

FILED  
April 1, 2016  
Court of Appeals  
Division I  
State of Washington

No. 74347-3-I

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

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MARISA BAVAND

Appellant/Plaintiff,  
v.

ONEWEST BANK FSB, a federally chartered savings bank; MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware  
corporation; NORTHWEST TRUSTEE SERVICES, INC., a Washington  
Corporation and DOE DEFENDANTS 1-10,

Respondents/Defendants.

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**APPELLANT'S OPENING BRIEF**

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## I. ASSIGNMENTS OF ERROR

A. The trial court erred in accepting the testimony of Brian Blake, Kevin Flannigan and Charles Boyle on summary judgment, in the absence of compliance with the provisions of *RCW 5.45.020* and *ER 803(a)(6)*.

B. The trial court erred in striking the Declaration of Marisa Bavand.

C. The trial court erred in granting summary judgment and dismissing Appellant's claims on November 20, 2015 (CP 13-19), pursuant to *CR 56*, when there were genuine issues of material fact in dispute, including: (1) the existence of two separately endorsed Notes, raising material issues of fact as to which Note was being foreclosed and who held each Note; (2) the successor trustee's reliance on an ambiguous beneficiary declaration, in violation of *RCW 61.24.010(4)* and *RCW 61.24.030(7)(a)*; the existence of evidence of violation of the Washington Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA"); the existence of evidence of violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA"); the existence of evidence of violation of *15§1692*; and the existence of injury and damages that were directly and proximately caused by Respondent's misconduct.

D. The trial court erred in refusing to continue the hearing on summary judgment to permit Ms. Bavand an opportunity to obtain discovery previously propounded to Respondents, pursuant to *CR 56(f)*.

## **II. STATEMENT OF THE CASE**

On August 13, 2007, Appellant, MARISA BAVAND (hereinafter “Ms. Bavand”) executed a Note in favor of IndyMac Bank, FSB. CP 391, 399-403. The Note specifically provided as follows: “The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder’”. CP 399. The Note was secured by a Deed of Trust with an effective date of August 6, 2007, naming Chicago Title Insurance Company as trustee (hereinafter “Chicago Title”), IndyMac Bank, F.S.B. (hereinafter “IndyMac”) as lender and MERS as the beneficiary. This Deed of Trust was initially recorded with the Snohomish County Auditor under Recording No. 200708160919. CP 405-426.

With regard to the Note and Deed of Trust, there are three relevant comments to make. First, the Note reflects an effective date of August 6, 2007, but was not actually signed until August 13, 2007. CP 399, 403. Second, while Ms. Bavand has not seen the original since the date of signing, various copies have been produced at various times, each

apparently negotiable, with different endorsements. CP 434, 466. Third, the Deed of Trust was apparently defective as recorded and Chicago Title was compelled to re-record a copy of the Deed of Trust over three years later on March 24, 2011, to add a legal description under Snohomish County Recording No. 201103240429. CP 428.

It is undisputed that IndyMac, FSB was seized by the FDIC in July of 2008. IndyMac Bank's parent company filed for relief under Chapter 7 of the U.S. Bankruptcy Code on July 31, 2008 in Case No. 08-bk-21752-BB, United States Bankruptcy Court, Central District of California. CP 392.

In 2011, Ms. Bavand sent a Qualified Written Request (hereinafter "QWR") to Respondent, ONEWEST BANK, FSB (hereinafter "OneWest") to ascertain the ownership of her loan. In response to this Qualified Written Request, OneWest provided Ms. Bavand a copy of the Promissory Note endorsed in blank. CP 392-393, 430-434. On the top of this copy there appears the statement "CERTIFIED A TRUE COPY". CP 430. The Promissory Note bears the blank endorsement of IndyMac Bank, FSB, signed by a Kimberly A. Woody, Vice President. CP 434. Although a copy of this version of Ms. Bavand's Note "exists in [OneWest's] records," OneWest does not hold this version of the Note.

CP 1944. Rather, OneWest “holds” a version of Ms. Bavand’s Note that is endorsed by another individual: Sam Lindstrom. CP 1944.

Ms. Bavand requested her attorney make an inquiry regarding the significance of the “Certified True Copy” language. In response, a letter was sent from Kemper Escrow Services, Inc.’s Records Custodian on December 12, 2011. CP 436. Ms. Bavand was advised that the copy provided by OneWest was not of the original Note, but rather one of three copies certified by Kemper Escrow and provided to IndyMac after funding of the loan. CP 436.

On or about May 18, 2011 a Notice of Default was mailed to Ms. Bavand by Respondent, NORTHWEST TRUSTEE SERVICE, INC. (hereinafter “NWTS”), as the “authorized agent of the beneficiary” and its “client: OneWest Bank, FSB”. CP 438-445, 1819-1824. Paragraph K of the Notice of Default identified the “owner of the note” and “the loan servicer” as “OneWest Bank, FSB.” CP 441. Critically, the Notice of Default does not identify the “holder” of the obligation or the “beneficiary”. The Notice of Default goes on to allege that the purported “beneficiary”, has declared Ms. Bavand to be in default of the subject Note and Deed of Trust as of September 1, 2010. CP 440.

Ms. Bavand and her husband were not convinced that OneWest was the true and lawful holder of her Note and Deed of Trust as alleged in the Notice of Default of May 18, 2011. Upon further investigation, Ms. Bavand learned on December 15, 2011, in a print-out obtained from the Freddie Mac website<sup>1</sup>, that Freddie Mac asserted ownership of her Promissory Note and Deed of Trust, and that OneWest was merely the servicer on behalf of an unknown principal, that may or may not be Freddie Mac. CP 447-448. This information was later confirmed by Respondents. CP 717, pg. 24, line 1, to pg. 25, line 1. However, no evidence of a transfer of the loan from IndyMac to any other person or entity, including Freddie Mac, has ever been produced.

On June 7, 2011, David Rodriguez, as an “Assistant Secretary” for MERS, executed, without consideration, an Assignment of Deed of Trust, in favor of OneWest without identifying MERS’ principal or the source of its authority for acting. CP 456, 1831. Through discovery, Ms. Bavand learned that David Rodriguez and Aleghse M. Lucas, the notary, were both employees of OneWest. CP 724, pg. 52, lines 16-25; pg. 53, lines 1-11.

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<sup>1</sup> Located at [http://www.freddie.mac.com/corporate/fm\\_owned.html](http://www.freddie.mac.com/corporate/fm_owned.html)

On July 27, 2011, OneWest, as purported “beneficiary” of the Deed of Trust, executed an Appointment of Successor Trustee, appointing NWTS as successor trustee. CP 458, 1833. Based upon information adduced to date, OneWest was never the owner of the loan at any time relevant to this cause of action. The only thing OneWest may have acquired from IndyMac and the FDIC were the “servicing rights” to the loan, acting on behalf of an unknown principal. CP 715, pg. 14, lines 17-25 to pg. 15, lines 1-8. Freddie Mac was the alleged “investor” of the loan as of at least March 19, 2009, although the precise date ownership commenced was never established on summary judgment. CP 717, pgs. 24, lines 1-25 to pg. 25, line 1. No evidence of a transfer of the loan from IndyMac to any other person or entity has ever been produced or presented on summary judgment.

On September 9, 2011, Vonnie McElligott of NWTS executed a Notice of Trustee’s Sale as Assistant Vice President, setting a trustee sale for December 16, 2011. CP 460, 1835-1838. This document alleges that the “beneficiary” has declared a default, but does not identify the owner or beneficiary of the obligation. On the same date, NWTS sent a Notice of Foreclosure pursuant to *RCW 61.24.040*, that fails to identify the owner

of the loan in disregard for the statutorily mandated language.<sup>2</sup> CP 1839-1841.

The Notice of Trustee's Sale was issued on the basis of a Beneficiary Declaration, purportedly executed by OneWest. CP 1829. This Beneficiary Declaration fails to provide the date upon which the document was executed, ambiguously representing it was signed on the "8<sup>th</sup> day of June, 20\_\_\_\_\_." CP 1829. Moreover, there was testimony that suggested the person who signed the Beneficiary Declaration may not have worked for OneWest prior to August of 2011. CP 726, pgs. 61, lines 24, to pg. 61, line 6; CP 1007-1008.

In a letter dated December 15, 2011, Ms. Bavand's attorney advised NWTS that the version of the Note produced by OneWest was merely an endorsed copy of an original and not a copy of the endorsed original Promissory Note. CP 450-451, CP 2215-2216. In response, Northwest Trustee's counsel, Sakae S. Sakai of the law firm of Routh Crabtree Olsen, PS (sharing common owners with NWTS) responded, claiming that all of the evidence supports NWTS' conclusion that the

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<sup>2</sup> *RCW 61.24.040(2)* states that the Notice of Foreclosure should state in substantially the following form: "The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . . , the Beneficiary of your Deed of Trust and owner of the obligation secured thereby." While the Notice sent by Northwest Trustee states "The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to the Beneficiary of your Deed of Trust." the failure to identify owner in compliance with the statutory mandate has never been explained by NWTS.

“holder” of the Note is OneWest, completely ignoring the possible existence of at least two separately endorsed and apparently negotiable versions of Ms. Bavand’s Note, discussed at length below, or the source of OneWest’s authority to act on behalf of Freddie Mac. CP 453-454. OneWest and NWTS failed to reveal that the version of the Note they actually believed to be the “original” and the one in OneWest’s possession was one endorsed by another individual than the one it provided Ms. Bavand in response to her QWR. CP 1944. NWTS refused to discontinue its sale of the property, then set for December 16, 2011.

On December 16, 2011, NWTS postponed the scheduled trustee’s sale to December 30, 2011. CP 1847. However, there is no evidence that NWTS investigated or verified the information represented in the Beneficiary Declaration or otherwise addressed Ms. Bavand’s concerns regarding OneWest’s claim to be the holder of the obligation, the whereabouts and identity of the holder of the second duly endorsed note or OneWest’s right and authority to foreclose the obligation.

On December 22, 2011, Ms. Bavand filed suit seeking declaratory and injunctive relief under claims for “wrongful foreclosure” under the DTA and damages for injury for violation of the CPA, damages for violation of the FDCPA, and Quiet Title. CP 2134-2228.

On February 14, 2012 Respondents filed a Notice of Removal, pursuant to 28 USC § 1332, 1441, and 1446. CP 1998-2000. The matter was assigned to the Honorable James Robart of the U.S. District Court for the Western District of Washington.

On December 13, 2012, OneWest submitted responses to Ms. Bavand's discovery requests. CP 311-325. Included in the documentation produced by OneWest was a different version of Ms. Bavand's Note than had previously been revealed.<sup>3</sup> Please compare CP 430-434 and 462-466. One version of Ms. Bavand's Promissory Note bears the blank endorsement of IndyMac Bank, FSB, signed by Kimberly Woody and the other is signed by a Sam Lindstrom, Vice President. Although OneWest claims to "hold" the version of the Note endorsed by Mr. Lindstrom, this version of the Note is actually in the possession of "Deutsche Bank, acting as custodian." CP 1944. At this point, there appeared to be at least two separately negotiable copies of Ms. Bavand's Note in circulation that could possibly expose Ms. Bavand to liability and obligate her to pay sums in excess of what she agreed to pay on August

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<sup>3</sup> Until this point in time, the only endorsed version of her Note was the one provided in response to Ms. Bavand's QWR, endorsed by Ms. Woody. In his Declaration of February 12, 2013, Mr. Charles Boyle ambiguously states that "another copy of the Note exists in our records . . . and bears an indorsement stamp on the last page signed by 'Kimberly A. Woody' of IndyMac Bank, FSB." CP 1944. At no time relevant to this cause of action has OneWest declared they hold this version of the Note.

13, 2007. There was no evidence provided the trial court as to who actually held the version of the Note endorsed by Ms. Woody.

On March 25, 2013, following briefing and argument, Judge Robart issued an order dismissing all of Ms. Bavand's claims save a claim under the CPA, for which he found there to be outstanding issues of material fact, and ordered the CPA claim remanded to state court for further hearing. CP 1589-1597. Judge Robart's Order was affirmed by the 9<sup>th</sup> Cir. Court of Appeals on October 20, 2014. CP 1742-1747

On June 2, 2015, NWTS and OneWest filed a Motion for Summary Judgment, pursuant to *CR 56*. CP 1853-1868.

On July 2, 2015, OneWest filed a Motion for Summary Judgment, pursuant to *CR 56*. CP 1658-1681.

On August 4, 2015, Ms. Bavand moved to continue the hearing on summary judgment, pursuant to *CR 56(f)*. CP 149-156.

Respondents' Motions for Summary Judgment were heard on September 24, 2015. The matter was argued and taken under advisement.

On November 20, 2015, the trial court granted Respondents' Motions for Summary Judgment. CP 13-19. Significantly excluded from the trial court's order are Ms. Bavand's CPA claims related to Respondents' FDCPA violations.

On December 3, 2015, Ms. Bavand timely filed her Notice of Appeal of the trial court's Order Granting Summary Judgment. CP 1-11.

### **III. ARGUMENT.**

#### **A. Standard of Review.**

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004); *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002); *Lyons v. U.S. Bank*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014) (hereinafter "*Lyons*"); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). Indeed, the non-moving party's factual allegations must be presumed to be true and all reasonable inferences from those allegations must be considered in favor of the non-moving party. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). Even hypothetical facts may be considered to determine if the trial court's dismissal of the non-moving party's claims was proper. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 296 P.3d 860 (2013).

Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Schroeder*; *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *O.S.T. v. Regence Blue Shield*, 181 Wn.2d 691, 703, 335 P.3d 416 (2014); *Bavand*, at pg. 485. As noted in *Atherton Condo. App.-Owners Ass'n Bd. Of Dirs. V. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), “a material fact is one upon which the outcome of the litigation depends in whole or in part.” Although summary judgment is intended to avoid a useless trial, “a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.” *Barber v. Bankers Life and Casualty Co.*, 81 Wn.2d 140, 144, 500 P.2d 88 (1972).

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56*. Sworn statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App.

252, 11 P.3d 883 (2000); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997).

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

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

In its *de novo* review, this Court is obliged to ignore the trial court's "findings". It is well established law in Washington that a trial court's findings of fact are superfluous in summary judgement proceedings, particularly when the facts were disputed at hearing. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 405 P.2d 585 (1965); *Washington*

*Optometric Assoc. v. Pierce Co.*, 73 Wn.2d 445, 438 P.2d 861 (1968); *Sinclair v. Betlach*, 1 Wn.App. 1033, 467 P.2d 344 (1970); *Fite v. Lee*, 11 Wn.App. 21, 521 P.2d 964 (1974).

Based upon the discussion below and the arguments raised in Ms. Bavand's Memorandum in Opposition to Summary Judgment (CP 160-209), incorporated herein by this reference, there were genuine issues of material fact before the trial court that were summarily ignored. The remedy is reversal.

**B. Strict Compliance with DTA Required.**

The Washington Supreme Court has often stated that the DTA must be strictly construed in the borrower's favor. *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter "*Albice*") (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007) (hereinafter "*Udall*")); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012) (hereinafter "*Bain*"); *Schroeder*, at pg. 105. See also *In re Fritz*, 225 B.R. 218 (E.D. Wash. 1997); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988); *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 306, 308 P.3d 716 (2013) (hereinafter "*Walker*"); *Bavand*, at pgs. 485-486. This standard leaves no

room for excuse of “mere technical violations.” Substantial compliance with the statutory provisions of the DTA is not enough.

The purpose to the DTA has most recently been articulated in *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 428-429, 334 P.3d 529 (2014):

The purposes of the DTA generally are well established: " 'First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.'" *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 181 Wn.2d 429 P.2d 683 (1985)).

Strict compliance with the provisions of the DTA and construction of the statute in favor of the borrower is necessary and justified because “of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.” *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013) (hereinafter “*Klem*”) (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007)).

Applying the foregoing to the facts that were before the trial court at hearing, the trial court erred in granting summary judgment.

C. **The trial court's Reliance on Declarations of Boyle, Blake and Flannigan was Misplaced.**

The trial court specifically relied on the Declarations of Brian Blake (CP 1640-1657), Kevin Flannigan (CP 1634-1639) and Charles Boyle (CP 1942-1946). However, the trial court's reliance on these Declarations was misplaced.

Each declarant claims to “personally reviewed” the records maintained and has “personal knowledge” of the facts they related to the trial court. However, each declarant failed to demonstrate sufficient personal and testimonial knowledge of the facts offered the trial court beyond conclusory statements and statements based exclusively on hearsay. *ER 801, ER 802, CR 56(e)*. Under *CR 56(e)*, conclusory statements or “mere averment” that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *Blomster v. Nordstrom, Inc., supra.*; Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4<sup>th</sup> Cir. 1972).

Significantly, none of the declarants specifically identify the documents they reviewed, ambiguously referring to the records as “business records” of their respective firms. However, these “business records” necessarily include records of third parties. Mr. Flannigan, an employee of the current servicer of the loan, states that “Ocwen's records

for this Loan include the business records of OneWest Bank.” Mr. Blake bases his testimony entirely upon records submitted by MERS members, including the FDIC, IndyMac, OneWest and Ocwen, among others. Mr. Boyle, an employee of OneWest, states that he relies on OneWest’s “business records” that include “data compilations, electronically imaged documents, and others”. At no time did these declarants reveal what records they were referring to, who created them or explain why those third party records should be relied upon.

While reviewing courts interpret the terms “custodian” and “other qualified witness” broadly, none of these declarants’ testimony meet the requirements of *RCW 5.45.020*. See *State v. Quincy*, 122 Wn.App. 395, 95 P.2d 353 (2004). Specifically, most of the records relied upon by these declarants were necessarily obtained from third-party sources for information generated prior to March 19, 2009. These third party sources include Freddie Mac (the alleged owner of the obligation as of March 19, 2009), Deutsche Bank (the apparent custodian of the alleged original Note and Deed of Trust) the Office of Thrift Supervision (the federal entity that placed IndyMac Bank into conservatorship) and the FDIC (the federal entity that oversaw the transfer of IndyMac Bank’s asserts, presumably the subject Note and Deed of Trust). Such third party records must be

separately authenticated by the third party who compiled the records to meet the business records exception to the hearsay rule and the requirement that such testimony must be based on personal knowledge from the third party's records custodian that satisfies each of the elements of RCW 5.45.020. *State v. Weeks*, 70 Wn.2d 951, 953, 425 P.2d 885 (1967) (affirming trial court's decision that out-of-state hospital record proffered by physician was inadmissible hearsay and business records exception to hearsay rule was not established because "[t]here was no evidence by the custodian of records of the Arkansas hospital or by any other qualified person that the document in question was a business record"); *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 631 & n. 9, 218 P.3d 621 (2009) (reversing summary judgment entered in favor of debt collector, and identifying as one of the issues for determination on remand whether "Sharp's affidavit [submitted by debt collector in support of summary judgment] presented only inadmissible hearsay" and met business records exception to hearsay rule, given the "lack of an explanation for how Sharp's status as a Midland employee provide[d] her with personal knowledge of her assertions regarding MRC, Zion's account with Providian, and how MRC came to own it"). Absent a proper

foundation, the testimony of Mr. Flannigan, Mr. Blake and Mr. Boyle must be stricken and disregarded by this Court on summary judgment.

Neither Mr. Flannigan, Mr. Blake nor Mr. Boyle provided the trial court, or this Court on *de novo* review, facts that would establish (1) how the documents they refer to are maintained, whether in hard copy or electronic; (2) if the records are maintained by electronic means, whether the computer document retrieval equipment used is standard; (3) the original source of the materials maintained; (4) the identity of person who compiled the information contained in the files or computer printouts; (5) when, aside from the conclusory statements that they were made “at or near the time of the happening or event”, the records or the entries were made and (6) and how the employer of each declarant relies on these records. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Without this information, there is no assurance that the information offered by these declarants is reliable without verification by the entity the provided the information as to the means by which the information was created and maintained. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982). There were simply no facts offered that justified the trial court’s reliance on the information provided by these declarants.

This sort of careless and conclusory testimony by mortgage lenders and loan servicers has been roundly criticized by other trial courts in Washington. In *McDonald v. OneWest*, 929 F. Supp. 2d 1079 (2013) (hereinafter “*McDonald*”), Judge Robert Lasnik was offered testimony by Mr. Boyle and other representatives of loan servicers on summary judgment like that offered by Mr. Flannigan, Mr. Blake and Mr. Boyle here. In *McDonald*, Judge Lasnik observed:

The testimony of Mr. Boyle and Mr. Corcoran confirmed what this Court has long suspected: defendants have not taken their obligations as litigants in federal court seriously enough. *Rather than obtain declarations from individuals with personal knowledge of the facts asserted or locate the source documents underlying its computer records, defendants chose to offer up what can only be described as a "Rule 30(b)(6) declarant" who regurgitated information provided by other sources.* Rule 30(b)(6) is a rule that applies to depositions in which an opposing party is given the opportunity to question a corporate entity and bind it for purposes of the litigation. *A declaration, on the other hand, is not offered as the testimony of the corporation, but rather reflects – or is supposed to reflect – the personal knowledge of the declarant.*

Not surprisingly given the fact that his counsel apparently did not understand the difference between a declaration based on personal knowledge and a Rule 30(b)(6) deposition, Mr. Boyle's declarations consist of sweeping statements, a few of which may be within his ken and admissible, but most of which are assuredly hearsay. When he was asked to sign a declaration in this case, he thought he was responding on behalf of OneWest and therefore felt justified in questioning co-workers, running computer searches, and reviewing other sources before reporting their statements as his own. Nothing in his declarations would alert the reader to the fact that Mr. Boyle was simply repeating what he had heard or read from undisclosed and untested sources. When his statements

turned out to be untrue, Mr. Boyle conveniently blames inaccuracies in the underlying documentation, computer input errors, or faulty reporting. Had defendants made the effort to produce admissible evidence in the first place, these errors may have been uncovered and avoided before they could taint the discovery process in this case.

*McDonald*, 929 F. Supp. at 1090-1091, emphasis added. The same criticisms can be lodged against the testimony of Mr. Flannigan, Mr. Bolye, and Mr. Blake in all forms offered to the trial court.

Absent a proper foundation, the testimony of Mr. Flannigan, Mr. Blake and Mr. Boyle constitutes rank hearsay and should not have been considered or given any weight by the trial court and should not be given any consideration or weight by this Court on *de novo* review. See *ER 803(a)(6)* and *RCW 5.45.020*.

**D. The trial court erred in striking the Declaration of Marisa Bavand.**

The trial court erred in striking the testimony of Ms. Bavand on the basis that her Declaration (CP 157-159) contradicted her previous testimony. The trial court's conclusion was not properly before the trial court, was not supported by Washington law and was factually erroneous.

OneWest raised the issue of striking Ms. Bavand's Declaration in its reply brief – effectively denying Ms. Bavand the opportunity to respond to this new allegation. OneWest's request was premised on a

faulty understanding of law and the resultant grant of summary judgment based on a misreading of *Marshall v. AC & S Inc.* 56 Wash. App. 181, 185, 782 P.2d 1107, 1109 (1989) (hereinafter “*Marshall*”). *Marshall* stands for the proposition that [w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” That is simply not the case here. Ms. Bavand did not give clear or unambiguous answers relating to the subject property and the damages sustained therefrom. Rather she repeatedly answered that she did not know or that her husband was the manager of the property and that he would know.<sup>4</sup> That deposition took place on January 28, 2013.

While Ms. Bavand did not personally know the facts at issue at the time of the deposition on January 28, 2013, her husband did. See CP 1004-1005, 1058-1063, 1089-1095. Indeed at the time Ms. Bavand filed her Declaration on August 2, 2015, over two and a half years had elapsed. She had ample opportunity to discuss this matter with her husband and

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<sup>4</sup> See e.g. CP 1769, pgs. 27-28; CP 1770, pgs. 95-96; CP 1585, pgs. 107-108; CP 1586, pg. 127; CP 1771, pgs. 137-139; CP 1773, pg. 157; CP 1774, pgs. 185-186.

with counsel. Ms. Bavand may not have known for certain the facts in her deposition in January 2013, but in the intervening two and a half years she has become more than familiar with those details. Ms. Bavand is unaware of any law or doctrine that prevents a party from supplementing her early discovery answers with new or supplemental information subsequently learned. Indeed litigants generally have a duty to supplement their discovery responses. See *CR 26(e)(2)*.

In any event, the time at which Ms. Bavand developed actual personal knowledge is irrelevant. Under well-established law, notice to an agent is notice to the principal. *Cont'l Ins. Co. v. PACCAR, Inc.*, 96 Wash. 2d 160, 170, 634 P.2d 291, 296 (1981). That rule applies when spouses act as each other's agents. *Chase v. Beard*, 55 Wash. 2d 58, 64, 346 P.2d 315, 319 (1959), overruled on other grounds by *Brown v. Brown*, 100 Wash. 2d 729, 675 P.2d 1207 (1984). Further agency can be established by implication. *Barker v. Skagit Speedway, Inc.*, 119 Wash. App. 807, 814, 82 P.3d 244, 248 (2003). It is clear, here, that Ms. Bavand's husband was acting as her agent for the purposes of the subject property, and, as such, his knowledge is imputed to her.

Accordingly, Ms. Bavand's Declaration of August 2, 2015 should not have been stricken by the trial court and the trial court's error and

failure to consider this testimony regarding Ms. Bavand's injuries and damages can only be cured by reversal and remand for further hearing.

**E. Violation of the DTA.**

The DTA essentially regulates trustees and non-judicial foreclosures. However, the lenders or holders of the notes and deeds of trust have significant duties and responsibilities. Under the DTA, only the duly authorized "beneficiary" has the right to declare a default, under *RCW 61.24.030*, or appoint a successor trustee, under *RCW 61.24.010*.

*RCW 61.24.005(2)* defines the term "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." As the Supreme Court in *Bain* notes, the definition of "noteholder" has remained unchanged since the definitions were added to the DTA in 1998, and is consistent with certain portions of Article 3 of the UCC, as adopted by the Washington legislature.<sup>5</sup> *Bain*, at pgs. 103-104. Article 3 holds that the person entitled to enforce (PETE) the terms of a promissory note is the holder, a non-holder in possession, or transferee who obtains the right to enforce directly from the holder. *RCW 62A.3-203*. However, the DTA does not use the all of the Article 3 language regarding

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<sup>5</sup> This is not to suggest the Article 9 of the UCC does not come into play when analyzing a secured transaction, such as the one now before the Court.

who may enforce. The DTA only refers to “the holder of the note or other obligation.” *RCW 61.24.005(2)*. Significantly, there is nothing in the DTA that would allow a non-holder, who might otherwise be able to enforce the terms of a note through other means under Article 3, to enforce the terms of the note through the initiation of a non-judicial foreclosure. *RCW 61.24.005(2)*. Rather, it appears the legislature has specifically limited who may initiate a non-judicial foreclosure under the DTA and, until 2009, that was solely and exclusively the note-holder. *RCW 61.24.005(2)*. See *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015) (hereinafter “*Brown*”).

In 2009, the legislature amended the DTA to require that certain sensitive actions in the foreclosure process be only undertaken by the “owner” of the note. See *RCW 61.24.030(7)(a)* and *(b)*, *RCW 61.24.030(8)(l)* and *RCW 61.24.163(5)(c)*. Drawing on these changes in the DTA, the *Bain* court specifically held that “if the original lender had sold the loan, the purchaser (Freddie Mac in this case) would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.” *Bain*, at pg. 111. The *Bain* court’s emphasis was on the ownership of the obligation and saw the right to hold the note as an incident of ownership.

However, the Supreme Court in *Brown*, finding the DTA hopelessly ambiguous as to the role of ownership in the enforcement of notes and deeds of trust, has ruled that a mere person entitled to enforce (or PETE) has the right to foreclose. *Brown*, at pgs. 514, 540. This is not to say that successor trustees can ignore the provisions of the DTA. *Brown*, at pgs. 541-544; See also *Lyons*; *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) (hereinafter “*Frias*”); *Trujillo v. NWTS*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter “*Trujillo II*”).

Specifically, *RCW 61.24.030(7)(a)*, which provides as follows:

It shall be requisite to a trustee's sale:

\* \* \*

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

(Emphasis added).

While a successor trustee can rely upon on a beneficiary declaration submitted pursuant to *RCW 61.24.030(7)(a)*, it can only do so if that reliance would not adversely affect the successor trustee’s duty of good faith. *RCW 61.24.030(7)(b)*. *Lyons* and *Trujillo II*. The Supreme

Court has held that acceptance and reliance on an ambiguous declaration violates the trustee's duty of good faith under *RCW 61.24.010(4)*. See *Lyons and Trujillo II*.

Turning to the facts of the present case, the Beneficiary Declaration (CP 1829) relied upon by NWTS to prepare, record and post its Notice of Trustee's Sale was ambiguous in several regards.

First, the date of the Beneficiary Declaration was incomplete, ambiguously representing it was signed on the "8<sup>th</sup> day of June, 20\_\_\_\_\_." CP 1829. Was the Beneficiary Declaration signed in 2008, after the loan closed, or was it signed in 2011 when NWTS initiated foreclosure? Or, was the Beneficiary Declaration signed at some later time, such as during the foreclosure process or the litigation?

The beneficiary declaration is not a superfluous document. The purpose of the beneficiary declaration is to assure that the purported beneficiary has the right to foreclose, imposing on the trustee a duty to conduct at least a "cursory investigation" to avoid wrongful foreclosure. *Lyons*, at pg. 787. *Walker*, at pgs. 309-310. Under *Lyons*, a trustee violates his or her duty of good faith under *RCW 61.24.010(4)* if they accept and rely upon a beneficiary declaration that is ambiguous or defective. *Lyons*, at pgs. 787-791. Here, NWTS acknowledged that the

subject Beneficiary Declaration was defective and should have been further investigated the document and verified its contents before issuing the subject Notice of Trustee's Sale.<sup>6</sup> However, during this time period, NWTS had no procedures in place to verify any of the information it received from clients like OneWest. CP 1399, line 21 to 1400, line 2; CP 1401, line 13 to 1402, line 5; CP 1414, line 7 to 1415, line 1; CP 1436, line 18 to CP 1437, line 8. See also *In re Meyer*, 506 B.R. 533 (2014) (hereinafter "*In re Meyer*").

Second, there was testimony that suggested the person who signed the Beneficiary Declaration may not have worked for OneWest prior to August of 2011. CP 726, pg. 61, lines 24, to pg. 61, line 6; CP 1007-1008. There was no testimony adduced at summary judgment that NWTS investigated the authority of the signatory of the Beneficiary Declaration.

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<sup>6</sup> Q. . . . Based upon a review of this document (the Beneficiary Declaration) it is impossible to determine from the perspective of Northwest Trustee that OneWest FSB was the holder of the note at the time that you issued a Notice of Trustee Sale initially in that matter?

\* \* \*

A. I don't know because we don't just issue it based off of a singular piece of information like this. I guess we would have looked at when we asked for it, when we received it. I would say we probably should have questioned the lack of the year in the document.

Deposition of Stenman of January 30, 2013.

Finally, and perhaps more importantly, the subject Beneficiary Declaration clearly states that “OneWest Bank, FSB is the holder of the promissory note,” implying there to be only one note. CP 1829. But testimony at time of trial established that there were two notes endorsed in blank by two different individuals. Compare CP 430-434 with CP 462-466. Only one of these two versions of Ms. Bavand’s Note, the one bearing the endorsement of Sam Lindstrom (CP 462-466), was held by any Respondent named herein. CP 1944. There was no evidence as to who held the version of Ms. Bavand’s Note bearing the endorsement of Kimberly Woody. CP 430-434.

At hearing, Respondents argued that the version of the Note endorsed by Ms. Woody was merely a copy. But this explanation makes no sense. Why would a mere copy of Ms. Bavand’s Note bear a blank endorsement of a different individual than the endorser of what Respondents claimed to be the “original”? And, why would a mere copy of any note be endorsed in the first place, if there was no intent to pass the document off as an original? These material issues of fact were never addressed by the Respondents or the trial court on summary judgment or otherwise resolved.

It is significant to note that the first version of the subject Note provided Ms. Bavand in 2011 in response to her QWR was the version endorsed by Kimberly Woody. CP 392-393. This same version was provided in response to discovery requests to NWTs. CP 393. Why would Respondents offer the version of Ms. Bavand's Note endorsed by Kimberly Woody instead of the version of the Note endorsed by Mr. Lindstrom they claim to be a copy of the original? The version of Ms. Bavand's Note endorsed by Mr. Lindstrom was not produced until December 12, 2012, a year after the version endorsed by Kimberly Woody was offered. CP 396. Why? Was it because the version of the Note endorsed by Mr. Lindstrom did not exist or was not in OneWest's possession in September of 2011 when NWTs issued its Notice of Trustee's Sale? Certainly, the original of the Note was never produced for inspection. Again, these material issues of fact and inference therefrom were never addressed by the Respondents or the trial court on summary judgment or otherwise resolved.

On December 15, 2011, NWTs was presented with a copy of Ms. Bavand's Note, endorsed by Kimberly Woody and apparently negotiable, which materially differed from the version its client, OneWest, purported to be the original. CP 2215-2219. NWTs made no attempt to investigate

and verify why two versions of the Note were endorsed by two different individuals and whether OneWest had possession of both versions of Ms. Bavand's Note, or, if not, who had possession of the version of the Note endorsed by Ms. Woody. Despite the issues that should have been raised by Ms. Bavand's correspondence of December 15, 2011, NWTS refused to discontinue its trustee's sale, which was reset from December 16, 2011 to December 30, 2011, forcing Ms. Bavand to initiate this action to protect her rights in her property.

What is abundantly clear is that there are two negotiable versions of Ms. Bavand's Note and only one is alleged to be in the possession of OneWest. Accordingly, the representation made in the Beneficiary Declaration regarding OneWest's possession, as holder, of "the promissory note" was at best ambiguous, or, at worst, false. Furthermore, this "ambiguity" was known to NWTS, which did not investigate or verify the information it had, in violation of NWTS' duty of good faith to Ms. Bavand under *RCW 61.24.010(4)*.

**F. Violation of the CPA.**

While damages for pre-sale violations of the DTA are not recoverable, a CPA claim may be maintained regardless of the status of the property. *Frias*, at pg. 417, *Lyons*, at pg. 784; *Trujillo II*, at pgs. 834-835.

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986), *Frias, Lyons, Walker and Bavand*. The CPA should be “liberally construed that its beneficial purposes may be served.” *RCW 19.86.920*; *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984). In *Lyons*, the court held that when a CPA claim is predicated on an alleged violation of the DTA, a question of fact is automatically created if the issue is disputed. *Lyons*, at pgs. 786-787. Here, each element of the CPA claim were in dispute.

**i. Unfair and Deceptive Acts.**

The *Bain* court specifically ruled that the unfair and deceptive act or practice element can be presumed based upon MERS’ business model and the manner in which it has been used.<sup>7</sup> *Bain* at pgs. 115-117; *Klem*, at pgs. 784-788; *Walker*, at pgs. 318-319 and *Bavand*, at pgs. 504-506. The acts need not be made with an intent to deceive, merely that the acts in

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<sup>7</sup> This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (hereinafter “*Panag*”) (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem*.

question have the capacity to deceive a substantial portion of the public. *Panag*. Indeed, the improper assignment of the obligation by MERS and appointment of NWTS based upon that assignment, among other violations of the DTA alleged herein, constitute unfair and deceptive acts or practices. *Walker*, at pgs. 319-320, and *Bavand*, at pgs. 505. CP 456 and CP 458.

Moreover, the creation for two separate versions of Ms. Bavand's Note with endorsements from two different individuals that could be separately negotiated is also a deceptive act and practice. Please compare CP 430-434 with CP 462-466. It is clear that the two versions of the Note presented to Ms. Bavand at deposition were different and both represent the original to anyone looking at them, conceivably exposing Ms. Bavand to twice the liability she bargained for on August 13, 2007.

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pgs. 115-120. MERS' execution of its Assignment of Note and Deed of Trust as an ineligible beneficiary constituted an unfair and deceptive act in that it prepared, executed and filed for record a document that it had no authority or right to prepare, execute or file. CP 456. *Bain*. Certainly, the source of MERS' apparent authority has not been offered by Respondents,

if it exists at all (the Supreme Court's *obiter dicta* in *Brown*, notwithstanding). Certainly, the extent of MERS' authority was a genuine issue of material fact in dispute on summary judgment. But for this Assignment, Respondents could not have initiated and prosecuted a non-judicial foreclosure of Ms. Bavand's home.

OneWest's execution of the Appointment of Successor Trustee also constituted an unfair and deceptive act in that OneWest had no authority to prepare and execute the document as it was not the actual holder of the obligation (beneficiary), within the terms of *RCW 61.24.010*, given the existence of two separate potentially negotiable Notes. CP 458. Certainly, the extent of OneWest's authority was a genuine issue of material fact in dispute on summary judgment. But for this Appointment, Respondents could not have initiated and prosecuted a non-judicial foreclosure of Ms. Bavand's home.

The *Lyons* court held that a trustee's failure to act impartially, in violation of its fiduciary duty of good faith under *RCW 61.24.010(4)* as NWTS did here, is actionable under the CPA as an unfair and deceptive act or practice. *Lyons*, at pgs. 788-789. See also *Trujillo II*. Specifically, NWTS' failure to verify the alleged "holder's" or "beneficiary's" right to foreclose constitutes an unfair and deceptive act and practice. See *Lyons*,

at pgs. 786-787. Here, notwithstanding serious doubts regarding whether any named Respondent had standing as the actual holder of the subject obligation to initiate a non-judicial foreclosure against Ms. Bavand, and the lawfulness of OneWest's appointment of NWTS as successor trustee, NWTS engaged in an unethical process of unreasonably relying upon documents it knew or should have known to be false, deceptive and misleading. Certainly, Ms. Bavand's counsel's December 15, 2011 correspondence (CP 2215-2216) revealing the existence of two separately endorsed and arguably negotiable versions of her Note should have prompted NWTS to engage in an investigation of OneWest's right to foreclose. But, NWTS failed to make any inquiry to investigate and verify OneWest's claims. By failing to verify any of the records it was provided by Respondent through LPS to initiate a non-judicial foreclosure; relying on an Assignment of Deed of Trust (CP 456) executed by an ineligible "beneficiary"; relying on an Appointment of Successor Trustee (CP 458) executed by an entity that was merely a servicer without verifying its authority and otherwise failing to verify the ownership of the obligation; and issuing its Notice of Default (CP 439-445) and Notice of Foreclosure (CP 1839-1841) misrepresenting the ownership of Ms. Bavand's Note and Deed of Trust, NWTS breached the "fiduciary duty of good faith" by

attempting to prosecute a non-judicial foreclosure of Ms. Bavand's home without strictly complying with all requisites of sale. This misconduct constitutes unfair and deceptive acts and practices. *Lyons*, at pgs. 786-787. *Trujillo II*. The extent of NWTs' failure to act in good faith was a material issue of fact in dispute on summary judgment.

**ii. Affecting the public interest.**

As noted in *Trujillo II*, pgs. 835-836:

To satisfy the second and third elements of her CPA claim--that NWTs's acts occurred in trade or commerce and that they affected the public interest--Trujillo alleges, " Wells [Fargo] makes these unfounded claims to foreclose on defaulting borrowers as a routine part of its foreclosure activities on behalf of Fannie Mae. Its foreclosure activities are conducted in the course of trade and commerce and certainly impact the public interest." CP at 93. In a private action, a plaintiff can establish that the lawsuit would serve the public interest by showing a likelihood that other plaintiffs have been or will be injured in the same fashion. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (quoting *Hangman Ridge*, 105 Wn.2d at 790). The court considers four factors to assess the public interest element when a complaint involves a private dispute: (1) whether the defendant committed the alleged acts in the course of his/her business, (2) whether the defendant advertised to the public in general, (3) whether the defendant actively solicited this particular plaintiff, and (4) whether the plaintiff and defendant have unequal bargaining positions. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 791). The plaintiff need not establish all of these factors, and none is dispositive. *Id.* Trujillo's allegations satisfy the second and third elements because they relate to the sale of property, RCW 19.86.010(2), and they state that other plaintiffs have or will likely

suffer injury in the same fashion. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 790). (Emphasis added).

Moreover, as noted in *Panag*, “the business of debt collection affects the public interest.” *Panag*, at pg. 54.

Like the facts of *Trujillo II*, Ms. Bavand’s claims “relate to the sale of property.” *RCW 19.86.010(2)*. Moreover, the conduct complained of here has actually occurred numerous times before. CP 1543-1571.

At hearing, it was undisputed that this element of a CPA claim had been established by Ms. Bavand.

**iii. Damages and Causation.**

As noted in *Frias*, at pg. 417, since “the CPA addresses ‘injuries’ rather than ‘damages,’ quantifiable monetary loss is not required” in a CPA claim for violation of the DTA, citing *Panag*, at pg. 58. *Frias*, at pg. 431. Comparing a DTA claim to an unlawful debt collection action, the *Frias* court noted: “[a] CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. [citing *Panag* at 55-56, & n. 13.] Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. . . . The injury element can be met even where the injury alleged is both minimal and temporary.” *Frias*, at

pg. 431. Accordingly, Ms. Bavand can establish a claim for injury and damage for Respondents' violations of the DTA, even without challenging the existence or extent of the underlying debt. Such claims could include threatened loss of title, impact on credit and legal fees. *Frias*, at pg. 432.

At hearing, Respondents argued that Ms. Bavand had not been damaged because she has enjoyed the subject property without making payment,<sup>8</sup> and has voluntarily refused to make payment and is, therefore, responsible for her own damages. However, as noted in *Panag*, pgs. 55-56: "a person's blameworthiness . . . is not relevant in deciding whether a collection practice is unfair or deceptive: the focus is on the conduct of the collection agency, not the alleged debtor." See also *Frias*. Accordingly, the fact that Ms. Bavand may have missed payments does not diminish or prejudice her claims under the CPA.

In addition to her claims for declaratory relief, injunctive relief and damages, Respondents deceived and prevented Ms. Bavand from meaningfully pursuing her options under the federal Home Affordable Modification Program (HAMP) or the FFA (*RCW 61.24.163*). Specifically, Respondents violated *RCW 61.24.030(8)(1)* by failing to provide contact information for Freddie Mac in the Notice of Default. The

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<sup>8</sup> This argument ignores the fact that Ms. Bavand has made substantial payment into the Court Registry pursuant to the TRO entered herein. See Dkt. 8 and 10.

address and phone number provided in the Notice of Default belongs to OneWest – not Freddie Mac. In fact, Ms. Bavand did not learn of Freddie Mac’s involvement until December 15, 2011, after the Notice of Trustee’s Sale had been recorded and served. (CP 393-394). Accordingly, Ms. Bavand had no meaningful way of contacting the purported owner of her obligation. Had she been given the proper contact information, Ms. Bavand could have pursued Freddie Mac sponsored programs that might have provided them a modification of her loan. Freddie Mac borrowers are eligible for modification of their loan when: “(1) you are ineligible to refinance; (2) you are facing a long-term hardship; (3) you are behind on your mortgage payments or likely to fall behind soon; (4) your loan was originated on or before January 1, 2009 (i.e., the date you closed your loan)’ and (5) your loan is owned by Fannie Mae or Freddie Mac – or is serviced by a participating mortgage company.”<sup>9</sup>

Unfortunately, Ms. Bavand did not become aware of Freddie Mac’s involvement until well after she was allegedly thousands of dollars in arrears, making any modification at that time problematic. Respondents all participated in concealing Freddie Mac’s involvement in Ms. Bavand’s

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<sup>9</sup> <http://www.knowyouroptions.com/modify/home-affordable-modification-program>

loan and colluded in leading Ms. Bavand to believe she did not have options under the federal programs, when, in fact, the opposite was true.

As a direct and proximate result of Respondents' misconduct, Ms. Bavand has been injured and damaged. As Ms. Bavand's husband and property manager describes her injuries and damages, OneWest's prosecution of its foreclosure efforts made it difficult to rent the subject property; when rented, Ms. Bavand accepted less than suitable tenants and lower than market rate rents in view of the potential aggravation of the pending foreclosure, consultation with counsel and increased Ms. Bavand's maintenance costs. CP 1003- 1005, CP 1060-1063; CP 1089-1094. In one instance, Ms. Bavand had to replace locks on the residence after OneWest's agents changed them without notice or authority, at a cost of \$42.00. CP 1089, lines 7-15.

From this testimony and information provided by her husband, Ms. Bavand described her injuries and damages as follows:

4. As a direct and proximate result of Defendants' misconduct, I have suffered injury and damages, as outlined below:

A. \$5,000.00 in loss of rent after tenants moved out when postings began. I was unable to get a tenant into the property of four months. In good conscience, I had to tell prospective tenants (as stated in their lease) the situation with Defendants, the pending lawsuit and Defendants' foreclosure efforts. What tenant would want to be in the middle of someone else's legal mess! As a

result, I lost time and money by not being able to rent the property during a very good landlord market.

B. \$11,000.00 in discounted rent from March, 2012 to the present. The current market rent for the subject property is \$1,500.00 per month. The tenants have negotiated a discount of \$250.00 per month from the normal market rent due to the stress and uncertainty of possibly relocating and dealing with the pending lawsuit and Defendants' foreclosure efforts that include occasional visits by Defendants' agents. The current tenants would only rent the property if the rent was discounted to \$1,250.00 per month.

C. \$442.00 was spent for gas and security while property was vacant.

D. In addition to the foregoing, I expended money to determine who my lender was. To this end, I sent OneWest a Qualified Written Request that it failed to respond to. This expense is recognized in *Bain and Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009). It is my understanding that the statutory penalty for failing to respond to a Qualified Written Request is \$1,000.00, to which I am entitled.

The foregoing is merely a cursory accounting of my damages and injury, which includes damage to my credit and the emotional stress of dealing with the potential loss of my property. Total monetary injuries and damages amount to approximately \$17,442.00 as of this date.

5. Pursuant to the TRO entered herein, my husband and I have deposited approximately \$50,000.00 into the Court Registry. CP

This is certainly specific enough for summary judgment purposes under *Frias*, *Lyons*, *Trujillo II* and *Panag*, where it is the existence of a material issue of fact in dispute that is germane.

Injury to a person's business or property is broadly construed and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem. Lyons*, at pgs. 9, fn 4. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). *Panag*, at pgs. 59-65. Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at pgs. 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association v. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc, v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), and *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one's credit reputation constitutes injury).

Here, Ms. Bavand had to repeatedly take time off from work at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of her Note, prepare and incur

the expense of submitting Qualified Written Requests to address Respondents' misconduct. CP 1093-1094. Such damages have been found to be compensable under Washington law. See *Lyons* and *In re Meyer*.

All of the injuries and damages alleged by Ms. Bavand were the direct and proximate cause of Respondents' misconduct, including NWTS, OneWest and MERS, and viewing the evidence in a light most favorable to the non-moving party, all five elements for a private cause of action under the CPA have been met. Accordingly, the trial court erred in dismissing Ms. Bavand's CPA claims, which can only be remedied by reversal and remand.

**G. Application of CR 56(f).**

*CR 56(f)* provides as follows:

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

On August 4, 2015, Ms. Bavand filed a Motion to Continue (CP 149-156), seeking additional time to conduct *CR 30(b)(6)* depositions to obtain the following information:

A. The identity of each and every owner of the Note and Deed of Trust from signing until the present. With regard to each owner identified:

a. The date such party acquired ownership of the Note and Deed of Trust.

b. The amount of consideration paid for the Note and Deed of Trust by each owner so identified.

c. The form of the consideration paid.

d. The date upon which the consideration was paid.

e. The source of funds paid for ownership of the subject Note and Deed of Trust.

f. The identity of each and every agent retained by each owner identified and the terms of said agency relationship.

B. Production of any and all document(s) related to the purchase and sale and/or assignment and/or transfer of the subject Note and Deed of Trust by each of the owners identified above, including, without limitation, evidence of the date, form and source of funds used to purchase the subject Note and Deed of Trust by each owner identified.

C. The identity of each and every holder or party in possession of the Note from signing until the present. With regard to each such holder identified:

a. The first date the Note was held or possessed.

b. The date of signing of any contracts related to the holding or possession of the Note.

c. The identity of each and every agent retained as custodian or other entity possessing the Note and Deed of Trust by each holder identified and the terms of said relationship.

D. Production of any and all document(s) identified above in response to the foregoing information regarding holders, including, without limitation, evidence of the date, form and terms of any agency or custodial relationship.

E. Production of Plaintiff's original note, bearing endorsements, deed of trust and their chain of custody since it was executed.

(CP 154-155).

While questions regarding ownership of the obligation would not have been particularly relevant in view of Brown, the questions regarding the parties holding the various versions of the Note would have been, given the undisputed existence of two separately endorsed and arguably negotiable versions of the Note. However, Ms. Bavand's Motion was denied. CP 18.

The trial court's refusal to provide Ms. Bavand additional time for discovery was prejudicial because there was no other means of addressing the existence of two separately endorsed and arguably negotiable versions of her Note presumably held by a non-party. The trial court should have granted Ms. Bavand additional time to "permit affidavits to be obtained", "depositions to be taken" or "discovery had", but did not do so. *CR 56(f)* Accordingly, this Court should remand this matter back to the trial court for further consideration and to provide Ms. Bavand the opportunity to obtain the discovery denied to her by the trial court.

#### **IV. CONCLUSION**

The foregoing argument and analysis, clearly demonstrate that the trial court had numerous issues of material fact in dispute before it when it entered summary judgment dismissing Ms. Bavand's claims.

Accordingly, Ms. Bavand respectfully request that this Court to:  
(1) reverse the trial court's Orders of November 29, 2015; (2) remand this matter for trial on the merits; and (3) award Ms. Bavand her taxable costs and reasonable attorney's fees incurred herein, pursuant to *RCW 19.86.090*. Justice demands no less.

**REPECTFULLY SUBMITTED** this 31<sup>st</sup> day of March, 2016.

**KOVAC & JONES, PLLC**

/S/ Richard Llewelyn Jones

Richard Llewelyn Jones

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