

NO. 70629-2-I

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

RYAN HOWARD,

Appellant/Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the
IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through
Certificates, Series 2007-AR7 under the Pooling and Servicing Agreement
dated 8/9/2007, ET AL.,

Respondents/Defendants.

BRIEF OF RESPONDENT DEUTSCHE BANK, AS TRUSTEE

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Through Certificates Series 2007-AR7

FILED
11/15/07
11:51 AM
CLERK OF COURT
SUPERIOR COURT
JANUARY 15 2008
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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED FOR REVIEW.....5

III. RESTATEMENT OF THE CASE.....6

 A. Mr. Howard filed a Complaint on February 2, 2011, and obtained a preliminary injunction of the foreclosure sale, then failed to serve the Summons and Complaint on Deutsche Bank, as Trustee for over a year.....6

 B. One year and three months after Mr. Howard filed his Complaint, Deutsche Bank, as Trustee moved to dismiss Mr. Howard’s claims against it for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted.....8

 C. Mr. Howard amended his Complaint, but failed to cure the deficiencies in his pleaded claims and on August 24, 2012 the court dismissed his claims against Deutsche Bank, as Trustee.....10

 D. After the court granted its Motion to Dismiss, Deutsche Bank, as Trustee filed a counterclaim for judicial foreclosure.....12

 E. On April 16, 2013, Mr. Howard attended mediation with his attorney and signed the CR 2A Agreement, then violated the Agreement by refusing to cooperate with Deutsche Bank, as Trustee to work out a formal Settlement Agreement.....14

F.	On June 10, 2013, upon Deutsche Bank, as Trustee’s motion, the court enforced the CR 2A Agreement and entered a judgment of foreclosure.....	17
G.	Mr. Howard improperly filed an objection to the Confirmation of Sheriff’s Sale on Real Property after waiving his right to object to confirmation of the sale in the CR 2A Agreement.....	18
IV.	AUTHORITY AND ARGUMENT.....	19
A.	The trial court correctly enforced the CR 2A Memorandum of Settlement.....	19
1.	Washington courts favor and enforce a strong policy toward compromises and settlements, and the finality of the same.....	19
2.	Mr. Howard’s Objection to Proposed Hearing and Request for Opportunity to be Heard was not signed by Mr. Howard’s attorney as required by Civil Rule 11.....	25
B.	The August 24, 2012 Order Granting Deutsche Bank, as Trustee’s Motion to Dismiss should also be upheld because Mr. Howard did not timely appeal the court’s decision; because Mr. Howard settled his claims; and because the trial court’s decision to grant the Motion was correct.....	29
1.	Mr. Howard failed to timely appeal the court’s ruling on the Motion to Dismiss within thirty days of the court’s order granting the Motion.....	29

2.	Mr. Howard’s appeal of the court’s ruling on Deutsche Bank, as Trustee’s Motion to Dismiss should also be denied because Mr. Howard agreed to dismiss all his claims with prejudice in the CR 2A Agreement.....	33
3.	Even if reviewed on the merits, the trial court’s decision to grant Deutsche Bank, as Trustee’s Motion to Dismiss was correct and should be upheld.....	33
V.	ATTORNEY’S FEES AND COSTS.....	38
VI.	CONCLUSION.....	39

TABLE OF AUTHORITIES

Cases

<u>Ashcroft v. Iqbal</u> , 556 U.S. 662, 129 S. Ct. 1937 (2009).....	35
<u>Baird v. Baird</u> , 6 Wn. App. 587, 494 P.2d 1387 (1972).....	19, 21, 22
<u>Balistreri v. Pacifica Police Dep’t</u> , 901 F.2d 696 (9th Cir. 1988).....	34
<u>Bell Atl. Corp. v. Twombly</u> , 550 U.S. 544, 127 S. Ct. 1955 (2007).....	35
<u>Bryant v. Joseph Tree, Inc.</u> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	25
<u>Business Guides, Inc. v. Chromatic Communications Enters., Inc.</u> , 498 U.S. 533, —, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991).....	25
<u>Conley v. Gibson</u> , 355 U.S. 41, 78 S.Ct. 99 (1957).....	34
<u>Cook v. Vennigerholz</u> , 44 Wn.2d 612, 269 P.2d 824 (1954).....	21

<u>Cutler v. Phillips Petroleum Co.</u> , 124 Wn.2d 749, 755, 881 P.2d 216, 219 (1994).....	34
<u>Deer v. Deer</u> , 29 Wn.2d 202, 186 P.2d 619 (1947).....	22
<u>Eddleman v. McGhan</u> , 45 Wn.2d 430, 275 P.2d 729 (1954).....	20
<u>Guillory v. County of Orange</u> , 731 F.2d 1379 (9th Cir.1984).....	34
<u>Haller v. Wallis</u> , 89 Wn.2d 539, 573 P.2d 1302 (1978).....	21
<u>Hoffer v. State</u> , 110 Wn.2d 415, 755 P.2d 781 (1988), <u>aff'd on rehearing</u> , 113 Wn.2d 148, 776 P.2d 963 (1989).....	34
<u>Matter of Hollingsworth Estate</u> , 88 Wn.2d 322, 560 P.2d 348 (1977).....	22
<u>Morris v. Maks</u> , 69 Wn. App. 865, 850 P.2d 1357 (1993).....	19, 22
<u>Howard v. Dimaggio</u> , 70 Wn. App. 734, 855 P.2d 335 (1993)....	19, 20, 22
<u>Nationwide Mut. Fire Ins. Co. v. Watson</u> , 120 Wn.2d 178, 840 P.2d 851 (1992).....	21
<u>Oregon Mut. Ins. Co. v. Barton</u> , 109 Wn. App. 405, 36 P.3d 1065 (2001).....	22
<u>In re Patterson</u> , 93 Wn. App. 579, 969 P.2d 1106 (1999).....	19, 21, 22
<u>Robertson v. Dean Witter Reynolds, Inc.</u> , 749 F.2d 530 (9th Cir.1984)...	34
<u>Schaeferco, Inc. v. Columbia River Gorge Comm'n</u> , 121 Wn.2d 366, 849 P.2d 1225 (1993).....	29
<u>Seafirst Center Ltd. P'ship v. Erickson</u> , 127 Wn.2d 355, 898 P.2d 299 (1995).....	21

Stottlemyre v. Reed, 35 Wn. App. 168, 665 P.2d 1383 (1983).....21, 33

Statutes

RCW 2.44.010.....19, 20

Rules

CR 2A.....20

CR 11.....25

RAP 5.2(a).....29

RAP 5.3(a).....30

RAP 18.1(j).....38

RAP 18.8(b).....29-30

Secondary Sources

3A L. Orland, Wash.Prac., Rules Practice § 5141 (3d ed. Supp.1991)... 26

I. INTRODUCTION

Plaintiff/Appellant, Ryan Howard, by this appeal, seeks to evade enforcement of the CR 2A Memorandum of Settlement (“the CR 2A Agreement”) that he voluntarily signed, with his attorney present, on April 16, 2013. The pertinent terms of the CR 2A agreement include that Mr. Howard would stipulate to a judgment of foreclosure in the amount of \$1,225,039.85; that all of his claims and defenses would be dismissed with prejudice; that he waived his right to object to confirmation of the sale; and that the parties would work together to formalize the agreement with appropriate documentation. In exchange, Deutsche Bank National Trust Company, as Trustee for IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through Certificates Series 2007-AR7 (“Deutsche Bank, as Trustee”) waived its right to a deficiency judgment, and agreed to provide a copy of the property appraisal to Mr. Howard. Both Mr. Howard and his attorney, David A. Leen, signed the CR 2A Agreement during the mediation.

After signing the CR 2A Agreement, Mr. Howard engaged in a campaign of subversion designed to avoid signing the formal Settlement

Agreement or the stipulated judgment of foreclosure (“the Stipulated Judgment”). Deutsche Bank, as Trustee’s prior counsel Danielle Hunsaker’s Declaration describes in detail Mr. Howard’s multiple, unreasonable demands regarding changes to the Settlement Agreement and his continuous invention of new objections to the language of the Settlement Agreement each time Deutsche Bank, as Trustee made the revisions that Mr. Howard requested. These revisions included removing the confidentiality and non-disparagement clause and reducing the post-judgment interest rate, among several others. Ms. Hunsaker’s declaration also describes how after several rounds of revisions, Mr. Howard contacted her directly, despite still being represented by counsel, and asserted a whole new host of allegations against Deutsche Bank, as Trustee and the parties’ mediator, Margo Keller, and demanded the production of various documents, including an accounting of the judgment amount to which he had already agreed.

Recognizing that Mr. Howard would never voluntarily sign the Settlement Agreement or the Stipulated Judgment, Deutsche Bank, as Trustee moved for entry of judgment based upon the CR 2A Agreement

that Mr. Howard and his attorney signed on April 16, 2013. Mr. Howard continued to circumvent his counsel of record by sending emails directly to the court and to Ms. Hunsaker, and by filing an Objection to Proposed Hearing and Request for Opportunity to be Heard (“the Objection”) on May 31, 2013, which he falsely signed as a *pro se* party. Mr. Howard’s attorney of record, David Leen, did not sign the Objection, and did not withdraw as counsel of record until July 20, 2013; fifty days after Mr. Howard filed the Objection. On June 7, 2013, the trial court granted Deutsche Bank, as Trustee’s Motion for Entry of Judgment, and entered a judgment of foreclosure in the amount of \$1,225,039.85, as Mr. Howard agreed in the CR 2A Agreement.

In addition to the entry of judgment, Mr. Howard untimely appeals the court’s order of August 24, 2012 granting Deutsche Bank, as Trustee’s Motion to Dismiss. In his Complaint, Mr. Howard asserted claims for violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and the Consumer Protection Act (“CPA”), as well as claims for fraud in the inducement and trespass. On August 24, 2012, the court dismissed Mr. Howard’s Complaint but held that he could assert fraud in

the inducement as a defense in the foreclosure action. Mr. Howard argues in his opening brief that he should have been given an opportunity to amend his Complaint to cure any deficiencies in the pleaded claims. His Brief omits the fact that at the first hearing on Deutsche Bank, as Trustee's Motion to Dismiss, the court granted him three additional months to amend his Complaint and to cure the deficiencies in his claims. Mr. Howard filed an Amended Complaint three days before the next scheduled hearing date on the Motion to Dismiss, yet failed to cure the defects that Deutsche Bank, as Trustee identified in its Motion. After reviewing the Amended Complaint and additional briefing from both of the parties, the court found that Mr. Howard's Amended Complaint failed to state a claim against Deutsche Bank, as Trustee upon which relief could be granted, and dismissed Mr. Howard's claims.

Mr. Howard has failed to show that either the court's ruling granting Deutsche Bank, as Trustee's Motion to Dismiss, or the entry of judgment based upon the signed CR 2A Agreement were done in error. The trial court's decisions on both motions were proper and Deutsche

Bank, as Trustee respectfully requests that this Court affirm the trial court's rulings.

II. ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly enforce the CR 2A Agreement that Mr. Howard voluntarily signed with is attorney present?
2. Did the trial court properly grant Deutsche Bank, as Trustee's Motion for Entry of Judgment over Mr. Howard's written Objection, where the Objection was not signed of his attorney of record?
3. Should the trial court's ruling on Deutsche Bank, as Trustee's Motion to Dismiss be upheld where Mr. Howard failed to timely file his Notice of Appeal?
4. Did the trial court properly dismiss Mr. Howard's claims when, after filing an Amended Complaint in response to Deutsche Bank, as Trustee's Motion to Dismiss, he still failed to state claims against Deutsche Bank, as Trustee upon which relief could be granted?

III. RESTATEMENT OF THE CASE

- A. Mr. Howard filed a Complaint on February 2, 2011, and obtained a preliminary injunction of the foreclosure sale, then failed to serve the Summons and Complaint on Deutsche Bank, as Trustee for over a year.**

Mr. Howard filed his Complaint on February 2, 2011, by and through his attorney David A. Leen, and named Pierce Commercial Bank (“PCB”), Regional Trustee Services, Corp. (“RTS”), and Deutsche Bank National Trust Company¹ as defendants. CP 1-8. The facts asserted in the Complaint amount to essentially three allegations: (1) that PCB fraudulently misrepresented that Mr. Howard would receive a 5% interest rate on his home loan, (2) that PCB induced Mr. Howard to accept a loan with a substantially higher adjustable interest rate by promising to refinance the loan at the lower rate, then refused to honor its promise, and (3) that in 2010 the loan beneficiary’s agents trespassed on his property causing damage to the property. CP 1-3. Mr. Howard’s asserted causes of action against the defendants included a claim for injunctive relief against the pending foreclosure, criminal racketeering under RICO/trespass,

¹ Deutsche Bank National Trust Company is an erroneous identification of the true party in interest, which is Deutsche Bank National Trust Company, as Trustee for IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through Certificates Series 2007-AR7 (“Deutsche Bank, as Trustee”).

deceptive practices under the CPA, promissory estoppel, and fraudulent inducement. CP 3-5.

On the same day he filed his Complaint, Mr. Howard moved the court to enjoin the pending foreclosure sale. Trial Court Docket Number (“Dkt #”) 5. At the March 3, 2011 hearing on Mr. Howard’s Motion for an Injunction, attorney Joe Soleseng appeared for Defendant RTS and entered a limited appearance for Deutsche Bank, as Trustee for the purpose of objecting to the preliminary injunction on the grounds that Deutsche Bank, as Trustee was not served with the Summons and Complaint. RP 3/4/11, p. 2. Mr. Leen argued that he had not served Deutsche Bank, as Trustee because he could not find its service address, and stated that he would obtain its service address through interrogatories addressed to RTS. He argued that there was no prejudice to the lender because once he served the lender it could move the court to modify the injunction and require a bond. RP 3/4/11, p. 3.

The court granted Mr. Howard’s request for a preliminary injunction. RP 3/4/11, p. 10-12; CP 9-11. After the injunction was

granted, Mr. Howard settled his claims against RTS. He never sent discovery to RTS to obtain Deutsche Bank, as Trustee's service address, and over one year later, Mr. Howard still had not served his Summons and Complaint on Deutsche Bank, as Trustee. RP 5/25/12, p. 2, 4; CP 423-424.

B. One year and three months after Mr. Howard filed his Complaint, Deutsche Bank, as Trustee moved to dismiss Mr. Howard's claims against it for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted.

On May 8, 2012, Deutsche Bank, as Trustee moved to dismiss Mr. Howard's claims. CP 421-429. First, Deutsche Bank, as Trustee argued that Mr. Howard's claims against it should be dismissed because it had not been served with the Summons and Complaint and therefore the court lacked personal jurisdiction. CP 423-424. It later waived these arguments after Mr. Howard finally served the Summons and Complaint on Deutsche Bank, as Trustee via its counsel, Danielle Hunsaker. CP 507-509. Deutsche Bank, as Trustee also argued that Mr. Howard failed to state a claim against it upon which relief could be granted. CP 424-427. Mr. Howard filed his Response to Deutsche Bank, as Trustee's Motion to

Dismiss on May 23, 2012. CP 477-486. In conjunction with his Response, on May 17, 2012, Mr. Howard also filed a Motion to Continue the Trial Date and noted his motion to be heard at the same time as the Motion to Dismiss. CP 436-439.

The court heard oral argument on both motions on May 25, 2012. At the hearing, Mr. Howard's attorney admitted that the trespassers that Mr. Howard alleges were the loan beneficiary's agents, "could be just garden-variety criminals." RP 5/25/12, p. 5. He also admitted to the court that he was "guilty of some delay" in serving Deutsche Bank, as Trustee and that he "should be admonished at a minimum." RP 5/25/12, p. 4. After hearing arguments from both parties on the Motion for Continuance and Motion to Dismiss, the court continued the trial date to April 3013, and continued the hearing on Deutsche Bank, as Trustee's Motion to Dismiss for three months to give Mr. Howard an opportunity to amend his Complaint and cure the deficiencies that Deutsche Bank, as Trustee identified in its Motion to Dismiss. RP 5/25/12, p. 12, 16.

C. Mr. Howard amended his Complaint, but failed to cure the deficiencies in his pleaded claims and on August 24, 2012 the court dismissed his claims against Deutsche Bank, as Trustee.

The second hearing on Deutsche Bank, as Trustee's Motion to Dismiss took place on August 24, 2012. RP 8/24/12. On August 21, 2012, three days before the hearing, Mr. Howard filed an Amended Complaint. The following day, Deutsche Bank, as Trustee filed a Supplemental Brief in Support of its Motion to Dismiss, and on August 23, 2012, Mr. Howard filed a Reply to Deutsche Bank's Supplemental Brief. CP 12-18, 509-523, and 524-542.

Although Mr. Howard amended his Complaint, the amended allegations still failed to state a claim against Deutsche Bank, as Trustee upon which relief could be granted. At the August 24, 2012 hearing, Deutsche Bank, as Trustee argued that Mr. Howard's defenses regarding PCB's fraud "should be addressed in the context of the injunction claim," not as affirmative causes of action against Deutsche Bank, as Trustee. RP 8/24/12, p. 4. Regarding Mr. Howard's remaining causes of action Deutsche Bank, as Trustee argued that despite Mr. Howard's amendments,

he still failed to draw any connection between the alleged wrongdoers and Deutsche Bank, as Trustee. 8/24/12, p. 2-5. At the hearing Mr. Howard's attorney, David Leen, again admitted that "[t]here's nobody else, except a burglar, I guess..." who would knock the doors in on Mr. Howard's house. RP 8/24/12, p. 8. After reviewing the pleadings and hearing argument from both parties, the court dismissed Mr. Howard's trespass and related RICO cause of action, finding that the facts Mr. Howard alleged were not sufficient to establish a connection between the trespassers and Deutsche Bank, as Trustee. RP 8/24/12, p. 12. The court also dismissed Mr. Howard's affirmative claims of deceptive practices (under the CPA) and promissory estoppel, but held that fraud in the inducement "may be asserted as a defense in the injunction proceeding against collection of the loan and foreclosure." RP 8/24/12, p. 12-13; CP 46-47.

Mr. Howard did not timely appeal the court's August 24, 2012 ruling, and did not mention this ruling in the Notice of Appeal that he filed on July 8, 2013. He challenges the court's ruling on Deutsche Bank, as Trustee's Motion to Dismiss for the first time in his Opening Brief, which

he filed on April 28, 2014. In his brief Mr. Howard argues that “if the trial court believed that the Mr. Howard’s [sic] Complaint was deficient in any technical sense, Mr. Howard should have been permitted leave to amend the Complaint, pursuant to CR 15, in lieu of dismissal, as requested in his responsive pleadings.” Opening Brief, p. 26-27. This argument ignores the facts that Mr. Howard *was* granted a generous three-month continuance to amend his Complaint and that the court dismissed Mr. Howard’s claims only after he filed an Amended Complaint that still failed to state claims against Deutsche Bank, as Trustee upon which relief could be granted. RP 5/25/12, p. 14-15; 8/24/12, p. 12-13.

D. After the court granted its Motion to Dismiss, Deutsche Bank, as Trustee filed a counterclaim for judicial foreclosure.

On September 11, 2012, following the court’s August 24, 2012 ruling granting the Motion to Dismiss, Deutsche Bank, as Trustee filed an Answer, Affirmative Defenses, Counterclaims and Third-Party Claims in which Deutsche Bank, as Trustee answered Mr. Howard’s remaining claim for injunctive relief, and initiated a judicial foreclosure against Mr. Howard and third-party defendants. Dkt # 41. On October 2, 2012,

Deutsche Bank, as Trustee then amended its Answer, Affirmative Defenses, Counterclaims and Third-Party Claims. Dkt # 42. Between November 19, 2012 and January 4, 2013 Deutsche Bank, as Trustee obtained default judgments or stipulated judgments of foreclosure against all of the third party defendants leaving Mr. Howard as the only remaining defendant to Deutsche Bank, as Trustee's judicial foreclosure action. Dkt #s 57, 58, 59, 63A, 70.

On December 13, 2012, Deutsche Bank, as Trustee filed a Motion for Judgment on the Pleadings and for Dismissal for Failure to Prosecute, arguing that Mr. Howard was late in answering Deutsche Bank, as Trustee's counterclaim, was late in answering discovery, and had failed to comply with any of the court-ordered deadlines. CP 543-560. The court denied the motion finding that "[d]ismissal for discovery failure is an extreme sanction available in limited circumstances..." CP 48-50.

Two months later, on February 15, 2013, Deutsche Bank, as Trustee filed a Motion for Summary Judgment against Mr. Howard (Dkt # 74), but on April 3, 2013, the court denied Deutsche Bank, as Trustee's

Motion for Summary Judgment. CP 92-93. Then, on April 16, 2013, thirteen days after the court's ruling on Deutsche Bank, as Trustee's Motion for Summary Judgment, the parties mediated the case, resolved their disputes, and signed the CR 2A Agreement. CP 259.

E. On April 16, 2013, Mr. Howard attended mediation with his attorney and signed the CR 2A Agreement, then violated the Agreement by refusing to cooperate with Deutsche Bank, as Trustee to work out a formal Settlement Agreement.

On April 16, 2013, the parties met and engaged in mediation with mediator Margo Keller. CP 253. Mr. Howard and his attorney were both present. *Id.* At the mediation the parties reached a settlement agreement, and Mr. Howard signed the CR 2A Agreement. His attorney also signed the Agreement, as did counsel for Deutsche Bank, as Trustee. CP 253, 259.

The CR 2A Agreement states, in relevant part, "The parties will work together to formalize this agreement with appropriate documentation..." CP 259. On April 25, 2013, nine days after Mr. Howard signed the CR 2A Memorandum, Ms. Hunsaker, prior counsel for Deutsche Bank, as Trustee, sent a proposed Settlement Agreement to Mr.

Leen. CP 254. Despite Mr. Leen's statement of April 30, 2013 that he was "[h]oping to have this done by tomorrow," and despite subsequently following up with Mr. Leen multiple times, she received no response until more than a week later. *Id.* On May 9, 2013, Mr. Leen responded to Ms. Hunsaker and told her that Mr. Howard objected to the confidentiality and non-disparagement clauses of the Settlement Agreement and had other concerns. He assured Ms. Hunsaker that he would confer with his client and get back to her with more specifics. *Id.* By May 14, 2013, Ms. Hunsaker had not heard anything further from Mr. Leen, and she contacted the mediator, Margo Keller, for assistance. *Id.* A conference call was scheduled, and during the call Ms. Keller told Mr. Howard that many of his objections to the standard settlement language were inappropriate. CP 255. She also advised Ms. Hunsaker that Mr. Howard's objection to the confidentiality and non-disparagement clauses were valid, and Ms. Hunsaker therefore removed those clauses and made several other requested changes to the agreement. *Id.*

During a second phone conference with Ms. Keller, which occurred on May 16, 2013, Mr. Howard objected for the first time to the

post-judgment interest rate. CP 256. Upon Mr. Leen's assurance that Mr. Howard would sign the agreement if the post-judgment interest rate were lowered to 8% along with one other minor change, Ms. Hunsaker agreed to the revisions and on May 20, 2013, sent a second revised Settlement Agreement and stipulated judgment to Mr. Leen. *Id.* Ms. Hunsaker received no response, and when she followed up with Mr. Leen on May 21, 2013, Mr. Leen responded that Mr. Howard was demanding further changes to the agreement. CP 257. Mr. Howard then copied Ms. Hunsaker on an email he sent to his attorney, and set forth a host of allegations and new issues that he never previously raised, demanded new documents from Deutsche Bank, as Trustee, demanded an accounting of the amounts stated in the judgment to which Mr. Howard had expressly agreed in the CR 2A Agreement, and made unfounded accusations against the mediator, Ms. Keller. CP 102-104, 257. At this time it became clear that Mr. Howard would perpetually invent new reasons not to sign the Settlement Agreement, and Deutsche Bank, as Trustee filed a Motion for Entry of Judgment. CP 242-251.

F. On June 10, 2013, upon Deutsche Bank, as Trustee's motion, the court enforced the CR 2A Agreement and entered a judgment of foreclosure.

After copying Ms. Hunsaker on an email to his attorney, Mr. Howard continued to circumvent his own counsel by sending emails directly to the court and to Ms. Hunsaker, and by filing an Objection to Proposed Hearing and Request for Opportunity to be Heard (“the Objection”) on May 31, 2013, which he falsely signed as a *pro se* party. CP 94-109. Mr. Howard’s attorney of record, David Leen, did not sign the Objection, and did not withdraw as counsel of record until July 20, 2013, fifty days after Mr. Howard filed the Objection. CP 100, 149-152.

Mr. Howard argues in his Opening Brief that the CR 2A Agreement should have been enforced against Deutsche Bank, as Trustee, because it failed to deliver the property appraisal per the Agreement. Opening Brief, p. 25. However, Ms. Hunsaker sent the appraisal to Mr. Howard on May 22, 2013, the day before Deutsche Bank, as Trustee filed its Motion for Entry of Judgment. CP 257-258.

On June 10, 2013, the Court granted Deutsche Bank, as Trustee's Motion for Entry of Judgment and entered a Judgment of Foreclosure against the property in dispute according to the terms of the CR 2A Agreement. CP 110-117, 259.

G. Mr. Howard improperly filed an objection to the Confirmation of Sheriff's Sale on Real Property after waiving his right to object to confirmation of the sale in the CR 2A Agreement.

After the Judgment of Foreclosure was entered, the Court issued an order of sale on June 20, 2013, and on August 9, 2013, the Sheriff sold the property at a foreclosure auction to Deutsche Bank, as Trustee. CP 204-205, 219-222. On September 5, 2013, Mr. Howard filed an Objection to Confirmation of Sheriff's Sale on Real Property, in which he alleged that the loan documents are fraudulent, unenforceable, and lacking a chain of title, among other things. CP 226-233. He also filed a Motion to Deny Confirmation of Sheriff's Sale on Real Property requesting that the court deny the confirmation of sale. CP 235. The CR 2A Agreement that Mr. Howard signed on April 16, 2013 specifically states "Howard waives his right to...object to confirmation of the sale..." CP 259. On October 2,

2013, the trial court properly entered the Order of Confirmation of Sale over Mr. Howard's objection. Dkt # 139.

IV. AUTHORITY AND ARGUMENT

A. The trial court correctly enforced the CR 2A Memorandum of Settlement.

1. Washington courts favor and enforce a strong policy toward compromises and settlements, and the finality of the same.

The standard of review for a trial court's decision to enforce a CR 2A Agreement is abuse of discretion. Morris v. Maks, 69 Wn. App. 865, 872, 850 P.2d 1357, 1361 (1993); In re Patterson, 93 Wn. App. 579, 585, 969 P.2d 1106, 1110 (1999). Agreements made pursuant to CR 2A and RCW 2.44.010 are binding on the parties. The Court's authority to enforce a settlement agreement is derived from court rule and statute, specifically CR 2A and RCW 2.44.010. Howard v. Dimaggio, 70 Wn. App. 734, 737-38, 855 P.2d 335 (1993); Baird v. Baird, 6 Wn. App. 587, 589, 494 P.2d 1387 (1972).

Civil Rule 2A on Stipulations, provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or **unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.**

CR 2A (emphasis added.) Further, RCW 2.44.010 on Authority of Attorney, provides in relevant part:

An attorney and counselor has authority:

(1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding **unless** such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, **or signed by the party against whom the same is alleged, or his attorney.**

RCW 2.44.010(1) (emphasis added). The purpose of CR 2A and RCW 2.44.010 “is to avoid such disputes and to give certainty and finality to settlements and compromises, if they are made.” Howard, 70 Wn. App. at 738 (quoting Eddleman v. McGhan, 45 Wn.2d 430, 432, 275 P.2d 729 (1954)). CR 2A and RCW 2.44.010, when read together, bind a party to a

settlement agreement where the agreement is signed by the party or their attorney. Patterson, 93 Wn. App. at 589. “A stipulation arrived at in this manner is binding on the parties.” Baird, 6 Wn. App. at 589 (citing Cook v. Vennigerholz, 44 Wn.2d 612, 269 P.2d 824 (1954)).

Washington courts recognize a strong public policy favoring and encouraging compromise and the settlement of claims, rather than litigation. See, Seafirst Center Ltd. P’ship v. Erickson, 127 Wn.2d 355, 366, 898 P.2d 299 (1995) (“We...will advance Washington’s strong public policy of encouraging settlements.”); Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851 (1992) (“[T]he law also favors private settlement of disputes.”); Haller v. Wallis, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978) (“If (the judgment) conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties”); Stottlemyre v. Reed, 35 Wn. App. 168, 173, 665 P.2d 1383 (1983) (“[T]he law favors the private settlement of disputes and is inclined to view them with finality.”). Further, compromise or settlement agreements are considered contracts, and their construction is governed by legal principles applicable to contracts. Riley v. State, 88

Wn.2d 933, 937-38, 568 P.2d 780 (1977); Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 413, 36 P.3d 1065 (2001). Consistent with this, in interpreting a stipulation of settlement, the role of the court is to ascertain the parties' intentions and give effect to their intentions. See, Matter of Hollingsworth Estate, 88 Wn.2d 322, 326-27, 560 P.2d 348 (1977).

In this matter, the trial court acted within its discretion when it enforced the parties' CR 2A Agreement. Washington permits parties to move to enforce settlement agreements reached during the course of litigation. See, e.g., Patterson, 93 Wn. App. 579; Morris, 69 Wn. App. at 850. If there is no dispute that the negotiations culminated in an agreement, the Court has the authority to enforce the Settlement Agreement. Howard, 70 Wn. App. at 738-39. "Only if fraud, mistake, misunderstanding, or lack of jurisdiction is shown will a judgment by consent be reviewed on appeal." Baird, 6 Wn. App. at 589. Further, "a trial court's decision that a stipulation was entered with the understanding and agreement of the parties will not be disturbed where it is supported by the evidence." *Id.* (citing Deer v. Deer, 29 Wn.2d 202, 186 P.2d 619 (1947)).

Here, the trial court properly enforced the CR 2A agreement by entering judgment against Mr. Howard and dismissing his claims with prejudice. A party changing his or her mind after the fact, or expressing buyer's remorse is patently insufficient under the controlling law. Mr. Howard was represented by David A. Leen – an attorney who is recognized in the Seattle legal community for his experience and contributions to Washington real estate law – throughout this litigation, and through the entirety of the mediation. His interests were therefore adequately protected and he entered into the CR 2A Agreement of his own volition.

Furthermore, Mr. Howard does not deny that the CR 2A Agreement is valid, and, in fact, compellingly argues in his Opening Brief that the Agreement is binding and enforceable. Opening Brief, p. 23-25. Specifically, he says “Mr. Howard presented, through the declaration of counsel, ample evidence of the existence of a valid and binding agreement between the parties and Deutsche Bank intention [sic] to be bound by the terms of the agreement.” *Id.* at 25. Where Mr. Howard differs with Deutsche Bank, as Trustee is that he believes the CR 2A Agreement

should only be enforced in one direction—against Deutsche Bank, as Trustee. Specifically, he argues that the trial court failed to enforce the CR 2A Agreement as to Deutsche Bank, as Trustee’s obligation to provide Mr. Howard with a copy of an appraisal. *Id.* This argument is illogical for a number of reasons, not the least of which is that counsel for Deutsche Bank, as trustee sent the appraisal to Mr. Howard on May 22, 2013, twelve days before the trial court heard the Motion for Entry of Judgment. CR 257-258. Therefore, by the time the court ruled on the motion, Mr. Howard’s argument that Deutsche Bank, as Trustee failed to provide the appraisal was a moot point.

Mr. Howard’s argument that the parties’ CR 2A Agreement is binding and enforceable concludes in a strange non sequitur. Mr. Howard argues that because Deutsche Bank, as Trustee did not provide the appraisal as agreed, “this Court should reverse the trial Court’s Order of June 7th, 2013 nullify the Sheriffs sale conducted on August 9th, 2013 and remand this matter back to the trial court for consideration of the matter on the merits.” Opening Brief, p. 25. If the CR 2A Agreement was valid and enforceable, as Mr. Howard agrees that it was, then the trial court properly

enforced the Agreement by granting Deutsche Bank, as Trustee's Motion for Entry of Judgment, and entering judgment per the terms of the Agreement. CP 112, 259. Mr. Howard has failed to show how the court's enforcement of the CR 2A Agreement was in any way improper.

2. Mr. Howard's Objection to Proposed Hearing and Request for Opportunity to be Heard was not signed by Mr. Howard's attorney as required by Civil Rule 11.

Civil Rule 11 states that "[e]very pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated." CR 11(a). "The purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system." Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (citing Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, —, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991)) (emphasis original). "Both the federal rule and CR 11 were designed to reduce 'delaying tactics, procedural harassment, and mounting legal costs.'" *Id.*

(citing 3A L. Orland, Wash.Prac., Rules Practice § 5141 (3d ed. Supp.1991)).

In his Opening Brief Mr. Howard falsely claims that “[o]n May 23rd, 2013, Deutsche bank [sic] filed (but did not serve a copy to Mr. Howard) a Motion pursuant to CR 2A to Validate the Mediation agreement, having full knowledge of the fact that Plaintiffs’ [sic] counsel was no longer representing Howard and that Howard was contesting the Mediation and related contracts.” Opening Brief, p. 21. To the contrary, the record shows that as of May 23, 2013, attorney David Leen still represented Mr. Howard. Mr. Howard’s email of May 21, 2013 is addressed to Mr. Leen and copied to Ms. Hunsaker, Deutsche Bank, as Trustee’s counsel. This email is devoid of any indication that Mr. Leen no longer represented Mr. Howard. CP 102-104. Then on June 3, 2013, Mr. Howard sent an email to the court stating, “I have always maintained the right to represent myself Pro-Se in conjunction with David.” CP 108. Therefore, as of June 3, 2013, Mr. Howard still considered Mr. Leen his attorney. The first indication that Mr. Leen would no longer be representing Mr. Howard was Mr. Leen’s Notice of Intent to Withdraw,

which he filed on July 5, 2013, well after Deutsche Bank, as Trustee's Motion for Entry of Judgment was served, heard, and granted. CP 149-151. According to the Notice of Intent to Withdraw, Mr. Leen's withdrawal was effective on July 20, 2013. CP 150. Because Mr. Leen was still Mr. Howard's attorney of record as of May 23, 2013, the date Deutsche Bank, as Trustee filed its Motion for Entry of Judgment, the Motion was correctly served on attorney David Leen, and not on Mr. Howard. CP 250-251.

On May 31, 2013, Mr. Howard filed an Objection to Proposed Hearing and Request for Opportunity to Be Heard, and he falsely signed the Objection as a *pro se* party. CP 94-100. Mr. Leen did not sign the Objection, although he was Mr. Howard's attorney of record at the time. Three days later, Mr. Howard sent an email to the court stating that he "maintained the right to represent [himself] Pro-Se in conjunction with David." CP 108. The Bailiff responded and told Mr. Howard that he was "mistaken about [his] representation status." CP 108. The court then made these emails part of the record and identified them as "Improper Email from Represented Plaintiff and Court's Response." CP 107.

The purpose of CR 11's signature requirement – to deter baseless filings and abuses of the judicial system, and to reduce delaying tactics, procedural harassment, and mounting legal costs – was well served in this case. Mr. Howard's Objection was a baseless opposition to the CR 2A Agreement, which he now argues is a valid and enforceable agreement that should have been enforced against Deutsche Bank, as Trustee. Mr. Howard has also demonstrated his propensity for using delay tactics to avoid the inevitable consequence of his failure to pay his loan. These tactics include enjoining the foreclosure then failing to serve the Summons and Complaint on Deutsche Bank, as Trustee for over a year after obtaining the injunction (CP 9-11, 423; RP 5/25/12, p. 2-3); failing to answer discovery or to meet court ordered deadlines (CP 543-560, 48-50); and refusing to cooperate in formalizing the parties' Settlement Agreement (CP 252-347). Mr. Howard has continued to engage in such tactics even after the Motion for Entry of Judgment was granted by filing a Notice of Appeal, then failing to file the Verbatim Report of Proceedings for seven more months. See the record herein.

On June 10, 2013, the court acted within its discretion when it enforced the CR 2A Agreement and granted Deutsche Bank, as Trustee's Motion for Entry of Judgment over Mr. Howard's improperly filed Objection, and therefore, the Court's decision to grant Deutsche Bank, as Trustee's Motion for Entry of Judgment should be upheld.

B. The August 24, 2012 Order Granting Deutsche Bank, as Trustee's Motion to Dismiss should also be upheld because Mr. Howard did not timely appeal the court's decision; because Mr. Howard settled his claims; and because the trial court's decision to grant the Motion was correct.

1. Mr. Howard failed to timely appeal the court's ruling on the Motion to Dismiss within thirty days of the court's order granting the Motion.

A party is allowed 30 days in which to file a notice of appeal. Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993), citing RAP 5.2(a). When an appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP 18.8(b). Schaefco, 121 Wn.2d at 368, citing State v. Ashbaugh, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978). That rule states:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the

desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

Id. Furthermore, “[a] notice of appeal must...designate the decision or part of decision which the party wants reviewed...” RAP 5.3(a).

In the present case, the trial court granted Deutsche Bank, as Trustee’s Motion to Dismiss on August 24, 2012. CP 46-47. On July 8, 2013, almost a year later, Mr. Howard filed his Notice of Appeal seeking review of the Judgment of Foreclosure “and all subsequent dependent documents.” Notice of Appeal, p. 2. Mr. Howard’s Notice of Appeal does not designate the trial court’s decision to grant Deutsche Bank, as Trustee’s Motion to Dismiss as a decision for review.

Mr. Howard raises this issue for the first time in his Opening Brief where he assigns error to the trial court’s decision to dismiss his “claims for violations of the CPA, Deed of Trust Act and claims for ‘RICO violations, deceptive practices, and promissory estoppel.’” Opening Brief, p. 15. The court dismissed these claims on August 24, 2012, and Mr. Howard’s only remaining claim was fraud in the inducement, which

the court ruled he could only assert as a defense to foreclosure. CP 46. To show that his Complaint was wrongfully dismissed, Mr. Howard devotes approximately half of his Opening Brief to arguing the merits of his dismissed claims. Opening Brief, p. 26-41. Among other things, he argues that the Deed of Trust is defective under the Washington Deed of Trust Act (*Id.* at 27-28); that MERS was not a proper beneficiary of the Deed of Trust and did not have authority to assign the Deed of Trust (*Id.* at 29-31); that OneWest Bank lacked authority to appoint RTS as the successor trustee (*Id.* at 32); that the defendants violated the CPA by recording documents they were allegedly not authorized to record (*Id.* at 32-38); and that he is entitled to quiet title in the subject property because the promissory note and Deed of Trust were split and are therefore unenforceable (*Id.* at 38-41).

These arguments are not properly before this Court because Mr. Howard did not timely appeal the trial court's decision to grant Deutsche Bank, as Trustee's Motion to Dismiss; because Mr. Howard did not designate the court's decision to grant the Motion to Dismiss for review in his Notice of Appeal; and because even if the court's ruling were properly

appealed, the issue before this court would be whether Mr. Howard stated a claim upon which relief could be granted against Deutsche Bank, as Trustee in his Complaint, not whether Mr. Howard's claims succeed on the merits.

Mr. Howard's arguments regarding the merits of his claims also do not amount to extraordinary circumstances that would allow this Court to extend the time for Mr. Howard to appeal the trial court's ruling on Deutsche Bank, as Trustee's Motion to Dismiss, because they provide no explanation as to why Mr. Howard failed to timely appeal the court's ruling. There is also no miscarriage of justice here. Mr. Howard had ample opportunity to prosecute his claims in the trial court, and on April 16, 2013, he chose to settle his claims. This Court should therefore disregard Mr. Howard's arguments regarding the merits of his claims, and affirm the trial court's decision to grant Deutsche Bank, as Trustee's Motion to Dismiss.

2. Mr. Howard's appeal of the court's ruling on Deutsche Bank, as Trustee's Motion to Dismiss should also be denied because Mr. Howard agreed to dismiss all his claims with prejudice in the CR 2A Agreement.

As stated above, principles of finality favor enforcement of settlements. Stottlemyre, 35 Wn. App. at 173. Furthermore, Mr. Howard himself argues that the CR 2A Agreement he signed on April 16, 2013 is binding and enforceable. Opening Brief, p. 23-25. The CR 2A Agreement states, "Plaintiff Howard shall stipulate to a judgment of foreclosure in the amount of \$1,225,039.85 (including dismissal with prejudice of all of Howard's claims and defenses)..." CP 259. By signing the CR 2A Agreement, Mr. Howard waived all claims asserted in this action, including those that were dismissed on August 24, 2012. Therefore, for this reason also, Mr. Howard's appeal of the trial court's decision to grant Deutsche Bank, as Trustee's Motion to Dismiss should be denied.

3. Even if reviewed on the merits, the trial court's decision to grant Deutsche Bank, as Trustee's Motion to Dismiss was correct and should be upheld.

"A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of

law and is reviewed de novo by an appellate court.” Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216, 219 (1994); Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff’d on rehearing, 113 Wn.2d 148, 776 P.2d 963 (1989); Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir.1984). Civil Rule 12(b)(6) provides that a responding party may move to dismiss Plaintiff’s claims if Plaintiff fails “to state a claim upon which relief can be granted.” “A complaint should not be dismissed under Rule 12(b)(6) ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988) (quoting Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99 (1957)). “Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri, 901 F.2d at 699 (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533–34 (9th Cir.1984)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, (2007)).

In this matter, Mr. Howard asserted claims for fraud in the inducement, violation of the Consumer Protection Act (“CPA”), violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)/trespass, promissory estoppel and injunctive relief. However, nowhere in his Complaint or in his First Amended Complaint does Mr. Howard allege any wrongful acts on the part of Deutsche Bank, as Trustee. CP 1-6, 12-18. The RICO and trespass claims were based on Mr. Howard’s allegations that in mid-2009 “agents of the beneficiary of the deed of trust, began trespassing onto the property causing considerable damage to his residence.” CP 14. Mr. Howard’s claims for fraud in the inducement, violation of the CPA, and promissory estoppel centered around his allegation that PCB fraudulently induced him to take out a loan at a higher interest rate than was told he would receive, then failed to refinance the loan at a lower interest rate as promised. CP 13-14.

Deutsche Bank, as Trustee moved to dismiss Mr. Howard's Complaint on May 8, 2012. CP 421-429. On May 25, 2012, the trial court heard Deutsche Bank, as Trustee's Motion to Dismiss as well as Mr. Howard's Motion to Continue the Trial Date. The trial court continued the trial date and also continued the hearing on Deutsche Bank, as Trustee's Motion to Dismiss for three months to give Mr. Howard an opportunity to cure the deficiencies in his Complaint. The court specifically advised Mr. Leen that to survive Deutsche Bank, as Trustee's Motion to Dismiss Mr. Howard would have to amend his Complaint to state a factual basis for alleging trespass against Deutsche Bank, as Trustee. RP 5/25/12, p. 12-16.

On August 21, 2012, Mr. Howard filed his First Amended Complaint and alleged that "LPS Field Services, agents of Indymac Bank, One West Bank, or others, had been there or an appraisal company had been there." CP 14. As Deutsche Bank, as Trustee pointed out in its supplemental briefing, Mr. Howard's Amended Complaint still did not draw any connection between the events complained of and Deutsche Bank, as Trustee. CP 512. Mr. Howard's attorney David Leen also

admitted at both the May 25, 2012 hearing and the August 24, 2012 hearing that the trespassers could have been “garden-variety criminals” or “burglars.” RP 5/25/12, p. 5, RP 8/24/12, p. 8. Regarding Mr. Howard’s other claims, Deutsche Bank, as Trustee argued that while fraud in the inducement could be asserted as a defense against foreclosure, it was not the basis for an affirmative action against Deutsche Bank, as Trustee because the alleged wrongdoer was PCB, and Mr. Howard had failed to draw any connection between PCB and Deutsche Bank, as Trustee. CP 425, 510-512; RP 8/24/12, p. 3-4. On August 24, 2014, the trial court granted Deutsche Bank, as Trustee’s Motion to Dismiss, but held that Mr. Howard’s “fraud in the inducement claim may be asserted as a defense to foreclosure.” CP 46.

The trial court’s decision to dismiss Mr. Howard’s claims should be upheld because it gave Mr. Howard an opportunity to amend his Complaint to state claims against Deutsche Bank, as Trustee upon which relief could be granted, and he failed to do so. On May 25, 2012, the court granted Mr. Howard an opportunity to amend his Complaint and advised him specifically what facts he needed to allege to avoid dismissal. Mr.

Howard did amend his Complaint but still failed to draw any connection between the events alleged and Deutsche Bank, as Trustee. The trial court therefore correctly ruled that Mr. Howard failed to state a claim against Deutsche Bank, as Trustee upon which relief could be granted and dismissed Mr. Howard's claims. RP 8/24/12, p. 12. For all of the foregoing reasons, the trial court's decision to grant Deutsche Bank, as Trustee's Motion to Dismiss should be upheld.

V. ATTORNEY'S FEES AND COSTS

If attorney's fees and costs are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney's fees and costs may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. RAP 18.1(j). Furthermore, under the Deed of Trust securing the loan at issue:

If...there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument...then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument...Lender's actions can include...paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument...Any

amounts disbursed by the Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument.

CP 568.

Pursuant to the Deed of Trust and RAP 18.1(j), if this Court denies Mr. Howard's Petition, Deutsche Bank, as Trustee respectfully requests an award of its reasonable attorney's fees and costs pursuant to RAP 18.1(j) and pursuant to the Deed of Trust.

VI. CONCLUSION

For all the reasons stated above, Deutsche Bank, as Trustee respectfully requests that this Court deny Mr. Howard's appeal and affirm the trial court's rulings.

RESPECTFULLY SUBMITTED this 10th day of July, 2014.

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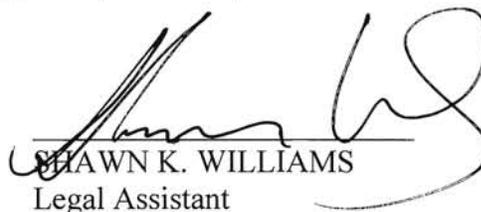
PROOF OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on July 10th, 2014, I caused the attached RESPONDENT DEUTSCHE BANK, AS TRUSTEE'S RESPONSE BRIEF to be served by UPS Overnight to the following address:

Ryan Howard
11310 Riviera Place NE
Seattle, WA 98125

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of July, 2014, at Seattle, WA.


SHAWN K. WILLIAMS
Legal Assistant

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