

Case No. 47484-1-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

DANIEL J. WAGNER and ALICE WAGNER,

Appellants,

v.

EMC MORTGAGE, LLC f/k/a EMC MORTGAGE CORPORATION;
ACQURA; VANTIUM CAPITAL, INC.; J.P. MORGAN CHASE BANK,
N.A.; J.P. MORGAN MORTGAGE ACQUISITION CORP.; KAREN L.
GIBBON, P.S. and Doe Defendants 1 – 20,

Respondents.

APPELLANTS WAGNERS'

OPENING BRIEF

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INTRODUCTION

The record in this case is replete with the Defendants' violations of the requirements of Deed of Trust Act ("DTA"), including intentional misrepresentations about the location and physical possession of the Wagners' Promissory Note, the identity of the owner of loan, refusal to adhere to the requirements of the Foreclosure Fairness Act ("FFA") (RCW 61.24.163) and the authority to appoint a successor trustee. CP 329-350. The purported foreclosing trustee, Karen L. Gibbon, P.S. ("Gibbon") violated its duties under the DTA throughout the nonjudicial foreclosure process, beginning with accepting a defective "beneficiary declaration" that was not signed by the loan owner or noteholder. RCW 61.24, *et seq.* *Id.* Contrary to the trial court's decision, the Wagners sustained multiple "injuries", as required to prove a claim under the Consumer Protection Act ("CPA"), and they sustained monetary damages. RCW 19.86, *et seq.*

Under Washington law, the Wagners may assert a claim for the damages and injuries they suffered as a result of Defendants' violations of the requirements of the DTA and breach of their duties under the DTA, which constitute unfair and/or deceptive acts under the CPA. Other claims are also available, such as intentional and/or negligent misrepresentations and emotional distress, consistent with the relevant Washington case law and depending upon the particular facts. This is just as true in the absence

of a completed foreclosure sale as it is after a sale, as recently affirmed by the Washington Supreme Court in *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014); *Lyons v. U.S. Bank Nat. Ass'n*, 336 P.3d 1142 (2014) and *Trujillo v. NWTs*, Case No. 90509-6 (Wash. Sup. Ct., August 20, 2015).

The Wagners articulated their injuries and out of pocket damages and pointed out that there was no credible evidence regarding the identity of the loan owner and noteholder, but the trial court appeared to be completely unconcerned about adherence to statutory requirements. As the Court of Appeals held in *Walker*, a claim for pre-foreclosure damages under the DTA is simply a “cause of action for damages . . . based upon a trustee’s failure to comply with the DTA, causing damage to the borrower.” *Walker*, 308 P.3d at 721.¹ Similarly, the elements of the Wagners’ CPA claim for injuries suffered as a result of Defendants’ pre-foreclosure unfair or deceptive acts, which include their DTA violations, are the same principles that govern any other CPA claim under the standard *Hangman Ridge* factors. *Id.*; see also, *Frias*, 181 Wn.2d at 18; *Lyons*, 336 P.3d 1142; *Trujillo* at 8; *Klem v. Washington Mut. Bank*, 176

¹ Such liability may extend to a controlling beneficiary under agency principles. As the Court stated in *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 791 n.12, 295 P.3d 1179 (2013), “[w]here the beneficiary so controls the trustee as to make the trustee a mere agent of the beneficiary, then as principal, the beneficiary may be liable for the acts of its agent.” *See also Walker*, 308 P.3d at 724 (“[W]e can plausibly hypothesize Select controlling Quality’s actions violating the DTA”).

Wn.2d 771, 782, 295 P.3d 1179 (2013). Contrary to the findings by the trial court, the Wagners have been injured by the actions of the Defendants and suffered monetary damages, as was clearly articulated, and they are entitled to relief. CP 329-336; 1456-1464. To hold otherwise, is an implicit finding by the trial court that mortgage loan servicers and foreclosing trustees are free to violate the requirements of the DTA at every stage in the nonjudicial foreclosure process with complete impunity. The Deed of Trust Act and Washington state case law make clear that the trial court's findings are inconsistent with the intent and purpose of the statute, and would contravene the Supreme Court's oft repeated assertion that the DTA must be strictly construed in favor of the homeowner with the intent to avoid a wrongful foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (Courts "are required, when possible, to give effect to every word, clause and sentence of a statute"). "[L]enders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

STANDARD ON REVIEW

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d

1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toyndee, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980).

Here, the trial court's factual findings are completely disconnected from the evidence provided and the standard articulated by the binding authority on these subjects.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.*; *see also, Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Here, the record is clear that the Wagners proved they had suffered an "injury" and incurred monetary damages, consistent with the requirements of the applicable law. Therefore, the trial court did not apply the proper facts to the law and its decision should be reversed.

In addition, it also appears that the Court based its decision, in part, upon the assertion by counsel for the Defendants that the Wagners were in the process of being reviewed for a loan modification and that no foreclosure sale was pending at the time of the hearing. VRP 8:13-9:17; 23:4-7. Settlement negotiations relating to the application for a loan modification should never have been referenced during the hearing (ER 408) but more importantly, it was completely irrelevant to the harm that

had already occurred to the Wagners and her claims related to the previous attempts at foreclosure. The Court also made findings that the Wagners had not incurred recoverable attorneys' fees related to obtaining injunctive relief because the TRO was not heard, even though the filing of motion paperwork resulted in a discontinuance of the foreclosure sale and in spite of binding precedent that allows for such recovery. VRP 27:23-30:11.

STATEMENT OF ISSUES

The issues in this case are as follows:

1. There was no credible, uncontroverted evidence regarding the identity of the loan owner and noteholder in connection with the 2012 and 2013 attempted nonjudicial foreclosures and the correct entity for participation in an FFA mediation.
2. The documentation used in connection with the attempted nonjudicial foreclosures did not comply with the statutory requirements. In particular, the Appointment document was not signed by the loan owner nor the noteholder and instead was signed by Acqura, as a purported "attorney in fact", but there was no documentation presented supporting that supposed authority nor any testimony that instructions were given in reliance thereon.
3. The Wagners clearly articulated their "injury" caused by the Defendants, as well as monetary damages, such that they are entitled to relief under the CPA and their claims for negligent and intentional misrepresentation.

The recent foreclosure opinions of the Washington Supreme Court and the intermediate appellate court decisions which have followed and relied upon them make clear that under Washington law, a plaintiff may state a claim for damages relating to a breach of duties under the DTA

and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property as a CPA claim and/or tort claims, such as misrepresentation and emotional distress.² *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014); *Lyons v. U.S. Bank Nat. Ass'n*, 336 P.3d 1142 (2014) and *Trujillo v. NWTs*, Case No. 90509-6 (Wash. Sup. Ct., August 20, 2015). These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As Division I emphasized in *Walker*, "No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA's requirements." *Walker*, 308 P.3d at 724.

This Court should also look to *Frias*, *Lyons*, *Trujillo* and *Walker* for guidance in how to measure injury and damages under similar circumstances. If this Court chooses to endorse the actions of these Defendants and ignore the injuries and damages the Wagners have suffered as a result of their blatant refusals to adhere to the requirements

² See also, *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Rucker v. Novastar Mortg., Inc.*, 177 Wn.App. 1, 311 P.3d 31, (2013); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013).

of the DTA, it will have effectively gutted the requirements that any person or entity comply with the requirements of the DTA.

STATEMENT OF THE CASE

The Wagners have owned their home for many years and reside there with their children. They obtained a mortgage loan from Wells Fargo Bank, N.A., which was insured by FHA, on or about March 14, 2005. They paid on the mortgage loan until Mr. Wagner lost his job in 2006 and was unemployed for approximately two years. In 2008, a foreclosure had been initiated and Mr. Wagner got into contact with EMC, which was servicing his mortgage loan at that time. CP 329-336. He spoke with someone named Freddie Williams about obtaining a loan modification that would allow him to keep the family home. The Wagners' mortgage payments in 2008, including property taxes and insurance, were \$1,250.00 and after entering into a short term loan modification agreement, their payment was reduced to \$845.00 which was supposed to be designed to allow them to save the home until they got back on their feet financially. *Id.* Mr. Williams told Mr. Wagner that if he paid \$1,200.00 immediately, the mortgage payments would be \$845.00 per month thereafter. Mr. Williams also advised that he would stop the foreclosure sale that was pending. He further told Mr. Wagner that if he made twelve payments on time, EMC would "reinstate" the loan and place

the mortgage arrears on the back end of the loan. CP 330; 1456-.

The new payments began on March 2008 and the Wagners made all required payments. In February 2009, after the Wagners had made the last of the twelve payments, Mr. Wagner received a telephone call from someone at EMC who advised that the “contract” had ended and that they needed to enter into a new one. Mr. Wagner advised the representative that he was scheduled to start a new job in late March 2009 and asked if he could wait until the new job had started to decide upon the appropriate course of action as regards the mortgage loan. CP 329-336; 1456-1464. The representative stated “That’s great” and said that that proposed course of action would be fine. He indicated that EMC would be sending him a packet which he needed to fill out and send back. Mr. Wagner confirmed that he should send in another payment for \$845.00 for the month of March and every month thereafter with the representative who said that that was required. *Id.*

Mr. Wagner did not hear anything further from EMC until he received a packet on April 27, 2009. He completed the paperwork and gathered all necessary documents and sent them in to the fax number on the paperwork as instructed. He also made the required payments for March, April and May 2009. Sometime in May, the Wagners received a letter from EMC stating that they had breached the agreement by not

sending in payments. Mr. Wagner immediately called EMC to advise that he had made the payments and provided the confirmation information from the Western Union payment process. Pursuant to the terms of the Agreement that the Wagners entered into, at the end of the reduced payment period, there was going to be a balloon payment owing, which the Wagners knew that they would not be able to pay. However, the persons with whom Mr. Wagner spoke at EMC had repeatedly assured him that when he had made all of the required payments, they would work with him on a new program or a new loan so that he could wrap that amount into the new loan payments. He was told to essentially ignore the requirement for the large balloon payment since everyone knew he would not have the money to make that payment. CP 329-336; 1456-1464.

Mr. Wagner did not hear anything else again from EMC until June 2009 when he found a Notice of Trustee's Sale document taped to his front door scheduling a foreclosure sale for September 4, 2009. Mr. Wagner immediately called EMC and asked what was happening since he had made all required payments and had submitted all requested paperwork. He also questioned why he had been receiving monthly statements showing that he was required to pay \$845.00 a month and had been making those payments if his "contract" had been terminated. The representative of EMC did not answer his questions and when he asked for

a supervisor, the call was terminated. After that, every time Mr. Wagner tried to call EMC, no one would answer the phone. CP 329-336; 1456-1464. It indicates that the foreclosure is being done on behalf of EMC by the supposed new trustee. *Id.*

On June 6, 2009 Mr. Wagner received a letter from Western Union indicating that the payment he had made on June 1, 2009 to EMC was being rejected and returned. On June 15, 2009, the Wagners received a letter dated June 8, 2009 from EMC confirming the rejection of the June payment because it did not fully reinstate the loan. On June 22, 2009, Mrs. Wagner talked to someone named Mira at the Research Department with EMC about the problems with the loan. Mira indicated that the Wagners might qualify for the new loan program available by the federal government, presumably HAMP. They sent the paperwork in again after that telephone call, pursuant to the instructions that Mr. Wagner had received. CP 329-336; 1456-1464.

The Wagners made the July 1, 2009 payment to help facilitate them getting approved for a loan modification. When they hadn't heard anything by July 3, 2009, Mr. Wagner contacted EMC and spoke with Ariane Shafer, supposedly a supervisor. Ms. Shafer reported that EMC did not have records of twelve consecutive payments and did not have any of their paperwork. She indicated that they would have to do another "down

payment” and enter into another agreement before EMC would agree to “reinstate” the loan. Mr. Wagner insisted that she review the records of EMC to look for the payments they had made (17 payments in all) and he faxed a cover letter to EMC explaining the situation, including proof of the payments made. CP 332; 1456-1457.

On July 15, 2009 someone from EMC called Mr. Wagner again and insisted that it had no records of his payments or documentation. Meanwhile, the newest attempt at foreclosure was apparently proceeding and EMC was unwilling to do anything to straighten out the situation. Mr. Wagner kept asking about the fact that this was an FHA-insured loan and whether or not that criteria was being considered when EMC was evaluating – or not evaluating them – under the FHA criteria. He did not receive any sort of response. CP 329-336.

Meanwhile, unbeknownst to the Wagners, an Appointment of Successor Trustee document was executed by one Scott Walker, an alleged Assistant Vice President of EMC on December 6, 2007 in Minnesota. In fact, Mr. Walker is not an officer or employee of EMC. He is an employee of a company called Lender’s Processing Services (“LPS”) who signs documents on behalf of many entities by falsely asserting he is an officer of those companies in order to facilitate foreclosures across the country. CP 81; 84-87. Even more importantly, at the time that this

document was executed, EMC was not the “beneficiary” as defined under the Deed of Trust Act, RCW 61.24.005(2). (The Wagners maintain that EMC was never the “beneficiary” but it certainly was not in December 2007.) This document purported to appoint Quality Loan Service Corp. of Washington (“QLS”) as the Successor Trustee under the Wagners’ Deed of Trust.

EMC’s efforts at creating a paper trail that made it appear as though it had the legal authority to foreclose on the Wagners included the creation of an Assignment of Deed of Trust purportedly executed by an alleged Assistant Vice President of Wells Fargo on or about January 2, 2008, Nancy Brownley. (Ms. Brownley’s LinkedIn Profile lists her title as “REO Supervisor”.) CP 82. The Wagners maintained that Ms. Brownley uses the “officer” title only for purposes of signing documents related to a foreclosure in order to give the appearance of having more legal authority and knowledge, as is a common practice among banks engaging in foreclosures as mortgage loan servicers. This Assignment purported to transfer the beneficial interest in the Wagners’ Deed of Trust to EMC. It was recorded in the records of Pierce County, Washington on January 11, 2008. CP 85-91.

Also unbeknownst to the Wagners, another Assignment of Deed of Trust was executed by Craig Davenport, “Authorized Signer” on behalf of

EMC asserting that it was transferring the beneficial interest in the Wagners Deed of Trust to Chase. This document was signed on May 22, 2009 in Orange County, California. The Wagners do not know if this document was recorded in the records of Pierce County, Washington. It does not appear to have been recorded, but was nevertheless provided to the Wagners by EMC in the various production of documents that occurred throughout the handling of this case. CP 92-94. EMC has offices in Texas – not in California. There is a Craig Davenport on LinkedIn who is a Chase employee in Chicago dealing with FHA loans for Chase and he has been so employed since 2009. CP 82; 95-96. The Wagners maintain that there is an outstanding question regarding whether anyone at EMC had the authority to assign an interest in the Deed of Trust in the first place, but it is extremely unlikely that Mr. Davenport was in Orange County, California to sign the document since he works in Chicago. *Id.*

The Wagners received an NOTS on or about June 3, 2009 indicating that their Property was going to be sold on September 4, 2009. This NOTS was completed and signed by QLS on June 2, 2009 and recorded in the records of Pierce County, Washington on June 4, 2009. CP 329-336.

The Wagners then filed a Chapter 13 bankruptcy in an attempt at saving their home. They made payments in the Chapter 13 for some period

of time but did not have the funds available to pay the alleged arrears on the first mortgage. During that process, there were hearings regarding the validity of the claims being made by EMC about its alleged status as the “beneficiary” or holder of their Promissory Note (Objections to the Proofs of Claim filed by EMC), EMC provided a copy of the Wagners’ Note with an indorsement by a purported Wells Fargo Vice President making the Note payable to EMC. There remain questions about the validity of this indorsement given the different copies of the document which were provided and there is no date on the indorsement and therefore no way to know when it was affixed, if it was actually affixed. At various points there has been a contention that the indorsement was affixed to back of the last page of the Note, but it does not appear as showing through in reverse on copies of the Note that have been provided. There have since been other assertions about loan ownership which contradict these assertions that will be described further below. CP 97-128; 329-336.

While the Wagners were in the Chapter 13, they received a Notice of Assignment, Sale or Transfer of Servicing Rights indicating that the rights to service their loan was transferred to Acqura. CP 329-336. This document was dated August 18, 2010. Acqura is a subsidiary of a company called Vantium Capital, Inc. that apparently engages in mortgage loan servicing, but this has no bearing on the identity of the Note holder,

as required under the DTA to initiate a nonjudicial foreclosure sale in Washington state.

During the bankruptcy, Proofs of Claim were filed by EMC wherein it asserted that it was the “creditor”, and therefore the party who had the authority to file the Proofs of Claim and to collect the debt. The Proofs of Claim were filed in January and June 2010, contending that EMC was the proper creditor. No mention was made to the Bankruptcy Court or the Wagners about the alleged assignment of the interest in the Deed of Trust to Chase in May 2009. Instead, EMC relied upon the versions of the Note proffered which showed the alleged indorsement to EMC by Wells Fargo. CP 102-134.

Eventually the Wagners’ Chapter 13 case was dismissed because they could not pay the arrears on the mortgage in 2011. They used that as an opportunity to then seek to be placed into the new foreclosure mediation program known as the Foreclosure Fairness Act (“FFA”). As soon as they received a new Notice of Default in March 2012 from the newest alleged trustee, Defendant Gibbon, the Wagners had their lawyer make a request for mediation. CP 1460-1464.

The Notice of Default identified EMC as the “owner of the note” and listed Acqura as the loan servicer. CP 1474-1484. This information completely contradicts the Assignment of Deed of Trust from May 2009

wherein EMC purported to transfer the beneficial interest in the Deed of Trust to Chase. The Foreclosure Loss Mitigation Form attached to the Notice of Default was signed by Doug Battin on March 30, 2012 in Irving, Texas. He contended that he was a Senior Vice President of Acqura. A review of the Management of Defendant Acqura from its website in 2012 does not identify Mr. Battin as an officer of the company or part of the management team. His name does appear in connection with Acqura on a licensing list with the State of Nevada, but there is a LinkedIn profile for a Doug Battin in Philadelphia, PA who is a Vice President of Default Administration at Popular Mortgage Servicing, Inc. In spite of his apparently tenuous relationship with Acqura, he represented under penalty of perjury on March 30, 2012 that “EMC and/or Acqura” had attempted to contact the Wagners to discuss their financial situation in order to avoid foreclosure and that the Wagners had not requested an in person meeting. The Wagners disputed this assertion because they were always responding to attempts at a loan modification. They also maintain that Mr. Battin had no personal knowledge about their loan. CP 135-140.

Because the Wagners had requested to participate in the FFA mediation program, they were assigned a mediator and submitted all necessary information and documentation. Acqura participated in the mediation session rather than the alleged “beneficiary” and/or “owner of

the loan”, EMC. All communications in the mediation process came from Acqura and the person on the phone during the mediation session was an employee of Acqura, Arthur Bryant. The “in person” representative of Acqura at the mediation session was a private investigator named Michael Fox who contended that since he was not a lawyer (apparently he was working as a Rule 9 clerk for some unidentified lawyer) he was just there to observe. The Wagners pointed out to the mediator that the owner of the loan was required to be present through a person physically present at the mediation session and could also have someone on the phone, but that the person physically present at the mediation session had to be more than an “observer”. The mediator refused to take any action and allowed the mediation to proceed, in contravention of the statute. CP 1456-1464.

In connection with the mediation session, neither Acqura nor EMC provided all of the required documentation under the FFA. Interestingly, Acqura did provide some illuminating documentation that contradicted previously made assertions. First, Acqura provided an alleged copy of the Wagners’ Promissory Note with an Allonge. This copy of the Note did NOT contain a copy of the indorsement from Wells Fargo to EMC. Instead, the copy contained the first two pages of the Note which appear to be consistent with the version signed by the Wagners. But the third page, which purported to be the Allonge, showed an indorsement from EMC to

Chase, and signed by Craig Davenport, the same man who signed the May 2009 Assignment. CP 137-140. Acqura also provided a copy of a Limited Power of Attorney document from J.P. Morgan Mortgage Acquisition Corp. (“MMA”) to Vantium Capital, Inc., as the “Owner” of various loans, giving Vantium the power to modify those loans. *Id.* This document was offered during the mediation as demonstrating the authority of Acqura, apparently as a subsidiary of Vantium, to modify loans on behalf of Chase. There is no mention anywhere in the document regarding loans owned by Chase and/or EMC. The sole reference is to MMA as the owner of the loans in question. Thus, this document did not provide evidence of any authority to act as to any of the parties to the Wagners’ mediation. Again, the mediator chose to ignore this issue entirely and allowed the mediation to proceed, even though there was completely contradictory information being provided about the “owner of the loan” and the “beneficiary”. *Id.*

During the mediation process, Acqura also provided a “Declaration of Ownership of Note” signed by one Vivian Forr, Declarant in Irving, Texas asserting under penalty of perjury on May 30, 2012 that EMC was the “current owner and/or the actual holder of the promissory note dated March 14, 2005.” CP 1397-1411. This document not only demonstrates the inconsistency in the Defendants’ positions during

mediation and in the nonjudicial foreclosure process, but it makes clear that Acqura and EMC were playing fast and loose with the facts. RCW 61.24.030(7) requires that the foreclosing trustee have proof that the entity initiating the nonjudicial foreclosure, the “beneficiary” (defined as the “noteholder” at RCW 61.24.005(2)), is also the loan “owner”. RCW 61.24.030(7). Ownership **may** be proven by way of a declaration signed under penalty of perjury by the actual holder. *Id.* The document produced during the mediation did not meet this requirement because it is phrased alternatively that: EMC is the “current owner and actual holder” OR EMC is the “actual holder”. Thus, the Declaration did not comply with the requirements of the DTA. RCW 61.24.030(7). This assertion also ignores the other assertions about MMA’s alleged rights to enforce described previously.

Of course, this directly contradicts the assertion that the Note, which includes in one version an Allonge indorsed by EMC to Chase is a true and correct copy of the Wagner’s Note which was made by Acqura during the mediation process. Basically, it appears that the Defendants simply assert whatever is convenient at any given time as regards the identity of the owner of the loan and the holder of the Wagners’ Promissory Note, but if the Note has actually been indorsed to Chase, then Chase is the “owner of the loan” and should have been the entity

participating in the mediation session, and it would be the only entity with the legal authority to commence a non-judicial foreclosure of the Wagners' home. During the mediation session, Acqura also asserted for the first time that even though the loan was originally structured as an FHA loan in 2005, it was not insured after signing and so was not part of the FHA program. CP 1456-1464; 81-86.

These same conflicting assertions appeared again after the mediation session. Acqura purported to offer a loan modification, but it was not feasible for the Wagners, as it was recapitalizing their arrears, which significantly increased the mortgage payments. Further, it did not appear that Acqura was properly crediting the Wagners for the payments that they had made under the Agreement from 2008 and 2009, nor for their payments made through the Chapter 13 Trustee. Instead of providing a complete payment history, as required under the FFA, Acqura provided only a partial printout from EMC through to August 16, 2010 which only showed a portion of the temporary payments and none of the bankruptcy payments. Acqura provided an Excel spreadsheet that apparently its employee had created, but nothing from the alleged "beneficiary" and "owner of the note", EMC. Of course, there was nothing at all from Chase, to whom the Note was allegedly indorsed and who was purportedly assigned the beneficial interest in the Deed of Trust in May 2009. Again,

all of this was ignored by the mediator. CP 1456-1464.

Following a certification issued by the mediator that it was complete, Gibbon issued an NOTS and a Notice of Foreclosure dated August 2, 2012. CP 1456-1464. The Notice of Foreclosure indicated that the Wagners were due for January 1, 2011, that there was \$505.91 in a suspense account and that there was an escrow shortage of \$11,714.32. There was also an entry for “bank fees” of \$725.00 and Trustee/Attorney’s Fees of \$675.00, as well as other foreclosure costs and expenses and late fees added to the loan balance. The NOTS was recorded in the records of Pierce County, Washington and the auction was scheduled for November 30, 2012. Ms. Gibbon issued these documents, asserting that she had been appointed as the Trustee by EMC by way of an Appointment of Successor Trustee document which was signed by Vivian Farr, Vice President of EMC on May 30, 2012. The document was recorded in the records of Pierce County, Washington on June 5, 2012. *Id.*

The Wagners maintained that since EMC had apparently executed an Allonge indorsing their Note to Chase at some point in time prior to the execution of this document, EMC did not have the legal authority to appoint a new trustee under the Deed of Trust because it was not the “beneficiary” as defined under the DTA. It was not the holder of the Note, even if it did have holder status because the Note was payable to EMC.

According to the copies provided by EMC to the Wagners, the Note was payable to Chase, and this was consistent with the Assignment of Deed of Trust to Chase that was also provided to the Wagners. CP 1346-1350.

The Wagners filed a Chapter 7 bankruptcy on November 29, 2012 in order to stop the foreclosure sale and so that they could receive a bankruptcy discharge of their unsecured debts, which would put them in an even better position to be able to make a mortgage payment in the future. That put a stop to the foreclosure sale temporarily. CP 1456-1464.

Acqura and EMC then filed a Motion for Relief from the Automatic Stay with the Bankruptcy Court, which was supported by a Declaration from an employee of Acqura, Amber Paxton, who asserted that she was a Vice President. CP . Her name also does not appear as Management on Acqura's company profile on its website. More importantly, in spite of the fact that Acqura is merely the loan servicer for the Wagners' loan, Ms. Paxton attempted to testify to having personal knowledge about the Wagners' loan and its history, and in particular, she asserted that she personally was knowledgeable about EMC's ownership of the Wagners' Promissory Note. *Id.* Ms. Paxton provided a copy of the Wagners' Note attached to her Declaration which included the indorsement to EMC. CP 163-166. There was no mention of and no copy of the version of the Note with the alleged indorsement to Chase. It

should also be noted that Gibbon, the foreclosing trustee who has a duty of good faith adherence to the requirements of the Deed of Trust Act, represented EMC in the Bankruptcy Court and presented the Court with a Declaration from Ms. Paxton wherein she asserted knowing that EMC owned the loan and/or held the Note, but did not make mention of the purported indorsement of the Note and transfer of the beneficial interest to Chase. The Wagners maintain that there remains a genuine issue of material fact as to the identity of the loan owner and noteholder, and what Gibbon knew about these relationships when she initiated the nonjudicial foreclosures, in order to assess liability under the CPA based upon violations of the DTA. The Defendants' actions were done in order to seek to speed up the foreclosure process for the benefit of one of the parties and to the detriment of the other. *Id.*

As is clear from the pleadings presented to the Bankruptcy Court and the Order signed by Judge Lynch on January 27, 2011, which incorporated the arguments in the Response, there was a significant limitation to the reasons for the Order, but most important among them would be that the ruling was fixed in time. In other words, if the Wagners' Promissory Note changed hands after the filing of the Proofs of Claim in January and June 2010, and/or after the Order was entered in 2011, it would be unrelated to and not covered by the Order. The claims

being made at this time by the Wagners relate to subsequent attempts at nonjudicial foreclosure and provide information regarding the history of the misrepresentations made in connection with attempts at collection to provide context. CP 101-146. Further, the Court entered the Order because it was a Chapter 7 no asset case and the Wagners did not have any equity in the Property. *Id.* The Bankruptcy Court left it up to the Wagners to proceed in state court. The foreclosure sale had been continued to February 15, 2013. *Id.*

Further evidence of the false nature of the representations being made by Acqura, EMC and Chase about the owner of the beneficial interest in the Deed of Trust and the holder of the Note is found in the Consent Order signed and entered into by Chase's parent company, J.P. Morgan Chase & Co. ("JPMC"), a registered bank holding company with the Board of Governors of the Federal Reserve System, Washington D.C. on April 13, 2011. CP 181-198. The contents of that Consent Order make clear that Chase was previously engaged in the business of mortgage loan servicing on behalf of others on its own and through subsidiaries, including EMC. However, on April 1, 2011, the bank holding company apparently transferred all of its loan servicing rights to Chase – the Bank in the Order – and indicates that EMC and the others are "no longer in the business of residential mortgage loan servicing, and only the Bank is

conducting residential mortgage loan servicing within the JPMC organization.” *Id.* Obviously, the representations made by Acqura, EMC, and Chase as regards the Wagners’ Note – who owns it, who holds it, who is servicing, etc. - expressly contradicts the requirements of the Consent Order and the representations made therein by Chase’s parent company. This Consent Order was predicated upon assertions that Chase and EMC, and others, had engaged in the type of activity alleged in this complaint – false assertions about loan ownership and who has the right to enforce the terms of the Note, etc. The Wagners maintain that Acqura, EMC and Chase have knowingly and intentionally violated the representations made in this Consent Order.³ *Id.*

Consistent with the continued attempts at manipulation of the facts, during the litigation Chase and EMC exchanged a Request for Admissions document wherein EMC admitted that it “assigned” the interest in the Wagners’ Deed of Trust to JP Morgan Mortgage Acquisition Corporation by way of an Assignment that was recorded in Pierce County, Washington on November 11, 2013. This was done at the same that EMC was

³ The Wagners are not contending that they have the right to enforce the terms of the Consent Order nor are they a party to its terms. Rather, they are contending that the Consent Order representations support their assertions that the representations made by the Defendants as regards their mortgage loan are demonstrably false at every level, and that the Defendants are intentionally engaged in actions to mislead and deceive the Wagners in a manner which is consistent with other similar action which have caught the attention of federal regulators.

contending that it was “in possession” of the Note. CP 593-597. Notably, in the Requests, Chase did not ask EMC to whom the Note is indorsed or in what role it is holding the Note, i.e., custodian, noteholder, or some other role. Certainly, it makes no sense that if EMC were the loan “owner”, as indicated on the Notice of Default issued in March 2012, it would “assign” its interest in the Deed of Trust to another entity, as the interest in the Deed of Trust follows the Note. Chase and EMC both intentionally obfuscate the identification of the “noteholder”, as defined by the UCC, nor is there any explanation given as to why the Deed of Trust would be assigned to the corporate parent of both Chase and EMC in November 2013. All of this prevented the entry of an order granting summary judgment to the Defendants.

In support of the Motion for Summary Judgment, EMC did not offer any proof at all. The only testimony came from the employee of the successor loan servicer, Residential Credit Servicing, and that declarant could only testify about the contents of its computer screen. CP 1342-1350; 1351-1353. The record was clear that the Appointment of Successor Trustee document purporting to appoint Ms. Gibbon as the trustee was not signed by EMC, the entity that the Court specifically found was the noteholder, even though there was no testimony from EMC that it held the Note. Instead, the Appointment was signed by Acqura as “attorney in fact”

for EMC. VRP 36:11-45:34. Counsel for EMC asserted to the Court that a Power of Attorney was provided to the Court but one was not provided. There was no testimony by anyone from EMC or Acqura that such a document existed; no testimony that someone from EMC told Acqura to act as its agent to sign the document or to do anything in connection with the attempts at foreclosure. *Id.* The trial court completely ignored this glaring deficiency and ignored the requirements of binding case law. *Id.*

The Wagners have been desperately trying to save their home for their family and to obtain recovery for the wrongs that have been done to them. They have only ever wanted a modification that was reasonable and they have made payments under temporary programs and the Chapter 13 bankruptcy in order to help make that happen. After being out of a job for a long period of time, Mr. Wagner has employment and the ability to make mortgage payments, which is all that he has ever wanted to do. They also want credit for the payments that have been made. The Wagners had the funds available to make a mortgage payment in 2012, but when they were not doing so, they used the money to fix the house, including necessary roof repairs and others. The Wagners are not people who are looking to get their house for free – they just want a fair shake, which they have been denied to date. This whole thing has caused them extreme emotional distress, including anxiety, sleeplessness, headaches and all of

the symptoms of carrying a heavy burden and facing the possibility of telling their children that they have lost their home, and they have incurred the financial damages outlined in the Declaration of Mr. Wagner filed in support of the TRO, and supported by Ms. Huelsman's testimony regarding payments made to her by the Wagners. CP 81-86; 1397-1400; 1456-1464.

ARGUMENT

A. Significant genuine issues of material fact remain unanswered and there are numerous contradictions in the evidence that precluded summary judgment.

The record is replete with the factual contradictions made by the Defendants in the case, and the careful crafting of a declaration by the employee of a subsequent loan servicer (CP __) to give the appearance of providing truthful information about loan ownership when, in fact, there has never been any evidence offered that supports the Court's finding that EMC had physical possession of the Note and that it was the loan owner in 2012 and 2013. *Id.* Moreover, the Wagners provided testimony about the manner in which they were damaged and injured because of the Defendants' actions in bringing a wrongful nonjudicial foreclosure and when they refused to properly participate in an FFA mediation. CP 1456-1464. The Wagners met all of the CPA elements as outlined in *Frias*, *Lyons* and *Trujillo*, which the Court simply ignored.

1. There was no credible evidence regarding the holder of the Note and the loan owner in 2012 and 2013 such that EMC could initiate a nonjudicial foreclosure.

The first recent case to consider the “beneficiary” definition in the DTA was *Bain v. Metropolitan Mrtg. Group*, 175 Wn.2d 83 (2012), wherein the Supreme Court considered who may act as the “beneficiary” under the DTA; if the “beneficiary” must be the “note holder”, what is the effect of someone who is not a “note holder” initiating a foreclosure; and whether a plaintiff can pursue a claim for violation of the CPA, if an entity falsely asserts it is a “beneficiary”. *Bain* at 85-87. The Court made clear that the “beneficiary” statute means what it says and that it must be “the actual holder of the promissory note or other instrument evidencing the obligation” and that entity has “the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.” *Id.* The Court did not determine the effect of such a misrepresentation. It provided some analysis but ultimately has left a determination of that question to the trial court. The Court also made very clear though that a homeowner may pursue a claim for a violation of the CPA for violations of the DTA, “but it will turn on the specific facts of each case.” *Id.*

The *Bain* case was particularly focused on the use of MERS as the particular entity who was claiming to be the “beneficiary”, but the decision and analysis used by the Supreme Court would apply to any

person or entity who falsely claims to be a “beneficiary”. When analyzing the effect of its decision that the plain language of the DTA definition of “beneficiary” means what it says and that the entity initiating the foreclosure must be the “note holder”, the Supreme Court pointed out that in order to demonstrate who may initiate a foreclosure as the “beneficiary”,

[T]he equities of the situation would likely (though not necessarily in every case) require court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender’s successors. If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having “MERS” convey its interests would not accomplish this.

Bain at 98. RCW 61.24.010(4) requires that the trustee has a duty of good faith to the borrower, beneficiary and grantor. Here, it is clear that these Defendants collectively participated in creating the false documentation, as noted above and in making false representations during an FFA mediation, which led to a futile mediation. RCW 61.24.030(4) provides, in part, that a nonjudicial foreclosure cannot be held unless all of its requirements have been met. No one is required to use the non-judicial foreclosure process, but if they choose to do so, they must adhere to all of its requirements. It cannot “redefine” any portions of the statute in the Deed of Trust, as noted by the Court in *Bain*. What a lender inserts

into the Deed of Trust cannot alter the statutory requirements of the DTA.

Bain, supra.

The Legislature has set forth in great detail how non-judicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

Bain at 98-99. The import of the definition of “beneficiary” is seen in the DTA. RCW 61.24.010(2) specifies who may act as a trustee and the process by which a trustee is substituted by the “beneficiary”. RCW 61.24.010(2). The Washington DTA has three objectives: (1) that the nonjudicial foreclosure process remains efficient and inexpensive; (2) that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) that the process promotes the stability of land titles. *Cox v. Helenius, supra*, at 387. *See also* RCW 61.24.030(6). “Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed on the trustee is exceedingly high.” *Id.* at 388-89. In *Cox*, the Washington Supreme Court noted that even if the plaintiffs had not properly acted to restrain the sale, it would have nevertheless been voided because of the trustee’s action. *Id.*

The recent foreclosure opinions of the Supreme Court and the

intermediate appellate court decisions which have followed and relied on them make clear that under Washington law, a plaintiff may state a claim for damages relating to a breach of duties under the DTA and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property.⁴ These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As Division I emphasized in *Walker*, “No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.” *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013).

Since Washington case law makes clear that a plaintiff may pursue these claims, we must look to the same cases to instruct us as to what principles guide the plaintiff’s claims under the DTA and the CPA. *Id.* Citing to *Klem*, the *Walker* court noted that it “supports our conclusion that the specific remedies provided in the DTA are not exclusive.” *Walker*, 308 P.3d at 721. With the exception of *Albice*, which did not

⁴ See *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Rucker v. Novastar, Inc.*, 177 Wn.App. 1 (2013); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013); *Frizzell v. Murray*, 170 Wn. App. 420, 283 P.3d 1139 (2012), review granted, 176 Wn.2d 1011 (2013).

address the issue because a CPA claim was not pled, all of the recent Washington foreclosure cases have consistently held that breach of duties and failure to adhere to the DTA's statutory requirements also constitute violations of the CPA and subject defendants to liability thereunder.

The Supreme Court recently decided *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) and *Lyons*, 336 P.3d 1142 (2014), which cited extensively to *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability.

In *Frias* and *Lyons*, the Supreme Court rejected the argument that plaintiffs may bring direct claims for violations of the DTA pre-foreclosure, but it reiterated its previous decisions and in fact strengthened its position on the bringing of claims for violations of the CPA predicated upon violations of the DTA requirements. (This means that the Wagners' claims for direct violations of the DTA are now moot.) The Court also made clear that any claims that are otherwise available under an existing body of law may be brought predicated upon violations of the requirements of the DTA. In *Frias*, the Supreme Court stated: "even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to

business or property caused by alleged DTA violations that could be compensable under the CPA.” *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57 (2009); *Lyons*, 336 P.3d at 1142.

Numerous other DTA cases decided by the Supreme Court require that language in the DTA be construed strictly in the homeowner’s favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (same); *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (same). The DTA “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.” *Bain*, 175 Wn.2d. at 93.

A plaintiff who alleges a violation of the Washington Consumer Protection Act must prove five elements: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property; (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). The Wagners described the unfair and deceptive acts and

practices of the Defendants in great detail above. As the Court also noted in *Bain*, a homeowner may pursue a claim for a violation of the CPA, provided that the plaintiff be able to provide the Court with sufficient facts to support the claim. *Bain*, at 98-110. The Court noted that “characterizing MERS as the beneficiary has the capacity to deceive” and that there is certainly a presumption that the public interest element is met because MERS is involved in “an enormous number of mortgages in the country”. *Id.* The same analysis applies here in connection with affirmative representations that appear to have also been made by Chase/MMA given the recent assignment to the parent and the intentional avoidance of Chase and EMC to using the language “noteholder” or “loan owner”. The Wagners can prove that these acts constituted violations of the CPA, *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990).

The Supreme Court noted in *Klem* that claims for violations of the CPA, RCW 19.86, *et seq.* can be brought against defendants for acts that are “unfair or deceptive”, including in the context of a non-judicial

foreclosure sale. *Klem* at 11. The Court went on to cite extensively and discuss its decision in *Panag v. Farmers Ins. Co. of WA*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009), and then it expressly clarified that a violation of the CPA may be brought because of a “*per se* violation of a statute, an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest.” *Klem* at 16. Quoting from *Panag*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would have undertaken an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

Klem, at 16, citing to *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). The *Klem* Court further noted that “an act or practice can be unfair without being deceptive” and that the statute clearly allows claims for “unfair acts **or** deceptive acts or practices.” *Klem*, at 16-17. Citing to *Panag*, the *Walker* Court also noted that Walker had valid claims even without the foreclosure being complete because he had suffered harm:

In *Panag v. Farmers Insurance Co. of Washington*, our Supreme Court held, “[T]he injury requirement is met upon

proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.

....

Because Walker pleads facts that, if proved, could satisfy all five elements, we conclude that the trial court erred by dismissing his CPA claim.

Walker, citing to *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 53, 204 P.3d 885 (2009).

Furthermore, on the same day that the Court of Appeals issued its opinion in *Walker*, it also issued *Rucker v. Novastar, Inc.*, Case No. 67770-5-I (Wash. Ct. App., Div. I, Aug. 5, 2013). *Rucker* continues to follow the reasoning outlined in the Supreme Court's recent foreclosure cases, and that outlined in the published opinion in *Walker*. *See Rucker*, slip op. at 12 (“[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale;” “such actions by the improperly appointed trustee, we have explained, constitute ‘material violations of the DTA.’”) (citing *Walker*) (quotation marks omitted). Furthermore, the Washington Court of Appeals reiterated its position in *Bavand. Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013). EMC, Acqura and Vantium have been colluding together and with subsequent servicer RCS

to hide the identity of the “noteholder” and loan “owner” and none of the complied with the requirements of the DTA.

The CPA allows for proof that the complained of practice is injurious to the public by actually injuring other persons or it “had the capacity to injure other persons” or “has the capacity to injure other persons”. RCW 19.86.093. It is clear that these actions are part of the Defendants’ regular business practices which has injured the public and will do so in the future. The Wagners were not required to prove that others have been similarly harmed. The CPA allows for liability simply because the actions complained of – making false representations regarding the identity of the loan owner and note holder and the wrongful initiation of a nonjudicial foreclosure – “has the capacity” to harm others. RCW 19.86.093.

In *Frias*, the Supreme Court stated: “even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.” *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57 (2009); *Lyons*, 336 P.3d at 1142.

B. The doctrines of *res judicata* and/or *judicial estoppel* did not apply to the claims advanced in this case.

Although it is unclear if the Court based its ruling on the doctrines of *res judicata* and *judicial estoppel*, the Wagners maintain that this would be an improper application of these doctrines. The Wagners provided a complete factual history of what led to the claims that they made in this case, but they were not pursuing claims that predated the most recent attempt at foreclosing nonjudicially. Thus, the limitations of the Bankruptcy Court's Order are even more important and do not have any relevance regarding the identity of the loan owner and note holder more than two years later because there was no credible evidence whatsoever about the location of the Note when the 2012 and 2013 foreclosures were initiated, and who had the authority to participate in the FFA mediation, because the only declarations came from the employee of a subsequent loan servicer testifying about information on a computer screen.

Moreover, the Bankruptcy Court did not effectively adjudicate any of those claims in connection with the Wagners' Objection to Proofs of Claim. The Bankruptcy Court determined that EMC had complied with the Bankruptcy Rules for filing a Proof of Claim. That is the extent of the impact of that Order. CP 468-498. Under the requirements identified in *Pederson v. Potter*, 103 Wn. App. 62, 67 (2000), the doctrine of *res judicata* did not apply, as the Wagners are not litigating the issue of what entity is permitted to file a proof of claim in a bankruptcy case, nor are

they litigating the issue of who had the right to appoint a successor trustee in 2009. Rather, they are litigating who had the right to act to attempt to foreclose nonjudicially in 2012 and to participate in a mediation under the FFA in that same time period, and then who had the right to attempt to foreclose in 2013.

The case of *Siegel v. Fed. Home Loan Mrtg. Corp.*, 143 F.3d 525 (9th Cir., 1998), cited by the Defendants, was merely persuasive authority and it significantly pre-dated the Courts' general understanding about the way that mortgages are sold and repackaged and serviced. While the *Siegel* decision has not been overruled, it is unlikely that any Court now would reach such an overly broad conclusion in the claims process absent a stronger showing and in light of recent case law, such as *In re Jacobsen*, 676 F.3d 1193 (9th Cir. 2011). It is important to note that in the Requests for Admissions that were crafted by attorneys for two related corporate entities, there is no mention at all of EMC being a "noteholder" or a loan "owner" – language which is necessary for actions under the Deed of Trust Act. Rather, there is mention of "transfer" or "assignment". There is a reason that Chase and EMC were avoiding using "noteholder" language, just as EMC avoided it in the Bankruptcy Court briefing. But in support of its motion, EMC, through its counsel and a subsequent servicer contends that it is the "noteholder", but not that it is the loan owner even

though that is a central point in this case.

In addition, new facts came to light since the entry of the Bankruptcy Court Order in January, 2011, including the language in the Consent Order, which contravenes assertions made in this case about loan ownership. During the FFA Mediation, the only participant was someone on the telephone from Acqura. There was person physically present as required by the statute nor was there proof that Acqura had the authority to act for EMC, the alleged noteholder. Instead, Acqura provided a Limited Power of Attorney document that allowed Vantium (Acqura's parent), to act on behalf of Chase to modify loans that were owned by MMA. It was offered to demonstrate Acqura's ability to participate in the mediation on behalf of EMC, even though EMC was not mentioned anywhere in the document. And the Declaration of Ownership read that EMC was the "noteholder and/or loan owner". CP 181-198. During the litigation, suddenly MMA was irrelevant, according to the Defendants.

Also during the mediation, EMC, acting through Acqura, provided a Declaration of Loan Ownership document that asserted it was the "current owner and/or actual holder" of the Wagners' Note. RCW 61.24.030(7); RCW 61.24.005(2), which is ambiguous, just as in the *Lyons* and *Trujillo* cases. Further, it was not signed by EMC. This ownership **may** be proven by way of a declaration signed under penalty of

perjury by the actual holder. *Id.* The document produced herein does **not** meet this requirement because it is phrased alternatively that: EMC is the “current owner and actual holder” OR EMC is the “actual holder”. Thus, the Declaration did not comply with the requirements of the DTA. RCW 61.24.030(7). And of course, this assertion ignores the other assertions about MMA’s alleged rights to enforce during the mediation. These later misrepresentations, which are actionable, make clear that the doctrines do not apply and that facts have been represented as changed since the entry of the prior Bankruptcy Court Order. The record is unclear as to the trial court’s findings as regards this argument, but in the event that this Court believes that it supported some portion of the trial court’s ruling, it should be overturned.

C. The Wagners’ claims for misrepresentation should have advanced as they proved the elements of their claims and the damages resulting therefrom.

The numerous misrepresentations made to the Wagners in the course of the foreclosure process were laid out in great detail. The Washington Supreme Court has adopted the definition of negligent misrepresentation in the Restatement (Second) of Torts as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise

reasonable care or competence in obtaining or communicating the information.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). When a court determines whether a party had a right to rely upon the representations made by another, it must engage in an analysis that involves consideration of the party's "diligence in ascertaining the facts for himself" and the "exercise of care and judgment in acting upon representations which run counter to knowledge within his possession or reach." *Rummer v. Throop*, 38 Wn.2d 624, 231 P.2d 313 (1951).

Washington adopts the position of the *Restatement (Second) of Torts* (1977), Section 551, which provides that:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
 - (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
 - (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading

Rest. (Second) of Torts, Section 551 (1977), cited with approval in *Oates v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924 (1949); *Sigman v. Stevens-*

Norton, 70 Wn.2d 915, 918-919, 425 P.2d 891 (1967) (relating to *Rest. (Second) of Torts*, Section 551(2)(a)); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964) (relating to *Rest. (Second) of Torts*, Section 551(2)(a)). Similarly, Section 552 provides:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Rest. (Second) of Torts, Section 552 (1977), cited with approval in *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). The suppression of a material fact which a party is bound in good faith to disclose is the equivalent of a false representation. *Oates*, 31 Wn.2d at 902.

In order to prove a claim for fraud or intentional misrepresentation, a plaintiff must prove (1) the representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation and (9) damages suffered by the plaintiff. *West Coast, Inc.*

v. Snohomish County, 112 Wn.App. 200, 206, 48 P.3d 997 (2002).

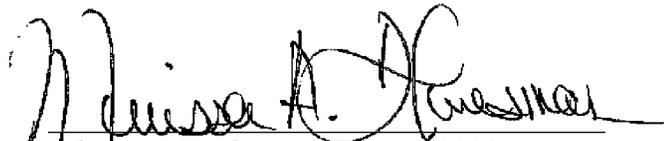
Here, the Wagners laid out the numerous specific misrepresentations that were made by the Defendants about the initiation of the 2012 and 2013 nonjudicial foreclosures and participation in the FFA mediation. Those misrepresentations relate to who could appoint a successor trustee, cause an NOD to be issued, the authority to foreclose, including the creation, execution and recording of an Appointment of Successor Trustee document signed by someone other than the beneficiary and loan owner; Gibbon's reliance upon a "Declaration of Loan Ownership" with ambiguous language and signed by a purported "attorney in fact"; entry into an FFA mediation based false information about the identity of the parties involved; and then issuance of an NOTS based upon that false information. The Wagners had to take affirmative action to put a stop to the foreclosure process, at their own expense. It is irrelevant whether or not the TRO hearing was held. The Wagners had to file pleadings and start the process to get the sale stopped. The attempt to shift the blame to the Wagners because they defaulted on the loan in the first place by the Defendants, which the Court seemed to accept, is in absolute defiance of the requirements of the recent Washington Supreme Court case law. For these reasons, the Wagners maintain that they met all of the elements necessary to support their claims for negligent and

intentional misrepresentations and should have been permitted to proceed to trial on those claims.

CONCLUSION

The Wagners maintain that significant genuine issues of material fact remain unanswered and there are numerous contradictions in the evidence that precluded summary judgment. Further, the doctrines of res judicata and/or judicial estoppel did not apply to the claims advanced in this case. The Wagners' claims for misrepresentation should advance as they have proven the elements and their damages resulting therefrom.

Respectfully submitted this November 30, 2015

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive, flowing style with a long horizontal line extending to the right.

Melissa A. Huelsman, WSBA # 30935
Attorney for Appellants Daniel J. Wagner
and Alice Wagner

CERTIFICATE OF SERVICE

I, Carl Turner, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on Monday, November 30, 2015, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

Wesley Jude Werich Nicolas A. Daluiso Robinson Tait, P.S. 710 Second Ave, Suite 710 Seattle, WA 98104 Emails: wwerich@robinsontait.com ndaluiso@robinsontait.com	<input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u>
Karen L. Gibbon P.S. 3409 McDouall Ave, Suite 202 Everett, WA 98201 Email: kgibbon@gibbonlaw.com	<input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail,</u>

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Monday, November 30, 2015, at Seattle, Washington.

/s/ Carl Turner
 Carl Turner, Paralegal

MELISSA HUELSMAN LAW OFFICE

November 30, 2015 - 4:56 PM

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Opening Brief

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