-102; *see also Brown v. Washington State Department of Commerce***, 184 Wn.2d 509, 524, 359 P.3d 771 (2015).

Importantly, the cases cited by Respondents USB and SPS as to why they are the beneficiary all include a basic assumption that they are a holder under RCW 3A. *See* USB/SPS's Answer at 4-5 (***citing Brown***, 184 Wn.2d 509; ***Bain v. Metro Morg. Grp., Inc.***, 175 Wn.2d 83, 104, 285 P.3d 34 (2012); ***Lynott v. Mortg. Elec. Registration Sys., Inc.***, No. 12-cv-5572-RBL, 2012 WL 5995053, at 2 (W.D. Wash. Nov. 30, 2012). Accordingly, their application to the present case is unhelpful when they rest on a primary finding of holdership.

To nonjudicially foreclose, the foreclosing entity must be a beneficiary under RCW 61.24.005(2). ***Bain***, 175 Wn.2d at 110; ***Bavand v. OneWest Bank, F.S.B.***, 176 Wn. App. 475, 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 Deeds of Trust Act ("DTA") does not define the term holder, courts look to the UCC for guidance. ***Bain***, 175 Wn.2d at 104; ***Brown***, 184 Wn.2d at 539 ("Bain thus recognized that holding the note is essential to beneficiary status.")

In Washington, the term holder is defined under RCW 62A.1-201(21)(A) & Ch. 62A.3. However, 62A.1-201 and Ch. 62A.3 RCW apply only to instruments that are negotiable. 62A.1-201(21)(A) 62A.3-102 ("This article applies to negotiable instruments). ***See also Brown***, 184 Wn.2d at 524 (whether a promissory note is subject to article of the UCC depends upon whether or not it it negotiable.)

When a promissory is not a negotiable instrument, contract law applies and one would need to establish their rights under common law contracts in order to enforce, such as demonstrating valid assignments and a chain of title from the original lender. ***Bain***, 175 Wn.2d at 111 (If the original lender had sold the loan, that purchaser would need to establish ownership of the loan, either by demonstrating that it actually held the promissory note or by documenting chain of title transactions." Here, where it is impossible to show note holdership under Ch. 62A.1 & 62A.3 RCW, demonstration of the chain of title through valid assignments is necessary. ***See id.***

Further, Respondents were granted summary judgment even though

they did not provide evidence that Bank of America, Chase or USB was the beneficiary at the time the nonjudicial foreclosure was initiated on June 26, 2009, June 8, 2010, and March 12, 2013. *Compare* CP 221 at ¶4 (counsel's representation that USB was current holder in 2015 *with* CP 352-371 (first Notice of Trustee's Sale issued in 2009)). ***See e.g. Bavand***, 176 Wn. App. at 486-87; ***see also e.g. Rucker***, 177 Wn. App. at 13-16. Tellingly, the purported "note holder" Respondent USB provides no citation that would explain their authority for conducting a nonjudicial foreclosure, aside from their production of a note at the summary judgment hearing years after initiation of nonjudicial foreclosure proceedings. *See* USB/SPS's Answer. ***See Blair***, 193 Wn. App. at *8.

Instead, Respondent Chase, a former loan servicer, cites to a number of corporate documents detailing larger transactions of Washington Mutual, the original lender. *See* CP 952-1073. However, none of these documents actually show Washington Mutual assigned Mr. Bucci's note, in accordance with the formalities of Washington contract law. ***See Demopolis v. Galvin***, 57 Wn. App. 47, 786 P.2d 804 (Div. 1 1990) (quoting 6A C.J.S. Assignments § 46 (1975); ***accord***, 6A C.J.S., *supra* at § 49)("A valid assignment must describe the subject matter of the assignment "with such particularity as to render it capable of identification."). Instead, Respondent Chase points to a number of

agreements, none of which identify Mr. Bucci's loan. *See* CP 953-1073. For example, respondents point to CP 922-23 ¶6 for the proposition that Mr. Bucci's note is owned in a WAMU trust initially by WAMU; yet, the PSA included is not even the full document,[4] does not state WAMU is the owner, and nowhere provides identifiable information that Mr. Bucci's loan was assigned to the trust. *Id.*

E. The Superior Court erred in dismissing Mr. Bucci's CPA claims against Respondents:

At summary judgment, Mr. Bucci presented evidence that Respondents had engaged in unfair or deceptive conduct. CP 294-323, 1139-1163, 1464-1490, 1506-1531. Additionally, Mr. Bucci presented evidence that all Respondents' conduct caused him injury. *Id.*

i. CPA claims based upon DTA violations do not require showing additional elements of materiality and prejudice.

Washington Courts have already rejected Respondent NWTS' argument that DTA based violations, sought under the CPA, require a showing of materiality and prejudice. NWTS's Answer at 16. The Supreme Court has been clear that DTA violations actionable under the CPA follow the exact same elements and standards as all CPA claims. ***Frias***, 181 Wn.2d at 430 ("Frias' CPA claim must be analyzed under the same principles that apply to any CPA claim."); ***Lyons v. U.S. Bank Nat.***

[4] The PSA totals 158 pages, but the copy produced is approximately 18.

Ass'n., 181 Wn.2d, 775, 785, 336 P.3d 1142 (2014). The Washington Supreme Court in ***Frias*** could not have been more clear when it emphatically and unequivocally stated:

> As noted above, nothing about the DTA indicates a CPA claim should be subject to a different analysis where the CPA claim is premised on alleged DTA violations as opposed to any other alleged wrongful acts. In response to the second certified question, we hold that the analysis of the elements of a CPA action premised on alleged DTA violations is the same as the analysis of the elements of a CPA claim premised on any other allegedly unfair or deceptive practice with a public interest impact occurring in trade or commerce that has allegedly proximately caused injury to a plaintiff's business or property. *See, e.g.,* ch. 19.86 RCW; *Klem,* 176 Wash.2d at 782–97, 295 P.3d 1179; *Panag,* 166 Wash.2d at 37–65, 204 P.3d 885; *Hangman Ridge,* 105 Wash.2d at 783–93, 719 P.2d 531.

Frias, 181 Wn.2d at 432-33. NWTS' request that this court add new and additional elements to the CPA when the claim is based on violation of the DTA, would directly conflict with the Washington Supreme Court's holdings in ***Lyons*** and ***Frias***. ***Id.***

ii. Unfair or deceptive conduct in this case

a. The Superior court erred by granting NWTS' summary judgment when it relied on an equivocal declaration to initiate a nonjudicial foreclosure on Mr. Bucci in violation of the CPA

The Superior Court erred in granting summary judgment to NWTS when NWTS relied on an ambiguous beneficiary declaration prior to recording, transmitting, or serving a notice of trustee's sale on Mr. Bucci's

home. In ***Blair***, Div. III emphasized that a Trustee's duty under RCW 61.24.030(7) must be complied with prior to conducting the nonjudicial foreclosure.

> The trial court allowed BoA to file a supplemental declaration. The supplemental declaration stated that BoA had held the promissory note for all times relevant. Based on this, the trial court excused NWTS's violation. In doing so, the trial court erred. The supplemental declaration came after the fact, and NWTS had to comply with RCW 61.24.030(7)(a)'s proof requirement "*before* recording, transmitting, or serving the notice of trustee's sale." *Trujillo,* 183 Wash.2d at 834 n. 10, 355 P.3d 1100. **Because NWTS relied on the ambiguous beneficiary declaration prior to recording, transmitting, or serving the notice of trustee's sale, it violated RCW 61.24.030(7)(a).**

Blair, 193 Wn. App. at *8 .

Importantly, NWTS does not argue that the declaration it relied upon was insufficient proof. NWTS's Answer at 20. Instead, NWTS argues (1) that Mr. Bucci failed to provide contradictory evidence that they were foreclosing on behalf of the wrong party and (2) NWTS had other proof that they were foreclosing on behalf of the correct party in order to proceed with the nonjudicial foreclosure against Mr. Bucci. *Id.* at 20 -25.

1. NWTS failed to adhere to their basic legal duties

Respondents NWTS, USB, and SPS argue that NWTS does not have a duty to investigate the veracity of documents provided by the beneficiary and erroneously argue Mr. Bucci never submitted any contradictory

evidence. NWTS's Answer at 30; USB/SPS's Answer at 24. However, the law firmly places the duty to verify the source of its authority upon NWTS before it can proceed with a nonjudicial foreclosure. *See generally* RCW 61.24; ***Lyons***, 181 Wn.2d at 787 (duty to do an investigation); ***Klem v. Washington Mutual Bank,*** 176 Wn.2d 771, 295 P.3d 1179 (2013) ("An independent trustee, who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the borrower...")

The Washington Supreme Court has held that "if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty." ***see Lyons,*** 181 Wn.2d at 790. Further, the trustee is not entitled to rely on the beneficiary's declaration if it has violated its duty of good faith. RCW 61.24.030(7)(b). The Washington Supreme Court has also held the trustee has an affirmative duty to investigate the origin of its authority, which at minimum includes a cursory investigation. ***Lyons***, 181 Wn.2d at 787 quoting ***Walker v. Quality Loan Service Corp.***, 176 Wn. App. 294, 309-10, 308 P.3d 716, 727 (Div. I 2013). Accordingly, under ***Lyons,*** NWTS' concession that the beneficiary declaration was defective automatically brings with it the legal duty to verify the veracity of the referring entity before proceeding with a nonjudicial foreclosure. ***See id.***

Here, there was no investigation done before NWTS began creating and issuing notices to Mr. Bucci including the notice of default and the notice of foreclosure. *See* CP 564 ¶ 7, 409 (NWTS issued Notice of Default upon receiving a referral and prior to appointing itself successor trustee or completing the assignment of the deed of trust).

2. NWTS attempts to manufacture proof it complied with its duties

(i) Appointment and Assignment

NWTS answer is a blatant attempt to create evidence that was not in their possession prior to initiating a nonjudicial foreclosure in order to circumvent their statutory duty. First, NWTS points to its appointment as successor trustee by the loan trust, through an attorney in fact, as proof the loan trust had authority to foreclosure. NWTS's Answer at 22. However, the fact that a different entity was appointing them than the loan trust, only demonstrates there was conflicting information that needed to be investigated. *See id.* Additionally, NWTS was the entity who created the appointment and sent it to be signed.CP 348,[5] 409. In addition to creating its own appointment, NWTS also facilitated the Assignment of Deed of Trust in July of 2009. CP 345[6], 409. NWTS completed these recordings

[5] The Appointment of Successor Trustee, has the return address for Northwest Trustee Services and was executed on July 6, 2009

[6] The Assignment of Deed of Trust was executed on June 29, 2009, has the return address for Northwest Trustee Services, Chris Ashcroft. CP 770

after beginning the nonjudicial foreclosure, including issuing and posting the Notice of Default on June 29, 2009 as Bank of America's duly authorized agent. CP 564 ¶ 7, 409. NWTS also charged for recording the appointment and the assignment. CP 409.[7] Accordingly, NWTS creation of documents after beginning the nonjudicial foreclosure[8] are not sufficient proof under ***Lyons*** or RCW 61.24.030(7). ***See Lyons***, 181 Wn.2d at 787.

(ii) Trustee's Sale Guarantee

The next piece of evidence NWTS points to is the Notice of Trustee's Sale Guarantee. NWTS's Answer at 22. NWTS claims it received an endorsement from the title company confirming the trust's identification in the public records as the beneficiary, which their insurance company stated as, "Bank of America, National Association as Trustee as successor by merger to LaSalle bank, National Association as trustee for WaMu Mortgage Pass-through Certificates Series 2007-0A6 was the beneficiary." *Id.* (citing CP 1296, 1323). NWTS stated,

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[7] 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.

[8] By its own admission, NWTS did not receive the referral to begin a nonjudicial foreclosure until June 29, 2009. CP 1295 ¶ 7. This referral came from Chase and Chase told NWTS to initiate foreclosure in the name of Bank of America. CP 1295-96 ¶7. NWTS charged a fee and completed the Notice of Default on June 29, 2009 before they were appointed and before they completed the assignment to make it look like chain of title was correct.

> in addition to NWTS' business practice and industry knowledge as foreclosure trustee, the Trustee's Sale Guarantee assures NWTS of the correctness of the information contained therein, it identifies the record owners and lists all exceptions of record against a secured property, and it provides the names of the those individuals or businesses who should receive foreclosure notices."

CP 1296 at ¶ 9, 1323. NWTS stated that they got the Trustee's Sale Guarantee on September 14, 2009. CP 1297 ¶14. Yet, they issued a Notice of Trustee Sale more than a month prior on August 13, 2009. CP 1297 ¶ 13.

However, the document used by the title company as the basis for this statement was the NWTS created assignment, that was recorded in the public records on July 10, 2009, along with the appointment of successor, after NWTS had already began the nonjudicial foreclosure. CP 345, 409, 564 ¶ 7, 1323.

This is in conformity with NWTS business practices to record documents in the public record to make the record appear correct. CP 1214 at 35:8-16. Causing documents to be created and recorded to make it look like you have authority, does not give you authority. This only proves that NWTS had no proof, and worked with Chase after issuing a notice of default to Mr. Bucci, to create the record and make the nonjudicial foreclosure look correct so the title insurance would come back with confirmation after their manufacturing of the record was complete.

b. Unfair or deceptive conduct by USB, SPS, and Chase

Respondents argue Mr. Bucci cannot show an unfair or deceptive act on behalf of Respondents, because USB as Trustee was the holder of the note and beneficiary of the deed of trust. Chase's Answer at 18-19; USB/SPS's Answer at 25-26. However, USB cannot be a holder of Mr. Bucci's note, as discussed at length *supra*. USB continued misrepresentation of its status as a note holder, is an unfair or deceptive act, in and of itself. ***Bain***, 175 Wn.2d at 117 (court found that it was deceptive to claim to be a beneficiary when an entity was not).

Respondent Chase committed an unfair or deceptive act, as discussed in Mr. Bucci's Opening Brief by advising Mr. Bucci to fall behind on his mortgage payments in order to receive a loan modification and then by appointing NWTS without authority. *See* Opening Brief at 30-33; CP 326 at ¶8; CP 1544-44545 at ¶¶3-8.

Additionally, Respondent NWTS committed an unfair or deceptive act by violating its duty of good faith under RCW 61.24.010(4) and failing to be neutral. *See* Opening Brief at 37. Finally, it was error for the court to grant summary judgment on Mr. Bucci's CPA claim where there was genuine issue of material fact regarding whether the Appointment of Successor Trustee by Chase was deceptive. Finally, Mr. Bucci set forth numerous other CPA violations in his opening brief that were not

addressed by Respondents' answering briefs. See Opening Brief at 25-37.

iii. Public interest impact of Respondents' Actions

Respondent NWTS argues that the beneficiary declaration at issue in this matter lacks the "capacity to deceive a substantial portion of the public." NWTS's Answer at 32. However, NWTS' analysis erroneously merges the five (5) different ways a party can show public interest impact, cites cases analyzing the "public interest impact" requirement as it existed before RCW 19.86.093 was enacted,[9] and adds a "substantial" standard not present in RCW 19.86.093. *See id.*

Further, this Court has already held that it is Mr. Bucci's analysis of the public interest impact that is correct and not NWTS', nor the Superior

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[9] **WPI 310.05 Public Interest Element in Private Disputes (WITHDRAWN)**

Previously, this instruction addressed the public interest element for private disputes, while former WPI 310.04 addressed the same element for consumer disputes. In 2009, the Legislature enacted RCW 19.86.093, which set forth a new "public interest" test and effectively removed the distinction between private and consumer disputes. See Laws of 2009, Chapter 371, § 2 (effective for causes of action that accrue on or after July 26, 2009). Accordingly, the new statutory test has been incorporated into WPI 310.04; WPI 310.05 has been withdrawn.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.05 (6th ed.)

See also **WPI 310.04 Public Interest Element**

Prior to 2009, violations of the public interest were determined by using two separate common law tests — one applied to consumer disputes, and the other to private disputes. See e.g., Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 789–91, 719 P.2d 531 (1986). Accordingly, each common law test was addressed in a separate pattern jury instruction — WPI 310.04 for consumer disputes, and WPI 310.05 for private disputes. The 2009 enactment replaces the common law tests and removes any need to distinguish between consumer and private disputes. Accordingly, this WPI 310.04 has been revised to address the requirements of RCW 19.86.093, and WPI 310.05 has been withdrawn.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.04 (6th ed.)

Court's. ***See Rush v. Blackburn***, 190 Wn. App. 945, 361 P.3d 217 (Div. I 2015). In ***Rush***, this Court laid out the public interest as follows: "[t]he public interest element can be satisfied per se where the plaintiff shows a violation of a statute that contains a specific legislative declaration of public interest impact." ***Id. at 968*** (citing ***Klem***, 176 Wn.2d at 804). In addition, under section, "Subsection (3), by contrast, "bases public interest impact on actual injury and capacity to injure." ***Id.*** "For violations failing under subsection (3), "whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed."" ***Id.*** (citing ***Hangman Ridge Stables Inc. v. Safeco Title Ins. Co***, 105 Wn.2d 778, 789-90, 719 P.2d 531 (1986)).

In his opening brief, Mr. Bucci provided uncontradicted evidence that the public interest element was *per se* met. *See* Opening Brief at 38-40. In addition, Mr. Bucci provided evidence at summary judgment that NWTS' action of solely relying on deficient beneficiary declaration and disregarding its duty of good faith is NWTS' business practice. CP 1243 at 29:14-22; CP 1246 at 40:22-25, 42:12-13.

iv. Mr. Bucci established the injury element of his CPA claim at summary judgment

Respondents argue Mr. Bucci has no damages under the CPA because,

"Bucci cannot show that any action of the Respondents to enforce their contractual rights after Bucci's multiple payment defaults was the "but for" cause of any damage or injury." USB/SPS's Answer at 27. Respondents misunderstand the injury element of the CPA. The Washington Supreme Court in ***Nordstrom, Inc. v. Tampourlos*** distinguished between injury and damages under the CPA: "This distinction makes it clear that no monetary damages are need be proven, and that nonquantitative injuries, such as loss of goodwill would suffice for this element of the Hangman Ridge Test." 107 Wn.2d 735, 740, 733 P.2d 208 (1987). "A plaintiff can establish injury based on unlawful debt collection practices [under the CPA] even when there is no dispute to the validity of the underlying debt." ***Frias***, 181 Wn.2d at 431 (citing ***Panag***, 166 Wn.2d at 55-56)). 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 v. *Omni Ins. Co.***, 138 Wn. App. 151, 159 P.3d 10 (Div. I 2007), affirmed on different issues in ***Panag***, 166 Wn.2d 27. "[D]istraction 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; ***Rush,*** 190 Wn. App. at 966 (Depriving individual of his vehicle is "substantial injury.").

F. The Superior Court erred in dismissing Mr. Bucci's negligence claims

Respondent NWTS argues the loan agreement in this case bar's Mr. Bucci's negligence claims. NWTS's Answer at 38. However, the independent duty doctrine is not a rule of general application; the independent duty doctrine only applies if the Washington State Supreme Court endorses its application to a given scenario. ***See Elcon Constr., Inc. v. E. Wash. Univ.***, 174 Wn.2d 157, 165, 273 P.3d 965 (2012).

In support, NWTS cites ***Badgett v. Security State Bank***, 116 Wn.2d 563, 807 P.2d 356 (1991), which facts are entirely unrelated to the issue here. In ***Badgett***, the court addressed whether a bank could be held liable for negligence when the borrower alleged the bank did not negotiate in good faith nor cooperate in negotiating the terms of the loan. ***Id.*** at 569. Additionally, in ***Badgett***, there is no discussion whatsoever regarding the "independent duty doctrine." ***see generally id.*** Therefore, ***Badgett*** is not factually on point. NWTS' duty in nonjudicially foreclosing upon Mr. Bucci's home comes from the DTA, not a contract. *See* RCW 61.24.

Further, Respondent Chase argues that a loan servicer has no duty to a homeowner. Chase's Answer at 31 (citing ***Miller v. U.S. Bank of Wash., N.A.***, 72 Wn. App. 416, 865 P.2d 536 (Div. I 1994). It cites ***Miller*** for the proposition that a lender is not a "fiduciary" to its borrower. ***Id.*** However,

Mr. Bucci's claim is for negligence, not breach of a fiduciary duty. *See* Opening Brief at 45-47.

In addition to the common law duty requiring all actors to be reasonable in their actions, "[a] breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence *per se*, but may be considered by the trier of fact as evidence of negligence." RCW 5.40.050. Here, there are numerous statutes that establish duties related to loan servicing,[10] debt collecting,[11] and foreclosure.[12] Even though some of these statutes do not apply to National Banks, they still establish a duty of reasonable care under RCW 5.40.050.

G. NWTS and RCO are not entitled to sanction for a frivolous appeal

Mr. Bucci appealed the order granting summary judgment for NWTS and RCO because they motioned together and submitted a joint order to the Superior Court Judge to sign. Mr. Bucci was required to appeal the order in order to preserve his claims against NWTS on appeal. *See* RAP 5.1. Now, RCO claims it is entitled to attorney fees for having to respond to a baseless inclusion of them in the appeal; yet, by their own admission, they did not have to do any work in responding to any issues against it. They have not established they were harmed. ***See Kinney v. Cook***, 150

[10] *See e.g.* RCW 31.04.027; RCW 31.04.208; RCW 31.04.165; WAC 208-620-550; WAC 208-620-551; WAC 208-620-900
[11] *See e.g.* Ch. 19.16 RCW
[12] Ch. 61.24 RCW

Wn. App, 150 Wn. App. 187, 195, 208 P.3d 1 (Div. III 2009). Further, RCO should have motioned and submitted a separate order on summary judgment, if it was worried about its affiliation with NWTS on appeal.

Their answer is written on behalf of NWTS, except for the page they have drafted requesting attorney fees. NWTS's Answer at 12. Accordingly, it makes no sense to ask for attorney fees for work not completed. Additionally, in the one page argument regarding RCO, none of their examples of when an appeal is frivolous occurred here[13], nor does RCO claim they did. NWTS Answer at 12. For example, counsel did not fail to cite to any applicable authority in support of their arguments, nor did RCO claim this. Nor did Mr. Bucci fail to make a debatable showing that the Superior Court abused its discretion, as that is not even the standard on an appeal of summary judgment. Mr. Bucci is appealing as a matter of right under RAP 2.2. Finally, Mr. Bucci is not appealing issues that were not raised below, nor is RCO claiming this. Finally, the record contained facts supporting inclusion of RCO in the case, including RCO and NWTS commingling and working together as a trustee. *See Supra* n. 5

[13] "All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." ***In re Marriage of Schnurman***, 179 Wn. App. 634, 644, 316 P.3d 514 (Div. I 2013) (citing ***Tiffany Family Trust Corp. v. City of Kent***, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). ; ***see also Kinney v. Cook***, 150 Wn. App. at 195 ("Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant.")

(Trustee's File at 9-14, 1352-1357;[14] 318;[15]). RCO provides no support for its wild proposition that Mr. Bucci's decision to limit the assignments of error out of limitation on briefing length subject his counsel to sanctions. Accordingly, RCO's request is baseless, unreasonable, and unsupported by any law or fact.

H. Mr. Bucci has the legal right to challenge documents being used to take his home.

Respondents argue this court to adopt the position that only borrowers at risk of paying twice have a right to challenge foreclosure documents. USB/SPS's Answer at 20-21. However, it is well settled that borrowers have standing to challenge documents used to nonjudicially foreclose. ***Bavand***, 176 Wn. App. at 486-90 (challenging appointment of successor trustee); ***Rucker***, 177 Wn. App. at 13-18 (same); ***Lyons***, 181 Wn.2d 7at 789-92 (challenging beneficiary declaration); ***Bain***, 175 Wn.2d at 90 (challenging appointments of successor trustee by MERS.)

Moreover, Respondents erred in its use of the term "standing", in this regard.

> What is labeled as a lack of standing is actually a decision that the governing substantive law offers no relief. If, however, a mortgagor could obtain relief under a different procedural vehicle — for example, in a defense to a suit to enforce the note or a foreclosure action — the rationale for

[14] RCO Billing for Trustee Services

[15] "Trustee/Foreclosure Counsel Certificate of Compliance" ("I am employed by Northwest Trustee Services, Inc./RCO Legal, P.S.")

> this theory of lack of standing would evaporate. This is the holding of the recent decision of the U.S. Court of Appeals in Culhane v. Aurora Loan Services, 708 F.3d 282, 291 (1st Cir. 2013). In Culhane, the court explained that: There is no principled basis for employing standing doctrine as a sword to deprive mortgagors of legal protection conferred upon them under state law. We hold, therefore, that a mortgagor has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status as mortgagee. *Id.* at 291; see also U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (Mass. 2011) (creating the state law protection relied upon by Culhane).

Dernier v. Mortgage Network, Inc., 2013 VT 96, P49 (Vt. 2013).

In this case, there is no substantive law that requires a debtor to establish they are at risk of paying twice before they challenge the collection methods employed by an entity claiming to be a creditor. In fact, as discussed throughout this reply, the substantive law is exactly the opposite.

I. The Superior Court erred in finding HOLA pre-empted Mr. Bucci's claims against JPMorgan Chase.

Here, just like at the Superior Court, the entirety of Chase's argument is that HOLA preempts Washington law even though Chase acted under color of Washington's DTA in order to foreclose. *See* CP 1101-12. Chase reasons that HOLA applies because the loan agreement was created by the now defunct Washington Mutual, FA ("WaMu"). However, by using the DTA for the benefit of its foreclosure remedies while simultaneously

seeking to be excluded from its regulations, Chase attempts to have its cake and eat it too. Accordingly, Mr. Bucci integrates the discussion regarding HOLA as it relates to the DTA contained at CP 1493-1504 which: (1) discusses the overall nature and breadth of law that HOLA and the DTA govern; (2) applies the two-step analysis to show Mr. Bucci's claims are **not** preempted by HOLA; (3) discusses problems with Chase' citations to legal precedents; (4) gives analysis of strong precedent overlooked by Chase; and, (5) entertains Chase's preemption argument by fully applying it to this case.

II. CONCLUSION

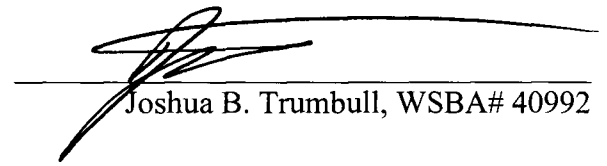
Mr. Bucci respectfully requests this court: 1) find the Bucci-WAMU note is not negotiable because it is not for a fixed amount of money; 2) reverse the superior court's grant of summary judgment to NWTS; 3) reverse the superior court's grant of summary judgment to Chase; 4) reverse the superior court's grant of summary judgment to USB & SPS; 5) find there was no evidence submitted showing that Chase, USB, or SPS were a proper beneficiary when NWTS was appointed successor trustee, therefore NWTS was wrongfully appointed; 6) find NWTS did not have proof sufficient to comply with RCW 61.24.030(7) before it recorded, transmitted, or served the notices of trustee's sale; 8) find Mr. Bucci has met all five elements of a Consumer Protection Act claim against all

Respondents; 9) find Respondents owed Mr. Bucci duties and Respondents breached those duties; 10) remand for trial to determine damages recoverable under the CPA; 11) remand for trial to determine causation and damages due to Respondents' breach of duties owed to Mr. Bucci.

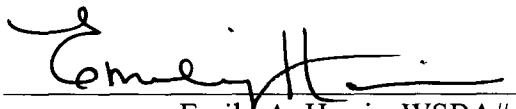
DATED this 1st day of July, 2016 at Arlington, Washington.

Respectfully Submitted By:

JBT & Associates, P.S.



Joshua B. Trumbull, WSBA# 40992



Emily A. Harris, WSBA# 46571

CERTIFICATE OF SERVICE

I, Ashley Brogan, 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 1st day of July, 2016, I caused to be served a true and correct copy of Appellant Frank Bucci's Reply Brief to respondents in the above title matter by causing it to be delivered to:

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DATED this 1st day of July, 2016 at Arlington, Washington.

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