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69746-3

NO. 6974603-3-I

69746-3

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CENTRALBANC MORTGAGE CORPORATION,

Appellant,

v.

SOLUTIONS FINANCIAL GROUP, INC., NORTH AMERICAN
SPECIALTY INSURANCE COMPANY, CHOICE ESCROW, INC.,
JULIE DEKMAN, SLAVA DEKMAN, ALLA PYATETSKAY AND
DAVID SOBOL

Respondents,

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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BRIEF OF APPELLANT, CENTRALBANC MORTGAGE
CORPORATION

RE: FEBRUARY 8, 2013 HEARING TO DETERMINE
APPEALABILITY

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A. INTRODUCTION

Defendants Choice Escrow, Inc., Slava Dekman and Julie Dekman (collectively “Choice”) and Defendants, Solutions Financial Group, Inc. and North American Specialty Insurance Company (collectively “NASIC”) moved for summary judgment on the same four grounds:

1. Lack of standing. (J&J Mortgage Corporation signed the Wholesale Broker Agreement-Washington, not CentralBanc Mortgage Corporation);
2. CMC suffered no damages;
3. No evidence that Solutions violated the Washington Mortgage Broker Practices Act;
4. Solutions did not proximately cause damages to Plaintiff.

Ultimately, the trial court granted Defendants’ Motions for Summary Judgment based on the perceived inability by CMC to establish a causal relationship between CMC and the legal obligations undertaken by John Delaney to repurchase the Stukov loans, in his individual capacity. CMC supplied evidence to the trial court that CMC (not John Delaney, CMC’s principal) repaid a second mortgage made to Stukov in the amount of \$144,249.97, paid Loan Payments from July 2007 to September 2012 in the amount of \$332,286.58, paid real estate taxes during the same period of \$26,104, insurance of \$1,273.00 and also acknowledged the collection of rents of \$121,400. CMC reported all expenditures made regarding the Stukov matter on its financial statements from 2007 forward. John Delaney

acknowledged that he, individually, undertook the mortgage obligation the proceeds of which repaid CMC's warehouse line of credit, American Home Mortgage Corporation ("AHMC"). From the financing of the Stukov property and CMC's cash contribution of \$144,249.97, the obligations of CMC to AHMC were satisfied. CMC maintains that its obligation to repurchase AHMC's loan by reason of Stukov's fraud and failure to pay even the first mortgage installment and CMC's actual payments of mortgage interest, principal, tax and insurance constitutes compensable damages for which CMC may maintain its action.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting Defendants' motions for summary judgment based upon CMC's putative lack of contractual status or legally enforceable obligation to pay the mortgage undertaken by John Delaney in his individual capacity, the proceeds of which were utilized to pay CMC's obligation to AHMC.

2. The trial court erred in granting Defendants' motions for summary judgment based upon CMC's purported lack of contractual status or legal obligation to pay AHMC when, in fact, CMC repurchased the Stukov second mortgage for which CMC was contractually obligated pursuant to the CMC/AHMC contract.

3. The trial court erred by dismissing all claims against Defendants Choice and NASIC and failed to afford CMC time to move to amend its pleadings and add John Delaney as a plaintiff in the action. The Court failed to provide a reasonable time after the 'real party in interest' objection to allow for the substitution, replacement or joinder.

(2) Issues Pertaining to Assignments of Error

1. Does a mortgage banker sustain compensable damages as the obligor of a secondary market loan purchase agreement that requires the mortgage banker to repurchase loans deemed per se fraudulent where the mortgage banker fulfills its obligation through financing obligations undertaken by mortgage banker's owner and principal and where mortgage banker makes payments of principal, interest, tax and insurance in payment of the loan proceeds that discharged the mortgage banker's obligations under the loan purchase agreement?

2. Does a mortgage banker sustain compensable damages as the obligor of a loan purchase agreement that requires the mortgage banker to repurchase loans deemed per se fraudulent where the mortgage banker directly pays the obligee of the loan purchase agreement?

3. Should the principal of a mortgage banker, who has financed an obligation of the mortgage banker and not personally suffered financial outlay by reason that the mortgage banker has paid all of the ongoing obligations of the principal, be joined as a party plaintiff to the underlying action?

C. STATEMENT OF THE CASE

At all times during the transactional events that form the cause of action filed by CMC, John Delaney was the president and principal equity owner of CMC. Clerk's Papers ("CP") at 555. At no time between the date of filing the complaint nor in the filing of any amended complaint was John Delaney named as an additional plaintiff to the CMC action for the simple reason that he expended no money to cover the damages caused by Andrey and Vera Stukhov, Choice Escrow and Solutions Financial Group, Inc. CP at 6-19, 368-382. CMC is a California corporation registered in the State of Washington as a foreign domiciled company since July 31, 2000 and has operated its business as a mortgage banking entity continuously since registration. CP at 555. Prior to July 14, 2004, CMC operated as J&J Mortgage Corporation (dba CentralFed Mortgage) and simply changed its name to CMC, but has remained the same corporate entity authorized to do business in the State of Washington as a loan originator under Washington Consumer Loan License # CL55 244 July of 2000. CP at 65, 556.

CentralBanc generates revenues by making residential retail and wholesale loans. CP at 65. Its retail loans are residential loans originated and funded by CentralBanc's own loan agents. Wholesale loans originate from independently licensed mortgage brokers that submit loan applications to CentralBanc for underwriting, approval and funding. CP at 65, 66. Typically, CMC sells loans into secondary mortgage markets, replenishes

its own capital or its warehouse line of credit and makes more loans in order to continue business operations. CP at 68.

On December 22, 2005, Solutions Financial Group, Inc. submitted a loan application package (“Stukov Loan Package”) to CMC for its borrowers, Andrey and Vera Stukov (“Stukov”). CP at 68, 404. Stukov intended to finance property located at 2106 Fairmount Avenue SW, Seattle, Washington 98126 (hereafter referred to as the “Property”). CP at 944. Solutions submitted the Stukov Loan package for residential purchase money financing, consisting of a loan in the amount of \$720,000 to be secured by a trust deed in first position and a second loan in the amount of \$125,000 to be secured by a deed of trust in second position (the “Stukov Loans”). CP at 944, 947, 953. Based upon the representations and warranties contained in the Broker Agreement and in reliance upon the truth and accuracy of the documents contained in the Stukov Loan Package, CMC underwrote and approved both Stukov Loans. Id, CP at 68, 404.

CMC subsequently sold the Stukov Loans to American Home Mortgage Corporation (“AHMC”). CP at 68, 936. In accordance with CMC’s written agreement with AHMC, a first payment default constituted fraud per se and legal grounds for AHMC to “deem” the Stukov loans “deficient” and to demand immediate repurchase of the Stukov Loans by CMC. CP at 69, 957-964. Andrey and Vera Stukov failed to make their first mortgage payment. CP at 68, 404. CMC demanded that Solutions repurchase the Stukov loans in accordance with and as required by the

Broker's Agreement between Solution's and CMC. CP at 69., See Section 3. of the Addendum to the Mortgage Loan Purchase Agreement. However, Solutions failed to repurchase the Stukov Loans and the present litigation ensued. Id.

In September 2006, AHMC caused non-judicial foreclosure to be commenced on the first deed of trust securing the first Stukov Loan against the Property as Stukov never made one mortgage payment after closing. The Notice of Trustee's Sale ("NTS") was recorded in King County under Auditor's File No. 20060922001441. CP at 68, 120. Pursuant to the NTS, a public auction was held on January 26, 2007 in which Property reverted back to AHMC for their minimum bid of \$779,877.23 and a trustee deed granting the Property back to AHMC was recorded under Auditor's File No. 20070215001765. CP at 69, 131.

CMC complied with the repurchase requirements invoked by AHMC and CMC pursuant to concerning the Stukov Loan for \$125,000 in second position by paying outright all of the interest and principal owing on the second mortgage in the total amount of \$145,249.97. CP at 69, 367 937, 941. This payment went directly from CMC to AHMC. Id. CMC did not have adequate cash reserves to pay the first note and deed of trust held by AHMC. CMC's president and shareholder, John Delaney purchased the Property from AHMC after the foreclosure sale for \$817,424.68.00, which was the amount of AHMC's repurchase request and obtained a deed to the

Property from AHMC. CP at 69. John Delaney took title to the Stukov Property in his personal name. Id.

CMC acknowledged the obligation incurred by John Delaney and its Directors executed a Board Resolution that required CMC to make all payments related to the Stukov Property. CP at 942. Since July of 2007, CMC fully assumed the financial consequences of Stukovs' breach of their loan commitments. CP at 936-940. CMC (not John Delaney) made every payment on the Delaney mortgage totaling \$332,286.68 from July 1, 2007 through September 30, 2012. Id. CMC (not John Delaney) paid real estate taxes totaling \$26,105 during the same period. CP at 937. CP at 937, 941 CMC (not John Delaney) paid \$1,273.00 for property insurance. Id. CMC (not John Delaney) received rents from the Stukov Property and accounted for the same on its financial statements and tax reporting. CP at 97, 944, 945. CMC included the Stukov Property as an asset/liability on its audited financial reports from 2007 to the present. CP at 1007-1010.

D. SUMMARY OF ARGUMENT

CMC maintains that it is the only real party in interest. CMC qualifies as the real party in interest under Civil Rule ("CR") 17(a) and Washington appellate cases that have interpreted that phrase. As such, CMC is entitled to assert and maintain a damage action in tort and contract against Choice and NASIC. CMC has demonstrated by significant and substantial facts that there exists a direct causal relationship between CMC damages

and Defendants' tortious conduct and breaches of contract. As CMC defended the summary judgment motions by Choice and NASIC, CMC should have accorded the benefit of all factual inferences. CMC, minimally, if not definitively, challenged Defendants' assertions that CMC suffered no damages and that such damages were caused by its contractual undertakings with AHMC. Even if the Court determines lack of causal connection or legal nexus between CMC and the John Delaney obligation, the court may apply principals of equitable subrogation as a basis for awarding compensatory damages.

E. ARGUMENT

(1) Standard of Review

This Court reviews orders on summary judgment de novo. *Gardner v. First Heritage Bank*, 175 Wn.App. 650, ¶15, 303 P.3d 1065 (Wash.App.Div. 1 2013). Summary judgment is appropriate only if 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). This Court must consider the facts, and all reasonable inferences from them, in a light most favorable to the nonmoving party. *International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186 (2002). Summary judgment is appropriate only where no genuine issue of material fact exists and reasonable persons could reach but one conclusion from all the evidence. *In re Estate of Black*, 153 Wn.2d 152, 161, 102 P.3d 796 (2004).

The burden is on the moving party to show there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989). A fact is "material" when the outcome of the litigation depends on it. *Balise v. Underwood*, 62 Wash.2d 195, 199, 381 P.2d 966 (1963). The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations. CR 56(e); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989). *Young v. Savidge*, 155 Wn. 806, 814, 230 P.3d 222 (Wash. App. Div. 2, 2010).

(2) CMC is the real party in interest.

Moving Defendants assert the existence of John Delaney on the title of the Property as conclusive evidence that CMC suffered no damages. This statement is factually erroneous. CMC has sustained all financial consequences of the Stukov loan scam¹. Mr. Delaney personally acquired the Property in May of 2006, financed the purchase price and tendered the loan proceeds to AHMC in satisfaction of CMC's repurchase obligation. CP at 134. CMC, not John Delaney, made all of the debt service on the loan secured by the Property. CMC, principal reduction, tax payments and payment for insurance premiums came from CMC. CMC is the real party in interest.

¹ See the Declaration of Mark Herriot. CP at 403 – 540. Herriot detail six mortgage financings involving Andrey Stukov, his wife, Vera Stukov, his brother, Roman Stukov in 2005 and 2006 that resulted in purchases and foreclosure in rapid succession.

Moving Defendants have offered no legal or statutory authority to support their position which is founded upon mere allegation. Plaintiff does not deny that Mr. Delaney is the owner of record of the Property. Mr. Delaney's purchase of the Stukov Property was necessitated in large part, by the gross irregularities in the administration of the Stukov escrow by Choice and the blatant misrepresentations made by Stukov and Solutions in the original loan application as set forth in the Complaint and subsequent amendments. Stukovs' failure to pay even one mortgage payment and their failure to use the Property as their personal dwelling. In stating that John Delaney is the real party in interest, Defendants would have the Court ignore CMC's significant damages and its role as the party that sustained financial harm as a result of Defendants' action. Plaintiff offers the following points to demonstrate that CMC, not Mr. Delaney, has been damaged.

a) CMC, as the party contractually obligated to repurchase the Stukov Loan from AHMC, that expended monies in satisfaction of the Delaney Mortgage fulfilling its corporate responsibility is the real party in interest under Civil Rule 17.

Given the facts before the trial court and the Court of Appeals, CMC, was in every respect the "real party in interest" by virtue of Washington Superior Court Civil Rules ("CR") 17(a).² As such, CMC has

² CR 17(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or

standing to sue each defendant in the underlying action and to receive compensatory damages under tort and contract theories. CR 17(a) is described and explained thusly: "Every action shall be prosecuted in the name of the real party in interest." *Goodwin v. Bacon*, 127 Wash.2d 50, 54, 896 P.2d 673 (1995). "[T]o enable one to maintain a cause of action to enforce private rights he must show that he has some real interest in the cause of action. His interest must be a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and he must show that he will be benefited by the relief granted." *Kim v. Moffett*, 156 Wn.App. 689, 698, 234 P.3d 279, 283, (Wash.App. Div. 2 2010).³

Facts before the trial court unchallenged in any way by either of the moving defendants demonstrated that CMC paid off the entire Stukov Second Mortgage (\$145,249.97) directly to AHMC, not by reimbursing John Delaney. CP at 937. CMC paid all taxes (\$26,105.00), insurance (\$1,273.00) and all mortgage payments (\$332,286.68) from July 2007 through September 2012 relative to the Property. Id. Aside from the substantial devaluation of the Stukov Property, CMC made actual expenditures of \$504,898.65 from July 2007 through September 2012. These expenditures by CMC were premised upon the contractual obligation

substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

³ The Moffett Court cites *State ex rel. Hays v. Wilson*, 17 Wash.2d 670, 672, 137 P.2d 105 (1943) (quoting 39 Am.Jur. 860); cf. *Denman v. Richardson*, 284 F. 592, 594 (1921) (applying former Rem. & Bal.Code § 179 (1910) (recodified as former RCW 4.08.010 (repealed 1985) and now found in CR 17), which required actions to be brought in the name of the real party in interest and holding that an agent cannot maintain an action on behalf of his principal in his own name).

of CMC to comply with the AHMC repurchase term in the Addendum of the Mortgage Loan Purchase Agreement, Section 3. and in compliance with the June 30, 2007 Resolution of CMC Directors requiring CMC to “assume the liabilities of mortgage financing for 2106 Fairmont (the “Property”) resulting from Stukovs’ default. CP at 942, 961 and 962. CMC acknowledges receiving rents from leasing the Stukov residence in the amount of \$121,400. CP at 1006-1010. CMC maintains that these expenditures were not voluntary and were made in good faith to satisfy its obligations with AHMC as a secondary mortgage financier. CP 140-144. The expenditures made by CMC, consistent with the meaning of the term ‘interest’ within CR 17(a), clearly constitute the kind of “present, substantial interest” described in *Kim v. Moffett* “distinguished from a mere expectancy, or future, contingent interest.” *Kim v. Moffett* at 698. Id. CMC actually made the expenditures necessary to bear the financial burden of the obligation of imposed under the AHMC repurchase requirement.

CMC’s damages were calculated with precision from CMC’s internal accounting records. CMC paid \$145,249.97 to AHMC to purchase the Stukov Note secured by the second deed of trust. CP at 941. There is no doubt nor was there competent contrary evidence submitted by any defendant that contradicted Plaintiff’s assertion.⁴ This repurchase of the

⁴ In its Motion for Summary Judgment, Choice leap frogs from allegation to conclusion with no substantive showing of fact to contradict that actual expenditures made by CMC. “CentralBanc claims that is [sic] has suffered damages of \$542,705.00. (Exhibit H to the Delaney Decl.) It alleges that it “was injured by having to buy back the loans. . .” Second Amended Complaint ¶ 3.1.) But we know that this allegation is false. Mr. Delaney

second deed of trust did not involve any assistance from any third party which would test theories of causation, remoteness or proximity or the damages. CMC made the payment directly to AHMC to discharge CMC repurchase obligation under the AHMC/CMC Mortgage Loan Purchase Agreement and Addendum to the Mortgage Loan Purchase Agreement. CP at 937. Finally, the *Kim v. Moffat* Court requires that Plaintiff show that CMC will be benefited by the relief granted. Surely, a monetary award against defendants in favor of CMC for the repayment of CMC's purchase of the Stukov Note secured by the second deed of trust would benefit CMC, the party that actually paid for the Stukov Note repurchase. Since July, 2007 forward, CMC has maintained a present, substantial interest in the property by paying for the maintenance and ongoing expenditures of mortgage payments, taxes, insurance and principal reduction. CMC has sustained very real damages that should be recuperable in the underlying lawsuit.

The same conclusion must be reached with respect to monies paid by CMC to satisfy the note undertaken by John Delaney, the proceeds of which were used to purchase from AHMC the Property in satisfaction of the Stukov Note secured by the Stukov first Deed of Trust. CMC's damages and financial outlay are no less genuine, direct, measurable and clear, in terms of proof before the trial court. Andrey and Vera Stukov executed

testified in this declaration: "I personally purchased the Property from AHMC . . . " (Delaney Decl. ¶17, pg. 6.) CP at 582.

their Note of \$720,000 payable to CMC on February 10, 2006. CP at 948-952. The Stukovs failed to make one payment on either CMC Note. CP at 68. On February 15, 2007, AHMC foreclosed and demanded payment from CMC under the AHMC/CMC Mortgage Loan Purchase Agreement. CP at 131, 140-144. CMC did not have the cash on hand to meet its contractual obligation to AHMC. CP at 69. CMC's principal, John Delaney, purchased the Stukov Property in his own name and satisfied the debt of CMC. Id. CMC's Board agreed to cover the costs of the financial obligations incurred by John Delaney and memorialized its decision in the June 30, 2007 CMC Board Resolution. CP at 942. CMC, in fact, paid all of the mortgage payments pertaining to the Stukov Property expending some \$332,286.58 from June 30, 2007 through September 2012. CP at 939- 940. Further, CMC paid insurance and the attendant real property taxes of \$1,273.00 and \$26,105.00, respectively. CP at 941. These facts were not meaningfully challenged by any defendant at the hearing on summary judgment nor could they reasonable be challenged.⁵ The trial court was required to resolve factual disputes in the light most favorable for CMC as the non-moving party.

At the hearing on Summary Judgment, Defendants Choice and NASIC contended that CMC had no legal obligation to pay John Delaney

⁵ Choice asserted conclusory statements in its Reply brief: "There is no admissible evidence showing that CentralBanc suffered any damages, let alone that nay alleged damages were ever caused by the acts or omission of Choice/Dekman." CP at 891. Lines 11-12.

for using his credit to obtain a loan on the Stukov Property, for transferring all of the loan proceeds to AHMC in satisfaction of the CMC obligation to repurchase the Stukov fraudulent loans and for causing CMC to make the loan principal, interest, tax and insurance payments in the combined amount of \$359,664.58.⁶ Yet CMC was the party in privity with Choice Escrow, Inc. and with American Home Mortgage Corporation, not John Delaney. CP at 957-962. Appellant refers the Court to the Contract between J&J Mortgage Corporation (now CMC) with Solutions Financial Group, Inc. dated July 4, 2004. CP at 73. Note also the Escrow Instructions wherein CMC is clearly identified as the funding source and contracting party. CP at 997. Plaintiff was the party to the General Closing, Specific Closing and Addendum to Closing Instructions. CP at 1000, 1001. Plaintiff, not John Delaney, is the Promisee on the Adjustable Rate Note between Andrey Stukov and CentralBanc. CP at 116.

⁶ The schedule of actual expenditures made by CMC is instructive:

<u>Item</u>	<u>Asset</u>	<u>Liability</u>
Second Loan Payoff		(145,249.97)
First Loan Expense		(817,424.68)
Current Tax Value	576,000	
Loan Payments 7-1-07 thru 9-30-12		(332,286.58)
Real Estate Taxes 07 thru 12		(26,105)
Insurance		(1,273.00)
Attorney Fees		(35,000)
Rents Collected	121,400	
Total Damages		(659,921.23)

CP at 937

Plaintiff, as the named party in the respective contracts has standing to sue in its own name as the real party in interest. “A party to a contract is entitled to enforce it and to sue in his own name. *Eastlake Constr. Co. v. Hess*, 33 Wash.App. 378, 381, 655 P.2d 1160 (1982) (citing 17A C.J.S. Contracts § 518 (1963)), affirmed in part and remanded in part on other grounds, 102 Wash.2d 30, 686 P.2d 465 (1984). Defendants do not challenge the fact that CentralBanc loaned Stukovs \$845,000.00 (\$720,000 secured by the first deed of trust and \$125,000 secured by the second deed of trust) and was the Stukov Promissory Note holder and beneficiary of the Deed of Trust. CentralBanc has the legal right to prosecute this action as the real party in interest, the party that sustained all of the financial losses and as the party clearly named in every relevant contract involved with the Stukov loan application, escrow, sale to AHMC pursuant to the Mortgage Loan Purchase Agreement and Addendum. Because John Delaney, out of necessity, utilized his credit to pay CMC’s obligation to AHMC, and CMC has borne the financial obligation of paying the Delaney mortgage obligation, does not signify a break in the causal relationship required for an award of damages. CMC contracted with AHMC and has the right “to enforce it and sue in [his] name.” *Id.* The damages sustained by CMC are not speculative since CMC actually made the payments outlined in footnote 6. In the context of the instant facts, it is the contractual obligation between CMC and AHMC that satisfies causation requirements and the actual good faith payments by CMC, not the lack of perceived legal nexus between John

Delaney and CMC. CMC correctly discharged its obligation to AHMC and has honored its commitment to bear the financial burdens of the Stukov mortgage, interest, taxes and insurance.

Although CMC does not concede the point that it has sustained direct and measurable damages legally and proximately related to its obligations under the AHMC Mortgage Loan Purchase Agreement, CMC maintains that even if it did not directly sustain damages, it may still maintain an action for damages against Choice and NASIC. To illustrate the point of CMC's position, the facts and holding in *Riverview Community Group v. Spencer & Livingston*, No. 30681-0-III, ¶ 14-17, 295 P.3d 258, 262 (Wash.App. Div. 3, 2013) are instructive. Riverview Community Group ("Riverview") was organized as a non-profit Washington corporation to pursue claims of homeowners adversely affected by Deer Meadows, Golf, Inc.'s ("DMG") closing of the golf course. The essence of the Riverview Community Group claims were founded in promissory estoppel.

"The essence of this case is promissory estoppel-the alleged breaking of a promise, made via promotional brochures and express statements by the developers, to maintain a golf course. The persons who purchased land in the development in reliance upon that promise are the ones who have been injured.⁷ The existence of an

⁷ Footnote 6 of the opinion states: The five elements of promissory estoppel are: "(1) a promise (2) which the promisor should reasonably expect will cause the promisee to change position and (3) which actually causes the promisee to change position (4) in justifiable reliance on the promise, so that (5) injustice can be avoided only by enforcement of the promise," *Shaw v. Hous. Auth.*, 75 Wash.App. 755, 761, 880 P.2d 1006 (1994).

injury is the dispositive factor driving the analysis of these related issues. With that focus in mind, we agree that Riverview is a real party in interest with standing.”

Riverview Community Group v. Spencer & Livingston, No. 30681–0–III, ¶17, 295 P.3d 258, 262 (Wash.App. Div. 3 2013).

Riverview Community Group was formed after the homeowners had purchased their respective properties and incurred their respective damages. *Id.* ¶30-33, 295 P3d. at 265. Even though, Riverview Community Group, as a corporate entity had not been financially damaged and the landowner constituents were CR 19 indispensable parties, the court allowed Riverview to continue its representation relying upon *International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wash.2d 207, 45 P.3d 186 (2002) (“IAF Local 1789”). *Riverview* at 262-3. While acknowledging that the general rule that organizations lack standing to seek damages of its constituent members where the organization had not been harmed, the court upheld Riverview’s standing citing the corporation’s knowledge of the monetary damages and certainty of calculation of damages. The *IAF* holding in the Second Circuit was later reaffirmed in *Five Corners Family Farmers v. State*, 173 Wash.2d 296, 304, 268 P.3d 892 (2011).

Remarkably, CMC, as an organization, has been impacted to a far greater degree than corporate entities in *Riverview Community Group*, *Association of Firefighters* or *Five Corners Family Farmers*. CMC was

Riverview Community Group v. Spencer & Livingston, , No. 30681–0–III, 295 P.3d 258, 269 (Wash.App. Div. 3 2013)

obligated contractually to purchase the Stukov Property. CMC made payments in furtherance of its contractual commitment to AHMC and CMC's Board Resolution to pay the John Delaney Mortgage. CMC paid AHMC directly \$145,249.97 for the Stukov second mortgage. From July 2007 through September 2012, CMC paid principal, interest, tax and insurance and has paid \$359,664.58 in supporting the mortgage undertaken by John Delaney on behalf of CMC offset by rents of \$121,400.00. CMC reported all financial aspects of the Stukov Loan on its financial statements. CMC sustained clear and definitive damages. CMC is the real party in interest under CR 17(a). CMC should survive and challenge of standing as a necessary party under CR 19.⁸

CMC financial undertakings regarding the Property were fully integrated into the financial affairs, reporting and taxes of CMC. Plaintiff cites the financial reporting documents generated in the regular course of business since 2007 that evidence the inclusion of the Property as a liability and asset on CentralBanc's Balance Sheet. Second Supplemental Decl. of J. Delaney, ¶ 6.

⁸ The Riverview court explained the conceptual connection of 'standing' and 'real party in interest.' "The concepts of standing and CR 17(a) real party in interest are often interchanged by our courts. Philip A. Trautman, Joinder of Claims and Parties in Washington, 14 GONZ. L.REV.. 103, 109 (1978). Standing refers to the demonstrated existence of "an injury to a legally protected right." [5]Sprague v. Sysco Corp., 97 Wash.App. 169, 176 n. 2, 982 P.2d 1202 (1999). "The real party in interest is the person who possesses the right sought to be enforced." *Riverview Community Group v. Spencer & Livingston*, No. 30681-0-III, ¶ 16, 295 P.3d 258, 262 (Wash.App. Div. 3 2013).

Assuming, arguendo, that defendants prevailed in their argument that John Delaney sustained the damage because it was he, not CMC, financially obligated on the mortgage of the Stukov Property, then the appropriate remedy would have been to allow John Delaney to appear in the action and make his own claims. CR 17 states explicitly that “[no] action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest reasonable time has been allowed after . . . joinder or substitution of, the real party in interest: . . . joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. CR 17(a). The trial court simply dismissed the action and did not afford CMC time to move to amend its pleadings and add John Delaney. Washington Courts are required to provide a reasonable time after the ‘real party in interest’ objection to allow for the substitution, replacement or joinder. “[T]he reasonable time permitted for the substitution of the real party in interest relates to the period after an objection has been made for not prosecuting in the name of the real party.” CR 17(a). *Miller v. Campbell*, 164 Wn.2d 529, 538, 192 P.3d 352, 357 (Wash. 2008). The major factors in allowing claims of the substituted party to relate back to the original complaint focus on prejudice to the party affected. If the substitution of a person or entity is made to correct a mistake of representative capacity, then there is generally no prejudice. *Id.* Here, the substitution of John Delaney would only ‘correct’ a supposed mistake. It should be noted that CMC maintains that John Delaney was not ever

named and should not have been named as a party given the fact that he was not a party to any of the agreements between CMC and any named defendants or AHMC and did not contribute money towards the Stukov Mortgage, the payment of the Stukov \$125,000 Note which was paid directly by CMC to AHMC and did not incorporate the financial effect of the Stukov matter onto his own financial and tax reporting.

b. CMC has demonstrated by significant and substantial facts that there exists a direct causal relationship between CMC damages and Defendants' tortious conduct and breaches of contract.

Plaintiff's Second Amended Complaint contains nine separate causes of action, three of which the Fourth Cause of Action (Breach of Fiduciary Duty by Choice and Dekman), Sixth Cause of Action (Fraud against all parties) and the Seventh Cause of Action (Negligent Misrepresentation against Solutions and Choice) sound in tort claims and two sound in contract. CP at 6-19. Neither Choice nor NASIC made any distinction in their respective Motions for Summary Judgment regarding any differences between tort and contract causation requirements for actionable damages. CP at 559-576 and CP at 577-585. The trial court mentioned no differentiation in causation requirements of contract or tort damages in the respective Orders dismissing NASIC, Choice Escrow, Inc. and the Dekmans. CP at 186, 188. Rather the November 13, 2012 Order Granting Defendant North American Specialty Insurance Company's

Motion for Summary Judgment states: "Plaintiff has failed to establish proximate causation between the alleged action of Defendants Solutions Financial Group, Inc. and the alleged damages suffered by Plaintiff and, therefore, there are no genuine issues of material fact which would preclude judgment as a matter of law . . ." CP at 909. The Order Granting Defendant Choice Escrow and Dekman's Motion for Summary Judgment is less descriptive. The Order merely states: "ORDERED, ADJUDGED AND DECREED, that Choice Escrow and Dekman's Motion for Summary Judgment be, and the same hereby is, GRANTED, and all claims against Choice Escrow, Inc., Julie Dekman and Slava Dekman are hereby DISMISSED WITH PREJUDICE. CP at 905.

The purpose of tort damages is to place the plaintiff in the condition he would have been in had the wrong not occurred. *Kim v. O'Sullivan*, 137 P.3d 61, 133 Wn.App. 557 (Wash.App. Div. 1 2006) citing *Tilly v. Doe*, 49 Wash.App. 727, 731-732, 746 P.2d 323 (1987). In the context of breach of a fiduciary relationship fiduciary (escrow relationship between CMC and Choice Escrow, Inc.) Plaintiff is required to prove: "(1) the existence of a duty owed; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury." *Miller v. U.S. Bank of Washington, N.A.*, 72 Wn.App. 416, 426, 865 P.2d 536 (1994) (citing *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)). A working definition of 'Proximate Cause' is found in Washington Pattern Instructions:

The term 'proximate cause' means a cause which in a direct sequence, unbroken by any new independent cause, produces the (injury) (event) complained of and without which such (injury) (event) would not have happened. '(There may be one or more proximate causes of an (injury) (event)). WPI 15.01 *King v. City of Seattle*, 84 Wn2d 229, 256, P.2d 228 (Wash. 1974).

Damages in contract cases are awarded to "put the wronged party in the position they would have been in had the contract been performed. *Yagi v. Cunningham*, 021108 WACA, 56993-7, *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 211, 165 P.3d 1271 (2007). Causation is a factual question for the jury. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007). In the context of Consumer Protection Act analysis, "[a] plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard*, 162 Wn.2d at 84. Sufficient evidence exists if the evidence is sufficient "to persuade a fair-minded, rational person of the truth of the declared premise." *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn.App. 553, 561, 825 P.2d 714 (1992) (quoting *Beeson v. ARCO*, 88 Wn.2d 499, 503, 563 P.2d 822 (1977)).

Both concepts of 'causal connection' in the context of contract litigation and 'proximate cause' in the context of tort litigation involve the fact finder to glean from evidence presented a trail of causation that leads from the breach or tort to actual damage suffered. CMC has demonstrated such a connection. The actions of the borrowers, Solutions Financial, Inc.

as the loan originator and Choice Escrow, Inc., as the escrow entity, are rife with actionable claims. CMC loaned the Stukovs \$845,000 to purchase the Property secured by first and second deeds of trust. CMC sold the loan into the secondary mortgage market to AHMC. The Stukovs failed to pay even one mortgage payment. AHMC caused non-judicial foreclosure to be commenced on the first deed of trust and the Stukov Property reverted back to AHMC. According to the terms of AHMC's purchase, CMC was required to repurchase the Stukov loan under certain conditions. Stukovs' failure to pay the first mortgage installment triggered CMC's purchase obligation and AHMC, accordingly, made its demand.

CMC, not John Delaney, complied with the repurchase requirements between AHMC and CMC. CMC immediately paid the interest and principal owing on the second mortgage in the amount of \$145,249.97. Because AHMC could not pay the first note and deed of trust held by AHMC, CMC's president and shareholder, John Delaney purchased the Property from AHMC after the foreclosure sale for \$817,424.68.00, which was the amount of AHMC's repurchase request and obtained a deed to the Property from AHMC. John Delaney took title to the Stukov Property in his personal name as he was the borrower. CMC, not John Delaney, made all subsequent payments of principal, interest, taxes and insurance. CMC booked the Stukov Property as an asset and accounted for expenditures relative to the Stukov Property on CMC's financial statements and tax

reporting from 2007 onward. CMC treated the outfall of the Stukov default as its own problem for which it paid dearly.

CMC contends that its payments on the Stukov Property were done by reason and under the obligation of the AHMC contract repurchase requirement. It should make no difference to the trier of fact whether CMC fulfilled its contractual duty to pay AHMC in cash, credit, barter, by CMC's own financial undertakings or the undertakings of CMC's principal officer or shareholder. The fact remains: CMC was obligated to repurchase the Stukov Loans from AHMC and did so directly, in the case of the second Note and somewhat directly in the case of the first Note. This is not a personal injury case where the unscrupulous plaintiff seeks to expand liability through inflation of damages. Quite the contrary, CMC has acted to uphold its key business relationship (AHMC as the secondary mortgage purchaser), fulfill its contract obligation to repurchase the Stukov Loans, minimize its losses and preserve its ability to continue its operation as a mortgage banker. Nothing more. John Delaney, as a principal and owner of CMC, materially assisted CMC to meet its obligation with AHMC through the mortgage financing of the Stukov Property. Aside from lending his credit to the undertaking of the Stukov Property obligation, John Delaney paid nothing on the loan obligation, taxes or insurance. All of the mortgage interest and principal payments were made by CMC, including taxes and insurance. In all respects, since July of 2007, CMC bore the financial brunt of the Stukov fiasco and reported the same on its tax and

accounting records. The trail of causal connection or proximate cause is clear and uninterrupted. There is a sufficient basis in the record to support a finding of causation.

c. Equitable subrogation principals may be applied to prevent unjust enrichment and fairly allocate wrong or loss to Defendants.

CMC paid its AHMC obligation by funding the mortgage payments due and owing on the Stukov Property. CP at 937-941. If the Court were to countenance Defendants' anticipated argument that the actions by John Delaney were voluntary or that CMC was and is not legally required to pay the mortgage obligation undertaken by John Delaney, then how should the Court regard CMC's payment of \$359,664.58 to cover the ongoing mortgage interest, principal, insurance and taxes since 2007.

Plaintiff urges the court to apply the doctrine of equitable subrogation or to preserve the good faith CMC payments in satisfaction of the mortgage incurred by John Delaney concerning the maintenance of the Property. Equitable subrogation has been applied in the state of Washington in the various contexts including the priority of real property lienholder contests *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 166, 776 P.2d 681 (1989) (citing *D. Dobbs, Remedies* § 4.3 at 250 (1973)); *Bank of Am., N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007)., and insurance subrogation disputes regarding tortfeasors that benefitted from the settlement of claims. *Newcomer v. Masini*, 45 Wn.App. 284, 290, 724 P.2d

1122 (1986). *Newcomer* deals with a tortfeasor who was fully responsible for an accident but never a named party in the subsequent action who was unjustly enriched by the resulting settlement and therefore liable for equitable subrogation to the defendant in the action.

“Subrogation has at least two elements: first, the person seeking it must have answered for the debt of another, usually by paying the other's creditor and, second, the person must have acted under some duty or compulsion, legal or moral, and not as a volunteer or intermeddler.” *BNC Mortg., Inc. v. Tax Pros, Inc.*, 111 Wn.App. 238, 253, 46 P.3d 812 (2002). The application of equitable subrogation principals in the context of the instant action would position CMC as the party paying for the mortgage obligation of John Delaney. CMC's actions were based upon its contractual obligations to AHMC. John Delaney was not acting as a mere volunteer, but under the compulsion of honoring the AHMC obligation to allow his business to survive by preserving CMC's ability to generate mortgage loans and sell such loans into the secondary market through its contract partner, AHMC.

Subrogation is fundamentally an equitable concept designed "to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it." *Mahler v. Szucs*, 135 Wash.2d 398, 411, 957 P.2d 632 (1998). Here, Choice and NASIC seek a determination by the Appeals Court that CMC's actual payments amounting

to more than \$504,941.55 do not actually constitute compensable damages because CMC was not obligated on John Delaney's mortgage note. This argument is advanced purely for the purpose of avoiding the consequences of grossly deficient escrow practices and misrepresentations in the Stukov loan application process. There can be no doubt that equitable subrogation should be invoked to assist the trial court to impose liability on Choice and NASIC.

(d) Attorney Fees

Plaintiff, CMC, requests its attorney fees for this appeal pursuant to Rules of Appellate Procedure ("RAP") 18.1. The applicable Closing Agreement and Escrow Instructions, the breach of which is the subject of Plaintiff's Second Cause of Action, clearly provides that "The parties [Choice Escrow, Inc., Sky Benson, Andrey Stukov and CMC] jointly and severally agree to pay the closing agent's costs [sic] expenses ad [sic] reasonable attorney's fees incurred in any lawsuit arising out of or in connection with the transaction or these instructions, whether such lawsuit is instituted by the closing agent, the parties or any other person." CP at 991. Additionally, Plaintiff, CMC, contends that any allegation or argument advanced by any Defendants/Respondents at the trial in the Summary Judgment hearing as well as Defendants' response to Plaintiff's appeal concerning the lack of causation regarding CMC's direct payment to AHMC of \$145,249.97 is frivolous. A position made by argument or an appeal is frivolous if there are no debatable issues upon which reasonable

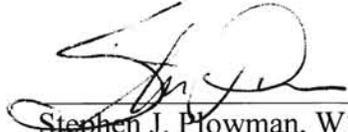
minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Malted Mousse, Inc. v. Steinmetz*, 150 Wash.2d 518, 535, 79 P.3d 1154 (2003). That is not the case here.

F. CONCLUSION

CMC asks the Appeals Court to overturn the November 2 and November 13, 2012 Orders granting Defendants Choice and NASIC Motions for Summary Judgment. CMC was and remains the only real party in interest under Civil Rule (“CR”) 17(a). As such, CMC is entitled to assert and maintain a damage action in tort and contract against Choice and NASIC. CMC has shown the existence of a direct causal relationship between CMC damages and Defendants’ tortious conduct and breaches of contract. The trial court should have interpreted factual inferences in favor of CMC. CMC has provided ample evidence of quantifiable damages directly resulting from the Stukov loan debacle. CMC, has definitively challenged Defendants’ assertions that CMC suffered no damages and that such damages were caused by its contractual undertakings with AHMC. Even if the Court determines lack of causal connection or legal nexus between CMC and the John Delaney obligation, the court may apply principals of equitable subrogation as a basis for awarding compensatory damages.

Respectfully submitted this 28th day of February, 2014.

STEPHEN J. PLOWMAN

A handwritten signature in black ink, appearing to read 'Stephen J. Plowman', written over a horizontal line.

Stephen J. Plowman, WSBA No. 21823
Counsel for CentralBanc