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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AURORA FINANCIAL GROUP,  
INC.,

Plaintiff,

v.

MARY K. TOLLEFSON, et al.,

Defendants.

CASE NO. C20-0297JLR

ORDER GRANTING IN PART  
AND DENYING IN PART  
THIRD-PARTY DEFENDANT’S  
MOTION TO DISMISS  
AMENDED THIRD-PARTY  
COMPLAINT

**I. INTRODUCTION**

Before the court is Third-Party Defendant McCarthy & Holthus, LLP’s (“MH”) motion to dismiss Defendant Mary K. Tollefson’s third-party claims. (MTD (Dkt. # 20).) The court has reviewed MH’s motion, the parties’ submissions filed in support of and in opposition to MH’s motion, the relevant portions of the record, and the applicable law.

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1 Being fully advised,<sup>1</sup> the court GRANTS in part and DENIES in part MH's motion. The  
2 court DISMISSES all of Ms. Tollefson's claims against MH except for a portion of her  
3 negligent misrepresentation claim. As described below, the court DISMISSES these  
4 claims WITHOUT PREJUDICE and with leave to amend except for those claims which  
5 are based on statements MH made during the course of judicial proceedings. These  
6 statements are immune from suit, and the court DISMISSES Ms. Tollefson's claims that  
7 are based on those statements WITH PREJUDICE and without leave to amend.

## 8 II. BACKGROUND

9 On May 22, 2015, Ms. Tollefson executed and delivered to American Financial  
10 Network a promissory note in the amount of \$297,924.00. (*See* Am. Ans. (Dkt. # 16)  
11 ¶¶ 35-36;<sup>2</sup> *see also* Ans. (Dkt. # 2) Ex. D (Dkt. # 2-4) at 2-3; Not. of Rem. (Dkt. # 1) Ex.  
12 A (Dkt. # 1-2).) At the same time, Ms. Tollefson executed a deed of trust to Mortgage  
13 Electronic Registration System, Inc. ("MERS"), as nominee for American Financial  
14 Networks, Inc., encumbering her home as security for the promissory note. (*See* Am.  
15 Ans. ¶¶ 35-36; *see also* Ans. Ex. D at 4-15; Not. of Rem. Ex. B (Dkt. # 1-3).) The deed  
16 of trust was recorded on June 11, 2015, with the King County Auditor under Instrument  
17 No. 20150611000745. (Ans. Ex. D.) On December 5, 2017, the deed of trust was

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20 <sup>1</sup> No party requests oral argument (*see* MTD at 1; Resp. (Dkt. # 25) at 1), and the court  
does not consider oral argument to be helpful to its disposition of the motion, *see* Local Rules  
W.D. Wash. LCR 7(b).

21 <sup>2</sup> Section IV of Ms. Tollefson's amended answer contains counterclaims and third-party  
22 claims. (*See* Am. Ans. at 7-35.) The court's paragraph citations to Ms. Tollefson's amended  
answer are to this portion of her amended answer.

1 assigned to Plaintiff Aurora Financial Group, Inc. (“Aurora”), and the assignment was  
2 recorded on December 20, 2017, under Instrument No. 20141220000501. (*See* Am. Ans.  
3 ¶ 40; Ans. Ex. C (Dkt. # 2-3).)

4 On July 9, 2015, an identical deed of trust to the one Ms. Tollefson executed on  
5 May 22, 2015, was recorded again—this time under Instrument No. 20150709000211.

6 (Am. Ans. ¶ 39; *see also* Ans. Ex. E (Dkt. # 2-5); Not. of Rem. Ex. BB (Dkt. # 1-4).)

7 Once again, the listed beneficiary on the second deed of trust was MERS, as nominee for  
8 the lender American Financial Network, Inc. (*See* Ans. Ex. E; Not. of Rem. Ex. BB.)

9 The two deeds of trust are identical in loan number, loan amount, and property

10 description. (*Compare* Ans. Ex. D *with id.* Ex. E; *compare* Not. of Rem. Ex. B *with id.*

11 Ex BB; *see also* Am. Ans. ¶ 39.)

12 Ms. Tollefson defaulted on her promissory note in August 2017. (Am. Ans. ¶¶ 4,

13 40.) Third-Party Defendant Freedom Mortgage Corporation (“Freedom Mortgage”)

14 obtained the servicing rights to the promissory note after Ms. Tollefson had defaulted and  
15 began seeking payment on the note. (*Id.* ¶ 9.)

16 In early 2018, Ms. Tollefson and Freedom Mortgage were referred to Washington  
17 State’s foreclosure mediation program and assigned a foreclosure mediator. (*Id.* ¶ 41.)

18 Under RCW 61.24.163, “the parties have a duty to mediate in good faith” and “failure to  
19 mediate in good faith may impair the beneficiary’s ability to foreclose on the property or

20 the borrower’s ability to modify the loan or take advantage of other alternatives to

21 foreclosure.” RCW 61.24.163(7)(b)(iii); *see also* RCW 61.24.163(10). The parties

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1 “scheduled and convened three [mediation] sessions” on May 2, 2018, July 9, 2018, and  
2 August 13, 2018. (Am. Ans. ¶ 41.)

3 Ms. Tollefson alleges that MH also attempted to collect payment on her  
4 promissory note after she was in default and that MH was also referred to the foreclosure  
5 mediation program and assigned a foreclosure mediator along with herself and Freedom  
6 Mortgage. (See Am. Ans. ¶¶ 16, 41.) However, the “Foreclosure Mediation  
7 Report/Certification” that Ms. Tollefson attaches to her initial answer identifies Ms.  
8 Tollefson as the borrower, Freedom Mortgage as the beneficiary, and MH as Freedom  
9 Mortgage’s attorney. (See Ans. Ex. F (Dkt. # 2-6) at 001, 004.) Thus, the document that  
10 Ms. Tollefson relies upon to support her allegations identifies MH not as a party to the  
11 mediation, but rather as an attorney for one of the parties. (See *id.*)

12 Ms. Tollefson alleges that the foreclosure mediator certified that both Freedom  
13 Mortgage and MH were “lacking good faith in their foreclosure mediation participation.”  
14 (Am. Ans. ¶ 42.) However, the Foreclosure Mediation Report/Certification that Ms.  
15 Tollefson attaches to her initial answer and cites in her amended answer finds only the  
16 “beneficiary” or Freedom Mortgage to be “not in good faith.” (See Ans. Ex. F at 002  
17 (capitalization omitted).) Specifically, the foreclosure mediator stated that the net present  
18 value (“NPV”) test or analysis was not completed and the beneficiary or Freedom  
19 Mortgage “failed to adhere to [the] agreement made during the second mediation session  
20 and complete review.” (*Id.*)

21 Ms. Tollefson alleges that three months following their initial foreclosure  
22 mediation, Freedom Mortgage and MH served her with a second notice of default signed

1 November 5, 2018. (An. Ans. ¶ 43.) In early 2019, Ms. Tollefson was once again  
2 referred to foreclosure mediation. (*Id.*) This time the parties convened two mediation  
3 sessions on February 28, 2019, and June 12, 2019. (*Id.*) Ms. Tollefson again alleges that  
4 the foreclosure mediator “certified that Freedom [Mortgage] and MH failed to meet their  
5 duty of good faith.” (*Id.* ¶ 44.) However, the Foreclosure Mediation Report/Certification  
6 upon which Ms. Tollefson relies finds only the “beneficiary” or Freedom Mortgage to be  
7 “not in good faith.” (*See* Ans. Ex. F at 005 (capitalization omitted).) Specifically, the  
8 foreclosure mediator stated that the “beneficiary failed to provide [a] timely [and]  
9 complete set of documents.” (*Id.* (capitalization omitted).) The foreclosure mediator also  
10 stated in relevant part:

11 This is the second mediation for this property. The first mediation ended  
12 with a finding of “not in good faith” by the beneficiary. . . . The borrower  
13 provided required [documents] in a timely manner. The beneficiary says  
14 they never received them but the borrower provided proof they were sent and  
the mediator received them. Beneficiary did not provide a ful[l] set of  
required documents in a timely manner and kept requesting more documents  
that had already been provided from the borrower. . . .

15 (*Id.* (capitalization omitted).)

16 On January 31, 2020, Aurora, represented by MH, filed a lawsuit in Washington  
17 State court against Ms. Tollefson for reformation of the deed of trust and judicial  
18 foreclosure. (*See* Compl. (Dkt. # 1-10).) The complaint alleges that MERS has an  
19 interest in Ms. Tollefson’s property by way of a “Junior Deed of Trust.” (*Id.* ¶ 23.) Ms.  
20 Tollefson asserts that, in fact, the deed of trust naming MERS “is just a duplicate copy of  
21 the original deed of trust recorded on July 9, 2015,” under Instrument No.  
22 20150709000211. (*See* Resp. at 4; *see also* Am. Ans. ¶¶ 46-47.) Ms. Tollefson alleges

1 that Aurora, Freedom Mortgage, and MH filed the complaint alleging that MERS has an  
2 interest in her property that MERS does not have in retaliation “for the two bad faith  
3 certification[s] in foreclosure mediation.” (Am. Ans. ¶¶ 47-49.)

4 Ms. Tollefson removed Aurora’s complaint to this court on February 24, 2020.  
5 (See Not. of Rem.) Ms. Tollefson filed her initial answer to Aurora’s complaint along  
6 with counter-claims and a third-party complaint that same day. (See Ans.) On March 31,  
7 2020, Ms. Tollefson filed her amended answer, counter-claims, and third-party  
8 complaint. (See Am. Ans.) MH moved to dismiss Ms. Tollefson’s third-party claims on  
9 April 14, 2020. (See MTD.) The court now considers MH’s motion.

### 10 III. ANALYSIS

#### 11 A. Standard on a Motion to Dismiss

12 Under Federal Rule of Civil Procedure 12(b)(6), dismissal for failure to state a  
13 claim is proper only if the pleadings fail to allege sufficient facts to establish a plausible  
14 entitlement to relief. *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57 (2007).

15 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
16 need detailed factual allegations, . . . a plaintiff’s obligation to provide the  
17 “grounds” of his “entitle[ment] to relief” requires more than labels and  
18 conclusions, and a formulaic recitation of the elements of a cause of action  
will not do . . . . Factual allegations must be enough to raise a right to relief  
above the speculative level . . . on the assumption that all the allegations in  
the complaint are true (even if doubtful in fact) . . . .

19 *Id.* at 555 (internal citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678  
20 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual  
21 matter, accepted as true, to state a claim to relief that is plausible on its face.”).

22 Numerous federal courts have applied the pleading standards set forth in *Iqbal* and

1 *Twombly* with equal force to cross-claims, counterclaims, and third-party complaints.  
2 *See, e.g., Reishus v. Almaraz*, No. CV-10-0760-PHX-LOA, 2011 WL 42679, at \*3 (D.  
3 Ariz. Jan. 6, 2011); *Se. Pa Transp. Auth. v. AECOM USA, Inc.*, No. 10-117, 2010 WL  
4 4703533, at \*3 (E.D. Pa. Nov. 19, 2010) (citing, among other authorities, *Travelers*  
5 *Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 256 n.13 (3d Cir. 2010)). A district  
6 court must accept as true all the factual allegations contained in a third-party complaint  
7 and draw all reasonable inferences in favor of the nonmoving party. *Erickson v. Pardus*,  
8 551 U.S. 89, 94 (2007); *Intri-Plex Tech., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1050 n.2  
9 (9th Cir. 2007). Mere legal conclusions, however, “are not entitled to the assumption of  
10 truth.” *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (internal  
11 quotation marks and citations omitted); *see also Lee v. City of L.A.*, 250 F.3d 668, 679  
12 (9th Cir. 2001). (“Conclusory allegations of law . . . are insufficient to defeat a motion to  
13 dismiss.”).

#### 14 **B. Matters the Court Considers**

15 Generally, a district court may not consider any material beyond the pleadings in  
16 ruling on a Rule 12(b)(6) motion to dismiss. *Lee*, 250 F.3d at 688 (citations omitted).

17 One exception to this rule is that the court may take judicial notice of documents pursuant  
18 to Federal Rule of Evidence 201.<sup>3</sup> *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988,  
19 998 (9th Cir. 2018); *see also* Fed R. Evid. 201. Thus, the “court may take judicial notice  
20 of matters of public record without converting a motion to dismiss into a motion for

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22 <sup>3</sup> “The court . . . may take judicial notice on its own.” Fed. R. Civ. P. 201(c)(1).

1 summary judgment.” *See Khoja*, 899 F.3d at 999 (quoting *Lee*, 250 F.3d at 689  
2 (quotation marks and citation omitted)). In addition, the court may consider material that  
3 is properly submitted as a part of the complaint. *Lee*, 250 F.3d at 688. Further, if the  
4 documents are not physically attached to the complaint, the court may still consider them  
5 if their authenticity is not contested and the plaintiff’s complaint necessarily relies on  
6 them. *Id.* The court is entitled to consider all the documents cited in the background  
7 section of this order based on one or both of these exceptions. *See supra* § II.

### 8 **C. Ms. Tollefson’s Third-Party Claims against MH**

9 In her third-party complaint against MH, Ms. Tollefson raises the following  
10 claims: (1) abuse of process (Am. Ans. ¶¶ 52-69); (2) violation of Washington State’s  
11 Consumer Protection Act (“CPA”), RCW ch. 19.86 (Am. Ans. ¶¶ 70-109); (3) violation  
12 of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.* (Am.  
13 Ans. ¶¶ 110-21); (4) slander of title (*id.* ¶¶ 129-40); (5) negligent misrepresentation (*id.*  
14 ¶¶ 141-52); (6) the tort of outrage (*id.* ¶¶ 153-62); and (7) breach of the implied covenant  
15 of good faith and fair dealing (*id.* ¶¶ 163-72). MH moves to dismiss each of these claims.  
16 (*See generally* MTD.) The court considers each claim in turn.

#### 17 1. Abuse of Process

18 Ms. Tollefson alleges that her claim for abuse of process against MH is based on  
19 MH’s representation of Aurora with respect to Aurora’s complaint in this action. (*See*  
20 Am. Ans. ¶ 54 (“Aurora, through its lawyers at [MH,] filed a lawsuit against Ms.  
21 Tollefson . . . .”); *id.* ¶ 63.1 (“Aurora and [MH] filed the state court complaint in  
22 retaliation for two consecutive foreclosure mediation findings of bad faith in 2018-2019.



1 Legal action here is used to punish Ms. Tollefson with the total and forced denial of any  
2 alternative default mitigation to foreclosure.”); *see also* Compl.) Ms. Tollefson avers that  
3 several allegations contained in Aurora’s complaint misrepresent or omit facts concerning  
4 the deeds of trust at issue here. (*See, e.g., id.* ¶ 56 (“Aurora’s complaint is silent with  
5 regard to the fact that the same deed of trust was recorded again July 9, 2015 . . . .”); *id.* ¶  
6 58 (“Aurora’s complaint plead[s] no facts alleging how the purported mistake [in the  
7 deed of trust concerning a reference to the county] altered, or could have altered the  
8 party’s [sic] agreement.”); *id.* ¶ 60 (“The state court complaint misrepresents that Aurora  
9 is duly authorized to conduct business in Washington.”); *id.* ¶ 61 (“The state court  
10 complaint . . . misrepresents that MERS has an interest in Ms. Tollefson’s property by  
11 way of a ‘Junior Deed of Trust.’”)). She asserts that MH drafted and filed the state court  
12 complaint “in retaliation for two consecutive foreclosure mediations findings of bad faith  
13 in 2018-2019” (*id.* ¶ 63.1), and that naming MERS as a co-defendant in the complaint  
14 “fraudulently encumbered the property thus eliminating the appearance of a lien-free  
15 property” (*id.* ¶ 63.2).

16 The tort of abuse of process is disfavored in Washington. *See Batten v. Abrams*,  
17 626 P.2d 984, 988-89 (Wash. Ct. App. 1981). To prevail on an abuse of process theory,  
18 the plaintiff must establish two elements: (1) the existence of an ulterior purpose to  
19 accomplish an object not within the proper scope of the process and (2) an act in the use  
20 of legal process not proper in the regular prosecution of the proceedings. *Id.* at 988; *Fite*  
21 *v. Lee*, 521 P.2d 964, 968 (Wash. Ct. App. 1974).

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1 First, the court rejects the notion that conduct within a foreclosure mediation can  
2 form the basis for an abuse of process claim. Indeed, Ms. Tollefson admits that “[t]here  
3 does not seem to be a case specifically holding misuse of non-judicial foreclosure is a  
4 misuse of process.” (Resp. at 10.) “[A]lthough Washington courts have not yet ruled on  
5 the issue, other courts have denied claims for malicious prosecution or abuse of process  
6 based on a nonjudicial foreclosure proceeding because a nonjudicial foreclosure does not  
7 constitute the type of legal action contemplated by such claims.” *Schwartz v. World*  
8 *Savings Bank*, No. C11-0631JLR, 2012 WL 993295, at \*5 (W.D. Wash. Mar. 23, 2012)  
9 (citing cases). The court finds these cases persuasive. Under Washington’s Foreclosure  
10 Fairness Act (“FFA”), the failure to mediate in good faith is a defense in certain  
11 circumstances to a nonjudicial foreclosure proceeding. *See* RCW 61.24.163(14). If a  
12 nonjudicial foreclosure proceeding does not represent the type of action contemplated by  
13 an abuse of process claim, neither does a mediation procedure that at best may serve as a  
14 defense to a nonjudicial foreclosure proceeding. Such a mediation procedure is even  
15 further removed from the type of legal action contemplated by an abuse of process claim.  
16 Thus, the court concludes that MH’s alleged conduct during Ms. Tollefson’s foreclosure  
17 mediations cannot serve as the factual underpinning for her abuse of process claim.

18 The foregoing ruling leaves MH’s participation in drafting and filing Aurora’s  
19 state court complaint with its alleged misrepresentations and omissions of fact as the sole  
20 undergird of Ms. Tollefson’s abuse of process claim. However, “[t]he mere institution of  
21 a legal proceeding even with a malicious motive does not constitute an abuse of process.”  
22 *Batten*, 626 P.2d at 988-89 (quoting *Fite*, 521 P.2d at 968). Indeed, “there must be an act

1 after filing suit using legal process empowered by that suit to accomplish an end not  
2 within the purview of the suit.” *Id.* at 990. Washington courts follow the majority of  
3 courts in concluding that the filing of a lawsuit, even if the allegations are “baseless or  
4 vexatious,” does not constitute the tort of abuse of process. *Id.* at 991. Accordingly,  
5 MH’s mere participation in the drafting and filing of Aurora’s state court complaint—  
6 even if the complaint contains frivolous or inaccurate allegations—is insufficient to  
7 maintain an abuse of process claim.

8 In sum, neither MH’s representation of Freedom Mortgage in the foreclosure  
9 mediations at issue here, nor MH’s representation of Aurora in the drafting and filing of  
10 Aurora’s complaint is sufficient to allege an abuse of process claim against MH.  
11 Accordingly, the court grants MH’s motion to dismiss Ms. Tollefson’s abuse of process  
12 claim against MH.

## 13 2. CPA

14 To recover under the CPA, a plaintiff must prove an “(1) unfair or deceptive act or  
15 practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to  
16 plaintiff in his or her business or property; [and] (5) causation.” *Hangman Ridge*  
17 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 710 P.3d 531, 533 (Wash. 1986). MH  
18 argues that the court should dismiss Ms. Tollefson’s CPA claim because she has failed to  
19 allege any unfair or deceptive act by MH. (MTD at 10.) The Washington Legislature,  
20 however, has declared that “[i]t is an unfair or deceptive act in trade or commerce and an  
21 unfair method of competition in violation of the [CPA] . . . , for any person or entity  
22 to . . . [v]iolate the duty of good faith under RCW 61.24.163.” RCW 61.24.135. Thus, if

1 the foreclosure mediator found MH in bad faith during Ms. Tollefson’s foreclosure  
2 mediations—as she alleges (*see* Am. Ans. ¶¶ 42, 44, 77, 86-89)—the first two elements  
3 of Ms. Tollefson’s CPA claim would be met.

4 In her response to MH’s motion, Ms. Tollefson argues that the foreclosure  
5 mediator found MH to be “not in good faith” during the foreclosure mediations. (*See*  
6 Resp. at 10-11 (“Both foreclosure mediators included [MH] in their bad faith  
7 certifications.”) (citing Ans. Ex. F & RCW 61.24.135); *see also* Am. Ans. ¶¶ 42, 44 77,  
8 86-89.) However, the documents Ms. Tollefson cites in her third-party complaint do not  
9 support her allegation that the foreclosure mediator certified that MH violated its duty to  
10 negotiate in good faith. (*See* Am. Ans. ¶ 42 (citing Ans. Ex. F at 2).) Indeed, the  
11 Foreclosure Mediation Report/Certification that Ms. Tollefson attaches to her initial  
12 answer and cites in her amended answer finds only the “beneficiary” or Freedom  
13 Mortgage to be “not in good faith.” (*See* Ans. Ex. F at 002, 005 (capitalization omitted).)  
14 Further, pursuant to the Foreclosure Mediation Report/Certification, MH was not a party  
15 to the mediation but rather only appeared as Freedom Mortgage’s attorney. (*See id.* at  
16 001, 004.) Thus, the court does not find Ms. Tollefson’s allegation that MH was found to  
17 be “not in good faith” during the foreclosure mediation to be plausible and disregards it.

18 Ms. Tollefson nevertheless argues that MH is liable for the foreclosure mediator’s  
19 finding that Freedom Mortgage was “not in good faith” by virtue of MH’s status as  
20 Freedom Mortgage’s attorney and agent. (Resp. at 11.) In analogous circumstances  
21 involving an alleged violation of the FDCPA, the Ninth Circuit stated that “there is no  
22 legal authority for the proposition that an attorney is generally liable for the actions of his

1 [or her] client.”<sup>4</sup> *See Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1173  
2 (9th Cir. 2006). The court finds this authority persuasive in the context of an alleged  
3 CPA violation. Accordingly, the court concludes that MH cannot be held liable for the  
4 foreclosure mediator’s finding that Freedom Mortgage “was not in good faith” or for a  
5 CPA violation based merely on MH’s status as Freedom Mortgage’s attorney. The court  
6 concludes that Ms. Tollefson has failed to allege facts supporting an unfair or deceptive  
7 act on the part of MH. Thus, the court grants MH’s motion to dismiss Ms. Tollefson’s  
8 CPA claim.

### 9 3. FDCPA

10 The elements of an FDCPA claim are: (1) the plaintiff has been the object of  
11 collection activity arising from a consumer debt; (2) the defendant collecting the “debt” is  
12 a “debt collector” as defined in the FDCPA; and (3) the defendant engaged in any act or  
13 omission in violation of the provisions of the FDCPA. *See Estate of Hoskins v. Wells*  
14 *Fargo Bank, N.A.*, No. C20-75RSM, 2020 WL 3884517, at \*8 (W.D. Wash. July 9,  
15 2020). MH argues that the court should dismiss Ms. Tollefson’s FDCPA claim because  
16 her allegations fail to show that MH violated any provision of the FDCPA. (MTD at  
17 11-12.) The court agrees for the reasons stated below.

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19 <sup>4</sup> The case that Ms. Tollefson relies upon is distinguishable. (*See Resp.* at 11 n.5.) In  
20 *Fite*, the court held that the attorney and not the client could be held liable for abuse of process  
21 when the attorney acted outside the authority and without the knowledge of his client. *See Fite*,  
22 521 P.2d at 969 (“It follows then that if an attorney has, without the knowledge or consent of his  
client, abused process to the damage of another, the attorney acts outside the scope of agency and  
the client should not be held derivatively liable. . . . Consequently dismissal of the action against  
the client should not be res judicata of the injured party’s claim against the attorneys.” (citations  
omitted)). Thus, the court’s narrow holding in *Fite* is inapplicable here.

1 First, Ms. Tollefson repeatedly describes MH as a “debt collector,” “attempting to  
2 collect a ‘debt,’” “engaged in the business of collecting debts,” a “collection agency,” or  
3 in a similar manner without accompanying factual content. (*See, e.g.*, Am. Ans.  
4 ¶¶ 15-19, 20-21, 24-27, 114.) These allegations constitute nothing more than legal  
5 conclusions, and they fail to meet the *Iqbal/Twombly* pleading standard. *See Iqbal*, 556  
6 U.S. at 678; *Twombly*, 550 U.S. at 555-57. Accordingly, the court disregards them.

7 To the extent that Ms. Tollefson bases her FDCPA claim on MH’s alleged  
8 involvement in enforcing the deeds of trust on her property or serving a notice of default  
9 as a part of that process (*see, e.g.*, Am. Ans. ¶¶ 43, 113), Ninth Circuit authority  
10 precludes such a claim. Specifically, in *Vien-Phuong Thi Ho v. Recontrust Co.*, the Ninth  
11 Circuit concluded that “actions taken to facilitate a non-judicial foreclosure, such as  
12 sending the notice of default and notice of sale, are not attempts to collect ‘debt’ as that  
13 term is defined by the FDCPA.” 858 F.3d 568, 572 (9th Cir. 2017).

14 Nevertheless, the Ninth Circuit has also concluded that “some security enforcers  
15 are debt collectors only for the limited purposes of [15 U.S.C. § 1692f(6)].”  
16 *Vien-Phuong Thi Ho*, 858 F.3d at 573. A security enforcer violates 15 U.S.C. § 1692f if  
17 it takes or threatens to take any nonjudicial action to effect dispossession or disablement  
18 of property if “there is no present right to possession of the property claimed as collateral  
19 through an enforceable security interest,” “there is no present intention to take possession  
20 of the property,” or “the property is exempt by law from such dispossession or  
21 disablement.” 15 U.S.C § 1692f(6)(A)-(C).

22 //

1 Although Ms. Tollefson generally alleges that Freedom Mortgage’s and MH’s  
2 conduct during Ms. Tollefson’s foreclosure mediations violated 15 U.S.C. § 1692f(6)  
3 (*see* Am. Ans. ¶¶ 115-115.3), she fails to allege facts supporting MH’s liability for any of  
4 the specific acts referenced in 15 U.S.C. § 1692f(6)(A)-(C) (*see generally* Am. Ans.). As  
5 noted above, MH was not a party to the mediation and served only as Freedom  
6 Mortgage’s attorney. (*See* Ans. Ex. F at 001, 004.) In *Fox v. Citicorp Credit Servs., Inc.*,  
7 15 F.3d 1507 (9th Cir. 1994), the Ninth Circuit concluded that, in the context of an  
8 FDCPA violation, “Congress intended the actions of an attorney to be imputed to the  
9 client on whose behalf they are taken.” *Id.* at 1516. Although the ruling in *Fox* might  
10 serve as a basis for finding a deed of trust beneficiary liable based on the alleged actions  
11 of its attorney, it is not a basis for finding MH liable based on Freedom Mortgage’s  
12 alleged behavior. *See id.* On the other hand, in *Clark*, the Ninth Circuit held that the  
13 district court appropriately granted summary judgment in favor of an attorney who was  
14 retained by a debt collector to send a collection letter and take other legal actions against  
15 the debtor. 460 F.3d at 1173. The attorney could not be held vicariously liable for the  
16 actions of his client because the debtors did not offer any evidence “upon which a  
17 reasonable trier of fact could conclude that [the attorney] exercised control over [the debt  
18 collector].” *Id.* Likewise, here, Ms. Tollefson has not alleged any facts to suggest that  
19 MH exercised control over Freedom Mortgage. Indeed, she has only alleged that MH  
20 served as both Aurora’s and Freedom Mortgage’s attorney and therefore agent. (*See* Am.  
21 Ans. ¶ 54 (“Aurora, through their lawyers at [MH] filed a lawsuit against Ms. Tollefson  
22 in King County Superior Court . . . .”); Ans. Ex. F at 001, 004 (identifying MH as

1 Freedom Mortgage’s attorney in the foreclosure mediations)); *see also Comm’r v. Banks*,  
2 543 U.S. 426, 436 (2005) (“The relationship between client and attorney, regardless of  
3 the variations in particular compensation agreements or the amount of skill and effort the  
4 attorney contributes, is a quintessential principal-agent relationship.”) (citing Restatement  
5 (Second) of Agency § 1, cmt. e (1957)).

6 Finally, Ms. Tollefson alleges that MH is liable under the FDCPA for drafting  
7 Aurora’s state court complaint which names MERS as a defendant and seeks a judicial  
8 foreclosure on her property. (*See* Am. Ans. ¶ 115.4; *see also id.* ¶¶ 35-36; Ans. Ex. D at  
9 4-15; Not. of Rem. Ex. B.) Ms. Tollefson argues that the description in Aurora’s  
10 complaint of the duplicate deed of trust as a “Junior Deed of Trust” benefiting MERS  
11 misrepresents an interest in Ms. Tollefson’s property and “threatens to exact possession  
12 of a larger interest in Ms. Tollefson’s property than Aurora can rightfully claim.” (*See*  
13 Am. Ans. ¶ 115.4; *see also* Compl. ¶ 23.)

14 The Ninth Circuit recently considered whether a person who initiates a judicial  
15 foreclosure is attempting to collect a debt within the confines of the FDCPA. The Court  
16 stated in pertinent part:

17 Our cases make clear that a plaintiff must identify something beyond the  
18 mere enforcement of a security interest to establish that the defendants are  
19 acting as debt collectors subject to the FDCPA’s broad code of conduct. . . .  
20 That additional debt-collection ingredient can be present for judicial  
21 foreclosure, provided that state law permits a creditor to recover money from  
22 the debtor after foreclosure if the property sells for less than the debt. . . .  
That remedy, called a deficiency judgment, is often available in judicial  
foreclosure proceedings (but typically not in non-judicial proceedings). . . .  
But unless a deficiency judgment is on the table in the proceeding, a person  
judicially enforcing a deed of trust in seeking only the return or sale of the  
security, not to collect a debt.



1 *Barnes v. Routh Crabtree Olsen PC*, 963 F.3d 993, 999 (9th Cir. 2020). In its complaint,  
2 Aurora asks for a deficiency judgment. (Compl. ¶ 28.) Thus, Aurora’s complaint may  
3 constitute an attempt to collect a debt within the scope of the FDCPA.

4 However, Ms. Tollefson has failed to identify any role by MH in the filing of the  
5 complaint other than to act as Aurora’s attorney. (*See id.* ¶ 54 (“Aurora, through their  
6 [sic] lawyers at [MH] filed a lawsuit against Ms. Tollefson in King County Superior  
7 Court . . . .”); *see also id.* ¶ 63.1 (“Aurora and [MH] filed the state court complaint in  
8 retaliation for two consecutive foreclosure mediation findings of bad faith in  
9 2018-2019.”).) As noted above, Ms. Tollefson makes no allegations that MH exercised  
10 control over Aurora. (*See generally id.*) Accordingly, there is no basis alleged in Ms.  
11 Tollefson’s FDCPA claim for a finding of liability on the part of MH merely because MH  
12 served as Aurora’s attorney in the drafting and filing of Aurora’s state court complaint.  
13 *See Clark*, 460 F.3d at 1173. Accordingly, the court concludes that Ms. Tollefson has  
14 failed to properly allege an FDCPA claim against MH and grants MH’s motion to dismiss  
15 this claim.

#### 16 4. Negligent Misrepresentation

17 To state a claim for negligent misrepresentation, Ms. Tollefson must allege the  
18 following elements: (1) the defendant supplied information for the guidance of others in  
19 their business transaction that was false; (2) the defendant knew or should have known  
20 that the information was supplied to guide the plaintiff in his or her business transaction;  
21 (3) the defendant was negligent in obtaining or communicating the false information; (4)  
22 the plaintiff relied on the false information supplied by the defendant; (5) the plaintiff’s

1 | reliance on the false information supplied by the defendant was justified (that is, the  
2 | reliance was reasonable under the surrounding circumstances); and (6) the false  
3 | information was the proximate cause of the plaintiff's damages. *ESCA Corp. v. KMPG*  
4 | *Peat Marwick*, 959 P.2d 651, 654 (Wash. 1988). Ms. Tollefson argues that MH supplied  
5 | false information during the foreclosure mediation sessions and misrepresented and  
6 | omitted material facts from the state court complaint that MH drafted for Aurora. (*See*  
7 | *Am. Ans.* ¶¶ 141-52.)

8 | MH challenges only the first element of Ms. Tollefson's negligent  
9 | misrepresentation claim. (*See* MTD at 15.) MH argues that because it was not a party to  
10 | the mediations but only acted as Freedom Mortgage's counsel, it did not supply any  
11 | information to Ms. Tollefson. (*See id.* ("Because MH was not a party [to the foreclosure  
12 | mediation sessions] required to supply information during the mediations, [Ms.  
13 | Tollefson's] entire claim fails.")) Further, MH argues that Aurora's complaint did not  
14 | contain any false statements. (*Id.*)

15 | First, the court notes that "[n]othing in Washington case law supports the  
16 | contention that attorneys are exempt from liability to nonclients for negligent  
17 | misrepresentation." *Lawyers Title Ins. Co. v. Baik*, 55 P.3d 619, 625 n.10 (Wash. 2002).  
18 | However, Washington courts have recognized absolute immunity in a judicial proceeding  
19 | for statements made by a witness, a party, or an attorney during the course of a judicial  
20 | proceeding. *See Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 776 P.2d 666, 669-70  
21 | (Wash. 1989) (applying the immunity to witnesses); *McNeal v. Allen*, 621 P.2d 1285,  
22 | 1286 (Wash. 1980) (applying the immunity to parties and attorneys). The immunity is

1 generally applied to bar suits alleging defamation but is not limited to defamation. *See,*  
2 *e.g., Jeckle v. Crotty*, 85 P.3d 931, 937 (Wash. Ct. App. 2004) (applying the immunity to  
3 claims for interference with the plaintiff’s business relationship with his patients, outrage,  
4 infliction of emotional distress, and civil conspiracy). Because statements made by  
5 counsel in the course of judicial proceedings are immune from suit, Ms. Tollefson may  
6 not base her negligent misrepresentation claim on statements drafted by MH and included  
7 in Aurora’s complaint. To the extent that Ms. Tollefson’s claim is based on these  
8 statements, the court grants this portion of MH’s motion and dismisses this portion of Ms.  
9 Tollefson’s negligent misrepresentation claim.

10       The statements that Ms. Tollefson alleges that MH made during the foreclosure  
11 mediation proceedings, however, are not subject to the immunity for statements made in  
12 the course of judicial proceedings. Significantly, the mediation sessions are ancillary to  
13 Freedom Mortgage’s and Aurora’s attempt to nonjudicially foreclose on Ms. Tollefson’s  
14 property. *See Brown v. Wash. State Dep’t of Commerce*, 359 P.3d 771, 773-75 (Wash.  
15 2015) (describing the interplay between Washington’s Deed of Trust Act (“DTA”), RCW  
16 ch. 61.24, and mediation under the FFA). Thus, not only are mediation sessions  
17 conducted under the FFA not judicial proceedings, they are not even ancillary to judicial  
18 proceedings. Accordingly, it is possible for an attorney to be held liable for negligent  
19 misrepresentation for statements he or she made during such mediation sessions even if  
20 those statements were made on behalf of a client—so long as all the elements of the tort  
21 are otherwise present. The court, therefore, rejects MH’s argument that Ms. Tollefson’s  
22 claim fails because MH was not a party to the mediation and cannot be held liable for

1 “relaying” the statements of its clients Freedom Mortgage or Aurora. (*See* MTD at 15.)  
2 Accordingly, the court denies MH’s motion to dismiss Ms. Tollefson’s negligent  
3 misrepresentation claim for MH’s alleged misrepresentations made during Ms.  
4 Tollefson’s foreclosure mediation sessions.

5 5. Slander of Title

6 Ms. Tollefson’s claim against MH for slander of title is based on the statements  
7 contained in Aurora’s complaint that MH drafted. (*See* Am. Ans. ¶¶ 129-40.) Ms.  
8 Tollefson alleges that statements in Aurora’s complaint alleging that MERS has an  
9 interest in her property and that there is a “Junior Deed of Trust” encumbering her  
10 property are false and caused her to suffer pecuniary loss. (*See id.*) For the same reason  
11 that MH is immune with respect to Ms. Tollefson’s claim of negligent misrepresentation  
12 arising out of statements contained in Aurora’s complaint, MH is also immune from  
13 liability for slander of title arising out of those same statements. *See supra* § III.C.4  
14 (discussing the applicability of immunity for statements made in the course of judicial  
15 proceedings). Accordingly, the court grants this portion of MH’s claim and dismisses  
16 Ms. Tollefson’s claim for slander of title against MH.

17 6. Tort of Outrage

18 To state a claim for outrage, Ms. Tollefson must allege: “(1) extreme and  
19 outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3)  
20 actual result to the plaintiff of severe emotional distress.” *See Dicombe v. State*, 782 P.2d  
21 1002, 1012 (Wash. 1989). Although these three elements are questions of fact for the  
22 jury, the court must initially “determine if reasonable minds could differ on whether the

1 conduct was sufficiently extreme to result in liability.” *Id.* “The conduct in question  
2 must be so outrageous in character, and so extreme in degree, as to go beyond all possible  
3 bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized  
4 community.” *Id.* (internal quotation marks omitted).

5 MH moves to dismiss this claim arguing that Ms. Tollefson’s allegations against it  
6 do not amount to the type of outrageous behavior encompassed by the tort. (MTD at  
7 15-17.) Ms. Tollefson relies on her allegations that the foreclosure mediator twice found  
8 MH to be in bad faith during the foreclosure mediations and that MH misrepresented the  
9 nature of MERS’s interest in the duplicate deed of trust recorded against her property  
10 when MH drafted and filed Aurora’s state court complaint. (*See, e.g.*, Am. Ans. ¶¶ 157,  
11 159; *see also* Resp. at 16-17). She argues that MH’s actions resulted in a cloud on the  
12 title of her property, reduced her property’s value, violated the DTA, and caused her  
13 grief, shame, and humiliation. (*See* Resp. at 17; *see also* Am. Ans. ¶ 160.) She argues  
14 that these allegations are sufficiently extreme to meet the threshold for outrage. (*See*  
15 Resp. at 15-18.)

16 First, the court notes that it has found Ms. Tollefson’s allegation that the  
17 foreclosure mediator found MH in bad faith to be not plausible based on the documents  
18 Ms. Tollefson relies upon in her complaint. *See supra* § III.C.2. Second, as for the  
19 remainder of Ms. Tollefson’s allegations against MH, the court agrees with MH that they  
20 do not meet the threshold for stating the tort of outrage.

21 In *Lyons v. U.S. Bank National Association*, the Washington Supreme Court  
22 recognized that “[c]onduct during foreclosure could support a claim for intentional

1 infliction of emotional distress, but it must satisfy the high burden applicable to these  
2 claims.” 336 P.3d 1142, 1151 (Wash. 2014). Indeed, courts have found outrageous  
3 conduct in situations where the defendants allegedly induced the plaintiff to enter a loan  
4 modification agreement, accepted payments for more than two years, then revoked the  
5 agreement, declared the borrower in default, and attempted to foreclose, *see Estes v.*  
6 *Wells Fargo Home Mortg.*, No. C14-5234 BHS, 2015 WL 362904, at \*6 (W.D. Wash.  
7 Jan. 27, 2015), and where defendants allegedly engaged in similar conduct and also used  
8 a perjured declaration in the foreclosure process, *see Montgomery v. SOMA Fin. Corp.*,  
9 No. C13-360 RAJ, 2014 WL 2048183, at \*7 (W.D. Wash. May 19, 2014).

10 Ms. Tollefson, however, alleges nothing as extreme or outrageous against MH in  
11 this case. Significantly, Ms. Tollefson admits that she is in default on her promissory  
12 note. (*See Am. Ans.* ¶¶ 4, 40.) The plaintiffs’ allegations concerning default in *Estes* and  
13 *Montgomery* stand in contrast to Ms. Tollefson’s straightforward admission. In *Estes*, the  
14 plaintiff was making trial payments on the defendants’ proposed loan modification at the  
15 time that the defendants nevertheless initiated a nonjudicial foreclosure against the  
16 plaintiff’s property. 2015 WL 362904, at \*2-\*3. In *Montgomery*, the plaintiffs alleged  
17 that the defendants never applied certain monthly mortgage payments to their account  
18 balance, represented that the plaintiffs were in default on their note when they were not,  
19 and then induced the plaintiffs to default so the defendants could foreclose on the  
20 property. 2014 WL 2048183, at \*1-\*2. These factual distinctions concerning default  
21 render the defendants’ alleged behavior in *Estes* and *Montgomery* more extreme.

22 //

1 The essence of Ms. Tollefson's allegations against MH is as follows: Ms.  
2 Tollefson alleges that MH served as counsel to a client, Freedom Mortgage, who the  
3 foreclosure mediator twice found to be in bad faith as to its conduct during Ms.  
4 Tollefson's foreclosure mediations. (*See* Ans. Ex. F); *see also supra* § III.C.2 (finding  
5 Ms. Tollefson's allegations that MH was a party to the mediation, as opposed to Freedom  
6 Mortgage's counsel, and that the foreclosure mediator found MH in bad faith during the  
7 mediations to be implausible). In addition, Ms. Tollefson asserts that MH represented  
8 Aurora in drafting and filing Aurora's state court complaint and that the complaint's  
9 allegations misrepresent and omit material facts concerning the deeds of trust recorded on  
10 her property. (*See* Am. Ans. ¶¶ 46-49.) These allegations are more akin to the majority  
11 of cases in which courts have found that although a defendant's alleged actions during the  
12 foreclosure process may have violated the DTA, supported a CPA claim, or been  
13 "problematic, troubling, or even deplorable," *see Vawter v. Quality Loan Serv. Corp. of*  
14 *Wash.*, 707 F. Supp. 2d 1115, 1128 (W.D. Wash. 2010), they did not "shock the  
15 conscience or go beyond all sense of decency" and were insufficient to support the tort of  
16 outrage, *Lyons*, 336 P.3d at 1152; *see also Grande v. U.S. Bank Nat'l Ass'n*, No. C19-333  
17 MJP, 2019 WL 3238471, at \*6 (W.D. Wash. July 18, 2019) (concluding that the  
18 defendant bank's actions in foreclosing on the plaintiffs' property after agreeing to but  
19 failing to execute multiple loan modifications was insufficient to constitute the tort of  
20 outrage). Accordingly, the court grants this portion of MH's motion and dismisses Ms.  
21 Tollefson's outrage claim against MH.

22 //

1           7. Breach of the Implied Covenant of Good Faith

2           Ms. Tollefson also alleges a breach of the implied covenant of good faith and fair  
3 dealing against MH. (*See* Am. Ans. ¶¶ 163-72.) MH moves to dismiss this claim on  
4 grounds that Ms. Tollefson has failed to allege any contractual relationship between MH  
5 and herself. (MTD at 17.)

6           Under Washington law, an implied duty of good faith and fair dealing exists in  
7 every contract. *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991) (“There is in  
8 every contract an implied duty of good faith and fair dealing.”). However, the duty arises  
9 only in connection with contractual terms agreed to by the parties. *Id.* Indeed, “[t]he  
10 implied duty of good faith is derivative, in that it applies to the performance of specific  
11 contract obligations.” *Johnson v. Yousoofian*, 930 P.2d 921, 925 (Wash. Ct. App. 1996),  
12 *as amended* (Jan. 9, 1997). “If there is no contractual duty, there is nothing that must be  
13 performed in good faith.” *Id.* Thus, as a threshold matter, Ms. Tollefson must plausibly  
14 allege privity between herself and MH to bring contract-based claims, including a claim  
15 that MH violated the duty of good faith and fair dealing. *See Kautzman v. Carrington*  
16 *Mortg. Servs., LLC*, No. C16-1040-JCC, 2018 WL 513588, at \*4 (W.D. Wash. Jan. 23,  
17 2018) (citing *N.W. Indep. Forest Mfrs. v. Dep’t of Lab. & Indus.*, 899 P.2d 6, 9 (Wash.  
18 Ct. App. 1995)). She has failed to do so, and indeed, based on Ms. Tollefson’s  
19 allegations, there does not appear to be any such relationship. (*See generally* Am. Ans.)  
20 Instead, Ms. Tollefson alleges that MH is counsel to Aurora and Freedom Mortgage.  
21 (*See id.* ¶ 54 (“Aurora, through their lawyers at [MH] filed a lawsuit against Ms.

22 //



1 Tollefson in King County Superior Court . . . .”); Ans. Ex. F at 001, 004 (identifying MH  
2 as Freedom Mortgage’s attorney in the foreclosure mediations.)

3 Ms. Tollefson nevertheless argues that the court should not dismiss this claim  
4 because Washington courts have found joint and several liability between lenders and  
5 their assigns. (Resp. at 18-19 (citing *White v. Homefield Fin., Inc.*, 545 F. Supp. 2d  
6 11159, 1166 (W.D. Wash. 2008)).) However, Ms. Tollefson asserts no allegations that  
7 the lender or mortgagee herein assigned any of its interest in Ms. Tollefson’s promissory  
8 note to MH. (*See generally* Am. Ans.) Accordingly, the court grants this portion of  
9 MH’s motion and dismisses Ms. Tollefson’s claim against MH for breach of the implied  
10 covenant of good faith and fair dealing.

11 **D. Leave to Amend**

12 When the court grants a motion to dismiss, it must also decide whether to grant  
13 leave to amend. *Mora v. Countrywide Mortg.*, No. 2:11-cv-00899-GMN-RJJ, 2012 WL  
14 254056, at \*2 (D. Nev. Jan. 26, 2012). Ordinarily, leave to amend a complaint should be  
15 freely given following an order of dismissal. *See* Fed. R. Civ. P. 15(a)(2). Generally,  
16 leave to amend is only denied when it is clear that the deficiencies of the complaint  
17 cannot be cured by amendment. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*,  
18 368 F.3d 1053, 1061 (9th Cir. 2004); *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655,  
19 658 (9th Cir. 1992) (“A district court does not err in denying leave to amend where the  
20 amendment would be futile.” (citing *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th  
21 Cir. 1990)).

22 //

1 Here, the court concludes that it would futile for Ms. Tollefson to replead the  
2 portion of her negligent misrepresentation claim that is based on allegations MH draft in  
3 Aurora's complaint herein or her slander of title claim against MH. This is so because  
4 these claims are based statements made in the course of judicial proceedings and are  
5 therefore immune from suit. *See supra* §§ III.C.4, III.C.5. Accordingly, the court  
6 dismisses these claims with prejudice. However, the court grants Ms. Tollefson leave to  
7 amend the remainder of her claims against MH, if appropriate. If Ms. Tollefson elects to  
8 amend her complaint in a manner consistent with this order, then she must file her  
9 amended complaint within 20 days of the filing date of this order.

#### 10 IV. CONCLUSION

11 Based on the foregoing analysis, the court GRANTS in part and DENIES in part  
12 MH's motion to dismiss Ms. Tollefson's claims (Dkt. # 20). The court GRANTS MH's  
13 motion and dismisses all of Ms. Tollefson's claims against MH except for a portion of  
14 her claim for negligent misrepresentation. The court GRANTS Ms. Tollefson leave to  
15 amend her complaint except for those tort claims that are based on statements MH drafted  
16 in Aurora's state court complaint. The court DISMISSES these claims, which include  
17 Ms. Tollefson's claim for slander of title and a portion of her claim for negligent  
18 misrepresentation, WITH PREJUDICE and without leave to amend because MH is

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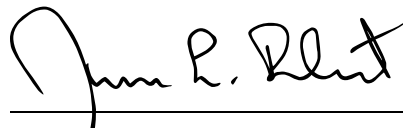
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1 immune from suit based on statements it made in the course of judicial proceedings. *See*  
2 *supra* §§ III.C.4, III.C.5, III.D.

3 Dated this 19th day of August, 2020.

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6 JAMES L. ROBART  
7 United States District Judge  
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