

FILED

UNITED STATES COURT OF APPEALS

OCT 26 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PETER J. MEYER; SHAREE MEYER,
husband and wife,

Plaintiffs-Appellants,

v.

NORTHWEST TRUSTEE SERVICES
INC., a Washington Corporation,

Defendant-Appellee.

No. 15-35560

DC No. 2:14 cv-0297RSM
WD Wash., Seattle

ORDER

Before: TASHIMA and NGUYEN, Circuit Judges, and WALTER,* District Judge.

The Memorandum Disposition filed on August 29, 2017, is withdrawn and replaced by the Memorandum Disposition filed concurrently with this order. With the filing of the revised Memorandum Disposition, the petition for rehearing en banc is denied as moot. Further petitions for panel and/or en banc rehearing may be filed with respect to the newly-filed revised Memorandum Disposition.

* The Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

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NORTHWEST TRUSTEE SERVICES
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No. 15-35560

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MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief District Judge, Presiding

Argued and Submitted July 11, 2017
Seattle, Washington

Before: TASHIMA and NGUYEN, Circuit Judges, and WALTER,** District
Judge.

Plaintiffs-Appellants Peter and Sharee Meyer (together, the “Meyers”) sued
Defendant-Appellee Northwest Trustee Services, Inc. (“NWTs”) after the latter

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald E. Walter, United States District Judge for the
Western District of Louisiana, sitting by designation.

initiated non-judicial foreclosure proceedings on their deed of trust. Following a bench trial, the bankruptcy court ruled that NWTS had violated the Washington Deed of Trust Act and, in doing so, also violated the Consumer Protection Act. It awarded the Meyers substantial damages and attorney's fees. NWTS appealed to the district court, which reversed the bankruptcy court. The Meyers now appeal from the judgment of the district court.

We have jurisdiction under 28 U.S.C. § 158(d)(1). We affirm the district court for the reasons stated in the district court's Order Reversing Bankruptcy Court, filed April 10, 2015, which is attached as Appendix "A" to this Memorandum.

AFFIRMED.

APPENDIX “A”

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PETER J. MEYER AND SHAREE L.
MEYER, husband and wife;

Appellee,

v.

U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR STRUCTURED ASSET
SECURITIES CORPORATION MORTGAGE
PASS-THROUGH CERTIFICATES, 2006-
GE1, a federally chartered national bank;
AMERICA’S SERVICING COMPANY, a
Division of WELLS FARGO NA d/b/a WELLS
FARGO HOME MORTGAGE, a National
Bank; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
Delaware corporation; and DOE
DEFENDANTS 1-10,

Defendants,

and

NORTHWEST TRUSTEE SERVICES, INC.,

Appellant

Defendants.

Case No. 14-00297RSM

USBC, WAWB 14-S002

BK No. 12-01630-KAO

ORDER REVERSING BANKRUPTCY
COURT

01 This matter comes before the Court upon appeal by Defendant-Appellant Northwest
02 Trustee Services, Inc. (“NWTS”) from the Bankruptcy Court for the Western District of
03 Washington’s memorandum decision granting judgment in favor of Plaintiffs-Appellees Peter and
04 Sharee Meyer (the “Meyers”). Following bench trial, the Honorable Karen Overstreet awarded the
05 Meyers \$72,008 plus costs and attorney’s fees on their claims against NWTS for violation of
06 Washington’s Deed of Trust Act and Consumer Protection Act. Having considered the briefs and
07 supporting exhibits of the parties and amicus curiae United Trustees Association (“UTA”),
08 together with the relevant record below, and having heard oral argument by the parties, the Court
09 REVERSES the Bankruptcy Court’s judgment for the reasons stated herein.

10 **FACTUAL BACKGROUND**

11 On November 10, 2005, the Meyers executed an adjustable rate promissory note (the
12 “Note”) in favor of Finance America LLC to secure a \$425,000 loan. Bankruptcy Record, Case
13 No. 12-01630KAO (“BR”), Dkt. # 1, Ex. A. The Note was secured by a Deed of Trust (the
14 “Deed”) against the Meyers’ residential property in Snohomish, WA. *Id.* at Ex. B. The Deed
15 named Ocwen Loan Servicing as servicer, DCBL, Inc. as trustee, Finance America LLC as lender,
16 and Mortgage Electronic Registration Systems (“MERS”) as beneficiary and nominee of the
17 lender. The Deed provided that the Note, together with the Deed, could be sold one or more times
18 without notice to the borrowers. *Id.* at ¶ 20. The Deed was recorded on November 18, 2005, and
19 the Meyers moved into their residence in January 2006 with their three children and began making
20 payments under the Note. Memorandum Decision, Dkt. # 145 (“MD”), p. 3.

21 In April 2006, the Note was transferred into a securitized trust, entitled Structured Asset
22 Securities Corporation Mortgage Pass-Through Certificates Series 2006-GELS2 (“GEL2”). MD

01 at p. 3. The relevant details of this transaction include the following: First GEL2 is not an operating
02 entity and therefore lacks a physical address. Second, U.S. Bank National Association (“U.S.
03 Bank”) served as Trustee of the trust, with America’s Servicing Company (“ASC”), a division of
04 Wells Fargo Bank NA (“Wells Fargo”), acting as the loan servicer. The trial court determined
05 based upon a review of the evidence, that Wells Fargo held the Note as custodian for U.S. Bank,
06 which in turn served as Trustee for GEL2. MD at p. 5. Third, under the trust agreement, U.S. Bank
07 was authorized to execute powers of attorney in favor of any servicer to permit the servicer to
08 foreclose against any mortgaged property in GEL2, with actions in pursuit of foreclosure
09 delegated to the servicer under a Servicing Agreement. NWTS produced three separate Limited
10 Power of Attorney documents executed by U.S. Bank authorizing Wells Fargo to act as its
11 attorney-in-fact under the Servicing Agreement. MD at p. 26; Defendant-Appellant’s Appendix
12 (“DA”), Dkt. # 12, pp. 61-66.

13 The Meyers continued to make the required payments of principal and interest under the
14 Note until they began to experience financial difficulties toward the end of 2008. Under the terms
15 of the Note, the Meyers agreed that failure to pay the full amount of each monthly payment on the
16 due date would put them in default. BR, Dkt. # 1, Ex. A, ¶ 7(B). The trial court could not determine
17 from the evidence presented at trial precisely when the Meyers initially defaulted or whether any
18 lender issued a formal notice of default. MD at p. 6.

19 On March 9, 2009, NWTS received its first referral to foreclose the Deed of Trust in the
20 form of a “Case Information Report” (“CIR”) pulled from the third party website “Vendorscape.”
21 MD at p. 6. According to Jeff Stenman, Foreclosure Manager for NWTS, NWTS has used
22 Vendorscape to access foreclosure information for at least a decade but has no procedures in place

01 to verify the accuracy of the information. *Id.* Based on the information in the CIR, Stenman
02 executed an Assignment of Deed of Trust from MERS to U.S. Bank as Trustee for GEL2 on
03 March 10, 2009. Although Stenman was an employee of NWTS, he prepared and signed the
04 assignment as a Vice President of MERS pursuant to what he described as a tri-party agreement
05 between himself, Wells Fargo, and MERS. *Id.* at p. 7. The agreement was not produced at trial,
06 though the Assignment was recorded on July 1, 2009. *Id.*

07 On March 26, 2009, Anne Neely signed an appointment of NWTS as Successor Trustee.
08 DA at p. 72. The document identified Neely as a Vice President of Wells Fargo, acting as
09 attorney-in-fact for U.S. Bank, Trustee for GEL2. *Id.* The assignment was recorded July 1, 2009,
10 and incorrectly identified MERS as beneficiary, although MERS' interest had already been
11 assigned to U.S. Bank at the time. *Id.*

12 For undisclosed reasons, the 2009 foreclosure proceeding against the Meyers was
13 discontinued and a new proceeding initiated in 2010, following NWTS's receipt of a second CIR
14 from Vendorscape requesting commencement of foreclosure. MD at p. 8; DA at p. 277. Both the
15 2009 and 2010 CIRs incorrectly referenced the Note as non-adjustable and contained conflicting
16 representations of the principal balance and interest rate. MD at p. 8. NWTS nonetheless issued a
17 Notice of Default under the Meyers' Deed of Trust on July 9, 2010 based on information contained
18 in the 2010 CIR. DA at pp. 73-75. The Notice, which was taped to the Meyers' door, stated that
19 they would need to pay \$82,035.65 in order to avoid foreclosure. *Id.*; MD at p. 11. Paragraph (K)
20 of the Notice provided the following contact details in accordance with RCW 61.24.030(8)(1):

21 (K) Contact Information for Beneficiary (Note Owner) and Loan Servicer

22 The beneficiary of the deed of trust is US Bank National Association, as Trustee for
[GEL2], whose address and telephone number are:

01 c/o America's Servicing Company
02 MAC X7801-02T, 3476 Stateview Blvd
03 Fort Mill, SC 29715
04 855-248-5719

05 The loan servicer for this loan is America's Servicing Company, whose address and
06 telephone number are:

07 MAC X7801-02T, 3476 Stateview Blvd
08 Fort Mill, SC 29715
09 800-662-5014

10 DA at pp. 74-75. The Notice also identifies U.S. Bank, as Trustee for GEL2, as the "creditor to
11 whom the debt is owed" and refers to NWTS as the "authorized agent" for U.S. Bank. *Id.* at p. 75.

12 In connection with the Notice of Default, NWTS provided a Foreclosure Loss Mitigation
13 Form and Beneficiary Declaration, pursuant to RCW 61.24, each dated June 24, 2010. DA at p. 76;
14 MD at p. 9. Both were signed under penalty of perjury by John Kennerty, though on the former he
15 was identified as "VP of Loan Documentation" for ASC, while on the latter he was identified as
16 "VP of Loan Documentation" for Wells Fargo as attorney-in-fact for U.S. Bank. *Id.* The
17 Beneficiary Declaration identifies U.S. Bank, as trustee for GEL2, as the holder of the Note. DA at
18 p. 76. Over NWTS's objection, the trial court admitted deposition testimony of Kennerty from a
19 separate proceeding involving NWTS, *Geline v. NWTS, et al.*, King Count Sup. Ct. Case No.
20 09-2-46576-2, in which Kennerty testified that he routinely signed such documents without
21 personal knowledge of any factual statements therein. MD at p. 10. The trial court determined that
22 no one at NWTS took any action to verify any information provided in the Notice of Default or
referenced in the declarations. *Id.*

Believing the interest rate and monthly payments stated on the Notice to be inaccurate, Mr.
Meyer contacted the phone number for ACS but was unable to resolve his concerns. MD at p. 11.

01 The Meyers accordingly hired attorney Richard Jones to represent them in July 2010 in their
02 mortgage-related dealings. *Id.* at pp. 11-12. On December 17, 2010, the Meyers, through Jones,
03 issued a Qualified Written Request (“QWR”) under the Truth in Lending Act to ASC to determine
04 the holder and owner of the Note. DA at pp. 138-159. On January 12, 2011, ASC responded by
05 letter informing the Meyers that their loan was in a “pool” managed by U.S. Bank and provided a
06 contact address for U.S. Bank. MD at p. 12.

07 On August 13, 2010, NWTS executed a Notice of Trustee’s sale, reciting a sale date of
08 November 19, 2010. DA at pp. 77-80. One day before the scheduled trustee’s sale of their
09 residence, the Meyers filed a Chapter 13 bankruptcy plan through separate retained counsel, Larry
10 Feinstein. DA at pp. 81-126. On December 21, 2010, U.S. Bank, as trustee for GEL2, filed a proof
11 of claim listing the total amount due under the loan as \$502,190.76, with delinquent monthly
12 payments from February 1, 2009 to November 1, 2010 and other costs totaling \$86,020.02. *Id.* at
13 pp. 127-28. The Meyers’ first proposed a Chapter 13 plan that provided only for payments of
14 \$2,000 a month on their mortgage, which U.S. Bank opposed.

15 The dispute was resolved by the Meyers agreeing to give up their residential property in
16 satisfaction of their debt. On June 1, 2011, the Meyers stipulated that U.S. Bank could have relief
17 from the automatic stay, and the Meyers amended their plan to remove the U.S. Bank loan. *Id.* at
18 pp. 129-36. On August 19, 2011, Judge Overstreet confirmed a plan without the subject mortgage.
19 *Id.* at p. 137. On June 29, 2011, NWTS restarted the foreclosure process with issuance of an
20 Amended Notice of Trustee’s Sale, reciting a sale date of August 12, 2011. MD at p. 13. The
21 Meyers subsequently sought mediation under the Foreclosure Fairness Act, RCW 61.24.163, and
22

01 participated in three mediation sessions that included a Wells Fargo representative. DA at pp. 163,
02 223-24.

03 **PROCEDURAL BACKGROUND**

04 The Meyers commenced this adversary proceeding on July 23, 2012, seeking a temporary
05 restraining order enjoining the scheduled foreclosure sale. The bankruptcy court entered the TRO
06 on August 2, 2012. BR at Dkt. # 16. Upon non-opposition by Defendants U.S. Bank and ASC, the
07 court entered a preliminary injunction on August 20, 2012, requiring the Meyers to continue
08 making monthly payments of \$3,616.03 into the court registry. *Id.* at Dkt. # 20. Upon the Meyers'
09 failure to respond to discovery requests and to make the requirement payments, the bankruptcy
10 court subsequently dissolved the injunction, dismissed all claims against U.S. Bank, Wells Fargo,
11 and MERS as a discovery sanction, and ordered that the trustee's sale could be reset. *Id.* at Dkt. ##
12 90, 91. Although the residence had not been sold when the case proceeded to bench trial against
13 NWTS, the Meyers decided to move into a rental house in July 2013. MD at p. 15. Mr. Meyers
14 testified that this decision was motivated by the stress of impending foreclosure.

15 On October 8, 2013, the case proceeded to bench trial against NWTS on claims for
16 violation of the Washington Deed of Trust Act, RCW 61.24 *et seq.* ("DTA"), the Washington
17 Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"), and the Fair Debt Collection Practices Act,
18 15 U.S.C. § 1692 ("FDCPA"). On February 18, 2014, Judge Overstreet issued a memorandum
19 decision, finding in favor of Plaintiffs on their DTA and CPA claims but denying them relief under
20 the FDCPA. The Court therein awarded damages to the Meyers of \$48,504, comprising actual
21 damages of \$23,504, plus CPA treble damages of \$25,000. *See* MD. Actual damages included
22 Jones's fees related to filing the QWR, Feinstein's fees related to filing the Chapter 13 bankruptcy,

01 monthly rent from July 2013 through trial, as well as security and pet deposit for the Meyers' rental
02 home, moving expenses, and lost wages attributable to the Meyers' attendance at mediations and
03 hearings. On March 26, 2015, the court also awarded the Meyers attorney's fees of \$30,324 and
04 costs of \$294.40, pursuant to RCW 19.86. BR, Dkt. # 169.

05 The bankruptcy court issued its final order and judgment on April 8, 2014. The instant
06 appeal by NWTS followed, with the briefing schedule renoted on several occasions at the request
07 of the parties and permission granted to UTA to participate in the appeal as amicus curiae.

08 **STANDARD OF REVIEW**

09 The district court, acting in its appellate capacity, reviews the bankruptcy court's legal
10 conclusion *de novo* and its factual determinations for clear error. *In re Olshan*, 356 P.3d 1078,
11 1083 (9th Cir. 2004). Mixed questions of law and fact are reviewed *de novo*. *Banks v. Gills*
12 *Distributions Centers, Inc.*, 263 F.3d 862, 867 (9th Cir. 2001).

13 **ANALYSIS**

14 **A. Judicial Estoppel**

15 Although Judge Overstreet did not address the application of judicial estoppel in her
16 memorandum decision, NWTS urges the Court to find that the Meyers are judicially estopped
17 from asserting their claims against NWTS because they failed to list these claims as assets in their
18 bankruptcy schedule. The Meyers contend that judicial estoppel should not apply because: 1) the
19 argument was not raised or considered at trial, 2) their claims against NWTS were not known or
20 cognizable in July 2010 when they filed for Chapter 13 relief, and 3) NWTS concealed actions that
21 now give rise to the Meyers' claims.

22 "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage

01 by asserting one position, and then later seeking an advantage by taking a clearly inconsistent
02 position.” *Hamilton v. State Farm & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). Under both
03 federal and Washington law, three factors inform the court’s decision whether to apply the
04 doctrine to a particular case. First, a party’s later position must be “clearly inconsistent” with its
05 earlier position. Second, the party must have succeeded in persuading a court to accept its earlier
06 position, such that judicial acceptance of a later inconsistent position would suggest that either the
07 first or second court was being misled. And third, the party seeking to assert a later inconsistent
08 position must derive an unfair advantage or impose an unfair detriment on the opposing party if not
09 estopped. *Id.*; *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 5345, 538, 160 P.3d 13 (2007). Judicial
10 estoppel applies to preclude a debtor from pursuing claims when he “has knowledge of enough
11 facts to know that a potential cause of action exists during the pendency of [a] bankruptcy, but fails
12 to amend his schedules or disclosure statements to identify the cause of action as a contingent
13 asset.” *Hamilton*, 270 F.3d at 784.

14 As a threshold question, this Court must determine whether the judicial estoppel argument
15 was properly before the bankruptcy court. In the Ninth Circuit, an appellate court may consider an
16 issue, even if not ruled on by the bankruptcy court, so long as it was “raised sufficiently for the trial
17 court to rule on it.” *In re E.R. Fegert, Inc.*, 8887 F.2d 955, 957 (9th Cir. 1989). Thus, even where
18 the bankruptcy court did not itself rule on it, “intermediate appellate courts may consider any issue
19 supported by the record.” *Id.* Here, the trial transcript shows that judicial estoppel was argued to
20 the bankruptcy court. *See* Dkt. # 12-5, p. 37 (arguing that the Meyers “should be estopped, under
21 case law from the Ninth Circuit” because they knew of the allegedly misleading information prior
22 to filing for bankruptcy); Dkt. # 27, p. 49 (response by Mr. Meyers to question by NWTs counsel,

01 admitting that he did not include his claims against NWTS in the bankruptcy schedule); *Id.* at pp.
02 45-46 (response by Meyers admitting that his “confusion began” upon receiving notice of default
03 in July 9, 2010, prior to filing bankruptcy). The Court consequently finds that the record is
04 sufficiently developed to allow it to reach the merits of the judicial estoppel issue.

05 Nonetheless, the Court agrees with the Meyers that application of judicial estoppel would
06 be inequitable, where the case law underlying their claims against NWTS, and on which Judge
07 Overstreet relied, only arose from 2012 – two years after the Meyers filed for bankruptcy.
08 Specifically, Judge Overstreet recognized that the Washington Supreme Court’s decision in *Bain*
09 *v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 10, 285 P.3d 34 (2012), and its progeny
10 had changed the legal landscape of the Washington Deed of Trust Act. *See MD* at pp. 16-18.
11 Whereas pre-*Bain* decisions had generally not recognized a pre-foreclosure cause of action under
12 the DTA, Judge Overstreet followed the 2013 appellate decisions in *Walker v. Quality Loan*
13 *Service Corp.*, 176 Wash.App. 294, 308 P.3d 716 (Wash.Ct.App. 2013) and *Bavand v. OneWest*
14 *Bank, F.S.B.*, 176 Wash.App. 574, 309 P.3d 636 (Wash.Ct.App. 2013) in finding that the Meyers
15 may pursue a pre-foreclosure cause of action under the DTA. Similarly, Judge Overstreet based
16 her CPA analysis on the Washington Supreme Court’s recent clarification in *Klem v. Washington*
17 *Mutual*, 176 Wn.2d 771, 790, 295 P.3d 1179 (2013) that a trustee’s failure to exercise independent
18 discretion as an impartial third party may be actionable as an unfair and deceptive practice under
19 the CPA.

20 Accordingly, the Meyers assertion of claims against NWTS in the adversary proceeding is
21 not “clearly inconsistent” with their failure to list claims against NWTS on their bankruptcy
22 schedule, as they only became cognizable several years after their bankruptcy filing. Further, the

01 change in intervening law undercuts the assertion that the bankruptcy court was misled by the
02 failure to list these claims, since the claims arguably could not have been considered assets at the
03 time the bankruptcy was filed. Given the unsettled and shifting state of DTA law in Washington,
04 the Court declines to find the Meyers judicially estopped from pursuing their claims against
05 NWTS.

06 **B. Violation of Deed of Trust Act**

07 While, as Judge Overstreet recognized, the legal landscape of the DTA had changed
08 considerably since *Bain*, it has changed once again since Judge Overstreet issued her
09 memorandum decision. Judge Overstreet reasonably relied on the Washington appellate court
10 decisions in *Walker* and *Bavand* to conclude that the “Washington courts have spoken” in rejecting
11 the earlier holding in *Vawter v. Quality Loan Service Cop.*, 707 F.Supp.2d 1115, 1123 (W.D.
12 Wash. 2010) that there is no cause of action for violation of the DTA where no trustee’s sale has
13 occurred. However, since the parties filed their opening briefs in this appeal, the Washington
14 Supreme Court released its decision in *Frias*, in which it held that “there is no actionable,
15 independent cause of action for monetary damages under the DTA based on DTA violations
16 absent a completed foreclosure sale.” *Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412,
17 429, 334 P.3d 529 (2014). *Frias* thereby overruled the conflicting holdings of *Walker* and *Bavand*
18 and now clearly bars the Meyers’ DTA claim, which they admit is for “pre-sale [] compliance with
19 the DTA.” *See* Appellee’s Opening Brief, Dkt. # 23, p. 20 (asserting that “this case involves a
20 pre-sale challenge to the foreclosure sale in which Mr. and Mrs. Meyer brought suit against the
21 purported lenders, servicers, and trustee under RCW 61.24.130. No sale has occurred.”) (emphasis
22 in original). Accordingly, this Court’s *de novo* review of current law requires it to reverse Judge

01 Overstreet's determination as to the Meyers' DTA claim.

02 **C. Violation of Consumer Protection Act**

03 At the same time that *Frias* abrogated the pre-sale DTA cause of action, it confirmed that
04 violations of the DTA may nonetheless be actionable under the CPA even in the absence of a
05 completed foreclosure sale. *Frias*, 181 Wash.2d at 430. The Court also determined that such
06 claims are governed by ordinary principles applicable to all CPA claims developed under this
07 independent statutory cause of action and its corresponding body of case law. *Id.* at 432; *see also*
08 *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wash.2d 775, 784, 336 P.3d 1142 (2014) ("*Frias* clearly
09 resolves the first issue in this case. Lyons cannot bring a claim for damages under the DTA in the
10 absence of a sale, but she may bring a claim for similar actions under the CPA."). Thus Judge
11 Overstreet did not err in determining that the Meyers could maintain a cause of action under the
12 CPA based on the alleged failure of NWTs to comply with the DTA. *See MD* at p. 23. The
13 question for this Court thus becomes whether the Meyers have established all of the elements of
14 their CPA claim.

15 The elements of a CPA claim are well-established and not in dispute. To prevail on her
16 CPA claim, a plaintiff must prove the following elements: (1) an unfair or deceptive act or
17 practice; (2) the act or practice occurred in trade or commerce; (3) the act or practice impacts the
18 public interest; (4) the act or practice caused injury to the plaintiff in his business or property; and
19 (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables,*
20 *Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). Whether a particular act
21 or practice is "unfair or deceptive" is a question of law that this Court reviews *de novo*. *See Lyons*,
22 181 Wash.2d at 786. As a general matter, the CPA is to be "liberally construed that its beneficial

01 purposes may be served.” RCW 19.86.920. On appeal, NWTS disputes Judge Overstreet’s
02 findings with respect to each prong of the CPA except the second, occurring in trade or commerce,
03 prong.

04 **1. Unfair or Deceptive Act or Practice**

05 Judge Overstreet identified four separate acts or practices by NWTS that violated the DTA
06 and also met the first prong of the CPA. These were: (1) NWTS failed to verify whether the
07 servicer, ACS/Wells Fargo, had the requisite authority to issue the Beneficiary Declaration in
08 accordance with RCW 61.24.030(7); (2) NWTS accepted the Loss Mitigation Form from ASC
09 without evidence that ASC was the authorized agent of U.S. Bank for the purpose of executing this
10 document; (3) NWTS referred to itself in the Notice of Default as the authorized agent for the
11 beneficiary when it was already the successor trustee; and (4) NWTS included the same address
12 for the beneficiary and service in the Notice of Default, rather than including a separate address
13 and phone number for either U.S. Bank (the Note holder) or GEL2 (the Note owner).

14 **a) Reliance on Beneficiary Declaration and Loss Mitigation Form**

15 The Deed of Trust Act, RCW 61.24.030, lays out requisites for a trustee’s sale in a
16 nonjudicial foreclosure on a deed of trust. Among these requirements, subsection (7) provides:

- 17 (a) That for residential property, before the notice of a trustee’s sale is recorded,
18 transmitted, or served, the trustee shall have proof that the beneficiary is the
19 owner of any promissory note or other obligation secured by the deed of trust. A
20 declaration by the beneficiary made under the penalty of perjury stating that the
21 beneficiary is the actual holder of the promissory note or other obligations
22 secured by the deed of trust shall be sufficient proof as required under this
subsection.
- (b) Unless that trustee has violated his or her duty under RCW 61.24.010(4), the
trustee is entitled to rely on the beneficiary’s declaration as evidence of proof
required under this subsection.

01 RCW 61.24.030(7). RCW 61.24.010(4) in turn provides that the “trustee or successor
02 trustee has a duty of good faith to the borrower, beneficiary, and grantor.”

03 The Act further requires that a Notice of Default include a declaration from the beneficiary
04 or authorized agent, referred to as a “Loss Mitigation Form,” certifying that it has contacted or
05 tried to contact the borrower. RCW 61.24.031(2); *see also* RCW 61.24.031(9) (specifying the
06 required contents of the Foreclosure Loss Mitigation Form). As with the Beneficiary Declaration,
07 the Act provides trustees a safe harbor to rely on this declaration, absent a violation of the trustee’s
08 duty of good faith to the borrower, beneficiary, or grantor. *See* RCW 61.24.031(2) (“Unless the
09 trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the
10 declaration as evidence that the requirements of this section have been satisfied, and the trustee is
11 not liable for the beneficiary’s or its authorized agent’s failure to comply with the requirements of
12 this section.”).

13 Here, it is undisputed that NWTS accepted and relied on both a Beneficiary Declaration
14 and Loss Mitigation Form. Nonetheless, Judge Overstreet determined that this reliance was
15 improper. As to the former, Judge Overstreet recognized that NWTS “had a declaration from
16 Wells Fargo, the purported attorney-in-fact for U.S. Bank.” MD at p. 21. While noting the
17 existence of three powers of attorney issued by U.S. Bank to Wells Fargo in 2007 which “would
18 have given Wells Fargo broad powers to sign documents related to foreclosures on behalf of U.S.
19 Bank,” Judge Overstreet found that “NWTS had no notice or knowledge of any of these powers of
20 attorney or any other agreement substantiating the authority of Wells Fargo to act on behalf of U.S.
21 Bank.” *Id.* Judge Overstreet found that NWTS was not entitled to rely on a Beneficiary Declaration
22 where it lacked such proof. She similarly found that NWTS could not rely on the Loss Mitigation

01 Form, signed by John Kennerty on behalf of ASC, because it lacked evidence that ASC was the
02 authorized agent of U.S. Bank for the purpose of executing the document. MD at p. 23. In essence,
03 as amici point out, Judge Overstreet held NWTs to an affirmative duty to investigate the veracity
04 of the representations contained in the declarations on which it relied.¹

05 Once again, case law developed since Judge Overstreet issued her decision has
06 circumscribed the situations in which such an affirmative duty would maintain. First, courts have
07 clarified that, in accordance with the plain language of the statute, the trustee is entitled to treat the
08 representations in a beneficiary declaration as true and rely on the declaration in initiating
09 nonjudicial foreclosure proceedings, absent evidence conflicting with the declaration's
10 representations or a separate violation of the trustee's duty of good faith. *See, e.g. Trujillo v.*
11 *Northwest Service, Inc.*, 181 Wash.App. 484, 326, P.3d. 768 (Wash.Ct.App. 2014) ("Absent
12 conflicting evidence, the declaration should be taken as true.")²; *Pelzel v. Nationstar Mortg., LLC*,
13 2015 WL 1331666, *6 (Wash.Ct.App. 2015). The Meyers cite to no authority suggesting that a
14 different standard should pertain with respect to reliance on the Loss Mitigation Form, and the
15 Court can identify none.

16 The fact that Wells Fargo signed the Beneficiary Declaration as attorney-in-fact for
17 U.S. Bank, where specifically authorized to do so by power of attorney agreements, does not
18 change this result. *See, e.g. id.* ("[W]e hold that under RCW § 61.24.030(7)(b), the declaration of a

19 ¹ NWTs asks the Court to find admission of John Kennerty's *Geline* testimony improper under Federal Rule of
20 Evidence 804. The Court declines to do so, as it is unable to find that Judge Overstreet clearly erred in determining that
21 Kennerty was unavailable as a witness and that his testimony fell under the former testimony exception to the rule
against hearsay, FRE 804(b)(1), or that the admission, if in error, affected the bankruptcy court's disposition. Further,
it appears that NWTs failed to lodge objections to any specific portions of the testimony upon Judge Overstreet's
invitation. *See* DA at p. 204.

22 ² The Washington Supreme Court's recent acceptance of a petition to review *Trujillo* does not affect this Court's
decision. The central holding of *Trujillo*, that RCW 61.24.030(7) is satisfied by proof that the beneficiary is either the
owner or holder of the promissory note, is not implicated in this case, where the Beneficiary Declaration identified
U.S. Bank as both the Note's holder and trustee for its owner, GEL2.

01 beneficiary's agent stating the beneficiary is the note's holder is sufficient proof that the
02 beneficiary is the note's holder, unless the trustee has violated its duty of good faith in some other
03 way."); *U.S. Bank Nat. Ass'n v. Woods*, 2012 WL 2031122 (W.D. Wash. 2012) (rejecting
04 borrowers' claims under the DTA where lenders submitted evidence showing that NWTS was in
05 possession of a declaration signed by Wells Fargo as attorney-in-fact for U.S. Bank"); *see also*
06 *Knecht v. Fid. Nat. Title Ins. Co.*, 2013 WL 7326111 (W.D. Wash. 2013) ("Mr. Knecht complains
07 that there is no recorded power-of-attorney document establishing AHMSI's right to act on DB's
08 behalf, but he points to no authority requiring AHMSI to record such a document. He also fails to
09 establish his own standing to object to AHMSI's acting on DB's behalf."). This result is so because
10 an authorized agent is empowered to make binding declarations within the scope of its agency on
11 its principal's behalf such that the declarations of the agent are deemed to be those of the principal
12 itself. *Ennis v. Smith*, 171 Wash. 126, 130, 18 P.2d 1 (1993).

13 Further, courts have since uniformly rejected the invitation to import a duty to verify the
14 information contained in the beneficiary declaration into the trustee's duty of good faith. In *Pelzel*,
15 for instance, the Washington Court of Appeals declined to find a DTA violation where the only
16 violation of the trustee's duty of good faith alleged was in its reliance on the beneficiary
17 declaration as proof that the beneficiary was the note's holder. *See Pelzel*, 2015 WL 1331666 at *6.
18 In an unpublished decision, the Ninth Circuit also recently rejected a borrower's argument that
19 NWTS violated its duty of good faith by failing to obtain proof that OneWest was the promissory
20 note's owner, where OneWest had declared itself to be the note's holder on the beneficiary
21 declaration. The Ninth Circuit found that "NWTS complied with its obligation under the statute
22 when it relied on OneWest's declaration under penalty of perjury," thereby refusing to hold NWTS

01 to an affirmative duty to investigate. *Bavand v. OneWest Bank FSB*, 587 Fed.Appx. 392, 394 (9th
02 Cir. 2014). Courts in this district have also been uniform in declining to import an affirmative duty
03 to verify into the trustee's duty of good faith. *See, e.g. Mickelson v. Chase Home Fin. LLC*, 2012
04 WL 6012791 (W.D. Wash. 2012), *aff'd*, 2014 WL 2750133 (9th Cir. 2014) ("The duty of good
05 faith does not create a duty to conduct an independent verification of sworn affidavits....NWTS
06 relied, as they are specifically permitted to do, on a declaration made under penalty of perjury.
07 They did not breach their duty of good faith in doing so."); *In re Butler*, 512 B.R. 643, 657 (Bankr.
08 W.D. Wash. 2014) (finding that NWTS was "entitled to rely on the Beneficiary Declaration, and
09 had no duty to undertake an independent investigation").

10 Here, as in *Pelzel*, Plaintiffs have failed to show that NWTS breached its duty of good faith
11 independent of its allegedly improper reliance on the Beneficiary Declaration and Loss Mitigation
12 Form without investigating their veracity. Further, NWTS could not have been alerted to any
13 errors in the information attested to on these documents, as it is undisputed that the information
14 they contained was in fact true. Absent a showing that NWTS violated its duty of good faith
15 *independent* of its reliance on the declarations, the vast weight of case law now deems NWTS's
16 reliance without further inquiry to be proper.

17 Plaintiffs' citations to the recent Washington Supreme Court decisions *Lyons* and *Klem*
18 only lend further support to this conclusion. The Court in *Klem*, a decision heavily relied on by
19 Judge Overstreet, opined that a trustee owes a duty to act impartially toward both parties to a
20 foreclosure proceeding. *Klem*, 176 Wash.2d at 790. The Court found that a trustee violated this
21 duty, and could be liable under the CPA for doing so, where it deferred to a lender on whether to
22 postpone a foreclosure sale and ignored entirely the dozens of requests by the guardian for the

01 borrower to postpone the sale. *Id.* at 791. While Judge Overstreet reasonably read *Klem's*
02 pronouncements on the duty of impartiality to be implicated in this case, the Washington Supreme
03 Court subsequently made clear that this duty is not so capacious. In *Lyons*, the Supreme Court
04 found that a trustee had violated its duty of good faith by summarily deferring to Wells Fargo's
05 preferred course of action and ignoring the borrower's vociferous protests that the situation
06 between the parties had changed subsequent to which NWTs lacked the authority to foreclose.
07 *Lyons*, 181 Wash.2d at 788. In both these cases, the Court faulted the trustee for failing to
08 investigate only when confronted with a host of information about irregularities in the foreclosure
09 process. By contrast, no such irregularities exist in this case, NWTs had no notice of errors in the
10 declarations or problems in the foreclosure proceeding, and all parties recognized that NWTs
11 possessed authority to foreclose.

12 While the Court agrees with both Judge Overstreet and the Meyers that there may be good
13 reason to require trustees to take some action or institute some process to ensure that the
14 information on which they rely is correct, the Washington legislature has evidently chosen not to
15 follow such a course. The Court finds that a proper reading of *Lyons* is that a trustee has a duty to
16 investigate only when it "knew about [] conflicting information regarding [its] right to initiate
17 foreclosure" or when the beneficiary declaration contained an inherent ambiguity. *See Lyons*, 181
18 Wash.2d at 788, 791 (holding that NWTs may not "just rely on [an] ambiguous declaration"). No
19 such duty would be triggered in this case.

20 Finally, a technical violation of the DTA is not in itself sufficient to constitute an unfair or
21 deceptive practice. As the Ninth Circuit noted, "Washington state courts have required the
22 borrower to show prejudice before they will set aside a trustee's foreclosure sale in the face of

01 allegations of technical errors.” *See Bavand*, 587 Fed.Appx. at 394-95 (citing *Amresco*
02 *Independence Funding, Inc. v. SPS Properties, LLC*, 199 P.3d 884, 886-87 (Wash.Ct. App. 2005));
03 *see also Steward v. Good*, 51 Wn.App. 509, 754 P.2d 150 (1998) (locating a “requirement that
04 prejudice be established” where a “technical violation” of the DTA occurs and there was “no
05 showing of harm to the debtor”). Even if NWTS had a duty to investigate the veracity of the
06 declarations, its investigations would have only revealed that the information contained in them
07 was correct. Accordingly, the Meyers cannot show that they were prejudiced or deceived, even if
08 NWTS did not strictly comply with the DTA. For all these reasons, the Court declines to find that
09 NWTS’s reliance on the Beneficiary Declaration and Loss Mitigation Form without independent
10 verification constituted an unfair or deceptive practice in violation of the CPA.

11 **b) Issuance of Notice of Default as an Authorized Agent**

12 Judge Overstreet also located a deceptive practice in NWTS’s reference to itself as
13 authorized agent for the beneficiary in the Notice of Default when the evidence established that
14 NWTS was already the successor trustee as the time it issued the Notice. The Court finds that
15 Judge Overstreet’s conclusion to this effect is not supported by the statutory language.

16 Under the DTA, a notice of default may be issued by the “beneficiary or trustee.” RCW
17 61.24.030(8); *see also* RCW 61.24.031(1)(a) (“A trustee, beneficiary, or authorized agent” may
18 issue a notice of default). Because NWTS had already been appointed successor trustee at the time
19 that it issued the notice, the statute provided it authority to do so, regardless of whether it was
20 actually an authorized agent for the beneficiary as well.

21 Further, if improper, the Meyers have made no showing that they were prejudiced by
22 NWTS’s reference to itself as an agent rather than trustee, where NWTS indisputably had

01 authority either way to issue the Notice. *See In re Butler*, 512 B.R. at 657 (rejecting identical
02 argument on the grounds that even if NWTS was not the beneficiary’s authorized agent, “Plaintiff
03 did not address why a reference to [NWTS] being One West’s ‘duly authorized agent’ would be a
04 *material* violation of the Deed of Trust Act. It is unclear what alleged harm stemmed from that
05 particular inaccuracy.”) (emphasis in original). While *Bain* recognized that a CPA violation may
06 lie where a trustee closes without authority, the Meyers here have not made a showing that NWTS
07 lacked the authority to foreclose or issued the Notice without authority to do so. The Court
08 consequently concludes that this alleged inaccuracy did not constitute an actionable unfair or
09 deceptive act.

10 **c) Inclusion of Same Address for Owner and Servicer in Notice of Default**

11 Finally, there does not appear to be any support for Judge Overstreet’s conclusion that
12 NWTS violated the CPA by only providing an address and phone number for ACS on the Notice
13 of Default. RCW 61.24.030(8)(l) provides that the notice of default shall contain the following
14 information:

15 In the event the property secured by the deed of trust is residential real property, the
16 name and address of the owner of any promissory notes or other obligations
17 secured by the deed of trust and the name, address, and telephone number of a party
18 acting as a servicer of the obligations secured by the deed of trust.

19 Here, NWTS provided the same address and phone number for both the Note holder/beneficiary,
20 U.S. Bank, and its servicer, ACS. NWTS argues that it was proper for it to provide U.S. Bank’s
21 phone number “care of” ACS because U.S. Bank was merely the legal title holder for the Note’s
22 owner, GEL2, which lacked a physical address and phone number, and because ACS was the
relevant entity to address the Meyers’ queries.

Regardless of whether NWTS strictly complied with the language of this statutory

01 provision, the Meyers were unable to point to any way in which they were deceived or otherwise
02 prejudiced by only receiving a phone number for ACS, either at trial or when specifically
03 prompted by this Court upon oral argument. Mr. Meyer was able to immediately reach a Wells
04 Fargo employee through the ACS phone number, where Wells Fargo was acting as
05 attorney-in-fact for U.S. Bank. While the Meyers claim that they would not have had to hire
06 attorney Jones to issue a Qualified Written Request had they known of their lender's true identity,
07 the QWR itself makes no mention of the notice of default and instead complains of inaccuracies in
08 accounting of the loan, robo-signing, and predatory lending practices. *See* DA at pp. 138-159. The
09 Meyers were also able to engage in three, albeit apparently unsuccessful, mediation sessions after
10 contacting ACS. Even if NWTs did not strictly comply with this statutory provision, its deviation
11 was only a technical one, and liability cannot lie where the Meyers could not show at trial that the
12 practice was likely to deceive. *See Panag v. Farmers Ins. Co. of WA*, 166 Wash.2d 27, 50, 204
13 P.3d 885 (2009) ("Deception exists if there is a representation, omission or practice that is likely to
14 mislead a reasonable customer.").

15 **2. Injury and Damages**

16 Before a violation of the CPA may be found, an injury to the claimant's business or
17 property must be established. *Hangman*, 105 Wash.2d at 792. Plaintiffs may only recover for
18 injuries that they demonstrate were proximately caused by a defendant's unfair or deceptive
19 practices. *See Bhatti v. Gild Mfg. Co.*, 2013 WL 6773673, *3 (9th Cir. 2013) (rejecting CPA claim
20 premised on DTA violation because the "cause prong" was not satisfied). The injury "need not be
21 great" and no monetary damages need be proven. *Mason v. Mortgage America, Inc.*, 114 Wash.2d
22 842, 854, 792 P.2d 142 (1990). Nonquantifiable injuries suffice, although mental distress alone

01 does not establish injury. *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 180, 159 P.3d 10
02 (Wash.Ct. App. 2007). Incurring time and money to prosecute a CPA claim also does not suffice,
03 *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 564, 825 P.2d 714 (1992),
04 although “consulting an attorney to dispel uncertainty regarding the nature of an alleged debt”
05 may. *Panag*, 166 Wash.2d at 62. Because damages are strictly limited to those in “business or
06 property,” lost wages are not compensable under the CPA. *Ambach v. French*, 167 Wn.2d 167, 216
07 P.3d 405 (2009).

08 Here, the record does not support Judge Overstreet’s finding that the damages awarded
09 were proximately caused by the alleged unfair or deceptive acts. As stated above, the QWR was
10 addressed to the loan’s servicers and raised no concerns about identification of the Note owner.
11 The Court is also unable to discern how the Meyers’ bankruptcy filing could have been
12 proximately caused by any of the alleged deceptive acts, particularly given that the bankruptcy
13 plan was confirmed even after the subject loan was removed from it. The Meyers’ bankruptcy
14 filing lists two automobile loans and a cumulative unsecured debt of \$105,681.42 in addition to the
15 home mortgage loan. *See* DA at pp. 94-110 (bankruptcy schedules). Although apparently
16 precipitated by pending foreclosure proceedings, the bankruptcy filing was plainly not dependent
17 on them, and in no event were NWTS’s alleged DTA violations the but-for cause of the Meyers’
18 Chapter 13 filing.

19 Similarly, the record does not support the finding that the Meyers’ rent, deposits, and
20 moving expenses were proximately cause by any of the allegedly deceptive acts by NWTS in
21 initiating the foreclosure proceedings. Mr. Meyers testified that the family moved out before their
22 house was foreclosed on after four years without making any mortgage payments. DA at pp. 231,

01 233. The Meyers' decision to move out was precipitated by their default, not by any of the asserted
02 technical violations of the DTA by NWTS. Finally, the lost wages that Judge Overstreet awarded
03 are not compensable under the CPA as a matter of law. *See Ambach*, 167 Wn.2d at 409 (lost wages
04 are compensable in personal injury, not CPA, actions).

05 Plaintiffs have undeniably suffered a great loss, and like many former homeowners, were
06 the victim of an economic downturn and the cumulative decisions of the many exploitative actors
07 that precipitated it. While the Court does not deny that the Meyers are victims, it simply cannot
08 find that they were victimized by NWTS in a way that can be traced to the losses they have
09 endured. Similarly, the Court in no way endorses the decision by NWTS to fulfill only the bare
10 minimum of its duty of good faith to borrowers. A greater fiduciary standard may well be called
11 for in light of the evident power differentials and access to information extent between lenders and
12 borrowers; indeed, the nature of a trustee relationship seems to require more than what the Meyers
13 were given in this case. Although a legislative fix may well be called for, this Court can do little
14 more than chastise NWTS for not behaving with greater affirmative care toward vulnerable
15 borrowers relying on them to act fairly and diligently. As Judge Jones recently remarked in a
16 similar situation, "[t]he court can chide Defendants for abysmal customer service in a business tied
17 intimately to its customers' financial and emotional well-being. The court cannot, however,
18 change the basic truth that if a homeowner cannot pay her mortgage, she will ultimately lose her
19 home." *Singh v. Federal Nat. Mortg. Ass'n*, 2014 WL 504820, *7 (W.D. Wash. 2014).

20 As current case law and the facts in the record do not support either the existence of
21 actionably unfair or deceptive acts by NWTS or of a causal nexus between NWTS's acts and the
22 Meyers' injuries, the Court concludes that the bankruptcy court erred in finding for the Meyers on

01 their CPA claim and in granting damages.³ *See Singh*, 2014 WL 504820 at *6 (dismissing CPA
02 claim where plaintiff borrowers failed to show causation despite finding that borrowers pled
03 sufficient fact to establish that defendant trustee violated its duty of good faith).

04 **CONCLUSION**

05 For the reasons stated herein, the Court concludes that the Meyers failed to meet their
06 burden of proof under Washington's Deed of Trust Act and Consumer Protection Act. The Court
07 REVERSES the decision of the bankruptcy court and grants judgment in favor of
08 Defendant-Appellant Northwest Trustee Service, Inc. on all claims.

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10 Dated this 9th day of April 2015.

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12 RICARDO S. MARTINEZ
13 UNITED STATES DISTRICT JUDGE

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³ As the Court determines that the Meyers have not made a sufficient showing under multiple prongs of the CPA, it does not reach NWTs's argument that Judge Overstreet erred in finding the public interest prong to be satisfied.