70706-0

70706-0

No. 70706-0-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

KELLY BOWMAN,

Plaintiff-Appellant

v.

SUNTRUST MORTGAGE, INC., a Virginia corporation, a subsidiary of SUNTRUST BANKS, INC.; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; a Delaware corporation; and DOE DEFENDANTS 1-10

Defendants-Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Monica J. Benton)

RESPONDENTS SUNTRUST MORTGAGE, INC., FEDERAL NATIONAL MORTGAGE ASSOCIATION, AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of the dismissal on summary judgment of Kelly Bowman (Bowman)'s claims against SunTrust Mortgage, Inc. (SunTrust), Federal National Mortgage Association (Fannie Mae), and Mortgage Electronic Registration Systems, Inc. (MERS). Bowman based his claims on initiated, but as yet incomplete non-judicial foreclosure proceedings against the real property he pledged as security for a $417,000 loan.

SunTrust made Bowman the loan in 2006, and subsequently indorsed the promissory note evidencing the loan in blank. In 2008, SunTrust sold the loan to Fannie Mae, but retained both the right to service the loan and physical possession of the Note and Deed of Trust. SunTrust has maintained continuous physical possession of these instruments since the loan originated, making it both the "beneficiary" under Washington's Deed of Trust Act (DTA) and a "holder" under the Uniform Commercial Code (UCC) as adopted in Washington. SunTrust (not MERS or another agent) directly appointed Northwest Trustee Services, Inc. (NWTS) as successor trustee of Bowman's deed of trust after Bowman defaulted. Because SunTrust properly appointed NWTS, NWTS is vested with the power to sell the subject property that Bowman granted when he executed the deed of trust.

Bowman's over-arching legal theory – that the note holder and the owner of the right to the payments due under the note must be the same entity – is expressly contrary to the DTA, UCC and federal and state decisions from Courts in Washington. Each of Bowman's claims rests on this flawed premise and he has made no other effort to meet his summary judgment burden of showing that he has sufficient evidence to prove any of his claims.[1] This Court should affirm the grant of summary judgment to SunTrust, Fannie Mae and MERS, and award SunTrust its appellate attorney fees and costs.

COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Contrary to RAP 10.3(a)(4), Bowman does not include any statement of the issues pertaining to his assignments of error. Respondents view the issue on appeal as whether the trial court properly dismissed with prejudice all claims against them in this wrongful initiation of foreclosure case where Bowman is in undisputed default, the subject promissory note was originally payable to SunTrust, SunTrust indorsed

[1] If a defendant makes its initial showing that there is no genuine issue of material fact, "then the inquiry shifts to the party with the burden of proof at trial…[and if] the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Granville Condominium Homeowners Ass'n v. Kuehner*, 312 P.3d 702, 707 (2013) (quoting *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

the Note in blank, and has retained continuous physical possession of the Note through the present day.

COUNTERSTATEMENT OF THE CASE

A. The Loan at Issue.

Bowman borrowed $417,000 from SunTrust and promised to repay this loan (Loan) according to the terms of a promissory note (Note) he executed on or about September 5, 2008. CP 258. Bowman secured the Note with a Deed of Trust against real property commonly known as 7525 120th PL SE, Newcastle, Washington 98056 (the Property). CP 474-476. By executing the Deed of Trust, Bowman granted to the trustee (and any duly appointed successor trustee) the power to sell the Property if he defaulted on his obligation to repay the Loan according to the terms of the Note. CP 476. The Deed of Trust also named MERS as beneficiary in a nominee capacity for SunTrust and any successors or assigns. CP 474.

B. Fannie Mae Purchases the Loan and SunTrust Retains the Right to Service It.

Fannie Mae purchased the Note from SunTrust on or about October 1, 2008. CP 255. SunTrust is a Fannie Mae-approved seller and servicer of mortgage loans, and it retained the servicing rights for the Loan and also maintained physical possession of the "wet ink" Loan documents, including the Note. CP 665. This arrangement was designed to allow

SunTrust to take all actions necessary for the collection and enforcement of the Loan, including receiving and processing loan payments, communicating with Bowman regarding the loan, and, should such action be necessary, initiating foreclosure, consistent with the promissory note, deed of trust and Fannie Mae servicing guidelines. CP 255. SunTrust has maintained physical possession of the Note since on or about September 5, 2008. *Id.*

C. Bowman's Default and Subsequent Foreclosure Proceedings.

Bowman defaulted on his Loan obligations in June 2010. *See* CP 665, 669. On March 26, 2012 and October 25, 2012, MERS recorded Assignments of the Deed of Trust (ADTs) in favor of SunTrust in the King County real property records. CP 43, 50-51.[2] On August 14, 2012, Northwest Trustee Services, Inc. (NWTS), in its capacity as SunTrust's agent, served Bowman with a Notice of Default (NOD). CP 45-48. The NOD reflects that at the time, Bowman was $104,958.99 behind on his monthly Loan payments (notwithstanding late fees, interest, and other charges) and that this default had been accruing since June 2010. *Id.* The NOD clearly and correctly identifies Fannie Mae as the "owner of the note" and SunTrust as the "loan servicer." CP 47. Attached to the NOD was a foreclosure loss mitigation form (the Loss Mit Form), dated July 21,

[2] The purpose of the second "Corrective" assignment was to reflect an addition of a co-borrower on the loan.

2012, and executed by SunTrust. CP 48. The Loss Mit Form describes SunTrust as "the beneficiary and actual holder of the [Note]." CP 48.

On November 8, 2012, SunTrust recorded an Appointment of Successor Trustee (AST) appointing NWTS as successor trustee under the Deed of Trust. CP 53. On November 29, 2012, NWTS issued and recorded a notice of trustee's sale (NTS) scheduling the non-judicial foreclosure sale of the Property for March 29, 2013. CP 55-58. The Notice of Sale lists a monthly payment arrears of $116,621.10. CP 56.

D. Procedural History.

On March 14, 2013, Bowman filed suit; the original sale date was postponed to June 7, 2013. CP 1; 242. Against SunTrust, Fannie Mae and MERS, Bowman alleged claims for: (1) wrongful foreclosure/violation of the Deed of Trust Act (DTA), (2) violation of the Consumer Protection Act (CPA), and (3) violation of Washington's criminal profiteering statute, RCW 9A.32 *et seq.* CP 9-13.

On June 27, 2013, the King County Superior Court temporarily restrained NWTS from selling the Property subject to following conditions: (1) Bowman's deposit of $2,601.54 into the Court registry by 9:00 a.m. on June 28, 2013; and (2) Bowman's deposit of this sum on or before the first of each month, beginning on August 1, 2013. CP 631. On July 12, 2013, the Superior Court granted the summary judgment motions

brought by SunTrust, Fannie Mae, and MERS, and by NWTS, and dismissed the case with prejudice. CP 716-720.

At the time the Superior Court granted the motions for summary judgment, Bowman's total loan debt was at $552,264.25, which included 38 months of missed interest payments, in the amount of $139,904.94. CP 665. Bowman appealed to this Court on July 24, 2013. CP 722.

ARGUMENT

A. The Superior Court Properly Dismissed SunTrust, Fannie Mae and MERS.

An appellate court reviews a trial court's grant of summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from them in the light most favorable to the non-moving party. *Right–Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). The grant of summary judgment should be upheld if the pleadings, discovery, and admissions on file, together with the affidavits, 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. *See* CR 56(c); *Phillips v. King County*, 136 Wn.2d 946, 956, 968 P.2d 871 (1998).

The order dismissing the claims against SunTrust, Fannie Mae and MERS should be upheld because each of these parties acted properly and

with the requisite authority in the non-judicial foreclosure proceedings against the Property and Bowman failed to establish that he has sufficient evidence to carry his burden of proof on his claims.

1. The DTA Claim Was Properly Dismissed.

Bowman's primary cause of action was for "Wrongful Foreclosure, Violation of *RCW 61.24, et seq.*, and Declaratory Relief." CP 9 (italics in original).[3] This cause of action rested on the theory that none of the entities Bowman chose to sue actually met the definition of "beneficiary" under RCW 61.24.005(2), and therefore none of them were entitled to foreclose. CP 9-12. However, the record and controlling law demonstrate that this premise is flawed.

a. SunTrust Has Been the Beneficiary of the Deed of Trust Since the Loan Originated.

Bowman's Note was originally payable to SunTrust, and SunTrust has possessed the instrument (which is now indorsed in blank) continuously from origination to the present. CP 255-260, 665.

Since 1998, the DTA has defined a "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 98-99, 285

[3] The question of whether the DTA supplies a pre-sale claim for damages has been certified to the Washington Supreme Court in *Frias v. Asset Foreclosure Services, Inc.*, Case No. C13-760-MJP (Sept. 25, 2013).

P.3d 34 (2012) (citing RCW 61.24.005(2)). The Washington UCC defines the "Holder" of a negotiable instrument in relevant part as "the person in possession if the instrument is payable to bearer. RCW 62A.1-201(21)(A); *Bain*, 175 Wn.2d at 104. A negotiable instrument is payable to bearer if, as is the case with the Note here, it is indorsed in blank. *See* RCW 62.A.3-205(b). These dispositive statutes demonstrate that Bowman's theory is without merit.

When Bowman executed the Note, it was payable to SunTrust. CP 4, 258. Thus, at the time of execution, SunTrust was both the "holder" of the note and "beneficiary" of the DOT. RCW 62A.1-201(21)(A) (holder is the identified person in possession of the instrument in the case of an instrument made payable to a specific person); RCW 61.24.005(2).

Subsequently, SunTrust indorsed the Note in blank. CP 260. After this time, the "holder" of the Note became the person in physical possession. RCW 62A.1-201(21)(A) (holder of note payable to bearer is person in possession of note). Because SunTrust has maintained physical possession of the Note since the time of its making and the Note has always been payable to SunTrust or indorsed in blank, SunTrust has always been the holder of the Note. RCW 62A.1-201(21)(A). CP 254-260; 664-666.

Because SunTrust has always been the holder of the Note, it has always been the beneficiary of the Deed of Trust. RCW 61.24.005(2). Because SunTrust has always been the beneficiary, SunTrust has the right to foreclose the Deed of Trust. *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1107-1108 (W.D.Wn. 2011) (granting motion to dismiss in functionally identical circumstances where lender sold loan to Fannie Mae, but then proceeds to conduct foreclosure in its own name – "Thus, even if Fannie Mae has an interest in Plaintiffs' loan, [Defendant] has the authority to enforce it.").

b. The Note Holder Need Not Be the Owner in Order to be the Deed of Trust Beneficiary.

Bowman attempts to avoid this simple, straightforward analysis by taking the position that the note holder must also be the note owner. *See* Br. of App. at 15-17; CP 9-12. Again, Bowman's premise is flawed.

There is no requirement that the note owner and holder be the same entity. *See, e.g., John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969) (for "holder" to enforce instrument, "[i]t is not necessary for the holder to first establish that he has some beneficial interest in the proceeds"). RCW 62A.3-203, Cmt. 1 ("The right to enforce an instrument and ownership of the instrument are two different concepts."). *See also* RCW 62A.3-301 (person may be entitled to enforce

even though not the "owner"); RCW 62A.1-201(20) (defining "holder" without respect to "ownership").

In *Corales*, the Western District of Washington rejected precisely the argument that Bowman makes here. There, the plaintiffs alleged that their loan had been transferred "into a mortgaged-backed security fund related to Fannie Mae." 822 F. Supp. 2d at 1107. The Court noted that Flagstar Bank possessed the Note indorsed in blank, and held that this was sufficient to provide Flagstar, as servicer for Fannie Mae, with the authority to foreclose. *Id.* The Court concluded that "even if Fannie Mae has an interest in Plaintiffs' loan, Flagstar has the authority to enforce it," and dismissed the plaintiffs' claim, allowing the foreclosure to proceed. *Id. See also In re Reinke*, 2011 WL 5079561, *10 (Bkrtcy. W.D. Wash. Oct. 26, 2011) ("The issue of [Freddie Mac's] ownership, however, is largely immaterial to the issues before the Court. Because under Washington law the focus of the analysis is on who is the holder of the note, and thus the beneficiary under the [DTA], Plaintiff's concern should be whether he knows who to pay.")

Similarly, in *Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728, *3 (W.D. Wash. 2013), the plaintiffs alleged CPA violations because the loan servicer was represented to be "the holder of Plaintiff's note in the notice of default and notice of trustee's sale, when [defendants] knew or should

have known the actual holder to be Fannie Mae." The servicer explained that "it is the true holder of the note, even if Fannie Mae is the owner of the note." *Id.* The Court dismissed the CPA claim, explaining:

> Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law. Further, despite the sale of Plaintiff's loan to Fannie Mae, Chase alerted Plaintiff that it remained servicer of his loan and was authorized to handle any of Plaintiff's concerns.

Id. The *Corales* and *Zalac* cases are consistent with *Bain*, the definition of "beneficiary" under RCW 61.24.005(2), and the U.C.C as adopted in Washington.

Bowman cannot avoid the problems with his theory by arguing that the 2009 amendments to the DTA permit only a note "owner" to foreclose. *See* Br. of App. at 15. Bowman selectively quotes RCW 61.24.030(7)(a)'s language that the "trustee shall have proof that the beneficiary is the owner of the note or other obligations secured by the deed of trust," but omits the next sentence, which states:

> A declaration by the beneficiary made under the penalty of perjury ***stating that the beneficiary is the actual holder of the promissory note*** or other obligation secured by the deed of trust ***shall be sufficient proof*** as required under this subsection.

RCW 61.24.030(7)(a) (emphasis added). In fact, Bowman attached the Loss Mit declaration in this case to his Complaint, in which SunTrust

correctly (and under the penalty of perjury) informed him that it was the beneficiary and actual holder of the Note. CP 48.

"[C]ourts must construe the statute so as to effectuate the legislative intent." *Whatcom Co. v. City of Bellingham*, 128 Wn.2d 537, 546 (1996). "In so doing, [courts] avoid a literal reading if it would result in unlikely, absurd, or strained consequences." *Id.* Bowman's Note and the Deed of Trust define his relationship with SunTrust, MERS and Fannie Mae, and the parties' relationship to those documents is defined by both the UCC and the DTA. Bowman's proposed interpretation of RCW 61.24.030(7)(a) should be rejected because it conflicts with these statutes.

Washington's UCC determines who may enforce a negotiable instrument such as the Note. *See* RCW 62A.3-104. As noted above, the person in possession of a note indorsed in blank is a holder entitled to enforce the instrument. *See* RCW 62.A1-201(21)(A); .3-301. The DTA creates the remedy of non-judicial foreclosure in the event of the obligor's default of a secured negotiable instrument such as the Note. It is therefore entirely logical that the Legislature would designate the "holder" of the promissory note under the UCC as the "beneficiary" of the corresponding security instrument under the DTA. See RCW 61.24.005(2). By equating "holder" and "beneficiary," the Legislature provided that the person

entitled to enforce a promissory note would be the person entitled to the remedy of non-judicial foreclosure.

Conversely, the UCC's definitional section contains no definition of "owner." *See* RCW 62A.1-201. Nor does the DTA define the "owner" of a promissory note. *See* RCW 61.24.005. Instead, the DTA is couched in terms of the statutorily-defined term "beneficiary." *See id.* Nowhere in the definitions of "beneficiary" or "holder," is it suggested that an ownership interest in the borrower's loan payments is required for a person to enforce a note's terms or the associated deed of trust. Instead, Washington's UCC Article 3 explicitly establishes the opposite: "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument[.]" RCW 62A.3-301. As noted above, the Washington Supreme Court has long agreed. *See John Davis & Co.*, 75 Wn.2d 21 (for a "holder" to enforce instrument, "[i]t is not necessary for the holder to first establish that he has some beneficial interest in the proceeds").

It would make no sense for the Legislature to create a scenario in which the "beneficiary," despite being the "holder" of the promissory note and entitled to enforce it, nevertheless cannot to initiate non-judicial foreclosure. If the Legislature intended to prevent the holder (entitled to enforce the Note) from proceeding with non-judicial foreclosure, it would

have said so explicitly. The most obvious way to do so would be to amend the definition of "beneficiary." But the Legislature chose not to do so.

Recently, the Legislature considered, but declined to adopt, a bill that would have changed the definition of "beneficiary" from its current meaning of "holder" to:

> [O]wner of the instrument or document, including a promissory note, evidencing the obligations secured by the deed of trust, even if another party or parties are named as the holder, seller, mortgagor, nominee, or agent, excluding persons holding the same as security for a different obligation.

SB 5191, § 1(1) (emphasis added). This rejected bill would also have required: "That only the owner of the beneficial interest or the authorized agent of the owner of the beneficial interest may foreclose a deed of trust . . . . The foreclosure must be in the name of the owner of the beneficial interest." SB 5191 did not pass.[4]

Thus, the Legislature has considered and declined to adopt the very legal requirement that Bowman now asks the Court to impose. *See Hardee v. State, Dept. of Social and Health Services*, 172 Wn.2d 1, 19, 256 P.3d 339 (2011) ("[I]t is not our role to substitute our judgment for that of the Legislature.") (alteration in original); *State v. Davis*, 163 Wn.2d

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[4] *See* Bill History for Senate Bill 5191, publicly available at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5191&year=2013

606, 614-15, 184 P.3d 639 (2008) ("it would be a clear judicial usurpation of legislative power for us to correct [a] legislative oversight") (quoting *State v. Hughes*, 154 Wn.2d 118, 150, 110 P.3d 192 (2005)). The Court should not impose a new rule of law where the Legislature has declined to do so.

Instead of defining "owner," RCW 61.24.030(7)(a) simply defines the proof that the beneficiary may provide to the trustee before a notice of trustee's sale may issue. RCW 61.24.030(7)(a). The proof deemed sufficient by the Legislature under RCW 61.24.030(7)(a) is intended simply to confirm that the beneficiary did, in fact, hold the note – i.e., that it was the beneficiary. In short, the Legislature used "owner" as a synonym for "holder."

The Legislative history confirms that RCW 61.24.030(7)(a) does not impose an additional "ownership" requirement on beneficiaries. The Washington Supreme Court has "acknowledged the value in appropriate circumstances of considering sequential drafts of a bill[,]" and it is "presumed that members of the Legislature were aware of prior drafts of [a] bill . . . ." *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 753, 675 P.2d 592 (1984) (quotations and citations omitted).

The Legislative history establishes that RCW 61.24.030(7)(a) was intended to prevent situations in which a party that did not actually hold

the note claimed to be the beneficiary and foreclosed, and was not intended to impose an additional "note ownership" requirement on the beneficiary.

The 2009 amendment that added subsection (7)(a) to RCW 61.24.030 began as Senate Bill 5810 (SB 5810), the original version of which was devoid of any requirement that the trustee have proof that the beneficiary held the promissory note. SB 5810, 61st Legislature, 2009 Regular Session (Feb. 3, 2009). The State Senate subsequently revised SB 5810 to include a requirement that the trustee obtain "proof that the beneficiary is the actual holder" of the promissory note or "possession of the original" promissory note "with the proper endorsements so that the entity initiating the foreclosure sale has the authority to enforce the terms of the promissory note." First Engrossed SB 5810, § 7(7)(k)(i) 61st Legislature, 2009 Regular Session (Mar. 12, 2009). This amendment would have required that "[p]roof that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust must be made by way of an affidavit made by a person with personal knowledge of the physical location of the promissory note or other obligation." Id. § 7(7)(k)(ii). While the core of this section – requiring the beneficiary to prove to the trustee that it was the "actual holder" of the note – survived, the Legislature changed the proof that was required.

The State House of Representatives subsequently amended the proof requirement regarding the beneficiary's authority to foreclose, replacing the Senate's language with the language that is now RCW 61.24.030(7)(a). Engrossed Senate Bill 5810, 61st Legislature, 2009 Regular Session, passed House Apr. 9, 2009, passed Senate Apr. 20, 2009.

Under this amendment, the trustee's proof of the beneficiary's ownership of the promissory note may be in the form of the beneficiary's declaration and the language regarding the trustee having possession of the original note is removed.

The April 9, 2009 Senate Bill Report for SB 5810 as amended by the House, notes that "[t]here must be proof that the beneficiary is the actual holder of the obligation secured by the Deed of Trust."[5] Similarly, both the House Judiciary Committee Bill Analysis on ESB 5810 and the House Bill Report on ESB 5810 as Amended by the House state that the bill "[r]equires that before a notice of sale may be recorded, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust."[6] Although these reports are prepared by non-partisan legislative staff for the use of legislators in their

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[5] Publicly available at:
http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5810&year=2009 .
[6] Publicly available at:
http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5810&year=2009 and
http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5810&year=2009.

deliberations, they provide evidence of how legislators understood SB 5810.

It is apparent that the purpose of SB 5810 was to require the trustee to confirm that the entity claiming to be the beneficiary on a deed of trust "actually held" the promissory note – i.e., that it was "entitled to enforce" the note under RCW 62A.3-301 and met the statutory definition of "beneficiary." RCW 61.24.005(2). Meanwhile, the word "owner" was inserted into the bill at the very end of the legislative process as a technical revision while the Legislature determined the appropriate evidence by which the beneficiary should prove that it was the "actual holder" of the promissory note. There is no indication in the legislative record that any of the legislators intended for the word "owner" to impose a separate requirement – apart from "actually holding" the promissory note – on beneficiaries.

Instead, the statement of Senator Kauffman, the sponsor of SB 5810, at a March 23, 2009 hearing in which the House Judiciary Committee passed out the bill, clarifies that RCW 51.24.030(7)(a) does not impose a separate "ownership" requirement on beneficiaries, but merely requires them to submit some proof that they actually hold the promissory note. Senator Kauffman stated the issue that SB 5810 addressed as follows: "[W]hen there is a foreclosure, you need to know

who actually holds that note, and there are actual cases in the United States in which when challenged, they cannot produce the note."[7] To address this issue, Senator Kauffman explained that SB 5810 required "you [the beneficiary] have to have the note, or at least know where the note is . . . you have to have at least the note and so that you can move forward on that."[8]

Similarly, Legislative staff counsel Trudes Tango summarized SB 5810 explained to the House Judiciary Committee on March 26, 2009 – the final committee meeting on SB 5810 – that the bill had "technical, clarifying changes made,"[9] and that the trustee "has to have proof from the beneficiary that the beneficiary is actually the holder of the promissory note securing the deed of trust, and that proof can be by declaration of the beneficiary." This testimony is the same as her testimony at the March 23, 2009 hearing.[10] Thus, the legislative history reveals that SB 5810 – and by extension RCW 61.24.030(7)(a) – was merely intended to require the beneficiary to demonstrate to the trustee that it was actually in

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[7] Publicly available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181. Senator Kauffman's testimony, quoted above, may be found at 47:30-48:05.
[8] Publicly available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181. Senator Kauffman's testimony, quoted above, may be found at 48:40 -49:00.
[9] Publicly available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030190. Ms. Tango's statement, quoted above, is available at 12:19-12:47
[10] *See* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181, at minute 46:10-46:37.

possession of the promissory note, not to impose a separate "ownership" requirement.

c. SunTrust Properly Initiated the Foreclosure Consistent with Fannie Mae's Servicing Guidelines.

SunTrust is a Fannie Mae approved seller and servicer of residential mortgage loans. CP 665. The Master Selling and Servicing Contract between SunTrust and Fannie Mae establishes the basic legal relationship between these parties and incorporates Fannie Mae's servicing guidelines. CP 656, 662. Fannie Mae-owned loans such as Bowman's must be serviced according to these guidelines. CP 663. The guidelines specifically permit a servicer such as SunTrust to execute foreclosure documents for defaulted loans in which MERS has been named the beneficiary of the Deed of Trust in a nominee capacity. CP 657. Where, as here, Fannie Mae possesses the Note through a document custodian such as SunTrust, SunTrust has custody of the Note for Fannie Mae's benefit. CP 658. The guidelines permit SunTrust to possess Bowman's Note so that it can act in its own name and represent Fannie Mae's interests. *Id.* In these circumstances, "the servicer [i.e. SunTrust] becomes the holder of the Note" and it "shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit." *Id.* The Fannie Mae servicing guidelines are

consistent with the UCC and DTA and their application yields the same result – SunTrust is authorized to enforce the Note by initiating non-judicial foreclosure proceedings in response to Bowman's undisputed default.

d. SunTrust Properly Appointed NWTS as Successor Trustee, Vesting it with the Power of Sale Bowman Granted in the Deed of Trust.

As the beneficiary, SunTrust was entitled to appoint NWTS as the successor trustee under the Deed of Trust. RCW 61.24.010(2). Upon the recording of the November 8, 2012 AST, NWTS became vested with the all the powers of the original trustee. *Id.* These powers specifically included the power to sell the Property if Bowman defaulted. CP 24.

2. The CPA Claim Was Properly Dismissed.

The trial court properly dismissed Bowman's claim for violation of the CPA. To prevail on a CPA action, the plaintiff must establish: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) a public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Bain*, 175 Wn.2d at 115. The failure to establish any one of these elements requires dismissal of the claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

First and foremost, the CPA claims against SunTrust, Fannie Mae and MERS were properly dismissed because they are derivative of and

depend entirely upon Bowman's incorrect premise that these entities violated the DTA. For the reasons in the preceding section, no DTA violations occurred. The CPA claim thus fails along with Bowman's DTA claim. In any event, Bowman cannot establish the essential elements of an unfair or deceptive act or practice, injury, and causation.

a. Bowman Did Not Establish Any Unfair or Deceptive Acts or Practices.

Bowman makes only a cursory argument in support of the first element of his CPA claim, relying entirely on an incorrect interpretation of *Bain*. Bowman claims that "[t]he *Bain* court specifically ruled that [the UDAP element] can be presumed based upon MERS' business model and the manner in which it has been used." Br. of App. at 28. Although *Bain* found this element could be presumptively met, it specifically rejected the premise that characterizing MERS as the beneficiary is "per se" deceptive. 175 Wn.2d at 117. Furthermore, *Bain* is also clear that any presumption does not relieve Bowman from proving his case, noting that a plaintiff "must produce evidence on each element required to prove a CPA claim." *Id.* at 119. The lone event Bowman identifies as an unfair or deceptive act or practice is the appointment of NWTS as successor trustee. Br. of App. 28. Critically, however, SunTrust, not MERS, appointed NWTS. CP 53. Because SunTrust is the note holder and beneficiary, this appointment was

done with proper authority and cannot be an unfair or deceptive act or practice.

b. Bowman Did Not Establish Any Injury to His Business or Property Proximately Caused by Any Respondent's Conduct.

Even if Bowman could establish an unfair or deceptive act or practice, dismissal of the CPA claim was still proper because he cannot establish the essential elements of injury or causation.

Bowman's alleged CPA injuries are: (1) the "threat of losing all of his equity in his home without compensation"; (2) a reduced ability to sell the Property after recordation of the Notice of Trustee's Sale; (3) reduction of the equity in the property for purposes of borrowing against it; (4) damage to his credit rating; (5) a claimed inability to take full advantage of the federal Home Affordable Modification Program (HAMP) and Washington's Foreclosure Fairness Act mediation program; and (6) consequential damages consisting of "out-of-pocket expenses for postage, parking, and consulting an attorney." *See* Br. of App. at 35; CP 291-299. Bowman also suggests that his emotional distress associated with the foreclosure proceedings satisfies the injury and causation elements of his CPA claim. Br. of App. at 32-33.

Although the general threshold for a CPA injury is not high, where, as here, the plaintiff claims an unfair or deceptive act or practice

based on an affirmative misrepresentation, the plaintiff must show "a causal link between the misrepresentation and the plaintiff's injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.* 162 Wn.2d 59, 83, 170 P.3d 10, 22 (2007). Critically, in this analysis, causation cannot be established "merely by a showing that money was lost." *Id.* at 81.

For several reasons, under the undisputed facts of this case, none of these items are cognizable CPA injuries that were caused by the Respondents.

First, Bowman's argument rests on the premise that he need only allege sufficient facts supporting injury and causation. This premise ignores the fact that the case was decided on the merits at the summary judgment stage, not on a pre-answer motion to dismiss. *See* Br. of App. at 30 (incorrectly arguing that "on summary judgment, Mr. Bowman needed only to allege facts regarding the [injury and causation elements]"). At the summary judgment stage, Bowman cannot rely on bare allegations or his own self-serving declaration to carry his burden of demonstrating that he has admissible evidence that, if believed, would establish the injury and causation elements of his CPA claim. *See Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001) ("The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues

remain, or having its affidavits accepted at face value."). Bowman's "testimony" about these expenses consists of bare statements in his declaration. *See* CP 297. This falls short of the evidence required to meet even the relatively low threshold for a CPA injury. The dismissal of the CPA claim can be affirmed for this reason alone.

Second, Bowman's undisputed failure to make the required loan payments is the proximate cause of each type of alleged injury, particularly with respect to items (1)-(4). The *potential* loss of the Property, any equity in it, and the ability to borrow money against that equity were all the result of his default, not any of the entirely proper conduct of the Respondents.

Third, Item 5, relates to Bowman's claim that, if not for the allegedly wrongful actions of Respondents, Bowman would have been able to obtain mortgage relief, such as a loan modification. CP 297. However, it is black letter Washington law that a lender has no duty to modify a borrower's loan; the lender can simply stand on its rights under the originally agreed-upon contract. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991). Further, Bowman's statement that he might have pursued a modification under the federal HAMP program is belied by the cases holding that there is no automatic right to a loan modification under HAMP. *See, e.g. Muresan v. America's Servicing*

Company, Case No. 12-00239-JCC at 2-3 (W.D. Wn. April 25, 2012) (citing cases). Furthermore, he admits that he was aware of Fannie Mae's ownership as of August 2012, but does not claim that he pursued any modification programs, either before or after this alleged discovery. *See* Br. of App. at 34-35. Nor does Bowman claim that he could have complied with any modified loan arrangement if he had applied for and been offered one. Finally, Bowman offers no evidence that he was referred to or otherwise eligible for Foreclosure Fairness Act mediation.

Fourth, with respect to Item 6 (alleged investigation costs and attorney fees), Bowman relies on *Walker*, but ignores the well-established principle that "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property." *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992). *See also Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (subsequent purchaser's prosecution of CPA claim brought to protect property against lender's non-judicial foreclosure insufficient to establish CPA injury); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, * 3-4 (W.D. Wash. Aug. 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas v. Paramount Equity Mortg.*, No. C13–0494RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) at *4 (citing *Sign-o-Lite* and stating

"the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation" and dismissing CPA claim where plaintiff sought emotional distress and litigation costs as damages, but plaintiff's "failure to meet his debt obligations is the "but for" cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title.").

Bowman also ignores a critical distinction between *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009) and this case. In *Panag*, the Court concluded that "[c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim," and concluded that the former could establish injury while the latter could not. 166 Wn.2d at 62-63. It is important to put the *Panag* Court's phrase "dispel uncertainty regarding the nature of an alleged debt" in context. In *Panag*, the "alleged debt" was a set of insurance company subrogation claims that had been referred to a collection agency. 166 Wn.2d at 34-35. Specifically, the insurance carrier had paid underinsured motorist benefits to its insureds (who had been in accidents with the *Panag* plaintiffs) and then sought to recover the amounts paid by referring the subrogation claims to a collection agency. *Id.*

Here, in contrast, Bowman does not dispute that he borrowed $417,000 from SunTrust itself, promised to repay the loan according to the terms of the Note, and pledged the Property as security that could be sold if he defaulted, which there is no dispute that he did. CP 24, 258-260; 665-666. The "uncertainty" that justified treating investigation expenses, consulting with an attorney and associated costs as a CPA injury is simply not present in this case. Rather, any "uncertainty," i.e., the "holder/owner" theory on which Bowman relies, is only a vehicle to assert a CPA claim and efforts toward that end cannot establish a cognizable CPA injury. Thus, Bowman's attempt establish a CPA injury based on alleged investigative expenses, time off from work, out of pocket expenses for postage, parking and consulting an attorney, and the like fails under the facts of this case. *See* Br. of App. at 31, 33-35.

Bowman knew that SunTrust was the entity from whom he originally borrowed the money and that all or some of the interest in his Note could be sold without prior notice. CP 258. Bowman's attempt to manufacture an "injury" from the Notice Default he received on or about August 14, 2012 also fails. *See* CP 293-294; Br. of App. 34. That document specifically informed him: "[t]he owner of the note is Federal National Mortgage Association (Fannie Mae)" and that "[t]he loan servicer for this loan is SunTrust Mortgage, Inc." CP 47 (emphasis added).

Indeed, Bowman admits that he was the one who used Fannie Mae's online loan lookup tool to verify that this information was correct, not his attorney. CP 60, 296. The *Panag* analysis Bowman asks this Court to undertake is simply inapplicable to the record before this Court. *See* Br. of App. at 31 (arguing that a *Panag* injury and causation analysis is "the most useful to the present case").

Fifth, Bowman misinterprets *Bain* and ignores the undisputed facts. That case does not, as Bowman claims, stand for the proposition that "a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary." Br. of App. at 29. This position is undercut by *Bain* itself, which makes it clear that "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury [under the CPA]." *Bain*, 175 Wn.2d at 120.

Furthermore, as noted above, SunTrust – the proper beneficiary – appointed NWTS, not MERS. CP 53. A CPA claim based on the inclusion of MERS in the Loan transaction should not be available under a *Bain* rationale where, as here, the holder's authority derives from possession of the note indorsed in blank. *Bain*, 175 Wn.2d at 120 (mere inclusion of MERS in deed of trust is not actionable under CPA); *and see Florez v. OneWest Bank, F.S.B.*, No. C11-2088-JCC, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012) ("In *Bain*, the alleged authority to foreclose

was based solely on MERS's assignment of the deed of trust, rather than on possession of the Note. Here, however, the undisputed facts establish that OneWest had authority to foreclose, independent of MERS, since OneWest held Plaintiffs' Note at the time of foreclosure."). *Accord Mickelson v. Chase Home Finance*, No. 11-cv-1445 MJP, --- F. Supp. 2d ----, 2012 WL 5377905 at *2 (W.D. Wash. Oct. 31, 2012) ("*Bain* is clear that there is no automatic cause of action under the CPA simply because [of] MERS.").

Sixth, Bowman's attempt to claim a CPA injury based on "the emotional impact of loss of home" is directly contrary to controlling authority. *See* Br. of App. 32. It is beyond dispute that the CPA redresses injury to a plaintiff's "business or property." Personal injury damages, including for emotional distress, are not recoverable as a matter of law. *See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) (damages for mental pain and suffering are not recoverable for a violation of the CPA because the statute, by its terms, only allows recovery for harm to "business or property"); *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 369-370, 770 P.2d 671 (1989) ("[A]ctions for personal injury do not fall within the coverage of the CPA."); *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998) ("[W]e note that emotional

distress damages are not available for a violation of the CPA."). The dismissal of Bowman's CPA claim should be affirmed.

3. The Criminal Profiteering Claim Was Properly Dismissed.

Bowman's last claim, for alleged violation of Washington's "little RICO" criminal profiteering statute, was also properly dismissed. As an initial matter, it must be noted that Bowman again erroneously claims that the Court must accept the allegations in his declaration and in his verified complaint as true. Br. of App. at 37. This is simply not the case; contrary to Bowman's claims to the contrary, this case was decided on the merits at the summary judgment stage. *See* Br. of App. at 39 (arguing for reversal of the dismissal of the criminal profiteering claim for a decision on the merits).

To avoid summary judgment, Bowman would have to show that he could prove, among other things, a pattern of criminal profiteering. RCW 9A.82.010(4); RCW 9A.82.100(1)(a). "Criminal profiteering" is defined as "any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred . . . ." RCW 9A.82.010(4).

This claim fails because Bowman neither makes specific allegations against any defendant, nor has any evidence that could

substantiate the required allegations. *See Zalac*, 2013 WL 1990728, *4 ("Plaintiff claims Defendants violated RCW 9A.82.045, which makes unlawful an attempt by 'any person knowingly to collect an unlawful debt.' Plaintiff fails to allege with particularity any act by Defendants that qualifies as criminal profiteering. Thus, the Court DISMISSES Plaintiff's Criminal Profiteering claim.").

Moreover, Bowman has offered absolutely no evidence whatsoever that any Respondent committed the crimes of extortion or collection of an unlawful debt, as would be required to sustain his claim. *See* RCW 9A.56.120; .130; RCW 9A.82.045; RCW 9A.82.010(4)(k), (p). Instead, he relies on his legally and factually flawed theory of wrongful foreclosure, which fails for all of the reasons set forth above. The dismissal of Bowman's criminal profiteering claim should be affirmed as well.

B. The Trial Court Properly Exercised its Discretion When it Admitted the Testimony of Carmella T. Norman Young and the Associated Business Records.

Bowman argues that the trial court erred in admitting the testimony of SunTrust Assistant Vice President Carmella T. Norman (Norman) on summary judgment. Br. of App at 8-11. Norman submitted evidence to the trial court through two declarations, both of which relied in part on SunTrust's business records. CP 254-260; 664-670. However, there is no

error here: the Court was well within its discretion when it admitted the Norman declarations.

1. The Decision Whether or Not to Admit Evidence is Reviewed for Abuse of Discretion.

Bowman suggests that this entire appeal should be reviewed de novo. Br. of App. at 6-8. However, a trial court's decision to admit or exclude evidence lies within its sound discretion. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (no abuse of discretion in admitting documents under business records exception to hearsay prohibition). The trial court's decision to admit or exclude business records will be reversed only if it was a manifest abuse of discretion. *State v. Doerflinger*, 170 Wn. App. 650, 661, 285 P.3d 217 (2012) (radiologist's statements admissible under business records exception).

Here, the trial court was well within its discretion in accepting Norman's testimony and associated business records.

2. Business Records are Admissible as an Exception to the Prohibition Against Hearsay.

Hearsay testimony is generally inadmissible as evidence. ER 802. However, business records which might otherwise be hearsay are admissible as an exception to the general rule. ER 803(6); RCW 5.45, *et seq.* A business record is admissible where:

> [T]he 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.

Regarding computerized business records, such records are admissible under the same standards as a non-computerized business record. *State v. Ben-Neth*, 34 Wn. App. 600, 604-605, 663 P.2d 156 (1983) (upholding the admission of a bank's computerized records under the business record exception).[11]

Here, Norman laid the following foundation in support of her testimony:

- She is an Assistant Vice President, Foreclosure Preparation Department (CP 664 at ¶ 1);
- She has access to SunTrust's records related to the subject loan (CP 665 at ¶ 2);

[11] *See also U.S. v. Casey*, 45 M.J. 623, 626 (U.S. Navy-Marine Corps Ct. of Crim. App. 1996) (Computer generated records can be entered into evidence as an exception to the general rule against hearsay if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness); *D & H Auto Parts, Inc. v. Ford Marketing Corp.*, 57 F.R.D. 548, 551 (1973) ("The fact that computers were used in compiling the data for these reports does not impair their admissibility as business records.").

- Her job duties involve accessing and reviewing the records to conduct foreclosure related activities (*id.*);
- The records are made and kept in the regular course of business (CP 664-665);
- She is familiar with the mode of preparation of the records (CP 664 at ¶ 1);
- The records are made at or near the time of the acts, conditions or events reflected in the records (CP 665. at ¶ 2);
- Her testimony was based on a compilation of electronic records (CP 665 at ¶ 6).

This foundational testimony is more than sufficient to support the trial court's discretionary decision to admit Norman's testimony.

3. Bowman's Objections to the Norman Declarations do not Support a Finding that the Trial Court Manifestly Abused its Discretion.

Bowman claims that the declarations are not admissible as business records because they:

> [F]ailed to provide the trial court facts that would establish that (1) the computer equipment used by Sun Trust is standard; (2) the identity of who compiled the information contained in the computer printouts; (3) a statement of how the information is maintained, (4) when the entries were made and whether they were made at or near the time of the

> happening or event; and (5) how SunTrust relies on these records.

Br. of App. at 8. However, each of these arguments in unavailing.

First, a declarant need only demonstrate the use of "standard" computer equipment where there is legitimate concern raised regarding the reliability of the computer system. *State v Kane*, 23 Wn. App. 107, 111-12, 594 P.2d 1357 (1979) (cited by Bowman, Br. of App. at 8). Here, Bowman does not point to anything in the record that demonstrates a concern with the reliability of SunTrust's computer equipment. *Id.*

Second, there is no requirement that SunTrust identify who personally compiled the information in the business records upon which Norman's testimony is based. *See Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010).[12] Similarly, in *Bank of America, N.A. v. Barr*, 9 A.3d 816, 821, 2010 ME 124 (Maine 2010), the Court upheld the admission of bank records, stating that "[t]he fact that the witness did not prepare or supervise the preparation of the record does not destroy the ability of the witness to provide the foundation for its admission, nor must the witness have been the custodian at the time of the record's creation in order to be deemed a qualified witness" for purposes of business records exception) (internal quotations omitted). Norman

[12] *See also State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004) (upholding admission of computerized price records and stating "[i]t is not necessary that the person who actually made the record provide the foundation.");

testified that she is familiar with records and that she relies on the records in the course of her job duties. CP 665. This foundation is more than sufficient.

Third, RCW 5.45.020 does not require the declarant to testify how the information was maintained. Further, Norman did testify (1) that the records on which she was relying were maintained in SunTrust's loan file; (2) that she has the ability to "access" the records; and (3) that the records are maintained in both hard copy and electronic form. CP 255 at ¶ 3-4 (hard copies); CP 264 at ¶ 6 (electronic records). This testimony is sufficient to establish the reliability of the Norman declarations.

Fourth, Norman specifically testified that SunTrust's records relating to Bowman's loan and its relationship with Fannie Mae were made .... at or near the time of the acts, conditions or events reflected in these records." CP 665 at ¶ 2. Bowman's complaint that this testimony is lacking is simply incorrect.

Fifth, Norman testifies that her "job duties include accessing and reviewing these records as necessary to conduct foreclosure-related activities in connection with loans which are in default." Supp. Norman Decl., CP 665 at ¶ 2. Bowman's argument that there is no foundation for how SunTrust relies on the records is also incorrect.

In sum, the record shows that Norman is a SunTrust officer whose job duties relate to loans in foreclosure and who is personally familiar with SunTrust's business records regarding such loans. The record also shows that the records are made at or near the time of the events they detail. Based on this foundation, Norman testified to basic facts regarding the history of the loan, including loan origination and servicing history, the accounting on the loan, and the location of loan documents. The trial court's decision to admit Norman's testimony was clearly within its discretion and the trial court's decision should therefore be affirmed.

C. The Trial Court Properly Denied Bowman's Request for a CR 56(f) Continuance.

A trial court's denial of a motion for a CR 56(f) continuance is also reviewed for an abuse of discretion, which only occurs if the decision is based on untenable grounds or reasons. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 183, 313 P.3d 408 (2013).

Here, the Superior Court did not abuse its discretion. A court has discretion to deny a CR 56(f) continuance if the party seeking it: (1) does not offer a good reason for the delay in obtaining the desired evidence; (2) does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of

material fact. *Baechler v. Beaunaux*, 167 Wn. App. 128, 132, 272 P.3d 277 (2012). Bowman cannot make the showing necessary to justify a CR 56(f) continuance. He did not serve discovery until *after* Defendants filed their motion, he does not state what evidence would be established had he received more discovery from the Defendants to date, nor does he explain how such evidence would raise a genuine issue of material fact. *Baechler*, 167 Wn. App. at 132.

Bowman states that all that SunTrust produced was "one document," but in reality SunTrust produced 1,400 pages of documents. CP 581. Bowman also declines to advise the Court that the 32 RFPs he served on SunTrust (including one RFP with 40 numbered subparts) are a simple cut and paste of discovery that he has served in other cases. Supp. CP 580-581. Indeed, nowhere in Bowman's discovery is there any request that is tailored to the specific facts and issues of this case, which precludes any credible argument that the requested discovery is necessary to oppose the MSJ in ***this*** case. *See* CP 682-683. Similarly, Bowman's claim that a CR 56(f) continuance should be granted because his discovery to MERS and Fannie Mae has gone unanswered is simply wrong. Br. of App. at 12. MERS and Fannie Mae have no record of having received document requests from Bowman in this matter and Bowman provides no evidence that he *served* such requests. CP 581; 355-396.

D. Bowman Is Not Entitled to Fees and Costs Under RAP 18.1.

Bowman's procedurally and substantively improper request for attorney fees and costs should be denied. *See* Br. of App. at 41. Under RAP 18.1(b), which Bowman does not cite, a party "must devote a section of its opening brief to the request for fees and expenses." Bowman's failure to comply with this requirement is fatal to his fees request. *See Henne v. City of Yakima*, 313 P.3d 1188, 1191 (2013) (denying request for appellate attorney fees because RAP 18.1(b) "requires more than a bald request for attorney expenses on appeal…[t]he party seeking costs and attorney fees must provide argument and citation to authority to establish that such expenses are warranted.").

Moreover, even if the fatal procedural defect in Bowman' fee request could be overlooked and he obtained a reversal of the summary judgment ruling in favor of SunTrust, Fannie Mae and MERS, his request should still be denied because he has not yet prevailed on the merits of any of his claims. *See Ryan v. State, Dept. of Social and Health Servs.*, 171 Wn. App. 454, 476, 287 P.3d 629 (2012) (denying fees under RAP 18.1 to appellant obtaining reversal because "[a] party must prevail on the merits before being considered a prevailing party.").

E. SunTrust, Fannie Mae and MERS Are Entitled to Appellate Fees and Costs Under RAP 18.1.

Under RAP 18.1(a), a prevailing party may recover its reasonable appellate attorney fees and expenses if applicable law grants a party the right to recover these fees and expenses. Here, the Deed of Trust of which SunTrust is beneficiary and Bowman is grantor contains the following provision:

> **26. Attorneys' Fees.** [SunTrust] shall be entitled to recover its reasonable attorneys' fees and costs, in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees", whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by [SunTrust] in any...appeal.

CP 486. Bowman's Note also contains an attorney's fees and costs provision. CP 468. In the event it prevails, SunTrust respectfully requests its reasonable attorney fees and costs incurred in connection with this appeal.

CONCLUSION

For the reasons above, SunTrust, Fannie Mae, and MERS respectfully request that the order dismissing all claims against them with prejudice be affirmed and that SunTrust be awarded its reasonable attorney fees and costs under RAP 18.1 and the Note and Deed of Trust.

RESPECTFULLY SUBMITTED this 12th day of March 2014.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and the laws of the State of Washington that on the 12th day of March 2014, I served a copy of the foregoing document on the following persons in the following manner:

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- ☑ by Hand Delivery
- ☐ by Overnight Delivery

SIGNED this 12th day of March 2014 at Seattle, Washington.

Sabrina Koskinen