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No 72051-1-I

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

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COURT OF APPEALS  
STATE OF WASHINGTON



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ALEX C. BARKLEY,

Appellant/Plaintiff,

v.

GREEN POINT MORTGAGE FUNDING, INC., a New York corporation; U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR TRUSTEE IN INTEREST TO STATE STREET BANK AND TRUST AS TRUSTEE FOR WASHINGTON MUTUAL MSC MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2003-AR1, a nationally chartered bank; JPMORGAN CHASE BANK NATIONAL ASSOCIATIONS, a nationally chartered bank; NORTHWEST TRUSTEE SERVICES, INC., a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; and DOE DEFENDANTS 1-10,

Respondents/Defendants.

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**APPELLANT'S INITIAL BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

No. 1. The trial court erred in granting summary judgment and dismissing the claims of Appellant, ALEX C. BARKLEY (hereinafter “Mr. Barkley”) in two separate orders entered May 23, 2014, pursuant to *CR 56*.

No. 2. The trial court erred in accepting the testimony of John Simionidis and Jeff Stenman on summary judgment, in the absence of compliance with the provisions of *RCW 5.45.020*, *CR 56(e)* and *ER 803(a)(6)*.

No. 3. The trial court erred in granting summary judgment on the basis of an assignment of the Deed of Trust by Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC (hereinafter “MERS”) that was void.

No. 4. The trial court erred in granting summary judgment where there were genuine issues of material fact concerning the status of Respondent, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR TRUSTEE IN INTEREST TO STATE STREET BANK AND TRUST AS TRUSTEE FOR WASHINGTON MUTUAL MSC MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2003-ARI (hereinafter U.S. Bank”) and Respondent, JPMORGAN CHASE BANK NATIONAL ASSOCIATION (hereinafter “Chase”) as “owners”, “holders” “servicers” or “beneficiaries” of the subject obligation with the right and

authority to initiate and prosecute a non-judicial foreclosure against Mr. Barkley, especially where there was compelling evidence that Chase and U.S. Bank had mere custodians of the Note, not in legal possession, and were acting solely as agents for an undisclosed lender.

No. 5. The trial court erred in granting summary judgment where there were genuine issues of material fact concerning whether Respondent, NORTHWEST TRUSTEE SERVICES, INC. (hereinafter “NWTs”) strictly complied with the provisions of *RCW 61.24, et seq.* (hereinafter “DTA”) and fulfilled its fiduciary duties of good faith under *RCW 61.24.010* in view of the fact that (1) there was no evidence that it conducted an investigation to adequately inform itself and verify Chase’ and U.S. Bank’s right to foreclose; (2) failed to conduct an investigation to adequately inform itself whether its reliance on the Assignment of Deed of Trust, the Beneficiary Declaration and Appointment of Successor Trustee was reasonable, when it knew or should have known that the declarant was not the owner or legal holder of the obligation, in violation of the provisions of *RCW 61.24.030(7)*; (3) issued documents that were improperly notarized; and (4) issued documents that materially violated provisions of the DTA, including *RCW 61.24.040(2)*.

No. 6. The trial court erred in dismissing Mr. Barkley’s claims under *RCW 19.86, et seq.* (hereinafter “CPA”) where there were disputed

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

No. 7. The trial court erred in dismissing Mr. Barkley's claims under *RCW 9A.82, et seq.* where there were disputed issues of material fact as to each of the elements for such a claim before the trial court.

No. 8. The trial court erred in refusing to continue the hearing on summary judgment to permit Mr. Barkley an opportunity to obtain discovery previously propounded to Respondents, including *CR 30(b)(6)* depositions, pursuant to *CR 56(f)*.

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

On November 19, 2002, Mr. Barkley executed a Promissory Note in favor of Defendant, GREENPOINT MORTGAGE FUNDING, INC. (hereinafter "GreenPoint"), as lender. CP 755-760. Contractually defining the term "note holder", the Note specifically provides that "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'". During discovery, Mr. Barkley received a copy of the Note that bears an undated endorsement by GreenPoint, signed by Kathy Jordan, a purported Assistant Secretary for the company, endorsing the Note in blank. CP 759. This transaction was purportedly registered with MERS by GreenPoint under MIN No. 100013801070699321. CP 915.

To secure repayment of the Promissory Note, Mr. Barkley, as grantor, executed a Deed of Trust dated November 19, 2002, naming Transnational Title Insurance Company, as the trustee, and naming MERS as the beneficiary, solely as a nominee for Lender and Lender's successors and assigns. CP 762-781. This instrument was recorded under King County Auditor's Recording No. 20021126002333 on November 26, 2002. At no time relevant to this cause of action has any evidence been adduced to establish that MERS ever held or owned the subject Note and at no time did Mr. Barkley ever owe MERS any obligation, either monetary or otherwise. CP 746-747; CP 836-862; *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*").

On January 19, 2011, NWTS issued a Notice of Default. CP 783-787. This Notice of Default contained numerous false and misleading statements. CP 747.

First, the Notice of Default states that the "beneficiary declares you in default", but there has been no evidence adduced to date to suggest that the true and lawful owner and holder of the subject Note and Deed of Trust ever declared Mr. Barkley in default, in violation of *RCW 61.24.030*.

Second, the subject Notice of Default misleadingly and falsely claims that "U.S. Bank" is the "Beneficiary (Note Owner)" and identifies Chase as the "loan servicer". There was insufficient and contradictory

evidence before the trial court to establish that at the time the subject Notice of Default was issued, U.S. Bank was either the “beneficiary” or the “note owner”, as the terms are defined under the Note and Washington law. CP 747-748. NWTS alleges that the creditor to whom the debt is owed could be either U.S. Bank or Chase. Remarkably, nowhere in the Notice of Default does NWTS unambiguously identify the true and lawful owner and holder of the subject obligation. CP 747-748. Although U.S. Bank is identified as the “beneficiary of the deed of trust”, there was no evidence presented to the trial court to establish that U.S. Bank ever held or owned the Note. CP 784. Moreover no evidence presented to the trial court that NWTS made any attempt to verify or to adequately inform itself of the truth of the facts contained in the Notice of Default. Rather, NWTS’ principal and sole source of information and authority for its actions was a servicer, Chase, which is evidenced by Northwest Trustee’s identification of its client as JPMorgan Chase Bank, National Association in the bottom margin of the signature page of the Notice of Default. CP 785.

On February 17, 2011, Mr. Barkley’s attorneys mailed a Qualified Written Request to Defendant Chase via certified mail postmarked February 22, 2011. CP 789-809. A certified return receipt card was returned to Mr. Barkley’s attorneys bearing a signature obtained from Chase at the address identified and dated February 25, 2011. CP 811.

In response, Chase wrote to Mr. Barkley's attorneys on March 30, 2011, stating that it was responsive to a letter it claims to have received on February 17, 2011, and purported to enclose copies of various documents in response to those requested in the QWR. CP 813. None of the documents Chase identified were enclosed with the letter, in violation of *12 USC 2605*. CP 748.

A second letter, also dated March 30, 2011, was received from Chase on April 14, 2011, also claiming to be responsive to Mr. Barkley's correspondence dated February 17, 2011. CP 816. This second letter inexplicably claims that their records show that it responded to the previous inquiry regarding this account on "March 30, 2011", and then encloses a copy of the letter of March 30, 2011, with none of the listed enclosures. This letter further states that "any information or document requested but not included with the prior response is unavailable or considered proprietary and will not be provided."

On February 12, 2012, unbeknownst to Mr. Barkley, U.S. Bank relinquished all interest in the subject transaction, according to MERS. CP 915. U.S. Bank's interest was allegedly transferred to an "undisclosed investor". CP 915

Mr. Barkley's attorneys mailed a letter in reply to Chase's response to the QWR of March 30, 2011, via certified mail on May 16, 2011, stating

that no documents or information whatsoever was provided in Chase's purported response dated March 30, 2011, and further advising Chase that it has now exceeded 60 business days for its response to the QWR. CP 818.

Mr. Barkley's attorneys received another nonresponsive letter, dated May 24, 2011, wherein Chase again states that it has already provided a response to Mr. Barkley's QWR on March 30, 2011. CP 821.

Mr. Barkley's attorneys received no further correspondence from Chase responsive to the QWR subsequent to the correspondence dated May 24, 2011, and has never been provided with any documents requested or any written answers in response to said QWR, in violation of *12 USC 2605*. CP 749.

On September 18, 2012, an Assignment of the Deed of Trust was purportedly executed by MERS as nominee for GreenPoint. CP 824. The Assignment was recorded in King County, Washington, on November 26, 2012, under King County Recording No. 20121126002455. The Assignment purports to convey all of MERS' beneficial interest in the deed of trust with all moneys now owing or that may thereafter become due or owing to U.S. Bank in exchange for "good and valuable consideration." There was no evidence adduced to date or before the trial court to establish that MERS ever obtained the consent or authority from GreenPoint, the true and lawful owner and holder of the obligation or the "unknown investor"

identified in CP 915 to execute the Assignment of Deed of Trust. Certainly no investigation was ever conducted by NWTS to verify the information contained in the Assignment of Deed of Trust. CP 749-750. At the time the subject Assignment of Deed of Trust was executed, GreenPoint had ceased operations, having gone out of business in 2007. CP 749-750.

On October 18, 2012, Chase, as alleged attorney-in-fact for U.S. Bank, executed a Beneficiary Declaration that asserts that U.S. Bank “is the holder of the promissory note” to fulfill NWTS’ obligations under *RCW 61.24.030(7)*. CP 255. However, as noted above, U.S. Bank transferred whatever interest it may have had in the subject transaction eight (8) months prior, on February 13, 2012. CP 915. Moreover, no recorded power-of-attorney issued by the “State Street Bank and Trust as Trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1” to Chase was ever offered to the trial court on summary judgment. Finally, there was no evidence offered to the trial court to establish that NWTS ever conducted any investigation to verify the statements contained in the Beneficiary Declaration.

On November 7, 2012, an Appointment of Successor Trustee was executed by Miljana Ilic Gajic, as Vice President for JPMorgan Chase Bank, NA, as attorney-in-fact for “U.S. Bank National Association, as Trustee, Successor in interest to State Street Bank and Trust as Trustee for

Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-ARI”, appointing NWTS the successor trustee. CP 258. Said Appointment of Successor Trustee was recorded November 26, 2012 under King County Recorder’s Recordation No. 20121126002456. This document was apparently executed and recorded over nine (9) months after U.S. Bank assigned its interest in this obligation to an “undisclosed investor”, raising issues of fact as to the propriety of the Appointment under *RCW 61.24.010*. CP 915. It appears that the Appointment of Successor Trustee was actually prepared by NWTS, which ultimately received material and financial benefit through the instrument. CP 750. The source of the information provided NWTS in the preparation of this document was never provided the trial court nor was there any evidence offered to the trial court to establish that NWTS ever conducted any investigation to verify the propriety of the Appointment of Successor Trustee.

On November 28, 2012, NWTS executed, posted and served a Notice of Trustee’s Sale, setting a Trustee’s Sale date of March 15, 2013. 830-833. It is significant to note that although the subject Notice of Trustee’s Sale was signed by Heather Smith on November 28, 2012 as Assistant Vice President for NWTS, it was not notarized until December 12, 2012. CP 833. This Notice of Trustee’s Sale was recorded under King County Recordation No. 20121213002050. This Notice of Trustee’s Sale

essentially relied on the defective Notice of Default, Beneficiary Declaration, Assignment of Deed of Trust and Appointment of Successor Trustee, discussed above. Upon information and belief, said Notice of Trustee's Sale was executed and recorded without the knowledge or authority of the "unidentified investor" referred to in CP 915 or true owner and holder of the Note and Deed of Trust, in violation of the DTA, and in violation of NWTS's fiduciary duty of good faith, under *RCW 61.24.010*. No evidence was offered to the trial court on summary judgment to establish that NWTS conducted any investigation to verify the information contained in its Notice of Trustee's Sale.

In conjunction with the subject Notice of Trustee's Sale, NWTS prepared, posted and served a Notice of Foreclosure that failed to comport with the requirements of *RCW 61.24.040(2)* by failing to identify the owner of the Note and misrepresenting the party to whom Mr. Barkley was obligated. CP 834-835. Specifically, the Notice of Foreclosure fails to use the statutory language proscribed by *RCW 61.24.040(2)*, requiring identity of the "owner of the obligation secured thereby." The Notice of Foreclosure merely notes "an obligation to U.S. Bank". Moreover, NWTS misleadingly identified U.S. Bank as the party to whom Mr. Barkley was obligated, but, as noted above, the evidence offered to the trial court suggests U.S. Bank assigned its interest in this obligation to an

“undisclosed investor” nine (9) months prior to execution of the Notice of Foreclosure. CP 915.

On or about May 22, 2013, Mr. Barkley initiated the above-captioned matter.

In April of 2014, Respondents moved the trial court for summary judgment in two separate motions, pursuant to *CR 56*.

On May 23, 2014, the trial court granted Respondents’ Motions for Summary Judgment and Mr. Barkley timely appealed.

### **III. ARGUMENT**

#### **A. Burden of Proof on Summary Judgment.**

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

*Schroeder; Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *Bavand*, at page 485.

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56*. Sworn statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App. 252, 11 P.3d 883 (2000); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997).

In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary materials must be taken as true. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963); *Reid v. Pierce Co.*, 136 Wn.2d 195, 961 P.2d 333 (1998).

Summary judgment is appropriate if reasonable persons can reach only one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Shows v. Pemperton*, 73 Wn.App. 107, 868 P.2d 164 (1994); *Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996); *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997). When there is contradictory evidence, or the moving parties'

evidence is impeached, an issue of credibility is presented and the Court should not resolve issues of credibility on Summary Judgment, but should reserve the issue of credibility for trial. *Balise v. Underwood, supra*.

Based upon the foregoing and the evidence presented to the trial court, there are numerous issues of material fact in dispute (if not undisputed in Appellants' favor) requiring the Orders of May 23, 2014 to be reversed and this matter remanded to the trial court for further proceeding or trial.

**B. Sufficiency of Declarations of John Simionidis and Jeff Stenman.**

On summary judgment, Respondents and the trial court relied primarily on the Declarations of John Simionidis (hereinafter "Mr. Simionidis) and Mr. Jeff Stenman (hereinafter "Mr. Stenman"). However, the testimony of these gentlemen failed to demonstrate sufficient personal and testimonial knowledge of the facts they offered the trial court to support Respondents' contentions on summary judgment.<sup>1</sup>

In his Declaration of April 15, 2014, Mr. Simionidis states that he is "familiar with Chase's record-keeping practices" and that based on this

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<sup>1</sup> A detailed analysis of the sort of testimony offered by Respondents in this matter was provided by Judge Robert Lasnik in *McDonald v. OneWest Bank, FSB*, 929 F.Supp.2d 1079 (2013) ("Rather than obtain declarations for 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."). See also *Knecht v. Fidelity National Title Insurance Co.* (2014 U.S. Dist. LEXIS 113131).

familiarity, “[he] believes that the business records submitted with this declaration are all records made at or near the time of the events and acts recorded by the individuals with personal knowledge.” CP 495-497. He “believes”, but does not know this to be true. He apparently did not create any of the documents himself nor was he apparently involved in the creation, custody or maintenance of these records. His conclusory statement of “personal knowledge” simply does not meet the requirements of *CR 56(e)*. *Blomster v. Nordstrom, Inc.*, 103 Wn.App. *supra*; Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 (4<sup>th</sup> Cir. 1972)).

By his testimony, Mr. Simionidis suggests that he is some sort of records custodian for Chase, without so stating or otherwise establishing his qualifications. Mr. Simionidis’ statements regarding his purported knowledge of the records of Chase fail to comply with *ER 803(a)(6)* and *RCW 5.45.020*. Mr. Simionidis never states he is records custodian for Chase, only that he is “familiar with Chase’s record-keeping practices”. That is not the sort of personal knowledge required under *CR 56(e)*. Many of the records Mr. Simionidis relies upon were necessarily created by third parties, such as GreenPoint, the FDIC or U.S. Bank – not Chase. See CP 915. Mr. Simionidis does not indicate how the records he refers to, whether the records of Chase, GreenPoint or U.S. Bank, were prepared, kept, the

basis of his knowledge of the same or how the records were transferred to Chase. Indeed, there is absolutely no basis upon which to rely on any of the statements contained in Mr. Simionidis' Declaration, as there has been no showing of how Chase obtained information regarding Mr. Barkley's Note, the basis of the purported accounting for the debt, or the maintenance of the records. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982). Simply put, there was no factual basis upon which to gauge the reliability of Mr. Simionidis' testimony at summary judgment. Where personal knowledge is lacking, Mr. Simionidis' Declaration should have been given no consideration by the trial court on summary judgment.<sup>2</sup> See *Loss v. DeBord*, 67 Wn.2d 318, 407 P.2d 421 (1965).

Finally, Mr. Simionidis testifies that Chase is the "attorney-in-fact" for U.S. Bank. But this statement raises a number of issues of material fact, because the name of the entity foreclosing against Mr. Barkley, as disclosed in the Notice of Default, the Beneficiary Declaration, the Appointment of Successor Trustee, and the Notice of Trustee's Sale, all documents

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<sup>2</sup> It bears noting that Mr. Simionidis testified that Chase didn't come into physical possession, "directly or through its agents (apparently Mr. Simionidis doesn't know which!), until around July 17, 2009. CP 496. That's approximately seven (7) years after the subject obligation was entered into. Mr. Simionidis offers no testimony regarding the handling of the Note or related loan documents between November 19, 2002 and July 17, 2009, who owned and held the obligation during this period of time, the terms upon which Chase took custody of the Note and for whom. As to these material facts, Mr. Simionidis appears to be completely ignorant.

Respondents themselves prepared, is identified as: U.S. Bank National Association, as Trustee, **successor in interest to State Street Bank and Trust as Trustee** for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1". CP 783-787, 255, 826-828, 830-833, 353. Although other similarly named trusts appear in the list attached to Mr. Simionidis' Declaration (CP 509-525), the specific trust identified by Respondents in their foreclosure documents and pleadings is not. Either Mr. Simiondis is attempting to mislead this Court or he hasn't reviewed the relevant documents associated with this action. In either event, Mr. Simiondis' credibility has become an issue, and such issues should not be determined on summary judgment. *Balise v. Underwood, supra.*

The failure to properly identify the subject trust in the Power of Attorney alleged by Chase to establish its basis of authority to execute the Beneficiary Declaration (CP 255) and the Appointment of Successor Trustee (CP 826-828) is a genuine issue of material fact as is fatal to Respondents' claims on summary judgment. If Chase did not have authority under a duly executed power of attorney to execute the Beneficiary Declaration or the Appointment of Successor Trustee, the documents upon which NWTS purportedly relied to initiate foreclosure proceedings against Mr. Barkley, Respondents foreclosure efforts were wrongful and lawful.

Mr. Stenman's testimony is equally inadequate and unreliable. In his Declaration of April 18, 2014, Mr. Stenman asserts that he has "personal knowledge of the procedures governing the creation and maintenance of NWTS' non-judicial foreclosure records." CP 353. But, he doesn't identify the records he refers to. 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)).

Mr. Stenman testifies that "on January 12, 2011, NWTS received a referral to commence a non-judicial foreclosure" without identifying the source of the referral. Mr. Stenman goes on to testify that the referral and instructions were received "through a secure communication platform, which is routinely relied upon in the course of our business as containing accurate information." In fact, Mr. Stenman is not telling this Court the truth. During trial in *In re Meyer*, 506 B.R. 533 (W.D. Wash. 2014) (hereinafter "*In re Meyer*"), Mr. Stenman told a different story:

Jeff Stenman, the Foreclosure Manager and Director of Operations for NWTS, testified that NWTS has used Vendorscape to access foreclosure assignments for 10 years. NWTS has no procedures to verify the accuracy of the information contained in Vendorscape, even though Mr. Stenman admitted that he does not know how the information is generated

within Vendorscape or who prepares it. He described Vendorscape as a secure website which NWTS can access using a password. If a NWTS employee has any question about the foreclosure process or any documentation, they may leave a message in Vendorscape and await a response. Mr. Stenman affirmed that NWTS employees do not contact servicers or lenders in any other way, and are instead trained to rely on the information provided through Vendorscape.

(Emphasis added)

Mr. Stenman clearly has no personal knowledge of or means to verify the information contained in the referral that was transferred to NWTS on or about January 12, 2011. While Mr. Stenman testifies that he has “reviewed the records that pertain to the Barkley Nonjudicial Foreclosure,” he fails to identify the specific documents he is referring to. Is he referring to the “records” submitted in the referral from the unnamed source or records generated by NWTS? Mr. Stenman does not say. If he is referring to the Notice of Default and Notice of Trustee’s Sale, where did NWTS get the information contained in those documents? Mr. Stenman does not say. One can infer that this information came from a third party source, since NWTS was not apparently involved in the transaction before the referral in 2011.

Mr. Stenman suggests the documents he has ambiguously identified are business records, but business records of whom? If he is referring to information from third parties, such as GreenPoint, the FDIC, Chase or U.S. Bank, these would not be business records of NWTS.

Regardless of the source, Mr. Stenman does not indicate how the records he refers to were prepared, kept, the basis of his knowledge of the same or how the records were transferred to NWTs. As the quotation cited above indicates, Mr. Stenman has no knowledge of how the information is generated or maintained or by whom. Simply put, there is absolutely no basis upon which to rely on any of the statements contained in Mr. Stenman's Declaration, as there has been no showing of how NWTs obtained information regarding Plaintiff's Note, the basis of the purported accounting for the debt, or the maintenance of the records and no factual basis upon which to gauge the reliability of Mr. Stenman's testimony. See *State v. Mason, supra*. Where personal knowledge is lacking or issues of credibility are present, Mr. Stenman's Declaration should have been given no consideration on summary judgment. See *Loss v. DeBord, supra*; *Balise v. Underwood, supra*.

Mr. Stenman has also failed to meet the requirements of *ER 803(a)(6)* and *RCW 5.45.020* in that he is not a records custodian – particularly in view of the fact that he fails to identify the documents he has allegedly reviewed and relies on and no basis to verify their authenticity.

Neither Mr. Simionidis nor Mr. Stenman demonstrate sufficient personal and testimonial knowledge of the facts they offered to justify the trial court's reliance of their statements. *CR 56(e)*. In fact, Mr. Stenman's

testimony in this matter is contradicted by the testimony he provided in *In re Meyer, supra*. Where personal knowledge is lacking, Mr. Stenman's Declaration should be given no consideration. See *Loss v. DeBord, supra*. Since the information that Mr. Simionidis and Mr. Stenman offer cannot be reliably verified, their testimony is rank hearsay and their Declarations should have been stricken by the trial court, pursuant to *CR 56(e)*.

C. **U.S. Bank's and Chase's status as "holders" of Mr. Barkley's Note and Deed of Trust unsupported by the record and insufficient to foreclose.**

On summary judgment, U.S. Bank and Chase argued that they were "holders" of the subject obligation, because: (1) the Note was endorsed in blank and arguably payable to bearer; and (2) they had physical possession of the Note.

A number of recent Washington decisions have addressed the issue of who is entitled to enforce notes and deeds of trust under the DTA. See *Lyons v. U.S. Bank, N.A.*, ---Wn.2d---, ---P3d--- (2014 Wash. LEXIS 897) (Washington Supreme Court Case No. 89132-0, October 30, 2014) (hereinafter "*Lyons*")<sup>3</sup>, *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn.App 484, 326 P.3d 768 (2014) (hereinafter "*Trujillo*"), *Knecht, supra.*,

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<sup>3</sup> A copy of *Lyons* is attached hereto at *Appendix A*. Citations to *Lyons* are to the opinion as filed for record on October 30, 2014.

(hereinafter “*Knecht*”).<sup>4</sup> However, there is no need to refer to this case law to initially evaluate Chase’s and U.S. Bank’s status.

The Note signed by Mr. Barkley contains a specific definition of note holder: the “Note Holder” is the party “*entitled to receive payments under [the] Note.*” CP 755. Since the “Note Holder” is specifically defined within the parties’ contract (the Note), the trial court did not need to any other body of law, including the DTA or the UCC for the definition of “Note Holder.” *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) (“[W]here, as here, the agreement already contains a bilateral attorneys’ fee provision, *RCW 4.84.330* is generally inapplicable.”); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990) (the statutory “prevailing party” provision of *RCW 4.84.330* does not control over the plain language of a contract that contains a bilateral attorney fee clause); *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425, 191 P.3d 866 (2008) (Undisputed contract language controls and where no extrinsic evidence to be presented, courts may decide the issue as a matter of law); *Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 734 P.2d 17 (1987) (The language of insurance contract, not statutory policy, controls underinsured motorist coverage).

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<sup>4</sup> A copy of *Knecht* is attached hereto at **Appendix B**. Citations to *Knecht* are to the opinion as filed for record on August 14, 2014.

So, the question that should have been asked by the trial court is: who is entitled to receive the payments? The evidence before the trial court was contradictory at best.

Defendants argue that U.S. Bank “holds” the Note pursuant to the Pooling and Servicing Agreement, only a portion of which was provided the trial court. And, those portions actually provided made no reference of any kind to Mr. Barkley’s Note or Deed of Trust. CP 372, lines 13-16. Respondents go on to allege that U.S. Bank is also the “beneficiary of record” based on an apparently unlawful assignment of the Deed of Trust by MERS. CP 372, lines 20-25. But, U.S. Bank also alleges it never took physical possession of the Note and Deed of Trust, which was entrusted to its agents. CP 372, lines 16-17.

These assertions are designed to confuse Respondents’ physical custody of the Note by loan servicing and collection agents with the sort of legal possession or “actual possession” mandated by the DTA, and offer nothing by way of establishing who is entitled to the payments. *RCW 61.24.030(7(a); Bain*, at page 104. Because legal possession remained at all times with the Note owner, arguably GreenPoint or the “undisclosed investor”, with right to the payments, U.S. Bank and Chase, by their own admissions, had mere custody of the Note and nothing more. Thus,

regardless of MERS' unlawful Assignment, neither Chase nor U.S. Bank were ever the "beneficiaries" as defined under the DTA.

Since a mortgage note is a specific type of promissory note, the UCC generally controls the transfer of holder (*RCW 62A.3*) and ownership (*RCW 62A.9*) interests in, and enforcement of (*RCW 62A.3*), mortgage notes in Washington. As the *Bain* court held, the UCC's definition of "holder" should be used when interpreting the same term as used in the DTA's definition of the "beneficiary" under *RCW 61.24.005(2)*. *Bain*, at pages 103-04. After quoting the UCC's definition, the *Bain* court stated: "The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus *a beneficiary must either actually possess* the promissory note *or be the payee . . . We agree.*" *Id.* (citation omitted; emphasis added).<sup>5 6</sup> The *Bain* court went on to hold that if MERS had never held the promissory note it cannot be a beneficiary under

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<sup>5</sup> In *Bain*, the Court was not asked to decide and did not address whether *physical custody* of a note is the equivalent of "*possession*" as the term "*possession*" is used in the UCC. In *Bain*, the fact that MERS had never obtained *physical custody* of the mortgage note was uncontested. *Bain*, at page 94-97. The distinction between an agent's physical custody of a note and legal possession was not at issue in *Bain*. Thus, in ruling that the beneficiary must "*possess*" the note, the Court did not have to, and was not making any statement about the legal meaning of "*possession*" as used in the UCC's definition of "holder." See *Lyons* and *Knecht*. However, it must be noted that under Washington law, a party who accepts an instrument as an agent for the owner of the instrument cannot qualify as a holder. *Central Washington Bank v. Mendelson-Zeller*, 113 Wn.2d 346, 779 P.2d 697 (1989). See also *RCW 62.A.3-203(d)*.

<sup>6</sup> This mitigates against any the anticipated arguments of "constructive possession" by Respondents, that has no support or basis in Washington law. For purposes of DTA, one must have "actual possession." See *RCW 61.24.030(7)(a)*; *Bain* at page 104

the terms of the DTA. *Bain*, at page 110. What the *Bain* court did not say, but inferred, is that the actual possession being referred to is a legal possession.

In order to be the “holder” of the Note under the UCC, and thus the “beneficiary” with authority to foreclose under the DTA, U.S. Bank was required to have *legal possession* of the Note as defined by Washington common law, including the common law of agency. As a mere trustee or agent for a trust, U.S. Bank’s temporary physical custody of the Note, through its agents, was not sufficient to qualify it as “the beneficiary” or a “holder” under the DTA or Washington law. *Central Washington Bank v. Mendelson-Zeller, supra*.

Just as the DTA’s definition of the “beneficiary” relies on the term “holder” that is not defined in the DTA, the UCC’s definition of “holder” relies on the term, “possession,” that is not defined in the UCC. *See RCW 62A.1-201*. Because the term “possession” is not defined, common law agency principles apply and determine what constitutes legal possession of the Note. *See RCW 62A.9A-313*, comment 3 (UCC Official Comment, entitled “Possession,” stating that “*in determining whether a particular person has possession, the principles of agency apply*”) (Emphasis added); *see also RCW 62A.1-103* (unless otherwise stated in the UCC, common law

“principles of law and equity, including . . . principal and agent” supplement the provisions of the UCC).

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

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

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

*RCW 62A.9A-313(h)* (Emphasis added).<sup>7</sup> See the Permanent Editorial Board for the Uniform Commercial Code, which agrees that the courts should interpret *RCW 62A.9A.-313(h)* as a codification of common law agency principles. See PEB Report at 9 n. 38, available at <http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf> (explaining that “[a]s noted in Official Comment 3 to *UCC § 9-313*, in determining whether a particular person has possession [of a mortgage note], the principles of agency apply,” then discussing § 9-313(h)).

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<sup>7</sup> See also *State v. Spillman*, 110 Wash. 662, 666-667, 188 P. 915 (1920) (defining “possession in law” as “that possession which the law annexes to the legal title or ownership of property, and where there is a right to the immediate, actual possession of property”).

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

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

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

While U.S. Bank and its agents may have had temporary physical custody of the Note, there is no evidence that U.S. Bank or Chase ever obtained legal possession. See 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 18.31 at 365 (2d ed. 2004) (discussing mortgage notes and the role of loan servicers as collection agents, emphasizing that the owner of the mortgage note, and not the servicer, is “the mortgage holder”). Certainly there was no credible evidence of transfer of the obligation from GreenPoint to U.S. Bank or Chase before the trial court on summary judgment. See Declaration of Tim Stephenson. CP 860-861.

Moreover, equating temporary physical custody of a note with legal possession does not make commercial sense because should physical possession equal legal possession, anyone who touches the note for any purposes, including the lawyer holding it for the temporary purpose of

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

Turning to the facts as presented on summary judgment, if U.S. Bank sold its interest in the Note and Deed of Trust on February 13, 2012, as alleged by MERS, how could U.S. Bank or Chase assert that they have any right to custody of the Note or the payments? CP 915. Where are the documents that establish the relationship between U.S. Bank, Chase and the “undisclosed investor”?

Clearly, there were material issues of fact unresolved regarding the status of Chase and U.S. Bank as “holders” of the obligation or entitlement to the payments under the Note before the trial court. Was the Note sold in 2003 to U.S. Bank, as trustee, as alleged by Respondents, or was it transferred along with the Deed of Trust by MERS to U.S. Bank in 2012? CP 371, 824. Was the Note sold by U.S. Bank on February 13, 2012, to an “undisclosed investor” as represented in the MERS Milestones of March 19, 2014? CP 915. The record before the trial court was contradictory on these issues. Who was entitled to the payments under the Note? No evidence of this was offered to the trial court. While Respondents argued that Chase, as servicer, accepted the payments from Mr. Barkley, that does not mean that Chase was entitled to the payment – only a fee for its

services. None of these issues were addressed or resolved on summary judgment.

The materiality of these disputed issues of fact should be clear. If the Note was sold to U.S. Bank in 2003, there was no evidence in the record before the trial court to support it. In fact, there was no evidence, beyond the MERS Assignment of Deed of Trust in September of 2012, of any transfer of the obligation to U.S. Bank.<sup>8</sup> CP 824. Absent a valid transfer of the obligation to U.S. Bank, U.S. Bank never became the lawful beneficiary and had no lawful right to appoint NWTS successor trustee. *RCW 61.24.010*. If NWTS was not appointed by a lawful beneficiary, it lacked legal authority to record and serve a notice of trustee's sale. *Walker v. Quality Loan Service Corp, et al.*, 176 Wn.App.294, 306, 308 P.3d 716 (2013) (hereinafter "*Walker*"), *Bavand*, at page 486, *Knecht*. If U.S. Bank never held the Note or obtained the Note in some unrecorded transfer and sold the Note in February of 2012, the Notice of Trustee's Sale issued by NWTS on behalf of U.S. Bank in November of 2012 (CP 830-833), based on the Beneficiary Declaration of October of 2012 (CP 255), was unauthorized and unlawful.

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<sup>8</sup> It should be remembered that MERS, as nominee, Chase, as servicer, and U.S. Bank, as trustee are agents, requiring express authority to act from their principal. Bain, at page 107

Notwithstanding the contractual definition of the “note holder” contained in Mr. Barkley’s Note, even the UCC does not support Respondents’ contention that they are legitimate “holders” of the obligation with rights to foreclose.

**D. NWTS failed to comply with the DTA and its fiduciary duty of good faith.**

Under current Washington law, private trustees, such as NWTS, are obligated by common law and equity to be evenhanded to both sides and to strictly follow the provisions of the DTA. See *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985) (hereinafter “*Cox*”); *Albice v. Premier Mortgage Services of Washington, Inc.*, 157 Wn. App. 912, 934, 239 P.3d 1148 (2010), *aff’d*, 174 Wn.2d 560, 5276 P.3d 1277 (2012) (hereinafter “*Albice*”); *Lyons*. As noted by the *Klem v. Washington Mutual Bank*, 176 Wn. 2d 771, 295 P.3d 1179 (2013) (hereinafter “*Klem*”), at page 790:

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

(Emphasis added).

Notwithstanding serious doubts regarding whether any named Respondent had standing as a true and lawful owner or actual holder of the subject obligation to initiate a non-judicial foreclosure against Mr. Barkley and the lawfulness of Chase's appointment of NWTs as successor trustee on behalf of U.S. Bank, NWTs engaged in an unethical process of unreasonably relying upon documents it knew or should have known to be false and misleading. By failing to verify any of the records it was provided by Defendants to initiate a non-judicial foreclosure, relying on an Assignment of Deed of Trust, executed by an ineligible "beneficiary", Appointment of Successor Trustee, executed by an attorney-in-fact without verifying the validity of the power of attorney, relying on a Beneficiary Declaration, failing to verify the ownership of the obligation and relying on improperly dated and notarized documents, NWTs breached the "fiduciary duty of good faith" by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale.

As noted by the Washington Supreme Court in *Lyons*, at page 11:

A foreclosing 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. *Walker*, 176 Wn.App. at 309-10. A trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands. But a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith. See *eg.*, *Cox v Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). A trustee's failure to act impartially between note holders and mortgagees, in

violation of the DTA, can support a claim for damages under the CPA. *Klem*, 176 Wn.2d at 792.

Specifically, under *RCW 61.24.030(7)(a)* a trustee must ensure that the beneficiary is the owner and holder of any promissory note or other obligation secured by the deed of trust before a notice of trustee's sale is recorded, transmitted, or served. *RCW 61.24.030(7)(a)*, *RCW 61.24.030(8)(l)* and *RCW 61.24.040(2)*. *Lyons*. Despite this Court's ruling in *Trujillo*, a trustee's violation of obtaining proof of ownership remains a viable basis of trustee liability under the CPA. As noted by the *Lyons* court, at pages 9-13:

The allegedly improper acts of NWTs are intertwined but can be generally categorized as violations of two DTA statutes – violation of the duty of good faith under *RCW 61.24.010(4)* and noncompliance with *RCW 61.24.030(7)(a)*, which instructs that a trustee must have proof the beneficiary is the owner prior to initiating a trustee's sale. . . .

\* \* \*

. . . If Lyons' alleged violations are true, NWTs' actions would likely be considered unfair acts. . . .

\* \* \*

. . . If Lyons' allegations are true and NWTs knew about the conflicting information regarding their right to initiate foreclosure but did not look into this matter, there are issues regarding whether this indicates deferral to Wells Fargo and therefore lack of impartiality. These issues of fact regarding NWTs' actions must be resolved before a court can determine if they have violated the duty of good faith. Considering the evidence in the light most favorable to Lyons, this claim (proof of ownership and status as beneficiary) should have survived summary judgment.

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. . . Lyons claims NWTS did not have proper proof that Wells Fargo was the owner of the note and could not direct NWTS to foreclose. Thus, Lyons alleges that NWTS violated RCW 61.24.030(7)(a), which requires that “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.” The trial court determined there were no issues of material fact and granted summary judgment. We disagree. . . .<sup>9</sup>

Accordingly, NWTS’ failure to comply with the provisions of *RCW 61.24.030(7)(a)*, by failing verifying the ownership of the subject obligation, either by commission or omission, prior to issuing its Notice of Trustee’s sale violates its fiduciary duty of good faith to Mr. Barkley – *Trujillo* notwithstanding.

Ordinarily, a trustee may rely on a beneficiary declaration submitted pursuant to *RCW 61.24.030(7)(a)*. However, such reliance is unwarranted here, where NWTS was presented with and relied upon a beneficiary declaration that did not allege ownership of the Note, was executed by an agent of the purported holder of the obligation, or is signed on the basis of a power of attorney that NWTS never verified.

Indeed, during this period of time, NWTS had no procedures in place to verify any of the information it received from its “clients”, such as

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<sup>9</sup> It is significant to note that in its discussion of Ms. Lyons claims regarding NWTS’ violation of *RCW 61.24.030(7)(a)* – specifically the claim that NWTS failed to obtain proof of ownership of the obligation prior to issuance of a trustee’s sale – the *Lyons* court unanimously ignored this Court’s ruling in *Trujillo*.

Chase and U.S. Bank. Please see quotation of Judge Overstreet Memorandum Decision in *In re Meyer*, cited at pages 17-18, above. Clearly, NWTS purposely eschewed all contact with its “clients” and instructed its employees to avoid the sort of investigation necessary to verify the information NWTS relies upon to initiate non-judicial foreclosures and its duties of good faith described in *Lyons*.

Moreover, NWTS violated the provisions of *RCW 61.24.030(8)* by failing to provide “the name and address of the owner of any promissory notes or other obligations secured by the deed of trust.” Rather, NWTS gave Mr. Barkley the address and phone number of the servicer (Chase) – not the purported “beneficiary” (U.S. Bank). This is a significant violation, as Judge Overstreet observes in *In re Meyer*, at page 547:

Despite the simple direction of the statute, however, NWTS failed to include an address and phone number of either U.S. Bank or GEL2. Instead, NWTS merely listed the address for the servicer, ASC, for both the beneficiary and the servicer, with two different phone numbers for ASC. Accurate information identifying the beneficiary and owner of the obligation is important to homeowners like the Meyers, who learn for the first time in a notice of default that their mortgage obligation is owned by someone with whom they never did any business or to whom they have never made any payment, because they have no idea if it is real or a potential scam. In this case, the failure of NWTS to include accurate information in the Notice of Default eventually caused the Meyers to hire an attorney and file bankruptcy in order to verify the true owner of their home loan.

\* \* \*

The Notice of Default, which did not meet the requirements

of the DOTA, tainted the entire foreclosure process.

The same misconduct is evident here. NWTS used the servicer, Chase, as the contact for the owner and used two different contact numbers, both numbers belonging to Chase and neither permitting Plaintiff to contact U.S. Bank.

Three additional issues merit consideration in evaluating NWTS' compliance with the provisions of the DTA.

First, the Notice of Foreclosure issued by NWTS on or about May 2, 2012 fails to comply with *RCW 61.24.040(2)*, which requires the trustee to specifically identify “. . . the Beneficiary of your Deed of Trust and owner of the obligation secured thereby. . . .” Instead, the NWTS' Notice of Foreclosure provided as follows:

The attached Notice of Trustee Sale is a consequence of default(s) in the obligation to U.S Bank National Association, as Trustee, successor in interest to State Street Bank and Trust as Trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1 of your Deed of Trust.

(Emphasis added)

This statement does not identify U.S. Bank as either the beneficiary or the owner, as required under *RCW 61.24.040(2)*.

Arguably, the language used in the subject Notice of Foreclosure substantially complies with the statute, but, substantial compliance is not sufficient. Strict compliance with the DTA is mandatory. *Albice, Bain*, at

page 93; *Schroeder*, at page 105. See also *In re Fritz*, 225 BR 218 (E.D. Wash. 1997); *Koegel v. Prudential Mut. Sav. Bank*, *supra*; *Walker*; *Bavand*, at pages 485-486. The failure to identify the owner of the obligation in the Notice of Foreclosure is significant because it was yet another means by which Respondents attempted to conceal the ownership and holder of the obligation to frustrate Mr. Barkley's attempt to "resolve the dispute". See *Bain*, at page 118.

Second, NWTS appears to have engaged in a practice of falsely dating mandated foreclosure documents. Specifically, the Notice of Trustee's Sale was "effectively" executed by Heather Smith on November 28, 2012, but her signature was not notarized until December 12, 2012. This false notarization was specifically addressed in *Klem*,<sup>10</sup> where the Washington State Supreme Court held that the act of false dating by a notary employee of the trustee in a non-judicial foreclosure constitutes a misdemeanor under *RCW 42.44.160* and constitutes an unfair and deceptive act and practice and satisfies the first three elements of a claim under the CPA. *Klem*, at pages 792-795. As noted by the *Klem* court: "the court does

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<sup>10</sup> While the *Klem* court specifically addressed the issue of "pre-dating" notarial signatures, this case involves the "post-dating" of notarial signatures. Under *RCW 42.44* there should be no distinction between the two forms of misconduct for purposes of this Court's analysis of NWTS' actions and for purposes of evaluating Mr. Barkley's claims under the CPA. Indeed, the *Klem* court specifically held that "the act of false dating by a notary employee of the trustee in a non-judicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA." *Klem* at pages 794-795.

not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence." *Klem* at page 793, citing *Werner v. Wener*, 84 Wn.2d 360, 526 P.2d 370 (1974). Clearly, Ms. Smith did not sign the Notice of Trustee's Sale before the notary on November 28, 2012 when she signed it. Otherwise the "effective" date of execution and the date of the notary would be the same. By permitting this sort of misconduct in its role as trustee, NWTS has clearly violated its fiduciary duty of good faith to Plaintiff, for which he should be entitled to a claim for injury under the CPA. *Klem*, pages 794-795.

In response to this apparent defect in the Notice of Trustee's Sale, Mr. Stenman testified that NWTS "routinely includes an 'effective date' on the Notice of Trustee's Sale which evidences the date that all figures in the Notice are good through", which "is not related to the signature." CP 354. However, this explanation makes no sense. NWTS' use of the term "effective date" has no statutory basis within the DTA, and deviates from the form adopted by the Washington Legislature in *RCW 61.24.040(1)(f)*. Moreover, one of the primary definitions of the term "effective" is to "execute". See *Black's Law Dictionary*, 4<sup>th</sup> Ed., Rev. (1968). A similar definition is found elsewhere: "concerning with, or having the function of, carrying into effect, executing, or accomplishing. . . ." *Oxford English*

Dictionary, Oxford Press (1979). None of these definitions would support NWTS' use of the term. Applying common sense to the definitions offered by Black's Law Dictionary and the Oxford English Dictionary and applying the plain and ordinary meaning to the term, "drafting" a document doesn't make it "effective", signing the document makes it "effective". Mr. Stenman's explanation of its use of the term "effective" is suspect and draws his credibility into question. Such questions should never be resolved on summary judgment. *Balise v. Underwood, supra*.

Finally, NWTS identified itself as the "duly authorized agent" of U.S. Bank. CP 785. This suggests a conflict of interest between NWTS' obligations to its principal and its duties of good faith to Mr. Barkley. See *Lyons*, at page 12 and *Klem*, at page 790.

Based upon the foregoing, there were clear issues of material fact before the trial court regarding NWTS' compliance with the provisions of the DTA and NWTS' fulfillment of its fiduciary duties of good faith.

**E. Violation of CPA.**

Under current Washington law, violations of the DTA do not create independent causes of action for monetary damages where no sale has been completed, but may be actionable under the CPA. *Frias v. Asset Foreclosure Services, Inc.*, ----Wn.2d---, 334 P.3d 529 (2014, Wash. LEXIS

763) (hereinafter “Frias”)<sup>11</sup>. As noted by the *Frias* court, at page 17: “[w]rongful foreclosure is *prevented* when a borrower obtains a restraining order or injunction based on a material DTA violations, while wrongful foreclosure is *compensated* when a borrower recovers damages for material DTA violations.”

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). 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).

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pages 115-120. The *Bain* court specifically ruled that the unfair and deceptive act or practice element can be presumed based upon MERS’ business model and the manner in which it has been used.<sup>12</sup> *Bain* at pages

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<sup>11</sup> A copy of *Frias* is attached hereto at *Appendix C*. References and citations to *Frias* are to the opinion as filed for record on September 18, 2014.

<sup>12</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) (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem* and *Lyons*.

115-117; *Klem*, at pages 784-788. See also *Walker*, at pages 318-319 and *Bavand*, at pages 504-506. Indeed, the improper appointment of NWTs, among other violations of the DTA alleged herein, can constitute unfair and deceptive acts or practices. *Walker*, at pages 319-320; and *Bavand*, at page 505; *Knecht*, at page 14, and *Lyons*, at 14.

The *Bain* court specifically ruled that the public interest impact element can also be presumed based on the number of mortgages that utilized MERS as a nominee for an undisclosed principal. *Bain*, at page 118; *Bavand*, at pages 506-507.

Although the *Bain* court did not specifically address the trade or commerce element, that could also be presumed from the court's analysis of the public interest element. See *Walker*, at page 318. All of the named Respondents are in the business of making or servicing loans for hundreds, if not thousands, of businesses and residents in the State of Washington. See *Bain*, at page 118. In sum, the only elements that cannot be presumed in a typical MERS case are the fourth and fifth elements: the elements of damages/injury and causation. Thus, on summary judgment, Mr. Barkley needed only to allege facts regarding the fourth and fifth elements of a CPA claim by asserting her claims of injury/damages and causation.

In *Klem*, the court concluded that the trustee's apparent practice of false dating by a notary non-judicial foreclosure documents also satisfied

the first three elements of a CPA claim. See *Klem*, pages 794-795. Thus, Mr. Barkley needed only to allege facts regarding the fourth and fifth elements of a CPA claim for violation of *RCW 42.22, et seq.*

The *Lyons* court held that violation of *RCW 6.24.010(4)* and *RCW 61.24.030(7)(a)* could establish claim for damages under the CPA. *Lyons*, at page 9-10.

As to the damages/injury and causation elements of a CPA claim, the analysis set forth in *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009) (hereinafter "*Panag*") is the most useful to the present case, because it also involved improper efforts to collect on a debt. There the Washington Supreme Court held, at page 58, that:

Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *NW. Airlines, Inc. v. Ticket Exch., Inc.*, (proof of injury satisfied by "stowaway theory" where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Fisons*, (damage to professional reputation); *Sorrel v. Eagle Healthcare, Inc.*, (injury by delay in refund of money); *Webb v. Ray*, (loss of use of property). (internal citations omitted).

The *Panag* analysis was cited with approval by the court in *Walker*, at page 320, and *Bavand*, at pages 508-509 and in *Lyons*, at page 10.

Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at page 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).

The *Frias* court noted, at page 19, that “the business and property injuries compensable under the CPA are relatively expansive.” These injuries can include, without limitation, unlawful debt collection, attorney consultation to dispel uncertainty regarding the nature and extent of the debt, mediation expenses, etc. *Frias*, at pages 18-21, *Panag*, at pages 55-64.

In addition to his claims for declaratory relief, injunctive relief and damages, Mr. Barkley has articulated damages reduced rental, damage to his credit and emotional distress.<sup>13</sup> CP 607-610, 649-653. Specifically, as a direct and proximate result of Respondents' misconduct, Mr. Barkley described and calculated his damages as follows:

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

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<sup>13</sup> Although acknowledging the that “conduct during foreclosure could support a claim for intentional infliction of emotional distress” could be plead and awarded, the *Lyons* court noted “it must satisfy the high burden applicable to these claims”, citing Restatement (Second) of Torts § 46, cmt. D (1965). *Lyons*, at page 18.

A. The subject real property would normally rent for approximately \$5,000.00 per month, with the renter paying for all ordinary maintenance and up-keep (yard-work, window cleaning, etc.). However, as a result of Defendants foreclosure efforts, I could not, in good conscience, rent the property out to a conventional renter. What tenant would want to be in the middle of someone else's legal mess! Rather, I have rented the property out as a "vacation" rental. As a "vacation" rental, I received approximately \$6,400.00 per month, on the average, in rental fees. But, unlike a conventional rental, I also incur maintenance costs that run approximately \$2,560.00 per month (yard-work, maid fees, advertising, window cleaning, etc.). Thus, while my gross rental income is greater as a "vacation" rental than if I rented the property out to a conventional renter; my net rental income is less, by approximately \$1,660.00 per month. Thus, since foreclosure efforts were initiated in January of 2011, I have lost in excess of \$66,400.00 approximately in rent. These figures are necessarily "ball park" numbers as I am currently in the process of calculating my expenses for tax purposes. These numbers will be revised and supplemented when my tax returns are filed.

B. In addition to the foregoing, I expended money to determine who my lender was. To this end, I sent Chase a Qualified Written Request that it effectively 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.

C. Finally, I have suffered stress and anxiety as a result of Defendant's wrongful foreclosure activities for which I have sought counseling from Dr. Tom Erdman and Patricia Davis. I have spent approximately \$5,000.00 for counselling, including medication (Lexapro and Xanax).

CP 751-752.

In addition to the foregoing, Mr. Barkley necessarily suffered damages through (1) the threat of losing all of his equity in his property without compensation, (2) a substantial reduction of his ability to sell the

house as a result of the recording of the Notice of Trustee's Sale; (3) a substantial reduction in any equity to borrow against as a result of the recording of the Notice of Trustee's Sale; (4) damages to his credit as a result of Defendants' unlawful acts, and (5) consequential damages arising by the wrongful foreclosure action. As to this last item the expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag* at page 902 and *In re Meyer*.<sup>14</sup>

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*. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge*. *Panag*, at pages 59-65. Here, the subject property is a rental, a source of business income, and Mr. Barkley had to repeatedly take time off from his work schedule at a loss of income and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of her Note and to address Defendants' misconduct.

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<sup>14</sup> See also *In re John Patrick Keahev*, BAP No. WW-08-1151.

All of the injuries and damages alleged by Mr. Barkley were the directly and proximately caused by Respondents' misconduct and viewing the evidence in a light most favorable to the non-moving party, Mr. Barkley's testimony, the testimony of Tim Stephenson and all inferences that could be inferred therefrom, all five elements for a private cause of action under the CPA have been met and the trial court erred in dismissing Mr. Barkley's CPA claims.

Mr. Barkley's remedies should be Respondents' joint and several liability. In addition to the claims addressed above, Mr. Barkley has plead additional claims of civil conspiracy and joint venture liability subsumed in his claim of joint and several liability based on the facts of this case. CP. 3. See *Gilbrook v. City of Westminster*, 117 F3d. 856 (9<sup>th</sup> Cir. 1999), *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 918 P.2d 531 (1996), *Refrigeration Engineering Co. v. McKay*, 4 Wn.App. 963, 486 P.2d 304 (1971) and *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wn.App. 533, 468 P.2d 717 (1970).

**F. Violation of RCW 9A.82.**

*RCW 9A.82.045* provides as follows:

It is unlawful for any person knowingly to collect any unlawful debt. A violation of this section is a class C felony.

*RCW 9A.82.100(1)(a)*, provides as follows:

(1)(a) A person who sustains injury to his or her person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in RCW 9A.40.100, 9.68A.100, 9.68A.101, or 9A.88.070, or by a violation of RCW 9A.82.060 or 9A.82.080 may file an action in superior court for the recovery of damages and the costs of the suit, including reasonable investigative and attorney's fees.

*RCW 9A.82.010(4)* defines 'criminal profiteering' as follows:

4) "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:

\* \* \*

(k) Extortion, as defined in RCW 9A.56.120 and 9A.56.130;

\* \* \*

(p) Collection of an unlawful debt, as defined in RCW 9A.82.045;

There is little Washington law construing the civil limits of *RCW 9A.82*, but the statute has been applied to misconduct associated with the DTA. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999).

While Mr. Barkley expects the Respondents and the Court to respond incredulously at the suggestion that well-heeled banks, mortgage lending and well-heeled servicing companies could be accused of "racketeering" in the ordinary course of their business activities, the

allegations contained in Mr. Barkley's Declaration on file herein, his verified Complaint, and the Declaration of Tim Stephenson, which the Court is obliged to accept as true under *CR 56*, clearly establish such a claim. CP 1-130, 745-835 and 836-982. Proof that these unscrupulous lending behaviors, particularly the utilization of MERS to conceal ownership of mortgage loans and assignment of the same to entities with no interest for the sole purpose of foreclosure for gain, is being pursued by these Respondents, including MERS, and others in the mortgage lending industry in hundreds of cases, as is amply documented in the cases offered by Plaintiff herein: *Bain, Klem, Schroeder, Walker, Bavand, In re Meyer, Frias* and *Lyons*, etc. See also CP 570-744. The facts plead in *Bain, Walker* and *Bavand* are enough to establish a pattern of felonious misconduct with these lending practices, had the claim been plead, to fulfill *RCW 9A.82.010* and *RCW 9A.82.100*, and are present in this case

First, Respondents attempt to collect a debt for which they have no lawful interest constitutes a violation of *RCW 9A.82.045*.

Second, Respondents efforts in demanding payment on a debt to which they have no lawful interest and threatening to take Mr. Barkley's property by non-judicial means constitutes extortion, within the terms of *RCW 9A.56.120* and *RCW 9A.56.130*. See also *RCW 9A.04.110(27)(j)*.

The pattern of misconduct alleged herein is the similar to what others in the State of Washington in Mr. Barkley's position suffer. The pervasiveness of MERS transactions in the mortgage lending marketplace were noted by the *Bain* court. See *Bain* at page 118. The misconduct of the servicers takes on fairly predictable patterns as they are intentionally transacted as "cookie cutter" transactions to lower costs and speed the process. See *Bain, Klem, Schroeder, Walker, Bavand, etc.*

Nevertheless, there were issues of material fact before the trial court that mitigated against summary judgment on this claim.

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

Finally, Respondents' Motions for Summary Judgment were untimely, to the extent that there remained discovery that needed to be completed to address the issues of fact outlined above, particularly the recent disclosure that U.S. Bank sold the obligation to an "undisclosed investor" in February of 2012. Although Respondents responded to Mr. Barkley's written discovery requests, they were largely boiler-plate objections and computer dumps of information that are not related to the specific questions posed. This forced Mr. Barkley and Mr. Stephenson to rely on inadequate responses to interrogatories and requests of production.

*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.

Based upon the clear need for additional discovery to flesh out the ownership of the subject Note and Deed of Trust and the agency relationships, if any, among the Respondents, and learn the identity of the “undisclosed investor”, Mr. Barkley requested by was denied the opportunity to conduct additional discovery, pursuant to *CR 56(f)*. Without full and complete discovery, including *CR 30(b)* depositions, Mr. Barkley was unable to adequately defend against portions of Respondents’ Motions for Summary Judgment. To the extent Mr. Barkley’s request for additional discovery was reasonable, based upon the foregoing, the trial court erred in refusing to permit him additional time to complete discovery, pursuant to *CR 56(f)*.

#### **IV. CONCLUSION.**

Based on the foregoing argument and analysis, the trial court had numerous genuine issues of material fact in dispute before it when it entered Summary Judgment dismissing Mr. Barkley’s claims on May 23, 2014.

On summary judgment, the trial court’s first order of business should have been determining the identity of the true and lawful owner

and holder of the subject obligation. But, based on the evidence it had before it, the trial court couldn't. Although GreenPoint was the initial lender on the Note, there was no credible evidence of a transfer of the obligation from GreenPoint to anyone prior to February 13, 2012, when the obligation was transferred to an "undisclosed investor" on February 13, 2012, eight months before the execution of the Beneficiary Declaration and ten months before NWTS issued its Notice of Trustee's Sale. CP 255, 830-833, 915. Although MERS purportedly assigned the Deed of Trust to U.S. Bank in September of 2012, it did not purport to convey the Note, which it never held, and the assignment of the Deed of Trust was arguably a legal nullity, based on the lack of credible evidence of MERS' authority to act. *Bain* and *Knecht*. Moreover, the lack of credible evidence of a transfer to U.S. Bank prior to January 19, 2011, casts doubt on the representations contained in the Notice of Default. CP 783-785. Only when the identity of the true and lawful owner of the obligation was established could the trial court evaluate the efficacy of NWTS' appointment as successor trustee and its compliance with its fiduciary duties of good faith to Mr. Barkley.

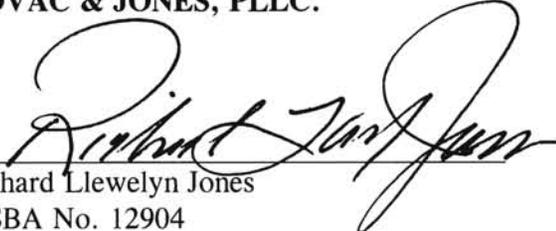
Nevertheless, NWTS knew or should have known there were questions regarding the identity of the true and lawful owner and actual holder of the obligation and failed to verify the information it received

from its “client”, Chase, or adequately investigate the issue, in violation of its fiduciary duty of good faith. *RCW 61.24.010, Lyons*, at page 11. In fact, NWTS avoided compliance with its duties of good faith by failing to establish procedures to verify the information it receives electronically from anonymous sources – going so far as to instruct its employees from contacting their clients directly to obtain such verification. *In re Meyer*.

Base on the foregoing, the trial court erred in granting summary judgment and Mr. Barkley respectfully request that this Court to: (1) reverse the trial court’s Orders of May 23, 2014; (2) remand this matter for trial on the merits; and (3) award Mr. Barkley his taxable costs and reasonable attorney’s fees incurred herein, pursuant to *RAP 18.1* and Paragraph 26 of the subject Deed of Trust. CP 775.

**REPECTFULLY SUBMITTED** this 6<sup>th</sup> day of November, 2014.

**KOVAC & JONES, PLLC.**

  
Richard Llewelyn Jones  
WSBA No. 12904  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

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

1. I am now and have been at all times mentioned herein a resident of the State of Washington, over the age of eighteen years, not a party to this action and I am competent to testify herein.

2. That on November 6, 2014, I caused a copy of the foregoing APPELLANT’S INITIAL BRIEF to be served to the following in the manner indicated:

Fred B. Burnside	<u>      </u>	Facsimile
Hugh R. McCullough	<u>  X  </u>	Messenger
Davis Wright Tremaine LLP	<u>      </u>	U.S. 1 <sup>st</sup>
1201 3 <sup>rd</sup> Avenue, Suite 2200		Class Mail
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**DATED** this 6<sup>th</sup> day of November, 2014, at Bellevue, Washington.

Susan L. Rodriguez  
Susan L. Rodriguez, Legal Assistant

## TABLE OF APPENDICES

- A. *Lyons v. U.S. Bank, N.A.*, ---Wn.2d---, ---P3d.--- (2014 Wash. LEXIS 897) (Washington Supreme Court Case No. 89132-0, October 30, 2014) (*Appendix "A"*).
- B. *Knecht v. Fidelity National Title Insurance Co.* (2014 U.S. Dist. LEXIS 113131). (*Appendix "B"*).
- C. *Frias v. Asset Foreclosure Services, Inc.*, ----Wn.2d---, 334 P.3d 529 (2014, Wash. LEXIS 763) (*Appendix "C"*)

## **APPENDIX “A”**

**FILE**

IN CLERKS OFFICE

SUPREME COURT, STATE OF WASHINGTON

DATE OCT 30 2014

*Madsen C. J.*  
CHIEF JUSTICE

This opinion was filed for record  
at 8:00 AM on Oct. 30, 2014

*[Signature]*  
Ronald R. Carpenter  
Supreme Court Clerk

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

WINNIE LYONS, a single person, )  
)  
Appellant, )  
)  
v. )  
)  
U.S. BANK NATIONAL )  
ASSOCIATION, as trustee for )  
Stanwich Mortgage Loan Trust Series )  
2012-3, by Carrington Mortgage )  
Services, LLC; WELLS FARGO )  
BANK, N.A., a chartered national )  
bank; Wells Fargo Bank, N.A., as )  
servicer, )  
)  
Defendants, )  
)  
and )  
)  
NORTHWEST TRUSTEE )  
SERVICES, INC., as trustee, )  
)  
Respondent. )  
)

No. 89132-0

En Banc

Filed OCT 30 2014

FAIRHURST, J.—Winnie Lyons brought suit against Northwest Trustee Services Inc. (NWTS) based on its conduct as the trustee during foreclosure. Lyons

- *Lyons v. U.S. Bank Nat'l Ass'n*, No. 89132-0

alleged violations of the deed of trust act (DTA), chapter 61.24 RCW; violations of the Consumer Protection Act (CPA), chapter 19.86 RCW; and the intentional infliction of emotional distress. First, this case asks whether a plaintiff can even bring a cause of action for damages under the DTA or the CPA in the absence of an actual sale of the property. It then asks whether the trial court erred by granting summary judgment in favor of NWTs on all three claims. We affirm the trial court's grant of summary judgment on the DTA and the intentional infliction of emotional distress claims, but we reverse and remand the CPA claim to the trial court.

#### I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In August 2007, Winnie Lyons signed a promissory note secured by a deed of trust encumbering real property in Burien, Washington. The Burien property is Lyons' primary residence and also the location from which she operates an adult family home (AFH),<sup>1</sup> her sole source of income. Wells Fargo Bank NA was identified on the deed of trust as the lender and beneficiary. Northwest Trustee Services LLC was identified as the trustee. The deed of trust was recorded on August 31, 2007 in King County. In early 2009, Northwest Trustee Services LLC became

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<sup>1</sup>In her briefing, Lyons says she lives at the Burien address, but her declaration to the trial court said she lived in Kent. In her reply brief she clarifies that she inadvertently signed the declaration with this error. Reply Br. of Lyons at 2. At all times since she obtained the mortgage she has resided and operated the AFH at the property in Burien. *Id.*

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NWTS and Wells Fargo recorded an appointment of successor trustee naming NWTS as the successor trustee.

In October 2009, an employee of Wells Fargo executed a beneficiary declaration identifying Wells Fargo as trustee for Soundview Home Loan Trust 2006. This beneficiary declaration asserted, "Wells Fargo Bank, NA, as Trustee for Soundview Home Loan Trust 2006-WFI is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." Clerk's Papers (CP) at 120. In June 2010, another beneficiary declaration was executed by an employee of Wells Fargo. It read, "Wells Fargo Bank, NA, is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." CP at 118.

In October 2011, Lyons filed bankruptcy, and in January 2012 she applied for a loan modification with Wells Fargo. On March 30, 2012, while Lyons was waiting for a response regarding her application for a modification, she received a notice of trustee's sale from NWTS informing her that her property was scheduled to be sold on July 6, 2012. On April 5, 2012, Wells Fargo told Lyons' attorney that the in-house modification had been approved. On April 19, 2012, Lyons received the letter confirming the modification. The terms required her to pay \$10,000 by May 1, 2012.

- *Lyons v. U.S. Bank Nat'l Ass'n*, No. 89132-0

Wells Fargo informed Lyons they would discontinue the sale upon receipt of this payment. She paid this amount to Wells Fargo as required.

However, on March 29, 2012, Wells Fargo had sold Lyons' loan to U.S. Bank National Association as trustee for Stanwich Mortgage Loan Trust Series 2012-3 with Carrington Mortgage Services LLC as the new servicer of the loan. This was to become effective on May 1, 2012. NWTS received notice of the sale and service release on April 12, 2012. Lyons received notice of this sale on April 26, 2012.

On April 26, 2012, Lyons' attorney spoke with a representative of NWTS to inform it that Wells Fargo no longer had any beneficial interest in the loan after the sale, that Carrington was the new servicer of the loan, and that Lyons had received a loan modification so she was no longer in default. On June 11, 2012, Lyons' attorney again called NWTS to inform them of the loan modification and the sale of the loan. A NWTS employee informed her that Carrington had directed NWTS to continue with the foreclosure sale as scheduled. On June 14, 2012, Lyons' attorney called Carrington and an employee indicated that Carrington did not show the property in foreclosure status. Another employee further indicated that Carrington had not told NWTS to go forward with the sale. Lyons' attorney then sent a cease and desist letter to NWTS and Carrington.

On June 18, 2012, Lyons' attorney followed up with NWTS. NWTS acknowledged receipt and informed her the sale was still on but that the matter had

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been referred to an attorney for NWTS. On June 19, 2012, the attorney for NWTS informed Lyons' attorney that he needed to do his due diligence. Lyons' attorney again spoke with NWTS' attorney on June 21, 2012. NWTS' attorney refused to discontinue the sale, and Lyons' attorney filed the complaint. At the end of the day on June 21, 2012, NWTS executed and recorded a notice of discontinuance of the trustee's sale.<sup>2</sup>

Lyons alleges that this situation has had serious emotional and economic impacts on her. In March 2012, Lyons arrived home to be handed the notice of trustee's sale by a family member of one of her full pay AFH clients. In addition to the sense of humiliation Lyons felt, this client moved out approximately two weeks later because of concern that Lyons was going to lose her business and her home. Before leaving, this client shared her belief that the home was going to be foreclosed on with other AFH clients, some of whom also moved shortly thereafter. The AFH business is her primary source of income, and the loss of clients directly impacted her financially. In her declaration, Lyons asserts that thereafter she struggled with day-to-day tasks and felt hopeless. She began counseling with the pastor of her church. Her pastor said that previously Lyons was a very positive woman with a drive to succeed, but since the pending foreclosure she was fearful and depressed.

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<sup>2</sup>NWTS maintains that it did not discontinue the trustee's sale because the complaint was filed, but that the dates are coincidental since NWTS was not served with the complaint until June 26, 2012.

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Lyons asserts that she experienced constant nausea from the stress and continuously worried about losing her business and the subsequent homelessness of herself, her son, and the elderly clients she cared for.

NWTS moved for summary judgment. After argument, the court granted the motion for summary judgment as to all claims against NWTS. Subsequently, Lyons and the remaining defendants (Stanwich, Carrington, and Wells Fargo) entered a stipulated order of dismissal. Lyons' motion for reconsideration of the order of summary judgment was denied. We granted Lyons' petition for direct review.

## II. ISSUES PRESENTED

1. If a nonjudicial foreclosure sale does not happen, can a plaintiff bring a claim for damages under the DTA or the CPA?
2. Was the grant of summary judgment against Lyons on her CPA claim improper?
3. Was the grant of summary judgment against Lyons on her intentional infliction of emotional distress claim improper?

## III. ANALYSIS

Lyons alleges a range of errors by the trial court that resulted from it granting summary judgment in favor of NWTS. We review questions of law and summary judgment rulings de novo. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004); *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). "In reviewing an order of summary judgment, we engage in the same inquiry as a trial court." *Reid*, 136 Wn.2d at 201. We interpret all the facts and inferences therefrom in favor of

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Lyons, the nonmoving party. *Id.* Summary judgment is appropriate only if the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Lyons alleges three causes of action against NWTS—one under the DTA, one under the CPA, and one for intentional infliction of emotional distress. All of these claims are supported by the same underlying conduct that Lyons alleges involves a violation of RCW 61.24.030(7) in relation to the beneficiary declaration and a breach of the duty of good faith under RCW 61.24.010(4). The trial court focused on the issue of whether Lyons could bring a claim for damages under the DTA in the absence of a trustee's sale, and there was almost no discussion of the CPA or the intentional infliction of emotional distress claims during argument on the summary judgment motion. Yet, the court granted NWTS' motion on all of these claims. We begin by addressing the causes of action under the DTA and the CPA, including Lyons' particular contentions regarding the beneficiary declaration and breach of the duty of good faith. We then address the cause of action for intentional infliction of emotional distress.

A. Without a nonjudicial foreclosure sale, a party may not bring a claim for damages under the DTA, but they can bring a claim under the CPA

Recently we decided *Frias v. Asset Foreclosure Services, Inc.*, \_\_\_ Wn.2d \_\_\_, 334 P.3d 529 (2014). *Frias* involved two certified questions from the federal district court regarding whether a plaintiff could bring a claim for damages under

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the DTA or the CPA in the absence of a foreclosure sale and what principles would govern each claim. This court carefully considered the language of the statute, the intended beneficiaries of the statute, the explicit and implicit legislative intent, and the purposes of the statute. The court concluded:

We hold that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed. . . . We further hold that under appropriate factual circumstances, DTA violations may be actionable under the CPA, even where no foreclosure sale has been completed. . . . [T]he same principles that govern CPA claims generally apply to CPA claims based on alleged DTA violations.

334 P.3d at 531. Without the sale of the property, damages are not recoverable under the DTA, but a CPA claim may be maintained regardless of the status of the property. *Frias* clearly resolves the first issue in this case. Lyons cannot bring a claim for damages under the DTA in the absence of a sale, but she may bring a claim for similar actions under the CPA.

B. There were material issues of fact for trial regarding whether NWTs violated provisions of the DTA, which could be used to support Lyons' CPA claim, so granting summary judgment to NWTs on Lyons' CPA claim was improper

A CPA claim is a preexisting statutory cause of action with established elements. *Id.* at 537. A claim under the CPA based on violations of the DTA must meet the same requirements applicable to any other CPA claim.<sup>3</sup> The availability of

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<sup>3</sup>The law regarding CPA causes of action is fairly clear and settled. A cause of action is available if the claim satisfies five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her

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redress for wrongs during nonjudicial foreclosure under the CPA is well supported in our case law. *Id.*; *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 119, 285 P.3d 34 (2012) (a plaintiff may bring a claim under the CPA arguing the facts specific to the case); *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 320, 308 P.3d 716 (2013) (actions taken during the nonjudicial foreclosure process were sufficient to support all five elements of a CPA claim and survive pretrial dismissal); *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1129-30 (W.D. Wash. 2010) (court discussed the five elements for a CPA claim and considered the factual allegations supporting Vawter's DTA claim to support the CPA claim as well); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) (property was sold in this case, but court discussed action amounting to CPA claims in depth, focusing on acts of defendants, not the fact the property was sold). The absence of a completed sale of the property does not affect the availability of this cause of action. Whether a plaintiff will prevail on a CPA claim is a case by case determination of whether the plaintiff can satisfy the requisite elements.

The main question raised by the parties surrounds whether the alleged actions of NWTS amount to unfair or deceptive practices under the CPA.<sup>4</sup> The allegedly

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business or property; (5) causation.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (alteration in original) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). The CPA “shall be liberally construed” to further its purposes. RCW 19.86.920.

<sup>4</sup>Much of the briefing also questions whether Lyons can show an injury by NWTS. Although emotional distress, embarrassment, and inconvenience are excluded, business and

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improper acts of NWTs are intertwined but can be generally categorized as violations of two DTA statutes—violation of the duty of good faith under RCW 61.24.010(4) and noncompliance with RCW 61.24.030(7)(a), which instructs that a trustee must have proof the beneficiary is the owner prior to initiating a trustee's sale.<sup>5</sup> Whether undisputed conduct is unfair or deceptive is a question of law, not a question of fact. *See, e.g., Panag*, 166 Wn.2d at 47 (“Whether a particular act or practice is ‘unfair or deceptive’ is a question of law.” (quoting *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997))).

CPA jurisprudence is well settled, and determining what an unfair act is can be done by looking to precedent. The DTA sets up a three party system for mortgages where an independent trustee acts as the impartial party between a lender and a borrower instead of the court. *Klem*, 176 Wn.2d at 790. If Lyons' alleged violations are true, NWTs' actions would likely be considered unfair acts, but questions of fact remain as to whether NWTs' actions amounted to such violations. These material

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property injuries compensable under the CPA are relatively expansive. *Frias*, 334 P.3d at 538. The injury element does not require that the homeowner lose their property in order to bring a claim under the CPA. *Id.* “[T]he injury requirement is met upon proof the plaintiff's ‘property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.’” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009) (quoting *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). Lyons has alleged that her AFH business was directly impacted by the actions of NWTs. These allegations are sufficient to satisfy the injury element of a CPA claim for the purposes of summary judgment.

<sup>5</sup>In RCW 61.24.135, the legislature listed some per se violations of the DTA that automatically satisfy this element of a CPA claim. The acts complained of by Lyons do not violate this section of the DTA and thus, even though they might violate a different statute, are not per se violations. Lyons must show NWTs' actions were unfair or deceptive.

questions of fact must be resolved by a fact finder, so the claim should have survived summary judgment.

1. There were material issues of fact regarding whether NWTs did not act in good faith

RCW 61.24.010(4) imposes a duty of good faith on the trustee toward the borrower, beneficiary, and grantor. “[U]nder our statutory system, a trustee is not merely an agent for the lender or the lender’s successors. Trustees have obligations to all of the parties to the deed, including the homeowner.” *Bain*, 175 Wn.2d at 93. This duty requires the trustee to remain impartial and protect the interests of all the parties. “[T]he trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary’s directions.” *Klem*, 176 Wn.2d at 791. 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. *Walker*, 176 Wn. App. at 309-10. A trustee does not need to summarily accept a borrower’s side of the story or instantly submit to a borrower’s demands. But a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith. *See, e.g., Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.3d 683 (1985). A trustee’s failure to act impartially between note holders and mortgagees, in

violation of the DTA, can support a claim for damages under the CPA. *Klem*, 176 Wn.2d at 792.

Lyons says that NWTS violated its duty to act in good faith by failing to act impartially toward her. Lyons points to various indicators that she believes demonstrates NWTS' lack of good faith:

(1) NWTS knew that Ms. Lyons had filed bankruptcy in 2011 (2) NWTS knew that Ms. Lyons had engaged in a review for a loan modification (3) In the bankruptcy [matter], NWTS, sister company, RCO represented Wells Fargo's interest (4) Lyons' counsel on numerous occasions contacted NWTS to discuss either the loan modification or the fact Wells Fargo no longer had any beneficial interest (5) NWTS knew that Wells Fargo requested a service release and that NWTS needed to provide Wells Fargo with an invoice or NWTS would not be paid (6) NWTS provided Wells Fargo with that invoice on or about April 2012 (7) NWTS changed the scheduled foreclosure sale loan number when it knew about the service release to Carrington (8) NWTS, Nanci Lambert, indicated that Carrington instructed NWTS to continue with the scheduled foreclosure sale (9) Before a lawsuit was filed, several telephonic phone conversations took place (10) On or about June 14, 2012, NWTS received a cease and desist letter, coupled with proof of the loan modification.

Opening Br. of Lyons at 34-35 (footnotes omitted). Put simply, Lyons claims NWTS deferred to the course of action that Wells Fargo had previously initiated without giving any credence to what she, the borrower, was telling it about a change in the situation between the parties.

We find that Lyons has presented material issues of fact. The conflict over the actual beneficiary was brought to the attention of NWTS on April 26, 2012, but there is no evidence in the record that anyone at NWTS investigated this conflict until

their attorney informed Lyons' attorney it would do so on June 19, 2012.<sup>6</sup> It is a material issue of fact whether NWTS investigated the status of the loan and the proper beneficiary earlier than when it referred the matter to their attorney. If Lyons' allegations are true and NWTS knew about the conflicting information regarding their right to initiate foreclosure but did not look into this matter, there are issues regarding whether this indicates deferral to Wells Fargo and therefore lack of impartiality. These issues of fact regarding NWTS' actions must be resolved before a court can determine if they have violated the duty of good faith. Considering the evidence in the light most favorable to Lyons, this claim should have survived summary judgment.

2. There were material issues of fact regarding whether the beneficiary declaration was proper and whether NWTS could rely on it

Lyons alleges multiple issues with the beneficiary declaration. Because of these issues, Lyons claims NWTS did not have proper proof that Wells Fargo was the owner of the note and could direct NWTS to foreclose. Thus, Lyons alleges that NWTS violated RCW 61.24.030(7)(a), which requires that "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

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<sup>6</sup>The only possible evidence NWTS investigated is that NWTS told Lyons it had spoken with Carrington and Carrington had directed it to continue the sale. But, it is unclear whether NWTS actually did speak to Carrington since Carrington's records indicated that the property was not in foreclosure and Carrington denies ever instructing NWTS to continue with the sale.

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deed of trust.” The trial court determined there were no issues of material fact and granted summary judgment. We disagree and find that when considering the allegations in favor of Lyons, some material factual issues remain that necessitate the denial of summary judgment.

Lyons claims that the second beneficiary declaration was defective because the language did not prove Wells Fargo, the beneficiary, was the owner, as required by RCW 61.24.030(7)(a). *Bain* emphasized that the act requires a trustee to have proof that the beneficiary is the actual owner of the note to be foreclosed on. 175 Wn.2d at 102 (citing RCW 61.24.030(7)(a)), 111 (“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.”). Seeking to foreclose without being a holder of the applicable note in violation of the DTA is actionable in a claim for damages under the CPA. *Id.* at 115-20.

Although ownership can be proved in different ways, the statute itself suggests one way: “A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as required under this subsection.” RCW 61.24.030(7)(a). Typically, unless the trustee has violated a duty of good faith, it is entitled to rely on the beneficiary’s declaration when initiating a trustee’s sale. *See* RCW

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61.24.030(7)(b). But if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee’s sale to comply with its statutory duty.

The United States District Court for the Western District of Washington recently decided *Beaton v. JPMorgan Chase Bank N.A.*, No. C11-0872 RAJ, 2013 WL 1282225 (Mar. 26, 2013) (court order), where it interpreted a beneficiary declaration similar to the declaration in this case. It read, ““JPMorgan Chase Bank, N.A. successor in interest to Washington Mutual Bank fka Washington Mutual Bank, FA is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation.”” *Id.* at \*5. The court held that this provision indicated that “Chase could be a nonholder in possession or a person not in possession who is entitled to enforce the instrument neither of which is proof that ‘the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.”” *Id.* (citation omitted) (quoting RCW 61.24.030(7)(a)). Because DTA provisions must be strictly complied with, the ambiguity regarding whether the beneficiary declaration satisfied the statutory requirement created enough of a question of whether there was a violation of the DTA to survive summary judgment in that case. *Id.* *Lyons* encourages the court to adopt the reasoning in *Beaton*.

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NWTS argues that *Beaton* is wrongly decided and that the language of the beneficiary declaration, in conjunction with the statutory requirements of the DTA and case law, is valid. Notably, NWTS points out that a beneficiary declaration is not the exclusive manner in which a trustee can satisfy RCW 61.24.030(7). This declaration uses the phrase “or has requisite authority,” and only a holder has the requisite authority to act as a beneficiary under *Bain*. CP at 118. Since requisite authority under the DTA and Washington case law is strictly limited to a holder status, NWTS argues both clauses in the beneficiary declaration provide proof that Wells Fargo was a holder for the purposes of RCW 61.24.030(7)(a).

Because DTA provisions should be strictly construed, 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. But NWTS, as trustee, can still prove that Wells Fargo was the owner of the note in a way other than through the beneficiary declaration referenced in RCW 61.24.030(7)(a). Thus, there remains a material issue of fact as to whether Wells Fargo was the owner prior to initiating the trustee’s sale. NWTS will need to furnish that proof but may not just rely on this ambiguous declaration.

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Additionally, Lyons claims the second beneficiary declaration was never proper because of the existence of the first beneficiary declaration. The first declaration identified Wells Fargo as trustee for Soundview, yet less than a year later Wells Fargo asserts that it is the holder. It is not entirely clear how Wells Fargo could give its interest to Soundview and then give it back to itself eight months later. Material questions of fact remain as to whether the second beneficiary declaration was valid and whether NWTs should have questioned its efficacy in light of the prior beneficiary declaration. Taking the facts in a light most favorable to Lyons, summary judgment was inappropriate and a cause of action under the CPA could be supported.

- C. No issues of fact remain for the claim of intentional infliction of emotional distress, so summary judgment was proper

Lyons also alleges a claim for the tort of outrage, otherwise known as intentional infliction of emotional distress. “The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). “The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.” *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); see *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59

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P.3d 611 (2002). “The first element requires proof that the conduct was ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Robel*, 148 Wn.2d at 51 (emphasis omitted) (internal quotation marks omitted) (quoting *Dicomes*, 113 Wn.2d at 630).

Conduct during foreclosure could support a claim for intentional infliction of emotional distress, but it must satisfy the high burden applicable to these claims. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965); compare *Montgomery v. SOMA Fin. Corp.*, No. C13-360 RAJ, 2014 WL 2048183, at \*7 (W.D. Wash. May 19, 2014) (court order) (plaintiffs alleged that the bank induced them to default, then foreclosed on the property using a perjured declaration; the court found that reasonable minds could differ as to whether this egregious conduct was sufficiently outrageous and so the claim survived summary judgment), with *Vawter*, 707 F. Supp. 2d at 1128 (“Chase’s and MERS’s actions in connection with the nonjudicial foreclosure process, as alleged by the Vawters, may be problematic, troubling, or even deplorable” but is insufficiently outrageous for an intentional infliction of emotional distress claim), and *McGinley v. Am. Home Mortg. Serv., Inc.*, No. 2:10-CV-01157 RJB, 2010 WL 4065826, at \*11 (W.D. Wash. Oct. 15, 2010) (court order) (claim resting on alleged nondisclosures associated with loan refinance, terms of the loan, and subsequent nonjudicial foreclosure proceedings was insufficiently

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outrageous to survive summary judgment), and *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1046 (2011) (“plaintiffs essentially allege that the lenders offered them loans that the lenders knew they could not repay; this is not inherently ‘extreme and outrageous’”), and *Wells v. Chase Home Fin., LLC*, No. C10-5001RJB, 2010 WL 4858252, at \*8 (W.D. Wash. Nov. 19, 2010) (court order).

To support her claim for intentional infliction of emotional distress, Lyons relies on the same factual allegations above. She claims that the conduct of NWTs in not confirming the proper beneficiary and in not suspending the trustee’s sale when she contacted them was so outrageous as to go beyond all bounds of decency. But these allegations are not so outrageous that they shock the conscience or go beyond all sense of decency. While perhaps the actions might have violated the DTA and could support a claim under the CPA, the acts are not sufficiently outrageous to support a claim for outrage. We affirm the trial court’s grant of summary judgment on the intentional infliction of emotional distress claim.

#### IV. CONCLUSION

If a trustee’s sale has not occurred, an allegedly wronged homeowner cannot bring a damages claim under the DTA. However even if a trustee’s sale has not occurred, an allegedly wronged homeowner can bring a claim for damages under the CPA. Material issues of fact remain as to whether NWTs violated the CPA by not acting in good faith or by improperly relying on a questionable beneficiary

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declaration. We affirm the court's grant of summary judgment in favor of NWTs for the DTA and intentional infliction of emotional distress claims. We reverse the grant of summary judgment on the CPA claim and remand to the trial court.

Fainhurst, J.

WE CONCUR:

Madsen, C. J.

Plum

Owen, J.

Strom, J.

Wiggins, J.

Conzales, J.

Gooden, J.

Jr., J.

## **APPENDIX “B”**

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHN KNECHT, et al.,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE  
INSURANCE COMPANY, et al.,

Defendants.

CASE NO. C12-1575RAJ

ORDER

**I. INTRODUCTION**

This matter comes before the court on a motion for summary judgment from Defendants Deutsche Bank National Trust Company (“DB”) and Mortgage Electronic Registration Systems, Inc. (“MERS”), a motion for summary judgment from Defendant Fidelity National Title Insurance Company (“Fidelity”), and a motion for partial summary judgment from Plaintiff John Knecht. The court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS Defendants’ motions in part and DENIES them in part, (Dkt. ## 67, 69) and DENIES Mr. Knecht’s motion (Dkt. # 64). A bench trial on the claims that survive Defendants’ motions will begin on November 12, 2014. A schedule for pretrial submissions concludes this order.

**II. BACKGROUND**

The court has already considered this dispute in a March 11, 2013 order granting in part and denying in part Defendants’ motions to dismiss. Although the court dismissed

1 some of Mr. Knecht's claims without prejudice, he declined to amend his complaint. The  
2 court now considers whether to grant summary judgment on the claims that survived the  
3 motions to dismiss: Mr. Knecht's claim for specific violations of the Washington Deed of  
4 Trust Act (RCW Ch. 61.24), his claim to enjoin a trustee's sale of his North Bend  
5 residential property, his claim for violations of the Washington Consumer Protection Act  
6 (RCW Ch. 19.86, "CPA"), and a few claims for declaratory relief.

7 Each of those claims arises from a \$315,000 loan in 2006 from American Brokers  
8 Conduit ("ABC") to Mr. Knecht, which is memorialized in an adjustable-rate promissory  
9 note. ABC secured that loan with a deed of trust to Mr. Knecht's North Bend residential  
10 property. The deed of trust named ABC as the lender, Fidelity National Title Company  
11 of Washington (a different entity than Fidelity, the Defendant in this case) as the trustee,  
12 and MERS as the beneficiary of the deed of trust. The deed of trust stated that MERS  
13 acted "solely as a nominee for [ABC] and [ABC]'s successors and assigns."

14 Mr. Knecht is in default on that loan, which no one disputes. He has been in  
15 default since 2010. Mr. Knecht does not dispute that he has not made loan payments  
16 since then, and he does not dispute that he cannot afford to pay what he owes.

17 DB and Fidelity have three times attempted to foreclose Mr. Knecht's deed of  
18 trust. DB purports to be the owner of Mr. Knecht's note, and thus purports to be the  
19 beneficiary entitled to foreclose. It purports to have appointed Fidelity in September  
20 2010 as the trustee entitled to conduct the foreclosure, and it was Fidelity who recorded  
21 notices of trustee's sales in October 2010, September 2011, and June 2012. Fidelity and  
22 DB ultimately abandoned each of these attempted foreclosures. There is no trustee's sale  
23 currently pending,<sup>1</sup> although Defendants are conspicuously silent about whether they  
24 intend to conduct a sale in the future. It is difficult to imagine that they have any other  
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27 <sup>1</sup> As the court noted in its previous order, the King County Superior Court issued a preliminary  
28 injunction enjoining any trustee's sale before Defendants removed the case to this court. Mar.  
11, 2013 ord. (Dkt. # 20) at 2-3, 8. No Defendant has asked the court to set aside that injunction.

1 intent. Mr. Knecht is still in default on the loan; it would appear that DB's only means of  
2 cutting its losses is to foreclose.

3 The dispute at the core of this dispute requires two critical determinations. First,  
4 the court must decide if DB is entitled to summary judgment that it was, throughout its  
5 foreclosure efforts, the beneficiary of Mr. Knecht's deed of trust. If it was not, it had no  
6 authority to appoint Fidelity as a successor trustee, and Fidelity had no authority to  
7 conduct foreclosure proceedings. Second, the court must decide if either Fidelity or Mr.  
8 Knecht are entitled to summary judgment that Fidelity complied with RCW 61.24.030(7),  
9 the provision of the Deed of Trust Act that requires a trustee to have proof that the  
10 beneficiary is the owner of the note secured by the deed of trust. As the court will  
11 explain in Part III of this order, DB is not entitled to summary judgment that it was the  
12 beneficiary, and neither Mr. Knecht nor Fidelity is entitled to summary judgment that  
13 Fidelity had the requisite proof of DB's beneficiary status. Resolving both of those  
14 issues will require a bench trial. In Part IV, the court will address Mr. Knecht's specific  
15 claims to determine which will be at issue at trial.

16 The court applies the familiar summary judgment standard, which requires it to  
17 draw all inferences from the admissible evidence in the light most favorable to the non-  
18 moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).  
19 Summary judgment is appropriate where there is no genuine issue of material fact and the  
20 moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The  
21 moving party must initially show the absence of a genuine issue of material fact. *Celotex*  
22 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must then show a  
23 genuine issue of fact for trial. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475  
24 U.S. 574, 586 (1986). The opposing party must present probative evidence to support its  
25 claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558  
26 (9th Cir. 1991). The court defers to neither party in resolving purely legal questions. *See*  
27 *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999).

III. ANALYSIS

A. Is DB the Beneficiary of Mr. Knecht's Deed of Trust?

A deed of trust is a three-party transaction in which a borrower (the grantor of the deed of trust) conveys title to her property to a trustee, who holds the title in trust for the lender, who is the beneficiary of the deed of trust. *Bain v. Metro. Mortgage Group, Inc.*, 285 P.3d 34, 38 (Wash. 2012). The deed of trust grants the beneficiary a power of sale that it can invoke if the borrower defaults, in which case the trustee is empowered to sell the property at a trustee's sale. *Id.* Washington's Deed of Trust Act places non-waivable restrictions on the power of sale and the means by which the trustee can conduct a sale. *Id.* ("The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication that the legislature intended to allow the parties to vary those procedures by contract.") Provided the trustee and beneficiary comply with the Deed of Trust Act, the trustee can sell the property without judicial oversight.

Mr. Knecht contends that DB is not (and was not) the beneficiary of his deed of trust.

1. MERS Falsely Declared Itself the Beneficiary of Mr. Knecht's Deed of Trust, and Purported to Convey to DB Rights That MERS Never Held.

From its inception, Mr. Knecht's deed of trust ran afoul of the Deed of Trust Act by designating MERS as its beneficiary. The Act declares that the beneficiary of a deed of trust is "the holder of the instrument or document evidencing the obligations secured by the deed of trust . . ." RCW 61.24.005(2). Banks and other well-heeled financial interests, in an effort to facilitate the easy transfer of mortgage obligations, created MERS in the mid 1990s. *Bain*, 285 P.3d at 39-40. MERS is, in essence, a database for tracking mortgage rights that permits MERS's member institutions to transfer mortgage obligations without publicly recording the transfers. *Id.* In Washington, lenders hoping to take advantage of the MERS system designated MERS as the beneficiary of deeds of trust, just as ABC did in Mr. Knecht's deed of trust. But it is now clear that Washington

1 law does not permit MERS to act as a beneficiary unless it is also the “holder” of the note  
2 secured by the deed of trust. *Bain*, 285 P.2d at 47.

3 There is no suggestion that MERS ever held Mr. Knecht’s note, and yet it  
4 purported in April 2010 to assign to DB “the Promissory Note secured by [the Knecht]  
5 deed of trust and also all rights accrued or to accrue under said Deed of Trust.” The  
6 assignment, which is recorded in King County, was executed by “MERS as nominee for  
7 [ABC],” but there is no evidence that ABC actually authorized MERS to effect the  
8 transfer. *See Bavand v. OneWest Bank, FSB*, 309 P.3d 636, 649 (Wash. Ct. App. 2013)  
9 (noting MERS’s failure to establish its agency relationship with a noteholder).

10 There is no dispute in this case that MERS lacked the power to transfer anything  
11 to DB. DB does not rest its claim to be the beneficiary of Mr. Knecht’s deed of trust on  
12 the MERS assignment, or at least it does not do so in these motions. Indeed, DB  
13 consistently refuses to acknowledge that MERS purported to assign not only the deed of  
14 trust, but Mr. Knecht’s note as well. DB avoids the MERS assignment, it appears,  
15 because it prefers that the court not focus on that apparently void transfer of the deed of  
16 trust and note. DB prefers that the court conclude that it acquired its interest in the deed  
17 of trust and note without MERS’s assistance.

18 **2. The Declaration from Mr. Knecht’s Bankruptcy Does Not Entitle DB**  
19 **to Summary Judgment.**

20 The court now considers DB’s evidence that it obtained its alleged interest in Mr.  
21 Knecht’s Note from a source other than MERS. DB relies on a version of Mr. Knecht’s  
22 note that is endorsed in blank by ABC. Ewbank Decl. (Dkt. # 68), Ex. B. There is no  
23 evidence as to how DB acquired that note. The note is in the record via a declaration  
24 from DB’s counsel stating merely that the endorsed document is a true and correct copy  
25 of the note. *Id.* ¶ 3. That statement raises more questions than it answers. The  
26 endorsement is undated, but it was plainly executed after Mr. Knecht signed the note.  
27

1 There is no direct evidence that DB acceded to ABC's rights as the lender on the note and  
2 the beneficiary of the deed of trust.

3 Instead of direct evidence, DB asks the court to rely on documents filed in Mr.  
4 Knecht's 2010 bankruptcy proceeding, which preceded the foreclosure attempts at issue  
5 in this case. In the bankruptcy proceeding, a person claiming to be the authorized agent  
6 of American Home Mortgage Servicing, Inc. ("AHMSI"), filed a March 2010 declaration  
7 stating that AHMSI was a servicer for DB. Ewbank Decl. (Dkt. # 68), Ex. C. It also  
8 stated that DB was "the holder and owner" of the Knecht note. *Id.* ¶ 6. The declaration  
9 purports to attach "documents evidencing the ownership of the loan including the Note  
10 and Deed of Trust," *id.*, but the only documents attached to it are the note and deed of  
11 trust.<sup>2</sup> The declarant (a "Bankruptcy Specialist" residing in Florida) stated that he had  
12 "personal knowledge" of the facts to which he attested. *Id.* ¶ 1. But the only basis he  
13 states for his "personal knowledge" of the ownership of the note is that he "personally  
14 reviewed the business records related to this loan . . . ." *Id.* ¶ 4. He does not reveal what  
15 those business records are. If DB (or anyone else) has business records that establish  
16 DB's ownership of Mr. Knecht's note, those records are not before the court.

17 DB relied on the declaration in the bankruptcy proceedings in its motion for relief  
18 from the automatic bankruptcy stay. No one opposed that motion, and the Bankruptcy  
19 court merely signed DB's proposed order. DB does not argue that the order is entitled to  
20 res judicata or issue preclusive effect. It nonetheless suggests that because no one  
21 objected in the bankruptcy court to its assertion that it was entitled to foreclose, its status  
22 as beneficiary is now an established fact. The court disagrees.

23 DB does not explain the apparent inconsistency between the bankruptcy  
24 declaration and MERS's assignment of the note and deed of trust on April 1, 2010. If the  
25 bankruptcy declaration accurately claimed that DB was the "holder and owner" of Mr.

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26 <sup>2</sup> DB did not include the exhibits to the declaration when it filed the bankruptcy declaration in  
27 this court. The court verified the existence of the attachments by examining the bankruptcy  
28 court's records.

1 Knecht's note as of late March 2010, why did MERS purport to assign the note to DB at  
2 the beginning of April 2010? DB suggests no answer.

3 **3. Trial is Necessary to Determine Whether DB Is the Beneficiary of the**  
4 **Deed of Trust.**

5 Perhaps recognizing that its own proof is shaky, DB insists that it is Mr. Knecht's  
6 burden to prove that DB does not own the note. The only authority it cites for that  
7 proposition is a decision from one of this District's judges in which the court held that  
8 where the beneficiary attempting to foreclose "was the original lender," conclusory  
9 allegations that the beneficiary had no authority to foreclose were inadequate to state a  
10 claim. *Coble v. Suntrust Mort., Inc.*, No. C13-1978JCC, 2014 U.S. Dist. LEXIS 23921,  
11 at \*10 (W.D. Wash., Feb. 18, 2014). The court in *Coble* did not address anyone's burden  
12 of proof, and granted the borrower leave to amend to more particularly state allegations  
13 that the original lender did not own the note. *Id.* at \*10-12. Here, DB was not the  
14 original lender, and *Coble* is of no assistance to DB.

15 Even assuming that Mr. Knecht bears the burden to prove that DB is not the  
16 beneficiary of his deed of trust, an issue the court does not decide,<sup>3</sup> the evidence he has  
17 provided is sufficient to create a genuine issue of material fact that only a trial can  
18 resolve. Mr. Knecht has offered two pieces of evidence: his original note and deed of  
19 trust, in which DB held no interest; and the MERS assignment, which was a legal nullity.  
20 A trier of fact could determine that this evidence makes it more likely than not that DB  
21 has no valid interest in Mr. Knecht's note or deed of trust.

22 On this record, a reasonable trier of fact could conclude that DB was the  
23 beneficiary of Mr. Knecht's deed of trust or that it was not. A trier of fact would likely  
24 wonder why DB, which claimed to have its interest in Mr. Knecht's deed of trust as of

25 <sup>3</sup> The court observes that it is the beneficiary, not the borrower, who can be expected to possess  
26 evidence that it is the holder or owner of a promissory note. The court finds it unlikely that a  
27 Washington court would burden the borrower alone with providing that evidence. As the *Bain*  
28 court observed, in cases where "the original lender ha[s] sold the loan, th[e] purchaser would  
need to establish ownership of that loan, either by demonstrating that it actually held the  
promissory note or by documenting the chain of transactions." 285 P.3d at 47-48.

1 March 2010, needed to record an assignment of that interest executed in April 2010. The  
2 trier of fact would likely be puzzled by DB's paltry evidence. If DB holds or owns the  
3 note, it is surprising that it has not offered evidence from a DB representative with  
4 personal knowledge about how DB acquired the note. Instead, DB relies on the  
5 bankruptcy declaration, sworn by a person whose claim to personal knowledge is  
6 dubious. Mr. Knecht's evidence is no better. He apparently conducted no discovery to  
7 help prove his contention that DB does not own the note. Despite these evidentiary  
8 shortcomings, the court can only rule on the record before it, and on that record, no one is  
9 entitled to judgment as a matter of law on the factual question of whether DB acquired a  
10 beneficiary interest that permitted it to foreclose Mr. Knecht's deed of trust.

11 **B. Did Fidelity Comply With Its Obligations as a Trustee?**

12 DB purported to appoint Fidelity as the trustee for Mr. Knecht's deed of trust in  
13 September 2010. The beneficiary of a deed of trust has authority to appoint a successor  
14 trustee. RCW 61.24.010(2). The purported appointment of a trustee by a non-  
15 beneficiary is a void act, and the purported trustee has no authority to foreclose. *See, e.g.,*  
16 *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716, 721 (Wash. Ct. App. 2013); *Bavand*,  
17 309 P.3d at 649. For purposes of examining whether Fidelity is liable for its actions as a  
18 trustee, the court assumes that DB had the power to appoint Fidelity.

19 The Deed of Trust Act imposes duties on a trustee. First, although a trustee has no  
20 fiduciary duty, RCW 61.24.010(3), it has a "duty of good faith to the borrower,  
21 beneficiary, and grantor." RCW 61.24.010(4). In addition, one of the statutory requisites  
22 of a trustee's sale is as follows:

23 [F]or residential real property, before the notice of trustee's sale is  
24 recorded, transmitted, or served, the trustee shall have proof that the  
25 beneficiary is the owner of any promissory note or other obligation secured  
26 by the deed of trust. A declaration by the beneficiary made under the  
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.

27 RCW 61.24.030(7)(a).

28 ORDER – 8

1           **1. Fidelity Had No Beneficiary Declaration That Complied with the Final**  
2           **Sentence of RCW 61.24.030(7)(a).**

3           According to Fidelity, it received two declarations that satisfy RCW  
4           61.24.030(7)(a). The declarations are nearly identical. Yellin Decl. (Dkt. # 70), Exs. 1 &  
5           2. Both suggest that someone other than DB prepared them, because they state:  
6           “PLEASE COMPLETE AND EXECUTE THE BELOW DECLARATION:” *Id.* Both  
7           declarations state as follows:

8                     The undersigned beneficiary or authorized agent for the beneficiary hereby  
9                     represents and declares under the penalty of perjury that the beneficiary is  
10                    the owner of the Promissory Note or other obligation secured by the Deed  
11                    of Trust[.]

12           *Id.* DB signed neither declaration. Instead, a representative of AHMSI signed each.  
13           Below each signature was the notation “Signature of Mortgagee, Beneficiary of  
14           Authorized Agent.” *Id.* One declaration plainly bears a September 24, 2010 date. *Id.*,  
15           Ex. 1. The other appears to be dated May 14, 2014, or about 7 weeks *before* Fidelity  
16           filed it in this case. *Id.*, Ex. 2. DB and Fidelity refuse to acknowledge that the document  
17           facially bears a 2014 date, and Fidelity attempts to demonstrate that the document was  
18           “uploaded” to Fidelity’s computer systems in August 2012. Yellin Decl. (Dkt. # 75) ¶ 3  
19           & Ex. 1. The earlier declaration does not mention DB. Yellin Decl. (Dkt. # 70), Ex. 1.  
20           The later declaration has DB’s name sandwiched between the date and the signature of  
21           the AHSMI representative. *Id.*, Ex. 2.

22           These declarations are woeful. Taken literally, they state that AHMSI is the  
23           “Mortgagee, Beneficiary of Authorized Agent.” But AHMSI is not the mortgagee (*i.e.*,  
24           the entity holding the security interest that secures the deed of trust), and the phrase  
25           “Beneficiary of Authorized Agent” is nonsense in this context. Assuming a  
26           typographical error, the declarations meant to state that AHMSI was the “Mortgagee,  
27           Beneficiary, *or* Authorized Agent,” without stating which of those three labels applies to  
28           AHMSI. The declarations do not identify who the beneficiary is. One declaration  
          appears to bear the wrong date. Although the declarations themselves are dated, there is

1 no evidence as to when Fidelity received either declaration. As to the later one, which  
2 Fidelity asserts is dated May 14, 2011, Fidelity asserts that it “uploaded” the document 15  
3 months later, in August 2012, which was two months *after* Fidelity recorded the last of  
4 the three notices of trustee’s sale it issued with respect to Mr. Knecht’s property.

5 On this record, Fidelity had no beneficiary declaration that complied with RCW  
6 61.24.030(7). First, there is no evidence that Fidelity had those declarations before it  
7 issued notices of trustee’s sales to Mr. Knecht. Second, the first of the declarations does  
8 not identify DB, and thus is of no value (without more evidence) in asserting DB’s  
9 beneficiary status. The second of the declarations at least states DB’s name, but it does  
10 not do so in a way that compels the conclusion that DB purports to be the beneficiary.  
11 Third, neither declaration is executed “by the beneficiary,” as the statute requires. It is  
12 possible that a declaration issued by an appropriately-authorized agent of a beneficiary  
13 would suffice to comply with RCW 61.24.030(7), but the declarations on which Fidelity  
14 purports to have relied neither squarely declare that AHMSI is an appropriately-  
15 authorized agent nor provide any reason to believe that AHMSI is an appropriately-  
16 authorized agent.<sup>4</sup>

17 In ruling that Fidelity had no statutorily-compliant beneficiary declaration, the  
18 court has considered the recent ruling of the Washington Court of Appeals in *Trujillo v.*  
19 *NW Trustee Servs., Inc.*, 326 P.3d 768 (Wash. Ct. App. 2014). There, the court  
20 considered whether a trustee could rely on a beneficiary declaration from the beneficiary  
21 itself declaring that it was “the actual holder of the promissory note . . . evidencing the  
22 [borrower’s] loan or has the requisite authority under RCW 62A.3-301 to enforce said  
23 [note].” *Id.* at 770. The court explained the difference between the “owner” of a note  
24 (the person or entity entitled to the note’s economic benefits) and the “holder” of a note

25 \_\_\_\_\_  
26 <sup>4</sup> Mr. Knecht asserts that the beneficiary declaration is invalid because it does not comply with  
27 RCW 9A.72.085, which contains requirements for declarations under penalty of perjury that  
28 Fidelity’s declarations plainly do not satisfy. The statute, however, applies only to declarations  
submitted in an “official proceeding.” A declaration from a beneficiary to a trustee in  
accordance with RCW 61.24.030(7) is not a declaration submitted in an official proceeding.

1 (the person or entity entitled to enforce the note). *Id.* at 774-76. It explained that a  
2 person or entity can be both the holder and owner of a note, or a note can have an owner  
3 and a separate holder. *Id.* at 775-76. It concluded that despite ambiguity in RCW  
4 61.24.030(7)(a), a beneficiary declaration need only establish that the beneficiary is the  
5 *holder* of the note secured by the deed of trust. *Id.* at 776 (“RCW 61.24.030(7)(a),  
6 properly read, does not require [the beneficiary] to also be the ‘owner’ of the note.  
7 Rather, it requires that a person entitled to enforce a note be a holder and need not also be  
8 an owner.”). *Trujillo* suffices to dispense with Mr. Knecht’s argument that the  
9 beneficiary declarations on which Fidelity relied are invalid because they do not declare  
10 anyone to be the “owner” of his note. It does not, however, shelter Fidelity from the  
11 other deficiencies the court has identified in its beneficiary declarations.

12 **2. Trial Is Necessary to Determine Whether Fidelity Had Sufficient Proof**  
13 **That DB Was the Beneficiary.**

14 That Fidelity had no beneficiary declaration that complied with the Deed of Trust  
15 Act is not dispositive of whether Fidelity followed the law. A beneficiary declaration is  
16 “sufficient proof” under RCW 61.24.030(7)(a), not necessary proof. A trustee who has  
17 no beneficiary declaration can act as long as it has “proof that the beneficiary is the  
18 owner of any promissory note or other obligation secured by the deed of trust.” RCW  
19 61.24.030(7)(a).

20 On this record, a trier of fact could reach different conclusions as to whether  
21 Fidelity had proof of DB’s beneficiary status. This is, again, primarily a consequence of  
22 the paltry record before the court. The beneficiary declarations that Fidelity has  
23 submitted did not materialize out of thin air, but the evidence before the court is silent as  
24 to their provenance. Fidelity offers no evidence of where they came from and neither  
25 does Mr. Knecht. A finder of fact considering this evidence would likely be flummoxed.  
26 The court cannot say with any certainty what conclusions a finder of fact would reach.

**IV. ANALYSIS OF MR. KNECHT'S INDIVIDUAL CLAIMS**

The court's March 2013 order identified which claims in Mr. Knecht's complaint survived Defendants' motion to dismiss. Mr. Knecht did not amend his complaint thereafter. The court now considers which of those claims will proceed to trial.

The claims that survived the motions to dismiss are:

- 1) Violations of the Deed of Trust Act:
  - a. DB's initiation of foreclosure, including the appointment of Fidelity as a trustee, when it had no authority to do so because it was not the beneficiary of Mr. Knecht's deed of trust;
  - b. Violation of RCW 61.24.030(7), based on Fidelity's lack of proof that DB was the beneficiary of Mr. Knecht's deed of trust; and
  - c. Violation of RCW 61.24.030(8), 61.24.030(9), 61.24.031, and 61.24.040(1), which govern the timing of a letter explaining a borrower's pre-foreclosure right to request a meeting with the beneficiary, a subsequent notice of default, and the timing of a notice of trustee's sale.
- 2) A claim to enjoin a future trustee's sale based on the Deed of Trust Act violations identified above.
- 3) A claim for violation of the CPA based on the Deed of Trust Act violations identified above.
- 4) Requests for declaratory judgment
  - a. that MERS's assignment of the note and deed of trust to DB is void
  - b. that DB is not the holder of Mr. Knecht's note, is not the beneficiary of his deed of trust, and that its purported appointment of Fidelity as trustee was invalid
- 5) A claim to quiet title by voiding Defendants' interests in the property and declaring the deed of trust void.

1 Mr. Knecht attempted to introduce a new claim in his motion for partial summary  
2 judgment, contending that Defendants violated the requirements of RCW  
3 61.24.030(8)(g)-(j), which require certain content in a notice of default. That claim  
4 appears nowhere in Mr. Knecht's complaint, the court did not acknowledge it as a claim  
5 that survived the motions to dismiss, and Mr. Knecht made no timely request to amend  
6 his complaint to include that claim. It is not part of this case.

7 Also not part of this case is a claim Mr. Knecht presented for the first time in his  
8 opposition to Fidelity's motion – a claim that Fidelity breached the duty of good faith that  
9 RCW 61.24.040 imposes.

10 **A. The Core Disputes Identified Above Are Sufficient to Carry Several Claims  
11 to Trial.**

12 The dispute over whether DB was the beneficiary of Mr. Knecht's deed of trust  
13 means that trial is necessary to resolve many of Mr. Knecht's claims. The Deed of Trust  
14 Act itself permits a cause of action against a beneficiary and a trustee who wrongfully  
15 initiate foreclosure proceedings, even where no trustee's sale occurred. *Walker*, 308 P.3d  
16 at 720 (eschewing "wrongful foreclosure" label, characterizing borrower's claim "as a  
17 claim for damages arising from DTA violations").<sup>5</sup> A Deed of Trust Act claim arises  
18 "when an unlawful beneficiary appoints a successor trustee," *Walker*, 308 P.3d at 721,  
19 just as DB may have done in this case.

20 Mr. Knecht has triable CPA claims for the same reasons. That claim would  
21 require Mr. Knecht to prove "(1) [an] unfair or deceptive act or practice; (2) occurring in  
22 trade or commerce; (3) public interest impact, (4) [an] injury to plaintiff in his or her  
23 business or property, [and] (5) causation." *Hangman Ridge Training Stables, Inc. v.*

24 <sup>5</sup> Another judge in this District has certified to the Washington Supreme Court some of the same  
25 questions that *Walker* answered. See *Frias v. Asset Foreclosure Servs., Inc.*, No. C13-760MJP,  
26 2013 U.S. Dist. LEXIS 147444 (W.D. Wash. Sept. 25, 2013). The court takes judicial notice of  
27 the Washington Supreme Court docket, which reveals that the court heard oral argument in *Frias*  
28 in February of this year, but has yet to issue a decision. Pending that court's decision, the court  
will follow *Walker*. The court observes that Defendants' failure to cite *Walker* or address its  
reasoning did not serve them well in the motions before the court.

1 *Safeco Title Ins.*, 719 P.2d 531, 523 (Wash. 1986). Mr. Knecht may be able to prove a  
2 variety of unfair or deceptive acts or practices. MERS purported to transfer interests in  
3 Mr. Knecht's deed of trust and note to DB even though it had no interests to assign. *See*  
4 *Bain*, 285 P.3d at 51 (“[C]haracterizing MERS as the beneficiary has the capacity to  
5 deceive and thus . . . presumptively the first element [of a CPA claim] is met.”). For the  
6 same reason, DB's appointment of Fidelity as a trustee is unfair or deceptive if the trier of  
7 fact concludes that DB had no authority to make the appointment. DB and MERS  
8 contend that their acts had no public interest impact, but that contention is wholly  
9 unpersuasive. *See Bain*, 285 P.3d at 51 (holding that MERS's deceptive conduct  
10 “presumptively” meets the public interest requirement of a CPA claim); *Bavand*, 309  
11 P.3d at 652 (holding that action based on unlawful beneficiary's unlawful appointment of  
12 successor trustee was sufficient to withstand summary judgment).

13 Mr. Knecht has evidence of damages caused by MERS's and DB's conduct. Mr.  
14 Knecht did what many homeowners faced with the prospect of foreclosure would do: he  
15 investigated. His evidence establishes that he spent substantial time on that investigation,  
16 and that suffices to establish a CPA injury. *Walker*, 308 P.3d at 727 (“Investigative  
17 expenses, taking time off from work, travel expenses, and attorney fees are sufficient to  
18 establish injury under the CPA.”). DB and MERS insist that the cause of Mr. Knecht's  
19 injury was his default, not their wrongdoing, but they are mistaken. If a jury concludes  
20 that DB had no authority to foreclose, then a trier of fact could infer that the cause of his  
21 need to investigate was DB's wrongfully-initiated foreclosure proceedings. Mr. Knecht  
22 already knew he was in default on his loan; he appears to have never disputed that. As to  
23 MERS, a trier of fact could conclude that Mr. Knecht needed to investigate, at least in  
24 part, because of MERS's attempt to assign rights in the deed of trust and note to DB.

25 Defendants assert that the purpose of the MERS assignment is to “provide notice to third  
26 parties of the security interest, not to provide notice to the borrower.” Defs.' Mot. (Dkt.  
27 # 67) at 9. Whatever the purpose of the assignment, it is a recorded document visible to

1 the borrower. It has the capacity to deceive the borrower into believing that a valid  
2 transfer of rights has occurred. It also has the capacity to deceive the borrower into  
3 believing that the assignee rests its claim to lawful beneficiary status on the assignment.  
4 And even if it lacks the capacity to deceive, it may nonetheless be an “unfair” act within  
5 the scope of the CPA. *See Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1187 (Wash. 2013)  
6 (“We note in passing that an act or practice can be unfair without being deceptive . . .”).

7 The court also declines to decide whether Mr. Knecht’s claim to enjoin a trustee’s  
8 sale is moot. As the court has noted, DB steadfastly refuses to state whether it intends to  
9 resume foreclosure efforts, and it is reasonable to suspect that DB will do so. In future  
10 foreclosure efforts, DB might take a different approach, perhaps an approach that  
11 complies with the Deed of Trust Act. That does not prevent the court, however, from  
12 enjoining DB from repeating the potentially unlawful conduct of its first three foreclosure  
13 attempts. Trial will determine to what extent an injunction is appropriate.

14 Because a trier of fact might conclude that Fidelity lacked proof of DB’s  
15 beneficiary status, Mr. Knecht has a claim against Fidelity arising under both the Deed of  
16 Trust Act and the CPA.

17 Mr. Knecht’s requests for declaratory judgment are ancillary to the core dispute  
18 underlying his Deed of Trust Act and CPA claims. For that reason, the court will not  
19 grant summary against his request for a declaration that the MERS assignment was void,  
20 or that DB is not the holder of Mr. Knecht’s note and thus has no authority to initiate a  
21 nonjudicial foreclosure.

22 **B. Mr. Knecht May Try His Claim Regarding the Pre-Foreclosure Letter**  
23 **Requirement and Its Impact on the Timing of the Notices of Default and**  
24 **Notices of Trustee’s Sales.**

25 Mr. Knecht raised only one claim that does not implicate the core disputes the  
26 court has identified. He declares that Defendants did not provide him with the pre-  
foreclosure disclosures that the Deed of Trust Act mandates. Knecht Decl. (Dkt. # 80),

27 ¶ 3.

28 ORDER – 15

1 Defendants offer no evidence that they provided the pre-foreclosure letter that  
2 RCW 61.24.031 mandates, nor that they complied with the timing requirements for the  
3 notice of default and notice of trustee's sale that depend on when that letter is sent. RCW  
4 61.24.030(8) (requiring notice of default at least thirty days before a notice of trustee's  
5 sale); RCW 61.24.030(9) (requiring compliance with RCW 61.24.031 before notice of  
6 trustee's sale); RCW 61.24.031(1)(a) (requiring 30 or 90 days before issuing notice of  
7 default, depending on borrower's response to pre-foreclosure letter); RCW 61.24.040(1)  
8 (requiring notice of trustee's sale 90 or 120 days before sale, depending on whether pre-  
9 foreclosure letter is required). They instead insist that this issue is moot, because they  
10 have abandoned their past foreclosure efforts. That does not, however, moot Mr.  
11 Knecht's claims for damages arising out of those past efforts.

12 Mr. Knecht has no evidence of damages caused by the timing of the notices, but  
13 he has evidence of damages that may have been caused by Defendants' apparent failure  
14 to send the pre-foreclosure letter. That letter is important, because it advises borrowers of  
15 their right to request a meeting with the beneficiary of their deed of trust. RCW  
16 61.24.031(1)(c)(iv). It also requires a beneficiary to make telephone calls to the borrower  
17 to follow up on the letter. RCW 61.24.031(5). A trier of fact could reasonably infer from  
18 the evidence before the court that Mr. Knecht may have been able to stop these  
19 foreclosure efforts sooner if DB or its authorized agent had complied with these  
20 requirements. A trier of fact could also reasonably infer that he would have spent less  
21 time investigating the foreclosure if Defendants had provided the pre-foreclosure letter.

22 Because the parties have paid little attention to Mr. Knecht's claims arising under  
23 these portions of the Deed of Trust Act, they have provided no analysis of when the  
24 requirements related to the pre-foreclosure letter first took effect. The court declines to  
25 conduct that analysis for them. It assumes, without deciding, that the requirements  
26 applied to all three of DB's foreclosure efforts.

1           **C. Some of Mr. Knecht’s Claims Cannot Proceed to Trial.**

2           Mr. Knecht provides no evidence from which any trier of fact could conclude that  
3 his note has become split from his deed of trust. The *Bain* court acknowledged the  
4 possibility that a deed of trust in which MERS falsely claimed a beneficial interest might  
5 “split the deed of trust from the obligation, making the deed of trust unenforceable,” but  
6 it did not chart a path for a borrower to prove as much. 285 P.3d at 48. Mr. Knecht  
7 offers neither evidence nor argument sufficient to chart that path, and the court rules that  
8 he has not demonstrated a “split” in his note and deed of trust as a matter of law.  
9 Moreover, he does not establish that he would benefit from showing a “split” of the note  
10 from the deed of trust. *See Bain*, 285 P.3d at 48 (noting possibility that current  
11 noteholder would become equitable mortgagee if a split occurred).

12           The court also rejects Mr. Knecht’s claim that his note was not negotiable, either  
13 because it was an adjustable rate note or because it was sold to an entity that pooled it  
14 with other loans to issue mortgage-backed securities. He offers no evidence, precedent,  
15 or argument that necessitates further discussion of that issue.

16           Similarly unavailing is Mr. Knecht’s claim to quiet title to his property. He may  
17 succeed at trial in proving that DB has no interest in his note or deed of trust, which  
18 would quiet title as to DB. Nonetheless, someone is presumably entitled to enforce the  
19 note and deed of trust. As noted, Mr. Knecht fails as a matter of law to demonstrate a  
20 “split” between the note and deed of trust. Mr. Knecht admits he has not paid the note  
21 and does not contend that he can do so. So, just like the state courts who have considered  
22 similar claims, the court rules that Mr. Knecht cannot quiet title as a matter of law. *See,*  
23 *e.g., Walker*, 308 P.3d at 729 (dismissing quiet title claim premised on designation of  
24 MERS as beneficiary of deed of trust); *Bavand*, 309 P.3d at 650 (following rule from  
25 *Walker* that plaintiff seeking to quiet title “must succeed on the strength of his own title  
26 and not on the weakness of his adversary”).

**D. Mr. Knecht's Invocation of the Washington Constitution is Unavailing.**

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Finally, the court rejects Mr. Knecht's invitation that the court rewrite RCW 61.24.030(7) (and perhaps much more of the Deed of Trust Act) in the guise of interpreting the Act to comply with the Washington Constitution. Mr. Knecht does not dispute that he has failed to timely assert a claim that the Deed of Trust Act (or any portion of it) is unconstitutional. He also does not dispute that he has not notified Washington's Attorney General of a constitutional challenge, as Federal Rule of Civil Procedure 5.1 requires. Instead, citing the canon of statutory construction requiring a court to construe statutes such that they do not violate the Washington constitution, he contends that the court should "interpret" RCW 61.24.030(7) in a manner wholly divorced from its plain meaning.

Citing the Washington Constitution's declaration that the State's superior courts "shall have original jurisdiction in all cases at law which involve the title or possession of real property," Art. IV, § 6, Mr. Knecht contends that the Deed of Trust Act's decision to vest discretionary authority in a trustee is unconstitutional. How the court could "interpret" any aspect of the Deed of Trust Act consistent with this argument, he does not explain. The Deed of Trust Act unambiguously permits nonjudicial foreclosures. Mr. Knecht advances no "interpretation" of the words of any portion of the Act that would prohibit nonjudicial foreclosures, and the court cannot conceive of one. Mr. Knecht asks the court to rewrite the Deed of Trust Act, not to interpret it.

Citing the Washington Constitution's guarantee of due process, Art. I, § 3, Mr. Knecht contends that the court should "interpret" the Deed of Trust Act so that it gives borrowers the right to be heard before they lose their homes. Of course, the Deed of Trust Act does just that, it permits a homeowner to seek relief from a court (as Mr. Knecht did) to enjoin a trustee's sale. Four of the Washington Supreme Court's current justices have contended that their Court has had "no occasion to fully analyze whether the nonjudicial foreclosure act" complies with the Washington Constitution's due process

1 clause. *Klem*, 295 P.3d at 1189 n.11. If Mr. Knecht wished to take up this invitation to  
2 challenge the constitutionality of the Deed of Trust Act, he ought to have made a proper  
3 constitutional challenge. To require more process than the Deed of Trust Act's explicit  
4 right to challenge a trustee's sale is not to "interpret" the statute, it is to rewrite it. For  
5 example, Mr. Knecht asks the court to "interpret" RCW 61.24.030(7)'s statement that a  
6 trustee may rely on a beneficiary declaration to require the trustee to provide the  
7 declaration to the borrower. That is not interpretation, is writing into the statute a  
8 requirement that the legislature did not impose.

9 Also unavailing is Mr. Knecht's invitation to "interpret" the Deed of Trust Act to  
10 comply with the Washington Constitution's guarantee that "[j]ustice in all cases shall be  
11 administered openly . . . ." Art. I, § 10. Mr. Knecht believes that because nothing  
12 obligates a trustee to prove to the borrower in advance of a foreclosure sale that it has  
13 complied with the Deed of Trust Act, the Act ought to be construed to impose that  
14 obligation in order to guarantee the open administration of justice. He relies on that  
15 argument to insist again that the court "interpret" the Deed of Trust Act to require a  
16 trustee to provide a borrower with a copy of a beneficiary declaration. Again, this is not  
17 "interpreting" the Deed of Trust Act, it is rewriting it.

18 In addition to his demands for statutory "interpretation," Mr. Knecht asks the court  
19 to certify his questions of interpretation to the Washington Supreme Court. The court  
20 will not exercise its discretion to do so. The court declines to have the Washington  
21 Supreme Court confirm that rewriting the Deed of Trust Act as Mr. Knecht prefers is not  
22 an exercise in statutory interpretation.

## 23 **V. CONCLUSION**

24 For the reasons previously stated, the court GRANTS Defendants' motions in part  
25 and DENIES them in part, (Dkt. ## 67, 69) and DENIES Mr. Knecht's motion (Dkt.  
26 # 64). A bench trial on the claims that survive Defendants' motions will begin on  
27 November 12, 2014. The court imposes the following pretrial schedule:

- 1) The parties must file motions in limine no later than October 2, 2014. Those motions shall comply with Local Rules W.D. Wash. LCR 7(d)(4). Defendants must cooperate in filing their motions in limine such that the cumulative length of their motions is 18 pages or fewer, and must do the same with respect to their oppositions to Mr. Knecht's motion in limine. Mr. Knecht's opposition to each Defendants' motion may contain no more pages than the motion to which it responds. All parties' motions must take into account that this case will be decided at a bench trial, not a jury trial.
- 2) The parties must file their agreed pretrial order no later than October 14, 2014.
- 3) The parties must submit trial briefs of 15 pages or fewer no later than October 29, 2014.
- 4) The parties must submit trial exhibits and deposition designations no later than October 31, 2014. The format of the trial exhibits shall comply with the court's previous scheduling order. Dkt. # 27.
- 5) The parties shall not submit proposed findings of fact or conclusions of law unless the court requests them.

DATED this 14th day of August, 2014.



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The Honorable Richard A. Jones  
United States District Court Judge

## **APPENDIX “C”**

**FILE**  
IN CLERKS OFFICE  
SUPREME COURT, STATE OF WASHINGTON

DATE SEP 18 2014

Madsen, C.J.  
CHIEF JUSTICE

This opinion was filed for record  
at 8:00 AM on Sept. 18, 2014

Ronald R. Carpenter  
Supreme Court Clerk

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

CERTIFICATION FROM THE )  
UNITED STATES DISTRICT )  
COURT FOR THE WESTERN )  
DISTRICT OF WASHINGTON )  
IN )

FLORENCE R. FRIAS, )

Plaintiff, )

v. )

ASSET FORECLOSURE )  
SERVICES, INC.; LSI TITLE )  
AGENCY, INC.; U.S. BANK, N.A.; )  
MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEMS, INC.; )  
and DOE DEFENDANTS 1-20, )

Defendants. )

No. 89343-8

EN BANC

Filed: SEP 18 2014

FAIRHURST, J.—We have been asked by the United States District Court for the Western District of Washington to determine whether state law recognizes a cause of action for monetary damages where a plaintiff alleges violations of the deeds of trust act (DTA), chapter 61.24 RCW, but no foreclosure sale has been

completed. We are also asked to articulate the principles that would apply to such a claim under the DTA and the Consumer Protection Act (CPA), chapter 19.86 RCW.

We hold that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed. The answer to the first certified question is no—at least not pursuant to the DTA itself. We further hold that under appropriate factual circumstances, DTA violations may be actionable under the CPA, even where no foreclosure sale has been completed. The answer to the second certified question is that the same principles that govern CPA claims generally apply to CPA claims based on alleged DTA violations.

#### I. FACTUAL AND PROCEDURAL HISTORY

In September 2008, plaintiff Florence R. Frias entered a promissory note secured by a deed of trust encumbering real property in Marysville, Washington. Defendant U.S. Bank National Association was identified on the note and deed of trust as the lender, and defendant Mortgage Electronic Registration Systems Inc. was identified as the beneficiary on the deed of trust. Frias eventually defaulted on her payments and attempted to contact representatives from U.S. Bank to obtain a loan modification. While Frias was waiting for a response from U.S. Bank, she received a notice of default followed by a notice of trustee's sale. Frias continued

working towards a loan modification, and the trustee's foreclosure sale was voluntarily discontinued.

Frias received another notice of trustee's sale in May 2011, which relied on the prior notice of default. The notice of trustee's sale included an itemization of the fees Frias needed to pay to stop the sale, including an auctioneer fee, a bankruptcy check fee, an assignment recording fee, and a fee for the anticipated cost of recording a trustee's deed following the trustee's sale, all of which Frias alleges are, at best, unreasonable in amount and, at worst, simply illegal.

Approximately 90 days later, in July 2011, Frias received a loan modification offer from U.S. Bank. Frias alleges the modification offer was unworkable because it required her to devote more than half of her gross income to her monthly mortgage payments. The May 2011 notice of trustee's sale did not indicate the sale would be delayed to accommodate Frias' efforts at loan modification, and the sale was not discontinued or postponed after U.S. Bank made its July 2011 modification offer.

In August 2011, Frias contacted a housing counselor in an attempt to participate in mediation pursuant to the Washington foreclosure fairness act. LAWS OF 2011, ch. 58. Frias' case was referred to the appropriate agency and a mediator was appointed. At the scheduled mediation session, Frias appeared, but no one appeared on behalf of the beneficiary. The mediation was rescheduled and U.S. Bank's attorney confirmed the foreclosure sale would be stayed pending mediation.

At the second scheduled mediation session, Frias learned the sale had gone forward as originally scheduled—after the first scheduled mediation session but before the second. U.S. Bank was the successful bidder, but the sale was not completed because the deed to the property was not issued. A third mediation session was scheduled to give U.S. Bank time to reverse the wrongful foreclosure sale and produce the required documentation. At that third session, U.S. Bank still did not have all its required documentation and refused to consider modifying Frias' loan. The mediator determined U.S. Bank had not participated in mediation in good faith.

Frias claims she is now uncertain of her status—she still has title to her home but has not entered a loan modification agreement and has not made any payments on her promissory note since mediation, though she would like to. Frias alleges this uncertainty has caused her emotional distress accompanied by physical symptoms.

Frias filed a summons and complaint in Snohomish County Superior Court. She named a cause of action against all defendants under the CPA, alleging that U.S. Bank refused to mediate in good faith in violation of the DTA, that various defendants made numerous misrepresentations to her, that defendants Asset Foreclosure Services Inc. and LSI Title Agency Inc. do not have legal authority to act as foreclosing trustees in Washington, and that the defendants falsely inflated the costs of the improper foreclosure sale for their own profit. Frias also named a cause of action for violations of the DTA against Asset Foreclosure and LSI as purported

trustees. Frias alleges these defendants violated their duties of good faith by initiating the foreclosure sale when they did not have legal authority to act as trustees and when they made demands for unreasonable payments not permitted by the DTA.

The matter was removed to the United States District Court for the Western District of Washington, and all defendants successfully moved for dismissal under Fed. R. Civ. P. 12(b)(6). As to the CPA claim, the federal court held Frias failed to allege any compensable injury because her property had not been sold and she had not paid any foreclosure fees. As to the DTA claim, the federal court held Frias could not state a cause of action under the DTA because no foreclosure sale had occurred. These holdings are consistent with prior western district decisions. *E.g.*, *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1123-24, 1129-30 (2010).

Frias moved for reconsideration. While her motion was pending, Division One of the Court of Appeals held in a published opinion that Washington law recognizes a cause of action for monetary damages under both the DTA and CPA for alleged DTA violations, even if no foreclosure sale has been completed. *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 313, 320, 308 P.3d 716 (2013). In light of *Walker*, the federal court refrained from ruling on Frias' motion for reconsideration and instead certified two questions to this court.

## II. CERTIFIED QUESTIONS PRESENTED

1. Under Washington law, may a plaintiff state a claim for damages relating to breach of duties under the [DTA] and/or failure to adhere to the statutory requirements of the [DTA] in the absence of a completed trustee's sale of real property?
2. If a plaintiff may state a claim for damages prior to a trustee's sale of real property, what principles govern his or her claim under the [CPA] and the [DTA]?

Order Certifying Questions to the Wash. Supreme Ct. at 3.

## III. STANDARD OF REVIEW

Certified questions are matters of law we review de novo. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). We consider the questions presented in light of the record certified by the federal court. *Id.* Because the federal court certified these questions in connection with a motion for dismissal for failure to state a claim on which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6), all facts alleged in the complaint are accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

## IV. ANALYSIS

In light of the submissions made in this case, we must first specify the scope and nature of our analysis. We then analyze whether the DTA implies a cause of action for damages premised on DTA violations absent a completed foreclosure sale, and we conclude it does not. Finally, we hold that the ordinary principles governing CPA claims generally apply to CPA claims premised on alleged DTA violations.

A. Our analysis is one of statutory construction, and we decline to consider submissions that make factual assertions and public policy arguments

As a preliminary matter, we must address submissions by some parties and amici that make factual assertions and policy arguments. In matters of statutory construction, we are tasked with discerning what the law is, not what it should be. We are in no position to analyze the large-scale impacts of accepting or rejecting Frias' position. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 109, 285 P.3d 34 (2012) ("The legislature, not this court, is in the best position to assess policy considerations."). And because this case is before us on certified questions from the federal court, our decision will be made on the certified record. RCW 2.60.010(4)-(5); RAP 16.16(d); *cf. Bain*, 175 Wn.2d at 114 (declining to answer a certified question because "resolution of the question before us depends on what actually occurred with the loans before us, and that evidence is not in the record").

We therefore decline all explicit and implicit requests that we take judicial notice of irrelevant submissions, including all of the following: materials and decisions from unrelated cases brought in federal bankruptcy courts or state superior courts; cases interpreting unrelated federal statutes; studies about the impacts of DTA-based actions on costs and on the availability of loan modifications; studies showing Washington's continued economic volatility, linking foreclosure rates to physical health problems, noting the financial disparity between borrowers and lenders, and pointing to the presence of hedge funds and out-of-state lenders in the

loan servicing market; and news articles about unrelated instances of lender misconduct and other homeowners' negative experiences with nonjudicial foreclosure.

B. The DTA does not create a cause of action for violations of its terms in the absence of a completed foreclosure sale

A statute can create a cause of action either expressly or by implication. *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702-03, 222 P.3d 785 (2009). At oral argument, Frias conceded that no provision of the DTA expressly creates a cause of action for monetary damages premised on a trustee's material DTA violations in the absence of a completed foreclosure sale. Wash. Supreme Court oral argument, *Frias v. Asset Foreclosure Servs., Inc.*, No. 89343-8 (Feb. 27, 2014), at 3 min., 20 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* <http://www.tvw.org>. Frias' concession is well taken, and we consider only whether such a cause of action is implied.

As in all questions of statutory construction, our goal is to discern and give effect to legislative intent. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1976). To do so, we consider the following: “[F]irst, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Bennett v. Hardy*, 113

Wn.2d 912, 920-21, 784 P.2d 1258 (1990) (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1353 (9th Cir. 1987)).

Frias is within the class for whose benefit RCW 61.24.127 was enacted. We can find no explicit legislative intent that addresses the issue presented, but implicit legislative intent supports denying a remedy. Implying the cause of action Frias seeks to assert would be neutral as to most underlying purposes of the legislation and detrimental to one. Therefore, we hold the DTA does not imply a cause of action for monetary damages premised on DTA violations absent a completed foreclosure sale.

1. Frias is a member of the class for whose especial benefit RCW 61.24.127 was enacted

The plain language of RCW 61.24.127, which is our primary focus, leaves no doubt that it was enacted to benefit borrowers or grantors subjected to nonjudicial foreclosure of owner-occupied real estate by preserving their right to bring damages claims that might have been deemed waived before the statute was enacted. *E.g.*, *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 169, 189 P.3d 233 (2008). Frias is certainly a borrower who has been subjected to nonjudicial foreclosure proceedings of her owner-occupied real property and so is within the class for whose especial benefit the statute was enacted.

2. There is no legislative history that explicitly supports creating or denying a remedy, but there is implicit support for denying it

Next, we look to explicit and implicit legislative intent. RCW 61.24.127(1) provides, in relevant part, “The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting: . . . (c) Failure of the trustee to materially comply with the provisions of this chapter.” Without question, this provision explicitly recognizes an independent cause of action for damages premised on a trustee’s material DTA violations. However, it does not state when such a cause of action accrues, so that is the question we must answer. *Cf. Ducote*, 167 Wn.2d at 703 (noting RCW 26.44.050 does create a cause of action for negligent investigation of suspected child abuse but analyzing the class of individuals with standing to bring such a claim as a separate inquiry).

We cannot find any explicit indicators that the legislature intended to either allow or deny the cause of action Frias seeks to assert. Indicators of implicit legislative intent, however, show that the legislature did not intend to imply a cause of action for money damages under the DTA absent a completed foreclosure sale.

- a) There is no explicit legislative intent on the issue presented

Something is “explicit” when it is “characterized by full clear expression : being without vagueness or ambiguity : leaving nothing implied : UNEQUIVOCAL.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 801 (2002). Frias contends

there is explicit evidence of legislative intent supporting her position because “the only logical reading” of RCW 61.24.127 is to presume that damages claims under the DTA must exist prior to a foreclosure sale. Pl. Frias’ Opening Br. on Questions Certified to the Supreme Ct. by the U.S. Dist. Ct. at 50 (citing *Walker*, 176 Wn. App. at 310-11); accord *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 496, 309 P.3d 636 (2013). This reading is logically mandated, Frias argues, because that statute states a claim for damages under the DTA is not waived where the borrower does not seek to enjoin the foreclosure sale, and, in order to be waived, the claim must exist in the first place. Frias’ interpretation, though reasonable, is not logically mandated and does not provide the explicit legislative intent she attributes to it.

Frias conflates the right to bring a cause of action with the time at which a particular claim accrues. One cannot waive a right that does not exist, but one can waive the right to bring a claim for damages before the claim accrues. A classic example is the contractual preinjury release—party A agrees not to bring a cause of action for damages arising from the contract even if party B is negligent. Because at the time the contract is signed, it is unknown whether B ever will be negligent, A’s claim for damages has not yet accrued. However, a contractual preinjury release will be upheld as a valid waiver of A’s right to bring a claim for B’s negligence, should it ever occur, so long as the provision does not violate public policy. See *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996).

We can find no statute or legislative history that explicitly—that is, without vagueness, ambiguity, or implication—addresses whether one can bring an action for damages under the DTA absent a completed foreclosure sale. There is simply no explicit legislative intent either way.

b) Implicit legislative intent counsels against accepting Frias' position

Because there is no explicit statement of legislative intent regarding whether a claim for damages under the DTA is actionable absent a completed foreclosure sale, we must look for sources that might imply the answer. Frias contends that this issue was not raised in the process of enacting RCW 61.24.127 because it was already decided; that is, the legislature assumed it was already settled that a claim for damages under the DTA absent a completed foreclosure sale is actionable. The defendants contend that the legislature simply never considered whether to allow such a claim or not, and so has not implicitly recognized it—at least not yet. Available sources support the defendants' position.

It is undisputed that the legislature's primary purpose in enacting RCW 61.24.127 was to supersede the Court of Appeals' holding in *Brown*, 146 Wn. App. 157. See Hr'g on S.B. 5810 Before the S. Fin. Insts., Hous. & Ins. Comm. 61st Leg., Reg. Sess. (Feb. 18, 2009), at 58 min., 33 sec.; 1 hr., 12 min., 14 sec.; Hr'g on S.S.B. 5810 Before the S. Fin. Insts., Hous. & Ins. Comm. 61st Leg., Reg. Sess. (Feb. 24, 2009), at 36 min., 55 sec.; Hr'g on E.S.B. 5810 Before the H. Judiciary Comm. 61st

Leg., Reg. Sess. (Mar. 23, 2009), at 45 min., 7 sec.<sup>1</sup> *Brown* held that a cause of action for damages under the DTA is waived when the borrower does not seek to enjoin the foreclosure sale before it happens. The damages claim at issue in *Brown* was not brought until well after a completed foreclosure sale, and the question of whether to allow a damages claim under the DTA absent a completed foreclosure sale was not raised in connection with the enactment of RCW 61.24.127 in any source we can locate.

Other than her argument that RCW 61.24.127 necessarily presumes a cause of action for damages under the DTA absent a completed foreclosure sale, Frias does not point to, and we cannot locate, any provision or legislative history implicitly supporting her position. As discussed above, we do not find that argument persuasive. We also cannot simply resort to our general rule of construing the DTA in favor of borrowers to resolve the question. The purpose of that rule is to protect the borrowers' interests in his or her own real property, but construing the DTA as Frias advocates here would not protect her real property interests—it would provide monetary compensation in the *absence* of damage to Frias' real property interests. *Cf. Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007) (rejecting borrower's argument that his interpretation should prevail because the act complained of "does not injure the borrower's interests").

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<sup>1</sup>Recordings of all committee hearings cited herein are available at <http://www.tvw.org>.

On the other hand, the defendants' position finds support in RCW 61.24.127(2), which sets restrictions on the nonwaived claims enumerated in RCW 61.24.127(1). The way the legislature phrased these restrictions strongly implies that a cause of action under the DTA for a trustee's material statutory violations is not available until after a completed foreclosure sale:

The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

....

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a *lis pendens* or any other document purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor.

RCW 61.24.127(2). Notably, all of these limitations refer to “the” foreclosure sale. The use of a definite article “the”—as opposed to an indefinite article “a”—is indicative of the legislature’s intent to specify or particularize the word that follows. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 297-98, 126 P.3d 802 (2006) (citing *Cowiche Growers, Inc. v. Bates*, 10 Wn.2d 585, 618, 117 P.2d 624 (1941) (Simpson, J., dissenting)). Plainly, the specific foreclosure sale referred to in RCW

61.24.127(2) is the foreclosure sale the borrower or grantor did not bring a civil action to enjoin. While foreclosure generally is a process rather than an event, “the foreclosure sale” is a single, specific event, and the limitations in RCW 61.24.127(2) all speak of that foreclosure sale in the past tense, clearly contemplating it has already happened.<sup>2</sup>

From the limited evidence available, we find there is no legislative intent that implicitly supports recognizing the DTA cause of action Frias seeks to assert; all the evidence implies that the legislature has not yet considered whether to allow a cause of action for damages under the DTA absent a completed foreclosure sale. Because the legislature has never considered the issue, it would be strange to hold the legislature has already implicitly decided it—we are not in a position to impute to the legislature the intent we think it will have if it does consider the issue. Further, the limitations in RCW 61.24.127(2) provide implicit support for the defendants’ position—under the current statutory framework, there is no independent cause of action under the DTA for DTA violations absent a completed foreclosure sale.

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<sup>2</sup>While a foreclosure sale did occur in this case, it was voided, as allowed by RCW 61.24.050(2). Once something is declared void, it never happened at all for legal purposes. BLACK’S LAW DICTIONARY 1709 (9th ed. 2009) (defining “void” as “[o]f no legal effect; null”).

3. Implying the remedy Frias seeks would not promote the purposes behind RCW 61.24.127 and the DTA

Finally, we consider the purposes behind RCW 61.24.127 specifically and the DTA generally to determine whether implying a cause of action for a trustee's material DTA violations absent a completed foreclosure sale is consistent with those purposes. Deciding the issue in Frias' favor would be inconsistent with one of the purposes of the DTA and neutral to the other relevant purposes.

As discussed above, the purpose behind RCW 61.24.127 was to supersede *Brown*. *Brown* dealt with a damages action brought after a completed foreclosure sale, and so implying a damages action absent a completed foreclosure sale neither furthers nor hinders the legislature's specific purpose in passing RCW 61.24.127.

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 P.2d 683 (1985)). Clearly, if a borrower's claim for damages accrues as soon as the trustee engages in material noncompliance with the DTA (or as soon as the borrower reasonably should know of the facts tending to show such noncompliance), nonjudicial foreclosure will be rendered less efficient and more expensive.

The accrual of a damages claim prior to a completed foreclosure sale is neutral as to the purpose of giving interested parties adequate opportunities to prevent wrongful foreclosure. Wrongful foreclosure is *prevented* when a borrower obtains a restraining order or injunction based on material DTA violations, while wrongful foreclosure is *compensated* when a borrower recovers damages for material DTA violations. There is no indication that stability of land titles will be either promoted or impeded by accepting Frias' interpretation of RCW 61.24.127 because a cause of action for damages under RCW 61.24.127 cannot serve to affect title to the real property at issue. RCW 61.24.127(2).

Thus, implying a presale damages action under RCW 61.24.127 would be inconsistent with the DTA's purpose of efficient and inexpensive foreclosure, and is neutral as to the other purposes relevant to our consideration.

We therefore hold that, while Frias is a member of the class for whose especial benefit RCW 61.24.127 was passed, available sources of legislative intent indicate the legislature has never actually considered whether to create a cause of action for monetary damages under the DTA absent a completed foreclosure sale. What the legislature would do upon considering the issue is beyond our judicial ken. Imputing to the legislature an intent to create this cause of action would be at odds with RCW 61.24.127(2) and would not serve the purposes underlying RCW 61.24.127 or the DTA generally. Under the existing statutory framework, we hold there is no

actionable, independent cause of action for monetary damages under the DTA based on DTA violations absent a completed foreclosure sale.

C. Even in the absence of a completed foreclosure sale, violations of the DTA may be actionable under the CPA under ordinary CPA principles

Frias' CPA claim must be analyzed under the same principles that apply to any CPA claim. Even where there is no completed foreclosure sale and no allegation the plaintiff has paid any foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.

1. RCW 61.24.127 does not modify the elements of a cause of action under the CPA or the time at which such an action accrues

Unlike a DTA-based cause of action for damages, the CPA is a preexisting statutory cause of action, with established elements. RCW 61.24.127 plainly intends to preserve, rather than modify, the availability of a CPA claim where a borrower does not seek to enjoin a foreclosure sale before it happens. *See* RCW 61.24.127(2)(f) (preserving statutory CPA remedies, notwithstanding limitations on damages for other nonwaived claims under RCW 61.24.127). Further, because CPA actions, unlike DTA actions for a trustee's material violations, are governed by their own body of statutes and case law, the limitations in RCW 61.24.127(2) are not at odds with a CPA cause of action absent a completed foreclosure sale, as they are in the case of a DTA cause of action for damages.

2. Frias arguably pleaded injuries that could be compensable under the CPA

Compensable injuries under the CPA are limited to “injury to [the] plaintiff in his or her business or property.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Without question, where a plaintiff actually loses title to her house in a foreclosure sale or actually remits foreclosure fees, that plaintiff has suffered injury to his or her property. However, those injuries are not necessary to state a CPA claim—other business or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context. We believe Frias did allege some injuries that may be compensable under the CPA.

The CPA’s requirement that injury be to business or property excludes personal injury, “mental distress, embarrassment, and inconvenience.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009). The financial consequences of such personal injuries are also excluded. *Ambach v. French*, 167 Wn.2d 167, 178, 216 P.3d 405 (2009). Otherwise, however, the business and property injuries compensable under the CPA are relatively expansive.

Because the CPA addresses “injuries” rather than “damages,” quantifiable monetary loss is not required. *Panag*, 166 Wn.2d at 58. 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. *Id.* 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. *Id.* at 62 (“Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not.” (citations omitted)). The injury element can be met even where the injury alleged is both minimal and temporary. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

Here, Frias alleges she was denied the chance to obtain a reasonable loan modification because U.S. Bank refused to participate in mediation in good faith. Where a more favorable loan modification would have been granted but for bad faith in mediation, the borrower may have suffered an injury to property within the meaning of the CPA. *Cf. Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 795, 295 P.3d 1179 (2013) (holding a CPA injury was pleaded where a falsely backdated notarization allowed a foreclosure sale to happen earlier than it could have otherwise, cutting short the borrower’s chance to close sale on the real property with a private purchaser for a higher price).

Frias further alleges numerous illegal fees have been added to her debt. Even though she has not paid those fees, expenses incurred in investigating their legality may be compensable, and she may be entitled to equitable relief in the form of those

fees being stricken, if they have not already been. *Panag*, 166 Wn.2d at 62-63. Frias also alleges that she appeared for a scheduled mediation session and no one appeared on behalf of U.S. Bank and that when Frias appeared for the rescheduled mediation session, U.S. Bank was not prepared. The expenses Frias incurred in the extra mediation sessions allegedly necessitated by U.S. Bank's failure to prepare and mediate in good faith could be an injury compensable under the CPA. *Id.* at 64.

Although Frias' alleged emotional distress and associated physical symptoms are not compensable under the CPA, she did plead other injuries to her property that could be compensable under the CPA. Loss of title or payment of illegal fees are sufficient, but not necessary, to plead an injury compensable under the CPA based on alleged DTA violations.

3. CPA claims alleging DTA violations are governed by the same principles as other CPA claims

As noted above, nothing about the DTA indicates a CPA claim should be subject to a different analysis where the CPA claim is premised on alleged DTA violations as opposed to any other alleged wrongful acts. In response to the second certified question, we hold that the analysis of the elements of a CPA action premised on alleged DTA violations is the same as the analysis of the elements of a CPA claim premised on any other allegedly unfair or deceptive practice with a public interest impact occurring in trade or commerce that has allegedly proximately caused injury

to a plaintiff's business or property. *See, e.g.*, ch. 19.86 RCW; *Klem*, 176 Wn.2d at 782-97; *Panag*, 166 Wn.2d at 37-65; *Hangman Ridge*, 105 Wn.2d at 783-93.

## V. CONCLUSION

We hold the answer to the first question certified by the federal court is no: Washington does not recognize an independent cause of action under the DTA seeking monetary damages for alleged DTA violations absent a completed foreclosure sale.

We hold the answer to the second question is that under appropriate circumstances DTA violations may be actionable under the CPA regardless of whether a foreclosure sale has been completed. Such claims are governed by the ordinary principles applicable to all CPA claims.

Fairhurst, J.

WE CONCUR: †

Madsen, C.J.

Carson, J.

Stephens, J.

Goebel McLeod, J.

† Judge C.C. Bridgewater participated as a justice pro tempore at the argument of this appeal but died prior to the filing of the opinion.

No. 89343-8

WIGGINS, J. (dissenting in part/concurring in part)—The United States District Court for the Western District of Washington certified two questions for our review. While I agree with the majority’s answer to the second question, I disagree with the majority’s answer to the first. The first certified question is whether “a plaintiff [may] state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee’s sale of real property.” Order Certifying Questions to the Wash. Supreme Ct. at 3. The majority’s answer is no; the answer should be the careful, lawyerly response: it depends. It depends on who the defendant is (e.g., a borrower, grantor, trustee, or guarantor) and which statutory duty the defendant breached. The majority categorically precludes claims for damages absent a completed trustee’s sale under the deeds of trust act (DTA), chapter 61.24 RCW, without a discussion of the various duties created in the statute. See majority at 2. I would focus on the trustee’s duty of good faith to the borrower, beneficiary, and grantor, which is the violation Florence Frias asserts. I conclude that a borrower, like

Frias, may sue a trustee for breach of this duty, even in the absence of a completed trustee's sale.

## ANALYSIS

The legislature may implicitly or explicitly create a cause of action. See *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702-03, 222 P.3d 785 (2009). Whether a statute creates a cause of action is a matter of statutory construction. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). As in most matters of statutory construction, our ultimate goal is to determine the intent of the legislature. See *id.* at 15-16. If the legislature does not expressly create a cause of action, our court utilizes a three-part test to determine the legislature's intent. *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). We determine whether the plaintiff is "within the class for whose 'especial' benefit the statute was enacted"; whether "legislative intent, explicitly or implicitly, supports creating or denying a remedy"; and "whether implying a remedy is consistent with the underlying purpose of the legislation." *Id.*

Using this test, I conclude that the legislature implicitly created a cause of action against a trustee for breach of its duty of good faith that is not dependent on a completed trustee's sale.

### *Part 1: Frias is a member of the class protected by the statute*

The first part of the test is satisfied because Frias is "within the class for whose 'especial' benefit the statute was enacted . . . ." *Bennett*, 113 Wn.2d at 920. RCW

61.24.010(4) states, "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." The clear legislative intent is to protect borrowers, beneficiaries, and grantors from actions taken in bad faith by trustees. Frias is a borrower under the act, whose interest the legislature sought to protect.

*Part 2: Legislative intent supports creating a claim*

Legislative intent explicitly and implicitly supports creating a cause of action against the trustee (even prior to a completed trustee's sale). *Bennett*, 113 Wn.2d at 920. The explicit support is found in RCW 61.24.127. The statute states that a borrower or grantor does not waive a claim for damages due to a trustee failing to "materially comply with the provisions of this chapter" by failing to enjoin a foreclosure sale. RCW 61.24.127(1)(c). This recognition of a claim against the trustee supports the creation of a cause of action for breach of a trustee's duty of good faith. The legislature placed no explicit limitation on when a borrower or grantor may bring suit.

The majority reaches a different conclusion. Majority at 10. It agrees that RCW 61.24.127 recognizes a cause of action against a trustee but concludes the claim is available only after a trustee's sale. See *id.* It relies on RCW 61.24.127(2), which subjects the nonwaived claims to certain limitations. The limitations include, for example, the claim must be brought within two years of the "foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier," and the claim cannot affect the validity of the foreclosure sale or cloud the title. RCW 61.24.127(2)(a), (c), (e). The majority relies on the fact that all of the limitations rely

on a past foreclosure sale to support its conclusion that the legislature intended a claim for damages only after a foreclosure sale.

I disagree with the majority's reasoning. Of course the limitations contemplate a completed trustee's sale—the legislature was specifically discussing the effects of failing to enjoin a sale on other claims that borrowers and grantors may bring. There is no indication that the legislature intended for this language to limit the availability of a claim for damages against a trustee for failing to materially comply with the DTA.<sup>1</sup>

There is also implicit support for allowing a claim before a trustee's sale is complete. We assume that the legislature is aware of the doctrine of implied cause of action, which is that the legislature "would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights." *Bennett*, 113 Wn.2d at 919-21. RCW 61.24.010 creates a duty and a corresponding right. "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.010(4). Here, the legislature did not explicitly provide a mechanism for protecting borrowers, beneficiaries, or grantors from a trustee who acts in bad faith.<sup>2</sup> Therefore, we may assume that the legislature intended

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<sup>1</sup> Interestingly, the majority abandons its reasoning when discussing the Consumer Protection Act (CPA), chapter 19.86 RCW. RCW 61.24.127(1) treats violations of Title 19 RCW the same as a claim against a trustee for failing to materially comply with the DTA, and subsection (2) provides applicable limitations. The majority concludes that despite subsection (2)'s limitations, a CPA claim may be commenced absent a completed trustee's sale. Majority at 18.

<sup>2</sup> RCW 61.24.130 is not the mechanism. It allows borrowers, grantors, guarantors, or other people interested in a lien to enjoin a trustee sale "on any proper legal or equitable ground." RCW 61.24.130(1). However, it requires the applicant to pay the clerk of the court "the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not

that there would be a judicial mechanism to enforce the statutory right. I have no reason to conclude that it intended this remedy only after a trustee's sale.

*Part 3: Implying a remedy is consistent with the purpose of the statute*

Implying a remedy is consistent with RCW 61.24.010(4)—which imposes a duty on the trustee to act in good faith toward borrowers, beneficiaries, and grantors—and is consistent with the purposes of the DTA. This implied remedy encourages trustees to act in good faith and allows early intervention for a breach of the duty.

A cause of action is also consistent with the overall objectives of the DTA. The objectives are that “[t]he nonjudicial foreclosure process should remain efficient and inexpensive[;] . . . the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure[; and] 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 P.2d 683 (1985)).

The majority opines that allowing a claim for damages to accrue as soon as a trustee violates the DTA would be inconsistent with the first objective articulated by *Schroeder* because the nonjudicial foreclosure will be rendered less efficient and more expensive than judicial foreclosure. Majority at 16-17. The majority opinion provides no reasoning for this conclusion, and I disagree. Allowing damage claims to accrue before a trustee sale should incentivize the trustee to conform to the requirements of

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being foreclosed.” *Id.* It does not appear that the legislature intended this to be the sole remedy for misdeeds by a trustee. The legislature did not make the trustee's duty contingent on the ability of borrowers to pay their arrears.

the law from the beginning of the foreclosure process. When nonjudicial foreclosures are pursued and completed lawfully, the process will ultimately be more efficient.

The remedy also supports the second purpose, which is to “provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” *Schroeder*, 177 Wn.2d at 104 (quoting *Cox*, 103 Wn.2d at 387). Under RCW 6, a borrower, grantor, or guarantor may restrain a trustee’s sale only if it pays the clerk of the court sums that would be due on the obligation if there was no foreclosure. If a borrower has insufficient resources to pay the sums due, the borrower will be unable to stop a wrongful trustee’s sale. Allowing the cause of action before the sale encourages trustees to adhere to the required procedures.

All three parts of the implied cause of action test are satisfied. A cause of action against a trustee for violation of its duty of good faith should be available even in the absence of a completed trustee’s sale. I disagree with the majority’s answer to the first certified question.

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Wiggins, J., dissenting in part/concurring in part

I dissent in part and concur in part.

  
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González, J.  
Plummer