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No. ~~72107-1-I~~

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DAVID GUTTORMSEN and TERRY GUTTORMSEN, husband and wife,

Plaintiffs-Appellants

v.

AURORA BANK, FSB; AURORA LOAN SERVICES, LLC; NATIONSTAR MORTGAGE LLC; FEDERAL NATIONAL MORTGAGE ASSOCIATION; QUALITY LOAN SERVICE CORPORATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; DOE DEFENDANTS 1-10,

Defendants-Respondents

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(Hon. Eric Lucas)

RESPONSE BRIEF OF RESPONDENTS AURORA BANK, FSB, AURORA LOAN SERVICES, LLC, NATIONSTAR MORTGAGE LLC, FEDERAL NATIONAL MORTGAGE ASSOCIATION, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

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I. INTRODUCTION

Plaintiffs David and Terry Guttormsen's claims for relief are based on the fact that the Deed of Trust securing their loan obligation was recorded twice, and that subsequently recorded assignments referenced different recording numbers. Plaintiffs received all the relief on these matters to which they were conceivably entitled when they successfully petitioned the Superior Court for an order enjoining the trustee's sale of the property securing their loan obligation. As a result, no nonjudicial foreclosure sale was ever completed, and none is pending.

Not satisfied with this remedy, in the proceedings below, the Guttormsens also asserted claims for damages under the Washington Deed of Trust Act (DTA), the Consumer Protection Act (CPA), and Chapter 9A.82 RCW, Washington's "little RICO" statute. In support of these claims, the Guttormsens relied on an erroneous legal theory that the foreclosing party must be both the "owner" of a loan obligation and the "holder" of a promissory note.

The Superior Court's grant of summary judgment in favor of Aurora Bank, FSB, Aurora Loan Services, LLC (collectively (Aurora), Nationstar Mortgage LLC (Nationstar), Federal National Mortgage Association (Fannie Mae), and Mortgage Electronic Registration Systems,

Inc. (MERS) (collectively, Respondents) was proper, and should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly grant summary judgment, where the evidence showed that Aurora and then Nationstar were the respective beneficiaries of the Deed of Trust?

2. Did the trial court properly grant summary judgment, where the evidence showed that MERS never purported to or did act as the beneficiary of the Deed of Trust?

3. Did the trial court properly grant summary judgment, where the evidence showed that the Guttormsens' alleged "injuries" were either inactionable as a matter of law and/or were caused by their own default on their loan obligation?

4. Did the trial court properly grant summary judgment, where the Guttormsens failed to show that they could prove any "pattern of criminal profiteering"?

5. Did the trial court properly admit evidence of self-authenticating records and declaration testimony based on a financial institution's business records?

6. Did the trial court act within its discretion when it denied the Guttormsens' conclusory and unsupported request for a CR 56(f) continuance?

III. COUNTERSTATEMENT OF THE CASE

A. The Guttormsens Execute a Negotiable Promissory Note Evidencing a $200,000 Loan and Secure It with a Deed of Trust Containing a Power of Sale.

On February 26, 2006, the Guttormsens executed a promissory note (Note) in the face amount of $200,000, which evidenced a loan from

AIG Federal Savings Bank (AIG). CP 934; 949; 848-853. By signing the Note, the Guttormsens agreed to pay back the loan according to the Note's original terms. CP 848.

The Guttormsens secured the Note with a Deed of Trust against real property commonly known as 4315 Hoyt Avenue, Everett, WA 98203 (Property). CP 934; 954. U.S. Recordings, Inc. (USRI) recorded the Deed of Trust on March 23, 2006 under Snohomish County Recording No. 200603230406 (406 Recording). CP 954.[1] The Deed of Trust discloses that MERS is the beneficiary in a nominee capacity for AIG and its successors and assigns. CP 955.

By signing the Deed of Trust, the Guttormsens conveyed legal title to the Property to the trustee of the Deed of Trust and agreed that the trustee and any successor trustee could sell the Property via the nonjudicial foreclosure process if the Guttormsens did not make their loan payments. CP 973.

The Deed of Trust securing the Note disclosed that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to [the Guttormsens]." CP

[1] Immediately thereafter, USRI recorded the same Deed of Trust again, under Snohomish County Recording No. 200603230407 (407 Recording). *Compare* CP 954 *with* CP 971 (evidencing recordation of the deed of trust at 12:40 and 12:41 p.m. respectively on March 23, 2006). The Guttormsens misleadingly characterize the two recordings as two separate deeds of trust, which allegedly "double[] the amount of the security" (App. Br. at 6), but in fact they were merely two recordings of the same instrument.

982. The Deed of Trust also disclosed that such sales "might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note . . . and performs other mortgage loan servicing obligations[.]" *Id.*

B. Transfers of the Note and Servicing Rights.

On or about April 22, 2006, AIG indorsed the Note to HSBC Mortgage Services, Inc. (HSBC), via an allonge in connection with HSBC's purchase of the loan. CP 843; 851. HSBC subsequently indorsed the Note in blank via a second allonge. CP 852.

On or about August 28, 2007, Fannie Mae purchased the loan. CP 843. At that time, Aurora Loan Services, LLC (Aurora) was servicing the loan. *Id.* Aurora continued to service the loan until on or about July 2, 2012, when Nationstar acquired the right to service the loan for Fannie Mae. CP 843. From on or about August 28, 2007 to on or about August 19, 2011, the indorsed in blank Note was in the physical possession of Aurora's authorized document custodian. CP 843-844.[2] From on or about

[2] Pursuant to Fannie Mae's Single-Family Servicing Guide, Fannie Mae itself holds mortgage notes until its servicers act in their own names for purposes of representing Fannie Mae's interest in foreclosure or legal proceedings. *See* CP 457 (Servicing Guide, Sec. I, 202.07.02, stating that in order to ensure that a servicer is able to perform its duties, possession of the note transfers to the servicer and the servicer becomes the holder when the servicer acts in its own name for purposes of representing Fannie Mae's interest in foreclosure or legal proceedings). Prior to this transfer of possession, "Fannie Mae may have direct possession of the note or a custodian may have custody of the note," and Sec. I, 202.07.01. Thus, in the time period prior to Aurora acting it its own name in the foreclosure proceedings, as a technical matter, Fannie Mae had constructive possession

August 20, 2011 to on or about March 10, 2013, Aurora itself had physical possession of the indorsed in blank Note. *Id.* Nationstar maintained physical possession of the original indorsed in blank Note from on or about March 10, 2013 to on or about January 28, 2014, when Nationstar transmitted the Note to its counsel of record in this matter. CP 844.

C. The Guttormsens Default, and Nonjudicial Foreclosure Proceedings Begin, But Are Never Completed.

The Guttormsens failed to make the May 1, 2011 payment required under the Note. CP 844; *see also* CP 1009; 1025. On November 30, 2011, a Corporate Assignment of Deed of Trust (CADT) executed by MERS (as nominee) in favor of Aurora was recorded under Snohomish County Recorder's No. 201111300356. CP 1003. This CADT referenced the 407 Recording of the Deed of Trust. *Id.*

On June 13, 2012, Aurora appointed Quality Loan Service Corp. of Washington (Quality) as the successor trustee, referencing the 407 Recording. CP 1005-1006. On July 13, 2012, Quality issued the Guttormsens a Notice of Default which referenced the Deed of Trust, identified Fannie Mae as the current owner of the Note secured by the

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of the indorsed in blank note through a document custodian. *See* CP 457; 843-844. The use of document custodians to maintain physical possession of mortgage notes also accords with sound commercial practice. *See Barton v. JP Morgan Chase Bank, N.A.*, No. C13-0808RSL, 2013 WL 5574429 (W.D. Wash. Oct. 9, 2013), at *1 (recognizing that "[o]riginal promissory notes are bearer paper: the holder of the note has the right to collect payments thereunder according to its terms. It is hardly surprising that original notes are not bandied about or otherwise put at risk of loss or destruction.").

Deed of Trust, and identified Aurora as the loan servicer managing the loan. CP 1008-1009.

On October 11, 2012, an Assignment of Deed of Trust (ADT) executed by Aurora (through Nationstar in its capacity as Aurora's attorney in fact) in favor of Nationstar was recorded under Snohomish County Recorder's No. 201210110416. CP 1020-1022. The ADT referenced the 406 Recording of the Deed of Trust. On December 17, 2012, Quality recorded a Notice of Trustee's Sale of the Property. CP 1024.

D. Procedural History and Discontinuance of the Trustee's Sale.

On April 18, 2013, the Guttormsens filed this case in Snohomish County Superior Court and obtained an order temporarily restraining the sale. CP 929-931. On April 30, 2013, the Superior Court issued a preliminary injunction enjoining the sale. CP 912. On July 8, 2013, Quality recorded a Notice of Discontinuance of the Trustee's Sale. CP 345.

On March 28, 2014, the Superior Court granted Aurora, Nationstar, Fannie Mae, and MERS's motion for summary judgment. CP 443. On June 4, 2014, the Superior Court denied the Guttormsens' motion for reconsideration of the order granting summary judgment to Aurora, Nationstar, Fannie Mae, and MERS. CP 388-389.

On September 10, 2014, the Superior Court granted Quality's motion for summary judgment. CP 14. On September 19, 2014, the Guttormsens appealed to this Court. CP 2.

IV. ARGUMENT

A. The Grant of Summary Judgment to Respondents Was Proper.

1. The Guttormsens Have Correctly Abandoned Their Pre-Sale DTA/Wrongful Foreclosure Cause of Action.

The Guttormsens' Complaint contained a cause of action for wrongful foreclosure based on alleged violations of the Deed of Trust Act (DTA). CP 940-943. On appeal, the Guttormsens concede that under *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 417, 334 P.3d 529 (2014), they cannot bring a damages claim for pre-sale alleged DTA violations. Brief of Appellants (App. Br.) at 41.

2. Aurora and Nationstar Were the Deed of Trust Beneficiaries at All Relevant Times.

The lynchpin of the Guttormsens' case against Respondents – that there is some question as to whether Aurora and later Nationstar were "beneficiaries" under the DTA (*see, e.g.*, App. Br. at 28) – is fatally flawed.

Under the DTA, the "beneficiary" is the "holder" of the obligation secured by the Deed of Trust, which in this case is the subject Note

evidencing the Guttormsens' loan. *See* RCW 61.24.005(2); CP 848. The UCC in turn defines the "Holder" of a negotiable instrument (such as the Note) in relevant part as "the person in possession if the instrument is payable to bearer." RCW 62A.1-201(21)(A). A negotiable instrument is payable to bearer if, as is the case with the Note here, it is indorsed in blank. *See* RCW 62A.3-205(b); CP 852.

Under Washington law, the "holder" need not be the same entity as the "owner," and it is the holder that has the right to enforce the note, regardless of whether that entity also owns the note. *Trujillo v. Nw. Trustee Servs., Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014) (beneficiary status is determined by the DTA and Article 3 of the Uniform Commercial Code (UCC))[3]; RCW 62A.3-203, Cmt. 1 ("The right to enforce an instrument and ownership of the instrument are two different concepts.").

Aurora serviced the loan for several years before the Guttormsens defaulted on or about May 1, 2011. CP 844; *see also* CP 1009; 1025. When Aurora appointed Quality as successor trustee on June 13, 2012, it had physical possession of the Note, making it the holder. *See* CP 843-

[3] Notably, *Trujillo* was modified on November 3, 2014 – after the Washington Supreme Court's decision in *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014). Although *Lyons* "touched on the issue of 'holder' versus 'owner' for negotiable instrument enforcement, this case did not overrule *Trujillo* . . . ." *Coble v. SunTrust Mortg.*, No. C13-1878-JCC, 2015 WL 687381, at *7 (W.D. Wash. Feb. 18, 2015). As correctly explained in *Coble*, "[b]ased on the current state of the law, a note holder is a beneficiary entitled to enforce the note . . . SunTrust is, therefore, a 'holder' and the beneficiary as a matter of law."

844; 457; 1005-1006. Thereafter, both servicing rights and physical possession transferred to Nationstar. CP 843-844.

Thus, the evidence showed that Aurora and then Nationstar were unquestionably the respective "holders" of the Note, and therefore they were the respective beneficiaries of the Note.

The Guttormsens attempted below – and attempt again now – to establish otherwise by offering a convoluted and confused argument that persistently conflates the concepts of "holder" and "owner" status. *See, e.g.*, App. Br. at 2, 7-8, 9-10, 11, 29, 30, 33-38. But it is clear under Washington law that these concepts are not the same, as discussed above, and the Guttormsens' erroneous legal theory does not create a disputed issue of material fact. The Superior Court correctly dismissed all of the Guttormsens' claims to the extent they are based on the erroneous theory that the "holder" of the note must be the same entity as the "owner" of the loan.

3. The CPA Cause of Action Was Properly Dismissed.

Even under the *Bain v. Metro. Mortg. Grp., Inc.* decision on which the Guttormsens rely, to prevail on a CPA cause of action a 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. 175 Wn.2d 83, 115, 285 P.3d

34 (2012). A failure of proof on any one of these elements requires dismissal of the claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

Whether the Guttormsens rely on their simplistic MERS-based theory of CPA liability or the actual events in the never-completed nonjudicial foreclosure process, the Guttormsens failed to establish all the essential elements of a CPA cause of action below, and cannot do so now.

a. The Guttormsens Did Not Establish an Unfair or Deceptive Act or Practice.

Likely because of the holdings of *Trujillo* and *Frias*, on appeal the Guttormsens rely primarily on the language in *Bain* to the effect that characterizing MERS as a beneficiary could "presumptively" meet the unfair or deceptive act or practice element of a CPA claim. *See* App. Br. at 41-42. The Guttormsens misread *Bain*,[4] and their theory does not fit the facts of this case.

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[4] The Guttormsens also misstate their burden on summary judgment, incorrectly arguing that they "needed only to allege facts regarding the fourth and fifth elements of a CPA claim." App. Br. at 43. It is black-letter law that a party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial," and "may not rest upon the mere allegations or denials of his pleading . . . ." CR 56; *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Indeed, *Bain* itself holds that a borrower must prove each element of a CPA claim. *See Bain*, 175 Wn.2d at 119 (CPA claim viable only if "the homeowner can produce evidence on each element required to prove a CPA claim"). In *Bain*, the MERS assignment suggested (wrongly) that MERS had no principal and was representing to the world that it was the beneficiary in its own right, which the Court in *Bain* found met the first CPA element. *Id.* at 116-17, 119. But the Court did not hold that labeling MERS as an agent for a disclosed principal in a Deed of Trust was deceptive, because it is not. *See Estribor v. Mtn. States Mortg.*, No. C13-5297 BHS, 2013 WL 6499535, at *3 (W.D. Wash. Dec. 11, 2013) ("The Deed

The Guttormsens admit that MERS was never represented to be the beneficiary, but rather was identified in the Deed of Trust as acting "solely as a nominee for AIG, the Lender, and Lender's successors and assigns." App. Br. at 6. And the Guttormsens do not allege that MERS ever acted or attempted to act as the beneficiary. The only action taken by MERS in relation to this matter was its execution of the CADT in favor of Aurora, which was recorded on November 30, 2011, and which references the 407 Recording of the Deed of Trust. CP 1003.

Moreover, although the *Bain* Court found that characterizing MERS as a beneficiary could presumptively meet the unfair or deceptive act or practice element, it was "unwilling to say that [characterizing MERS as a beneficiary] is per se deceptive." 175 Wn.2d at 117. Unequivocally, a plaintiff asserting a MERS-based CPA claim "must produce evidence on each element required to prove a CPA claim." *See id.* at 119. "*Bain* is clear that there is no automatic cause of action under the CPA simply because MERS acted as an unlawful beneficiary under the

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of Trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive."). Indeed, not only did *Bain* hold that lenders ***may*** designate MERS as their agent in the Deed of Trust, 175 Wn.2d at 106, the Court in *Bain* lacked jurisdiction to hold that a lender's designation of MERS as its nominee was unfair or deceptive because the certified question was limited to whether a CPA claim exists "if MERS ***acts*** as an unlawful beneficiary." *Id.* at 91; *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 (1998) (court lacks jurisdiction to go beyond certified questions). In *Bain*, the Court was under the impression that MERS had appointed the Trustee and had disavowed having a principal. No similar facts are alleged here.

Deed of Trust Act." *Mickelson v. Chase Home Finance*, 901 F. Supp. 2d 1286, 1288 (W.D. Wash. 2012), *aff'd*, 579 F. App'x 598 (9th Cir. 2014).

In *Bain*, the Washington Supreme Court's decision hinged on the fact that MERS (as opposed to a loan servicer holding the note) was alleged to have appointed the successor trustees of the at-issue deeds of trust – which only a beneficiary or its agent is entitled to do. *See* 175 Wn.2d at 89 (stating "[t]he primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act if it does not hold the promissory notes secured by the deeds of trust.").[5] However, in this case it is undisputed that Aurora, the noteholder at the time – not MERS – appointed Quality, the successor trustee. CP 1005-1006.

The Guttormsens' MERS-based theory fails for the additional reason that Aurora's authority to initiate nonjudicial foreclosure proceedings derives from its noteholder status, not from any assignment of a deed of trust. *See, e.g.*, *Trujillo* 181 Wn. App. 484; *Lynott v. Mortg. Elec. Reg. Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at *2 (W.D. Wash. Nov. 30, 2012) (holding that "U.S. Bank is the beneficiary

[5] These were the facts in the parallel *Selkowitz* case, but in *Bain*, the Supreme Court was mistaken; in that case, IndyMac Bank, not MERS, had appointed the trustee. *See Bain v. Metro. Mortg. Grp. Inc.*, No. C09-0149-JCC, 2010 WL 891585, at *1 (W.D. Wash. Mar. 11, 2010) ("IndyMac . . . appointed Regional Trustee Service as the successor trustee under the deed of trust").

of the deed because it holds Plaintiff's note, not because MERS assigned it the deed").[6]

Indeed, a CPA claim based on MERS' involvement is not available under a *Bain* rationale at all 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). Where, as here, authority to foreclose is based on possession of the Note, the assignment issues in *Bain* are simply not implicated. *See Florez v. OneWest Bank, F.S.B.*, No. C11-2088-JCC, 2012 WL 1118179 (W.D. Wash. Apr. 3, 2012).[7]

Finally, to the extent the Guttormsens' claim is based on the MERS-executed CADT, it fails because the Guttormsens are not entitled to rely on the CADT. Washington "does not require the recording of such

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[6] Indeed, assignments are not even necessary to foreclose. *Corales v. Flagstar Bank, FSB,* 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011) ("Washington State does not require the recording of such transfers and assignments"); *St. John v. Nw. Tr. Serv., Inc.*, No. C11-5382BHS, 2011 WL 4543658, at *3 (W.D. Wash. Sept. 29, 2011) (same) (citing RCW 61.24.005(2); *In re Reinke*, Bankr. No. 09-19609, 2011 WL 5079561, at *10 (Bankr. W.D. Wash. Oct. 26, 2011) ("The [Deed of Trust Act] does not require that an assignment of a deed of trust be recorded in advance of the commencement of foreclosure."); *Salmon v. Bank of Am. Corp.*, No. CV-10-446-RMP, 2011 WL 2174554, at *8 (E.D. Wash. May 25, 2011) ("there is no basis for the Court to find that the [borrowers'] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed").

[7] As explained in *Florez* by the same Judge who certified *Bain* to the Washington Supreme Court: "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."

transfers and assignments." *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011). Any such recording is for the benefit of third parties – not the borrower. *Id.*[8] And, as non-parties to the assignments in this case, the Guttormsens lack standing to challenge them. *See Brodie v. Nw Trustee Servs., Inc.*, --- Fed. Appx.---, 2014 WL 2750123, *1 (9th Cir. Jun. 18, 2014) (unpublished) ("The district court also correctly concluded that Brodie lacks standing to challenge the transfer and assignment of the note and deed of trust. She is neither a party to nor a beneficiary of the assignment and transfer.").[9]

b. <u>The Guttormsens Did Not Establish Injury or Causation</u>.

Even if there were a genuine issue of fact as to whether the never-completed nonjudicial foreclosure activity amounted to an unfair or deceptive act or practice, summary judgment dismissal of the CPA cause of action was still appropriate because the Guttormsens did not establish that they suffered an injury proximately caused by this activity.

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[8] *See also In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1987) ("An assignment of a deed of trust . . . is valid between the parties whether or not the assignment is ever recorded. . . . Recording of the assignments is for the benefit of third parties[.]").

[9] *See also Cagle v. Abacus Mortg.*, No. 2:13–cv–02157–RSM, 2014 WL 4402136 (W.D. Wash. Sept. 5, 2014), at *5 (stating "plaintiff lacks standing to challenge an allegedly fraudulent assignment or appointment of a successive trustee, irrespective of robo-signing").

On appeal,[10] the Guttormsens claim that they sustained the following injuries compensable under the CPA: (1) the "threat of losing all of their equity in their property without compensation"; (2) a reduced ability to sell the Property after recordation of the DOT (which they note was recorded twice); (3) reduction in the equity in the property for purposes of borrowing against it; (4) damage to their credit; (5) a claimed inability to take advantage of the federal Home Affordable Modification Program (HAMP) and Washington's Foreclosure Fairness Act mediation program;[11] and (6) consequential damages consisting of "out-of-pocket expenses for postage, parking, and consulting an attorney[.]" App. Br. at 46.

Where, as here, plaintiffs claim an unfair or deceptive act or practice based on an affirmative misrepresentation, they must show "a causal link between the misrepresentations and the plaintiff's injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162

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[10] The Guttormsens appear to have abandoned their claim below for emotional distress damages under the CPA. *See* CP 510-511; App. Br. at 41-47. As a matter of law, emotional distress does not constitute an "injury" under the CPA. *See, e.g., Wash. 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.").

[11] Plaintiffs make no such allegation in their Complaint. As explained above, Plaintiffs may not amend their Complaint through a response to a summary judgment motion. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472-473, 98 P.3d 827 (2004); *supra* at 3.

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, the Guttormsens' 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 their default, not of any conduct of the Responding Appellees. Plaintiffs have not demonstrated that they have any equity in the Property whatsoever. *See generally* CP 519-529.

Second, with regard to Item 5, 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). Similarly, with regard to the federal HAMP program, there are multiple cases holding that there is no automatic right to a loan modification under HAMP. *See, e.g.*, *Tran v. Bank of Am., N.A.*, No. 12-cv-5341-RBL, 2012 WL 5384929, at *4 (E.D. Wash. Nov. 1, 2012) (citing cases); *see also Mills v. Bank of Am., N.A.*, No. 3:14-cv-05238-RBL, 2014 WL 4202465,

at *2 (W.D. Wash. Aug. 22, 2014) (no private right of action authorized by HAMP).

Furthermore, the Guttormsens admit they have learned that Fannie Mae had owned – thus, even the factual premise of their argument fails. CP 937; 480-481. In any event, the Notice of Default preceding the actual nonjudicial foreclosure activities informed the Guttormsens that Fannie Mae owned their loan in July 2012. CP 1008, 1012. But the Guttormsens do not claim that they pursued any modification programs, either before or after this alleged discovery. Nor do the Guttormsens claim they could have complied with any modified loan arrangement if they had applied for and been offered one. Finally, the Guttormsens offer no evidence that they were referred to or were otherwise eligible for Foreclosure Fairness Act mediation.

Third, with regard to the alleged investigation costs and attorney fees, the Guttormsens ignore 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 Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 281, 109 P.3d 1 (2004) (noting that "there must be some other evidence to establish injury to the claimant's property and attorney fees from prosecuting a CPA claim

alone does not satisfy the injury requirement"); *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).

The Guttormsens rely heavily on *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), but ignore a critical distinction between that case and this one. 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, the Guttormsens do not dispute that they borrowed $200,000, promised to repay the loan according to the terms of the Note, and pledged the Property as security that could be sold if they defaulted, which there is no dispute that they did. CP 934-35, 949-51, 954-67; *see also* CP 879. Indeed, the Guttormsens disclosed their debt obligation in their Voluntary Petition for Bankruptcy, filed in U.S. Bankruptcy Court for the Western District of Washington on November 29, 2010, listing in Schedule D a mortgage on the Property opened in February 2006, valued at $205,800.00. *In re Guttormsen*, Case No. 10-24233 (Bankr. W.D. Wash. 2010) (Dkt. 1).

Thus, the "uncertainty" that justified treating investigation expenses, consulting with an attorney and associated costs as a CPA injury in *Panag* is simply not present in this case. Rather, any "uncertainty" was manufactured for purposes of this litigation; i.e., the costs of the instant lawsuit are themselves claimed as an "injury" that justifies the Guttormsens' CPA claim. Efforts toward bringing this lawsuit cannot establish a cognizable CPA injury.

Judge Coughenour rejected similar allegations last year, for lack of injury and causation. *Bakhchinyan v. Countrywide Bank, N.A.*, No. C13-2273-JCC, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014). In *Bakhchinyan*, plaintiffs brought CPA and fraud claims and challenged

(among other things) MERS's assignment of its interest in the Deed of Trust – arguing MERS had no interest to assign. *Id.* at *1. As in this case, plaintiffs in *Bakhchinyan* sought damages for "attorney fees, audit fees, accounting fees, travel, [and] loss of business and personal time pursuing th[e] action and attempting to unravel the complicated chain of ownership created by Defendants' [alleged] fraud and deceit." *Id.* (brackets original). As to the injury under the CPA, the court first explained that "litigation expenses incurred to institute a CPA claim do not constitute injury." *Id.* at *5. The court cited *Panag* for the holding that consulting an attorney to dispel uncertainty about debts plaintiffs claim are owed ***can*** suffice for injury, but emphasized that an actionable injury must be fairly traceable to the ***defendants' conduct***, rather than a self-inflicted choice: "such a consultation must still be for a ***purpose***: Plaintiffs must **have a reason to resolve the particular uncertainty at issue**." *Id.* (bold emphasis added). In examining the alleged injuries, the court found no injury traceable to the defendants' representations (none of which was by MERS anyway) and ***no reason*** why the plaintiff would need to incur any costs:

> Here, Plaintiffs argue that "[d]efendants' wrongful conduct has caused injury to Plaintiffs including, but not limited to, loss of business and personal time, travel, meeting with accountants and attorneys, professional fees and having to file this action." But, even assuming that Plaintiffs accrued those expenses in an attempt to "dispel uncertainty" about the debt, ***Plaintiffs have not put forward any explanation***

> ***for why they need to clarify the identity of the beneficiary***. Plaintiffs, as noted above, have not alleged that they were unable to make payments on their mortgage, or described what disputes they have been unable to resolve or legal protections of which they have been unable to avail themselves. Nor do they describe any future actions that they are unable to take without knowledge of the identity of the beneficiary. They do not allege that they had to leave their business to "respond to improper payment demands," as they do not allege that the payment demands were improper. Nor do they state that defendants have sought to collect monies not actually owed, as occurred in *Panag*.
>
> Accordingly, Plaintiffs have failed to allege a CPA claim . . . .

Id. at *6 (emphasis added). Judge Coughenour is exactly right, and the exact same rationale applies here.

B. The Criminal Profiteering Cause of Action Was Properly Dismissed.

The Guttormsens' other remaining cause of action, for violation of Washington's "little RICO" criminal profiteering statute, Chapter 9A.82 RCW, was also properly dismissed.

As an initial matter, it must be noted that the Guttormsens are incorrect that the Court must accept the allegations in Mr. Guttormsen's declaration and in the verified complaint as true. App. Br. at 48-49. This case was decided on the merits at the summary judgment stage. To avoid summary judgment, the Guttormsens would have had to show that they could prove, among other things, a pattern of criminal profiteering. *See*

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).

The Guttormsens failed to do so; they made no specific allegations against any Respondent that could substantiate the required allegations. *See Zalac v. CTX Mortg. Corp.*, No. C12-01474 MJP, 2013 WL 1990728, at *4 (W.D. Wash. May 13, 2013) ("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, the Guttormsens have 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 their claim. *See* RCW 9A.56.120; .130; RCW 9A.82.045; RCW 9A.82.010(4)(k), (p). Instead, the Guttormsens rely on their legally and factually flawed theories of wrongful foreclosure, which fail for all of the reasons set forth above. The dismissal of the Guttormsens' criminal profiteering claim should be affirmed.

C. The Superior Court Properly Admitted A.J. Loll's Testimony and Associated Business Records.

"Trial court rulings on the admissibility of evidence on summary judgment are reviewed *de novo*." *Kenco Enterprises Northwest, LLC v. Wiese*, 172 Wn. App. 607, 614, 291 P.3d 261 (2013). The trial court properly admitted and considered A.J. Loll's declaration testimony and the associated business records.

1. The Note, Deed of Trust, and Assignments Are Self-Authenticating Documents.

On appeal, the Guttormsens incorrectly assert that the documents attached to the Loll Declaration lacked the necessary foundation for admissibility. App. Br. at 14. However, the Guttormsens overlook the fact that the Note is self-authenticating commercial paper under ER 902(i). *See also In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006) ("the promissory note is self-authenticating pursuant to Rule 902 . . ."); *Theros v. First Am. Title Ins. Co.*, No. C10-2021, 2011 WL 462564, at *2 (W.D. Wash. Feb. 3, 2011) ("Promissory notes are self-authenticating . . ."). Similarly, the Deed of Trust is a self-authenticating acknowledged document under ER 902(h). As such, none of these documents are hearsay. *See Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) ("Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are nonhearsay.")

(quoting Thomas A. Mauet, Fundamentals of Trial Techniques, 180 (1988)). These documents are properly before the Court.

2. The Testimony in the Loll Declaration Was Properly Admitted.

"When the witness testifies to facts that [s]he knows partly at first hand and partly from reports, the judge, it seems, should admit or exclude according to the reasonable reliability of the evidence." *State v. Smith*, 87 Wn. App. 345, 352, 941 P.2d 725 (1997) (quoting 1 McCormick on Evidence § 10)). *See also* 5A Karl B. Tegland, *Washington Practice: Evidence* § 218(3) (3d ed. 1989). Washington Courts have long recognized that when computer-generated evidence is provided by a well-established financial institution, it is "reasonable for a court to assume that the 'electronic-computer' equipment is reliable" enough to justify the admission of computerized financial records. *State v. Kane*, 23 Wn. App. 107, 112, 594 P.2d 1357 (1979). Further, the Guttormsens ignore the well-established principle that:

> Summaries of books and records which are themselves admissible as business records are likewise admissible when the original documents are so numerous or the information contained in them is so intricate...that it would be impractical to have the jury examine the originals and extrapolate the relevant information."

State v. Smith, 16 Wn. App. 425, 432-433, 558 P.2d 271 (1976). In *Smith*, the Court upheld the admission of an exhibit prepared from the bank's

computer printouts. *See id.* at 425. Similarly, in *Kane*, the Court upheld admission of an exhibit containing information culled from printouts of computerized account records. 23 Wn. App. 107. Here, Loll summarized the servicing and document custody history of the Guttormsens' loan based on a review of the relevant business records. CP 843-844. A trial court acts within its discretion when it admits such evidence. *See State v. Garrett*, 76 Wn. App. 719, 725, 887 P.2d 488 (1995) (admitting physician's testimony based on business records prepared by her fellow physicians).

Simply put, it is well within the trial court's discretion to permit employees of a financial institution to testify regarding the information contained in the institution's business records. *See Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010) (upholding admission of declaration testimony where declarants testified that their statements were based on personal knowledge and review of business records, they had access to account records in the course of their employment, and records attached to declaration were true and correct copies made in ordinary course of business); *Markovskaya v. Am. Home Mortg. Servicing, Inc.*, 867 F. Supp. 2d 340, 344 (2012) (testimony in affidavit, based on personal knowledge and review of business records, that servicer never received notice from any credit reporting agencies

regarding Plaintiff's payment history was admissible and supported summary judgment). The Superior Court properly admitted Loll's testimony.

Nor do the Guttormsens' critiques of Loll's testimony warrant reversal. *See* App. Br. at 17-24. As the Guttormsens acknowledge, issues regarding what happened in 2006 occurred long before their May 2011 default and the subsequent nonjudicial foreclosure activities. *See* App. Br. at 17. Moreover, the Guttormsens' own evidence reveals that HSBC was the owner/investor of the loan before Fannie Mae's purchase, contrary to the Guttormsens' attempt to muddy the waters on this point. *See* CP 995-996. The self-authenticating 407 Recording of the Deed of Trust attached to the Loll declaration is also irrelevant because the Guttormsens themselves rely on and acknowledge the existence of the Deed of Trust. Similarly, the ADT speaks for itself and reflects that Aurora, through its attorney-in-fact Nationstar, executed this document in favor of Nationstar. CP 876. The recording coversheet does not control. *Cf. State v. Mares*, 160 Wn. App. 558, 564, 248 P.3d 140 (2011) ("a certificate of authenticity is not testimonial because it attests only to the existence of a particular public record and does not interpret the record nor certify its substance or effect"). The balance of the Guttormsens' arguments regarding Loll's testimony are precisely the kind of "speculation [and] argumentative

assertions that unresolved factual issues remain" that are patently insufficient to create an issue of fact on summary judgment. *Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001).

D. The Guttormsens Were Not Entitled to a Continuance to Conduct Discovery.

On appeal, the Guttormsens offer a near-verbatim version of the conclusory CR 56(f) argument that the Superior Court properly rejected. *Compare* App. Br. at 26-27 *with* CP 516-517. Simply claiming that "discovery needs to be done" is insufficient as a matter of law to support a request for a CR 56(f) continuance. *See id.*

A trial court's decision to deny a CR 56(f) continuance for the purpose of gathering additional evidence is reviewed for an abuse of discretion. *Old City Hall LLC v. Pierce Cnty. AIDS Found.*, 181 Wn. App. 1, 15, 329 P.3d 83 (2014). A court may deny a CR 56(f) continuance if: (1) the party seeking it does not offer a good reason for the delay in obtaining the desired evidence; (2) the party seeking it 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). The Guttormsens did not below, and cannot now, make the showing necessary to justify a CR 56(f) continuance. The Guttormsens did not serve

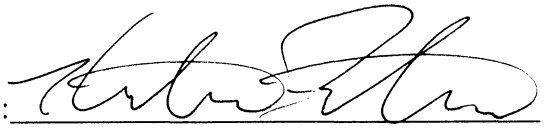
discovery on Aurora, Nationstar, Fannie Mae, or MERS, nor did they articulate what evidence would be established had they conducted discovery, nor did they explain how such evidence would raise a genuine issue of material fact. *See Baechler*, 167 Wn. App. at 132. The Superior Court therefore properly denied the Guttormsens' request for a CR 56(f) continuance.

V. CONCLUSION

For the reasons above, the Superior Court's grant of summary judgment to the Respondents was proper and should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of March, 2015.

LANE POWELL PC

By: 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 6th day of March, 2015, I caused a true and correct copy of Response Brief of Defendants/Respondents Aurora Bank, FSB, Aurora Loan Services, LLC, Nationstar Mortgage LLC, Federal National Mortgage Association, Mortgage Electronic Registration Systems, Inc. to be served on the following via messenger and email as indicated below:

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DATED this 6th day of March, 2015.

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