The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KAREN D. SMITH, Plaintiff, v. THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF THE CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2007-SD1, and NEW PENN FINANCIAL LLP, d/b/a SHELLPOINT MORTGAGE SERVICING, LLC, MTC FINANCIAL INC., DBA TRUSTEE CORPs, and MALCOLM & CISNEROS, A LAW CORPORATION, Defendant	Case No.: 2:19-cv-00538-JCC PLAINTIFF'S RESPONSE TO MALCOLM & CISNEROS'S MOTION TO DISMISS NOTED FOR HEARING JUNE 21, 2019

I. INTRODUCTION

Plaintiff Karen D. Smith ("Plaintiff" or "Ms. Smith") alleges that Malcolm & Cisneros ("MC") violated Washington's Consumer Protection Act ("WCPA") and the Fair Debt Collection Practices Act ("FDCPA") by filing in this Court a time-barred judicial foreclosure complaint on behalf of co-defendant The Bank of New York Mellon ("BONY"). That complaint

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

was subsequently dismissed with prejudice by Judge Thomas S. Zilly, who was sitting in diversity in the case. ("Judicial Foreclosure Complaint"). *See* Complaint, at ¶ 40. Ms. Smith alleges that the judicial foreclosure filed on April 11, 2018 omitted the material fact of the Plaintiffs' September 11, 2009 bankruptcy discharge, a factual omission that was misleading and the equivalent of an affirmative false statement. *See* Amended Complaint, Dkt No. 10 at ¶¶ 67(a)–(c). Additionally, Ms. Smith alleges that the Judicial Foreclosure Complaint demanded an award of all expenses and the costs of collection even though Ms. Smith had no liability on the debt due to the time-barred nature of the action. *Id.* at ¶ 67(c). The basis of MC's motion to dismiss appears to lie in an argument that, because MC was not a named party to the Judicial Foreclosure Complaint, they are not bound by the court's ruling in that case; their brief fails to even mention that the Judicial Foreclosure Complaint at issue was dismissed.[1] Although the causes of action alleged in Amended Complaint are different than the ones in the Judicial Foreclosure Complaint, MC is bound by that decision under the doctrine of collateral estoppel or issue preclusion. Thus, under the standards of a Rule 12(b)(6) motion, where Ms. Smith's allegations must be taken as true, MC's motion to dismiss must be denied.

II. STANDARD OF REVIEW

A. Fed. R. Civ. P. 12(b)(6) Motions to Dismiss

Complaints with enough facts to state a plausible claim to relief survive motions to dismiss. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Claims are plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (*citing Twombly*, 550 U.S. at 555). The court must assume the truth of all factual allegations and construe all inferences from them in the light most favorable to the

[1] The Judicial Foreclosure Complaint is on appeal in the Ninth Circuit under Case No. 18-35950 and Malcolm & Cisneros remain the attorneys of record for The Bank of New York Mellon in that matter.

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

nonmoving party. *Cahill v. Liberty Mut. Ins.Co.,* 80 F.3d 336, 337-38 (9th Cir.1996); *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir.2002); *Twombly*, *at* 555-56 (2007). Plausibility is a context-specific determination requiring reviewing courts to draw on common sense. *Iqbal,* 556 U.S. at 679.

District courts should grant leave to amend even if no such request was made, unless the pleading could not possibly be cured by the allegation of other facts. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 968, (9th Cir. 2016). *See also Doe v. United States,* 58 F.3d 494, 497 (9th Cir.1995). The Ninth Circuit reviews district court denials for leave to amend *de novo* ensuring the "complaint would not be saved by any amendment." *Carvalho v. Equifax Info. Svs., LLC*., 629 F.3d 876 (9th Cir. 2010).

1. Plausible Complaints Survive Rule 12(b)(6) Motions to Dismiss

The Ninth Circuit has explained the "plausibility" requirement as follows:

> If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6) … The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only 'plausibly suggest an entitlement to relief.'

Starr v. Baca, 652 F.3d 1202, 1216-17 (9th Cir. 2011) (citing *Iqbal*, 129 S. Ct. at 1951). Stated more succinctly, "*Iqbal* demands more of plaintiffs than bare notice pleading, *but it does not require us to flyspeck complaints looking for any gap in the facts*." *Lacey v. Maricopa County (Arpaio)*, 693 F.3d 896, 924 (9th Cir. 2012) (en banc) (citations omitted) (emphasis added).

2. Notice Pleading Standards Apply

The Ninth Circuit has held that *Iqbal*, *Twombly*, and their progeny did little to alter federal pleading standards beyond notice pleading, as insufficient complaints would be dismissed under either the current or former standards. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 963 (2009), *rev'd on other grounds by Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011) ("Even before the Supreme Court's decision[s] in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, it was likely that conclusory allegations of motive, without more, would not have been enough to survive a motion to

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

dismiss"). It remains the case that a complaint requires a "short and plain statement of the claim showing the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting Twombly, 127 S. Ct. at 1964). A plaintiff's allegations need "only enough facts to state a claim for relief that is plausible on its face." *Twombly*, 556 U.S. at 570. "[W]e do not require heightened fact pleading of specifics..." *Id*.

III. ARGUMENT

MC's motion to dismiss rests on a faulty premise: that the dismissal of the Judicial Foreclosure Complaint against Ms. Smith has no bearing on the outcome of this lawsuit. Rather than accept this court's judicial decision in that case, MC's motion to dismiss seeks to relitigate issues already determined by this Court. *See Bank of New York Mellon as Tr. for Certificate Holders of CWABS, Inc. v. Smith*, C18-764 TSZ, 2018 WL 5024033 (W.D. Wash. Oct. 17, 2018) (dismissing judicial foreclosure complaint as time-barred). Although not addressed by MC's motion to dismiss, the main issue at hand is whether MC is estopped from relitigating the time-barred nature of the Judicial Foreclosure Complaint.

A. MC is Collaterally Estopped from Relitigating Issues of Fact Between the Parties

Under federal common law, the preclusive effect of a prior federal diversity judgment is determined by reference to the law of the state where the court sat. *NTCH-WA Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019). In Washington, the doctrine of collateral estoppel prevents the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal. *Billings v. Town of Steilacoom*, 408 P.3d 1123, 1131 (Wash. Ct. App. 2017), *review denied,* 190 Wn.2d 1014, 415 P.3d 1199 (2018). In contrast with claim preclusion or res judicata, instead of preventing a second assertion of the same claim or cause of action, collateral estoppel prevents a second litigation of *issues* between the parties, when a different claim or cause of action is asserted. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

Res judicata "is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation." *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967).

Collateral estoppel, or issue preclusion, applies when the subsequent suit involves a different claim but the same issue. To establish collateral estoppel, a party must establish the following: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 957 (2004).

1. The Issue in the Earlier Proceeding was Identical

This matter involves the identical foreclosure action previously litigated and ruled upon in response to the Judicial Foreclosure Complaint. MC, the defendant in this case, there represented BONY, the plaintiff in the earlier matter, and made the substantially identical argument that the foreclosure was not time-barred.

2. The Earlier Proceeding Ended in a Judgment on the Merits

In its Order Granting Defendant Karen Smith's Motion to Dismiss, the district court considered the identical argument made by MC on behalf of BONY, and dismissed the foreclosure action with prejudice. *Bank of New York Mellon as Tr. for Certificate Holders of CWABS, Inc. v. Smith*, C18-764 TSZ, 2018 WL 5024033 at *3 (W.D. Wash. Oct. 17, 2018).

3. Privity is Found in an Agency Relationship

In Washington, courts have found privity where there is a "special relationship" between the defendants in each suit. *See U.S. v. Deaconess Medical Ctr. Empire Health Srvc.,* 140 Wn.2d 104, 111, 94 P.2d 830 (2000) (case dealing with res judicata). Broadly speaking, one is in privy

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

when he is "so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case." *Smith v. Jenkins*, 562 A.2d 610, 615 (D.C. 1989). Thus, one particular form of privity may arise when two parties are bound by an agency relationship. *See Herrion v. Children's Hosp. Nat'l Med. Ctr.*, 786 F.Supp.2d 359, 371 (D.C. Cir. 2011). In that case, a medical center was held vicariously liable for the actions taken by security officers in the course of their employment, and the officers were subsequently sued individually for the same actions. *Id.* The court found that the two suits "share[d] a common nucleus of fact and both turn[ed] on the same conduct allegedly taken in the scope of the Security Officer's agency relationship with Children's National." *Id.* In the first lawsuit, *Herrion* claimed the officers were the center's "agents" and the center was liable for the officers' actions. The court agreed and held that the center and officers were in effect "one and the same party" for the purposes of res judicata. *Id.* at 372.

The *Herrion* reasoning in regard to privity applies here. MC represented BONY in the time-barred Judicial Foreclosure Complaint and they acted as debt collectors and agents to BONY. *McNair v. Maxwell & Morgan, PC*, 893 F.3d 680, 683 (9th Cir. 2018).[2] It is undisputed that MC and BONY had an agency relationship as they were the attorneys of record in that lawsuit. As such, their actions were adequately represented in the action since they were the ones actually litigating the claims and are thus in privity with BONY. *See Hackler v. Hackler*, 37 Wash. App. 791, 794-95, 683 P.2d 241, 243 (1984). (There is an exception to the privity requirement where a person who is fully acquainted with a lawsuit's character and object and interested in its results is estopped by the judgment as fully as if he had been a party).

---

[2] MC claims that it could not collect due to the bankruptcy, but that argument is wrong. Under Washington law, even if a waiver eliminates a servicer's ability to collect a deficiency judgment, *see* RCW 61.12.070, the amount of deficiency can only be calculated relative to the court's judgment and the property's sale price at foreclosure. RCW 61.12.100 (deficiency is the amount "remaining unsatisfied after applying the proceeds of the sale of mortgaged property"). This means that, between the Court's judgment and the foreclosure sale, a servicer that has waived its right to a deficiency nonetheless has a money judgment that would be enforceable, for example. *See In re Quintana*, 915 F.2d 513, 516 (9th Cir. 1990) (holding that, under Idaho law, a creditor's waiver of deficiency judgment was irrelevant until after the foreclosure sale).

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

4. Collateral Estoppel Will Work No Injustice Toward MC

"The injustice component is generally concerned with procedural, not substantive irregularity," and "the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum." *Christensen*, 152 Wn. 2d. at 309, 96 P.3d at 962. MC litigated the case at the trial court on behalf of BONY and is currently litigating the appeal to the Ninth Circuit. If MC believes that it never had a full and fair opportunity to litigate the issue—on which its own interests are substantially identical to those of BONY—they have not alleged that in its motion to dismiss. And since they were the attorneys, presumably they have advanced the best argument they had at the time.

B. The Plaintiff's Claim for Judicial Foreclosure Would Be Time-Barred If Not Estopped

Under Washington law, RCW § 4.16.040 provides that "[a]n action upon a contract in writing" must be "commenced within six years." *See Edmundson v. Bank of Am.*, 194 Wn. App. 920, 927, 378 P.3d 272 (2016). In Washington, promissory notes and deeds of trust are governed by the statute of limitations imposed by RCW 4.16.040. RCW 4.16.040(1); *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 784–85, 239 P.3d 1109 (2010). In *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn. App. 739, 904 P.2d 1176 (1995), the court held that the legislature intended to apply RCW § 4.16.040 when it stated in RCW § 61.24.020 that "[e]xcept as provided in this chapter, a deed of trust is subject to all laws relating to mortgages on real property." *Walcker,* 79 Wn. App. at 743–44. The Washington Deeds of Trust Act ("DTA"), RCW § 61.24, is otherwise silent on the statute of limitations for non-judicial foreclosures.

In the present case, installment payments were due until Ms. Smith received her discharge on September 11, 2009. Without tolling, therefore, the six-year statute of limitations to enforce Ms. Smith's deed of trust would have expired on September 11, 2015, more than two and a half years before MC filed the Judicial Foreclosure Complaint on behalf of BONY on April 11, 2018 in King County Superior Court, in Washington state. *See* Ex. 4 of Motion to Dismiss, Judicial Foreclosure Complaint, Dkt No. 21-1. MC can only prevail, therefore, if it can

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

demonstrate that its nonjudicial foreclosures collectively tolled the statute of limitations past April 11, 2018.[3]

1. Tolling the Statute of Limitations

Commencement of non-judicial foreclosure proceedings tolls the statute of limitations. *Fujita v. Quality Loan Serv. Corp. of Washington*, No. 16-925, 2016 WL 4430464 (W.D. Wash. Aug. 22, 2016); *Edmundson*, 194 Wn. App. at 930, 378 P.3d 272.[4]

The purpose of a notice of default is to notify the debtor of the amount to cure a default and that there is a statutory right to cure the default prior to the recording of a foreclosure sale. RCW § 61.24.030; *Cedar West*, 434 P.3d at 562. In contrast, the Notice of Trustee's Sale is recorded to give notice to the whole world that a foreclosure sale is scheduled, specifying the when and where a borrower's home will actually be sold. RCW § 61.24.040; *Cedar West Owners Ass'n v. Nationstar Mortg., LLC*, 434 P.3d 554, 562 (Wash. Ct. App. 2019). Where the Notice of Default only gives notice to the borrower and grantor, the Notice of Trustee's Sale must also be mailed to other interested parties. RCW § 61.24.040(1)(b)(ii–iv), (1)(c–d). These parties include non-borrower occupants of the property, lienholders, and others with potential legal interests in the property. *Id.*

The Washington Supreme Court has also recognized that under RCW § 61.24.030–040 of the DTA, "foreclosure . . . beg[i]n[s] with receipt of the notice of sale and foreclosure." *Cox v. Helenius*, 103.Wn.2d 383, 387, 693 P.2d 683, 686 (1985) (a lawsuit filed after receiving the notice of default but prior to "initiation of foreclosure" precluding the lender from pursuing a non-judicial foreclosure); *see also Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100, 1105 (2015) (the provisions of RCW § 61.24.030 are "mandatory prerequisite[s] to notice

---

[3] Although it is in fact unclear whether a non-judicial foreclosure tolls the statute of limitations at all. *See U.S. Bank v. Ukpoma*, 438 P.3d 141, 145 (Ct. App. 2019).

[4] However, the filing of a notice of default does *not* definitively toll. *Cedar West Owners Ass'n v. Nationstar Mortg., LLC*, 434 P.3d 554, 562 (Wash. Ct. App. 2019).

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

of a trustee's sale" and that if they are not satisfied "a trustee may not initiate . . . a non-judicial foreclosure.").

2. MC's Tolling Calculations are Incorrect, Inconsistent, and Misleading

In its Motion to Dismiss, MC uses a calculation methodology that disregards both the district court's earlier ruling and Washington state law to arrive at an expiry date for the statute of limitations that allows its April 11, 2018 action to proceed. This section explores the three methodologies that are relevant here, and explains the multiple errors MC has made.

The district court's methodology

In *The Bank of New York Mellon v. Karen D. Smith,* Cause No. 18-2-09839-4 SEA, the district court accepted Ms. Smith's calculation of the dates and durations during which the statute of limitations on MC's right to bring suit was tolled. *Bank of New York Mellon as Tr. for Certificate Holders of CWABS, Inc. v. Smith*, C18-764 TSZ, 2018 WL 5024033 (W.D. Wash. Oct. 17, 2018). According to the court's ruling, the tolling events were as follows for each of the five non-judicial Notices of Trustee's Sale:

- Foreclosure Notice 1: Issued May 27, 2009, Foreclosure Notice 1 predated the September 11, 2009 bankruptcy discharge and does not toll the statute of limitations.[5] Plaintiff's Request for Judicial Notice ("RJN"), Ex. A.
- Foreclosure Notice 2: Issued July 19, 2010 with a sale date of October 15 = 88 days; statute of limitations delayed to December 8, 2015. RJN, Ex. B.
- Foreclosure Notice 3: Issued April 19, 2011 with a sale date of July 22 = 94 days; statute of limitations delayed to March 11, 2016. RJN, Ex. C.
- Foreclosure Notice 4: Issued March 27, 2015 with a sale date of July 31, 2015 = 126 days; statute of limitations delayed to July 15, 2016. RJN, Ex. D.

[5] The foreclosure notices are numbered 1 through 5 here for consistency with the Plaintiff's Amended Complaint. In its Motion to Dismiss, MC omits mention of the pre-discharge notice and numbers the remaining notices 1 through 4 (corresponding to 2 through 5 here).

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

- Foreclosure Notice 5: Issued November 14, 2016 with a sale date of March 24, 2017. By Ms. Smith's calculations, this foreclosure notice was issued after the expiry of the statute of limitations on July 15, 2016, and was therefore time-barred. *See* Ex. B of Amended Complaint, Foreclosure Mediation Certification at Dkt. No. 10-2.

In total, then, the statute of limitations was tolled for a total of 308 days between July 19, 2010 and July 31, 2015, and—had it not expired in July 2016—would have been tolled for an additional 130 days between November 2016 and March 2017, for a total of 438 days.

MC's assertion, calculated correctly

In its Motion to Dismiss, MC claims that RCW § 61.24.030(8) entitles it to an additional 30 days of tolling for each of the final four notices of foreclosure, for a total of 120 days. Motion to Dismiss, Dkt No. 21 at 8. MC further asserts that the tolling period following Foreclosure Notice 4 should have extended past the designated sale date of July 31, 2015 to October 30, 2015, the date on which the sale was discontinued. *Id*. In addition, MC asserts that the tolling period following Foreclosure Notice 5 should have extended past the designated sale date of March 24, 2017 to January 10, 2018, the date on which mediation ended. *Id*. In *The Bank of New York Mellon v. Karen D. Smith,* Cause No. 18-2-09839-4 SEA, the district court found none of these arguments persuasive. *Bank of New York Mellon as Tr. for Certificate Holders of CWABS, Inc. v. Smith*, C18-764 TSZ, 2018 WL 5024033, *2 (W.D. Wash. Oct. 17, 2018). Nevertheless, if this Court were to grant MC an extra 30 days for each post-discharge non-judicial foreclosure action *and* presume that the statute were tolled through the discontinuation of Foreclosure 4 *and* during mediation, the calculation would properly run as follows:

- Foreclosure Notice 1: As noted, Foreclosure Notice 1 was issued before the bankruptcy discharge and does not toll the statute of limitations. RJN, Ex. A.
- Foreclosure Notice 2: Issued July 19, 2010 with a sale date of October 15 = 88 days; with 30 days added, the statute of limitations is delayed to January 7, 2016. RJN, Ex. B.

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

- Foreclosure Notice 3: Issued April 19, 2011 with a sale date of July 22 = 94 days; with 30 days added, the statute of limitations is delayed to May 10, 2016. RJN, Ex. C.
- Foreclosure Notice 4: Issued March 27, 2015 and discontinued October 30 = 247 days; statute of limitations delayed to January 12, 2017. RJN, Ex. D.
- Foreclosure Notice 5: Issued November 14, 2016. RJN, Ex. E. Mediation initiated November 17, 2016 and continued through January 10, 2018 = 422 days; with 30 days added, the statute of limitations is delayed to April 9, 2018. *See* Ex. B of Amended Complaint, Foreclosure Mediation Certification at Dkt. No. 10-2.

By these calculations, MC's judicial foreclosure action initiated on April 11, 2018 occurred two days after the expiry of the statute of limitations, and was therefore time-barred.

MC's assertion, if calculated MC's way

Perhaps recognizing its near-miss, MC introduced a novel and highly non-standard method of calculating dates in its Motion to Dismiss. The durations that MC gives for each of the non-judicial tolling periods are calculated inclusively, rather than exclusively. Motion to Dismiss, Dkt No. 21 at 8. For example, the period between January 1 and January 3 would ordinarily be calculated as two days, via simple subtraction. MC's method would appear to count January 1, January 2, and January 3 each as separate days, for a total of three days. This method is explicitly rejected by Washington state law, which specifies that dates shall be calculated by excluding the first day of the range and including the last. RCW § 1.12.040.

Using this unusual and extralegal methodology, MC arrives at a figure of 89, 95, 218, and 423 days, respectively, for each of the latter four non-judicial foreclosure actions, plus the additional 120 days (4 × 30) to which it claims it is entitled via RCW § 61.24.030(8). Motion to Dismiss, Dkt No. 21 at 8. The four added days mean that the expiry of the statute of limitations is pushed from April 9, 2018 to April 13—two days *after* MC filed its judicial foreclosure action, rather than two days before.

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

Even if one were to accept without question the assumptions and calculations that enabled MC to arrive at a date of April 13, 2018 for the final expiry of the statute of limitations, however, that figure can only be derived by tolling the statute for 30 full days for *each* of the final four Notices of Trustee's Sale, on the assumption that each one must come at least 30 days after the associated Notice of Default. But because MC only ever issued two Notices of Default—one of which was the basis for Foreclosure Notices 2 and 3, and the other of which was the basis for Foreclosure Notices 4 and 5—allotting a full 120 days of tolling means counting the thirty-day period twice for each of the two Notices of Default, a practice for which there is no basis in state law. Even if each Notice of Default were to automatically confer a 30-day toll, that can only provide MC with an additional 60 days at most, which would move the expiry date from January 16 to March 17, 2018—and the April 11 judicial action is therefore still time-barred.

MC's inconsistent and illogical date calculations leave Ms. Smith with the overwhelming impression that MC selected a date or range of dates at which it would prefer the statute of limitations to have expired, and worked backward from the selected date to develop an argument that might be stretched to provide support for it, heedless of the actual events involved or the logic behind its claims.

3. Acknowledgement and Statute of Limitations

As discussed above, MC is bound by the decision *The Bank of New York Mellon as Tr. for Certificate Holders of CWABS, Inc. v. Smith*, C18-764 TSZ, 2018 WL 5024033 (W.D. Wash. Oct. 17, 2018). Alternatively, as discussed above, the statutes of limitations expired on September 11, 2015 or with tolling, it expired on July 15, 2016. See Section III.A and III.B.1 – B.3, *supra*. Nonetheless, should the court entertain MC's tolling argument that extends the statute of limitations beyond the start of the FFA mediation which initiated on November 17, 2016 and ended in bad faith on January 10, 2018, Ms. Smith's application for a loan modification that was later rejected due to lack of contractual authority to modify the loan was

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

not a written acknowledgement of the debt under RCW 4.16.280. *See* Ex. B of amended complaint, Foreclosure Mediation Certification at Dkt. No. 10-2.

In Washington, a creditor has a right to payment on a debt even after the statute of limitations period has expired because the expiration of the limitations period extinguishes the remedy but it does not eliminate the debt. *Lombardo v. Mottola*, 18 Wn.App. 227 (1977) *see generally*, 51 Am. Jur. 2d Limitation of Actions §22 (1970). Based on this principle, RCW 4.16.280, which allow a written acknowledgement or promise signed by the debtor that indicates an intention to repay, merely provides a means "whereby the remedy for recovery on the debt may be revived." *Id*. Neither the actual language of the statute, nor the legislative intent being inferred therefrom, allows for the revival of those debts that have been discharged in bankruptcy.

Cases involving the debtor's filing for bankruptcy protection and those that do not is determinative in the analysis of whether RCW 4.16.280 applies. Here, the 2011 bankruptcy discharge extinguished Ms. Smith's original mortgage debt and her application for a loan modification did not result in any agreement for a loan modification. The case of *Thacker v. Bank of New York Mellon*, No. 18-5562 RJB, 2019 WL 1163841 at *6 (W.D. Wash. Mar. 13, 2019) that recently applied this concept to a discharged debt relied on a single case in support of its holding, *In re Receivership of Tragopan Props., LLC*, 164 Wn.App. 268, 280, 263 P.3d 613 (2011) is distinguishable because the borrower made a written application for a loan modification that included statements that the *Thacker* court relied on to determine that the borrower had an intent to pay the debt, a requirement to find a written acknowledgment. *Thacker*, 2019 WL 1163841 at *6. In contrast here, documents submitted for a loan modification application are not referenced in the complaint or in evidence at this stage of the litigation. In viewing the facts in the light most favorable to the Plaintiff, the only facts alleged in the Amended Complaint are the fact that Plaintiff was referred to the foreclosure mediation program on November 30, 2016, that she participated in two mediation sessions, that Ms. Smith asserted that her property was time-barred at the mediation and that several months later she was

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

informed that the investors on her mortgage loan had not given contractual authority to modify the loan. Amended Complaint, Dkt No. 10, ¶ 35-38. Since the allegation is that Ms. Smith maintained that the debt was time-barred throughout the FFA mediation and nothing about the language used or documents submitted for a loan modification, there is not enough evidence to conclude that Ms. Smith ever recognized the debt and intended to pay it. Thus, any assertions that Ms. Smith acknowledged the debt are false, and this Court should deny the argument.

C. Plaintiff Has Pled a Legally Cognizable WCPA Claim Against MC

Plaintiff alleges all the required elements sufficiently stating her claim under Washington's Consumer Protection Act ("CPA"): (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to the Plaintiffs' business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co,* 105 Wn.2d 778, 780 (1986).

1. Filing a Time Barred Complaint is an Unfair and Deceptive Act

MC argues that once a lawsuit is filed, the matter becomes a private dispute not occurring in trade or commerce. *Blake v. Fed. Way. Cycle* Ctr., 40 Wn.App. 302, 312, 698 P.2d 578, 584 (1985). However, the cited authority in *Blake* pre-dates *Hangman Ridge* as well as the Legislature's passing of RCW 61.24, otherwise known as Washington's Foreclosure Fairness Act (FFA). MC's argument stands in stark contrast to *Hangman Ridge,* which plainly requires the Legislature to make determinations of unfairness. *Hangman Ridge,*105 Wn.2d at 786-87, 719 P.2d 531. Here, the Legislature did just that, but not until June of 2011, when it passed the FFA. Second Substitute House Bill, 2 SHB 1362 2011, pg. 1. The FFA specifically states,

> It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86. RCW, for any person or entity to: (a) Violate the duty of good faith under RCW 61.24.163;….

RCW 61.24.135(2). Plaintiff did allege that, "at the conclusion of the parties' participation in Washington's foreclosure mediation program a foreclosure mediator certified defendants' breach of their duty to mediate in good faith" under RCW 61.24.163. Amended Complaint, Dkt. No. 10,

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

pg. 9, ¶ 63. Plaintiff alleged that the foreclosure mediator's certification cited defendants' non-responsiveness, lack of contractual authority to modify the loan, late mediation fee payment, and failure to appear as basis for her determination. Amended Complaint, Dkt. No. 10, pg. 9, ¶ 64. MC is mentioned all over the foreclosure mediator's certification. *See* Ex. B of Amended Complaint, Foreclosure Mediation Certification at Dkt. No. 10-2, pg. 2. The plain language of the statute provides that "[i]t is an unfair or deceptive act . . . for any person or entity to: (a) Violate the duty of good faith under RCW 61.24.163." RCW 61.24.135(2). Therefore, plaintiff sufficiently states *per se* violations of the first two *Hangman Ridge* elements against MC. *See Minnick v. Clearwire U.S., LLC*, 683 F. Supp. 2d. 1179, 1186 (W.D. Wash. 2010.)

2. In this instance filing of a Judicial Foreclosure Complaint is a matter that is in trade or commerce

Plaintiff pleaded that MC "used false, deceptive, or misleading representations or means in connection with the collection of an alleged debt…." Amended Complaint, Dkt. No. 10, ¶67. Plaintiff further alleged that MC "filed a lawsuit demanding an award of all expenses and costs of collection even though plaintiff's personal liability on the debt was previously discharged in bankruptcy." *Id. at* ¶67(c). This places MC's fee collection practice into the realm of the entrepreneurial and commercial, and thus falls within the sphere of "trade or commerce" under RCW 19.86.010(2) and 19.86.020.

In a legal practice, entrepreneurial aspects include 'how the price of legal services is determined, billed, ***and collected ….***" *emph. added*. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695, 699 (Wash. 2009) (quoting *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163, 168 (Wash. 1984)). Collecting, "all expenses and costs of collection," on a matter otherwise extinguished by statute of limitations is the entrepreneurial commercial plunder the CPA seeks to prohibit especially in light of its public impact.

3. Plaintiff sufficiently states MC's conduct affects the public interest because MC has the capacity to injure other persons.

RCW 19.86.093 states:

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

> In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:
>
> (1) Violates a statute that incorporates this chapter;
>
> (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
>
> (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

Defendants' certified bad faith under RCW 61.24.163 is incorporated into RCW 19.86 through RCW 61.24.135.

MC was mentioned by name in the foreclosure mediator's certification. Amended Complaint, Dkt. No. 10-2, pg. 2. The foreclosure mediation certification mentions MC both in "c/o" the beneficiary and as the representative of the beneficiary in attendance at the foreclosure mediation. *Id at* pg. 2. The foreclosure mediator certified MC's participation in bad faith. *Id at* pg. 3. That certification triggered the incorporation of the CPA through RCW 61.24.135(2). *See supra*.

MC's actions undermine Washington's Deeds of Trusts Act containing a specific legislative declaration of public interest.

The three main policies of the Washington's Deeds of Trusts Act ("DTA") are: (1) the nonjudicial foreclosure process should remain efficient and inexpensive, (2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) the process should promote the stability of land titles. *Bain v. Metro. Mortg. Grp., Inc.*,175 Wn.2d 83, 93, 285 P.3d 34 (2012). To further those policies, the Washington state Legislature amended the DTA in 2011 with the Foreclosure Fairness Act ("FFA"). The Legislature declared that prolonged foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state, and it enacted procedures to help encourage and strengthen the communication between homeowners and lenders and to assist homeowners in navigating through the foreclosure process. RCW 61.24.005 Findings-Intent—2011c58(1). The Legislature further declared it intends to

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

> (a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;
>
> (b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and
>
> (c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain a professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation."

RCW 61.24.005 Findings-Intent—2011c58 (2). MC's conduct undermines the Legislature's intent of efficiency, cost-effectiveness, and title clarity. Plaintiff did plead in the amended complaint that the foreclosure mediator indicated MC's conduct breached the duty of good faith by failing to respond, lacking contractual authority to modify the loan, late with mediation fee payment, and failing to appear, as basis for her determination. Taken all as true and construed in light favorable to plaintiff, MC made a mockery of Washington's Deeds of Trusts Act by completely ignoring it along with the applicable statute of limitations. The impact of MC's conduct is not limited to Washington.

4. MC has the capacity to injure other persons.

MC's website states it is licensed to practice in nineteen (19) states, and that it has "established a strong national presence in state and federal courts throughout the country." Attached hereto as Ex. A Ex. A is a true and correct copy of the page from MC's website found at https://www.malcolmcisneros.com/multi-state-jurisdiction (*hereinafter* "Ex. A."). The site further states that MC "represents financial institutions in connection with their defaulted consumer and commercial loans." Ex. A. Therefore, Plaintiff sufficiently states a real and substantial potential for repetition, and not just the hypothetical possibility of the repetition of MC's unfair or deceptive acts. *See Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604, 200 P.3d 695 (2009).

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

5. Conduct Proximately Caused Alleged Injury.

Plaintiff alleges that she "would not have been injured in her business and property but for defendants' dilatory and manipulative conduct." Dkt. No.10, pg. 13, ¶¶80-85. Plaintiff alleges she is a certified residential real estate appraiser but has been unable to accept FHA or VA appraisal assignments for 12 years because of the continuous and unending foreclosure status imposed by defendants. *Id.* Such wage loss may be recovered under the CPA. *See Urner Johnson v. JP Morgan Chase*, 3:14-cv-05607-RJB, Dkt. No. 84, pg. 17 (W.D. Wash., Aug. 11, 2015) (court held, in the summary judgment context, that plaintiff's inability to transition to higher paying work and the necessity plaintiff's spouse to take on extra work pointed to sufficient issues of fact as to whether plaintiffs were injured). Indeed, the Plaintiff here alleged in her complaint that she "refrained from re-applying for a position on the FHA Roster as well as the VA Roster because the prolonged foreclosure disqualifies her from those rosters." Amended Complaint, Dkt. No.10, pg. 13, ¶83.

MC's actions prolong all the alleged injuries. Plaintiff did plead that "[B]ut for defendants' dilatory conduct plaintiff would not be incurring the arrears, additional costs and expenses described above[.]" Plaintiff also alleged that she "was injured in the form of a negatively impacted credit profile for over ten years. Defendants' failure to mitigate left plaintiff with a credit profile in flux and eliminated hope of moving forward pending resolution." Amended Complaint, Dkt. No. 10, pg. 12, ¶79.

D. Plaintiff Has Pled a Legally Cognizable FDCPA Claim Against MC

MC relies on the recent case of *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019) to claim that MC could not have violated the FDCPA because the underlying debt was not time-barred and that MC Judicial Foreclosure Complaint was not seeking a deficiency judgment and, in any event, could not obtain a deficiency because the debt was discharged in bankruptcy. Motion to Dismiss, Dkt No. 21 at 11–12. For the reasons discussed above the debt was time-barred. However, there is nothing in the Judicial Foreclosure Complaint to support the argument that it was for a judgment of foreclosure only.

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

Here, MC qualifies as a "debt collector" under 15 U.S.C. § 1692a(6). As alleged in the Amended Complaint, MC started collecting on this debt after it was already in default, and their principal purpose of business is to collect or attempt to collect, directly or indirectly, delinquent consumer debts. Amended Complaint, Dkt No. 10, at ¶ 12. Additionally, Ms. Smith alleges that the Judicial Foreclosure Lawsuit demanded an award of all expenses and costs of collection without ever mentioning Ms. Smith's bankruptcy discharge. Amended Complaint, Dkt No. 10, at ¶¶ 67 (a)-(c). The Judicial Foreclosure Complaint explicitly sought a money judgment from Ms. Smith. Judicial Foreclosure Complaint, Dkt No. 21-4. In the Ninth Circuit, judicial foreclosure proceedings seeking a deficiency judgment can constitute "debt collection" activities. *McNair v. Maxwell & Morgan PC*, 893 F.3d 680, 683 (9th Cir. 2018). Under RCW 61.12.100, a deficiency judgment can only be calculated relative to the court's judgment and the property's sale price at foreclosure. RCW 61.12.100 (deficiency is the amount "remaining unsatisfied after applying the proceeds of the sale of mortgaged property"); *Ward v. Bank of America*, WL 2103124 at *9, No. 2:19-cv-00185, (W.D. Wash. May 14, 2019). Thus, seeking a money judgment as the Judicial Foreclosure Complaint does here, is an enforceable judgment. *In re Quintana*, 915 F.2d 513, 516 (9th Cir. 1990) (holding that, under Idaho law, a creditor's waiver of deficiency judgment was irrelevant until after the foreclosure sale). Consequently, without any mention of the bankruptcy discharge in the Judicial Foreclosure Complaint, the action sought to enforce Ms. Smith's obligation to pay money, bringing it within the debt collector definition of 11 U.S.C. § 1692a(6). *Ward,* WL 2103124 at *9. Lastly, the fact that Ms. Smith obtained a discharge under 11 U.S.C. § 727 does not negate the fact that MC nonetheless attempted collected on the debt in violation of 15 U.S.C. §§ 1692e, e(10), e(2)(A), 1692d(4), 1692f, and 1692f(1).

IV. CONCLUSION

MC has not met its burden on motion to dismiss and its motion to dismiss should be denied in its entirety. Alternatively, the Plaintiff's request leave to amend this complaint.

HENRY & DEGRAAFF, P.S.
787 MAYNARD AVE S
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

Dated this 17th of June 2019.

/s/ Christina L Henry
Christina L Henry, WSBA# 31273
Henry & DeGraaff, PS
787 Maynard Ave S., Seattle, WA 98104
Tel# 206-330-0595 / Fax@ +1-206-400-7609
chenry@hdm-legal.com

/s/ Arthur Ortiz
Arthur Otiz, WSBA# 26676
The Law Office of Arthur Ortiz
6015 California Ave SW, No. 203
Seattle, WA 98136-1674
Tel# 206-898-5704
arthur@aeolegal.com

V. CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document to be filed with the Clerk of the Court via CM/ECF system. Pursuant to their ECF agreement, the Clerk will give notice of this filing to all counsel of record via email.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed June 17, 2019 at Seattle, Washington.

s/ Christina L Henry
Christina L Henry