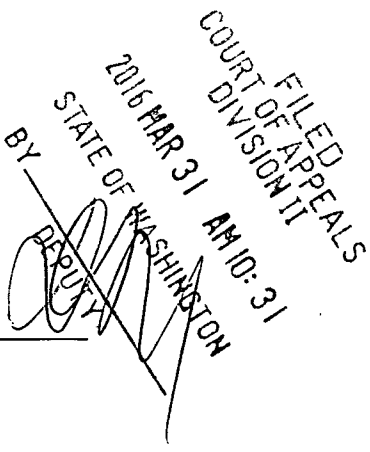
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 477779-3-II



CYRIL J. WORM, a married man, as his sole and separate property,

Appellant,

vs.

BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2004-J12, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-J12; BAC HOME LOANS SERVICING, LP; RESIDENTIAL CREDIT SOLUTIONS, INC.; NORTHWEST TRUSTEE SERVICES OF WASHINGTON; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF MASON

APPELLANT WORM'S OPENING BRIEF

CYRIL J. WORM, Plaintiff Pro se
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I ARGUMENT

1. MERS' Assignments of Note and DOT were legally ineffective.

RCW 62A.9A-203(a) states a "***security interest***" (including the interest of a ***buyer*** of a promissory note in a transaction subject to Article 9A) attaches to a promissory note when the security interest becomes enforceable against the debtor (including a ***seller*** of a promissory note [RCW 62A.9A-102(a)(28)(B)]). A "mortgage note" is just a variety of *secured* promissory note. Consequently, Article 9A – the *Secured Transactions* Article -- applies to transactions involving *secured* mortgage notes.

RCW 62A.9A-203(b) states that a security interest (i.e., *ownership* interest [RCW 62A.1-201(b)(35)]) in a promissory note becomes enforceable when three conditions have been met. The first of the three conditions requires the person to give "*value*" for the note (RCW 62A.9A-203[b][1]). MERS never gave value for Plaintiff's Note. Additionally, each of the two MERS assignments—June 11, 2010 and October 1, 2012--indicates MERS acted in its individual capacity. As a result, MERS did not have an enforceable *ownership* interest in the Note to transfer. Since MERS had no ownership interest in the Note, *and did not even hold the Note*, MERS's two assignments of the Note in its individual capacity were void at their respective inceptions.

2. The "Security Follows the Note" Legal Axiom.

RCW 62A.9-203(g) is the codification of the common law "security follows the note" legal axiom. *See Official Comment 9 to UCC §9-203.* It is undisputed that the beneficial interest in Plaintiff's Note has never been transferred to MERS. Under §9-203(g), an entity cannot obtain the right to enforce a deed of trust ("DOT") until after it obtains an enforceable *ownership* interest in the note the DOT secures. Since it is undisputed MERS never obtained an enforceable ownership interest in, or even held, Plaintiff's Note, it is impossible that MERS ever obtained the right to enforce the DOT. Consequently, MERS, acting in its individual capacity, had no right to assign the right to enforce the DOT.

The two MERS assignments of the DOT were unquestionably unfair and deceptive acts and practices. Defendants-Respondents, including Northwest Trustee Services, Inc. ("NWTS"), knew, or at least should have known, all of the MERS-related facts recited herein. Thus, Defendants-Respondents were aware of the deceptions as the deceptions were occurring. NWTS should not be permitted to now piously claim it is not responsible for its unlawful actions simply because it received a declaration from an entity it knew, for several reasons, could not possibly be the beneficiary of the DOT.

In the normal course of its business, MERS has, under identical circumstances, executed assignments of DOT's for Defendants-Respondents in thousands of foreclosure cases throughout the State of

California. This manifestly fraudulent conduct has been widespread and has affected thousands of Washington homeowners over the years.

3. The Trust's Appointment of NWTS was an Unfair and Deceptive Act.

The Trust's appointment of NWTS as the successor trustee on the basis of the authority purportedly obtained through the MERS assignments was an unlawful, unfair, and deceptive act. The Trust had never become the lawful beneficiary because each of MERS' assignments were legally ineffective (facts which NWTS knew or should have known). Since the Trust never lawfully obtained an interest in the DOT,[1] its appointment of NWTS did not comply with RCW 61.24.010 and therefore did not grant NWTS the powers of the successor trustee. Hence, NWTS's initiation of the non-judicial foreclosure proceeding was an unlawful, unfair, and deceptive act.

Over the years, in the normal course of their businesses, Defendants-Respondents have conducted non-judicial foreclosures under circumstances very similar to or exactly the same as the circumstances presented by this case in thousands of foreclosure throughout the State of Washington. Their joint and several actions have had significant impact on residents of this state.

[1] Please do not lose sight of the fact we are speaking in the alternative. The Trust did not own the Note or beneficial interest in the DOT when it appointed NWTS the successor trustee. Accordingly, on these separate, substantial, unrelated bases, NWTS was not entitled to foreclose.

4. If Sale Avoidable for Any Reason, Tender not required.

Even if it had been lawful for MERS to transfer the Note and DOT, the assignments would still have been unlawful. The entire foreclosure proceeding is unlawful because, among other reasons, the attempted sale is ultimately founded on MERS' transfers of the Note and DOT to the Trust. In addition, however, each of the assignments occurred not minutes, days, weeks, or even months after the Trust closed, but years after the Trust closed. The attempt to publicly auction the Plaintiff-Appellant's home was *void,* not *voidable*, from its inception.

Under such circumstances, Plaintiff-Appellant is entitled to avoid the sale. Also, Plaintiff is entitled to avoid the sale without tendering payment. *Vissuet v. Indymac Mortgage Servs.,* No. 09-CV-2321-IEG, 2010 U.S. Dist. LEXIS 26241, 2010 WL 10310113, at *3 (S.D. Cal. March 19, 2010) ("[W]here a party has the right to avoid a sale, he is not bound to tender any payment in redemption.") The tender rule does not apply in cases in which the Plaintiff is seeking to prevent an illegal sale from occurring, as opposed to setting aside a completed illegal sale. *Barrionuevo v. Chase Bank, N.A.,* 885 F. Supp. 2d. 964, 969 (N.D. Cal. 2012) *see also*, e.g., *Giannini v. American Home Mortgage Servicing, Inc.,* No. 11-04489 THE, 2012 U.S. Dist. LEXIS 12241, 2012 WL 298254, at *3 (N.D. Cal. February 1, 2012) ("While it is sensible to require tender following a flawed sale—where irregularities in the sale are harmless

unless the borrower has made full tender—to do so prior to sale, where any harm may yet be preventable, is not.").

Finally, tender is not required if a sale is void, not merely voidable. *See, e.g., Dimock v. Emerald Properties LLC*, 81 Cal. App. 4th 868, 878, 97 Cal. Rptr. 2d 255 (2000) (holding that plaintiff "was not required to tender any of the amounts due under the note" because he "could rely on the face of the record to show that the Commonwealth deed was void"); *Pfeifer v. Countrywide Home Loans, Inc.*, 211 Cal. App. 4th 1250, 1280, 150 Cal. Rptr. 3d 673 (2012) ("Courts have recognized various exceptions to the tender rule, including an exception based on an allegation that a foreclosure sale is void").

In the case before this court, Plaintiff-Appellant seeks to prevent a foreclosure sale and is arguing the Trust is not the true beneficiary and therefore does not have the power of sale.

5. NWTS had no lawful authority to commence this foreclosure.

NWTS is the biggest foreclosure mill in the State of Washington. The MERS assignments have been recorded in the Mason County Auditor's Office for 3½ and 6 years respectively. Hence, just as Plaintiff, an individual with no formal legal training, has been able to piece together the fact the foreclosure proceeding is illegal, NWTS knew or certainly should have known the foreclosure proceeding was illegal.

6. Assignment Occurred After Trust Closing Date, and was therefore Unlawful, Unfair, and Deceptive.

I anticipate Defendants-Respondents, in an effort to divert the court's attention from the real issues in this case, will argue Plaintiff-Beneficiary is not a party to the assignment of the Note and DOT, is not a third-party beneficiary of the assignment, and may not assert violations of federal statutes. If Plaintiff was arguing the assignment is *voidable*, Defendants-Respondents' arguments might be valid. Plaintiff, however, is not arguing the assignment is *voidable.* Plaintiff is arguing the assignment is *void.* Therefore, the facts that Plaintiff is not a party to the assignment agreement, is not a third-party beneficiary of the assignment, and is postulating violations of the Real Estate Mortgage Conduit Act ("REMIC") (26 U.S.C. §860[A]-[G]) do not prevent Plaintiff from asserting the illegality of the assignment. *See Glaski v. Wells Fargo Bank, N.A.,* 218 Cal. App. 4th 1079, 1096-1098 (160 Cal. Rptr. 3rd 449) (2013).

Plaintiff recognizes some cases accept the third-party beneficiary and lack-of-privity arguments. As demonstrated below however those cases paint with too broad a brush.

a. Assignment Violated Pooling and Servicing Agreement.

The Trust Pooling & Servicing Agreement ("*PSA*"), the governing document for the Trust, supports the claim that the Trust does not have the power of sale. The PSA requires all loans to be placed in the Trust no more than 30 days after the Trust's Closing Date. *Alternative Loan Trust 2004-J12 Mortgage Pass-Through Certificates, Series 2004-J12,* at II-1.

The Trust closed on December 30, 2004. *See id.*, at I-5 and I-25. The PSA can be found at http://www.secinfo.com/drjtj.zE5.d.htm#3n3. .Accordingly, to be assigned to the Trust lawfully, Plaintiff's loan had to be assigned to the Trust no later than December 30, 2004. The loan, if it has ever been placed in the Trust, was not assigned to the Trust until, at the earliest, June 9, 2010, five years and 161 days after the Trust's Closing Date. The assignment was therefore legally ineffective, unlawful, unfair (because it gave the world the impression the Trust was the lawful owner of Plaintiff's Note and DOT), and deceptive (because it was intended to give the world the impression the Trust was the owner of Plaintiff's Note and DOT).

b. Plaintiff Prejudiced by Assignment.

The Trust appointed the NWTS to commence this foreclosure. It did so because the Note and DOT were allegedly assigned to it by MERS—even though the assignment occurred years after the last date upon which both the *PSA* and the REMIC statute authorized lawful loan assignments into the Trust. Consequently, the harm identified by Plaintiff—the attempt to foreclosure with all of its attendant costs for Plaintiff—can be traced directly to the Trust's exercise of the authority purportedly granted to it by the assignment. Moreover, and this, if possible, is even more important; Plaintiff is obligated to pay the Note issued in payment of the mortgage debt, or suffer loss of the security (i.e., his home), *only to a person that has actually been lawfully assigned the*

debt. *Yvanova v. New Century Mortgage Corp.*, 62 Cal. 4th 919, 2016 WL 639526 at *11.

Plaintiff-Appellant has made this same argument, repeatedly, from the start of this litigation. Plaintiff-Appellant owes a debt to a specific person, not to everyone in the world! This is precisely what the DOT states. *See DOT, TRANSFER OF RIGHTS IN THE PROPERTY Section.*

Prior to the California Supreme Court's very recent decision in *Yvanova,* the majority rule in California had been that homeowners could not challenge late assignments of DOT's into securitized trusts because they were neither parties to the assignments nor third-party beneficiaries of the assignments. The same *reasoning* is currently the majority rule in Washington.

From the beginning of this litigation, Plaintiff-Appellant has argued in vain that the majority rule is ill-conceived. Now, the California Supreme Court, the leading state court in the country, has joined me. My reasoning, which I knew was correct all along, has been vindicated. Washington courts may not be advanced enough in their ability to analyze this issue to rule in Plaintiff-Appellant's favor on this issue, but the leading state court in the country has finally analyzed the issue correctly. It is only a matter of time until the rest follow. Win or lose, Plaintiff-Appellant's position has been vindicated. That position is presented in greater detail below.

Plaintiff does not owe money to the world at large, but to a particular person. More than a few courts fail to keep this fact firmly in mind when evaluating cases of this type. Only the person to whom the debt is owed may enforce the debt by foreclosing on the security for the debt (i.e., the home). *See* DOT, *TRANSFER OF RIGHTS IN THE PROPERTY Section*; and RCW 62A.9-203(a), (b), and (g) (codification of the "security follows the debt" legal axiom). Taking the contrary position (that there is no prejudice from a void assignment because the homeowner owes the debt to ***someone***) leads to an absurdity: anyone, even a stranger to a debt, can declare a default and order a trustee's sale because, after all, the homeowner owes the debt to someone, *though not to the foreclosing entity*. In a post-foreclosure-sale context, the California Supreme Court has already condemned *reasoning* of this kind. *Yvanova,* 62 Cal. 4th 919, 2016 Cal. LEXIS, at *12.[2] It is only a matter of time until state court across the country become enlightened enough to join the California Supreme Court. Since I have some hope for the Washington judiciary, I have some hope this court will recognize the correctness of the position.

c. Prejudice exists in Pre-Foreclosure-Sale Context.

[2] The California Supreme Court has granted review in two cases that address the prejudice issue in the ***pre-foreclosure-sale*** context: *Keshtgar v. U.S. Bank,* 178 Cal. Rptr. 3d 320, 334 P.3d 686 (Cal. 2014) (granting petition for review), and *Mendoza v. JP Morgan Chase Bank,* 228 Cal. App. 4th 1020 (July 2014). Both cases were stayed pending the Supreme Court's decision in *Yvanova.* Anticipating the California Supreme Court's decisions in *Keshtgar* and *Mendoza*, in *Lundy,* the United States District Court for the Northern District of California analyzes and decides the prejudice issue in a ***pre-foreclosure-sale*** context.

Prejudice in the post-foreclosure-sale context is more easily recognized than in the pre-foreclosure-sale context. In the post-foreclosure-sale situation, plaintiff has already suffered the perceptible injury of the loss of the property. Because the sale in *Yvanova* had been completed, it is possible to conclude the *Yvanova* prejudice analysis applies only in the context of a completed foreclosure sale. However, such a conclusion would be erroneous.

The prejudice analysis in *Yvanova* does not depend on the existence of a completed foreclosure sale. *Lundy v. Selene Finance, LP,* 2016 U.S. Dist. LEXIS 35547 at *31. The *Yvanova* Court's prejudice analysis focuses, as it should, on the unfairness of requiring a plaintiff to be subjected to foreclosure proceedings by an entity that has no right to initiate those proceedings. *Id.* For this reason, in *Lundy* the U.S. District Court for the Northern District of California concluded that *Yvanova's prejudice* ruling applies just as strongly to pre-foreclosure-sale plaintiffs as it does to post-foreclosure-sale plaintiffs. *Lundy,* 2016 U.S. Dist. LEXIS 35547, at *31. ("A plaintiff who has already lost her home has undoubtedly suffered prejudice; but so has a plaintiff who is at imminent risk of doing so."). Defendants-Respondents' assertion that Plaintiff-Respondent has suffered no prejudice is ludicrous.

At the commencement of this litigation, Plaintiff herein was at imminent risk of losing his home. If this case ends with Plaintiff-Appellant's defeat, the imminence of losing his home will immediately

return. As such, there is no lack of prejudice, and there never has been a lack of prejudice.

7. These acts are capable of repetition and have a substantial impact on the public interest.

Defendants clearly have the capacity to repeat these acts, and in fact have repeated these acts in other foreclosure proceedings that are now concluded or that are currently underway.

For years Defendants have allowed MERS to assign Notes and DOTs into securitized trusts years after the trusts have closed. Defendants are fully aware that in most instances the courts are simply turning a blind eye to Defendants actions in non-judicial foreclosure proceedings because, after all, the homeowner owes a debt to *somebody*. Does it really matter to whom the debt is paid, as long as the homeowner is not required to pay it more than once? If any member of this court is thinking in such venal terms, the answer is "Yes, it does matter, if the law matters."

Because courts pay little attention to what these very corrupt foreclosure mills are doing, illegal actions go undetected and uncorrected in almost every illegally-conducted non-judicial foreclosure proceeding. Moreover, even in those few instances in which borrowers challenge non-judicial foreclosure efforts in court, some judges do not possess sufficient understanding of the statutory requirements, or do not desire to look sufficiently closely at the trustee's actions, to know the foreclosure proceeding should be arrested.

Because these actions are so often repeated, the practices described herein above have a widespread impact on some of Washington's most vulnerable and exposed citizens, Plaintiff among them. If the court permits this sale to occur despite the illegality of Defendants' actions, Plaintiff will lose the Property—a grave injury indeed if, as Plaintiff claims, the foreclosure proceeding is unlawful.

Finally, the loss of the Property will have been due entirely to Defendants' unlawful conduct. The fact Defendant owes a debt to someone means only that someone has a right to foreclose. If anyone else forecloses, as happened here, they have foreclosed illegally. Any injury caused by an illegal foreclosure is due strictly to that illegal foreclosure.

Each Defendant's participation in the preparation, execution and implementation of the false documents were prepared, executed, and implemented in this case violated the Washington version of the Consumer Protection Act.

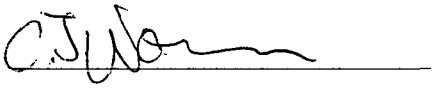
V CONCLUSION

For the reasons listed herein above, the court should reverse the trial court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

DATED THIS 30th Day of March, 2016.

Respectfully submitted,

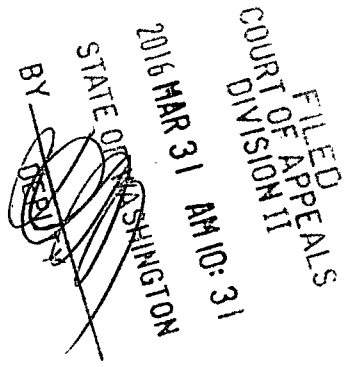
CYRIL J. WORM



Cyril J. Worm, Appellant Pro se

DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under the laws of the State of Washington that he caused Plaintiff's Amended Opening Brief to be served on the following representative for Defendants at the below stated address by U.S. Mail as previously agreed between the parties to this litigation:



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DONE this 30th day of March, 2016 at Tacoma, WA.

CYRIL J. WORM

Cyril J. Worm, Plaintiff Pro se