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No. 60075-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ANNE and CHRIS McCURRY,

Appellants,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellants sued Chevy Chase Bank, F.S.B. in a putative nationwide class action. Appellants claim Chevy Chase was not entitled to charge two loan-related fees when Appellants paid off their home loan. The trial court correctly dismissed the Complaint under CR 12(b)(6) because Appellants' claims are preempted by the federal statutes and regulations governing the operations of federal savings banks and because Appellants have otherwise failed to state a claim.

Appellants obtained a home loan from Chevy Chase. Appellants decided to pay off the loan early. Appellants asked Chevy Chase to prepare and fax to them statements of the amount they owed. Chevy Chase charged Appellants a \$20.00 fee for the service of faxing the payoff statements (the "Accumulated Fax Fee") and a \$2.00 fee for notary services related to the loan payoff (the "Notary Fee"). According to the Complaint and documents attached to it, Appellants reviewed and approved the payoff statement (which specifically identified the fees) and they paid the fees without objection. They filed this lawsuit about two years later.

King County Superior Court Judge Richard Eadie properly dismissed the Complaint for several independent reasons. Appellants' claims are barred by the preemptive effect of a federal statute (the Home

Owners' Loan Act ("HOLA")) and regulations implementing that statute. In adopting HOLA, Congress authorized the creation of federally chartered savings banks ("FSBs") whose operations are comprehensively and exclusively regulated by the Office of Thrift Supervision ("OTS").

OTS adopted regulations designed to create a uniform regulatory scheme for the operations of FSBs and to authorize FSBs to operate without regard to state laws purporting to regulate or otherwise affect their credit activities. OTS's regulations fully "occupy the field" and preempt state law as to loan-related fees charged by FSBs. OTS's interpretations of its regulations (which are entitled to significant weight) and cases applying those regulations have repeatedly held that state law claims relating to the kinds of loan-related fees at issue in this case are preempted by federal law. The trial court correctly dismissed Appellants' claims (all of which were pleaded under state law) as preempted.

The preemption analysis ends this case, but the trial court's dismissal order is proper even if the claims were not preempted. Appellants' breach of contract claim fails because Appellants cannot identify any provision in their Deed of Trust ("DOT") that prohibits Chevy Chase from charging fax or notary fees. Indeed, the DOT makes clear that the contract is not breached by charging loan-related fees unless the particular fee is expressly prohibited by the DOT. It also says in plain

language that the lack of express authorization for a fee cannot be interpreted as a prohibition against charging the fee and that the parties may enter into subsequent agreements resulting in fees. Appellants do not devote one line of their brief to these paragraphs of the DOT, even though the paragraphs dispose of their breach of contract and unjust enrichment claims. Appellants' breach of contract and unjust enrichment claims are also barred by the voluntary payment doctrine.

Appellants' claim under the Washington Consumer Protection Act ("CPA") fails for at least four reasons. First, the CPA contains an express statutory exemption (RCW 19.86.170) which says the CPA does not apply to activities that are permitted under exhaustive regulatory schemes like OTS's "cradle to grave" regulation of FSBs. Second, the Complaint does not allege any unfair or deceptive conduct because the payoff statement plainly identifies the nature and amount of the challenged fees. Third, Appellants have not pled any injury cognizable under the CPA because they merely paid a fee that they actually owed. Fourth, Appellants have not pled the necessary proximate cause to establish a CPA claim. Each of these points standing alone constitutes a sufficient basis to dismiss the

CPA claim. Accordingly, this Court should affirm the trial court's dismissal of the entire Complaint with prejudice.¹

II. STATEMENT OF THE ISSUES

1. Did the trial court properly dismiss the Complaint because the Home Owners' Loan Act and OTS regulations pre-empt state law claims regarding the loan-related fees at issue in this case?

2. Did Appellants' breach of contract claim fail to state a claim because the DOT does not preclude charging fax fees or notary fees, and it expressly provides that "the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee"?

3. Did Appellants' breach of contract and unjust enrichment causes of action fail to state a claim because those claims are barred by the voluntary payment doctrine and because the Complaint states that the Notary Fee and the Accumulated Fax Fee were paid and does not allege any contemporaneous objection or mistake as to the nature of the fees?

4. Did the trial court properly dismiss Appellants' claim under the CPA because RCW 19.86.170 exempts Chevy Chase's practice of charging fax fees and notary fees from the application of the CPA and

¹ Plaintiffs did not seek leave to file and did not propose to file any amendments to the Complaint.

because Appellants have not alleged any unfair or deceptive act, any injury cognizable under the CPA or the necessary proximate cause?

III. STATEMENT OF THE CASE

A. **HOLA And OTS Regulations Regarding Loan-Related Fees Charged By FSBs Preempt State Law.**

In 1933, Congress enacted the Home Owners' Loan Act, 12 U.S.C. § 1462 *et seq.* ("HOLA"). HOLA created a new variety of financial institution – federally chartered savings associations and federal savings banks. Congress intended HOLA to restore public confidence at a time when (because of the Great Depression) 40% of all residential home loans were in default. *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002). Congress enacted HOLA as a “radical and comprehensive response to the inadequacies of the existing state systems.” *Conference of Fed. Sav. & Loan Ass'n v. Stein*, 604 F.2d 1256, 1257 (9th Cir. 1979), *aff'd*, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754 (1980). HOLA created a system of federal savings and loan associations regulated by the Federal Home Loan Bank Board (the “Board”) to ensure the continued existence of associations and enable people to finance their homes. *Id.* at 1257-58.

Congress “plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed to be the ‘best practices’” of local thrift institutions and thus, “Congress

expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 161-62, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). After the *de la Cuesta* decision, the Board promulgated 12 C.F.R. § 545.2, which explained that the Board's regulatory authority "is preemptive of any state law purporting to address the subject of the operations of a Federal savings association."

In 1989, Congress replaced the Board with OTS and made OTS responsible for the regulation of all federally-chartered savings associations. 12 U.S.C. §§ 1462a(a), 1463(a), 1464. OTS subsequently promulgated a detailed and comprehensive pre-emption regulation. *See* 12 C.F.R. § 560. This new regulation (discussed in more detail below) reiterates and clarifies the broad preemptive reach of OTS regulations. In exercising the authority granted to OTS by Congress under HOLA, OTS has made clear that it "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2. Chevy Chase is an FSB regulated by OTS. CP 104.

B. Appellants' Deed Of Trust Does Not Prohibit Chevy Chase From Charging Fax Fees Or Notary Fees.

Appellants obtained a home loan from Chevy Chase on February 14, 2003. CP 4; CP 13. Appellants' loan was secured by a deed of trust ("DOT"). CP 4; CP 12-31. At payoff, the DOT requires the borrower to "pay any recordation costs and the Trustee's fee for preparing the reconveyance." CP 24.

Appellants' DOT also addresses imposition of other loan-related fees. For example, the DOT provides that Chevy Chase "may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law." CP 21. The DOT contains no provision either authorizing or prohibiting the charging of fax fees or notary fees. With respect to fees that are not specifically authorized or prohibited by the DOT, Appellants' DOT states "the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee." *Id.*

C. Chevy Chase Disclosed The Fees And Appellants Approved And Paid Them Without Objection.

Appellants asked Chevy Chase to provide a statement of the amount owing when they prepaid their loan in November 2004. CP 33. When it provided the statement of amounts owed, Chevy Chase expressly disclosed to Appellants in a Payoff Statement that the amount included a

“Notary Fee” of \$2.00 and “Accumulated Fax Fees” of \$20.00. CP 33; CP 4.

The payoff statement, which is the sole document Appellants claim they received from Chevy Chase regarding these fees, shows each of these fees as separate line items and then includes them in the line item “Total Amount Due Chevy Chase.” CP 33. Appellants reviewed and approved the payoff statement “as to form and content.” *Id.* Appellants paid their loan off in November 2004. *Id.* They paid the \$20.00 fax fee and the \$2.00 notary fee and do not allege that they ever contested them. CP 5.

D. Procedural Background.

Appellants commenced this litigation on about April 12, 2006, almost two years after they paid off their loan. It is a putative nationwide class action lawsuit. Appellants assert three claims, each of which arises under state law: breach of contract, unjust enrichment and violation of Washington’s Consumer Protection Act. CP 3. Appellants attached their deed of trust and the payoff statement to their Complaint. CP 11-33.²

On August 2, 2006, Chevy Chase moved under CR 12(b)(6) to dismiss the Complaint. CP 40-68. The case was temporarily stayed pending the issuance of a preemption decision (*Watters v. Wachovia Bank*,

² Appellants do not plead facts explaining their delay in asserting these claims or when or how they supposedly discovered that the claims existed.

N.A., 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007)) by the United States Supreme Court. After receiving supplemental briefing on *Watters* and after holding oral argument, on May 11, 2007, Judge Eadie granted Chevy Chase's motion and dismissed all three of Appellants' claims. Appellants appealed.

IV. ARGUMENT

Appellants effectively ask this Court to create and impose a new requirement arising under Washington state law regarding the operation of a federally chartered savings bank. Specifically, Appellants seek a state-law rule that FSBs must disclose in their mortgage security instruments every single fee that may ever be imposed for all conceivable services over the life of a mortgage. Appellants wish to ignore the fact that the lending operations of FSBs (like Chevy Chase) are governed solely by federal law and are already required to comply with "an elaborate network of federal disclosure laws, including the Truth-in-Lending Act ("TILA") and Regulation Z." CP 120 (OTS Opinion letter dated March 10, 1999).

The goal of HOLA and the OTS regulations is to create a uniform set of rules under federal law so that FSBs can operate efficiently and in conformance with those practices that the OTS determines are proper. OTS regulations therefore preempt state law and leave no room for the fractured, state-by-state overlay that would result from the relief sought by

Appellants in this case. The trial court properly dismissed Appellants' claims because they are preempted.

A. Appellants' Claims Cannot Survive the "Plausibility" Standard That Governs Dismissal Motions Under CR 12(b)(6).

Civil Rule 12(b)(6) requires dismissal of a complaint that fails to state a claim upon which relief may be granted. The United States Supreme Court has recently explained that, under Rule 12(b)(6), a defendant's motion to dismiss must be granted if the plaintiff fails to plead enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007) (dismissing complaint because Appellants failed to nudge their claims "across the line from conceivable to plausible"). In *Twombly*, the Supreme Court rejected the dismissal motion standard previously announced in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that a defendant's 12(b)(6) motion must be denied unless there is "no set of facts" that the plaintiff could prove in support of his claim which would entitle him to relief. *Twombly*, 127 S. Ct. at 1968-69. To survive a pleading motion, a plaintiff must now provide more than labels and conclusion; a formulaic recitation of the elements of a cause of action will not suffice. *Id.* at 1965.

This Court should likewise adopt the *Twombly* standard for CR 12(b)(6) because Washington courts look to federal court interpretation of the Federal Rules of Civil Procedure for guidance in construing the Civil Rules.³ *Twombly* abrogated *Conley*, so the 12(b)(6) cases cited by Appellants (*see* Appellants' Opening Brief, pp. 10-11) no longer state the proper 12(b)(6) dismissal motion standard. While Judge Eadie correctly concluded that Appellants' claims failed as a matter of law, Appellants' failure to state a claim under *Twombly* provides a further basis for affirming his order dismissing Appellants' complaint.

B. Appellants' State Law Claims Are Preempted And Were Properly Dismissed.

The federal preemption doctrine has its roots in the Supremacy Clause of the United States Constitution (U.S. CONST. art. VI, cl. 2), under which federal law may preempt the operation of state law. *de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). When

³ The Washington Civil Rules are based on the federal rules. *Sanderson v. Univ. Vill.*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999); *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119 n.2, 147 P.3d 1275 (2006) (Madsen, J., concurring) ("Our version of CR 12(b) mirrors its federal counterpart."). Federal court interpretation of the federal rules is "highly persuasive in determining the effect of Washington's rules." *Sanderson*, 98 Wn. App. at 410 n.10. "The Washington Supreme Court has stated that when the language of a Washington Rule and its federal counterpart are the same, courts should look to decisions interpreting the Federal Rule for guidance." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 n.14, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

federal law preempts claims asserted under state law, those claims are subject to dismissal as a matter of law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). State law can be preempted by a statute enacted by Congress or by regulations adopted by a federal agency under authority granted to it by Congress. *de la Cuesta*, 458 U.S. at 153 (“[F]ederal regulations have no less preemptive effect than federal statutes.”).

State law is preempted if Congress intended that federal law supersede state law. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986). In resolving the preemption question in this case, the Court must decide (1) whether OTS’s preemption regulation is within the scope of the authority that Congress delegated to the OTS and (2) if so, whether the OTS regulations are intended to preempt state law as applied to FSBs in connection with the fees in question. *de la Cuesta*, 458 U.S. at 153-54 (finding that OTS has authority to adopt regulations preempting state law). The answer to both of these questions is “yes”, so Appellants’ state law claims are preempted.

1. Congress Authorized OTS To Adopt Regulations Preempting State Law.

When Congress enacted HOLA in 1933, it was dissatisfied with the disparate and inconsistent state regulations regarding home loans.

Bank of Am., 309 F.3d 551, 559 (9th Cir. 2002). Under Section 5(a) of HOLA, Congress vested the Director of the Board (and later OTS) with plenary authority to issue regulations “to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations.” 12 U.S.C. § 1464(a). The states “had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that [the Board’s] rules would set an example for uniform and sound savings and loan regulations.” *Stein*, 604 F.2d 1256, 1258 (9th Cir. 1979), *aff’d*, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754 (1980), *quoting* Thomas B. Marvell, *The Federal Home Loan Bank Board* 26 (1969).

The United States Supreme Court has made clear that “[t]he broad language of § 5(a) expresses no limits on the Board’s authority to regulate the lending practices of federal savings and loans” and “[it] would have been difficult for Congress to give the [Board] a broader mandate.” *de la Cuesta*, 458 U.S. at 161 (quoting *Glendale Fed. Sav. & Loan Ass’n v. Fox*, 459 F. Supp. 903, 910 (C.D. Cal. 1978)). The Court in *de la Cuesta* concluded:

Congress plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed to be the “best practices.” . . . Thus, the statutory language suggests that Congress expressly

contemplated, and approved, the Board's promulgation of regulations superseding state law.

de la Cuesta, 458 U.S. at 161-62 (citations omitted).

In *de la Cuesta*, the Supreme Court recognized that the regulations have governed the "powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *Id.* at 145 (quoting *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)). The regulation of federal savings associations has been characterized as being so "pervasive as to leave no room for state regulatory control." *Stein*, 604 F.2d at 1260.

Congress unquestionably gave OTS the authority to adopt regulations that would displace and preempt state laws affecting FSBs. The remaining issue is whether OTS regulations preempt state law as to the claims asserted in the Complaint.

2. OTS Regulations Expressly Preempt State Law Affecting An FSB's Imposition Of Loan-Related Fees Like Those Paid By Appellants.

OTS accepted the invitation of Congress to preempt state laws affecting the loan operations, lending, and loan servicing practices of FSBs. Like the Board before it, OTS has regulated "comprehensively the operations of these [FSBs], including their lending practices and, specifically, the terms of loan instruments." *de la Cuesta*, 458 U.S. at 166-67. Section 12 C.F.R. § 560.2(a) reflects OTS's express preemption

and occupation of the entire field of “. . . state laws affecting the operations of federal savings associations. . . .” 12 C.F.R. § 560.2(a).

This OTS regulation makes plain that OTS intended to displace state law with respect to FSBs. The relevant OTS regulation provides:

Occupation of field. . . . [T]o enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), **OTS hereby occupies the entire field of lending regulation for federal savings associations.** OTS intends to give federal savings associations maximum flexibility to **exercise their lending powers in accordance with a uniform federal scheme of regulation.**

12 C.F.R. § 560.2(a) (emphasis added). This key OTS regulation excludes FSB operations from the reach of state law, including common law, by providing that FSBs “may extend credit as authorized under federal law, including this part, **without regard to state laws purporting to regulate or otherwise affect their credit activities.**” *Id.* (emphasis added).

When it adopted the regulation, OTS expressly stated its intention to preempt state laws affecting FSBs and to allow them to operate under one set of rules:

[I]nstead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, federal thrifts are free to originate loans under a single set of uniform federal laws and regulations. This furthers both the “best practices” and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit

to the public free from undue regulatory duplication and burden.

CP 131-32 (61 Fed. Reg. 50951, 50965-66 (Sept. 30, 1996)).

OTS regulations provide a non-exhaustive list of “[i]llustrative examples” of the “types of state laws preempted.” 12 C.F.R. § 560.2(b). Several of the enumerated types of state laws that are preempted by § 560.2 plainly encompass Appellants’ claims. For example, among the categories of state laws set forth in § 560.2(b) are state laws “purporting to impose requirements regarding”:

[t]he terms of credit including . . . adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable . . .

[l]oan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees; [and]

[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.

12 C.F.R. § 560.2(b)(4), (5), (10).

OTS carved out a narrow exception to the preemptive effect of this regulation for certain types of state law claims, but that exception does not apply to Appellants’ claims in this suit. Certain categories of general laws (e.g. contract, real property, and tort) “are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph

(a) of this section.” 12 C.F.R. § 560.2(c). But even these areas of state law are preempted if they more than “incidentally affect the lending operations” or are not consistent with the overarching purpose of providing a single, uniform, and nationwide set of rules for the operations of FSBs. *Id.* According to OTS, “[w]hen analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted.” CP 132 (61 Fed. Reg. 50951, 50966 (Sept. 30, 1996)). Here, the plain language of the OTS regulation makes clear that all of Appellants’ claims are preempted. Appellants’ allegations relate to fees charged in connection with the early payoff of their loan. The disputed fees fall directly within the categories enumerated in § 560.2(b), and so the preemption analysis stops there and the state law on which Appellants rely is preempted as applied to those fees.

3. Fax and Notary Fees Are Loan-Related Fees.

Appellants contend that fax fees and notary fees are not “loan-related fees” under § 560.2(b)(5). Appellants’ Br. at 24-27. Appellants base this argument on a strained and incorrect reading of the regulation which contradicts OTS’s position. OTS has emphasized that fees for preparing and faxing a payoff statement are subject to the “uniform scheme of regulations” because “[t]he payoff statement is an integral part

of the lending process as it provides the information necessary to satisfy the debt and extinguish the extension of credit.” See *Moskowitz v. Wash. Mut. Bank, F.A.*, 768 N.E.2d 262, 265-66, 329 Ill. App. 3d 144 (2002); CP 137-38 (OTS Opinion Letter dated April 21, 2000). Notarizing a release of lien for recording also plainly falls squarely into the broad definition of “loan-related fees.” 12 C.F.R. § 560.2(b)(5) (“Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees[.]”). The language of § 560.2(b) makes clear that “[t]he failure to list [any particular fee] as an example does not signal that OTS meant to exclude state laws regulating such fees from preemption.” *Haehl v. Wash. Mut. Bank, F.A.*, 277 F. Supp. 2d 933, 941-42 (S.D. Ind. 2003).

Under OTS’s own reading of its regulations, OTS “has determined that the payoff statement is integral to the lending process and that payoff statement fees are loan-related fees within the meaning of section 560.2 of the OTS regulations.” *Moskowitz*, 768 N.E.2d at 266; CP 122 & 137 (OTS Opinion Letters concluding that fax fees and demand statement fees are loan-related fees).

4. OTS Has Interpreted Its Own Regulations To Preempt The Very Type Of Claims Alleged Here.

OTS has repeatedly concluded that the preemption regulations preclude the types of claims alleged in this case. These OTS interpretations are entitled to deference. *de la Cuesta*, 458 U.S. at 158 & n.13 (Agency's interpretation of HOLA and its implementing regulations is entitled to deference). In fact, the Supreme Court has repeatedly emphasized that an agency's interpretation of its own regulations must be upheld unless it is plainly erroneous or inconsistent with the regulation. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980); *see also Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991) (courts give substantial weight to the agency's interpretation of the law).

OTS has emphasized that its regulations preempt state law claims regarding payoff-related fees. For example, by letter dated March 10, 1999, OTS considered whether claims for unfair business practices could be asserted under a California statute based on the imposition of "demand statement" fees and "facsimile charges." CP 115; CP 122. OTS observed that "imposing certain loan-related fees" is an "integral component" of an FSB's lending practices and subjecting FSBs to unfair and deceptive claims "would have a significant impact on those operations." CP 119-20.

OTS concluded that “demand statement fees and facsimile charges” are “loan-related fees” within the meaning of § 560.2(b) and therefore state law claims relating to the imposition of these fees are preempted. CP 122.

OTS reiterated this position in another letter regarding the application of a New York statute to an FSB. CP 136 (OTS Letter dated April 21, 2000). A New York court had interpreted one of its statutes in a way that made it illegal for an FSB to charge a fax fee as a part of a payoff. OTS explained why § 560.2 preempted that application of the New York statute:

On November 5, 1999, a New York state appellate court found that a borrower who alleged that a mortgagee charged a fax fee to provide a payoff statement to borrower upon an oral request stated a cause of action for violation of [a New York statute]. . . . OTS regulations are clear that federal law preempts state laws that restrict loan-related fees. . . . Here, the fee the Association charges for faxing loan payoff statements, at the borrower’s request, is a loan-related fee. . . . The payoff statement is an integral part of the lending process as it provides the information necessary to satisfy the debt and extinguish the extension of credit.

CP 137 (emphasis added).

These two letters leave no doubt that OTS has determined that the claims asserted by Appellants in this case are preempted.

5. Courts Applying OTS Regulations Have Concluded That Claims Like Appellants’ Are Preempted.

Using preemption analysis, many courts have held that the very type of state law claims advanced by Appellants here – including breach

of contract and unjust enrichment claims based on fax fees and other payoff-related fees – are preempted by the broad sweep of OTS’s regulatory authority.

In dismissing as preempted state law claims for alleged violations of a consumer protection statute and common law claims for fraud and breach of fiduciary duty, a district court strictly and correctly applied OTS’s preemption analysis. *Prince-Servance v. Bank United, FSB*, 2007 WL 3254432 (N.D. Ill. Nov. 1, 2007):

[I]f the law falls into one of the categories listed in 560.2(b), it is preempted and no further analysis is needed.

Id. at *4 (citation omitted).

In *Prince-Servance*, plaintiffs sought to circumvent preemption by asserting that OTS’ regulations “only preempt laws that regulate a federal savings association’s lending activity, and not laws of general applicability.” *Id.* at *5. The court flatly rejected plaintiff’s proposed “general applicability” analysis, finding that approach “states the issue too broadly.” *Id.* (citing *Lopez v. World Savings and Loan Ass’n*, 105 Cal. App. 4th 729, 741, 130 Cal.Rptr.2d 42 (Cal. App. Ct. 2003)). “[W]hether any given generally applicable state law will be preempted depends solely on whether the conduct complained of falls within the scope of OTS’ regulation.” *Id.* (citing *In re Ocwen Loan Servicing*, 491 F.3d 638, 643-45

(7th Cir. 2007)). But even if the fax and notary fees are not “loan-related fees,” if the claims asserted concern how the fees were disclosed – as Appellants argue here – the disclosure required of FSBs in lending relationships is “also listed as an area within the exclusive purview of the federal laws, and thus [such] state law claims are preempted.” *Id.* (citing § 560.2(b)(9)). This is the only proper and logical result to reach; otherwise, there would be a “hodgepodge” of incongruous state regulations, which “is exactly what OTS was attempting to prevent through preemption.” *Id.* (citing *Haehl v. Washington Mutual Bank*, 277 F.Supp.2d 933, 942 (S.D. Ind. 2003)).

The result in *Prince-Servance* is entirely consistent with other cases applying OTS preemption to claims based on fees like those paid by Appellants. In one case, Plaintiff claimed violation of Illinois’s Consumer Fraud Act and breach of contract. *Moskowitz v. Washington Mutual Bank, F.A.*, 768 N.E.2d 262, 263 (Ill. App. Ct. 2002). Plaintiff had subsequently requested and received a “Demand/Payoff Statement” to pay off her loan in full, which included a prepayment fee, a payoff statement fee, and a fax fee. *Moskowitz*, 768 N.E.2d at 263.

The lender – an FSB – moved to dismiss on the basis that the claim was federally preempted. *Id.* at 264. The court agreed that claim was preempted:

Plaintiff's breach of contract action is premised on defendant's failure to disclose in her mortgage that defendant intended to charge plaintiff a payoff statement fee prior to the release of her mortgage. The effect of plaintiff's claim would be to impose, at the state level, a substantive requirement mandating when in the loan process such fees must be disclosed. . . . By regulating defendant's imposition of payoff statement fees, the use of contract law here would more than "incidentally affect the lending operations" Accordingly, the trial court did not err in determining that plaintiff's breach of contract claim was preempted.

Id. at 266 (citations omitted).

Likewise, in *Haehl*, the court dismissed as preempted state common law claims for fraud, breach of fiduciary duty, concealment, nondisclosure and breach of the duty of good faith and fair dealing, unjust enrichment, and conversion. *Haehl v. Washington Mutual Bank, F.A.*, 277 F.Supp.2d 933, 942 (S.D. Ind. 2003). Plaintiffs argued that these common law claims were "tort" claims, and therefore were expressly permitted under § 560.2(c). *Haehl*, 277 F.Supp.2d at 942. The Court rejected this argument because applying tort law in this way would have the same effect as a direct regulation on the fees. *Id.* ("A decision in plaintiffs' favor would have the same effect as a direct regulation of the fees: to determine the circumstances under which [the lender] may charge its customers a reconveyance fee, which is a loan-related fee."). These claims would more than "incidentally affect" lending operations and

“mean that federal savings associations would be subject to a host of regulations that varied by state.” *Id.* at 942-43. This is “precisely what the OTS sought to prevent in establishing a uniform scheme of regulation for savings associations.” *Id.* at 943. Therefore, the court dismissed all of plaintiffs’ claims, including their common law “tort” claims. *Id.* See also *Boursiquot v. Citibank F.S.B.*, 323 F. Supp. 2d 350, 352, 354-56 (D. Conn. 2004)(dismissing as preempted claims under Connecticut Unfair Trade Practices Act based on charging a “fax/statement fee”); *Lopez v. World Sav. & Loan Ass’n*, 105 Cal. App. 4th 729 (2003)(OTS regulations preempted state law purporting to regulate loan payoff fees, such as fax fees).

The *Prince-Servance*, *Moskowitz*, *Haehl* and *Boursiquot* cases are directly on point. The very types of claims Appellants allege here were also alleged in these cases. All these courts properly held the claims were preempted, and dismissed them on pleading motions. The trial court properly applied the federal preemption doctrine in dismissing Appellants’ three claims because all of the state law claims are preempted by federal law.

Appellants’ theories – that an FSB cannot charge a fax fee or notary fee where the contract is silent and that the fee must be disclosed in a particular way in the loan – are precisely the type of state law

“requirement” that is specifically preempted by § 560.2(b)(4), (5) and (9) (concerning loan-related fees, terms of credit and disclosure). Moreover, Appellants’ claims directly affect lending, as OTS and courts have observed. Otherwise, FSBs would have to evaluate all of the individual state requirements that exist prior to providing their borrowers with payoff quotes. Thus, the exception for requirements that only “incidentally affect” FSBs’ operations does not apply. OTS’s preemption analysis formula and the policy in favor of uniform operating rules embodied in the preemption regulation mandate the conclusion that Appellants’ claims are preempted and were properly dismissed.

6. Appellants’ Cases Do Not Support A Different Result.

a. The Seventh Circuit’s Preemption Analysis Demonstrates That The Dismissal Of Plaintiffs’ Claims Was Proper.

In arguing against preemption, Appellants rely heavily on a recent Seventh Circuit case, *In re: Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638 (7th Cir. 2007). But this case does not save Appellants’ claims from preemption.

Instead, the Seventh Circuit held that the complaint – described as a “hideous sprawling mess” – was so vague that the case was “unripe for a determination of preemption.” *Id.* at 641, 648 (allegations so vague as to

some claims, the court “cannot guess whether they are preempted or not.”).

The court concluded that some of the claims were “pretty clearly, even certainly, preempted.” *Id.* at 648. The court held that alleging a claim that the bank engaged in actionable conduct by “failing to provide mortgagors with adequate monthly statements of their account balances,” assessing “excessive” late fees, and “force placing insurance on properties that already have insurance coverage” were all preempted by OTS regulations. *Id.* at 646. The court reasoned that “prohibiting them could interfere with federal regulation of disclosure, fees, and credit terms.” *Id.*

Similarly, claims under state law that purport to impose a “code of truthful marketing that would constitute the regulation of advertising” would be preempted because advertising “is one of the preempted categories listed in subsection (b).” *Id.* at 647. And a claim that the servicing company was not entitled to impose a “cost-plus pricing scheme” on forced placed insurance is preempted unless “the loan contracts at issue forbade the mortgagee to charge more than the cost of the insurance.” *Id.* (emphasis added).

The Seventh Circuit remanded the case to the trial court to ferret out the nature of the charges and claims involved. *Id.* at 648. The Seventh Circuit also made clear that on remand, the Court should apply the

Twombly standard under Rule 12(b)(6) and require the Complaint to provide “enough factual matter” to provide proper notice of the nature of the claims. *Id.* at 648-49.

While not directly on point – the *Ocwen* case did not involve fax or notary fees – Judge Posner’s opinion plainly supports dismissal of Appellants’ claims in this case. While the Seventh Circuit opined that charging fees that are “forbidden” by the loan contracts would not be preempted, the Seventh Circuit made clear that if the loan documents do not forbid the conduct, then a claim relating to charges would be preempted. *Id.* at 647. Similarly, where the claim related to conduct listed in § 560.2(b), preemption was proper. *Id.* at 643.

Appellants complain about fees that the loan documents do not forbid. On the contrary, Appellants’ loan documents make clear that the failure to list a particular fee is not a prohibition to charging it. Moreover, the fees at issue are “loan-related fees” and fall within § 560.2(b). Accordingly, the claims are preempted and were properly dismissed.

b. *Gibson And Lopez Do Not Allow Appellants to Avoid Dismissal.*

Appellants’ arguments based on two California cases, *Lopez* and *Gibson*, also do not support a different result. As noted in *Prince-Servance*, the “generally applicable law” analysis in those cases missed

the point. *See* 2007 WL 3254432 at *5. And Appellants simply misread *Lopez*. *See* Appellants' Br. at 14-15 (citing *Lopez*, 105 Cal. App. 4th 729, 130 Cal. Rptr. 2d 42 (2003)). *Lopez* held that claims for alleged violations of a statute purporting to limit payoff statement fees were preempted, as were statutory consumer protection claims based on a violation of that statute. 105 Cal. App. 4th at 732. The preemption question faced and decided by the *Lopez* court on appeal simply did not involve the common law claims at issue in this case. *Id.* at 737.

Appellants also wrongly rely on *Gibson*. *See* Appellants' Br. at 16 (citing *Gibson v. World Sav. & Loan Ass'n*, 103 Cal. App. 4th 1291, 128 Cal. Rptr. 2d 19 (2002)). In *Gibson*, plaintiffs alleged that the defendant bank imposed forced place insurance, charged more for it than allowed by the deed of trust and fraudulently misrepresented the cost of the insurance, thereby violating California's unfair competition law. 103 Cal. App. 4th at 1294-95. The *Gibson* court recognized that the OTS formula for analyzing preemption is first to "determine whether the type of law in question is listed in paragraph (b)." *Id.* at 1302, *quoting* 61 Fed. Reg. 50951, 50966-50967 (Sept. 30, 1996). If so, the analysis ends there and the state law is preempted. *Id.* And that is the result required here because both fees are loan-related fees.

c. Appellants' Other Authority Is Off-Point.

Appellants cite other authority to overcome the preemption analysis, but it is inapplicable. *See* Appellants' Br. at 16-17.⁴ *First*, several of Appellants' cases were decided under a prior OTS preemption regulation. This fact alone "casts serious doubt on the continuing validity of the holding in *Siegel*." *Lopez*, 105 Cal. App. 4th at 740. *Second*, none of those cases involved the loan-related fees challenged in this case. *Siegel* and *Konynenbelt* involved reconveyance fees that were found to be specifically prohibited by the DOT. *Siegel*, 210 Cal. App. 3d at 957-58; *Konynenbelt*, 617 N.W.2d at 709. *Sepulveda* involved a lawsuit where an FSB engaged in fraudulent loan transactions in order to avoid criminal and civil liability to circumvent landlord-tenant laws by operating low-income housing in slum-like conditions. *Sepulveda*, 14 Cal. App. 4th at 1700-01. Moreover, the California court in *Sepulveda* held that allegations relating to loan rates and charges were preempted. *Id.* at 1708-09. In *Fenning*, the FSB allegedly misrepresented the nature of the relationship between the FSB and an affiliated brokerage firm and lied about whether certain investments were FDIC insured. 40 Cal. App. 4th at 1289. These

⁴ *Citing Siegel v. Am. Sav. & Loan Ass'n*, 210 Cal. App. 3d 953, 258 Cal. Rptr. 746 (1989); *Konynenbelt v. Flagstar Bank, FSB*, 617 N.W.2d 706, 713 (Mich. App. 2000); *Sepulveda v. Highland Fed. Sav. & Loan*, 14 Cal. App. 4th 1692, 19 Cal. Rptr. 2d 555 (1993); *Fenning v. Glenfed, Inc.*, 40 Cal. App. 4th 1285, 47 Cal. Rptr. 2d 715 (1995).

activities had nothing to do with loan-related charges or the disclosure of such charges. *Id.* at 1289-90.

Appellants' reliance on *McKell* is also misplaced. *See* Appellants' Br. at 21 (citing *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227 (2006)). *McKell* involved state law claims that an FSB was charging more for underwriting, tax services and wire transfer fees in conjunction with home loans than the bank actually paid for the services. *McKell*, 124 Cal. App. 4th at 1465. The court said that the allegations arose from practices governed by RESPA, and thus were not likely governed by HOLA. *Id.* at 1486-87 ("Section 560.2, which interprets HOLA, thus would be inapplicable in determining whether state laws affecting settlement practices are preempted."). Thus *McKell* did not even apply § 560.2 preemption.

McKell was decided shortly before *Weiss v. Washington Mutual Bank*, 147 Cal. App. 4th 72, 53 Cal. Rptr. 3d 782 (2007), a case which Appellants inexplicably ignore even though it is directly on point. In *Weiss*, the plaintiffs challenged the charging of a pre-payment penalty and sued for alleged unfair business practice. *Id.* at 75. The court concluded that prepayment penalties are "loan-related fees" listed in the illustrative examples under § 560.2(b)(5). *Id.* As such, the preemption analysis stops there because the claims are all preempted. *Id.* at 77. The *Weiss* court

declined to consider whether the claims only “incidentally affect” lending. *Id.* The *Weiss* court, which is the same court that decided *McKell*, properly distinguished *McKell* on the basis that *McKell* did not involve the charging of a fee expressly preempted under § 560.2(b). *Id.* at 78 n.5.

d. The *Watters* Decision Supports Preemption.

Appellants’ reliance on *Watters*, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007) is seriously misplaced. In *Watters*, the United States Supreme Court determined that the National Bank Act (“NBA”) created exclusive federal regulatory authority over the operations of national banks, whether those operations were conducted through the national bank itself or through an operating subsidiary. 127 S. Ct. at 1570-71. The NBA authorized national banks to do mortgage lending, subject to “such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.” *Id.* at 1567 (citing 12 U.S.C. § 371(a)). And Congress had authorized national banks to use subsidiaries to perform operations for which the national banks had authority under the NBA. *Id.* at 1570-71. Because Congress intended those operations to be governed by federal law, the state laws at issue were preempted. *Id.*

The *Watters* Court made clear that under the National Bank Act “federal control shields national banking from unduly burdensome and duplicative state regulation.” *Id.* at 1566-67. HOLA likewise was

intended to allow FSBs to operate without interference or burden from state regulation.

As the *Watters* Court correctly noted, under this kind of statutory structure, “the States can exercise no control over [FSBs], nor in any wise affect their operation, except in so far as Congress may see proper to permit.” 127 S. Ct. at 1567 (citations omitted). HOLA’s broad delegation of authority to the OTS unquestionably demonstrates Congress’s intent to preempt state law, except as OTS has chosen to permit its application to the operations of FSBs. OTS and courts applying OTS regulations have found that state law claims like those asserted by Appellants are preempted under HOLA and the applicable OTS regulations. Thus, the Supreme Court’s decision in *Watters* makes clear that the question of whether state law claims are preempted requires careful analysis of Congress’s intent when it enacted HOLA. That analysis demonstrates that HOLA and the applicable OTS regulations preempt all of Appellants’ claims. *Watters* supports preemption rather than counseling against it.

In summary, the OTS’s formula for analyzing preemption shows that Appellants’ claims are preempted. The fees at issue are not “forbidden” by the loan documents and Appellants’ lawsuit would result in a *de facto* regulation of the fees under state law. *See Haehl*, 277 F. Supp. 2d at 942 (holding that the practical effect of permitting state

common law and statutory claims to go forward for allegedly concealing and overcharging fees, including claims of fraud, were preempted because such claims would result in “precisely what the OTS sought to prevent in establishing a uniform scheme of regulation”); *Moskowitz*, 768 N.E.2d at 266. All of the pertinent authority supports the conclusion that federal law preempts Appellants’ state law claims. Therefore, the Court should affirm the dismissal.

7. The Generic Choice-Of-Law Provision Does Not Alter The Preemption Analysis.

Appellants also contend that the choice-of-law provision found in Paragraph 16 of the McCurry Deed of Trust provides for application of both federal and state law, and thus their claims under state law are not preempted. This argument was directly rejected in *Chaires v. Chevy Chase Bank, F.S.B.*, 748 A.2d 34 (Md. App. 2000).

In *Chaires*, plaintiffs alleged that Chevy Chase Bank imposed “illegal” fees, and thus engaged in unfair and deceptive acts and practices. *Id.* at 37. The plaintiffs made claims arising from a number of fees, including “property inspection fees”; “tax service fee”; “documentation fees”; “underwriting fees”; “appraisal fees”; “courier fees”; and fees for bouncing a check. *Id.* at 46-47. The court dismissed all of these claims concluding that claims arising from the imposition of the fees were all

preempted by the OTS regulations. *Id.* In rejecting the very argument advanced here by Appellants, the court held that a general choice of law provision in the deed of trust did not contractually eliminate the preemption defense because “the parties could not elect to have state law govern over federal law.” *Id.* at 42. Rather, the OTS regulations still applied regardless of the language in the contract. The court explained that “upon careful examination of these documents, it appears that the appellees were not attempting to opt for Maryland law over federal law, but were attempting to include a choice of law provision to govern the areas not preempted by the federal regulations. Appellees could not and were not waiving any federal protections.” *Id.* at 45.

This Court should also reject Appellants’ misguided choice-of-law argument. Paragraph 16 of the McCurry Deed of Trust simply means that federal law applies to the extent applicable (including federal laws relating to preemption) and state law also applies to the extent applicable (which would not include those areas of state law that are preempted). The parties simply did not “agree,” nor could they, to eliminate applicable OTS regulations. *Id.*

C. Appellants' Claims For Breach Of Contract And Unjust Enrichment Were Properly Dismissed Even If Not Preempted.

Even if federal law did not preempt Appellants' causes of action, the trial court properly dismissed Appellants' breach of contract and unjust enrichment claims for three additional reasons. *First*, the contract on which Appellants rely does not preclude Chevy Chase from charging the fees about which Appellants complain. On the contrary, the DOT states that mere silence shall not be construed as a prohibition. Courts have held that when, as in this case, a deed of trust is silent on this issue, the lender does not breach the contract by charging payoff-related fees. *Second*, given the contractual language in the DOT, Appellants' claim for unjust enrichment fails as a matter of law. *Third*, Appellants waived these two claims by voluntarily paying the clearly disclosed fees identified in the payoff statement.

1. The Contract Does Not Prohibit The Fees.

Appellants incorrectly allege that the DOT does not permit Chevy Chase to charge fees "other than recordation costs and Trustee fees." CP 7-8 (Compl. ¶ 27). Appellants' conclusory allegation is flatly contradicted by the DOT, which Appellants attached to their Complaint:

Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In

regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

CP 21 (Compl., Ex. A ¶ 14) (emphasis added).

Appellants' DOT does not limit Chevy Chase's right to charge other fees for services requested and provided to its borrowers. The only fees prohibited by the DOT are those expressly prohibited by either the DOT or applicable law. Moreover, the DOT provides that silence in applicable law on the subject of whether parties can reach agreements on issues not covered by the DOT "shall not be construed as a prohibition against agreement by contract." CP 91 (DOT ¶ 16). Appellants cannot point to any provision in the DOT that prohibits the charging of the Notary Fee or the Accumulated Fax Fee, nor is there an express prohibition in Washington law against charging such fees. Thus, Appellants have failed to establish a viable breach of contract claim.

Absent restrictions in the DOT, Chevy Chase is permitted to charge for services it actually provides its customers. *See, e.g., Krause v. GE Capital Mortgage Serv., Inc.*, 731 N.E.2d 302, 311, 314 Ill. App. 3d 376 (2000) (allowing payoff statement fee); *see also Jerik v. Columbia Nat'l, Inc.*, No. 97 C 6877, 1999 WL 1267702, *4 (N.D. Ill. Sept. 30,

1999) (“borrower is not entitled to services from the lender free of charge just because the lender did not anticipate the request”). As one court has explained, “[B]ecause notes and mortgages last for long periods of time, it would be unreasonable to require each mortgage company to anticipate in the initial loan documents the type of services that a borrower may request and the amount that the lender can charge for such services.” *Krause*, 731 N.E.2d at 311 (citing *Cappellini v. Mellon Mortgage Co.*, 991 F. Supp. 31, 39-40 (D. Mass. 1997)).

Even in *Kislak*, a case heavily relied upon by Appellants, the trial court properly granted a motion to dismiss plaintiffs’ breach of contract and unjust enrichment claims based on charging of a fax fee. *See Dwyer v. J.I. Kislak Mortgage Co.*, 103 Wn. App. 542, 545, 13 P.3d 240 (2000). The plaintiff in *Kislak* did not appeal the dismissal of those claims. *Id.* On appeal, the *Kislak* court was careful to note that it would “not infringe on [a lender’s] right to charge a fax fee.” *Id.* at 548. The holding in *Kislak*, which did not involve any preemption defense because the lender in *Kislak* was not regulated by the OTS, unquestionably establishes a lender’s right to charge a fax fee.

Given Chevy Chase’s right to charge for services rendered, and the express provision in the DOT making clear that it is not a breach of contract to do so, Appellants have failed to properly plead a breach of this

DOT. To sustain a breach of their DOT, Appellants must either show that the fees at issue are expressly prohibited by the DOT or applicable law. CP 90 (DOT ¶ 14). Appellants cannot make this showing and, therefore, just as in *Kislak* and the other cases cited above, their breach of contract claim fails.

2. Appellants Failed To Allege A Viable Claim For Unjust Enrichment.

Appellants' unjust enrichment claim is premised on the erroneous conclusion that Chevy Chase was not permitted by the DOT to charge for any additional services. CP 5 (Compl. ¶ 13) ("Appellants paid the two fees, which were neither permitted nor secured by the Deed of Trust"). Because it is not a breach of contract to charge the fees, Appellants' unjust enrichment claim fails.

To state a claim for unjust enrichment the plaintiff must show that the enrichment be unjust and at their expense. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 732-33, 741 P.2d 58 (1987) (affirming dismissal of unjust enrichment claim where defendant, although "enriched," did not act in an "unjust" fashion with respect to the plaintiff). "Not only must the party be enriched but the enrichment must be unjust." *See Truckweld Equip. Co., Inc. v. Olson*, 26 Wn. App. 638, 646, 618 P.2d

1017 (1980) (bank's retention of sale proceeds did not give rise to unjust enrichment claim where bank had a security interest in the collateral).

Here, there is no basis to conclude that Chevy Chase's practice of charging borrowers for additional services rendered is unjust in any way, in fact, Appellants benefited by having their documents notarized and having their payoff statements sent to them promptly via fax. The only potential injustice that Appellants point to is an alleged violation of the mortgage contract, a point on which they are simply wrong. Appellants' allegations did not even state a claim for breach of the only contract term alleged to have been violated. Accordingly, Appellants' conclusory allegations were thus insufficient to sustain their unjust enrichment claim as a matter of law and the trial court properly dismissed the claim.

3. The Voluntary Payment Doctrine Bars Appellants' Contract and Unjust Enrichment Claims.

Appellants' breach of contract and unjust enrichment claims are also barred under the well-established voluntary payment doctrine. Appellants' Complaint shows that they paid the Notary Fee and Accumulated Fax Fee, which Chevy Chase disclosed to them before they paid off their loan. Complaint Exhibit B bears the signatures of the Appellants indicating that they had "read and approved as to form and content." CP 33. The Complaint alleges they paid the fees, but does not

allege that they ever contested the disputed fees. CP 5 (Compl. ¶ 13). Having known about and paid the challenged fees without objection, Appellants cannot now claim that they did not owe them.

Washington has long recognized the voluntary payment doctrine, which bars claims to recover payments that were voluntarily made absent fraud or mistake. *See, e.g., Hawkinson v. Conniff*, 53 Wn.2d 454, 458, 334 P.2d 540 (1959). The Washington Supreme Court acknowledged the ongoing viability of this defense to breach of contract claims less than a month ago. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, No. 79977-6, 2007 WL 3025836, at *14 (Wn. Oct. 18, 2007) (“Washington courts have generally applied the voluntary payment doctrine only in the contract context.”)

That doctrine follows the “universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge by the payor of the facts on which the claim is based, cannot be recovered on the ground that the claim was illegal, or that there was no liability to pay in the first instance.” *Hawkinson*, 53 Wn.2d at 458. The party seeking to recover a payment has the burden of demonstrating that the payment was not made voluntarily. *See Thys v. Rivard*, 25 Wn.2d 345, 361, 171 P.2d 255 (1946) (finding that party seeking repayment had burden of proving “that he had made the payment under a mistake of fact,

or that he had been induced to make the payment by fraud”); *Clark v. Luepke*, 60 Wn. App. 848, 851, 809 P.2d 752 (1991), *aff’d*, 118 Wn.2d 577, 826 P.2d 147 (1992). A plaintiff must plead the bases for avoiding the doctrine. *Putnam v. Time Warner Cable of Se. Wisc., LP*, 649 N.W.2d 626, 637 (Wis. 2002) (looking to the complaint to determine whether fraud or mistake of fact exists and affirming dismissal of claims where exceptions to voluntary payment doctrine were not sufficiently pled). Thus, where the complaint does not demonstrate a reason why the voluntary payment doctrine is inapplicable, *e.g.*, fraud, duress, or mistake of fact, a motion to dismiss should be granted. *See Putnam*, 649 N.W.2d at 637.

A review of the Complaint demonstrates that Appellants’ contract and unjust enrichment claims are barred by the voluntary payment doctrine. Appellants alleged their DOT governs the ability of Chevy Chase to charge fees. CP 4 (Compl. ¶¶ 11, 12). Appellants further asserted that when they sought to payoff their mortgage, “Defendant prepared a Payoff Statement that itemized the amount due to Defendant.” CP 4 (Compl. ¶ 12). Appellants further alleged that they “paid the fees.” CP 5 (Compl. ¶ 13). Finally, the Payoff Statement, which clearly disclosed both fees, bears Appellants’ signatures indicating they read the statement, and approved it for form and content. CP 33 (Compl., Ex. B).

Appellants did not plead any mistake of fact, fraud, or duress that would excuse application of the voluntary payment doctrine. Even if Appellants attempted to cure their pleading deficiency by alleging that at the time that they approved the form and content of the payoff statement (and paid the fees) they were mistaken about whether the disputed fees were contractually owed, such a “mistake” is one of law. *See Stone v. Mellon Mortg Co.*, 771 So.2d 451, 458 (Ala. 2000) (“The Stones’ misperception of the legal significance or effect of Mellon’s including the fax fee in the total shown on the payoff statement constitutes a mistake of law rather than a mistake of fact, and a mistake of law does not preclude the application of the voluntary-payment doctrine.”) (emphasis added). Thus, Appellants’ claims would still be barred by the voluntary payment doctrine as a matter of law. The trial court properly dismissed Appellants’ claims. *See Hawkinson*, 53 Wn.2d at 458; *Putnam*, 649 N.W.2d at 637.

D. Appellants’ Allegations Failed to State A Claim Under Washington’s Consumer Protection Act.

Appellants’ Complaint also does not support a cause of action for violation of Washington’s Consumer Protection Act (“CPA”) for multiple independent reasons. *First*, Washington’s CPA does not apply here because the CPA exempts activities regulated and permitted by the applicable regulatory agency. *Second*, because Chevy Chase was entitled

to collect fees for services rendered at Appellants' request, Appellants cannot circumvent that result by claiming the payment was "deceptive," or that they were "injured" by paying the fees. *Third*, Appellants' bare allegation that they paid the fees is not sufficient to meet the "causation" element of the CPA.

1. Washington's CPA Expressly Exempts The Permitted Activities Of Institutions, Such As Chevy Chase, That Are Exhaustively Regulated.

Appellants' CPA claim failed to state a claim because RCW 19.86.170 provides a carve-out to the CPA's application that is triggered by the OTS's pervasive regulation of the fees that FSBs may charge. RCW 19.86.170 provides, in relevant part:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority

This provision makes the CPA inapplicable to activities that are "closely regulated under federal law." *Interstate Prod. Credit Ass'n v. MacHugh*, 61 Wn. App. 403, 410, 810 P.2d 535 (1991) (citing *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 464, 656 P.2d 1089 (1982)).

As explained above, OTS's regulation over Chevy Chase is extensive. Washington courts have emphasized that where an allegedly unfair practice "is specifically permitted, prohibited, or regulated," it is exempt from the application of the CPA under RCW 19.86.170. *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 420, 865 P.2d 536 (1994). Thus, the cases interpreting RCW 19.86.170 hold that where the activities in question are permitted, prohibited, and heavily regulated, the CPA does not apply. *Tokarz*, 33 Wn. App. at 464 (dismissing CPA claim in substantially identical case when activity of savings and loan was regulated "from its cradle to its corporate grave" by the Federal Home Loan Bank Board, the direct predecessor of the OTS) (citation omitted).

Just as the claim in *Tokarz* against a federally-chartered savings and loan was exempted because of the heavy regulation in the banking industry by OTS' predecessor, so is this claim. *Tokarz* is dispositive and Appellants' CPA claims also failed under this alternative theory.

Similarly, the CPA does not apply when "actions or transactions [are] permitted by any other regulatory body or officer acting under statutory authority." RCW 19.86.170. Here, OTS (i.e., the "regulatory body") acting pursuant to HOLA and OTS regulations (i.e., "under statutory authority") has repeatedly stated that FSBs can charge the very fees plaintiffs complain about even if there are state laws purporting to

prohibit the imposition of those fees. *See* CP 122 (OTS Letter Dated March 10, 1999) (“The fees at issue in the example provided by the Associations, demand statement fees and facsimile charges, are loan-related fees” and therefore state law claims relating to imposition of these fees is preempted); CP 137 (OTS Letter Dated April 21, 2000) (New York statute purporting to regulate charging of fax fee is preempted). Thus, Appellants’ CPA claim is flatly barred by the plain language of RCW 19.86.170 and the unequivocal statements of the OTS that FSBs may charge such fees without regard to state law restrictions.

2. Appellants Did Not Allege Key Elements Of A CPA Claim, So Dismissal Was Proper

Even if the CPA applied in this context (which it does not), Appellants failed to properly allege a claim under the CPA. The seminal case setting forth the five required elements to establish a CPA claim is *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Under the *Hangman Ridge* test, a private citizen must show (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to a party’s business or property, and (5) which injury is causally linked to the unfair or deceptive act. *Id.* at 784-85. Failure to properly plead any one element is fatal to a CPA claim. *Id.* at 780.

a. Chevy Chase's Specific Identification Of The Fees Was Not Misleading.

Appellants cannot meet the CPA's requirement of an unfair or deceptive act or practice first element because the payoff statements they received from Chevy Chase clearly identify the fees Appellants were charged. Chevy Chase identified by name and specific amount the Notary Fee and Accumulated Fax Fee. Appellants cannot allege that they did not know they were incurring those fees because an exhibit to their own Complaint shows that they reviewed and approved the payoff statement before they paid off the loan. CP 102. Claimants cannot claim that charging the fees was somehow "unfair" because they relate directly to services they requested Chevy Chase Bank to perform. *Id.*

Nor can they claim that the payoff statement had the capacity to deceive them about the nature of the fees. Because of Chevy Chase's clear labeling of the fees, this matter is readily distinguishable from the facts in *Kislak* where the disclosure of the fax fee was found to be deceptive. *Kislak*, 103 Wn. App. 542, 545, 13 P.3d 240 (2000).

In *Kislak*, the trial court granted a motion to dismiss the plaintiffs' breach of contract and unjust enrichment claims based on charging of a fax fee. *Id.* at 544. Appellants survived a motion for summary judgment on their CPA claim by showing the lender had concealed fees for

providing expedited delivery of a payoff statement by mislabeling the fax fees as “Misc Service Chgs,” and provided a payoff statement that made it appear that those “Misc. Service Chgs.” were secured by the DOT. *Id.* at 547. On appeal, the lender argued that the first element of the CPA was not satisfied. *Id.* at 545-46. While the court made clear that it would “not infringe on [a lender’s] right to charge a fax fee”, it did determine that the method of disclosure was potentially deceptive. *Id.* at 548.

Chevy Chase’s payoff statement does not run afoul of *Kislak*. Chevy Chase did not misname the fees in an effort to conceal them from Appellants. Chevy Chase plainly labeled and set forth as separate line items both the Notary Fee and Accumulated Fax Fees. CP 102. Nor did Chevy Chase include language indicating that the fax fee and notary fees were part of the secured obligation under the DOT. The payoff statement properly and accurately labels the payoff amount as the “Total Amount Due Chevy Chase.” This description is true – Chevy Chase had been requested to perform services for which it was entitled to charge fees.

b. Appellants Are Charged With Knowing Which Amounts Are Secured By The DOT.

Moreover, under the traditional duty to read in contract law, “a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.” *Michak v.*

Transnation Title Ins. Co., 148 Wn.2d 788, 799, 64 P.3d 22 (2003). Here, (as Appellants point out in their brief), Appellants had complete information about which amounts were or were not secured by the DOT. Appellants' Br. at 40. They cannot conveniently claim not to have known this information in order to support their after-the-fact suggestion that the form of the payoff statement somehow had the capacity to mislead them, especially in light of the clear delineation of the fees and their amounts.

c. Appellants Suffered No Injury Cognizable Under The CPA.

Appellants cannot meet the fourth and fifth elements of a CPA claim because Chevy Chase did not breach the contract by charging for services rendered, which it plainly had the right to do under the parties' DOT. CP 21 (Compl., Ex. A ¶ 14) (making clear that the lender could charge fees not mentioned in the DOT unless such fees were expressly prohibited); *Kislak*, 103 Wn. App. at 546 n.3 (observing that the "actual charge of a fully disclosed fax fee is not misleading"). Chevy Chase need not offer services for free. *See Jerik*, 1999 WL 1267702 at *4 ("borrower is not entitled to services from the lender free of charge"). Injury is a necessary element to establish a private CPA claim for damages. Charging a fee that is owed is not "deceptive," and paying the agreed fee does not result in any "injury."

In *Clark v. Luepke*, 118 Wn.2d 577, 584, 826 P.2d 147 (1992), a car owner brought claims against a mechanic for numerous violations of the Automotive Repair Act, RCW 46.71 (“ARA”). Ordinarily, a violation of the ARA constitutes a violation of Washington’s CPA. See RCW 46.71.70. However, the mechanic only collected amounts that he would have been otherwise entitled to collect because the sums collected were authorized by the owner in advance. *Clark*, 118 Wn.2d at 583-84. Although Washington’s Supreme Court found the repair shop violated the ARA, it nevertheless found that “[a]bsent proof of injury for the ARA violations, [the plaintiff] cannot maintain a private action for damages under the CPA based upon these violations.” *Id.* at 584-85.

Like the car owner in *Clark*, Appellants only paid Chevy Chase fees they incurred for services rendered, and thus they actually owed. Accordingly, even if a court were to conclude that Chevy Chase’s payoff statement (that they approved as to form and content) had the “capacity to deceive” borrowers who had already authorized the fees, Chevy Chase only collected sums actually owed to it. Accordingly, Appellants’ CPA claim fails because they cannot show any injury arising from the alleged CPA violation.

d. Appellants Do Not Allege CPA "Causation."

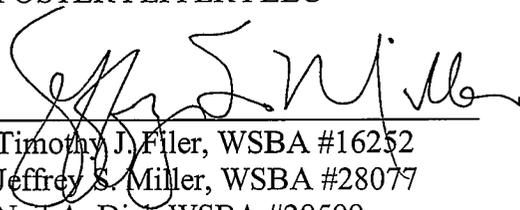
Finally, Appellants' allegations do not allege facts sufficient to show the "causation" element of the CPA claim. It is not enough to say the fee was charged and paid "because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff's damages." *Indoor Billboard/Wash.*, 2007 WL 3025836, at *12. Appellants allege nothing more than payment of the challenged fees, CP 5, and therefore fail to state a claim.

V. CONCLUSION

The trial court ruled correctly when it dismissed Appellants' lawsuit in its entirety against Chevy Chase under CR 12(b)(6), and this court should affirm that holding.

RESPECTFULLY SUBMITTED this 16th day of November, 2007.

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No. 60075-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ANNE and CHRIS McCURRY,

Appellants,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

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DECLARATION OF SERVICE

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Kellie DeVera declares that on November 16, 2007, a true and correct copy of Brief of Respondent was served via hand-delivery upon:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECTUED at Seattle, Washington this 16th day of November,
2007.


Kellie DeVera

DECLARATION OF SERVICE