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MAR 13, 2017

Court of Appeals  
Division III  
State of Washington

NO. 346153

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IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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WORD CHURCH AKA REV. GEORGIA PLUMB, GEORGIA A.  
PLUMB, JOSHUA C. PLUMB, KAMERON F. PLUMB,

Appellants/Defendants, *pro se*,

v.

U.S. BANK NATIONAL ASSOCIATION, ET AL,

Respondent/Plaintiff.

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**RESPONDENT'S BRIEF**

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Pass-Through Certificates Series 2005-1*

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## I. INTRODUCTION

This appeal challenges judgment entered in favor of the Respondent by the Yakima County Superior Court for foreclosure of the appellants' property. Appellants advance several meritless arguments and this Court should affirm the decision entered below. Respondent is the property party to enforce the Note and Deed of Trust. The appellants are in default under the terms of the Note, and under the Deed of Trust, respondent maintains a right to foreclose the lien and cause the Sheriff to sell the property in satisfaction of its judgment. Appellants failed to establish their asserted affirmative defenses and the court below entered judgment. Respondent respectfully requests this Court affirm the lower court's order of summary judgment.

## II. STATEMENT OF THE CASE

This appeal arises out of The King County Superior Court entered Summary Judgment in favor of the Respondent on July 1, 2016.<sup>1</sup> Appellants are borrowers under a Promissory Note originally made to Finance America and have been in default on the loan since 2009. Appellants raised several affirmative defenses in their Answers. Chief among the affirmative defenses was that respondent somehow lacked

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<sup>1</sup> CP 995

standing to foreclose because it did not physically possess the note as of the date of filing the Complaint. The lower court made no findings with regard to actual possession on that date, but concluded that at the time respondent moved for summary judgment and presented the original Note to the court, it was in possession and thus appellants' standing challenge failed. In addition, the appellants claims that there was fraud in the origination of the loan and complained of many independent acts of non-parties to the action in the course of finalizing their refinance transaction in 2006. The court below rejected this defense as to the actual enforcement of the Note and Deed of Trust. Finally, the appellants asserted that respondent's claims were barred by the doctrine of laches, and that respondents, its agents, or its counsel were somehow engaged in bad faith prosecution of the foreclosure. The court below rejected these arguments and ultimately found for respondent.

#### **A. Factual History**

##### *1. Plumb Loan and Default.*

On or about August 16, 2004, Carl H. Plumb, Georgia A. Plumb, Joshua C. Plumb, and Kameron F. Plumb (hereinafter "Borrowers" or "Defendants") for value received, executed, and delivered a promissory

note (hereinafter, "Note") to Finance America, LLC (the "Originator").<sup>2</sup> The Note is indorsed in blank and Plaintiff is the current holder of the Note. In preparation for the Motion for Summary Judgment below, respondent had provided the original Note to its counsel.<sup>3</sup>

At the same time as the execution and delivery of the Note and in order to secure repayment of the Note, the Borrowers made, executed, and delivered to the Originator, a Deed of Trust encumbering the real property commonly known as 4902 Richey Road, Yakima, W A 98908, (hereinafter the "Subject Property").<sup>4</sup> The Deed of Trust is dated on the front page as August 16, 2004, the notary on the Deed of Trust shows that the document was signed by the Defendants on August 26, 2004. The Deed of Trust was recorded on August 31, 2004, in the official records of Yakima County under recording No. 7417552.<sup>5</sup>

The beneficial interest in the Deed of Trust was assigned to the Plaintiff. The Assignment of the Deed of Trust was recorded on April 28, 2010, under Yakima County recording number 7689717.<sup>6</sup> The Deed of Trust was again assigned to respondent and was recorded on March 28,

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<sup>2</sup> CP 224, 228.

<sup>3</sup> VRP 23 ll. 8-13.

<sup>4</sup> CP 234

<sup>5</sup> Id.

<sup>6</sup> See CP 253.

2013, under Yakima County recording number 7797349.<sup>7</sup> Plaintiff is the current beneficiary of the Deed of Trust and is the mortgagee of record.<sup>8</sup>

The Borrowers failed to make the monthly payment due on March 1, 2010 and have not made any payments sufficient to bring the loan current thereafter. On or about August 8, 2013, Ocwen sent a letter to the Borrowers at the address of the Subject Property advising them of the default.<sup>9</sup> The Notice of Default clearly stated the amount of the default and informed the Borrower that this amount needed to be paid by September 8, 2013 in order to cure the default. The letter also advised that acceleration of the full amount remaining would result if the delinquency was not timely cured.<sup>10</sup> Appellants failed to cure the default and Plaintiff initiated the present foreclosure action.<sup>11</sup>

On June 15, 2010 under Yakima recording Number 7694625, Carl H. Plumb, Georgia A. Plumb, Kameron F. Plumb and Joshua C. Plumb filed a Rescission of Deed of Trust and Full Reconveyance said to effect the subject Deed of Trust of this action, recorded August 31, 2004 under Yakima recording number 7417552.<sup>12</sup> Carl H. Plumb, Georgia A. Plumb,

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<sup>7</sup> See CP 255.

<sup>8</sup> CP 225.

<sup>9</sup> CP 258.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> CP 837.

Kameron F. Plumb and Joshua C. Plumb are not the beneficiaries or Trustee of the subject Deed of Trust, did not have a court order and showed no authority for how they could file an effective Rescission of the Deed of Trust and Full Reconveyance.

Respondent is the beneficiary under the operative Deed of Trust, and is the actual holder of the operative promissory note (“Note”). At both hearings on Respondent’s Motion for Summary Judgment, the original Note was in the possession of Respondent’s counsel. At the second hearing on July 1, 2016, Respondent’s counsel brought the Note into the Courtroom, and as a condition of granting the Motion, the court below took the extraordinary step of entering the original Note into evidence as an exhibit.<sup>13</sup> The court did so to quell any fears about letting the Note out “into the wild” after Respondent’s foreclosure.<sup>14</sup>

Appellants provided some documentation that suggested Respondent was not in physical possession as of the date of filing its complaint.<sup>15</sup> The document in question was a record of internal communication from Respondent’s servicing agent, Ocwen who is not a party to this action. This email from Rocio Valencia suggested that Deutsche Bank was in physical possession of the note as of December 26,

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<sup>13</sup> VRP 110 l. 22 – 111 l. 19.

<sup>14</sup> VRP 111 ll. 16 – 19.

<sup>15</sup> CP 665.

2013, when the Complaint was filed. The court below rejected this line of argument,<sup>16</sup> (Cite), and seemed to also consider the evidence itself as hearsay, (cite). The court reasoned that at the time of the presentation of evidence, Respondent proved it was in possession of the Note through its attorneys and it did not matter that it may not have possessed the Note at the time of filing under the principles of notice pleading.<sup>17</sup>

Appellants attempted to introduce voluminous evidence regarding the actions of Respondent's loan servicer Ocwen in other cases around the country. The trial court excluded the bulk of this evidence, without specificity, on objection by Respondent's objection that all of the documents constituted hearsay.<sup>18</sup> Appellants are again trying to introduce these documents in the form of their clerk's papers designation.

*1. Procedural History.*

On or about May 12, 2014, Defendants, Estate of Carl Plumb, Georgia A. Plumb, Joshua C. Plumb, Kameron F. Plumb and the Word Church, filed Answers with the Court. The Defendants deny all claims and make claims regarding the sufficiency of the Plaintiffs case. On December 23, 2015, Plaintiff dismissed Estate of Carl Plumb, Deceased.

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<sup>16</sup> VRP 102 ll. 17 – 18; 108 ll. 8 – 13.

<sup>17</sup> VRP 102 ll. 20 – 103 l. 15.

<sup>18</sup> VRP 95 ll. 5-10

None of the appellants' Answers contain any counterclaims or add any additional parties to the action. All of the Answers are substantially the same and all assert affirmative defenses rejected by the court below and reasserted here on appeal.

The court below held two separate hearings on Respondent's Motion for Summary Judgment. On March 30, 2015, respondent filed Plaintiff's Motion for Summary Judgment accompanied by supporting Affidavits and Memorandum. The Motion, originally scheduled for May 6, 2016, was taken off calendar. The first hearing on the Motion for Summary Judgment was held on December 18, 2015.<sup>19</sup>

At the December 18th hearing, the court below denied the Respondent's Motion because the Estate of Carl Plumb, for which there was no open probate, had not been properly served.<sup>20</sup> After the hearing, and after consultation with the title company, Respondent chose to dismiss the Estate of Carl Plumb from the lawsuit, and refile the Motion for Summary Judgment. Despite the denial, the court conducted an extensive colloquy with the appellant Georgia Plumb regarding its inclination to grant the Motion but for the procedural deficiency.

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<sup>19</sup> VRP 3.

<sup>20</sup> VRP 37 ll. 12-14.

Respondent refiled its Motion for Summary Judgment on March 30, 2016. The parties again appeared for the continued hearing on July 1, 2016. Judge Gibson engaged the appellants in another long colloquy regarding their claims, and queried Georgia Plumb first. While she was not sworn in, Ms. Plumb made several relevant admissions. First, Ms. Plumb stated that she discovered the alleged fraud in the origination of the refinance loan in “about 2009.”<sup>21</sup> Second, Ms. Plumb stated that the individuals who allegedly committed the fraud worked for the mortgage company, First Columbia Mortgage,<sup>22</sup> and who were never party to the action below. Third, Ms. Plumb admitted that no payments were made past April, 2009.<sup>23</sup> After lengthy colloquy and argument, the lower court entered summary judgment on behalf of respondent.

### III. RESPONSE TO THE ASSIGNMENTS OF ERROR

1. The trial court did not err in ruling that respondent had standing to enforce the Note and Deed of Trust because it presented the original Note and accompanying evidence of ownership.

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<sup>21</sup> VRP 79 ll. 20-22.

<sup>22</sup> VRP 79 ll. 4 – 14.

<sup>23</sup> VRP 82 ll. 4-12.

2. The court did not err by failing to sanction respondent or its counsel as there was never a motion before it to do so. In addition, the court did not err because the appellants never established the underlying assertions of bad faith or misconduct..
3. The trial court did not err in denying appellants affirmative defense of fraud in the origination because they failed to satisfy the pleading requirements and failed to provide clear and convincing evidence to establish a genuine issue of material fact.
4. The court did not err in rejecting the appellants' laches defense because the foreclosure action was brought within the statute of limitations.
5. The court did not err and deprive appellants of any rights under the U.S. or Washington Constitutions.

#### IV. ARGUMENT IN RESPONSE

##### A. Standard of Review

This appeal arises out of the trial court's ruling on Respondent's Motion for Summary Judgment. Summary judgment rulings are reviewed de novo, and this court engages in the same inquiry as the trial court.

*Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). A party is entitled to summary judgment as a matter of law “when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). “Substantial evidence” is evidence that is sufficient “to persuade a fair-minded, rational person of the truth of a declared premise.” *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963).

The trial court’s decision to admit or exclude evidence for consideration in the context of summary judgment is reviewed under an abuse of discretion standard. See *King Cty. Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wash. 2d 819, 826, 872 P.2d 516, 519 (1994). “A court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *Id.* Courts may exclude portions of affidavits and admit other portions without abusing their discretion. *Id.*

**B. This Court should affirm the Trial Court's Decision because the Trial Court did not Err in Rejecting Appellants' Standing Argument.**

Respondent established that it was the real party of interest with standing to prosecute the foreclosure each time moved it for summary judgment below. In its Complaint, respondent alleged that it held the Note and was the beneficiary under the subject Deed of Trust. In support of its motions, respondent submitted an Affidavit of Andres Fernandez, an employee of Ocwen.<sup>24</sup> Mr. Fernandez swore that "plaintiff directly or through an agent, has possession of the Note hereinafter described."<sup>25</sup> Mr. Fernandez's affidavit contains a copy of the Note as Exhibit A which contains an allonge to the Note with an endorsement in blank by Finance America, LLC.<sup>26</sup> At the first hearing on respondent's motion for summary judgment, its attorney appeared by phone and represented to the trial court that the original Note was in her office.<sup>27</sup> At the second hearing on respondent's renewed motion for summary judgment, respondent's attorney appeared in person, brought the Note and eventually lodged it with the trial court per its conditions on granting the motion for summary judgment.<sup>28</sup>

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<sup>24</sup> CP 223 & 781.

<sup>25</sup> CP 224 l. 18.

<sup>26</sup> CP 227-32

<sup>27</sup> VRP 23 l. 8-13.

<sup>28</sup> CP 108 ll. 10-13.

Despite this showing and presentation by respondent, appellants contend that the court erred by not recognizing a piece of evidence derived from discovery responses provided by respondents below. Appellants point to a document they refer to as “Note Location Determined.”<sup>29</sup> The document seems to be record of an internal communication between Ocwen employees regarding the location of the Note.<sup>30</sup> The appellants seize on the fact that Deutsche Bank, rather than U.S. Bank, had possession of the Note on the date of filing the Complaint. Appellants’ contention fails to create a triable issue of material fact with respect to standing, and the court below correctly declined to dismiss the respondent’s complaint.

*1. Under CR 17(a), the lower court did not err.*

Assuming for the purposes of this appeal that the “Note Location Determined” document presents an issue of standing, or more precisely, whether U.S. Bank was the real party in interest at the time the complaint was filed, appellants waived their ability to object. CR 17(a) states, in relevant part: “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the

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<sup>29</sup> CP 665

<sup>30</sup> See *id.*

action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” The preferred method for objecting to a plaintiff’s status as the real party in interest is a CR 12(b)(6) motion to dismiss. *See Dennis v. Heggen*, 35 Wn. App. 432, 434 P.2d 131 (1983). CR 17 objections may be waived if they were not timely made. 4 James W. Moore, *Moore’s Federal Practice* § 17.12[2][a], at 17-64 to 17-65 (3d ed. 1997). Here, the appellants never brought any motion to dismiss or countermotion in answer to respondent’s two motions for summary judgment. The appellants had the discovery responses in their possession for nearly a year before the case was finally decided in July, 2016. The court below properly rejected their argument.

Even if the objection to U.S. Bank’s status was properly made, it ratified the action. Respondent’s two motions for summary judgment serve as affirmative ratification. The term “ratification” in the context of CR 17 analysis has been interpreted to require some sort of positive action or other manifestation of consent by the real party in interest. *Fox v. Sackman*, 22 Wn. App. 707, 710, 591 P.2d 855 (1979) (holding an affidavit sufficient as a manifestation of consent). Assuming for the sake of this appeal that the “Note Location Determined” document accurately identifies who had physical possession of the Note on the date of filing the

Complaint, it also identifies that Ocwen had possession of the Note as of August 4, 2014.<sup>31</sup> Mr. Fernandez in turn swore that Ocwen was an agent acting on behalf of respondent U.S. Bank.<sup>32</sup> Thus, even if U.S. Bank was improperly identified as the plaintiff at the outset, it subsequently ratified the actions undertaken on its behalf.

In addition, reversal would be a pointless exercise given that substitutions relate back to the date of the complaint. CR 17(a). Again, assuming the “Note Location Determined” document accurately identifies the real party in interest as Deutsche Bank at the time of the Complaint, a court would permit substitution when the wrong plaintiff is named through an honest or understandable mistake. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 230, 734 P.2d 533 (1987). Given that all the other elements of a justiciable controversy, including that the Note had not been paid since 2009 and that the subject property was pledged as collateral for the loan, were not contested at summary judgment, a retroactive change in the name of the plaintiff, only to then substitute U.S. Bank for the purposes of relating back to the date of the original complaint would be a waste of judicial resources.

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<sup>31</sup> CP 665

<sup>32</sup> CP 223-24.

Moreover, the purposes underlying CR 17 would not be served by a reversal of the court's decision and vacation of the judgment. CR 17 is construed liberally to allow adjudication on the merits rather than on technicalities. *Beal v. City of Seattle*, 134 Wn.2d 769, 778, 954 P.2d 237 (1998). Retroactive change to a real party in interest, rather than dismissal, is preferred in Washington when the refusal do so "would cause retrial of the same case, delay in final settlement of the issues, and waste judicial resources." *Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 895-96, 707 P.2d 1361 (1985). The purpose of CR 17(a) is to expedite litigation by preventing narrow construction or technicalities to interfere with adjudication of the merits of legitimate controversies. *Fox*, 22 Wn. App. at 707. The rule promotes the res judicata effect and protects the parties from repetitive suits on the same cause of action. *Fitch v. Johns-Manville Corp.*, 46 Wn. App. 867, 869, 733 P.2d 562 (1987).

The out-of-jurisdiction case cited by the appellants is distinguishable in both procedural and factual posture. In *U.S. Bank National Association v. Kimball*, the Vermont Supreme Court affirmed a lower court's grant of summary judgment in favor of defendant borrowers on the grounds that the plaintiff bank lacked standing to foreclose. 190 Vt. 210, 211, 27 A.3d 1087 (2011). In contrast to the case at bar, the borrowers in *Kimball* actually brought a motion for summary judgment

and sought affirmative relief from the court. When the plaintiff bank failed to demonstrate that, at the time of filing of the complaint it did not allege that it possessed a promissory note endorsed in blank or that the note bore a special endorsement to the bank naming it as the payee, the lower court dismissed the action. *Id.* at 217. In the case at bar, appellants never brought a motion to dismiss or countermoved for summary judgment at any time. As argued above, the absence of affirmative action on the appellants part can be deemed a waiver under Washington law.

*Kimball* is also factually distinguishable from the case at bar. There, the plaintiff bank's original complaint relied only on an assignment of deed of trust as the basis for its standing to bring foreclosure claim; the bank did not originally allege that it possessed the original note, but only attached a copy of the note with an attached allonge bearing an endorsement in blank. 190 Vt. at 217. After the borrower defendant brought the motion for summary judgment, the plaintiff bank produced another version of the Note with an allonge containing a special endorsement to the plaintiff bank. *Id.* The court reasoned that the plaintiff bank's failure to produce sufficient evidence as to the discrepancy between the two notes, or to document the transfer of the Note, and held that there was no error when the lower court dismissed. *Id.*

In the case below, there was no such unexplained change with regard to the Note. The Note endorsed in blank was provided with the Complaint and the Affidavit of Mr. Fernandez, and the original was lodged with the court. Both the Ocwen affiants and counsel below represented that they were acting on behalf of the holder, U.S. Bank, at all times relevant to the action. There is no unexplained discrepancy at the time the respondent made its presentation in support of its motion for summary judgment, and thus there is no reason to reverse the decision of the trial court.

2. *The “Note Location Determined” document was properly excluded by the trial court.*

Although the “Note Location Determined” document was produced in discovery, it was not evidence that could be considered under CR 56(e), and the court did not abuse its discretion by excluding it. CR 56(e) mandates that “opposing affidavits shall be made on personal knowledge.” Courts “may permit affidavits to be supplemented by depositions, answers to interrogatories, or further affidavits.” *Id.* Notably absent in the text of the rule are documents produced in response to requests for production. The appellants’ affidavits in response that contain the “Note Location Determined” document cannot have been made with personal knowledge as the document was from Ocwen, not the plaintiffs.

The court below stated: “for purposes of this motion let me make it clear that I’m not considering any statement in any affidavit that is made without a showing of personal knowledge . . .”<sup>33</sup>

In addition, the document is inadmissible hearsay that does not fall under any of the allowed hearsay exceptions. The document is an out of court statement that the appellants are attempting to use to prove the truth of the matter asserted, namely that the Note was not in U.S. Bank’s possession at the time the Complaint was filed. Cf. ER 801(c). Thus, the evidence is inadmissible unless it falls within one or more of the hearsay exceptions.

Appellants may argue that the document constitutes an admission by a party-opponent under ER 801(d)(2)(iv). ER 801(d)(2)(iv) states that “a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party,” is not hearsay. Although Ocwen is the servicing agent on the Respondent’s loan, there is no evidence in the record below that the document was made by a person who had authority to make a statement for U.S. Bank. Thus, the document is not a party admission and is excludable hearsay.

Appellants may also argue that the document constitutes a business record, but cannot satisfy the elements of the business record exception.

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<sup>33</sup> VRP 95 ll. 5-10.

ER 803(a)(6) and RCW 5.45.020 excepts from the hearsay rule a “record of an act, condition or event . . . if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” Here, the appellants provided the document through the affidavit signed by Georgia Plumb. Ms. Plumb is a plaintiff in this matter, and is certainly not the custodian of records for Ocwen, nor is she qualified to testify as to the creation of the document in question or any other facts material to the determination of whether the evidence is a business record.

Finally, the document is hearsay upon hearsay. The speaker in the document appears to be referencing research he did into the location of the note. The results of that research are also out of court statements introduced to prove who had the note when. There is no testimony on the record, and certainly nothing in the appellant’s opposing affidavit to indicate that the records reviewed by the speaker would qualify as business records. Thus, the court below did not abuse its discretion by excluding this particular document.

**C. The Trial Court did not Err by Granting Summary Judgment in Light of Alleged “Bad Faith, Fraud, and**

**Egregious Litigation Misconduct” by the Respondent’s Counsel.**

In Assignment of Error 2, Appellants assert several derivative, redundant, and meritless arguments in support of their prayer for reversal. Not only do appellants contend that the rejection of their legal arguments related to the enforcement of respondent’s Note and Deed of Trust was error, but that the court also erred by failing to sanction respondent or its counsel for bringing the lawsuit and seeking relief in the first place.

As a threshold matter, appellants’ arguments are not properly preserved for appeal. The docket below shows no motion or other application to the trial court for dismissal or sanction as a penalty for the respondents’ litigation conduct. While it is true that the appellants asked the court to deny the motion for summary judgment and also to dismiss the case in their opposition to the motion itself, they did not countermove or place the issue squarely before the trial court. Thus, there is no order of the lower court which this Court could overturn and either impose sanctions or mandate that the lower court do so. The only possible outcome in the appellants’ favor on appeal would be one where the trial court is reversed and the case remanded for further proceedings.

To the extent that Appellants’ argument is in support of their prayer for reversal of the trial court’s Order granting summary judgment, the argument is derivative of their other assignments of error. To start, appellants argue that not only did respondent lack standing at

the initiation of the lawsuit, the respondent, or its counsel advanced the lawsuit in bad faith. The appellants' argument about bad faith is only viable if their underlying theory of standing is also valid. As demonstrated above, respondent had standing as the holder in due course of a negotiable instrument and as beneficiary under the Deed of Trust. There was no competent evidence before the trial court to satisfy the appellants' burden of demonstration that a question of material fact existed as to the issue of standing. In the event that this Court found error with trial court's ruling on standing, because the final order appealed from is the Order granting summary judgment, the only result could be reversal and remand for further proceedings. No independent inquiry by this Court would be necessary on the issue of bad faith prosecution; rather, the case would simply proceed to trial.

The same analysis applies to the appellants' derivative argument that the lawsuit was brought in bad faith because respondent, its servicing agent, or its attorneys were aware of the fraud in the origination of the loan documents. The merits of their affirmative defense of fraud will be addressed *infra* Part IV, Section D, but in short the appellants failed to plead or effectively demonstrate fraud in the context of the lower court's consideration of respondent's motion for summary judgment. Again, if this Court should decide to reverse and remand because there may be an issue of fact with respect to the fraud defense, there would be no need to independently consider the merits of

the bad faith allegations premised on knowledge of that fraud in the context of this appeal.

Appellants use faulty logic to attack the declarations filed by respondent below by Ocwen employees on the grounds of their lack of competence. Appellants contend that “if U.S. Bank’s two Affiants were truly competent, then they would have known of the fraud when they made the Affidavits[,]” and “if [the Ocwen affiants] did know of this obvious fraud, then they are incompetent.”<sup>34</sup> Appellants argument is circular and question begging. Appellants assume, and call on the Court to assume the truth of the underlying argument: that there was indeed fraud in the origination, to support an argument against the competence or good faith of the affiants. As will be demonstrated below in part IV. D, there is no question of material fact as to fraud in the origination because the appellants failed to properly plead and demonstrate facts to support the affirmative defense.

**D. The Trial Court did not Err in Rejecting Appellants’ Improperly Plead and Unproven Affirmative Defenses of Forgery and Fraud in the Inducement.**

Appellants brief, like their pleadings below, is a confusing morass of attacks on the enforceability of the Note and Deed of Trust at issue in this case. The court below rejected all of their attacks. Appellants again fail to demonstrate that there are genuine questions of material fact as to the issues considered below. Chiefly problematic for the appellant’s

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<sup>34</sup> Op. Br. at 24.

argument is that it contains several assertions of fact that are improperly lumped into the rubric of fraud according to their own definition of the legal doctrine. Unfortunately, none of appellants arguments coalesce to any cogent theory of fraud satisfying any or much less all of the required elements.

“Fraud must be pleaded with particularity. Particularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud.” *Adams v. King Cnty.*, 164 Wash. 2d 640, 662, 192 P.3d 891, 902 (2008) (citations omitted). The elements of the fraud are:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

*Id.* at 662. Additionally, a broken promise or agreement does not support an action for fraud. *Id.* Each of these elements must be proved by clear, cogent, and convincing evidence. *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965). The burden is on the plaintiff to prove the existence of all of the elements of fraud. *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958). The absence of any element is fatal to a claim. *Id.* at 54.

Appellants never establish what representation of an existing fact was made during the refinance transaction. Appellants first theory is that the appraisal done in conjunction with their refinance reflected an incorrect and inflated value for the property.<sup>35</sup> Such an allegation would fall under the concept of fraud in the inducement which refers to fraud that induces the transaction “by misrepresentation of motivating factors such as value, usefulness, age, or other characteristic of the property or item in question.” *Pedersen v. Bibioff*, 64 Wn. App. 710, 722, 828 P.2d 1113 (1992). Misrepresentations include “half-truths calculated to deceive.” *Ikeda v. Curtis*, 43 Wn.2d 449, 460, 261 P.2d 684 (1953). The only evidence appellants offer for this assertion is the assessed value of the property as determined by the Yakima County Assessor. However, appellants do not present evidence that the assessed value is the appropriate measure of market value for the purposes of refinancing, nor any evidence by a qualified expert detailing any relationship between those two figures. Thus, appellants could not demonstrate that a question of material fact existed as to whether the appraised value of the property was a misrepresentation of a motivating factor. The lower court did not err in rejecting appellants’ defense for fraud in the inducement.

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<sup>35</sup> CP 210-211. Appellants filed five separate Answers to the foreclosure complaint, and all assert the same affirmative defense of fraud in the inducement as set forth in CP 210-215.

Even if the appraisal was wrong, the appellants cannot say that the mortgage broker knew that the inflated value was false. According to appellants' Answers and opening brief, there was an appraisal done on the property. Appellants have no evidence to suggest that the mortgage broker improperly relied on the appraisal or otherwise knew that the appraisal was inflated.

Most importantly, the appellants cannot establish that they were damaged by an allegedly inflated appraisal. As the court below established with the appellants in colloquy, no payment had been made on the loan since 2009.<sup>36</sup> At least some of the appellants had lived continuously in the property since the default.<sup>37</sup> Appellants are not paying taxes on the subject property.<sup>38</sup> Moreover, no deficiency judgment is being sought by respondent, so the only remedy possible is the value of the property. If the property was over-appraised, the risk of loss falls on the lender, not the borrower in this case. Finally, the appellants admitted that they used some of the refinance proceeds to pay other bills.<sup>39</sup> If they appraisal had been lower, the amount of the refinance would loan would have been lower, and appellants would not have had the loan funds

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<sup>36</sup> VRP 82 ll. 4 – 14.

<sup>37</sup> VRP 82 ll. 15 – 17.

<sup>38</sup> VRP 82 l. 20 – 83 l. 1.

<sup>39</sup> CP 212.

available to relieve themselves of other debts. Appellants can offer no cogent theory on how they were damaged, much less any cogent evidence to establish a genuine issue of material fact.

The second statement alleged is a threat, by an unnamed person working with the Plumbs on the refinance, to sue the Plumbs if they do not sign the loan documents.<sup>40</sup> However, a threat is not a statement of existing material fact. There was never a lawsuit, and any lawsuit if brought would be ancillary to the terms of the loan agreement between the parties. In addition, appellants do not establish what, if any, factual grounds such a suit would be based upon. Thus, they cannot establish that the speaker uttered a false statement, or would have known of its falsity. As stated above, even if the threat as alleged is viewed as a statement of existing material fact, appellants cannot elucidate a cogent theory of damages from the statement.

Appellants' argument is better viewed under the legal doctrine of duress. To assert duress after voluntarily signing a contract, a party must prove more than stress or pecuniary necessity. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn. 2d 939, 944, 640 P.2d 1051 (1982). Appellants must demonstrate that they were deprived of its free will by the wrongful or oppressive conduct of the other

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<sup>40</sup> Op. Br. at 35, n. 139; CP 61, 62.

party. *Id.* at 944. Business compulsion is a form of duress. *Barker v. Walter Hogan Enters., Inc.*, 23 Wn. App. 450, 452-53, 596 P.2d 1359 (1979). In order to assert this theory, the appellants must prove that the other party caused or contributed to the victim's vulnerability and then applied immediate pressure. *Id.* at 453. There is no competent evidence that the respondent or its predecessor contributed to whatever financial situation led the appellants to seek a refinance of their loan in the first place.

Moreover, a threat to exercise a legal right or to institute a civil action based upon a good faith belief that valid grounds exist for the action constitutes neither duress nor coercion. *Pleuss v. City of Seattle*, 8 Wash. App. 133, 137, 504 P.2d 1191 (1972). Appellants do not even state what the grounds may have been for such a lawsuit, and thus failed to establish the absence of good faith on the part of the speaker. The record below is devoid of any evidence that would allow for such inquiry by this Court, and the appellants took no affirmative steps to establish that factual record below. In absence of such evidence, the lower court was correct in rejecting the appellants' affirmative defense to enforcement of the Note and Deed of Trust.

Appellants cannot establish the elements of forgery. Appellants admitted that they signed loan documents,<sup>41</sup> but denied that the documents presented in support of the Motion for Summary Judgment were not the documents they signed. The lower court properly rejected their self-serving defenses. For example, appellants never established that the original note lodged with the court did not actually bear their signatures. Instead, appellants point to circumstantial evidence related to the dates placed on the Deed of Trust. It would seem that they actually signed the document on August 26, 2004, but there was a typed date of August 16, 2004 elsewhere on the document. Such a discrepancy is of no effect as the date of signature would control if there was any dispute as to the date the contract was actually entered into, which there is not. Appellants also complain of certifications that were later placed on copies of the Deed of Trust, which again are acts performed after the documents were executed, and did not effect the terms of the instruments in any way. There is simply no cogent evidence of any forgery or material alteration of any of the instruments relied upon by respondent in support of its Motion for Summary Judgment.

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<sup>41</sup> VRP 18 l. 19 – 19 l. 13.

**E. The Trial Court did not Err by denying the Appellants' Laches Defense.**

Appellants assign error to the lower court's rejection of their affirmative defense of laches. Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Lopp v. Peninsula Sch. Dist.*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978). The elements of laches are: first, knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; second, an unreasonable delay by the plaintiff in commencing that cause of action; and third, damage to the defendant resulting from the unreasonable delay. *Id.* at 759. Damage to a defendant can arise either from acquiescence in the act or from a change of conditions. *Id.* at 759-60. None of these elements alone raises the defense of laches. *Id.* at 759.

Absent highly unusual circumstances, courts will not apply the doctrine of laches to bar an action short of the applicable statute of limitations. *In re Marriage of Hunter*, 52 Wn. App. 265, 270, 758 P.2d 1019 (1988), review denied, 112 Wn.2d 1006 (1989); *Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453*, 48 Wn. App. 743, 750, 740 P.2d 889 (1987). RCW 4.16.040(1) imposes a six-year statute of limitations on 'promissory notes and deeds of trust.' This six-year statute of limitations begins when

the note becomes due.” *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109, 1113 (2010) (finding that the statute of limitations on a 1992 note that came due in 1994 expired six years after the note became due, i.e., in 2000). For a promissory note paid in installments where the holder has the option of accelerating the debt upon a missed payment, or even where the note provides for automatic acceleration upon default, the statute of limitations does not commence running merely on a default in payment. *See, e.g., Weinberg v. Naher*, 51 Wash 591, 595-96 (1909). Accordingly the statute of limitations has not run on the Note in this case. The Note at issue does not mature until September 1, 2034. The note in its entirety did not mature in May 2009, rather an installment payment for that month came due. Respondent filed the Complaint on December 26, 2013, well within any interpretation of the statute of limitations. Accordingly, respondent is not precluded from foreclosing and there are no genuine issues of material fact and summary judgment should be found in Plaintiff’s favor.

**F. This Court should reject Appellants’ Due Process Arguments as Meritless.**

Appellants raise a new issue on appeal that their due process and equal protection rights were somehow violated by the lower court’s entry of summary judgment on respondent’s behalf. Given that appellants have

been provided the opportunity to defend a lawsuit brought in a court of competent jurisdiction, and are now appealing the lower court's decision before this court, it strains credulity that they are somehow being denied due process of law. Appellants do not contest service of process, or lack of further notice of respondent's Motion for Summary Judgment. In terms of equal protection, the appellants fail to demonstrate that have been treated differently than other similarly situated individuals, other than to say other homeowners are "protected."

Indeed, all that has been entered in this matter is summary judgment in favor of respondents. There has been no foreclosure sale of the subject property, and to the respondents' knowledge, at least one of the appellants still occupies the property. There simply has been no deprivation of property as of the date of the appeal, nor will there be any such deprivation until the judgment is affirmed and the Sheriff actually sells the property.

Instead, appellants' argument is similar to their arguments about bad faith litigation conduct on the part of respondent or its counsel. The facts underlying appellants' claim for constitutional violations are that the lower court erred in ways already addressed through other assignments of error. The remedy for such errors, if established, would simply be reversal and remand back to the lower court for further determination. Appellants

establish no free-standing claim for violations of their constitutional rights that would be remedied by anything other than remand for trial. Thus, this new claim is derivative of their other assignments of error for rejection of their affirmative defenses. As established above, the lower court did not err in rejecting those defenses and entering judgment for the appellants.

#### V. CONCLUSION

In light of the foregoing, Appellants establish any error by the trial court that warrants reversal or remand for further consideration. Appellants had two separate opportunities to respond to and argue any opposition that he had against the respondent's Motion. The lower court properly denied their affirmative defenses to enforcement of the Note and Deed of Trust by Foreclosure and entered Summary Judgment in favor of respondent. This Court should affirm the decision below.

Dated this 10th day of March, 2016.

/s/Ryan M. Carson  
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Pass-Through Certificates Series  
2005-1, N.A.

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I, the undersigned, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I hereby declare that on March 10, 2017, I caused to be served four (4) copies of the RESPONDENT'S OPENING BRIEF via first-class, postage prepaid mail as follows:

Word Church aka Rev. Georgia Plumb  
Georgia Plumb  
Joshua Plumb  
Kameron Plumb  
4902 Richey Road  
Yakima, WA 98908

Dated: March 10, 2017

/s/Karina Krivenko  
Karina Krivenko, Declarant  
Wright, Finlay & Zak, LLP

**WRIGHT FINLAY ZAK LLP**  
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