70295-5

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NO. 70295-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Respondent,

v.

MICHIKO STEHRENBERGER

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE JOHN P. ERLICK

REPLY BRIEF OF APPELLANT

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- RCW 62A.1-201(b)(21)(A) definition of "holder"
- RCW 62A.3-104 definition of "negotiable instrument"
- RCW 62A.3-302(a) requires "holder" and physical possession of the original paper note before "holder in due course" status can be available
- RCW 62A.3-203(a) definition of "transfer" as physical delivery
- RCW 62A.3-203(b) rights of "transferee" derived from "transferor"
- RCW 62A.3-301 "Person entitled to enforce" negotiable instrument
- RCW 62A.3-309 "Enforcement of Lost, Destroyed or Stolen instruments":
  (a) physical possession required at time of loss
  (b) burden of proof on person seeking to enforce, "adequate protection" must be provided by court prior to entry of judgment
- RCW 62A.9A-108(c) "sufficiency of description of assets" required in agreements governing sale of promissory notes

ISSUES RAISED IN RESPONDENT'S BRIEF

A. Did Chase acquire ownership of the Note and the "loans and loan commitments of Washington Mutual Bank by operation of law" under FIRREA (12 U.S.C. 1821(d)(2)(G)(i)(II))? (Short answer: No.)

B. Does res judicata bar Stehrenberger's UCC defenses, even though the other court specifically stated that "res judicata would not operate to bar [Stehrenberger's] cause of action as it contemplates an entirely different cause of action," and Chase was neither served nor required to appear or defend? (Short answer: No.)

C. Does FIRREA preempt Washington State law's burden of proof requirements regarding the enforcement of negotiable instruments and the sale of promissory notes such as the Stehrenberger Note? (Short answer: No.)

D. Under the terms of the Purchase and Assumption Agreement, did Chase purchase or acquire ownership of the Stehrenberger Note from the FDIC, even though (1) the terms do not identify the categories of "promissory notes" or "loans" as among the "Assets Purchased by Assuming Bank" Section 3.1, (2) no other loan schedule or asset list exists between the FDIC and Chase that identifies this Note as among the assets sold, (3) Chase admits it did not pay the unique "Book Value" purchase price required under Section 3.2 to purchase this Note? (Short answer: No.)

E. Is the "Affidavit of the FDIC" (Robert C. Schoppe) admissible as parol evidence to supplement a description of assets otherwise insufficient or missing from the Purchase and Assumption Agreement? (Short answer: No.)

F. Is Chase a "holder in due course," even though the record reflects that neither Chase nor the FDIC has ever had physical possession of the original paper Note at any time? (Short answer: No.)

G. Does RCW 5.46.010 allow a copy of a negotiable instrument (Note) to be admitted in place of the original paper asset when seeking to enforce it? (Short answer: No.)

APPELLANT'S REPLY

1. "[Chase] did not acquire WaMu's assets by operation of law."

The Michigan Supreme Court's holding in Kim v. JPMorgan Chase Bank, N.A. defeats Chase's arguments that Chase acquired the Stehrenberger Note from the FDIC *by operation of law* under FIRREA[1] and that federal preemption under FIRREA allows Chase to circumvent the longstanding burden of proof requirements under State law:

> We hold that defendant [Chase] did not acquire plaintiffs' mortgage by operation of law...
>
> The dispositive question in this case is whether the second transfer of WaMu's assets – the transfer from the FDIC to [Chase] – took place by operation of law...Had a merger occurred under that statutory provision [Chase] would have a strong argument that it had merely stepped into the shoes of WaMu. It would have had no need to engage in a transfer of WaMu's assets...But here, a merger did not occur.
>
> In selling WaMu's assets to defendant, the FDIC relied on a different statutory provision, 12 U.S.C. §1821(d)(2)(G)(i)(II), which allows the FDIC to "transfer" the assets and liabilities of failed institutions. Hence, although the FDIC could have effectuated a merger in reliance on subsection (d)(2)(G)(i)(I), it explicitly chose not to do so...
>
> In sum, the Court of Appeals correctly held that [Chase] did not acquire WaMu's assets by operation of law."

Kim v. JPMorgan Chase Bank, N.A.,
493 Mich. 98, at 102-109 (Mich. 2012), 825 N.W.2d 329

1 Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1811 et seq.; specifically, 12. U.S.C. § 1821(d)(2)(G)(i)(I) and (II).

The Kim decision was published on December 21, 2012, twelve months before the filing of Chase's Respondent's Brief. The Kim court's careful analysis of two different prongs of FIRREA (subsections (G)(i)(I) versus (G)(i)(II) is directly relevant to Chase's argument that Chase "became the owner of the loans and loan commitments of Washington Mutual Bank *by operation of law*" (Respondent's Brief, p. 6, and 16-18). Despite Chase's familiarity with the adverse authority in Kim, however, its counsel fails to make any mention of it whatsoever in its Brief.[2] Much of the FIRREA-Chase case law upon which Chase relies in its Brief pre-dates the Kim decision and is no longer relevant or viable as support for Chase's federal law preemption theories here.

The Kim decision is in keeping with this Court's holding in Federal Financial Co. v. Gerard, 90 Wn.App. 169 (1998), 949 P.2d 412 that State law, Washington's Uniform Commercial Code (RCW 62A), rather than FIRREA, governs the direct enforcement of individual negotiable instruments and the assignment of rights in promissory notes when obtained from the FDIC as Receiver of a failed bank.

The trial court relied on the holding in Gerard for its ruling that Chase had acquired enforcement rights to the Stehrenberger Note as an

2 The trial court lists Stehrenberger's January 28, 2013 motion regarding the Kim decision *CP 1010* as among the papers it considered leading up to summary judgment *CP 1409, 1414, see docket listing #135.* The Kim case was referenced in Stehrenberger's opposition to Chase's motion for summary judgment, *CP 1066,* and considered by the trial court. *CP 1415, see docket listing # 148.*

assignee from the FDIC as Receiver of a failed bank. *RP 6, ¶ 17*

Where the facts in Gerard differ from those here, however, is that the FDIC formerly "held" the Gerard note (Gerard, at 174) and physically delivered the Gerard note to Federal Financial such that Federal Financial had become the "current holder" of the Note (Gerard, at 171), and on the basis of that physical possession prerequisite already having been met, this Court then determined that an assignee of a note from the FDIC "steps into the shoes" of the FDIC to obtain the same enforcement rights that the FDIC had. ("Because the FDIC's ability to seek a remedy within the FIRREA limitations period is integrally tied to its *possession of the instrument*, it is among the 'rights remedies and benefits which are incidental to the thing assigned..." Gerard, at 180, emphasis added.)

Here, of course, the record reflects that Chase has never had physical possession of the original paper Stehrenberger Note at any time[3] *CP 454-456* and that Chase has no Lost Note Affidavit *CP 501 ¶ 4* from the FDIC or from Washington Mutual Bank to help it bridge the gap in the chain of physical custody to prove enforcement rights under RCW 62A.3-309 or the seller's [FDIC's] prior right to enforce under RCW 62A.9A-109, Cmt. 5.

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3 "Chase does not now possess the original [Stehrenberger] promissory note and can not tell if it ever took possession of the original promissory note..." *CP 454, ¶ 8-9,* "Chase is not aware that it ever had possession of the original promissory note..." *CP 456, ¶ 13,* "Chase does not know if anyone was responsible for the "loss or misplacement of the original Stehrenberger Promissory Note..." *CP 456, ¶ 12*

2. A negotiable instrument is a "reified right to payment" under RCW 62A.3-203 Cmt. 1, ¶ 3 and is therefore a one-of-a-kind asset. Under RCW 5.46.010, a mere copy of a negotiable instrument is not admissible in place of the original for the purpose of seeking enforcing payment upon it.

When a document is an asset, such as a negotiable instrument is, RCW 5.46.010 does not permit the admissibility of a duplicate or copy in place of the original asset.[4] The court in McKay v. Capital Resources, 327 Ark. 737; 940 S.W.2d 869 (1997) emphasized the inherent unfairness that if a duplicate was allowed in place of the original note, the obligors could later be subjected to double liability. Chase cites to Braut v. Tarabochia, 104 Wn.App. 728, 733-34 (2001), in which it is not clear that the copy of the "collateral agreement" was actually a negotiable instrument under RCW 62A.3-104, as it is here. *CP 143*

Contrary to Chase's assertion, Stehrenberger did not actually *concede* that the copy submitted by Chase is a "true and correct copy" of the original, but rather only that *Chase* had claimed it was a "true and correct copy." (Respondent's Brief, p. 27 ¶ 3) It is a logical impossibility for Chase's counsel to have actually compared the copy for accuracy against an original paper Note that it has never possessed. Chase therefore cannot credibly assert it to this Court as a "true and correct copy."

4 Stehrenberger filed her objection to the unauthenticated copy of the negotiable instrument as a copy of asset not allowed under RCW 5.46.010 *CP 1215*, considered by the trial court leading up to summary judgment. *CP 1416, docket # 165*

Without access to the original Note, it is impossible for this Court to determine whether or not newer endorsements to persons and entities have been placed upon it, or allonges attached to it, to designate a new entity to be entitled to enforce it, since the uncertain time of this un-dated copy having been made. Even so, under RCW 62A.3-203(b), Cmt. 1, if Chase had proved that Chase is the owner of the Note, Chase still is not entitled to enforce payment until it proves the chain of physical possession required according to RCW 62A.3-309 and RCW 62A.9A-109, Cmt. 5. Chase relies on the wrong version of UCC § 3-309 in the Permanent Editorial Report, as the Report addresses the 2002 text rather than the text that is currently law in Washington State.

The trial court erred in granting summary judgment on the basis of Chase's unauthenticated copy of the Note when it disregarded RCW 5.46.010's restriction that a copy of an asset may not be accepted in place of the original asset itself, and summary judgment should be reversed.

3. The Non-Existent Lost Note Affidavit; the improper shifting of the plaintiff's burden of proof onto the defendant to disprove.

Chase admits that there is no Lost Note Affidavit for the Stehrenberger Note. *CP 501 ¶ 4* The decisions in Allen v. US Bank, Nat'l Ass'n (In re Allen), 472 B.R. 559 (B.A.P. 9th Cir. 2012) and Atlantic National Trust, LLC v. McNamee, 984 So.2d 375 (Ala. 2007) are readily distinguishable, as those courts relied upon the Lost Note Affidavits from

the prior possessors of the notes to bridge the evidentiary gap in the chain of physical custody of missing notes to meet the proof requirement under UCC § 3-309.

Chase's Brief invites this Court to join it in speculating that Washington Mutual Bank "*could have* executed a lost note affidavit had it not failed" (Respondent's Brief, at 3, ¶ 2). Chase then improperly seeks to shift the burden of proof to Stehrenberger, as defendant, to prove the *opposite* of the second element (required of Chase under RCW 62A.3-309) that someone else besides Chase is entitled to enforce the Note. Under RCW 62A.3-309(b), however, it is statutorily specified that it is *Chase's* burden to prove *all three* elements of 3-309(a), including proof that no one else has possession of the original Note.

On the basis of the trial court's disregard for Chase's complete failure of proof, whether by Lost Note Affidavit or other evidence meant to fulfill RCW 62A.3-309(a)(i), and RCW 62A.9A-109, Cmt. 5, summary judgment should be reversed.

4. Because Washington Mutual Bank no longer owned 100 percent of the assets on the date it went into receivership, it was crucial for Chase to prove that the original paper Note was physically among those assets on the September 25, 2008 failure date.

Chase speculates that WaMu was entitled to enforce the Note on the date that it failed in September 2008 because Stehrenberger indicated that she had left it unattended on a desk in an public office in 2007.

The Office of Thrift Supervision's "Fact Sheet on Washington Mutual Bank," *CP 87-83,* however, indicates that Washington Mutual Bank no longer owned a large percentage of the loans on its books,[5] and the Washington State Department of Licensing's UCC filings show that other entities had already laid claim to certain of Washington Mutual Bank's "notes" and "negotiable instruments."[6] Under RCW 62A.3-309(b), it is statutorily-specified that it is the burden of proof of the "person seeking to enforce" the instrument to prove all three elements under Section 3-309(a). Because the statutorily-specified burden of proof was not met by Chase, summary judgment was improper and should be reversed.

5. Did Chase meet its burden of proof under Washington State law to show that it acquired ownership of the Stehrenberger Note from the FDIC under the terms of the Purchase and Assumption Agreement?

In its Brief, Chase asserts that the assignment and rights to the Stehrenberger Note were obtained through the terms of the Purchase and Assumption Agreement ("PAA"), *CP 621-664* that "the PAA transferred to Chase certain of the assets, including all loans and loan commitments, of Washington Mutual." (Respondent's Brief 6, ¶ 1) and that '[a]s a

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5 See Office of Thrift Supervision "Fact Sheet on Washington Mutual Bank" *CP 87-83*, Testimony of Schneider before the U.S. Senate Permanent Subcommittee / Investigations Committee on Homeland Security and Government Affairs, April 13, 2010, requested for judicial notice before the trial court and to which Chase did not make objection, as quoted again in opposition to summary judgment *CP 1059*

6 Washington State Department of Licensing UCC filings, as considered by the trial court leading up to summary judgment *CP 1415, see item # 454-455*

result, on September 25, 2008, [Chase] became the owner of the loans and loan commitments of Washington Mutual by operation of law' without the need for assignments identifying each loan." CP93 ¶ 5 (citing to the Affidavit of FDIC (Robert C. Schoppe).

The trial court erred in granting summary judgment for Chase "under FDIC and FIRREA" *RP 6, ¶ 5-6* without first construing the terms and legal effect of the PAA contract. *CP 621-664.*[7]

This Court's de novo construction of the terms and legal effect of the Purchase and Assumption Agreement is vital to confirming the nature of the trial court's error and its automatic presumption that Chase had acquired enforcement rights to the exact Stehrenberger Note through the PAA, even though on closer examination the terms of the PAA together with Chase's admissions in this case do not actually support the trial court's conclusion.

It appears that no other court has yet examined the legal effect of four short paragraphs of the PAA: Sections 3.1, 3.2, Article VII and Article VIII – and in light of the FDIC's acknowledgment that the FDIC never received any records or ever verified any master list of assets that belonged to Washington Mutual Bank on the date that it failed, prior to

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7 Stehrenberger's objections to the admission of the PAA as evidence of any chain of assignment under RCW 62A.9A-108(c) were properly before the trial court and included among the papers considered by it prior to summary judgment, *CP 28, 38, 39, 56, 57, 58, 1081, 1222-1333*, Order, *CP 1416, see docket # 148, 161*

purportedly selling each of them through the PAA, together with Chase's admissions made in this case that the master asset list and loan schedules are non-existent and that no "Book Value" purchase price was actually paid to the FDIC on the $307.02 billion in Washington Mutual Bank total assets – this Court's careful construction of the effect of these terms of this PAA will better clarify the understanding of the rights and obligations of these parties as well as future parties interacting under this same PAA fact pattern.

- **Stehrenberger has standing to challenge the chain of assignment as a defendant-obligor.**

As the party moving for summary judgment, Chase had the burden of establishing its standing as a real party in interest by proving its right to sue on Purchase and Assumption Agreement assignment as a matter of law. As a defendant-obligor, Stehrenberger has standing to question the chain of assignment and to require Chase to prove the assignment:

> An obligor "may assert as a defense any matter which renders the assignment absolutely invalid or ineffective, or void." 6A C.J.S. Assignments § 132 (2010). "These defenses include assignee's lack of title...Obligors have standing to raise these claims because they cannot otherwise protect themselves from having to pay the same debt twice." Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 399 Fed. Appx. 97, 102 (6th Cir. 2010).

- **The burden of proof is upon Chase to prove the assignment and its claim to ownership of the specific Stehrenberger Note.**

> When, as here, "the fact of assignment is put in issue by the pleadings[8]...proof of the assignment is essential to a recovery" and "[t]he burden of proof of the assignment is on the one claiming to be the assignee." MRC Receivables Corp. v. Zion, 152 Wn.App. 625, 218 P.3d 621 (2009), at 630, citing Smith v. Rowe, 3 Wash.2d 320, 323, 100 P.2d 401 (1940).

Chase admits that there is no loan schedule or master asset listing that exists that identifies the Stehrenberger Note or loan as among the assets of Washington Mutual Bank on the date that the FDIC was appointed its Receiver. ("No schedule of all of the loans purchased...by Chase from Washington Mutual has been prepared..." *CP 454, ¶ 2*, "There is no document that specifically mentions the Stehrenberger Note by name." *CP 869, ¶ 1*). Does a contract such as this PAA convey or assign certain things, if none of those certain things are identified *at all*?

- **Governing law of the Purchase and Assumption Agreement is Washington State law.**

The PAA's Section 13.4 states that:

> "Governing law. This Agreement and the rights and obligations hereunder shall be governed by and construed in accordance with federal law and in the absence of controlling federal law, in

8 Stehrenberger's pleadings, her Answer and Affirmative Defenses, specifically alleged that Chase lacks standing as a real party in interest because Chase is not the "successor in interest," *CP 18 ¶ 3* that Chase has failed to demonstrate the existence of any enforceable contract in which Chase is a party in interest *CP 27, ¶ 1, CP 57, ¶ 2,* that the Purchase and Assumption Agreement is missing the "Schedule 3.1a" or any other list evidencing any of the loans and promissory notes actually involved in the Purchase and Assumption arrangement between the FDIC and Chase *CP 38-39, ¶ 36-40, CP 58, ¶ 9-11, CP 59, ¶ 29.*

> accordance with the laws of the State in which the main office of the Failed Bank [Washington Mutual Bank] is located." *CP 654*

Matters not specifically preempted by FIRREA [such as those of a contractual nature] are left to state law. O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994), 114 S.Ct. 2048, 129 L.Ed2d 67, 62 USLW 4487. According to public SEC filings undisputed by Chase, the "main office" of Washington Mutual Bank was located in Seattle, Washington on the September 25, 2008 date that it failed. Washington State law therefore governs the construction of the legal effect of the PAA contract.

- **The fully integrated PAA contract may be construed de novo.**

Chase indicates that the 44-page Purchase and Assumption Agreement ("PAA") that is available from the FDIC.gov website and filed along with its motion for summary judgment *CP 621-664* is an accurate, complete, and final agreement between the FDIC and Chase, which is the operative document that evidences Chase's claim that it is an assignee or purchaser of the assets.[9] The PAA also specifies within its Section 13.1, "Entire Agreement," that

> "This Agreement embodies the entire agreement of the parties hereto in relation to the subject matter herein and supersedes all prior understandings or agreements, oral or written, between the

9 Respondent's Brief, p. 1, fn. 1, "this Court may take judicial notice of official government publications (like the FDIC PAA), where the information is "capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned. ER 201(b); see also Rodriguez v. Loudeye Corp., 144 Wn.App. 709, 726 (2008)..."

parties." *PAA*, page 34 out of 44, numbered page 30, *CP 654*.

The 44-page PAA is therefore a contract that may be construed de novo as a matter of law to determine its legal effect as to whether or not ownership of, or enforcement rights to, the Stehrenberger Note were conveyed from the FDIC to Chase through this contract.

When construing a fully integrated contract such as the PAA, parol evidence is inadmissible:

> "for the purposes of importing into a writing an intention not expressed therein," and is admissible only "with the view of elucidating the meaning of the words employed...It is the duty of the court to declare what is written, and not what was intended to be written..." J.W. Seavey Hop. Corp. v. Pollock, 20 Wash.2d 337, at 348-49, 147 P.668 (1944), as noted with approval and reaffirmed by Berg v. Hudesman, 115 Wn.2d 657 (Wash. 1990), 801 P.2d 222.

> "Under the parol evidence rule, [p]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments [such as the PAA] which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud or mistake." Berg v. Hudesman, 115 Wn.2d 657 (Wash. 1990), 801 P.2d 222, quoting St. Yves. v. Mid State Bank, 111 Wash.2d 374, 377, 757 P.2d 1384 (1988)
> [internal citations omitted]

The extrinsic Affidavit of the FDIC (Robert C. Schoppe), *CP 93*, is therefore inadmissible parol evidence and cannot be used to support Chase's claim that "all loans and loan commitments of Washington Mutual Bank" were acquired by Chase through the PAA *CP 93, ¶ 4*. The PAA contract itself must furnish the description of the assets being

conveyed through it. This affidavit on its face also clearly fails to comply with the personal knowledge requirements of CR 56(e) for summary judgment.[10] As this same Affidavit of the FDIC was discussed in Kim, "the FDIC's purported 'guidance' is offered through an affidavit submitted by an individual 'receiver in charge' for the FDIC. This affidavit is not the statement of the governing board of directors of the FDIC, it is not the statement of any single member of the governing board of directors of the FDIC, and it certainly is not the fruit of rulemaking or adjudication by the FDIC." Kim v. JPMorgan Chase Bank, N.A., 493 Mich. 98, at 120 (Mich. 2012), 825 N.W.2d 329.

> It might appear that where the alleged assignor appeared to urge his claim on behalf of another that in itself would be prima facie evidence of the assignment. It might be expedient and relatively just to so hold. But such a holding would to some extent be speculative. When courts of appeal resort to psychological legerdemain to force a fact into a barren record it breaks down the law itself and can result in naught but disaster.

Messick v. Houx Bros., Inc., 105 Cal.App. 637, 288 P. 434 (1946)

Chase has asserted that it is RCW 62A.9A governs the sale of promissory notes through the PAA *CP 255, ¶ 2* [11] and references

10 Stehrenberger's objections to the admission of the Affidavit of the FDIC (Robert C. Schoppe, *CP 93*) under CR 56(e) are at *CP 1234-1237,* as considered by the trial court leading up to summary judgment. *CP 1416, see docket # 162.*

11 Chase adopts the terminology of RCW 62A.9A that refers to the assets of the failed bank instead of "assets" as the "collateral," the PAA contract as the "security agreement," the seller (the FDIC-Receiver) as the "Debtor" and the purchaser (purportedly, Chase) as the "Secured Party." *CP 255* Also adopting that terminology here, the PAA shall also be referred to as a "security agreement" and the assets of Washington Mutual Bank as "collateral" when appropriate to correspond with terms used in court decisions.

RCW 62A.9A-109 Cmt. 5 for asserting its ownership through the PAA in Respondent's Brief at 29, ¶ 2.

In construing the legal effect of the PAA contract (also, the "security agreement" under RCW 62A.9A's terminology) under the requirements of RCW 62A.9A, this Court may choose to conclude that ownership or rights to the Stehrenberger Note was not sold or conveyed to Chase through the PAA, and that the PAA is not enforceable against Stehrenberger as a third party as proof of the chain of assignment under RCW 62A.9-203 because the description of assets in the PAA are not reasonably described because they do not meet the minimum "sufficiency of description requirements[12]" under RCW 62A.9A-108(c):

> (a) Sufficiency of description...(c) **Supergeneric description not sufficient.** A description of collateral as "**all the debtor's assets**" or "**all the debtor's personal property**" or using words of similar import does not reasonably identify the collateral... [emphasis added]

The PAA describes the types of assets covered under its terms as follows:

> Section 3.1 Assets Purchased by Assuming Bank. Subject to sections 3.5, 3.6, and 4.8,[13] the Assuming Bank [Chase] hereby purchases from the Receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title, and interest of the Receiver in and to **all of**

12 Stehrenberger's objections to the admission of the Purchase and Assumption Agreement as evidence of any chain of assignment *CP 1222, ¶ 16-17, CP 1081, ¶ 2,* as considered by the trial court prior to summary judgment, *CP 1415 see dkt # 146.*

13 PAA Section 3.5 "Assets Not Purchased by Assuming Bank" *CP 635* and accompanying Schedule 3.5 *CP 662,* PAA 3.6 "Assets Essential to Receiver" *CP 635,* PAA Section 4.8 "Agreement with Respect to Certain Existing Agreements" *CP 640*

> **the assets** (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, **of the Failed Bank** [Washington Mutual Bank] **whether or not reflected on the books of the Failed Bank** as of Bank Closing [September 25, 2008].
>
> PAA numbered page 9, PDF page 13 of 44, PAA Section 3.1 *CP 633*; objection under RCW62A.9A-108(c) at *CP 1423*

Also within Section 3.1, the PAA makes reference to a "Schedule 3.1a," *PAA CP 633* ostensibly intended to more specifically identify any other assets or subsidiaries being conveyed through the PAA, but Chase admits that no Schedule 3.1a exists or was ever created, *CP 869*.

The missing and non-existent schedules and asset lists, which Chase asserts would not have contained the categories of "promissory notes" and "loans" on the missing Schedule 3.1a, *CP 869, ¶ 2* are therefore further insufficient to establish that the FDIC assigned the rights and obligations in this particular Stehrenberger Note to Chase. In J.K. Gill Company v. Fireside Realty, Inc., 262 Or. 486 (Or. 1972), 499 P.2d 813 that court determined that the missing description was insufficient to convey the assets through the security agreement:

> The security agreement states the collateral [assets] is 'Furniture as per attached listing.' No listing was attached to the security Agreement introduced into evidence...The security agreement, like any other contract, must be sufficient[ly] certain in its terms so as to evidence the agreement of the parties [here, the FDIC and Chase]...We hold that a security agreement describing the collateral, 'Furniture as per attached listing,' with no listing

attached does not comply with ORS 79.2030 and 79.1100.[14] For this reason the plaintiff has no security interest in the furniture." J.K. Gill Company v. Fireside Realty, Inc., 262 Or. 486 (Or. 1972), 499 P.2d 813, *See further collected cases*[15]

The PAA, which functions equivalent to a bill of sale or similar type of assignment contract, but contains no name, account number or other information identifying the specific characteristics of the Stehrenberger Note as being included among the assets being sold or assigned, does not meet the required proof of assignment of the Stehrenberger Note. Unifund CCR Partners v. Sunde, 163 Wn.App. 473 (Wash.App. Div. 2 2011), 260 P.3d 915, referencing MRC Receivables Corp. v. Zion, 152 Wn.App. 625, 218 P.3d 621 (2009) (where debt collector provides no direct or even indirect proof of any written

14 UCC § 9-110, similar to Washington's RCW 62A.9A-108. Washington's version contains the additional subsection 108(c) stating that "supergeneric" descriptions of assets ("all assets") are insufficient to fulfill the requirements to convey the assets.

15 Collected cases, generally: Insufficient description of assets in security instrument, cannot be enforced against debtors or third parties, collected cases: World Wide Tracers, Inc. v. Metropolitan Protection, Inc., 42 UCC Rep Serv 1573, 384 NW2d 442 (Minn 1986); In re Gist, 34 UCC Rep Serv 1708, 25 BR 96 (BC SC 1982); In re Martin Grinding & Machine Works, Inc., 1 UCC Rep Serv 2d 1329, 792 P.2d 592 (CA7 1986); Avlin, Inc. v. Manis, 35 UCC Rep Serv 2d 295, 124 NM 544, 953 P.2d 309 (NM App. 1997); In re Singer Productions Co., Inc., 10 UCC Rep Serv 2d 547, 102 BR 912 (BC ED NY 1989); Chase Manhattan Bank, N.A. v. J&L General Contractors, Inc., UCC Rep Serv 2d 1286, 832 SW2d 204 (Tex. App. 1992); In re Straight, 32 UCC Rep Serv 2d 911, 207 BR 217 (BAP10 1997)(A bank's security interest did not extend to accounts receivable because they were not identified as collateral in the parties' security agreement. The bank's alleged evidence that both parties assumed or intended that the accounts were covered is inadmissible. Parol evidence is not admissible if the contract is unambiguous).

assignment by the original debt holder, reversal of summary judgment is appropriate.).[16]

Upon construing the legal effects of the Purchase and Assumption Agreement, this Court may choose to conclude that the purported assignment of ownership of unidentified assets from the FDIC to Chase through the PAA does not convey or assign rights to the Stehrenberger Note, due to insufficiency of description 62A.9A-108(c), and therefore, as written, cannot be enforced against third party obligors like Stehrenberger. RCW 62A.9A-203.

In its Brief, Chase claims for the first time that the PAA lists "Loans" as among the assets purchased from the FDIC (Respondent's Brief, p. 6, ¶ 1). However, this Schedule 3.2 *CP 660* is related only to Section 3.2's "Asset Purchase *Price"* only, to be referenced only if the category of "Loans" had been included in the more relevant Section 3.1, "Assets Purchased by Assuming Bank," which it was not.

The trial court erred by taking improper judicial notice of the PAA and accepting one party's theory of the legal effect of the PAA, over objections and oppositions of the other party, without any apparent

16 Unlike in Unifund, the declaration of Raymond Diamond in support of Chase's motion for summary judgment *CP 835* improperly asserts personal knowledge of various facts that occurred over a year prior to his employment with Chase. Stehrenberger's objection *CP 1080* and Motion to Strike *CP 1085,1097, 1101* were both properly before the trial court prior to summary judgment. *CP 1415 see docket # 148, 151.*

further objective inquiry itself into the PAA's relevant sections and terms. In the context of Chase's admissions that the master asset lists and loan schedules had never been created at all, the evidentiary gap in the chain of assignment created issues of fact improperly resolved by the trial court on summary judgment "under FDIC and FIRREA," and should therefore be reversed.

6. Chase never paid the required "Book Value" to purchase the Stehrenberger Note, and therefore Chase neither became the owner of it under the specific purchase terms of the PAA, nor did it suffer any proximate harm from the alleged default.

By the plain language of the PAA's Schedule 3.2 *CP 633*, Chase was required to pay "Book Value" *CP 660* (definition of "Book Value" at *CP 627*) to the FDIC to purchase each of the listed asset categories, which Chase admits it never actually paid.[17] While that may be a matter between the FDIC and Chase, it is directly relevant here because it demonstrates that Chase actually has *no equity* in this Note whatsoever, and that Chase has not suffered proximate harm as a result of the breach of contract it alleges[18]. By comparing just three sections of the PAA, this Court can readily determine that Chase was required to make *three* different installment payments: (1) the "Initial Payment" of

17 "Book Value" discovery responses, as filed by Chase prior to summary judgment: *CP 457, ¶ 15, CP 458,¶ 16, CP 458 ¶ 17, CP 458, ¶ 18*

18 "Book Value" and lack of equity arguments raised in opposition to Chase's motion for summary judgment, *CP 1064,1075-1077* as considered by the trial court prior to summary judgment, *CP 1415, see docket # 148.*

$1,888,000,000, see PAA Article VII, PAA page 20, *CP 644* (2) a "Required Payment" of $50,000,000, in exchange for paying one day late on September 26, 2008, PAA page 6, *CP 631* (for a combined total of the reported $1.9 billion claimed paid by Chase *CP 457, ¶ 15*) **plus** (3) a unique and separately identifiable "Asset Purchase Price" for each individual asset related to the value of that specific asset on the books of Washington Mutual Bank on the September 25, 2008 date it failed, see PAA Section 3.2 "Asset Purchase Price," *CP 633,* Schedule 3.2 "Book Value" *CP 660-661,* and definition of "Book Value," see PAA definitions, page 3, *CP 627.*

Chase admits that Chase has not actually paid any "Book Value" for any of the assets that Chase claims it acquired from the FDIC, *CP 457-458* (approximately $307.02 billion, according to the undisputed Office of Thrift Supervision's "Fact Sheet on Washington Mutual Bank," *CP 87-88*) . Chase therefore has not paid any "Book Value" for the Stehrenberger Note, and under the terms of the PAA, as written, did not purchase or acquire the Stehrenberger Note.

> "It is the duty of the court to declare what *is* written, and not what was intended to be written..." J.W. Seavey Hop. Corp. v. Pollock, 20 Wash.2d 337, at 348-49, 147 P.668 (1944) [emphasis added]

7. Chase's failure of proof, and lack of equity in the Note

Chase's problem is evidentiary; a total failure to meet the essential elements of proof on its breach of contract claim: the existence of an enforceable contract between the parties under RCW 62A.3-203, 3-301, 3-309 and 9A-109,[19] that Chase has performed its part to Stehrenberger, that Stehrenberger has not performed her part to Chase, and that Chase has suffered proximate harm as a result.

Chase has no basis for an alternative equitable claim because it has neither loaned any money to Stehrenberger, nor has it paid any money towards purchasing the Stehrenberger Note. In fact, Chase's records reflect that it has received approximately $15,000 in payments from Stehrenberger after the 2008 failure date of WaMu. Chase's ad hominem arguments fail to mention that Stehrenberger had formally tendered rescission and offered to pay the entire remaining principal on October 28, 2011 *CP 128-142, CP 1076-1077* conditioned upon Chase surrendering the original paper Note in exchange for final payment, in accordance with the presentment requirement (RCW 62A.3-501). Chase did not do so. Chase's lack of equity in this case therefore prevents this

19 See RCW 62A.9A-109, Cmt. 5, "the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller [FDIC] to provide the proof under that section;" there, under RCW 62A.3-301.

Court from affirming the trial court's grant of summary judgment for Chase on alternative equitable grounds.

8. In the words of the Ohio court in Stehrenberger v. JPMorgan Chase: "res judicata would *not* operate to bar [Stehrenberger's] cause of action as it contemplates an entirely different cause of action."

Chase's Brief ignores the Southern District of Ohio court's subsequent November 15, 2012 Order stating: "...applying the foregoing, res judicata would *not* operate to bar [Stehrenberger's] cause of action as it contemplates an entirely different cause of action[20]." [emphasis added]

Stehrenberger's declaration in support of her Notice of Voluntary Dismissal in the Southern District of New York[21] makes clear that the three filings in three different venues were related to meeting a statute of limitations deadline, in the face of uncertainty over the proper venue with the authority to grant relief over a National Association conglomerate with multiple branches and various foreign corporation filings overlapping among various states' Secretaries of State. The declaration confirms that each case was dismissed, prior to any service of

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20 Southern District of Ohio Order regarding res judicata, November 15, 2012. See PACER Case: 2:12-cv-00874-JLG-EPD Doc #: 9 Filed 11/15/12 pp. 73-74, at 73 ¶ 3, of which judicial notice is requested, Rodriguez v. Loudeye Corp., 144 Wn.App. 709, 726 (2008). Addressed in Stehrenberger's opposition to Chase's motion for summary judgment *CP 1062-1063,* as considered by the trial court leading up to summary judgment, *CP 1415, see docket # 148*

21 Southern District of New York, declaration regarding reasoning behind multiple venue filings during statute of limitations deadline. See PACER Case 1:12-cv-07212-AJN, Document 17 Filed 06/10/13, of which judicial notice is requested, see fn. 19.

process on the opposing party, such that Chase was not even required to appear or defend. The matters were therefore not fully adjudicated on their merits.

> "The parties are the same, but the issues are not identical. The precise questions of fact were not litigated." Cf. Eplham Hall Co. v. Hassett, 1 Cir., 147 F.2d 63. Corrigan v. C.I.R., 155 F.2d 164 (6th Cir. 1946).
>
> "[..I]t is nevertheless the general rule that res judicata is no defense where, between the time of the first judgment and the second, the has been an intervening decision or a change in the law creating an altered situation." State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154 (1945), 65 S.Ct. 573, 89 L.Ed. 812, citing 2 Freeman on Judgments (5th ed.1925) § 713; Blair v. Commissioner, 300 U.S. 5, 9 (collecting additional cases).

The Ohio court's November 2, 2012 dismissal relied in part upon the same defective FIRREA "acquired by operation of law" theory,[22] and the intervening event of the Kim decision on December 21, 2012 makes obsolete the earlier dismissal, at least for res judicata and collateral estoppel purposes here.

9. The Federal Holder in Due Course doctrine is not applicable, and does not immunize Chase against claims against its own conduct and lack of standing

The FDIC itself was not a "holder" with physical possession of the original paper Note, and therefore not a "holder in due course." One

22 November 2, 2012 Order, 2012 U.S. LEXIS 157457, (S.D. Ohio Nov. 2, 2012) as referenced to Report & rec. at within Chase's motion for summary judgment, "Courts have, therefore, consistently held that Chase became the owner of WaMu's loans and loan commitments by operation of law and have rejected arguments that Chase is entitled to enforce the acquired WaMu loans." *CP 596-597*

cannot convey a greater title or interest in property than he or she has. Sofie v. Kane, 32 Wn.App. 889, 895, 650 P.2d 1124 (1982).

CONCLUSION

There is no windfall to the obligor here. Stehrenberger still remains indebted to the party lawfully entitled to receive her payment. Were this Court to affirm the trial court's summary judgment and allow Chase to evade its burden of proof under Washington law, the physical possession requirements so carefully interwoven throughout RCW 62A – and the long standing protections afforded to obligors against imposters claiming to be their creditors – would cease to have meaning.

For the foregoing reasons, Stehrenberger respectfully requests that this Court reverse the trial court's summary judgment for Chase and its dismissal of her two counterclaims; vacate the trial court's award of Chase's attorney fees and award RAP 18.1 fees and costs of appeal to Stehrenberger; and remand this matter to the trial court, with specific instructions that it (1) immediately dismiss Chase's breach of contract claim for lack of standing, and (2) reset the trial calendar to allow Stehrenberger to move forward in seeking recovery on her counterclaims.

Respectfully submitted,

January 22, 2014

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Appellant Pro Se
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on January 22, 2014, I filed by postal mail, this **Reply Brief of Appellant** in Case No. 70295-5-I, as one original with one true and correct copy, with the Washington State Court of Appeals, Division I, by courier hand-delivery to:

Washington Court of Appeals, Division 1
600 University Street
One Union Square
Seattle, WA 98101-1176

and also served by mail on January 22, 2014 one true and correct copy of the Amended Brief of Appellant upon the Respondent, JPMorgan Chase Bank, N.A., via its counsel of record, by courier hand-delivery:

Mr. Fred Burnside and Ms. Rebecca Francis
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1201 Third Avenue, Suite 2200
Seattle, WA 98101-3047

I additionally served upon the Respondent, JPMorgan Chase Bank, N.A., via its counsel of record, by email including a download link to an online DropBox archive folder, available for immediately download, containing an electronic PDF copy of the Reply Brief of Appellant, to:

Mr. Fred Burnside, at FredBurnside@DWT.com
Ms. Rebecca Francis, at RebeccaFrancis@DWT.com

Dated January 22, 2014

Michiko Stehrenberger, Appellant pro se