 71945-9

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Court of Appeals
Division I
State of Washington

Case No. 71945-9-I

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

JAMES KEITH RICHARDS and KIRSTEN RICHARDS,

Appellants,

v.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, INC.; LEHMAN BROTHERS BANK, FSB; AURORA LOAN SERVICES, LLC; MORTGAGE ELECGTRONIC REGISTRATION SYSTEM, INC.; and DOE DEFENDANTS 1 through 20

Respondents.

APPELLANTS RICHARDS' OPENING BRIEF

Melissa A. Huelsman, WSBA #30935
Attorney for Appellants Richards
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
206-447-0103

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INTRODUCTION

This is a case which demonstrates the manner in which mortgage loan servicers continue to avoid the clear requirements of the Deed of Trust Act, RCW 61.24, *et seq.* ("DTA"), in order to more swiftly bring about a nonjudicial foreclosure to the detriment of Washington property owners. Mr. Richards defaulted on his mortgage loan because his real estate development business faltered significantly with the recession in 2009 and he was denied meaningful relief from his mortgage loan servicer. He sought to prevent the loss of his home and preserve significant equity therein once the servicer, Aurora Loan Servicing, LLC ("Aurora") attempted to nonjudicially foreclose without the legal authority do so under Washington law. Aurora sought to do so with the assistance of Mortgage Electronic Registration Systems, Inc. ("MERS").

The purported foreclosing trustee, Quality Loan Service Corporation of Washington ("QLS") settled with the Richards before trial, but they maintain that QLS did not have the authority to initiate a nonjudicial foreclosure based upon Aurora's instructions because it was not the "beneficiary" nor was it the loan owner. The Richards alleged that these actions made all of the defendants liable to them. The Richards maintain that Aurora and MERS are liable to them for the wrongful initiation of the nonjudicial foreclosure sale when Aurora was never anything more than the loan servicer and a custodian of the Promissory Note, and MERS had no relationship whatsoever to the Note, in spite of its false identification as a "beneficiary" on the Deed of Trust.

STANDARD ON REVIEW

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle,* 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynbee, Inc. v. George Schofield Co., Inc.,* 25 Wn.App. 580, 582, 612 P.2d 2 (1980). Here, the trial court's factual findings are inconsistent with the evidence and the standard articulated by the binding authority on these subjects.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.; see also, Skamania County v. Columbia River Gorge Commission,* 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Here, the record is clear that Aurora did not have authority under Washington law to initiate a nonjudicial foreclosure nor appoint a substitute trustee, and it is therefore liable to the Richards. The trial court did not apply the facts to the law in a manner consistent with the requirements of Washington law.

STATEMENT OF ISSUES

The issues in this case are as follows:

1. What was Aurora's role when it acquired possession of the Promissory Note signed by Mr. Richards indorsed in blank? What was MERS' role in purportedly "assigning" the beneficial interest in the Deed of Trust?

2. If Aurora was merely the custodian when it acquired possession of Mr. Richards' Promissory Note, was it a "beneficiary" or "noteholder" as defined under Washington law? RCW 61.24.005(2).

3. If Aurora was merely the custodian when it acquired possession of Mr. Richards' Promissory Note, could it prove it was the "owner" of the loan by signing the Beneficiary Declaration as an "actual holder" as defined under Washington law? Was Aurora ever an "actual holder"? RCW 61.24.030(7).

4. If Aurora was not a "beneficiary", an "actual holder" or an "owner" of Mr. Richards' Promissory Note, did it have the legal authority under Washington law to initiate a nonjudicial foreclosure?

5. If Aurora did not have the legal authority to initiate a nonjudicial foreclosure based upon Mr. Richards' Promissory Note and Deed of Trust, is it liable to Mr. Richards under the Consumer Protection Act ("CPA")? RCW 19.86, *et seq.* And if so, did Mr. Richards prove the elements of a CPA claim?

The recent opinions of the Washington appellate courts relating to foreclosure make clear that under Washington law, a plaintiff may state a claim for damages relating to a breach of duties under the DTA and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property.[1] Those claims

[1] *See Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Rucker v. Novastar Mortg., Inc.*, 177 Wn.App. 1, 311 P.3d 31, (2013); *Bavand v. OneWest Bank, FSB*, 176

are not derived directly as claims specified in the DTA, but rather, support other legal claims that are always available to plaintiffs, such as the CPA and other tort claims such as misrepresentation. *Frias v. Asset Foreclosure Services, Inc.,* ___ Wn.2d ___, 334 P.3d 529 (2014). These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As this Court recently emphasized, "No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA's requirements." *Walker v. Quality Loan Service Corp.,* 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013). This Court should also look to *Frias* and *Walker* for guidance in how to measure injury and damages for wrongful foreclosure. Aurora and MERS affirmatively misrepresented their interest in Mr. Richards' Note throughout the nonjudicial foreclosure process and Aurora falsely asserted it was the "beneficiary", 'actual holder" and "owner" of the Note, even though it was never anything more than the loan servicer and temporary Note custodian.

STATEMENT OF THE CASE

1. Following loss of business income, Mr. Richards sought to save his home and the equity therein.

Wn. App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013).

Mr. and Mrs. Richards had owned their home for several years when the case was filed. RP 203. Mr. Richards is a real estate professional who derives his income from construction and real estate transactions. RP 204. In July 2007, the Richards refinanced their home and obtained a mortgage loan for $1,000,000.00. CP 97-98; RP 204; Trial Exhibits ("TE") 1-10. The Lender was Lehman Bros. Bank, FSB ("Lehman") and it was an adjustable rate, negative amortization loan with rate changes occurring five years after loan origination. RP 208; TE 1-10. Mr. Richards was the only signer on the Promissory Note payable to Lehman, who is also identified as the "Lender" on the Note and Deed of Trust. TE 1-24; CP 98; RP 209-210.

Once the economy became troubled in 2008, the Richards suffered a reduction in income and it continued for several years. RP 210; 213. The Richards struggled to make the monthly payments and to pay escrow amounts. RP 210-211. In October 2009, the Richards were late paying the property taxes and were aware that they would pay a penalty and interest as a result, but there was nothing that they could do about their financial situation that they were not already trying to do. *Id.*

By October 2009, the Richards were making their monthly mortgage payments to Aurora, the loan servicer. RP 209-211. On February 16, 2010, Aurora made the property tax payment for October 2009. RP

211. Aurora then immediately sought reimbursement from the Richards. RP 212-213. When the Richards advised that they did not have the funds, Aurora significantly increased their monthly payment amount in order to repay tax advance, which exacerbated the problem. RP 213. If they had had the funds available to pay the property taxes, they would have done so. *Id.* Mr. Richards was in contact with Aurora on a regular basis seeking an agreement to work with them on the required monthly payments. RP 213-220. On or about May 12, 2010, Aurora provided the Richards with a Workout Agreement which required monthly payments of $3,750.00 and required the documentation and payment at its offices by June 20, 2010. RP 213-214; TE 261-268. Mr. Richards signed and returned the Agreement on June 10, 2010. RP 214-215.

The Workout Agreement sent by Aurora defines Aurora as the "Lender". TE 261-268. This designation was untrue and belied by statements later made to the Richards about denial of later modification requests by the "Investors" that actually owned the loan. RP 243. It is also belied by other evidence adduced at trial. The Workout Agreement notes that as of May 10, 2010, the Richards were only delinquent a portion of one month's regular payment once funds that were being held in suspense were applied to the balance owed. TE 261-268. However, the regular monthly payment was $2,813.00 and the amount listed as owing was more than $11,000.00, so Aurora was claiming they were due for much more than payments through April 2010. *Id.* The Agreement also reads, at Paragraph 3, Page 2 of 5, that the "Lender shall forbear from exercising any of its rights and remedies now existing or arising during the term of this Agreement under the Loan Documents, provided there is no "Default", as such term is defined in Paragraph 6." *Id.*

The Richards made the required payments through November 2010. RP 214-215. But in the meantime, they had fallen behind on the new property taxes that came due and Mr. Richards was still trying to get a more permanent modification. RP 215. As a result of these communications, they were offered another special repayment plan by Aurora on or about February 14, 2011. RP 215-216; TE 269-276. This new Agreement was supposed to go into effect on March 1, 2011. TE 296-276. Mr. Richards, who had been in regular communication with Aurora about the loan, was advised by one of its representatives that no foreclosure sale had been initiated. RP 214. They had received a Notice of Default previously, while the other Workout Agreement was in effect (in spite of its contents indicating that this would not happen), but were told that the foreclosure would be continued and not completed so long as they were making the payments required under the Forbearance document. RP 214; 224-226; 242-243.Mr. Richards signed the Foreclosure Alternative

Agreement and returned it to Defendant Aurora along with the first required payment. RP 214-216; RP 224; TE 269-276.

The Foreclosure Alternative Agreement asserted that the Richards were due for August 2010. TE 269-276. However, this information contradicts the information in the other Workout Agreement, which indicated that they owed a partial payment for April 2010. TE 269-276. Since the Richards made a total of six (6) smaller payments during the term of the previous Workout Agreement, it is impossible for them to have been delinquent for payments through August 2010. RP 243. Another $3,809.83 in legal fees was added to the amount owing, for no apparent reason. TE 269-276. Neither Aurora nor the actual Note Holder had incurred any legal expenses by that time. The only possible item which could have resulted in charges was because of the issuance of the Notice of Default, which was done in contravention of the terms of the first Agreement. No evidence was produced at trial by Aurora to support that demand for payment.

Because of the assurances by Aurora's representatives about the foreclosure not proceeding and in spite of the "forbearance" language in the Agreement as quoted above, Mr. Richards signed the Agreement, which falsely identified Aurora as the "Lender", and made the payment on March 1, 2011. RP 214-216; 220-224; 278-279; TE 269-276. Mr.

Richards mailed a cashier's check in the amount of $5,878.43 to Aurora on February 28, 2011. RP 219; 277-278. But Aurora almost immediately caused a Notice of Trustee's Sale to be delivered to the Richards indicating a foreclosure sale would occur on June 17, 2011. RP 242; TE 50-52. The payment of February 28, 2011 was returned by Aurora by way of a letter dated March 21, 2011. RP 217-218. The letter reads that the check is being returned because it is insufficient to cure the arrears and because "we do not have arrangements with you to bring your loan current." RP 217. Aurora contended at trial that because of the delay in sending in the document, the agreement was invalid. RP 279-281. A few days later he received another Aurora letter advising that it was denying his request for a "possible foreclosure alternative" because it did not receive the first forbearance plan payment. This also was untrue, as the payment had just been returned to him. RP 279.

Once he received the letters, Mr. Richards contacted Aurora trying to get answers. RP 217-219. He was reassured again that the foreclosure would not proceed and would be cancelled, so long as he made the required monthly payments. RP 217; 275-276. Based upon these representations, Mr. Richards sent in the required payment for April 2011. RP 219. In spite of Mr. Richards having complied with the terms of the Foreclosure Alternative Agreement, on or about April 19, 2011, Aurora sent his payments back along with a cover letter asserting against there were no arrangements allowing him to bring his loan current. RP 218-219; 242. On April 15, 2011, Mr. Richards had also received a telephone call from a representative of Aurora advising him that it was going to return both of the payments recently made because the "investor", i.e., note holder, had decided not to offer them a Forbearance Agreement. RP 243. The person calling did not provide an explanation or reason for why the Forbearance Agreement had been revoked. *Id.*

2. A non-judicial foreclosure was begun by entities without the legal authority to foreclosure under Washington law.

The Notice of Default which was posted at the Richards' residence was signed on February 10, 2011 by Angelica Castillo, Assistant Secretary of QLS (who has since been dismissed from this lawsuit) as "Agent for Aurora Loan Services, LLC as Beneficiary". TE 32-45. The Richards maintain that evidence at trial demonstrated that Aurora was not the "Beneficiary", as defined under Washington law (RCW 61.24.005(2)). It was nothing more than the loan servicer and custodian of the Note.

The Notice of Default also reads on the first page of the document that Aurora is the "current owner/beneficiary of the Note secured by the Deed of Trust". TE 38. This was false. QLS admitted during a 30(b)(6) deposition that it created the Assignment and all other foreclosure documents based solely upon Aurora's submission to it of the Beneficiary

Declaration. The document attached to the Notice of Default was signed by Shannon Laura on December 30, 2010 wherein she asserts that Aurora is the "Beneficiary" as defined under the DTA and that someone acting on behalf of the "beneficiary" had contacted the Richards in order to assess their ability to pay the debt so that the borrower might avoid a foreclosure. TE 44-45. The Richards maintained that there was no "assessment" done of their financial situation and that they were only offered the Agreements as a "take or leave it" proposition. RP 216; Further, the first offer was revoked soon after the second one was offered and accepted by Mr. Richards. 217-221. Certainly neither one of the Agreements offered a long term solution based upon a review of their financial circumstances. RP 215; 227. Mr. Richards had not yet sent in his financial information, but they did not cure the default in total because they did not have the funds. RP 226. However, they did accept the Foreclosure Alternative Agreement, only to have it revoked almost immediately. RP 216-221.

On or about January 12, 2011, an employee of Aurora, Jan Walsh, signed a Corporation Assignment document falsely asserting that she was actually a Vice President of MERS and indicating that she had the authority to transfer the beneficial interest in Mr. Richards' Deed of Trust to Aurora. TE 25. Ms. Walsh's employer, Aurora, asserted that she was "appointed" as a Vice President of MERS solely for purposes of executing documents on its behalf. *Id.* The Richards maintained at trial that this Assignment contravenes the requirements of Washington state law and that it is invalid and false. While assignments are not required under Washington law, it contained false information and was recorded in the records of King County, Washington in order to give the false impression that Aurora had the legal authority to foreclose. TE 25. Ms. Walsh is an employee of Aurora and had no relationship with MERS. RP 104-100. Further, MERS did not have a "beneficial" interest Mr. Richards' Deed of Trust at any time because it did not have an interest in his Promissory Note. By April 2009 Lehman had ceased to exist and had changed its name to Aurora Bank, FSB. Thus, it did not have the power to authorize MERS or anyone else to act on its behalf once it ceased to exist and in fact, there was no evidence at trial of anyone other than Aurora making decisions about the foreclosure. RP 104- 110. More importantly, Lehman had sold the Richards' loan to a securitized trust shortly after the loan was made in 2007 and this was borne out by the records of MERS and Aurora. TE 172. A search of MERS' website done on June 3, 2011 makes it clear that Aurora is only the servicer of the loan and that the "Investor" is U.S. Bank as Trustee for an unidentified trust. TE 172.

On or about February 12, 2011, a Cheryl Marchant, a Vice President of Aurora, signed an Appointment of Successor Trustee falsely asserting that Aurora was the “present Beneficiary” under the subject Deed of Trust and that it therefore had the authority to appoint QLS as a new trustee. TE 25. But Aurora was not the Note Holder or “Beneficiary”, as defined under the Washington DTA and therefore did not have the legal authority to appoint a new trustee. RCW 61.24.005(2); 61.24.010(2). Nevertheless, Aurora caused the Appointment document to be recorded in the records of King County, Washington on February 9, 2011 and used it to initiate a foreclosure sale against the Richards’ real property when there was no legal authority to do so. TE 25.

On or about March 14, 2011, Brooke Frank, an employee of QLS, executed the Notice of Foreclosure document which was served upon the Richards. In spite of the fact that Aurora had contended that part of the problems with the delinquent payments had been the arrears on the property taxes, the Notice of Foreclosure document states that the balance on any outstanding “costs and advances” is $0.00. The Notice of Foreclosure also falsely asserts that Aurora is the “Beneficiary” and the “owner of the obligation”, when, in fact, it was nothing more than the servicer. The Notice of Trustee’s Sale (“NOTS”) continues with the same assertions regarding the loan ownership and identity of the Note Holder. TE 50-52. The first page of the NOTS asserts that the beneficial interest in Mr. Richards’ Deed of Trust was transferred by MERS, in its capacity as the "nominee" for Lehman to Aurora, but the records of MERS and Aurora's own admissions make it clear that Aurora was nothing more than the mortgage loan custodian and servicer. TE 50.

3. The record is clear that Aurora was not the "beneficiary" nor the loan owner, and was merely a servicer and custodian of the Promissory Note. Aurora had physical possession of the Note for the benefit of the loan owner, not for itself.

The Servicing Agreement for the securitized trust that owned the Richards' loan outlines the obligations of the parties, including Aurora, and discusses the role of the "custodian" who holds the Promissory Note and other loan documents. TE 56-140. There is absolutely no language anywhere in the Servicing Agreement which supports the notion that Aurora is the "noteholder". TE 56-140. Instead, a third party, LaSalle National Bank ("LaSalle"), is identified as the "custodian". TE 63.

The Custodial Agreement, which is incorporated by reference into the Servicing Agreement, contains similar language. TE 141-171. The first page of the document indicates that the Custodian, LaSalle Bank, shall "hold the Mortgage Loan Documents (as defined herein) **on behalf of the Trustee in accordance with the terms hereof** . . ." (emphasis added). TE 144. In the Definitions section, Aurora is identified as the "Servicer". TE 145. On or prior to the Closing Date, the parties were required to send the original loan documents, including the Note indorsed payable to the Trustee or in blank to the Custodian. "All Mortgage Loan

Documents held by the Custodian as to each Mortgage Loan shall constitute the related Custodial File. TE 146. In Section 4 of the Custodial Agreement, the parties agree that:

> With respect to each Mortgage Note, Mortgage and Assignment of Mortgage, and other document constituting each Custodial File that is delivered to the Custodian or that comes into the possession of the Custodian pursuant to this Agreement, **the Custodian acknowledges and agrees that the Custodian is the custodian for the Trustee exclusively** and that the Trustee of the Mortgage Loans has the legal right to, at any time and in its absolute discretion, direct, in writing the Custodian to release any Mortgage Loan File or all Mortgage Loam Files to the Trustee or the Trustee's designee, as the case may be, at such place or places as the Trustee may designate." (Emphasis added.)

TE 149. This portion of the document makes clear that the ultimate authority is the Trustee – the owner of the loans and not the Custodian. The Custodian acts at the discretion of the Trustee. Further, Section 15 makes clear that the Custodian does not have any "adverse interest, by way of security or otherwise, in any Mortgage Loan, and hereby waives and releases any such interest which it may have in any Mortgage Loan as of the date hereof." TE 152. This section makes clear that the Trustee is the entity with an interest in the Mortgage Loan Documents and that the Custodian does not have any, and may not have any such interest for itself.

The evidence at trial indicated that Aurora acquired custody of the

Note from the new custodian after LaSalle had ceased to exist. RP 92; *See generally* RP 88-198. The Servicing Agreement references the Custodian Agreement: "Each custodial agreement relating to the custody of certain of the Mortgage Loans, each between the applicable Custodian and Trustee, each dated as of August 1, 2007." TE 63. The Custodians are referred to as U.S. Bank and LaSalle and their successors. *Id.* The Trustee is identified as US Bank or its successors. TE 71. Aurora is only the Master Servicer and the Servicer. TE 66. Article II, Section 2.01 describes its relationship to the loan documents as follows:

> **The Servicer's possession of any portion of the Mortgage Loan documents shall be at the will of the Trustee [US Bank] for the sole purpose of facilitating servicing of the related Mortgage Loan** [defined on Page 8 as "includes, without limitation the Mortgage Loan documents, the Monthly Payments, Principal Prepayments, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds, REO Disposition Proceeds, and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan."] pursuant to this Agreement and **such retention and possession by the Servicer shall be in a custodial capacity only. The ownership of each Mortgage Note, Mortgage and the contents of the Servicing File shall be vested in the Trustee and the ownership of all records and documents with respect to the related Mortgage Loan prepared by or which come into possession of the Servicer shall immediately vest in the Trustee and shall be retained and maintained, in trust, by the Servicer at the will of the Trustee in a custodial capacity only.** The portion of each Servicing File retained by the Servicer pursuant to this Agreement shall be segregated from the other books and records of the Servicer (which, except for collateral documents such as the

> Mortgage and the Mortgage Note, may be stored as imaged files) and shall be appropriately marked to clearly reflect the ownership of the related Mortgage Loan by the Trustee. The Servicer shall release from its custody the contents of any Servicing File retained by it only in accordance with this Agreement.

TE 72.

Section 2.02(d) reads: **"All rights arising out of the Mortgage Loans shall be vested in the Trustee, subject to the Servicer's right to service and administer the Mortgage Loans hereunder in accordance with the terms of this Agreement."** TE 73. This confirms the limitations on Aurora's rights as the Servicer. It is entitled to keep the monies which it is owed for performing its work. Section 3.10 requires that the Servicer is supposed to make sure the indorsements on the Note are done to the Trustee. TE 61-62.

Just as there was no basis for Aurora to attempt to foreclose non-judicially on the Richards' home, there was no justification for MERS to participate in the non-judicial foreclosure process. While the Assignment document is not necessary under the DTA, it is part of the process that the Aurora used in order to bring the non-judicial foreclosure and thus, MERS is liable for its role. To the extent that MERS tried to assert that its actions are permitted under the DTA because it was acting as an "agent" for someone, relying on the holding in *Bain*, it failed to meet the standard articulated therein because there was no evidence of any principal who gave direction to Ms. Walsh or anyone else purporting to act for MERS. RP 107-110. There was no evidence during trial that the loan owner or Lehman participated in any way in this foreclosure. The Assignment purported to transfer the beneficial interest derived at loan origination from MERS to Aurora – an interest which does not exist under Washington law. TE 46. Certainly, MERS never provided the trial court with any evidence to support its assertions.

The Richards were required to file suit in order to enjoin the pending foreclosure sale. RP 248-252. They were trying to market and sell their property in order to pay back the amounts that were legitimately owed on the loan and to preserve the significant equity that they had in the property. RP 222-223. Consistent with the requirements of the Temporary Restraining Order, Mr. Richards made monthly payments to the Court Registry for many months, until he no longer had the money to make those payments. RP 251. By the time that he failed to make payment in, July, 2013, Aurora was not the loan servicer and did not have any authority to enforce the terms of the loan. At trial, the Richards proved that they had sold the Property and had paid the loan balance in full, including all foreclosure fees and costs that had been added to the loan balance, as well as all late fees and charges added to the loan balance. CP 254.

Aurora tried to deflect from their actions by contending that the Richards had lived in the property “rent free” and thus were not harmed by the attempts at foreclosure. CP 36; 53. But this ignored the fact that the Richards had paid every single cent demanded on the loan balance to the new servicer and the loan owner by the time of trial. RP 254. Thus, the amounts wrongfully added to the payoff constituted a portion of the Richards’ damages.

The record is clear that Aurora and MERS were engaged in unfair, deceptive and misleading acts on a regular basis with regard to other foreclosure sales that were taking place in Washington State. It is part of their regular business operations, as evidenced by the testimony provided at trial. RP 61. As a result of the unfair and deceptive actions of Aurora and MERS, the Richards faced the loss of their family home and all of the equity in the property, which was estimated to be at least $2 million dollars at the time that the lawsuit was initiated. RP 222-223. This estimation was consistent with the sales price that was later achieved. *Id.*

At trial, Mr. Richards articulated his injury as being the threat of an improper foreclosure sale, and his damages were identified as the costs of investigating his claims, costs associated with traveling to meet for that investigation including parking, paying an attorney to bring a motion to enjoin the foreclosure sale, the costs associated with traveling to and paying for parking to attend the hearings on the motion to enjoin the sale and other motions held during the course of the litigation. RP 248-255; 293-295. He also had to pay the costs associated with litigating the case which are recoverable, such as the filing fee, service of process costs and deposition costs, and he paid the foreclosure fees when he paid off the loan. *Id.* Thus, the Richards established that they suffered injuries as a result of the actions of Aurora and MERS, and that they incurred out of pocket monetary damages. *Id.*; RP 254-255.

II. ARGUMENT

A. Aurora and MERS were never the loan owner nor the "holder" of Mr. Richards' Note and thus neither was a "beneficiary" as defined under Washington law.

The first issue before the Court is what the Washington Legislature meant when it required that the "beneficiary" prove itself to be the "owner" of the mortgage debt at key points in the foreclosure process as set forth in RCW 61.24.030(7)(a) and RCW 61.24.163(5)(c). The Legislature's chosen language is significant and must be given effect. *See Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (courts "are required, when possible, to give effect to every word, clause and sentence of a statute"); *accord, American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008)).

The proof of ownership requirement set forth in these key provisions is essential to create a framework for homeowners to communicate directly with note owners, which promotes negotiation and resolution of defaults. *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 103, 285 P.3d 34 (2012) ("'[T]he legislature intends to . . . [c]reate a framework *for homeowners and beneficiaries to communicate with each other* to reach a resolution and avoid foreclosure whenever possible; and [p]rovide a process for foreclosure mediation.'") (citing legislative findings, Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2)); *see also* RCW 61.24.005, Reviser's Note (legislative findings).

Aurora argued to the trial court that the Legislature's chosen terminology in these provisions differentiating "owners" from "holders", and from mere servicers of a promissory note, is meaningless and, if given effect, would result in "unlikely, absurd, or strained consequences." CP 24-42. In finding for Aurora and MERS, the trial court ignored the cardinal rule that where "the plain language of a statute is unambiguous and legislative intent is apparent, [the court] will not construe the statute otherwise." *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). The Richards agree that "'courts must construe the statute so as to effectuate the legislative intent.'" The intent behind the DTA, however, is to promote resolution of defaults through direct negotiation between note *owners* and borrowers. *See Bain*, 175 Wn.2d at 98 n.7 ("there is considerable reason to believe that servicers [as opposed to owners of loans] will not or are not in a position to negotiate loan modifications or respond to similar requests") (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011)).

The DTA defines a "beneficiary" 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 a different obligation." RCW 61.24.005(2) (emphasis added). The DTA also specifies particular circumstances where a beneficiary must prove itself to be the *owner* of the note at issue in order to take sensitive actions. For example, "[i]t shall be requisite to a trustee's sale …. [t]hat, 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." RCW 61.24.030(7)(a) (emphasis added). Although the trustee may generally rely upon a declaration establishing that the beneficiary is the "actual holder" of the note, the trustee may not so rely where the trustee has breached its duty of good faith toward the borrower. *Id.*; RCW 61.24.030(7)(b). Because in this case Aurora certainly knew that it did not own the Note, it took affirmative actions to hide the identity of the loan owner, including causing the issuance of the Notice of Default which identified Aurora as the loan owner and servicer, that was false. This is the same false assertion that was included on the "Beneficiary Declaration", which was signed by Aurora's employees and which did not comply with the requirements of the DTA. RCW 61.24.030(7). TE 25.

Similarly, in order to participate in a DTA mediation as the beneficiary, a party must supply "[p]roof that *the entity claiming to be the beneficiary is the **owner*** of any promissory note or obligation secured by the deed of trust." RCW 61.24.163(5)(c) (emphasis added). Ownership status "may" be shown by the declaration described in RCW 61.24.030(7)(a), but where, as here, the parties are *aware* that the entity submitting the declaration is not in fact the owner of the Note or the holder, the DTA's demands for proof of owner status are not satisfied.[2] The "owner" requirement also surfaces in the required language on a Notice of Default, which requires both "the name and address of the ***owner*** of any promissory notes or other obligations secured by the deed of trust," *and* "the name, address, and telephone number of a party acting as a *servicer*." RCW 61.24.030(8)(l) (emphasis added). Likewise, a Notice of Trustee's Sale "shall" include language specifying which entity is "the *Beneficiary* of [the grantor's] Deed of Trust *and **owner*** of the obligation

[2] There was no mediation in this case. Rather, the Richards are merely analyzing various portions of the DTA where the word "owner" is used and its importance to the statute.

secured thereby." RCW 61.24.040(2) (emphasis added). Finally, the Notice of Foreclosure statutorily required language has long contained reference to the demand for payment being done by the "Beneficiary of your Deed of Trust and **owner** of the obligation secured thereby". RCW 61.24.040(2) (emphasis added). This language predates the later additions of the "owner" language by the Legislature in 2009 and demonstrates that there is nothing new about the concept of the Legislature intending that the noteholder and the loan owner be one and the same.

Aurora contended at trial that merely because it had possession of the Richards' Note, it was a "noteholder", while ignoring the terms under which it was in possession of the Note – as a custodian and servicer pursuant to the Agreements it entered into with the loan owner. Aurora and the securitized trust that owned the loan created and agreed to the terms of the Servicing and Custodial Agreements and therefore agreed to be bound by their terms. TE 56-171. They cannot disavow the roles that the parties to those agreements decided to have with respect to the Note in order to facilitate ignoring the requirements of the DTA. In other words, Aurora cannot contend that it was actually the "noteholder" when it agreed to contract terms that were clear that at all times the loan owner, the securitized trust, was the "noteholder" and that anyone acting to hold the note for the trust was a "custodian". It is also important that Aurora never contended that it "owned" the Note during trial, which is contrary to the information contained in the NOD document and otherwise during the foreclosure process, where the securitized trust was never referenced or involved in the least. RP 366. The terms of the Servicing Agreement makes it clear that Aurora is not the owner of the Note. *See, In re Reinke*, 2011 WL 5079561, *10, *11 (Bkrtcy. W.D. Wash. Oct. 26, 2011) (concluding that "Freddie Mac was the *owner*" of the promissory note, per its Servicer Guide) (emphasis in original).

Recently, this Court issued an opinion in *Trujillo v. Northwest Trustee Services, Inc.*, 326 P.3d 768, 774 (2014), which the Richards acknowledge is, on its face, precedential authority. However, *Trujillo* expressly contradicts the decision of the Washington Supreme Court in *Bain*. In *Bain,* as noted above, the Supreme Court found that "beneficiary" was defined by the legislature in the DTA to mean the "noteholder", consistent with the definition in RCW 61.24.005(2). *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d at 88-89. The *Bain* Court held that the trustee in a non-judicial foreclosure "'shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust,'" *Bain* at 93-94 (RCW 61.24.030(7)(a)) (emphasis added), and that "[i]f the original lender [has] sold the loan, that purchaser would need to establish *ownership* of the loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions." *Id*. at 111 (emphasis added). The *Bain* Court did not find that the "owner" language was superfluous nor that it could be read out of the statute. And in fact, it would be inappropriate for the Supreme Court to do so. The Legislature chose to include the "owner" language in the DTA when it created the Notice of Foreclosure language at RCW 61.24.040(2), and it made the choice again when it used the language multiple times in recent years with additions to the statute which are all designed to protect property owners.

It is inconsistent with *Bain* for the *Trujillo* court to find that after the legislature amended the DTA to include an express proof of ownership requirement for the noteholder in RCW 61.24.030(7)(a) and required that the owner be identified under RCW 61.24.030(8)(*l*), it intended there to be an even lower standard for use under the DTA which allows parties with a lesser relationship to the note – less than the "noteholder" and "owner" requirements recognized in *Bain* – to non-judicially foreclose.[3] Consistent with its business model of making false representations regarding the identity of noteholders and loan owners, Aurora asserted that it was the

[3] The legislature added this additional "proof of ownership" requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must identify the "name and address of the owner of any promissory notes or other obligations secured by the deed of trust." *Id*. § 8 (8)(*l*).

‘actual holder”, which it was not (it was the custodian and servicer), and thus that it could prove it was the “owner”. RCW 61.24.030(7). This is a very twisted logic. The Legislature could not have meant that one could prove it was the “owner” of the loan by testifying that it is the “actual holder” if the purported “actual holder” is **not** the “owner”.

Aurora argued, and that the trial court incorrectly found, that it was the “holder” or ‘actual holder” and that the Washington Legislature really meant the term “owner” in the DTA to mean the same thing as “holder” in the Uniform Commercial Code.[4] RP 365-370; CP 32-35. The trial court made this finding in spite of the fact that there are numerous instances in the DTA, as outlined above, where the Legislature used both words in the same sentence and clearly indicated that there they are two separate words and concepts. RP 394-398.

1. The DTA’s Legislative History Shows the Legislature Intended to Protect Homeowners By Providing That Only the Note Owner May Take Key Actions.

The statutory language of the DTA is clear that, while an entity may qualify as a beneficiary for general purposes as a *holder*, only beneficiaries that *own* a given Note are empowered to take sensitive actions like causing a Trustee’s Sale to take place, appearing at mediation,

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[4] The *Reinke* court’s common sense conclusion that Freddie Mac *owns* its own promissory notes may be contrasted with Defendants’ novel theory that possession of a Note conclusively establishes “ownership” of the same. *See* MFR 6 (citing “the dictionary definition of ‘own’ as ‘to have or possess’”).

and causing the issuance of Notices of Default or Trustee's Sale. The DTA's specific references to owner-beneficiaries are consistent with the legislative intent of facilitating direct borrower-owner negotiation by ensuring that no one stands between the owner and borrower at key points in the foreclosure process. *See Bain*, 175 Wn.2d at 103 ("'[T]he legislature intends to .... [c]reate a framework *for homeowners and beneficiaries to communicate with each other to reach a resolution* and avoid foreclosure whenever possible; and [p]rovide a process for foreclosure mediation.'") (citing legislative findings, Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2)).

Washington's Legislature was entitled to conclude as it did that, unlike a mere servicer or an entity purportedly appointed to act on behalf of the owner, the owner of a promissory note has a unique incentive to compromise when brought to the table to negotiate with its borrower. *Bain* at 98 n.7 ("there is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests") (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011), and other authorities).

Aurora and MERS contended, and the trial court found, that the owner-beneficiary language in the DTA cannot mean what it says because the ownership requirement expressly imposed under the statute is inconsistent with the UCC. RP 365- 370; 394-398. Yet while the owner-beneficiary requirements promote the DTA's goals as discussed above, the trial court ignored that this is a circumvention of other language in the DTA when it is contrasted with UCC Article 3 highlights that the legislature deliberately ***chose to diverge*** from the concept of the "holder" under Article 3 by adopting different requirements for the DTA. RP 394-398. For example, Aurora is correct that, *under Article 3*, "[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument," RCW 62A.3-301. This would include a thief in possession of a note endorsed in blank. *Id.* But the DTA "owner" provisions, passed into law after Washington adopted Article 3, plainly diverge from the language of Article 3 by differentiating *owners* from other beneficiaries. The more recent, more specific requirements of the DTA control over any differing provision of Article 3. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) ("To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.") (collecting cases). It is important to note that nowhere in the UCC is there a definition of "owner". *See* RCW 62A.1-201 and 62A.3-103 (UCC and Article 3 Definitions sections). The trial court was apparently persuaded that (1) the

Legislature's failure to adopt a yet more explicit ownership requirement impliedly repudiates *any* ownership requirement and (2) that the DTA provision allowing for proof of ownership by demonstrating "actual holder" status through an unequivocal declaration that contains the language required in RCW 61.24.030(7)(a), and subject to the trustee's duty of good faith to the borrower under RCW 61.24.030(7)(b), somehow renders the ownership requirement superfluous. The trial court was incorrect.

First, the Legislature's failure to adopt a bill in 2013 that would have required Aurora to foreclose in its own name does not alter or undercut RCW 61.24.030(7)(a)'s express requirement that the foreclosing beneficiary prove that it is the "owner" of the promissory note, a requirement that has been an essential part of the DTA since 2009. *See City of Medina v. Primm*, 160 Wn.2d 268, 280, 157 P.3d 379 (2007) ("***nothing can be inferred from the legislature's inaction on the proposed bill***") (emphasis added); *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992) ("when the Legislature rejects a proposed amendment, as they did here, we will not speculate as to the reason for the rejection"). Second, the fact that the declaration described in the second sentence of RCW 61.24.030(7)(a) must state that the beneficiary is the "actual holder" of the promissory note or other obligation secured by the deed of trust does not alter the requirement in the first sentence of that provision expressly demanding "proof that the beneficiary is the ***owner***" of the promissory note. RCW 61.24.030(7)(a). The Legislature's use of the term "actual holder" in this provision, in contrast to the term "holder" used elsewhere in the DTA, indicates the Legislature's intent that more than a mere UCC "holder" status (and presumably actual possession) is required in order for a beneficiary to be an "actual holder." *See In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) ("Where the legislature uses certain statutory language in one instance, and different language in another, there is different legislative intent."). Irrespective of how the term "actual holder" is interpreted, the statute's explicit proof of ***ownership*** requirement must be given effect as written. *See Cox*, 103 Wash.2d at 388 (courts must "give effect to every word, clause and sentence of a statute").

Aurora presented argument about some snippets of testimony by individual legislators and staff in relation to proposed legislative amendments to the DTA in 2009 that are dismissive of more broad language relating to RCW 61.24.030(7)(a)'s "ownership" requirement, but there are also snippets of testimony by others that support the broader approach to the change in language. RP 365-370. Use of selected statements of individual legislators during committee hearings is improper and should be rejected by this Court. *See Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972) ("statements and opinions of individual legislators generally are not considered by the courts in construing legislation"). What this Court should consider, instead, is the drafting history of the 2009 amendments that resulted in RCW 61.24.030(7)(a)'s "ownership" requirement and the bill reports that explain this history. The sequential drafting history provides strong evidence of the Legislature's intent behind the "ownership" requirement. *See Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992) ("In determining legislative intent it is appropriate to consider sequential drafts"); *State v. Turner*, 98 Wn.2d 731, 735-37, 658 P.2d 658 (1983) (changes during bill revisions laid to rest all doubts about legislative intent). This legislative history reinforces the plain language reading of the statute set forth above, and makes clear that the Legislature intended that proof of the beneficiary's "owner" status be proven, as it is a prerequisite to a nonjudicial foreclosure. RCW 61.24.030(7)(a).

The original version of the bill contained none of what is now RCW 61.24.030(7)(a). (SB 5810 as originally proposed on February 3, 2009). The next version of the bill contained language almost identical to the language now contained in RCW 61.24.030(7)(a), with the notable difference that that version used the words "actual holder" where the word "owner" appears in the statute as enacted. (Striker amendment to Senate Bill 5810, adopted March 12, 2009). Under that early version (later abandoned), before the notice of trustee sale was recorded, the Trustee would have been required to have either "proof that the beneficiary is the ***actual holder*** of any promissory note or other obligation secured by the deed of trust," or "possession of the original of any promissory note secured by the deed of trust . . ." *Id*. In the *final* version of the bill, however, that language was stricken and replaced by the current language of RCW 61.24.030(7)(a) requiring that the Trustee have proof that the beneficiary is the "***owner***" of the promissory note. (ESB 5810, adopted April 9, 2009). (Emphasis added).

In the explanatory Senate Bill Report, the Senate Committee on Financial Institutions, Housing and Insurance summarized the public testimony that supported the amended language and stated, in part: "Few homeowners to know who has the authority to negotiate with them due to loan repackaging. ***The entity owning the loan*** should have to present the paper to prove they have authority to foreclose." (Senate Bill Report, ESB 5810) (emphasis added). The final bill as enacted and codified contains identical language. RCW 61.24.030(7). Based on this sequential drafting history showing Legislature's deliberate substitution of the term "owner" in place of the term "actual holder" before requiring, in the final bill, that there must be proof that the beneficiary is the "***owner***" of the promissory note, this Court should infer that this change was deliberate, consistent with cited bill report, and the Legislature meant what it said. *See Turner,* 98 Wn.2d at 735 (discussing sequential drafting history and concluding that the "changes . . . lay to rest all doubts about the legislative intent").

Aurora and MERS have engaged in executing entirely false documents. Aurora is NOT the beneficiary as defined under the DTA, because it is not the "noteholder", as defined in RCW 61.24.005(2). It only held the Note as a loan servicer and custodian. More importantly, it has never been the owner of the Note. When Aurora acquired physical possession of the Note, it did so as a custodian for the "investor" (the Securitized Trust) and never became the "actual holder", because it was "standing in the shoes" of the actual entity that owned the loan. The Washington Supreme Court in *Bain v. Metro. Mtg. Group, Inc.*, 175 Wn.2d at 97, answered these three questions: who may act as the "beneficiary" under the DTA; what is the effect of someone who is not a "note holder" initiating a foreclosure; and can a plaintiff pursue a claim for violation of the Consumer Protection Act, RCW 19.86, *et seq.* ("CPA"), if an entity falsely asserts it is a "beneficiary". *Bain,* at 86-89. The Court made clear that the "beneficiary" statute means what it says and that it must be "the actual holder of the promissory note or other instrument evidencing the obligation" and that entity has "the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Id.* The Court did not determine the effect of such a misrepresentation and left it to the trial court. The Court also made very clear that a homeowner may pursue a claim for a violation of the CPA based violations of the DTA, "but it will turn on the specific facts of each case." *Id.*

The *Frias* Court did reject the argument that plaintiffs may bring direct claims under the DTA, but it reiterated its previous decisions and in fact strengthened its position on the bringing of claims for violations of the CPA predicated upon violations of the DTA requirements. Thus, the Richards' claims for direct violations of the DTA are now unavailable. But the Supreme Court otherwise reiterated its stand on damages being available for violations of the DTA that support otherwise available claims, including the CPA. "Even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA." *Frias* at 18. Citing to *Panag v. State Farm Ins. Co. of WA,* 166 Wn.2d 27, 57, 204 P.3d 885 (2009), the Supreme Court noted that "injuries" rather than "damages" are compensable under the CPA, and quantifiable monetary loss is not necessary. *Id.* at 19.

This Court recently held in the *Walker* case, following up on *Bain* and other recent DTA decisions, that the facts pled by Walker supported viable claims for violation of the requirements of the DTA, which are very similar to those proven by Mr. Richards at trial. The essence of those claims are that the entity that initiated the attempted foreclosure did not have the legal authority to do so under the DTA and that same entity did not therefore have the legal authority to appoint a successor trustee. The Court explained itself as follows:

> Because the assignment to Select was ineffective, Select's designation of Quality as successor trustee was also ineffective, meaning that Quality lacked authority to initiate nonjudicial foreclosure proceedings. **Although no foreclosure sale occurred, Walker labels this a "wrongful foreclosure" claim. We consider it more accurate to characterize this as a claim for damages arising from DTA violations. Select and Quality respond that Washington does not recognize a claim for "wrongful initiation of foreclosure when, as here, the foreclosure sale has been discontinued." We disagree.**
> …..
> 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. Accordingly, 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.
> ….
> The Washington Supreme Court "has frequently emphasized that the deed of trust act 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.'" (citing to *Klem*)

….
The DTA permits a borrower or grantor, among others, "to restrain, on any proper legal or equitable ground, a trustee's sale." But, as Walker correctly observes, the DTA includes "no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring." However, in response to a decision of this court, in 2009 the legislature explicitly recognized a cause of action for damages for failure to comply with the DTA. It did so by amending the DTA to include RCW 61.24.127, which provides that a borrower or grantor does not waive certain claims for damages by failing to bring a civil action to enjoin a foreclosure sate. The claims not waived include the "[failure of the trustee to materially comply with the provisions of this chapter." Nothing in the 2009 amendment requires that the violation resulted in the wrongful sale of the property. This provision preserves a cause of action existing at the time a sale could be restrained—in other words, a claim existing before a foreclosure sale. It reflects the legislature's understanding of existing law—that a cause of action for damages existed based upon a trustee's presale failure to comply with the DTA, causing damage to the borrower.

Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) supports our conclusion that the specific remedies provided in the DTA are not exclusive. There, the court considered whether the violations of the DTA that the legislature identified in RCW 61.24.135 as unfair or deceptive acts for purposes of the CPA were the only DTA violations that were unfair for CPA purposes. The *Klem* court held that the legislature's list was not exclusive, observing, "Given that there is 'no limit to human inventiveness,' courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA."
….
In addition to these procedural violations [violations of the requirements of RCW 61.24.005(2), 61.24.010(2) and 61.24.040], Walker alleges that Quality breached its statutory duty of good faith to him imposed by the DTA.26

> He contends, "If [Quality] intends to foreclose a property non-judicially it is obligated to have evidence that it is doing so on a legitimate and legal basis and not simply acting at the behest of a party that may or may not have the legal right to conduct such an action."

Walker v. Quality Loan Service Corp. of WA, 176 Wn. App. at 297-300, (footnotes omitted; emphasis added). That portion of the opinion which allows for a claim under the DTA directly has been rejected by the Supreme Court in *Frias*, the rest of the *Walker* opinion remains good law. (The Richards also maintain that *Trujillo* and *Walker* are inconsistent and the Washington Supreme Court will ultimately need to resolve that issue. The *Trujillo* plaintiff has sought Supreme Court review and is awaiting a decision on that petition after a hearing on March 31, 2015.)

Because the Washington Supreme Court just weighed in on the specific issue of the importance of the "owner" requirement, there is no reason to believe that its decision would differ from that expressed by this Court in *Walker*, especially in light of the *Bain* decision. The last five decisions interpreting the DTA by the Washington Supreme Court in the last two years have been consistent – a failure to adhere to the exact requirements of the Deed of Trust Act supports causes of action for those breaches, including violations of the Consumer Protection Act.[5] In

[5] *Albice v. Premier Mortg. Services,* 174 Wn.2d 560, 270 P.3d 1277 (2012); *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, 97, 285 P.3d 34 (2012); *Klem v. Washington*

addition, on the same day that the Court of Appeals issued its opinion in *Walker*, it also issued two other unanimous opinions in foreclosure cases, although one is still unpublished. *Rucker v. Novastar, Inc.*, 177 Wn.App. 1 (2013) (now published) and *Leiphemer v. Recontrust Co.,* Case No. 67005-1-I (Wash. Ct. App., Div. I, Aug. 5, 2013) (unpublished and referenced only for the purpose of describing the appellate court's actions). Division I then issued another published decision shortly thereafter which followed the same *Walker* reasoning. *Bavand v. One West Bank, FSB,* 176 Wn.App. 475, 309 P.3d 636 (2013). These cases continue to follow the reasoning outlined in the Supreme Court's recent foreclosure cases, especially *Bain.*

The *Bain* case was focused on the use of MERS as the particular entity who was falsely claiming to be the "beneficiary" throughout the foreclosure proceedings, but the decision and analysis used by the Supreme Court would apply to any person or entity who falsely claims to be a "beneficiary". In this case, MERS was involved by and through an employee of Aurora who purported to assign the beneficial interest in the Richards' Deed of Trust to Aurora, when there was no "principal" who gave an instruction for that assignment, and when Aurora was only entitled to servicing rights. RP 107-110. When analyzing the effect of its

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Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Mngmt.,* 2013 WL 791863 (Wash. Feb. 28, 2013).

decision that the plain language of the DTA definition of "beneficiary" means what it says and that the entity initiating the foreclosure must be the "note holder", the Supreme Court pointed out that in order to demonstrate who may initiate a foreclosure as the "beneficiary",

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

Bain at 97.

The importance of the foreclosing trustee adhering to the requirements of the DTA are laid out in very strong language in two recent Washington Supreme Court cases. In the first, *Albice v. Premier Mortg. Services,* 174 Wn.2d 560, 270 P.3d 1277 (2012), they held:

> Because the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor. *Udall v. T.D. Escrow Servs., Inc*., 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. *Udall*, 159 Wn.2d at 911.

> …..
> **Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required.** *Udall*, 159 Wn.2d at 915-16.

Albice, at 564 (emphasis added).

The Supreme Court further clarified in *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013), the importance of the trustee's duties to the borrower under the DTA. RCW 61.24.010(4). These duties must also be adhered to by the other parties in a nonjuudicial foreclosure. In *Klem,* citing to *Bain* at 95-97, the Supreme Court reiterated the importance of adhering to the requirements of the DTA:

> While the Legislature has established a mechanism for nonjudicial sales, neither due process nor **equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure**. An sindependent trustee 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 is a 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.

Klem at 782 (citations omitted) (emphasis added). It is important to note, as Justice Madsen does in the Concurrence, that the present standard for a trustee under the DTA is one of "good faith" to all parties rather than a fiduciary duty, as it was historically, but that distinction does not change the outcome of the Court's decision. RCW 61.24.010(4).

In another Supreme Court decision decided on the same day as *Klem,* the Court reiterated its commitment to strict adherence to the requirements of the DTA. *Schroeder v. Excelsior Mgmt. Gr., LLC*, 177 Wash.2d 94, 106, 297 P.3d 677 (2013). It noted, with regard to waiver defenses against plaintiffs alleging violations of the requisites to a non-judicial trustee's sale of real property, "**RCW 61.24.030 is not a rights-or-privileges-creating statute.**" *Schroeder*, 177 Wn.2d at 106 (emphasis added). Rather, those requisites, including the requirement at issue here, *i.e.*, "that the trustee have proof that the beneficiary is the ***owner*** of the obligation secured by the deed of trust," *id*. at 107 (quoting RCW 61.24.030(7)(a)) (emphasis added), "**are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision.**" *Id*. (emphasis added); *see also Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 570-71, 276 P.3d 1277 (2012) (Washington applies waiver under the DTA "only where it is equitable under the circumstances and where it serves the goals of the [DTA];" the DTA goal that "interested parties hav[e] an adequate opportunity to prevent wrongful foreclosure" is "particularly important" when considering waiver defenses); *Bain*, 175 Wn.2d at 108 ("We will not allow waiver of statutory protections lightly.").

B. It is very clear that the Defendants herein intentionally deceived and misled the Richards about their right to foreclose and that this is part of their regular course of business which support claims for violations of the Consumer Protection Act.

The trial court dismissed the Richards' claims upon its determination that Aurora and MERS had not violated the provisions of the DTA. RP 395-397. Thus, there was no meaningful analysis regarding whether they could pursue a CPA claim because the court found there was no "unfair or deceptive" act that had occurred in connection with the attempted nonjudicial foreclosure. *Id.* If this Court determines that the trial court was incorrect regarding whether or not there was a failure to adhere to the requirements of the DTA, then it may determine whether those actions constituted an "unfair or deceptive" act which support a violation of the CPA.

This is similar to the findings made by this Court in *Walker*:

> The CPA does not define an "unfair or deceptive act or practice." Whether an alleged act is unfair or deceptive presents a question of law. A consumer may establish an unfair or deceptive act by showing "either that an act or practice 'has a capacity to deceive a substantial portion of the public,' or that 'the alleged act constitutes a per se unfair trade practice.'" "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact. To establish a per se violation, a plaintiff must show "that a statute has been violated which contains a specific legislative declaration of public interest impact."

Citing to *Panag*, the *Walker* Court noted that Walker had valid claims even without the foreclosure being complete because he had suffered harm,

> In Panag v. Farmers Insurance Co. of Washington, our Supreme Court held, "[T]he injury requirement is met upon proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.
>
> ….
>
> Because Walker pleads facts that, if proved, could satisfy all five elements, we conclude that the trial court erred by dismissing his CPA claim.

Walker at 300-302, citing to *Panag v. Farmers Ins. Co. of Wash.* 166 Wn.2d 27, 53, 204 P.3d 885 (2009).

As concluded by the Supreme Court in *Bain*, violations of the DTA can constitute violations of the CPA by proving the elements: "(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property; (5) causation." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). The Richards proved that Aurora and MERS made affirmative false representations about its relationship to the loan throughout the attempted nonjudicial foreclosure process and that they had a complete and utter disregard for complying with the requirements of the DTA. The Richards demonstrated at trial that this was "business as usual" for Aurora and MERS - that it was part of their regular course of business. RP 61. These business activities had the capacity to injure others since it was a part of their regular business practices at the time that the actions occurred. RCW 19.86.093(3). *Id.* The Richards proved that they suffered injuries and incurred damages as a direct result of the actions of Aurora and MERS and they are therefore entitled to relief under the CPA. RCW 19.86, *et seq.* RP 248-255; 293-295. The Richards' proof supports an award of damages and attorneys' fees. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990).

The Supreme Court in *Klem* found that claims for violations of the CPA can be brought against defendants for acts that are "unfair **or** deceptive", including in the context of a non-judicial foreclosure sale. *Klem* at 782-97. The Court went on to cite extensively and discuss its decision in *Panag v. Farmers Ins. Co. of WA*, 166 Wn.2d 27, quoting the following:

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

Klem, at 796, citing to *Panag,* 166 Wn.2d at 48 (quoting *State v. Schwab,* 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914)). The *Klem* Court further noted that "an act or practice can be unfair without being deceptive" and that the statute clearly allows claims for "unfair acts **or** deceptive acts or practices." *Id*. In *Frias*, the Supreme Court stated: "even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA." *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA,* 166 Wn.2d 27, 57 (2009); *Lyons,* 336 P.3d at 1142. Aurora and MERS have chosen to completely ignore the requirements of the DTA and have intentionally published in the public records false and deceptive information in order to proceed with their wrongfully initiated nonjudicial foreclosure sale.

C. Aurora and MERS are liable to the Richards for their

intentional and negligent misrepresentations in connection to the attempt at nonjudicial foreclosure.

The numerous misrepresentations made in the course of this foreclosure process have been laid out in detail above. The Washington Supreme Court has made clear that it has adopted the definition of negligent misrepresentation in the Restatement (Second) Torts:

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

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). Similarly, when a court determines whether a party had a right to rely upon the representations made by another, it must engage in an analysis that involves consideration of the party's "diligence in ascertaining the facts for himself" and the "exercise of care and judgment in acting upon representations which run counter to knowledge within his possession or reach." *Rummer v. Throop*, 38 Wn.2d 624, 231 P.2d 313 (1951). Here, Aurora and MERS did not rely upon representations of any third party. Rather, they unilaterally made decisions to make false representations regarding the loan ownership and who had a right to foreclose nonjudicially.

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

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

Rest. (*Second*) *of Torts, Section 551* (1977), *cited with approval in Oates v. Taylor,* 31 Wn.2d 898, 903, 199 P.2d 924 (1949); *Sigman v. Stevens-Norton,* 70 Wn.2d 915, 918-919, 425 P.2d 891 (1967) (relating to *Rest.* (*Second*) *of Torts*, Section 551(2)(a)); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964) (relating to *Rest.* (*Second*) *of Torts*, Section 551(2)(a)). Similarly, Section 552 provides:

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

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

In order to prove a claim for fraud or intentional misrepresentation, a plaintiff must prove (1) the representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation and (9) damages suffered by the plaintiff. *West Coast, Inc. v. Snohomish County,* 112 Wn.App. 200, 206, 48 P.3d 997 (2002). Here, the Richards provided evidence of the specific misrepresentations that were made by Aurora and MERS in the foreclosure documents which supported their false assertion that Aurora had the authority to foreclose nonjudicially. Aurora and MERS were never the "beneficiary" or noteholder as defined by Washington law, RCW 61.24.005(2) nor were they the loan owner at any time. They nevertheless initiated a nonjudicial foreclosure and purported to appoint a new trustee who took action on their behalf.

Aurora and MERS were required to provide truthful information to everyone, including the foreclosing trustee, the Richards and the public at large regarding the legal authority to nonjudicially foreclose. They intentionally made false representations and/or caused others to make false representations in connection with that attempt at foreclosure and they are therefore liable to the Richards for those false representations.

CONCLUSION

The trial court erred when it found that there were no violations of the requirements of the DTA by Aurora and MERS who provided false, unfair and deceptive information regarding the ownership of the Richards' Note. Further, the trial court erred when it found that Aurora was a "noteholder" as defined by the DTA and had the legal authority to appoint a successor trustee and initiate a nonjudicial foreclosure sale, and therefore denied the Richards' claims for violations of the CPA and for misrepresentation. The Richards ask that this Court reverse and remand.

Respectfully submitted this 25th day of March, 2015.

Melissa A. Huelsman, WSBA # 30935
Attorney for Appellants James Keith Richards
and Kirsten Richards

CERTIFICATE OF SERVICE

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

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

2. That on March 25, 2015, I caused the foregoing document attached to this Certificate of Service to be served upon the following individuals via the methods outlined below:

Adam G. Hughes, Esq. David A. Weibel, Esq. Bishop Marshall & Weibel, P.S. 720 Olive Way, Suite 1201 Seattle, WA 98101-1801 Ph: 206-622-5306 ahughes@bwmlegal.com dweibel@bwmlegal.com	☒ Legal Messenger: □ Same Day ☒ Next Day ☒ Electronic Mail □ Federal Express □ Other: ____________________________

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

Dated March 25, 2015, at Seattle, Washington.

/s/ Carl Turner ____________
Carl Turner, Paralegal