Civil Motions
July 23, 2020 at 1:30 p.m.
Wells Fargo and SPS' SECOND Motion for Summary Judgment

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF GRAYS HARBOR

BRIAN J. WINTERS and REBECCA L. WINTERS, Plaintiffs, v. WELLS FARGO BANK, NA as Trustee on behalf of the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2007-HE4 Mortgage Pass-Through Certificates, Series 2007-HE4; SELECT PORTFOLIO SERVICING, INC.; QUALITY LOAN SERVICE CORPORATION of WASHINGTON, INC., and DOE Defendants 1-20, inclusive, Defendants.	Case No. 16-2-00628-7 RESPONSE OF PLAINTIFFS BRIAN AND REBECCA WINTERS TO DEFENDANT WELLS FARGO BANK, N.A. AND SPS' **SECOND** MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiffs Brian Winters and Rebecca Winters, to oppose Defendants Wells Fargo Bank, NA as Trustee on behalf of the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2007-HE4 Mortgage Pass-Through Certificates, Series 2007-HE4 ("Wells Fargo") and Select Portfolio Servicing Inc.'s ("SPS") **Second** Motion for Summary Judgment.

RELEVANT FACTS AND THOSE MANIPULATED BY DEFENDANTS

The Defendants seek to have this Court grant summary judgment for a second time, in

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spite of the "law of the case", which precludes the filing of another summary judgment based upon manufactured "new" information by Defendants. While Defendants argue that they may bring one based upon Division I's ruling in favor of QLS, it is only as to those issues related to QLS that this Court can reconsider. The Defendants are not entitled to create new, purported facts to bring an untimely motion for reconsideration, which includes the re-writing of Ms. Benight's Declaration.

Benight Declaration Changes:

The Defendants' attorneys have manipulated Ms. Benight's testimony in an effort to mislead and deceive this Court. The manner in which this was done is outlined below:

First Dec.: She makes the Declaration "for and on behalf of SPS"

Second Dec.: She asserts: "As an officer of SPS, I am authorized to make this affidavit on behalf of the Trust." Now, Ms. Benight is suddenly an "officer of SPS" and has authority to testimony on behalf of Defendant Wells Fargo. None of this information was previously provided to the Winters or to the Court and it is only being offered in order to mislead this Court. It is entirely lacking in any credibility whatsoever.

First Dec.: At Paragraph 2 confirms that the records she reviewed are **only** those of SPS, "said servicing agent". The information about those records only focuses on SPS' records and makes no mention whatsoever of the records of any prior servicers or Wells Fargo. She also provides no testimony as to how she allegedly knows how the records she reviewed are created or maintained, yet makes assertions that she has such knowledge.

Notably, the **only** mention of the Winters' Note is referenced at the end of Paragraph 5 wherein Ms. Benight references that a **copy** of the Note is part of SPS' business records. She makes no mention whatsoever of the original Promissory Note signed by the Winters: where it

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is, what is looks like, where it is stored, etc. This matters because a copy of the Note is which is part of SPS' business records is not sufficient to substantiate a non-judicial foreclosure. RCW 61.24.005(2). The original Note must be payable to (or in blank) and in the possession of an entity for that entity to qualify as a "beneficiary" under the DTA.

Second Dec.: At Paragraphs 3, 4 and 5, the authors of Ms. Benight's Declaration have inserted a great deal of additional information, including how prior servicer's records are allegedly handled by SPS, about which there was zero mention in the first declaration. Notably, there is not one single mention of how Ms. Benight, a "document control officer" when signing a declaration for Court, but a "Default Case Manager/Corporate Witness" in her LinkedIn profile, knows anything about the prior servicer's records and their alleged accuracy. *See,* Ruling Denying Review, Case No. 53609-9-II, Wn. Ct. App. Div. 11 (Nov. 14, 2019), pg. 7. These new assertions are nothing more than manipulation of the testimony in order to avoid the deficiencies as noted in the Commissioner's Ruling.

At Paragraph 6, Ms. Benight again only speaks about a **copy** of the Winters' Promissory Note being in SPS' records. At Paragraph 7, she then asserts that the "Loan Records"

First Dec.: At Paragraph 8, Ms. Benight asserts without any documentary support that the Winters' loan was sold to the Wells Fargo Trust. At Paragraph 9, she asserts that "pertinent pages" of the Pooling and Servicing Agreement ("PSA") has become part of SPS' "loan records" because it was sent to SPS when it took over servicing of the loan. In Paragraph 10, she refers to language of the PSA setting forth its requirements as being proof that these requirements have been fulfilled. Further contending in Paragraphs 10 and 11 that an unidentified document custodian was in possession of the original Note, based upon

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unidentified "Loan Records", "until February 12, 2016, at which time, pursuant to a request from SPS, the original Note was transferred to SPS", which controlled its possession thereafter. No documentation is provided to verify these bald assertions by Ms. Benight.

Second Dec.: At Paragraph 10, Ms. Benight asserts that SPS serviced the Winters' loan on behalf of Wells Fargo and refers to a Limited Power of Attorney that allegedly authorizes it to do so. Ex. C. She does not provide **any** other information about or documentation of SPS' alleged possession of the original Note and its holding on behalf of Wells Fargo. This is true in both declarations.

Similarly, Defendants' obstructive and evasive discovery "responses" confirm their refusal to provide specifically requested information about the location of the Note and who had the lawful authority to enforce its terms. *See,* Declaration of Melissa A. Huelsman filed ISO this Response, Ex. 1 and 2 (hereinafter "Huelsman Dec."). This is entirely consistent with both of Ms. Benight's Declarations.

First Dec.: In Paragraph 12, again without any documentary support, Ms. Benight asserts that SPS had control over Wells Fargo's custodian and that after February 12, 2016, SPS exercised "dominion and control" over the Winters' original Note.

Second Dec.: As noted above, this Declaration does not include any information about the Note nor its location. Ms. Benight never attests, because she cannot do so, that she has any personal knowledge of what the original Note looks like nor whether the copy of the Note she continually references is accurate.

First Dec.: Paragraphs 15 and 16 make clear that SPS is acting as a "subservicer" for the Master Servicer, Bank of America ("BANA") and is NOT working directly with or for Defendant Wells Fargo.

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Second Dec.: There is zero mention of BANA's role as the Master Servicer and instead, the testimony is all about what Ms. Benight can repeat from Loan Records made by other people. *See,* Paragraphs 10-26. Ms. Benight knows ZERO about the Winters' loan.

First Dec.: Paragraphs 21 through 33 reflect Ms. Benight's samplings from the Loan Records about the Winters' inability to make payments and requests for loan modification documentation. In Paragraph 29, she notes that the Winters were denied a loan modification, but doesn't discuss why they were denied at that time. The history reflects that there were further attempts to communicate with the Winters about the situation, but at Paragraph 32, asserts that they were again denied a loan modification, even though there is no mention of them having applied for one again.

Second Dec.: Paragraph 11 documents one loan modification denial but makes no mention of the second denial referenced above.

First Dec.: In Paragraphs 34 and 36, Ms. Benight provides the Court with her legal arguments about why someone at SPS engaged in actions to initiate a non-judicial foreclosure, which are irrelevant. Someone at SPS did sign documents related to the initiation of an attempted non-judicial foreclosure of the Winters' home and the Winters maintain that they were not done in conformity with the requirements of Washington law as outlined to the Court in previous MSJ briefing. *See,* Exhibits 12 and 14.

Second Dec.: The Second Declaration does not include this testimony.

First Dec.: At Paragraph 39, Ms. Benight contends that SPS became the Master Servicer and that Wells Fargo executed a new Limited Power of Attorney allowing it to act for its benefit as to the loans it serviced. Ex. C. Notably, **both** of the Limited Power of Attorney documents do **not** come from the Winters' Loan Records or in any of their loan documentation.

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Rather, they are documents recorded in Salt Lake County, UT, which has no relationship to the Winters' loan. There is no evidence that any person at SPS who took action in relation to the Winters' loan had any knowledge of their existence, nor is there any evidence that Wells Fargo EVER communicated with SPS or BANA about the Winters' loan or any other of the loans in the securitized trust. There is no evidence whatsoever that Wells Fargo **ever** acted as a principal exercising control and oversight of its alleged agent, Defendant SPS. Exhibit T of the Second Declaration includes an indication of two letters sent to the "investor" at the end of 2019. These are the only record of any communication with that entity about the Winters' loan.

First Dec.: Paragraphs 41 through 50 document numerous alleged attempts to communicate with the Winters about applying for a loan modification; however, as noted by Ms. Benight, the Winters had advised SPS representatives that Mr. Winters was still unemployed and not receiving any income. While SPS tries to make itself look reasonable and helpful for making these offers to review for a modification, it made no sense whatsoever for them to apply because they only had one source of income and it was insufficient for a mortgage payment.

Second Dec.: This Declaration provides the copies of the phone logs and the like, but they provide no more clarity or certainty than Ms. Benight's previous testimony.

RELEVANT FACTS

The Winters owned the Property for many years, and they reside there with their children. Mr. Winters was employed in the construction industry for many years and Mrs. Winters is a childcare professional. In October 2006, the Winters obtained a new mortgage loan from Decision One Mortgage Company, LLC ("Decision One") and in connection therewith, they signed a Promissory Note and a Deed of Trust on October 23, 2006. Decision One was identified as the "Lender" on the Note and Deed of Trust and MERS was identified as the

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"beneficiary" in the Deed of Trust, even though this designation contravenes the requirements of the Washington Deed of Trust Act ("DTA"). The Deed of Trust was recorded in Grays Harbor County on October 26, 2006. *See,* Declaration of Brian Winters previously filed with this Court ("Winters Dec.").

The Winters made payments on the mortgage loan for years, going through a series of mortgage loan servicers. In 2011 Mr. Winters' construction business was struggling and in March 2012, the business failed. He struggled to find work and eventually began working for others. In Fall of 2013, Mr. Winters suffered a work injury and was unable to work. This significantly diminished the Winters' ability to make the mortgage payment because although Mrs. Winters works, their primary source of income was from Mr. Winters' employment. They had been intermittently behind on the mortgage over the years but by January 2012 they could not catch up. The Winters began talking to their loan servicer about obtaining a loan modification; however, Mr. Winters was receiving medical care and treatment for his injury and could not work. He applied for disability, but that process takes a long time. He had to get legal counsel to reopen his Labor and Industries case, which took until December 2014. He had surgery in February 2015. The Winters communicated his status and income issues to his mortgage loan servicer. He is still receiving vocational training. *Id.*

Given that they were struggling financially, the Winters were forced to file for a Chapter 7 bankruptcy in March 2014. They filed the bankruptcy and participated in the case, receiving a discharge in August 2014. *Id.*

By 2014, the servicing of their loan was transferred to Defendant SPS and the Winters were communicating with SPS about a possible loan modification. In August 2014, the Winters received a letter from SPS about alleged deficiencies in their loan modification application and

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they worked on getting that documentation completed and submitting it. At that point, the Winters did not know the identity of their loan owner and all communications were with Defendant SPS. They received two letters dated August 25, 2014 from Defendant SPS about the alleged inadequacy of the documentation. Winters Dec.

While the Winters were working on obtaining a loan modification, they were served with a Notice of Default ("NOD") posted at the Property on or about **August 4, 2014**. The Winters maintain that since they were in the process of applying for a loan modification, no foreclosure activity should have begun, as this activity is known as "dual tracking". *Id*. By 2014, there had been numerous actions taken by federal and state regulators to make clear to loan servicers that they were prohibited from engaging in dual tracking. Huelsman Dec. filed previously with the Court. The NOD indicated that the Winters were due for January 1, 2012 and demanded payment of the defaulted amount, including "corporate advances" of $1,734.00. The Winters had no idea what these "corporate advances" represented, nor why they were being demanded. The NOD was issued by Defendant QLS, acting as the "trustee" and also demanded payment of numerous foreclosure fees, including a "trustee fee" of $600.00. The Foreclosure Loss Mitigation form, signed by an employee of SPS, indicated that the Winters had been contacted about foreclosure avoidance options, but that they did not request an in-person meeting. The Winters believe that they did request an in-person meeting, but do not have a copy of any documentation about that request. Winters Dec.

The Winters kept on submitting loan modification documents even after receipt of the NOD because that is what they understood to be the only option available for saving their house. *Id.* Unbeknownst to them, on or about June 3, 2011, an employee of ReconTrust, another foreclosing trustee company that is a wholly owned subsidiary of BANA, signed an

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Assignment of Deed of Trust as an "Assistant Secretary" of MERS, purporting to transfer the beneficial interest in the Winters' Deed of Trust from Decision One to Defendant Wells Fargo. It was recorded in Grays Harbor County on June 14, 2011. However, Decision One ceased operations in 2007 – four years before this Assignment was executed. *See,* Huelsman Dec. filed ISO of the Second Response ("2nd Huelsman Dec."). The Winters' previous experience with BANA was as a loan servicer and/or loan owner. They actually thought BANA was the loan owner. Winters Dec.; Huelsman Dec.

In a rush to foreclose as soon as possible, QLS issued a Notice of Trustee's Sale ("NOTS") on **September 5, 2014** to the Winters by posting and mailing. Mr. Winters was in contact with SPS about a loan modification and the pending foreclosure sale, but he was shocked by how soon he received the NOTS in light of his efforts. This was more of the dual tracking activity by SPS. The NOTS set a sale date of January 9, 2015. The Winters were told by SPS employees that the foreclosure would be stopped so long as they were continuing to work on the loan modification. Mr. Winters continued to work with SPS on the loan modification, and he was simultaneously trying to get his disability benefits and began receiving medical treatment for his injuries. Winters Dec.

The foreclosure sale that was scheduled to take place on January 9, 2015 was eventually discontinued by QLS, presumably because of the Winters' application for loan modification. Mr. Winters was told about the discontinuance by the persons with whom he was communicating at SPS and they also received a Notice of Discontinuance from QLS. Mr. Winters was assured by persons at SPS that the foreclosure would not go forward, and those representations were accurate. *Id*.

Unbeknownst to the Winters, on or about December 5, 2013 an employee of Defendant

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SPS, Stormie Medina, signed an Appointment of Successor Trustee for SPS, which was purportedly acting as "Attorney in Fact" for Defendant Wells Fargo. *Id*. It was recorded in Grays Harbor County on December 17, 2013. The Deed of Trust Act ("DTA") requires that this document be signed by the "beneficiary", rather than an alleged "agent". RCW 61.24.010(2); 61.24.005. Defendant SPS previously provided the Court with a copy of a Limited Power of Attorney as between Wells Fargo and SPS which it contends was in its business records, even though it is obviously a copy of a public record. Benight 1st Dec., Ex. 6. SPS continues to assert that this document allows it to violate to requirements of Washington law that an Appointment be signed by the "beneficiary". RCW 61.24.010(2). However, even if this Court were to accept that an "agent" may sign for the "beneficiary", contrary to the plain language of the statute, neither Defendant provides this Court with evidence of any actions taken that would support a principal-agency relationship as between Defendants SPS and Wells Fargo. There is no evidence that Wells Fargo ever exercised any control over its purported agent, sub-servicer SPS, which is a requirement to prove this relationship. *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970).

The foreclosure was initiated in reliance upon a Beneficiary Declaration or Declaration of Ownership that was not signed by the alleged noteholder, Defendant Wells Fargo, but rather, by Tina Martin, an employee of SPS, who asserts under penalty of perjury that she can attest to Wells Fargo's status as the "actual noteholder" on November 25, 2013. *See,* Herbert-TWest Dec., Ex. G. Division I reversed this Court's determination that QLS should be denied summary judgment based upon defects in the non-judicial foreclosure process, which leaves this Court with that decision to consider. However, Division I could not make a determination as to whether Wells Fargo and SPS were acting in contravention of the requirements of the

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DTA since they were not parties to that appeal.

While the Winters continued to work with SPS on trying to get a loan modification in 2015, they also sought help from a housing counseling agency, Parkview Services. They were too late in seeking help to ask for mediation under the Foreclosure Fairness Act, but Parkview was able to assist them with completing the loan modification application, which resulted in them receiving a trial period loan modification offer. Mr. Winters was having significant mental issues related to all the stress caused by the loss of income and a job, as well as the stress of trying to save his home for his family. He was concerned about the potential terms of any loan modification and once he saw the TPP offer, he believed that there would be a large balloon payment due at the end of the loan term if it was accepted. Mr. Winters did not understand that even if there was a balloon payment at the end of the loan term, it would be the result of an artificially low monthly payment – and not a sum added to the loan balance without explanation. Winters Dec.

Mr. Winters sought to understand the ramifications of entering into the TPP before sending in a payment, so he sent an email to his housing counselor and called but did not receive a response to either. Therefore, he called a representative at SPS and came away believing that if he made the TPP payments, he would be agreeing to pay an additional $100,000.00 plus on the loan over and above what he actually owed. He now knows that his understanding was not correct. *Id*. As a result of Mr. Winters' misunderstanding, the Winters did not make the TPP payments. He continued to be in communication with SPS representatives about obtaining a loan modification, as he wanted to receive an offer that did not include what he believed was thousands of dollars being added to the loan balance improperly. *Id*.

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SPS disputes these communications with Mr. Winters based upon its telephone log, but since no one with any personal knowledge of Mr. Winters' communications with SPS has not and cannot testify thereto, this leaves the parties with a genuine issue of material fact at issue.

The Winters were eventually served with another NOTS posted at their residence. It was recorded in Grays Harbor County on August 27, 2015. It set a new sale date on January 8, 2016. *Id.*

Mr. Winters continued working on the loan modification documents and he was repeatedly advised by persons at SPS that so long as he continued to work on the loan modification paperwork, the foreclosure sale would not go forward. In reliance upon the representations made to him by SPS representatives, he did not act to stop the foreclosure sale by filing suit or otherwise taking action. *Id*.

The foreclosure sale apparently took place on January 8, 2016 and the Winters did not know it had happened until they received a posting at their home afterwards. At some point after the sale, the Winters received a letter from Defendant SPS confirming that the property had "reverted to the investor" at the foreclosure sale. On January 15, 2016 QLS signed a Trustee's Deed Upon Sale purportedly transferring title to the Property to Wells Fargo. The records and testimony of SPS makes clear that Wells Fargo had no knowledge of this alleged acquisition of title to the Property and that at all times, the only entity who was aware of this occurrence was SPS. That is because there is no meaningful participation in the servicing of these mortgage loans by Wells Fargo. It never acts as a principal to even monitor the actions of its purported agent, SPS. The Trustee's Deed asserts at Paragraph 9 that "all legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW." The Winters maintain, as noted

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above, that this assertion is false because Wells Fargo, the beneficiary, did **not** provide QLS with instructions to proceed to sale. The only communication came from SPS. The Trustee's Deed was recorded in the records of Grays Harbor County on January 20, 2016. *Id.*

The Winters were stunned to learn that their Property had been foreclosed. They immediately contacted SPS but were simply advised that the Property had been sold and there was nothing else that could be done about the loan. Thereafter, they received notices relating to attempts to remove them from the Property which have been the subject of contention in the eviction litigation. *Id.*

The Winters understand that they were not entitled to a loan modification and that Mr. Winters' misunderstanding of the TPP and the terms of any subsequent permanent loan modification have added to their circumstances that they presently find themselves in. However, they were also misled by the actions of the employees of Defendant SPS when they were confronting the prospect of another pending foreclosure sale. They did not re-engage with the housing counselors because they had not received a response to their last communications and they just continued communicating with Defendant SPS. Had they known that the foreclosure sale was going to happen, they would have acted to stop it, just as they have done in the past. *Id*.

The Winters are aware that because they did not enjoin the foreclosure sale or otherwise acted to prevent the sale, they may be precluded from seeking to retain title to the Property. However, they maintain that in light of the fact that the Defendants were engaged in dual tracking throughout the foreclosure process and that the Winters received misleading information from SPS employees, they did not stop to enjoin the non-judicial foreclosure sale. They believed that they were still in the same process that had gone on for several years –

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telephone calls, receiving threatening letters, communications about a loan modification, etc. – and that they would not be foreclosed while this was on-going.

The Winters maintain that they were injured by way of the Defendants' actions as complained of herein, including the loss of their home to a process that is not in conformity with the requirements of the DTA, and that they were damaged by having to pay attorneys' fees of $400.00 for a consultation to investigate their claims and costs incurred in traveling to Seattle to do so, of at least $50. They have also incurred damages and attorney's fees related to defending the eviction case in the amount of more than $3,000.00. The loss of their family home has caused them a great deal of stress, anxiety, sleeplessness and depression. *Id.*

Defendants still rely upon the Declaration of Sherry Benight, a SPS "Document Control Officer". Documents attached to Ms. Huelsman's MSJ Declaration filed in support this Response make clear that this is **not** Ms. Benight's job title. She is really nothing more than a "Corporate Witness", according to her LinkedIn Profile. Huelsman MSJ Dec., **Ex. 1**. She describes her job as:

> Resolve through loss mitigation or judgment contested foreclosure actions. Represent company and clients as corporate witness at trials, hearings and mediations. Experience in bankruptcy and foreclosure actions.

Huelsman MSJ Dec., Ex. 1. Nowhere in her job description does she mention having any experience as a "document control officer" or "document custodian" or otherwise having any experience or knowledge of the means by which SPS creates the documents that she contends are admissible into evidence in this case. Attached as **Exhibit 2** to the Huelsman MSJ Dec. is a copy of Ms. Benight's Declaration filed with a federal court in 2018 wherein she describes herself as a "Document Control Officer" **and** "Document Custodian". It is very clear that Ms. Benight only represents herself as being a "Document Control Officer" when her employer and

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its attorneys seek to improperly use her to admit hearsay documents into evidence under the business records exception, RCW 5.45.020, even though she cannot meet the criteria required to get those records admitted. Ms. Benight is nothing more than a professional testifier and she parrots whatever it is that her employer instructs her to say. She cannot testify about anything in this case based upon her personal knowledge, including any knowledge about how business records are created and kept.

It is also **still** notable that Ms. Benight contended that:

> [E]ntries in those records are made at the time of the events and conditions they describe by people with first-hand knowledge of those events and conditions or **from information provided by people with such first-hand knowledge**.

Benight 1st Dec., ¶3 (emphasis added). The testimony that some of these records were created "from information provided by people with such first-hand knowledge" makes clear that some or even all these records could have been or were created by third parties at a later date and **not** persons with first-hand knowledge. This fact **still** remains true.

RCW 5.45.020 defines the hearsay exception as needing to meet the following criteria:

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

RCW 5.45.020. Ms. Benight does not provide this Court with any testimony about the "mode of preparation" of the various records and instead, only testifies that "SPS maintains a computer database", "recording such information is a regular practice of the servicing agent's regularly conduct business activities", that she has "access" to the records and knowledge of how they are maintained. She also does not testify unequivocally that she has reason to know that the records were created "at or near the time of the act, condition or event" or explain how

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she would have that information. Benight 1st Dec., ¶2. She confirms that from her employment she has "knowledge" of the "business operations" of SPS and "with the services that SPS offers in connection with real estate secured loans in general." The problems with her Second Declaration are outlined above.

At Exhibit 1 of the First Declaration, Ms. Benight provides a copy of the Winters' Note, contending that it is SPS' "business record". But since SPS is not a party to the Note and did not participate in its creation, including the indorsement that was not present when the Winters signed the original Note, it is not admissible as a "business record" of SPS. Moreover, a copy of the Note is irrelevant to anything. Similarly, Ms. Benight asserts that the "Pooling and Servicing Agreement" (Ex. 3) is an SPS business record because it acquired the document from "Wells Fargo upon its acquisition of servicing rights to the loan on August 16, 2012"; however, Ms. Benight provides no evidence of this alleged transfer of the document from Wells Fargo that would permit it to be considered a "business record" of SPS.

At Paragraph 11 of the First Declaration, Ms. Benight asserts, **without any documentation to support her testimony**, that the "Loan Records" show the **original** Note was "delivered to the records custodian and that it remained in the custodian's possession, custody and control for Wells Fargo's benefit and on [its] behalf until February 12, 2016" until SPS requested it be delivered to it. *Id.* at ¶11. She further asserts, again **without any documentation to support her testimony**, that "from August 16, 2012 and February 12, 2016, as Wells Fargo's servicing agent and attorney-in-fact, SPS exercised control over the records custodian." *Id.* at ¶12. Ms. Benight does not even bother to identify this supposed "custodian". Ms. Benight then asserts that "at all times during SPS' servicing of the loan", the original Note "has been in the possession and control of SPS and SPS exercised dominion and control over

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it." *Id.* So, it appears that Ms. Benight contends that **SPS** was the beneficiary **not** Wells Fargo and that it was entitled to enforce the terms of the Note on behalf of itself. This contradicts the assertions she makes about Wells Fargo's possession of the Note through a custodian and SPS in previous paragraphs.

In First Declaration Exhibit 9, at the top of Page 49 of 68 (4/11/14), the entry makes clear that SPS' personnel were relying upon the LPS record system to make representations about the identity of the Holder. It did not include any reference to actual documentation from the custodian and/or Wells Fargo.

It is notable that SPS relies upon the PSA (Ex. 3) to provide it with the authority to foreclose on the Winters' Property, even though it is not a party to that agreement.[1] *Id.* at ¶13. At Paragraphs 15 and 16, **again without any credible documentation in support thereof**, Ms. Benight asserts that SPS entered into a Sub-Servicing Agreement with Wells Fargo wherein it was directed to act as a "sub-servicer for the [Winters'] Loan, on Wells Fargo's behalf and for Wells Fargo's benefit." *Id.* The "evidence" of this alleged relationship is nothing more than a letter sent to the Winters about the alleged servicing transfer.[2] At Paragraph 16, Ms. Benight also asserted an **undocumented** relationship with Bank of America as the Master Servicer "on Wells Fargo's behalf and for Wells Fargo's benefit." *Id.*

As noted above, First Declaration Ex. 6 is a copy of a recorded document, a Limited Power of Attorney signed by Wells Fargo. While a public record is admissible as an exception

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[1] The Winters are not waiving their objections to the admission of the PSA as a "business record", but in the event the Court does agree to consider it, they are required to point out the problems with the reliance that Defendants ask that this Court place on it.

[2] The Notice to the Winters is dated August 7, 2012 (and perhaps mailed that day) when the transfer was effective on August 16, 2012 – NINE days later. Federal law **requires** any servicing transfers to be sent to the borrower "not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan." 12 C.F.R. §1024.33(b)(3)(i).

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to hearsay so long as there is competent testimony as to the declarant describing how she obtained such "true and correct copy" from those public records, Ms. Benight does not do so. Instead, she merely asserts that a document **signed by Wells Fargo** and not SPS, is an SPS "business record". *See,* RCW 5.44.040; 5.45.020. The Winters concede that for purposes of motion practice, the submission of a copy obtained from public records by a declarant should be acceptable and does not necessarily need to be certified. However, Ms. Benight does not even attempt to testify that she obtained that copy from the records of Salt Lake City. She testifies **without evidentiary support** that SPS received the document from Wells Fargo but this makes no sense since it is a copy of a recorded document. If Wells Fargo intended SPS to rely upon this Limited Power of Attorney, why wouldn't it provide SPS with an original document directly?

As to SPS' alleged efforts to "work with" the Winters, there are significant questions raised based upon Ms. Benight's assertions:

Paragraph 26 – SPS asked the Winters to send in an IRS Form 4605-T in connection with their request for a loan modification on **February 27, 2013.**

Paragraph 27 – Allegedly because the Winters did not send in that form, SPS sent out a Notice of Default letter (not the same as the NOD sent by QLS) on **February 27, 2013.**

Paragraph 34 – Contends that the Beneficiary Declaration was executed by an SPS employee based upon authority under the PSA and the LPOA, but notably, did not provide any testimony as to how this SPS would have the requisite personal knowledge required to sign that document under penalty of perjury as to the physical location of the Winters' Note.

Paragraph 39 – Contends that SPS assumed the role as Master Servicer as to two trusts but does **not** provide any documentation of that assumption. It also references Exhibit 16,

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which is just another copy of a recorded Limited Power of Attorney.

Paragraph 41 - References letters allegedly sent to the Winters about applying for a HAMP loan modification after they received their bankruptcy discharge on **July 2 and 16, 2014.** Contends because the Winters had not submitted a HAMP application right away, they were "not responding". It then initiated a non-judicial foreclosure on **August 4, 2014**.

Paragraph 52 – SPS asserts to the Winters that Wells Fargo owns the loan.

Paragraph 60 – SPS asserts to the Winters that Bank of America is the "investor" on the loan.

II. ISSUES PRESENTED

(1) Are Defendants Wells Fargo and SPS entitled to summary judgment when there are genuine issues of material fact which remain?

(2) Are Defendants entitled to summary judgment when the Winters have demonstrated that they can prove violations of the Consumer Protection Act?

III. EVIDENCE RELIED UPON

The Winters rely upon the moving papers, this Response, Declarations of Melissa Huelsman and Brian Winters on file with the Court, the previously filed Request for Judicial Notice, the Declaration of Melissa Huelsman filed in support of this Second Motion and the pleadings on file in this case.

IV. ARGUMENT

A. Standard on Motion for Summary Judgment.

A motion for summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). When determining whether an issue of material fact exists on summary judgment, a court must

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construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). A "material fact" for summary judgment purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d 1024, 60 P.3d 92. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594. But Washington courts are "reluctant to grant summary judgment when 'material facts are particularly within the knowledge of the moving party.'" *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 661-62, 240 P.3d 162 (Div. II 2010).

B. Defendants did not adhere to the requirements of the DTA and have therefore engaged in unfair and deceptive practices, which constitute violations of the CPA.

There is a question as to how this Court must deal with the Winters' arguments about non-compliance with the DTA in light of the Division I Opinion as to their claims against QLS, even though these Defendants were not parties to that appeal and were forced to participate in a separate attempt at an interlocutory appeal.

1. Deed of Trust Act Requirements.

The Washington DTA has three objectives: (1) that the nonjudicial foreclosure process remains efficient and inexpensive; (2) that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) that the process promotes the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985). S*ee also* RCW 61.24.030(6). "Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed on the trustee is exceedingly high." *Id.* at 388-89. In *Cox*, the Supreme Court noted that even if the plaintiffs had not properly acted to

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restrain the sale, it would have nevertheless been voided because of the trustee's action. *Id*. Here, the analysis should be the same. There was no adherence to DTA requirements.[3]

Where parties purporting to conduct a nonjudicial foreclosure sale of residential real property fail to conform to the requirements of the DTA, their actions are without legal effect and the sale is invalid. *See Albice v. Premier Mrtg.,* 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) ("*Without statutory authority, any action taken is invalid.*"); *Rucker v. Novastar, Inc.*, 177 Wn.App. 1, 16-17 (2013) ("the vacation of a foreclosure sale *is required* where a trustee has conducted the sale without statutory authority"); *id*. ("[i]f the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, *this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority*"). (Emphasis added).

Here, the requisites to a trustee's sale were never met and Supreme Court case law makes clear that even a completed a sale can be found invalid when it does not meet the requirements. *See*, *Albice, supra,* (sale not in compliance with the statute is invalid); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (claims arising from violation of requisites to a trustee's sale in RCW 61.24.030 not barred by waiver; requisites set forth in statutory list "*are not, properly speaking, rights held by the debtor*; instead, they are limits on the trustee's power to foreclose without judicial supervision") (emphasis added). *See also, Walker v. Quality Loan Serv. Corp of Wash.,* 176 Wn.App. 294, 309-10, 308 P.3d 716 (2013) ("[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale.");

[3] It is also important to point out that in *Cox,* the sale had long been complete, and a trustee's deed issued when the Supreme Court held that the sale was void.

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"Such actions by the improperly appointed trustee, we have explained, constitute 'material violations of the DTA.'" *Rucker,* 177 Wn.App. 1, 15-17, (citing to *Walker*).

2. Application of RCW 61.24.127 to the facts of this case.

RCW 61.24.127(1) specifically outlines those claims which **may not be waived** even if the **residential homeowner** does not seek to enjoin the foreclosure sale ("nonwaived claims"). *Id.* The statute does not state that it is an exclusive list of permissible post-sale claims or that every instance of failing to seek injunctive relief before the sale precludes any and all future claims. *Id.* This is consistent with Washington Supreme Court case law. Such a position would be in direct contravention of the language in RCW 61.24.040(1)(f)(IX) which is explicit in its language that a failure to enjoin the sale **may** result in a waiver of all claims. *Id.*

3. There is Nothing in the Legislative History of RCW 61.24.127 Which Supports the Conclusion that No Other Challenges to a Non-Judicial Foreclosure May be Made by Homeowners.

When the Legislature passed into law RCW 61.24.127, it was a direct rejection of Court of Appeal's decision in *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 189 P.3d 233 (2008), and nothing in the statute indicates the Legislature intended to preclude all other claims post-foreclosure. The portion of the *Brown* decision interpreting DTA language on waiver of claims rejected by the Legislature was its finding that it should be interpreted as meaning that a failure to enjoin a sale "shall" result in a waiver of claims. Rather, the plain language of the statute reads that a failure to enjoin the sale **"may"** result in a waiver of claims. RCW 61.24.040(1)(f)(IX).

In creating the protections only available to residential homeowners in RCW 61.24.127, the Legislature created a "safe harbor" to pursue claims for former homeowners irrespective of whether or not they sat on their rights and did not even attempt to enjoin the sale. The effect of

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RCW 61.24.127 is that it took away any requirement for a court to engage in a waiver analysis, which had been outlined in previous Supreme Court decisions. In fact, RCW 61.24.127(1) provided absolutely that the enumerated claims could be pursued without regard to waiver. *Id.* The statute of limitations for pursuing those claims is two years or less, depending upon when they accrue. RCW 61.24.127(2)(a). Notable in the language used by the Legislature as to claims that may be pursued are those against a "trustee" (defined at RCW 61.24.005) for "Failure . . . to materially to comply with the provisions of this chapter." RCW 61.24.127(1)(c). This language assumes that the trustee in question **is** actually a trustee. In this case, Mr. Miller has challenged whether the alleged trustee who sold his home had any power under the DTA to act as a trustee, and according to the stipulated facts for purposes of this appeal, Asset and Peak have conceded that they are **not.**

Nothing in RCW 61.24.127 and its legislative or case law history, going back to *Brown*, supports Defendants' arguments that the Legislature intended to preclude residential homeowners from taking action if they discover that the entity which has foreclosed on their home did not have the lawful authority to do so. Further, there is nothing in the statutory history which supports the notion that the Legislature intended to deprive residential homeowners and **only** residential homeowners from being able to take action after a foreclosure sale if they discover a lack of authority. Since RCW 61.24.127 **only** applies to provide protection from the waiver analysis for residential homeowners and not to any other property owner who might lose property to non-judicial foreclosure, such a finding would mean that this Court is concluding that the Legislature intended to provide commercial and investment property owners with stronger rights to challenge a potentially void non-judicial foreclosure in the event the purported "trustee" lacks legal authority. Given that the Legislature

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chose to act and act swiftly to grant particular protections to residential property owners after *Brown,* such an argument makes no sense.

A recent Division I Opinion in *Miller v. U.S. Bank, N.A., et al.*, Case No. 78044-1-I (October 28, 2019) (unpublished) engaged in a detailed analysis of RCW 61.24.127 and

> To this end, we reject the Bank Parties' argument that if a claim is one of the types of claims described in RCW 61.24.127(1), then it is categorically waived unless pursued within the time period specified in RCW 61.24.127(2). Specifically, the Bank Parties assert that "[a] claims-including equitable claims to void a sale-are waived if they are not brought prior to a foreclosure sale, unless they fall within one of the four articulated exceptions" set forth in RCW 61.24.127(1). (Emphasis added.) In other words, the Bank Parties contend that if a claim is not protected from waiver by RCW 61.24.127, then it is waived regardless whether the Plein waiver requirements of notice, knowledge of a defense, and failure to enjoin the sale are satisfied.

Miller at pg. 9. Referring to the *Patrick* case, the *Miller* Court quoted the following to reject arguments that that case supported the arguments that all claims post-foreclosure are waived, noting that: "Here, the Patricks concede that they did not use the DTA's procedure to restrain the trustee's sale. And they do not contest that Wells Fargo established the three waiver elements, as the Patricks had notice of the sale, knew of the defenses they now assert, and did not try to enjoin the sale." *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn.App. 398, 407, 385 P.3d 165 (2016), *review denied,* 187 Wn.2d 1022 (2017).

The Winters note that this Court has already engaged in the waiver analysis as to the factual assertions related to the reasons they did not enjoin the sale, which is that they reasonably expected the foreclosure to be continued again based upon representations made during phone calls with representatives of SPS and its previous conduct. Defendants' contend that these did not happen, but these are the contested facts that mean there are still genuine issues of material fact which must be decided by a trier of fact.

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4. Applying the Consumer Protection Act to DTA Requirements.

When analyzing CPA claims, a plaintiff must prove 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 their business or property; (5) causation." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). Beginning with *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, the Washington Supreme Court has been clear that a homeowner may pursue a CPA claim for violations of the DTA. *Bain,* at 98-110, noting that "characterizing MERS as the beneficiary has the capacity to deceive" and that there is certainly a presumption that the public interest element is met because MERS is involved in "an enormous number of mortgages in the country". *Id.* The same analysis applies here. Consistent with long standing case law, there are genuine issues of material fact that prevent summary judgment here. *Sato v. Century 21,* 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.,* 25 Wn. App. 90, 605 P.2d 1275 (1979). Under the CPA, specific monetary damages are not necessary, but a court is nevertheless required to award a prevailing plaintiff attorneys' fees. *Mason v. Mortgage America,* 114 Wn.2d 842, 792 P.2d 142 (1990). The Winters have testified about their out of pocket damages relating to investigation of claims, defending against an eviction following the sale, and the injuries they have suffered in relation to the demand for unearned amounts even though they were not paid. *See, Walker.*

a. Unfair and deceptive practices.

The Supreme Court noted in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) that CPA claims can be brought against defendants for acts that are "unfair **or** deceptive", including in the context of a non-judicial foreclosure sale. *Klem* at 11. *Klem* went on

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to cite extensively and discuss its decision in *Panag v. Farmers Ins. Co. of WA*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) to expressly clarify that a violation of the CPA may be brought because of a ". . . an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest." *Klem* at 16. In describing the "unfair or deceptive" standard, the Supreme Court quoted from this portion of *Panag*:

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

Klem, at 16, citing to *Panag,* 166 Wn.2d at 48 (quoting *State v. Schwab,* 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914)). The Court further noted that "an act or practice can be unfair without being deceptive" and that the statute clearly allows claims for "unfair acts **or** deceptive acts or practices." *Klem,* at 16-17. Citing to *Panag*, the *Walker* Court also noted that Walker had valid claims even without a completed foreclosure because he had suffered harm:

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

Walker, 176 Wn.App. 294, 309-10, citing to *Panag,* 166 Wn.2d at 53; *see also, Rucker,* at 16-17 (2013) ("[W]hen an unlawful beneficiary appoints a successor trustee, **the putative trustee lacks the legal authority to record and serve a notice of trustee's sale**;" "such actions by the

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improperly appointed trustee, we have explained, constitute 'material violations of the DTA.'"). The Defendants have repeatedly ignored the requirements of the DTA. Just as in *Rucker,* QLS, the purported foreclosing trustee, was not appointed by the "beneficiary", but by the loan servicer and the Beneficiary Declaration was not signed by the "actual noteholder". Instead, it was signed by an employee of the servicer who could not have any personal knowledge about the location of the Note and the identity of the noteholder. There is no credible testimony whatsoever offered about the alleged physical location of the Winters' Note nor is it supported by any admissible evidence. *See,* Benight 1st and 2nd Dec. While Ms. Benight contends it is and has been in the possession of SPS for years, but neither she nor anyone else there has apparently never seen it.

There is no testimony from Defendant Wells Fargo nor any documentation from SPS which would support the alleged principal-agent relationship because neither Benight Declaration provides **one word** of information or include documentation which represents the alleged principal, Wells Fargo, exercising control over the alleged agent, SPS. As pointed out above, SPS does not even allege that Wells Fargo communicated with it or directly provided it with the Limited Powers of Attorney upon which it relies.

In this case, the copy of the Note proffered indicates it is indorsed in blank, making its possession even more important. If Wells Fargo and/or its custodian was/is in physical possession of the Note, then it could have provided the Court with that testimony. It has apparently made a choice not to do so or, as the Winters suspect, Wells Fargo has no involvement in this litigation whatsoever, it does not know that it exists and it does not participate in any way, shape or form in overseeing and controlling its alleged agent.

A "Holder" of a negotiable instrument is defined in Washington as:

RCW 62A.1-201…

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(21) "Holder" with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

RCW 62A.1-201(21)(A). *See also,* RCW 61.24.005(2). This means that Wells Fargo was required to execute the Appointment of Successor Trustee (RCW 61.24.010(2)); Beneficiary Declaration (RCW 61.24.030(7)); and it was supposed to be the entity that gave direction to the properly appointed trustee to foreclose (RCW 61.24.030; .031; .040). Consistent with the Supreme Court's decision in *Bain,* parties who utilize the Deed of Trust Act cannot try to alter its requirements by contract.

While Division I has determined that QLS could rely upon the documentation submitted to it by SPS employees because of the existence of the Limited Power of Attorney, even though there was no evidence it even knew of its existence and in spite of the fact that the DTA does not have language allowing an "agent" to execute a Beneficiary Declaration or an Appointment of Successor Trustee. RCW 61.24.005(2); 010(2); 030(7)(a)). Further, even if the Court leans towards accepting the Defendants' position that SPS employees could take those actions through the use of a POA, Washington case law makes clear that there must be evidence of an actual principal/agent relationship. Defendants contend that *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106, 285 P.3d 34 (2012) stands for the proposition that Washington law allows the use of agents in spite of the plain language in RCW 61.24.010(2) ("[t]he trustee may … be replaced by the ***beneficiary***") (emphasis added). Compare this to the actual language of *Bain*, 175 Wn.2d at 107 ("[w]e have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal") (quotation marks and citation omitted) (emphasis in original). As *Bain* acknowledges, there are portions of the DTA which allows the use of "authorized agents" to perform certain specific acts (RCW 61.24.030; .031(1)(a), (b); .050(2); .143; and .163(8)(a)).

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The actions complained of herein do not include those sections. The remainder of the DTA ***does not empower an agent to act in the beneficiary's stead***. *See In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) ("Where the legislature uses certain statutory language in one instance, and different language in another, there is different legislative intent."). While there are some unpublished Division I cases which misconstrue and misrepresent the *Bain* Court's language as to the use of "agents", these are not binding on this Court, and this Court should not follow appellate case law that does not comport with Supreme Court case law and the plain meaning of the relevant statute.

Defendants ask this Court to rule once again, in spite of the fact that it has already ruled on these issues, that the DTA, and the language in *Bain*, freely allows alleged beneficiaries to delegate their responsibilities to unsupervised "agents." But, even supposing that an agent *could* lawfully take an action like appointing a successor trustee on behalf of the beneficiary, material questions of fact prevent them from obtaining summary judgment as Defendants' evidence of the existence of an alleged principal-agent relationship is nothing more than the Limited POA and the complete absence of any evidence that Wells Fargo has ever acted as a principal controlling the actions of its alleged agent. These were the same facts this Court considered previously and which were rejected by Division II as being a proper foundation for an appeal of the summary judgment holding. *Bain,* 175 Wn.2d at 106, requires that "'an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, ***with a correlative manifestation of consent by the other party to act on his behalf and subject to his control***'" (citing *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)) (emphasis added). No such evidence has been presented to this Court.

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The Winters maintain that because of the insufficiency of the documentation used in connection with the nonjudicial foreclosure at issue in this case, as well as the misrepresentations to the Winters about the pending foreclosure sale date, SPS has engaged in "unfair **and** deceptive" practices. Further, these actions were intentional because the documentation used in support of the foreclosure was defective on its face. The "Appointment of Successor Trustee" was not signed by the "Beneficiary" but rather by an alleged "attorney in fact" who asserts that she has personal knowledge of information in the possession of the alleged "beneficiary". The same is true as regards the Beneficiary Declaration. It was defective on its face because an SPS employee signing as an "attorney in fact" could not personally attest under penalty of perjury that a third party – Wells Fargo and/or its custodian – had physical possession of the Note.

In addition, SPS repeatedly engaged in "dual tracking" during their dealings with the Winters – pursuing a foreclosure action while simultaneously working with the Winters on the loan modification process – and by misleading and deceiving them in relation to the second foreclosure proceeding such that they reasonably believed that it would not occur – just as it did not occur previously and consistent with the information being provided to the Winters by SPS' representatives.

b. Occurring in trade or commerce.

Defendants' actions were done in the course of performing its mortgage loan servicing business by having its employees execute documents without the requisite authority under Washington law to do so, and without any personal knowledge of who was in possession of the original Promissory Note. (The Appointment of Successor Trustee and Beneficiary Declaration are made under penalty of perjury.) These documents are recorded in the public records of all

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Washington counties. Further, Defendants' actions relating to the dual tracking and false information about the pending non-judicial foreclosure was done in connection with its mortgage servicing business and it is likely that this would happen to other consumers. Thus, the complained of acts occurred in the course of trade or commerce.

c. Public Interest Element.

Proof of the public interest element may be proven through evidence of actual injury to others or a finding that it "had the capacity to injure other persons" or "has the capacity to injure other persons". RCW 19.86.093. Proof that the business practices of Wells Fargo and SPS will and has injured others is evident in its assertions that it did comply with Washington law and asks this Court to affirm its actions, which are in direct contravention of the requirements of the DTA. The Supreme Court found in *Bain, Frias v. Asset Foreclosure Services, Inc*., 181 Wn.2d 412, 334 P.3d 529 (2014) and *Lyons v. U.S. Bank National Ass 'n,* 181 Wn.2d 775, 336 P.3d 1142 (2014) that provision of and reliance upon the same sort of false information and noncompliant documentation is ""unfair" and "deceptive" under the CPA, as did the Court of Appeals in *Walker* and *Rucker.* Numerous other DTA cases decided by the Supreme Court require that language in the DTA be construed strictly in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain,* 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). DTA "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Bain,* 175 Wn.2d. at 93.

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Defendants contend that their actions were done in conformity with the requirements of the DTA and therefore have proven through their responses to the Winters' allegations that they have already and will engage in the same actions in the future. The same is true of its assertions relating to the manner in which the dual tracking occurred and the false information provided to the Winters which caused them to not take actions to prevent the foreclosure. RCW 19.86.093(3)(b) & (c) allow for proof of the public interest element by demonstrating that the complained of act "has" or "had" the "capacity" to injure other persons.

d. The Winters were damaged and injured by the actions of the Defendants.

The Winters have testified about their out of pocket damages incurred as a result of the actions of the Defendants. *See,* Winters Dec. Further, the Winters lost title to their home. "**Even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA**." *Frias v. Asset Foreclosure Services, Inc*., 181 Wn.2d 412, 430, 334 P.3d 529 (2014), citing to *Panag v. State Farm Ins. Co. of WA,* 166 Wn.2d 27, 57 (2009); *Lyons,* 336 P.3d at 1142 (emphasis added).

e. Causation

As outlined above, the Winters would not have lost their home to foreclosure had they received accurate and truthful information about the likelihood of a completed foreclosure the second time around, and it was particularly credible for the Winters to believe that it would not occur given how long they had been involved in the cycle of attempting to get a loan modification and being threatened with non-judicial foreclosure. The Defendants' actions in engaging in dual tracking made their belief much more likely. Defendants' caused the loss of their home to foreclosure when they may well have been able to prevent it had they understood that the years

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long cycle of applications for loan modifications and pending foreclosures was coming to an end.

C. <u>The Notice of Grievance is inapplicable to this case</u>.

The language in the Deed of Trust relating to "Notice of Grievance" bears no relationship to the claims made in this case relating to the wrongful initiation of a non-judicial foreclosure. Nothing in the plain language of that paragraph relates to disputes about use of state statutes to foreclose and **all** of the out of state and federal cases cited to by Defendants include breach of contract claims. The Winters did not allege a breach of contract anywhere in their claims. This is nothing more than a red herring designed to further mislead this Court.

V. CONCLUSION

For these aforementioned reasons, the Defendants' motion for summary judgment must be denied as there are genuine issues of material fact which remain.

DATED this Thursday, May 2, 2019

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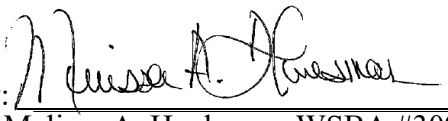
By: 

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of laws of the State of Washington that on July 15, 2020, I caused to be served in the manner indicated below a true and accurate copy of the foregoing document upon the following:

D. Jeffrey Courser, WSBA #15466 Stoel Rives, LLC 760 SW Ninth Avenue, Suite 3000 Portland, OR 97205 Jeffrey.courser@stoel.com Attorney for Select Portfolio Servicing, Inc. and Attorney for Wells Fargo	[X] By Email [ ] Legal Messenger [ ] By Facsimile [ ] By Air Courier [ ] By US Mail
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/s/ Melissa A. Huelsman ___
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