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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 TRAVIS MICKELSON, and DANIELLE  
H. MICKELSON,

11 Plaintiffs,

12 v.

13 CHASE HOME FINANCE LLC, et al.,

14 Defendants.  
15

CASE NO. C11-1445 MJP

ORDER GRANTING CHICAGO  
TITLE'S MOTION TO DISMISS

16 This matter comes before the Court on Defendant Chicago Title Insurance Company's  
17 ("Chicago") motion to dismiss. (Dkt. No. 83.) Having reviewed the motion, the response (Dkt.  
18 No. 87), the reply (Dkt. No. 92), and all related papers, the Court GRANTS the motion and  
19 DISMISSES the CPA claim against Chicago and DISMISSES Chicago from this action.  
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**Background**

21 The parties are familiar with the allegations in this foreclosure-related case to the extent  
22 that the Court does not repeat them. Plaintiffs' one remaining claim against Chicago is that it  
23 violated the Consumer Protection Act ("CPA") by "contractually defining, enforcing, or drafting  
24

1 uniform language which defines MERS as beneficiary under the Washington Deed of Trust Act  
2 in order to facilitate mass foreclosures, when by statute the beneficiary of a Deed of Trust is  
3 statutorily defined to be the person who holds the note.’ (Amended Complaint ¶ 13.7.) This  
4 claim involves the separate allegation that MERS cannot be a beneficiary under the Deed of  
5 Trust Act. Chicago moves for dismissal on the theory Plaintiffs have not alleged it to have  
6 undertaken any act that might constitute an unfair or deceptive conduct in violation of the CPA.

### 7 **Analysis**

#### 8 A. Standard

9 On a motion to dismiss, the Court must accept the material allegations in the complaint as  
10 true and construe them in the light most favorable to Plaintiff. NL Indus., Inc. v. Kaplan, 792  
11 F.2d 896, 898 (9th Cir. 1986). A motion to dismiss filed pursuant to Rule 12(b)(6) tests the  
12 sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). “To survive a  
13 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a  
14 claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).  
15 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007)). The plaintiff must provide  
16 “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
17 will not do.” Twombly, 550 U.S. at 555.

#### 18 B. CPA Claim

19 Chicago has correctly asserted that Plaintiffs’ CPA claim against it is flawed and ripe for  
20 dismissal.

21 To prevail on their CPA claim, Plaintiffs must establish five distinct elements: “(1) unfair  
22 or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4)  
23 injury to plaintiff in his or her business or property; [and] (5) causation.” Hangman Ridge

1 Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986). Whether a practice is  
2 unfair or deceptive is a question of law for the court to decide if the parties do not dispute what  
3 the parties did. Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d  
4 59, 74 (2007). To satisfy the first element, Plaintiffs must show that the act or practice either has  
5 a capacity to deceive a substantial portion of the public or that it constitutes an unfair trade or  
6 practice.

7         The CPA claim against Chicago fails to allege any conduct that violates the Act. The key  
8 to Plaintiffs' CPA claim against Chicago is the allegation that MERS cannot be a beneficiary  
9 under the Deed of Trust Act and that Chicago's act of naming it as a beneficiary/nominee is an  
10 unfair and deceptive act. (Am. Compl. ¶ 13.7.) As Plaintiffs admit, the Court has already  
11 rejected Plaintiffs' theory that MERS could never be a beneficiary under the Deed of Trust Act.  
12 (Dkt. No. 58 at 7-8; Dkt. No. 87 at 3.) The basis for Plaintiffs' CPA claim against Chicago is  
13 thus untenable. Any forms or documents Chicago may have drafted naming MERS as a  
14 beneficiary were not misleading or unfair on this point because there is no legal reason why  
15 MERS cannot be a beneficiary. The Court thus GRANTS the motion and DISMISSES this final  
16 claim against Chicago.

17         Plaintiffs invite the Court to consider new allegations made for the first time in their  
18 response brief—an invitation to error the Court declines. Plaintiffs allege that Chicago has  
19 serially agreed to be a trustee on various deeds of trust without any intention “of performing non-  
20 judicial foreclosure trustee” [sic]. (Dkt. No. 87.) Chicago asks the Court to strike this argument  
21 and the Court agrees. (Dkt. No. 92 at 1-2.) New allegations in support of claims cannot be made  
22 in a response brief. Even if the allegations were properly made, the Court finds them inadequate  
23 to show a CPA violation. The mere fact Chicago is named as a trustee on many deeds of trust  
24

1 does not show it has engaged in any acts that violate the CPA. Plaintiffs' additional unsupported  
2 statements do not suffice to allege a plausible claim under the CPA.

3 **Conclusion**

4 The Court GRANTS Chicago's motion to dismiss and dismisses it from this case. The  
5 CPA claim Plaintiffs allege against Chicago fails to state a claim on which relief can be granted.  
6 Chicago's alleged conduct does not violate the CPA.

7 The clerk is ordered to provide copies of this order to all counsel.

8 Dated this 21st day of August, 2012.

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12 Marsha J. Pechman  
13 United States District Judge  
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