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No. 60075-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others
similarly situated,

Appellants,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

On Appeal From King County Superior Court
Hon. Richard Eadie

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
A. <i>Conley v. Gibson</i> establishes the inquiry to be employed by the Court in evaluating the CR 12(b)(6) motion.	2
B. HOLA and OTS regulations do not bar the McCurrys’ claims under the WCPA	3
1. The McCurrys’ WCPA claim is not preempted under 12 C.F.R. § 560.2(b)	3
2. The McCurrys’ WCPA claim is not preempted under 12 C.F.R. § 560.2(c)	8
C. The McCurrys’ breach of contract and unjust enrichment claims are not preempted	11
D. The McCurrys’ Deed of Trust provides that Washington law governs; thus, Washington law is not preempted	15
E. RCW 19.86.170 does not exempt Chevy Chase from the WCPA	16
F. The McCurrys properly pleaded their WCPA claim	19
G. Chevy Chase’s cases concerning the McCurrys’ breach of contract claims are distinguishable or are not on point	20
H. Application of the voluntary payment doctrine is not a proper subject for resolution on a CR 12(b)(6) motion	22
III. CONCLUSION	25

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Auto-Chlor System of Minnesota, Inc. v. Johnson Diversey</i> , 328 F. Supp.2d 980 (D. Minn. 2004)	22
<i>Bell Atlantic Corp. v. Twombly</i> , ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)	2
<i>Binetti v. Washington Mutual Bank</i> , 446 F. Supp.2d 217 (S.D.N.Y. 2006)	8, 9, 12, 13
<i>Bourisquot v. Citibank, F.S.B.</i> , 323 F. Supp.2d 350 (2004)	4
<i>Chaires v. Chevy Chase Bank, F.S.B.</i> , 748 A.2d 34 (Md. App. 2000)	14, 15
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.</i> , 467 U.S. 837, 104 S.Ct. 2778 (1984)	3
<i>In re Coday</i> , 156 Wn.2d.485, 130 P.3d.809 (2006)	2
<i>College Loan Corp. v. SLM Corp.</i> , 396 F.3d 588 (8 th Cir. 2005)	15
<i>Dwyer v. J.I. Kislak Mortgage Corp.</i> , 103 Wn. App. 542, 13 P.2d 240 (2000)	4, 18, 23
<i>Gerber v. First Horizon Home Loans Corporation</i> , 2006 WL 581082 (W.D. Wash. 2006)	14
<i>Haehl v. Washington Mutual Bank, N.A.</i> , 277 F. Supp.2d 933 (S.D. Ind. 2003)	3, 4
<i>Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P. 2d 531 (1986)	18
<i>Hawkins v. Conniff</i> , 53 Wn.2d 454, 459, 334 P.2d 540 (1959)	22

<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , __ Wn.2d __, 170 P.3d 10 (2007)	21
<i>Jerik v. Columbia National, Inc.</i> , 1999 WL 1267702 (N.D. Ill. 1999)	19
<i>Krause v. GE Capital Mortg. Serv., Inc.</i> ; 731 N.E.2d 302, 314 Ill. App.3d 376 (2000)	19
<i>Koynenbelt v. Flagstar Bank, FSB.</i> , 617 N.W.2d 706, 242 Mich. App. 21 (2000)	6, 7
<i>Lopez v. World Savings and Loan Association</i> , 105 Cal. App.4th 729, 130 Cal. Rptr.2d 42 (2003)	13, 14
<i>Moskowitz v. Washington Mutual Bank, N.A.</i> , 768 N.E.2d 262, 329 Ill. App.3d 144 (Ill. App 2002)	3
<i>Orser v. Select Portfolio Servicing, Inc.</i> 2005 WL 3478126 (W.D. Wash. 2005)	11, 14, 23
<i>Pinchot v. Charter One Bank, F.S.B.</i> , 792 N.E.2d 1105, 99 Ohio St.3d 390 (2003)	5, 6
<i>Prince-Servance v. BankUnited, FSB</i> , 2007 WL 3254432 (N.D. Ill. 2007) (Slip Copy)	4, 5
<i>Rienschke v. Cingular Wireless, LLC</i> , 2007 WL 3407137 (W.D. Wash. 2007) (Slip Copy)	23
<i>Shaw v. Marriott Intern., Inc.</i> , 474 F. Supp.2d 141 (D.D.C. 2007)	22
<i>Singleton v. Naegeli Reporting Corp.</i> , __ P.3d __, 2008 WL 134212 (January 15, 2008)	16, 17
<i>Speckert v. Bunker Hill Ariz. Mining Co.</i> , 6 Wn.2d 39, 106 P.2d 602 (1940)	22
<i>Stone v. Mellon Mortg. Co.</i> , 771 So.2d 451 (Ala. 2000)	20

<i>T.C. Jefferson v. Chase Home Finance</i> , 2007 WL4374410 (N.D. Cal. 2007)(Slip Copy)	9, 10
<i>Thys v. Rivard</i> , 25 Wn.2d 345, 171 P.2d 255 (1946)	22
<i>Tokarz v. Frontier Fed. Sav & Loan Ass'n</i> , 33 Wn. App. 456, 656 P.2d 1089 (1982)	17
<i>Vogt v. Seattle-First Nat'l Bank</i> , 117 Wn.2d 541, 817 P.2d 1364 (1991)	15
<i>Weiss v. Washington Mutual Bank</i> , 147 Cal. App. 4 th 72, 53 Cal. Rptr. 782 (2007)	13
<i>Wells v. Chevy Chase Bank, F.S.B.</i> , 832 A.2d 812 (Md. 2003)	15

STATUTES, TREATISES, AND COURT RULES

12 U.S.C. § 1462	1
12 C.F.R. § 560.2	1, 8, 12
12 C.F.R. § 560.2(b)	3, 6, 13
12 C.F.R. § 560.2(b)(5)	3, 4, 5, 13
12 C.F.R. § 560.2(b)(10)	5, 6
12 C.F.R. § 560.2(c)	7, 9, 11
RCW 19.86	2
RCW 19.86.170	2, 15, 16
RCW 19.86.920	7
CR 8(a)	18
CR 12(b)(6)	2, 12, 21

2 Jones, A TREATISE ON THE LAW OF MORTGAGES § 1155 (6 th Ed. 1928)	21
59A C.J.S. MORTGAGES § 998 (2007)	12

I. INTRODUCTION

Chevy Chase Bank, F.S.B. (“Chevy Chase”) misunderstands several arguments made by Appellants McCurry in their opening brief, ignores others, and cites no controlling authority for the result it seeks. The Home Owners Loan Act, 12 U.S.C. § 1462 *et seq.* (“HOLA”), and the Office of Thrift Supervision (“OTS”) regulation, 12 C.F.R. § 560.2, do not authorize Chevy Chase to engage in deceptive conduct to collect fees, whether they are “loan-related fees” or not; they do not permit Chevy Chase to ignore its contracts by demanding payment of unsecured fees as preconditions to the release of real property it holds as security for its loans. Finally, because a borrower is entitled to find out, without charge, how much he must pay in order to pay off – to “redeem” – his mortgage, Chevy Chase cannot violate its contract with the borrower by charging for the information. Congress did not intend for HOLA to preempt the operation of state law to prevent such conduct. The McCurrys alleged that Chevy Chase engaged in such conduct. Under the facts they allege and the causes of action they have pleaded, they have stated claims for relief that are not preempted by federal law, and the trial court judge committed error in ruling that they were preempted and dismissed their case.

The trial court judge also committed error in ruling that Chevy Chase’s conduct was exempt from the Washington Consumer Protection

Act, RCW Chapter 19.86 (“WCPA”), pursuant to RCW 19.86.170. The conduct is not specifically permitted, authorized, or regulated by OTS.

This Court should reverse the trial court’s order dismissing the McCurrys’ claims and permit their case to proceed.

II. ARGUMENT

A. *Conley v. Gibson* establishes the inquiry to be employed by the Court in evaluating the CR 12(b)(6) motion.

The standard enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) does not apply to a Washington state court, and the *Conley v. Gibson* rule remains the standard in Washington. Under *Conley*, a motion to dismiss under CR 12(b)(6) must be denied if there is a set of facts the plaintiff could prove consistent with the complaint that would entitle him to relief. *See e.g., In re Coday*, 156 Wn.2d 485, 497, 130 P.3d 809 (2006).

Even under the *Twombly* standard, once a claim has been stated adequately, a plaintiff may support it in response to a CR 12(b)(6) motion by showing any set of facts consistent with the allegations in the complaint. *Twombly*, 127 S.Ct. at 1969. A plaintiff “receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.” *Id.* (citation omitted). Under either standard the complaint should not have been dismissed.

B. HOLA and OTS regulations do not bar the McCurrys' claims under the WCPA.

1. The McCurrys' WCPA claim is not preempted under 12 C.F.R. § 560.2(b).

Chevy Chase supports its contention that the fax fee the McCurrys were required to pay was a "loan-related fee" under 12 C.F.R. §560.2(b)(5) principally by referring to OTS opinion letters that, without any explanation or reasoning, characterize the fax fees as "loan-related fees." *See* Br. of Respondent, at 17-19. Opinion letters like these issued by the OTS, which have no explanation or reasoning, are not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984); instead they are relevant only to the extent of their power to persuade. Chevy Chase did not respond to this discussion and apparently concedes its validity.

The cases Chevy Chase cites do not support the conclusion that fax fees are "loan-related fees." The **only** case Chevy Chase cites, *Moskowitz v. Washington Mutual Bank, N.A.*, 768 N.E.2d 262, 329 Ill. App.3d 144 (Ill. App. 2002), based its decision that fax fees are "loan-related fees" solely on the same OTS opinion letters upon which Chevy Chase also relies, without further analysis..

In *Haehl v. Washington Mutual Bank, N.A.*, 277 F. Supp.2d 933 (S.D. Ind. 2003), a trial court concluded that the fee charged by Washington Mutual to its borrower for a reconveyance fee was "loan-

related” under §560.2(b)(5). The court provided no explanation or reasoning for this conclusion, so it too provides little persuasive authority in support of Chevy Chase’s contention. As the plaintiff did not assert a statutory claim under Indiana’s equivalent to the WCPA, the case has little utility as to whether the McCurrys’ WCPA claim should be preempted.

In *Boursiquot v. Citibank, F.S.B.*, 323 F. Supp.2d 350 (2004), the trial court determined that plaintiff’s claims under the Connecticut equivalent to the WCPA to recover fees paid to Citibank were preempted by HOLA. In arriving at this conclusion, this court also relied exclusively on one of the conclusory OTS opinion letters, *Boursiquot*, 323 F. Supp.2d at 355 n.3, making the decision of no real assistance in evaluating the merits of Chevy Chase’s contentions.¹

In *Prince-Servance v. BankUnited, FSB*, 2007 WL 3254432 (N.D. Ill. 2007) (Slip Copy) the plaintiff sued a federal savings bank based on the Illinois Consumer Fraud and Deceptive Practices Act, for allegedly encouraging mortgage brokers to arrange for loans with higher than par rate interest rates by offering the broker a portion of the up-charged interest rate, a “yield spread premium.” The lender argued that yield

¹Another fact that distinguishes *Boursiquot* is that the plaintiffs based their consumer fraud claim on the contentions that the fax/statement charge was “both unreasonable” and an undisclosed finance charge” under Connecticut statutes. By way of contrast, facts similar to those which the McCurrys allege constitute a violation of the WCPA have already been determined by this very Court to constitute a violation of the WCPA. See *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547-48, 13 P.2d 240 (2000).

spread premiums are “loan-related fees” under § 560.2(b)(5), which was **conceded** by the plaintiff. *Prince-Servance*, 2007 WL 3254432, at *5.

Chevy Chase contends the notary fees are “loan-related fees” under §560.2(b)(5) without citation to any authority. Indeed, if “notary fees” are, as Chevy Chase hypothesizes, fees for the notary seal embossed on deed of trust reconveyances recorded *after* borrowers’ loans have been paid off, the argument that these are loan-related is even more tenuous than the one concerning fax fees. It is illogical that fees imposed for “services” performed *after* the lending relationship has concluded should be characterized as “loan-related fees.” *Pinchot v. Charter One Bank, F.S.B.*, 792 N.E.2d 1105, 99 Ohio St.3d 390 (2003), is instructive. In *Pinchot*, a mortgagor brought an action against a federal savings bank alleging it had violated the state residential mortgage satisfaction statute. The bank sought to dismiss plaintiff’s claims on the basis that the state statute was preempted by HOLA and 12 C.F.R. §560.2(b)(10), arguing that recording a mortgage satisfaction was part of a lender’s servicing obligations. The Ohio Supreme Court, however, rejected “out of hand any definition of loan or mortgage ‘origination’ that would encompass an activity that necessarily occurs after the debt is satisfied.” *Pinchot*, 792 N.E.2d at 396. As for the argument that recording the release was part of the lender’s “servicing” duties, the court disagreed:

... Section 560.2(b), though broadly constructed to fill in much of the sphere of regulatory preemption, is still

embedded within the functional boundaries of lending and credit-related activity. In our opinion, it would constitute an unwarranted extension of those boundaries were this court to find that the recording of mortgage satisfactions is a lending or credit-related function auxiliary to the “servicing” of mortgages under Section 560.2(b)(10). The recording of a mortgage satisfaction or real estate lien release is not an integral part of the lending process, as it occurs after the debt is satisfied and the extension of credit is extinguished. Such a recording requirement cannot even begin until the mortgage has already been terminated. It does not center around the essential reasons lenders issue home loans, for it has nothing to do with charging and collecting interest or any other lending or credit-related function. And such a recording requirement cannot be realistically connected to lending practices or to the operations of savings associations because it has no concrete significance to whether and how loans are made. The mortgage is taken to secure the loan and filed to perfect the lien. When the loan is paid, the mortgage is satisfied, leaving a cloud on the title to the realty until the satisfaction is recorded. There is nothing in either the lending regulations themselves or in the regulatory history to indicate that the OTS intended to occupy the field of clearing real estate titles, much less to include the filing of notices of mortgage satisfactions within the preempted category of mortgage servicing under Section 560.2(b)(10).

Pinchot, 792 N.E.2d at 1113-14.

The court in *Koynenbelt v. Flagstar Bank, FSB*, 617 N.W.2d 706, 242 Mich. App. 21 (2000) employed similar reasoning in holding that the plaintiffs’ state common-law claims were not preempted by HOLA and 12 C.F.R. § 560.2(b). In that case, plaintiff mortgagors who had prepaid their loans were charged a \$9 recording fee by the lender for the satisfaction of mortgage, despite language in their mortgages stating that the lender would “file a discharge of [the] Security Instrument without charge to the

Borrower.” *Koymenbelt*, 617 N.W.2d at 709. The lender argued that it was a federal thrift, the charges were “loan-related fees,” and the claims were preempted. The court disagreed and refused to dismiss the case:

[T]he trial court in the present matter reviewed the language quoted above from 12 C.F.R. 560.2 and found that the state law claims relied on by plaintiffs ... only incidentally affected Flagstar’s lending operations. The trial court found that the \$9 recording fee did not affect interest rates and was not an up-front cost of the loan. We agree with the trial court’s findings. The fee in question is merely incidental and has nothing to do with the lending of money. The fee is charged after lending has occurred. Moreover, subsection c of 12 C.F.R. 560.2 expressly preserves the viability of certain state laws, including those based on contract, commercial, and property law. Had Congress intended to completely occupy the field, it would not have excepted certain state laws.

Id. at 713.

If the “notary fee” the McCurrys were charged was for the notarization of the full reconveyance of their deed of trust as Chevy Chase contends (without support in the record), that fee cannot be classified as “loan-related” because the lending relationship between them was over.

2. The McCurrys’ WCPA claim is not preempted under 12 CFR § 560.2(c).

The WCPA was not passed to regulate lending activity. As stated in RCW 19.86.920, its purpose is

to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition.

Because it was not passed to specifically regulate lending but to establish

the basic norms governing commercial transactions, the WCPA, as applicable here, is not preempted.

Binetti v. Washington Mutual Bank, 446 F.Supp.2d 217 (S.D.N.Y. 2006), is instructive. In that case, a borrower brought a class action lawsuit against the federal savings association lender based on allegations that borrowers who obtained loans to finance the ownership of cooperative apartments were assessed with impermissible interest charges after the loans were paid off. New York's consumer fraud statute, similar to the WCPA, declared unlawful "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in [the] state." *Binetti*, 446 F.Supp.2d at 220. The court denied Washington Mutual's motion to dismiss the consumer claim holding it was preempted by HOLA, concluding that the statute only had an incidental effect on the bank's lending operations, and considered the effect of 1999 OTS opinion P-99-3, which was considered by the trial court judge here (CP 122):

[T]he New York Consumer Fraud Statute ... is not directly aimed at lenders, and has only an incidental impact on lending relationships. Additionally, there is nothing in the record to suggest that the New York statute is in conflict with the federal objectives identified in § 560.2. Indeed, the New York Consumer Fraud Statute is precisely the type of general commercial law designed to "establish the basic norms that undergird commercial transactions" that OTS has indicated that it does not intend to preempt.

...
There is no indication in the record that the New York Consumer Fraud Statute has been used, by filing lawsuits or otherwise, to set substantive standards or establish particular requirements for lending operations in the state

of New York. In the absence of such evidence, I cannot conclude that the narrow scope of OTS's 1999 opinion [P-99-3] mandates dismissal of this claim. Rather, based on the language of the statute and the record before the Court, § 349 of the General Business Law [, the relevant portion of the Consumer Fraud Statute,] ... while having an incidental impact on lending relationships, is excepted from OTS preemption under § 560.2(c). This conclusion is consistent with the general notion that preemption is not a preferred defense and that courts are to exercise caution in finding state statutes preempted by federal law.

...
Defendant's claim that the New York Consumer Fraud Statute has more than an incidental effect on lending operations misreads or misconstrues the nature of the "incidental" aspect of § 560.2(c). As should be clear from the foregoing, the question is whether any impact on lending operations is incidental to *the statute's* primary purpose not whether the impact of the statute on a bank's lending operation is "incidental" (which, for defendant, seems to mean *de minimis*).

Binetti, 446 F.Supp.2d at 220-21.

T.C. Jefferson v. Chase Home Finance, 2007 WL 4374410 (N.D. Cal. 2007) (Slip Copy), involved whether plaintiff's state law claims related to the defendant's mortgage-related conduct was preempted under the National Bank Act ("NBA"), the act similar to HOLA which pertains to regulation of national banks. In that case, the plaintiff alleged that the lender was not properly crediting his extra payments to principal reduction on his mortgage, directing the court to evidence which indicated that the lender was not complying with its representations concerning payment application. The lender moved to dismiss these claims, arguing that they were preempted under the NBA. The court disagreed:

The core of each of Plaintiff's causes of action is the claim that Chase misrepresented how it would credit prepayments to Plaintiff's account. Plaintiff also contends that Chase's systematic breach of the promises about how it would credit prepayments is an unfair business practice under the [California Unfair Competition Law]. ... Plaintiff does not claim that California consumer protection laws require Chase to service or process loans, include specific content in its disclosures, or handle repayment of loans in any particular manner – requirements that would be preempted. Instead Plaintiff claims that the laws require Chase to refrain from misrepresenting the manner in which it *does* service loans. The core issue in this case will be not whether or when Chase is permitted to place payment in suspense accounts, but whether Chase misrepresented to customers what it would do with their payments.

The duty to refrain from misrepresentation falls on all businesses. It does not target or regulate banking or lending, and it only incidentally affects the exercise of banks' real estate lending powers. Chase has not articulated any way that enforcing state laws prohibiting misrepresentation to consumers would interfere with a bank's nationwide operation or "obstruct, impair or condition" its ability to engage in real estate lending any more than those laws impair the operation of any business.

Nearly every case Chase cites is fundamentally distinguishable because it involves state law claims either brought under or based on a substantive state law rule specifically directed at banking or lending activities and institutions.

T.C. Jefferson, 2007 WL 4374410, at *13. Thus, the lender was not able to use federal preemption to avoid the court's enforcement of its promises merely because it would result in an incidental effect on its operations.

Because the WCPA was not passed specifically to regulate lenders' conduct and has not been used to set substantive standards for how lenders conduct their business in Washington, any affect the statute may have on

them and Chevy Chase is incidental. Accordingly, the McCurrys' WCPA claim is not preempted by HOLA or 12 C.F.R. § 560.2(c).

C. The McCurrys' breach of contract and unjust enrichment claims are not preempted.

Chevy Chase promised that it would reconvey the McCurrys' property subject to the Deed of Trust when they paid off the "sums secured by" it. CP 24. The fax and notary fees listed in the Payoff Statement Chevy Chase sent to the McCurrys' escrow agent were not secured fees – Chevy Chase does not contend that they were. Yet, when Chevy Chase sent the McCurrys' escrow agent the Payoff Statement, it included the \$20 "Accumulated Fax Fees" and the \$2 Notary Fee as part of the "Total Amount Due Chevy Chase." CP 33. The Payoff Statement further warned that the McCurrys' loan payoff "cannot be processed unless the 'Total Amount Due Chevy Chase ... is remitted.'" *Id.* This was a breach of Chevy Chase's promise to reconvey upon the McCurrys' payment of the sum secured by the Deed of Trust. *See e.g., Orser v. Select Portfolio Servicing, Inc.*, 2005 WL 3478126, at *2 (W.D. Wash. 2005).

Moreover, the McCurrys had the absolute right to redeem – in other words, pay off – their mortgage when they wanted.² Because they could not redeem without learning what was owed, it was inherent in the

²A right of redemption is inherent in, and essential to, every mortgage, and is an absolute right, so that a mortgagor has the right to redeem whether or not he realizes he has that right. 59A C.J.S. MORTGAGES §998 (2007).

contract that the McCurrys had the right to find out for free. Chevy Chase had no right to charge a fee to tell them how much to pay in order to redeem. It is a conceivable set of hypothetical facts that Chevy Chase would not provide a free Payoff Statement. It is also a conceivable set of hypothetical facts that Chevy Chase did not inform the McCurrys it would deliver a Payoff Statement by some other means other than by fax for free, and that delivery by fax would cost \$20. These two hypothetical sets of facts show that the McCurrys can prevail and have stated facts sufficient to state a claim upon which relief may be granted. CR 12(b)(6).

Chevy Chase argues that the McCurrys' breach of contract and unjust enrichment claims are also preempted by 12 C.F.R. § 560.2. The McCurrys concede that some cases cited by Chevy Chase support this argument. However, the better view is that these state law claims are not preempted but are the kinds of state law causes of action Congress envisioned would continue to be viable against federal thrifts when it enacted HOLA. Several better-reasoned cases support the McCurrys.

Binetti also supports the argument that the breach of contract and unjust enrichment claims are not preempted. In that case, the lender, a federal thrift, argued that the application of New York contract law to the plaintiffs' claims would result in an impermissible state-imposed regulation on the conduct of its business so that the plaintiffs' state law breach of contract and unjust enrichment claims should be preempted by

HOLA. The trial court rejected the argument.³

Chevy Chase claims that the McCurrys “inexplicably” ignored *Weiss v. Washington Mutual Bank*, 147 Cal. App. 4th 72, 53 Cal. Rptr. 782 (2007) See Br. of Respondent, at 30-31. They ignored the case because it is not on point. The issue in *Weiss* was not whether a fee was a “loan-related fee.” Instead, the plaintiff sought to recover a pre-payment penalty her loan contract required her to pay when she redeemed her mortgage. The plaintiff did not assert a breach of contract claim, as the prepayment penalty was stated in a provision of his loan contract. “Loan-related fees” in 12 C.F.R. § 560.2(b)(5) specifically include “prepayment penalties.” Thus, there could be no question concerning whether the plaintiff in *Weiss* could resort to state laws to prevent the lender from charging a prepayment penalty, because “state laws purporting to impose requirements regarding” prepayment penalties are preempted. 12 C.F.R. §560.2(b).

Chevy Chase contends that the McCurrys misread the decision in *Lopez v. World Savings and Loan Association*, 105 Cal. App.4th 729, 130 Cal. Rptr.2d 42 (2003). See Br. of Respondent, at 28. However, while the

³ “[I]t does not follow, from the fact that New York law would be applied to interpret plaintiff’s contract claim, that a state-imposed regulation is being enforced. Indeed, New York law did not dictate the terms of the contract at issue, or require the parties to enter into it. Furthermore, the Court found it persuasive that, in the absence of an analogous federal cause of action, the Bank would be completely insulated from liability for its breach if the Court were to find plaintiff’s claim preempted.” *Binetti*, 446 F. Supp.2d at 219

claims of plaintiffs in *Lopez* based on a state statute regulating the *amount* a federal savings bank could charge for a payoff statement were preempted the common law claims for breach of contract and unjust enrichment, and the claim for deceptive practices based on a state statute, were *not*. *Lopez*, 105 Cal. App.4th at 742, 745. The plaintiffs' claims were dismissed on the merits, on grounds not applicable to this case. *Id.* at 745-47.⁴

There are no Washington cases addressing whether HOLA preempts state common law claims asserted by the McCurrys.. The better-reasoned cases from other jurisdictions support the conclusion that HOLA does not preempt them.

D. The McCurrys' Deed of Trust provides that Washington law governs; thus, Washington law is not preempted.

The McCurrys' Deed of Trust provides that it is governed by Washington law which cannot be not preempted. *See* Br. of Appellant, at 23. In response, Chevy Chase disputes this contention and cites an intermediate appeals court case from Maryland, *Chaires v. Chevy Chase Bank, F.S.B.*, 748 A.2d 34 (Md. App. 2000). Chevy Chase's argument

⁴The plaintiff's state common-law claims in *Lopez* were dismissed because the court concluded that her escrow agent had requested to receive delivery of the payoff statement by fax, and to pay the additional \$10 charge required by the lender for it. In this case, there was no presentation in the trial court concerning the circumstances by which the payoff statement was ordered or delivered. One hypothetical set of facts is that Chevy Chase did not offer a payoff statement for free by mail, as the lender did in *Lopez*. Another hypothetical set of facts is that there was no disclosure by Chevy Chase that it would charge for delivery of a payoff statement by fax. Under either hypothetical set of conceivable facts, the McCurrys state a claim for breach of contract and unjust enrichment upon which relief may be granted. *See Orser*, 2005 WL 3478126, at *2, 4; *Gerber v. First Horizon Home Loans Corporation*, 2006 WL 581082, at *3 (W.D. Wash. 2006).

ignores *Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812 (Md. 2003), a decision cited by the McCurrys in their opening brief that was rendered after *Chaires* by a higher court and supports the McCurrys' position that, by referencing Washington law in the Deed of Trust it had them sign, Chevy Chase agreed that Washington state law causes of action and remedies would not be preempted.⁵ Therefore, the McCurrys' contention that their state law claims cannot be preempted because their Deed of Trust is to be governed by Washington law is essentially un rebutted.

E. RCW 19.86.170 does not exempt Chevy Chase from the WCPA.

Chevy Chase is wrong that it is entitled to exemption from the WCPA provided under RCW 19.86.170. It argues that because the OTS provides general regulation over federal savings banks, its conduct is exempt from the WCPA. *See* Br. of Respondent at 43-45. However, RCW 19.86.170 "does not exempt actions or transactions merely because they are regulated generally; the exemption applies only if the particular practice found to be unfair or deceptive is specifically permitted, prohibited, or regulated." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). There are no federal statutes or regulations that permit a lender to charge its borrowers a fax fee for

⁵Nor did Chevy Chase address or attempt to distinguish *College Loan Corp. v. SLM Corp.*, 396 F.3d 588 (8th Cir. 2005), also cited by the McCurrys in their opening brief for the same proposition. *See* Br. of Appellant, at 23.

delivery of a payoff statement; to charge for the notary seal to be placed on a full reconveyance; to deceive its borrowers that they must pay unsecured charges in order to obtain the release of their real property security; to agree to reconvey deeds of trust or satisfy mortgages upon payment of certain specified amounts, then require the payment of previously unidentified fees in order to effect the release of their real property security. No statutes or regulations specifically permit federal savings banks to take these actions; Chevy Chase is not exempt from the WCPA.

Division Two of the Court of Appeals recently reaffirmed this rule in *Singleton v. Naegeli Reporting Corp.*, __ P.3d __, 2008 WL 134212 (Docket No. 35234-6) (January 15, 2008). In *Singleton*, a plaintiff sought recovery and injunctive relief under the WCPA against a court reporting company related to its practice of altering transcripts to inflate the number of pages in them. The trial court judge dismissed the WCPA claims because court reporters are regulated generally by the Department of Licensing, notwithstanding that there were no statutes or regulations authorizing court reporting companies to take the actions alleged by the plaintiff. After accepting interlocutory review of the trial court's dismissal of the WCPA claim, the Court of Appeals reinstated plaintiff's WCPA claim. After summarizing several cases involving the exemption available under RCW 19.86.170, the court concluded,

These cases all support the same proposition that unless a regulatory agency takes overt and affirmative actions to

specifically permit actions and transactions within its authority, then such actions and transactions do not qualify as exemptions under the CPA.”

Singleton, 2008 WL 124213, at *6.

While it recognized that court reporting is a closely regulated industry, that fact alone does not authorize an exemption:

[T]he trial court dismissed the case because the court reporting industry is closely regulated by a regulatory body. The fact of regulation does not rise to the standard set forth in Washington constituting a CPA exemption.

Id.

The Court of Appeals’ decision in *Singleton* simply underscores what is missing in this case – any specific permission or authorization by any regulatory body for the conduct complained of by the McCurrys. Without such specific permission or authorization, the WCPA exemption does not apply, and the trial court committed error by holding that it does.

Chevy Chase wrongly cites *Tokarz v. Frontier Fed. Sav & Loan Ass’n*, 33 Wn. App. 456, 656 P.2d 1089 (1982), as “dispositive” on the issue of whether it is exempt from the WCPA in this case. The court in *Tokarz* dismissed the plaintiff’s WCPA claim because the Federal Home Loan Bank Board had primary jurisdiction of the issues presented, *not* because statutes or regulations authorized the lender to take specified acts. The OTS does not have primary jurisdiction of the issues presented by the McCurrys’ claims, so *Tokarz* is not on point and is irrelevant.

F. The McCurrys properly pleaded their WCPA claim.

The specific fact allegations supporting the WCPA claim are asserted in paragraph 12 of the Complaint, and the WCPA allegations are stated in paragraphs 30-32. CP 4-5, 8. These allegations explain that Chevy Chase's method of extracting unsecured fees from its borrowers at the time of loan payoff is precisely the same as the method employed by the lender in *Dwyer*, which were found to be deceptive and to violate the WCPA. All the McCurrys were required to do was to set forth "a short and plain statement of the claim" showing that they were entitled to relief and "a demand for judgment for the relief" which they thought themselves entitled. CR 8(a). The McCurrys' Complaint complies with these requirements, and properly pleads a WCPA claim. CP 3-10.⁶

Chevy Chase also argues that they were entitled to charge fax fees and a Notary Fee, whether or not the fees were secured by the Deed of Trust. Therefore, Chevy Chase argues, the McCurrys suffered no damages when they paid these fees as a precondition to obtaining release of their Deed of Trust. *See* Br. of Respondent at 48-49. This argument ignores the conceivable set of hypothetical facts that the McCurrys have discussed before. For instance, if Chevy Chase did not offer some other

⁶Citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986), Chevy Chase also argues that the failure by a plaintiff to "properly plead any one element" of a WCPA claim "is fatal" to the plaintiff's CPA claim. No such rule of law is stated in *Hangman Ridge*, and such a strict pleading requirement would be inconsistent with modern rules of pleading found in Washington's civil rules.

commercially reasonable delivery method of a free payoff statement, then the McCurrys paid for something they were entitled to receive for free – a statement showing how much they would need to pay in order to exercise their contract right of redemption. Thus, under this conceivable set of facts, the McCurrys suffered money damages by paying the fees.

G. Chevy Chase's cases concerning the McCurrys' breach of contract claims are distinguishable or are not on point.

Chevy Chase cites several cases from other jurisdictions in its effort to undermine the McCurrys' breach of contract claims. These cases can be distinguished or are not on point, and they do not affect the claims. None of the cases address a mortgagor's inherent right to redeem the mortgage by paying it off. In order to be able to do so, it is an implicit contract right that a mortgagor is entitled to obtain a payoff amount without charge. *See, supra* at 11-12. For that reason alone, none of Chevy Chase's cases are applicable here.

In *Krause v. GE Capital Mortg. Serv., Inc.*, 731 N.E.2d 302, 314 Ill. App.3d 376 (2000), and *Jerik v. Columbia National, Inc.*, 1999 WL 1267702 (N.D. Ill. 1999), the principal issue was whether the lender's imposition of a fax fee at the time the borrower paid off the loan was an impermissible prepayment penalty. That issue has not been raised here, so *Krause* and *Jerik* are inapplicable. In addition, in *Krause* the court noted that the fax fee at issue was incurred at the request of the plaintiff. Here, potential hypothetical facts are that the McCurrys or their escrow agent did

not request the delivery of the payoff statement by fax; the fax and notary fees (either their existence or amount, or both) were not disclosed to the McCurrys before they received the statement; Chevy Chase provided no alternative to delivery of the statement by fax; and Chevy Chase would have refused to reconvey the McCurrys' deed of trust had they not paid the fax and notary fees. Any of these hypothetical facts would support the conclusion that Chevy Chase's requirement that the fax and notary fees had to be paid in order to process the McCurrys' loan payoff and to obtain the release of their Deed of Trust, was a breach of contract.

In *Stone v. Mellon Mortg. Co.*, 771 So.2d 451 (Ala. 2000), on summary judgment, the court dismissed the plaintiff's breach of contract claims to recover a fee the lender charged for fax delivery of a payoff statement. This would not have been the outcome had Mellon moved to dismiss for failure to state a claim, as Chevy Chase has here. The *Stone* court recognized that if Mellon had failed to release the mortgage until the fax fee was paid, just like Chevy Chase threatened the McCurrys here, "Mellon's policy would have violated the terms of the mortgage" and thus would have been a breach of contract. *Stone*, 771 So.2d at 455. Clearly, Chevy Chase's conduct in this case – requiring payment of unsecured fax fees and a Notary Fee before it processed the release of the McCurrys'

Deed of Trust – constituted a breach of contract.⁷

H. Application of the voluntary payment doctrine is not a proper subject for resolution on a CR 12(b)(6) motion.

Chevy Chase argues that the voluntary payment doctrine compels dismissal of the McCurrys' breach of contract and unjust enrichment claims. However, with respect to the unjust enrichment claim, the voluntary payment doctrine is not a valid defense. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, ___ Wn.2d ___, 170 P.3d 10, 23 (2007) (“[W]ashington courts have generally applied the voluntary payment doctrine only in the contract context.”). With respect to the breach of contract claim, it is inapplicable on these facts. 2 Jones, A TREATISE ON THE LAW OF MORTGAGES § 1155 (6th Ed. 1928) (when holder of mortgage requires mortgagor to pay more than is due on mortgage in order to redeem it and mortgagor pays sum demanded, mortgagor can recover overpayment).

The voluntary payment doctrine cannot bar the McCurrys' breach of contract claims under CR 12(b)(6) motion, because it always presents

⁷Chevy Chase points out that the McCurrys' Deed of Trust contains a provision stating that the absence of express authority in it to charge a specific fee shall not be construed as a prohibition on the charging of such a fee. However, this provision has no affect on the other provision in the Deed of Trust that “upon payment of all sums secured” by the Deed of Trust, Chevy Chase would request reconveyance of it, without further requirement. Whether fax or Notary fees are mentioned in the Deed of Trust is not the point; even if Chevy Chase was authorized to charge the fees, it could not condition release of the McCurrys' Deed of Trust on receipt of them. Even if the Deed of Trust could be construed to permit Chevy Chase to charge fax fees or Notary Fees, they were still not “sums secured” by the Deed of Trust, and by requiring the McCurrys to pay them before releasing their Deed of Trust, Chevy Chase breached the contract.

issues of fact. *Shaw v. Marriott Intern., Inc.*, 474 F. Supp.2d 141 (D.D.C. 2007) (application of voluntary payment doctrine as defense was premature on hotel owner's motion to dismiss guest's claims where fact issue existed as to voluntariness of guest's payment in order to check out of in foreign country); *Auto-Chlor System of Minnesota, Inc. v. Johnson Diversey*, 328 F. Supp.2d 980, 1012 (D. Minn. 2004) (“[W]hether Plaintiff's claims are barred by the voluntary payment rule is an issue of fact for the jury.”).

Under the voluntary payment doctrine, a party may not recover fees voluntarily paid to another party, but the doctrine applies only where there has been no mistake, compulsion, duress or fraud. *Speckert v. Bunker Hill Ariz. Mining Co.*, 6 Wn.2d 39, 52-54, 106 P.2d 602 (1940); see also *Thys v. Rivard*, 25 Wn.2d 345, 360-61, 171 P.2d 255 (1946). The doctrine also does not apply where there is a threat of a seizure of property of the person who made the payment or where there are other oppressive circumstances. *Hawkins v. Conniff*, 53 Wn.2d 454, 459, 334 P.2d 540 (1959). When the McCurrys paid Chevy Chase the amount required in the payoff statement, they were mistaken as to material facts regarding the amount needed to satisfy their loan obligations and obtain reconveyance.

Chevy Chase claims the McCurrys knew the relevant facts because it disclosed the \$20 “Accumulated Fax Fees” and \$2 Notary Fee in the payoff statement. Even if true, Chevy Chase focuses on the wrong

material fact. The real issue whether the McCurrys knew that the fees were not in fact part of the required payoff balance and did not need to be paid. A plausible set of hypothetical facts is that they did not. In *Dwyer*, the Washington Court of Appeals determined that a payoff statement such as Chevy Chase's has the capacity to deceive consumers into believing that unsecured fees must be paid before the borrower's mortgage will be satisfied and the lien released. *Dwyer*, 103 Wn. App. at 547-48. The facts in this case are nearly identical to the facts in *Dwyer*. Thus, given the capacity Chevy Chase's payoff statement had to deceive consumers, it is understandable that the McCurrys would have been deceived about how much they needed to pay in order to obtain the reconveyance of the deed of trust encumbering their property.

Chevy Chase never disclosed the fees until the payoff statement was provided, effectively holding the property hostage until the McCurrys paid them to obtain its release.⁸ Had they not paid the fees, they could very well have endangered their loan payoff and refinance. This is a form of economic duress which renders inapplicable the voluntary payment doctrine. See *Riensch v. Cingular Wireless, LLC*, 2007 WL 3407137, at *7 (W.D. Wash. 2007) (Slip Copy) (noting that courts have recognized a range of situations, termed business compulsion" or "economic duress,"

⁸See *Orser*, 2005 WL 3478126 at *2 (lender who required borrower to pay payoff statement fee before it would request trustee to reconvey deed of trust "in effect [held] plaintiffs' property hostage to collect the statement fee.").

that will counteract the voluntary payment doctrine). Chevy Chase could have informed the McCurrys it planned to charge these additional fees when they entered the loan agreement; it instead chose to keep the fees secret when the McCurrys entered the agreement. Accordingly, the voluntary payment doctrine does not apply.

III. CONCLUSION

The trial court committed error when it dismissed the McCurrys' Complaint. This court should reverse the trial court and permit the case to proceed in the trial court.

DATED THIS 22nd day of January, 2008.

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DECLARATION OF SERVICE

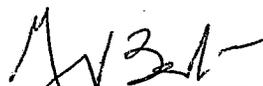
Guy W. Beckett declares:

On January 22, 2008 I mailed a copy of the foregoing document by
United States first-class mail, with proper postage affixed, to:

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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.

EXECUTED THIS 22nd day of January, 2008, at Seattle,
Washington.



Guy W. Beckett

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