74347-3

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Court of Appeals
Division I
State of Washington

Case No. 74347-3-I

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

MARISA BAVAND

Appellant,

v.

ONEWEST BANK, FSB, a federally chartered savings bank; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation and DOE DEFENDANTS 1-10,

Respondents.

# BRIEF OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.

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## TABLE OF CONTENTS


**I. Introduction** ..... 1

**II. Statement of the Case** ..... 2

A. Factual History ..... 2

B. Procedural History ..... 4

**III. Response to Assignments of Error** ..... 5

**IV. Response Argument** ..... 6

A. The Trial Court Properly Considered OneWest's Declarations ..... 6

B. The Trial Court's Grant of Summary Judgment to NWTS Should be Affirmed ..... 7

1. Standard of Review ..... 7

2. Bavand's CPA Claim Against NWTS ..... 9

3. A Plaintiff Must Demonstrate the Existence of an Unfair or Deceptive Act With a Capacity to Deceive the Public ..... 10

4. DTA-Based Violations Also Require a Showing of Materiality and Prejudice ..... 10

5. NWTS Was Lawfully Appointed ..... 14

a. As a Threshold Matter, Bavand Lacked Standing to Challenge the Appointment ..... 15

b. Even if Bavand Did Have Standing to Challenge NWTS' Appointment, the Document Was Properly Executed ..... 16

6. NWTS Did Not Violate RCW 61.24.030(7) ..... 17

7. NWTS Acted in Good Faith .....21

8. Bavand Did Not Show a Public Interest Impact .....24

9. NWTS Did Not Cause Injury to Bavand .....27

C. Bavand Did Not Deserve a CR 56(f) Continuance .....30

D. NWTS Should be Granted Costs .....32

**V. Conclusion** .....32

## TABLE OF AUTHORITIES

**Case Law**

*Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009) .....27

*Amresco Independence Funding, Inc. v. SPS Props., LLC*,
129 Wn. App. 532, 119 P.3d 884 (2005) .....12

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986) .....8

*Arnett v. MERS*, 2014 WL 5111621 (W.D. Wash. Oct. 10, 2014) .....20

*Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83,
285 P.3d 34 (2012) .....18, 24

*Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58,
358 P.3d 1204 (2015) .....1, 6

*Bavand v. OneWest Bank FSB*, 2013 WL 1208997
(W.D. Wash. Mar. 25, 2013) .....1, 7, 14

*Bavand v. OneWest Bank, FSB*,
587 Fed. Appx. 392 (9th Cir. 2014) .....1, 10, 13, 14, 18, 22, 29

*Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225
(W.D. Wash. Mar. 26, 2013) .....18

*Beaupre v. Pierce County*, 161 Wn.2d 568, 166 P.3d 712 (2007).....7

*Bhatti v. Guild Mortg. Co.*, 2013 WL 6773673
(9th Cir. Dec. 24, 2013) .....28

*Brodie v. NWTS*, 2012 WL 6192723 (E.D. Wash. Dec. 12, 2012),
*aff'd*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) .....15

*Brophy v. JPMorgan Chase Bank*, 2013 WL 4048535
(E.D. Wash. Aug. 9, 2013).....15

*Brophy v. JPMorgan Chase Bank*, 2015 WL 1439346
(E.D. Wash. Mar. 27, 2015).....15

*Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509,
359 P.3d 771 (2015)..... 17-18, 19, 31

*Brown ex rel. Richards v. Brown*, 157 Wn. App. 803,
239 P.3d 602 (2010).....24

*Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003).....30

*Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136
(W.D. Wash. Sept. 5, 2014).....13, 15

*Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706
(W.D. Wash. Oct. 16, 2013) .....25

*Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990).....27

*Diessner v. Mortg. Elec. Registration Sys.*, 618 F.Supp.2d 1184
(D. Ariz. 2009), *aff'd*, 384 Fed. Appx. 609 (9th Cir. Jun.17, 2010).....26

*Douglass v. Bank of Am. Corp.*, 2013 WL 2245092
(E.D. Wash. May 21, 2013).....18

*Dubose v. Suntrust Mortg., Inc.*, 2012 WL 1376983
(N.D. Cal. Apr. 19, 2012) .....25

*Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742,
551 P.2d 1398 (1976).....21

*Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412,
334 P.3d 529 (2014).....14

*Hallquist v. United Home Loans*, 715 F.3d 1040 (8th Cir. 2013).....23

*Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*,
105 Wn.2d 778, 719 P.2d 531 (1986).....9, 27

*Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992).....9

*Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*,
134 Wn. App. 210, 135 P.3d 499 (2006).....11

*Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*,
162 Wn.2d 59, 170 P.3d 10 (2007).....27

*Ines v. Countrywide Home Loans*, 2008 WL 4791863
(S.D. Cal. Nov. 3, 2008).....26

*Izenberg v. ETS Servs., LLC*, 589 F.Supp.2d 1193 (C.D. Cal. 2008).....26

*Jackson v. Qual. Loan Serv. Corp.*, 186 Wn. App. 838,
347 P.3d 487 (2015).....19

*Javaheri v. JPMorgan Chase Bank*, 2012 WL 3426278
(C.D. Cal., Aug. 13, 2012).....15

*King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304,
170 P.3d 53 (2007).....8

*Klem v. Wash. Mut. Bank*, 176 Wn.2d 771,
295 P.3d 1179 (2013)..... 11, *passim*

*Knecht v. Fid. Nat. Title Ins. Co.*, 2015 WL 3618358
(W.D. Wash. Jun. 9, 2015).....28

*Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998),
*rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999).....8

*Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108,
752 P.2d 385 (1988).....12

*Lucero v. Cenlar FSB*, 2015 WL 520441 (W.D. Wash. Feb. 9, 2015).....23

*Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775,
336 P.3d 1142 (2014)..... 10, 18-19, 22, *passim*

*Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309
(W.D. Wash. Dec. 23, 2013).....28

*McAfee v. Select Portfolio Serv., Inc.*, -- Wn. App. --,
Slip Opin. No. 71995-5-I (Apr. 18, 2016) ..... 19-20

*McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208
(W.D. Wash. Feb. 25, 2013).....25

*Merry v. NWTS*, 188 Wn. App. 174, 352 P.3d 830 (2015).....12

*Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767
(W.D. Wash. 2015), *reh'g denied*, 2015 WL 3609238
(W.D. Wash. Jun. 9, 2015).....13, 22, 29

*Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009).....11

*Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821
(W.D. Wash. Nov. 14, 2011) .....23

*Mickelson v. Chase Home Fin. LLC*, 579 Fed. Appx. 598
(9th Cir. 2014).....21

*Molsness v. City of Walla Walla*, 84 Wn. App. 393,
928 P.2d 1108 (1997).....30, 31

*Myers v. Mortg. Elec. Registration Sys. Inc.*, 540 Fed. Appx. 572
(9th Cir. 2013).....21

*Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27,
204 P.3d 885 (2009).....9, 28

*Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999 (9th Cir. 2005) .....30

*Reid v. Countrywide Bank*, 2013 WL 7801758
(W.D. Wash. Apr. 3, 2013).....29

*Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989).....10

*Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229 (W.D. Wash. 2003).....24

*Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 38 P.3d 1024 (2002).....9

*State v. Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983).....6

*Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (1988).....12

*Stranberg v. Lasz*, 115 Wn. App. 396, 63 P.3d 809 (2003)..... 30-31

*Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013).....27

*Tran v. Bank of Am.*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013).....24

*Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014), *rev'd on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015).....18

*Trujillo v. NWTS*, 183 Wn.2d 820, 355 P.3d 1100 (2015).....19, 25

*Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474 (1989).....30

*Twombly v. Truckee Meadows Funding, Inc.* ., 2012 WL 14023 (D. Nev. Jan. 4, 2012).....26

*Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007).....12

*U.S. v. Lewis*, 611 F.3d 1172 (9th Cir. 2010).....20

*Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).....8

*Vawter v. Qual. Loan Serv. Corp. of Wash.*, 2010 WL 5394893 (W.D. Wash. 2010).....13

*Wash. State Physicians Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993).....27

*Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*,
133 Wn. App. 835, 138 P.3d 638 (2006) ..... 24

*Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) ..... 8

**Statutes and Codes**

RCW 5.45.020 ..... 6

RCW 19.86.090 ..... 27

RCW 61.24.010(2) ..... 16

RCW 61.24.030(7) ..... 10

RCW 61.24.030(7)(a) ..... 17, 18, *passim*

RCW 61.24.127 ..... 14

RCW 62A.3-301 ..... 19

15 U.S.C. § 45(n) ..... 10

**Court Rules**

CR 12(b)(6) ..... 25

CR 56(c) ..... 8

CR 56(e) ..... 8

CR 56(f) ..... 5, 30, 31

R.A.P. 14.2 ..... 32

R.A.P. 14.3(a) ..... 32

R.A.P. 14.4 ..... 32

R.A.P. 18.1(b) ..... 32

## I. INTRODUCTION

Appellant and licensed attorney Marisa Bavand ("Bavand") failed to succeed on several claims in this case before the United States District Court for the Western District of Washington. *Bavand v. OneWest Bank FSB*, 2013 WL 1208997, *1 (W.D. Wash. Mar. 25, 2013).

Bavand next failed to convince the Ninth Circuit Court of Appeals to overturn the District Court's decision. *Bavand v. OneWest Bank, FSB*, 587 Fed. Appx. 392, 395 (9th Cir. 2014).

Finally, Bavand then failed to succeed on her remaining post-remand Consumer Protection Act ("CPA") claim before the Snohomish County Superior Court.

Because Bavand raises many of the same arguments that were defeated in the Ninth Circuit, and many of the same arguments that this Court already addressed and rejected in *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 358 P.3d 1204 (2015), she must fail on this appeal as well.

## II. STATEMENT OF THE CASE

### A. Factual History.

**Bavand's Loan.** On August 7, 2007, Bavand executed a promissory note (the "Note") in the amount of $240,000.00, payable to IndyMac Bank, F.S.B. ("IndyMac"). CP 1694-1698.

To secure repayment of the Note, Bavand also executed a deed of trust (the "Deed of Trust"). CP 1700-1721. The recorded Deed of Trust encumbers a piece of real property located at 630 168th Place S.W., Lynnwood, Washington. CP 1703.

The Deed of Trust listed IndyMac as "Lender," Chicago Title Insurance Co. as Trustee, and Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") as "Beneficiary" solely as the nominee for IndyMac and any successors or assigns of IndyMac. CP 1701. The Deed of Trust explained that the Note could be sold at any time without notice to Bavand. CP 1710, ¶ 20.

**OneWest's Acquisition of Bavand's Loan.** On July 11, 2008, the Office of Thrift Supervision closed IndyMac, and created a new conservatorship bank, IndyMac Federal Bank, FSB. CP 1689, ¶ 4. The Federal Deposit Insurance Corporation ("FDIC") operated IndyMac Federal Bank, FSB. *Id.*

On March 19, 2009, OneWest Bank, FSB ("OneWest") commenced operations, acquired certain assets owned by IndyMac Federal Bank, FSB, and the failed thrift, IndyMac (including the servicing rights to Bavand's loan), and took possession of the original Note indorsed in blank as well as the Deed of Trust. *Id.*

**Bavand's Default.** Bavand defaulted on her loan in September 2010, and on or about May 18, 2011, she was sent a Notice of Default. CP 1819-1827. The Notice of Default explained that if Bavand did not cure her default, foreclosure proceedings might begin. *Id.* OneWest retained Northwest Trustee Services, Inc. ("NWTS") as an agent (but not yet as trustee) to issue the Notice of Default.

Shortly after the Notice of Default was delivered, OneWest provided a declaration to NWTS confirming that "OneWest Bank, FSB is the holder of the promissory note or other obligation evidencing the above-referenced loan." CP 1829.

**MERS's Role Ends.** On September 8, 2011, MERS (acting as nominee for the Note holder, OneWest) assigned its agency interest in the Deed of Trust to OneWest. CP 1831. This ended MERS's nominee role under the Deed of Trust, and demonstrated OneWest's authority as

beneficiary in the public record. The assignment was between MERS and OneWest, and was not delivered to Bavand.

**OneWest Appoints NWTS.** On or about September 8, 2011, with Bavand still failing to cure her default, OneWest began taking steps in furtherance of foreclosure by appointing NWTS as the successor trustee. CP 1833.

On September 12, 2011, NWTS recorded a Notice of Trustee's Sale concerning the Property. CP 1835-1838. To ensure any party examining the public record understood which property was at issue – and to mirror the format proposed by the Washington Deed of Trust Act ("DTA") itself pursuant to RCW 61.24.040 – the Notice of Trustee's Sale referenced the parties to, and recording information of the Deed of Trust, and set a sale date of December 16, 2011. *Id.*

NWTS subsequently postponed the scheduled sale on multiple occasions. CP 1784, ¶ 15. However, no completed foreclosure of the Property took place and NWTS closed its file. *Id.*, ¶¶ 15-16.

B. Procedural History.

On or about December 22, 2011, Bavand filed suit against OneWest, MERS, and NWTS. CP 2132-2229. On February 14, 2012, the case was removed to the United States District Court for the Western

District of Washington. CP 1724 (docket).

On March 25, 2013, after the parties conducted discovery, the District Court granted summary judgment in Defendants' favor on all claims except under the CPA, which was remanded. CP 1732-1740.

On April 22, 2013, Bavand appealed to the Ninth Circuit Court of Appeals. CP 1730. On October 20, 2014, the District Court's ruling was affirmed. CP 1742-1747.

On November 20, 2015, the Hon. Judge Appel of the Snohomish County Superior Court entered an order granting summary judgments to the Defendants on the remaining CPA claim. CP 13-19.

## III. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly relied on OneWest's evidence and declarations when granting summary judgment.[1]

2. The trial court did not err in granting summary judgment to NWTS on a cause of action for violations of the CPA.

3. The trial court did not err in denying Bavand's belated CR 56(f) request, as Bavand could not articulate a proper basis for obtaining a continuance.

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[1] NWTS will not address the Assignment of Error related to Bavand's declaration as NWTS was not involved in the motion to strike that pleading.

## IV. RESPONSE ARGUMENT

### A. The Trial Court Properly Considered OneWest's Declarations.

Bavand challenges the trial court's admission of declarations supporting OneWest's arguments on summary judgment, which NWTS adopted and incorporated by reference into its briefing. Brief of Appellant at 16; *see also* CP 1634-1639, 1640-1657, 1856, ¶ 4, 1942-1946.

Bavand's contentions mirror those unsuccessfully raised in *Barkley*, *supra.*, where this Court observed:

> [s]tatements in a declaration based on a review of business records satisfy the personal knowledge requirement of CR 56(e) if the declaration satisfies the business records statute, RCW 5.45.020.... Reviewing courts interpret the statutory terms 'custodian' and 'other qualified witness' broadly.

190 Wn. App. at 67 (finding the declarations admissible), *citing State v. Quincy,* 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

Washington courts routinely admit declarations that rely on the review of business records created by third parties. RCW 5.45.020 does not require that a "qualified witness" be an individual within the original company that generated the record. *State v. Ben-Neth*, 34 Wn. App. 600, 603, 663 P.2d 156 (1983), *citing Cantrill v. American Mail Line, Ltd.,* 42 Wn.2d 590, 257 P.2d 179 (1953). "A trial court's ruling admitting or

excluding such records is given considerable weight and will not be reversed absent a manifest abuse of discretion." *Id.*, *citing State v. Kreck*, 86 Wn.2d 112, 542 P.2d 782 (1975).

In fact, the Federal District Court specifically cited Mr. Boyle's declaration to identify that OneWest held the Note. *Bavand v. OneWest Bank FSB*, 2013 WL 1208997 at *1. Notably, Bavand did not assign error to the District Court's acceptance of Mr. Boyle's testimony when she appealed to the Ninth Circuit. Yet now, she suddenly contends the declaration did not have a "proper foundation." Brief of Appellant at 18-19, 21.

This Court should affirm the admission of OneWest's declarations in support of summary judgment because they satisfy the business records statute.

B. The Trial Court's Grant of Summary Judgment to NWTS Should be Affirmed.

1. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). However, a ruling may be affirmed on any ground supported in the record,

"even if the trial court did not consider the argument." *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007).

Summary judgment is proper if the pleadings, depositions, answers to discovery, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).

If the moving party demonstrates that an issue of material fact is absent, the nonmoving party must then articulate specific facts establishing a genuine issue. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also* CR 56(e) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."). A genuine issue of material fact does not exist where insufficient evidence exists for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986).

Unsupported conclusory allegations, or argumentative assertions, are insufficient to defeat summary judgment. *See Vacova Co.*, *supra.* at 395, *citing Blakely v. Housing Auth. of King Cy.*, 8 Wn. App. 204, 505

P.2d 151, *rev. denied,* 82 Wn.2d 1003 (1973), *Stringfellow v. Stringfellow,* 53 Wn.2d 639, 335 P.2d 825 (1959). "Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Id., citing Grimwood v. University of Puget Sound, Inc.,* 110 Wn.2d 355, 753 P.2d 517 (1988). Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend,* 118 Wn.2d 476, 824 P.2d 483 (1992).

Here, Bavand failed to advance a genuine issue of material fact precluding NWTS from receiving summary judgment. As such, the trial court's order should be affirmed for the reasons set forth below.

2. Bavand's CPA Claim Against NWTS.

A CPA violation requires:

> (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.

*Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986). The failure to meet any one of these elements is fatal to the claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

Material violations of the DTA may be actionable under the CPA

even in the absence of a completed foreclosure sale. *See Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014) ("Lyons cannot bring a claim for damages under the DTA in the absence of a sale, but she may bring a claim for similar actions under the CPA."). Because a pre-sale DTA claim was not available to Bavand – as also recognized by the Ninth Circuit – her instant appeal strictly concerns allegations that NWTS violated the CPA. *Bavand v. OneWest Bank, FSB*, 587 Fed. Appx. at 395.

To that end, Bavand argues that NWTS was improperly appointed as trustee, that NWTS breached RCW 61.24.030(7) prior to recording a sale notice, and that NWTS did not act in good faith because it failed to "verify" [the servicer's] authority" or "verify the ownership of the obligation." Brief of Appellant at 24-31, 34-35.

3. A Plaintiff Must Demonstrate the Existence of an Unfair or Deceptive Act With a Capacity to Deceive the Public.

The CPA first requires an act or practice with either: 1) "a capacity to deceive a substantial portion of the public," or 2) that "the alleged act constitutes a per se unfair trade practice." *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), *quoting Hangman Ridge*, *supra*.

*Klem v. Wash. Mut. Bank* states that "[t]he Washington legislature instructed courts to be guided by federal law in the area" of CPA liability. 176 Wn.2d 771, 295 P.3d 1179 (2013). Federal law defines an act or practice as "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." 15 U.S.C. § 45(n). An act or practice is "deceptive" when it is material, likely to mislead a consumer, and the consumer's interpretation is reasonable. *Id.*

"Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Comm. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006); *see also Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009) (to establish an unfair or deceptive act under the first prong test, there must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated act being repeated).

4. DTA-Based Violations Also Require a Showing of Materiality and Prejudice.

Both state and federal courts in Washington routinely dismiss CPA claims predicated on DTA violations where a plaintiff fails to demonstrate

that his interests were prejudiced by a material failure to comply with statutory mandates. *See, e.g., Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (a borrower who cannot cure default is economically indifferent to procedural defects in the foreclosure process and suffers no prejudice); *Merry v. NWTS*, 188 Wn. App. 174, 192, 352 P.3d 830 (2015) (rejecting liability for "formal, technical, nonprejudicial violations of the DTA"); *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005) ("Washington state courts have required the borrower to show prejudice before they will set aside a trustee's foreclosure sale in the face of allegations of technical errors."); *Steward v. Good.* 51 Wn. App. 509, 754 P.2d 150 (1988) (noting a "requirement that prejudice be established" where a "technical violation" of the DTA occurs and there was "no showing of harm to the debtor"); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112, 752 P.2d 385 (1988) (strict compliance with the DTA does not obviate a borrower's need to show prejudice).

Indeed, the Ninth Circuit articulated the prejudice requirement for DTA-based claims in this very litigation, stating:

> Washington state courts have required the borrower to show prejudice before they will set aside a trustee's foreclosure sale in the face of allegations of technical errors. Here, even if Bavand is

> correct in her assertion that NWTS should have listed Freddie Mac as an owner and not OneWest under Wash. Rev. Code § 61.24.030(8)(1) – which requires trustees to provide 'the name and address of the owner of any promissory notes' in the notice of default – these notations were not prejudicial to Bavand. The notice of default provided all the necessary information to Bavand by identifying OneWest as the foreclosing party, and any technical, non-prejudicial issues should not bar foreclosure proceedings.

587 Fed. Appx. at 394-395 (citation omitted).

As the Western District of Washington held in *Meyer v. U.S. Bank, N.A.*, when it denied the reconsideration of a reversed CPA judgment against NWTS, "[t]echincal violations of the DTA do not constitute unfair or deceptive acts or practices actionable under the CPA absent a showing of materiality or prejudice." 530 B.R. 767 (W.D. Wash. 2015), *reh'g denied*, 2015 WL 3609238 (W.D. Wash. Jun. 9, 2015); *see also Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, *4 (W.D. Wash. Sept. 5, 2014) (dismissing CPA claim where Plaintiff did not plead prejudice); *Vawter v. Qual. Loan Serv. Corp. of Wash.*, 2010 WL 5394893, *6 (W.D. Wash. 2010) (dismissing CPA claim where alleged DTA violation "could not be said to be 'of material importance,' " because to do otherwise would effect a "misguided elevation of form over substance."). Courts recognize that while the DTA is strictly construed, it is not a strict-liability statute for purposes of determining CPA liability.

Indeed, it would be inapposite to require materiality and prejudice only in a post-sale DTA-based claim pursuant to RCW 61.24.127, yet totally eliminate the same requirement for "DTA violations that could be compensable under the CPA." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014).

Consequently, because Bavand's CPA claim was wholly predicated on purported material non-compliance with the DTA, she needed to demonstrate that she suffered prejudice from NWTS' alleged conduct.

5. NWTS Was Lawfully Appointed.

Bavand attacks NWTS' appointment as successor trustee on the ground that "OneWest had no authority to prepare and execute the document as it was not the actual holder of the obligation...." Brief of Appellant at 34.

Bavand is completely mistaken, however, as multiple courts have already held that OneWest "was the party entitled to initiate non-judicial foreclosure proceedings" as the Note holder. *Bavand*, 587 Fed. Appx. at 394; *see also Bavand*, 2013 WL 1208997, at *1 ("OneWest held the note and the deed of trust when Ms. Bavand defaulted, and OneWest appointed NWTS as 'successor trustee' to foreclose on the property.").

a. As a Threshold Matter, Bavand Lacked Standing to Challenge the Appointment.

The United States District Court for the Eastern District of Washington has found that a borrower:

> [d]oes not have standing to contest the appointment [of successor trustee]. Because Plaintiff is neither a party to nor a third-party beneficiary of this agreement, he could not have been injured by the alleged fraud.

*Brophy v. JPMorgan Chase Bank,* 2013 WL 4048535, *7 (E.D. Wash. Aug. 9, 2013), *citing Javaheri v. JPMorgan Chase Bank,* 2012 WL 3426278 (C.D. Cal., Aug. 13, 2012)[2]; *see also Brophy v. JPMorgan Chase Bank*, 2015 WL 1439346, *5 (E.D. Wash. Mar. 27, 2015) ("Whatever claim Plaintiffs have regarding the alleged fraudulent execution of the appointment of successor trustee can only be pursued against Defendant JPMorgan Chase, not Defendant NWTS. The DTA does not impose a duty upon Defendant NWTS to verify the validity of an appointment."); *Brodie v. NWTS*, 2012 WL 6192723, *3 (E.D. Wash. Dec. 12, 2012), *aff'd*, 2014 WL 2750123 (9th Cir. Jun. 18, 2014) (dismissing challenge to trustee's appointment; "[a]t bottom, the alleged misconduct had no bearing

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[2] *See Javaheri* at *6 ("The only injury [plaintiff] alleges is the pending foreclosure on his home, which is the result of his default on his mortgage. The foreclosure would occur regardless of what entity was named as trustee, and so [plaintiff] suffered no injury as a result of this substitution.").

whatsoever upon Plaintiff's obligation to make her… payments."). The Western District of Washington also adopted similar reasoning in *Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, *5 (W.D. Wash. Sept. 5, 2014), and NWTS urges this Court to hold likewise.

b. Even if Bavand Did Have Standing to Challenge NWTS' Appointment, the Document Was Properly Executed.

The DTA affords a beneficiary the right to appoint a new successor trustee to foreclose on a deed of trust. RCW 61.24.010(2). There is simply no *genuine* issue of material fact concerning OneWest's authority to have acted as the beneficiary during the subject foreclosure. As mentioned above, OneWest's status as Note holder has been recognized now in three different courts in both the federal and state systems.

Throughout her Opening Brief, Bavand continues to raise a "red herring" issue concerning a second copy of the Note. Brief of Appellant at 29-31, 34, *inter alia*. Bavand's argument stems from the existence of a copy of the Note with a "certified" stamp on the first page, and a different indorsement on the last page. CP 430-434. *But this is not a copy of the original Note*. *See* CP 1690, ¶¶ 6-8 (Aff. of Boyle). The original Note bears an indorsement in blank, signed by Sam Lindstrom, Vice-President of IndyMac Bank, F.S.B. *Id.*; *see also* CP 1694-1698.

Thus, the evidence below was undisputed: on March 19, 2009, OneWest became the holder of both the original Note and Deed of Trust. CP 1690, ¶ 6. The Appointment of Successor Trustee was consequently proper.

Moreover, because NWTS did not appoint itself, it cannot be liable for a CPA violation in connection the Appointment document, or OneWest's decision to make NWTS the successor trustee pursuant to the terms of the Deed of Trust which Bavand assented to. CP 1711, ¶ 24 (Bavand possessed no right to select who the successor trustee of the Deed of Trust would be).

6. NWTS Did Not Violate RCW 61.24.030(7).

Bavand next contends that NWTS strictly relied on a "defective" beneficiary declaration as part of the uncompleted foreclosure process. Brief of Appellant at 27.

The DTA requires a trustee to "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). The Supreme Court confirms this statute is ambiguous "where the owner and the holder of the note are different entities." *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 543, 359 P.3d 771

(2015), *citing* Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement To Enforce the Note,* 66 Ark. L.Rev. 21, 26 & n.23 (2013) (stating that RCW 61.24.030(7)(a) was subject to "considerable confusion" because the statute "conflates 'owner' and 'holder' ").[3]

The statute does not define what "proof" means, but it suggests *one* possible means of easily accomplishing the requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." RCW 61.24.030(7)(a); *see also Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013).[4]

In *Lyons*, the Supreme Court found a beneficiary declaration's

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[3] The Supreme Court found that RCW 61.24.030(7)(a) creates "ambiguity in cases where the owner of the note is different from the holder of the note because the provisions each have a sentence that, standing alone, could be read to support either party's conclusion." *Id.* at 534. Turning to context and history, the Court disagreed with Brown's premise that beneficiary status equates with ownership. *Id.* at 536-537. Rather, the Court adhered to its ruling in *Bain v. Metro. Mortg. Grp., Inc.*, finding that "RCW 61.24.005(2) requires the beneficiary be the holder of the note." *Id.* at 540, *citing* 175 Wn.2d 83, 285 P.3d 34 (2012). Both *Brown* and *Bain* are in accord with this Court's opinion in *Trujillo v. NWTS*, stating "it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." 181 Wn. App. 484, 326 P.3d 768 (2014), *rev'd on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015). Despite Bavand's strenuous argument to the Ninth Circuit that only a note's owner can non-judicially foreclose, she was wrong. 587 Fed. Appx. at 394.

[4] Washington law does not mandate recording a beneficiary declaration or providing a copy to the borrower. *See, e.g., Douglass v. Bank of Am. Corp.*, 2013 WL 2245092 (E.D. Wash. May 21, 2013).

reference to RCW 62A.3-301 was ambiguous, and NWTS could not rely on it; however, NWTS could still show compliance with RCW 61.24.030(7)(a) through other evidence. 181 Wn.2d at 791. *Lyons* also found questions of fact existed due to an earlier declaration identifying Wells Fargo in a different capacity. *Id.*

Likewise, in *Trujillo*, the Supreme Court ruled that a beneficiary declaration referencing RCW 62A.3-301 contained an ambiguity "about whether Wells Fargo actually held the note when it initiated the foreclosure." 183 Wn.2d at 833. As a result, "this ambiguity indicated that the declaration *might be* ineffective." *Id.* (emphasis added). The Supreme Court further held that, "[o]n remand, Trujillo must have the opportunity to *prove that NWTS actually relied* on the impermissibly ambiguous declaration as a basis for issuing the notice of trustee's sale." 183 Wn.2d at 834 (emphasis added).

Here, the beneficiary declaration did not contain the same ambiguity as the declarations in *Lyons* and *Trujillo*. CP 1829. Rather, its contents precisely matched both RCW 61.24.030(7)(a) *and* the declaration explicitly approved of by the Supreme Court in *Brown*. 184 Wn.2d at 542 ("the declaration [from M&T Bank] does not suffer from the ambiguity at issue in *Lyons* and *Trujillo*."); *see also McAfee v. Select Portfolio Serv.,*

*Inc.*, -- Wn. App. --, Slip Opin. No. 71995-5-I (Apr. 18, 2016); *Jackson v. Qual. Loan Serv. Corp.*, 186 Wn. App. 838, 347 P.3d 487 (2015) (affirming right to rely on unequivocal beneficiary declaration).[5]

Nonetheless, Bavand argues that OneWest's beneficiary declaration was missing its year of execution. Brief of Appellant at 27. This is yet another "red herring" because the evidence clearly established that the declaration was signed on June 8, 2011. CP 1691, ¶ 19. The evidence further established that NWTS received this declaration on June 15, 2011. CP 1783, ¶ 9.

By contrast, Bavand did not put forward any evidence suggesting the declaration was made by OneWest or tendered to NWTS at some *different* time, and she did not assert that the omission of a year in the signature block prejudiced her in some manner. As a result, the Ninth Circuit specifically found that NWTS was entitled to rely on the beneficiary declaration Bavand repeatedly and relentlessly attacks. *Bavand*, 587 Fed. Appx. at 394; *accord U.S. v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010) (the decision of an appellate court on a legal issue

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[5] It would be circular reasoning to suggest that, although the statute expressly permits reliance on a declaration of the beneficiary's status, the duty of good faith was breached *because* of receiving that same declaration. *See Arnett v. MERS*, 2014 WL 5111621, *4 (W.D. Wash. Oct. 10, 2014) (it is "nonsensical" to suggest that a trustee's acceptance of a beneficiary declaration is "in itself, a violation of the duty of good faith.").

must be followed in all subsequent proceedings in the same case).

But even if this Court were to put aside the declaration, NWTS still had *other sufficient proof* that OneWest was the proper beneficiary prior to recording the Notice of Trustee's Sale. CP 1783-1784, ¶¶ 4-6, 8, 10, 12 (NWTS had a copy of the Note from OneWest, loan-level data from OneWest, a secure referral naming OneWest as the beneficiary, a third-party title report naming OneWest as the assured beneficiary, and NWTS was appointed as trustee by OneWest; no information suggested another entity was foreclosing as the beneficiary.).[6] NWTS did not commit an unfair or deceptive act when it recorded a sale notice after complying with RCW 61.24.030(7)(a).

7. NWTS Acted in Good Faith.

Bavand next pivots to claiming that NWTS violated its statutory duty of good faith because it did not "investigate" or "verify" information

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[6]And OneWest truthfully did hold the Note. *See Mickelson v. Chase Home Fin. LLC*, 579 Fed. Appx. 598, 601 (9th Cir. 2014) ("Chase actually held the promissory note during the relevant period. For this reason, even if the Mickelsons were correct that Chase's beneficiary declaration was inadequate under Washington Revised Code § 61.24.030(7)(a), any such failing could not have prejudiced them."); *Myers v. Mortg. Elec. Registration Sys. Inc.*, 540 Fed. Appx. 572 (9th Cir. 2013) (holding the note is the "bottom line."). Under Washington law, it cannot be unfair or deceptive to take actions based on information that is true. *cf. Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 551 P.2d 1398 (1976) (promises were deceptive because they did not become true).

provided to it. Brief of Appellant at 28, *inter alia*.[7]

In *Lyons*, the Supreme Court accepted the debtor's contention that she had contacted NWTS regarding a change in the beneficiary and her acceptance of a loan modification prior to the sale date. 181 Wn.2d at 788. Under this set of facts, *Lyons* found that a trustee must "adequately inform" itself of a beneficiary's authority through a "cursory" investigation. *Id.* at 788 ("*If* Lyons' allegations are true and *NWTS knew about the conflicting information* regarding their right to initiate foreclosure but did not look into this matter, there are issues....") (Emphasis added).

But the DTA does not require conducting a *sua sponte* investigation into the beneficiary's identity or the contents of every document provided to it during foreclosure. *See, e.g., Meyer*, 530 B.R. at 779 ("Absent a showing that NWTS violated its duty of good faith *independent* of its reliance on the declarations, the vast weight of case law now deems NWTS's reliance without further inquiry to be proper.")

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[7] It is remarkable that Bavand's counsel routinely maintains the argument that NWTS has a "fiduciary duty" under the DTA, especially when the Ninth Circuit clearly pointed out in this same case that "NWTS does not have a fiduciary duty... under the DTA." *Bavand*, 587 Fed. Appx. at 394, *citing* RCW 61.24.010(3), (4). Yet, Bavand's Opening Brief falsely and unethically states otherwise. Brief of Appellant at 35.

(emphasis in original):[8] *Lucero v. Cenlar FSB*, 2015 WL 520441 (W.D. Wash. Feb. 9, 2015) (NWTS did not have "an independent duty to investigate or confirm the information provided by its principal before issuing the Notice of Default."); *Mickelson v. Chase Home Fin. LLC*, 2011 WL 5553821 (W.D. Wash. Nov. 14, 2011) ("Plaintiffs would have every trustee conduct a secondary investigation into the papers filed by the beneficiary, which is simply too great a demand."); *accord Hallquist v. United Home Loans*, 715 F.3d 1040 (8th Cir. 2013) ("[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure… proceed upon that advice without making any affirmative investigation and without giving any special notice to the debtor.").

Bavand did not present evidence that she expressed a concern to NWTS about inaccuracies in documentation. Quite the opposite – Bavand told NWTS that she called OneWest to request a pre-foreclosure meeting with one of its representatives. CP 1785, ¶ 14. Without the slightest indication of a flaw in the foreclosure-related documents, as indeed the

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[8] *Meyer* cites to *Lyons* and *Klem*, *supra.*, observing that "[i]n both these cases, the Court faulted the trustee for failing to investigate *only when confronted with a host of information* about irregularities in the foreclosure process." (Emphasis added.)

proper beneficiary was foreclosing, NWTS was not obligated to "investigate" or "verify" OneWest's authority.

8. Bavand Did Not Show a Public Interest Impact.

Evidence of a likely impact on the public is necessary under the CPA because "[t]he public interest in a private dispute is not inherent." *Tran v. Bank of Am.*, 2013 WL 64770 (W.D. Wash. Jan. 4, 2013), *citing Hangman Ridge*, *supra.* at 790; *see also Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to meet public interest requirement); *accord Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816, 239 P.3d 602 (2010), *citing Burns v. McClinton,* 135 Wn. App. 285, 290-91, 143 P.23d 630 (2006) (CPA claim defeated because of no evidence that Wells Fargo's actions had "the capacity to deceive a large portion of the public."); *Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n*, 133 Wn. App. 835, 855, 138 P.3d 638 (2006); *but see Bain*, 175 Wn.2d at 118 ("*considerable evidence* that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as *half nationwide*.") (emphasis added).

As the Hon. Judge Lasnik of the Western District of Washington stated in *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013), "[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong."

Bavand cites to *Trujillo v. NWTS* for the broad proposition that any foreclosure litigation essentially satisfies the public interest element of a CPA cause of action. Brief of Appellant at 36, *citing* 183 Wn.2d at 835-836. But *Trujillo* was a CR 12(b)(6) motion where the borrower's allegation that Wells Fargo made "unfounded claims" was accepted as true. *Id.*[9]

Bavand also contends that "debt collection" affects the public interest, but non-judicial foreclosure is not considered debt collection as defined under the Fair Debt Collection Practices Act by every district court within the Ninth Circuit. *See, e.g., Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706 (W.D. Wash. Oct. 16, 2013); *Dubose v. Suntrust Mortg., Inc.*, 2012 WL 1376983, *2 (N.D. Cal. Apr. 19, 2012);

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[9] Interestingly, the Supreme Court never commented on how *NWTS' actions* as a trustee were likely to impact the general public. Instead, the Court impugned Wells Fargo – and Wells Fargo's beneficiary declaration – as the basis for remand.

*Twombly v. Truckee Meadows Funding, Inc.* ., 2012 WL 14023, *2 (D. Nev. Jan. 4, 2012); *Diessner v. Mortg. Elec. Registration Sys.*, 618 F.Supp.2d 1184, 1189 (D. Ariz. 2009) (finding that activity of foreclosing on property pursuant to deed of trust is not collection of a debt within the meaning of the FDCPA), *aff'd,* 384 Fed. Appx. 609 (9th Cir. Jun.17, 2010); *Ines v. Countrywide Home Loans,* 2008 WL 4791863, *2 (S.D. Cal. Nov. 3, 2008) (same); *Izenberg v. ETS Servs., LLC,* 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008) (same).

In this case, the conduct Bavand complained of was specific to her and no one else. Critically, Bavand offered no evidence whatsoever on how the public was likely affected by NWTS' issuance of notices directed *only to her* during the uncompleted foreclosure process. CP 1772 at 155:17-157:2 (Plaintiff bases her CPA claim solely on the notion that "fraudulent mortgage transfer foreclosures have been occurring," according to a report she watched on the television show "Frontline."); *Cf.* CP 2143 (Compl.), ¶ 6.6 (conclusory allegation that "such activities… [affect] the people of the State of Washington.").

Therefore, Bavand could not meet her burden of proving the public interest prong and her remaining CPA claim was unsubstantiated on this basis as well.

9. NWTS Did Not Cause Injury to Bavand.

An award under the CPA is *strictly limited* to damage "in… business or property…." RCW 19.86.090, *see also Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009). Lost wages or personal injuries, including pain and suffering, are *not* compensable under the CPA. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons,* 122 Wn.2d 299, 858 P.2d 1054 (1993); *Demopolis v. Galvin,* 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are *not* an "injury" under the CPA); *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013), *citing Gray v. Suttel & Assocs.*, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012) ("time and financial resources expended to... pursue a WCPA claim do not satisfy the WCPA's injury requirement."), *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010) ("The cost of… [prosecuting] a CPA claim is not sufficient to show injury to business or property.").

CPA liability also requires a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman Ridge*, *supra* at 793; *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007) (a plaintiff must prove that the "injury complained of… would not have

happened" if not for the defendant's acts). If a claimed expense would have been incurred regardless of whether a CPA violation existed, causation is not established. *Panag*, *supra.* at 64. As the Ninth Circuit held concerning a CPA claim in the foreclosure context:

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

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

Likewise, Bavand did not identify an injury that was proximately caused by NWTS' conduct. In fact, the proximate cause of *the entire foreclosure and every notice* was *Bavand's own default*, not NWTS's fulfillment of its duties during the uncompleted process. *See, e.g.*, *Knecht v. Fid. Nat. Title Ins. Co.*, 2015 WL 3618358, *10 (W.D. Wash. Jun. 9, 2015)[10]; *Massey v. BAC Home Loans Serv. LP*, 2013 WL 6825309, *8 (W.D. Wash. Dec. 23, 2013), *citing Babrauskas v. Paramount Equity*

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[10] "Fidelity's failure to send the RCW 61.24.031 letter did not cause Mr. Knecht an injury. As the court has already found, much of the time and effort Mr. Knecht expended was in an effort to modify his loan, obtain forbearance, or otherwise cure or avoid his default. To the extent he expended time or money directly responding to foreclosure efforts, the court concludes that Mr. Knecht would have made the same efforts with respect to saving his home from foreclosure regardless of the receipt of an additional RCW 61.24.031 letter."

*Mortg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure); *McCrorey, supra.* (plaintiffs' failure to pay led to foreclosure); *Reid v. Countrywide Bank*, 2013 WL 7801758, *5 (W.D. Wash. Apr. 3, 2013) (alleged deception in making payments to "parties who are not the true holders and owners of the Note" suggested no basis for injury).

Bavand merely reiterates the same failed arguments she has tried before in other courts. *Compare* Brief of Appellant at 39 (Bavand did not know how to contact owner Freddie Mac), *with Bavand*, 587 Fed. Appx. at 395 (vitiating this argument; "the notice of default provided all necessary information to Bavand...."); *compare also* Brief of Appellant at 42-43 *with Meyer v. U.S. Bank Nat. Ass'n, supra.* at 782 (ruling against the same categories of injuries being compensable under the CPA, including "QWRs" to the lender).[11]

The evidence below did not substantiate Bavand's CPA claim on the necessary causation and injury prongs, and the trial court properly granted summary judgment to NWTS as a result.

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[11] Bavand's counsel disingenuously misleads the Court through a citation to "*In re Meyer*" for the statement that "such damages have been found to be compensable under Washington law." Brief of Appellant at 43. The *Meyer* Bankruptcy Court decision which awarded those forms of damages was *reversed* by the District Court, although the debtors are still fighting that outcome in the Ninth Circuit.

C. Bavand Did Not Deserve a CR 56(f) Continuance.

A trial court "may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003); *see also Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400, 928 P.2d 1108 (1997), *citing Coggle v. Snow,* 56 Wn. App. 499, 504, 784 P.2d 554 (1990) (standard of review is a manifest abuse of discretion).

First, CR 56(f) is not intended to reward procrastination. *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999 (9th Cir. 2005).[12] Yet here, although the case began in December 2011 and NWTS' summary judgment was filed in June 2015, Bavand waited until just one week before the summary judgment hearing on August 12, 2015 to submit a motion suddenly seeking more time to conduct discovery. CP 149-156.

Second, Bavand does not indicate how further discovery would have been of assistance to her. *See Stranberg v. Lasz*, 115 Wn. App. 396,

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[12] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (looking to Fed. R. Civ. P. 56(f)).

63 P.3d 809 (2003); *see also Molsness*, *supra.* at 401, *citing Lewis v. Bell,* 45 Wn. App. 192, 196, 724 P.2d 425 (1986) (mere possibility that discoverable evidence exists is not sufficient). In light of the prior District Court and Ninth Circuit opinions in this case, her reasoning for needing more time was specious at best.

Basically, Bavand claimed that: 1) there were questions about OneWest's authority to enforce the Note, and 2) that a Note holder must simultaneously be the Note's owner. CP 149-156. The former issue was already addressed through lengthy litigation in federal court, and the latter oft-repeated issue was resolved by *Brown v. Dep't of Commerce*, *supra.*

Third, Bavand could not identify how she was somehow unable to "present by affidavit facts essential to justify [her] opposition." CR 56(f). She does not state how discovery on the "ownership" of the Note or various other inquiries would raise a genuine issue of material fact. CP 149-156. Clearly she was able to produce a 49-page brief responding to every issue in NWTS' Motion for Summary Judgment, and then some. CP 160-209. CR 56(f) is not meant to allow a party to claim inadequate discovery after producing comprehensive briefing in opposition to a summary judgment motion.

Bavand's application for more time was wholly infirm, and the

trial court did not abuse its discretion in denying a continuance.

D. NWTS Should be Granted Costs.

Under R.A.P. 14.2, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." Under R.A.P. 14.3(a), certain expenses are allowed as awardable costs.

R.A.P. 18.1(b) requires that a "party must devote a section of its opening brief to the request for the fees or expenses." Thus, in accordance with R.A.P. 14.2, and upon presentation of a cost bill pursuant to R.A.P. 14.4, NWTS requests a cost award if the Court determines that NWTS is the substantially prevailing party on appeal.

## V. CONCLUSION

The record in this case demonstrates that: 1) Bavand signed the Note and secured its repayment with the Deed of Trust naming the Property as collateral (CP 1694-1698, CP 1700-1721); 2) Bavand agreed in the Note that if she did not "pay the full amount of each monthly payment on the date it is due," she would be in default (CP 1696, ¶ 7(B)); 3) Bavand also agreed that the Note and Deed of Trust could be sold one or more times without notice to her (CP 1710, ¶ 20); 4) Bavand knew that

OneWest was the correct entity to communicate with concerning the loan (CP 1785, ¶ 4); 5) NWTS issued all DTA-required notices (CP 1819-1827, CP 1835-1838), and 6) the trustee's sale never occurred (CP 1784, ¶ 16).

The totality of Bavand's allegations in this case disagree with OneWest's authority as the beneficiary, yet they conspicuously downplay Bavand's default since September 2010 and her agreement in the loan documents that foreclosure was a proper remedy.

Throughout Bavand's Opening Brief, she assails each step NWTS took in the foreclosure process, but without any supporting evidence besides her mistaken legal theories. In sum, the trial court did not err by granting summary judgment to NWTS on Bavand's CPA cause of action, and this Court should affirm the ruling below.

DATED this 26th day of April, 2016.

**RCO LEGAL, P.S.**

By: _____
Joshua S. Schaer, WSBA #31491
Attorneys for Respondent Northwest Trustee Services, Inc.

**Declaration of Service**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On April 27, 2016 I caused a copy of the **Brief of Respondent Northwest Trustee Services, Inc.** to be served to the following in the manner noted below:

| | |
|---|---|
| Richard Llewelyn Jones<br>Kovac & Jones, PLLC<br>1750 112th Ave. NE, Suite D151<br>Bellevue, WA 98004<br><br>Attorneys for Plaintiff | [**X**] US Mail, Postage Prepaid<br>[ ] Hand Delivery<br>[ ] Overnight Mail<br>[ ] Facsimile |
| Ryan M. Carson<br>Wright Finlay & Zak, LLP<br>3600 15th Ave. W., Suite 200<br>Seattle, WA 98119<br><br>Attorneys for Defendants Mortgage Electronic Registration Systems, Inc. and OneWest Bank, FSB | [**X**] US Mail, Postage Prepaid<br>[ ] Hand Delivery<br>[ ] Overnight Mail<br>[ ] Facsimile |

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|---|---|
| Fred B. Burnside<br>Davis Wright Tremaine, LLP<br>1201 Third Ave., Suite 2200<br>Seattle, WA 98101<br><br>Attorneys for Defendant Mortgage Electronic Registration Systems, Inc. | [**X**] US Mail, Postage Prepaid<br>[ ] Hand Delivery<br>[ ] Overnight Mail<br>[ ] Facsimile |

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 27th day of April, 2016.

Kristine Stephan, Paralegal