

71402-3

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No 71402-3-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

VALMARI RENATA,

Appellant/Plaintiff,

v.

FLAGSTAR BANK, F.S.B., a federally chartered Savings Bank;
NORTHWEST TRUSTEE SERVICES, INC., a Washington
corporation; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., a Delaware corporation.

Respondents/Defendants.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CASES AND AUTHORITIES	i
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE	3
III. ARGUMENT	8
A. Burden of Proof on Summary Judgment	8
B. Sufficiency of Declaration of Sharon Morgan	10
C. Deficiencies in Deed of Trust	12
D. Deficiencies in Note – Forged Endorsement	13
E. Assignment of Deed of Trust by MERS void	18
F. Flagstar Bank’s status as “holder” and “owner unsupported by the record and insufficient to foreclose.....	21
G. While Flagstar Bank might have physical possession of the Note, it did not own the Note, it did not have legal possession of the Note and did not become the Beneficiary entitled to initiate non-judicial foreclosure	27
H. Breach of Trustee’s Duty of Good Faith by NWTS	38
I. Respondents have violated the CPA	44
J. Need for additional discovery.....	47
IV. CONCLUSION.....	47
APPENDIX	

TABLE OF CASES AND AUTHORITIES

CASES	Page
<i>Accord, Hosea</i> , 156 Wn. App. 263, 271, 223 P.3d 576 (2010)	35
<i>Albice v. Preimer Mortgage Services of Washington, Inc.</i> 174 Wn.2d 560, 568, 276 P.3d 1277 (2012).....	26, 38
<i>Albice v. Premier Mortgage Services of Washington, Inc.</i> 157 Wn. App. 912, 934, 239 P.3d 1148 (2010).....	29
<i>Bain v. Metropolitan Mortgage Group</i> 175 Wn.2d 83, 111, 285 P.3d 34 (2012).....	19, 20, 21, 22, 23, 24, 27, 28, 29, 40, 43, 44, 45, 46
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P2d 966 (1963)	8, 9
<i>Bank of the West v. Wes-Con Development</i> , 15 Wn.App. 238, 548 P.2d 563 (1976)	14, 15
<i>Bavand v. OneWest Bank, FSB</i> , 176 Wn.App 475, 485, 309 P.3d 636 (2013).....	8, 20, 44, 45, 47
<i>Bellistri</i> , 284 S.W.3d.....	19
<i>Blomster v. Nordstrom</i> , 103 Wn.App. 252, 11 P.3d 883 (2000)	9
<i>City of Kent v. Beigh</i> , 145 Wn2d. 33, 45-46, 32 P.3d 258 (2001)	35
<i>City of Seattle v. Montana</i> , 129 Wn.2d 583, 590, 919 P.2d 1218 (1996) ..	25
<i>City of Seattle v. Ross</i> , 54 Wn.2d 655, 660, 344 P.2d 216 (1959).....	25
<i>Corporacion Venezolana de Fomento v. Vintero Sales Corp.</i> , 452 F. Supp. 1108, 1116 -1118 (S.D.N.Y. 1978).....	34

<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985)	38, 39
<i>Doherty v. Municipality of Metro</i> , 83 Wn.App. 464, 921 P.2d 1098 (1996)..	9
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	8
<i>George v. Surkamp</i> , 336 Mo. 1, 9, 76 S.W.2d 368 (1934)	19
<i>Goad v. Hambridge</i> , 85 Wn.App. 98, 931 P.2d 200 (1997)	9
<i>Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.</i> 105 Wash.2d 778, 780, 719 P.2d 531 (1986).....	44, 46
<i>Haselwood v. Bremerton Ice Arena, Inc.</i> , 137 Wn. App. 872, 155 P.3d 952 (2007)	37
<i>Hauber v. Yakima County</i> , 147 Wn.2d 655, 56 P.3d 559 (2002)	8
<i>Hayden v. Mutual of Enumclaw Insurance Co.</i> , 141 Wn.2d 55, 1 P.3d 1167 (2000).....	8
<i>Herring v. Texaco, Inc.</i> , 161 Wn.2d 189, 165 P.3d 4 (2007).....	8
<i>In re Veal</i> , 450 B.R. 897 (9 th Cir. BAP 2011).....	17
<i>Johnstone v. Bank of Am., N.A.</i> , 173 F. Supp. 2d 809 (N.D. Ill. 2001)	46
<i>Klem v. Washington Mutual Bank</i> , 176 Wn. 2d 771, 295 P.3d 1179 (2013).....	25, 38, 41, 42, 43
<i>Lilly v. Lynch</i> , 88 Wn.App. 306, 945 P.2d 727 (1997)	9
<i>Loss v. DeBord</i> , 67 Wn.2d 318, 407 P.2d 421 (1965).....	12
<i>Matthews v. Homecoming Fin. Network</i> , 2005.....	46
<i>Meyer v. U.S. Bank N.A.</i>	40, 41
<i>MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.</i> , 893 F. Supp. 1304 (D. S.C. 1994)	34

<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 740, 733 P.2d 208 (1987).....	46
<i>Parks v. Wells Fargo Home Mortg., Inc.</i> , 398 F.3d 937, 941 (7th Cir. 2005)	46
<i>Peeler v. Kingston Mines</i> , 862 F.2d 135, 136 (7th Cir. 1988).....	46
<i>Schroeder v. Excelsior Management Group, LLC</i> , 117 Wn.2d 94, 297 P.3d 677 (2013).....	8, 23, 24
<i>Short v. Demopolis</i> , 103 Wash.2d 52, 691 P.2d 163 (1984).....	44
<i>Shows v. Pemperton</i> , 73 Wn.App. 107, 868 P.2d 164 (1994)	9
<i>Snohomish County v. Rugg</i> , 115 Wn.App. 218, 61 P.3d 1184 (2002).....	9
<i>Stafford v. Puro</i> , 63 F.3d 1436, 1442 (7th Cir. 1995).....	46
<i>State ex rel Bond v. State</i> , 62 Wn.2d 487, 383 P.2d 288 (1963).....	9
<i>State v. Mason</i> , 31 Wn.App. 680, 644 P.2d 710 (1982)	12
<i>Thiem v. Seattle First National Bank</i> , 7 Wn.App. 845, 502 P.2d 1240 (1972).....	17
<i>Walker v. Quality Loan Service Corp, et al.</i> , 176 Wn.App.294, 308 P.3d 716 (2013).....	20, 28, 43, 44, 45, 46, 47
<i>Werner v. Werner</i> , 84 Wash.2d 360, 526 P.2d 370 (1974).....	41, 42

RULES

<i>CR 30(b)(6)</i>	50
<i>CR 56</i>	1, 8
<i>CR 56(e)</i>	1, 11, 12
<i>CR 56(f)</i>	3, 47

<i>ER 803(a)(6)</i>	1, 11
<i>RCW 19.86, et seq</i>	5
<i>RCW 19.86.920</i>	44
<i>RCW 42.44.160</i>	42
<i>RCW 5.45.020</i>	1, 13
<i>RCW 61.24</i>	22, 38
<i>RCW 61.24, et seq</i>	4
<i>RCW 61.24.005</i>	21
<i>RCW 61.24.005(2)</i>	16, 27, 28, 35, 37
<i>RCW 61.24.010</i>	1, 12, 16, 40, 43
<i>RCW 61.24.010 (2)</i>	27, 30, 36, 37
<i>RCW 61.24.010 (4)</i>	25
<i>RCW 61.24.030</i>	4, 16, 37
<i>RCW 61.24.030(2)</i>	42
<i>RCW 61.24.030(7)</i>	2, 22, 25, 40
<i>RCW 61.24.030(7)(a)</i>	22, 24, 25, 27
<i>RCW 61.24.030(7)(b)</i>	25
<i>RCW 61.24.030(8)</i>	27
<i>RCW 61.24.030(8)(l)</i>	22
<i>RCW 61.24.031(1)(a)</i>	36

<i>RCW 61.24.031(1)(b)</i>	36
<i>RCW 61.24.031(2)</i>	36
<i>RCW 61.24.031(9)</i>	36
<i>RCW 61.24.040</i>	6, 8, 9, 25
<i>RCW 61.24.040(2)</i>	2, 6, 7, 22
<i>RCW 61.24.050</i>	36
<i>RCW 62A.1-103</i>	31
<i>RCW 62A.1-201</i>	30
<i>RCW 62A.1-201(b)(21)</i>	28, 38
<i>RCW 62A.1-201(b)(21)(A)</i>	30
<i>RCW 62A.1-201(35)</i>	33
<i>RCW 62A.3</i>	28
<i>RCW 62A.3.302</i>	17
<i>RCW 62A.3.403(a)</i>	14, 15
<i>RCW 62A.3-201</i>	14
<i>RCW 62A.3-201(43)</i>	14
<i>RCW 62A.3-203(b)</i>	17
<i>RCW 62A.9</i>	28
<i>RCW 62A.9A-102(12)(B)</i>	33
<i>RCW 62A.9A-102(72)(D)</i>	33
<i>RCW 62A.9A.-313</i>	30

<i>RCW 62A.9A.-313(h)</i>	31, 33, 34, 38
<i>RCW 60.04</i>	37
<i>RCW 60.04.061</i>	37
<i>RCW 61.24.163(8)(a)</i>	36
Other Authorities	
<i>Black's Law Dictionary</i>	30, 32
LEXIS	40, 46
<i>Washington Practice: Real Estate Transactions</i> § 18.31 at 365 (2d ed. 2004)	32
www.ali.org/00021333/	31

I. ASSIGNMENTS OF ERROR

No. 1. The trial court erred in accepting the testimony of Sharon Morgan on Summary Judgment, in the absence of compliance with the provisions of *RCW 5.45.020*, *CR 56(e)* and *ER 803(a)(6)*.

No. 2 The trial court erred in granting Summary Judgment and dismissing the claims of Appellant, VALMARI RENATA (hereinafter “Ms. Renata”) in two separate orders entered December 13, 2013, pursuant to *CR 56*.

No. 3. The trial court erred in granting Summary Judgment where it appeared the original trustee named in the subject Deed of Trust was not qualified under *RCW 61.24.010*.

No. 4. The trial court erred in granting Summary Judgment on the basis of an assignment of the Deed of Trust by MERS that was void.

No. 5. The trial court erred in granting Summary Judgment when there was clear and un rebutted evidence that the endorsement affixed to the Note, upon which Respondents’ relied for their authority to initiate and prosecute a non-judicial foreclosure, was a forgery.

No. 6. The trial court erred in granting Summary Judgment where there were genuine issues of material fact concerning the status of Respondent, FLAGSTAR BANK, FSB (hereinafter “Flagstar Bank”) as “owner”, “holder” or “beneficiary” of the subject obligation with the right

and authority to initiate and prosecute a non-judicial foreclosure against Ms. Renata and where there was compelling evidence that Flagstar Bank had mere custody of the Note, not legal possession, and was acting solely as a purported agent for the alleged owner of the obligation, the FEDERAL HOME LOAN MORTGAGE CORPORATION (hereinafter “Freddie Mac”), without apparent authority.

No. 7. The trial court erred in granting Summary Judgment where there were genuine issues of material fact concerning whether Respondent, NORTHWEST TRUSTEE SERVICES, INC. (hereinafter “NWTS”) strictly complied with the provisions of *RCW 61.24, et seq.* (hereinafter “DTA”) concerning its reasonable reliance on Ms. Morgan’s Assignment of Deed of Trust and Appointment of Successor Trustee; its reasonable reliance on the “Beneficiary Declaration” of August 24, 2010 when it knew or should have known that the declarant was not the owner or legal holder of the obligation and could not rely on the same, in violation of the provisions of *RCW 61.24.030(7)*; issued documents that were improperly notarized; and issued documents that materially violated provisions of the DTA, including *RCW 61.24.040(2)*.

No. 8. The trial court erred in dismissing Ms. Renata’s claims under *RCW 19.86, et seq.* (hereinafter “CPA”) where there were disputed

issues of fact as to each of the elements for such a claim before the trial court.

No. 9. The trial court erred in refusing to continue the hearing on Summary Judgment to permit Plaintiff an opportunity to obtain discovery previously propounded to Respondents, pursuant to *CR 56(f)*.

II. STATEMENT OF THE CASE

On August 4, 2006, Ms. Renata executed a Note in favor of Capital Mortgage Corporation. CP 344-345, 1083-1084. The Note specifically defines the term “Note Holder” as follows: “[t]he lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder’”.

The subject Note was secured by a Deed of Trust that named Joan Anderson, on behalf of Flagstar Bank, as trustee, Capital Mortgage Corporation, as lender and purporting to appoint Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter “MERS”), the beneficiary. CP 346-356, 1132-1142. This instrument was recorded under Snohomish County Auditor’s Recording No. 200608080472.

At some point after execution of the Note and Deed of Trust, the Note was allegedly endorsed by Capital Mortgage Corporation to Flagstar Bank. CP 345. However, the signature on the endorsement is a forgery.

CP 627-628. At some unknown subsequent point in time, Flagstar Bank endorsed the Note in blank. CP 837-840.

In September of 2006, Flagstar Bank sold the Note and Deed of Trust to Freddie Mac. CP 459, 1029.¹

On April 1, 2010, the original lender of the obligation, Capital Mortgage Corporation, was administratively dissolved by the Secretary of State of Washington. CP 627, 1156.

On July 22, 2010, in response to Ms. Renata's inquiries, Jeff Stenman of NWTS wrote to Ms. Renata identifying Flagstar Bank as the "servicer" of the loan, not as the true and lawful owner or actual holder of the subject obligation. CP 291-292. No reference was made in this letter of the sale of the obligation to Freddie Mac in September of 2006 or the alleged endorsement of the loan to or by Flagstar Bank.

On July 23, 2010, NWTS executed and served a Notice of Default pursuant to *RCW 61.24.030*. CP 1085-1088. This document was issued by NWTS as "duly authorized agent" for Flagstar Bank and represents that Flagstar Bank is the "beneficiary of the deed of trust," the "loan servicer" and "the creditor to whom the debt is owed." No reference was made in

¹ It should be noted that this allegation is based solely on the testimony of Ms. Morgan, which may not be entirely credible, for the reasons argued below. At this point in time this allegation has not been confirmed by Freddie Mac and remains a genuine issue of material fact in dispute.

this Notice of Default to the sale of the obligation to Freddie Mac in September of 2006.

On August 11, 2010, MERS purportedly executed an Assignment of Deed of Trust in favor of Flagstar Bank. CP 1152. This instrument was recorded under Snohomish County Auditor's Recording No. 201008160038. The document was apparently signed by Sharon Morgan as "Vice President" of MERS in Oakland County, Michigan. At the time this document was executed, Ms. Morgan was an employee of Flagstar Bank and was not an employee of MERS. CP 457. Curiously, the Assignment appears to lack a notarial stamp. Again, no reference was made in this Assignment of Deed of Trust to the sale of the obligation to Freddie Mac in September of 2006.

On August 11, 2010, Flagstar Bank executed an Appointment of Successor Trustee, naming NWTS as successor trustee. CP 1154. This document was also executed by Sharon Morgan, now signing as an "Asst. Vice President" of Flagstar. The Appointment appears to lack a notarial stamp. This instrument was recorded under Snohomish County Auditor's Recording No. 201008160039.

On August 23, 2010, Robert Stoudemire of Flagstar Bank executed a Beneficiary Declaration, alleging that Flagstar Bank is the "actual holder of the promissory note." CP 1093. No reference was made in this

Beneficiary Declaration to the sale of the obligation to Freddie Mac in September of 2006.

On September 1, 2010, NWTS executed, filed and served a Notice of Trustee's Sale pursuant to *RCW 61.24.040*, setting sale of Ms. Renata's home for December 10, 2010. This document falsely and misleadingly represented that the subject Deed of Trust was to "secure an obligation "Obligation" in favor of Mortgage Electronic Registration System, Inc." CP 318-322, 1158-1163. This instrument was recorded under Snohomish County Auditor's Recording No. 201009070636. No reference was made in this Notice of Trustee's Sale to the sale of the obligation to Freddie Mac in September of 2006.

In connection with the execution of the subject Notice of Trustee's Sale, NWTS executed and served a Notice of Foreclosure that fails to comport with the provisions of *RCW 61.24.040(2)* by failing to identify the "Beneficiary of [Ms. Renata's] Deed of Trust and the owner of the obligation secured thereby." CP 324-325.

On December 9, 2010, Plaintiff filed for relief under Chapter 13 of the U.S. Bankruptcy Code in the Western District of Washington. The matter was subsequently dismissed on April 26, 2011. CP 341.

On April 29, 2011, NWTS executed, filed and served an Amended Notice of Trustee's Sale pursuant to *RCW 61.24.040*, setting sale of Ms.

Renata's home for June 10, 2011. This document falsely and misleadingly represented that the subject Deed of Trust was to "secure an obligation 'Obligation' in favor of Mortgage Electronic Registration System, Inc." CP 949-952, 1165-1168. This instrument was recorded under Snohomish County Auditor's Recording No. 201105030612. No reference was made in this Amended Notice of Trustee's Sale to the sale of the obligation to Freddie Mac in September of 2006.

In connection with the execution of the subject Amended Notice of Trustee's Sale, NWTS executed and served an Amended Notice of Foreclosure that fails to comport with the provisions of *RCW 61.24.040(2)* by failing to identify the "Beneficiary of [Ms. Renata's] Deed of Trust and the owner of the obligation secured thereby." CP 332-334.

This action was filed on June 2, 2011, seeking declaratory judgment, temporary and permanent injunction of Respondents' foreclosure efforts, damages for violation of the DTA, quiet title and violation of the CPA. CP 1121-1168. This action was based on a number of defects that were apparent in the documentation relied upon by Respondents in their foreclosure efforts. CP 120-206.

On or about November 15, 2012, Respondents' moved for Summary Judgment to dismiss all of Ms. Renata's claims. CP 407-408, 511-541.

On December 13, 2013, the trial court granted Respondents' Motions for Summary Judgment. CP 8-11.

On January 2, 2014, Ms. Renata filed a Notice of Appeal, seeking review of the trial court's Orders of December 13, 2013. CP 1-7.

III. ARGUMENT

A. Burden of Proof on Summary Judgment.

A trial court's summary dismissal of claims under *CR 56* is reviewed by this Court *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004); *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Schroeder*; *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *Bavand*, at page 485.

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56*. Sworn

statements on Summary Judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App. 252, 11 P.3d 883 (2000); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997).

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

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

Based upon the foregoing and the evidence presented to the trial court, there are numerous issues of material fact in dispute (if not undisputed in Appellants' favor) requiring the Orders of December 13, 2013 to be reversed and this matter remanded to the trial court for further proceeding or trial.

B. Sufficiency of Declaration of Sharon Morgan.

On Summary Judgment, Respondents and the trial court relied primarily on the Declaration of Sharon Morgan. However, Ms. Morgan's Declarations failed to demonstrate sufficient personal and testimonial knowledge of the facts she is offering this Court to support Respondents' contentions on Summary Judgment. Moreover, she provided the trial court contradictory statements regarding her qualifications and the source of information she relies upon. Please compare Ms. Morgan's Declaration of June 20, 2011 with her Declaration of October 15, 2013. CP 457-510, 1028-1032.

In her Declaration of June 20, 2011, Ms. Morgan states that the basis of her information was information compiled by "personnel [of Flagstar Bank] in the appropriate offices and departments of said entity." CP 1023. Although she asserts that Flagstar has custody of the Note and Deed of Trust, the owner of the loan is Freddie Mac.² CP 1029. Curiously,

² In this Declaration, Ms. Morgan does not indicate when Freddie Mac became the "investor and owner of the obligation."

she makes a point of noting that while the Note is owned by Freddie Mac, the Note has been endorsed to Flagstar Bank instead of Freddie Mac, as one would expect.

However, in her Declaration of October 15, 2013, Ms. Morgan appears to suggest that she is some sort of records custodian for Flagstar Bank, without so stating or otherwise establishing her qualifications. CP 457-460.

Ms. Morgan's statements regarding her knowledge of the records of Flagstar Bank fail to comply with *ER 803(a)(6)* and *RCW 5.45.020*. *RCW 5.45.020* provides as follows:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Ms. Morgan never states she is records custodian for Flagstar Bank, only that she is familiar with the records maintained by Flagstar Bank. That is not the sort of personal knowledge required under *CR 56(e)*. Many of the records Ms. Morgan relies upon were necessarily created by third parties – not Flagstar Bank. Ms. Morgan does not indicate how the records she refers to were prepared, kept, the basis of her knowledge of the same or how the records were transferred to Flagstar Bank. Indeed, there is

absolutely no basis upon which to rely on any of the statements contained in Ms. Morgan's Declarations, as there has been no showing of how Flagstar Bank obtained information regarding Ms. Renata's Note, the basis of the purported accounting for the debt, or the maintenance of the records. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982). Simply put, there is no factual basis upon which to gauge the reliability of Ms. Morgan's testimony. Where personal knowledge is lacking, Ms. Morgan's Declaration should have been given no consideration by the trial court. See *Loss v. DeBord*, 67 Wn.2d 318, 407 P.2d 421 (1965).

Since the information that Ms. Morgan offers this Court cannot reliably verify, her testimony is rank hearsay and her Declarations should be disregarded, pursuant to *CR 56(e)*.

C. Deficiencies in Deed of Trust.

The Deed of Trust executed by Ms. Renata on August 4, 2006 appointed "Joan B. Anderson, EVP on behalf of Flagstar Bank, FSB" as Trustee. There is no competent evidence that Ms. Anderson met the qualifications set forth in *RCW 61.24.010* at any time relevant to this cause of action. This deficiency could not be remedied by Flagstar Bank's appointment of NWTS, given Flagstar Bank's questionable status as holder of Ms. Renata's Note. Therefore, the deficiency remains to date. But this deficiency pales to the problems associated with Ms. Renata's Note.

D. Deficiencies in Note - Forged Endorsement.

Respondents' suggest that Capital Mortgage Corporation was only acting as an "intermediary" for Flagstar Bank when the subject loan was negotiated, but acknowledge that the subject loan was made in the name of Capital Mortgage Corporation as "lender". CP 518-522. This alleged arrangement creates a number of issues of fact that have not been addressed in Respondents' pleadings. If Flagstar Bank is the real lender and Capital Mortgage Corporation is only the loan broker, why wasn't Flagstar Bank identified as the lender in the Note and Deed of Trust? If the endorsement from Capital Mortgage Corporation to Flagstar Bank is irrelevant, as Respondents argued to the trial court, why was an endorsement required in the escrow instructions? If Flagstar Bank was the "owner" of the obligation at the time of closing who subsequently sold the obligation or a portion thereof to Freddie Mac in September of 2006, why did Flagstar Bank endorse the Note in blank instead of expressly naming Freddie Mac as the "payee"? None of these issues were addressed in Respondents' pleadings and remain disputed issues of fact.

Respondents' arguments notwithstanding, the Note was, in fact, executed in favor of Capital Mortgage Corporation, as lender, and transfer of ownership in the Note required a valid endorsement from a duly authorized agent of the corporation to assign the obligation to anyone.

Defendants appear to acknowledge that the Note had to be endorsed to affect a transfer of the obligation. CP 519. See *RCW 62A.3-201*. Unfortunately, in this case, the endorsement of Ms. Renata's Note contained an "unauthorized signature" that rendered the endorsement invalid and void.

An "unauthorized signature" is one that is "made without actual, implied or apparent authority and includes a forgery." *RCW 62A.1-201(43)*. Under *RCW 62A.3.403(a)*, "an unauthorized signature is ineffective. . . ." See *Bank of the West v. Wes-Con Development*, 15 Wn.App. 238, 548 P.2d 563 (1976).

Here, the subject Note was allegedly endorsed by Ms. Christina Butler on behalf of Capital Mortgage Corporation, allegedly on the basis of some arrangement worked out between Defendants and Capital Mortgage Corporation. CP 463-475. However, Ms. Butler's signature has been forged. As Ms. Butler states in her Declaration of April 30, 2012:

2. I have reviewed the copy of Plaintiff's Promissory Note, dated August 4, 2006 and attached to the Declaration of Matthew Sullivan of April 10, 2012. On page two of the Promissory Note is an endorsement that purports to assign the subject Promissory Note from Capital Mortgage Corporation to Flagstar Bank, FSB. However, the signature that appears in the endorsement is not mine, as one can ascertain by comparing the signature in the endorsement with the one below.

(Emphasis added) CP 627

While Respondents may have warranty or contract claims under the purported Wholesale Lending Broker Agreement of April 17, 2003 (CP 463-475) over and against Capital Mortgage Corporation for the defective endorsement, the unauthorized endorsement is ineffective regardless and the alleged transfer to Flagstar Bank void. *RCW 62A.3.403(a); Bank of the West v. Wes-Con Development, supra.*

At hearing on Summary Judgment, Respondents argued that pursuant to the terms of the limited power of attorney provisions contained in Paragraph 7.11 of the Wholesale Lending Broker Agreement of April 17, 2003 (CP 473-474), Flagstar Bank could have utilized its limited power of attorney to effect an endorsement of Ms. Renata's Note, but there is no evidence that it did so. Paragraph 7.11 of the Wholesale Lending Broker Agreement of April 17, 2003 appears to be conditioned upon the execution of "appropriate separate instruments" (CP 474) to be effective, but there is no evidence that Flagstar Bank ever "requested" Capital Mortgage Corporation to execute a separate limited power of attorney to effect an endorsement of Ms. Renata's Note. Finally, the limited power of attorney provision of Paragraph 7.11 of the Wholesale Lending Broker Agreement of April 17, 2003 is limited to those "Mortgage Loans sold to Flagstar," but there is no evidence that Flagstar ever purchased Ms. Renata's Note and Deed of Trust. The Note represents that Capital Mortgage Corporation

made the loan as the lender, not Flagstar Bank. CP 344-345, 1083-1084. The only arguably contemporaneous evidence of Flagstar Bank's interest in the Note is the undated and forged endorsement of the obligation to Flagstar Bank.

Based upon the best evidence before the Court, the subject Note remains in the hands of Capital Mortgage Corporation, since it has not been properly assigned or transferred to Flagstar Bank or any named Respondent herein.³ Thus, Capital Mortgage Corporation arguably remains the true and lawful "owner" and actual "holder" of the obligation despite Flagstar Bank's alleged custody of the Note. Since Capital Mortgage Corporation arguably remains the "holder" of the obligation, as defined under the terms of the Note itself, only Capital Mortgage Corporation had the right to declare a default on the obligation and appoint a successor trustee under the DTA. See *RCW 61.24.005(2)*, *RCW 61.24.030* and *RCW 61.24.010*.

More importantly, without a valid endorsement of the subject Note to Flagstar Bank or any other named Respondent, no Respondent named herein had the right, title or authority to initiate non-judicial foreclosure proceedings against Ms. Renata. Certainly, these claims raise material

³ While Ms. Morgan has testified that the subject obligation was "sold" to Freddie Mac in September of 2006 (CP 458), there is no evidence to support this allegation beyond Ms. Morgan's testimony. As noted in footnote 1, above, Freddie Mac has not verified this allegation. Indeed, if the subject Note and Deed of Trust to Flagstar Bank was ineffective, due to the forged endorsement, there was nothing for Flagstar Bank to sell to Freddie Mac.

issues of disputed fact that mitigated against the trial court's Summary Judgment.

Finally, there is no evidence before this Court that any representative of Capital Mortgage Corporation ever ratified the forged endorsement. Certainly, there has been no sworn testimony that anyone at Capital Mortgage Corporation (the party to be bound) had "full knowledge of all material facts and expressed an intent to ratify the unauthorized act." *Thiem v. Seattle First National Bank*, 7 Wn.App. 845, 502 P.2d 1240 (1972). Clearly, the issues raised by Respondents' concerning Capital Mortgage Corporations' "constructive" ratification of Ms. Butler's forged signature are material issues of fact in dispute.

While the provisions of *RCW 62A.3-203(b)* and *RCW 62A.3.302* generally provide a buyer of an instrument rights as a holder, even in the absence of endorsement, the question here is the identity of that buyer and current owner. E.g. *In re Veal*, 450 B.R. 897 (9th Cir. BAP 2011). Is it Capital Mortgage Corporation, based upon a defective transfer? Is it Freddie Mac, as alleged by Respondents? Or is it some other entity, such as a mortgage backed security trust by assignment from Freddie Mac? The evidence supporting one candidate over another is disputed and conflicting. More importantly, the provisions of *RCW 62A.3-203(b)* cannot be relied upon "if the transferee [Capital Mortgage Corporation] engaged in fraud or

illegality affecting the instrument,” an issue clearly raised by Ms. Butler’s Declaration of April 30, 2012. CP 627-628.

E. Assignment of Deed of Trust by MERS void.

Respondents argued on Summary Judgment that MERS had the ability as “beneficiary” of the Deed of Trust to assign its interest in the Deed of Trust to Flagstar Bank. Specifically, Flagstar Bank argues that since it was in “possession” of the Note, it had the right to direct MERS to assign the beneficial interest in the Deed of Trust to it on August 11, 2010. CP 1152. This argument ignores the fact that due to the forged endorsement discussed above, Flagstar Bank had no legitimate interest in the Note and ignores the fact that Flagstar Bank allegedly sold whatever interest it had in the Note to Freddie Mac in September of 2006. CP 459.

Regardless of its agency relationships to other named Respondents and third parties, there is an issue of material fact as to whether Ms. Morgan or Flagstar Bank ever obtained authority from the true and lawful owner and holder of the obligation (Freddie Mac or Capital Mortgage Corporation) to initiate assignment of the Deed of Trust from MERS to Flagstar Bank. If Flagstar Bank did not own or actually hold the subject Note, such authority would be required.

Even if such authority was obtained, and there is no evidence that it was, any assignment of the Deed of Trust by MERS was void, as a matter

of law, as MERS has no interest in the Deed of Trust to assign. As noted in *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 111, 285 P.3d 34 (2012) (hereinafter “*Bain*”):

In the alternative, MERS suggests that if we find a violation of the act, “MERS should be required to assign its interest in any deed of trust to the holder of the promissory note, and have that assignment recorded in the land title records, before any non-judicial foreclosure could take place.” Resp. Br. of MERS at 44 (*Bain*). But if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey. Other courts have rejected similar suggestions. *Bellistri*, 284 S.W.3d at 624 (citing *George v. Surkamp*, 336 Mo. 1, 9, 76 S.W.2d 368 (1934)).

(Emphasis added)

If MERS had no rights in the subject Deed of Trust, it had nothing to assign and any assignment of nothing amounts to nothing.

Here, Respondents attempted to distinguish *Bain* on Summary Judgment by arguing that since MERS was acting as an agent of Flagstar Bank, MERS’ Assignment of Deed of Trust of August 11, 2010 was valid. However, this same argument was raised and rejected by the *Bain* court, at page 107:

MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as “acting solely as a nominee for Lender and Lender’s successors and assigns.” But MERS offers no authority for the implicit proposition that the lender’s nomination of MERS as a nominee rises to an agency relationship with successor noteholders. MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal.

However, MERS could not have been acting as an agent of Flagstar Bank when Ms. Morgan executed the Assignment of Deed of Trust of August 11, 2010 on behalf of MERS because by the time of the assignment, Flagstar Bank believed it had sold its interest in the obligation to Freddie Mac in September of 2006. CP 459. Moreover, there is no evidence of any agency relationship between MERS and Flagstar Bank of any kind, and the existence of such a relationship constitutes a material issue of fact. See *Bain* at page 107.

Finally, Flagstar Bank argued that they had the right to request assignment of the Deed of Trust by virtue of the fact that it was in physical possession of the Note. However, this argument is also addressed by the *Bain* court, at page 111:

The difficulty with MERS's argument is that if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender's successors. 15 If the original lender had sold the loan, that purchaser [Flagstar Bank or Freddie Mac] 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.

(Emphasis added)

See also *Walker v. Quality Loan Service Corp, et al.*, 176 Wn.App.294, 308 P.3d 716 (2013) (hereinafter "*Walker*") and *Bavand*.

Simply put, the Assignment of Deed of Trust of August 11, 2010 is a nullity and provides Flagstar Bank nothing. *Bain* at 111. As the *Bain* court noted, at page 104, the security follows the note. Accordingly, if the subject Note was never lawfully transferred or duly endorsed over to Flagstar Bank, the Deed of Trust would remain with the lawful owner and holder of the Note: presumably Capital Mortgage Corporation. In sum, at no time relevant to this cause of action was Flagstar Bank ever the true and lawful owner and holder of the subject Note or Deed of Trust. At the very least, the foregoing concerns create issues of disputed fact that mitigated against the trial court's Summary Judgment.

F. **Flagstar Bank's status as "holder" and "owner" unsupported by the record and insufficient to foreclose.**

On Summary Judgment, Respondents argued that the only relevant inquiry in this matter is the identity of the note-holder, apparently under the mistaken belief that any party in physical possession or custody of a note with a forged endorsement or blank endorsement is entitled to enforce the obligation and foreclose the security interest as the "holder" of the same. This is simply not the law in the State of Washington. Even if it is assumed that the mere possession of a promissory note endorsed in blank is sufficient to meet the definition of "beneficiary" under *RCW 61.24.005*, it does not meet other standards under the broader requirements of *RCW*

61.24 nor does it validate the activities of MERS as purported “beneficiary” in this case.

The *Bain* court specifically held that “if the original lender had sold the loan, the purchaser (Flagstar Bank or Freddie Mac in this case according to Respondents) 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.” *Bain* at 111. The *Bain* court’s emphasis was on the ownership of the obligation and saw the right to hold the note as an incident of ownership. To illustrate this point, the *Bain* court cited to *RCW 61.24.030(7)(a)*, which provides as follows:

It shall be requisite to a trustee's sale:

* * *

(7) (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is **the owner** of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under penalty of perjury stating that the beneficiary is the **actual holder** of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(Emphasis added).

But *RCW 61.24.030(7)* is not the only provision found in the Deed of Trust Act in which the terms “owner” and “holder” are equated. Please see *RCW 61.24.030(8)(l)* and *RCW 61.24.040(2)*, which has been enforce since 1998:

(2) In addition to providing the borrower and grantor the notice of sale described in subsection (1)(f) of this section, the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

NOTICE OF FORECLOSURE

Pursuant to the Revised Code of Washington, Chapter 61.24 RCW

- o The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to, **the Beneficiary of your Deed of Trust and owner of the obligation secured thereby.**

(Emphasis added)

There is no reasonable way to read *Bain* and the statutory provisions cited above in any other manner except that being the holder is a necessary, but not a sufficient condition to conducting a non-judicial foreclosure: the “holder” must also be the “owner” of the obligation. This is particularly so prior to the actual sale, despite Defendants’ arguments that many of the administrative acts of an agent can occur where an entity is acting as a mere “holder”, the Washington legislature has added an additional requirement that prior to the sale the “beneficiary” be not only a “holder” but also the actual “owner” of the promissory note. This is a “requisite” of the statute that must be strictly complied with and cannot be contractually waived. *Schroeder*. The foregoing statutory provisions explicitly preclude the very actions taken by Respondents in this matter.

To justify their misconduct, Respondents relied on that portion of the Beneficiary Declaration that Flagstar Bank provided to NWTS which

states that Flagstar Bank was the “actual holder” of the Note, as if there was an ambiguity between the first and sentences of *RCW 61.24.030(7)(a)* that allows for emphasis to be given to the second sentence at the expense of the first. However, the person or entity offering the Beneficiary Declaration must be the owner, first and foremost, to make a declaration that it is the actual holder of the promissory note or other obligations secured by the deed of trust. The ambiguity that Respondents believed to exist is purely imaginary because it would render the first sentence superfluous.⁴ When both sentences of *RCW 61.24.030(7)(a)* are read together, the meaning of the provision as a whole is clear. The first sentence states the statutory requirement that the beneficiary must provide the trustee with proof of the beneficiary’s ownership of the promissory note or other obligation secured by a deed of trust before the trustee is authorized to issue the Notice of Trustee’s Sale. That is an absolute requirement, as the Supreme Court has stated so. *See Schroeder*, at pages 106-07; *Bain*, at page 93. The second sentence does not create an exception. Rather, it allows the trustee to rely on a declaration stating that the beneficiary is the “actual holder” as a *proxy* to establish the required proof of the beneficiary’s ownership.

The trial court had a duty to review all the evidence before it to determine whether NWTS was entitled to rely on the beneficiary

⁴ *See Dept of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (when interpreting a statute, the court should “giv[e] effect to all the language used”).

declaration as sufficient proof of ownership as set forth in *RCW 61.24.030(7)*. A statute that creates a presumption which is arbitrary or which operates to deny a fair opportunity to repel the presumption violates the due process clause. *City of Seattle v. Ross*, 54 Wn.2d 655, 660, 344 P.2d 216 (1959). If possible, a court must construe a statute so as to render it constitutional. *City of Seattle v. Montana*, 129 Wn.2d 583, 590, 919 P.2d 1218 (1996). To avoid a construction of *RCW 61.24.030(7)* that would render the statute unconstitutional, the trial court was obligated to read the provisions of *RCW 61.24.030(7)(a)* and *(b)* together and hold that where a trustee knows otherwise, it cannot rely on a beneficiary declaration as sufficient proof of ownership where the purported holder is not the owner of the note. Given the facts most favorable to Ms. Renata, the trial court should have ruled that NWTs's reliance on the Beneficiary Declaration it received from Flagstar Bank as proof of Flagstar Bank's ownership of the note violated *RCW 61.24.030(7)(b)* and the trustee's fiduciary duty of good faith under *RCW 61.24.010(4)*, when the Beneficiary Declaration on its face stated that Flagstar Bank was *not* the owner, but only a servicer. See Stenman correspondence of July 22, 2010 and Notice of Default of July 23, 2010. CP 291-292 and 1087. See also *Klem v. Washington Mutual Bank*, 176 Wn. 2d 771, 295 P.3d 1179 (2013) (hereinafter "*Klem*") ("[a]n independent trustee who owes a duty to act in good faith to exercise a

fiduciary duty to act impartially . . .); *Albice v. Premier Mortgage Services of Washington, Inc.*, 157 Wn. App. 912, 934, 239 P.3d 1148 (2010), *aff'd*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (hereinafter “*Albice*”) (“a trustee must take reasonable and appropriate steps to avoid sacrificing the debtor’s interest in the property” or be in violation of its statutory duty).

Here, Respondents knew or should have known that the Assignment of Deed of Trust was executed by Flagstar Bank’s own employee, Ms. Morgan, and was executed without the knowledge or consent of the true and lawful owner and holder of the obligation, either Capital Mortgage Corporation or Freddie Mac. Certainly, there is no evidence in the discovery provided by Respondents’ to date to suggest that anyone consulted MERS, Capital Mortgage Corporation or Freddie Mac before Ms. Morgan executed the Assignment of Note and Deed of Trust to Flagstar Bank on August 11, 2010. At the very least, there are genuine issues of material fact in dispute as to the reasonableness of any reliance NWTS could reasonable place on the Beneficiary’s Declaration or, for that matter, on Loss Mitigation Declaration, in view of Ms. Morgan’s apparent failure to inquire into the ownership of the subject obligation or obtain the express consent of MERS, Capital Mortgage Corporation or the true and lawful owner of the obligation before executing the Assignment of Note and Deed of Trust. At the very least there are numerous questions of material fact in

dispute concerning Flagstar Bank's status as "owner" and "holder" of Ms. Renata's Note and Deed of Trust.

G. While Flagstar Bank might have physical possession of the Note, it did not own the Note, it did not have legal possession of the Note and did not become the beneficiary entitled to initiate non-judicial foreclosure.

The DTA requires that any party initiating a non-judicial foreclosure must be the "beneficiary." *See Bain*, at pages 98-105. The "beneficiary" is defined in the statute as "the **holder** of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for another obligation." *RCW 61.24.005(2)* (Emphasis added). Under the terms of various provisions in the DTA, Flagstar Bank could not initiate a lawful foreclosure without being the "beneficiary" under this provision. For instance, Flagstar Bank was required to be the "beneficiary" in lawfully order to issue the Notice of Default, *RCW 61.24.030(8)*. Flagstar Bank was also required to be the "beneficiary" in order to lawfully appoint NWTS as a successor trustee, *RCW 61.24.010(2)*. And, NWTS, after being appointed as successor trustee, was required to have proof that Flagstar Bank, as the lawful "**beneficiary**," was "the **owner** of the promissory note or other obligation secured by the deed of trust." *RCW 61.24.030(7)(a)* (Emphasis added). Only a lawful beneficiary has the power to appoint a successor trustee and only a lawfully appointed successor trustee has the authority to issue a

notice of trustee's sale. *Walker*, at page 306. When an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale. *Id.*

Respondents argued at Summary Judgment that pursuant to Freddie Mac's "guidelines," Flagstar was allowed to hold the Note and its continuous holding of the Note since 2006 entitled Flagstar Bank to be a "holder" under *RCW 62A.1-201(b)(21)* ("the UCC"), and in turn was the "beneficiary" under *RCW 61.24.005(2)* of the DTA." This argument confuses Flagstar Bank's physical custody of the Note as a loan servicing and collection agent with the sort of legal possession mandated by the DTA. Because legal possession remained at all times with the Note owner (accordingly to Respondents - Freddie Mac), Flagstar had custody pursuant to a Freddie Mac's "guidelines" and nothing more. The guidelines do not confer beneficiary status upon Flagstar Bank by judicial fiat. Thus, Flagstar Bank was never the "beneficiary" as defined under the DTA. Because a mortgage note is a specific type of promissory note, the UCC generally controls the transfer of holder (*RCW 62A.3*) and ownership (*RCW 62A.9*) interests in, and enforcement of mortgage notes in Washington. The Supreme Court recognized this in *Bain* when it referred to the UCC's definition of "holder" in interpreting the same term as used in the DTA's definition of the "beneficiary" under *RCW 61.24.005(2)*. *Bain*, at pages

103-04. After quoting the UCC's definition, the Court stated: "The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus *a beneficiary must either actually possess* the promissory note or be the payee . . . *We agree.*" *Id.* (citation omitted; emphasis added).⁵ The *Bain* court went on to hold that since MERS had never held the promissory note, it was not a beneficiary under the terms of the DTA. *Bain*, at page 110. What the *Bain* court did not say is that the actually possession being referred to is a legal possession.

In order to be the "holder" of the Note under the UCC, and thus the "beneficiary" with authority to foreclose under the DTA, Flagstar Bank was required to have *legal possession* of the Note as defined by Washington common law, including the common law of agency. As a mere loan servicer or agent for Freddie Mac, Flagstar Bank's temporary physical custody of the Note was not sufficient to qualify it as "the beneficiary" under the DTA. Because of this, Flagstar Bank was not the lawful "beneficiary" and did not have authority to appoint NWTs as the successor

⁵ In *Bain*, the court was not asked to decide and did not address whether *physical custody* of a note is the equivalent of "*possession*" as the term "*possession*" is used in the UCC. In *Bain*, the fact that MERS had never obtained *physical custody* of the mortgage note was uncontested. *Bain*, at page 94-97. The distinction between an agent's physical custody of a note and legal possession was not at issue in *Bain*. Thus, in ruling that the beneficiary must "*possess*" the note, the Court did not have to, and was not making any statement about the legal meaning of "*possession*" as used in the UCC's definition of "holder."

trustee under *RCW 61.24.010(2)* or otherwise initiate a non-judicial foreclosure under the DTA.

The UCC's definition of "holder" in effect when Flagstar Bank initiated the foreclosure at issue here as: "The person in *possession* of a negotiable instrument that is payable either to bearer or to an identified person that is the person in *possession*." *RCW 62A.1-201(b)(21)(A)* (emphasis added). Similarly, *Black's Law Dictionary* defines "holder" as:

1. A person who has *legal possession* of a negotiable instrument and is entitled to receive payment on it.
2. A person with *legal possession* of a document of title or an investment security.

Black's Law Dictionary 736 (7th ed. 1999) (emphasis added). Thus, underlying Flagstar Bank's claim that it was the "beneficiary" under the DTA, and the "holder" of the Note is the requirement that Flagstar Bank must have *legal possession* of the Note to be a "holder" under the UCC, which it did not.

Just as the DTA's definition of the "beneficiary" relies on the term "holder" that is not defined in the DTA, the UCC's definition of "holder" relies on the term, "possession," that is not defined in the UCC. *See RCW 62A.1-201*. Because the term "possession" is not defined, common law agency principles apply and determine what constitutes legal possession of the Note. *See RCW 62A.9A-313*, comment 3 (UCC Official Comment, entitled "Possession," stating that "*in determining whether a particular person has possession, the principles of agency apply*") (Emphasis added);

see also RCW 62A.1-103 (unless otherwise stated in the UCC, common law “principles of law and equity, including . . . principal and agent” supplement the provisions of the UCC).

The common law agency principle of legal possession is now codified in *RCW 62A.9A.-313(h)*, which provides as follows:

A secured party having possession of collateral ***does not relinquish possession by delivering the collateral*** to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

- (1) ***To hold possession of the collateral for the secured party's benefit***; or
- (2) ***To redeliver the collateral to the secured party.***

RCW 62A.9A-313(h) (Emphasis added).⁶

The applicability of this principle to mortgage notes is emphasized in recent guidance issued by the Permanent Editorial Board for the Uniform Commercial Code, which agrees that the courts should interpret *RCW 62A.9A.-313(h)* as a codification of common law agency principles. *See* PEB Report at 9 n. 38, available at <http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf> (explaining that “[a]s noted in Official

⁶ *See also State v. Spillman*, 110 Wash. 662, 666-667, 188 P. 915 (1920) (defining “possession in law” as “that possession which the law annexes to the legal title or ownership of property, and where there is a right to the immediate, actual possession of property”).

Comment 3 to *UCC § 9-313*, in determining whether a particular person has possession [of a mortgage note], the principles of agency apply,” then discussing § 9-313(h)).

This critical distinction between physical custody and legal possession of a mortgage note is consistent with the common law definition of “possession,” which *Black’s Law Dictionary* defines as:

1. The fact of having or holding property in one’s power; the exercise of dominion over property.
2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.

Black’s Law Dictionary 1183 (7th ed. 1999).

While Flagstar Bank may have had temporary physical custody of the Note pursuant to Freddie Mac’s “guidelines”, under the facts of this case there is no evidence that Flagstar Bank’s rights as a servicer and temporary custodian of the Note were expanded to constitute legal possession. See 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 18.31 at 365 (2d ed. 2004) (discussing mortgage notes and the role of loan servicers as collection agents, emphasizing that the owner of the mortgage note, and not the servicer, is “the mortgage holder”). Moreover, should physical possession equal legal possession, anyone who touches the note for any purposes, including the lawyer holding it for the temporary purpose of litigation, or the carrier who

transport it from one place to another, or the custodian who maintains it for safekeeping, can arguably initiate non-judicial foreclosure.

The applicability of *RCW 62A.9A-313(h)* becomes clear when the UCC definitions of the terms “secured party,” “collateral” and “debtor” are considered in turn. A “secured party” under the UCC includes “[a] person to which . . . promissory notes have been sold.” *RCW 62A.9A-102(72)(D)*. Similarly, “collateral” is defined to include “promissory notes that have been sold.” *RCW 62A.9A-102(12)(B)*. The “debtor,” as defined under the revised Article 9, is “[a] person having an interest, other than a security interest or other lien, in the collateral,” including “[a] seller of . . . promissory notes; or . . . consignee.” *RCW 62A.9A-102(12)(B)*. Finally, a “security interest” includes the interest of “a buyer of . . . a promissory note.” *RCW 62A.1-201(35)*. Returning to *RCW 62A.9A-313(h)*, but substituting these governing UCC definitions as they apply here, *RCW 62A.9A-313(h)* provides and operates as follows:

A secured party [*person to whom promissory note has been sold, i.e., Freddie Mac*] having possession of collateral [*the promissory note*] does not relinquish possession by delivering the collateral [*the promissory note*] to a person other than the debtor [*the seller or consignee of the promissory note, i.e., the lender that sold the Note to another entity*] . . . if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

- (1) To hold possession of the collateral [*the promissory note*] for the secured party's [*person to whom promissory note has been sold, i.e., Freddie Mac*] benefit; or

(2) To redeliver the collateral [*the promissory note*] to the secured party [person to whom promissory note has been sold].

(Emphasis added; UCC definitions inserted).

Under these principles of agency law, as codified in *RCW 62A.9A.-313(h)*, Freddie Mac, presuming it actually purchased the Note in September of 2006, never relinquished its legal possession of the Note to Flagstar Bank. This conclusion is consistent with the case law from other jurisdictions discussing the difference between physical custody and legal possession of a promissory note under the agency principles and the UCC.⁷ *MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304 (D. S.C. 1994)(where the promissory notes were sold to Ginnie Mae, but Bank of America kept physical custody on behalf of Ginnie Mae, Ginnie Mae had “possession” and was thus the “holder” as defined under Article 1-201 of the UCC); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1116 -1118 (S.D.N.Y. 1978) (The court held that because the notes were delivered to custodians, Chemical and Security Pacific, whose role was limited to “that of depository and collection agent,”

⁷ In the UCC context, decisions from other jurisdictions are particularly persuasive due to the uniform nature of the UCC. Thus, Washington courts often look to UCC case law from other jurisdictions in interpreting Washington’s UCC. *See, e.g., Badgett v. Security State Bank*, 116 Wn.2d 563, 572-73, 807 P.2d 356 (1991); *Lydig Construction, Inc. v. Rainier National Bank*, 40 Wn. App. 141, 144-45, 697 P.2d 1019 (1985).

the owners continue to have “legal possession” and were the “holders” under the UCC).⁸

Respondents have argued strenuously that Flagstar Bank had physical custody and that this should be sufficient under the UCC for Flagstar Bank to qualify as the “holder” under the DTA. The question, however, is whether its physical custody is sufficient to render it the “beneficiary” under the DTA. In addition to the arguments and authorities set forth above, basic rules of statutory construction demonstrate otherwise. It is an elementary rule of statutory construction “that where the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent.” *City of Kent v. Beigh*, 145 Wn2d. 33, 45-46, 32 P.3d 258 (2001). *Accord, Hosea*, 156 Wn. App. 263, 271, 223 P.3d 576 (2010). Here, the plain language of *RCW 61.24.005(2)* in defining the term “beneficiary” is explicit: “beneficiary” means “*the* holder.” *RCW 61.24.005(2)* (Emphasis added). The definition does not include the holder’s agents within the definition of beneficiary, as the legislature could easily have done. Moreover, the statute only

⁸ See also *In re Kelton Motors, Inc.*, 97 F.3d 22, 26-27 (2d Cir. 1996) (noting that the UCC “nowhere defines ‘possession,’” and holding based on common law agency principles that the party with “possession” of checks under *UCC § 1-201(20)*, the prior version of what is now *RCW 62A.1-201(b)(21)(A)*, was the party that had the legal right to control the checks, not the party that had physical custody of the checks); *First Nat’l Bank in Lenox v. Lamoni Livestock Sales Co.*, 417 N.W.2d 443, 447-48 (Iowa 1987) (again noting that “[p]ossession is not defined in the UCC,” holding that temporary physical custody did not constitute “possession” and that “as applied to the facts of this case [it] means ownership”).

authorizes the “beneficiary” to appoint a successor trustee by recording an appointment of a successor trustee. *See RCW 61.24.010(2)* (stating that “**the** beneficiary (not “**a** beneficiary) shall appoint a trustee or a successor trustee”) (Emphasis added). By contrast, there are numerous provisions throughout the DTA where the “beneficiary” or “it’s authorized agent” is required or authorized to take certain actions. For example, the DTA provides that the beneficiary “or authorized agent” may issue the notice of default. *RCW 61.24.031(1)(a)*. However, before doing so, the beneficiary “or authorized agent” must make initial contact with the borrower. *RCW 61.24.031(1)(b)*. Any notice of default must include a declaration from the beneficiary “or authorized agent” that they have complied with these requirements. *RCW 61.24.031(2)* and *(9)*. Similarly, in another section of the DTA, a beneficiary “or authorized agent” may declare a trustee’s sale and trustee’s deed void in certain defined circumstances. *RCW 61.24.050*. The DTA was also recently amended to require that the beneficiary “or authorized agent” participate in mediation with the borrower. *RCW 61.24.163(8)(a)*.

The fact that the DTA refers to “**the** holder,” singular, as opposed to “**a** holder,” suggesting a plurality, further demonstrates that there can be only one holder of the Note under the statute, which precludes Flagstar Bank from arguing that it and Freddie Mac might somehow both be,

concurrently, a “holder” of the Note. *RCW 61.24.005(2)* (Emphasis added). In this regard, *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 155 P.3d 952 (2007), is instructive. There, the statutory term in question was the term “the claim of lien” under *RCW 60.04.061*. *Id.* at page 885. The Haselwoods argued that the statute should be interpreted to encompass two different types of liens, both “liens on realty and liens on improvements.” *Id.* at page 885, n.5. The court rejected that interpretation because it was contrary to the plain language of the statute, which referred to “*the* claim of lien,” in the singular. As it explained, “[t]he ‘claim of lien’ referred to in the relation-back statute is singular, implying that *RCW 60.04* creates only one kind of lien.” *Id.* at page 885.

Likewise, the DTA’s “beneficiary” definition refers to “the holder,” singular, which shows that the statute contemplates only one “holder.” In short, under the DTA only the entity with legal possession, which includes the ultimate right of interest or control, of the note can claim the status of “the beneficiary” under *RCW 61.24.005(2)*. Servicers or other custodial agents of the note owner of one stripe or another, are not the lawful beneficiaries with authority to declare a default under *RCW 61.24.030*, appoint a successor trustee under *RCW 61.24.010(2)* or otherwise entitled initiate a non-judicial foreclosure under the Act. Since at all times relevant to this cause of action, Freddie Mac (or Capital Mortgage Corporation)

retained *legal possession* of the Note under *RCW 62A.9A.-313(h)*, Flagstar Bank could not be the “holder” under *RCW 62A.1-201(b)(21)*, and thus was not the “beneficiary” of the Note under the DTA. This does not mean to suggest that Freddie Mac could not have provided Flagstar Bank express authority to take the actions Flagstar Bank did against Ms. Renata, but there is no indication in the record, either before this Court or the trial court, to suggest that such authority was ever sought or granted. Certainly, NWTS took no action to verify Flagstar Bank’s authority. Accordingly, the Summary Judgment granted by the trial court premised on the presumption that Flagstar Bank was the “holder” and “beneficiary” with authority to foreclose under the DTA was erroneous and should be reversed.⁹

H. Breach of Trustee’s Duty of Good Faith by NWTS.

Under Washington law, private trustees, such as NWTS, are obligated by common law and equity to be evenhanded to both sides and to strictly follow the provisions of *RCW 61.24*. See *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *Albice v. Preimer Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012); *Klem*. As noted in *Klem*, at page 790:

In a non-judicial foreclosure, the trustee undertakes the role of judge as an impartial third party who owes a duty to both parties to

⁹ This is appears to be an issue of first impression, and this issue is also currently before the Court in the case of *Trujillo v. Northwest Trustee Services, Inc.*, Washington Court of Appeals, Division One, Case No. 70592-0-I.

ensure that the rights of both the beneficiary and the debtor are protected. *Cox* at 103 Wn.2d at 389. . . . An independent trustee who owes a duty to act in good faith to exercise **a fiduciary duty** to act impartially to fairly respect the interests of both the lender and the debtor to minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.

(Emphasis added)

It is Ms. Renata's contention that NWTS violated its fiduciary duty of good faith in several regards.

First, it is Ms. Renata's contention that NWTS engaged in misconduct even before being appointed successor trustee by Flagstar Bank. It appears from the record that Ms. Morgan, an employee, Assistant Vice-President of Flagstar Bank, prepared, executed and recorded both the Assignment of Deed of Trust of August 11, 2010 on behalf of MERS and the Appointment of Successor Trustee on behalf of her employer, Flagstar Bank, for the benefit of NWTS. In one, Ms. Morgan signed as an agent of MERS and in the other an agent of Flagstar Bank. This act would appear to constitute a conflict of interest, inasmuch as Ms. Morgan's employer realized a financial gain when the Assignment of Note and Deed of Trust and ultimately benefited NWTS. Indeed, Ms. Morgan's conduct seems to violate Section 2 of Flagstar Bank's Code of Business Conduct and Ethics. CP 147-148. NWTS was on inquiry notice to question Ms. Morgan's authority under these circumstances. However, it has been established that

NWTS had no procedures in place to verify the information it received from “clients” such as Flagstar Bank. *Meyer v. U.S. Bank N.A.* (hereinafter *In re Meyer*) 2014 Bankr. LEXIS 651 (Bankr., W.D. Wash. Feb. 18, 2014.) At the time Ms. Morgan prepared, executed and recorded the Assignment of Deed of Trust, NWTS knew or should have known that MERS never holds the notes it “registers”. See *Bain*. There is no evidence before the Court to suggest NWTS made any inquiries into Ms. Morgan’s authority. Without questioning Ms. Morgan’s authority to act under these circumstances, NWTS violated its fiduciary duty of good faith. In the absence of any evidence on the issue, there is an issue of fact regarding NWTS’ conduct.

Second, in view of the foregoing, NWTS could not reasonably rely on the “Beneficiary’s Declaration” in preparing their Notices of Default and the Notices of Trustee’s Sale, when it knew or should have known that Ms. Morgan acted without authority in executing the Assignment of Deed of Trust? See *RCW 61.24.030(7)*. Indeed, NWTS knew that Flagstar Bank was merely the servicer for Freddie Mac. CP 291-292. By relying on a document NWTS knew to be false, NWTS violated its fiduciary duty of good faith under *RCW 61.24.010*. NWTS knew or should have known that the Assignment of Deed of Trust was executed without the authority of the true and lawful owner and holder of the obligation and reliance on the declaration of the party who benefited from the fraud violates NWTS’s duty

of good faith. At the very least, NWTS should have inquired as to the identity of the true and lawful owner and holder of the obligation to obtain their ratification of their actions, but this does not appear to have been done. But, as a business practice, NWTS has no procedures to verify the accuracy of the information provided by its “clients”, does not know how the information provided to it through its electronic data base and communication platform with its “clients” is generated or who prepares the information and NWTS employees are prohibited from contacting the “clients” directly. See *In re Meyer* at page 6.

Third, NWTS engaged in a systematic disregard of *RCW 42.44*. As noted in *Klem*, pages 792-794:

. . . . Specifically, in this case, it appears that at least from 2004-2007, Quality [the trustee] notaries regularly falsified the date on which documents were signed.

* * *

Quality suggests these falsely notarized documents are immaterial because the owner received the minimum notice required by law. This no-harm, no-foul argument again reveals a misunderstanding of Washington law and the purpose and importance of the notary's acknowledgment under the law. A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. Local, interstate, and international transactions involving individuals, banks, and corporations proceed smoothly because all may rely upon the sanctity of the notary's seal. This court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence. *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974).

* * *

We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA.

(Emphasis added)

NWTS executed, filed and served an Amended Notice of Trustee's Sale that was notarized after it was executed. NWTS' Amended Notice of Trustee's Sale was signed by Vonnie McElligott on April 29, 2011, but was not notarized until May 2, 2011. CP 1102. These facts give rise to a reasonable inference that the document was not signed in the presence of the notary, in violation of Washington law. *RCW 42.44.160; Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974) and *Klem*. At the very least, there is a genuine issue of material fact in dispute on this issue.

Next, NWTS prepared posted and served two Notices of Foreclosure that fail to substantially comply with the provisions of *RCW 61.24.030(2)* in that neither one identifies "the Beneficiary of your Deed of Trust and **owner** of the obligation." CP 324-325, 332-334. The statutorily mandated form cited above suggests that the trustee must name the specific person or entity who is both the beneficiary and owner of the obligation. This fulfills the legitimate needs and interest of the borrower to ascertain the identity of the owner and holder of their obligation to "resolve disputes", "correct irregularities" and "take advantage of legal protections"

found so important by the *Bain* court. *Bain* at page 118. In neither of the Notices provided to Ms. Renata did NWTS comply with this statutory obligation. The forms simply use the term “beneficiary” without identifying the specific entity referred to.

Finally, both Notices of Trustee’s Sale misleadingly refer to MERS as the party Ms. Renata was originally obligated to pay. CP 318 and 327. This reference is not only misleading, but false. When this misrepresentation is combined with the other references to the ownership of the subject obligation, there is no way Ms. Renata could have reasonably identified the true and lawful owner and holder of her loan. Please compare the representations in the Mr. Stenman’s correspondence (CP 291-292), the Notice of Default (CP 1085-1088), the Notice of Trustee’s Sale (CP 318-322, 1158-1163), the Notice of Foreclosure (CP 324-325), the Amended Notice of Trustee’s Sale (CP 949-952, 1165-1168), with the Amended Notice of Foreclosure (CP 332-334). At no time did Respondents provide Ms. Renata the identity of the true and lawful owner and holder of her loan – the party to with whom she could “resolve disputes”, “correct irregularities” and “take advantage of legal protections”.

Based upon the foregoing, it is clear that there are genuine issues of material fact raised as to NWTS’ compliance with its fiduciary duties of good faith to Plaintiff. *RCW 61.24.010; Bain, Klem and Walker.*

I. Respondents have violated the CPA.

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. See *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986); *Bain* at page 35; *Walker* at page 317; *Bavand* at page 503. The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920*; *Short v. Demopolis*, 103 Wash.2d 52, 691 P.2d 163 (1984). See *Walker* at 306 and *Bavand* at page 486-486.

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pages 115-120. The *Bain* court specifically ruled that the unfair and deceptive act or practice element is presumed based upon MERS' business model and the manner in which it has been used.¹⁰ *Bain* at pages 115-117. There is little dispute, that the conduct alleged herein occurred in trade and commerce. Moreover, the *Bain* court specifically ruled that the public interest impact element may also be presumed based on the number of mortgages that utilized MERS as a nominee for an undisclosed principal.

¹⁰ This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive methods used by a collection agency to recover money on behalf of an insurance company).

Bain at page 118. The *Walker* court specifically held that the same allegations made herein against Respondents would support a CPA claim. *Walker* at pages 317-321. See also *Bavand* at pages 503-509.

The only element to a CPA claim that should be left to a trial court is the damage or injury element. To this element, the *Bain* court states: “[f]urther, if there have been misrepresentation, fraud or irregularities in the proceedings, and if the homeowner borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA.” *Bain* at page 118; *Walker* at pages 318-321. Ms. Renata has alleged a number of acts of misrepresentation, fraud and irregularities in these proceedings upon which to claim injury under the CPA. Significant to the facts of the present controversy, the *Bain* court noted that assignment of the note and deed of trust without verification of the underlying information that results as an “incorrect or fraudulent transfer” could establish an injury. *Bain* at page 118, fn. 18. The *Walker* court noted that “investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.” *Walker* at page 320. Finally, injury to person’s business or property is broadly construed and in some instances where “no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill

would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987).

Moreover, across this country, foreclosure or the prospect of foreclosure has been recognized as an emotional harm – almost on a *per se* basis. *Cf. Parks v. Wells Fargo Home Mortg., Inc.*, 398 F.3d 937, 941 (7th Cir. 2005); *Matthews v. Homecoming Fin. Network*, 2005 U.S. Dist. LEXIS 21535 (N.D. Ill. 2005); *Johnstone v. Bank of Am., N.A.*, 173 F. Supp. 2d 809 (N.D. Ill. 2001); *Stafford v. Puro*, 63 F.3d 1436, 1442 (7th Cir. 1995); *Peeler v. Kingston Mines*, 862 F.2d 135, 136 (7th Cir. 1988) The likelihood of foreclosure and the devastating personal impact of foreclosure should be enough to demonstrate both outrageous conduct and knowledge that severe emotional distress is likely to result.

Turning to the evidence that was offered to the trial court, Ms. Renata articulated injuries and damages directly and proximately caused by Defendants' wrongful foreclosure activities. CP 341-342. These injuries and damages were directly and proximately caused by Respondents' misconduct and were sufficient to sustain her claims under the CPA. *Walker and Bain*. At least there are genuine issues of material fact in dispute concerning the extent of Ms. Renata's injuries and damages at least for Summary Judgment purposes.

J. Need for Additional Discovery.

Finally, at hearing, Ms. Renata requested additional time to complete discovery, pursuant to *CR 56(f)*. This request was reasonable, in view of the status of discovery up to that point. Respondents' responses to Ms. Renata's discovery requests were computer dumps of form documents that were unrelated to the specific requests made and were replete with boiler-plate objections with little meaningful information provided. CP 207-264. To address the issue of authorization that was so central to the *Walker* and *Bavand* courts and the issues surrounding the forged endorsement, Ms. Renata articulated the need to conduct *CR 30(b)(6)* depositions of the parties. In view of the foregoing, this request was reasonable and justified. However, the trial court refused to provide Ms. Renata any additional time to complete discovery before summarily dismissing their claims, in accordance with *CR 56(f)*, thus depriving her of information she needed to "justify her opposition." In this, the trial court clearly erred and unfairly prejudiced Ms. Renata's ability to defend herself on Summary Judgment.

IV. CONCLUSION.

Based on the foregoing argument and analysis, the trial court had numerous genuine issues of material fact in dispute before it when it entered Summary Judgment dismissing Ms. Renata's claims on December 13, 2013. There were genuine issues of material fact concern, without

limitation, the forgery of Ms. Butler's signature on Capital Mortgage Corporation's endorsement of the Note to Flagstar Bank; questions regarding Flagstar Bank's status as "owner", "beneficiary" and/or "holder" of the obligation and Respondents' authority to initiate a non-judicial foreclosure against Ms. Renata; questions regarding the credibility of Ms. Morgan's testimony, upon which Respondents' and the trial court primarily relied at Summary Judgment; questions regarding Respondents' compliance with the DTA and questions regarding application of the CPA. Accordingly, Ms. Renata respectfully request that this Court to: (1) reverse the trial court's Orders of December 13, 2013; (2) remand this matter for trial on the merits; and (3) award Ms. Renata her taxable costs and reasonable attorney's fees incurred herein, pursuant to RAP 18.1 and Paragraph 26 of the subject Deed of Trust. CP 1142.

REPECTFULLY SUBMITTED this 28th day of April, 2014.

KOVAC & JONES, PLLC.

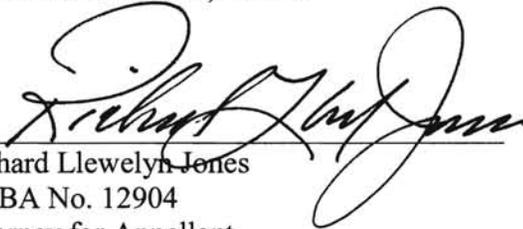

Richard Llewelyn Jones
WSBA No. 12904
Attorney for Appellant

TABLE OF APPENDICES

1. Memorandum Decision of the Honorable Karen Overstreet of February 18, 2014, in the matter of *In re Meyer*, U.S. District Court Adversary No. 12-01630 (2014 Bankr. LEXIS 651)

Below is a Memorandum Decision of the Court.



Karen A. Overstreet

Karen A. Overstreet
U.S. Bankruptcy Court Judge
(Dated as of Entered on Docket date above)

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Karen A. Overstreet
Bankruptcy Judge
United States Courthouse
700 Stewart Street, Suite 6301
Seattle, WA 98101
206-370-5330

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re

Peter James Meyer and
Sharee Lynn Meyer,

Debtor(s).

Case No. 10-23914

Peter James Meyer and
Sharee Lynn Meyer,
Plaintiffs,

Adv. No. 12-01630

v.

U.S. BANK N.A, as Trustee for Structured
Asset Securities Corporation Mortgage
Pass-Through Certificates, 2006-GEL2, a
National Bank; AMERICA'S SERVICING
COMPANY, a division of Wells Fargo
Bank N.A. dba Wells Fargo Home
Mortgage, a National Bank; WELLS
FARGO BANK NA, a National Bank;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a

MEMORANDUM DECISION

1 Delaware Corporation; and NORTHWEST
2 TRUSTEE SERVICES, INC., a
3 Washington Corporation,
4
5 Defendants.

6 The trial of this matter commenced on October 8, 2013 and concluded on November 5,
7 2013. The Court has considered the evidence presented at trial, the records and files in the case,
8 and the parties' post trial submissions. This Memorandum Decision contains the Court's
9 findings of fact and conclusions of law for purposes of Bankruptcy Rule 7052.¹

10 I. BACKGROUND

11 Plaintiffs, Peter and Sharee Meyer, commenced this action against Northwest Trustee
12 Services Inc. ("NWTS") and other defendants, asserting various causes of action against the
13 defendants related to foreclosure proceedings against their home located at 12412 – 84th St. S.E.,
14 Snohomish, WA (the "Residence"). After summary judgment proceedings, the Meyers' claims
15 remaining for trial included violation of the Washington State Deeds of Trust Act, RCW 61.24 et
16 seq. (the "DOTA"), the Washington State Consumer Protection Act, RCW 19.86 et seq. (the
17 "WACPA"), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (the
18 "FDCPA"). By the time of trial, all of the defendants had been dismissed from the case except
19 NWTS, so the case proceeded to trial on these claims only against NWTS.
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22 II. FACTS

23
24 On November 10, 2005, the Meyers executed a promissory note in favor of Finance
25 America LLC. (the "Note"). Ex. P-1. To secure payment of the Note, they executed a Deed of
26

27 ¹ Unless otherwise indicated, all Code, Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S.C.
28 §§101 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et seq.

1 Trust on the same date (the "Deed of Trust") against their Residence. Ocwen Loan Servicing
2 was identified as the servicer in the Deed of Trust, although the Deed of Trust provides both that
3 the servicer might change and that the Note can be transferred. *See* Ex. P-2. The Deed of Trust
4 named DCBL, Inc. as trustee, Finance America LLC as lender, and Mortgage Electronic
5 Registration Systems ("MERS") as nominee of the lender and beneficiary under the Deed of
6 Trust. The Deed of Trust was recorded on November 18, 2005. *Id.* The Meyers moved into the
7 Residence with their three children and began making their payments under the Note in January
8 of 2006.

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11 **A. The Transfer of the Loan.**

12
13 Unbeknownst to the Meyers, after the closing of their loan transaction, the Note was
14 transferred into a so-called securitized trust. When and to whom the Note was transferred was
15 highly contested at the trial. After reviewing all of the evidence and testimony, the Court is
16 persuaded that in or around April of 2006, the Meyers' loan became part of a securitized trust
17 entitled Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series
18 2006-GEL2 ("GEL2"). At some point prior to April 1, 2006, the Note was indorsed in blank via
19 a separate Allonge, which is undated (the "Allonge"), but which is signed by a Loan
20 Administration Supervisor for Finance America. *See* Ex. D-1. Although the path of the Note
21 into GEL2 is not clear, the Court finds it more probable than not that possession of the Note,
22 after its indorsement in blank, was first obtained by Lehman Brothers Holdings, Inc. ("Lehman")
23 and then deposited by Lehman into GEL2 pursuant to the terms of a Trust Agreement dated
24 April 1, 2006 (the "Trust Agreement"), among Structured Asset Securities Corp, as Depositor,
25 Aurora Loan Services LLC, as Master Servicer, Clayton Fixed Income Services, Inc., as Credit
26
27
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Below is a Memorandum Decision of the Court.

1 Risk Manager, and U.S. Bank National Association, as Trustee (“U.S. Bank”). The Deed of
2 Trust has never been assigned by Finance America.

3
4 According to the Trust Agreement, Lehman acquired various loans, sold them to
5 Structured Asset Securities Corp., which in turn “deposited” the loans into GEL2. Ex. D-3, pp.
6 1, 46. Under the Trust Agreement, individual investors could acquire differing types of interests
7 in GEL2 by purchasing the certificates described in the Trust Agreement.

8
9 John Richards, a vice president of U.S. Bank, testified concerning the Trust Agreement.
10 According to his testimony, GEL2, as a trust, is not an operating entity. It has no employees, no
11 office, and acts solely through its trustee, U.S. Bank. According to Mr. Richards, U.S. Bank’s
12 duties as trustee were primarily to address the needs of the investor certificate holders, with the
13 Trust Agreement placing responsibility for the management of the loans with one or more
14 servicers. Under the Trust Agreement, U.S. Bank also stands as the title holder of the loans, by
15 its possession of the loan notes or possession through one or more custodians.

16
17
18 By separate agreement, Wells Fargo Bank, N.A. (“Wells Fargo”) acted as an independent
19 contractor and servicer of the loans which were part of GEL2 for the “seller,” defined under the
20 agreement as “Lehman Brothers Holdings Inc. or its successor in interest or assigns.” Ex. D-4,
21 Securitization Subservicing Agreement, dated April 1, 2006 (the “Servicing Agreement”), Art. 1,
22 Art. III §§ 3.01. U.S. Bank is not a party to that agreement, and only acknowledged it as the
23 trustee. *Id.* Mr. Richards testified that Wells Fargo also acted as a custodian for GEL2. Under
24 the Servicing Agreement, Wells Fargo was to maintain possession of loan files on behalf of U.S.
25 Bank, as trustee for GEL2. Ex. D-4, p. 13. Under the Trust Agreement, U.S. Bank was
26 authorized to execute powers of attorney in favor of any servicer to permit the servicer to
27
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APPENDIX “1”

Below is a Memorandum Decision of the Court.

1 foreclose against any mortgaged property in GEL2 [Ex. D-3, p. 123], but all actions in pursuit of
2 foreclosure were delegated to the servicer under the Servicing Agreement. Brock Wiggins, a
3 vice president for loan documentation for Wells Fargo, identified three separate Limited Power
4 of Attorney documents, each executed by U.S. Bank and recorded in Snohomish County in 2007,
5 pursuant to which he testified Wells Fargo acted as attorney-in-fact for U.S. Bank under the
6 Servicing Agreement. Ex. D-6, D-7, D-8.
7

8 The Meyers sought to show at trial that their loan was not part of GEL2 and that neither
9 GEL2 nor U.S. Bank had possession of the Note. NWTs submitted a redacted schedule of loans,
10 which included the Meyers' loan, and which Brock Wiggins testified was the schedule of loans
11 which were part of GEL2 and being serviced by Wells Fargo under the Servicing Agreement.
12 Ex. D-5. The Court ordered an *in camera* submission of an unredacted version of the schedule
13 of loans, and the Court verified that the Meyers' loan was referenced on line 858 of the schedule
14 of loans. See Declaration of Brock Wiggins, Dkt. 136. A column in that spreadsheet states that
15 information concerning the Meyer loan was shown as of April 1, 2006, indicating that the loan
16 had become part of GEL2 on or before that date. Mr. Wiggins testified that according to Wells
17 Fargo's records, Wells Fargo took possession of the Note and the Allonge on March 1, 2006, and
18 that those documents and the other documents related to the Meyer loan had been maintained
19 initially in Wells Fargo's document vault in San Bernadino, but subsequently moved to Wells
20 Fargo's vault in Minnesota. Ex. P-13. The original Note, which Mr. Wiggins testified had been
21 in Wells Fargo's continuous possession pursuant to the terms of the Servicing Agreement, was
22 produced at trial for the Court's examination. Based upon the evidence, the Court concludes that
23 the holder of the Note is Wells Fargo, as custodian for U.S. Bank, as trustee for GEL2.
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1 **B. Foreclosure.**

2 The Meyers continued to make their payments under the Note until they started to
3 experience financial problems toward the end of 2008. It is not clear from the evidence when
4 the Meyers initially defaulted in their payments under the Note. There is no evidence that any
5 lender ever issued a formal notice of default.¹ On March 9, 2009, NWTS received its first
6 referral to foreclose the Deed of Trust, which referral was in the form of a Case Information
7 Report (the "2009 CIR") that NWTS pulled from a third party website called Vendorscape. Ex.
8 D-9.
9

10
11 Jeff Stenman, the Foreclosure Manager and Director of Operations for NWTS, testified
12 that NWTS has used Vendorscape to access foreclosure assignments for 10 years. NWTS has no
13 procedures to verify the accuracy of the information contained in Vendorscape, even though Mr.
14 Stenman admitted that he does not know how the information is generated within Vendorscape
15 or who prepares it. He described Vendorscape as a secure website which NWTS can access
16 using a password. If a NWTS employee has any question about the foreclosure process or any
17 documentation, they may leave a message in Vendorscape and await a response. Mr. Stenman
18 affirmed that NWTS employees do not contact servicers or lenders in any other way, and are
19 instead trained to rely on the information provided through Vendorscape.
20
21

22
23 Consistent with NWTS's customary practice, it used the information from Vendorscape
24 and the 2009 CIR, without any verification, to initiate the foreclosure against the Meyers'
25 Residence. The 2009 CIR is a table collection of data and does not contain any instructions. The
26 2009 CIR lists the Meyers as the obligors under the Note, it includes the Residence address and
27

28 ¹ Mr. Richards testified that it was the servicer's responsibility under the Servicing Agreement to declare a default under a loan which was part of GEL2, and not the duty of U.S. Bank as trustee.

Below is a Memorandum Decision of the Court.

1 the Meyers' social security numbers, and it shows U.S. Bank as the trustee for GEL2 as the
2 "beneficiary." The report mistakenly lists the interest rate on the Note as not being adjustable,
3 when in fact it was adjustable. The interest rate is listed as 9.6050% with the last payment made
4 on September 1, 2008. Mr. Stenman testified that he assumed the information in this report
5 came from America's Servicing Company ("ASC"), which is listed in the report as the servicer,
6 and he testified that he thought (but did not say for sure) that ASC was a division of Wells Fargo.
7

8
9 Based upon the information in the 2009 CIR, Mr. Stenman executed an Assignment of
10 Deed of Trust from MERS to "U.S. Bank National Association as Trustee for Structured Asset
11 Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2, as beneficiary" on
12 March 10, 2009, the day after receiving the referral. Ex. P-3. Although Mr. Stenman was an
13 employee of NWTS, he prepared and signed the assignment as a Vice President of MERS
14 pursuant to what he described as a tri-party agreement between himself, Wells Fargo and MERS.
15 Although NWTS repeatedly relied at trial on the authority of this so-called tri-party agreement,
16 the agreement was never produced in evidence. The Assignment of Deed of Trust was recorded
17 on July 1, 2009.
18

19
20 On March 26, 2009, Anne Neely signed an appointment of successor trustee, appointing
21 NWTS as successor trustee. See Ex. P-4. Ms. Neely is identified in the document as a vice
22 president of loan "doc" Wells Fargo, acting as attorney-in-fact for U.S. Bank, trustee for
23 Structured Asset Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2. The
24
25
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28

1 appointment of successor trustee was recorded July 1, 2009. It incorrectly refers to MERS as the
2 beneficiary.²

3
4 For reasons that were not disclosed during the trial, the 2009 foreclosure proceeding
5 against the Meyers was discontinued and a new proceeding started in 2010. The 2010
6 foreclosure was based upon a case information report which NWTs accessed in Vendorscape on
7 June 23, 2010 (the "2010 CIR"). Ex. P-15. With the report was a separate set of instructions
8 with an express request to commence foreclosure, but it is not clear from whom those
9 instructions originated. Ex. P-16. The 2010 CIR carried over the incorrect reference to the Note
10 as not adjustable, it showed a lower principal balance than the 2009 CIR, and a higher interest
11 rate of 9.6250%. It also showed the last payment made on February 1, 2009.
12

13
14 Heather Smith of NWTs prepared the Notice of Default dated July 9, 2010 (the "Notice
15 of Default") based on the information contained in the 2010 CIR. Ex. P-5. At the time, Ms.
16 Smith was a foreclosure assistant with NWTs. Paragraph (K) of the Notice of Default provides:
17

18 K) Contact Information for Beneficiary (Note Owner) and Loan
19 Servicer

20 The beneficiary of the deed of trust is US Bank National
21 Association, as Trustee for Structured Asset Securities
22 Corporation Mortgage Pass-Through Certificates, 2006-GEL2,
whose address and telephone number are:

23 c/o America's Servicing Company
24 MAC X7801-02T, 3476 Stateview Blvd
25 Fort Mill, SC 29715
26 855-248-5719

27
28 ² On March 10, 2009, Mr. Stenman had assigned MERS' interest in the Deed of Trust to U.S. Bank.

Below is a Memorandum Decision of the Court.

1 The loan servicer for this loan is America's Servicing Company,
2 whose address and telephone number are:

3 MAC X7801-02T
4 3476 Stateview Blvd
5 Fort Mill, SC 29715
6 800-662-5014

7 In paragraph L of the notice, under "Notice pursuant to the Federal Fair Debt Collection
8 Practices Act" it states "[t]he creditor to whom the debt is owed [sic] US Bank National
9 Association, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through
10 Certificates 2006-GEL2/America's Servicing Company." The Notice of Default incorrectly
11 referred to NWTS as the "authorized agent" for U.S. Bank. As of the date of the notice, there is
12 no evidence that NWTS was an authorized agent for any of Wells Fargo, U.S. Bank, or GEL2;
13 instead, by that time NWTS was already the trustee under the Deed of Trust with statutory duties
14 to the Meyers. The Notice of Default also states "[t]he beneficiary declares you in default for
15 failing to make payments as required by your note and deed of trust." *Id.*, ¶ C. However, there
16 is no evidence that GEL2, U.S. Bank, or Wells Fargo/ASC ever formally declared the Meyers in
17 default and no evidence that NWTS was the beneficiary or was authorized to declare such a
18 default.
19

20 In connection with the preparation of the Notice of Default, NWTS received a
21 Foreclosure Loss Mitigation Form declaration (the "Loss Mitigation Form") and a Beneficiary
22 Declaration (the "Beneficiary Declaration") as required by RCW 61.24, each dated June 24,
23 2010. The Loss Mitigation Form was signed under penalty of perjury by John Kennerty, "VP of
24 Loan Documentation" for ASC. *See* Ex- P-5. The declaration states that "[t]he Beneficiary or
25 Beneficiary's authorized agent has contacted the borrower under, and has complied with, Section
26 2 of Chapter 292, Laws of 2009 (contact provision to 'assess the borrower's financial ability to
27
28

Below is a Memorandum Decision of the Court.

1 pay the debt secured by the deed of trust, and explore options for the borrower to avoid
2 foreclosure’).” There is no evidence that any employee or representative of ASC, U.S. Bank, or
3 GEL2 contacted the Meyers before the foreclosure was commenced. Mr. Kennerty also signed
4 the Beneficiary Declaration, signing that document as a “VP Loan Documentation” for Wells
5 Fargo as attorney-in-fact for US Bank. *See also*, Exhibit D6, 7 and 8, Limited Power of
6 Attorney. The Beneficiary Declaration, which is also under penalty of perjury, states that U.S.
7 Bank, as trustee for GEL2, was the holder of the Note. Ex. P-5. Mr. Kennerty testified at a
8 deposition that he routinely signed documents of this type despite the fact that he had no personal
9 knowledge of any of the factual statements therein, but that he merely received these forms from
10 other departments at Wells Fargo and signed them. Ex. P-17, pp. 59-67.³
11
12

13 No one at NWTS took any action to verify any of the information used in the Notice of
14 Default or referenced in the Loss Mitigation Form or Beneficiary Declaration. The information
15 in the Notice of Default was merely pulled mechanically from the 2010 CIR. Ms. Smith testified
16 that she had been trained not to make any inquiries concerning these documents, but instead to
17 rely on them. In fact, when asked repeatedly by counsel for the Meyers whether she had verified
18 information she received, her consistent response was “I have been trained to rely on the referral
19 information in Vendorscape” or “I have been trained to rely on the Beneficiary Declaration.” As
20 to Mr. Kennerty's authority, Ms. Smith testified that she knew he worked for Wells Fargo and/or
21 ASC. She further testified that in her experience, Wells Fargo routinely executed documents for
22 U.S. Bank.
23
24

25
26
27 ³ Mr. Kennerty's deposition was taken in the case of *Geline v. NWTS* on May 20, 2010, so it would be directly
28 relevant to the procedures used by him at or around the time the Meyers' home foreclosure was commenced. Over
the objection of NWTS, the Court admitted Mr. Kennerty's deposition pursuant to Rules 804(a)(5)(A) and 804(b)(1),
and gave NWTS the opportunity to object to particular parts of the deposition. NWTS raised no objections to any
part of the deposition.

1 The Meyers found the Notice of Default taped to the door of their Residence. They were
2 not familiar with any of the entities identified in the notice except for ASC, to which they had
3 been making mortgage payments. The notice stated that in order to avoid foreclosure, the
4 Meyers would have to pay \$82,035.65. When Mr. Meyer called the phone number for ASC
5 listed in the notice, the individual who answered the phone identified themselves as an employee
6 of Wells Fargo. No one explained to him what the relationship was between these two entities.
7
8 When he contacted NWTs, he was referred to "a local law firm."

9
10 Mr. Meyer did not agree with the information contained in the notice. He believed that
11 the arrears listed were incorrect because he believed the interest rate listed in the Notice of
12 Default of 9.6% was incorrect. He contended that their monthly payment was only \$3200,
13 whereas the payment shown in the Notice of default was \$4,066.50. The Meyers did not believe
14 they owed any money to U.S. Bank or GEL2. Mr. Meyer attempted to contact Wells Fargo,
15 ASC and NWTs with his concerns, but was unable to resolve the issues. Mr. Meyer also
16 attempted to locate Finance America, the original lender.
17

18
19 On August 13, 2010, NWTs executed a notice of trustee's sale (the "Notice of Trustee's
20 Sale"). Ex. P-6. The notice recited that the Residence would be sold on the steps of the
21 Snohomish County Courthouse on November 19, 2010, unless the Meyers paid \$82,431.77 by
22 November 8, 2010. Ms. Smith signed the Notice of Trustee's Sale for NWTs.
23

24 **C. The Bankruptcy Proceedings.**
25

26 Failing to resolve the situation on their own, the Meyers hired attorney Richard Jones to
27 represent them in July of 2010. See Standard Retainer Agreement attached to the Declaration of
28

Below is a Memorandum Decision of the Court.

1 Richard L. Jones, Case No. 10-23914, Dkt. 51.⁴ The Meyers also retained attorney Larry
2 Feinstein to assist them with the filing of a chapter 13 bankruptcy proceeding on November 18,
3 2010, the day before the scheduled trustee's sale of their Residence. Mr. Meyer testified that but
4 for the foreclosure, he would not have filed bankruptcy and that the sole reason for the filing was
5 to find a way to save their home from foreclosure.
6

7 Through Mr. Jones, by letter dated December 17, 2010, the Meyers issued a Qualified
8 Written Request under the Truth in Lending Act, directed at ASC, in order to determine the
9 holder and owner of the Note. Ex. P-7. ASC sent a response to Mr. Feinstein on January 12,
10 2011. Ex. P-14. The letter advised that the Meyers' loan was in a "pool of loans" managed by
11 U.S. Bank, but it provided no detailed information about how or when that had occurred, or even
12 the name of the fund. The letter did, however, contain a contact address for U.S. Bank.
13
14

15 On December 21, 2010, U.S. Bank, as trustee for GEL2, filed a proof of claim in the
16 Meyers' bankruptcy proceeding listing a total amount due under the Deed of Trust as
17 \$502,190.76. In the proof of claim, unpaid interest is calculated at the rate of 9.625% (the rate
18 shown in the 2010 CIR) from January 1, 2009. The claim shows a payment amount of \$4,066.50
19 per month for the period February 1, 2009, to June 2009, but then reduced payments of
20 \$3,448.30 per month as of December 1, 2010. The Meyers' first proposed chapter 13 plan
21 provided only for payments of \$2,000 per month on their mortgage; their plan stated that they
22 were working on a loan modification with the lender. Case No. 10-23914, Dkt. 6. U.S. Bank
23 opposed confirmation of the plan on the grounds that it did not provide for payment of the
24 current mortgage payment of \$3,448.30 per month or provide for the cure of the prepetition
25 arrears totaling \$86,020.02. *Id.*, Dkt. 19.
26
27

28 _____
⁴ The Court may take judicial notice of its pleadings and files. Fed.R.Evid. 201.

Below is a Memorandum Decision of the Court.

1 The Meyers and U.S. Bank were unable to resolve their disputes over plan confirmation.
2 On June 1, 2011, the Meyers stipulated that U.S. Bank could have relief from the automatic stay
3 effective June 22, 2011. Case No. 10-23914, Dkt. 30. They removed their home mortgage from
4 their plan and their plan was confirmed on August 19, 2011. *Id.*, Dkt. 40.
5

6 On June 29, 2011, NWTS restarted the foreclosure process with the issuance of an
7 Amended Notice of Trustee's Sale with a sale date of August 12, 2011. Ex. P-8. Despite
8 having agreed in the bankruptcy case to relief from stay, the Meyers then commenced this
9 adversary proceeding on July 23, 2012, and sought a temporary restraining order enjoining the
10 scheduled foreclosure sale. U.S. Bank did not appear at the hearing on August 1, 2012, nor did it
11 file any opposition to the entry of the temporary restraining order. Heidi Buck appeared for
12 NWTS at the hearing as NWTS was also a named defendant in the action. On August 2, 2012, a
13 temporary restraining order was entered, which required the Meyers to deposit \$3,616.03 into the
14 Registry of the Court by August 6, 2012, pursuant to RCW 61.24.130. A hearing on the entry of
15 a preliminary injunction was scheduled for August 10, 2012. U.S. Bank and ASC, through the
16 same counsel, filed a joint non-opposition to the request for a preliminary injunction, provided
17 the Meyers would continue to make monthly payments of \$3,616.03 pursuant to the terms of the
18 temporary restraining order. Dkt. 19. The non-opposition recited that the parties had engaged in
19 three failed mediation attempts. This Court entered the preliminary injunction on August 20,
20 2012, requiring the Meyers to continue to make monthly payments into the Registry of the Court.
21 Dkt. 22.
22
23
24
25

26 Multiple motions were filed in this case, including various discovery motions. On March
27 29, 2013, U.S. Bank and MERS filed a motion to compel the Meyers' responses to
28 interrogatories and request for production of documents. The Meyers responded and at a hearing

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1 on April 19, 2013, the Court gave the Meyers until April 30, 2013 to fully respond to the
2 discovery requests. In addition, the Court awarded discovery sanctions of \$1,200 to U.S. Bank
3 and MERS. See Order at Dkt. 76. U.S. Bank and Wells Fargo then moved on May 17, 2013 to
4 dissolve the preliminary injunction entered by the Court on the ground that the Meyers had failed
5 to make the monthly payments into the court registry since September 10, 2012. These
6 defendants also filed their second motion to compel discovery responses from the Meyers,
7 complaining that the Meyers had failed to comply with the Court's prior order to compel. The
8 Meyers did not respond to either motion, and on June 5, 2013, the Court entered orders granting
9 the defendants' motion to dissolve the preliminary injunction (Dkt. 90), and dismissing all claims
10 against U.S. Bank and MERS as a discovery sanction (Dkt. 91). The motion to dissolve the
11 injunction also sought an order allowing the trustee's sale to be reset. On June 13, 2013, the
12 Court entered an order providing that the trustee's sale could be reset pursuant to applicable non-
13 bankruptcy law. As of the date of trial, however, the Meyers' Residence had not been sold at
14 trustee's sale.
15
16
17

18 The Meyers contend that NWTS violated its duties as a foreclosure trustee under
19 Washington state law. They contend that they have been damaged as a consequence of NWTS's
20 unlawful acts by having to (1) hire Mr. Jones to issue a Qualified Written Request to determine
21 the name and contact information for the holder and owner of their loan, (2) file a bankruptcy
22 proceeding in order to stop what they believed was an unlawful foreclosure action against their
23 Residence, (3) incur attorney's fees in connection with the foreclosure and the bankruptcy, and
24 (4) incur expenses moving to a rental house to avoid the uncertainty associated with the multiple
25 notices of trustee's sale.
26
27
28

1 Between the time the Meyers hired Mr. Jones and the time ASC responded to their
2 Qualified Written request, Mr. Jones incurred fees of \$980. Case No. 10-23914, Dkt. 54, p. 3.
3 Mr. Feinstein charged the Meyers \$3,500 for the filing and preparation of their bankruptcy case,
4 and the Meyers paid the bankruptcy filing fee of \$274.
5

6 Mr. and Mrs. Meyer also testified to the emotional effects of the foreclosure proceedings
7 on them. Mr. Meyer described it as "four years of hardship." Although he took full
8 responsibility for his financial problems and default in payments under the Note, he testified that
9 the stress of foreclosure and the attempts to get back on track with his mortgage resulted in
10 severe stress affecting his work, his marriage, and his parenting, for which he ultimately sought
11 professional help. Given the stress, he and his wife made the decision to move into a rental
12 house in July of 2013. Their monthly rent under the lease is \$2,595, which they had paid from
13 July through October as of the time of trial (\$10,380).⁵ The Meyers were also required to pay a
14 security deposit of \$2,245 and a pet deposit of \$300. In addition, Mr. Meyer testified to moving
15 expenses incurred of \$2,625, which included the time that he and his wife were off work in order
16 to handle the move themselves. Mr. Meyer also calculated his and his wife's time off from work
17 in order to attend multiple mediations and hearings, which he estimated cost him \$3,200 in total,
18 including travel expenses. Their damages, according to the evidence, amount to \$23,504. Mr.
19 Meyer testified that he has also incurred attorney's fees and costs in this litigation.
20
21
22

23 III. JURISDICTION

24 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and
25 this is a core proceeding under 28 U.S.C. § 157(b)(2)(B),(K).
26
27

28 ⁵ The Meyers were required to pay \$3,616.03 into the registry of the court pursuant to the Court's preliminary injunction, thus the move reduced their monthly housing expense by just over \$1,000.

IV. DISCUSSION

A. Violation of the Washington Deeds of Trust Act.

Washington permits the foreclosure of deeds of trust nonjudicially under the DOTA. The statute offers a convenient and relatively inexpensive method for foreclosing deeds of trust, provided the lender complies with the terms of the statute.

Washington's deed of trust act should be construed to further three basic objectives. *See Comment, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash.L.Rev. 323, 330 (1984). First, the nonjudicial foreclosure process should remain efficient and inexpensive. *Peoples Nat'l Bank v. Ostrander*, 6 Wash.App. 28, 491 P.2d 1058 (1971). Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.

Cox v. Helenius, 103 Wash.2d 383, 387, 693 P.2d 683 (1985).

1. The Changing Legal Landscape of the DOTA.

The Meyers contend that NWTS violated the DOTA by commencing a foreclosure against their Residence without the proper authority under Washington State law and that NWTS failed to comply with its duties to them as trustee under RCW 61.24.010(3).

As is typical in a number of similar cases asserting claims under the DOTA, NWTS argues that because the Residence has not been sold, the Meyers cannot, as a matter of law, establish damages. As is also typical in these cases, NWTS argues that in Washington, there is no cause of action for wrongful initiation of foreclosure. Federal judges in the Western District of Washington addressing these issues have generally followed the case of *Vawter v. Quality Loan Service Corp.*, 707 F.Supp.2d 1115, 1123 (W.D. Wash. 2010). In that case, addressing a motion to dismiss by the lender and MERS, the court held that under Washington state law "the DTA does not authorize a cause of action for damages for the wrongful initiation of nonjudicial

Below is a Memorandum Decision of the Court.

1 foreclosure proceedings where no trustee's sale occurs." However, recent state court cases have
2 undermined the validity of this statement of the law. In *Walker v. Quality Loan Service Corp.*,
3 176 Wash.App. 294, 308 P.3d 716 (Wash.Ct.App. 2013), the Washington State Court of Appeals
4 stated its disagreement with the holding in *Vawter*, concluding that *Vawter* relied on cases which
5 were decided before the legislature enacted the current version of RCW 61.24.127 and before the
6 Washington Supreme Court decided *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d
7 83, 10, 285 P.3d 34 (2012). The court in *Walker* held:

9 Because the legislature recognized a presale cause of action for damages
10 in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim
11 against a trustee who, by acting without lawful authority or in material
12 violation of the DTA, injures the borrower, even if no foreclosure sale
13 occurred. Additionally, where a beneficiary, lawful or otherwise, so
controls the trustee so as to make the trustee a mere agent of the
beneficiary, then, as principal, it may have vicarious liability."

14 176 Wash.App. at 313. See also *Bavand v. OneWest Bank, F.S.B.*, 176 Wash.App. 475, 309 P.3d
15 636 (Wash.Ct.App. 2013)(rejecting *Vawter*).

16 NWTS urges the Court to decline to follow *Walker*, arguing that as an intermediate
17 appellate decision, it is not binding on this Court, and further, that the question addressed by
18 *Walker* was certified to the Washington Supreme Court for review by District Judge Marsha
19 Pechman in *Frias v. Asset Foreclosures Services, Inc.*, Case no. C13-760-MJP, by order entered
20 September 25, 2013. In addition, NWTS offers the additional authority from the Ninth Circuit
21 Bankruptcy Appellate Panel, *Brown v. Bank of America, et al.*, BAP No. WW-12-1534, in which
22 the panel followed *Vawter*, without any citation to *Walker* or *Bavand*.
23
24

25 As far as this Court is concerned, the Washington courts have spoken: *Walker* and
26 *Bavand* reject the holding in *Vawter* that there is no cause of action for violation of the DOTA.
27 Bankruptcy courts routinely follow state courts when addressing legal issues under state law,
28

1 particularly with respect to questions involving real property. *Butner v. U.S.*, 440 U.S. 48, 99
2 S.Ct. 914 (1979). In following state court cases, this Court has never distinguished between state
3 appellate and supreme court cases. Moreover, the Court finds the *Walker* case particularly
4 thoughtful and on point. Following *Walker*, the Court must determine whether the Meyers
5 proved that NWTs violated some provision of the DOTA.
6

7 **2. NWTs's Duties Under the DOTA.**

8 In 2008, the legislature amended the DOTA to provide that a trustee has no fiduciary duty
9 to either the lender or the homeowner in a foreclosure action. Specifically, subsections (3) and
10 (4) were added to RCW 61.24.010, and they provide:

11 (3) The trustee or successor trustee shall have *no fiduciary duty* or fiduciary
12 obligation to the grantor or other persons having an interest in the property
13 subject to the deed of trust.

14 (4) The trustee or successor trustee shall *act impartially* between the
15 borrower, grantor, and beneficiary.

16 Laws of 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) and (4)(emphasis added). In
17 2009, the statute was revised again, and RCW 61.24.010(4) was rewritten to read: "(4) The
18 trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor."
19 Laws of 2009, ch. 292, § 7, codified in part as RCW 61.24.010(4)(emphasis added).

20 In *Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 295 P.3d 1179 (2013), the
21 Washington Supreme Court reviewed the history of the DOTA and issued a strong statement
22 with particular reference to the duty of a trustee under that statute. Squarely at issue in the case
23 was the trustee's failure to exercise independent discretion to postpone a trustee's sale.
24 Recognizing the "tremendous power" given a trustee to sell a borrower's family home, and the
25 need to construe the DOTA in favor of borrowers "because of the relative ease with which
26 lenders can forfeit borrowers' interests," the court concluded that "[i]n a nonjudicial foreclosure,
27
28

Below is a Memorandum Decision of the Court.

1 the trustee undertakes the role of the judge as an impartial third party who owes a duty to both
2 parties to ensure that the rights of both the beneficiary and the debtor are protected." *Id.* at 789-
3 790. "If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent
4 of the beneficiary and a deed of trust no longer embodies a three party transaction." *Id.* The
5 *Klem* court rejected the trustee's argument that "no competent Trustee would fail to respect its
6 Beneficiary's instructions not to postpone a sale without first seeking the Beneficiary's
7 permission" and held that in failing to exercise its independent judgment as to whether the sale
8 should be postponed, the trustee violated its duty to the borrowers. *Id.* at 791.⁶

10 Nonjudicial foreclosure in Washington is initiated by the issuance of a notice of default to
11 the borrower. Under RCW 61.24.030, the notice of default must be transmitted "by the
12 beneficiary or trustee" 30 days before the notice of sale is recorded, transmitted or served. The
13 "beneficiary" under the DOTA is the "holder of the instrument or document evidencing the
14 obligations secured by the deed of trust, excluding persons holding the same as security for a
15 different obligation." RCW 61.24.005(2).

18 In this case, NWTS referred to itself in the Notice of Default as the authorized agent for
19 the beneficiary even though the evidence established that it was not an authorized agent for U.S.
20 Bank. Furthermore, at the time the Notice of Default was issued, NWTS was already the
21 successor trustee under the DOTA with duties to both the Meyers and U.S. Bank. Ms. Smith
22 testified that the misreference to its role as agent was just a mistake. The appearance to the
23 Meyers, however, was that a lender they had never heard of, through an agent they had never
24 heard of, was declaring them in default under their Note and attempting to take away their home.

26 At the time the Notice of Default was issued, NWTS was required to include additional
27

28 ⁶ The court went on to hold that the trustee's failure to exercise independent judgment in continuing the trustee's sale was an unfair or deceptive act or practice under the WACPA.

Below is a Memorandum Decision of the Court.

1 and specific information in the notice pursuant to RCW 61.24.030(8), which was added to the
2 DOTA effective July 26, 2009. Laws of 2009, Ch. 292, § 2. Of relevance here is the
3 requirement in subsection (l) that NWTS include in the Notice of Default "the name and address
4 of the owner of any promissory notes or other obligations secured by the deed of trust and the
5 name, address, and telephone number of a party acting as a servicer of the obligations secured by
6 the deed of trust." According to the statute, inclusion of this information is mandatory "in the
7 event the property secured by the deed of trust is residential real property."
8

9 At trial, NWTS successfully proved, by resort to many complicated and lengthy exhibits,
10 that as of the commencement of the foreclosure, U.S. Bank, as trustee for GEL2, was the holder
11 of the Note and that GEL2 was the owner of the Note.⁷ Despite the simple direction of the
12 statute, however, NWTS failed to include an address and phone number for either U.S. Bank or
13 GEL2. Instead, NWTS merely listed the address for the servicer, ASC, for both the beneficiary
14 and the servicer, with two different phone numbers for ASC. Accurate information identifying
15 the beneficiary and owner of the obligation is important to homeowners like the Meyers, who
16 learn for the first time in a notice of default that their mortgage obligation is owned by someone
17 with whom they never did any business or to whom they have never made any payment, because
18 they have no idea if it is real or a potential scam. In this case, the failure of NWTS to include
19 accurate information in the Notice of Default eventually caused the Meyers to hire an attorney
20 and file bankruptcy in order to verify the true owner of their home loan.
21
22
23

24
25 ⁷ RCW 61.24.030 refers in different places to the "beneficiary of the deed of trust," the "beneficiary" and the
26 "owner" of the note or obligation secured by the deed of trust. The Court must assume those references are
27 intentional. RCW 61.24.005(2) defines "beneficiary" as the "holder of the instrument or document evidencing the
28 obligations secured by the deed of trust...." Under Article 3 of Washington's version of the Uniform Commercial
Code, the "owner" and "beneficiary" of a note can be different persons. A person entitled to enforce an instrument
means (i) the holder of the instrument or (ii) a nonholder in possession of the instrument who has the rights of the
holder. RCW 62A.3-301. A person may be entitled to enforce a negotiable instrument even though the person is
not the owner of the instrument. RCW 62A.3-301. Mr. Wiggins testified that although U.S. Bank was the holder of
the Note, GEL2 was the owner of the Note.

1 Also by amendment in 2009, the Washington legislature added a new requirement
2 enacted as subsection (7)(a) to RCW 61.24.030 as follows:

3 (7)(a) That, for residential real property, before the notice of
4 trustee's sale is recorded, transmitted, or served, the trustee shall
5 have proof that the beneficiary is the owner of any promissory note
6 or other obligation secured by the deed of trust. A declaration by the
7 beneficiary made under the penalty of perjury stating that the
8 beneficiary is the actual holder of the promissory note or other
9 obligation secured by the deed of trust shall be sufficient proof as
10 required under this subsection.

11 (b) Unless the trustee has violated his or her duty under RCW
12 61.24.010(4), the trustee is entitled to rely on the beneficiary's
13 declaration as evidence of proof required under this subsection.

14 In this case, NWTS had a declaration from Wells Fargo, the purported attorney-in-fact for U.S.
15 Bank. Although NWTS submitted into evidence three separate powers of attorney issued by
16 U.S. Bank to Wells Fargo in 2007 which, if still in effect in 2010 when the Meyers' foreclosure
17 was commenced, would have given Wells Fargo broad powers to sign documents related to
18 foreclosures on behalf of U.S. Bank, NWTS had no notice or knowledge of any of these powers
19 of attorney or any other agreement substantiating the authority of Wells Fargo to act on behalf of
20 U.S. Bank. Further, Ms. Smith, as the foreclosing NWTS officer, was specifically trained not to
21 seek out that information. Instead, NWTS merely accepted without question the purported
22 authority of these entities.⁸

23 The Meyers argue that a trustee may not rely on a beneficiary declaration executed by
24 anyone other than the beneficiary. Further, they argue that the trustee must have proof, in the
25 words of the statute, that the beneficiary is the "owner" of the note as opposed to the holder of

26 _____
27 ⁸ The 2010 CIR listed ASC as the servicer of the Meyers' loan. Nowhere in that report, however, does it refer to
28 Wells Fargo as attorney in fact for U.S. Bank. Because the powers of attorney were recorded in Snohomish County,
presumably NWTS could have located them in a title search. Ms. Smith, however, testified that she did not see the
powers of attorney prior to issuing the Notice of Default. Instead, she relied on the Beneficiary Declaration and on
her knowledge that Mr. Kennerty worked for ASC/Wells Fargo.

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1 the note. It is not necessary to address either of these arguments, however, because the Court
2 concludes that NWTS could not rely on the Beneficiary Declaration because it had no proof that
3 Wells Fargo had authority to execute that declaration on behalf of U.S. Bank.

4 In this case, NWTS also failed to comply with the requirements of RCW 61.24.030(9).
5 Under that section, before a notice of trustee's sale may be recorded, in the case of owner-
6 occupied residential real property, the beneficiary must have complied with RCW 61.24.031.
7 RCW 61.24.031(1)(a) provides that a trustee, beneficiary, or its authorized agent may not issue
8 the notice of default until 30 days after satisfying the due diligence requirements described in
9 subsection (5) if the borrower has not responded, or 90 days after contact was initiated if the
10 borrower does respond. Under RCW 61.24.031(9), the beneficiary or authorized agent must
11 prepare a "Foreclosure Loss Mitigation Form" the contents of which are set out in the statute.
12 The purpose of the foreclosure loss mitigation form is to confirm for the trustee that the due
13 diligence required under the statute has been completed as required.
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16 In this case, NWTS accepted the Loss Mitigation Form from ASC signed by John
17 Kennerty. The form stated that "[t]he beneficiary, *or their authorized agent* has contacted the
18 borrower under, and has complied with, Section 2 of Chapter 292, Laws of 2009...." This is in
19 reference to the requirement of RCW 61.24.031(b) that the "beneficiary or its authorized agent"
20 contact the borrower in writing or by telephone to assess their financial ability to pay the debt
21 and to explore options for the borrower to avoid foreclosure. The statute contains specific
22 requirements for the content of the communication between the beneficiary and the borrower.
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Below is a Memorandum Decision of the Court.

1 communication initiated by ASC; there was no evidence of same) would not have satisfied the
2 statute. Moreover, Mr. Kennerty testified in his deposition that he had no personal knowledge of
3 the statements in these declarations, and that he relied completely on his collections and
4 foreclosure departments to provide the information to him. NWTS had no evidence that ASC
5 was the authorized agent of U.S. Bank for the purpose of executing this document.
6

7 The Court concludes that NWTS failed to materially comply with its duties under the
8 DOTA. RCW 61.24.127(1)(c). Misrepresenting itself in the Notice of Default as the authorized
9 agent of U.S. Bank, NWTS declared a default under the Note, commenced a foreclosure against
10 the Residence without verifying in any way the authority of Wells Fargo or U.S. Bank to
11 maintain such foreclosure, and failed to provide the Meyers with the most basic information
12 required by statute about the current holder and owner of their loan. The Notice of Default,
13 which did not meet the requirements of the DOTA, tainted the entire foreclosure process.
14

15 **B. Violation of the Washington Consumer Protection Act.**

16 The WACPA, RCW 19.86 et seq., prohibits unfair methods of competition and unfair or
17 deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. The
18 Meyers base their WACPA claim on the failure of NWTS to comply with the DOTA. Because
19 NWTS's violation of the DOTA is not a *per se* violation of the WACPA under the facts of this
20 case, the Court must examine whether the Meyers have proved each element required under the
21 WACPA.¹
22

23 Case law in Washington mandates that a plaintiff prove the following elements to recover
24 under the WACPA: (1) an unfair or deceptive act or practice; (2) the act or practice occurred in
25
26

27 ¹ See RCW 61.24.135. "A *per se* unfair trade practice exists when a statute which has been declared by the
28 Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Hangman Ridge
Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 786, 719 P.2d 531 (1986).

Below is a Memorandum Decision of the Court.

1 trade or commerce; (3) the act or practice impacts the public interest; (4) the act or practice
2 caused injury to the plaintiff in his business or property; and (5) the injury is causally linked to
3 the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
4 Wash.2d 778, 780, 719 P.2d 531 (1986). To clear up any confusion about these elements, the
5 court in *Klem* held "that a claim under the Washington CPA may be predicated upon a per se
6 violation of statute, an act or practice that has the capacity to deceive substantial portions of the
7 public, or an unfair or deceptive act or practice not regulated by statute but in violation of public
8 interest." *Klem*, 176 Wash.2d at 787.

10 The statutory definitions of "trade" and "commerce" require that the act directly or
11 indirectly affect the people of the State of Washington. The act permits any "person who is
12 injured in his or her business or property" to bring a civil suit for injunctive relief, damages,
13 attorneys' fees and costs, and treble damages. RCW 19.86.090.

15 **1. Unfair and Deceptive Act.**

16 After the decision of the Washington Supreme Court in *Klem v. Washington Mutual*,
17 there is no uncertainty as to how to apply the WACPA elements in a case like this one. The
18 court in *Klem* held that the practice of a trustee in a nonjudicial foreclosure deferring to the
19 lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent
20 discretion as an impartial third party with duties to both parties is an unfair or deceptive act or
21 practice and satisfies the first element of the WACPA. Like the record before the court in *Klem*,
22 the record in this case supports the conclusion that NWTS abdicated its duty to act impartially
23 toward both sides. For the following reasons, the Court finds that NWTS's multiple violations of
24 the DOTA, as detailed in the preceding section, also constitute violations of the WACPA.
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27 The standard practices of NWTS ignore the importance of a foreclosure trustee's duties
28

Below is a Memorandum Decision of the Court.

1 to the consumer borrower. The requirements for a notice of default under RCW 61.24.030 and
2 031 are straightforward and unambiguous. The trustee is required to provide the name and
3 address of the owner of the homeowner's loan. RCW 61.24.030(8)(1). All NWTS provided to
4 the Meyers was the address and two phone numbers for ASC. When Mr. Meyer called the phone
5 numbers, a representative of Wells Fargo answered. Counsel for NWTS argued that everyone
6 knows that ASC is a "dba" of Wells Fargo. In fact, everyone does not know that – most, if not
7 all, homeowners do not know that. Most, if not all, homeowners would be completely perplexed
8 by a reference to their home loan lender as "U.S. Bank National Association, as Trustee for
9 Structured Asset Securities Corporation, Mortgage Pass-Through Certificates, 2006-GEL2."
10 And while there is no law against maintaining a lender's name in that form, common sense
11 dictates that if a foreclosure trustee is going to put that in a notice of default, some additional
12 explanation will likely be necessary to the average homeowner. Because NWTS provided no
13 contact information for U.S. Bank as the trustee for GEL2, or for GEL2, the Meyers had no way
14 to contact either to verify the information in the Notice of Default except through the servicer
15 ASC. The statute specifically requires the Notice of Default to include contact information for
16 both the owner of the note and the servicer.
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20 The Notice of Default purports to be a formal declaration that the Meyers were in default
21 under their Note, in that it states "[t]he beneficiary *declares* you in default for failing to make
22 payments as required by your note and deed of trust." (Emphasis added). Yet, there is no
23 evidence that U.S. Bank ever declared the Meyers in default. NWTS's misrepresentation of itself
24 as the "authorized agent" of U.S. Bank made it appear that the Notice of Default did suffice as a
25 declaration of default by the beneficiary. In fact, RCW 61.24.030(8)(c), in effect at the time the
26 Notice of Default was issued, required "[a] statement that the beneficiary *has declared* the
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Below is a Memorandum Decision of the Court.

1 borrower or grantor to be in default..." (Emphasis added). The Meyers were insistent in their
2 testimony that they had not received any formal notice of default from their lender prior to their
3 receipt of the Notice of Default issued by NWTS.

4 In order to obtain contact information for their new lender, the Meyers were forced to
5 hire an attorney to prepare a Qualified Written Request for them under the Truth in Lending Act.
6 It wasn't until ASC responded to that request on January 12, 2011, six months after the
7 foreclosure was commenced, that contact information for U.S. Bank was provided, with, of
8 course, the admonition by ASC that "[a]lthough we are providing this information, the Trustee
9 will more than likely refer you back to us [ASC] to answer any questions about the loan or the
10 servicing of the loan." Ex. P-14.
11

12 Finally, as noted above, foreclosure against owner-occupied real property may not be
13 commenced unless the due diligence requirements of RCW 61.24.031(5) have been completed
14 by the beneficiary or an authorized agent, and unless the trustee has proof that the beneficiary is
15 the owner of the promissory note. NWTS, because of its standard policy of accepting whatever
16 is contained in a Loss Mitigation Form and Beneficiary Declaration without question, moved
17 forward with foreclosure against the Meyers' Residence without exercising any diligence of its
18 own to confirm the authority of U.S. Bank and Wells Fargo to initiate foreclosure.
19

20 While a foreclosure trustee is not required to be an attorney, they must be capable of
21 assembling enough information about the lender, servicer and others involved in the lending
22 chain to be able to objectively satisfy the homeowner that the correct party is initiating the action
23 to take their home. The foreclosure trustee should be able to accurately state minimal
24 information required by the DOTA to be included in the notice of default, which is, from the
25 perspective of the homeowner, the frightening first step to the loss of their home. A homeowner
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Below is a Memorandum Decision of the Court.

1 should not be required to hire an attorney to draft a Qualified Written Request under the Truth in
2 Lending Act just to get the name and address of their home loan lender. In short, NWTS must be
3 more than a typing service for the lending community. The Court therefore concludes that the
4 failures of NWTS under the DOTA in this case are both unfair and deceptive acts within the
5 meaning of the WACPA.

6
7 **2. Occurring in Trade or Commerce.**

8 There can be no serious question that the actions of NWTS relative to the Meyers'
9 foreclosure action and the other foreclosures handled by NWTS in the State of Washington
10 occurred in trade or commerce.

11
12 **3. Public Interest Impact.**

13 Whether NWTS complies with its duties under the DOTA has a significant impact on the
14 public interest. Homeowners have a right to a trustee who acts in good faith toward them in the
15 exercise of its foreclosure duties. Homeowners have a right to accurate information and conduct
16 by the trustee which complies with state law. The testimony demonstrated that NWTS, as a
17 matter of practice, accepts all information provided to it through its Vendorscape portal without
18 verification or question, without any knowledge concerning the source or accuracy of that
19 information, and without exercising any discretion relative to the interests of the borrower. Mr.
20 Meyer summed up the sentiment of the thousands of Washington homeowners who have lost
21 their homes to foreclosure in the recent economic downturn: the threat of foreclosure of his
22 family's home was the worst event of his life. The Court concludes that the Meyers have proved
23 the public interest element of their WACPA claim.

24
25
26 **4. Causation and Injury.**

27 Before a violation of the WACPA may be found, an injury to the claimant's business or
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Below is a Memorandum Decision of the Court.

1 property must be established. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
2 Wash.2d at 792, 719 P.2d 531. The injury “need not be great” and no monetary damages need
3 be proven. *Mason v. Mortgage America, Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990);
4 *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563, 825 P.2d 714
5 (1992). Nonquantifiable injuries, such as loss of goodwill, suffice to prove injury, *Nordstrom,*
6 *Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987), but mental distress alone does not
7 establish injury. *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 180, 159 P.3d 10
8 (Wash.Ct.App. 2007). Incurring time and money to prosecute a WACPA claim does not suffice
9 as an injury to business or property. *Sign-O-Lite*, 64 Wash.App. at 564, 825 P.2d 714. On the
10 other hand, “[c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt
11 is distinct from consulting an attorney to institute a CPA claim.” *Panag v. Farmers Ins. Co. of*
12 *Washington*, 166 Wash.2d 27, 62, 204 P.3d 885 (2009). As for damages, as opposed to injury,
13 the court in *Mason* stated:

16 [W]hether an “injury” has been sustained so as to support an award
17 of attorneys’ fees and costs under the Consumer Protection Act is a
18 different inquiry than whether treble damages are appropriately
19 awarded. An injury cognizable under the Act will sustain an award
20 of attorneys’ fees while treble damages are based upon “actual”
21 damages awarded.

22 *Mason*, 114 Wash.2d at 855, 792 P.2d 142. Finally, on causation, the Washington Supreme
23 Court instructs that “[i]f investigative expense would have been incurred regardless of whether a
24 violation existed, causation cannot be established.” *Panag*, 166 Wash.2d at 64, 204 P.3d 885.

25 In this case, NWTs had a simple task: provide the Meyers with an address and telephone
26 number for the owner of the Note and exercise independent judgment to confirm the authority of
27 the entities requesting foreclosure of the Residence. But for the failure of NWTs to provide that
28 information in the Notice of Default as required by the DOTA and to exercise independent

1 judgment, the Meyers would not have been forced to incur the expense of retaining Mr. Jones to
2 pursue additional information concerning their loan and Mr. Feinstein to file a bankruptcy
3 proceeding in order to stop a foreclosure which was improperly instituted as to their Residence.

4 **5. Damages.**

5 Under the WACPA, the Meyers are entitled to actual damages, together with the costs of
6 suit, including a reasonable attorney's fee. RCW 19.86.090. The Court may increase the award
7 to three times the amount of actual damages, provided the award does not exceed \$25,000.
8

9 Because the Notice of Default issued by NWTS was completely defective, the Meyers are
10 entitled to all of the damages they suffered which flowed from the unlawful foreclosure activities
11 of NWTS. In short, they should not have been displaced from their home based upon the Notice
12 of Default. As detailed in the facts above, those damages total \$23,504. The Court further finds
13 that trebling under RCW 19.86.090 is also warranted up to the statutory maximum of \$25,000.
14 The Meyers are also entitled to seek recovery of the costs of this suit, including a reasonable
15 attorney's fee.
16

17 **C. Fair Debt Collection Practices Act.**

18 The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA") was
19 enacted "to protect consumers from a host of unfair, harassing, and deceptive collection
20 practices without imposing unnecessary restrictions on ethical debt collectors." *FTC v. Check*
21 *Investors, Inc.*, 502 F.3d 159, 165 (3rd Cir. 2007) *cert. denied Check Investors, Inc. V. F.T.C.*,
22 555 U.S. 1011, 129 S.Ct. 569, 172 L. Ed. 429 (2008)(quoting *Staub v. Harris*, 626 F.2d 275,
23 276-77 (3rd Cir. 1980) (internal quotations omitted)). Under the act, a debt collector may not
24 use unfair or unconscionable means to collect or attempt to collect any debt (15 U.S.C. §1692f),
25 nor may a debt collector use any "false, deceptive, or misleading representation or means in
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Below is a Memorandum Decision of the Court.

1 connection with the collection of any debt" (15 U.S.C. §1692e). In *Walker, supra*, the
2 Washington appellate court addressed the potential liability of foreclosure trustees under these
3 two sections and discussed developing federal law on the issues, concluding that as long as a
4 trustee confines itself to actions necessary to effectuate a foreclosure, its liability will be solely
5 under Section 1692f rather than Section 1692e. 308 P.3d at 725-26.⁹
6

7 In analyzing liability under Section 1692, *Walker* relied on *McDonald v. OneWest Bank*,
8 2012 WL 555147 (W.D. Wash. Feb. 21, 2012). In *McDonald*, the court noted the current trend
9 among federal district courts in the Ninth Circuit to limit a trustee's liability to Section 1692f if
10 they confine their activities to foreclosure, citing *Jara v. Aurora Loan Services, LLC*, 2011 WL
11 6217308, at * 5 (N.D.Cal. Dec.14, 2011); *Pizan v. HSBC Bank USA, N.A.*, 2011 WL 2531104, at
12 *3 (W.D.Wash. June 23, 2011) ; *Lettenmaier v. Fed. Home Loan Mortg. Corp.*, 2011 WL
13 1938166, at *11-12 (D.Or. May 20, 2011); *Armacost v. HSBC Bank USA*, 2011 WL 825151, at *
14 5-6 (D. Idaho Feb. 9, 2011); *Long v. Nat'l Default Servicing Corp.*, 2010 WL 3199933 at *4 (D.
15 Nev. Aug. 11, 2010). In the absence of any Ninth Circuit law, the Court sees no reason to depart
16 from this trend.
17

18
19 In this case, there is no evidence that NWTs took any action other than that which was
20 necessary to effectuate a nonjudicial foreclosure against the Residence. Accordingly, NWTs
21 could be liable only under Section 1692f if it commenced the foreclosure against the Residence
22 when (A) there was no present right to possession of the property claimed as collateral through
23 an enforceable security interest; (B) there was no present intention to take possession of the
24 property; or (C) the property was exempt by law from such dispossession or disablement. 15
25 U.S.C. § 1692f(6). In *Walker*, the court noted that the trustee there could be liable under Section
26

27
28 ⁹ For purposes of Section 1692f(6), a "debt collector" includes a "person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

Below is a Memorandum Decision of the Court.

1 1692f(6)(A) if it commenced foreclosure without a valid appointment as trustee. 308 P.3d 716,
2 726. In this case, however, NWTS had been appointed successor trustee when it issued the
3 Notice of Default, and it proved at trial that U.S. Bank was the holder of the Note with a right to
4 foreclose against the Residence. Accordingly, the Court finds there was a present right of
5 possession of the property through an enforceable security interest, although the procedure
6 initiating the enforcement of that security interest was defective. Accordingly, the Court finds
7 that the Meyers have failed to prove entitlement to relief under the FDCPA.
8

9 **CONCLUSION**

10 For the foregoing reasons, the Court finds in favor of the Meyers in the amount of
11 \$48,504, consisting of actual damages of \$23,504, plus treble damages under the WACPA of
12 \$25,000. The Meyers may request costs of suit and a reasonable attorney's fee under the
13 WACPA by separate motion and submit an order and judgment in conformance with this
14 Memorandum Decision.
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17 **///END OF MEMORANDUM DECISION///**
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No 71402-3-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

VALMARI RENATA,

Appellant/Plaintiff,

v.

FLAGSTAR BANK, F.S.B., a federally chartered Savings Bank;
NORTHWEST TRUSTEE SERVICES, INC., a Washington
corporation; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., a Delaware corporation.

Respondents/Defendants.

CERTIFICATE OF SERVICE

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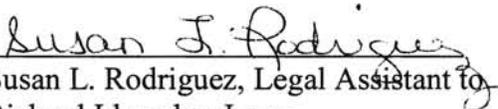
FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on April 28, 2014, I arranged for service of Appellant's Brief on the following parties in the manner indicated:

Heidi E. Buck, WSBA No. 41769	_____	Facsimile
RCO LEGAL, P.S.	<u>X</u>	Messenger
13555 S.E. 36 th Street, Suite 300	_____	U.S. 1 st Class Mail
Bellevue, WA 98004	_____	Overnight Courier
Attorneys for NWTs	_____	Electronically
Fred B. Burnside, WSBA # 32491	_____	Facsimile
Matthew Sullivan	<u>X</u>	Messenger
DAVIS WRIGHT TREMAINE,	_____	U.S. 1 st Class Mail
LLP	_____	Overnight Courier
1201 Third Avenue, Suite 2200	_____	Electronically
Seattle, WA 98101-3045		
Attorneys for Flagstar and MERS		
Court of Appeals, Div. I	_____	Facsimile
One Unions Square	<u>X</u>	Messenger
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Seattle, WA 98101	_____	Overnight Courier
	_____	Electronically

DATED this 28th day of April, 2014.


Susan L. Rodriguez, Legal Assistant to
Richard Llewelyn Jones

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