

COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON  
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No. 75043-7-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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JOHN P. HURNEY AND LESLIE A. HURNEY,

Appellants,

v.

HSBC BANK, USA, N.A., as Trustee for Merrill Lynch Alternative Note  
Asset Trust, Series 2007-OAR2, et al.,

Respondents.

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ANSWERING BRIEF OF RESPONDENTS HSBC BANK USA, N.A.  
AND ONEWEST BANK, N.A.

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**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Appellants John and Leslie Hurney were uniformly told that Respondent HSBC Bank USA, N.A. (“HSBC”), as Trustee for Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR2 (the “Trust”), was the beneficiary of their Deed of Trust and that Respondent OneWest Bank N.A. (“OneWest”) was their loan servicer (and attorney-in-fact for HSBC). Despite this uniformity—and the Hurneys’ admitted loan default—the Hurneys contend foreclosure initiation was improper and this Court should reverse the grant of summary judgment in favor of HSBC and OneWest. Appellants’ conclusory argument is unsupported by facts and refuted by the evidence: they “maintain” that Defendants HSBC Bank USA, N.A. (“HSBC”) might not be the beneficiary of the Deed of Trust, so the actions taken toward non-judicial foreclosure in HSBC’s name were deceptive. But their arguments ignore the undisputed evidence.

This case is neither novel nor complicated. In 2005 the Hurneys took out a loan from IndyMac Bank, F.S.B. (“IndyMac”) as evidenced by a promissory Note, and IndyMac indorsed the Note to HSBC—as part of IndyMac’s sale of the Hurneys’ loan to the Trust—and then in blank, but continued to service the loan for HSBC and maintained custody of the indorsed Note. Under the Pooling and Servicing Agreement (“PSA”) governing the Trust, the servicer (IndyMac) was required to foreclose on defaulted loans. The PSA also authorized the issuance of a Limited Power of Attorney (“LPOA”) from HSBC to the servicer—confirming that the servicer was authorized to foreclose on loans held by the Trust, in the name of the HSBC as Trustee—and HSBC issued LPOAs to OneWest.

IndyMac failed and was taken into receivership by the FDIC, and OneWest obtained its assets (including possession of the original, indorsed in blank Note), and became the servicer on the Note for HSBC. Under the PSA and LPOAs, OneWest as servicer was authorized by HSBC to proceed with foreclosure in HSBC's name if the Hurneys defaulted, which they did. Thus, HSBC (through its attorney-in-fact, OneWest) executed a trustee substitution naming Regional Trustee Services Corp. ("RTS"), who commenced foreclosure proceedings (which have expired). The Hurneys filed a lawsuit attacking the foreclosure. On summary judgment, they abandoned all but their Consumer Protection Act ("CPA") claim, and the Court entered summary judgment for Defendants. This Court should affirm the trial court's judgment because:

*First*, because HSBC and OneWest committed no unfair or deceptive act, the Hurneys cannot show a CPA violation. OneWest was authorized to take actions as attorney-in-fact for HSBC, OneWest held the Note for HSBC, and HSBC was thus a valid and proper beneficiary under the Deed of Trust Act. Likewise, OneWest's appointment of the successor Trustee (as attorney-in-fact for HSBC) was not unfair or deceptive because OneWest was expressly authorized to appoint a new trustee.

*Second*, the Hurneys' CPA claim also fails because they have no evidence to support the public-interest prong of the CPA, citing evidence solely related to their own circumstances.

*Third*, the Hurneys cannot show injury under the CPA at all, let alone injury caused by OneWest or HSBC.

## II. STATEMENT OF THE CASE

### A. Factual Background

The Hurneys' statement of the case is verbose and contains legal commentary on the events leading to this case. HSBC and OneWest offer a concise summary of the relevant facts.

On February 22, 2005, the Hurneys executed an \$825,000 Note with IndyMac secured by a Deed of Trust on real property located at 605 First Street, Kirkland, Washington 98033 (the "Property"). CP 1 ¶ 1.2; CP 4 ¶ 2.2; CP 57 ¶ 3; CP 166 ¶ 3. The Deed of Trust identified IndyMac as the lender and non-party Mortgage Electronic Registration Systems Inc. ("MERS") as nominee beneficiary for IndyMac and IndyMac's successors and assigns on the loan (like HSBC). CP 66. The Deed of Trust allowed the Note holder to non-judicially foreclose upon a default. CP 128-147. As a result of the Hurneys' financial hardships, IndyMac agreed to modify their loan in January 2007, which changed the loan balance to \$850,186.03 and altered their monthly payments. CP 166 ¶ 4.

In March 2007, the Note was indorsed to HSBC, as Trustee for the Trust, but IndyMac continued to service the loan and possessed the indorsed Note. CP 58 ¶ 8; CP 95; CP 166 ¶ 5; CP 169-173. (IndyMac also indorsed the Note in blank. CP 173.) In July 2008, IndyMac failed and OneWest purchased its assets from the FDIC, acting as receiver (including, but not limited to, IndyMac's servicing rights). CP 166 ¶ 6. OneWest took over all aspects of servicing the Hurneys' loan, including taking possession of the documents IndyMac possessed. CP 57 ¶ 4; 166 ¶

7. The Hurneys defaulted in December 2009 and a foreclosure began in March 2010. CP 57 ¶¶ 4-5; CP 152-164; CP 166 ¶ 9.

Although not legally required, HSBC directed MERS to assign its nominee (i.e., agency) interest in the Deed of Trust to HSBC; the assignment was recorded on July 15, 2010, and had the effect of making HSBC beneficiary of record (it was already beneficiary as a matter of law because it held the Note). CP 149-150; CP 166 ¶ 8.<sup>1</sup> The assignment was executed by Kristin Kemp, as a MERS officer, but the signature page referenced IndyMac because MERS was listed as nominee for IndyMac on the Deed of Trust.<sup>2</sup> CP 149-150; CP 166 ¶ 8. HSBC appointed RTS as the new trustee of the Deed of Trust (through its attorney in fact, OneWest), in a document signed by Ms. Kemp. CP 152-153. Ms. Kemp

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<sup>1</sup> As the leading Real Estate Treatise explains, an assignment is done for practical, rather than legal reasons, as it makes it possible for a purchaser at a foreclosure sale (or a borrower paying off her loan) to obtain title insurance more readily

[A] mortgagor (and his or her title attorney or title insurance company) may feel quite uncomfortable taking a discharge from someone who has no recorded assignment of the mortgage. It is true that, in theory, if the assignee has possession of the note, and the note is negotiable, the power to enforce and discharge the mortgage must be held by that assignee. But ... possession of the note leaves no permanent record that future title examiners can rely upon.

Nelson & Whitman, *1 Real Estate Fin. L.* § 5.28 (5th ed. 2010)

<sup>2</sup> Courts recognize that MERS's nominee role means it may assign its nominee interest on behalf of the original lender—at the direction of the current Note holder—even where that lender no longer exists. See *In re Tucker*, 441 B.R. 638, 646 (Bankr. W.D. Mo. 2010); *Kiah v. Aurora Loan Serv. LLC*, 2011 WL 841282, \*4 (D. Mass. 2011) (“dissolution of [lender] would not and could not prevent [Note holder] from obtaining an assignment of the mortgage from MERS, both as a matter of law and according to the arrangement that existed between MERS and Aurora as a ‘successor and assign’”); *Long v. OneWest Bank, FSB*, 2011 WL 3796887, \*3 (N.D. Ill. 2011) (“whether [lender] was in bankruptcy prior to the assignment by MERS to Deutsche is irrelevant and does not show that the assignment was invalid”).

likewise signed an Affidavit of Holder of Note confirming that OneWest possessed the indorsed Note (for the owner, HSBC). CP 58 ¶ 8; CP 95. The assignment, appointment and affidavit documents were executed on March 23, 2010. CP 58 ¶ 8; CP 95, 149-150, 152-153.

RTS executed a Notice of Trustee's Sale on July 13, 2010. CP 155-158. The assignment, appointment and Notice of Trustee's Sale were recorded sequentially on July 15. CP 149-150, 152-153, 155-158. The day before the trustee's sale, the Hurneys filed a bankruptcy petition. CP 57 ¶ 6. The bankruptcy was later dismissed. CP 6 ¶ 2.9; CP 57 ¶ 7.

HSBC submitted to RTS a separate beneficiary declaration in January 2013 confirming that HSBC was the Deed of Trust beneficiary and that OneWest was the loan servicer. CP 199-200. HSBC delivered (through its agent) a new Notice of Default on March 4, 2013 that *again* explained HSBC was the Deed of Trust beneficiary and OneWest was the loan servicer. CP 87-93. The Hurneys attended foreclosure mediation but were denied a second loan modification. CP 58 ¶ 8; CP 167 ¶ 10.

RTS, on February 24, 2014, recorded a second Notice of Trustee's Sale. CR 160-164. No sale has occurred, and the 120-day period to complete a trustee's sale has expired.

**B. Procedural Background**

**The Hurneys' Complaint.** The Hurneys filed a lawsuit on June 19, 2014, alleging claims for: (1) injunctive relief enjoining the foreclosure sale; (2) violation of the Washington Foreclosure Fairness Act; (3) violation of the Washington Deed of Trust Act; (4) violation of

Washington's Consumer Protection Act; and (5) intentional infliction of emotional distress. CP 1-14. The Hurneys chose not to sue RTS or MERS but relied on conduct by those entities as a basis for liability against HSBC and OneWest. The Hurneys obtained a temporary restraining order enjoining the sale, but it expired. CP 99-101; RP 8. Mr. Hurney filed a declaration in support of the request (he also relied on it for the later summary judgment motion). CP 56-59, 307.

**HSBC and OneWest's Summary Judgment Motion and the Hurneys' Response.** On April 21, 2015, HSBC and OneWest filed a motion for summary judgment. CP 102-205. In their response to the motion, the Hurneys conceded judgment on all but the CPA claim. CP 327. Also, in their response the Hurneys proffered only two pieces of evidence—the PSA and Mr. Hurney's declaration. CP 56-59, 206-305. Neither document created a dispute of fact.

**C. Undisputed Evidence**

**The PSA Supports HSBC and OneWest.** The PSA states some of the duties OneWest and HSBC (and others) have to each other in administering the mortgage trust and servicing the loans in the trust. CP 206-305. The PSA in fact provides additional evidence showing OneWest can properly possess the Note (*i.e.*, hold it as an agent for HSBC) despite the Hurneys' assertion that only the trust custodian can possess it. It also confirms that the loan servicer is *required* to initiate foreclosure on defaulted loans on behalf of the Trust. CP 281, 294; CP 299 § 3.13. And

the unrefuted evidence is that IndyMac and OneWest have possessed the Note for HSBC at all times. CP 166 ¶¶ 5-8.<sup>3</sup>

**Mr. Hurney's Declaration Addresses the Wrong Note.** Nor did Mr. Hurney's declaration create any factual dispute. He claimed that the missed payments listed in the March 2013 Notice of Default were wrong. CP 57-58 ¶ 7. But he failed to provide any basis for his conclusion that the payments were higher—as explained below in the motion papers (which was uncontradicted), he was relying on the 2005 Note, not the amended and modified 2007 Note, which had different terms. CP 166 ¶ 4; CP 339-348. The loan balance was modified and increased in 2007, which increased his payments. *Id.* In any event, the differing payments are irrelevant to the issue on appeal—did HSBC properly foreclose (through OneWest as its attorney-in-fact), which it did.

**Mr. Hurney's Declaration Offers No Evidence Refuting OneWest's Authority to Act for HSBC.** Mr. Hurney asserts OneWest did not prove it had authority to foreclose during the foreclosure mediation that occurred in June and October 2013. CP 58 ¶ 8. But it is incontrovertible that OneWest *was* acting under the 2011 LPOA during the mediation that *did* authorize it to modify the Hurneys' loan. CP 166 ¶ 8, CP 202 ¶ 2; CP 204-05. It is also uncontroverted that OneWest was authorized by HSBC under the PSA to modify the Hurneys' loan and act

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<sup>3</sup> To the extent the Hurneys are arguing that IndyMac and OneWest's conduct violates the PSA, they lack standing to challenge compliance with the PSA. *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 177, 367 P.3d 600, 606 (2016), *review denied sub nom. Deutsche Bank Nat'l Trust Co. v. Slotke*, 185 Wn.2d 1037, 377 P.3d 746 (2016).

as attorney-in-fact for HSBC. CP 204-05; CP 299 § 3.13. In sum, OneWest possessed the indorsed Note for the benefit of HSBC and was authorized to bind HSBC to any modified loan terms available, and the evidence contradicts Mr. Hurney's contrary speculation. CP 165-167.

Undeterred by such facts, Mr. Hurney feigns confusion by pointing out that OneWest executed in 2010 an Affidavit of Holder of Note—which was then delivered to RTS, not the borrowers, as required by RCW 61.24.030(7)(a)—which he believes somehow shows that OneWest lacked authority to modify their loan during the 2013 foreclosure mediation. CP 58 ¶ 8. Leaving aside the unrefuted evidence showing OneWest *did* have authority to modify the loan, Mr. Hurney is wrong. The document he cites shows OneWest *did* have authority to modify the loan because it shows OneWest held the Note for the benefit of the disclosed Note owner, HSBC. Because OneWest possessed the Note indorsed in blank (and held it for the benefit of HSBC), the document shows OneWest was authorized to modify the loan. CP 58 ¶8; CP 95. The documents submitted to the Hurneys show HSBC owned the loan, HSBC was the beneficiary with the right to foreclose on the Deed of Trust, OneWest was the servicer holding the Note for the benefit of HSBC, and that OneWest was HSBC's attorney-in-fact authorized to modify their loan. CP 87, 152-53, 155, 160, 181, 187, 199.

**No Further Evidence.** The Hurneys offered no other evidence to the court to support the essential elements of their claims (and they failed

to respond to discovery requests asking for any supporting evidence, precluding admission of any further evidence). CP 350-375. Nor did the Hurneys seek an extension under CR 56(f) to conduct discovery into HSBC and OneWest's evidence (and the Hurneys conducted no discovery before then).

**The Court Enters Summary Judgment.** Oral argument on the motion occurred on October 9, 2015. RP 1- 34. The court granted the motion, entering judgment on October 9, 2015. CP 377-378; RP 33.

### **III. STANDARDS OF REVIEW**

**Summary Judgment.** This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). The Court may ***affirm*** the ruling below ***on any ground supported by the record***, “even if the trial court did not consider the argument.” *King Cnty. v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 310 (2007) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01 (1989)).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). If the moving party meets this initial showing, the burden shifts to the opposing party. *Id.* An opposing party “may [not] rely on ‘speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.’”

*Rucker v. Novastar Mortg., Inc.*, 177 Wn. App. 1, 10 (2013) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13 (1986)). “Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue.” *Rucker*, 177 Wn. App. at 10 (citing *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132 (1989)).

#### IV. ARGUMENT

HSBC and OneWest moved for judgment on all five claims pled in the complaint. HSBC and OneWest provided evidence that: 1) HSBC owned the Note; 2) HSBC held the Note through its agent (IndyMac) after March 2007; 3) OneWest purchased IndyMac’s assets and took over servicing in July 2008; 4) OneWest was attorney-in-fact for HSBC in March 2010 and provided a power of attorney document for January 2011 onwards; and 4) HSBC ratified any actions OneWest performed in the foreclosure. The Hurneys conceded judgment on all but their CPA claim.

The Hurneys speculate, without evidence, that a CPA violation arose based on some issue with possession of the Note and who was authorized to foreclose. But there is no dispute that HSBC is the owner of the Note and Deed of Trust and that OneWest was authorized to foreclose on behalf of HSBC both under the PSA and the LPOAs. The Hurneys simply ignore the facts in making their arguments, and there was no error in granting HSBC and OneWest judgment.

The CPA requires the Hurneys to show: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the

public interest; (4) which causes injury to a plaintiff's business or property; and (5) that injury is causally linked to the unfair or deceptive act. *Guijose v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001). The Washington Supreme Court emphasized that the Hurneys need to “produce evidence on each element required to prove a CPA claim.” *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 119 (2012). Courts can decide whether an action is an unfair or deceptive act as a matter of law. *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 150 (1997).

Notably, Division II of the Washington Court of Appeals recently addressed virtually identical allegations filed by the same counsel and rejected these same arguments in affirming dismissal. *Djigal v. Quality Loan Serv. Corp. of Wash., Inc.*, 2016 WL 6216252, \*1 (Wash. App. 2016). Although the decision is presently unpublished, the reasoning is persuasive and directly on point.

The Hurneys chided HSBC and OneWest—and cut and pasted the same argument in their opening brief—for purportedly ignoring Washington appellate decisions in favor of federal district court decisions. The Hurneys' Opening Brief relies heavily on a series of published decisions they claim support them, but those cases (*Bain*, *Selkowitz*, *Bavand*, *Walker*) were all decided under a Rule 12 standard (or on certified questions), not on summary judgment. Notably, as below, the Hurneys fail to reveal that in the vast majority of the cases they cite, the

defendants prevailed on summary judgment.<sup>4</sup> In any event, since this case was decided below, the Washington appellate courts—and in particular this Court—have consistently rejected the same theories the Hurneys try here.<sup>5</sup>

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<sup>4</sup> See *Selkowitz v. Litton Loan Serv. LP*, 2014 WL 3953195, \*2 (Wash. Super. Ct. 2014) (“plaintiff has failed to show causation and injury or damage from any of the conduct of the three defendants who are before me today. ... I have no reason to question the assertions and the documentation and evidence that supports the fact that Litton is the holder of the note. ... [T]he particular defects that the plaintiff claims with regard to the notice of default and notice of sale just don’t lead to any damages. There is no causal link between any alleged defect in those documents, any reliance by the plaintiff and any actual damage that flowed from that”), *aff’d* 191 Wn. App. 1025 (2015), *review den.*, 185 Wn.2d 1037 (2016); *Bain v Metro. Mortg. Grp., Inc.*, 2013 WL 6193887, \*5 (Wash. Super. Ct. 2013) (granting summary judgment: “While Deutsche Bank owned the note, it gave IndyMac the authority to modify and foreclose on the loan and use MERS as an agent. ... And **Deutsche Bank executed power of attorney to allow IndyMac to take any actions necessary to foreclose on the deed of trust**”) (emphasis added); *Walker v. Quality Loan Serv.*, 2015 WL 1969843, \*1 (Wash. Super. Ct. 2015) (“the big one that was argued ... the CPA, I don’t find that there’s any causation or any injury.”); *Bavand v. OneWest Bank, FSB*, 2015 WL 5277073, \*4 (Wash. Super. Ct. 2015) (“The most that might be said about MERS’s assignment of the beneficiary interest in the deeds of trust is that it was unnecessary to the foreclosure. Second, the evidence in this case was that MERS’s assignment of the deeds of trust was at the behest of OneWest. The law permits lenders and assigns to name MERS as their agent. The undisputed evidence is that MERS’s assignment was in its capacity as agent for OneWest. Finally, the assignments of the deeds of trust, even if deceptive, could not have caused any injury to the plaintiff where she had no communication with MERS, never reviewed the property records, and never knew of the MERS assignments until after starting this lawsuit. The plaintiff failed to raise a material issue of fact with regard to any of these issues.”)

<sup>5</sup> See, e.g., *Brown v. Wash. State Dept. of Commerce*, 184 Wn.2d 509 (2015) (servicer may foreclose where authorized by investor); *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 37–38 (2016), *as amended on denial of reconsideration* (May 12, 2016), *pet. for review den.* (Nov. 1, 2016); *Djigal*, 2016 WL 6216252, at \*1; *Nilson v. Quality Loan Servicing Corp. of Wash.*, 2016 WL 1183165, \*5 (Wash. App. 2016); *Slotke*, 192 Wn. App. at 178 (“Slotke fails to persuasively argue that [MERS’s] recorded assignment of the deed of trust in this case is ineffective to transfer The Lending Center’s interest to Deutsche Bank.”); *Big Blue Cap. Partners of Wash. LLC v. McCarthy & Holthus, LLP*, 2015 WL 7431445, \*6 (Wash. App. 2015) (“Big Blue cannot dispute that Riggle failed to pay the note as required. Nothing in Big Blue’s pleadings demonstrated an injury to Riggle’s business or property caused by the alleged violations of the DTA or other irregularities. The record contains no declaration from Riggle or other evidence that he failed to make his payments because of the alleged unfair or deceptive acts. It contains no evidence that he was unable to determine whom he was supposed to make his payments to or that anything other than his financial straits caused his default and subsequent

**A. There Were No Unfair or Deceptive Acts or Practices.**

The Hurneys, ignoring the facts and all evidence, argue three things were deceptive: 1) It was not clear HSBC owned the Note and that OneWest was authorized to act for HSBC; 2) OneWest could not substitute a trustee; and 3) RTS deceptively relied on a purportedly defective beneficiary declaration.<sup>6</sup> These three arguments fail because the evidence establishes HSBC owned the Note, was the beneficiary of the Deed of Trust, and authorized OneWest to act as its attorney-in-fact and to take steps toward modification or foreclosure. The Hurneys cannot cover their eyes as to the evidence and claim deception. The trial court did not err dismissing CPA.

**1. The Hurneys Offered No Evidence Showing a Deceptive Act as to HSBC or OneWest**

The Hurneys did not submit a declaration saying they were deceived or confused as to who was foreclosing or why, and they did not offer evidence showing that any statement or action by HSBC or OneWest has the capacity to deceive a substantial portion of the public as required

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bankruptcy. Big Blue thus failed to demonstrate a genuine issue of fact showing the alleged CPA violations caused any injury to Riggle.”); *Jackson v. Quality Loan Serv. Corp. of Wash.*, 186 Wn. App. 838, 842 (2015); *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 232 (2016); *Richards v. Quality Loan Serv. Corp. of Wash., Inc.*, 2015 WL 7355279, \*3 (Wash. App. 2015); *Pelzel v Nationstar Mortg. LLC*, 2015 WL 1331666, \*3, \*7 (Wash. App. 2015); *Guttormsen v. Aurora Bank FSB*, 2015 WL 4611328 (Wash. App. 2015); *Bowman v. SunTrust Mortg., Inc.*, 2015 WL 473011587, \*3 (Wash. App. 2015).

<sup>6</sup> The defective beneficiary declaration issue constitutes over 66% of the argument section in their brief, despite the fact that beneficiary declarations are not required under the DTA and the Hurneys have no evidence showing what RTS relied upon to determine that the right party was foreclosing. [Opening Brief p.21-24, 30-44.]

to meet the CPA's first element. *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 74 (2007). Instead, they are trying to play "gotcha" by speculating about made-up issues to bootstrap that speculation into a CPA claim.

There is no evidence in the record establishing any deceptive practice by HSBC or OneWest. To be "deceptive," the act or practice must be one that "misleads or misrepresents something of material importance." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007). Again, the only facts in evidence showed that HSBC owned the Note, and OneWest held it and acted pursuant to a power of attorney. CP 58 ¶8; 95; 166; RP 5. All the Hurneys have is speculation that HSBC and OneWest did not have authority and did not own or possess the Note, which is not enough for several reasons, not least of which is that the Hurneys bear the burden of proof and yet offered no evidence supporting their theory. *See Djigal*, 2016 WL 6216252, at \*5 ("Djigal does not identify anything in the record that contradicts, or creates a question of fact regarding, who held the Note. Djigal's argument that 'no credible evidence' supports Loll's declaration does not create an issue of material fact."). Division III likewise concurs:

For the first time at the summary judgment hearing, Mr. Blair attempted to dispute whether BoA physically possessed the note. However, "[m]ere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue." *Rucker*, 177 Wash. App. at 10, 311 P.3d 31. We therefore conclude that there is no issue of material fact disputing BoA's possession of Mr. Blair's note.

*Blair*, 193 Wn. App. at 33, *as am. on den. of recon.* (May 12, 2016), *pet. for review den.* (Nov. 1, 2016).

a. There is No Deception because OneWest was Properly Acting for HSBC

OneWest could not act deceptively by performing foreclosure actions on behalf of HSBC because OneWest was contractually authorized and obligated to do so under the PSA, it was HSBC’s attorney-in-fact for the express purpose of foreclosure, and it possessed the original indorsed Note (for the benefit of HSBC). The Washington Uniform Commercial Code expressly contemplates possession of Notes through an agent. *See, e.g.*, RCW 62A.3-201 Official Comment No. 1 (one can possess a Note directly “or through an agent”); RCW 62A.9-313 Official Comment No. 3 (may possess through agent). Thus, there was nothing deceptive about OneWest pursuing foreclosure for HSBC because under its LPOA, OneWest could take actions *as* HSBC—including foreclosure measures. “There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions.” *Bain v. Metro. Mortg. Grp., Inc.*, 2010 WL 891585, \*6 (W.D. Wash. 2010) (citation omitted). This point was emphasized by Judge Ricardo Martinez in reversing a bankruptcy appeal:

The fact that Wells Fargo signed ... as attorney-in-fact for U.S. Bank, *where specifically authorized to do so by power of attorney agreements*, does not change this result. ... This result is so because an authorized agent is empowered to make binding declarations within the scope of its agency on its principal’s behalf *such that the declarations of the agent are deemed to be those of the principal itself.*

*Meyer v. U.S. Bank Nat'l Ass'n.*, 530 B.R. 767, 778 (W.D. Wash. 2015) (citing *Ennis v. Smith*, 171 Wash. 126, 130 (1933)) (emphasis added). In fact, Washington courts routinely recognize that an entity operating under a power of attorney has the authority of a principal. See *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 109 n.1 (1988) (recognizing that Mr. Koegel “is the real party in interest in this case,” even though “all the transactions herein were conducted by ... Koegel’s attorney in fact.”); *Puget Sound Nat'l Bank v. Burt*, 56 Wn. App. 868, 869-70 (1990) (when attorney-in-fact signed principal’s name to check, signature was not forgery because attorney-in-fact had actual authority under general power of attorney); *Lumbermen’s Indem. Exch. v. Herrick*, 143 Wash. 508, 513 (1927) (attorney-in-fact may take actions for the association); *Travelers Cas. & Sur. Co. v. Wash. Trust Bank*, \_\_\_ WN. 2d \_\_\_, No. 92483-0, slip op. at 15-16 (Wash. Nov. 3, 2016) (check indorsement can be made by agent).

Nor was the 2010 OneWest affidavit deceptive. It accurately states that OneWest held the Note—because the evidence shows OneWest possessed the Note indorsed in blank in 2010—and identified HSBC as the entity for which OneWest was acting. Literally every document issued in connection with 2013 foreclosure at issue in this case confirms that HSBC was the beneficiary but that OneWest was authorized to foreclose in HSBC’s name.<sup>7</sup> CP 87, 152-53, 155, 160, 181, 187, 199.

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<sup>7</sup> In their fact section, the Hurneys mention that the notice of default stated HSBC was the owner and gave an address in care of OneWest. They do not argue this statement is the

The Hurneys argue that since the PSA from 2007 indicated a custodian or master servicer would maintain the Note, OneWest might not have held it in 2010 or 2013. They ignore that the only evidence on the subject shows that HSBC owned it, OneWest possessed it at all material times, and HSBC gave OneWest an LPOA to foreclose. CP 58 ¶ 8; CP 95; CP 166 ¶ 8. Indeed, the PSA allows HSBC and/or OneWest to possess the Note, providing additional support that OneWest physically held it. CP 281 § 2.01; CP 294 § 3.01. Regardless, the Hurneys cannot state a claim based upon a violation of the PSA because they are not parties to that contract. *Slotke*, 192 Wn. App. at 177. The Hurneys’ speculation that the Note might have been with someone else cannot defeat summary judgment. *Blair*, 193 Wn. App. at 33.

b. OneWest Acted Under a Valid Power of Attorney and HSBC Ratified OneWest’s Action

The Hurneys—isolating one piece of evidence (the power of attorney document)—claim OneWest might not have had a power of attorney until after 2011. The Hurneys fail to explain the relevance of that speculation. *Cf. Knecht v. Fid. Nat’l Title Ins. Co.*, 2013 WL 7326111, \*7 (W.D. Wash. 2013) (“Mr. Knecht complains that there is no recorded power-of-attorney document establishing AHMSI’s right to act on DB’s

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basis for their CPA claim. It cannot be as there was no deception. Nothing prevents HSBC from requiring loan-related contact to go to the loan servicer, OneWest. *See e.g., Meyer*, 530 B.R. at 781 (providing address of only loan servicer does not rise to the level of “unfair or deceptive practice” in violation of the CPA); *Bavand v. OneWest Bank, FSB*, 587 Fed. App’x 392, 395 (9th Cir. 2014) (affirming dismissal because using servicer’s address did not injure borrower).

behalf, but he points to no authority requiring AHMSI to record such a document. He also fails to establish his own standing to object to AHMSI's acting on DB's behalf.").

In any event, they ignore the evidence (two declarations) showing OneWest had a power of attorney for HSBC both before and after 2011. CP 166 ¶ 8 (OneWest was attorney in fact for HSBC in 2010); CP 202 ¶ 2 (acknowledging the existence of LPOA *before* 2011 but stating that a copy is presently unavailable more than four years later). Indeed, the limited evidence the Hurneys did offer—the PSA—showed that HSBC agreed to give OneWest (as servicer) an LPOA and to give it (and the master servicer) contractual authority to take any required actions to foreclose. CP 293 §3.01; CP 299 §3.13.

But even if OneWest did not possess the indorsed Note for the benefit of HSBC (it did), and did not have an LPOA (it did), it can foreclose as an agent for HSBC. "Washington law, and the deed of trust act itself, approves of the use of agents . . ." *Bain*, 175 Wn.2d at 106. There is nothing deceptive about a servicer (OneWest) acting for its principal (HSBC) in performing foreclosure actions, especially when the servicer has independent authority to act. *McAfee*, 193 Wn. App. at 229.

Regardless, even if OneWest lacked express authority and it was HSBC that had the right to foreclose, HSBC ratified OneWest's actions. CP 95; CP 166 ¶8; CP 202 ¶2. The Washington Supreme Court explains:

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, *whereby the act, as to some or all*

**persons, is given effect as if originally authorized by him.**  
... To be charged by ratification with the unauthorized act of an agent, the principal must act with full knowledge of the facts, accept the benefits of the acts, or without inquiry assume an obligation imposed.

*Riss v. Angel*, 131 Wn.2d 612, 636–37 (1997) (emphasis added) (citing *Nat'l Bank of Commerce v. Thomsen*, 80 Wn.2d 406, 413 (1972) and *Stroud v. Beck*, 49 Wn. App. 279, 286 (1987)). Thus, the undisputed evidence shows that OneWest **always** had authority to act.

This Court has expressly approved of this routine conduct in affirming dismissal of CPA claims, where the servicer acts under a power of attorney:

U.S. Bank executed a limited power of attorney, authorizing Chase to execute and deliver all documents and instruments necessary to conduct any foreclosure. ... U.S. Bank, through its agent, Chase, was the holder of the note, which GreenPoint had endorsed in blank. Therefore, U.S. Bank had the authority to appoint NWTS as successor trustee. It was not deceptive to refer to U.S. Bank as the beneficiary on the notice of default and notice of trustee's sale and foreclosure.

*Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 63, 69 (2015), review denied sub nom. *Barkley v. JPMorgan Chase Bank*, 184 Wn.2d 1036 (2016); *Meyer*, 530 B.R. at 778.

The Hurneys are engaging in unsupported speculation to try to create a disputed claim. *Blair*, 193 Wn. App. at 33. They cannot, so the judgment should stand.

c. It was Not Deceptive for OneWest to Perform Foreclosure Actions

The Hurneys' argument that the appointment of RTS was improper because OneWest might not have had authority is unsupported by fact.

Such speculation cannot succeed. *Blair*, 193 Wn. App. at 33. The undisputed facts are that HSBC, acting through its attorney-in-fact, OneWest, appointed RTS as trustee. CP 58 ¶8; CP 95; 152-153; CP 166 ¶ 8. This is not deceptive and is not a CPA violation. *Barkley*, 190 Wn. App. at 63, 69.<sup>8</sup>

d. The Hurneys Failed to Show an Unfair Act as to HSBC or OneWest

The Hurneys fail to distinguish how HSBC or OneWest acted unfairly as opposed to deceptively. Their arguments focus on deception, because they cannot show unfairness. Nothing was unfair—the Hurneys defaulted and a foreclosure occurred as they agreed it could in the Deed of Trust. Tellingly, the Hurneys never suggest that some other entity should foreclose, and they concede HSBC owns their loan. CP 1-2 ¶¶ 1, 3.

In any event, the Hurneys have no evidence supporting an unfair act or practice by HSBC and OneWest. They do not contend that HSBC or OneWest committed a *per se* unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice as being *per se* “unfair.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787 (1986). The Hurneys cite no statutory violation that is a legislatively declared *per se* CPA violation and, thus, there is no basis for a *per se* “unfair” claim.

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<sup>8</sup> The Hurneys imply that the recorded assignment of MERS’s interest before the foreclosure started may be deceptive. The assignment, which was not legally required, merely reflected the reality that HSBC was the owner of the Note. CP 58 ¶ 8; CP 95, 149-150; CP 166 ¶ 8; *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011); *McAfee*, 193 Wn. App. at 230–31; *Slotke*, 192 Wn. App. at 177.

To show HSBC or OneWest acted “unfairly”—aside from a *per se* unfair trade practice—the Hurneys must show HSBC or OneWest took some action that offends public policy as established by law, is “immoral, unethical, oppressive, or unscrupulous” or causes substantial injury to consumers. *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57–58 (1983). Public policy and the law allow servicers to take actions on behalf of the Note owners like HSBC. *Brown*, 184 Wn.2d at 539–40. There is nothing immoral or oppressive in having a servicer hold a Note (and take steps to foreclose) for the benefit of the Note owner, especially when they disclose those relationships and have contracts expressly permitting that conduct. CP 58 ¶ 8; CP 95, 166, 204-205; CP 299 § 3.13.

e. HSBC and OneWest Are Not Liable for RTS’s Alleged Failures

The Hurneys attempt to impute RTS’s actions to HSBC and OneWest as a basis to hold them liable. But the CPA does not permit vicarious liability for a party that did not actually perform any wrongful or deceptive actions. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165 (1990) (CPA claim correctly dismissed against party who did not have any contact with plaintiff and was not involved in deceptive action); *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 183 (2007), *aff’d sub nom. Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27 (2009). And RTS’s primary supposed CPA violation—that it did not confirm who the beneficiary was—applies only to foreclosure trustees, not lenders or servicers, and thus has no bearing on HSBC or OneWest. (And of course, HSBC and

OneWest did have the right to foreclose, making the entire inquiry irrelevant.) Moreover, the Hurneys' reliance on the 2010 beneficiary declaration provided to RTS proves nothing because a beneficiary declaration is not required at all and is only one way RTS could meet its obligations to ensure the right party is foreclosing. RCW 61.24.030(7)(a). The Hurneys chose not to pursue claims against RTS (voluntarily dismissing RTS), have no first-hand knowledge of what RTS relied on to confirm the right party was foreclosing, and thus cannot create a disputed issue of material fact. The trial court correctly rejected the Hurneys' CPA claim based upon RTS's actions.

## **2. There Was No Public Interest Impact**

A plaintiff asserting a CPA claim must offer evidence showing the alleged act complained of impacts the public interest. *Hangman Ridge*, 105 Wn.2d at 780. “[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” *Id.* at 790. Notably, the 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. Now, the Hurneys must show HSBC or OneWest's act or practice “(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.

The Hurneys provided no evidence that HSBC or OneWest's actions injured other persons or have the capacity to injure other persons. Mr. Hurney's declaration focuses entirely on his unique circumstances. CP 56-59. Foreclosing on a Deed of Trust that HSBC held and on which OneWest had an LPOA does not injure other persons in the past or future. All it shows is HSBC and OneWest are exercising their rights properly.

### **3. The Hurneys Cannot Show Injury or Causation**

The only injury alleged in the Hurneys' Complaint is the purported failure to provide a "meaningful opportunity to try to save their home from foreclosure." CP 11. Mr. Hurney referenced a prior declaration in opposing summary judgment, but a party may not amend their complaint via summary judgment briefing. *Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 162 (2006). The Court should disregard the Hurney declaration because it contains allegations appearing nowhere in the Complaint.

Should the Court consider the Hurney declaration, however, nothing in that document suggests injury compensable under the CPA. Indeed, in Division II's *Djigal* decision, an *identically worded* declaration (drafted by the same counsel) was rejected as establishing injury, going through each contention and explaining why it was insufficient. *Djigal*, 2016 WL 6216252, at \*8-\*10. Specifically, the court there found (a) the threat of loss of the borrower's home was caused by the borrower's default, not the lender's conduct; (b) there was no evidence suggesting an improper loan balance increase, beyond the plaintiff's unsupported

speculation; (c) the fees paid to the same counsel (in the same amount) do not establish injury caused by the defendants because the borrower did not show an “issue of material fact as to ‘a deceptive business practice’ that *necessitated* a consultation and investigation,” so the borrower had “not shown that the claimed injury was caused by ‘a deceptive business practice’”; and (d) “[e]xpenses incurred for defending against a collection action and prosecuting a CPA counterclaim are insufficient to show injury.” *Id.* (citations omitted).

The Hurneys argued below that their injuries were “demands for monies which were not owed included in all the non-judicial foreclosure documents” as well as “attorneys’ fees incurred to investigate their rights, mediation fees, the costs of filing suit and serving the complaint and travel and parking costs associated with meeting an attorney and attending mediations and hearings.” CP 322. But these broad descriptions are not evidence or proof, and they fail to identify a false statement that necessitates investigation into anything. *See, e.g., Nilson*, 2016 WL 1183165, at \*6 (citing *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810, \*6 (W.D. Wash. 2014) (“Nilsen also fails to establish any damages causally linked to such alleged acts. Merely spending time trying to investigate and acquire information from [the trustee, servicer, and investor] are insufficient for a CPA claim.”); *Bakhchinyan*, 2014 WL 1273810, at \*6 (dismissing CPA claim for lack of injury and causation: “[E]ven assuming that Plaintiffs accrued those expenses in an attempt to

‘dispel uncertainty’ about the debt, Plaintiffs have not put forward any explanation for *why* they need to clarify the identity of the beneficiary.... Nor do they describe any future actions that they were unable to take without knowledge of the identity of the beneficiary.”)(emphasis added); *see also Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903, \*4 (W.D. Wash. 2013) (“fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation.”).

Even assuming the Hurneys did incur compensable CPA injuries, they have no evidence showing that but for HSBC and OneWest’s actions, they would not have incurred those same purported expenses. The Hurneys thus cannot establish CPA injury caused by HSBC and OneWest. Costs and attorneys’ fees are a *remedy* under the CPA, not an element. *See Panag*, 166 Wn.2d at 60. Again, expenses incurred for defending against a collection action and prosecuting a CPA counterclaim are insufficient to show injury. *Sign-O-Light Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564 (1992) (“mere involvement in having to defend against Sign’s collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property.”); *see also Demopolis v. Galvin*, 57 Wn. App. 47, 54 (1990) (plaintiff’s alleged injury resulting from having to bring suit to protect against lender’s foreclosure action not sufficient to satisfy CPA injury).

The Hurneys speculate that perhaps HSBC (by acting through OneWest) improperly initiated foreclosure proceedings. As discussed, this is simply wrong. They defaulted. OneWest held the Note for HSBC's benefit, was authorized to take actions as HSBC, and HSBC has expressly ratified all of OneWest's actions. Thus, HSBC, through its attorney-in-fact OneWest, had the right to foreclose, and taking lawful actions toward foreclosure *cannot* cause the Hurneys injury.

The only other basis for their CPA claim is the unsupported allegation that RTS wrongly commenced a foreclosure when it lacked proper confirmation that the beneficiary indeed sought to foreclose. But the Hurneys chose to abandon their claims against RTS, they lack first-hand knowledge of what materials RTS relied upon, and receipt of a beneficiary declaration is only *one way* a trustee may satisfy its duty to ensure the right entity is foreclosing. *See* RCW 61.24.030(7)(a).

The Hurneys cannot show the essential CPA element of causation based on RTS conduct—that is, but for RTS's actions, the foreclosure was not authorized and would not have occurred. *Jordan by Prappas v. Bergsma*, 63 Wn. App. 825, 832 (1992); *Indoor Billboard*, 162 Wn.2d at 82. Even assuming RTS lacked evidence showing the right entity was foreclosing—and the Hurneys offer no evidence—the Hurneys ignore that:

Had [the trustee] complied with RCW 61.24.030(7)(a), it would have learned that BoA was the holder of the note endorsed in blank, and that institution of the nonjudicial foreclosure proceeding was arguably proper. Consequently, [the trustee's] violation of RCW 61.24.030(7)(a) did not cause a wrongful initiation of foreclosure. Because the initiation of foreclosure was not wrongful, Mr. Blair has

failed to establish a causal link between [the trustee's] wrongful act and his injury.

*Blair*, 193 Wn. App. at 37–38.

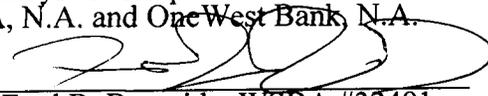
V. **CONCLUSION**

The Hurneys rely on speculation and cite to no evidence creating a disputed issue of material fact. The evidence shows HSBC held the Note and Deed of Trust; OneWest, for HSBC, possessed the Note indorsed in blank, and HSBC expressly authorized OneWest to foreclose on the Deed of Trust in HSBC's name. The Hurneys fail to provide any evidence that shows something different—all they have done is to re-hash their trial court arguments. HSBC and OneWest respectfully ask this Court to affirm the trial court's order granting summary judgment in its entirety.

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

Davis Wright Tremaine LLP  
Attorneys for Respondents HSBC Bank  
USA, N.A. and OneWest Bank, N.A.

By

  
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**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the state of Washington that on this day I caused a copy of the foregoing **Answering Brief of Respondents HSBC Bank USA, N.A., and OneWest Bank, N.A.** to be served upon the following counsel of record:

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Dated at Seattle, Washington this 7th day of November, 2016.

  
Lisa Bass