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COURT OF APPEALS  
DIVISION ONE

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NO. 72825-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JASON BROCK

Appellant,

v.

WELLS FARGO BANK, N.A. as trustee on behalf of the holders of the  
HarborView Mortgage Loan Trust Mortgage Loan Pass-Through  
Certificates, Series 2006-12, NORTHWEST TRUSTEE SERVICES,  
INC., SELECT PORTFOLIO SERVICING, INC.,

Respondents.

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APPELLANT JASON BROCK'S OPENING BRIEF

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## I. INTRODUCTION

This case presents a dispute between Jason Brock (“Brock”) and (1) Wells Fargo Bank, NA., in its capacity as trustee on behalf of the holders of the Harborview Mortgage Loan Trust Mortgage Loan Pass-Through Certificates Series 2006-12 (“Wells Fargo”); (2) Mortgage Electronic Registration Systems Inc. (“MERS”); (3) Select Portfolio Servicing, Inc. (“Select”); (4) and Northwest Trustee Services, Inc. (“NWTS”) (collectively the Respondents) that culminated in the Orders Granting Respondents’ Motions for Summary Judgment Dismissing Complaint, entered on October 9, 2014, and Denying Plaintiff’s Motion for Reconsideration, entered on November 17, 2014 (collectively the Appealed Orders).

The case presents what should be a relatively simple problem: Did the Respondents act unfairly or deceptively when they initiated foreclosure proceedings against Brock’s home?

Rather than meet their burden below, Respondents relied on inadmissible evidence and irrelevant legal arguments. The Trial Court erred when it granted the Respondents’ Motions for Summary Judgment and when it denied Brock’s Motion for Reconsideration because as a matter of law the Respondents were not entitled to summary judgment.

Brock respectfully requests this Court reverse the Trial Court's decisions and remand this case for further proceedings.

## **II. ASSIGNMENTS OF ERROR**

1. The Trial Court erred in granting the Respondents' request for summary judgment when Respondents failed to introduce admissible evidence to show there was no genuine issue of material fact.
2. The Trial Court erred in granting the Respondents' request for summary judgment where genuine issues of material fact existed regarding Brock's Consumer Protection Act claims, including whether Wells Fargo was a beneficiary when NWTs was appointed trustee, whether NWTs complied with its duty of good faith under the DTA, and whether MERS acted unfairly or deceptively when it falsely claimed to hold Brock's Note.

## **III. ARGUMENT**

First, Brock will examine the appropriate standards of review. Next, Brock will discuss why the Respondents failed to meet their initial burden under CR 56(c) to show by admissible evidence that no genuine issue of material fact existed. Finally, Brock will discuss the genuine issues of material fact that existed regarding Brock's claim under Ch.

19.86 RCW (“CPA”) arising out of the wrongful initiation of a nonjudicial foreclosure.

**A. Standards of Review**

First, Brock will address the appropriate standard of review to be used when reviewing orders granting summary judgment. Second, Brock will address the appropriate standard of review to be used when reviewing orders denying reconsideration.

1. Standard of Review Regarding a Summary Judgment Motion

In granting summary judgment, a court is declaring due process has been fulfilled as well as cutting off both the non-moving party’s right to discovery, see **Putman v. Wenatchee Valley Med. Ctr., P.S.**,<sup>1</sup> 166 Wn.2d 974, 979, 216 P.3d 374 (2009), and right to a jury trial, Wash. Const. art. I § 21. In order to do this without violating Washington’s Constitution, it must be beyond dispute that a reasonable person could not find in favor of the party against whom the judgment is entered. CR 56(c); **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The respective burdens imposed on the moving and nonmoving party by CR 56 are sometimes confusing. Two related points must

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<sup>1</sup> Counsel for Brock is aware that GR 14(d) requires citations to conform to the requirements set forth by the Office of the Reporter of Decisions, and that the Reporter of Decisions requires citations to be italicized. However, pursuant to this court’s brief writing best practices tip #10, case citations have been bolded in order to increase readability.

be kept in mind. First, while the defendant moving for summary judgment is not required to submit affidavits in support of his motion, CR 56(b), this does not mean he does not bear a genuine and substantial burden in supporting his motion. *While CR 56(e) requires the nonmoving party to come forward with facts showing a material issue of fact, this does not occur unless and until the defendant meets his initial burden of showing that there is no issue of material fact.*

**Young v. Key Pharmaceuticals, Inc.**, 112 Wn.2d 216, 234, 770 P.2d 182 (1989) (Dore, J. concurring in part, dissenting in part) (emphasis added); **accord Folsom**, 135 Wn.2d at 663 (citing **Lamon v. McDonnell Douglas Corp.**, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)). As will be explained **infra**, the Trial Court impermissibly admitted evidence, construed the facts in favor of the moving parties, and misconstrued the burdens of proof applicable to summary judgment.

## 2. Standard of Review Regarding Motion for Reconsideration

A trial court's ruling on a motion for reconsideration is reviewed for abuse of discretion. **Go2Net, Inc. v. C I Host**, 115 Wn. App. 73, 88, 60 P.3d 1245 (Div. I, 2003) (internal citations omitted). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. **Magana v. Hyundai Motor America**, 167 Wn.2d 570, 583, 220 P.3d 191 (2009). A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court applies the wrong legal standard. **Mayer v. Sto**

**Indus., Inc.**, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (internal citations and quotations omitted).

**B. The Respondents Did Not Meet Their Burden to Show No Genuine Issue of Material Fact Existed by Admissible Evidence**

Admission of evidence, not properly identified and authenticated by a witness, is manifest abuse of discretion. **State v. DeVries**, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

The Respondents' own evidence established genuine issues of material fact, including which Note was the "original" Brock Note, whether Wells Fargo possessed the original Note on the day it appointed NWTS as trustee. Additionally, the Trial Court relied on the inadmissible testimony of Suzanne Johnstone and Wells Fargo's attorney in granting Respondents' Motions for Summary Judgment.

1. The Respondents' Own Evidence Created a Question of Fact Regarding the Authenticity of the Multiple "Original Notes" Submitted to the Trial Court.

In support of their Motion for Summary Judgment, Wells Fargo submitted two different copies of the so-called original Note. CP 200-207 (attached to the Declaration of Suzanne Johnstone); Supp. CP 1-8 (brought to Court by Wells Fargo's counsel).<sup>2</sup> Both contain at least one anomalous indorsement from Countrywide Bank N.A. and Wells Fargo's counsel's

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<sup>2</sup> A motion to Supplement the Clerk's Papers is currently pending before this Court.

copy contains multiple indorsements in blank from Countrywide Home Loans Inc., one on the face of the alleged note, and one on an “allonge.”

It is not controversial to say *there can be only one original*.

Respondents have submitted two different copies, claiming both are the true and correct copy of the original note. **Compare CP 200-207 with Supp. CP 3-10.**

Possession of the original Note is absolutely critical to the Respondents’ affirmative defenses.

Possession of a "true and correct *copy* of the original" note does not, of course, establish possession of the original note itself. Without possession of the note...[Wells Fargo] is not the holder of that instrument either under the Uniform Commercial Code or the Deeds of Trust Act.

**Bavand v. Onewest Bank FSB**, 176 Wn. App. 475, 498-99, 309 P.3d 636 (Div. 1, 2013); **see also Bain v. Metro. Mortg. Grp., Inc.**, 175 Wn.2d 83, 106, 285 P.3d 34 (2012). Ultimately, the purpose of evidence is “that the truth may be ascertained and proceedings justly determined.” ER 102. To that end, all evidence should be original, authenticated, and relevant. ER 1002; **Fiore v. PPG Industries, Inc.**, 169 Wn. App. 325, n.4, 279 P.3d 972 (Div. I, 2012); **Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.**, 122 Wn. App. 736, 748-49, 87 P.3d 774 (Div. I, 2004); **State v. Payne**, 117 Wn. App. 99, 106, 69 P.3d 889 (Div. II, 2003), *rev. denied*, 150 Wn.2d 1028, 82 P.3d 242 (2004); ER 402. All the other rules of

evidence are essentially methods or means to fulfill this fundamental purpose or “reasonable” exceptions, the latter of which must be narrowly construed. See e.g. **State v. Wanrow**, 88 Wn.2d 221, 232, 559 P.2d 548 (1977) (“Exceptions are, as a general rule, to be strictly construed and allowed to extend only so far as their language warrants.”); **United States v. Nixon**, 418 U.S. 683, 710, n.18, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (“these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”).

*i. Wells Fargo Presented No Evidence That it Had Any Interest in the Note During the Brock Nonjudicial Foreclosure Proceedings*

Summary Judgment was Improper when Wells Fargo offered no evidence tending to show it had possession of any copy of the Note during the Brock Nonjudicial Foreclosure Proceedings.

On October 16, 2012, Wells Fargo purported to appoint<sup>3</sup> NWTS as successor trustee. CP 144.

As discussed in more detail **infra**, in order to bring nonjudicial foreclosure proceedings against Brock, Wells Fargo was required to be a “beneficiary” when Wells Fargo purported to appoint NWTS as successor

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<sup>3</sup> Wells Fargo, the purported beneficiary, did not appoint NWTS; instead, SPS appointed NWTS as “attorney in fact” for Wells Fargo. CP 144. RCW 61.24.010(2) only allows for a beneficiary to appoint a successor trustee, not a beneficiary’s agent.

trustee. See e.g. **Bavand**. 176 Wn. App. at 486-87; see also e.g. **Rucker v. NovaStar Mortg., Inc.**, 177 Wn. App. 1, 13-16, 311 P.3d 31 (Div. I 2013). Ms. Johnstone's Declaration is dated August 22, 2014, CP 194, and she declared Wells Fargo "is in possession of, controls, and holds the original [Note]." CP 193 at ¶ 4. Taken in the light most favorable to Brock, Ms. Johnstone's declaration simply shows that as of August 22, 2014, Wells Fargo possessed the Note. Wells Fargo's counsel appeared in Court on October 9, 2014 and produced a document Wells Fargo's counsel purported to be the original Brock Note. CP 83-4, Supp. CP 1-8. There is no evidence on the record whatsoever showing Wells Fargo had any interest in the Note on October 16, 2012, the day it appointed NWTs as trustee and initiated a nonjudicial foreclosure.

*ii. Wells Fargo's Evidence Fails to Prove Possession of the Original Note.*

Duplicates, or copies, are admissible unless (1) a genuine question is raised as to the authenticity of the original or (2) the circumstances dictate it would be unfair to admit the duplicate in lieu of the original. ER 1003. In this case, both exceptions to ER 1003 are present with regard to the different copies of the Brock Note.

First, Brock continuously objected to the admission of the copy of the document Wells Fargo's counsel purported to be the original Brock

Note at the summary judgment hearing. RP 5:13-14; 7:18-21; 8:8-9. In doing so, Brock raised a genuine question as to the authenticity of the document that rendered it inadmissible without further authentication. ER 1003.

Wells Fargo had the burden of proving either document was what Wells Fargo claimed it was - a true and correct copy of the original Brock Note. ER 901(a). Documents parties submit must be authenticated to be admissible. ER 1003. For the purposes of “admissibility”, authentication of the documents in question “is satisfied by evidence sufficient to support a finding that the [document] in question is [the original of that document as Wells Fargo’s counsel and Ms. Johnstone] claim[.]” See ER 901(b).

ER 901(b) illustrates the type of evidence that would suffice to prove Wells Fargo’s counsel’s and Ms. Johnstone’s claims. Those applicable in this case would be (1) testimony of witness with knowledge “that a matter is what it is claimed to be;” (2) “[c]omparison by the court...with specimens which have been authenticated;” and (3) “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”

Wells Fargo’s counsel and Ms. Johnstone each claimed a different document is a true and correct copy of the original Note but neither claim

is supported by evidence showing either declarant had actual personal knowledge sufficient to authenticate either document under ER 901(b)(1).

The Trial Court viewed Wells Fargo's counsel's "original" but had no authenticated specimens for comparison to make the document admissible under ER 901(b)(3). The only other copy of the Note in the record (attached to the Declaration of Suzanne Johnstone) had different indorsements and did not have the "PREPARED BY RICHMOND MONROE GROUP" label in the bottom left corner of the allonge and the top left corner of the first page of the note. **Compare** CP 200, 204, 207 **with** Supp. CP 1, 5, 8.

The appearance and circumstances certainly do not warrant finding sufficient evidence that either document is the original to authenticate either document under ER 901(b)(4). Ms. Johnstone claims one copy is the true and correct copy of the Note while Wells Fargo's counsel testified a different document is the original Note. **Compare** CP 193 at ¶ 4, CP 200-7 **with** RP 5:2-3, 6:13, Supp. CP 1-8. This inconsistency establishes a genuine issue of material fact: reasonable minds can differ as to which document is a copy of the original Brock Note. The Trial Court erred when it resolved this issue of fact by determining the Note offered as evidence by Wells Fargo and authenticated by its counsel at the Summary

Judgment Hearing was the original when Ms. Johnstone testified a different document was a true and correct copy of the original.

Second, it would be unfair<sup>4</sup> to admit a duplicate as proof of possession of the original; if Wells Fargo requested the Trial Court to find it was in possession of the Original Note and Wells Fargo needed to prove it when “mere allegations, denials, opinions, or conclusory statements” are insufficient to meet its burden on Summary Judgment. **Int'l Ultimate**, 122 Wn.App. at 744 (citing CR 56(e)); **Grimwood v. Univ. of Puget Sound, Inc.**, 110 Wn.2d 355, 359, 753 P.2d 517 (1988)). It makes no sense that the non-moving party would bear a greater burden than the moving party. See **Kiessling v. NW Greyhound Lines, Inc.**, 38 Wn. 2d 289, 293, 229 P.2d 335 (1951)(“It is only in exceptional instances that a plaintiff is required to plead or prove a negative, and this case is not one of them.”); accord **Dixie Insurance Co. v. Mello**, 75 Wn. App. 328, 336, 877 P.2d 740 (Div.2, 1994) (burdened with proving a negative making “all reasonable efforts to ascertain the identity of the owner” will satisfy any burden); see Whitman, D. **Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note**, 66 Ark. L. Rev. 21, 43 (2013)(“plac[ing] the burden of alleging evidence as to possession of the note on the borrower -- the party

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<sup>4</sup> ER.1003(2) (“A duplicate is admissible to the same extent as an original unless...in the circumstances it would be unfair to admit the duplicate in lieu of the original.”).

least likely to have any information or knowledge on the subject” is “nonsensical”.) Indeed, it does not make sense for one copy of the note to be deemed more credible than another based solely on the testimony of Ms. Johnstone or Wells Fargo’s counsel. Such competing unsupported claims warrant a trial where a fact finder can weigh the credibility of each claimant, not summary judgment. **Owen v. Burlington Northern and Santa Fe R.R. Co.**, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (summary judgment is appropriate only when reasonable minds could reach but one conclusion); **Folsom**, 135 Wn.2d at 663 (same).

Finally, irrelevant evidence is inadmissible. ER 402. The purported original Brock Note is only relevant if it makes it “more probable or less probable than it would be without the [document]” that Wells Fargo was in possession of the original when it appointed NWTs and initiated nonjudicial foreclosure proceedings. **See** ER 401. There is no evidence Wells Fargo was in possession of the Brock Note when it appointed NWTs as trustee on October 16, 2012- all Ms. Johnstone and Wells Fargo’s counsel proved was that Wells Fargo had possession of the Brock Note on August 22, 2014, CP 194, and October 9, 2014, RP 5:2-3, 6:13. Further, there is no evidence that Wells Fargo was a proper beneficiary

under the three part test set for in RCW 61.24.005(2)<sup>5</sup> when it appointed NWTS.

The Respondents will likely rely heavily, if not solely, on ER 902(h) and (i) to justify the admission of the purported Note. But even if the purported original Note is deemed to be self-authenticating and therefore admissible (which would impeach Ms. Johnstone's declaration when she said the copy attached to her declaration was a true and correct copy of the original note), that does not end the inquiry. The real question is whether Wells Fargo possessed the Brock Note on October 16, 2012, the date of the appointment of successor trustee. **See Bavand**, 176 Wn. App. at 487.

Even if admitted, the question of whether a document purported to be the original note is in fact the original and is, or was at the relevant time, in the possession of Wells Fargo are questions for a finder of fact:

Once a prima facie case [of authenticity] is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.

**U.S. v. Carriger**, 592 F.2d 312, 316 (6th Cir., 1979) (quoting **United States v. Goichman**, 547 F.2d 778, 784 (3d Cir. 1976)) (alterations

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<sup>5</sup> “‘Beneficiary’ means [1] the holder of the instrument or document evidencing the obligations, [2] secured by the deed of trust, [3] excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2) (brackets added).

original); accord **Young**, 112 Wn. 2d at 236; see also **Folsom**, 135 Wn.2d at 663 (citing **Lamon.**, 91 Wn.2d at 349). Summary judgement was improper where there was *no admissible evidence* that Wells Fargo was in possession of the original note when it initiated nonjudicial foreclosure proceedings against Brock's property on October 16, 2012.

2. Wells Fargo's Counsel's Testimony Regarding Possession of the Note Is Inadmissible

The Washington Rules of Professional Conduct prohibits a lawyer from acting as a witness in the same case in which he is an advocate. RPC 3.7(a). Comment 2 to RPC 3.7 explains the rationale behind this rule:

The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

While attorneys may testify regarding procedural and process facts, problems arise when attorneys testify regarding issues that go to the merits of the dispute:

The advocate-witness concern arises because lawyers become involved in the client's affairs in their status as lawyer. Lawyers may know facts because they have been involved in the planning of a deal or arrangement or the negotiation of a contract. They may know facts because of

investigations undertaken as part of the representation. Lawyers may know process facts, such as what documents are ascertainable from discovery. Lawyers routinely make assertions of procedural and process facts and provide background information to judges without running afoul of the advocate-witness rule. Lawyers do not need to be sworn when asserting these process and background facts because they have an ethical obligation not to make false statements of fact or law to the judge. In these situations lawyers are making representations of fact that will likely affect the procedural presentation of the case, but do not go to the underlying merits. When lawyers have become intertwined with the merits, however, they begin to look more like a traditional fact witness. In these circumstances, any factual statements that a lawyer makes should be subject to the same vetting that all witnesses receive, including the requirement that the witness be sworn and subject to cross examination. Once the lawyer moves into the realm of functioning as both advocate and fact witness, distinct professional responsibility issues arise.

McMorrow, J. A. **The Advocate As Witness: Understanding Culture, Context and Client**, 70 *Fordham L. Rev.* 945, 946 (2001). Wells Fargo's counsel's representations that (1) the purported note was original, RP 5:2-3; 6:13, and (2) Wells Fargo had possession of the Note on the relevant dates (i.e. when Wells Fargo appointed NWTs as trustee and when Brock's real property was scheduled for sale), RP 31:19-32, should have been taken as argument and not as evidence. The Trial Court erred when it relied on Wells Fargo's counsel's representations that the document was the original Note and that Wells Fargo possessed the document as of the

date of the appointment of successor trustee. RP 31:19-32; CP 6, 10 (stating that Court reviewed all pleadings submitted by parties).

3. The Declaration of Suzanne Johnstone was inadmissible because there was no evidence the declarant had any personal knowledge, and the Declaration Contained Inadmissible Hearsay

Respondents also relied on the Declaration of Suzanne Johnstone in their Motions for Summary Judgment. CP 229, 188 (NWTS joining in co-Respondents' arguments). Ms. Johnstone's declaration is largely inadmissible she merely recites information based on the reports of others in violation of ER 602. **Hollingsworth v. Wash. Mut. Sav. Bank**, 27 Wn. App. 386, 681 P.2d 845 (Div. I, 1984), rev. denied, 103 Wn.2d 1007 (1984).

According to her declaration, Ms. Johnstone works for SPS. CP 192-3, ¶ 1. Ms. Johnstone claims to have knowledge of Wells Fargo's records and record keeping practices. **Id.** Ms. Johnstone claims Wells Fargo's records are "maintained in the ordinary course of business" and "are based on information and data placed in the records by persons who have knowledge of the information and data at the time they are recorded in the records." **Id.** There is no evidence in the record tending to show how Ms. Johnstone, an SPS employee, has personal knowledge of how Wells Fargo maintains its records, how Wells Fargo's records are created,

or who creates Wells Fargo's records. Ms. Johnstone claims the business records created by Wells Fargo are kept in the regular course of Wells Fargo's business. CP 193 at ¶ 3. Again, Respondents have introduced no evidence establishing Ms. Johnstone has any personal knowledge of Wells Fargo's business records.

Furthermore, the exhibits to the declaration which Ms. Johnstone is attempting to authenticate are Wells Fargo's records, not SPS'. See e.g., CP 193, ¶ 4 ("Based on a review of these business records kept and recorded in the ordinary course of its business, [Wells Fargo] as trustee is in possession of, controls, and holds the original [Note]..."); see also CP 193-4, ¶ 6 ("based upon a review of these business records kept and recorded in the ordinary course of its business, [Wells Fargo] as trustee is in possession of, controls, and holds the original Deed of Trust..."). There is no evidence in the record demonstrating how Ms. Johnstone has access to Wells Fargo's records to be able to know whether those records show Wells Fargo is in possession of, controls, or holds the Note and if Wells Fargo did so during the Brock nonjudicial foreclosure proceedings.

Ms. Johnstone's testimony is inadmissible because no evidence was admitted tending to show Ms. Johnstone: had personal knowledge of Wells Fargo's business records, Wells Fargo's practices related to the

creation and maintenance of those business records, or that she even had access to Wells Fargo's business records.

Furthermore, Ms. Johnstone's declaration is largely comprised of inadmissible hearsay. An out of court statement offered for the truth of the matter asserted is hearsay. ER 801(c). In general, hearsay is inadmissible. ER 802. One exception to the rule against hearsay is the business records exception. See RCW 5.45.020. RCW 5.45.020 provides:

*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.*

RCW 5.45.020 (emphasis added). RCW 5.45.020 is to be strictly construed. **State v. Finkley**, 6 Wn. App. 278, 280, 492 P.2d 222, (Div. I, 1972), review denied, 80 Wn.2d 1007 (1972). Admissible business records must be produced by a custodian and identified by one who has supervised the record's creation. See **State v. Smith**, 16 Wn. App. 425, 433, 558 P.2d 265 (Div. II, 1976), review denied, 88 Wn.2d 1011 (1977). Further, Ch. 5.45 RCW does not create an exception for the foundational requirements of identification and authentication. **State v. Devries**, 149 Wn.2d 842, 847, 72 P.3d 748 (2003).

Here, Ms. Johnstone states that, according to SPS' records, there is a current amount due of \$1,037,605.95 in unpaid principal balance and accrued unpaid interest as of August 20, 2014. CP 194, ¶ 7. Significantly, Ms. Johnstone's declaration does not include any records demonstrating this balance is correct, but simply expects the court to trust her summary of SPS' records. RCW 5.45.020 only allows a record to be admitted as an exception to the rule against hearsay, not a summary of the business record. **See** RCW 5.45.020; **see also Pollock v. Pollock**, 7 Wn. App. 394, 405, 499 P.2d 231 (Div. I, 1972) (Summary of business records is not admissible under business records exception).

If SPS' records indicate there was \$1,037,605.95 due on the note, then the Respondents had to introduce admissible evidence, i.e. the records, to substantiate that number. **See** RCW 5.45.020; **see also** ER 1002. The Trial Court could not rely on a second hand account of the records through Ms. Johnstone to prove facts asserted within the records themselves. **State v. Mahmood**, 45 Wn. App. 200, 203, 724 P.2d 1021 (Div. I, 1986) ("To prove the contents of a corporate record, the original writing is required unless it cannot be obtained by any judicial process or procedure.").

Additionally, for the same reasons every factual assertion in the Declaration of Ms. Johnstone is inadmissible when there is an absence of

corresponding business records to substantiate the facts being asserted by Ms. Johnstone. CP 193 at ¶¶ 4, 6; CP 194 at ¶¶ 7, 8. The law is clear; in order to use the business records exception, a party must introduce the actual record into evidence. RCW 5.45.020. Because the Declaration of Ms. Johnstone does not introduce the business records relied on by Ms. Johnstone, the factual assertions within Ms. Johnstone's declaration are inadmissible hearsay.

**C. Brock Established Genuine Issues of Material Fact Exist Regarding His CPA Claim**

“To prevail on a CPA action, the plaintiff must prove an ‘(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.’” **Klem v. Wash. Mut. Bank**, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013); citing **Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.**, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)

Pre-sale violations of the DTA may be compensable under the CPA. **Frias v. Asset Foreclosure Servs., Inc.**, 181 Wn.2d 412, 432-33, 334 P.3d 529 (2014); **Lyons v. U.S. Bank, N.A.**, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014).

Brock contended the Respondents committed unfair or deceptive acts by violating the DTA. CP 55-6. The Respondents argued (1) there

were no violations of the DTA, (2) there was no causation, and (3) that Brock's damages were not compensable under the CPA. CP 94-5, 188, 235. Respondents did not contest whether there was a public interest impact or whether the conduct occurred in trade or commerce and accordingly concede that their conduct occurred in trade or commerce and impacted the public interest. **State v. Ward**, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("[Party] does not respond and thus, concedes this point.").

1. Unfair or Deceptive Acts Arising From Wrongful Initiation of Foreclosure

Liability under the CPA may be predicated on an unfair act. **Klem**, 176 Wash.2d at 782. The term unfair is not defined in the statute because "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." **Panag v. Farmers Ins. Co. of Wash.**, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) (quoting **State v. Schwab**, 103 Wn.2d 542, 558, 693 P.2d 108 (1984)).

Liability may also be predicated on deceptive acts. RCW 19.86.020. "The implicit understanding is that 'the actor *misrepresented* something of material importance.'" **State v. Kaiser**, 161 Wn. App. 705, 719, 254 P.3d 850 (Div. 1, 2010) (emphasis in original) (internal citations omitted). "To prove that an act or practice is deceptive, neither intent nor actual deception is required." **Id.** "Even accurate information may be

deceptive ‘if there is a representation, omission or practice that is likely to mislead.’” **Id.**

Whether a particular action is unfair or deceptive is a question of law. **Leingang v. Pierce County Med. Bureau**, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

i. Wells Fargo Acted Unfairly or Deceptively by Violating the DTA

Despite Wells Fargo’s claims that it was entitled to enforce the Brock Note, the legally relevant question is whether Wells Fargo was a “beneficiary” under the DTA, and therefore entitled to initiate a nonjudicial foreclosure. Wells Fargo cannot be a beneficiary because the Brock Note is not a negotiable instrument capable of granting holder status. Even assuming *arguendo* that the Brock Note is negotiable, there is no evidence establishing how Wells Fargo took possession of the Brock Note, which could mean that Wells Fargo is not a holder, but rather a person entitled to enforce or partial assignee.

a. Wells Fargo’s Status as a Beneficiary, Not a Person Entitled to Enforce the Note, Matters Under the DTA

Below, the Respondents repeatedly argued Wells Fargo was a “beneficiary” entitled to nonjudicially foreclose under the DTA because Wells Fargo possessed the Note and was therefore entitled to enforce the

Note. CP 31, 86, 230, 235, 236. To be clear, this case is not about whether Wells Fargo was entitled to enforce the Note; it is about whether Wells Fargo was a “beneficiary” entitled to initiate nonjudicial foreclosure proceedings under the DTA.

RCW 61.24.005 defines “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.” “Holder” with respect to a negotiable instrument, means: “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(21)(A). A party becomes a holder by (1) acquiring possession of the negotiable instrument, *id.*, (2) that is properly endorsed, RCW 62A.3-201, (3) that was delivered for the purpose of giving to the person all rights in the instrument, RCW 62A.3-203(a), (d).

RCW 62A.3-301 makes clear that a “holder” under Ch. 62A.3 RCW is distinct from a person entitled to enforce. A person entitled to enforce may be a holder, a non-holder in possession of the negotiable instrument, or a person not in possession who is entitled to enforce the promissory note. RCW 62A.3-301. Being a person entitled to enforce does not also make one a beneficiary under the DTA. **See Lyons**, 181 Wn.2d at 789-92.

In **Bain**, Washington’s Supreme Court referenced former RCW 62A.1-201(20)<sup>6</sup> and RCW 62A.3-301 to dispense with MERS’ argument that as “holder” of the deed of trust it was a beneficiary. 175 Wn.2d at 104.

In **Lyons**, the Supreme Court examined a declaration which stated the purported beneficiary was a holder or person entitled to enforce under the RCW 62A.3-301: “we find, consistent with **Beaton**, that the declaration at issue here does not comply with RCW 61.24.030(7)(a). On its face, it is ambiguous whether the declaration proves Wells Fargo is the holder or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3-301.” 181 Wn.2d at 791.

Thus, Respondents’ arguments regarding Wells Fargo’s status as a person entitled to enforce the Note were legally irrelevant to determining whether Wells Fargo was a “beneficiary” as defined by the the DTA. See RCW 61.24.005(2).

- b. A Negative Amortization Note Is Not Negotiable and Cannot Grant “Holder” Status to Anyone Under RCW 62A.1-201(21)(A)

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<sup>6</sup> Currently RCW 62A.1-201(21) though no change to the language was made.

A negotiable instrument is, *inter alia*, an unconditional promise or order to pay *a fixed amount of money*. RCW 62A.3-104(a) (emphasis added). RCW 62A.3-104(a) requires a fixed amount of money because negotiable instruments were intended to be as precise as a dollar bill in the amount of money it represents:

An indefinite obligation is obviously unadapted to the exigencies of commercial paper, which derives its peculiar qualities from the intended freedom and facility of its circulation, and the consequent necessity that it should carry upon its face unambiguous evidence of the maker's liability, *and should denote, with precision, how much the maker is bound to pay and the holder is entitled to receive.*

**Anderson v. Hoard**, 63 Wn.2d 290, 292-293, 387 P.2d 73 (1963) (emphasis added) (citing **Farquhar v. Fidelity Ins., Trust & Safe Deposit Co.**, 13 Phila. 473, 474, 8 Fed. Cas. 1068 (C.C.E.D. Pa, 1878)); **Vancouver Nat. Bank v. Starr**, 123 Wn. 58, 62, 211 P. 746 (1923); see also J.P.T., Annotation, **Negotiability of note as affected by provision therein, or in mortgage securing the same for payment of taxes, assessments, or insurance**, 45 A.L.R. 1074 (1926) (“The reason for this rule is that negotiable paper is used as a substitute for money, and therefore it must indicate precisely how much money it represents.”). To determine whether a note contains an unconditional promise to pay a fixed amount of money, Washington Courts analyze the note’s contents to decide if the note’s holder could determine his or her rights, duties, and

obligations with respect to payment on the note without having to examine any other document. **Anderson**, 63 Wn.2d at 292-293; **Vancouver Nat. Bank**, 123 Wn. at 62; **Alpacas of America v. Groome**, 179 Wn. App. 391, 396-398, 317 P.3d 1103 (Div. II, 2014).

Here, in Paragraph 1 of the Note the borrower promises to pay to \$825,000.00 (defined as “Principal”), plus interest, to the order of Lender, Countrywide Home Loans. CP 200. The Note, in a section entitled “Additions to My Unpaid Principle,” states the Principal may increase if the borrower makes a monthly payment that is less than the interest accrued during that month:

*Since my monthly payment amount changes less frequently than the interest rate, and since the monthly payment is subject to the payment limitations... my minimum payment could be less than or greater than the amount of interest portion of the maturity payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal, and interest will accrue in the amount of this difference....*

CP 201-2 (emphasis added). On its face, the Note is not a promise to pay a fixed amount of money because the amount Brock (the borrower would pay, the Principal, is “fluctuating and indefinite” and may only “be ascertained by looking to extrinsic circumstances,” Brock’s payment

history. **Contra Anderson**, 63 Wn.2d at 292-293; **Vancouver Nat. Bank**, 123 Wn. at 62. Therefore, Brock's Note is not negotiable. **Id.**; **see also** Elizabeth Renuart, **Uneasy Intersections: The Right to Foreclose and the UCC**, 48 Wake Forest L. Rev. 5, 29-30 (2013) (In a note with negative amortization "[t]he actual principal is never certain, rendering the note nonnegotiable"); Kathleen C. Engel and Thomas J. Fitzpatrick IV, **Complexity, Complicity, and Liability Up the Securitization Food Chain: Investor and Arranger Exposure to Consumer Claims**, 2 Harv. Bus. L. Rev. 345, 358, n.50 (2012) ("Arguably, loans with negative amortization could be for uncertain sums because the principal balance can increase over time...").

At Summary Judgment, the Respondents relied on the Declaration of Suzanne Johnstone, who claimed the unpaid principal balance was \$868,133.53, CP 194 at ¶ 7, over forty three thousand dollars more than the original principal balance from the Note dated nearly eight (8) years before the Declaration was executed. CP 200. There is simply no way a potential holder of Brock's Note could have any idea how much Brock owed on the principal without looking to information outside the four corners of the Note; indeed, Ms. Johnstone claimed to know the principal amount through her alleged review of documents extrinsic to the note - SPS' business records. CP 194 at ¶ 7. Therefore, Respondents admit that

the amount Brock would be required to pay, the Principal, cannot be ascertained without reference to extrinsic documents or circumstances.

If a note makes it clear that negative amortization and capitalization will inevitably occur, that note does not contain a fixed amount of principal because the stated initial principal constitutes only a floor, and the principal cap operates like a credit limit. **Ralston v. Mortgage Investors Grp., Inc.**, 2010 WL 3211931, \*2 (N.D. Cal. 2010). Under the terms of the Note, negative amortization will inevitably occur.

The note is dated for October 26, 2015. CP 200, Supp. CP 1. It provides “until the first Interest Rate Change Date, defined below in Section 2(B), I will pay interest at a yearly rate of 1.500%.” CP 200 at ¶ 2(A); Supp. CP 1 at ¶ 2(A). The note further states, “This rate is sometimes referred to as the ‘Start Rate’ and is used to calculate the initial monthly payment described in Section 3. CP 200 at ¶ 2(A); Supp. CP 1 at ¶ 2(A).

In the very next paragraph titled “(B) Interest Rate Change Date” the note states, “[t]he interest rate I will pay may change on the first day of December 2006, and on that day every month thereafter.” CP 200 at ¶ 2(B); Supp. CP 1 at ¶ 2(B). “The new rate of interest will become effective on each Interest Rate Change Date. The interest rate may change monthly,

but the monthly payment is recalculated in accordance with Section 3.” CP 200 at ¶ 2(B); Supp. CP 1 at ¶ 2(B).

Following this, the note states “my adjustable interest rate will be based on an Index. The ‘Index’ is the “Twelve-Month Average” of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled ‘Selected Interest Rates (H.15)’ (the “Monthly Yields”).” CP 200-1 at ¶ 2(C); Supp. CP 1-2 at ¶ 2(B).

The Note then states the “Note Holder will calculate my new interest rate by adding three & 10/100 percentage point(s) 3.100 (“Margin”) to the Current Index.” CP 201 at ¶ 2(D); Supp. CP 2 at ¶ 2(D). Based on this formula the lowest interest rate that could possibly applied to the outstanding principal balance of the loan is 3.1 percent.<sup>7</sup> This interest rate was applied starting on December 2006, however, Mr. Brock’s payments for the period of December 2006 to December 2007 were based upon an interest rate of 1.5 percent. CP 201 at ¶ 3(C); Supp. CP 2 at ¶ 3(C). Additionally, the note states, “[i]f the Minimum Payment

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<sup>7</sup> Even if the Current Index, the “Twelve-Month Average” of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board,” CP 200 at ¶ 2(C), Supp. CP 1 at ¶ 2(C), was zero, the interest rate would be 3.1%.

is not sufficient to cover the amount of the interest due the *negative amortization will occur.*” CP 201 at ¶ 3(C); Supp. CP 2 at ¶ 3(C).

In this case, negative amortization was guaranteed to occur because the note based the payments for December 2006 to December 2007 on an interest rate of 1.5 percent, while at the same providing that the interest rate during that time period would be the index plus a margin of 3.1 percent. The actual rate of interest being charged on the unpaid principal balance is more than twice the rate of interest that was used to calculate the monthly payment amount. CP 201 at ¶ 3(B); Supp. CP 2 at ¶ 3(B).

Not only was negative amortization inevitable, it actually happened. The amount of the principal Ms. Johnstone claims Brock owed as of August 22, 2014, \$868,133.53, is higher than the original principal balance of \$825,000.00 listed in the Note dated October 26, 2006.

**Compare** CP 194 at ¶ 7 **with** CP 200 and Supp. CP 1. Again, this is not a fixed amount of money, a holder could not possibly tell that Brock owed over forty thousand more than the original principal balance nearly eight years after the Note was executed. Further, the fact that the Note lists a purported “maximum limit” for the Principal does not make the Note

negotiable; RCW 62A.3-104(a) requires a fixed amount of money, not a range of money.<sup>8</sup>

Refusing to recognize negative amortization notes as negotiable instruments also serves public policy. RCW 19.144.050 prohibits financial institutions from making or facilitating a loan with negative amortization.<sup>9</sup> Given that the Legislature has outlawed the creation of these loans, it follows that the Legislature did not intend for these types of loans to receive protection under Ch. 62A.3 RCW.

Accordingly, Wells Fargo was never a beneficiary under RCW 61.24.005(2) because the Brock Note is not a promise to pay a fixed amount of money and is therefore not a negotiable instrument. This also means that the special indorsements and indorsement in blank relied on by Respondents has absolutely no legal effect.

c. Even if the Note Is Negotiable, Mere Possession Does Not Make Wells Fargo a Beneficiary

Although there was no admissible evidence showing Wells Fargo possessed Brock's Note, even if the Court accepts the inadmissible testimony of Wells Fargo's attorney that Wells Fargo had possession of

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<sup>8</sup> Under the paragraphs 3(E) and 3(F) of the Note, the Principal may increase up to 115% of the original Principal for a range from \$825,000.00 to \$948,750.00. CP 200-203.

<sup>9</sup> RCW 19.144.010(8) defines "negative amortization" as "an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal."

the Note, that does not show that Wells Fargo is a holder, under the DTA or Ch. 62A.3 RCW.

Possession of a negotiable instrument does not automatically make one a holder. Many possessors are in fact thieves, partial assignees, or persons entitled to enforce the instrument: As the **Lyons** Court observed, ““Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a *nonholder in possession* of the instrument who has the rights of a holder, or (iii) a *person not in possession* of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). 181 Wn.2d at 790. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. RCW 62A.3-301 (emphasis added).

One becomes a holder only by negotiation of a negotiable instrument. RCW 62A.3-201(a) (emphasis added). Ch. 62A.3 RCW contemplates several situations where a person possesses a negotiable instrument but is not the holder, like a transferee from a non-holder in possession of the instrument, RCW 62A.3-203(b) and RCW 62A.3-301(ii)-(iii), or where the transferor purports to transfer less than the entire instrument, RCW 62A.3-203(d).

As explained *supra*, even if Wells Fargo established it possessed the Note on the day of the Summary Judgment hearing on October 9, 2014, CP 83, there is no evidence in the record to support a finding that Wells Fargo possessed the Note on October 16, 2012, the day Wells Fargo's agent appointed NWTs as trustee. CP 144. Whether or not Wells Fargo and NWTs had authority to initiate a nonjudicial foreclosure proceedings depends on whether it was a beneficiary when Wells Fargo's agent<sup>10</sup> appointed NWTs as trustee. **Bavand**, 176 Wn. App. at 487. This is a genuine issue of material fact that is unresolved by the record before the Court.

d. Wells Fargo May Still Be the Owner of the Note, but Would Need to Establish the Chain of Title

As stated in **Bain** and emphasized in **Lyons**, Wells Fargo must be able to document the chain of transactions that show how it became the owner of the Note. **Lyons**, 181 Wn.2d at 789 (quoting **Bain**, 175 Wn.2d at 102, 285 P.3d 34 (“If the original lender had sold the loan, [it] 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.” (emphasis added))). While Wells Fargo cannot be a holder of a negotiable

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<sup>10</sup> Brock does not concede that SPS had authority to appoint NWTs as successor trustee. However, even assuming *arguendo* that an agent can appoint a successor trustee, the agent's authority to do so depends on the principal's authority as a beneficiary.

instrument because Brock's Note is not negotiable as explained **supra**, Wells Fargo may still have been a beneficiary if it could establish the chain of transactions transferring ownership of the Brock Note from Countrywide Home Loans to Wells Fargo in addition to the two other requirements contained in RCW 61.24.005(2).

However, Wells Fargo did not introduce evidence to document the chain of transactions between Countrywide and Wells Fargo, which was required to show whether Wells Fargo was the owner of the Note. Accordingly, genuine issues of material fact exist regarding the chain of ownership of the Brock's Note. These facts are material because if Wells Fargo is not the owner of the document, it did not have authority to initiate foreclosure under the DTA and acted unfairly and deceptively when it initiated nonjudicial foreclosure proceedings pursuant to the DTA against Brock..

ii. NWTS Acted Unfairly and Deceptively when it Violated the DTA

Genuine issues of material fact exist regarding whether (1) NWTS was properly appointed as trustee, (2) NWTS complied with its duty of good faith when it did not investigate Wells Fargo's authority to foreclose, and (3) NWTS had proof of Wells Fargo's ownership of Brock's Note.

- a. NWTS was not properly appointed as trustee

Under the DTA, only a proper beneficiary has the power to appoint a successor to the original trustee named in the deed of trust. **Bavand**, 176 Wn. App. at 486. The question of whether a proper beneficiary has appointed a trustee is a question of fact for trial. **Rucker**, 177 Wn. App. at 17. When an unlawful beneficiary appoints a successor trustee, the actions of the purported trustee constitute material violations of the DTA. **Id.** at 14 (internal citations omitted).

Here, Wells Fargo appointed NWTS as successor trustee. CP 144. As explained *supra*, genuine issues of fact exist regarding whether Wells Fargo was a beneficiary because Wells Fargo has not introduced sufficient evidence to carry its burden. If Wells Fargo was not a beneficiary, it had no power to appoint NWTS as trustee. NWTS' recording the Notice of Trustee's sale without proper appointment violated the DTA, and was an unfair or deceptive act. Additionally, Wells Fargo purporting to appoint NWTS as trustee without Wells Fargo being a lawful beneficiary violated the DTA and was unfair or deceptive.

b. NWTS Violated its Duty of Good Faith by Failing to Investigate Wells Fargo's authority to foreclose

"A foreclosure trustee must 'adequately inform' itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a 'cursory investigation' to adhere to its duty of good faith." **Lyons**, 181

Wn.2d at 787. NWTS put forward no evidence showing that it ever conducted any investigation, much less a cursory investigation, of Wells Fargo's right to foreclose.

Brock alerted the trial court to NWTS' complete lack of an investigation in his Motion for Reconsideration, CP 70-2, along with the fact that NWTS failed to respond to this argument in its response, CP 26. A party opponent can manifest adoption of a statement by complete silence. **State v. Neslud**, 50 Wn. App. 531, 550-551, 749 P.2d 725 (Div. I, 1988) review denied 110 Wn.2d 1025 (1988). NWTS' failure to deny this accusations constitutes an admission by adoption under ER 801(d)(2)(ii) that NWTS never conducted any investigation into the authority of Wells Fargo to foreclose. **State v. Cotton**, 75 Wn. App. 669, 689, 879 P.2d 971 (Div. II, 1994) (Silence constitutes an adoptive admission if the party-opponent heard the statement, was able to respond, and the circumstances surrounding the statement were such that it is reasonable to conclude that the party-opponent would have responded had there been no intention to agree with the statement). By failing to respond to Brock's argument that it failed to conduct an investigation into Wells Fargo's authority to foreclose despite having an opportunity to do so, NWTS admitted it conducted no investigation. *See* ER 801(d)(2)(ii).

c. NWTS Did Not Have Proof of Wells Fargo's Ownership of Brock's Note Before Recording the Notice of Trustee's Sale

RCW 61.24.030(7)(a) requires that the trustee have proof the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. The statute also allows, under certain circumstances, for the trustee to rely on a declaration "by the beneficiary" stating the beneficiary is the actual holder to be sufficient proof under RCW 61.24.030(7)(a). **Id.**

While it is true that the DTA does allow for the use of agents, the Legislature has specifically designated acts that may be performed by an agent of the beneficiary or an agent of the trustee in nonjudicial foreclosures. **See, e.g.,** RCW 61.24.040(4) (authorized agent of the trustee may sell property at public auction); RCW 61.24.031(1)(a) (authorized agent of beneficiary may issue a notice of default); RCW 61.24.050(2)(a) (authorized agent of beneficiary may declare trustee's sale and trustee's deed void). The principle of *expressio unius est exclusio alterius* means that the Legislature, in allowing the agents to undertake certain activities but not allowing an agent to make the declaration under RCW 61.24.030(7)(a), only intended for the beneficiary itself to make the declaration. **See Wash. Natural Gas Co. v. Pub Util. Dist. No. 1**, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); **see also State v. Swanson**, 116 Wn.

App. 67, 75-6, 65 P.3d 343 (Div. II, 2003). Here, the declaration relied on by NWTS was executed by SPS. CP 179. Because the purported beneficiary in this case is a trust, only Wells Fargo could have executed a beneficiary declaration that complied with RCW 61.24.030(7)(a). **See In re Meyer**, 506 B.R. 553 (Bkrtcy. W.D. Wash. Feb. 18, 2014).

Accordingly, because the declaration of ownership NWTS relied on to establish Wells Fargo's ownership of Brock's Note was defective, and NWTS violated its duty of good faith owed to Brock, according to RCW 61.24.030(7)(b), NWTS needed other proof of ownership to satisfy RCW 61.24.030(7)(a). NWTS introduced no proof that it relied on anything other than the declaration of ownership, so genuine issues of material fact exist regarding what proof NWTS had that Wells Fargo was the owner of Brock's Note.

iii. MERS Falsely Represented It Held the Note

In **Bain**, the Washington Supreme Court held MERS purporting to be a "beneficiary" when it did not hold the note was presumptively deceptive. 175 Wn.2d at 117.

Here, MERS claimed to be a beneficiary in its own name, and not as a nominee for Countrywide Home Loans (the original Lender). CP 139. Additionally, MERS purported to transfer its interest in the Deed of Trust

“together with the note” to BAC Home Loan Servicing. As part of its business model, MERS does not hold the Note but instead acts as a mortgagee of record for the true note holder. **Bain** 175 Wn.2d at 97; see **also** CP 121. MERS holding itself out as a beneficiary when it is not one presumptively meets the unfair or deceptive act or practice element. **Bain**, 175 Wn.2d at 117.

2. Brock Suffered Damages Caused by the Respondents’ Unfair or Deceptive Acts.

In **Panag** the Washington Supreme Court held that the 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.*” 166 Wn.2d at 57 (emphasis added). “A plaintiff can establish injury based on unlawful debt collection practices [under the CPA] even when there is no dispute as to the validity of the underlying debt.” **Frias**, 181 Wn.2d at 431; citing **Panag** 166 Wn.2d at 55-56. Concealment of loan transfers could deprive homeowners of other rights, including the ability to take advantage of statutory protections or actions that require the homeowner to sue or negotiate with the actual holder of the promissory note. **Bain**, 175 Wn.2d at 118-19.

In support of his response to Respondents’ Summary Judgment Motions, Brock declared that he paid for an audit report regarding his

loan. CP 105 at ¶ 3. The money he spent for the audit report is a compensable injury under the CPA. **See Panag**, 166 Wn.2d at 57.

Additionally, Brock declared that he sustained severe damage to his personal credit because of the Respondents' actions. CP 257 at ¶ 18, CP 105 at ¶ 2 (Certifying facts contained in complaint are true and accurate). Damage to credit is compensable under the CPA.

The reason Brock suffered CPA damages, i.e. having to pay for an investigator to research whether or not Respondents had authority to foreclose under the DTA, was because of the unfair and deceptive acts committed by the Respondents, the DTA violations. When faced with a foreclosure he believed to be improper, Brock did what any reasonable homeowner would do - he investigated. If the nonjudicial foreclosure was improper, then the cause of Plaintiff's damages was the wrongful initiation of the nonjudicial foreclosure. **Knecht v. Fid. Nat'l Title Ins. Co.**, 2014 WL 4057148 at \*23-25 (W.D. WA. August 14, 2014); **see also Bain**, 175 Wn.2d at 119-120 (noting that a borrower may establish injury and causation elements of a CPA claim in a single nonjudicial foreclosure); **see also Walker v. Quality Loan Service Corp.**, 176 Wn. App. 294, 320, 308 P.3d 716 (Div. I, 2013) in part reversed on other grounds in **Frias**, 181 Wn.2d at 429 (filing of deceptive assignments of deeds of trust and appointments of successor trustee can cause CPA damages). But for the

wrongful initiation of the nonjudicial foreclosure, Brock never would have had to hire an investigator to address the Respondents' misconduct. Accordingly, the Respondents' actions proximately caused Brock damages.

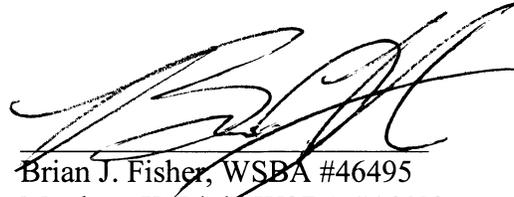
#### IV. CONCLUSION

The Trial Court erred in admitting the inadmissible testimony of Wells Fargo's attorney and Suzanne Johnstone's declaration based off of undisclosed "business records." Additionally the Trial Court erred by finding there was no genuine issue of material fact when there were genuine issues of fact regarding whether Respondents' violations of the DTA were unfair or deceptive and whether those violations caused Brock to investigate what was happening with his loan. This Court should reverse the Trial Court's Order Granting Summary Judgment to Respondents and remand the case back to the Trial Court for further proceedings including trial to resolve the genuine issues of material fact that are present.

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By:

  
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A handwritten signature in black ink, appearing to read 'B. Fisher', written over a horizontal line.

Brian J. Fisher, WSBA #46495

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**CERTIFICATE OF SERVICE**

I, Ashley Burns, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 1st day of April, 2015, I caused to be served a true and correct copy of Appellants Opening Brief to Respondents in the above title matter by causing it to be delivered to:

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DATED 1st day of April, 2015 at Arlington, Washington.

  
Ashley Burns  
Legal Assistant  
Stafne Trumbull PLLC