Supreme Court No. 95654-5
Court of Appeals No. 75665-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHELLE MERCERI, a single woman,

Petitioner,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, et al,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Deutsche Bank National Trust Company, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, et al, ("Deutsche") respectfully submits this Answer in opposition to Petitioner Michelle Merceri's ("Merceri") Petition for Review of a decision of the Court of Appeals, Division One, dated January 22, 2018, in *Merceri v. Deutsche Bank*, No. 75665-6-I.

II. INTRODUCTION

Merceri obtained a loan, secured by a deed of trust. She defaulted on her obligation, and subsequently filed for bankruptcy protection. Immediately upon filing bankruptcy, 11 U.S.C. § 362(a) imposed an automatic stay that prohibited foreclosure. The Court of Appeals held that under the plain language of the tolling statute in the statute of limitations, RCW 4.16.230, the 6-year statute of limitations applicable to foreclosure proceedings was tolled while the bankruptcy stay was in place.

Despite Merceri's assertion that all four factors of RAP 13.4(b) justify review by this Court, none are applicable, and review should be denied. This is simply a case where the losing litigant is

unhappy with a court's correct application of the plain terms of the tolling statute. Merceri has never raised a constitutional issue in this case until her Petition for Review. She has also never relied upon the Division 1 decision in *Watson v. Northwest Trustee Services, Inc.*, 180 Wash. App. 8 (2014), *review denied*, 181 Wn.2d 1007 9 (2014), until she first raised it in her appellate motion for reconsideration. In addition, nothing in *Watson* is applicable to this case. The Court of Appeals never addressed these issues, and they do not provide any basis for review. Finally, the decision of the Court of Appeals does not conflict with any other Washington case, nor does it present an issue of substantial public interest.

III. STATEMENT OF ISSUES

A. The Court should deny review under RAP 13.4(b)(1) because the decision of the Court of Appeals does not conflict with any decisions of the Supreme Court.

B. The Court should deny review under RAP 13.4(b)(2) because the decision of the Court of Appeals does not conflict with *Watson v. Northwest Trustee Services, Inc*.

C. The Court should deny review because the case does not present a significant question of law under the Constitution of the State of Washington or of the United States.

D. The Court should deny review because the case does not involve an issue of substantial public interest.

IV. STATEMENT OF THE CASE

In December 2006, Michelle Merceri, and her former business partner Shawn Casey Jones, borrowed $2,800,000 to finance the purchase of real property in King County. CP 45–50. To secure the loan, Merceri and Jones granted a deed of trust, encumbering real property located at 3009 Fairweather Place, Hunts Point, Washington 98004. CP 51–70.

Beginning in February 2007, Merceri and/or Jones made payments on the loan for 16 months, and stopped paying the loan in June 2008. CP 35, ¶6. Approximately nine months later, a non-judicial foreclosure action commenced. On February 25 and 26, 2009, a notice of default was mailed and served. CP 121, ¶IV. The beneficial interest of the deed of trust was subsequently assigned to Deutsche. CP 117. On June 16, 2010, the trustee recorded a Notice of Trustee's Sale. CP 119.

On November 17, 2010, Merceri filed for Chapter 7 bankruptcy protection in the Western District of Washington (Case No. 10-23826-CMA). CP 589, ¶ 43. Merceri thereby invoked the automatic stay in bankruptcy under 11 U.S.C. § 362(a). The

statutory bankruptcy stay halted all foreclosure attempts, and enjoined Deutsche from proceeding with any action to enforce its defaulted loan. *Id*. The property securing Deutsche's loan became an asset of Merceri's bankruptcy estate, subject to Deutsche's secured lien.

Merceri's bankruptcy trustee wanted to sell the property to satisfy her creditors. CP 573-76. The bankruptcy court allowed the trustee to market and sell the property. CP 577-580. But despite the trustee's marketing efforts and multiple attempts to close a sale of the property during the pendency of her bankruptcy (*see*, *e.g.*, CP 573–576), the trustee was ultimately unsuccessful. CP 125. The property remained unsold. *Id.*

Merceri moved the federal bankruptcy court for an order directing the bankruptcy trustee to abandon all interest in the property. CP 125. On December 4, 2012, the bankruptcy court granted Merceri's motion, and ordered the bankruptcy estate's interest in the property abandoned. *Id*. Accordingly, the automatic stay in bankruptcy under 11 U.S.C. § 362 invoked by Merceri on November 17, 2010, was terminated. 11 U.S.C. § 362(c)(1).

In January 2014, a new foreclosure was commenced. CP 213-219. In February 2014, Merceri demanded that the parties participate in the foreclosure mediation program under RCW 61.24.163. CP 221-222. After two unsuccessful mediation sessions, the mediator certified that the mediation process had been completed in good faith on May 20, 2015. CP 224-225. Deutsche was then permitted to proceed with its non-judicial foreclosure again.

On September 30, 2015, a new Notice of Trustee's Sale was issued. CP 227-238. On December 2, 2015, Merceri filed the complaint in the present case, challenging and attempting to stop the non-judicial foreclosure again. CP 1–32. The trustee's sale was postponed to May 27, 2016. CP 243-44. The trustee ultimately discontinued the sale.

On May 25, 2016, Merceri filed a motion for partial summary judgment, requesting that the trial court determine the statute of limitations had expired, and that Deutsche's foreclosure was time-barred. CP 249–253. On June 16, 2016, and after discontinuance of the last trustee's sale, Deutsche filed a motion for leave to amend its answer to include a counterclaim for judicial foreclosure and a third

party complaint. CP 315-319. On June 29, 2016, the trial court entered an order denying Deutsche's motion to amend. CP 551–552. On June 30, 2016, the trial court entered an order granting Merceri's motion for partial summary judgment. CP 553–554.

On July 11, 2016, Deutsche moved the trial court to reconsider its orders ruling regarding the statute of limitations. CP 555–569. On July 19, 2016, the trial court clarified its order by stating its reliance upon *Hazel v. Van Beek*, 135 Wn.2d 45, 64–66 (1998), in having determined that the statute of limitations had run on Deutsche's judicial foreclosure claim, permanently barring foreclosure. CP 714–715.

The Court of Appeals reversed the trial court, held that the automatic bankruptcy stay tolled the statute of limitations, and that Deutsche's foreclosure, therefore, was timely.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Merceri has not met the criteria required for a discretionary grant of review by this Court.

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

A. The Court should deny review under RAP 13.4(b)(1) because the decision of the Court of Appeals does not conflict with any decision of the Supreme Court.

In *Hazel v. Van Beek*, 135 Wn.2d 45 (1998), Hazel had obtained a judgment against Van Beek, and the judgment lien attached to Van Beek's property. Van Beek filed bankruptcy, and for a period of time, Hazel was precluded from enforcing her judgment lien due to the automatic stay. *Id*. at 48. The life of a judgment lien was at issue, under RCW 4.56 *et seq.*, for which no tolling statute existed. The Washington Supreme Court concluded only that 11 U.S.C. § 108(c) *itself* did not toll the statute of limitations.[1] The

[1] 11 U.S.C. § 108(c) provides a 30-day period in which to pursue any federal or state action following a bankruptcy stay if the statute

Court then denied tolling due to the bankruptcy stay because there was no tolling statute for judgment liens. In so doing, it held: "[i]t would be improper for us to write new exceptions into RCW 4.56.210. If the Legislature intended for tolling, it could have provided for it." *Id*. at 64. The Court further noted the "judgment life-span" is not "a normal statute of limitations." *Id*. at 61.

For statutes of limitation, the Legislature did intend tolling, and so provided, under RCW 4.16 *et seq*., by enacting RCW 4.16.230. The Court of Appeals' decision in the present case does not conflict with the Court's decision in *Hazel*.

Neither does the Court of Appeals' decision conflict with any of the other six Washington Supreme Court cases argued by Merceri.

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of limitations expires while the stay is in effect. It allows tolling provided under state law. In *Pettibone v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991), the court held that Illinois state law tolls the statute of limitations for the entirety of a bankruptcy proceeding: "Federal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business. Some states do—e.g., Illinois, which tolls its statute of limitations during the entire bankruptcy proceeding, Ill, Rev. Stat. ch. 110 para. 13-216." Illinois is the same as Washington—it tolls the statute of limitations when commencement of an action is "stayed by injunction or a statutory prohibition."

In *Spokane County v. Prescott*, 19 Wash. 418 (1898), a county treasurer waited over three years to commence an action against the former treasurer for sums due. *Id*. at 418-19. The treasurer argued he was under a "disability" to sue until authority was procured from the superior court to commence the action. *Id*. at 424-25. The Court, however, found that the cause of action accrued when liability arose. There was no injunction or statutory prohibition at issue, and tolling was not discussed or addressed.

In *Bennett v. Thorne*, 36 Wash. 253 (1904), the Court similarly dealt with accrual of a cause of action, not tolling. The Court held that the action accrued when the bank became insolvent. *Id*. at 271. It further held was no requirement for a decree ordering an assessment on behalf of the creditors, before filing suit. *Id*.

In *Jones v. Jacobson*, 45 Wn.2d 265 (1954), there was similarly no tolling at issue, and the court determined that the right of action accrued when the party could have demanded possession of personal property.

In *Douglas County v Grant County*, 98 Wash. 355, 361 (1917), the Court held there was no injunction against Douglas

County enjoining it from suing Grant County, because the injunction was only against Grant County.

Similarly, in *Del Guzzi Constr. Co. v. Global Northwest*, 105 Wn.2d 878, 885 (1986), no statutory or contractual prohibition prevented the subject action at any time within the statute of limitation. The Court determined that Global knew of the inability to compact soil earlier, and that its cause of action accrued in 1976. *Id*. at 884.

The Court of Appeals' decision is also consistent with *Hinchman v. Anderson*, 32 Wash. 198 (1903). There, the Court dealt with a statute that mandated that a plaintiff shall not proceed to foreclose while prosecuting any other action for the same debt. *Id*. at 205. The Court determined that the statute prevented the plaintiff from splitting his cause of action and maintaining two separate actions for the same debt at the same time—it did not prevent the plaintiff from making all the parties to the notes parties to the action, and proceeding in one action. *Id*. at 206. Therefore, tolling did not apply. *Id*. at 207. The Court noted, in fact, that statutory tolling *does apply* in cases where, for some reason *beneficial to the debtor*, *the*

commencement of the action is prohibited. *Id*. at 206. The Court's decision in *Hinchman* is consistent with the Court of Appeals' decision.

Merceri conflates a procedural step required prior to commencing an action, such as those discussed above, as "injunctions" and/or "statutory prohibitions." Despite RCW 4.16.230 being unconditional, she argues that there is a due diligence required for tolling to apply, and that, for over 100 years in Washington, a party has had a duty to initiate litigation to terminate an injunction or prohibition, such as an automatic stay, in a U.S. bankruptcy court in order for tolling to apply. Otherwise, she asserts, if it could have done so, the statute of limitations would simply continue to run.[2]

Merceri's argument conflicts with the plain meaning of RCW 4.16.230 and the nature of the automatic stay, which is more than a procedural step. Congress has described the automatic stay as follows:

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[2] Merceri's argument is belied by the fact that, despite her insistence that this has been the state of the law in Washington for over one hundred years, there has never been a single case or controversy over the amount of equity in property to determine whether the statute of limitations continued to run, or not.

> The automatic stay is one of the fundamental debtor protections provided by bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6296-97.

Creditors who attempt to enforce their rights against a debtor or its property without first obtaining relief from stay may be held liable for damages for contempt of court. *See Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 620 (9th Cir. 1993)(holding that a corporation may recover civil contempt damages for an automatic stay violation). The stay is an actual statutory prohibition, and indeed, as characterized by the Court in *Hazel*, an injunction. *Hazel*, 135 Wn.2d at 60.

It is not a foregone conclusion that a motion for relief will be granted. 11 U.S.C. § 362(d) specifically gives the bankruptcy court multiple options "such as by terminating, annulling, modifying, or conditioning such stay." And 11 U.S.C. § 362(e) provides that the stay may be further extended by the bankruptcy court "for good

cause." The burden to establish relief from stay is on the moving party, and includes obtaining and admitting opinion evidence in the bankruptcy court case, presented at a court hearing, regarding the value of the collateral. *See In re Lakeside Dev., LLC,* 2012 Bankr. Lexis 695, 2012 WL 619071. In Merceri's bankruptcy case, the bankruptcy trustee moved for a court order to sell the property, and the court granted the trustee's motion. CP 573-580. It allowed the trustee time to try and liquidate the collateral. As such, good cause existed for the stay to be extended.

As the Court in *Seamans v. Walgren,* 82 Wn.2d 771 (1973), explained and held, when a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him, as reflected in RCW 4.16.230. *Id*. at 775. The federal bankruptcy stay is such a positive rule of law.

Regardless of whether or not Deutsche could have obtained relief from stay, there is no requirement in RCW 4.16.230, or elsewhere, that a creditor be unable to obtain relief from stay for tolling to apply. None of the cases relied upon by Merceri stand for

such a proposition, because none deal with an injunction or a statutory prohibition. Accordingly, none of these cases conflict with the Court of Appeals' decision in this case, and this Court should deny review under RAP 13.4(b)(1).

B. The Court should deny review under RAP 13.4(b)(2) because the decision of the Court of Appeals does not conflict with *Watson v. Northwest Trustee Services, Inc*.

In *Watson v. Northwest Trustee Services, Inc.*, 180 Wash. App. 8 (2014), *review denied*, 181 Wn.2d 1007 9 (2014), the foreclosure trustee sent a notice of default in February, prior to Washington's Foreclosure Fairness Act ("FFA"), chapter 61.24 RCW. In March 2011, the trustee recorded a notice of sale. *Id*. at 10. The Watsons filed bankruptcy, which caused the sale to be postponed, and then canceled. *Id*. In July 2011, the FFA amended the Deeds of Trust Act ("DTA"), which changed and added requirements for a pre-foreclosure notice. *Id*. at 11. After the bankruptcy, in November 2011, the trustee recorded an "amended notice of sale," setting the sale on shortened time. *Id*. The trustee did not issue a new notice of default that complied with the new law. *Id*. The trustee argued that it need not comply with the new FFA

requirements because the entire foreclosure process was "one continuous transaction." *Id*. at 13. The court disagreed. It noted that the trustee had no more than 120 days to continue the sale date, and after that, the DTA required a new notice. *Id*. at 15. The court held that, regardless of the fact that the notice was titled "amended," the new notice requirements of the FFA then applied. *Id*.

The court's decision in *Watson* is irrelevant to any issue raised in the present case. The court in *Watson* does not address "timely lifting the bankruptcy stay" in any manner. Lifting the stay is not a "DTA remedy."[3]

[3] Merceri argues that tolling for nonjudicial foreclosure proceedings is an "unresolved issue in this appeal." *See* Petition, p. 9, fn 5. The issue is not unresolved, rather it is moot given that tolling due to the bankruptcy stay alone made Deutsche's judicial foreclosure within the statute of limitations. *Merceri v. Deutsche Bank AG*, 2 Wash. App. 2d 143, 154 n.7, 408 P.3d 1140, 1146 (2018). None of Merceri's arguments regarding nonjudicial proceedings are relevant because the Court of Appeals' never reached the issue. The bankruptcy stay prohibited all foreclosure actions, whether nonjudicial or judicial. In any event, Division 1 has held that nonjudicial foreclosure proceedings, even if not completed, toll the statute of limitations for 120 days beyond the original sale date, even when the trustee does not exercise his ability to continue the sale. *Erickson v. America's Wholesale Lender*, No. 77742-4-I, 2018 Wash. App. LEXIS 811, at *10 (Ct. App. Apr. 16, 2018)(unpub.).

Accordingly, the decision of the Court of Appeals does not conflict with any other decision of the Court of Appeals.[4]

C. The Court should deny review because the case does not present a significant question of law under the Constitution of the State of Washington or of the United States, and any such claims were waived.

To the extent Merceri's constitutional claims are viable, she waived them. "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. This rule affords the trial court the opportunity to rule correctly upon a matter before it can be presented upon appeal." *New Meadows Holding Co. v Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)(citation omitted). Here, Merceri never raised a constitutional issue at any point in this case until her petition for review to this Court.

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[4] The request for this Court to take judicial notice of a document never filed in the trial court is not appropriate and should be denied. The 2012 notice of discontinuance is also irrelevant. The decision of the Court of Appeals held the statute of limitation was tolled while the automatic stay was in effect, and the method and manner of re-noting the trustee's sale after the stay was terminated is irrelevant to anything in the Court of Appeals' decision. Further, neither the court in *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844 (2015), *review denied*, 184 Wn.2d 1011 (2015), nor ER 201 permits this Court to review additional evidence not in the record by simply attaching it to petition for review. RAP 9.11.

The decision of the Court of Appeals did not "usurp the Legislature's Article II authority" by "amending" RCW 4.16.230. *See* Petition for Review, p. 16. The statute provides that when the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action. The Court of Appeals held that the automatic stay is such a statutory prohibition. It did not amend the statute. Despite asserting that the decision violated the Washington constitution, Merceri has provided no authority for the same, and accordingly it need not be considered for this reason as well. *McKee v. Am. Home Prods. Corp.*, 113 Wash. 2d 701, 705 (1989). The argument is frivolous and does not provide any basis for this Court to accept review.

Similarly, the decision of the Court of Appeals did not "violate federal preemption." *See* Petition for Review, p. 17. Federal law protects creditors like Deutsche so that the automatic stay does not render claims time-barred and unenforceable under states' statutes of limitations. 11 U.S.C. § 108(c) allows thirty days after the

stay terminates to file an action, even if the state statute of limitations ran during the automatic stay. It further allows states to employ additional tolling periods due to the automatic stay. If state law fixes a period of commencing a civil action on a claim against the debtor, such period does not expire until the later of: (1) the end of such period including any suspension of such period; or (2) 30 days after termination of the stay. 11 U.S.C. § 108(c); *And see e.g., Koyle v. Sand Canyon Corp.*, 2016 U.S. Dist. LEXIS 29616 (D. Utah Mar. 8, 2016)(after recognizing that the "suspension of such period" language in 108(c)(1) to be a reference to state or federal tolling statutes, and then applying Utah's tolling statute, the court then applied Utah's statute of limitations tolling statute [nearly identical to RCW 4.16.230] to toll the statute of limitations during the entire period of the automatic stay.)[5]

[5] Merceri's reliance upon *Butner v. United States*, 440 U.S. 48 (1979) is misplaced. The Supreme Court held that the determination of the validity and extent of a mortgagee's interest in the assets of a bankruptcy estate, including an interest in rents generated by the mortgaged property, *is governed by state law*. *Id*. at 54. Nor does tolling under state law provide a "windfall." As the Washington Supreme Court stated, "tolling provisions, by nature, exist to assure all persons subject to a particular statute of limitations *enjoy the full benefit of the limitation period.*" *Rivas v. Overlake Hop. Med. Ctr.*,

Thus, § 108(c) specifically permits state law statutes of limitation and tolling provisions to extend the time a creditor has to seek relief against a debtor once the bankruptcy proceeding terminates. Federal law permits, rather than preempts, state law in this regard. Accordingly, this case presents no constitutional preemption issue.

D. The Court should deny review because the case does not involve an issue of substantial public interest.

There has been no confusion in Washington regarding the plain meaning of RCW 4.16.230. Homeowners' and debtors' rights are not impacted by the Court of Appeals' decision in any respect. Certainly if a debtor in bankruptcy would prefer the statute of limitations to continue to run, she need only move the bankruptcy court to terminate the automatic stay, which is precisely what Merceri did in 2012. CP 125. Debtors should not enjoy a protective stay from creditors taking action to enforce debts, and at the same time argue that the statute of limitations is running.

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164 Wn.2d 261, 267 (2008)(emphasis provided, citations omitted). Restoring the full limitation period is not a windfall, rather the purpose, of tolling.

The Court of Appeals' decision does not conflict with *Walcker v. Benson & McLaughlin*, 79 Wash. App. 739 (1995). Under common law, a mortgage existed separately from the obligation it secured such that even if the statute ran on a promissory note, a mortgagee could still foreclose. *Id*. at 742. Benson and McLaughlin asserted that public policy supported an *unlimited* right to foreclose deeds of trust. *Id*. at 745. The court disagreed, and held that RCW 7.28.300, which expressly makes the statute of limitations defense available in mortgage foreclosure proceedings, applied to foreclosure of trust deeds as well. *Id*. at 746. RCW 7.28.300 was thereafter amended to specify that deeds of trust were included. Nothing in *Walcker* asserts that, despite the statute of limitations applying, the tolling provision would not. The Court of Appeals' decision in this case is consistent with *Walcker*.

Merceri has failed to identify any substantial public impact the Court of Appeals' decision could have. Accordingly, this Court should deny review.

VI. REQUEST FOR ATTORNEY'S FEES

The Court of Appeals awarded attorney fees and expenses to Deutsche. This Court may further award attorneys' fees. RAP 18.1(j). Paragraph 26 of the deed of trust provides that the Lender is entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of the deed of trust, including, without limitation, attorneys' fees incurred on appeal. CP 60, ¶26. Deutsche respectfully requests this Court award it its attorney's fees incurred in responding to Petitioner's Petition for Review.

VII. CONCLUSION

Respondent Deutsche Bank National Trust Company, as Trustee for holder of the BCAP LLC TRUST 2007-AA2 requests this Court deny Petitioner's Petition for Review.

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Respectfully submitted this 23rd day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2018, I caused to be delivered the foregoing APPELLANT DEUTSCHE BANK'S ANSWER TO PETITION FOR REVIEW TO SUPREME COURT to the following parties in the manner indicated below, pursuant to written agreement of counsel:

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Under the penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 23rd day of April, 2018, at Seattle, Washington.

/s/ Tamorah L. Burt
Tamorah L. Burt, Legal Assistant

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April 23, 2018 - 3:19 PM

Transmittal Information

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