No. 320111

DIVISION III,
COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTINA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRUST, SERIES 2012-13, its successor in interest and/or assigns,

Plaintiffs

v.

STEVEN M. MILLER and LETICIA MILLER,

Defendants/Appellants

v.

SUNTRUST MORTGAGE, INC.

Third Party Defendant/Respondent

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
(Hon. Gregory D. Sypolt)

RESPONDENT SUNTRUST MORTGAGE INC.'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND COURT RULES

MISCELLANEOUS

I. INTRODUCTION

This case arises out of Steven and Leticia Miller's decision to "short-pay" their true loan obligation rather than accept the actual trial or permanent loan modification options that SunTrust Mortgage, Inc. (SunTrust) offered them. The Millers' short payments were based on the amounts specified in a modification plan they received, but which on its face was only a *temporary* plan and which the Millers quickly learned was not a valid offer they were free to accept. The Millers understood that this plan did not permanently modify their loan obligations, but insisted on a lower payment than SunTrust could offer them. After SunTrust instituted judicial foreclosure proceedings, the Millers argued that the invalid and temporary modification plan was somehow an enforceable agreement that permanently modified their loan terms. They reached this conclusion despite the fact that the trial plan did not include a principal balance, interest rate, or specify the number of years in which the loan was to be paid off.

Nonetheless, the Millers alleged counterclaims against SunTrust for (1) violation of the federal Fair Debt Collection Practices Act (FDCPA), (2) violation of the Washington Consumer Protection (CPA) and Collection Agency Acts (CAA), (3) intentional infliction of emotional distress, and (4) defamation.

Below and now on appeal, the Millers acknowledge that every one of their counterclaims hinges on the validity of their theory that they reached an agreement with SunTrust to permanently modify their loan. Because this theory fails, each of their counterclaims fail. However, the Millers' appeal has even more fundamental flaws. The Millers have not supported their appeal with adequate assignments of error, citations to the record, and in some cases citation to legal authority. And even if these procedural flaws are overlooked, the Millers simply do not address the multiple substantive flaws with each of their specific claims.

II. COUNTERSTATEMENT OF ISSUES

SunTrust restates the issue in this appeal as whether the Spokane County Superior Court (Superior Court) properly granted summary judgment dismissal of the Millers' Amended Counterclaims against SunTrust where the Millers' claims all rest on a flawed "contract" theory of liability[1] and there are multiple other flaws with each of the Millers' counterclaims.

III. COUNTERSTATEMENT OF THE CASE

A. The Loan at Issue.

On October 9, 2008, the Millers borrowed $417,000 from the Bank of Whitman and secured the promissory note evidencing the loan with a

[1] Tellingly, the Millers do not actually allege a cause of action for breach of contract against SunTrust.

deed of trust against real property commonly known as 13210 South Campbell Road, Rockford, Washington 99030 (the Property). CP 61; 100; 146; 150. The Bank of Whitman subsequently sold the loan, and SunTrust became the beneficiary of record under the deed of trust. CP 61; 100; 164. SunTrust began servicing the Millers' loan on or about November 24, 2008. CP 220. At the time SunTrust began servicing, the loan was not in default. *Id.*

B. The Millers Enter into a Trial Modification Plan with Temporary Monthly Payment of $2,113.31.

Due to financial difficulty, the Millers applied for and, on July 20, 2009, were approved for a Trial Period Plan (First TPP) under the federal Home Affordable Modification Program (HAMP). CP 166; 170-173. The letter enclosing the First TPP explained that:

> The Trial Period Plan is the first step. Once we are able to finalize your modified loan terms, we will send you a loan modification agreement . . . which will reflect the terms of your modified loan. In addition to successfully completing the trial period, you will need to sign and promptly return to us both copies of the Modification Agreement or your loan cannot be modified.

CP 166 (emphasis added).

On July 30, 2009, the Millers signed the First TPP, which specified three trial period payments of $2,113.31. CP 173. The First TPP states that it is not a permanent loan modification; it identifies itself as "Step

One of a Two-Step Documentation Process" and defines a three-month Trial Period lasting from August 1, 2009 to November 1, 2009, after which a permanent modification *may* be offered if certain conditions are met. *Id.* It further provides that "the Plan is not a modification of the Loan Documents[.]" CP 172. The Millers made only one of the temporary payments of $2,113.31 under the First TPP. CP 176.

C. <u>The Second TPP</u>.

On August 7, 2009, SunTrust sent the Millers a second Trial Period Plan (Second TPP) contemplating temporary trial payments of $1,311.87. CP 184. Like the First TPP, the Second TPP explained that the temporary payment amount was "our estimate of what your payment will be IF we are able to modify your loan under the terms of the program." *Id.* (capitalization in original). The Second TPP also made clear that it is not a permanent modification; it defined a Trial Period lasting from September 1, 2009 to December 1, 2009. CP 187-188. The Second TPP further provided that it "is not a modification of the Loan Documents" and that "[t]he Trial Period Payment is an estimate of the payment that will be required under the modified loan terms, which will be finalized [in a later permanent modification agreement]." CP 188-189.

On October 20, 2009, SunTrust sent the Millers a letter informing them they had been approved for a permanent HAMP modification. CP

192. The Home Affordable Modification Agreement specified a monthly payment of $2,084.85 for the first five years of the agreement. CP 196. The letter accompanying the agreement explained that "[t]o accept this offer, you must sign and return both copies of the Modification Agreement . . . by October 27, 2009." CP 192 (emphasis in original).

Upon receiving the letter and permanent modification agreement, Mr. Miller contacted SunTrust on October 23, 2009, and a SunTrust representative allegedly informed him that the Second TPP and accompanying letter had been sent by "mistake." CP 177; *see also* CP 202 (Steven Miller notes re phone communications) ("Mr. Johns went on to say that the $1311.87 monthly payments that we had been offered in the trial agreement were a mistake."). Thus, no later than October 23, 2009, the Millers were aware that the Second TPP was not a valid offer of a trial plan, much less of a permanent modification. CP 181.

D. The Millers Reject SunTrust's Offers of Permanent Loan Modifications.

The Millers never accepted the October 20, 2009 permanent modification agreement SunTrust offered them because they believed that the permanent monthly payments that would have been required under the agreement were too high. CP 180. In November 2010, SunTrust offered the Millers yet another modification agreement. *Id.* The Millers rejected this offer as well, also because they thought the permanent payment amount was too high. *Id.*

Mr. Miller also admits that he received a letter from SunTrust stating that the Millers did not qualify for the Second TPP. CP 177. Mr. Miller understood that the Second TPP was not a permanent modification, and the $1,311.87 amount was not binding. CP 179; 181. Nevertheless, Mr. Miller contacted SunTrust's representatives a number of times and requested a permanent modification of the loan agreement with a payment amount of $1,311.87. CP 208; 210; 212; 214. Mr. Miller did not claim in any of these letters that the Second TPP had somehow become a permanent loan modification; rather, he merely requested that SunTrust accept payments of $1,311.87 instead of the payment amounts required under the loan agreement in force. *See id.* SunTrust never agreed to accept the lower payments. CP 181.

E. **The Millers Continue Making Payments Based on the Second TPP.**

The Millers continued making payments of only $1,311.87 per month, despite the facts that: (1) the Millers never entered a permanent modification agreement with SunTrust; (2) the Millers had never even been offered a permanent modification agreement providing for payments of $1,311.87; (3) on its face, the Second TPP was only effective until

December 1, 2009; and (4) Mr. Miller became aware that the Second TPP had been issued in error before the last trial payment under that TPP would have become due (November 1, 2009). CP 177; 187-188; 202. SunTrust held some of these payments in suspense and applied them to the loan balance (as it was permitted to do under the Deed of Trust) and returned others to the Millers. CP 223-236. The Millers' short payments placed their loan in default, and SunTrust initiated judicial foreclosure proceedings in this matter on September 4, 2012. CP 59.

On October 17, 2012, SunTrust informed the Millers that the servicing rights to their loan would be transferred to Carrington Mortgage Services, Inc. (Carrington) effective November 1, 2012. CP 215. The loan is currently owned by Christiana Trust, a division of Wilmington Savings Fund Society, FSB, as Trustee for Stanwich Mortgage Loan Trust, Series 2012-13, and is serviced by Carrington. CP 119-120.

IV. STANDARD OF REVIEW

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 grant of summary judgment in favor of SunTrust should be upheld because: (1) the Millers do not address the numerous grounds that warrant dismissal of the Amended Counterclaims in addition to the flaws in their "contract theory" and (2) the "contract theory" on which the Millers base their appeal is undisputedly incorrect.

V. ARGUMENT

A. The Millers Fail to Support Their Appeal With Sufficient Assignments of Error, Citations to the Record, or Legal Argument.

"The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties." *Clark Cnty. v. Western Wash. Growth Mgmt. Hrgs. Rev. Bd.*, 177 Wn.2d 136, 144-145, 298 P.3d 704 (2013). Under RAP 10.3(g) the "appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." After a notice of appeal designates the decision or part of a decision that the appellant wants reviewed, "the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review." *Clark Cnty.*, 177 Wn.2d at 146. To be considered, any assignments of error that a party does make must be supported by citation to legal authority and the relevant portions of the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Here, the Millers make a single assignment of error:

> The superior court erred as a matter of law when it found there was no issue of fact regarding whether a contract was established by the August 7, 2009 TPP agreement signed by the Millers.

Br. of App. at 2. The only issues the Millers raise relate to contract formation, promissory estoppel, and SunTrust's alleged breach of an implied duty of good faith. *Id.* The Millers appealed from the Superior Court's orders granting summary judgment and denying reconsideration of that ruling, CP 44-54, but they have strictly circumscribed the issues they ask this Court to determine. Unfortunately for the Millers, their desire to confine the case to their fundamentally flawed "contract" theory has serious consequences. The Millers have failed to challenge numerous other reasons why the Amended Counterclaims fail as a matter of law.

B. <u>The Court Can Affirm the Grant of Summary Judgment to SunTrust Without Reaching Any of the Millers' Arguments</u>.

The Millers' only arguments on appeal rest on their flawed theory that they reached a permanent agreement with SunTrust to modify their loan. The flaws in this theory are numerous and obvious, but the Court need not even consider them because each of the Millers'counterclaims have numerous other flaws that warrant dismissal in their own right. The Superior Court considered these at least some of these flaws in its rulings. CP 49-50; August 16, 2013 Verbatim Report of Proceedings (VRP) at 8:14 to 10:24; 25:4-25:18; 27:12; 33:1-23. However, this Court can affirm the Superior Court's summary judgment ruling based on the presence of these flaws even if the Superior Court did not consider them at all. *See Davidson Serles & Associates v. City of Kirkland* 159 Wn. App. 616, 624-625, 246 P.3d 822 (2011) (stating that "[o]n summary judgment review, we may affirm the trial court's decision on any basis within the record."). As was the case below, the presence of the following flaws in the Millers' Amended Counterclaims warrant their dismissal.

1. **The FDCPA Counterclaim Fails Because SunTrust is Not a "Debt Collector."**

A predicate for liability under the FDCPA is the defendant's status as a "debt collector." *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 314, 308 P.3d 716 (2013). Under the FDCPA, "the term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails" to collect debts "or who regularly collects or attempts to collect . . . debts . . . owed or due another" and "does not include a consumer's creditors." 15 U.S.C. § 1692a(6); *Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (6th Cir. 2003). Mortgage servicing companies who service outstanding debts for others, are not "debt collectors" so long as the debt was not in default when it was taken for servicing. *Walker*, 176 Wn. App. at 315. *See also De Dios v. Int'l Realty & Investments*, 641 F.3d 1071, 1075 n.3 (9th Cir. 2011); *Diessner v. Mortg. Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1188-89 (D. Ariz. 2009).

SunTrust began servicing the Millers' loan on or about November 24, 2008, but the Millers did not default on their loan until September 2009, when they ceased making payments in the full amount due under their original loan terms or the 1st TPP. CP 220; 223-236. The Millers also acknowledge that SunTrust was the servicer of their loan during the time in question. CP 182. As the servicer of the Millers' loan prior to the time it went into default, SunTrust is not a "debt collector" for purposes of the FDCPA. *Walker*, 176 Wn. App. at 315. *See also Bailey v. Security Nat'l Serv. Corp.*, 154 F.3d 384, 388 (7th Cir. 1998) (holding that a mortgage servicing company not a debt collector under the FDCPA where the debt was not in default when it began servicing it); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (holding that the FDCPA definition of debt collector does not include a mortgage servicing company so long as the debt was not in default at the time it was acquired).

The dismissal of the Millers' FDCPA counterclaim can be upheld on this basis alone.

2. <u>The Millers' Defamation Counterclaims Fail as a Matter of Law.</u>

The Superior Court properly dismissed the Millers claims for (1) defamation of credit and (2) common law defamation. *See* CP 103.

a. <u>The Millers Cannot Establish a Prima Facie Defamation Claim</u>.

Summary judgment "plays a particularly important role in defamation cases" because "'[s]erious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial.'" *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005) (quoting *Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981)). To establish defamation, the Millers must prove (1) a false statement, (2) publication, (3) fault, and (4) damages. *Duc Tan v. Le*, 300 P.3d 356, 363 (Wash., May 9, 2013). The Millers' defamation claim fails because they do not and cannot establish the falsity of any of SunTrust's alleged "statements" about them.

The Millers allege that "[SunTrust] has defamed [the Millers'] name and credit through its credit recovery actions." CP 103. But the only statements on which the Millers could base a defamation claim are private default servicing phone calls and correspondence, public foreclosure documents, and the filing of the foreclosure action as to their property. *See* CP 99-105. None of these "communications" were false. As explained below, the Millers' claims arise from their theory that SunTrust "breached" the Second TPP by rejecting the Millers' short loan payments of $1,311.87 per month. But the $1,311.87 payment was never part of an enforceable contract, and by paying only that amount, the Millers failed to abide by the terms of the loan agreement actually in force. Therefore, any harm to the Millers' reputation is the result of the Millers' unreasonable interpretation of the Second TPP and their subsequent default, not any false statements by SunTrust.

b. **The FCRA Preempts the Common Law Defamation of Credit Claim.**

Even if the Millers' minimal pleading were sufficient to state a common law defamation of credit claim, the claim would be preempted by the federal Fair Credit Reporting Act (FCRA). The FCRA has two preemption provisions. The first was part of the original statute and provides in relevant part that absent willful or negligent misrepresentation, "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information . . . except as to false information furnished with malice or willful intent to injure such consumer." *See* 15 U.S.C. § 1681h(e). In 1996, Congress amended the FCRA to add 15 U.S.C. § 1681t(b)(1)(F), a new and broader preemption provision, which provides: "No requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under ... (F) section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies." 15 U.S.C. § 1681t(b)(1)(F). *See id.*

In *Purcell v. Bank of Am.*, 659 F.3d 622, 623 (7th Cir. 2011), the Seventh Circuit has recently recognized how these preemption provisions work in tandem:

> [W]e do not perceive any inconsistency between the two statutes. Section 1681h(e) preempts some state claims that could arise out of reports to credit agencies; § 1681t(b)(1)(F) preempts more of these claims. Section 1681h(e) does not create a right to recover for wilfully false reports; it just says that a particular paragraph does not preempt claims of that stripe. Section 1681h(e) was enacted in 1970. Twenty-six years later, in 1996, Congress added § 1681t(b)(1)(F) to the United States Code. The same legislation also added § 1681s–2. The extra federal remedy in § 1681s–2 was accompanied by extra preemption in § 1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges. Reading the earlier statute, § 1681h(e), to defeat the later-enacted system in § 1681s–2 and § 1681t(b)(1)(F), would contradict fundamental norms of statutory interpretation.

> Our point is not that § 1681t(b)(1)(F) repeals § 1681h(e) by implication. It is that the statutes are compatible: the first-enacted statute preempts some state regulation of reports to credit agencies, and the second-enacted statute preempts more. There is no more conflict between these laws than there would be between a 1970 statute setting a speed limit of 60 for all roads in national parks and a 1996 statute setting a speed limit of 55. It is easy to comply with both: don't drive more than 55 miles per hour. Just as the later statute lowers the speed limit without repealing the first (which means that, if the second statute should be repealed, the speed limit would rise to 60 rather than vanishing), so § 1681t(b)(1)(F) reduces the scope of state regulation without repealing any other law. This understanding does not vitiate the final words of § 1681h(e), because there are exceptions to § 1681t(b)(1)(F). When it drops out, § 1681h(e) remains. But, even if our understanding creates some surplusage, courts must do what is essential if the more recent enactment is to operate as designed.

Purcell, 659 F.3d at 625.

Applying a variety of approaches, Courts, including the United States District Court for the Eastern District of Washington and the Second and Seventh Circuits, have held that state common law claims based on violations of duties imposed by the FCRA are preempted.[2] *See, e.g., Dvorak v. AMC Mortg. Srvs. Inc.*, No. CV-06-5072-LRS, 2007 WL 4207220 (Nov. 6, 2007) (explaining approaches of Courts within the 9th Circuit to preemption of state claims under § 1681t(b)(1)(F) and

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[2] The Ninth Circuit was presented with the issue of whether a California common law defamation claim would be preempted by either § 1681h(e) or § 1681t(b)(1)(F) but did not reach the issue because it found that dismissal of the claim was appropriate even if it were not preempted. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1167 (9th Cir. 2009).

§ 1681h(e) and dismissing common law defamation claim as preempted); *Purcell*, 659 F.3d 622 (state law claim for defamation preempted under FCRA); *Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45 (2nd Cir. 2011) (same); *Himmelstein v. Comcast of the District, L.L.C.*, 931 F. Supp.2d 48 (D.D.C. 2013) (same).

Correctly, the Millers never disputed that the FCRA preempted their defamation of credit claim below. The dismissal of the defamation of credit claim can be affirmed on this basis alone.

c. <u>The Remaining Defamation Claims Are Barred by the Absolute Defenses of Truth and the Litigation Privilege</u>.

Truth is an absolute defense to a defamation claim. *Maison de France v. Mais Oui!*, 126 Wn. App. 34, 54, 108 P.3d 787 (2005). There is also an absolute privilege for allegedly defamatory or libelous statements made in the course of litigation if they are pertinent or material to the relief sought. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 420 P.2d 698 (1966). All of SunTrust's allegedly defamatory conduct (to the extent it is even identified) is really just standard statements that the Millers were in default on their original loan terms and/or were made in the context of SunTrust's judicial foreclosure lawsuit. *See* CP 101-103. None of these "statements" can support a defamation claim as a matter of law.

Moreover, the Millers have not argued on appeal that they have any evidence to support a defamation claim. *See generally* Br. of App.

3. **<u>The Intentional Infliction of Emotional Distress Claim Fails Because None of SunTrust's Alleged Actions Are Sufficiently Outrageous to Support the Claim</u>.**

The standard required to prove intentional infliction of emotional distress is extremely high. A prima facie case of intentional infliction of emotional distress requires a showing of (1) an "extreme and outrageous" act (2) committed with intent to cause "severe emotional distress" or with recklessness as to such consequences that (3) actually results in "severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). The conduct must be "'*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community*.'" *Diocomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)) (emphasis in original). The Millers have not alleged or shown any of these elements.

Furthermore, a creditor's "use of available legal remedies to collect an indebtedness does not give rise to a cause of action for mental anguish or harassment." *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 85, 604 P.2d 1025 (1979); *see also Vawter v. Quality Loan Serv. Corp. of*

Wa., 707 F. Supp. 2d 1115, 1128 (W.D. Wash. 2011) (dismissing emotional distress claim based on nonjudicial foreclosure and stating that defendants' conduct "may be problematic, troubling, or even deplorable," but does not rise to the level of outrage). Here, the Millers' claims all arise out of SunTrust's initiation of judicial foreclosure proceedings to recover on the security for a debt that the Millers owe pursuant to loan documents to which the Millers agreed. CP 102-103. Thus, the Millers' intentional infliction of emotional distress claim fails as a matter of law.

4. **The CAA Claim Fails as a Matter of Law.**

The Millers allege a violation of RCW 19.16, the CAA, and RCW 19.86, the CPA. CP 103. As with the rest of their actual counterclaims, the Millers do not discuss their CAA claim in their appeal brief. In any event, this claim was properly dismissed.

The Millers' attempt to bring an independent CAA fails because there is no direct private right of action under the CAA. *Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1218 (W.D. Wash. 2011) ("[T]he WCAA does not recognize any liability separate from the CPA."). The Legislature specifically provided for enforcement of the CAA only by the Attorney General or a prosecuting attorney. RCW 19.16.460; RCW 19.16.480; *Connelly v. Puget Sound Collections, Inc.*, 16 Wash. App. 62, 65, 553 P.2d 1354 (1976) ("Under the Collection Agency Act, it appears that only the attorney general or the local prosecuting attorney 'may bring an action' to restrain a violation of that act.'") (internal quotation omitted). Nothing in the statute allows a plaintiff to sue for a supposed CAA violation, and so this claim should be dismissed. *Paris*, 828 F. Supp. 2d at 1218; *accord Genschorck v. Suttell & Hammer, P.S.*, 2013 WL 6118678, at *3 (E.D. Wash. Nov. 21, 2013) ("The WCAA, which bars persons from acting as a collection agency without a license, does not provide a private right of action on its own."). Because there is no stand-alone claim for alleged violations of the CAA, the dismissal of this claim should be affirmed.

5. **<u>The CPA Claim Fails Because the Millers Cannot Establish Each Essential Element of the Claim</u>.**

The Millers' Amended Counterclaims make only passing mention of a CPA claim. CP 103. This is insufficient to state a claim. *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827, 835 (2004) (stating"[a] pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests."). Nonetheless, to the extent the Millers stated a viable CPA claim that was not predicated on the CAA, it was also properly dismissed.

To establish a violation of the CPA, the Millers have the burden of proving five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, and (4) injures them in their business or property; (5) the injury must be causally linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). The Millers must establish all five of these elements in order to show a violation of the CPA. *Id.* (citing *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 358, 581 P.2d 1349 (1978)). 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

a. <u>The Millers Cannot Show a Public Interest Impact</u>.

The Millers' claims all arise out of the Second TPP, an agreement they knew had not been validly offered to them. CP 177; 181; 202. This is a unique situation specific to the Millers. It does not impact the public interest within the meaning of the CPA because there is no pattern or generalized course of conduct; no historical practice that predates the allegations; no substantial potential for repetition; and no actual or likely effect on many consumers. *See Hangman Ridge*, 105 Wn.2d at 790.

The Washington Supreme Court has held that, when the alleged injury is the result of an isolated mistake, there can be no violation of the

CPA absent evidence that the mistake is part of a continuing practice that would affect the public interest in general. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 602, 681 P.2d 242 (1984). In *Sato*, a real estate broker prepared an earnest money agreement that contained a clerical error, which resulted in the plaintiffs purchasing a different piece of property than the one they intended to purchase. The Court rejected the plaintiffs' CPA claim, affirming the trial court's finding that, because the evidence established nothing "other than that the salesman made a mistake," there was no impact on the public interest and thus no CPA violation. *Id.* Similarly, here, under Mr. Miller's own version of events, at worst the Second TPP was sent to him by "mistake." CP 177; 181.

Here, the Millers were undisputedly aware no later than October 23, 2009 that the Second TPP was invalid. The Millers did not rely on the Second TPP to their detriment. They simply continued to pay less than they owed under the original terms of their loan. *See* CP 223-235.

b. **The Millers Cannot Establish Injury.**

The Millers have not alleged any injury to their business or property, which is an essential element of a CPA claim. *See Hangman Ridge*, 105 Wn.2d at 780. Even if the Millers had sufficiently alleged a CPA injury, summary judgment dismissal was proper because they rely exclusively on the premise that the Second TPP was a binding permanent modification, which it is not. *See* CP 104; Br. of App. at 2-3. In other words, the Millers' injury claim is dependent on the presence of an enforceable agreement *other* than the original note and deed of trust, but none exists. As a result, they cannot establish an injury within the meaning of the CPA.

Further, it is well-established that "having to prosecute" a claim under the CPA "is insufficient to show injury" necessary to state that claim. *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 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); *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.").

The Millers have been making the erroneous $1,311.86 payment on their loan since 2009, effectively having the use and enjoyment of real property without making the required payments to keep the loan current. CP 223-235. A party's payment to a defendant cannot be a CPA injury where the underlying debt on which the payment was made is valid. *See Moritz v. Daniel N. Gordon*, 895 F. Supp. 2d 1097, 1117 (W.D. Wash. 2012). In *Moritz*, the Court rejected plaintiff's argument that her payment made in satisfaction of a valid underlying debt satisfied the CPA's injury element, stating "[plaintiff] cannot recover the amounts she paid to [a debt collector] because those amounts were less than the total amount she owed to [the creditor] on a valid debt." *Id.*

Similarly, the United States District Court for the Eastern District of Washington has held "[t]o the extent that [plaintiff] alleges an injury as a result of the garnished amount [of the debt he owed] based solely on the underlying debt and interest thereon, [plaintiff] fails to allege an injury to his business or property [for the purposes of his CPA claim]." *Gray v. Suttell & Assocs.*, No. CV–09–251–EFS, 2012 WL 1067962, at *6 (E.D.Wash. Mar. 28, 2012). Thus, even if SunTrust committed an independent unfair or deceptive act or practice, the Millers cannot establish injury in the form of their short payments because the underlying mortgage debt was valid.

c. **The Millers Cannot Establish that Any Claimed Injury Was Proximately Caused By SunTrust.**

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. Because the Millers could not establish that the Second TPP is a permanent modification, they could not establish that SunTrust's conduct proximately caused them any injury cognizable under the CPA. SunTrust's refusal to accept short-payments from the Millers based on a TPP that not only was temporary on its face, but which the Millers knew had been sent in error, did not "cause" them any injury. Rather, any injury arising out of the foreclosure proceedings is a result of the Millers' own decision to short-pay their loan obligations – despite their knowledge that the Second TPP was not in force.

C. <u>The Millers' "Contract Theory" Cannot Support Any Actionable Claims</u>.

Both at the trial court and on appeal, the Millers' Amended Counterclaims rest on the flawed premise that they reached a binding agreement with SunTrust for a permanent loan modification. CP 101-102; Br. of App. at 2-4. Because of the Millers' failure to address any of the ***other*** flaws with their counterclaims, the Court need not even consider this theory. However, to the extent that the Court does reach the Millers' "contract" theory, it should affirm the grant of summary judgment to SunTrust.

1. <u>The Millers Were Aware the Second TPP Was Not a Valid Offer that They Could Accept</u>.

The record is clear that the Millers knew that the Second TPP was not a valid offer that they could accept. No later than October 23, 2009, the Millers[3] were aware that the Second TPP was not a valid offer of a trial period plan, much less of a permanent modification. CP 181.

Under Washington law, a defendant "is not liable under a contract executed by him as a result of his material unilateral mistake of fact or law

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[3] Mrs. Miller never spoke to anyone at SunTrust, nor was she involved in any correspondence with SunTrust relating to the HAMP modification process at issue here. CP 205-206.

if the plaintiff knows of the defendant's mistake." *Puget Sound Nat. Bank v. Selivanoff*, 9 Wn. App. 676, 681, 514 P.2d 175 (1973). Similarly, under the "snap up" doctrine, a court may decide not to enforce a contract where a party made a unilateral mistake in entering the contract and the other party knew of the other party's mistake at the time of acceptance and unfairly exploited the mistaken party's error. *See Clover Park Sch. Dist. No. 400 v. Consol. Dairy Products Co.*, 15 Wn. App. 429, 434, 550 P.2d 47 (1976). Here, the Millers were aware no later than October 23, 2009, a date within the original trial period specified by the Second TPP, that the Second TPP was not a valid offer that they could accept. CP 181; 187-188. The Millers' attempt to "accept" the Second TPP by short-paying their loan does not result in an enforceable trial plan, much less a permanent loan modification.

2. **The Second TPP Is Not a Permanent Modification as a Matter of Law.**

Even if the Second TPP were an offer that could be accepted by the Millers, it is not an offer of a permanent modification. Under Washington law, a valid modification of a contract requires an offer, acceptance and consideration separate from the original contract. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007). A modification "arises out of the parties' intention and requires a meeting of the minds." *Id.* The written language in a contract is the best evidence of the parties' agreement. *See Rowe v. Dixon*, 31 Wn.2d 173, 183, 196 P.2d 327 (1948). Unless there is some indication of contrary intent, "[w]ords in a contract are given their ordinary, usual, and popular meaning[.]" *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Construction Co.*, 176 Wn.2d 502, 509-10, 296 P.3d 821 (2013).

Similarly, a contract for a loan modification does not automatically arise when a borrower qualifies for a trial plan under HAMP. *See Lucia v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 1059, 1069 (N.D. Cal. 2011). This is because HAMP "only requires participating servicers to consider eligible loans for modification, but does not require servicers to modify eligible loans." *Id.* In any case, a TPP is not itself a permanent modification; it merely provides an estimate of what payments under a modification would be. *Gaudin v. Saxon Mortg. Serv., Inc.*, 820 F. Supp. 2d 1051, 1054 (N.D. Cal. 2011) (holding that even where a TPP creates an obligation to calculate a permanent-modification payment, the TPP is not itself a permanent modification); *see also Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 563 (7th Cir. 2012) (a TPP only creates an obligation to *offer* a modification if all conditions precedent are fulfilled).

For several reasons, neither the Second TPP itself or the Millers' unilateral decision to make several payments in the amount of the $1,311.87 trial payment stated in the Second TPP are sufficient to create the alleged new and permanent modification on which each of the Millers' claims depends.

a. The Second TPP Is Not an Offer of a Permanent Modification.

Like the First TPP, the Second TPP unambiguously stated that it was the first step in a two-step process, that trial payments were an "estimate" of the payment that would be required under a permanent modification, and most fundamentally, was "not a modification of the Loan Documents." CP 170-172. The Second TPP also provides that it is only in effect during the designated Trial Period; it defines the Trial Period as that length of time "commencing on the Trial Period Effective Date [September 1, 2009] and ending on the earlier of: (i) the first day of the month following the month in which the last Trial Period Payment is due (the "Modification Effective Date") or (ii) termination of this Plan[.]" CP 171. According to the schedule set forth in the Second TPP, the last Trial Period Payment was due on November 1, 2009. *Id.* Therefore, the Modification Effective Date was December 1, 2009; Mr. Miller testified that this was correct. CP 177-178. It follows that the Trial Period Effective Date ended, at the latest, on December 1, 2009. And, as noted above, the Millers knew before the last payment would have been due that the Second TPP was not even a valid offer of a temporary payment plan. *See* CP 181. Even if the Second TPP were an offer that the Millers could accept (which it was not), it would be nothing more than an offer for a trial period payment – *not* a permanent modification.

The Millers provide no reason for giving the language of the Second TPP a meaning other than its "ordinary, usual, and popular meaning." *Huber, Hunt & Nichols-Kiewit Construction Co.*, 176 Wn.2d at 509-10. They cannot dispute that, under the plain language of the Second TPP, it was in effect until December 1, 2009 at the latest. Further, the Second TPP clearly states that it "is not a modification of the Loan Documents[.]" CP 172. Thus, the Millers' claim that the Second TPP was a "loan modification" is flatly contradicted by the plain language of the Second TPP itself.

b. The Millers Admit the Second TPP Lacks Necessary Terms for a Permanent Modification.

Under Washington's contract statute of frauds, the writing which is alleged to embody the terms of the parties' agreement must evidence agreement on all material terms. *Knight v. American Nat. Bank*, 52 Wn. App. 1, 4, 756 P.2d 757 (1988). The Second TPP does not specify an interest rate, nor what the principal balance of the loan will be, nor the number of years in which the loan would have to be repaid. *See* CP 187-190. Mr. Miller admits that the Second TPP does not contain any of these terms, and that he understood the Second TPP was not a permanent modification. CP 179. Declaring the Second TPP a permanent modification of the loan agreement would be unenforceable for vagueness and violate the statute of frauds. *See also Ecolite Mfg. Co., Inc. v. R.A. Hanson Co., Inc.*, 43 Wn. App. 267, 272, 716 P.2d 937 (1986) (refusing to enforce earnest money agreements that contemplated future execution of deeds of trust but did not contain material terms relating to forfeiture, default, risk of loss, liens by third parties, insurance, taxes, acceleration or due-on-sale clauses). The Millers simply ignore this fatal flaw in their "contract theory" which requires that the Second TPP be treated a permanent modification of their loan, which it unequivocally is not.

Even if the Second TPP had been in effect, the Millers have not shown that there was ever a *permanent* modification of the terms of their loan. The Second TPP states that a permanent modification will arise only if (1) all the conditions for a permanent modification are met; (2) the borrower receives an executed copy of a permanent modification agreement; and (3) the modification effective date has passed. CP 172. These conditions were not fulfilled: Mr. Miller admits that he never received an executed copy of a permanent modification agreement specifying a payment amount of $1,311.87. CP 181. The only modification agreements the Millers received from SunTrust were the two they chose not to sign because they did not accept their terms. CP 180.

c. <u>Any Claimed Oral Modification Would Be Unenforceable</u>.

The Millers do not specifically allege that there was an oral modification of their loan terms. However, they admit that they did not meet the conditions to obtain a permanent modification of their loan agreement, and yet they assert that the Second TPP constituted a permanent modification. To the extent the Millers allege that the Second TPP became a permanent, enforceable modification based on an oral agreement, such an agreement is unenforceable. The deed of trust securing the promissory note evidencing their loan clearly states that "ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW." CP 88 (capitalization in original). The Millers' signatures – which they admit are their own – appear directly below this statement. CP 175; 204.

Any alleged oral modification would be barred by this language and the statute of frauds, which requires that a contract must be in writing and signed by the party to be bound if, by its terms, the agreement takes more than one year to perform. RCW 19.36.010(1).

3. **The *Corvello* Case is Inapplicable.**

The Millers place great reliance on *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013), but they misstate its holdings and misapply it to their case. *See* Br. of App. at 7-11. For several reasons, the *Corvello* decision does not warrant reversal of order dismissing the Amended Counterclaims.

First and most fundamentally, even if *Corvello* applied, it would, at most, have required SunTrust to offer the Millers a permanent modification upon successful completion of a trial period plan. The crux of the *Corvello* opinion is that "[w]here, as here, borrowers allege, and we must assume, that they have fulfilled all of their obligations under the TPP, *and the loan servicer has failed to offer a permanent modification*, the borrowers have valid claims for breach of the TPP agreement." *Corvello*, 728 F.3d at 884 (emph. added).[4] The *Corvello* case is distinguishable from this one because there, the borrowers alleged that they did not receive a permanent modification offer at all. *Id.* Here, in

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[4] The Millers never completed the First TPP and they have taken the position that SunTrust told them the 2nd TPP was not operative. Thus, at most, the only TPP the Millers ever completed was the 2nd TPP. Even if they are considered to have validly completed the Second TPP, their claims fail under *Corvello* because SunTrust offered them two permanent modifications.

dispositive contrast, the SunTrust offered the Millers <u>two</u> permanent modifications (in October 2009 and November 2010), but Millers chose not to accept either one of them. CP 180. In fact, the Millers' argument on appeal is based on the incorrect statement that SunTrust only offered one modification in October 2009, which is simply not true. *See* Br. of App. at 9-11; CP 180.

<u>Second</u>, the *Corvello* decision was decided on the pleadings at the Rule 12(b)(6) stage. This case was decided at the summary judgment stage, after the Superior Court considered not only the First and Second TPPs themselves, but also the permanent modification agreements that SunTrust offered to the Millers, the Millers' deposition testimony, including Mr. Millers' admissions regarding the absence of material terms of the purported agreement and his understanding that the TPPs were not permanent modifications, and that the Second TPP was not operative. CP 177, 179, 181.

<u>Third</u>, *Corvello* was decided under California contract law and therefore did not involve Washington's contract statute of frauds rule that the memorandum that allegedly embodies the terms of the parties' agreement must evidence agreement on all material terms. *Knight*, 52 Wn. App. at 4. Indeed, because the issue in *Corvello* was the servicer's failure to *offer* a permanent modification after the borrowers allegedly

completed a TPP, the issue of agreement on all material terms was not before the Court.[5]

The *Corvello* neither applies to this case nor changes the appropriateness of the decision to dismiss the Amended Counterclaims with prejudice.

D. The Millers' Promissory Estoppel and "Good Faith" Arguments Do Not Warrant Reversal.

Finally, the Millers make a confusing argument with respect to promissory estoppel and the implied duty of good faith and fair dealing. *See* Br. of App. at 11-15. The Millers' argument is difficult to follow, and does not explain how either of these concepts would warrant reversal under applicable law. Rather, the Millers believe they are entitled to a permanent modification because they want one, not because the law requires that they be given one (even though they rejected the two they were offered). *See id.*

In any event, the doctrine of promissory estoppel does not apply because the Promissory Note and Deed of Trust governed the parties' loan relationship and "[p]romissory estoppel does not apply where a contract

[5] The only statute of frauds issue in *Corvello* was whether the breach of contract claim (a claim not made in this case) was barred as the equivalent of an oral agreement to modify the loan. The allegation of full TPP performance removed the *TPP agreement* from the statute of frauds. *Corvello*, 728 F.3d at 884. That analysis has no application to this current case for the simple reason that this case involves an entirely different statute of frauds issue (lack of a writing evidencing agreement on all material terms) under the law of a different state.

governs." *Westcott v. Wells Fargo Bank, N.A.*, 862 F. Supp. 2d 1111, 1116 (W.D. Wash. 2012) (citing *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 261 n. 4, 616 P.2d 644 (1980)). Nor can the Millers meet any of the five elements of promissory estoppel, which are: (1) A promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that causes the promisee to change his position (4) in justifiable reliance upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13, 98 P.3d 491 (2004).

The "promise" on which the Millers rely is that SunTrust would "look at the file and see what could be done." Br. of App. at 11. At best, this is an unsubstantiated and non-specific subjective paraphrasing of the Millers' interpretation of SunTrust's position; at worst it is unattributed hearsay. In any event, the "promise" is insufficient. A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Elliott Bay Seafoods, Inc.*, 124 Wn. App. at 13 (quoting Restatement (Second) of Contracts § 2(1)). Moreover, because the Millers knew that the Second TPP was not the operative agreement, they cannot claim their reliance on the alleged promise was reasonable. *See Corbit v.*

J.I. Case Co., 70 Wn.2d 522, 539, 424 P.2d 290 (1967). Promissory estoppel simply does not apply.

The Millers' attempt to invoke the implied covenant of good faith and fair dealing is also unavailing. *See* Br. of App. at 12-15. First, the Millers have no breach of contract claim. *See* CP 102-103. And as the Millers correctly note, there is no "free-floating" duty of good faith. *See* Br. of App. at 13 (citing *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-570, 807 P.2d 356 (1991)). The law is well-settled, however, that "the duty exists only 'in relation to performance of a specific contract term'"; there is no "'free-floating' duty of good faith and fair dealing that is unattached to an existing contract." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 177, 94 P.3d 945 (2004) (quoting *Badgett*, 116 Wn.2d at 570). "As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Badgett*, 116 Wn.2d at 570. Here, SunTrust offered the Millers the First TPP and two subsequent permanent loan modification agreements. CP 166; 170-173; 180; 192; 196. The Millers knew the Second TPP was not a valid offer and was only temporary in nature; SunTrust's refusal to extend the Millers a permanent modification with the same monthly payment as the Second TPP is not a breach of the duty of good faith and fair dealing.

VI. CONCLUSION

SunTrust respectfully requests that this Court affirm the Superior Court's orders granting SunTrust's Motion for Summary Judgment and denying the Millers' Motion for Reconsideration.

RESPECTFULLY SUBMITTED this 24th day of March, 2014.

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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 24th day of March, 2014, I caused a true and correct copy of Respondent SunTrust Mortgage, Inc.'s Brief to be served on the following via email and mail as indicated below:

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