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No. 73827-5

WASHINGTON COURT OF APPEALS, DIVISION I

D. RYAN PATRICK and RHONDA PATRICK, husband and wife,

FILED
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Court of Appeals
Division I
State of Washington

Appellants,

vs.

WELLS FARGO BANK, N.A., a national banking association; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; QUALITY LOAN SERVICE CORPORATION, a California corporation; MCCARTHY & HOLTHUS, LLP, a California law firm; and HSBC BANK, USA, N.A. AS TRUSTEE FOR WELLS FARGO ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-AR8, a National Bank as Trustee for a New York common law trust,

Respondents.

BRIEF OF RESPONDENTS WELLS FARGO BANK, N.A. AND HSBC BANK, USA, N.A. AS TRUSTEE FOR WELLS FARGO ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-AR8

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I. INTRODUCTION

This is not a case about a promised loan modification. Appellants conceded in the trial court below that the Patricks were never promised a modification. RP 20-24. Nevertheless, their opening brief is riddled with inappropriate argument that Wells Fargo "promised" them a modification.

The actual facts presented to the trial court paint a very different picture. In 2009, the Patricks purposefully defaulted on their payments in an attempt to get a better deal on their loan. CP 3, 841 at ¶ 3.5; RP 25-26. In 2010, they were offered and accepted a loan modification, but they did not like the terms. Thus, in 2012, the Patricks purposefully defaulted a second time. They were never offered a second loan modification and never cured their default. When foreclosure proceedings eventually commenced, they filed suit arguing they were somehow entitled to better terms and that the foreclosure proceedings were wrongful. CP 837. Despite filing suit, the Patricks chose not to restrain the trustee's sale and the property sold. CP 927.

Wells Fargo and HSBC moved for summary judgment, arguing that the Patricks waived their claims by failing to restrain the sale and otherwise lacked evidence to support a claim under Washington's Consumer Protection Act ("CPA"). In an effort to create the illusion of a material dispute, Appellants dumped thousands of pages of documents into the record as "true and correct" copies of discovery documents.

Importantly, nowhere in the mountain of documents they submitted was there any evidence disputing the following material facts:

1. The Patricks intentionally defaulted on their loan payments. RP 25-26.

2. They had notice of the right to enjoin the sale. CP 899-902.

3. They knew of their claims long before the sale took place (they filed suit before the sale).

4. They chose not to restrain the sale. RP 29 ("The Patricks chose not to go forward with the injunction procedures under the DTA.").

By failing to follow the procedures necessary to restrain the sale (including making payments on their loan), the Patricks waived all but their CPA claim for damages. RCW 61.24.127(1); *Frizzell v. Murray*, 179 Wn.2d 301, 312-313 (2013); *Plein v. Lackey,* 149 Wn.2d 214, 229 (2003); *Leahy v. Quality Loan Serv. Corp. of Wash.,* 190 Wn. App. 1, 16 (2015); *Merry v. Nw. Tr. Servs., Inc.,* 188 Wn. App. 174, 183 (2015).

Summary judgment was also appropriate on the CPA claim. The Patricks failed to show (1) an unfair or deceptive act; (2) a public impact; or (3) that Wells Fargo caused any cognizable damages under the CPA.

Finally, even if the Patricks had raised a genuine issue of material fact as to each element of their CPA claim, the trial court still properly dismissed the claim because Wells Fargo and HSBC are exempt under RCW 19.86.170. *Miller v. United States Bank*, 72 Wn. App. 416 (1994).

For these reasons, the Court should affirm the trial court's order granting summary judgment.

II. STATEMENT OF ISSUES

1. Whether the Patricks waived their claims when they chose not to restrain the foreclosure sale.

2. Whether the Patricks failed to raise a genuine issue of material fact as to key elements of their CPA claim.

3. Whether RCW 19.86.170 exempts Wells Fargo and HSBC from Appellants' CPA claim.

III. STATEMENT OF THE CASE

A. The Patricks Borrow Money Secured by a Deed of Trust.

On July 10, 2007, the Patricks executed a promissory note to receive a $435,960 loan from Wells Fargo ("Note"). CP 856. To secure their payment obligations, they executed a deed of trust encumbering property located at 4028 164th Place SE, Bothell, WA 98012 ("Property"). CP 840. Wells Fargo was listed as the lender and beneficiary of the deed of trust, and Northwest Trustee Services, LLC was the trustee ("DOT"). CP 862. Wells Fargo later assigned its interest in the loan to HSBC as trustee for a mortgage backed security fund. CP 843. HSBC thereafter became the holder of the Note. CP 434, 860, 2918. Wells Fargo remained the servicer. CP 838.

B. The Patricks Purposefully Default.

Despite the 2008 market crash, the Patricks were employed and had no trouble making their monthly mortgage payments. CP 2, ¶¶ 4-7. Nevertheless, Ryan Patrick worked in real estate and believed the Property

had declined in value. In 2009, he contacted Wells Fargo to request consideration for a loan modification "to see what their options were." RP 25-26. It merits emphasis that the Patricks were both employed and fully capable of making their loan payments under the agreed upon terms. RP 25. They did not ***need*** a loan modification, they just wanted one.

In their declarations, the Patricks contend that an unnamed Wells Fargo representative informed them over the phone that "there were multiple loan modification programs available," but they could not qualify if they were current on their payments (i.e. not experiencing financial hardship). CP 3 at ¶¶ 7-8. They allege that this representative "advised" them to stop making payments in order to be considered. CP 3 at ¶¶ 7-8, 2779. In January 2009, the Patricks intentionally defaulted on their payments. CP 3, 841, 2779. They then applied for and were reviewed for a loan modification.

On March 3, 2009, Wells Fargo notified the Patricks that the investor had declined to modify their loan. CP 2119. They applied again and, in September 2010, were offered a loan modification agreement that allowed them to recommence their payments at approximately the same amount as before (which they could afford), and tacked their missed payments onto the end of their loan without interest. They accepted the modification. CP 4-5, 30. The last page of the agreement is an affidavit of eligibility, in which the Patricks certified that "[they] did not intentionally or purposefully default on the Mortgage Loan in order to obtain a loan modification . . . ." CP 35.

Nevertheless, in 2012, the Patricks purposefully defaulted on their loan payments a second time in the hopes of obtaining a modification with better terms. CP 5 ("I intentionally missed mortgage payments in order to obtain a true loan modification from Wells Fargo."). Curiously, in the contemporaneous applications they submitted to Wells Fargo they said they were experiencing financial hardship. CP 208-209. Moreover, they attested to the following under the penalty of perjury:

> ***I understand that if I have intentionally defaulted on my existing mortgage***, engaged in fraud or misrepresented any fact(s) in connection with this request for mortgage relief or if I do not provide all required documentation, ***the Servicer may cancel any mortgage relief granted and may pursue foreclosure on my home and/or pursue any available legal remedies***.

CP 68 at ¶ 4 (emphasis added). The Patricks' signatures appear directly below this key term.

The Patricks did not qualify for any subsequent loan modifications. To the contrary, they were repeatedly told that they did not qualify. CP 461 (July 2012 denial letter); CP 470 (November 2012 denial letter); CP 466 (December 2012 denial letter); CP 463 (January 2013 denial letter); CP 473 (June 2013 denial letter); CP 480 (February 2014 denial letter); CP 2431 (April 2014 denial letter). Although they did not make the allegation until they filed suit, the fact that they intentionally defaulted is yet another reason they would not qualify for a loan modification. CP 68 at ¶ 4.

On November 25, 2014, the Patricks requested mediation with Wells Fargo pursuant to the Foreclosure Fairness Act. The mediation took

place on February 25, 2014. CP 843. Consistent with the previous denials, the Patricks were told at the mediation that they did not qualify for a modification. CP 477-490.

The FFA mediator certified that the parties mediated in good faith. Attached to the good faith certificate is a copy of the agreed upon net present value numbers used at the mediation, the investor restrictions, and evidence of Wells Fargo's efforts to obtain a waiver of the investor restrictions. CP 477-490.

C. <u>The Trustee Commences Nonjudicial Foreclosure.</u>

The Patricks failed to make a single payment on their loan after July 2012 . On September 13, 2013, HSBC (through Wells Fargo as its attorney-in-fact) executed an Appointment of Successor Trustee, appointing Quality Loan Service Corporation of Washington ("QLS") as successor trustee under the DOT. CP 2915.

On November 19, 2013, QLS sent the Patricks a Notice of Default showing they remained in default for their July 2012 payment and all subsequent payments due thereafter. CP 885.

Before recording, transmitting, or serving the Note of Trustee's Sale ("NOTS"), QLS received a declaration signed by Nakeisha Covington, Vice President Loan Documentation for Wells Fargo, stating under penalty of perjury, as HSBC's attorney-in-fact, HSBC was the actual holder of the Note secured by the DOT. CP 2912. QLS recorded a

NOTS on September 8, 2014, setting the date of the nonjudicial foreclosure sale for January 9, 2015. CP 2938.

D. The Patricks Choose Not to Restrain the Sale.

The Patricks filed suit on December 15, 2014, but never took any further steps to restrain the trustee's sale. Because they neither cured their default nor restrained the sale, the Property sold at public auction on February 13, 2015, more than two and a half years after the Patricks stopped making payments. CP 2913. Following the sale, the trustee issued a Trustee's Deed to HSBC. CP 927, 2949.

IV. STANDARD OF REVIEW

On review of an order of summary judgment, the Court engages in the same inquiry as the trial court: "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed *de novo*." *Coppernoll v. Reed,* 155 Wn.2d 290, 296 (2005); *Leahy v. Quality Loan Serv. Corp. of Wash.,* 190 Wn. App. 1, 3 (2015).

The motion should be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c) (emphasis added). Summary judgment should be denied only if a reasonable jury could return a verdict for Appellants on the record they submitted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986); *Young v. Key Pharmaceuticals, Inc.,* 112 Wn. 2d 216 (1989).

To survive a motion for summary judgment, Appellants have "the burden of establishing ***specific and material facts*** to support each element of [their] prima facie case." *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66 (1992) (emphasis in original). They "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having [their] affidavits considered at face value." *Wash. Fed. Sav. v. Klein,* 177 Wn. App. 22, 27 (2013); *Leahy,* 190 Wn. App. at 3. Affidavits opposing summary judgment "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." CR 56(e).

Notably, the Court may affirm summary judgment on *any* valid basis supported by the record. RAP 2.5(a); *see also Nast v. Michels*, 107 Wn.2d 300, 308 (1986) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.").

V. ARGUMENT

A. The Patricks Waived Their Claims.

Washington's Deeds of Trust Act ("DTA"), RCW 61.24 *et seq*., sets forth procedures that must be followed in order to obtain a pre-sale injunction to halt a nonjudicial foreclosure sale. RCW 61.24.130. "This statutory procedure is the '***only means*** by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.'" *Brown v. Household Realty* Corp., 146 Wn. App. 157, 163

(2008) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388 (1985)) (emphasis added); *In re Marriage Kaseburg*, 126 Wn. App. 546, 588 (2005) ("The Act provides the sole method to contest and enjoin a foreclosure sale under RCW 61.24.13 0(1)."). From this, Washington courts have developed a waiver doctrine that supports the DTA's primary goals of (1) promoting efficient and inexpensive nonjudicial foreclosures, (2) allowing the parties adequate opportunity to prevent wrongful foreclosure, and (3) promising stability of land titles. *Plein v. Lackey*, 149 Wn.2d 214, 225 (2003).

The law is clear. The failure to enjoin and prevent a nonjudicial foreclosure sale waives a party's ability to contest the sale or the underlying debt obligation extinguished by the sale. *Frizzell v. Murray*, 179 Wn.2d 301, 307-309 (2013). Waiver occurs when a party (1) had notice of the right to enjoin the sale, (2) had actual knowledge of his defenses prior to the sale, and (3) failed to obtain a court order enjoining the sale. *Id.* at 309; *Plein,* 149 Wn. 2d at 227.

Here, the elements of waiver are uncontested. The Patricks (1) received notice of their right to enjoin the foreclosure sale, (2) had knowledge of their claims prior to the sale, and (3) failed to enjoin the sale. Accordingly, the Court should uphold summary judgment based on waiver. *Frizzell,* 179 Wn.2d at 308 (2013); *Plein,* 149 Wn.2d at 227; *Leahy,* 190 Wn. App. at 13.

1. <u>The Patricks Had Notice of the Sale.</u>

The Patricks do not dispute that they received notice of their right to enjoin the trustee's sale. They attached the NOTS to their complaint, which they filed a month before the sale. CP 899. The NOTS states that "[a]nyone having objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. ***Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.***" CP 900, ¶ IX (emphasis added). Thus, the Patricks' own pleading is proof that they knew of their right to seek an injunction to restrain the sale. *E.g. Frizzell*, 179 Wn.2d at 307.

2. <u>The Patricks Had Knowledge of Their Claims.</u>

"[I]n applying the waiver doctrine, a person is not required to have knowledge of the legal basis for his claim, but merely knowledge of the facts sufficient to establish the elements of a claim that could serve as a defense to foreclosure." *Brown*, 146 Wn. App. at 164–65. Here, the Patricks filed their complaint prior to the sale, so there can be no dispute that they had knowledge of their claims. *Frizzell*, 179 Wn.2d at 307 ("[S]he also had knowledge of a defense to the foreclosure prior to the sale, demonstrated by the claims made in her original complaint."). Thus, the second element of waiver also exists.

3. <u>The Patricks Chose Not To Enjoin The Sale.</u>

This is not a case where a party alleges they were told no sale would take place only to find out that, in fact, a sale went forward. The Patricks simply ***chose*** not to invoke the mandatory procedures in the DTA. RP 29. In so doing, they knowingly waived any rights they had to contest the sale or the underlying debt.

The Washington Supreme Court made it clear in *Plein* that the mere act of filing a complaint seeking injunctive relief is insufficient to avoid waiver. In *Plein*, a junior lienholder "disputed whether there was a default[,] . . . [but] he never sought a preliminary injunction or any order that would have halted the sale, and accordingly did not comply with other requirements such as providing the trustee with five days' notice of any attempt to seek such an order." *Plein*, 149 Wn.2d at 226. The court emphasized that "[***s***]***imply bringing an action to obtain a permanent injunction will not forestall a trustee's sale that occurs before the end of the action is reached***." *Id.* (emphasis added). If it did, the mandatory injunction procedures set forth in RCW 61.24.130 would be rendered meaningless. *Id.* at 227.

In *Frizzell*, the borrower actually did file a pre-sale motion to restrain the trustee's sale. *Frizzell*, 179 Wn.2d at 305. The trial court granted the motion but conditioned relief upon the borrower making required payments and posting a bond in accordance with RCW

61.24.130(1). *Id.* The sale went forward when the borrower failed to make the payments. *Id.*

Frizzell nevertheless applied waiver. The court reasoned that RCW 61.24.130(1) is "clear that the [restraining] order is conditional upon payment, which Frizzell failed to make." *Id.* at 308. "Frizzell received notice and had the opportunity to prevent foreclosure, but through her actions she failed to meet the clear statutory requirements under RCW 61.24.130 and did not actually obtain an order enjoining the sale." *Id.* It was "not inequitable to conclude that Frizzell waived her sale claims where she had knowledge of how to enjoin the sale and failed to do so through her own actions.." *Id.* at 20.

Likewise, the Patricks waived their claims when they chose not to pursue an injunction. All the elements of waiver exist. Accordingly, the Court should uphold summary judgment based on waiver.

B. <u>Only the CPA Claim Survives Waiver.</u>

Waiver is not limited to claims for injunctive relief. To the contrary, under the canon of *expression unius est exclusio alterius*, waiver applies to ***all*** pre-sale claims related to the debt except those that are expressly preserved under RCW 61.24.127(1). That statute only preserves the Patricks' CPA claim.

RCW 61.24.127(1) provides that a failure to enjoin a sale under the DTA may not be deemed a waiver of a claim for damages asserting:

> (a) Common law fraud or misrepresentation (not alleged);
>
> (b) Violation of [the CPA];

> (c) Failure of the *trustee* to materially comply with the provisions of [the DTA]; or;
>
> (d) A violation of RCW 61.24.026 (not at issue).

RCW 61.24.127(1). RCW 61.24.127(2) places further restrictions on the preserved claims by imposing a two year post-sale statute of limitation and prohibiting the borrower from recording a *lis pendens* related to the foreclosed upon property. The legislature's primary purpose in enacting RCW 61.24.127 was to soften the holding of *Brown v. Household Realty Corp.,* 146 Wn. App. 157 (2008), which held that a borrower waives all claims against a lender related to the loan, including claims related to the origination and servicing of the loan, if the borrower fails to restrain the trustee's sale. *Frias v. Asset Foreclosure Servs.,* 181 Wn.2d 412, 425 (2014); *Leahy,* 188 Wn. App. at 194.

The import of the statutory list of "non-waived" claims in RCW 61.24.127 is clear: "an inference arises in law that all things or classes of things omitted from [the list] were intentionally omitted by the legislature under the maxim *expression unius est exclusion alterius*. . . ." *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 750 (2014) (quoting *Wash. Natural Gas Co. v. Public Util. Dist.*, 77 Wn.2d 94, 98 (1969)). If the legislature intended to save *all* damages claims from waiver, it would have simply stated that claims for damages are not waived. It would not have gone to the trouble of carving out specific damages claims if it intended for all damages claims to be saved.

As a result, courts in Washington have consistently held that only those claims for damages that are specifically identified in RCW 61.24.127 are saved from waiver. *Coble v. SunTrust Mortg., Inc*., 2015 U.S. Dist. LEXIS 19434, at *10-12 (W.D. Wash. Feb. 18, 2015) (borrowers waived all but claims expressly listed in RCW 61.27.127(1)); *Bakhchinyan v. Countrywide Bank, N.A.,* 2014 U.S. Dist. LEXIS 46943, at *19 (W.D. Wash. Mar. 27, 2014) (dismissing negligence claim because it "is not included in the list of claims" enumerated in RCW 61.24.127(1)); *Ness v. Northwest Trustee Servs*., 2012 U.S. Dist. LEXIS 189842, at *7 (W.D. Wash. Apr. 6, 2012) (dismissing breach of contract claim because it does "not fall within one of those exceptions" enumerated in RCW 61.24.127); *Campbell v. Indymac Mortg. Servs*., 2011 U.S. Dist. LEXIS 100028, at *6 (W.D. Wash. Sept. 6, 2011) (dismissing complaint because it was "not asserting any of those claims" enumerated in RCW 61.24.127); *see also Merry,* 188 Wn. App. at 194 ("This legislative preference for presale remedies is even more clear following the legislature's enacting in 2009 of a provision explicitly identifying claims for damages arising out of foreclosures of owner-occupied residential real property that are not waived by a failure to enjoin a foreclosure sale.").

The Patricks asserted claims for negligence, intentional infliction of emotional distress, breach of contract, criminal profiteering, and civil conspiracy. None of these fall into the narrow exempted claims listed in RCW 61.24.127. To the extent they asserted a DTA claim against Wells Fargo or HSBC under RCW 61.24.127(1)(c), it fails too because RCW

61.24.127(1)(c) only exempts from waiver claims alleging the "[f]ailure of the ***trustee*** to materially comply with the provisions of [the DTA]." *Dietz v. Quality Loan Serv. Corp.*, 2014 U.S. Dist. LEXIS 630, at *11 (W.D. Wash. Jan. 3, 2014) (dismissing DTA claim as waived because "[p]ost-sale claims under the DTA are confined to claims that allege 'failure of the trustee to materially comply with the provisions of this chapter.'").

Appellants' assertion that the Washington Supreme Court has "consistently held that waiver . . . only applies to actions to vacate the sale and not to claims for damages" misstates the law. *Frizzell, Schroeder,* and *Klem* do not support this sweeping conclusion. Indeed, the Supreme Court made clear in *Frizzell* that it was **<u>not</u>** deciding the interplay between DTA waiver and RCW 61.24.127. 179 Wn.2d 301, 310 (2013). Instead, the court remanded the case to determine which "non-waived" claims remained in light of RCW 61.24.127. *Id.* The court did not hold that all damages claims survive waiver.

Schroeder and *Klem* similarly do not support the assertion that claims for damages are immune from DTA waiver. *Schroeder v. Excelsior Mgmt.,* 177 Wn.2d 94 (2013), turned on whether the property at issue was agricultural. If so, the nonjudicial sale would have to be set aside because the DTA ***prohibited*** nonjudicial foreclosures of agricultural property. *Schroeder* held that parties cannot contractually waive the prohibition against nonjudicial foreclosure of agricultural property. *Id.* at 107. The case was remanded to determine whether the property in

question was agricultural or not. *Id.* at 111-12. It contains no discussion of RCW 61.24.127. *Schroeder* is inapposite.

Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 783 (2013), approved the lower courts' ruling that it was inequitable to apply waiver against the guardianship estate of an elderly woman when circumstances made it ***impossible*** to obtain pre-sale injunctive relief. Specifically, Klem's guardian could not obtain pre-sale injunctive relief "due to the time frame, the need for court approval [i.e., from the guardianship court to even pursue a pre-sale injunction], and the lack of assets in the guardianship estate." *Id.* at 780, 783 n.7. *Klem* held that waiver was inequitable under those unique facts. It did not hold that all claims for damages survive waiver, and it contained no discussion of RCW 61.24.127.

Finally, the assertion that applying waiver is "unconstitutional" lacks merit. The legislature and Washington Supreme Court established the law by which the Patricks waived their claims. Waiver is not a special immunity. It is a long standing common law doctrine that says if you sit on your rights for too long, you may lose them. It is no more unconstitutional than a statute of limitations. By failing to follow known procedures, the Patricks voluntarily relinquished their rights.

C. <u>The Patricks Lack a Defense to Waiver.</u>

The Patricks next argue that waiver should not apply because the sale was void, their claims arise "outside the DTA," and that waiver was generally inequitable. None of these defenses has merit.

1. The Sale Was Not Void.

The Patricks dedicate four pages of their opening brief to discussion of cases where sales were void, but fail to apply that analysis to the facts of this case. They offer only the conclusory statement that "[i]f the sale was void, this Court does not have the power to declare it valid for the purposes of RCW 61.24.127." Opening Brief pg. 67.

There is no evidence in the record to support a conclusion that the sale was void here. The Patricks' claims are all based upon their contention that Wells Fargo should have offered them a better deal on their loan after they purposefully defaulted. They do not dispute that HSBC held the Note and was the beneficiary of the DOT, or that it had the authority to appoint QLS as the successor trustee.

Once again, the Patricks' reliance on *Schroeder,* 177 Wn.2d at 105, is misplaced. As this Court recently made clear, *Schroeder* merely "stands for the proposition that the deed of trust act does not apply to land used for agricultural purposes." *Leahy,* 190 Wn. App. at 13. Here, the Property was not agricultural. *Schroeder* is inapposite.

Cox v. Helenius, 103 Wn.2d 383 (1985), is also distinguishable. It was decided based on language in RCW 61.24.030 that has since been amended to correct the very result it reached. *Id.* at 386. Furthermore, in *Cox*, the trustee instilled a sense of reliance that the trustee's sale would not occur, yet proceeded with the trustee's sale without providing any

notice to the plaintiffs. *Id.* at 389-90. None of those circumstances exist here.

Finally, the Patricks' reliance on *Bavand v. OneWest Bank* is misplaced. In *Bavand*, the bank was not the beneficiary when it attempted to appoint a foreclosure trustee, so the trustee lacked authority to foreclose. 176 Wn. App. 475, 494 (2013). There is no evidence here that HSBC was not the beneficiary when it appointed QLS as successor trustee under the DOT. *See also Rucker v. NovaStar Mortg., Inc.,* 177 Wn. App. 1, 14-15 (2013) (where bank was not beneficiary, it lacked authority to appoint successor trustee, and therefore trustee lacked authority to conduct sale).

2. <u>Waiver Applies to All Claims Related to the Underlying Debt.</u>

The Patricks next argue that waiver does not apply to claims that "do not arise under the DTA." Opening Brief at pg. 60-62. They cite only *Schroeder* in support of this novel argument, but again, *Schroeder* is inapplicable. 177 Wn.2d at 94. *Schroeder* held that the DTA does not apply to agricultural property and, therefore, it must be foreclosed judicially. The court never addressed what claims, if any, could survive waiver where the DTA applied. Any passing comment on that issue was dicta.

Washington courts have never limited waiver to claims based on the DTA. To the contrary, courts have routinely held that a party waives claims related to the underlying default—like those asserted by the

Patricks—by failing to restrain the non-judicial foreclosure process. *Frizzell,* 179 Wn. 2d at 301 (upholding application of waiver to claims related to origination of loan); *Plein,* 149 Wn.2d at 214 (waiver of claim that underlying debt had been paid); *CHD, Inc. v. Boyles,* 138 Wn. App. 131, 139 (2007) ("a person waives the right to contest the *underlying obligations* on the property in foreclosure proceedings when there is no attempt to employ the presale remedies under RCW 61.24.130") (emphasis added).

Finally, even if case law carved out claims that did not arise under the DTA, which it does not, the claims in this case would still be waived because they arise out of steps taken by Wells Fargo and QLS to foreclose on the Property following the Patricks' intentional default.

3. The Application of Waiver Was Equitable.

Appellants' argument that waiver is inequitable because they have claims related to the foreclosure is circular. Those are the very claims they waived by failing to restrain the sale.

As the Supreme Court recently explained in *Frizzell,* "it is not inequitable to conclude that [a borrower] waived her sale claims where she had knowledge of how to enjoin the sale and failed to do so through her own actions." 179 Wn.2d at 309. Here, the Patricks *chose* not to restrain the foreclosure sale. They were represented by counsel. There is nothing inequitable about applying waiver under these circumstances.

Albice v. Premier Mortg, 174 Wn.2d 560 (2012), is distinguishable. In *Albice*, the court held that waiver was inequitable where the borrowers were making payments on a forbearance agreement, did not know of their breach in time to restrain the sale, and in fact reasonably believed their last payment cured the default. In other words, the borrowers in *Albice* reasonably believed they were not in default and that no sale was going forward. Here, the Patricks simply chose to let the sale go through rather than making any payments and obtaining a restraining order, as would have been required under the DTA. The circumstances of this case are nothing like *Albice*.

D. The Patricks Failed to Raise a Genuine Issue of Material Fact as to Their CPA Claim.

For their CPA claim to survive summary judgment, the Patricks had to raise a genuine issue of material fact as to each one of the following elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to their 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). Failure to come forth with evidence supporting any single element of their claim is grounds for summary judgment. *Id.* at 793 ("[P]rivate CPA plaintiffs must establish all five elements . . . .").

In this case, summary judgment was appropriate because the Patricks failed to raise a genuine issue of material fact as to (1) an unfair

or deceptive act, (2) public impact, (3) causation, and (4) injury. The trial court was also justified in granting summary judgment to Wells Fargo and HSBC on the basis that they are exempt under RCW 19.86.170.

1. <u>No Unfair or Deceptive Practice.</u>

An unfair or deceptive practice is one that "has the capacity to deceive a substantial portion of the public." *Hangman*, 105 Wn.2d at 785; *Westview Invs., Ltd.v. U.S. Bank,* 133 Wn. App. 835, 854 (2006). An act is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits." *Klem*, 176 Wn.2d at 787. What these definitions require—and what is lacking from the Patricks' claim—is a capacity to impact the broader public. That is what distinguishes a CPA claim from an ordinary tort claim for private harm.

The Patricks' allegations focus entirely on their personal communications with Wells Fargo concerning their personal loan. They are intimately related to their unique circumstances of purposefully defaulting while allegedly being able to make payments. They submitted ***no evidence*** whatsoever showing how negotiations with respect to their loan could deceive a substantial portion of the public or other consumers.

No Washington case has found that private loan modification negotiations constitute an "unfair or deceptive act" for purposes of the CPA. Federal courts in Washington have dismissed similar CPA claims on this basis alone. *See, e.g., Ringler v. Bishop White Marshall and*

Weibel, 2013 U.S. Dist. LEXIS 60929, at *7-8 (W.D. Wash. Apr. 29, 2013) (dismissing CPA claim based on denial of loan modification where plaintiff failed to allege any facts to suggest negotiations had the capacity to deceive a substantial portion of the public.); *Potter v. General Electric Capital*, 2014 U.S. Dist. LEXIS 13289, at *12-13 (W.D. Wash. Feb. 3, 2014) (same); *see also Kullman v. Northwest Trustee Servs., Inc.*, 2012 U.S. Dist. LEXIS 167385, at *5-6 (W.D. Wash. Nov. 26, 2012) (summarily dismissing CPA claim where "Complaint makes clear that Bank of America reviewed their application for a loan modification, but rejected it. There is nothing improper alleged.").

The Patricks' allegations boil down to an assertion that Wells Fargo told them that they had to be in default in order to qualify for any loan modification program. There is no evidence in the record suggesting other customers were told that same thing. Even if there was, it is not an unfair or deceptive act. A borrower must be experiencing financial hardship (in default or imminent risk of default) in order to qualify for a loan modification. Loan modifications are not intended for customers who simply want a better deal. That is why the applications the Patricks signed clearly state that if they have defaulted on purpose, the bank will not only deny their application, but will also pursue foreclosure or any other available legal remedy. CP 68 at ¶ 4.

The Patricks construct several different "theories" of unfair or deceptive acts in their opening brief, but none can save their claim.

(a) No Unfair or Deceptive Act with Respect to 2009 Modification Application.

No reasonable jury could find that it was "unfair and deceptive" for Wells Fargo to consider the Patricks for a loan modification in 2009 when they called in and requested consideration. To start, any claim based on an alleged misrepresentation in 2009 has long been time barred. RCW 19.86.140 (CPA claim must be asserted within four years).

Moreover, the assertion that Wells Fargo was deceptive because it "did not inform" the Patricks that they needed to be in default is incompatible with their claim that it was also unfair or deceptive to later advise them that they needed to be in default. They cannot have it both ways.

Finally, the guidelines the Patricks point to require a borrower to be in default ***or*** imminent risk of default in order to qualify for a loan modification. Opening Brief pg. 26. They allege that it was deceptive to accept their modification application when they were current on their payments because, under those guidelines, Wells Fargo should have known they would never qualify. *Id.* This argument fails to address how, without first reviewing their application, Wells Fargo could have known that they were not in imminent risk of defaulting. There was nothing unfair or deceptive about reviewing the Patricks for a loan modification before they decided to default because they could have qualified as being in imminent risk of default.

(b) <u>No Evidence of Unfair or Deceptive Practice by Reviewing the Patricks for Loan Modifications.</u>

The Patricks next argue that it was "unfair and deceptive" for Wells Fargo to "advise" them they would need to be in default in order to qualify for a loan modification and then conduct the review in an "unfair" manner. Opening Brief at pg. 27-29. The argument really amounts to an assertion that Wells Fargo was negligent in reviewing them for a modification. They seek to impose a duty on loan servicers to "pre-deny" applications before they are even reviewed. No reasonable jury could find that it was unfair or deceptive to review the Patricks for a loan modification at their own request.

It merits emphasis that the Patricks ***chose*** to default hoping for a better deal. There is no allegation that they were ever promised a loan modification, only that they would be considered for multiple programs. They were considered. And, they were repeatedly denied.

The Patricks do not explain how it is an unfair or deceptive practice to review a customer for a loan modification. Nor do they cite a single Washington case where a court has found an unfair or deceptive act under similar circumstances. To the contrary, Washington courts decline to impose any duties with respect to loan modification negotiations. *Badgett v. Security State Bank,* 116 Wn.2d 563, 571 (1991) (no duty of good faith with respect to loan modification negotiations); *McPherson v. Homeward Residential*, 2014 U.S. Dist. LEXIS 15123, at *16 (W.D.

Wash. Feb. 4, 2014) ("[T]he Defendants were under no obligation to modify the [Plaintiffs'] loan and thus had no duty in regards to such negotiations.").

The cases Appellants cite are inapposite. *Tokarz v. Frontier Fed. Sav. & Loan Ass'n,* 33 Wn. App. 456 (1982), held that "[a]s a general rule, the relationship between a bank and a depositor or customer does *not* ordinarily impose a fiduciary duty of disclosure upon the bank. They deal at arm's length." *Id.* at 458-459. The court went on to find that no special circumstances existed that would create a heightened duty to disclose. *Id.* at 462. *Tokarz* contains no discussion of the CPA.

The Patricks' reliance on a Montana and California cases is similarly misplaced. Those cases do not interpret the CPA. In *Morrow v. Bank of Am., N.A.,* 375 Mont. 38, (2014), the borrowers alleged that they were told to default and then advised again and again to continue with the reduced payments and ignore default notices. The court found that where the borrower relied upon this very specific advice over the course of a year it could create a fiduciary relationship. 375 Mont. at P37. The court expressly cautioned, however, that such a relationship would ***not*** arise where the borrower was advised by others. *Id.* at P36. Here, the record is devoid of any evidence of a special relationship aside from the Patricks' self-serving statement that an unnamed employee once told them over the phone that they would need to be in default to qualify. Moreover, the Patricks concede they were working with housing counselors throughout

the process. CP 1-10, 2778-2782. Thus, even under Montana law, a heightened duty would not arise.

In *Alvarez v. BAC Home Loans Servicing, L.P.,* 228 Cal. App. 4th 941 (2014), the California state court held that a bank who undertakes a modification review may have a duty to exercise reasonable care. The case does not contain any discussion whatsoever of unfair and deceptive practices for purposes of a CPA claim.

Finally, even if it did have a duty, Wells Fargo did nothing deceptive. There is no evidence in the record that Wells Fargo knew that the Patricks would not qualify for a second loan modification. The fact that there were investor restrictions on how the loan could be modified did not mean that it could not be modified. Indeed, the screen print-outs that the Patrick cite as evidence of their theory clearly state that loan modifications are "allowed with limitations." CP 2242. This is insufficient to show that Wells Fargo's review was deceptive.

In summary, no reasonable jury could find that merely informing a borrower that modifications are only available to borrowers who are in default or risk of default—especially with no promises of a permanent loan modification—is an unfair or deceptive practice.

(c) Wells Fargo Mediated in Good Faith.

The Patricks' assertion that Wells Fargo committed various unfair and deceptive acts at the FFA mediation in February 2014 is defied by the very records they rely upon.

RCW 61.24.163(12) requires an FFA mediator to complete a written certificate following any mediation certifying whether the parties mediated in good faith. If no resolution is reached, and the mediator certifies that the parties mediated in good faith, "the beneficiary may proceed with the foreclosure." RCW 61.24.163(13). A certificate of bad faith creates a rebuttable presumption that the party engaged in an unfair or deceptive act for purposes of the CPA. RCW 61.24.135(2).

Here, the mediator certified that Wells Fargo mediated in ***good faith***. CP 477-490. RCW 61.24.135 does not support an unfair or deceptive act when the mediator certifies that the beneficiary mediated in good faith. The good faith certificate completely undermines the Patricks' self-serving allegations to the contrary. It states that the Patricks failed to qualify for a HAMP modification (a government regulated modification program) based on their net present value calculations ("NPV") and also due to investor restrictions. CP 478. The Patricks' purposeful default would be a third reason for the denial had the bank known about it back in 2014. The mediator attached copies of the relevant excerpt from the pooling and servicing agreement, the agreed upon NPV inputs, and evidence of Wells Fargo's efforts to obtain a waiver of the investor restrictions to the good faith certificate. CP 477-490 (attachments 1, 3 and 4). The Patricks cannot create a factual issue with bald argument that is contradicted by the very documents they rely upon.

Finally, even if there was evidence of bad faith in the mediation, which there is not, there is no evidence that Wells Fargo's conduct in a

private mediation had any capacity to deceive the broader public, as required for a CPA claim under Washington law.

(d) <u>No Unfair or Deceptive Acts in Conducting Foreclosure.</u>

As a last resort, the Patricks make a circular argument that the foreclosure itself was unfair and deceptive because "Defendants repeatedly violate[d] multiple borrower protections in the DTA and then [directed] their agent, QLSWA, to sell the property." Opening Brief, pg. 32. As set forth above, the Patricks failed to meet their burden of showing that Wells Fargo or HSBC committed any unfair or deceptive acts.

2. <u>There Is No Public Impact.</u>

The "purpose of the Consumer Protection Act [is] to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally." *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333 (1976). "Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." *Hangman Ridge*, 105 Wn.2d at 790. It is only 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." *Id.* (emphasis added). A plaintiff must show "a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated."

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-05 (2009) (internal quotation and citation omitted). Moreover, a "private plaintiff must show that his lawsuit would serve the public interest." *Id.* at 605.

RCW 19.86.093 sets forth three ways to prove that an unfair or deceptive act injures the public interest: (1) the conduct violates a statute that incorporates the CPA; (2) it violates a statute that contains a specific legislative declaration of public interest impact; or (3) the conduct actually injured other persons, had the capacity to injure other persons, or has the capacity to injure others.

The Patricks failed to meet their burden on this essential element. They did not allege, much less prove, a *per se* public impact. A *per se* public interest impact occurs when a statute "contains a specific legislative declaration of public interest." RCW 19.86.093(1)-(2); *Klem*, 176 Wn.2d at 804 (J. Madsen concurring). The DTA does ***not*** contain a specific legislative declaration of a public interest impact. RCW 61.24 *et seq.* Consequently, there can be no *per se* public interest impact under RCW 19.86.093(1) or (2).

The Patricks next argue that their CPA claim "conclusively" meets the public impact element because it relates to FFA mediation. Appellants cite only RCW 61.24.135(2) for this proposition (no case law), but that statute says nothing about public impact. It says that a violation of the duty to mediate in good faith is an "unfair or deceptive act." That is a different element from a "declaration of public interest." Moreover, as set forth above, the evidence shows Wells Fargo mediated in good faith.

Accordingly, the Patricks cannot meet their burden of showing a public impact by relying on RCW 61.24.135.

RCW 19.144.005 is similarly unhelpful. That statute deals with subprime lending and caps on negative amortization. There is no claim under RCW 19.144.005 in this case. Nor could there even be a claim under that statute because it does not apply to national banks like Wells Fargo and HSBC. RCW 19.144.010.[1] Thus, whether it contains a declaration of public interest is irrelevant.

Finally, the Patricks failed to submit any evidence whatsoever to show that their private interactions with Wells Fargo injured others in the exact same fashion. *Hangman Ridge,* 105 Wn.3d at 790. Their claims are specific to their financial situation (i.e. could afford payments but wanted a better deal), their loan (with specific investor restrictions), and their private conversations with Wells Fargo. Private discussions and negotiations do not implicate the public interest. There are no facts in the record from which the court could infer a broader public injury from the Patricks' private negotiations. *See, e.g., McCrorey v. Fed. Nat'l Mortg. Ass'n*, 2013 U.S. Dist. LEXIS 25461, at *11-12 n.4 (W.D. Wash. Feb. 25, 2013) ("To the extent plaintiffs are asserting a CPA claim based on Flagstar's breach of promise to modify the loan and Nationstar's unwillingness to honor Flagstar's commitment . . . , there are no facts from

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[1] Specifically, the act provides that "Financial Institution" includes only those banks subject to regulation under Title 30A RCW. RCW 30A.04.010(2)(1) expressly excludes national banks from its definition.

which one could infer that this lamentable situation affects the public interest.").

Next, the Patricks cite to a website containing a press release related to a 2010 assurance of discontinuance which they contend relates to Wells Fargo's problematic servicing of adjustable rate notes. *Id.* Even if a cursory citation to an unauthenticated website was admissible evidence for purposes of summary judgment, which it is not, Appellants make no effort to explain how the press release shows that other Washington consumers were affected by the same deceptive acts. The assurance of discontinuance referenced in the press release was unique to "Pick-a-Payment" mortgage loans sold by Wachovia and has no bearing on the allegations in this case. The Patricks did not have a Pick-a-Payment loan. Even if they did, the Assurance expressly provides at ¶ IVB that it "shall not be construed or deemed to be evidence of an admission or concession on the part of Wells Fargo of any violation of law, liability, or wrongdoing by it, and shall not be offered or received in evidence in any action or proceeding. . . ." Thus, by its own terms, the assurance cannot be evidence of a public impact.

As a last resort, the Patricks cite to an Arizona law review article and assert that because "millions nationwide" have been considered for a HAMP loan modification, there must be a public impact. The mere fact that many people have applied for modifications does not create a genuine issue of material fact as to whether the allegations in this case have a substantial potential for repetition. If it were that easy, the public interest

element would be met any time a plaintiff made a CPA claim against a large bank simply because the bank has many other customers.

It is only 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 (emphasis added). The Patricks failed to submit any evidence to raise a genuine issue of material fact as to a public interest.

3. <u>The Patricks Failed to Show the Conduct Caused a Cognizable Injury.</u>

The "injury" element of a CPA claim requires a "specific showing of injury" to "business or property." *Hangman Ridge*, 105 Wn.2d at 792. "The injury involved need not be great, but it must be established." *Id.* "Personal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement. Thus, damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57 (2009). Neither are costs associated with instituting a CPA action. *Panag*, 166 Wn.2d at 62.

In order to establish proximate cause, a plaintiff must show that "but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 84 (2007). Put another way, proximate cause requires proof of a direct sequence unbroken by any superseding cause, that produces the injury and without which the injury would not have

occurred. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 278 (2011).

The Patricks argue that they spent time and money filing out modification applications and conducting online research in an attempt to modify their loan before ultimately choosing to let the foreclosure sale go forward. They submitted conclusory declarations stating they had been injured, but submitted no documents or other admissible evidence showing an actual injury to business or property.

More importantly, none of the Patricks' alleged injuries were caused by Wells Fargo or HSBC. They are the direct result of their decisions to purposefully default on their payments, not to cure their default, and not restrain the inevitable foreclosure sale. The Patricks failed to make 31 subsequent payments beginning in July 2012. Any one of their many, many failures to timely make loan payments constituted a default on the loan, allowing Wells Fargo to pursue the remedy of foreclosure. *Massey v. BAC Home Loan Servicing LP*, 2013 U.S. Dist. LEXIS 180472, at *22-23 (W.D. Wash. Dec. 23, 2013) ("Any injuries associated with the foreclosure proceedings . . . were caused solely by her own default"); *Babrauskas v. Paramount Equity Mortgage*, 2013 U.S. Dist. LEXIS 152561, at *4 (W.D. Wash. Oct. 23, 2013) (holding no injury under the CPA because "plaintiff's failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey*, 2013 U.S. Dist. LEXIS 25461, at *11 (holding no injury under the CPA because "it was

[plaintiffs'] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure").

No evidence shows that the Patricks would not have applied for a loan modification "but for" Wells Fargo's alleged statement that they needed to have a financial hardship to qualify. Nor is there any evidence that the Patricks would not have defaulted "but for" that alleged call with a Wells Fargo representative. In fact, such an allegation would run headfirst into signed statements the Patricks submitted in connection with their loan modification applications indicating that their default was caused by financial hardship. *See* CP 208-209 ("We have now drained our savings and are not certain of our future if this modification were not to come to fruition."). The Patricks failed to establish that they would not have a defaulted on 31 payments but for the alleged statements by unnamed Wells Fargo representatives.

Appellants argue that Wells Fargo should be barred from asserting that their intentional default caused their injuries because "Wells Fargo promised the Patricks a modification and told them they would give them a modification if they stopped making their monthly mortgage." Opening Brief at pg. 37-38. This argument completely misconstrues the evidence and claims in this case. The Patricks never alleged that Wells Fargo promised them a loan modification if they defaulted, and there is no evidence in the record to support that allegation. Their own declarations do not even contain any evidence of a promise. They merely state that Wells Fargo "advised" them to default and said that it "had multiple loan

modification programs available." CP 3 at ¶ 8. That is far from a promise of a modification. It was this sort of creative liberties with the facts that caused the trial court below to seek clarification that there was ***no promise of a loan modification*** during oral argument. RP 22-23.

Any injuries associated with the modification applications and foreclosure proceedings were caused solely by the Patricks' own decision to default and quest for more favorable terms on their loan. They failed to show that they would not have incurred these injuries but for the alleged unfair acts. *Schnall*, 171 Wn.2d at 278.

4. RCW 19.86.170 Exempts Wells Fargo and HSBC from the CPA Claim.

The CPA exempts from its purview specific acts that are "otherwise permitted, prohibited, or regulated under laws administered by . . . any other regulatory body or officer acting under statutory authority of this state." RCW 19.86.170; *Miller v. U.S. Bank, N.A.*, 72 Wn. App. 416, 420 (1994). The exemption applies to the particular activity alleged to be unfair or deceptive that "is specifically permitted, prohibited, or regulated." *Vogt v. Seattle First Nat'l Bank*, 177 Wn.2d 541, 552 (1991).

In *Miller,* this court held that national banks, such Wells Fargo and HSBC, are exempt from CPA claims alleging unfair or deceptive practices under RCW 19.86.170. *Miller*, 72 Wn. App. at 420-22. The court adopted and applied a primary jurisdiction analysis to determine whether CPA exemption applied. "When both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines

whether the court or the agency should make the initial decision." *Miller,* 72 Wn. App at 421 (citing *Vogt*, 117 Wn.2d at 544). The court analyzed three factors: (1) whether the agency has authority to resolve the issues that would be before the court; (2) whether the agency has special competence over the controversy that renders the agency better able to resolve the dispute; and (3) whether the claim before the court involves issues that fall within the scope of a regulatory scheme such that judicial action has the potential to conflict with the regulatory scheme. *Id.*

As to the first factor, *Miller* held that "the relationship between a national bank and its customers concerning whether the bank's loan collection practices are unfair or deceptive is specifically regulated by the Comptroller of the Currency." *Id*. The second factor was satisfied because the banking system is federally regulated. 15 U.S.C. § 57a regulates unfair and deceptive practices, and the Comptroller of the Currency has a statutory enforcement function. Thus, the court held the Comptroller of the Currency, not a state court, "is uniquely qualified to regulate and resolve disputes arising in the bank-customer relationship." *Id.* at 422. *Miller* also concluded the third factor was satisfied since the relationship between a national bank and its customers was a part of a "pervasive regulatory scheme," danger existed that "judicial action could conflict with that" scheme. *Id.* Thus, *Miller* dismissed the plaintiff's CPA claim against the national bank under RCW 19.86.170. *Id.*

Here, 12 C.F.R. § 1014.3 specifically prohibits Wells Fargo and HSBC from misrepresenting any material aspect of a loan modification

program, including "the consumer's ability or likelihood to obtain a refinancing or modification of any mortgage credit product or term." 12 C.F.R. § 1014 is part of Regulation N, issued by the Bureau of Consumer Financial Protection ("CFPB"). The CFPB was created by the 2010 Dodd Frank Wall Street Reform Act to take over some of the regulatory functions from the OCC. Regulation N applies to all persons "over which the Federal Trade Commission has Jurisdiction under the Federal Trade Commission Act," which includes national banks. 12 C.F.R. § 1014.1. 15 U.S.C. § 57a—the statute relied upon by the court in *Miller*—is the statute within the Federal Trade Commission Act that grants authority to prescribe regulations relating to unfair or deceptive acts or practices in or affecting commerce and also applies to national banks. *Miller,* 72 Wn. App. at 422. These are just examples of the pervasive regulations governing the conduct at issue that led the court in *Miller* to find that national banks are exempt from CPA claims.

As to the first factor, Wells Fargo and HSBC are both national banks regulated by federal law. The OCC and CFPB have authority to resolve disputes between the banks and their customers. 15 U.S.C. § 57a ; 12 U.S.C. § 5565 (CFPB enforcement powers). Following *Miller*, the CFPB (which took over partial duties from the OCC in 2010) is the agency with the power to grant the Patricks relief should it determine there was any wrongdoing.

The second factor is satisfied because the CFPB is uniquely qualified to regulate and resolve disputes regarding banking practices, and

federal regulations are in place to specifically regulate unfair or deceptive acts or practices of banks. *Miller*, 72 Wn. App. at 422 (citing 15 U.S.C. § 57a (Unfair or Deceptive Acts or Practices Rulemaking Proceedings)); 12 U.S.C. § 5565 (CFPB enforcement powers).

Lastly, there is a risk that a court's adjudication of what is "unfair or deceptive" could conflict with this "pervasive regulatory scheme" that governs the relationship between national banks and their customers. *Miller*, 72 Wn. App. at 422. Whether certain acts or practices by a national bank are unfair or deceptive are matters within the jurisdiction of the CFPB.

Aside from a passing comment that *Miller* "concluded the CPA exemption did not apply," the Patricks fail to address how their CPA claim against Wells Fargo and HSBC survives *Miller.* Instead of distinguishing *Miller*, they infer that *Miller* got it wrong and invite this Court to ignore its own precedent.

First, the Patricks argue that the CPA exemption only applies if a regulation expressly "permits" the activity in question. Such an interpretation would require this Court to essentially overrule *Miller*. Appellants rely on *Vogt,* 117 Wn.2d 541 (1991), to support their argument, but *Vogt* is not on point. *Vogt* considered whether a national bank acting in a fiduciary capacity as a trustee was exempt from a CPA claim relating to the amount of fees it charged to the trust. The bank argued that 12 C.F.R. § 9.15(a) permitted it to charge the fees. However, that regulation contained an important limitation—it applied only "[i]f the

amount of the [fees] is not regulated by local law ***or provided for in the instrument creating the fiduciary relationship*** or otherwise agreed to by the parties." *Id.* at 550-551 (emphasis added).

In analyzing whether CPA exemption applied, the *Vogt* court recited the same general rule that *Miller* applied several years later: "Exemption under the [CPA] is applied only after determining whether the specific action is ***permitted, prohibited, regulated or required*** by a regulatory body or statute." *Id.* at 551 (emphasis added). Ultimately, because the underlying statute looked first to the trust document itself, and because the trust document in *Vogt* authorized the bank to receive reasonably compensation, the court found that the conduct was not specifically permitted, prohibited or regulated by the federal regulation and exemption did not apply. *Id.* at 553. *Vogt* does not stand for the proposition that only conduct that is expressly permitted by a regulation can be exempt under RCW 19.86.170 such that *Miller* is not good law.

Similarly, the Patricks' argument that exemption does not apply to a national bank when it acts as a trustee misconstrues the court's holding in *Vogt*. *Vogt* interpreted a specific regulation governing the fiduciary activities of a national bank. The allegations against HSBC in this case involve the bank's collection activities like in *Miller,* not fiduciary activities like those at issue in *Vogt*.

Miller held that national banks are exempt from CPA claims in connection with their loan collection activities. Accordingly, even if the Court were to find that the Patricks raised a genuine issue of material fact

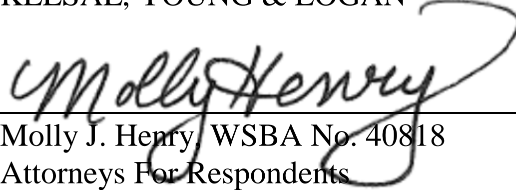
to support a CPA claim, which they have not, this Court should still affirm summary judgment because Wells Fargo and HSBC fall within the exemption of RCW 19.86.170.

VI. CONCLUSION

For all the foregoing reasons, Wells Fargo and HSBC respectfully request that the Court affirm summary judgment.

DATED this 22nd day of February, 2016.

KEESAL, YOUNG & LOGAN



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing BRIEF OF RESPONDENTS WELLS FARGO BANK, N.A. AND HSBC BANK, USA, N.A. AS TRUSTEE FOR WELLS FARGO ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-AR8 upon the following person via Email and First Class U.S. mail, postage prepaid:

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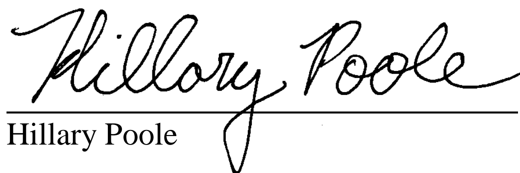
DATED this 22nd day of February, 2016, at Seattle, Washington.



Hillary Poole

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