73406-7

No. 73406-7

(King County Superior Court No. 13-2-29758-2 SEA)

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

FRANK BUCCI,

Appellant/Plaintiff,

v.

NORTHWEST TRUSTEE SERVICES, INC, et al.,

Respondents/Defendants.

RESPONDENT JPMORGAN CHASE BANK, N.A.'S ANSWERING BRIEF

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I. INTRODUCTION

Plaintiff owns a luxury property in Newcastle, Washington that he obtained through a $1.53 million loan from Washington Mutual Bank, FA in 2007. Plaintiff defaulted on this loan less than two years later, in March 2009. Plaintiff does not dispute he cannot repay his loan, yet continues to live in the property even though he stopped making payments over ***seven*** years ago.

The trial court dismissed Plaintiff's claims against Chase on multiple grounds. First, the court granted Chase's Motion for Summary Judgment because Plaintiff could not demonstrate any genuine issue of material fact preventing dismissal on any claim alleged in the Complaint. Second, Plaintiff's claims are preempted by the federal Home Owners Loan Act ("HOLA").

This Court should conclude the trial court properly granted summary judgment and should affirm the trial court in all respects.

II. STATEMENT OF THE CASE

A. Undisputed Facts

Plaintiff Frank Bucci. Plaintiff is a general contractor who claims to have worked with some of the largest builders in Washington and Florida. CP 136 ¶ 2. He is "extremely familiar" with the real estate market on the east of Seattle, especially properties located in Newcastle. *Id.* Plaintiff built his house located in Newcastle (the "Property") using the proceeds of a construction loan. CP 851 at 19:15-20. Plaintiff claims the Property is approximately 4,000 square feet and located on the Reserve

at Newcastle golf course. CP 859 at 227: 19-21; 228:14-17. But an internet listing states that the Property is 7,716 square feet and describes the Property as follows:

> Spectacular home situated above the 5th green (China Creek) with exceptional attention to details and exposure. The home features a morning room, master bedroom on the main floor, bed & breakfast guest suite, wine cellar, full basement for shop space, and an intriguing tower with an observation deck to enjoy the incredible views!

CP 841 ¶ 3; CP 907-908. This description is consistent with photographs Plaintiff took of the Property. CP 859 at 228:25-229:11; CP 907-908.

Plaintiff is not and never has been married. CP 849 at 13:20-20; 857 at 202:21-25; 203:1-5. Other than occasional visits from his two children, Plaintiff has always lived at the Property alone. CP 851 at 20:21-25; 21: 1; CP 867 at 293:19-22. Plaintiff describes himself as semi-retired and stopped working full-time in 1998. CP at 730 at 338:4-9.

Plaintiff Borrows $1.53 from Washington Mutual Bank, F.A.

On or about May 22, 2007, Plaintiff signed an Adjustable Rate Note ("Note") as evidence of his obligation to repay a $1.53 million refinance loan from Washington Mutual Bank, F.A. ("WaMu"). CP 6 ¶ 20; CP 922 ¶ 3; CP 926-934; CP 922 ¶ 3; CP 926-934. He also signed a Deed of Trust ("Deed of Trust"), dated May 22, 2007, which encumbered the Property, to secure his obligations under the Note. CP 6 ¶ 21; CP 26-42; CP 922 ¶ 4; CP 935-951. The Deed of Trust was recorded in King County on

March 30, 2007. CP 26-42; CP 935-951. Plaintiff admits signing both the Note and Deed of Trust. CP 681 at 21:6-11; CP 684 at 33:8-11.

By signing the Note and Deed of Trust, Plaintiff agreed that the Property could be sold at foreclosure sale if he did not make payments. Paragraph 7(B) of the Note states, "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." CP 930. Paragraph 22 of the Deed of Trust provides, "If the default is not cured . . . Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law." CP 948.

Plaintiff's Loan is Securitized and Sold to the WaMu Mortgage Pass-Through Certificates Series 2007 -OA6 Trust. After Plaintiff obtained the loan, LaSalle Bank, N.A. bought the loan while acting in its capacity as trustee for a trust known as the "WaMu Mortgage Pass-Through Certificates Series 2007 -OA6 Trust" ("WaMu Trust").[1] CP 922 ¶ 5. The Pooling and Servicing Agreement ("PSA") governing the WaMu Trust was by and between WaMu Asset Acceptance Corp., as Depositor; Washington Mutual Bank, F.A., as Servicer; LaSalle Bank N.A., as Trustee; and Christiana Bank and Trust Company, as Delaware Trustee,

[1] According to the Pooling and Servicing Agreement ("PSA"), LaSalle Bank N.A. was the initial trustee of the WaMu Trust. CP 922 ¶ 5; CP 952-984. As reflected in the FDIC's records, on October 17, 2008, LaSalle merged into, and subsequently operated as part of, Bank of America, N.A. CP 841 ¶ 4; CP 909-910.

for the WaMu Trust. CP 922 ¶ 5. Washington Mutual indorsed the Note in blank. CP 229.

Under the PSA, Washington Mutual was identified as the Initial Custodian. CP 922-23 ¶ 6; *see also* CP 923 ¶ 8; CP 985-1000. The Mortgage File, which includes the original Note, was provided to Washington Mutual to maintain physical possession on behalf of the WaMu Trust. CP 922-23 ¶ 6. Additionally, Washington Mutual was identified as the servicer for the WaMu Trust. As servicer, Washington Mutual was authorized to act in the same manner it would act in its capacity as a servicer for its own loans, which includes executing documents, including deed of trust assignments, and initiating foreclosure on defaulted loans on behalf of the WaMu Trust. CP 923 ¶ 7.

WaMu Fails and Chase Acquires Plaintiff's Loans from the FDIC. On September 25, 2008, the FDIC placed WaMu in receivership, transferring WaMu's loan assets to Chase. *See* http://www.fdic.gov/about/freedom/washington_mutual_p_and_a.pdf (Purchase and Assumption Agreement Among FDIC and JP Morgan Chase Bank, N.A. (Sept. 25, 1998) (the "Purchase and Assumption Agreement")). CP 923 ¶ 9. Chase thus became the holder of the Note and the beneficiary under the Deed of Trust in September 2008, as an agent for the WaMu Trust. Chase began servicing Plaintiff's loan after it acquired the servicing rights with respect to Plaintiff's loan (and others) from the FDIC. CP 923 ¶ 10. As servicer, Chase was in physical possession of Plaintiff's Note. CP 923 ¶ 10.

On June 29, 2009, Chase executed an Assignment of Deed of Trust to provide notice that it was transferring its beneficial interest under the Deed of Trust to Bank of America, N.A. ("BANA") in its capacity as the successor trustee (succeeding LaSalle Bank) for the WaMu Trust. The Assignment of Deed of Trust stated as follows:

> For Value Received, the undersigned as Beneficiary, hereby grants, conveys, assigns and transfers to Bank of America, National Association as successor by merger to "LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust, whose address is c/o WAMU 7255 Baymeadows Way Jacksonville, FL 32256, all beneficial interest under that certain deed of trust, dated 05/22/07, executed by Frank Bucci, an unmarried person, as his separate estate, Grantors, to Ticor Title Company, Trustee, and recorded on 05/30/07, under Auditor's File No. 2007053000858, Records of King County, Washington.

CP 6 ¶ 22; CP 45-46. The Assignment of Deed of Trust was recorded July 10, 2009. CP 6 ¶ 22; CP 45-46. Chase remained servicer of Plaintiff's loan and retained "physical possession" of the Note on behalf of the WaMu Trust. CP 923 ¶ 10.

At the direction of BANA, Chase Appoints Northwest Trustee Services as Trustee Under the Deed of Trust. On July 6, 2009, Chase, as attorney-in-fact for BANA signed an Appointment of Successor Trustee, which appointed Northwest Trustee Services, Inc. ("NWTS") as the successor trustee under the Deed of Trust. CP 6 ¶ 21; CP 43-44; CP 923-24 ¶ 11; CP 1046-1053. Chase had authority to act as BANA's attorney-in-fact through a limited power of attorney. CP 923 ¶ 11; CP

1046-1053. The limited power of attorney specifically provided that Chase authority to act as to: "The substitution of trustee(s) serving under a Deed of Trust, in accordance with state law and the Deed of Trust." CP 288 ¶ 8(a).

The Appointment of Successor Trustee appointed a new foreclosure trustee under the ***Deed of Trust***; it did not affect the identity of the trustee of the ***WaMu Trust***. The Appointment of Successor Trustee was recorded in King County July 10, 2009. CP 6 ¶ 21; CP 43-44.

U.S. Bank Succeeds BANA as the Trustee of the WaMu Trust. After Plaintiff's loan was sold to the WaMu Trust, BANA, U.S. Bank N.A. ("U.S. Bank"), and several other financial entities entered into a Purchase Agreement whereby U.S. Bank acquired BANA's securitization and trust-administration businesses. U.S. Bank then succeeded BANA as the trustee of the WaMu Trust. U.S. Bank executed an Affidavit confirming that U.S. Bank succeeded BANA as the trustee of certain mortgage-backed transactions, including the WaMu Trust. CP 924 ¶ 12; CP 1054-1073. U.S. Bank is therefore trustee of the WaMu Trust and the current owner of Plaintiff's loan, with Chase retaining physical possession of the Note in its capacity as the servicer and acting on behalf of US Bank.

Plaintiff Defaults on the Loan. As of March 1, 2009, Plaintiff defaulted on the loan by failing to make payments. CP 720 at 252:6-253:1. Plaintiff chose not to pay the arrearages on the loan to make the

loan current because he believed the value of the Property had decreased. CP 710 at 168:14-25.

Plaintiff Submits False Loan Modification Applications, But Fails to Qualify for Available Loss Mitigation Options. After defaulting on the loan, Plaintiff, under the penalty of perjury, submitted a series of false loan modification applications to Chase. For example, on August 20, 2009, Plaintiff submitted a hardship letter falsely stating that Plaintiff and his "wife" purchased the Property, that Plaintiff was an accountant, and that he had listed the Property for a short sale. CP 724 at 287:19-288:6. During his deposition, Plaintiff admitted that he was never married, his girlfriend never lived in the Property, that he was not a certified public accountant, and that he never listed the Property for a short sale. CP 724 at 288:7-291:7. When asked why he falsely stated that he listed the Property for a short sale, Plaintiff said, "I don't know." CP 725 at 291:7.

Likewise, on November 11, 2009, Plaintiff submitted another hardship letter with a loan-modification application that stated, "please allow us to get a loan modification so we can continue to raise our family in this home we have worked so hard in trying to keep." CP 725 at 291:21-293:10; CP 897. Plaintiff later admitted that he always lived alone in the Property and his girlfriend did not live in the Property when he wrote the letter. CP 725 at 293:11-25.

Even if Plaintiff's statements had been true, Plaintiff did not qualify for or obtain a loan modification. Plaintiff received a letter from

Chase, dated November 17, 2011, stating that he did not qualify for a foreclosure alternative through the Home Affordable Foreclosure Alternatives ("HAFA") Program. The letter provided the following explanation or Plaintiff's ineligibility:

> You are ineligible for the HAFA Program for the following reason(s):
> The current unpaid principal balance on your Loan is higher than the program limit ($729,750 for a one-unit property ....).

CP 898-890.

Chase also sent letters to Plaintiff denying other loan-modification applications because Plaintiff did not timely provide all of the required information. For example, Plaintiff received a letter, dated December 8, 2011, which stated as follows:

> We received your request for a mortgage modification. After completing two reviews of the information you sent us, we determined that you are not eligible for a modification under the Home Affordable Modification Program (HAMP) or under any other modification programs.
>
> [...]
>
> First, we wanted to let you know why you are not eligible for a modification:
>
> You did not provide all of the documents we requested within the required timeframe, or your documents were incomplete. We sent you several letters with a list of the documents we needed from you to finish reviewing your modification.

CP 898-890.

Later, Plaintiff received a letter, dated May 25, 2012, stating that Chase was cancelling Plaintiff's request for a short sale because "You have not responded to our requests for documents or information." CP 904. Plaintiff also requested and was referred to foreclosure mediation under Washington's Foreclosure Fairness Act ("FFA"), RCW 61.24.163. CP 651-661. But Plaintiff preemptively cancelled the FFA mediation after he decided unilaterally that the beneficiary would not mediate in good faith. CP 789; CP 697 at 107:6-23.

NWTS Commences Non-Judicial Foreclosure on the Property.

Because Plaintiff defaulted on the loan, NWTS issued a Notice of Default on March 12, 2013. CP 7 ¶ 23; CP 47-51. The Notice of Default stated that Plaintiff had been delinquent on his monthly payments since March 1, 2009. *Id.* It also stated that Plaintiff's total arrears and costs, as of the date of the Notice of Default, were $328,902.95. CP 47-51.

The Notice of Default identified the "owner of the note" as "U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007 -OA6 Trust." The Notice of Default also identified the loan servicer as "JP Morgan Chase Bank, National Association." CP 7 ¶ 23; CP 47-51.

On June 24, 2013, NWTS executed a Notice of Trustee's Sale setting the trustee's sale for October 25, 2013. CP 8 ¶ 27, CP 76-80. The

Notice of Trustee's Sale stated that the arrears on the loan had grown to $349,883.84. CP 8 ¶ 27, CP 76-80. The Notice of Trustee's Sale was recorded in King County on June 25, 2013. CP 841 ¶ 5; CP 911-916.

As the servicer of the loan, and the custodian under the PSA, Washington Mutual, and later Chase, held the Note (indorsed in blank) on behalf of the WaMu Trust at all relevant times during the discontinued foreclosure. CP 922-23 ¶¶ 6, 10. As of August 1, 2013, Select Portfolio Servicing, Inc. ("SPS") began sub-servicing the loan, taking over as servicer for the loan on a day-to-day basis. CP 924 ¶ 13.

B. Procedural Background

Plaintiff Filed Suit to Enjoin the Pending Trustee's Sale.

Plaintiff filed this lawsuit on August 16, 2013, seeking, among other things, to enjoin the sale. CP 1850-1914. The trustee's sale was postponed several times (and still has not occurred). CP 681 at 20:24-21:1; CP 1294-1301.

On January 10, 2014, Plaintiff filed a first amended complaint to add SPS as a defendant. CP 1-25. In the first amended complaint, Plaintiff alleged he suffered damages from the defendants' actions due to "distraction and loss of time to pursue business and personal activities" and "having to take time off from work." CP 15-16 ¶¶ 51 (a), 51 (c). But during deposition, Plaintiff admitted that nothing relating to the lawsuit prevented him from working because he was semi-retired and did not engage in paid employment. CP at 730 at 338:4-9. He also stated that the

lawsuit did not impair his ability to engage in any meaningful personal activities. He testified as follows:

> Q: If you weren't here today, what would you be doing?
> A: Probably taking a walk.
> Q: So it's your testimony that you have no personal activities you do outside this deposition?
> A: I'm not being evasive here. I'm about as boring as they come, okay?
> Q: You were semi-retired when you filed this complaint, correct?
> A: That's correct.
> Q: You had no income from employment?
> A: No.
> Q: Do you foresee receiving any income from employment in the foreseeable future?
> A: I hope not.
> Q: Before, you testified that you do not have any personal activities. Do you remember that testimony?
> A: You asked me what I would be doing if I weren't here.
> Q: And you said nothing?
> A: I said I would be out for a walk.
> Q: So this lawsuit or the alleged wrongful conduct that you're complaining of has prevented you from taking a walk?
> A: It's prevented me from walking every day and getting on with my life, however pathetic you think it is.
> Q: Before, you mentioned that part of your injury is pain and suffering; is that correct?
> A: I said that tongue and cheek.

CP 858 at 206:24-207:5; CP 872 at 327:7-328:9.

Plaintiff also testified that "money is fungible," and thus agreed that money not used to make his mortgage payments was available to use for other expenses. CP 687 at 46:10-18; CP 728 at 322:4-14.

The Trial Court Grants Chase Summary Judgment. Between January 30, 2015 and February 27, 2015, all parties sought summary judgment. CP 203-219; CP 538-561; CP 1074-1098; CP 1101-1112; CP 1139-1163.

On March 27, 2015, the trial court granted Chase's Motion for Summary Judgment dismissing all claims against Chase with prejudice. CP 1841-1842. Despite already having entered summary judgment for Chase, on April 7, 2015, the trial court filed a separate order granting in part and denying in part Chase's Motion for Judgment on the Pleadings, ruling that the federal Home Owners Loan Act ("HOLA"), 12 U.S.C. § 1461, et. *seq.*, preempted Plaintiff's "claims to the extent that they [were] predicated upon Plaintiff's allegation regarding computation of the amount due under Plaintiff's loan and Plaintiffs allegations regarding the calculation and assessment of loan-related fees, including late charges and servicing fees." CP 1845-1848.

Plaintiff Appeals Dismissal. Plaintiff filed his notice of appeal on April 21, 2015.

III. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly find the Note is a negotiable instrument?

2. Did the trial court properly dismiss Plaintiff's Consumer Protection Act ("CPA"), RCW 19.86.010, *et seq.*, claims because Plaintiff failed to identify a genuine issue of material fact precluding summary judgment?

3. Did the trial court properly dismiss Plaintiff's negligence claims because Plaintiff failed to identify a genuine issue of material fact precluding summary judgment?

4. Did the trial court properly find in the alternative that the federal Home Owners Loan Act ("HOLA"), 12 U.S.C. § 1461, *et seq.*, and its implementing regulations preempted Plaintiff's claims to the extent that they were predicated upon Plaintiff's allegations regarding computation of the amount due under Plaintiff's loan, the calculation and the assessment of loan-related fees, including late charges and servicing fees?

5. Did the trial court properly consider the evidence on summary judgment?

IV. ARGUMENT

The only claims before this Court on review are ones for which Plaintiff failed to demonstrate a genuine issue of disputed fact precluding summary judgment and are barred by HOLA. Plaintiff's Complaint alleged several additional theories of liability that they do not pursue on appeal; Plaintiffs have thereby waived any challenge to the dismissal of those claims. *Ang v. Martin*, 154 Wn.2d 477, 486-87 (2005); RAP 10.3(a). Specifically, Plaintiff's opening brief does not challenge dismissal of their allegations that Chase violated the CPA by (1) failing to exercise authority to postpone or reschedule the trustee's sale; (2) wrongly identifying the beneficiary or owner of the note; (3) purporting to have legal authority to foreclose; (4) robo-signing documents. Plaintiff also does not challenge dismissal of his claims under the Deed of Trust Act,

RCW 61.24, *et seq.*, for breach of good faith, for injunctive relief, to quiet title, or under the Uniform Declaratory Judgments Act, RCW 7.24.020.

A. Standard and Scope of Review.

This Court reviews an order granting summary judgment *de novo*. *See Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271 (2012). Summary judgment is appropriate when the pleadings and supporting materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c); *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501 (2005). Once the moving party meets the initial burden of demonstrating the absence of genuine issues of material fact, the nonmoving party bears the burden of producing admissible evidence showing that material facts are in dispute. *See Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Id.*

The nonmoving party ***cannot*** meet that burden "by responding with conclusory allegations, speculative statements, or argumentative assertions." *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn. App. 28, 36 (2000). *See also Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852 (1986) (same). If the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharmas., Inc.*, 112 Wn.2d 216, 225 (1989) (citation omitted).

B. Plaintiff's Note is a Negotiable Instrument.

Whether an instrument is negotiable is a question of law to be determined by the Court. *See Northern Bank v. Pefferoni Pizza Co.*, 562 N.W.2d 374, 376 (Neb. 1997); *Cartwright v. MBank Corpus Christi, NA.*, 865 S.W.2d 546, 549 (Tex. Ct. App. 1993).

Plaintiff argues the Note is not a negotiable instrument because there must be a promise to pay a fixed amount of money, and the Note provides that the principal amount may change depending on a borrower's payments. OB at 15-22. Plaintiff's argument that the Note is not negotiable fails because he relies on an outdated version of the UCC and the case law that cites to it. *Id.*

Plaintiff's reliance upon *Anderson v. Hoard*, 63 Wn.2d 290 (1963), and earlier cases, to support his arguments is misplaced. *Anderson* was decided under the former UCC, which was repealed in 1965. *Id.* The current definition of "negotiable instrument" under RCW 62A.3-104(a) shows the Note is negotiable. A "'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order [...]"[2] 62A.3-104(a); *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509,

[2] 62A.3-104(a) includes a list of other requirements necessary for a "negotiable instrument," however, Plaintiff does not argue the Note does not meet these other requirements. *See* 62A.3-104(a) (1)-(3) (requiring the note be "payable to bearer or to order," "payable on demand or at a definite time," and "[d]oes not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money").

524 (2015). The Note states exactly that: "I promise to pay U.S. $1,530,000 plus any amounts added in accordance with Section 4 (G) below, (this amount is called "Principal"), plus Interest, to the order of the Lender." CP 927. Thus, Plaintiff promised to pay the fixed amount of $1,530,000, plus "other charges described in the promise or order." Those other charges are described in Section 4(G) of the Note, including negative or accelerated amortization, and do not affect negotiability of the instrument. CP 929.

Further, under RCW 62A.3-112(b): "Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and ***may require reference to information not contained in the instrument***. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, then except as otherwise provided in RCW 19.52.010, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues." (emphasis added).

Washington case law confirms negotiability. Washington courts hold that to meet the fixed-amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source. A recent Washington case demonstrates this approach. In *Alpacas of America v. Groome*, 179 Wn.

App. 391 (2014), the court explained, "[w]e analyze the promissory notes' contents to determine whether the notes' holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any other documents." *Id.* at 397 (citing RCW 62A.3-106 cmt. 1). This rule, which is reflected in the UCC negotiability provisions and the related comments, follows from the purpose and policy behind the concept of a negotiable instrument.[3] Indeed, RCW 62A.3-106 cmt. 1 states, in part:

> The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment. But subsection (b)(i) permits reference to a separate writing for information with respect to collateral, prepayment, or acceleration. Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment. A statement of rights and obligations concerning collateral, prepayment, or acceleration does not prevent the note from being an instrument if the statement is in the note itself.

RCW 62A.3-106; *see also* RCW 62A.3-104(a)(3); RCW 62A.3-108(b).

Thus, negotiability exists if the fixed amount can be determined from the face of the instrument, except with respect to calculations and amounts of interest, for which reference to information not contained in

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[3] "The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents. *See First State Bank at Gallup v. Clark*, 91 N.M. 117 (1977).

the Note is allowable. The fact that the Note provides for the accrual and payment of variable amounts of interest and interest rates, some of which may, under specified circumstances be re-characterized as principal up to a maximum limit, is all disclosed and set out in detail on the face of the Note. CP 927-29. Therefore, the Note is negotiable.

C. The Trial Court Correctly Granted Summary Judgment for Chase on Plaintiff's CPA Claim.

A private cause of action exists under the CPA only if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). The trial court properly dismissed Plaintiff's CPA claim against Chase because Plaintiff did not (and could not) demonstrate any facts supporting the required elements. CP 1841-42.

1. Plaintiff Cannot Demonstrate 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). Plaintiff could meet the first CPA element in only two ways: 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 a per se unfair trade practice." *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting Hangman Ridge, 105 Wn.2d at 785-86).

Additionally, to violate the CPA, 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).

Neither Plaintiff's Complaint nor his appeal alleged any per se unfair trade practice. Nor did Plaintiffs allege facts showing Chase committed an unfair or deceptive act or practice more generally that had the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785.

On appeal, Plaintiff alleges that Chase committed an unfair or deceptive act by:

> [1.] inducing Mr. Bucci to stop making his mortgage payments to receive a loan modification, [2.] by failing to give him a modification, [3.] by making material misrepresentations, [4.] by appointing NWTS to conduct a nonjudicial foreclosure without the requisite authority, and [5.] by not providing him a pre-foreclosure letter under RCW 61.24.031.

OB at 3. Plaintiff's brief discusses material misrepresentations only in the context of Plaintiff's failure to obtain a loan modification. OB at 32. Plaintiff fails to allege in his Complaint, or present substantive argument on appeal, that Chase did not provide him a pre-foreclosure letter under RCW 61.24.031. Thus, this allegation is waived. *Ang*, 154 Wn.2d at 486-87; RAP 10.3(a). Plaintiff's other allegations fail for the reasons discussed below.

Chase Did Not Induce Plaintiff to Default. Plaintiff argues WaMu and Chase induced him to default on his loan. OB at 30-31.

Courts routinely reject fraud claims based on allegations that banks told them to default on their loans. *See Atkins v. Litton Loan Serv., LLP*, 2010 WL 3184350, at *3 (N.D. Cal. 2010) (dismissing unfair competition claim based on allegation that bank told borrower to default to be considered for loan modification because the underlying fraud was not adequately plead); *Mortenson v. Mortg. Elec. Registration Sys., Inc.*, 2010 WL 5376332, at **7-8 (S.D. Ala. 2010) (granting judgment against borrower on fraud claim alleging borrower induced default); *Vega v. CTX Mortg. Co.*, 761 F. Supp. 2d 1095, 1100 (D. Nev. 2011) (dismissing promissory estoppel claim alleging Chase told plaintiff's to default to obtain a modification)]. Plaintiff's CPA claim suffers the same defects.

First, Plaintiff alleges in his Complaint only that he was dual-tracked, CP 17, and below and on appeal that "the only way [he] could qualify for a loan modification was to miss mortgage payments." CP 1544-45; OB at 30-31. In essence, Plaintiff alleges that Chase told him it does not modify performing loans, because there is no reason for doing so (and if Plaintiff wanted a refinance he could apply for that option). Plaintiff does ***not*** allege that he was promised a loan modification if he became delinquent, or that Chase would assist him in any way beyond processing his application. Chase's alleged statements do no more than advise Plaintiff of modification requirements. *See Shook v. Scott*, 56 Wn.2d 351, 355 (1960) (rejecting as "mere estimate" statements about future performance because "[t]he first essential [for a fraud claim] is that

the statement be a representation of an existing fact."). Regardless, even equivocal assurances fail as actionable promises or as a basis for reasonable reliance. *See Seattle-First Nat'l Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 824 (1992); *see also Lectus, Inc. v. Rainier Nat'l Bank*, 97 Wn.2d 584, 587-90 (1982) (company could not reasonably rely on a future conditional promise that program development was deferred "until we have a resolution of our class-action suit"). And Plaintiff admits he was in fact considered for loan modifications, but he was denied because the unpaid principal balance on his loan was higher than the HAFA Program limit and because he did not provide all the documents required for a modification application. CP 898-890. Plaintiff was denied a short sale because he failed to respond to requests for documents and information, CP 904, and he cancelled his FFA mediation after he decided unilaterally that the beneficiary wouldn't mediate in good faith. CP 789; CP 697 at 107:6-23.

These allegations are not sufficient to show that Chase made any intentionally false misrepresentation of a material existing fact, or that Plaintiff relied on false representations to his detriment. In *Atkins*, the court explained:

> [P]laintiffs' claim presupposes that Litton (and the lender) not only would consider a loan modification application, but that a loan modification agreement would in fact be reached. Plaintiffs have alleged no facts or representations by Litton that would support their reasonable reliance on an expectation of such an outcome.

2010 WL 3184350, at *3; *see also*); *Mortenson*, 2010 WL 5376332, at *8 ("plaintiff's own testimony reflects that when he called defendants to request forbearance, they merely informed him that he would have to be in default to be considered for such relief. This was not a false statement."); *Vega*, 761 F. Supp. 2d at 100 ("Plaintiffs plead no facts to support their conclusion that Chase intended to default without negotiating in good faith. A promise to negotiate is not a promise to modify.").

Second, Plaintiff does not allege that Chase's purported misrepresentations prevented him from curing his default. Plaintiff admits he did not attempt to pay the arrears on his loan after he defaulted because he "didn't want to" and that under no circumstances would he pay for the outstanding balance of the loan because there was "negative equity" in the Property. CP 864 at 276:13-278:10. Plaintiff admits he has an "obligation to pay." *Id.* Thus, Plaintiff failed to cure, but does not allege (and cannot show) that his failure to cure the default was somehow attributable to any Chase representations. To the contrary, Plaintiff refused to pay on the loan because the Property was "under water." Plaintiff knew he needed to cure default to avoid foreclosure but chose not to do so.

Accordingly, the Court should reject Plaintiff's CPA claim. *See Atkins*, 2010 WL 3184350, at *3 ("if plaintiffs were in fact able and willing to make the payments had they allegedly been advised not to do so, they have not alleged facts explaining why their purported reliance on Litton's representations rendered them unable to pay the amounts past due

once it became clear that foreclosure was going forward."); *Mortenson*, 2010 WL 5376332, at *8 ("Because the record unequivocally shows that Mortensen would have defaulted—even in the absence of purportedly fraudulent representations by defendants—because he was simply out of money, he cannot meet the reliance element of his fraud claims as a matter of law").

Chase is Not Required to Modify Plaintiff's Loan. Plaintiff alleges Chase acted deceptively by "failing to disclose to Bucci that if he failed to make his payments, they would take his home and not provide him a loan modification." OB at 32. Plaintiff also alleges Chase's alleged act of "dual tracking"—exploring modification options while reserving the right to pursue foreclosure—was unfair and deceptive. OB at 32-33.

But disappointment over a loan-modification denial is not actionable under any theory: "While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 572 (1991); *see also Ogorsolka v. Residential Credit Solutions, Inc.*, 2014 WL 2860742, *4-*5 (W.D. Wash. 2014) (lender has no duty to modify loan); *McPherson v. Homeward Residential*, 2014 WL 442378, *6 (W.D. Wash. 2014) (rejecting loan-modification claim). And though Plaintiff complains he was "dual-tracked," he does not deny default or that the Note or Deed of Trust allow the Property to be sold at foreclosure sale if he did not make payments. CP 930; CP 948. In fact, Plaintiff's Deed of Trust expressly

states that Chase's willingness to consider modification or other forbearance alternatives is not a waiver of its right to immediately resume foreclosure. CP 945 ¶ 12. If after being reviewed for modification, every borrower could postpone foreclosure by simply re-applying for loan modification, no lender could ever guarantee a right to realize on the collateral securing the loan. Finally, as described above, Chase ***did*** consider Plaintiff for modification on various occasions but Plaintiff failed to provide the necessary documentation and was otherwise ineligible. CP 864 at 276:13-278:10. Thus, Plaintiff does not allege any deceptive act.

Chase Had Authority to Appoint NWTS. The beneficiary has the power to appoint any trustee that is qualified to act as such pursuant to law. RCW 61.24.010(2). A trustee so appointed by a beneficiary may foreclose a deed of trust non-judicially when the borrower defaults, RCW 61.24, *et seq.* Here, Chase acquired WaMu's assets on September 25, 2008. Chase then executed the Assignment of Deed of Trust, which transferred its beneficial interest to BANA as Trustee on June 29, 2009. CP 922 ¶ 5; CP 952-984; CP 6 ¶ 22; CP 45-46.

Thereafter, BANA, through Chase as its agent and attorney-in-fact, appointed NWTS as the successor trustee under the Deed of Trust on July 6, 2009. CP 6 ¶ 21; CP 43-44. Chase had authority to act as BANA's attorney-in-fact through a limited power of attorney. CP 923 ¶ 11; CP 1046-1053. The limited power of attorney specifically provided that Chase authority to act as to: "The substitution of trustee(s) serving under a

Deed of Trust, in accordance with state law and the Deed of Trust." CP 288 ¶ 8(a).

Plaintiff argues that "[w]hile it is true that the DTA does allow for the use of agents, the Legislature has specifically designated which acts may be performed by an agent of the beneficiary or an agent of the trustee in nonjudicial foreclosures." OB at 34. Plaintiff is incorrect. Nothing in the DTA precludes the use of agents for particular purposes. In fact, the Supreme Court in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), held that "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note," and that "Washington law, and the deed of trust act itself, approves of the use of agents." *Id.* at 106. *Brodie v. Nw. Tr. Servs., Inc.*, 579 F. App'x 592, 593 (9th Cir. 2014) ("The fact that U.S. Bank chose to act through its authorized agent, JPMorgan Chase Bank, does not alter its right to foreclose and to appoint a successor trustee under the Washington Deed of Trust Act") (citing *Bain*, 175 Wn.2d at 106).

The undisputable facts show that BANA (later succeeded by U.S. Bank), as trustee of the WaMu Trust, was the holder of the Note and beneficiary under the Deed of Trust and was entitled to initiate foreclosure proceedings against the Property after Plaintiff defaulted.[4] BANA also

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[4] Washington law expressly permits one to hold a note either "directly or through an agent." RCWA 62A.3–201 cmt. 1. *See also Deutsche Bank Nat'l tr. Co. v. Slotke*, --- Wn. App. ---, 2016 WL 107783, *4 n.35 (2016) (same) (citations omitted).

had the ability and authority to designate Chase as its agent to appoint NWTS as the successor trustee under the Deed of Trust. Thus, NWTS was properly appointed as successor trustee and is authorized to take steps as the trustee to carry out the non-judicial foreclosure. *Rouse v. Wells Fargo Bank, NA.*, 2013 U.S. Dist. LEXIS 144013, at *13 (W.D. Wash. 2013) ("As the 'holder' of the Note and therefore the 'beneficiary' under the Deed of Trust Act, Wells Fargo had authority to appoint a successor trustee and foreclose on the property."); *Mickelson v. Chase Home Fin.*, 2012 U.S. Dist. LEXIS 110800, at *12 (W.D. Wash. 2012) ("Chase had authority to appoint NWTS as a successor trustee given that Chase was the holder of the Note."), *aff'd*, 2014 U.S. App. LEXIS 11480 (9th Cir. 2014).

2. Plaintiff Cannot Demonstrate Public-Interest Impact.

The Washington legislature amended the CPA in 2009 to create a new test for establishing the public interest element of the CPA, for actions occurring after that date. *See* RCW 19.86.093. Under the amended CPA standard applicable here, Plaintiff must offer evidence showing Chase's actions (a) injured other persons, (b) had the capacity to injure other persons, or (c) has the capacity to injure other persons. RCW 19.86.093(3)(a); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789–90 (1986). A dispute among the parties to a private contract does not affect the public interest. *Id.* at 790.

Here, Plaintiff's allegations involve a discontinued non-judicial foreclosure on his personal loan. There are no facts by which one could

infer that Chase's conduct implicates the public interest. *Ringler v. Bishop White Marshall & Weibel, PS*, 2013 WL 1816265, at *3 (W.D. Wash. 2013) (inferring private actions between two parties during loan-modification process "had the capacity to deceive a substantial portion of the public [was] unreasonable."); *McCrorey v. Fed. Nat. Mortgage Ass'n*, 2013 WL 681208, at *4 n.4 (W.D. Wash. 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 which one could infer that this lamentable situation affects the public interest."). As a result, Plaintiff failed to demonstrate the public interest element of his CPA claim.

3. Plaintiff Cannot Demonstrate Any Facts Showing Injury Caused by Chase.

Because Chase did not commit any unfair or deceptive act or practice, it cannot have injured Plaintiff by reason of that practice, as required by the CPA. A CPA action requires a "showing that plaintiff was injured in his or her 'business or property.'" *Hangman*, 105 Wn.2d at 792 (citing RCW 19.86.090). The injury element further requires a "specific showing of injury." *Id.* The causation element requires the establishment of a "causal link between the alleged acts and the plaintiff's injury." *Id.*

There is no dispute Plaintiff defaulted on the loan. CP 710 at 168:14-25. Plaintiff refuses to continue to make payments on the loan because he believes the Property is worth less than he owes. CP 710 at 168:14-25; CP 723 at 277:24-278:1-10. That is of course his choice, but

one that has consequences because he chose to use that home as collateral to obtain the loan he does not want to make payments on. Plaintiff has been living in the Property—a luxury home on a golf course—for over seven years without making loan payments. He agreed that money he was not using to make loan payments could be used for his other expenses. CP 687 at 46:10-18; CP 728 at 322:4-14. Plaintiff is not possibly "injured" by the initiation of foreclosure proceedings under these circumstances. Plaintiff's deposition testimony also shows he did not suffer injury from loss of employment or impairment to his personal activities. Plaintiff was semi-retired and received no income from paid employment at the time he filed the Amended Complaint and did not foresee receiving employment income in the near future. CP at 730 at 338:4-9.

Although Plaintiff stated that the lawsuit generally prevented him from "getting on with [his] life"—neglecting the fact that ***he*** filed the lawsuit—"[p]ersonal injuries are not compensable damages under the CPA and do not constitute an injury to business or property." *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013) (citing *Ambach v. French*, 167 Wn.2d 167, 172-73 (2009)).

Plaintiff also makes the empty allegation that the actions of the defendants somehow "harmed [his] ability to negotiate with the actual stakeholder(s)." CP 20 ¶ 63. But there is no evidence that Plaintiff did not know where to send his payments or that he was unable to explore loss mitigation options with his loan servicer. In *Brown v. Wash. State*

Department of Commerce, 184 Wn.2d 509 (2015), the Supreme Court recognized that a borrower who knows who to contact regarding the servicing of his or her loan has no need to determine the owner of his or her promissory note:

> A borrower can identify the note holder based on the information provided in the notice of default. The notice of default informs the borrower of the identity of the "servicer." RCW 61.24.030(8)(l). "Servicer" is not a legal term of art. Homeowners use the word to refer to the bank to which they send mortgage payments because they reasonably believe the servicer is the person entitled to enforce the note and because paying the servicer will discharge their obligation. That is true when the servicer holds the note. RCW 62A.3–301(i), –602(a).

Id. at 537-38; *see also Ogorsolka v. Residential Credit Sols., Inc.*, 2014 WL 2860742, at *4 (W.D. Wash. 2014) ("Plaintiffs do not allege that they failed to make payments because they did not know where to send payments or know what entity was servicing their loan. Thus ... the Complaint fails to state a claim for violation of the CPA."). To the contrary, the evidence shows that Plaintiff submitted multiple applications for loan modification or other loss mitigation options and that Plaintiff was denied loss mitigation options because his large loan was ineligible for relief or he failed to submit the required documentation. CP 898-890, 904. Plaintiff also voluntarily cancelled foreclosure mediation. CP 697 at 107:6-23; CP 871 at 324:8-24.

Any contention that the attorney's fees and costs Plaintiff incurred in this lawsuit constitute an injury fails as a matter of law. Attorney's fees

incurred for bringing a CPA claim are "insufficient to satisfy the injury element of a private CPA claim." *Demopolis v. Galvin*, 57 Wn. App. 47, 54 (1990); *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564 (1992); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 62–63 (2009).

Plaintiff's supposed "injuries" relating to the discontinued foreclosure were caused by Plaintiff's default, not the actions of the defendants. *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903, at *4 (W.D. Wash. 2013) (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 WL 681208, at *4 (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"). Plaintiff lacks any evidence that Chase caused him injury to his business or property. Accordingly, Plaintiff's CPA claim fails as a matter of law.

D. The Trial Court Correctly Granted Summary Judgment for Chase on Plaintiff's Negligence Claim.

Plaintiff alleges that NWTS negligently performed its statutory obligations under the DTA. CP 23-24 ¶¶ 89-93. None of these allegations involves Chase, so the Court should affirm summary judgment on Plaintiff's negligence as to Chase.

On appeal, Plaintiff simply rehashes his CPA claim, stating "Respondents' created a risk of harm to Mr. Bucci when they made errors,

misrepresentations, and omissions to Mr. Bucci during the loan modification and nonjudicial foreclosure, as discussed *supra*." OB at 46-47. But Chase had no duty to Plaintiff such that it could breach that duty to sound in negligence: "The general rule in Washington is that a lender is not a fiduciary of its borrower; a special relationship must develop between a lender and a borrower before a fiduciary duty exists." *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 426-27 (1994), *as corrected* (1994) (citing *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456 (1982); *Liebergesell v. Evans*, 93 Wn.2d 881, 889-91 (1980)). Chase had no duty to Plaintiff outside its contract obligations under the Note and Deed of Trust. Thus, Plaintiff's negligence claim fails for the same reasons he cannot demonstrate a CPA claim.

E. The Trial Court Properly Found HOLA Preempts Plaintiff's Origination Claims Against Chase.

HOLA preempts Plaintiff's claims on appeal and is an alternate basis on which the Court may affirm. *State v. Carter*, 74 Wn. App. 320, 324 n. 2 (1994) (court may affirm on any basis supported by record).

Congress passed HOLA in 1933, and gave the Federal Home Loan Bank Board, now known as the Office of Thrift Supervision ("OTS"), plenary power to comprehensively and ***uniformly*** regulate the operations of federal savings associations, including their lending practices. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159-68 (1982); *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). HOLA specifically authorizes OTS to "promulgate regulations that

preempt state laws affecting the operation of federal savings associations." 12 C.F.R. § 560.2(a) (emphasis added).[5]

To the extent a plaintiff attempts to regulate a federal savings bank's lending activities—even where the loan is subsequently serviced or acquired by a National Bank, rather than a federal savings bank—through state law claims, those claims are preempted. *Fultz v. World Savings*, 571 F. Supp. 2d 1195, 1195 (W.D. Wash. 2008); *Campidoglio LLC v. Wells Fargo & Co.*, 2012 WL 4514333, at *2 (W.D. Wash. 2012); *Javaheri v. JPMorgan Chase Bank, N.A.*, 2012 WL 3426278, at *4 (C.D. Cal. 2012), *aff'd*, 561 F. App'x 611 (9th Cir. 2014).

HOLA Preemption Application. Plaintiff obtained his loan from Washington Mutual Bank, F.A., a federal savings association. The "Definitions" section of the Deed of Trust defines "Lender" as "WASHINGTON MUTUAL BANK, F.A." and states that "Lender is a FEDERAL SAVINGS BANK," CP 6 ¶ 21 ;CP 26-42. Washington Mutual Bank, FA's bank charter class, as reflected on the FDIC's records, is a "savings association." CP 1113-14 ¶ 2; CP 1126-1127. Thus, a federal savings bank originated Plaintiff's loan.

The Ninth Circuit's *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008) is the seminal decision on HOLA preemption. As

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[5] "That the preemption is expressed in OTS's regulation, instead of HOLA, makes no difference because, 'federal regulations have no less preemptive effect than federal statutes.'" *Silvas*, 514 F.3d at 1005 (citation omitted).

Silvas explains, there is a two-step preemption analysis under HOLA. *Silvas*, 514 F.3d at 1005-06. Courts must first determine if the state law in question relates to any of the non-exhaustive subjects listed in 12 C.F.R. § 560.2(b). If it does, the analysis ends and the state law is preempted. *Silvas*, 514 F.3d at 1006. If the law is not covered by paragraph (b), but still more than incidentally affects lending operations, "the presumption arises that the law is preempted." *Silvas*, 514 F.3d at 1005-06 (citing OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (1996)). "This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c)." *Id.* Paragraph (c) is interpreted narrowly, with "[a]ny doubt ... resolved in ***favor*** of preemption." *Id.* (emphasis added).

HOLA Section 560.2(b) Preempts Plaintiff's Claims.

Plaintiff's claims on appeal—negligence and violations of the Washington CPA—are based on allegations that Chase induced him to default, "dual tracked" him with regards to modification and foreclosure, failed to disclose it was pursuing foreclosure while simultaneously discussing modification, and that Chase is unable to act as an agent of Plaintiff's loan beneficiary. OB at 30-34. Plaintiff's claims all relate to the method and manner of servicing and disclosures required in the process of servicing. But HOLA regulations expressly preempt claims challenging "[p]rocessing, origination, servicing...or participation in, mortgages." 12 C.F.R. § 560.2(b)(10). *Parmer v. Wachovia*, 2011 WL

1807218, at *1 (N.D. Cal. 2011) (claims to set aside a trustee's sale, cancel a trustee's deed, and allegations that defendant engaged in wrongful acts in executing a foreclosure sale, and "in making misleading representations concerning a loan modification with respect to the property" were preempted by HOLA because such claims concerned the "servicing or processing of the loan and/or its sale to a subsequent purchaser"). Thus, HOLA preempts these claims. Because Plaintiff's claims relate directly to lending activity, and whether a lender is obligated to modify a loan or issue a new loan, under § 560.2 (b), the analysis ends there. *Silvas*, 514 F.3d at 1005-06.

12 C.F. R. § 560.2(c) Also Preempts Plaintiff's Claims. In the event that this Court determines Plaintiff's claims do not fall under § 560.2(b), Plaintiff's claims are still preempted under § 560.2(c). The state laws listed in paragraph (c) "are not preempted to the extent that they ***only incidentally*** affect the lending operations of Federal savings associations." 12 C.F.R. § 560.2(c) (emphasis added). State law claims of generally applicability can more than "incidentally affect" lending operations when they directly speak to the lending operations of the federal savings bank. *Boursiquot v. Citibank*, FSB, 323 F. Supp. 2d 350, 356 (D. Conn. 2004).

Washington's limited case law addressing HOLA preemption is in accord. In *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96 (2010), the Washington Supreme Court declined to find preemption because the

plaintiff sought to compel the bank to "adhere to contract terms" through claims under the CPA. *See id.* 108; *see also id.* at 105 ("this court reads the McCurrys' CPA claim as solely based upon the representations made through the contract"); 12 C.F.R. § 560.2(c)(1) (excepting "contract and commercial law"). Requiring parties to adhere to the terms of their contracts only incidentally affects loan-related fees and was therefore exempt from preemption under 12 C.F.R. § 560.2(c). *Id.*

The decision in *Dvornekovic v. Wachovia Mortgage*, 2010 WL 4286215 (W.D. Wash. 2010) is instructive. After ruling that § 560.2(b) preempted plaintiffs' claims because loan servicing "universally affects lending practices, [loan servicing] falls within the OTS's exclusive authority to set standards for processing and servicing mortgages[,]" *Dvornekovic* held that even if the case reached the next step in the analysis, the claim would still be preempted under§ 560.2(c). *Dvornekovic*, 2010 WL 4286215, at *3. The court reasoned that the plaintiffs' breach of contract claims—which challenged the method of dispersing loan funds—would result in a "fundamental change in the way lending associations operate." *Id.* Thus, the *Dvornekovic* court held that it would be "precluded from ruling on the claim under state law because the impact would be more than incidental, and state law claims that have more than an incidental impact on lending are preempted pursuant to§ 560.2(c)." *Id.*

Like *Dvornekovic*, Plaintiff seeks to fundamentally change the way Chase (and ostensibly every other lender) conducts its servicing of loans after default. Plaintiff does not allege mere breach of terms of the Note and Deed of Trust—he challenges fundamental ways loans are serviced, including communications and disclosures with borrowers and Chase's ability to act as an agent. OB at 32-34. *See Sato v. Wachovia Mortg.*, FSB, 2011 US Dist LEXIS 75418, at *17 (N.D. Cal. 2011) ("additional notice and disclosure requirements ... affect lending in a manner that cannot be described as incidental); *see also Copeland-Turner v. Wells Fargo Bank*, 800 F. Supp. 2d 1132, 1142 (D. Or. 2011); *Fultz v. World Savings and Loan Ass'n*, 571 F. Supp. 2d 1195, 1198 (W.D. Wash. 2008).

Thus, HOLA preempts Plaintiff's state law claims because they relate to the areas of preemption listed in§ 560.2(b), and because they would more than incidentally affect lending operations by dictating additional requirements on loan servicing—including disclosures related to mediation and restrictions on the use of agents.

F. The Trial Court Properly Considered the Evidence on Summary Judgment.

Plaintiff alleges the trial court improperly weighed the credibility of evidence on summary judgment. OB at 8-10. Plaintiff points to select excerpts in the court transcript:

> "The—when a defendant moves for summary judgment, he is entitled to put the put the plaintiff's evidence to the test." VP 92:21-23. In regards to Plaintiff's evidence; the Superior Court stated, "I do not have credible evidence in front of me in support of each element." VP 93: 1-6.

OB at 9. But Plaintiff simply points to a transcript that recites the standard of review for a motion for summary judgment.

A party must provide affirmative factual evidence to oppose a motion for summary judgment. CR 56(e); *Mackey v. Graham*, 99 Wn.2d 572, 576 (1983). An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached. *Amend v. Bell*, 89 Wn.2d 124, 129 (1977) (citing *Balise v. Underwood*, 62 Wn.2d 195 (1963)). "A ***genuine*** issue of material fact exists if, after weighing the evidence, reasonable minds could reach different factual conclusions about an issue that is material to the disputed claim." *Jones v. State*, Dep't of Health, 170 Wn.2d 338, 352 (2010) (emphasis added). If a plaintiff fails to produce evidence (or believable evidence) in opposition to summary judgment, summary judgment will be granted. *See Hartley v. State*, 103 Wn.2d 768, 775-76 (1985). In *Amend*, the Supreme Court explained:

> A presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary. *Bates v. Bowles White & Co.*, 56 Wash.2d 374, 353 P.2d 663 (1960). The depositions and affidavit were uncontradicted. Plaintiff presented no facts in rebuttal, but instead relied on the presumption to carry his burden of establishing the existence of a material fact. But the presumption had become a nullity. In effect, plaintiff presented no factual dispute to the court. Therefore, the summary disposition of the issue was appropriate.

Amend, 89 Wn.2d at 129.

At the summary judgment hearing, the trial court explained that defendants were entitled to test Plaintiff's evidence through summary judgment and that Plaintiff failed to rebut defendants' evidence with evidence that could create a genuine issue of material fact—i.e., summary judgment was appropriate because reasonable minds would find Plaintiff's evidence "too incredible to be believed," *Hartley*, 103 Wn.2d at 775-76, or Plaintiff failed to present evidence as to each element.

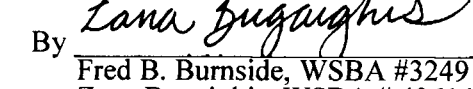
Plaintiff also points to the trial court's evaluation of a declaration he presented in support of his motion for partial summary judgment. OB at 9 ("As far as the Johnson declaration, I reviewed it. I find the information provided has zero weight."). As to the "Johnson declaration," it was not entitled to any weight. Ryan Johnson was an attorney for Plaintiff whose declaration simply attached deposition excerpts to be considered by the court. CP 1200-02. The declaration itself did not go to Plaintiff's opposition. In fact, Plaintiff argues on appeal that an attorney is not allowed to testify as to any issue before the court. *See* OB at 10-14.

V. CONCLUSION

Respondent Chase respectfully asks this Court to affirm the trial court's dismissal of Plaintiff's First Amended Complaint in its entirety.

RESPECTFULLY SUBMITTED this 4th day of April, 2016.

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a copy of the foregoing to be served upon the following counsel of record:

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

Dated at Seattle, Washington this 4th day of April, 2016.

Anita A. Miller