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AMENDED

No. 35869-1-III

DIVISION III, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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WILLIAM MOORMAN,

Appellant,

v.

CLEAR RECON CORP.; U.S. BANK, National Association, as Trustee  
for Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-  
Through Certificates, Series 2006-2; HSBC BANK USA, N.A.; PHH  
MORTGAGE CORPORATION, NATIONSTAR MORTGAGE and DOE  
DEFENDANTS 1 through 20, inclusive,

Respondents.

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ON APPEAL FROM CHELAN COUNTY SUPERIOR COURT  
(Case No. 16-2-00703-6)

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**RESPONDENTS PHH MORTGAGE CORPORATION AND HSBC  
BANK U.S.A., N.A.'S ANSWERING BRIEF**

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## **I. INTRODUCTION**

Respondents PHH Mortgage Corporation (“PHH”) and HSBC Bank U.S.A., N.A. (“HSBC”) (collectively, “Respondents”) respectfully submit this response to the Amended Opening Brief of Appellant William Moorman (“Moorman”).

Mr. Moorman is a long-time mortgage broker and real estate investor who at one point owned as many as 33 properties, including the property at issue in this case. The property in question here is a four bedroom, four bathroom, 3,500 square-foot waterfront home on Lake Chelan, with a boat lift and dock, and a gourmet kitchen. Since acquiring the property around 2005, Moorman has sometimes lived in the property and sometimes rented it out as a vacation rental, earning \$30,000.00 to \$50,000 per year in rental income.

Despite the substantial rental income he earned on the subject property, Moorman missed tens of thousands of dollars’ worth of mortgage payments to his lender on the loan secured by a deed of trust on the property. Consequently, Moorman’s loan went into foreclosure and he brought this lawsuit to enjoin that foreclosure. Although HSBC Mortgage Corporation originated his loan, it was transferred to a U.S. Bank asset-backed trust soon after origination. The loan was foreclosed in the name of the U.S. Bank trust. Uncontradicted sworn testimony presented in

support of summary judgment in the trial court demonstrated that, at all relevant times, U.S. Bank was in physical possession of the “wet ink” note memorializing Moorman’s loan. Accordingly, the trial court properly ruled that U.S. Bank was the “holder” of Moorman’s note and thus had authority to foreclose. Resolution of this “wrongful foreclosure” issue doomed Moorman’s derivative tort claims, which were also dismissed on summary judgment.

This case boils down to one legal issue: U.S. Bank held the note and so U.S. Bank had authority to foreclose. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn. 2d 83, 111, 285 P.3d 34 (2012). For this legal conclusion, and for the consequences that flow from it, the trial court correctly dismissed Moorman’s wrongful foreclosure claims and so, with respect, this Court should affirm.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Whether the trial court erred in dismissing Moorman’s wrongful foreclosure claims when uncontradicted sworn testimony demonstrated that U.S. Bank was the holder of the note and beneficiary of the deed of trust and therefore had authority to foreclose.

2. Whether the trial court erred in dismissing Moorman's claim for damages when he failed to raise a genuine issue of material fact to support the existence of a tortious act, much less damages or causation flowing from that act.

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Origination of the Loan and Loan Modification.**

On November 2, 2005, Moorman borrowed \$1,000,000.00 ("Loan") from HSBC Mortgage Corporation ("HMC").<sup>1</sup> The Loan was memorialized by a note ("Note") and secured by a deed of trust ("DOT") against the property located at 3107 Chelan Blvd., Manson, WA 98831 ("Property").<sup>2</sup>

By September 2, 2010, Moorman had fallen \$61,320.10 behind on his monthly payments on the Loan.<sup>3</sup> Accordingly, on September 9, 2010, HMC started foreclosure proceedings against Moorman by recording a notice of trustee's sale ("2010 NOTS") against the Property.<sup>4</sup>

This foreclosure sale did not occur, and on January 4, 2011, Moorman and HMC entered into a recorded loan modification agreement ("Loan Mod").<sup>5</sup> The Loan Mod had the effect of capitalizing past due

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<sup>1</sup> Note, CP 578-582.

<sup>2</sup> *Id.*; DOT, CP 585-605.

<sup>3</sup> 2010 NOTS, CP 477-480.

<sup>4</sup> *Id.*

<sup>5</sup> Loan Mod, CP 482-486.

principal, interest, and fees due on the Loan so that the new balance was \$1,081,298.98 (as compared to \$1,000,000 original principal).<sup>6</sup>

**B. Transfer in Servicing and Ownership of Loan.**

Shortly after origination, HSBC sold the Loan to Defendant U.S. Bank, National Association, as Trustee for Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2006-2 (“U.S. Bank”).<sup>7</sup> However, HSBC retained the servicing rights to the Loan through its servicing entity HSBC Bank, U.S.A, N.A.<sup>8</sup> As servicer, HSBC was responsible for collecting payment, generating loan statements and notices, interfacing with the borrower regarding loan issues, conducting loss mitigation, and foreclosing on loans in default.<sup>9</sup> Thus, to reiterate, HSBC Mortgage Corporation originated the Loan, U.S. Bank purchased the Loan, and HSBC Bank, U.S.A, N.A. (the respondent here) serviced the Loan.

U.S. Bank took possession of the Loan’s collateral file, which includes the original “wet ink” note that memorializes the Loan.<sup>10</sup> The Note was indorsed in blank by HMC, the original payee. U.S. Bank had

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<sup>6</sup> *Id.*

<sup>7</sup> Spare Decl. ¶ 7, CP 574.

<sup>8</sup> *Id.* at ¶ 8.

<sup>9</sup> Declaration of Jane Spare (“Spare Decl.”) ¶ 2, CP 573.

<sup>10</sup> Declaration of Sorrell E. Elbert (“Elbert Decl.”) ¶¶ 5-6, CP 613.

physical possession of the original “wet ink” Note through the time the trial court entered judgment.<sup>11</sup>

On or about May 1, 2013, HSBC retained PHH as its subservicer for the Loan.<sup>12</sup> Accordingly, with the permission of U.S. Bank, HSBC delegated its servicing duties to PHH.<sup>13</sup> Moorman received notice of PHH’s role as subservicer.<sup>14</sup> There is nothing in the record to suggest that Moorman objected to PHH’s role prior to filing suit.

**C. Moorman Defaults Again and a New Foreclosure is Started.**

Even though he received the Loan Mod in 2011, Moorman again defaulted on the Loan in 2013.<sup>15</sup>

On October 15, 2015, PHH, as attorney in fact for U.S. Bank, recorded an appointment of successor trustee (“Appointment”), naming Defendant Clear Recon Corp. (“CRC”) as successor trustee of the DOT.<sup>16</sup> The Appointment is notarized and the notarization affirms that

Jane M. Spare, who proved to me on the basis of satisfactory evidence to be the person(s) whose names(s) is /are subscribed to the within instrument and acknowledged to me that he/she/they **executed the same in** his/her/their **authorized capacity**(ies)[.]<sup>17</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Spare Decl. ¶ 8, CP 574.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See* 2015 NOTS, CP 490-496.

<sup>16</sup> Appointment, CP 488.

<sup>17</sup> *Id.* (emphasis added).

On December 15, 2015, CRC recorded a notice of trustee's sale ("2015 NOTS"), setting a non-judicial foreclosure for April 22, 2016.<sup>18</sup> The 2015 NOTS recited that Moorman was over \$167,000.00 in arrears on his monthly payments on the Loan.<sup>19</sup> The 2015 NOTS expired as a matter of law on August 19, 2016, without the sale having taken place. RCW 61.24.040(6) (trustee may continue original sale date not more than 120 days).

On October 17, 2016, CRC recorded a new notice of sale ("2016 NOTS"), setting a new sale date of February 17, 2017.<sup>20</sup> The 2016 NOTS recited that Moorman's 2013 default remained uncured and he was over \$239,000.00 in arrears on his monthly Loan payments.<sup>21</sup>

**D. Testimony Elicited and Moorman's Deposition.**

Defendants deposed Moorman on September 8, 2017.<sup>22</sup> Moorman testified that he has been involved in the real estate industry for decades, working as a licensed real estate agent in the 1980s.<sup>23</sup> In 1997, Moorman began working as a mortgage broker and has worked in that industry ever since.<sup>24</sup>

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<sup>18</sup> 2015 NOTS, CP 490-496

<sup>19</sup> *Id.* at CP 492.

<sup>20</sup> 2016 NOTS, CP 498-504.

<sup>21</sup> *Id.* at CP 500.

<sup>22</sup> Moorman Dep, CP 524.

<sup>23</sup> Moorman Dep. 9:13 to 10:2, CP 525-526.

<sup>24</sup> Moorman Dep. 11:20-24, 12:24 to 13:14, CP 527-529.

In addition to working as a mortgage broker, Moorman is an avid property investor.<sup>25</sup> At the time of his deposition, Moorman owned a few investment properties in his individual capacity and additional properties as part of partnerships.<sup>26</sup> Of the 13 or so total properties Moorman had interest in at the time, all of them were rented out and the rent from these properties covered the mortgage, taxes, and insurance.<sup>27</sup>

Before the so-called Great Recession in 2008, Moorman owned as many as 33 properties.<sup>28</sup> Several of these properties were acquired by cashing out the equity of existing properties to fund the down payment on new purchases.<sup>29</sup> However, many of those properties were foreclosed or relinquished in workouts due to the economic downturn.<sup>30</sup>

Regarding the subject Property, Moorman stated that, while he has never had an appraisal performed, he estimates the Property is worth \$1.2 million or greater.<sup>31</sup> The Property is a waterfront home with boat lift and dock, a gourmet kitchen, 4 bedrooms with *en suite* bathrooms, and a total of 3,500 square feet of living space.<sup>32</sup>

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<sup>25</sup> Moorman Dep. 18:25 to 19:6, CP 530-531.

<sup>26</sup> Moorman Dep. 20:1 to 21:22 CP 532-533.

<sup>27</sup> *Id.*

<sup>28</sup> Moorman Dep. 22:4-12, CP 534.

<sup>29</sup> Moorman Dep. 30:25 to 31:4, CP 538-539.

<sup>30</sup> Moorman Dep. 22:4 to 25:1, CP 534-537.

<sup>31</sup> Moorman Dep. 65:10:15, CP 542.

<sup>32</sup> Moorman Dep. 65:16 to 66:3, CP 542-543.

Since acquiring the Property, Moorman has consistently rented it out as a Vacation Rental By Owner (“VRBO”) when he is not staying at the home.<sup>33</sup> In that time, he has earned \$30,000 to \$50,000 per year in rental income from the Property.<sup>34</sup>

Regarding his claim that he was charged improper foreclosure fees, Moorman admitted that he does not have familiarity with the fees customarily charged as part of the foreclosure process.<sup>35</sup>

**E. Procedural Posture**

Moorman filed this lawsuit on August 16, 2016, just before the 2015 NOTS expired as a matter of law.<sup>36</sup> Moorman petitioned for a TRO two days later, but that motion was denied by the trial court for failing to comply with the notice requirements of RCW 61.24.130(2).<sup>37</sup>

On February 16, 2017, the parties stipulated to a temporary injunction restraining the sale that was conditioned upon Moorman making regular payments into the Court registry.<sup>38</sup>

On May 3, 2017, the parties stipulated to a preliminary injunction that restrained the sale on the same terms.<sup>39</sup> Therefore, as of the time of

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<sup>33</sup> Moorman Dep. 73:5 to 74:18, CP 544-545.

<sup>34</sup> *Id.*

<sup>35</sup> Moorman Dep. 48:19 to 49:1, CP 540-541.

<sup>36</sup> Compl., CP 31.

<sup>37</sup> Order Denying TRO, CP 123-125.

<sup>38</sup> TRO Granting TRO, CP 294-296.

<sup>39</sup> PI Order, CP 457-459.

the summary judgment hearing, no foreclosure sale of the property had occurred.

On January 19, 2018, the trial court heard PHH and HSBC's motion for summary judgment.<sup>40</sup> The trial court granted the motion and dismissed the lawsuit in its entirety and with prejudice.<sup>41</sup>

On February 20, 2018, Moorman filed his notice of appeal to this Court.<sup>42</sup>

#### **IV. STANDARD OF REVIEW**

An appellate court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015) (affirming trial court's grant of defendant's summary judgment motion).

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Once the moving party establishes no dispute exists as to a material fact, the burden shifts to the nonmoving party to show the existence of such fact. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

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<sup>40</sup> Order Granting MSJ, CP 761-762.

<sup>41</sup> *Id.*

<sup>42</sup> Notice of Appeal, CP 788-789.

“The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations.” *Lipscomb v. Farmers Ins. Co. of Wn.*, 142 Wn. App. 20, 27, 174 P.3d 1182 (2007).

## V. ARGUMENT

### A. U.S. Bank Has Authority to Foreclose as a Matter of Law.

Nonjudicial foreclosures such as the one at issue here are governed by RCW 61.24, the Washington Deeds of Trust Act (“DTA”). The DTA defines “beneficiary” of a deed of trust as the “holder” of the obligation secured by the deed of trust. RCW 61.24.005(2). The UCC defines the “[h]older” of a negotiable instrument in relevant part as “the person in possession if the instrument is payable to bearer.” RCW 62A.1-201(21)(A). A negotiable instrument is payable to bearer if, as is the case with the Note here, it is indorsed in blank. *See* RCW 62.A.3-205(b).

The Washington Supreme Court has confirmed that the relevant inquiry when determining a deed of trust beneficiary is the identification of the holder of the note. *Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771, 2015 WL 6388153 (2015).

Here, the evidence clearly establishes:

1. The Note is indorsed in blank by HMC, the original payee.<sup>43</sup>

2. U.S. Bank is the holder of the Note.<sup>44</sup>

This evidence conclusively establishes U.S. Bank's authority to foreclose as a matter of law. *Bain*, 175 Wn.2d at 111 (successor lender may prove authority to foreclose by demonstrating that it holds the note).

**B. U.S. Bank Validly Appointed CRC as Successor Trustee.**

The DTA provides that “[t]he trustee may resign at its own election or be replaced by the beneficiary.” RCW 61.24.010; *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 305-6, 308 P.3d 716 (2013) (only lawful beneficiary may appoint successor trustee); *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 488, 309 P.3d 636 (2013) (same).

Here, U.S. Bank appointed CRC as successor trustee on October 15, 2015, via the recorded Appointment.<sup>45</sup> U.S. Bank had authority to appoint CRC because it was the holder of the Note.<sup>46</sup> Thus, CRC was a validly appointed successor trustee of the DOT as a matter of law.

The preceding sections establish that U.S. Bank has authority to foreclose through CRC, the DOT trustee. This conclusion defeats

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<sup>43</sup> Note p. 5, CP 582.

<sup>44</sup> Elbert Decl. ¶¶ 5-6, CP 613.

<sup>45</sup> Appointment, CP 488.

<sup>46</sup> Elbert Decl. ¶¶ 5-6, CP 613.

Moorman's core theory of the case and dooms his tort claims, which are all dependent on establishing "wrongful foreclosure."

C. **Moorman's Derivative Consumer Protection Act Claim was Properly Dismissed as a Matter of Law Because There Was No Unfair or Deceptive Act, Nor Was There Causation and Damages.**

Moorman brought a cause of action for violation of RCW 19.86, the Washington Consumer Protection Act ("CPA") arising out of Respondents' allegedly improper foreclosure.<sup>47</sup> This cause of action fails and was properly dismissed as a matter of law.

To prevail on a CPA claim, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986).

A claimant must show a causal link "between the unfair or deceptive acts and the injury suffered. That link must establish that the alleged injury would not have occurred "but for" the defendant's unlawful acts. Establishing causation thus depends on the deceptive or unfair practices that violated the CPA. If reasonable minds could not differ, this court may determine the factual question of causation as a matter of law.

*Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App 398, 408, 385 P.3d 165 (2016) (dismissing "wrongful foreclosure" CPA claim on summary judgment). "Whether a particular action constitutes a CPA violation is

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<sup>47</sup> Am. Compl. ¶¶ 3.6-3.12, CP 194-196.

reviewable as a question of law.” *Bavand v. OneWest Bank*, 196 Wn. App. 813, 841, 385 P.3d 233 (2016) (same).

The statute of limitations on a CPA claim is four years. RCW 19.86.120. As this lawsuit was filed August 16, 2016, any allegedly wrongful act that is the basis for the CPA claim must have occurred on or after August 16, 2012.

Here, Moorman cannot prevail on elements 1, 4, or 5.

**First**, there was no unfair or deceptive act. The basis of Moorman’s CPA claim as alleged in the Complaint is as follows:

All of the Defendants.... have made numerous misrepresentations about the identity of the foreclosing trustee that has the authority to foreclose, as well as the legitimate amounts actually owing on the loan....

Further, Defendants HSBC and/or PHH, acting through the other Defendants, with whom they have colluded to give the false impression that they have complied with the requirements of the DTA, have demanded amounts from Mr. Moorman that are not due and owing. They have also allowed the sham "substitute trustee", Defendant CRC, to make a demand for monies from them that are unearned, inflated and unreasonable, in order to preclude him from preventing the loss of his Property and the value therein.<sup>48</sup>

PHH and HSBC propounded interrogatories to Moorman on these topics seeking additional information, but his response indicated that “he does not understand this personally and is relying upon the knowledge of his attorney because of her expertise in these matters.”<sup>49</sup>

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<sup>48</sup> Compl. ¶¶ 3.7-3.8, CP 194-195

<sup>49</sup> Discovery Responses pp. 9:1 to 10:8, CP 514-515.

Regarding the first allegation, both the 2015 NOTS and the 2016 NOTS state that the sale is being conducted in the name of U.S. Bank.<sup>50</sup> As shown above, U.S. Bank held the Note and was thus beneficiary of the DOT at that time.<sup>51</sup> Further, CRC was validly appointed successor trustee by U.S. Bank before either the 2015 or 2016 NOTS were recorded.<sup>52</sup> Thus, the allegation that U.S. Bank or CRC lacked authority to foreclose is not supported by any admissible evidence. As such, the allegation could not defeat the Rule 56 motion in this case.

Regarding inflated foreclosure fees, Moorman did not provide any evidence that such fees are inflated. Indeed, the DOT specifically allows the lender to recover “all expenses incurred in pursuing the remedies [of a trustee’s sale], including, but not limited to, reasonable attorney fees and costs of title evidence.”<sup>53</sup> In his declaration, Moorman stated that he lacked knowledge of whether or not the fees were reasonable and so he is not capable of giving testimony on that point.<sup>54</sup> To the extent Moorman relies on testimony from his attorney regarding inflated foreclosure fees, as his attorney, she is not competent to testify on those matters.<sup>55</sup>

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<sup>50</sup> 2015 NOTS p. 3, CP 492; 2016 NOTS p. 3, CP 500.

<sup>51</sup> Elbert Decl. ¶¶ 5-6, CP 613.

<sup>52</sup> Appointment, CP 488.

<sup>53</sup> DOT ¶ 22, CP 597.

<sup>54</sup> Moorman Dep. 48:19 to 49:1, CP 540-541.

<sup>55</sup> RP 11:15 to 12:1.

**Second**, Moorman cannot prove damages or causation. To satisfy the causation element of a CPA claim, a “plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.” *Indoor Billboard/Wn., Inc. v. Integra Telecom of Wn., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). “Although causation generally is a question of fact, one must nevertheless aver facts that support a causal link.” *Blair v. Northwest Trustee Services, Inc.*, 193 Wn. App. 18, 37, 372 P.3d 127 (2016) (granting summary judgment on “wrongful foreclosure” CPA claim where plaintiff had evidence of deceptive acts and injury but no evidence for causation).

In written discovery requests, Defendants asked Moorman to detail his damages and he responded as follows:

Mr. Moorman knows that he expended \$400.00 for an initial consultation with Ms. Huelsman in order to investigate his circumstances and to obtain advice about how to deal with the pending foreclosure and the refusal of the Defendants to consider his loan modification. Further, Mr. Moorman was required to pay Ms. Huelsman \$6,000.00 for her to prepare the pleadings for and attend the hearing on the Motion for Temporary Restraining Order, which was separate from her retention to bring this case. To the extent that there are any other damages or injuries Mr. Moorman has incurred at this time, he is reviewing his records and will supplement when he is able, but he certainly was injured by the loss of his home and the equity therein in an amount to be determined by the trier of fact.<sup>56</sup>

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<sup>56</sup> Discovery Responses 7:5-17, CP 512.

At the time of summary judgment, Moorman had not supplemented his discovery responses, nor produced evidence of other injuries other than counsel's fees.

While attorney fees may be recoverable by a plaintiff following a successful CPA action, attorney fees on their own are not sufficient to support the claim. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) (Merely "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property.")

Moreover, even if such "injury" were compensable (it is not), Moorman cannot show a causal link between the alleged injury and wrongful conduct by Defendants. U.S. Bank had authority to foreclose as noteholder/beneficiary and Moorman was in default on his Loan. *Barbarauskas v. Paramount Equity Mortgage*, No. C13-0494RSL, 2013 WL 5743903, at \*4 (W.D. Wash. Oct. 23, 2013) (Dismissing wrongful foreclosure case on Rule 12 motion where "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."). Indeed, Division II recently affirmed in an unreported decision the dismissal of a CPA claim based on nearly identical evidence about attorney fees and investigation costs. *See Djigal v. Quality Loan Serv.*

*Corp. of Washington, Inc.*, 196 Wn. App. 1038, \*8-10 (2016) (“Expenses incurred for defending against a collection action and prosecuting a CPA counterclaim are insufficient to show injury.”) (citing *Sign-O-Lite*).

Moorman was fully entitled to retain an attorney to advise him of his rights and obligations in such a situation, but he cannot force his creditors to pay for such advice. Respondents did not commit any unfair or deceptive act nor has such alleged act caused Moorman injury. The CPA claim was therefore properly dismissed.

**D. Moorman’s Theories of Error Either Fail as a Matter of Law or are Not Supported by the Admissible Evidence.**

Because review is de novo, in the preceding sections Defendants have demonstrated that they were affirmatively entitled to judgment as a matter of law. Now, Defendants will address Moorman’s specific assignments of error and theories of the case and demonstrate why each is insufficient to merit reversal.

**1. The Record Proves that U.S. Bank Was the Noteholder.**

In his brief, Moorman contends that PHH and HSBC violated the CPA because they made “multiple misrepresentations about the identity of Mr. Moorman’s noteholder and most importantly, the record is not clear about the noteholder identify.”<sup>57</sup> However, the record is perfectly clear

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<sup>57</sup> Op. Br. p. 21.

that U.S. Bank is the noteholder – that fact is established by both the Elbert Declaration and the Spare Declaration.<sup>58</sup> Also, the foreclosure that Moorman was seeking to enjoin was at all times conducted in the name of U.S. Bank.<sup>59</sup> Thus, the trial court was presented with evidence that (1) U.S. Bank held the Note; and (2) that the foreclosure was being conducted in the name of U.S. Bank as beneficiary. Against this evidence, Moorman offered nothing admissible that raised a genuine issue of material fact to suggest that U.S. Bank was not the beneficiary. Accordingly, Moorman’s arguments about the identity of the noteholder are insufficient to merit reversal.

**2. The Only Admissible Evidence Established that HSBC was Loan Servicer and PHH Was Subservicer.**

Here, U.S. Bank appointed CRC as substitute trustee and CRC conducted the nonjudicial foreclosure proceedings.<sup>60</sup> Moorman claims that CRC’s appointment was improper not because U.S. Bank lacked authority to appoint CRC (U.S. Bank was the beneficiary at the time), but because PHH supposedly did not have authority to act on behalf of U.S.

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<sup>58</sup> See Spare Decl. ¶¶ 7-8, CP 574; Elbert Decl. ¶¶ 5-6, CP 613.

<sup>59</sup> 2015 NOTS p. 3, CP 492; 2016 NOTS p. 3, CP 500.

<sup>60</sup> See *id.* (CRC conducted foreclosures), and see Appointment, CP 488 (U.S. Bank appointed CRC).

Bank.<sup>61</sup> Like his above claim, Moorman offers no admissible evidence that calls into question PHH's authority in this context.

HSBC's status as servicer and PHH's status as subservicer are established by sworn testimony in the Spare Declaration.<sup>62</sup> Indeed, PHH executed the Appointment of Successor Trustee as "attorney-in-fact" for U.S. Bank and that document contains a notarization affirming PHH's authority to act.<sup>63</sup> Finally, PHH sent Moorman a letter advising him of its appointment as subservicer and there is no evidence that Moorman objected or was confused by this at the time.<sup>64</sup>

PHH acting for U.S. Bank in this way is entirely proper. Nothing in the DTA prohibits the use of agents in this context—Washington law, and the deed of trust act itself, approves of the use of agents. *Bain*, 175 Wn. 2d at 106.

Moreover, agency law requires that if the beneficiary is a corporation, then an agent of the beneficiary necessarily must make the declaration. Where the beneficiary of the promissory note is a corporation, it would be impossible for the corporation to make a declaration swearing under penalty of perjury that it is the beneficiary without the use of an agent because corporations are necessarily only able to act through their agents.

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<sup>61</sup> Op. Br. pp. 21-22.

<sup>62</sup> Spare Decl. ¶¶ 7-8, CP 574. Due to a scrivener's error for which undersigned counsel takes responsibility, the Spare Declaration includes a reference to non-party Silver State. This error does not void or invalidate the Spare Declaration.

<sup>63</sup> Appointment, CP 488.

<sup>64</sup> Letter, CP 607-609.

*Djigal v. Quality Loan Serv. Corp. of Washington, Inc.*, 196 Wn. App. 1038 (2016) (affirming summary judgment finding that beneficiary acted through authorized agent).

Moorman attempts to use the *Bain* case to establish that the use of agents is not allowed in certain aspects of non-judicial foreclosures, but this argument is not supported by statute or case law.<sup>65</sup> Indeed, PHH and HSBC are unaware of any Washington jurisprudence holding that an authorized agent is not permitted to act on behalf of the beneficiary/noteholder.

Moorman's theory in opposition to this reasoning is that HSBC and PHH were not actually authorized agents of U.S. Bank and thus did not have authority to act on its behalf.<sup>66</sup> Moorman's flaw, however, is that he offers no evidence to support this theory. Moorman could have deposed U.S. Bank or PHH or HSBC – he did not. Moorman could have propounded discovery on this issue – he did not do that either. In the end, Moorman offers a meritless theory as to why CRC was not properly appointed successor trustee, and he fails to raise a genuine issue of material fact to support this theory. For that reason, Moorman's mere

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<sup>65</sup> See Op. Br. p. 27 (arguing that the DTA only authorizes use of agents for certain sections).

<sup>66</sup> See Op. Br. p. 25.

allegations regarding PHH and HSBC authority to act for U.S. Bank cannot merit reversal. *Lipscomb*, 142 Wn. App. at 27.

**3. Moorman Did Not Suffer Any CPA Injury Caused by HSBC or PHH.**

The final section of Moorman's brief argues that the trial court incorrectly found that Moorman had not suffered an injury caused by Respondents' alleged wrongful conduct.<sup>67</sup> Moorman acknowledges however, that his position is directly contradicted by this Court's ruling in the *Blair* case. 193 Wn. App. at 34. *Blair* held that when the holder of a note indorsed in blank initiates even an arguably proper, non-judicial foreclosure, there is no causation element for a CPA claim. *Id.* at 37-38. Moreover, when a beneficiary properly appoints a successor trustee, there is no but-for harm to support a CPA claim. *Id.*

The fact pattern here matches *Blair* because Moorman was admittedly deeply in default on his Loan and U.S. Bank was the clear note holder. Under *Blair*, therefore, there was no CPA causation or damages. *Blair* is still good law and this Court's reasoning in that case is equally applicable here. There was no error in dismissing the CPA claim and so the trial court should be affirmed.

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<sup>67</sup> See Op. Br. p. 34.

## VI. CONCLUSION

Moorman took out the Loan, he enjoyed use of the Property, earned rental income on the property, and he failed to pay his mortgage. U.S. Bank foreclosed on his in-default Loan and it had authority to do so because it held the Note. U.S. Bank acted through its authorized agents and no evidence exists in the record that calls into doubt the authority of those agents. This case was correctly dismissed on summary judgment and, with respect, this Court should affirm.

RESPECTFULLY SUBMITTED this 7th day of September, 2018.

LANE POWELL PC



By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of September, 2018, I caused to be served a copy of the foregoing **RESPONDENTS PHH MORTGAGE CORPORATION AND HSBC BANK U.S.A., N.A.'S ANSWERING BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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