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No. 66721-1-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION I

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JACK GRANT,

Appellant

v.

FIRST HORIZON HOME LOANS, aka First Horizon Corporation dba  
"First Horizon Home Loans" et al.,

RESPONDENTS

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ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT  
(Hon. Steven J. Mura)

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**BRIEF OF RESPONDENT FIRST HORIZON HOME LOANS**

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**ORIGINAL**

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## **I. SUMMARY INTRODUCTION**

This an appeal from the dismissal of a suit brought by appellant Jack H. Grant (Grant), an experienced real estate attorney, on his own behalf. Grant ceased making his monthly payments on an \$800,000 loan for his waterfront home in Blaine, Washington in April 2010. When respondent First Horizon declined to allow him an unlimited amount of time to sell his house and pay his mortgage, he filed this suit. After the superior court dismissed the suit and dissolved a temporary restraining order, Grant filed this appeal and secured a stay pending the appeal.

The dismissal order should be affirmed, and the stay lifted. Most of Grant's causes of action are based on the December 1, 2004 loan closing. As a result, a three or four-year statute of limitations bar those claims because he filed suit in October 2010, almost six years after the loan closing. His substantive allegations fail on numerous additional grounds. The remainder of Grant's claims rest on vague theories of wrongful foreclosure that do not support any causes of action. For these reasons, the trial court properly granted First Horizon and the other Respondents' motions to dismiss pursuant to CR 12(b)(6).<sup>1</sup>

## **II. ISSUE PRESENTED**

Can Grant state any actionable claims against First Horizon where all of his claims are based on events that occurred on or before December

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<sup>1</sup> Respondent Quality Loan Service Corporation of Washington, Inc. also moved pursuant to CR 12(c).

1, 2004 on nonjudicial foreclosure proceedings that have not yet resulted in a Trustee's Sale?

### III. COUNTERSTATEMENT OF THE CASE

#### A. The Loan Closed on December 1, 2004.

In 1996, Grant married Lisa Alvaro. Clerk's Papers (CP) 226. Three years later, Grant was admitted to practice law in Washington.<sup>2</sup> Eight years into their marriage, Grant and his wife executed a promissory note (Note) for an \$800,000 residential mortgage loan. CP 227-228; Supplemental Clerk's Papers (Supp. CP) 652, 655-657. The loan paid off a construction loan for a house located at 4630 Drayton Harbor Road, Blaine, Washington (the Property). *Id.*; Br. of App. 11. The Note was secured by a Deed of Trust recorded against the Property. Supp. CP 658-672.

The Note and Deed of Trust identified the original lender as "First Horizon Corporation" d/b/a First Horizon Home Loans." Supp. CP 655, 658. In the Note, Grant acknowledged his understanding that "the Lender may transfer this Note [and] [t]he Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder." Supp. CP 655. Similarly, the Deed of Trust informed Grant that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower" and that such a sale "might result in a change in the

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<sup>2</sup> See Washington State Bar Association website at [www.mywsba.org](http://www.mywsba.org). The Brief of Appellant does not include his bar membership number in the signature block. APR 13(a).

entity (known as the Loan Servicer”) that collects Periodic Payments due under the Note and this Security Instrument[.]” Supp. CP 669. The Deed of Trust also informed Grant that there “might be one or more changes of the Loan Servicer unrelated to a sale of the Note.” *Id.*

The Deed of Trust clearly identified Mortgage Electronic Registration Systems, Inc. (MERS) and its role:

**(E) “MERS” is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as nominee for Lender and Lender’s successors and assigns. MERS is the beneficiary under this Security Instrument.**

\* \* \*

#### TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS.

\* \* \*

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender[.]

Supp. CP 659-660 (emphasis in original).

At closing, Grant and his wife also executed a Quit Claim Deed. CP 228. According to Grant, the loan documents he and his wife signed at closing were in error because they reflected that they would hold title to the property as community property. CP 227. Grant claims that Respondent Stewart Title told him this was not an error because his wife had to be added to the title to create community property. *Id.* Stewart

Title prepared the Quit Claim Deed. CP 228. Grant claims he objected to the Quit Claim Deed and the reduction in the loan amount to \$800,000, but he and his wife closed on the loan under “coercion, the undue influence, and the overreaching conduct.” CP 228-229, Compl. ¶ 4.10; CP 242, ¶ 7.4 (coercion and duress). Four years later, Grant and his wife filed for divorce. *Id.*, ¶ 4.12.

**B. Granted Defaulted on the Loan in April 2010.**

The Note required Grant to make monthly payments in the amount of \$4,732.31. Supp. CP 655. Grant made the payments for almost five years, but he ceased making payments in April 2010. CP 5-8. From May to September 2010, Grant sent numerous letters to First Horizon at the correct address for its loss mitigation department. CP 275-290. He was essentially asking that he be allowed to stop making payments while he tried to sell his house. *Id.* His explanation for his inability to pay included his divorce, the dissolution of his law firm, the filing of a suit against the contractors to repair and finish the house, and slow paying clients. CP 276-277.

**C. The Notice of Trustee’s Sale Was Recorded in October 2010.**

On July 15, 2010, Respondent Quality Loan Service Corporation of Washington, Inc. (“Quality”), issued a Notice of Default to Grant. CP 293-299. Quality issued the Notice of Default in its capacity as the agent of Bank of New York Mellon (f/k/a the Bank of New York), the trustee for the holders of the certificates of First Horizon Mortgage Pass-Through Certificates Series FH05-01, the securitized loan pool of which Grant’s

loan was a part. CP 5-8; 293, 297. The Notice of Default correctly identified Bank of New York Mellon as the owner/beneficiary of the Note in its capacity as trustee for holders of the certificates issued by the securitized loan pool. *Id.*

Five days later, MERS as the nominee beneficiary and holder of the legal rights under the Deed of Trust, executed an Assignment of Grant's Deed of Trust (Assignment of Deed of Trust).<sup>3</sup> In other words, MERS made the assignment to Bank of New York Mellon, which acts through First Horizon, the master servicer of the securitized loan pool. CP 300-301.

The Assignment of the Deed of Trust was recorded on September 10, 2010. CP 302-303. On October 1, 2010, Quality recorded a Notice of Trustee's Sale. CP 304-306. The Notice of Trustee Sale set a sale date of January 7, 2011. CP 304. By September 28, 2010, Grant was \$36,898.22 in arrears, and \$739,972.28 in principal, plus interest, was still owing on the obligation. CP 305.

**D. Grant Filed Suit in October 2010, Almost Six Years After the Loan Closed.**

Grant filed suit on October 25, 2010. CP 220. On November 5, the court granted a temporary restraining order restraining the Trustee's Sale.

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<sup>3</sup> The assignee was the trustee for the securitized loan pool. The assignee was identified as "The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FH05-01, by First Horizon Home Loans, a division of First Tennessee Bank National Association, Master Servicer, in its capacity as agent for the Trustee under the Pooling and Servicing Agreement." CP 300-301.

CP 188-189. On January 14, 2011, the Honorable Steven J. Mura orally granted the motions to dismiss the complaint. Verbatim Report of Proceedings (RP) 28:6 to 31:18. On February 4, the Court considered Grant's motions for reconsideration and to amend the complaint. *See generally* 2/04/2011 RP; CP 36-37; 499-510; 511-514. The Court denied the motions and entered an order dismissing the complaint and dissolving the temporary restraining order. CP 33-34. Granted appealed and this Court stayed the dissolution of the restraining order and allowed the Property to be the security for the stay pending appeal. As of March 2011, Grant was over \$66,597.27 in arrears and his total loan balance was \$793,255.29. CP 6.

#### IV. ARGUMENT

##### A. Standard of Review.

The decision to dismiss a complaint under CR 12(b)(6) is reviewed *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint that would entitle him to relief. *Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005). A plaintiff's factual allegations are presumed to be true, but the Court need not accept the plaintiff's legal conclusions as true. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 1046 (1987). CR 12(b)(6), read together with CR 8(a), requires the court to decide whether plaintiff's allegations constitute a short and plain statement of the

claim and demonstrate that the pleader is entitled to relief. *Id.* A court may take judicial notice of public documents if their authenticity cannot be reasonably disputed when ruling on a motion to dismiss. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-726, 189 P.3d 168 (2008). Documents whose contents are alleged in a complaint may also be considered, even if not physically attached to the complaint. *Id.*

The court may also consider the record as a whole, including the admissions and statements of a lawyer representing himself or herself, which permits the case to be treated on appeal as a summary judgment motion. *Limstrom v. Ladenburg*, 98 Wn. App. 612, 614, 989 P.2d 1257 (2000); *Steiner v. Shawmut Nat. Corp.*, 766 F. Supp. 1236, n.13, 1241 (D. Conn. 1991) (stating that in a court’s discretion, a “wide range of material may be introduced in conjunction with a Rule 12(b) motion ... [including] admissions of counsel ... contracts ... letters, oral arguments...transcripts of prior court proceedings and matters of public record.”) (quoting 5A C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 1364, at 475-81 (1990)).

**B. The Trial Court Properly Dismissed the Claims Based on the December 1, 2004 Loan Closing; the Limitations Periods Bar Those Claims.**

The claims in the complaint are primarily based on the December 1, 2004 loan closing with the “required” execution of the Quit Claim Deed and the reduction in the amount of the loan. CP 227-229; 244-245. Based on these allegations, Grant asserts causes of action against First Horizon

for (1) negligence, (2) intentional infliction of emotional distress,<sup>4</sup> (3) interference with business expectancies, and (4) violation of the Consumer Protection Act (“CPA”). CP 243-247. The trial court properly dismissed these claims, because the statutes of limitation barred these claims. The limitations periods expired two or three years before Grant filed suit on October 25, 2010.<sup>5</sup>

**1. The Loan Closing Claims Are Subject to Three and Four-Year Statutes of Limitation.**

Grant concedes a three year statute of limitations applies to his claims for negligence, intentional infliction of emotional distress, and intentional interference with contractual relations or a business expectancy. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 592, 5 P.3d 730 (2000) (negligence); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 192, 222 P.3d 119 (2009) (intentional infliction of emotional distress); *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997) (interference with business expectancy/contractual relations); 29 Washington Practice § 3:6 (same); *see also* RCW 4.16.080(2). Grant’s claims under the CPA are subject to a four-year

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<sup>4</sup> Even if Grant had brought a claim for negligent infliction of emotional distress, Br. of App. 51, that claim is also subject to the three-year statute of limitation. *See* RCW 4.16.080; *St. Michelle v. Robinson*, 52 Wn. App. 309, 759 P.2d 467 (1988).

<sup>5</sup> First Horizon carefully delineated the claims that were subject to dismissal on statute of limitations grounds and those claims that had other, independent flaws. *Compare* Supp. CP 637-648, and 1/14/11 RP 10:15-24 *with* Br. of App. 46 (claiming the arguments applied to other claims).

statute of limitations. RCW 19.86.120; *Beroth v. Apollo College, Inc.*, 135 Wn. App. 551, 145 P.3d 386 (2006).

These claims accrued no later than December 1, 2004 when he closed the loan and signed the Quit Claim Deed under alleged “duress.” *See* CP 228; 243-246. But Grant filed suit more than five and three quarters years later on October 25, 2010. Thus, the three and four-year limitations periods bar the claims. CP 220.

**2. The Discovery Rule Does Not Apply and Would Not Alter the Outcome Even If It Applied.**

Grant did not argue for application of the discovery rule below until his motion for reconsideration. Supp. CP 505. Grant has failed to make the necessary “showing of a manifest abuse of discretion” for this Court to reverse the denial of the reconsideration motion. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

The “discovery rule” is a judicial policy that tolls the running of the statute of limitations for the benefit of an innocent plaintiff. *See Denny’s Restaurants, Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 216, 859 P.2d 619, 631 (1993). The discovery rule does not affect the outcome in this case for two reasons.

First, as a licensed lawyer, Grant should have known at the time of closing that the alleged facts might establish a legal cause of action.

Second, even if one were to ignore his status as a real estate lawyer, there is the same outcome under the general discovery rule. Under the discovery rule, a cause of action “accrues when the plaintiff knows or

should know the relevant facts, regardless of whether the plaintiff also knows that these facts establish a legal cause of action.” *Price v. State*, 96 Wn. App. 604, 613, 980 P.2d 302 (1999). The discovery rule “will postpone the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action[,] [a] cause of action will accrue on that date even if actual discovery did not occur until later.” *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

Grant was undisputedly aware of the facts when he signed the instruments at the December 1, 2004 closing. And Grant conceded at the hearing on the dismissal motions that he knew of the allegedly improper recordation of the 2004 Quit Claim Deed in the public records in 2006. At the hearing, Grant admitted that: “In fact, in 2006, I tried to get loans, secondary financing. I got loans, I got approval from the Bank of America, I mean, I found these materials and it says non-title spouse to sign appropriate documentation.” RP 25:23-26:2; RP 24:22-25; 25:1-7. Based on this admission, only the CPA claim (which has a four year limitations period) might not be time barred, and that claim fails on its merits for the reasons in Subsection D below.

**3. Grant Failed to Plead the Necessary Predicate Facts to Support a Request for Equitable Tolling.**

Equitable tolling does not save the claims. *See* Br. of App. 41; 45-52. Courts apply equitable tolling sparingly and only when justice so requires. *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 405,

225 P.3d 439 (2010). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). A plaintiff must establish that equitable tolling is warranted by “clear, cogent and convincing evidence” and that there was “justified reliance of the party asserting it.” *See Howard v. Dimaggio*, 70 Wn. App. 734, 739-40, 855 P.2d 335 (1993). The party seeking application of the doctrine bears this burden of proof. *Mellish*, 154 Wn. App. at 406.

Here, Grant admitted that in December 2004 he signed the loan documents under protest. It is axiomatic that equity aids the vigilant, not those who slumber on their rights. *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 185 P.2d 113 (1947) (ruling claimant who failed to file a timely workers’ compensation claim was not entitled to equitable relief). Yet, Grant was not vigilant. Grant accepted the proceeds of the refinance loan, made payments until April 2010, and only sued after First Horizon refused to excuse him from making these payments for an indefinite period of time. CP 5-8, 279, 281. Grant has conceded awareness of the Quit Claim Deed issues in 2006 and admitted he cannot bring his loan current. RP 24:22-25; 25:1-7, 20-25; 26:1-2. There is no basis for equitable tolling on this record.

Also, Grant does not cite anything in the record to carry his burden of proof. His conclusory assertion on appeal should not be considered by this Court. *See, e.g., Ferencak v. Dep’t of Labor & Indus.*, 142 Wn. App. 713, 727, 175 P.3d 1109 (2008) (declining to consider appellant’s claimed

violations of administrative code provisions unsupported by any citation to the record).

**4. Grant's Knowledge of His Claims and the Nature of the Claims Preclude the Application of the Continuing Tort Doctrine.**

This Court should also decline Grant's request to create new law through stretching the "continuing tort" doctrine beyond its restricted grounds. The doctrine was originally grounded in nuisance law where there is an abatable harm continuing over time. *Island Lime Co. v. Seattle*, 122 Wash. 632, 211 P. 285 (1922). Thus, the doctrine applies in special situations such hazardous workplace conditions, continuing nuisances and trespasses, and environmental cases, where successive new harms occur and policy considerations favor the application of the doctrine. *See, e.g., Hill; Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir.1984); *Fowkes v. Pennsylvania R.R.*, 264 F.2d 397 (3d Cir. 1959); *Island Lime Co.*, 122 Wash. 632; *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 977 P.2d 1265 (1999). There is no authority or policy basis for the imposition of a continuing torts theory where the operative events are the loan closing and the recordation of publicly available documents related to a nonjudicial foreclosure.

In addition, one of the decisions cited by Grant to support the application of this doctrine refutes his argument. Br. of App. at 48 citing *Hill v. Dep't of Transp.*, 76 Wn. App. 631, 638, 887 P.2d 476 (1995). In *Hill*, the court declined to apply doctrine when plaintiff knew of his condition more than three years prior to filing suit. 76 Wn. App. at 643.

This is also not a case where there was “new harm” continually inflicted.  
*Id at 638.*

**C. The Trial Court Properly Dismissed the Truth in Lending Act (TILA) Claim for Rescission.**

The only claim Grant attempts to state under TILA is for rescission. Br. of App. 41.<sup>6</sup> TILA grants a borrower the right to rescind consumer credit transactions within three business days from the latest of the following three dates: (1) the date of the transaction; (2) the date the obligor receives the material TILA disclosures; or (3) the date the obligor receives a notice of right to cancel. *See* 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(3). The only one of these dates evidenced in the record on appeal is the December 1, 2004 loan closing and Grant does not allege any specific TILA violations that would extend his right to rescind. However, even if Grant could show that his right to rescind extended three business days from December 1, 2004, he still could not state a rescission claim under TILA.

**1. The Three-Year Limitations Period Bars the TILA Claim.**

If a creditor fails to make the required TILA disclosures, the obligor’s right to rescind is extended and “shall expire three years after the date of consummation of the transaction or upon sale of the property.” 15

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<sup>6</sup> TILA damages claims are subject to a one-year statute of limitations, which begins to run at the date the violation occurred. *See Joern v. Ocwen Loan Servicing, LLC*, No. 10-0134, 2010 WL 3516907, at \*4 (W.D. Wash. Sept. 2, 2010) (citing 15 U.S.C. § 1640(e)). Any such claims would have expired on the one-year anniversary of the December 1, 2004 loan closing.

U.S.C. § 1635 (f); *see* 12 C.F.R. § 226.3 (a)(3) (“If the required notice of material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever occurs first”).

Here, even if Grant’s right of rescission had been extended for three years, his claim was barred on December 1, 2007, the maximum period. He consummated his loan transaction on December 1, 2004, and filed his complaint on October 25, 2010. CP 220. The “date of consummation” of the transaction is the date on which the loan is signed. *See, e.g.*, 12 C.F.R. § 226.2(a)(13) (“Consummation means the time that a consumer becomes contractually obligated on a credit transaction.”); *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986) (holding TILA claim for rescission barred by three-year statute of limitations where loan was dated more than three years before plaintiff filed complaint); *Maguca v. Aurora Loan Servs.*, No. 09-1086, 2009 WL 3467750, at \*2 (C.D. Cal. Oct. 28, 2009) (dismissing TILA rescission claim with prejudice where plaintiff entered into mortgage agreements on April 5, 2006 and filed suit on April 14, 2009).

Section 1635(f) represents an “absolute limitation on rescission actions” which bars any claims filed more than three years after the consummation of the transaction. *King*, 784 F.2d at 913; *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164-1165 (9th Cir. 2002). Because Grant filed the instant suit over three years after his loan closed, his TILA rescission claim is barred.

Equitable tolling does not extend TILA rescission claims. Unlike claims for TILA damages that are subject to equitable tolling in extremely limited circumstances, the three-year limit on TILA rescission claims is not subject to equitable tolling. The Ninth Circuit ruled that “Section 1635 is a statute of repose, depriving the courts of subject matter jurisdiction when a section 1635 claim is brought outside the three year limitation period.” *Miguel*, 309 F.3d at 1164, citing *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998); see also *Ramos v. Citimortgage, Inc.*, No. 08-2250, 2009 WL 86744, at \*3 (E.D. Cal. Jan. 8, 2009); *Herrera v. Countrywide KB Home Loans, et al.*, No. 10-0902, 2010 WL 1839010, at \*4 (N.D. Cal. May 4, 2010) (finding that “unlike §1640(e), the limitations period of 15 U.S.C. § 1635(f) is not subject to equitable tolling” and granting defendant’s motion to dismiss plaintiff’s TILA rescission claim for failure to bring within statutory period); *Caligiuri v. Columbia River Bank Mortg. Group*, No. 07-3003, 2007 WL 1560623, at \*5 (D. Or. May 22, 2007) (same). This is true even where the plaintiff provides timely notice of the rescission within the three year limitations period. *Ramos*, 2009 WL 86744, at \*3 (quoting *Miguel* and dismissing TILA claim for rescission where plaintiff timely provided notice, but did not file suit within three years, rendering the court “powerless to grant rescission”); *Caligiuri*, 2007 WL 1560623, at \*5. Accordingly, Grant’s TILA claim for rescission is time-barred.

**2. Grant Failed to Allege the Ability to Tender Back the Borrowed Funds and has Conceded His Inability to Pay.**

Even if a TILA rescission claim were timely, it would still fail because Grant has not alleged that he is able to tender the borrowed funds back to First Horizon. A claim for rescission under TILA requires a plaintiff to allege they can or will tender the borrowed funds back to the lender.<sup>7</sup> See *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th Cir. 2003) (“Rescission should be conditioned on repayment of the amounts advanced by the lender”); *Galyean v. OneWest Bank, FSB*, No. 10-827, 2010 WL 5138396, at \*4 (W.D. Wash. Dec. 9, 2010); see also *Joern v. Ocwen Loan Servicing, LLC*, No. 10-0134, 2010 WL 2813769, at \*4 (W.D. Wash. July 14, 2010) (“Plaintiff must allege an ability to tender in order to state a claim for rescission under TILA.”). A court may properly dismiss a plaintiff’s TILA claim where the plaintiff fails to allege tender, before even deciding if there is any TILA violation. E.g., *Yamamoto*, 329 F.3d at 1169-73. Here, Grant does not allege that he can tender back the remaining loan balance and he has not even made a mortgage payment since April of 2010. CP 5-8. When asked whether he

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<sup>7</sup> TILA contemplates a particular sequence to effectuate a valid rescission, namely: rescission by the consumer, followed by tender to the creditor and termination of its security interest, and concluded with tender by the creditor. See 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d). However, 12 C.F.R. § 226.23(d)(4) provides that these procedures “may be modified by court order.” And case law in the Ninth circuit has almost invariably interpreted 12 C.F.R. § 226.23(d)(4) to require actual tender by the borrower as a prerequisite for a rescission claim. See, e.g., *Yamamoto*, 329 F.3d at 1171.

was able to pay his arrearage into the registry of the Court, Grant conceded that he could not. RP 26:21-23.

**D. The Trial Court Properly Dismissed Grant’s Other Claims on the Merits. None of His Legal Theories Are Sufficient to Support a Cause of Action Against First Horizon**

In addition to the statutory and tort-based claims based on the loan closing, Grant’s complaint also tried to state claims for “violation of statutory requirements”, which Grant frames as claims under the Deed of Trust Act (DTA), the CPA, and the TILA. Br. of App. 18-37. Grant also attempted to state claims for breach of contract and unspecified duties. CP 242-243. For the reasons that follow, the trial court’s decision to dismiss each of these claims pursuant to CR 12(b)(6) was correct.<sup>8</sup>

**1. The Trial Court Properly Dismissed Grant’s Breach of Contract Claim Because the Terms of the Original Note and Deed of Trust Remain in Effect.**

Grant makes only a cursory argument that his breach of contract claim should not have been dismissed. Br. of App. 53-54. He does not cite anything in the record to support this claim. *Id.* Below, Grant’s breach of

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<sup>8</sup> To the extent Grant also seeks the remedy of quiet title as part of his “laundry list” of claims, it can be rejected out of hand because he has admitted he has not fulfilled the obligation secured by the Deed of Trust. In *Evans v. BAC*, No. C10-0656 RSM, 2010 WL 513894 (W.D. Wash. Dec. 10, 2010), the Court dismissed a quiet title claim, reasoning that “in order to bring an action to quiet title, a plaintiff must allege that they ‘are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust.’” *Id.* at \*4 (quoting *Santos v. Countrywide Home Loans*, 2009 WL 3756337 at \*4 (E.D. Cal. Nov. 6, 2009)). As the Court succinctly stated in *Evans*, “[t]he logic of such a rule is overwhelming.” 2010 WL 513894 at \*4.

contract claim was predicated on the factually and legally flawed premise that he and First Horizon had a binding contract *before* execution of the final loan documents on December 1, 2004. CP 242-243. Specifically, Grant claimed that he accepted an initial offer for a \$838,000 loan in his sole name by signing a loan application on November 16, 2004 and paying a \$350 fee. CP 227. In reality, however, the November 16, 2004 application Plaintiff signed was for an \$800,000 loan to both Plaintiff and his wife. Supp. CP 652-654. These terms did not change between this application and the loan closing. *See id.*; CP 228. Moreover, the alleged breaches – the change in loan terms and requiring execution of the Quit Claim Deed – were actually conditions Plaintiff and his wife were free to reject. There are at least three other fatal flaws to the breach of contract claim.

First, no contract other than the actual loan agreement was ever formed, and Grant cannot state a breach of contract claim as a matter of law. To form an enforceable contract, there must be an objective manifestation of mutual assent. *Discover Bank v. Ray*, 139 Wn. App. 723, 726, 162 P.3d 1131 (2007). “Generally, manifestations of mutual assent will be expressed by an offer and acceptance.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004). The issue of mutual assent can be determined as a matter of law where reasonable minds cannot differ. *Discover Bank*, 139 Wn. App. at 726.

Here, Grant relies on an alleged contract consisting only of a loan application, unidentified disclosures and Plaintiff’s payment of a \$350.00 fee. CP 227. Clearly, this purported agreement does not contain all of the

terms of an \$800,000 refinance loan. Most fundamentally, there is no note governing payment terms or a deed of trust. And, the application clearly states it is just that, an *application* for a loan that was subject to review and approval by the potential lender. Supp. CP 652-654.

Second, the opportunity to consult with an attorney is relevant to such claims of coercion/lack of consent. “[I]f a party has the opportunity to consult with counsel regarding a proposed contract, that party cannot later invalidate the agreement by claiming economic duress.” *Sheppard v. Aerospatiale, Aeritalia*, 165 F.R.D. 449, 452 (E.D. Pa. 1996). Here, Grant was and is an attorney. He is in no position to invalidate the contract on the basis of coercion. Any compulsion was eliminated when the loan was funded. Yet, after the removal of the compulsive circumstances, he took no action to preserve his alleged claim by seeking the higher loan amount and to quiet title.

Third, the Note and Deed of Trust would supersede any prior agreement, and Grant’s claim of a secret agreement with the escrow agent does not state a claim against First Horizon. Even if it did, he concedes a default that would have permitted recordation of the Quit Claim Deed under this alleged agreement. CP 242; RP 24:18-25; 25:1-7. Clearly, his contract claim fails as a matter of law.

**2. Grant Has Abandoned His Apparent Claim for “Bad Faith/Breach of Duties” Against First Horizon on Appeal and It Was Properly Dismissed By the Trial Court**

Grant devotes a single paragraph of his brief to a cursory argument that his “breach of fiduciary duties” claim should not have been dismissed against Respondent Quality. Br. of App. 50. Although he tried to bring this claim against First Horizon in the trial court, his failure to pursue it on appeal is to be deemed an abandonment of the claim. *See Cashmere Valley Bank v. Brender*, 128 Wn. App. 497, 510, 116 P.3d 421 (2005) (deeming breach of covenant of good faith and fair dealing and other claims against bank abandoned on appeal where appellant did not “marshal authorities and argument showing that the court erred by dismissing these claims”).

Even if Grant did not abandon this claim against First Horizon, the trial court properly dismissed it. Below, this claim was based on conduct “at the time of loan inception” and Grant merely alleged that it continued to constitute bad faith or be a breach of some unspecified duty. CP 243.<sup>9</sup> Giving this claim the most charitable construction possible, it appears Grant attempted to state a claim for breach of the implied duty of good faith and fair dealing.

Every contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so

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<sup>9</sup> To the extent Plaintiff attempts to state a tort-based cause of action under this theory it is time-barred for the reasons set forth above.

that each may obtain the full benefit of performance. *Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007) (citing *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). The law is well-settled, however, that “the duty exists only ‘in relation to performance of a specific contract term’”; there is no “‘free-floating’ duty of good faith and fair dealing that is unattached to an existing contract.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 177, 94 P.3d 945 (2004) (quoting *Badgett*, 116 Wn.2d at 570). “As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Badgett*, 116 Wn.2d at 570.

Because there is no enforceable agreement between Grant and First Horizon apart from the Note and Deed of Trust Grant executed on December 1, 2004 there can be no “free-floating” duty of good faith and fair dealing associated with the loan application or events leading up to the December 1, 2004 loan closing. In sum, Grant’s claim for breach of the duty of good faith and fair dealing was properly dismissed because it was based on conduct occurring at a time when there was no contract between the parties.

And under *Badgett* and analogous cases from other jurisdictions, there can be no claim that First Horizon was under a duty to modify the terms of Plaintiff’s actual loan. In *Badgett*, the plaintiffs borrowed money from the bank for their dairy operation. 116 Wn.2d at 565-66. The bank twice agreed to restructure the terms of the Badgetts’ loan, but the bank refused to accept the Badgetts’ third proposal for restructuring. *Id.* at 566-

67. The Badgetts defaulted and sued the bank for damages, claiming the bank acted unreasonably in refusing to accept the Badgetts' third proposal. *Id.* at 567. The trial court granted summary judgment to the bank, dismissing the Badgetts' claim that the parties' dealings created an extra-contractual obligation on the bank's part. *Id.* at 567-68. The Court of Appeals reversed, finding that the parties' course of dealing created a good faith obligation to consider the Badgetts' proposal, although not required to by the terms of their contract.

Our Supreme Court squarely rejected the Court of Appeals' broad interpretation of the duty of good faith, and affirmed summary judgment for the bank. *Id.* at 571 n.2. The Court confirmed that, as a matter of law, there can be no breach of the duty of good faith when a party simply stands on its rights under the contract. *Id.* at 570 (citing *Layne v. Fort Carson Nat'l Bank*, 655 P.2d 856 (Colo. Ct. App. 1982) (holding that the duty of good faith was not violated when defendant-bank stood on its rights under security agreement); *Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co.*, 560 A.2d 151 (Pa. Sup. Ct. 1989) (holding that a lender is generally not liable for harm caused to a borrower by exercising its rights under an agreement to refuse to advance additional funds, release collateral, or assist in obtaining additional loans from third persons)). The Court refused "to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract." *Badgett*, 116 Wn.2d at 570; *cf. Watson v. Ingram*, 70 Wn. App. 45, 57, 851 P.2d 761 (1993) (holding that there is no breach of the duty of

good faith and fair dealing even when the party is exercising its rights under the contract to protect its own interests). Any breach of duties claim against First Horizon was properly dismissed by the trial court.

**3. Grant's Claims For Violation of the Deed of Trust Act Fail Because There Is No Cause of Action for Wrongful Initiation of Foreclosure.**

The “violation of statutory requirements” claim in Grant’s complaint is based primarily on a number of alleged violations of the DTA. *See* CP 245-246; Br. of App. 18-36. As discussed in detail below, none of these alleged violations are actually violations of the Act all. However, the Court need not reach the specifics of these alleged violations because there is no cause of action for wrongful initiation of foreclosure proceedings under the DTA.

**a. The Deed of Trust Act Has No Express Cause of Action for Recovery of Damages.**

The Washington legislature enacted the Act in 1965 and the Act governs statutory deeds of trust in Washington. Laws of 1965, ch. 74; *see also* 18 William B. Stoebuck & John W. Weaver, Washington Practice, Real Estate: Transactions § 20.1, at 403 (2d ed. 2004). A deed of trust is a form of three-party mortgage, involving not only a lender and a borrower, but also a neutral third party called a trustee. 18 Stoebuck & Weaver, § 20.1 at 403; John A. Gose, The Trust Deed Act in Washington, 41 WASH. L. REV. 94, 96 (1966). Under this system, “[a] borrower or obligor incurs a debt or other obligation to a ‘beneficiary’ and, as security for that

obligation, the ‘grantor’ conveys an estate in land to a third-party ‘trustee.’” 18 Stoebuck & Weaver, § 20.1 at 403.

The “key feature” of the DTA is that it permits a deed of trust to be foreclosed nonjudicially by trustee’s sale. *Id.* The legislature enacted the Act to promote the following three goals: (1) an efficient and inexpensive nonjudicial foreclosure process; (2) an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) the stability of land titles. *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061, 1065 (2003); Joseph L. Hoffmann, Comment, Court Actions Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington, 59 WASH. L. REV. 323, 330 (1984). There is no express right of action to recover damages for wrongful institution of a foreclosure. This point is underscored by the fact that the legislature enacted RCW 61.24.127 as part of the July 2009 amendments to the DTA.<sup>10</sup> That statute preserves certain causes of action for damages that were previously waived by a failure to bring a pre-sale suit to enjoin a Trustee’s Sale, subject to certain restrictions, including that such claims be brought within two years of the sale or within the applicable statute of limitations, whichever expires first. RCW 61.24.127(1)(a)-(c); (2)(a)-(f). Notably, the trustee’s failure to materially comply with the DTA is one of the claims preserved by this statute. RCW 61.24.127(1)(c).

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<sup>10</sup> This statute does not play a direct role in this case because Grant did bring a pre-sale action to enjoin the sale.

A right of action for damages for wrongful initiation of nonjudicial foreclosure proceedings would be contrary to these legislative goals, the plain language of the Act, and the case law construing it.

**b. Injunctive Relief is the Exclusive Remedy for Improperly Initiated Nonjudicial Foreclosure Proceedings.**

The Act establishes “a comprehensive scheme for the nonjudicial foreclosure process, including specific remedies for grantors and borrowers facing the potential loss of their homes.” *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010). Under the DTA, a borrower or grantor may restrain a trustee’s sale on “any proper legal or equitable ground.” RCW 61.24.130(1). “This statutory procedure is ‘the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.’” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 223 (2008) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985)).<sup>11</sup>

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<sup>11</sup> To determine if a statute contains an implied private right of action, Washington courts consider whether: (1) the plaintiff is within the class for whose benefit the statute was enacted, (2) legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) implying a remedy is consistent with the underlying purpose of the statute. *Ives v. Ramsden*, 142 Wn. App. 369, 389, 174 P.3d 1231 (2008). Here, although borrowers and grantors such as Grant are within one of the classes of people to whom the DTA extends certain protections and the right to seek to enjoin an improper foreclosure, legislative intent and purposes of the DTA establish that the Act carries no private right of action for wrongful initiation of foreclosure.

In *Vawter*, the Western District of Washington recently declined to recognize an implied cause of action for wrongful institution of foreclosure proceedings. 707 F. Supp. 2d at 1124. The Court identified three key reasons why an implied cause of action for wrongful institution of foreclosure proceeding was inappropriate: (1) neither the Act itself or any case law supported such a claim; (2) the Act's comprehensive scheme for handling the nonjudicial foreclosure process; and (3) and a cause of action for damages for wrongful institution of foreclosure proceedings could undermine the legislature's goal that the nonjudicial foreclosure process remain efficient and inexpensive. *Id.*, at 1123-24.

As the *Vawter* Court correctly recognized, a claim for damages would "undermine the legislature's goal that the nonjudicial foreclosure process remains efficient and inexpensive...[and] spawn litigation...while at the same time failing to address directly the propriety of foreclosure or advancing the opportunity of interested parties to prevent wrongful foreclosure." *Id.*, at 1123-24.

Grant's attempts to distinguish the reasoning of *Vawter* are unavailing. *See* Br. of App. 28-30. His primary concern, that a wrongfully instituted foreclosure will cause a significant drop in the value of the property subject to the Deed of Trust, is a reality that will be present in any foreclosure, whether instituted wrongfully or not. *See id.* 30. Contrary to the unsupported statements in Grant's brief, the Note is not current and the Respondents have accurately identified the entities involved in the foreclosure and the roles they occupy in accordance with

the Act. CP 5-8; 293-306. Grant cannot avoid the sound reasoning of *Vawter* by making unsubstantiated arguments in his brief that are not supported by citation to authority or the record.

**4. Even if the Court Recognized a Cause of Action for Wrongful Initiation of Foreclosure, No Violations of the Deed of Trust Act Occurred.**

For the reasons stated above, this Court should not create new law and recognize a cause of action for wrongful initiation of foreclosure. However, even if the Court were to recognize such a claim or reach the substance of Grant's alleged violations, Grant still cannot state a claim on which relief can be granted. Grant's allegations, even if accepted as true, do not actually amount to any violation of the Act. Rather, he makes a series of assertions that rest on a flawed theory of wrongful foreclosure and misunderstanding of the operative facts and law.

**a. Grant Has Admitted He Is In Default on the Note.**

Pursuant to this Court's instructions, First Horizon submitted a declaration to the trial court identifying the losses it would sustain during Grant's appeal period. CP 5-8. Grant's statement that the owner of his Note considers the payments to be current misrepresents the actual testimony submitted through the declaration. *See* Br. of App. 18. Edward Hyne, a representative of MetLife Home Loans, the subservicer of Grant's loan, testified that as of March 16, 2011, Grant "is \$66,597.27 in arrears on his monthly loan payments[.]" CP 6. The fact that First Horizon is obligated to advance sums to Bank of New York Mellon as part of its

master servicing agreement does not change the fact that Grant is in admitted default. Grant conceded this default in correspondence with First Horizon and on during oral argument at the trial court. CP 274, 276, 279; 1/14/11 RP 21:24. There is no factual support for Grant's position that he is not in default.

**b. Grant's Vague Theory of Wrongful Foreclosure Is Based on a Misunderstanding of the Applicable Facts and Law and Improper Attempts to Impose Burdens That Are Not Required Under the Deed of Trust Act.**

At pages 18 to 35 of his opening brief, Grant makes a number of vague challenges to the foreclosure proceedings. Although labeled as different "violations," they are all essentially challenges to First Horizon and Quality's authority to prosecute the foreclosure.

First, Grant's argument that there is no "chain of title" because the Notice of Default was issued by Quality, as opposed to Bank of New York Mellon or First Horizon, is without merit. *See* Br. of App. 18-19. RCW 61.24.030(8), which governs the issuance of a notice of default, clearly permits "beneficiary or trustee" to mail and post the required notice. An authorized agent of the trustee or beneficiary may also issue the notice of default. *See* RCW 61.24.031(1)(a). Grant's uncited proposition that "it is the 'beneficiary' who must file the Notice of Default" is directly contrary to the DTA.

Second, Grant's attempts to suggest that the owner of the Note is unknown or that production of the original note is required are not supported by law. *See* Br. of App. 20-24. In fact, these propositions are

contrary to the DTA, the Uniform Commercial Code (“U.C.C.”) and the publicly recorded and other documents that Grant attaches to his Complaint. *See, e.g.* RCW 61.24.030(7) (entitling trustee to rely on declaration from beneficiary of the note); RCW 62A.1-201(5); .3-109; .3-205(b); .3-301; RCW 61.24.005(2); CP 293-306; *see also Diessner v. Mortgage Electronic Registration Systems*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (stating courts “have routinely held that Plaintiff’s ‘show me the note’ argument lacks merit.”); *Freeston v. Bishop, White & Marshall, P.S.*, 2010 WL 1186276, at \*6 (W.D. Wash. 2010) (same).

Third, Grant made his loan payments to First Horizon without dispute or question for over five years and only challenged its right to receive payments and prosecute the foreclosure after it would not allow him an unlimited time to sell his house. *See* CP 5-8; RP 3:6 to 6:23. Indeed, Grant admitted that the proper time to challenge First Horizon’s authority was when he was first notified that they were servicing the loan. RP 6:16-19.

Fourth, Grant does not cite any authority for the proposition that First Horizon or any other Respondent is required to “offer proof of successorship [sic] or chain of title” beyond the publicly recorded assignment of deed of trust, appointment of successor trustee, or notice of trustee’s sale. *See* Br. of App. 20. Moreover, First Horizon’s role as master servicer for Bank of New York Mellon is clearly set out in the publicly recorded documents and the notice of default. CP 293-306. Indeed, Grant engaged in extensive communications with First Horizon in

this capacity from at least May to October 2010, filing suit only after it would not let him live in his house for free for as long as it took him to sell it. CP 274-290. In other words, Grant was happy to acknowledge and accept First Horizon's authority to grant him a forbearance of his obligation to make his mortgage payments and he only contests this authority now that he is facing foreclosure.

Fifth, the fact that the Note and Deed of Trust state the original lender is "First Horizon Corporation d/b/a First Horizon Home Loans" does not give rise to any actionable claims. *See* Supp. CP 655, 658. Grant concedes this is merely a "scrivener's error," and it does not result in him being able to state claims. *See* Br. of App. 21, 24-25. The Note is a negotiable instrument pursuant to RCW 62A.3-104. As such it can be negotiated by transfer and delivery. RCW 62A.3-201(a).<sup>12</sup> Indeed, the Note specifically states: "I understand that the Lender may transfer this Note." The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder." Supp. CP 655. The Deed of Trust informed Grant that "[t]he Note or a partial interest in the Note (together with this security instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security

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<sup>12</sup> Because negotiable instruments are transferred through delivery, Grant's claim that MERS purported to assign the note via the Assignment of Deed of Trust is not valid. *See* CP 300; Br. of App. 22-23.

Instrument and performs other mortgage loan servicing obligations[.]”  
Supp. CP. 669. BNYM is now the beneficiary of the Note and First  
Horizon is the master servicer of the securitized loan pool of which it was  
a part. CP 5-8; 293-306. As contemplated by the Note and Deed of Trust,  
the parties who have the authority enforce them can change and any  
scrivener’s error in the original documents does not change the fact that  
the current entities enforcing these instrument have the authority to do so.

**5. Grant Has Not Asserted Actionable CPA Claims  
Against First Horizon.**

As demonstrated in Section IV. B, any CPA claim based on the  
December 1, 2004 closing is barred by the statute of limitations. *See*  
RCW 19.86.120; CP 246-245. Because Grant does not make any specific  
allegations against First Horizon in his CPA argument on appeal, it is  
unclear at best whether Grant believes he can state a CPA claim against it  
based on events occurring after December 1, 2004. *See* Br. of App. 37-40.

A CPA plaintiff must allege, with sufficient factual support,  
conduct by the defendant which was (1) unfair or deceptive, (2) occurred  
in trade or commerce, (3) impacted the public interest, and (4) caused (5)  
injury the plaintiff’s business or property. *Hangman Ridge Training  
Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). In addition,  
Grant must prove proximate causation. *Fidelity Mort. Corp. v. Seattle  
Times Co.*, 131 Wn. App. 462, 471, 128 P.3d 621 (2005). Grant’s only  
arguable allegations against First Horizon are a alleged failure to properly  
“assign the Promissory Note and Deed of Trust to MERS and/or to others

and Defendants' failure to notify [Grant] of changes in the Trustee and/or owner of the Promissory Note and Deed of Trust and/or appointment agents under such documents and/or the use of agents in the process of collection[.]" CP 245.

However, none of these allegations, even if true, would be sufficient to state a legally actionable claim against First Horizon under the CPA or otherwise. First, the Deed of Trust was assigned *by* MERS, not to MERS. CP 300. Second, when Grant executed his Deed of Trust in 2006, he specifically agreed that all or some of the interest in his Note and Deed of Trust could be assigned without prior notice. Supp. CP 669. Third, Grant cannot point to anything in the DTA that entitles him to notice of a substitute trustee or prohibits the use of "agents" in the manner alleged. *See* RCW 61.24 *et. seq.*

**a. The Functioning of the MERS System Does Not Give Rise to a CPA Claim.**

To the extent that Grant's vague CPA theory is based on an underlying challenge to the MERS system itself, his theory fails. *See* CP 232-234; Br. of App. 38. The only case to consider Grant's MERS-based theory of wrongful foreclosure under Washington's DTA squarely rejected the premise that MERS cannot serve as a nominee beneficiary. *See Vawter*, 707 F. Supp. 2d 1115. In rejecting essentially the same challenge to MERS's ability to appoint a successor trustee that Plaintiff makes here, the Court concluded:

***The deed of trust act allows a beneficiary, such as MERS, to appoint a successor trustee, which MERS did in this case.***

Plaintiff argues, however, that MERS cannot be a beneficiary and therefore MERS'[s] appointment of a new trustee was invalid. RCW 61.24.005(2) defines a beneficiary as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." Plaintiff provides a printout from MERS'[s] website stating that it is an electronic registry that tracks the ownership of loans. Debtor argues that because MERS only registers documents it does not actually hold them. Plaintiff's argument is unconvincing. Simply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument.

*Vawter*, 707 F. Supp. 2d at 1125-26 (quoting *Moon v. GMAC Mortgage Corp.*, 2008 WL 4741492, at \*5 (W.D. Wash. 2008)) (emphasis added).

Recently, in *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 WL 2102485 (W.D. Wash. 2010) (Slip op.), the Court granted a motion to dismiss the plaintiffs' complaint, where the plaintiffs made the exact same arguments regarding MERS' standing under the DOTA as Grant makes here:

Plaintiffs' sole basis for blocking the foreclosure . . . is their contention that MERS has no beneficial interest in the note that the deed of trust secures, and that Recontrust therefore has no power as MERS's designee to initiate a foreclosure action. This assertion is baffling. The deed of trust, of which the court takes judicial notice, explicitly names MERS as a beneficiary. The deed of trust grants MERS not only legal title to the interests created in the trust, but the authorization of the lender and any of its successors to take any action to protect those interest, including the 'right to foreclose and sell the Property.' Plaintiffs attempt to counter this unambiguous grant of power by introducing a prospectus for the trust that holds the deed of trust. Plaintiffs do not explain how the court can properly consider this document on a motion to dismiss. The court considers it nonetheless, because nothing in it remotely supports Plaintiffs' assertion that MERS somehow has been stripped of the power that the deed of trust grants. Plaintiffs have raised no valid basis to stop any foreclosure sale.

*Id.* at \*5 (citations omitted); *see also Klinger v. Wells Fargo Bank, N.A.*, 2010 WL 5138478, \*7 (W.D. Wash. 2010) (Slip op.) (rejecting the plaintiffs' assertions that MERS had neither a beneficial interest nor the authority to act under the DTA).

In addition to being soundly reasoned under Washington law, the *Vawter* decision is also in accord with the vast majority of decisions from other jurisdictions that affirm MERS's authority to act as a nominee on behalf of its member financial institutions. Numerous other courts that have considered the issue have also ruled that mortgage lenders and their assigns (via MERS) have standing to foreclose and take various actions on behalf of its member beneficiaries. *See, e.g., Jackson v. MERS, Inc.*, 770 N.W.2d 487 (Minn. 2009) (holding MERS does not need to record assignments of underlying indebtedness to initiate foreclosure proceedings); *Mortgage Electronic Registration Systems, Inc., v. Azize*, 965 So.2d 151, 153 (Fla. App.2d 2007); *Mortgage Electronic Registration Systems, Inc., v. Revoverdo*, 955 So.2d 33, 34 (Fla. App.3d 2007); *MERSCORP, Inc., v. Romaine*, 8 N.Y.3d 90, 101, 828 N.Y.S.2d 266, 271, 861 N.Ed.2d 81 (2006); *In re Huggins*, 357 B.R. 180, 183 (D. Mass. 2006); *Elias v. HomeEq Servicing*, 2009 WL 481270, \*1 (D. Nev. 2009) (deeds of trust confirmed the standing of the loan servicer, the loan owner, and MERS as the nominee beneficiary to seek foreclosure); *Blau v.*

*America's Servicing Co.*, 2009 WL 3174823, \*7-8 (D. Ariz. 2009) (MERS was authorized to act on behalf of, and exercise the rights of, the loan originator); *Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 3157160, at \*11 (D. Ariz. 2009) (rejecting claim that MERS could not act as beneficiary under a deed of trust); *Derakshan v. Mortgage Electronic Registration Systems, Inc.*, 2009 U.S. Dist. LEXIS 63176, \*17-\*18 (C.D. Cal. 2009) (same). To the extent Grant relies on a challenge to the MERS system to support his CPA or other claims, this reliance is misplaced and Grant's claims based thereon should be dismissed.

Finally, Grant argues that Washington's Foreclosure Fairness Act ("FFA") provides a basis for a CPA claim against one or more Respondents. Br. of App. 39-40. Although Governor Gregoire signed the FFA into law on April 11, 2011, except for certain sections inapplicable to this case,<sup>13</sup> the FFA does not become effective until July 22, 2011. Laws of 2011, ch. 58 (Second Substitute House Bill 1362). None of the sections of the FFA on which Grant might arguably rely for a CPA claim are even in effect now, much less applicable in 2010, when Respondents initiated the foreclosure. Thus, Grant's argument regarding "retroactive" application of the FFA is not even applicable. See Br. of App. 40.

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<sup>13</sup> Sections 11, 12, and 16 of Laws of 2011, ch. 58 became effective April 4, 14, 2011.

**E. The Dismissal of Grant’s “Defenses,” Including Recoupment, Was Proper Because He Cannot Assert those Defenses in this Case.**

Once again, Grant’s precise argument is unclear, but he appears to assert that he should be allowed to assert affirmative defenses of duress, set off, or recoupment under the U.C.C. *See* Br. of App. 42-44. First and foremost, these arguments fail for the simple reason that Grant’s entire theory of the case, which is also the basis for these alleged defenses, fails on the merits. Nonetheless, even if his legally and factually flawed theories allowed him to assert defenses but not claims, these defenses would fail for the following reasons.

**1. The Defense of Duress is Unavailable to Grant as a Matter of Law**

Grant claims that he closed on his loan under duress, but his own authorities and admissions demonstrate that he did not. As the trial court correctly noted, the classic example of duress under the U.C.C. is the execution of a contract because one has a gun to his or her head. *See, e.g.,* RCW 62A.3-305, Comment 1 (stating “[a]n instrument signed at the point of a gun is void, even in the hands of a holder in due course”); Restatement (1st) of Contracts, § 492 (1932) (defining “duress” as “a wrongful act...that compels a manifestation of apparent assent by another to the transaction without his volition”); Br. of App. 43-44. *see also Duke v. Force*, 120 Wash. 599, 624, 208 P. 67 (1922) (contract obtained by duress is merely voidable, and may be subsequently ratified and confirmed); *id.* at 622 (party must “disaffirm his [or her] action upon the removal of the duress.”); *id.* at 620-21 (discussing business compulsion);

.”); *Lopp v. Peninsula Sch. Dist No. 401*, 90 Wn.2d 754, 759-61, 585 P.2d 801 (1978) (affirming summary judgment dismissal on the basis of laches in an action to enjoin school district from the sale of bonds and fine board members for violation of the open public meetings act).

Here, Grant closed on the loan at issue in order to refinance an outstanding construction loan. CP 226-227. The only “duress” he alleges is that at closing he was asked to sign the Quit Claim Deed and loan documents that reflected that his wife would also be on title. CP 227-229. Grant also acknowledges that he was experiencing “other strains concurrently happening in [his] life” and was concerned about “the threat of mortgage rates significantly rising.” CP 229. As the trial court correctly concluded, Grant’s decision to close on the refinance and get out from under the obligation of the original construction loan was a business decision, not a decision made under legal duress. RP 24:1-17. And, as Grant himself acknowledged, “in hindsight I agree. [The Quit Claim Deed] was purely to accommodate this loan.” RP 24:18. Moreover, Grant admits that Respondent Stewart was entitled to record the Quit Claim Deed because he defaulted. RP 21:11-25.

**2. Grant’s Defenses Fail Because Respondents Are Foreclosing a Security Instrument, Not Seeking Payment on the Note.**

The recoupment and duress defenses under RCW 62A.3-305 are to be asserted against “the right to enforce the obligation of a party to pay an instrument.” Similarly, the right to assert a recoupment defense based on an alleged TILA violation is available in an “action to collect the debt.”

*See* 15 U.S.C. § 1640(e). Here, in dispositive contrast, Respondents do not seek payment on the underlying obligation represented by the Note. Respondents seek to exercise their remedy for Grant’s default on his Note – foreclosure of his Deed of Trust.

This is an action filed in response to a *non-judicial* foreclosure under the DTA. It is a requisite for a DTA Trustee’s Sale that there be “no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor’s default on the obligation secured[.]” RCW 61.24.030(4). Moreover, if and when a Trustee’s Sale of the property occurs, there will not be a possibility of a deficiency judgment against Grant himself. *See* RCW 61.24.100(1)(“[e]xcept to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee’s sale under that deed of trust”). In other words, after the foreclosure is complete, Grant is not at risk of being sued on the Note and thus has no need for a recoupment or offset defense. Recoupment and set off are equitable defenses. It is axiomatic that equity follows the law. A court cannot grant equitable relief when a statute provides a specific remedy. *In re Marriage of Barber*, 106 Wn. App. 390, 23 P.3d 1106 (2001).

Grant’s reliance on *Olsen v. Pesarik*, 118 Wn. App. 688, 77 P.3d 385 (2003) is misplaced. There, the grantors’ defenses to a nonjudicial foreclosure were dismissed by the trial court on the erroneous basis that

they were barred by the statute of limitations. *Olsen*, 118 Wn. App. at 694. In that case, the recoupment/set off was for a liquidated sum that had been paid. Here, although many of Grant's substantive causes of action are time-barred, to the extent those claims are characterized as defenses, they are invalid because they fail on the merits. Further, this is not an action to collect on a debt, it is an action to prevent the foreclosure of a Deed of Trust. The *Olsen* court focused its analysis on the statute of limitations issues and apparently did not consider the effect of RCW 61.24.030(4) or RCW 61.24.100(1). Allowing Grant to plead an unliquidated recoupment or set off claim would be prejudicial and unwieldy. See *Warren, Little & Lund, Inc. v. Max J. Kuney Co.*, 115 Wn.2d 211, 216, 796 P.2d 1263 (1990) (permitting an unliquidated counterclaim as setoff "unless the plaintiff can show the prejudice or the court finds the counterclaim would make the proceedings unwieldy). Therefore, the trial court properly denied converting these equitable defenses into affirmative causes of action.

**F. The Trial Court Properly Denied Grant's Improper Motion to Amend**

A court's decision to deny a party leave to amend a complaint is reviewed for manifest abuse of discretion, which occurs only if the trial court makes its decision based on untenable grounds or reasons. *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 338-339, 229 P.3d 893 (2010). After a responsive pleading has been served, a party may amend a complaint "only by leave of court or by written consent of the adverse party." CR 15(a).

Leave to amend shall be freely given when justice so demands, but it should not be granted where amendment would result in prejudice to the opposing party or where amendment would be futile. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 329, 670 P.2d 240 (1983). The timing of Plaintiff's motion to amend should also be a significant factor in the Court's decision. *See, e.g., Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 639 P.2d 240 (1982) (stating "[w]hen a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation."); *Del Guzzi Constr. Co. v. Global Northwest, Ltd.*, 105 Wn.2d 878, 888-89, 719 P.2d 120 (1986) (no abuse of discretion when trial court denied a motion to amend pleadings filed a week before summary judgment); *see also Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (stating that a motion to amend should be denied where the amended complaint would be subject to dismissal). Put another way, the Court should deny a motion to amend where the new claim lacks merit. *See, e.g., Nelson v. Pima Cmty. College*, 83 F.3d 1075, 1083 (9th Cir. 1996) (affirming district court's denial of motion to amend where claim lacked merit).

Here, Grant moved to amend his complaint in conjunction with a motion for reconsideration of the decision granting Respondents' motions to dismiss. Supp. CP 499-514; CP 38-81. Grant's attempt to add First Tennessee Bank (FTB) and BNYM was properly denied because the

existence of these entities and their role vis a vis his loan were made clear to him before he originally filed his complaint and he has shown no excuse for not adding them previously. *See, e.g.*, CP 293, 295 (July 15, 2010 Notice of Default identifying BYNM as the owner and beneficiary and FTB as master servicer); CP 300 (July 22, 2010 Assignment of Deed of Trust identifying same); CP 304 (Notice of Trustee Sale recorded October 1, 2010). More fundamentally, FTB appeared through counsel and defended against the original complaint, making the proposed amendment superfluous. Grant successfully sued and enjoined the *trustee*, as contemplated by the DTA. *See* RCW 61.24.130(1).

The trial court properly denied Grant's request to plead fraudulent concealment and equitable tolling because his proposed amendments did not and could not adequately allege these theories. *See* CP 43-79. Civil Rule 9(b) imposes a heightened pleading standard for claims grounded in fraud. Civil Rule 9(b); *Haberman v. Wash. Public Power Supply Sys.*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987) (stating that CR 9(b) ensures that plaintiffs seek redress for a wrong, rather than using lawsuits as pretexts to discover known wrongs and that CR 9(b) gives defendants sufficient notice to enable them to prepare a defense); *see also Stieneke v. Russi*, 145 Wn. App. 544, 560-61, 190 P.3d 60 (2008) (stating that in pleading a claim for fraudulent concealment, a plaintiff must affirmatively plead each element of fraudulent concealment with "clear, cogent, and convincing evidence."). "To determine whether allegations of fraud satisfy CR 9(b),

*the court will consider only the complaint, and not additional allegations made in the briefs.” Id. (emphasis added).*

The heightened pleading requirements of Civil Rule 9(b) require plaintiffs to plead sufficient facts to apprise the defendant of the facts that give rise to the allegations of fraud. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.2d 891 (2008). The complaint must inform the “defendant of who did what, and describe[] the fraudulent conduct and mechanism.” *Haberman*, 109 Wn.2d at 165.

Here, Grant’s entire case is predicated on a Note and Deed of Trust he admits signing, correspondence he admits receiving, and publicly recorded documents. For these and all of the other reasons set forth above in response to Grant’s argument that equitable tolling saves his time-barred claims, this is simply not a case where fraudulent concealment or equitable tolling applies. Grant cannot maintain these theories in light of, among other things, his admitted inability to pay the amounts due under his obligation, his knowledge of all of the facts and circumstances he now tries to disclaim. Moreover, Grant’s proposed amendments are devoid of any factual detail or specificity; he simply states that these doctrines should apply.<sup>14</sup> Grant’s lawsuit is simply a challenge to a *nonjudicial* foreclosure sale. The trial court properly denied Grant’s motion to amend.

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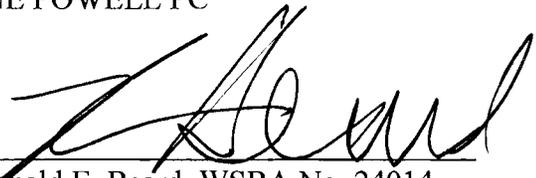
<sup>14</sup> The trial court also properly rejected Grant’s confusing and inapplicable attempts to impose the requirements of WCCR 54(c), which Grant presumably used to bolster his argument that production of his original note was required. As stated above, no party is seeking a judgment on a negotiable instrument in this case.

## V. CONCLUSION

The circumstances of Grant's loan closing and nonjudicial foreclosure proceedings do not give rise to any actionable claims. First Horizon respectfully requests that the trial court's order dismissing Grant's Complaint and dissolving the November 5, 2010 order restraining the trustee's sale of the Property be affirmed.

RESPECTFULLY SUBMITTED this 27 day of June, 2011.

LANE POWELL PC

By 

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CERTIFICATE OF SERVICE

I, Kree Arvanitas, under penalty of perjury under the laws of the State of Washington, that on June 27, 2011, I served a copy of the foregoing document on all counsel of record as indicated below:

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by **CM/ECF**  
 by **Electronic Mail**  
 by **Facsimile Transmission**  
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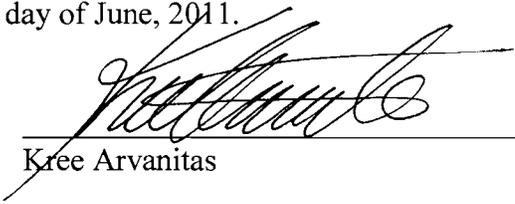
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 by **Hand Delivery**  
 by **Overnight Delivery**

Executed this 27th day of June, 2011.

  
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Kree Arvanitas