

No. 74210-8-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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MICHAEL J. BEVERICK and CINDY M. BEVERICK, husband  
and wife,

Appellants/Plaintiffs,

v.

LANDMARK BUILDING AND DEVELOPMENT INC.; LAND  
TITLE & ESCROW COMPANY, and WMC MORTGAGE  
CORP., and AURORA BANK FSB, and U.S. BANK  
ASSOCIATION AS TRUSTEE for STRUCTURED ASSET  
CORPORATION MORTGAGE PASS CERTIFICATES, SERIES  
2007-GELI Acct. No. 0122944200 and BISHOP AND LYNCH OF  
KING CO., and MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., and NATIONSTAR MORTGAGE,

Respondents/Defendants.

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BRIEF OF APPELLANTS

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## I. INTRODUCTION

Appellants, MICHAEL J. BEVERICK and CINDY M. BEVERICK, husband and wife (hereinafter “Mr. and Mrs. Beverick”) initially sought to resist a *non-judicial* foreclosure initiated by parties with whom they never contracted, and then were confronted with a *judicial* foreclosure seeking a foreclosure of the same debt, all strangers to their original loan transaction with the exception of Respondent, BISHOP & LYNCH OF KING COUNTY, the trustee named in the borrowers’ Deed of Trust. Although there were numerous issues of material fact before the trial court regarding compliance with *RCW 61.24, et seq.* (hereinafter “DTA”) and questions concerning the legal sufficiency of statements offered the trial court on summary judgment, the ultimate factual question is whether the Respondent, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET CORPORATION MORTGAGE PASS CERTIFICATES, SERIES 2007-GEL1 60 Acct. No. 0122944200 (hereinafter “U.S. Bank”) is the “mortgagee” of the subject obligation with clear and undisputed authority and standing to judicially foreclose the subject obligation. However, the record on review does not provide the clear and undisputed answers necessary to affirm the trial court’s summary judgment of foreclosure as a matter of law. But the record before this Court does raises a number of questions of material fact. Indeed, virtually every assertion made by Respondents before the trial court on

summary judgment is legally unsound, unsupported by the record and/or factually questioned.

Reversal is the remedy.

## II. ASSIGNMENTS OF ERROR

The trial court erred by granting summary judgment on November 14, 2013, May 21, 2015 and October 16, 2015.

### Issues

1. Was the evidence relied upon by the trial court and Respondents, in the form of the testimony of A.J. Loll, Adam Hughes and Laura McCann, competent within the terms of *ER 801*, *ER 802*, and *CR 56(e)*?

2. Were there material issues of fact concerning Respondents' compliance with the Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA")? Specifically, were there material issues of fact concerning: (1) whether there was evidence before the trial court that the Pre-Forclosure Notice under *RCW 61.24.031* and the notices required to be incorporated into the Notice of Default under *RCW 61.24.030(8)(k)* were provided; (2) did the Notice of Default properly identify the "beneficiary" who declared Mr. and Mrs. Beverick to be in default, pursuant to *RCW 61.24.030(8)(c)*; (3) did the Notice of Default include all statements and representations required under *RCW 61.24.030(8)(k)*; and (4) did the Notice of Default properly identify the purported owner of the obligation or provide contact information for the purported owner of the obligation as required under *RCW 61.24.030(8)(l)*?

3. Were there issues of material fact as to whether the document Respondents alleged to be the original Note was in fact the original or a counterfeit?

4. Were there material issues of fact concerning U.S. Bank's status and standing to judicially foreclose as a "mortgagee" of the obligation, within the terms of *RCW 61.12.040* in dispute on summary judgment?

5. Was there evidence that Respondents' conduct violated the Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA")?

### III. STATEMENT OF FACTS

On May 1, 2006, Mr. and Mrs. Beverick executed a Note in favor of Respondent, WMC MORTGAGE CORP. (hereinafter "WMC") in the amount of \$409,600.00. CP 837-840. To secure repayment of the Note, Mr. and Mrs. Beverick executed a Deed of Trust in which WMC was identified as the "lender", Respondent, BISHOP & LYNCH OF KING COUNTY (hereinafter "Bishop & Lynch") was named trustee and Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS"), was named purported beneficiary as nominee for the lender. CP 64-86. The Deed of Trust was recorded on May 5, 2006.

On September 1, 2011, Mr. and Mrs. Beverick mailed a Qualified Written Request to Respondent, AURORA BANK, FSB (hereinafter "Aurora Bank"), pursuant to *12 USC §2605(e)*. CP 797, CP 805-806.

On September 13, 2011, Mr. and Mrs. Beverick received a response to their Qualified Written Request. In its response, Aurora Bank alleged that it was the servicer of the loan, which was owned by U.S. Bank at that time. CP 808-809. No information was given as to who currently held the obligation.

On September 20, 2011, Mr. and Mrs. Beverick received correspondence from Barbara Tishuk of McGinnis Tessitore Wutscher, LLP, representing that she represented Aurora Bank. CP 810-813.

On October 24, 2011, Mr. and Mrs. Beverick sent a Qualified Written Request to U.S. Bank. CP 816-817.

On November 2, 2011, Mr. and Mrs. Beverick received correspondence from Julie Kirby, purported Vice President for U.S. Bank, representing that U.S. Bank then held the obligation and that Aurora Bank was the servicer of the obligation. CP 818-819. Curiously, Ms. Kirby stated that “[a]s Trustee, U.S. Bank does not have any information to provide to you, nor do we have any control over the mortgage servicer. The servicer is an independent third party company and is not affiliated with U.S. Bank.” (Emphasis added) CP 818. From this it is apparent that Aurora Bank was not acting as an agent of U.S. Bank, raising the question as to who Aurora Bank acted on behalf of.

On January 17, 2012, MERS, an ineligible beneficiary, purportedly assigned its interest in the subject obligation to Aurora Bank. CP 170 and CP 824. This assignment was recorded on March 7, 2012.

On or about March 13, 2012, Bishop, White, Marshall & Weibel, P.S. executed, as attorneys for the purported deed of trust “beneficiary”, posted and served a Notice of Default, pursuant to *RCW 61.24.030*. CP 825-832. This Notice of Default was defective in a number of material ways, including, without limitation: (1) there was no evidence before the trial court that the Notice was preceded by the pre-foreclosure notices required under *RCW 61.24.031* and the Notice did not incorporate the specific warnings proscribed under *RCW 61.24.030(8)(k)*; (2) the Notice did not identify the “beneficiary” who declared Mr. and Mrs. Beverick to be in default, in violation of *RCW 61.24.030(8)(c)*; (3) the Notice did not include the statements required under *RCW 61.24.030(8)(k)*; and (4) the Notice failed to properly identify the purported owner of the obligation or provide contact information for the purported owner of the obligation, in violation of *RCW 61.24.030(8)(l)*.

On June 15, 2012, Aurora Bank provided Mr. and Mrs. Beverick notice that the servicing of their loan was being transferred to Respondent, NATIONSTAR MORTGAGE (hereinafter “Nationstar”). CP 841-842.

On August 27, 2012, this action was filed by Mr. and Mrs. Beverick seeking quiet title, cancellation of debt and violation of *RCW 19.86, et seq.* (hereinafter “CPA”). CP 188-200.

On August 22, 2013, U.S. Bank, Aurora Bank, Nationstar, MERS and Bishop & Lynch moved for summary judgement, pursuant to *CR 56*. CP 1107-1121. The motion was initially denied on September 30, 2013. CP 1275-1277.

On the day of the hearing, Mr. and Mrs. Beverick, with counsel, met with the attorney for Nationstar to inspect the document Respondents alleged to be the original Note. Upon inspection, Mr. Beverick determined the document to be a counterfeit. CP 795.

On October 9, 2013, U.S. Bank, Nationstar, MERS and Bishop & Lynch moved for partial reconsideration of the trial court's Order of September 30, 2013, pursuant to *CR 59(a)(3), (8) and (9)*. CP 1081-1098.

On November 14, 2013, the trial court granted Respondents' Motion for Partial Reconsideration, in part. CP 1282-1294. Of significance, the trial court specifically held that the following issues of material fact remained in controversy: (1) the authenticity of the indorsement of the Promissory Note; (2) the identity of the proper holder of the Note; (3) the authenticity of the Deed of Trust; (4) the party currently in possession of the obligation; and (5) the party entitled to enforce (PETE) the obligation. CP 1285.

On May 27, 2014, Aurora Bank assigned its interest in the subject obligation to U.S. Bank. CP 53, CP 88. This assignment was recorded June 13, 2014. This assignment was purportedly executed by Nationstar pursuant to a power of attorney, but the power of attorney identified as the basis of authority wasn't acknowledged by Nationstar until August 13, 2014 and does not identify the specific Trust that is a party to this action. CP 96-116.

On or about August 7, 2014, Nationstar filed an Amended Answer, Affirmative Defenses, Counter-claim and Third Party Complaint, seeking

judicial foreclosure of the subject obligation, pursuant to *RCW 61.12, et seq.* In its pleadings, Nationstar merely identified itself as the “current holder” of the obligation and fails to allege standing as the “mortgagee or his or her assigns”, as required under *RCW 61.12.040*. Moreover, Nationstar represented that it was specifically taking action on behalf of “U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET CORPORATION MORTGAGE PASS CERTIFICATES, SERIES 2007-GEL1.” CP 130. No competent evidence of U.S. Bank’s standing as owner and holder of the subject obligation was ever presented to the trial court by U.S. Bank or the Trust.

On March 23, 2015, Nationstar moved for summary judgment on its claim for judicial foreclosure, pursuant to *CR 56* and *RCW 61.12, et seq.* CP 1091-1106. In support of its motion, Nationstar offered the testimony of A.J. Loll, who testified that Nationstar acted on behalf of a power of attorney from U.S. Bank. CP 54-55, CP 91-116. However, the power of attorney did not identify the specific entity/trust identified in Nationstar’s Amended Answer, Affirmative Defenses, Counter-claim and Third Party Complaint. The closest entity/trust identified in the power of attorney to the one identified in Nationstar’s Amended Answer, Affirmative Defenses, Counter-claim and Third Party Complaint is “U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-GEL1.”

CP 113. Accordingly, there was an unresolved material issue of fact in dispute on summary judgment as to whether the entity/trust identified in Nationstar's Amended Answer, Affirmative Defenses, Counter-claim and Third Party Complaint was the same as the entity/trust identified in the power of attorney and Nationstar's standing to foreclose. Compare CP 113 with CP 130.

On May 21, 2015, the trial court granted Nationstar's motion for summary judgment, despite conflicting evidence regarding Nationstar's and U.S. Bank's standing to judicially foreclose, pursuant to *RCW 61.12, et seq.* CP 1287-1294.

On or about June 5, 2015, WMC moved for summary judgment, pursuant to *CR 56*.

On August 27, 2015, the trial court granted WMC's motion for summary judgment. CP 1278-1279. A final judgment was entered on October 16, 2015. CP 1042-1044.

On November 9, 2015, Mr. and Mrs. Beverick timely filed their Notice of Appeal. CP1189-1209.

#### IV. ARGUMENT

##### A. Standard of Review.

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297

P.3d 677 (2013) (hereinafter “*Schroeder*”) (citing *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004); *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002); *Lyons v. U.S. Bank*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014) (hereinafter “*Lyons*”); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485, 309 P.3d 636 (2013) (hereinafter “*Bavand*”). Indeed, the non-moving party’s factual allegations must be presumed to be true and all reasonable inferences from those allegations must be considered in favor of the non-moving party. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). Even hypothetical facts may be considered to determine if the trial court’s dismissal of the non-moving party’s claims was proper. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 296 P.3d 860 (2013).

Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Schroeder; Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *O.S.T. v. Regence Blue Shield*, 181 Wn.2d 691, 703, 335 P.3d 416 (2014); *Bavand*, at pg. 485. As noted in *Atherton Condo. App.-Owners Ass’n Bd. Of Dirs. V. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), “a material fact is one upon which the outcome of the litigation depends in whole or in part.” Although summary judgment is intended to avoid a useless trial, “a trial is not useless, but is absolutely necessary where there is a genuine issue as to any

material fact.” *Barber v. Bankers Life and Casualty Co.*, 81 Wn.2d 140, 144, 500 P.2d 88 (1972).

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56*. 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. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App. 252, 11 P.3d 883 (2000); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997).

In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary material must be taken as true. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963).

Summary judgment is appropriate if reasonable persons can reach only one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Shows v. Pemperton*, 73 Wn.App. 107, 868 P.2d 164 (1994); *Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996); *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997). When there is contradictory evidence, or the moving parties’ evidence is impeached, an issue of credibility is presented and the Court should not resolve issues of

credibility on summary judgment, but should reserve the issue of credibility for trial. *Balise v. Underwood, supra.*

Based upon the discussion below and the arguments raised in the pleadings before the trial court on summary judgment, there were genuine issues of material fact before the trial court that were summarily ignored. The remedy is reversal.

**B. Sufficiency of Supporting Affidavits and Declarations.**

On summary judgment, the trial court relied exclusively on the testimony of Adam Hughes, attorney for Aurora Bank and Nationstar (CP 597-630), A.J. Loll, a purported Vice President of Nationstar (CP 50-116) and Laura McCann, Vice-President of Aurora Commercial Corp., purported successor to Aurora Bank (691-703). However, the testimony offered by these individuals in their respective declarations and/or affidavits failed to meet the requirements of *CR 56(e)* or were incompetent under *ER 803(a)(6)* and *RCW 5.45.020*.

Each declarant claimed to have “personally reviewed” the records maintained by their respective clients or employer and had “personal knowledge” of the facts they related to the trial court. However, none of the declarants demonstrated sufficient personal and testimonial knowledge of the facts offered the trial court beyond conclusory statements and statements based entirely on hearsay. *ER 801, ER 802, CR 56(e)*. Under *CR 56(e)*, conclusory statements or “mere averment” that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *Blomster v.*

*Nordstrom, Inc., supra.*; Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4<sup>th</sup> Cir. 1972.) See also *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988).

Incredibly, none of the declarants specifically identify the documents they reviewed, ambiguously referring to them as “business records” of their respective clients or employer. However, these “business records” necessarily included records of third parties. As to the records actually attached to the sworn statements, there is no indication as to who prepared them, the source of the information or how the information was maintained and by whom.

A.J. Loll’s testimony was based solely on a review of Nationstar’s computer records. CP 51-52. He/she did not personally inspect the original Note or Deed of Trust or any other document included in the “collateral file”. He/she does not provide the dates of his/her employment, so it is impossible to determine whether he/she was even employed by Nationstar at the time the events related in his/her affidavit occurred or when (or if) Nationstar took possession of the original Note and Deed of Trust. He/she has no knowledge of where any of the purported “business records” came from, who prepared them, how they were maintained before being transferred to Nationstar, or when they were the submitted to Nationstar and by whom and whether the records he/she viewed have been modified or otherwise tampered with either prior or after transfer to Nationstar. But, what is clear is that A.J. Loll is merely parroting what he/she has seen on someone’s computer screen – nothing more.

What A.J. Loll offers this Court is not the sort of personal and testimonial knowledge required under *CR 56(e)*. Without a proper foundation, A.J. Loll's testimony fails to meet the requirements of *CR 56(e)*, that mandates supporting affidavits be "made on personal knowledge" setting forth such facts "as would be admissible in evidence" and affirmatively showing the "affiant is competent to testify to the matters stated." Since A.J. Loll relies exclusively on computer generated information that he/she has failed to share with this Court, he/she failed to establish the basis of his/her personal knowledge. When personal knowledge was lacking, A.J. Loll's testimony should have been given no weight by the trial court. See *CR 56(e); Loss v. DeBord*, 67 Wn.2d 318, 321, 407 P.2d 421 (1965).

The testimony of Mr. Hughes was obtained solely from his clients and constitutes rank hearsay. *ER 801* and *ER 802. Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 512 p.2d 225 (1973). He testifies that "Nationstar Mortgage removed the Beverick's original Promissory Note and Deed of Trust from its secure records depository and delivered them to my law firm" (CP 565), but how does he know this based on his personal knowledge? See also CP 598. Was he there? Did he go to Nationstar's secure depository and view the removal of the documents from the "collateral file"? He doesn't say. Although he testifies that he received the Note and Deed of Trust from Nationstar, that does not mean Nationstar didn't obtain the documents from another source. This is relevant as possession of the original Note and Deed of

Trust at specific points in the foreclosure process is important and was a disputed fact on summary judgment. CP 795. RCW 61.24.005(2); *Lyons v. U.S. Bank*, 181 Wn.2d 775, 336, P.3d 1142 (2014) (hereinafter “*Lyons*”); *Trujillo v. NWTS*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter “*Trujillo II*”); *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015) (hereinafter “*Brown*”)<sup>1</sup>.

Ms. McCann’s testimony is based in large part on “information transmitted by a person with knowledge” and computer screen shots. CP 678-690. Like A.J. Loll, Ms. McCann does not provide the dates of her employment, so it is impossible to determine whether she was even employed by Aurora Bank at the time the events she describes in her Declaration occurred or the “business records” she refers were executed or compiled. Ms. McCann does not allege that she has ever inspected the original Note and Deed of Trust or ever inspected the contents of the “collateral file”. Like A.J. Loll, Ms. McCann is merely parroting what she has seen on a computer screen. Specifically, based on hearsay obtained from DocTrack, Ms. McCann testifies as to the location of the “original Note at all times that it was in Aurora Bank’s possession.” CP 694, 702. But she doesn’t know this based on personal knowledge as required under *CR 56(e)*. Her testimony is based on

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<sup>1</sup> It is important to note that this does not appear to be a Freddie Mac or Fannie Mae insured transaction, so much of *Brown* is not applicable to the facts of this case.

inadmissible hearsay and should be given no weight. *ER 801* and *ER 802*; *Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 512 p.2d 225 (1973). As with A.J. Loll's testimony, where personal knowledge is lacking, Ms. McCann's testimony should have been given no consideration by the trial court and should not be given any weight by this Court on *de novo* review. *Loss v. DeBord, supra.*, at pg. 321.

While reviewing courts interpret the terms "custodian" and "other qualified witness" broadly, none of these declarants' testimony meet the requirements of *RCW 5.45.020*. See *State v. Quincy*, 122 Wn.App. 395, 95 P.2d 353 (2004). Specifically, most of the purported "business records" relied upon by these declarants were necessarily obtained from third-party sources. These third party sources necessarily include WMC, Wells Fargo, DokTrack, among others. Such third party records must be separately authenticated by the third party who compiled the records to meet the business records exception to the hearsay rule and the requirement that such testimony must be based on personal knowledge from the third party's records custodian that satisfies each of the elements of *RCW 5.45.020*. *State v. Weeks*, 70 Wn.2d 951, 953, 425 P.2d 885 (1967) (affirming trial court's decision that an out-of-state hospital record proffered by a physician was inadmissible hearsay and business records exception to hearsay rule was not established because "[t]here was no evidence by the custodian of records of the Arkansas hospital or by any other qualified person that the document in question was a business record"); *MRC*

*Receivables Corp. v. Zion*, 152 Wn. App. 625, 631 & n. 9, 218 P.3d 621 (2009) (reversing summary judgment entered in favor of debt collector, and identifying as one of the issues for determination on remand whether “Sharp’s affidavit [submitted by debt collector in support of summary judgment] presented only inadmissible hearsay” and met business records exception to hearsay rule, given the “lack of an explanation for how Sharp’s status as a Midland employee provide[d] her with personal knowledge of her assertions regarding MRC, Zion’s account with Providian, and how MRC came to own it”). Significantly, neither WMC, Wells Fargo nor DokTrack offered testimony to corroborate these declarants’ testimony on summary judgment. Absent a proper foundation, the testimony of A.J. Loll, Adam Hughes and Laura McCann must be given no weight or consideration by this Court on *de novo* review.

Furthermore, neither A.J. Loll, Mr. Hughes nor Ms. McCann provided the trial court, or this Court on *de novo* review, facts that would establish (1) how the documents they refer to are maintained, whether in hard copy or electronic; (2) if the records are maintained by electronic means, whether the computer document retrieval equipment used is standard; (3) the original source of the materials maintained; (4) the identity of the person who compiled the information contained in the files or computer printouts; (5) when, aside from the conclusory statements that they were made “at or near the time of the happening or event”, the records or the entries were made and; (6) how the

employer of each declarant relies on these records. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Without this information, there is no assurance that the information offered by these declarants was reliable without verification by the entity that provided the information as to the means by which the information was created and maintained. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982). There were simply no facts offered that justified the trial court's reliance on the information provided by these declarants.

Clearly, neither A.J. Loll, Mr. Hughes nor Ms. McCann offered the trial court on summary judgment the sort of personal and testimonial knowledge required under *CR 56(e)*. There were simply no facts offered the trial court that would justify its reliance on the information provided by these declarants. This sort of careless and conclusory testimony by mortgage lenders and loan servicers is all too common and has been roundly criticized by other trial courts in Washington.

In *McDonald v. OneWest*, 929 F. Supp. 2d 1079 (2013) (hereinafter "*McDonald*"), Judge Robert Lasnik was offered testimony by representatives of loan servicers on summary judgment similar to that offered by the declarants here. In *McDonald* Judge Lasnik observed:

The testimony of Mr. Boyle and Mr. Corcoran confirmed what this Court has long suspected: defendants have not taken their obligations as litigants in federal court seriously enough. *Rather than obtain*

*declarations from individuals with personal knowledge of the facts asserted or locate the source documents underlying its computer records, defendants chose to offer up what can only be described as a "Rule 30(b)(6) declarant" who regurgitated information provided by other sources. Rule 30(b)(6) is a rule that applies to depositions in which an opposing party is given the opportunity to question a corporate entity and bind it for purposes of the litigation. A declaration, on the other hand, is not offered as the testimony of the corporation, but rather reflects – or is supposed to reflect – the personal knowledge of the declarant.*

Not surprisingly given the fact that his counsel apparently did not understand the difference between a declaration based on personal knowledge and a Rule 30(b)(6) deposition, Mr. Boyle's declarations consist of sweeping statements, a few of which may be within his ken and admissible, but most of which are assuredly hearsay. When he was asked to sign a declaration in this case, he thought he was responding on behalf of OneWest and therefore felt justified in questioning co-workers, running computer searches, and reviewing other sources before reporting their statements as his own. Nothing in his declarations would alert the reader to the fact that Mr. Boyle was simply repeating what he had heard or read from undisclosed and untested sources. When his statements turned out to be untrue, Mr. Boyle conveniently blames inaccuracies in the underlying documentation, computer input errors, or faulty reporting. Had defendants made the effort to produce admissible evidence in the first place, these errors may have been uncovered and avoided before they could taint the discovery process in this case.

*McDonald*, 929 F. Supp. at 1090-1091 (Emphasis added.)

The same criticisms can be lodged against the testimony of A.J. Loll, Mr. Hughes and Ms. McCann in all forms offered to the trial court on summary judgment.

Finally, we know nothing about A.J. Loll's or Ms. McCann's actual work activities or how they are conceivably qualified to speak to the issues they attempt to address. Absent a proper foundation, A.J. Loll's, Mr. Hughes' and

Ms. McCann's testimony constituted rank hearsay and should not have been considered or given any weight by the trial court and should be given no weight by this Court on *de novo* review. See *ER 803(a)(6)* and *RCW 5.45.020*. Absent credible and competent evidence to support Respondents' claims, the trial court's summary judgment should be reversed and this matter remanded for further discovery and hearing.

C. Violations of the DTA

The Washington Supreme Court has often stated that the DTA must be strictly construed in the borrower's favor. *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter "*Albice*") (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007) (hereinafter "*Udall*")); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012) (hereinafter "*Bain*"); *Schroeder*, at pg. 105. See also *In re Fritz*, 225 B.R. 218 (E.D. Wash. 1997); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988); *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 306, 308 P.3d 716 (2013) (hereinafter "*Walker*"); *Bavand*, at pgs. 485-486. This standard leaves no room for excuse of "mere technical violations." Substantial compliance with the statutory provisions of the DTA is not enough.

While Mr. and Mrs. Bevericks' claims against Respondents were initially plead and characterized as a quiet title action, they were precipitated by the initiation of a non-judicial foreclosure action through the service and

posting of a Notice of Default under *RCW 61.24.030*. CP 825-832. On summary judgment, the trial court completely ignored numerous violations of the DTA in dismissing Mr. and Mrs. Bevericks' claims, including their CPA claims.

i. Violation of *RCW 61.24.031*.

On or about July 22, 2011, the DTA was amended to require specific pre-foreclosure notices. See *RCW 61.24.031*; *Brown*, at pg. 516. Specifically, *RCW 61.24.031* was enacted to inform borrowers like Mr. and Mrs. Beverick of their right to “meet and greet” their lender and seek a state sponsored mediation (hereinafter “FFA”). The purpose of any such a “meet and greet” and mediation is to provide the homeowner and lender a forum for working out alternatives to foreclosure. See 2011 Findings-Intent following *RCW 61.24.005* and *RCW 61.24.163(7)*. However, homeowners like Mr. and Mrs. Beverick cannot effectively take advantage of FFA mediation if their rights are not disclosed to them. Indeed, the FFA is intended to be remedial in nature and this Court has ruled that since the FFA is remedial, it should be applied retroactively.

Here, there was no evidence offered the trial court that the pre-foreclosure notices were ever provided, as required under *RCW 61.24.031*.

ii. Violation of *RCW 61.24.030(8)(c)*.

*RCW 61.24.030(8)(c)* requires “a statement that the beneficiary has declared the borrower or grantor to be in default”. However, the subject Notice

of Default does not identify the beneficiary. CP 825-832. If the declaration of default was made by anyone other than the “beneficiary” the Notice is defective. In this case, identifying the “holder” of the obligation in March of 2012 is difficult, based on conflicting testimony.

A.J. Loll testified that Nationstar was the holder of the Note and Deed of Trust in March of 2015, but does not testify as to when Nationstar may have taken possession of the Note and Deed of Trust. CP 53.

Adam Hughes testified that Nationstar had possession of the Note and Deed of Trust in June of 2013 when Nationstar “removed” the Note and Deed of Trust for transfer to Mr. Hughes’ law firm that arguably had possession of the Note and Deed of Trust from June 14, 2013 to March of 2015. CP 565-566; CP 598. However, Mr. Hughes does not indicate who held the Note and Deed of Trust in March of 2012, when the Notice of Default was executed, served and posted. Moreover, Mr. Michael Beverick viewed the document Mr. Hughes alleged to be the original Note and Deed of Trust and found it defective:

On the day of the hearing on Nationstar’s First Motion for Summary Judgment, my attorney and I arranged to meet with Mr. Adam Hughes at his office for the purpose of inspecting the document that he had with him in court that day and which he claimed was the original promissory note that my wife and I signed. We met with him in the conference room of his office. He handed the document and I held it and inspected it.

The first thing I noticed as I held the document was that it was printed on heavy paper. The original documents that we had signed were printed on normal copy paper. When we had signed the loan

documents at First American Title Company, they had printed all of the documents, and had also printed a set of copies for us. I still have my set of copies of the loan documents that we signed were printed on the same paper as were our copies. The document that Mr. Hughes has is printed on much heavier and stiffer paper than was the original promissory note.

As I looked at the printing on Mr. Hughes' document, I notice that the blue ink on the signature did not look right. The color was a light blue and the edges of the ink appeared blurry. It did not look the same as my signature when I signed the original with a dark blue ball point pen.

The document that Mr. Hughes has and claims to be the original note that my wife and I signed, is not the document that she and I signed. It appears to be a copy printed on a color printer. CP 795.

This testimony directly repudiates the testimony of Mr. Hughes, raising issues of credibility that should not be resolved on summary judgment. *Balise v. Underwood, supra*. Moreover, this testimony draws into question who may have had the right to enforce the obligation when the Notice of Default was issued and when Nationstar initiated judicial foreclosure and certainly raises questions as to whether Nationstar or U.S. Bank had the right to declare Mr. and Mrs. Beverick's loan to be in default. As noted in *Brown*, at pg. 522, when a note is indorsed in blank, as the Beverick Note appears to have been, it is "payable to bearer and may be negotiated by transfer of possession alone." *RCW 62A.3-205(b)*. The bearer then has the right to enforce. *RCW 62A.3-301*. If the Note inspected by Mr. Beverick is the same one relied upon by U.S. Bank, MERS, Aurora Bank and Nationstar to initiate foreclosure proceedings herein, none of them actually "held" the obligation or had the right to enforce

it or declare a default if the original is in the hands of another. This material issue of fact was addressed in the trial court's order of November 14, 2013 (CP 1282-1286), but was thereafter ignored and dismissed by the trial court.

Ms. McCann testified that Aurora Bank had possession of the Note and Deed of Trust from December 23, 2011 to June 22, 2012 (CP 694), but, as noted above, this testimony is based on hearsay: information maintained by a third-party vendor, DokTrack, with whom she is not employed and who was not an affiliate of Aurora Bank. CP 694. Although Aurora Bank is identified as the servicer of the loan in the Notice of Default, it is not identified as the "holder" or otherwise in possession of the Note and Deed of Trust so as to establish its status as a "PETE". See *Brown*.

Finally, MERS purportedly assigned the Deed of Trust to Aurora Bank on January 17, 2012. CP 170 and CP 824. However, this document did not assign the Note to Aurora Bank or to its assignee: U.S. Bank. As noted in *Bain*, at pg. 104, "the [DTA] contemplates that the security instrument follows the note, not the other way around." There was no evidence before the trial court that MERS ever held the Note, so MERS acted as an ineligible beneficiary and assigned nothing to Aurora Bank. *Bain*.

On the basis of the foregoing, there was conflicting evidence as to who held the obligation when the Notice of Default was issued in March of 2012, that, in turn, created a colorable violation of *RCW 61.24.030(8)(c)* that was ignored by the trial court on summary judgment.

iii. Violation of RCW 61.24.030(8)(k).

*RCW 61.24.030(8)(k)* provides a number of statutorily mandated statements and representations that were in effect when Respondents' Notice of Default was executed, served and posted. These statutorily mandated statements were not incorporated into Respondents' Notice of Default, thus denying Mr. and Mrs. Beverick the assistance they could have obtained had the Notice of Default properly included the statements mandated. CP 825-832.

iv. Violation of RCW 61.24.030(8)(l).

*RCW 61.24.030(8)(l)* requires the drafter of any notice of default to provide the "name and address of the owner of any promissory notes or other obligations secured by the deed of trust." Here, the Notice of Default identifies the owner as "SASCO 2007-GEL1", but does not provide its address, offering instead the address of the purported servicer: Aurora Bank. CP 830. This frustrates the borrower's ability to "resolve disputes or to take advantage of legal protections," which, in turn, could constitute injury and form the basis of a CPA claim. *Bain*, at pg. 118.

While each of the foregoing violations of the DTA may, by themselves, appear insignificant, taken as a whole they demonstrate an abuse of the non-judicial foreclosure procedure that limited Mr. and Mrs. Beverick's ability to protect their rights in and to the subject property and negotiate with the real party in interest to obtain a modification of their loan and other remedial relief, requiring them to hire counsel to investigate the identity of the party entitled to

foreclose and to seek action to quiet title. The existence of these violations of the DTA constituted material disputes of fact that the trial court simply ignored on summary judgment. Although the Court in its Order of November 14, 2013, acknowledged that Respondents had failed to identify the proper holder of the Note, the party in possession of the Note at the time the Notice of Default was issued and the party entitled to enforce the obligation, the trial court ultimately issued summary judgment without resolving these material issues of disputed fact. CP 1285. Nevertheless, despite the existence of these unresolved issues of material fact, the trial court ultimately ignored them and dismissed Mr. and Mrs. Beverick's claims against Aurora Bank, Bishop and Lynch of King County and MERS without proper basis in law or fact. CP 1287-1294. The trial court's failure to address the acknowledged violations of the DTA on summary judgment constituted error and should be reversed.

**D. U.S. Bank's status and standing to foreclose.**

In its unverified Amended Answer, Counterclaim and Third Party Complaint for Judicial Foreclosure, Nationstar (not U.S. Bank) initiated a judicial foreclosure as the "the current holder of the Note in its capacity as the servicer for the owner of the loan U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET CORPORATION MORTGAGE PASS CERTIFICATES, SERIES 2007-GEL1." CP 130. (Emphasis added). However, as a matter of law, this is insufficient to establish Nationstar's standing to initiate a judicial foreclosure.

*RCW 61.12.040* provides as follows:

When default is made in the performance of any condition contained in a mortgage, the mortgagee or his or her assigns may proceed in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage. (Emphasis added)

*RCW 61.12, et seq.* does not define the term “mortgagee” nor, for that matter, does *RCW 62A, et seq.* But, Washington case law suggests that the term means something more than a mere “holder” or “PETE” as the term is defined under *RCW 62A.3-301*.<sup>2</sup> Indeed, “the person who can foreclose the mortgage must be the one to whom the obligation is due.” William B. Stoebuck and John W. Weaver, *Washington Practice: Real Estate: Transactions* §18.18, at 334 (2d ed. 2004). This echoes the more stringent definition of “note holder” found in the subject Note itself (CP 139) and suggests ownership. See *Cashmere Valley Bank v. Dept. of Revenue*, 181 Wn2d 622, 334 P.3d 1100 (2014); *Brown* (“The owner has the right to the economic benefits of the note, such as monthly mortgage payments and foreclosure proceeds.”).

The only proper parties to a judicial foreclosure are the mortgagor, the mortgagee and those who have acquired an interest from either the mortgagor or the mortgagee. *California Safe-Deposit and Trust v. Cheney Electric Light*,

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<sup>2</sup> *RCW 62A.3-301* provides as follows: “Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to *RCW 62A.3-309* or *62A.3-418(d)*. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”

12 Wash. 138, 40 Pac 732 (1895); *Washington National Building v. Saunders*, 24 Wash 321, 64 Pac 546 (1901). No reported Washington case has ever permitted a mere agent, like Nationstar here, to initiate a judicial foreclosure. Indeed, in the context of judicial foreclosures, the courts of this state have consistently described the “mortgagee” entitled to foreclose as the owner of the obligation and where the term “holder” is used, it is used in conjunction with “ownership” of the obligation.<sup>3</sup>

Here, Nationstar did not allege itself to be the “mortgagee or his or her assigns”, but merely the “holder” of the obligation. CP 130. This is simply

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<sup>3</sup> See *Byrd v. Forbes*, 3 Wash.Terr. 318, 13 Pac. 715 (1887); *Peters v. Gay*, 9 Wash. 383, 37 Pac 325 (1894); *Bacon v. O’Keefe*, 13 Wash. 655, 43 Pac. 886 (1896); *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534 (1896); *Allen v. Swerdfiger*, 14 Wash 461, 44 Pac. 894 (1896); *Washington National Bank of Seattle v. Smith*, 15 Wash. 160, 45 Pac 736 (1896); *National Bank of Commerce v. Lock*, 17 Wash. 528, 50 Pac 478 (1897); *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715 (1898); *Chase National Bank v. Hastings*, 20 Wash. 433, 55 Pac. 574 (1898); *Denny v. Palmer*, 26 Wash. 469, 67 Pac. 268 (1901); *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269 (1901); *Chase National Bank v. Security Savings Bank*, 28 Wash. 150, 68 Pac. 454 (1902); *Purdin v. Washington National Building, Loan and Inv. Assoc.*, 41 Wash. 395, 83 Pac 723 (1906); *Bank v. Doherty*, 42 Wash. 317, 84 Pac. 872 (1906); *Presby v. Melgard*, 48 Wash. 689, 94 Pac. 94 (1908); *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 Pac 900 (1908); *Collins v. Gross*, 51 Wash. 516, 99 Pac. 573 (1909); *Virtue v. Stanley*, 87 Wash. 167, 151 Pac. 270 (1915); *Gerber v. Heath*, 92 Wash. 519, 159 Pac. 691 (1916); *Miller v. American Savings Bank & Trust*, 119 Wash. 243, 205 Pac 388 (1922); *Everly v. Wold*, 125 Wash. 467, 217 Pac. 7 (1923); *Catlin v. Mills*, 140 Wash. 1, 247 Pac. 1013 (1926); *Citizens Savings & Loan v. Chapman*, 173 Wash. 539, 24 P.2d 63 (1933); *Nichols v. McDougal*, 175 Wash. 536, 27 P.2d 699 (1933); *Buchanan v. First National Bank*, 184 Wash. 185, 50 P.2d 520 (1935); *McCall v. Smith*, 184 Wash. 615, 52 P.2d 338 (1935); *Norlin v. Montgomery*, 59 Wn.2d 268, 367 P.2d 621 (1961); *Federal National Mortgage Assoc. v. Carrington*, 60 Wn.2d 410, 374 P.2d 153 (1962); *John Davis & Co. v. Cedar Glen No. Four*, 75 Wn.2d 214, 450 P.2d 166 (1969); *Damascus Milk Co. v. Morriss*, 1 Wn.App. 501, 463 P.2d 212 (1969). See also *Kennebec, Inc., v. Bank of the West*, 88 Wn.2d 718, 724-725, 565 P.2d 812 (1977), citing to *Norfor v. Busby*, *supra*, at page 452.

insufficient to establish standing to judicially foreclose as a matter of law under *RCW 61.12.040*.

It is anticipated that Respondents will argue that U.S. Bank's ownership of the Note and Deed of Trust can be traced to the Assignment of Deed of Trust of May 27, 2014 that purportedly assigned the obligation from Aurora Bank to U.S. Bank. CP 88. But there are material defects in this Assignment. The Assignment was executed by Nationstar on May 27, 2014, as attorney in fact for Aurora Bank, but the power of attorney cited as the basis of Nationstar's authority wasn't acknowledged by Nationstar until August 13, 2014 and wasn't recorded until March 2, 2015. CP 92-116. Accordingly, Nationstar did not have authority to act on behalf of Aurora Bank at the time the Assignment was executed and recorded.

Moreover, Nationstar expressly represented that it initiated the judicial foreclosure "in its capacity as servicer" for a very specific entity: U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET CORPORATION MORTGAGE PASS CERTIFICATES, SERIES 2007-GEL1." CP 130. But the power of attorney Nationstar relied upon does not identify this particular Trust. The closest entity/trust identified in the power of attorney to the one identified in Nationstar's Amended Answer, Affirmative Defenses, Counter-claim and Third Party Complaint is "U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH

CERTIFICATES, SERIES 2007-GEL1.” CP 113. Accordingly, there was an unresolved material issue of fact in dispute on summary judgment as to whether the entity/trust identified in Paragraph 5 of Nationstar’s Amended Answer, Affirmative Defenses, Counter-claim and Third Party Complaint was the same as the entity/trust identified in the power of attorney Nationstar relied upon to counterclaim for judicial foreclosure under *RCW 61.12, et seq.* Please compare CP 113 with CP 130.

It is also significant to note that although Nationstar purported to act on behalf of U.S. Bank, U.S. Bank repudiated any agency relationship with Aurora Bank and Nationstar and denied it had any authority to control the acts of servicers like Nationstar, which is the prerequisite of any agency relationship. *Bain*, at pg. 107, citing *Moss v. Vadman*, 77 Wn.2d 396, 402, 463 P.2d 159 (1970). As Ms. Kirby stated to Mr. and Mrs. Beverick: “[a]s Trustee, U.S. Bank does not have any information to provide to you, nor do we have any control over the mortgage servicer. The servicer is an independent, third party company and is not affiliated with U.S. Bank.” (Emphasis added) CP 818. This statement clearly repudiates Nationstar’s assertions of authority to act on behalf of U.S. Bank. See *Blake Sand & Gravel, Inc. v Saxon*, 98 Wn.App. 218, 989 P.2d 1178 (1999).

In sum, there were numerous issues of material fact concerning Nationstar’s agency relationship with U.S. Bank and U.S. Bank’s and

Nationstar's standing to initiate a judicial foreclosure that were simply ignored by the trial court.

Arguably, U.S. Bank would have the right under *RCW 61.12.040* to initiate a judicial foreclosure as purported "owner" of the obligation, but it didn't do so. Rather, U.S. Bank's purported agent, Nationstar, initiated the judicial foreclosure in its Amended Answer and Counterclaim. CP 119-170. But, even if U.S. Bank had counter-claimed for judicial foreclosure, U.S. Bank's "ownership" was disputed on summary judgment and the evidence of U.S. Bank's ownership of the Note and Deed of Trust was contradictory. First, there was undisputed evidence before the trial court that the Trust that U.S. Bank purportedly acted as trustee for was never registered with the Federal Securities and Exchange Commission, giving rise to a disputed issue of material fact as to the Trust's standing to judicially foreclose. CP 852-855. Second, on November 14, 2013, the trial court concluded that there were material issues of fact as to (1) the authenticity of the indorsement of the Promissory Note; (2) the identity of the proper holder of the Note; (3) the authenticity of the Deed of Trust; (4) the party currently in possession of the obligation; and (5) the party entitled to enforce (PETE) the obligation. CP 1285. Indeed, Mr. Beverick testified that the instrument he inspected in the offices of Nationstar's attorney, Adam Hughes, in August of 2013, was not the original Note he and his wife signed on May 1, 2006, but a counterfeit. CP 795. If the original Note was endorsed in blank and is in the hands of a person

or entity not a party to this action, with full rights to enforce under *RCW 62A.3-205(b)* and *RCW 62A.3-301*, on what basis or authority do the Respondents rely to take any action against Mr. and Mrs. Beverick? All of these issues of material fact remained unresolved when the trial court granted summary judgment, dismissing Mr. and Mrs. Beverick's claims.

Clearly, the testimony before the trial court on summary judgment raised significant issues of material fact regarding Nationstar's standing to initiate a judicial foreclosure against Mr. and Mrs. Beverick and the trial court's grant of summary judgment was clearly erroneous and should be reversed.

**E. Violation of the CPA.**

While damages for pre-sale violations of the DTA are not recoverable, a CPA claim may be maintained regardless of the status of the property. *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 417, 334 P.3d 529 (2014) (hereinafter "*Frias*"), *Lyons*, at page 784.

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986); *Frias, Lyons, Walker and Bavand*. The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984).

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary, as it did when it executed the Assignment of Deed of Trust in favor of Aurora Bank. CP 170 and 824. *Bain* at pages 115-120.

Moreover, it is Mr. and Mrs. Beverick's position that "strict compliance" with the DTA means any action taken contrary to and impedes their pursuit of the procedural safeguards set forth in the DTA is a presumptively unfair and deceptive act under consumer protection analysis.

In *Lyons*, the court held that when a CPA claim is predicated on an alleged violation of the DTA, a question of fact is automatically created if the issue is disputed. *Lyons*, at pgs. 786-787. Here, each element of the CPA claim were in dispute.

In the context of Mr. and Mrs. Beverick's quiet title claim, responsibility for the confusion concerning ownership and entitlement to enforce the obligation must first be put at the feet of WMC. WMC was instrumental in the entire process through its consent to the unlawful designation of MERS and the subsequent actions taken against Mr. and Mrs. Beverick's property. Second, the confusion created by the use of MERS was the direct and proximate cause of the injuries and damages suffered by Mr. and Mrs. Beverick, requiring them to investigate Respondents' ownership and entitlement to enforce the Note and Deed of Trust based on the reasonable belief that they were being deceived to their

detriment.

i. Unfair or Deceptive Acts.

As to WMC, while the use of MERS is not actionable in and of itself, the *Bain* court specifically ruled that the unfair and deceptive act or practice element is presumed based upon MERS' business model and the manner in which it has been used.<sup>4</sup> *Bain*, at pgs 115-117; *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 784-788, 295 P.3d 1179 (2012) (hereinafter "*Klem*"); *Walker*, at pgs. 318-319 and *Bavand*, at pgs. 504-506.

Here, through its Assignment of the Deed of Trust to Aurora Bank, MERS took action that necessarily lead to the initiation of Respondents' non-judicial foreclosure. But for the improper Assignment of the Note and Deed of Trust by MERS to Aurora Bank, Respondents would have had no colorable basis to initiate a non-judicial foreclosure, which constituted unfair and deceptive acts or practices. *Walker*, at pages 319-320, and *Bavand*, at page 505.

There is absolutely no evidence that MERS ever held the subject Note at any time relevant to this cause of action. In fact the evidence is to the contrary. CP 678-690; CP 982. Therefore, MERS was never an eligible

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<sup>4</sup> This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See *Walker* at page 320.

beneficiary within the terms of *RCW 61.24.005(2)*. *Bain*. As a result of WMC's appointment of MERS as its "nominee" and MERS' unlawful Assignment of the Deed of Trust, Mr. and Mrs. Beverick were kept in the dark regarding the true identity of their lender which had the effect of compelling them to conduct an investigation to discover their true financial options and leaving them ignorant of their full legal rights.

As to MERS, Nationstar and Aurora, their improper initiation of a non-judicial foreclosure without proper authority was deceptive. Indeed, under Washington law, an entity's initiation of a non-judicial foreclosure in violation of the DTA is actionable as a violation of the CPA. See *Walker*, pgs. 319-320; *Bavand*, pgs. 504-506. In their Motion for Summary Judgment, Respondents allege that since they were "servicers and the proper beneficiaries under the Deed of Trust", they had the right to foreclose, either judicially or non-judicially. CP 1117-1118. However, this contention is rebutted by the fact that their allegations were based on sworn statements that failed to meet the requirements of *CR 56(e)* and *ER 801* and *ER 802*. Moreover, while U.S. Bank would have been permitted to use agents (such as Aurora Bank and Nationstar) to enforce its rights under the Note and Deed of Trust, it could not authorize a third party to foreclose by simply ceding its foreclosure authority and decisions to the agent without exercising control over the agent, as was apparently the case here. *Bain*, at pg. 107; *Rucker v. NovaStar Mort., Inc.*, 177 Wash.App. 1, 311 P.3d 31, 38 (2013); *Singh v. Federal Nat. Mortg. Ass'n*, 2014 WL 3739389

(2014) (citing *Rucker*). See also *Lyons* and *Trujillo II*. In fact, the evidence before the trial court indicated that U.S. Bank, the purported owner of the obligation, expressly repudiated any agency relationship with the foreclosing agents, Aurora Bank and Nationstar. CP 818. Aurora Bank and Nationstar were arguably acting without the authority of their purported principal. Respondents' initiation and prosecution of foreclosure proceedings without authority of the true and lawful owner and actual holder of the obligation is at the crux of the deceptive acts and practices of MERS, U.S. Bank, Aurora Bank and Nationstar, for which Mr. and Mrs. Beverick are entitled to recover under the CPA.

ii. Acts Occurred in Trade or Commerce and Public Interest.

Respondents did not dispute on summary judgment that their actions occurred in trade and commerce or affected the public interest. Nevertheless this element is satisfied by the fact that the claims involve the sale of property.

*RCW 19.86.010(2)*. As noted in *Trujillo II*, pgs. 835-836:

To satisfy the second and third elements of her CPA claim--that NWT's acts occurred in trade or commerce and that they affected the public interest--Trujillo alleges, Wells [Fargo] makes these unfounded claims to foreclose on defaulting borrowers as a routine part of its foreclosure activities on behalf of Fannie Mae. Its foreclosure activities are conducted in the course of trade and commerce and certainly impact the public interest." CP at 93. In a private action, a plaintiff can establish that the lawsuit would serve the public interest by showing a likelihood that other plaintiffs have been or will be injured in the same fashion. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (quoting

*Hangman Ridge*, 105 Wn.2d at 790). The court considers four factors to assess the public interest element when a complaint involves a private dispute: (1) whether the defendant committed the alleged acts in the course of his/her business, (2) whether the defendant advertised to the public in general, (3) whether the defendant actively solicited this particular plaintiff, and (4) whether the plaintiff and defendant have unequal bargaining positions. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 791). The plaintiff need not establish all of these factors, and none is dispositive. *Id.* Trujillo's allegations satisfy the second and third elements because they relate to the sale of property, RCW 19.86.010(2), and they state that other plaintiffs have or will likely suffer injury in the same fashion. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 790). (Emphasis added).

Moreover, as noted in *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009) (hereinafter “*Panag*”) “the business of debt collection affects the public interest.”

Like *Trujillo II*, Mr. and Mrs. Beverick’s claims “relate to the sale of property.” *RCW 19.86.010(2)*.

iii. Injury and Damages.

The fourth and fifth elements of the CPA claim relate to causation and damages. On summary judgment, Respondents offered little on this issue, except to dismiss Mr. and Mrs. Beverick, arguing an apparent right and authority to foreclose and alleged default – ignoring the material issues of disputed fact addressed above.

The causation and damage elements of a CPA claim were well analyzed in *Panag*, which also involved improper efforts to collect on a debt. Mr. and

Mrs. Beverick contend that but for Respondents' manifest violations of the DTA and *RCW 61.12, et seq.* they would have suffered no injury or damages.

In *Panag* the Washington Supreme Court held that:

Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *NW. Airlines, Inc. v. Ticket Exch., Inc.*, (proof of injury satisfied by “stowaway theory” where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Fisons*, (damage to professional reputation); *Sorrel v. Eagle Healthcare, Inc.*, (injury by delay in refund of money); *Webb v. Ray*, (loss of use of property).

*Panag* at pages 58. (internal citations omitted). The *Panag* analysis was cited with approval by this Court in *Walker*, at pg. 320, *Bavand*, at pgs. 508-509; *Frias*, at pg. 431-433 and *Lyons*, at pg. 786, fn. 4.

As noted in *Frias*, since “the CPA addresses ‘injuries’ rather than ‘damages,’ quantifiable monetary loss is not required” in a CPA claim for violation of the DTA, citing *Panag*, at pg. 58. *Frias*, at pg. 431. Comparing a DTA claim to an unlawful debt collection action, the *Frias* court noted:

A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. [citing *Panag* at 55-56, & n. 13.] Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. . . . The injury element can be met even where the injury alleged is both minimal and temporary.

*Frias*, at pg. 431. Accordingly, Mr. and Mrs. Beverick can fulfill the injury and damage element of their CPA claim even without challenging the underlying debt, based solely on the manner in which Respondents conducted their business activities. That a plaintiff may be behind in payments (in default) is

totally irrelevant to the claims against the deceptive agent. A plaintiff's claims could include threatened loss of title, impact on credit and legal fees. *Frias*, at pg. 432.

Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at pg. 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association v. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), and *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one's credit reputation constitutes injury).

As noted above, injury to a person's business or property is "relatively expansive" and broadly construed; and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Frias*, at pg. 431; *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem. Lyons*, at pg. 9, fn 4. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag*, at pages 59-65.

Here, Respondents concede, Mr. and Mrs. Beverick incurred expenses to investigate and consult with counsel to dispel uncertainty regarding the ownership of the loan. CP 794-851.

Such damages have been recently found to be compensable under Washington law. See *Lyons* and *In re Meyer*, 506 B.R. 533 (2014). Courts have even previously held that the costs of postage do create an issue of fact as to injury. *Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097 (2012) (improper to grant summary judgment on the basis of alleged illegal collection activities where plaintiff had alleged \$7.75 in postage costs related to activities). Here, Mr. Beverick offered a certified postage receipt for \$5.59. CP 817.

Moreover, Mr. and Mrs. Beverick allege costs associated with sending requests for information to the servicers. CP 805, CP 814-815, CP 816-817, CP 820-821. In response, they received material that most ordinary citizens would classify as “legal doublespeak” meant to further confuse them rather than enlighten. CP 808, CP 810-813, CP 818-819, CP 822-823. WMC’s original designation of MERS is what caused this chain of events, as Mr. and Mrs. Beverick were left in ignorance about the true owner, as a direct and proximate result of the use of MERS by WMC, and forced to inquire of various opaque entities that refused to provide useful information.

Further, a reasonable reading of *Panag* is that hiring an attorney to prevent improper foreclosure proceedings qualifies as injury under the CPA (“...a plaintiff may recover the cost of hiring an attorney if he or she did so as a result of a collection notice that misleadingly threatens legal action.”) *Panag*, at pg. 63 (citing *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174)). If

investigatory expenses are recoverable, it stands to reason that all other expenses incurred, aside from those directly involved in bringing the CPA claim itself, must also qualify as damages.

On the basis of the foregoing, and in view of *Panag, Frias, Lyons* and *Trujillo II*, Mr. and Mrs. Beverick have sufficiently alleged injury and damage to satisfy the fourth and fifth elements of a CPA claim, even if the costs of litigation related to initially defending against the wrongful foreclosure are ultimately determined to be unrecoverable. The costs related to the initial investigation of ownership are attributable to Respondents. All of the injuries and damages alleged by Mr. and Mrs. Beverick were the direct and proximate cause of Respondents in that none of these injuries would have been suffered and the damages would have been incurred but for the misleading documents provided to Mr. and Mrs. Beverick and used by other Respondents to prosecute the foreclosure. Viewing the allegations in a light most favorable to Mr. and Mrs. Beverick, all five elements for a private cause of action under the CPA have been met.

## V. CONCLUSION

Defending first a non-judicial foreclosure and then a judicial foreclosure is the ultimate peril against which no homeowner should have to contend.

The testimony of A.J. Loll, Adam Hughes and Laura McCann upon which the trial court relied on summary judgment was incompetent, within the terms of *CR 56(e)*, *ER 801 ER 802* and *RCW 5.45.020*.

As described at length above, Respondents non-judicial foreclosure activities violated numerous provisions of the DTA and Nationstar had no standing to initiate judicial foreclosure proceedings given the fact that under no set of facts could it comply with the terms of *RCW 61.12.040* as servicer for U.S. Bank. Moreover, in view of the fact that the Note Respondents claim to be the original Note appears to be counterfeit, there were material issues of fact in dispute as to whether Respondents had any authority and/or standing to initiate non-judicial for judicial foreclosure proceedings against Mr. and Mrs. Beverick. CP 795. Indeed, until the original Note is found and its possessor is identified, no foreclosure proceedings are warranted.

In view of the trial court's manifest error on summary judgment, reversal is the remedy.

Finally, Mr. and Mrs. Beverick should be awarded taxable costs, expenses and reasonable attorney's fees on appeal, pursuant to *RAP 18.1*, based on the terms of the subject Note and Deed of Trust.

REPECTFULLY SUBMITTED this 9th day of May, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on May 9, 2016, I caused to be served a true and correct copy of the foregoing Brief of Appellants on the following party(ies) and in the manner(s) indicated:

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