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No. 71724-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MARISA BAVAND,

Appellant/Plaintiff,

v.

CHASE HOME FINANCE, et al.,

Respondents/Defendants.

RESPONDENT FLAGSTAR BANK, F.S.B.'S ANSWERING BRIEF

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I. INTRODUCTION

Appellant Marisa Bavand borrowed $160,000.00 from Capital Mortgage Corporation ("Capital Mortgage") to purchase investment property. To secure her obligation to repay this loan, Appellant signed a Deed of Trust listing an officer of Respondent Flagstar Bank, FSB ("Flagstar") as Trustee. Eight years later—long after Flagstar's involvement with her loan ended—Appellant's investment (and the economy as a whole) soured, triggering foreclosure by JPMorgan Chase Bank, N.A. ("Chase"),[1] the subsequent holder of her promissory note.

In an effort to stave off foreclosure, Appellant filed this lawsuit against Chase and its agent, Northwest Trustee Services, Inc. ("Northwest Trustee"). Remarkably, Appellant also names Flagstar in the lawsuit—an entity she admits played no role in her foreclosure—alleging only that at some point in the last eight years "Flagstar was apparently both the trustee and beneficiary under the Deed of Trust, in violation of RCW 61.24.020" of the Washington Deed of Trust Act (DTA). Finding no controverting evidence had been presented, the trial court awarded summary judgment to Flagstar. This Court should affirm the trial court's Order.

II. STATEMENT OF THE CASE

A. Factual Background.

Appellant's Note. On March 18, 2004, Appellant borrowed $160,000.00 from Capital Mortgage, and Appellant's loan was evidenced by a promissory note (the "Note") payable to Capital Mortgage. *See* Clerk's Papers ("CP") 1839 ¶ 3.2; *see also* CP 1502-05. Immediately

[1] JPMorgan Chase Bank, N.A. is successor by merger to Chase Home Finance, LLC, which no longer exists as of May 1, 2011.

thereafter, the Note was transferred to Flagstar by Capital Mortgage. CP 1839 ¶ 3.2. The Note bears an endorsement to Flagstar as well as a Flagstar endorsement in blank. CP 1504-05.

The Note defined Capital Mortgage as the initial "Lender" but required Appellant to acknowledge that she "underst[ood] that the Lender may transfer this Note," and that the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" CP 1502. The Note explained that the parties entered into a Deed of Trust the same day, and that the Note holder would have certain rights upon Appellant's default: "In addition to the protections given to the Note Holder under this Note, a . . . Deed of Trust. . . dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note." CP 1503.

Appellant's Deed of Trust. To secure repayment of the Note, Appellant executed a deed of trust (the "Deed of Trust") encumbering real property located at 628 168th Place SW, Lynnwood, Washington 98037 (the "Property").

The Deed of Trust names "'Joan H. Anderson, EVP' on behalf of Flagstar" as Trustee. CP 1839 ¶ 3.3; CP 1859 at (D). It also provides—consistent with Washington law, RCW 61.24.010(2)—that Ms. Anderson could be replaced with a new trustee at any time and that any "successor trustee shall succeed to all the title, power and duties conferred upon

Trustee." CP 1868 ¶ 24. Thereafter, "on or about the same day that the Note was executed," Capital Mortgage sold Appellant's Note to Flagstar making Flagstar the beneficiary of the Deed of Trust. CP 1839 ¶ 3.2; RCW 61.24.005 (beneficiary is note holder).

Appellant concedes Flagstar's ownership of her loan was short-lived. By April 1, 2004, barely one week after she executed the Deed of Trust, Appellant admits Federal National Mortgage Association ("Fannie Mae") owned the rights to receive payments from the Note holder on the loan. CP 1842 ¶ 3.12. But Appellant's Note was quickly transferred to Chase in May 2004 and Flagstar's role ended. CP 1499 ¶¶ 5-6; CP 1507.

Appellant Defaulted on Her Loan in September 2010.

Appellant defaulted under the Note and Deed of Trust by failing to make payments starting in September 2010—over four years ago. CP 1887-89. As a result, Chase delivered (through its agent) a Notice of Default on or about February 1, 2011, listing total arrears at that point of $8,565.62. *Id.* ¶ D. The Notice of Default also explained that failure to cure the default within 30 days would result in recordation of a Notice of Trustee's Sale and a sale of the property within 120 days after the Notice of Trustee's Sale. *Id.* ¶ G. Finally, the Notice of Default explained Chase was beneficiary of the Deed of Trust (as Note holder), it was Appellant's creditor, and it was also the loan servicer. CP 1889 ¶¶ K, L(2).

Chase Appoints a New Trustee and Initiates Foreclosure. After Appellant defaulted on her loan, Chase recorded its appointment of

Northwest Trustee as successor trustee—replacing the Flagstar officer initially named as Trustee under the Deed of Trust. CP 1583; CP 1842 ¶ 3.11; & CP 1891. As required by the Deed of Trust Act, RCW 61.24.030(7), Chase executed and delivered to Northwest Trustee a declaration (the "Beneficiary Declaration"), stating Chase was "the actual holder of the promissory note or other obligation evidencing the above-referenced loan" or "has requisite authority under RCW 62A.3-301 to enforce said obligation." CP 1598; *see also* CP 261:12-15.

Northwest Trustee Schedules a Trustee's Sale. Because Appellant did not cure her default, Northwest Trustee initiated foreclosure on Chase's behalf through a May 2012 Notice of Trustee's Sale—15 months after Flagstar's role ended. CP 1842 ¶ 3.13 & CP 1895-1900. To delay the inevitable trustee's sale, Appellant filed a Complaint in August 2012 suing every party involved with her loan and the foreclosure process. *See* CP 1836-51. But Appellant's Complaint is generally based on one legal theory—that none of the "Defendants had any right to initiate the non-judicial foreclosure procedures set out in [the DTA]." CP 1845 ¶ 4.6. Appellant's Complaint sought damages and injunctive relief because ***defendants other than Flagstar*** allegedly tried to wrongfully enforce the Note and Deed of Trust. CP 1844 ¶ 3.17.

B. Procedural Background.

Flagstar's Motion for Summary Judgment. On January 28, 2014, Flagstar filed its summary judgment motion. CP 1515-31. The

motion was supported by the declaration of Lisa L. Mahony, a Flagstar employee, who based her testimony on personal review of Flagstar's business records. CP 1498-1500. Attached to the Mahony Declaration were copies of the indorsed Note and a screen-shot from Flagstar's document management system showing the transfer of the loan to Chase. CP 1501-07. On the same date, Chase, Fannie Mae, MERS, and Northwest Trustee filed motions from summary judgment. CP 1604-1706.

On February 14, 2014, Appellant filed a memorandum in opposition to Defendants' motions. CP 1449-97. Instead of providing evidence disputing the facts presented in Defendants' motions, Appellant submitted a Declaration of Tim Stephenson—with a purported "forensic audit" of Appellant's loan—consisting almost entirely of legal conclusions. CP 1368-86.

Defendants moved to strike the Stephenson Declaration. CP 305-10. Moreover, Flagstar's reply brief pointed out that Appellant does not dispute that: (i) Ms. Anderson took ***no*** action as Trustee; (ii) Flagstar made ***no*** misrepresentations about the loan to Appellant; (iii) Flagstar had ***no*** involvement with nonjudicial foreclosure; and (iv) Flagstar did not otherwise affect Appellant in any way. CP 131-47. The evidence in the record established Flagstar's involvement with Appellant's loan was short-lived, and that Flagstar had no involvement with her loan after 2004. *Id.* It was Chase and Northwest Trustee that initiated foreclosure, not Flagstar. Flagstar's active role ended over 10 years ago.

The Trial Court Granted Summary Judgment. Finding no controverting evidence had been presented, the trial court awarded summary judgment to Defendants on March 26, 2014. CP 52-56. On the same date, the trial court entered an order striking the Stephenson Declaration. CP 57-59. On April 3, 2014, Appellant filed a Notice of Appeal. CP 41-51.

III. ARGUMENT

A. Standard of Review.

This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000) (citing *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147 (1997)). In determining whether a genuine issue of material fact exists, this Court construes the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 963 (1997). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). If the moving party meets this initial showing and is a defendant, the burden shifts to the plaintiff. *Id.*

B. The Trial Court Properly Granted Summary Judgment Notwithstanding Appellant's Contention that Ms. Anderson was an Improper Trustee.

On appeal, Appellant reiterates her contention that there are defects in the Deed of Trust by observing that Joan Anderson, a Flagstar officer, was appointed as original trustee of the Deed of Trust in March 2004, notwithstanding that Flagstar became the beneficiary of the Deed of Trust on "April 4, 2004, approximately seventeen days after the execution of the Deed of Trust." Appellant's Br. at 18-19.

While it is not clear for which claims Appellant makes this point, it does not matter. To the extent Appellant claims the designation of Ms. Anderson in the Deed of Trust violates the CPA, that claim is barred by the CPA's four-year limitations period, since Appellant filed her Complaint in August 2012. *See* RCW 19.86.120. The effect of an ineligible trustee—and Flagstar does not concede Ms. Anderson was an improper trustee—is only that the beneficiary may not nonjudicially foreclose until a new trustee is appointed.[2] That is precisely what happened.

To the extent Appellant suggests foreclosure by other parties was wrongful because the Deed of Trust lists Ms. Anderson as Trustee, such claim fails as to Flagstar because Ms. Anderson was replaced as Trustee by Northwest Trustee before any foreclosure began. CP 1885; CP 1895-1900. Appellant does not suggest that Northwest Trustee is somehow an

[2] Of course, the beneficiary could always elect to judicially foreclose, making the Trustee irrelevant to enforcement of the loan. Here, Flagstar did not take any foreclosure actions.

invalid trustee. Appellant thus cannot show injury caused by Ms. Anderson's designation, since she never took any action as Trustee. As a result, any claim based on her designation fails as a matter of law. Moreover, the Washington Supreme Court has expressly held that there is not damages claim for wrongful foreclosure initiation absent a completed foreclosure. *See Frias v. Asset Foreclosure Serv. Inc.*, --- Wn.2d ---, 2014 Wash LEXIS 763 (Sep. 18, 2014). The "DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed." *Id.* at *1.

And regardless, Appellant's theory is also wrong substantively. Although the DTA once prohibited an employee, agent, or subsidiary of a beneficiary from serving as the trustee for the beneficiary under the same deed of trust, this prohibition changed almost forty years ago: "[T]he Legislature specifically amended the statute in 1975 to allow an employee, agent or subsidiary of a beneficiary to also be a trustee." *Cox v. Helenius*, 103 Wn.2d 383, 390 (1985) (citing Laws of 1975, 1st Ex.Sess., ch. 129, § 2).[3] And the Legislature did this for good reason: "The amendment furthers the general intent of the act that nonjudicial foreclosure be efficient and inexpensive, and in the ordinary case would present no problem." *Id.* Every court to consider the issue has rejected Appellant's

[3] In 1975, the Legislature deleted that portion of 61.24.020 which read, "nor may the trustee be an employee, agent, or subsidiary of a beneficiary of the same deed of trust." Laws 1975, 1st Ex.Sess., ch. 129, § 2.

argument here. *Cascade Manor Assoc. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 69 Wn. App. 923, 934-35 (1993) (holding the DTA "does not does not prohibit a trustee from also acting as the attorney for the beneficiary"); *Meyers Way Dev. Ltd. P'ship v. Univ. Savings Bank*, 80 Wn. App. 655, 666 (1996) (noting DTA does not "prevent a trustee from serving simultaneously as the creditor's attorney, agent, employee or subsidiary. The trustee serving in such a dual role must transfer one role to another party if serving in this capacity causes an actual conflict of interest with the debtor.").[4]

Finally, even if Ms. Anderson were somehow an improper trustee or was otherwise unqualified, that does not make the Deed of Trust void, it would just make the Deed of Trust unenforceable nonjudicially until a proper trustee is appointed. (In fact, the Deed of Trust could still be judicially foreclosed by the beneficiary.) Appellant's counsel made a similar argument with regard to MERS at the Washington Supreme Court in *Bain v. Metro. Mortg. Grp,. Inc.*, 175 Wn.2d 83 (2012)—*i.e.*, arguing that designating MERS as beneficiary voided the Deed of Trust. *See Bain*,

[4] *See also Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, *6 (E.D. Wash. 2011) ("a subsidiary or a person or entity otherwise acting as agent for the beneficiary may serve as trustee under the Deed of Trust Act. ... Therefore, the Court finds that with regard to this argument the Plaintiffs do not state a plausible claim for relief."); *see also US Bank N.A. v. Woods*, 2012 U.S. Dist. LEXIS 78676, 15-17 (W.D. Wash. 2012) ("Washington case law allows 'an employee, agent or subsidiary of a beneficiary to also be a trustee'"). And every major treatise on the DTA agrees. 2 Wash. Real Prop. Deskbook Series: Real Estate Essentials § 21.7(1) (2012) ("Although RCW 61.24.020 prohibits the same person or entity ... to act as trustee and beneficiary under one deed of trust, an employee, agent, or subsidiary of a beneficiary may act as the trustee.") Wm. B Stoebuck & John W. Weaver, 18 Wash. Prac., Real Estate § 20.8 (2d ed. 2012) ("This amendment, according to the Washington Supreme Court in *Cox v. Helenius*, had the effect of permitting the beneficiary's officers and attorneys to act as trustee").

175 Wn.2d at 112-13. The Washington Supreme Court rejected that argument, as having "no authority." *Id.* The only effect of having an improper trustee (and there was not one) is that there could be no nonjudicial foreclosure until after appointment of a new Trustee—exactly what happened here. Thus, because there was and is a current valid trustee under the Deed of Trust, it is not void.

Simply put, Flagstar cannot be liable for DTA violations over the Deed of Trust because there was no completed foreclosure, Flagstar did not take any actions under the DTA, and Flagstar has had no interest in the Deed of Trust for over 10 years. The DTA "is not a rights-or-privileges-creating statute." *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106 (2013). Instead, it is an elaborate system of checks and balances crafted by the legislature to allow a fair and efficient foreclosure process. *Bain*, 175 Wn.2d at 94. But because the DTA does not create any liability-creating rights, Flagstar took no steps toward foreclosure, and there is no damages claim under DTA, these claims fail as to Flagstar.

C. Appellant's DTA and Wrongful Foreclosure Claims Fail Because She Admits Flagstar Was Not (and Is Not) Involved in the Foreclosure Process.

The thrust of Appellant's lawsuit is that Chase and Northwest Trustee lacked the authority to enforce the terms of the Note and Deed of Trust and thus could not initiate nonjudicial foreclosure. CP 1836-1976. Appellant alleges foreclosure initiation was wrongful because "none of the above-named Defendants had any right to initiate the non-judicial foreclosure procedures set out in RCW 61.24 *et seq*." as "none of the

above-named Defendants . . . obtained the express authority from the true and lawful holder and owner of the subject Promissory Note to take any action against Plaintiff." CP 1845 ¶¶ 4.5-4.6.

Appellate made these allegations before the Washington Supreme Court held that there is no pre-sale damages claim for wrongful foreclosure. *See, e.g., Frias*, 2014 LEXIS 763, at 1. The Court should affirm summary judgment on this basis alone.

Regardless, this claim fails on the merits as to Flagstar for one simple and straightforward reason—the evidence shows Flagstar had no involvement in the nonjudicial foreclosure as Northwest Trustee replaced Ms. Anderson as successor trustee on February 2, 2011. *See* CP 1583; CP 1842 ¶ 3.11, & CP 1891.

When a borrower defaults on a loan secured by a deed of trust, the DTA allows the trustee to foreclose the deed of trust and sell the property without judicial supervision—provided certain requirements are met. *Bain*, 175 Wn.2d at 92-94. Should the trustee fail to comply with these requirements, the "DTA provides the only means by which a [borrower] may preclude a sale once foreclosure has begun." *Frizzell v. Murray*, 170 Wn. App. 420, 427 (2012), *rev'd in part on other grounds*, 179 Wn.2d 301 (2013). There is no remedy under the DTA against a party not involved in the foreclosure process. *See Frase v. U.S. Bank, N.A.*, 2012 WL 1658400, *9 (W.D. Wash. 2012).

In *Frase*, the court considered whether ***undisputed*** DTA violations by a ***previous*** trustee affected the validity of a second foreclosure action initiated after that trustee had been replaced by a successor trustee. *Id.* at *9. Because the initial trustee was not involved in the foreclosure, and thus could not have violated the DTA, the court dismissed the claims against that trustee. The court held "[i]ndeed, [the initial trustee] is no longer the trustee with respect to the new foreclosure proceedings. U.S. Bank has appointed Peak Foreclosure as the new successor trustee. The alleged violations, therefore, that Mr. Frase raised in his complaint with respect to Deed of Trust Act are no longer at issue. . . . Accordingly, the court dismisses this cause of action." *Id.*

Here, Appellant admits Ms. Anderson was named as trustee only in the original deed of trust (before Flagstar was beneficiary). Appellant's Br. at 19; CP 1839 ¶ 3.3. And Appellant concedes Northwest Trustee replaced Ms. Anderson as trustee on February 2, 2011. Appellant's Br. at 3; CP 1842 ¶ 3.11. Because the initiation of the nonjudicial foreclosure process took place after February 2, 2011, and was conducted by an entirely different trustee (*i.e.*, Northwest Trustee), Appellant cannot maintain a claim against Flagstar under the DTA. Indeed, it would make little sense to hold Ms. Anderson (or Flagstar) liable for the conduct of someone else over which she had no control. *See* 18 Wash. Prac. § 20.8 ("The ability to resign and be replaced can be a valuable safeguard for the beneficiary."). The trial court, thus, properly granted summary judgment

in favor of Flagstar on Appellant's claims for violation of the DTA and wrongful foreclosure.

D. The Trial Court Properly Granted Summary Judgment on Appellant's CPA Claim.

Flagstar moved for summary judgment on Appellant's CPA claim by arguing her alleged claim against Flagstar accrued on March 24, 2004 when Ms. Anderson was designated as trustee in the Deed of Trust. The Deed of Trust itself revealed that Flagstar would take over the loan, as the cover page states that upon recordation it should be returned to Flagstar. *See* CP 925. As a result, Appellant's claim was time-barred by the CPA's four-year limitations period. *See* RCW 19.86.120. But even if it were not time-barred, Appellant failed to satisfy all five elements for a Washington CPA claim, which require proof of: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to the plaintiff's business or property; and (5) that injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Indeed, Flagstar did nothing unfair or deceptive, and Appellant offered no evidence showing that Appellant was injured by Flagstar's actions. As a result, the trial court properly granted summary judgment on Appellant's CPA claim.

1. Appellant Failed to Identify An Unfair or Deceptive Act or Practice.

"[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard*

Wash., Inc. v. Integra Telecom of Wash., 162 Wn.2d 59, 74 (2007) (citation omitted). Appellant can meet the first CPA element by establishing either that an act or practice (i) has a capacity to deceive a substantial portion of the public, or (ii) that the alleged act constitutes an unfair trade practice. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986)). Appellant must have therefore alleged facts showing that Flagstar's acts have the capacity to deceive a substantial portion of the public or show an unfair trade practice as set out by the Legislature. Appellant cannot do either.

Flagstar did not commit any *per se* unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice as being *per se* "unfair." *Hangman Ridge*, 105 Wn.2d at 787. Appellant cites no statutory violation that is a legislatively declared *per se* CPA violation, and thus there is no basis for a CPA claim tied to a *per se* "unfair" act or practice. Appellant cannot show that Flagstar committed a *per se* CPA violation, and thus she cannot establish a *per se* unfair act as a basis for a CPA claim.

Further, to show Flagstar acted "unfairly" under the CPA—outside the context of a *per se* unfair trade practice—Appellant must show Flagstar took some action violating the public interest, which typically requires a showing that Flagstar's practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by

consumers themselves and is not outweighed by countervailing benefits." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 ¶ 33 (2013) (citing FTC standard). Appellant's Complaint does not allege Flagstar acted unfairly at all, let alone in a manner "likely to cause substantial injury to consumers."

Appellant likewise failed to offer any evidence establishing any deceptive practice by Flagstar. To be "deceptive," the act or practice must be one that "misleads or misrepresents something of material importance." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007). Appellant does not allege Flagstar misled her about any material fact—indeed, Flagstar made no representations to her at all—and thus cannot show deception. Moreover, even if Appellant did allege deceptive acts toward her, she must also allege facts showing Flagstar's conduct had the capacity to deceive a substantial portion of the public.

Should Appellant's reply brief argue it was deceptive that an officer of Flagstar was named as Trustee when Flagstar would later acquire the underlying loan (briefly), that argument fails as well because the DTA allows a corporate officer of the beneficiary to serve as trustee and because such a claim is barred by the CPA's four-year limitations period in any event. RCW 19.86.120 ("Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues."). Ms. Anderson was named as Trustee on the Deed of Trust dated March 24, 2004, and

Appellant signed that Deed of Trust over a decade ago. *See* CP 1839 ¶ 3.3; CP 1858-1876. Accordingly, any CPA claim premised on the fact Flagstar held that Note at the same time that Ms. Anderson was designated as Trustee on the Deed of Trust is time-barred.

2. There is No Public Interest Impact.

A plaintiff asserting a CPA claim must also allege facts demonstrating that the act complained of impacts the public interest. The factors to be considered when evaluating this element depend upon the context in which the alleged act was committed. *Hangman Ridge*, 105 Wn.2d at 780. Because Appellant complains of a consumer transaction, the following factors are relevant:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

McKenna v. Commonwealth United Mortg., 2008 WL 4379582, *5 (W.D. Wash. 2008) (quoting *Hangman Ridge*, 105 Wn.2d at 790). In *McKenna*, the court dismissed a CPA claim, finding the plaintiffs failed to: "identify any facts from which a reasonable jury could conclude that additional plaintiffs have been or will be injured in the same fashion; that the alleged conduct was part of a pattern or was repeated prior to the conduct alleged in this matter; that there is potential for similar conduct in the future; [or] that many consumers were affected, or will likely be affected, by the

conduct." *Id.* In other words, "it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Hangman Ridge*, 105 Wn.2d at 790.

Because Appellant failed to identify any deceptive act committed by Flagstar, there is no public interest impact. A necessary prerequisite to a public interest impact is a deceptive act. Appellant's failure to allege a deceptive act thus prevents her from satisfying the public interest prong of her CPA claim.

3. Appellant Does Not Allege Compensable Injury or Any Causal Link Between Flagstar's Acts and Injury.

Appellant's CPA claim also fails because she cannot show an actionable injury. "Even if the deception element of the CPA is met, the Plaintiffs cannot make a claim under the CPA because they cannot show injury." *Mickelson v. Chase Home Fin. LLC*, 901 F. Supp. 2d 1286, 1288 (W.D. Wash. 2012). Notwithstanding that the only specified injury in her Complaint is "the distraction and loss of time to pursue business and personal activities due to the necessity of addressing wrongful conduct" (CP 1848 ¶ 5.9), Appellant argues on appeal that Flagstar's failure to inform her that her loan was sold to Fannie Mae in April 2004, "deceived and prevented her from meaningfully pursuing her options under the federal Home Affordable Modification Program (HAMP)." Appellant's Br. at 44.

As a threshold matter, Appellant paradoxically and falsely states that she "did not become aware of Fannie Mae's involvement until receiving a copy of Ms. Mahony's Declaration on January 28, 2014 and confirmation of the fact with the Declaration of Tim Stephenson on February 13, 2014" (Appellant's Br. at 44-45), despite Appellant naming Fannie Mae as a defendant in her 2012 Complaint and acknowledging that by April 1, 2004, Fannie Mae owned the rights to payment on the loan. CP 1842 ¶ 3.12. Furthermore, Appellant remarkably posits that had she known that Fannie Mae "owned her loan, she could have pursued Fannie Mae sponsored programs that might have provided her a modification of her loan." Appellant's Br. at 44. This theory fails for several reasons.

First, both the Deed of Trust and the Note explained to Appellant that her loan could be sold without notice. Indeed, the Note defined Capital Mortgage as her initial "Lender" but required Appellant to acknowledge that she "underst[ood] that the Lender may transfer this Note," and that the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" *See* CP 1853. Like the Note, the Deed of Trust explained that Appellant's initial "Lender" was Capital Mortgage, but that Capital Mortgage or any subsequent holder of the Note could sell the Note without providing notice to her: "Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to

Borrower." *See* CP 1866 ¶ 20.

Second, courts have universally held that there is no private right of action to enforce HAMP. *See, e.g., Vida v. OneWest Bank, F.S.B.*, 2010 WL 5148473, at *3-6 (D. Or. Dec. 13, 2010) (collecting cases and finding that "there is uniform agreement that HAMP does not provide for a private right of action and, even if [plaintiff] could establish a violation of HAMP, she lacks standing to assert such a claim"); *Simon v. Bank of Am., N.A.*, 2010 WL 2609436, at *10 (D. Nev. June 23, 2010) ("[HAMP] does not provide borrowers with a private cause of action against lenders"); *In re Castano*, 2011 WL 3809932, *1 (Bankr. N.D. Cal. 2011) (plaintiffs cannot "circumvent the lack of a private right of action under HAMP by pleading state law" claims) (citing cases); *Macris v. Bank of Am., N.A.*, 2012 WL 273120, *5-*6 (E.D. Cal. 2012) (rejecting state law claim as disguised HAMP claim); *Abreu v. Countrywide Bank, FSB*, 2009 WL 2913509, *2 (D. Md. 2009) ("The law is clear that Freddie Mac guidelines ... are not intended to, and do not, grant borrowers any rights and are not part of the contract between lender and the borrower.").

Third, where, as here, Fannie Mae owns the rights to payment on the loan, the HAMP-specific guidelines by their terms do not apply to loans where Fannie Mae is the investor.[5] Thus, HAMP guidelines would

[5] *See* Supplemental Directive 12-02: Making Home Affordable Program, at p. 2 (noting effective of June 1, 2012 and that "guidance does not apply to mortgage loans that are owned or guaranteed by Fannie Mae or Freddie Mac"), p. 5-6 (expanding program for non-Freddie/Fannie loans to include rental properties that are not owner-occupied, but subject to certain conditions), available at www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1202.pdf.

preclude modification of Appellant's loan.

Fourth, Plaintiff does not allege that she was in default or considered loan modification in 2004 when Flagstar held her Note, such that any allegations over her lack of knowledge as to Fannie Mae's investment in the loan then has no bearing on her modification arguments. Put simply, Plaintiff neither wanted nor needed a loan modification when Flagstar held the Note, making any issues over Fannie Mae's investment irrelevant.

4. Appellant Cannot Establish Causation.

Appellant likewise cannot show injury caused by Flagstar, which defeats her CPA claim. There has been no foreclosure sale and Appellant offers no evidence that "but for" Ms. Anderson's designation as trustee while Flagstar was Note holder, she would not have suffered any injury. *See Indoor Billboard*, 162 Wn.2d at 82. There is no derivative CPA liability; for Flagstar to be liable, it must have violated the CPA in some way that caused Appellant's injury, regardless whether some other defendant is alleged to have injured Appellant. *See Schmidt v. Cornerstone Inves., Inc.*, 115 Wn.2d 148, 165 (1990) (affirming dismissal of CPA claim against an attorney/escrow agent because plaintiffs failed to provide sufficient evidence that he was involved in the allegedly injurious conduct causing injury). Foreclosure at issue here stems from Appellant's default years after Flagstar's role ended, not through any action by

Flagstar. Thus, the trial court properly granted Flagstar summary judgment on Appellant's CPA claim.

E. The Trial Court Properly Granted Summary Judgment on Appellant's Criminal Profiteering Claim.

The trial court properly granted Flagstar summary judgment on Appellant's criminal profiteering claim because Appellant's claim is entirely premised on Ms. Anderson's brief designation as trustee of the Deed of Trust "in apparent violation of RCW 61.24.020," and not any specified "criminal" acts. *See* CP 1848-49 ¶ 6.2(C) ("circumvent[ing] procedures set forth in RCW 61.24"), ¶ 6.2(E) ("Utilizing the provisions of *RCW 61.24 et seq.*") & ¶ 6.3(D) ("Damages . . . to the integrity of the non-judicial foreclosure process in Washington").

Moreover, Appellant cannot sustain a claim for criminal profiteering because there are no allegations in the Complaint that Flagstar acted "criminally," which, by definition, is a necessary requirement for any claim for "criminal profiteering" under RCW 9A.82. *See* RCW 9A.82.010(4) for definition of "criminal profiteering."

While Appellant accuses Flagstar of "theft of said real property" and "extorting payments from Plaintiff," Appellant offers no factual allegations of any criminal conduct (let alone the pattern of conduct required) and has no evidence to support of such those allegations. *See* CP 1849 ¶ 6.2(C)-(E). Further, because no foreclosure has occurred and Appellant still has possession of the Property—it has not been "stolen." Nor does Appellant allege facts or offer evidence of extortion. Simply

put, Appellant has not and cannot establish a claim for relief under RCW 9A.82. *See Robertson v. GMAC Mortg. LLC*, 2013 WL 1898216, *3-*4 (W.D. Wash. 2013) (rejecting criminal profiteering claim on similar allegations). As a result, the trial court properly granted Flagstar summary judgment on Appellant's criminal profiteering claim.

F. The Trial Court Properly Denied Appellant's Request for Additional Discovery.

One and a half years after filing her Complaint, and three weeks after being served with Flagstar's motion for summary judgment, Appellant used one paragraph in her opposition to Flagstar's motion to ask the trial court to continue Flagstar's motion for additional discovery on an issue of law, namely "the recent disclosure that the Trust is the owner and holder of the obligation." CP 1494.

The trial court should deny a CR 56(f) request when: (1) the moving party fails to state what evidence it would establish through additional discovery; (2) the evidence sought would not raise a genuine issue of fact rendering delay and further discovery futile; or (3) the moving party fails to offer good reason for their delay in obtaining the evidence desired. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400 (1997). Failure to meet one of these requirements is fatal and the timing of a motion for summary judgment is irrelevant to whether a continuance should be denied. *See e.g.*, *Manteufel v. SAFECO Ins. Co.*, 117 Wn. App. 168, 175 (2003) (denying request to continue motion for summary

judgment one month after filing of the complaint). The trial court properly denied Appellant's request for the following reasons:

First, delay for additional discovery "is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Molsness*, 84 Wn. App. at 400-01. "Vague, wishful thinking is not enough." *Id.* (holding trial court did not abuse discretion by denying continuance). Appellant must identify, by affidavit, specific evidence she will obtain that is necessary to oppose summary judgment. *See* CR 56(f); *Molsness*, 84 Wn. App. at 401. Appellant failed to present any such affidavit to the trial court. This failure by itself bars her claims here. Regardless, Appellant also failed to identify any specific evidence that she might uncover by delaying the motion for additional discovery. While Appellant claimed to require additional discovery "to flesh out the ownership of the subject Note and Deed of Trust and the agency relationships" (CP 1494; Appellant's Br. at 48), such evidence is not in Flagstar's possession, since Flagstar's role ended a decade ago.

Second, the trial court properly denied Appellant's request for delay because Appellant did not and could not demonstrate that additional discovery could raise a genuine issue of fact. *Stranberg v. Lasz*, 115 Wn. App. 396, 406-07 (2003). The mere possibility that discoverable evidence exists that may be relevant is not sufficient. *Molsness*, 84 Wn. App. at 401. Appellant did not and could not submit any facts surrounding the

ownership of the Note and Deed of Trust would bear on what is a question of law—whether Flagstar had anything to do with her foreclosure.

Third, the trial court properly denied Appellant's request for delay because Appellant failed to offer good reason for her delay in obtaining the evidence desired. CR 56(f) is not intended to endorse inaction and delay. *Bridges v. ITT Research Inst.*, 894 F. Supp. 335, 337 (N.D. Ill. 1995) ("Rule [56(f)] is not to be used as a delay tactic or scheduling aid for busy attorneys"). "The failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2005).[6] Appellant did nothing in this case for over a year—she neither noted a deposition nor submitted a single request for admission, request for production, or interrogatory. Indeed, Appellant waited until the deadline for responding to Flagstar's motion for summary judgment before asking the trial court for a continuance. As a result, the trial court properly denied Appellant's request for delay to conduct additional discovery.

G. The Trial Court Correctly Allowed into Evidence the Declaration of Lisa L. Mahony.

Appellant contends the trial court erred by allowing into evidence and considering the Declaration of Lisa L. Mahony and its supporting documents in violation of CR 56(e). Appellant's Br. at 8-12. Appellant argues that although Ms. Mahony claims to have personal knowledge of

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[6] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989) (looking to Fed. R. Civ. P. 56(f))

all the facts contained within her declaration as well as familiarity with Flagstar's record-keeping practices, Flagstar submitted no evidence indicating how the records she refers to were prepared, compiled, maintained, or stored. *Id.* Moreover, Appellant contends Flagstar failed to state or otherwise establish Ms. Mahony's qualifications, or the activities customarily handled by her. *Id.* at 11. Plaintiff's arguments fail as a matter of law.

> CR 56(e) requires competent declarants with personal knowledge:
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Thus, under CR 56(e), affidavits have three substantive requirements: (i) they must be made on personal knowledge, (ii) be admissible in evidence, and (iii) show affirmatively that the declarant is competent to testify to the information contained in the declaration. CR 56(e). The requirement of personal knowledge might require someone who signed or witnessed the signing of a document to establish its authenticity. Nevertheless, Washington courts consider "the requisite of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute." *Wells Fargo Bank, N.A. v. Short*, 2014 WL 1266304, at *4 (Wn. App. Div. 3 Mar. 27, 2014) (citing *Discover Bank v. Bridges,* 154 Wn. App. 722 (2010)); *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-75 (2012) (rejecting challenge to bank employee

declaration, holding that affiant's personal knowledge of how records are kept generally was sufficient for business records exception).

Washington's business records statute, RCW 5.45.020, states:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Courts broadly interpret the statutory terms "custodian" and "other qualified witness" under the business records statute. *State v. Smith,* 55 Wn.2d 482, 419-20 (1960); *State v. Ben–Neth,* 34 Wn. App. 600, 603 (1983); *State v. Quincy,* 122 Wn. App. 395, 399 (2004). Under the statute, the person who created the record need not identify it. *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590 (1953); *Ben–Neth,* 34 Wn. App. at 603.

More importantly, testimony by a witness who has custody of the record as a regular part of her work suffices. *Cantrill*, 42 Wn.2d 590; *Quincy*, 122 Wn. App. at 399; *Ben–Neth,* 34 Wn. App. at 603. Admissibility hinges upon the opinion of the court that the sources of information, method, and time of preparation were such as to justify its admission. *Quincy*, 122 Wn. App. at 401; *Ben–Neth*, 34 Wn. App. at 603. Computerized records are treated the same as any other business records. *Quincy*, 122 Wn. App. at 399.

Ms. Mahony's declaration squarely meets these requirements and is indistinguishable from evidence this Court has approved previously.

For instance, in *Discover Bank v. Bridges*, Discover Bank relied on three affidavits from employees of DFS, an affiliated entity that assisted Discover Bank in collecting delinquent debts. The three affiants stated in their respective affidavits that (1) they worked for DFS, (2) that two of the affiants had access to the Bridges' account records in the course of their employment, (3) the same two affiants testified based on personal knowledge and review of those records, and (4) the attached account records were true and correct copies made in the ordinary course of business. *Discover Bank*, 154 Wn. App. at 726. The Court of Appeals rejected the Bridges' contention that the trial court improperly admitted the affidavits into evidence. *Id.*

Similar to *Discover Bank,* Ms. Mahony stated in her declaration that she has personal knowledge of and access to Appellant's loan documents. Moreover, Ms. Mahony states she personally reviewed those records. CP 1499 ¶ 3. She has personal knowledge of how Flagstar's business records were "ma[d]e, collect[ed], and maintain[ed] … and how each "document attached to [her] declaration was retrieved." *Id.* While Ms. Mahony does not expressly state she was a custodian of the records, neither did the affiants in *Discover Bank.* Thus, the trial court correctly allowed into evidence the Mahony Declaration and its supporting documents.

In addition, Appellant attacks the creditability and sufficiency of the Mahony Declaration by arguing that Ms. Mahony's statement that

Flagstar's records reflect a loan sale in May 2004 contradicts the Declaration of Karie Mullen, submitted in support of Chase's motion for summary judgment, which provides "Fannie Mae became the investor of the obligation on April 8, 2004, was the investor when servicing of the loan was transferred to Chase in October 2004, and is the current investor." *See* CP 1499 ¶ 5; CP 1554 ¶ 5; Appellant's Br. at 9.

But Flagstar's records (attached to the Mahony Declaration) confirm the statement of Ms. Mullen and show (a) Fannie Mae became the investor April 2004 (with Flagstar receiving payment April 9, 2004); and (b) Flagstar was informed by Fannie Mae in May 2004 that Plaintiff's loan was part of a "Sale Group," with loan servicing rights sold to Chase with a servicing transfer effective October 1, 2004. CP 1507. Chase's records confirm these facts, showing the servicing transfer date was October 1, 2004 and that Chase received the original Note (indorsed in blank) from Flagstar on November 15, 2004. CP 1554 ¶ 4.

In any event, because Plaintiff defaulted in September 2010—almost six years after all evidence show Chase held the Note—none of the facts challenged by Plaintiff is material to Chase's right to foreclose, let alone has any bearing on Flagstar liability. All evidence shows that at the time of Plaintiff's default, Flagstar's role had ended years earlier and Chase held the original Note indorsed in blank (giving Chase the right to enforce the Note and corresponding Deed of Trust).

H. The Trial Court Correctly Struck the Declaration of Tim Stephenson.

On appeal, Appellant argues that the trial court erred in striking the Declaration of Tim Stephenson offered in opposition to Defendants' motions for summary judgment. Appellant's Br. 13-18. The Stephenson Declaration was, however, a purported forensic audit of Appellant's loan and consisted almost entirely of legal conclusions. CP 1368-86. Thus, the trial court properly struck the Stephenson Declaration because Appellant may not rely on the legal conclusions contained in the audit as evidence. *Fidel v. Deutsche Bank Nat'l Trust Co.*, 2011 WL 2436134, *1 (W.D. Wash. 2011) (court disregarded Forensic Audit attached to complaint because plaintiff must state facts sufficient to state a claim for relief in the complaint, rather than rely on legal conclusions from a report); *Abarquez v. OneWest Bank, FSB*, 2011 WL 1459458, *1 (W.D. Wash 2011) (same).

Indeed, the Washington Attorney General has issued a warning to borrowers against falling for (and paying for) scams such as the Stephenson Declaration. *See* Washington State, Office of the Attorney General, Foreclosure and Mortgage Assistance, *Beware of Scams!*, available at www.atg.wa.gov/page.aspx?id=28320. That bulletin warns against "Forensic Mortgage Loan Audits," where "[s]o-called loan auditors, often backed by attorneys, offer to review your loan documents to determine whether your lender complied with state and federal laws." *Id.* It explains that the FTC has likewise warned against these same "Loan Audits" as a scam, *id.*, and provides a link to an FTC webpage "Forensic

Loan Audits," available at www.consumer.ftc.gov/articles/0130-forensic-loan-audits, which warns:

> [T]the latest foreclosure rescue scam to exploit financially strapped homeowners pitches forensic mortgage loan audits. [¶] In exchange for an upfront fee of several hundred dollars, so-called forensic loan auditors, mortgage loan auditors, or foreclosure prevention auditors backed by forensic attorneys offer to review your mortgage loan documents to determine whether your lender complied with state and federal mortgage lending laws. ***The "auditors" say you can use the audit report to avoid foreclosure***, accelerate the loan modification process, reduce your loan principal, or even cancel your loan. [¶] ***Nothing could be further from the truth***.

Id. (emphasis added). It appears Appellant has fallen prey to just this type of predatory tactic by this purported "auditor," her lawyer, or both. Last year, a Georgia court granted a dismissal rejecting a similar audit as improper:

> [T]he Court is equally concerned by Plaintiff's attempt to incorporate such an "audit," which is more than likely the product of "charlatans who prey upon people in economically dire situation," rather than a legitimate recitation of Plaintiff's factual allegations. As one bankruptcy judge bluntly explained, "[the Court] is quite confident there is no such thing as a 'Certified Forensic Loan Audit' or a 'certified forensic auditor.'" In fact, the Federal Trade Commission has issued a "Consumer Alert" regarding such "Forensic Loan Audits." The Court will not, in good conscience, consider any facts recited by such a questionable authority.

Demilio v. Citizens Home Loans, Inc., 2013 WL 331211, *3 (M.D. Ga. 2013) (citations omitted); *see also Hewett v. Shapiro & Ingle*, 2012 WL 1230740, *4, n. 4 (M.D.N.C. 2012) (discussing "audits" and noting such documents "confirm the empty gimmickry of these types of claims.").

Even if the purported loan audit had some bearing on the claims pleaded—and it does not—the trial court properly struck the declaration because it purported to offer expert testimony as to legal violations under various statutes, which is improper and inadmissible: "Each courtroom comes equipped with a legal expert, called a judge," and only the judge gets to decide "the relevant legal standards." *State v. Clausing*, 147 Wn.2d 620, 628 (2002) (citation and quotations omitted); *Orion Corp. v. State*, 103 Wn.2d 441, 461 (1985) ("Experts are not to state opinions of law."); ER 704 cmt. ("experts are not to state opinions of law or mixed fact and law"). "Courts will not consider legal conclusions in a motion for summary judgment." *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791-92 (2007) (trial court properly refused to consider declaration from witness who sought to explain the respective legal rights of the parties to a civil dispute involving real property). Because the entirety of the Stephenson Declaration consisted of legal conclusions, the trial court properly disregard it.

IV. CONCLUSION

Respondent Flagstar respectfully ask this Court to affirm the trial court's granting of summary judgment in its entirety.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

Davis Wright Tremaine LLP
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By _____
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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

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Dated at Seattle, Washington this 19th day of September, 2014.

Lisa Bass