

Case No. 47595-2-II

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

DJIBRIL DJIGAL,

Appellant,

v.

**QUALITY LOAN SERVICE CORPORATION OF WASHINGTON,
INC.; AURORA LOAN SERVICES, LLC; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.; NATIONSTAR
MORTGAGE, LLC; Wilmington Trust Company as Trustee for
Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6
AND DOES 1-20, INCLUSIVE,**

Respondents.

**THURSTON COUNTY SUPERIOR COURT
CASE NO. 13-2-01782-0**

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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 Djigals' Promissory Note, the identity of the owner of loan, and the authority to appoint a successor trustee. The purported foreclosing trustee, QLS, repeatedly 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 and which was inconsistent with the statute on its face because of the qualifying language. CP 356. A QLS employee then signed the Appointment of Successor Trustee document on her own authority, purporting to sign on behalf of the loan servicer, Nationstar. (CP 343-344; 462). Contrary to the trial court's decision, Mr. Djigal sustained multiple "injuries", as required to prove a claim under the Consumer Protection Act ("CPA"), and sustained monetary damages. RCW 19.86, *et seq.*

Under Washington law, Mr. Djigal may assert a claim for the damages and injuries he 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*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

Mr. Djigal articulated his injuries and out of pocket damages and pointed out that there was no credible evidence regarding the identity of the loan owner and noteholder during the initiation of the nonjudicial foreclosure, that the documentation which was available did not support the claims, and that there was a lack of evidence presented by the Defendants to support the factual assertions they made. However, the trial court appeared to be completely unconcerned about adherence to statutory requirements. Mr. Djigal met the standards articulated by the Washington Supreme Court in *Frias*, 181 Wn.2d at 18; *Lyons*, 336 P.3d 1142; *Trujillo* at 8; and *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013). If this Court agrees with the trial court. Then it would implicitly be finding 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, contrary to the

standard articulated by the Supreme Court in its recent decisions.

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 & Toyne, 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 Mr. Djigal proved he 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.

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 multiple attempted nonjudicial foreclosures. This includes the fact that there is no documentation provided to support the bald-assertion by another servicer employee (Nationstar) about the location of the Note prior to July 1, 2012.

2. The documentation used in connection with the attempted nonjudicial foreclosures did not comply with the statutory requirements. In particular, the 2012 Beneficiary Declaration had qualifying language on its face that rendered it not in compliance with the requirements of the DTA.

3. The subsequent Appointment of Successor Trustee document, signed in October 2012, was not signed by the loan owner nor even the purported noteholder, Nationstar, but instead was signed by an employee of QLS on her own initiative. (CP 356) It was also signed and recorded **two months** after QLS issued a NOTS document setting a new sale date. (CP 338-346). The subsequent NOTS issued in 2013 (CP 346-349) was also sent and recorded in reliance upon the improper

Appointment of Successor Trustee document. Nothing about these attempted foreclosure were done in conformity with the requirements of the DTA.

4. Mr. Djigal clearly articulated his “injury” caused by the Defendants, as well as monetary damages, such that he is entitled to relief under the CPA and his 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.¹

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*, 183 Wn.2d 820, 355 P.3d 1100 (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

¹ 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).

by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA's requirements." *Walker v. QLS*, 176 Wn. App. 294, 308 P.3d 716, 724 (2013)

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 Mr. Djigal has suffered as a result of the Defendants' blatant refusals to adhere to the requirements 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

Mr. Djigal is the owner of the real property located at 11234 Emily Lane SW, Olympia, WA ("Property") where he lives there today with his wife and family. Mr. Djigal refinanced the Property after the initial purchase by obtaining a loan from Ward Lending Group, LLC in January 2007. After obtaining the loan, he began making payments to Aurora because he was notified that it was the new loan servicer. It appears from the records obtained throughout his disputes with the various entities involved in the disputed foreclosures that Aurora was never anything more than the loan servicer. CP 381-404. *See also*, Declaration of Djibril Djigal in support of Motion for TRO ("Djigal TRO Dec."). (This Declaration was

inadvertently left out of the Clerk's Papers which are going to be supplemented.)

Late in 2008, Mr. Djigal had begun to experience financial problems and fell behind on his mortgage payments. While he was making efforts to obtain a loan modification, Aurora was trying to foreclose on the Property. Mr. Djigal outlined in his complaint actions which occurred in connection with earlier attempts to foreclose and following motions made by the Defendants, the Court dismissed all claims against MERS, CPA claims for actions that occurred prior to August 21, 2009 and DTA violations and misrepresentations claims to the extent that they occurred before August 21, 2010 following a hearing on a Motion to Dismiss in 2014. Mr. Djigal maintains that those rulings were incorrect as well. Djigal TRO Dec.

On or about February 27, 2009, QLS served Mr. Djigal with a Notice of Default (NOD") which it had signed as an agent for MERS, identified as the "beneficiary" therein. When Mr. Djigal did not pay the amounts being demanded in the NOD, a Notice of Trustee's Sale ("NOTS") was served upon him by QLS and a foreclosure sale date was scheduled for July 10, 2009, which also falsely asserted that MERS was the "beneficiary". CP 328-330. The NOTS was apparently issued in reliance upon an Appointment of Successor Trustee ("AST") signed on

March 5, 2009 by Sierra West, an employee and purported officer of QLS who signed the document as an “Asst. Secretary of MERS”, in contravention of QLS’ duties to Mr. Djigal and the requirements of Washington law. This document was recorded in the records of Thurston County, Washington on March 10, 2009. CP 328-329.

The foreclosure sale scheduled for July 2009 was discontinued for unknown reasons. Mr. Djigal continued to submit loan modification paperwork that detailed his financial hardship, but Aurora never offered anything. The process of Mr. Djigal submitting documentation went on for months, even while nonjudicial foreclosures were restarted throughout 2009 and into 2010. Finally, Aurora sent a HAMP solicitation letter that asked him to make a payment of \$6,302.59. Djigal TRO Dec. Mr. Djigal made that payment on August 9, 2010 and he made several other payments to Aurora in the following months, totaling almost \$20,000.00. *Id.* Aurora also sent Mr. Djigal a “Workout Agreement” in August 2010 which required him to repay all of the arrears and his current monthly payments within six (6) months. Mr. Djigal was unable to pay off his very significant arrears in such a short period of time. The Workout Agreement indicated that it was demanding payment of foreclosure related fees in the total amount of \$3,652.01, which he maintains had not been incurred as of that date. *Id.* Aurora was constantly sending Mr. Djigal contradictory

documentation and information, including a letter in February 2011, indicating that he had been denied a loan modification because of “insufficient time to complete the transaction”. Djigal TRO Dec.

In spite of the payments made in the preceding months, Mr. Djigal received a new NOTS with a scheduled sale date for October 29, 2010. CP 332-34. The Notice of Foreclosure attached to the NOTS included a demand for payment of \$2,196.25 for charges related to the foreclosure as of July 22, 2010, with an indication that Mr. Djigal would be required to pay \$3,396.25 in foreclosure fees to stop the foreclosure if he waited to pay until October 18, 2010. Djigal TRO Dec. The \$2,196.25 amount is less than the amount that Aurora was trying to add to the loan balance in August 2010 Workout Agreement for foreclosure costs. This demonstrates that falsified demands for payment that were being made by QLS and Aurora, in spite of its obligation to only demand “reasonable” and actual costs associated with the foreclosure. *Id.*

It appears that because of the payments that were made by Mr. Djigal, the foreclosure scheduled to take place in October 2010 did not occur. It was continued numerous times and then discontinued. *Id.* When Mr. Djigal received notice that he had been denied a loan modification in early 2011, he felt he had no choice but to file a Chapter 13 bankruptcy to try to get the matter resolved in that forum. In that case, Mr. Djigal made

many payments to the Chapter 13 Trustee, which were forwarded to Aurora, who received more than \$45,000.00 in December 2011 from the Chapter 13 Trustee. *Id.*

Mr. Djigal continued to fight with Aurora about its role as the servicer and to get truthful information regarding the identity of the owner of his loan so that he could try to obtain a loan modification. However, because of the requirements of the Bankruptcy Code, the case was eventually dismissed because he could not pay all of the outstanding arrears over the life of a Chapter 13 Plan. Djigal TRO Dec. During this process, Mr. Djigal learned that his loan is apparently owned by Wilmington, a securitized trust that was created in 2007, shortly after he obtained the loan. Yet, on December 30, 2009, a Senior Vice President of Aurora signed a “Declaration of Ownership” document under penalty of perjury asserting that Aurora is the “actual holder of the Promissory Note evidencing the above-referenced loan.” This was done in an effort at proving ownership of the loan, consistent with RCW 61.24.030(7), but the assertion was false. If Aurora actually had possession of the Note, it did so as a custodian for Defendant Wilmington, not because it was the “owner” of the loan. *Id.*

Also on December 30, 2009, another employee of Aurora signed a Corporate Assignment of Deed of Trust as though she was a Vice

President of MERS acting as “nominee for Ward Lending Group, LLC, its successors and assigns” purporting to transfer a beneficial interest in Mr. Djigal’s Deed of Trust from MERS to Aurora. Mr. Djigal maintains that “MERS” was not acting at the behest of any principal in executing this Assignment and that it was only executed in order to continue to perpetrate the false impression that Aurora was the “beneficiary” and loan owner as defined under Washington law. No evidence was ever produced to support the assertions that MERS received instructions from anyone. A copy of a ServicerID Report from MERS as of April 23, 2012 confirms that Aurora is nothing more than the servicer and that the “investor” is U.S. Bank as Trustee. Mr. Djigal does not know what relationship U.S. Bank is supposed to have to his loan. Djigal TRO Dec.

Once Mr. Djigal’s bankruptcy was dismissed, he was served with a new NOTS signed on August 23, 2012. In spite of the fact that he had not received an NOD since 2009 and that the foreclosure laws in Washington state had changed significantly, Mr. Djigal was served with this NOTS setting the sale date on December 28, 2012. (The Foreclosure Fairness Act had been passed into law in 2009 and then significantly amended in 2011. RCW 61.24.163.) Mr. Djigal should have been provided with notice of his rights to foreclosure mediation under the FFA by way of a Notice of Pre-Foreclosure Options. CP 338-341. Included in the NOTS

documents was a copy of the Note Mr. Djigal signed. It includes indorsements on the last page including one by Karl E. Larson of Ward Lending payable to Lehman Bros. E. Todd Whittemore, Vice President of Lehman Bros. then signed another indorsement making the Note payable to Lehman Bros. Holdings. Another Note indorsement by Paul E. Sveen, “Authorized Signatory” for Lehman Bros. Holdings. That indorsement is in blank. CP 381-384. The NOTS was sent by QLS, even though it had not been appointed as Trustee by the actual beneficiary, violating DTA provisions. RCW 61.24.005(2); 61.24.040. *Id.*

In an effort at apparently matching up the records of Thurston County with more false information, QLS caused to be recorded a new Corporate Assignment of Deed of Trust dated July 2, 2012 whereby Aurora purported to transfer its beneficial interest in the Deed of Trust to Nationstar, which is also nothing more than another loan servicer - not the “beneficiary” nor the loan owner. CP 336. This document was recorded in the records of Thurston County, Washington on October 17, 2012. QLS then caused to be recorded a new Appointment of Successor Trustee (AST) document signed on October 25, 2012 by Gladys Limon, an employee of QLS, who was holding herself out to be an Assistant Secretary of Nationstar. CP 343-344. Ms. Limon represented on the document that she had authority to sign the document because QLS was

the “attorney in fact” for Nationstar. Notably, none of the Defendants provided one word of testimony nor a single document that supports the assertion that any entity related to this case appointed QLS as its “attorney in fact”. CP 321-323; 276-278. Further, Nationstar was not the noteholder nor the loan owner and therefore did not have the legal authority to do anything other than act as a loan servicer. Certainly, it did not have any rights to act under the DTA. RCW 61.24.005(2); 61.24.010(2)-(4); 61.24.030(7)-(8). In addition, QLS’ actions in making false representations about its authority to appoint itself as the trustee is a breach of its duties to Mr. Djigal. RCW 61.24.010(4). The AST was recorded in the records of Thurston County, Washington on October 26, 2012. CP 343-344. Thus, even if the AST was compliant with the DTA because it was signed by the beneficiary, which it was not, it would only be effective as of the date of recording. QLS signed the NOTS on **August 23, 2012** – approximately two months before the recording of the AST. Thus, the NOTS issued in August 2012 was done by an entity that had never been properly appointed as the Successor Trustee and this fact was known by QLS because it was in control of all of the documents. *Id.*

This foreclosure sale was discontinued as Mr. Djigal continued to fight with these entities regarding the legality of their actions. But, a new NOD was sent to Mr. Djigal in March 2013 which falsely asserted that

Nationstar was the owner of the loan and the servicer. Notably, Mr. Djigal was **still** never served with a NOPFO – giving him information about the FFA mediation program. In spite of the false assertions, QLS issued yet another NOTS and set a sale date of August 23, 2013. The new NOTS also identifies Nationstar as the “owner” of the obligation secured by the deed of trust and the “current Beneficiary” of Mr. Djigal’s loan. CP 346-349. At every step in the years of attempting to foreclose on Mr. Djigal’s house, QLS has never once included truthful information in any of the foreclosure documentation and never once has the actual loan owner ever attempted to foreclose. Instead, two different servicers, Aurora and Nationstar, have attempted to foreclose while assisting in falsifying or having QLS falsify documentation to accomplish this goal.

Discovery responses submitted by QLS also make clear the inconsistencies in its position. These documents included:

- (1) Foreclosure Loss Mitigation form signed on David Fliam with no identification of his position or employer but it lists the “beneficiary or beneficiary’s agent” as being AIG (Mr. Djigal has no idea what relationship AIG has to his loan and the defendants certainly have not provided any explanation); (CP 427)
- (2) Letter dated 4/3/09 re: publication of NOTS indicating that “investor name not on record”; (CP 429)
- (3) Letter dated 7/22/10 re: publication of NOTS indicating “Investor LXS 2007-6”; (CP 431)
- (4) Letter dated 8/22/12 re: publication of NOTS indicating “Investor LXS 2007-6”; (CP 433)
- (5) Letter to Nationstar dated 8/27/12 from QLS enclosing Assignment of Deed of Trust, in spite of the fact that QLS’ records clearly

indicated that there was another “investor” that owned the loan; (CP 435-437);

(6) Letter to Nationstar with Loss Mitigation Form dated 8/27/12; (CP 439-440)

(7) Beneficiary Declaration dated 3/12/13 signed by Nationstar employee with improper qualifying language; (CP 442)

(8) Debt Validation Notice sent by QLS which falsely lists Nationstar as the creditor; (CP 444)

(9) Letter from Nationstar dated 7/22/13 confirming that it is the servicer and that the Trust owns the loan; (CP 446-447)

(10) Letter from Nationstar dated 4/23/13 confirming identity of loan owner; (CP 449) and

(11) Internal records from QLS confirming that all communications about the foreclosure were had with Aurora and Nationstar. There is not a single communication from the loan owner. (CP 451-483).

CP 423-483.

The documentation produced by QLS is clear in reflecting that it has known since it first began working on the file that the loan owner was a trust and that Aurora and Nationstar were nothing more than loan servicers. QLS knew that it had never received instruction to foreclose from the loan owner and that the documents used in support of the foreclosure contained false information. And certainly Aurora, Nationstar and Wilmington knew that the loan owner had never communicated with QLS and that Aurora and Nationstar were loan servicers and not noteholders. The most important of the recent documents prepared by QLS is the Beneficiary Declaration, which has inappropriate qualifying language, which is the sort of language that has been expressly rejected by

the Washington Supreme Court. CP 356. The Declaration begins with the language that is not in conformity with DTA requirements. “The undersigned declares that it is the Beneficiary *or the authorized agent for the Beneficiary* who is the actual holder of that certain Promissory Note or other obligation which is secured by the below referenced Deed of Trust. . . .” (emphasis added). CP 356. RCW 61.24.030(7)(a) requires proof that the “beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” Proof of this ownership may be established by way of the “beneficiary” signing a declaration under penalty of perjury that it is the actual holder. *Id.* There is absolutely nothing in the DTA that would permit an “authorized agent” to execute this document, and this was known by QLS.

QLS internal communications make clear (CP 461-462) that Ms. Limon, QLS employee, simply decided that the “SOT” document (Substitution of Trustee) would be “executed in house”. This evidences that QLS simply decided on its own to have one of its employees sign an Appointment of Successor Trustee document that should ONLY have been signed by the actual “beneficiary”. This was an intentional violation of the requirements of the DTA by QLS in an effort at speeding up the foreclosure process.

Aurora, Nationstar and Wilmington, the apparent owner of Mr.

Djigal's loan, also participated intentionally in allowing these multiple attempts at nonjudicial foreclosure to proceed in a manner that contravenes the requirements of the DTA. As a result, Mr. Djigal continues to face the loss of his home, which he has been trying to prevent for years. He is challenging all of the amounts that have been added to his loan balance related to all of the attempts to foreclose that were done by entities who did not have the legal authority to do so. He knows that he is responsible for making his mortgage payments, but that does not excuse the Defendants from complying with the law. In connection with his efforts to save his home, Mr. Djigal had to pay his attorney an initial consultation fee related to obtaining her assistance in investigating his claims and the issues related to all of the wrongful attempts at foreclosure. He also had to pay Ms. Huelsman \$4,000.00 in attorneys' fees related to the work done on enjoining the foreclosure sale. This amount is separate from the retainer agreement that Mr. Djigal has with Ms. Huelsman related to the affirmative work being done on pursuing his claims. In addition, Mr. Djigal has spent at least \$200.00 in travel and parking costs related to meeting with Ms. Huelsman initially and attending the hearing seeking enjoinder of the foreclosure, as well as other costs incurred in connection with pursuit of this lawsuit, including the \$240.00 filing fee and service of process costs totaling \$480.00 and deposition costs in the

amount of \$459.58. CP 419-422. Mr. Djigal has also suffered a compensable “injury” under the CPA because of the wrongful initiation of foreclosures for which there was no lawful authority and because the Defendants, and in particular QLS, demanded monies from him which were not due and owing when acting on behalf of the other Defendants. Those amounts included all of the “foreclosure fees” for all of the attempted foreclosures that were not done in conformity with the requirements of Washington law. *Id.*

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 276-278) 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 Aurora had physical possession of the Note or that it was the loan owner. The Loll Declaration estimates the supposed physical possession of the Note by Aurora, something about which she has no personal knowledge whatsoever. CP 277. Not a single document presented to the Court supports this bare assertion made an employee of another

company years later. *Id.* Ms. Loll also asserts that Nationstar possessed the original Note after July 1, 2012, but does not identify in what role it holds that Note and always refers to itself as the “servicer” throughout the Declaration. At no time does Ms. Loll assert that Nationstar was the “noteholder” nor does she provide any documentation to indicate the manner in which Nationstar allegedly holds the Note. *Id.* CP 278. The “Beneficiary Declaration” provided by Ms. Noll has qualifying language that is impermissible (CP 356) and the actual Appointment of Successor Trustee was signed by an employee of QLS, Ms. Limon, because she decided to do so (CP 462). None of these actions comply with the requirements for initiating a nonjudicial foreclosure under the DTA.

Mr. Djigal provided the Court with testimony about the manner in which he has been damaged and injured because of the Defendants’ actions in bringing multiple wrongful nonjudicial foreclosures and none of them were initiated based upon truthful and proper documentation. Mr. Djigal has met all of the CPA elements as outlined in *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014), *Lyons*, 336 P.3d 1142 (2014), and the *Trujillo* Supreme Court decision, which the trial court simply ignored. Further, the most recent Supreme Court decision in *Brown v. Dept. of Commerce*, No. 90652-1, 2015 WL 6388153 (Wash., Oct. 22, 2015).

1. There was no credible evidence regarding the holder of the Note and the loan owner presented to the Court regarding the attempted nonjudicial foreclosures.

The first recent case to consider the “beneficiary” definition in the DTA was *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (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.² 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. QLS*, 176 Wn. App. 294, 308 P.3d 716, 724 (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."

² 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 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. QLS*, 176 Wn. App. 294, 308 P.3d 716, 724 (2013); *Frizzell v. Murray*, 170 Wn. App. 420, 283 P.3d 1139 (2012). *review granted*, 176 Wn.2d 1011 (2013).

Walker, 308 P.3d at 721. With the exception of *Albice*, which did not 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 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. 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. And in particular, the focus of much of the Court’s decisions in *Frias* and *Lyons* was on the Beneficiary Declarations which contained qualifying language that was not permissible according to the requirements of the DTA. CP 356. And the Appointments of Successor Trustee were executed by employees of QLS, Ms. Herbert-West (as though she were an officer of MERS) and Ms. Limon, rather than even the alleged noteholders, Aurora and Nationstar. CP 325-326; 343-344.

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). Mr. Djigal described the unfair and deceptive acts and practices of the Defendants in great detail, consistent with the requirements of the DTA. 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 the Defendants as described regarding the execution of the Appointment of Successor Trustee documents, including the timing of the recording of the 2012 Appointment AFTER a Notice of Trustee’s Sale was issued by QLS allegedly on behalf of Nationstar. CP 338-344. Mr. Djigal proved these acts violations of the DTA requirements and they 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 *Klem* 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 Mortg., Inc.*, 177 Wn.App. 1, 311 P.3d 31, (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*, 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). All of the Defendants, including QLS, Aurora, Nationstar and Wilmington, have been colluding together to hide the identity of the “noteholder” and loan “owner”, and to subvert the requirements of the DTA at every opportunity.

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. Mr. Djigal was 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.

The Defendants will certainly cite to *Brown v. Dept. of Commerce*, No. 90652-1, 2015 WL 6388153 (Wash., Oct. 22, 2015) in support of their position, contending that the case requires dismissal of Mr. Djigal’s claims. But the Supreme Court in *Brown* was focused on the role of the “beneficiary”, “noteholder” and “owner” language in the Deed of Trust Act as it relates to exemptions under the Foreclosure Fairness Act. RCW 61.24.163. But the Court did not reject its other recent decisions in *Frias* and *Lyons* and its analysis of the import of the requirement to adhere to the DTA. Here, even if Aurora and Nationstar could be considered the “noteholder”, when they were allegedly holding the Note as a custodian for the loan owner, Wilmington, there is no credible evidence that they were the “noteholder” rather than the custodian for Wilmington. Ms. Loll’s Declaration asserts that Nationstar became the noteholder on July 1, 2012 because it had physical possession of the Note without any supporting documentation to demonstrate the relationship to the Note. CP

276-278. And there is no actual testimony from Aurora regarding its alleged “noteholder” status nor its relationship to the loan owner nor any supporting documentation. *Id.*

But even if this Court were to accept the assertion that Aurora and Nationstar were the noteholders, there was still no compliance with the requirements of the DTA. Someone from Aurora did sign a Beneficiary Declaration (CP 354) in 2009, but the Appointment of Successor Trustee was signed by an employee of QLS on behalf of MERS. CP 325-326. This is not permitted under the DTA and all subsequent NOTS documents issued by QLS in reliance upon this Appointment are invalid. CP 328-334. Then QLS repeated its continuous course of conduct by accepting yet another Beneficiary Declaration which had qualifying language and that was signed by the servicer, Nationstar. CP 356. This document also has qualifying language, indicating it is being signed by the “Beneficiary/ Authorized Agent for Beneficiary”. *Id.* It also says that the declarant is asserting that the “Beneficiary or Authorized Agent for Beneficiary” is the noteholder. *Id.* The subsequent Appointment of Successor Trustee document was then signed by an employee of QLS and it was recorded two months **after** the 2012 NOTS was issued by QLS and recorded in Thurston County. CP 343-344. None of these actions comply with the requirements of the DTA and those violations are unchanged even if

Nationstar and/or Aurora were the “noteholder”, even though they were never the loan owner.

B. Mr. Djigal’s claims for misrepresentation should have advanced as he proved the elements of her claims and the damages resulting therefrom.

The numerous misrepresentations made to Mr. Djigal 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, Mr. Djigal laid out the numerous specific misrepresentations that were made by the Defendants during the initiation of all of the nonjudicial foreclosures outlined herein. Those misrepresentations relate to who could sign a Beneficiary Declaration and the language required under the DTA, 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; the timing of the recording of the 2012 Appointment of Successor Trustee document in relation to the issuance of the 2012 NOTS, and QLS' reliance upon two

Beneficiary Declarations that it knew to be signed by servicers who were not noteholders.

Mr. Djigal had to take affirmative action to put a stop to the foreclosure process, at his own expense. He had hire an attorney to file pleadings for a TRO, attend a hearing for the TRO and to file pleadings and participate in the preliminary injunction process. This was necessary for him to get the sale stopped. The Defendants' attempt to shift the blame to Mr. Djigal because he defaulted on the loan in the first place, which the trial court seemed to accept, is in absolute defiance of the requirements of the recent Washington Supreme Court case law.

For these reasons, Mr. Djigal maintains that he has met all of the elements necessary to support his claims for negligent and intentional misrepresentations and should have been permitted to proceed to trial on those claims.

CONCLUSION

Mr. Djigal maintains that significant genuine issues of material fact remain unanswered and there are numerous contradictions in the evidence that precluded summary judgment as to his claims for violations of the Consumer Protection Act. The same is true for his claims for misrepresentation should advance as he has proven the elements of those claims and his damages resulting therefrom.

Respectfully submitted this November 19, 2015

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a large initial "M" and a long horizontal flourish at the end.

Melissa A. Huelsman, WSBA # 30935
Attorney for Appellant Djigal

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 Thursday, November 19, 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 Thursday, November 19, 2015, at Seattle, Washington.

/s/ Carl Turner
 Carl Turner, Paralegal

MELISSA HUELSMAN LAW OFFICE

November 20, 2015 - 8:59 AM

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Appellant's Opening Brief

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