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Supreme Court No. 97479-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STEVEN J. VILLEGAS

Petitioner

v.

NATIONSTAR MORTGAGE, LLC, et al.

Respondents

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On Appeal From King County Superior Court, Hon. Beth M. Andrus  
Court of Appeals, Division I, COA No. 771639-I

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**RESPONDENTS NATIONSTAR AND U.S. BANK'S  
ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

The Court of Appeals issued a thorough opinion that relied upon well-established law and faithfully applied that law to the facts of this case. In particular, it affirmed the trial court's ruling that Plaintiff Steven Villegas had failed to present any evidence at trial showing that Nationstar had caused any damage resulting from a mediation conducted pursuant to the Foreclosure Fairness Act. This conclusion was based on ample and accurate citations to governing law and to the record on appeal.

Plaintiff's Petition for Review fails to present any basis for this Court to review this case further. This Court has three separate and independent reasons to deny Plaintiff's petition. First, Plaintiff never identifies a basis for this Court's review, and none is present because this case is a simple application of well-established law to the facts of this case. Second, Plaintiff failed to preserve in the Court of Appeals the argument that he raises in his petition. And third, this case has unique facts and an unusual procedural history that make it a poor vehicle for review by this Court.

The Court of Appeals' Opinion does not conflict with cases from the Court of Appeals or this Court when it simply lays out the governing law and then applies that law to the facts of this case. Plaintiff argues that the trial court misapplied the "but for" standard of causation and injury

under the Consumer Protection Act (RCW 19.86), but the facts presented at trial provide substantial evidence for the trial court's ruling. Nothing in this case involves larger constitutional arguments or issues of public concern.

Additionally, this case does not present this Court with a good vehicle to analyze the argument that Plaintiff raises in his Petition for Review. Plaintiff did not raise his argument in his opening brief on appeal and he did not file a reply brief on appeal. The Court of Appeals' Opinion therefore did not address the argument raised in Plaintiff's Petition for Review, and this Court therefore does not have a ruling to review.

Finally, this case is also not a good vehicle because of the unique facts involved in Plaintiff's mediation and the unusual procedural history of this case. Plaintiff engaged in very little mediation, and when he sold his property to avoid a foreclosure sale, he actually *profited* from the sale of his property, thereby negating any damages claim. At trial, Plaintiff's counsel stated that she forgot to obtain Plaintiff's testimony about damages, and Plaintiff suggests on appeal that this procedural

complication affected the outcome of his case. For each of these three reasons, this Court should deny Plaintiff's Petition for Review.<sup>1</sup>

## **II. IDENTITY OF RESPONDENTS**

This Answer is submitted on behalf of Nationstar Mortgage, LLC and U.S. Bank, N.A. They are the Respondents in this Court, Appellees before the Court of Appeals, and Defendants in the Superior Court.

## **III. COUNTERSTATEMENT OF THE ISSUES**

Whether the trial court and Court of Appeals properly applied the “but for” standard of causation and injury under the Consumer Protection Act to the evidence presented at trial about a mediation conducted pursuant to the Foreclosure Fairness Act.<sup>2</sup>

## **IV. COUNTERSTATEMENT OF THE CASE**

### **A. Plaintiff Defaulted on His Mortgage in January 2012.**

In 2002, Plaintiff purchased real property located in Seattle with a loan for \$379,000. CP 584. About four years later, in December 2006, he refinanced the loan to borrow against equity in the property. CP 643-54. He executed a Promissory Note for \$552,000 payable to

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<sup>1</sup> Plaintiff filed several versions of his Petition for Review with this Court because he failed to comply with the Court's drafting requirements. This brief responds to the Petition filed on August 9, 2019, at 1:06 p.m.

<sup>2</sup> Although Plaintiff's “Issues Presented For Review” suggests that Plaintiff also wishes to challenge the trial court's Order granting summary judgment, the Petition contains no such argument. *See* Petition 1, 13-17. However, any such argument would lack merit for the reasons established in this brief.

Americahomekey, Inc. and agreed that if he did “not pay the full amount of each monthly payment on the date it is due,” he would be in default. CP 656-60. Plaintiff also executed a Deed of Trust securing the Note. CP 661-77. The Deed of Trust identified Plaintiff as borrower, Americahomekey, Inc. as lender, The Talon Group as trustee, and Mortgage Electronic Registration Systems, Inc. (“MERS”) as beneficiary and nominee for the lender and the lender’s successors and assigns. CP 663. In March 2007, the servicing of the loan was transferred from Americahomekey, Inc. to Aurora. CP 773-75.

In January 2012, Plaintiff voluntarily stopped making his loan payments and defaulted on his loan. CP 35-36, 593, 639. He directed his bookkeeper to cease tendering payments because he wanted to pursue a short sale of the property. CP 587, 589. A notice of default was sent to Plaintiff in June 2012, and it listed the January 2012 loan installment as due and owing. CP 546-48. It also indicated that the loan’s investor was now U.S. Bank, as trustee for the loan trust, and that the loan’s servicer was Aurora. CP 546-48. On July 1, 2012, servicing of the loan was transferred from Aurora to Nationstar. CP 639, 822-25. Nationstar appointed Northwest Trustee as the successor trustee to replace The Talon Group. CP 556.

**B. Nationstar Entered Into Foreclosure Mediation With Plaintiff, but Nationstar Provided an Incomplete Explanation of Its Escrow Calculations.**

In September 2012, Plaintiff elected to participate in statutory mediation pursuant to Washington's Foreclosure Fairness Act, RCW 61.24.163. CP 830-36. Soon after announcing that he wanted mediation, in November 2012, Plaintiff submitted a loan modification application packet to Nationstar. CP 640, 838-56.

Nationstar and Plaintiff only had one in-person mediation session, which occurred in December 2012. CP 895; RP 322. Nonetheless, they continued to exchange emails after the in-person mediation with the hope of reaching an agreement. Nationstar offered Plaintiff a trial plan, which Plaintiff accepted. Trial RP 636-40. Plaintiff made his trial payments, and Nationstar prepared a permanent loan modification offer for Plaintiff in September 2013. Trial RP 740. But when Plaintiff saw his projected monthly payments, he asked Nationstar to explain the calculations Nationstar had used to derive its escrow payments. Trial RP 748-49. The parties exchanged emails about this issue, but the mediator and Plaintiff were not satisfied with the adequacy of Nationstar's explanation of its escrow calculations, and the mediator concluded that Nationstar had participated in mediation "not in good faith." Trial RP 481, 748-49; CP



894-96. The parties were not able to reach an agreement to implement a loan modification. *See* Trial RP 481, 748-49; CP 894-96.

**C. Plaintiff Sued for a Violation of Washington’s Consumer Protection Act, and Meanwhile, He Sold the Property for a Profit of \$7,246.84.**

Nationstar filed a Complaint for Judicial Foreclosure in June 2015. CP 1. As of July 2015, the principal balance on the mortgage was \$514,767.66, as well as interest, late charges, and other advances secured by the Deed of Trust, for a total debt of \$654,474.64. CP 3-4.

In September 2015, Villegas filed an Answer and two Counterclaims against Nationstar for (1) violation of Washington’s Consumer Protection Act, and (2) intentional and negligent misrepresentation. CP 29, 41-43. He also added Aurora Bank, FSB, Northwest Trustee Services, Inc., and U.S. Bank, N.A as cross-defendants for the same two claims. CP 29. As the litigation continued, Plaintiff dropped the misrepresentation claim. MSJ RP 24. He also developed his claim under the Consumer Protection Act into two claims: one claim was based on Aurora and Nationstar’s status as noteholders, and the other claim was based on Nationstar’s incomplete explanation of its escrow calculations after the in-person mediation. Appellant’s Opening Br. 33-47.

Villegas sold the mortgaged property in October 2016. CP 492, 622. He used the sale proceeds to pay off his mortgage, and had a *profit* of \$7,246.84 after the sale. CP 492, 622. Nationstar voluntarily moved to dismiss its foreclosure complaint without prejudice because the loan had been paid in full. CP 52-55. The trial court (at the time, the Honorable Mary E. Roberts) granted the motion to dismiss and re-captioned the case to reflect that Villegas had become the “Plaintiff” against defendants Nationstar, Aurora, Northwest Trustee Services, and U.S. Bank. CP 65.

**D. The Trial Court Ruled in Favor of Nationstar After a Trial, and the Court of Appeals Affirmed.**

Nationstar, U.S. Bank, and Northwest Trustee jointly moved for summary judgment in November 2016.<sup>3</sup> CP 487. The trial court granted partial summary judgment. CP 991-92. It found that summary judgment in favor of Defendants was appropriate on all claims, except for the Consumer Protection Act claim based on Nationstar’s involvement in the mediation pursuant to the Foreclosure Fairness Act. CP 992. This remaining claim involved allegations against only Nationstar, and it needed to go to trial. *Id.*

In May 2017, the trial court (the Honorable Beth M. Andrus) held a four-day bench trial for the remaining claim. CP 1449. The Judge

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<sup>3</sup> Nationstar acquired and assumed Aurora’s rights with respect to the loan at issue in this case in June 2012. CP 639.

determined that Plaintiff had failed to prove that Nationstar's actions at mediation "caused him to incur any injury to his business or property." CP 1459, 1461. Plaintiff had argued that he suffered two types of damages: legal fees and damage to his business credit, but the judge found that Plaintiff had no proof of either one. CP 1461. First, the judge determined that Plaintiff's legal fees were not casually connected to Nationstar's performance after the in-person mediation because those fees were incurred before Nationstar was unable to give a complete explanation for its escrow calculations. CP 1461. Second, the Judge found that any damage Plaintiff sustained to his credit "occurred as a result of his non-payment of his mortgage long before the mediation, and not as a result of Nationstar's mediation conduct." CP 1461. Therefore, on the sole claim to survive summary judgment, the trial court ruled in favor of Nationstar. CP 1461.

Plaintiff moved for reconsideration. CP 1658. The trial court reviewed the parties' briefing and again determined that Nationstar's actions after the in-person mediation session were not the cause of any money Plaintiff spent on attorney's fees or any damage he suffered to his credit. CP 1767-68. Plaintiff appealed. CP 1770.

The Court of Appeals affirmed the trial court's ruling on all issues. Opinion 9-17. The Court of Appeals examined Plaintiff's argument that

Nationstar violated the Consumer Protection Act during the mediation, but it found no basis for damages based on the evidence Plaintiff presented at trial. Opinion 14-17. The Court of Appeals observed that, although Plaintiff alleged that he had been damaged in several ways, he failed to provide evidence of any such damages at trial. *Id.* Plaintiff filed a motion to reconsider, and the Court of Appeals denied it. *See* Reconsideration Order.

**V. REASONS WHY THE COURT SHOULD DENY REVIEW**

Plaintiff fails to provide justification for this Court to accept the Petition and fails to satisfy RAP 13.4(b). Plaintiff never identifies a basis for this Court's review, and none is present because this case is a simple application of well-established law to the facts of this case. Plaintiff failed to preserve in the Court of Appeals the argument that he raises in his petition. And finally, this case has unique facts and an unusual procedural history that make it a poor vehicle for review by this Court.

**A. Plaintiff Provides No Basis for Review Under RAP 13.4(b).**

A petitioner seeking this Court's discretionary review must identify at least one of four bases for such review: (1) a conflict between the decision to be reviewed and a decision by this Court; (2) a conflict between the decision to be reviewed and a published decision of the Court of Appeals; (3) a significant question of law under the United States or

Washington Constitution; or (4) an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). To fall within the fourth basis for review, a case must affect not only the parties to the litigation before it, but also a large portion of the public at large, otherwise the ruling might “invite[] unnecessary litigation on” the issue raised or generally create confusion about it. *State v. Watson*, 155 Wn.2d 574, 577 (2005) (citation and footnote omitted).

Plaintiff does not cite to RAP 13.4 or explicitly identify a basis for this Court’s review in his petition. Petition 1-17. He does, however, suggest that this case falls within the first and second bases for review by arguing that the Court of Appeals’ opinion is in conflict with other decisions about the Consumer Protection Act. Petition 1, 2.

However, Plaintiff does not actually raise a legal argument about the interpretation of the Consumer Protection Act in his Petition for Review that conflicts with other decisions. Instead, he contends that he only needed to prove a “but for” standard of causation, which was not contested by the parties in this case and is not in conflict with Washington case law. Petition 13-17. His disagreement with the trial court and Court of Appeals is instead based on how that standard was applied to the facts of this case. *Id.* In his “Issues Presented For Review,” Plaintiff asserts that this case is about “how the facts presented at trial . . . are analyzed

under the CPA,” and he later asserts that “[the trial court judge] and the Court of Appeals did not apply [the trial court’s] factual findings properly to the law.” Petition 1, 11. Plaintiff therefore brings this petition not to address a conflict in the law, but to ask this Court to change the outcome of his particular case. That is not a sufficient basis for this Court’s review.

The third and fourth bases are similarly not applicable. Nowhere in the petition does Plaintiff mention the United States or Washington Constitutions. Petition 1-17. And his petition is about unique facts that are specific to this case; review of the Court of Appeals’ opinion would not have any effect on the general public.

Additionally, Plaintiff’s argument in his Petition for Review lacks merit because the Court of Appeals accurately determined that Plaintiff “did not present any evidence” establishing causation. Opinion 16. Although Plaintiff asserted that he had been injured by having to pay attorney’s fees, the Court of Appeals found that Plaintiff would have paid those attorney’s fees “no matter what happened.” *Id.* And even though Plaintiff asserted that his credit score had been damaged, the Court of Appeals determined that Plaintiff “did not present any evidence of a causal link” associated with Plaintiff’s credit score. *Id.* This Court reviews the trial court’s factual findings only to determine if they are supported by “substantial evidence,” and it defers to those findings. *See Keene Valley*

*Ventures, Inc. v. City of Richland*, 174 Wn. App. 219, 223-24 (2013);  
*Quinn v. Cherry Lane Auto Plaza Inc.*, 153 Wn. App. 710, 717 (2009).

Overall, the Petition for Review is nothing more than a last-ditch attempt at obtaining reconsideration of a ruling that Plaintiff dislikes. It presents no conflict with other opinions, no constitutional issues, and no issues of substantial public interest. Review by this Court, therefore, is not justified.

**B. This Case is Not a Good Vehicle for Review Because Plaintiff Failed to Preserve the Argument He Raises in His Petition for Review.**

For this Court to grant a petition for review, it must be able to review an argument that was properly presented and resolved below. *Pappas v. Hershberger*, 85 Wn.2d 152, 154 (1975) (“Having failed to properly raise or preserve the present issue in either the trial court or Court of Appeals, we will not consider it here for the first time on appeal.”). In the Court of Appeals, an issue must be raised in the briefing to be preserved. RAP 10.3(a), (g); *see also State v. Powell*, 126 Wn.2d 244, 257-58 (1995) (limiting the issues addressed on appeal to the issues raised in the appellate briefing); *Sepich v. Dep’t of Labor & Indus.*, 75 Wn.2d 312, 319 (1969) (“An assignment of error that is not argued in the brief cannot be considered.”).

In his Petition for Review, Plaintiff asks this Court to analyze whether the Court of Appeals properly applied the “but for” standard of causation and injury under the Consumer Protection Act. Petition 1, 13-17. He begins his argument by relying extensively on *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59 (2007), and by discussing the definition of proximate causation provided in Washington Practice Jury Instruction 15.01. Petition 13-14. Plaintiff then quotes several cases with general statements about the Consumer Protection Act, and closes by relying on *FTC v. Wells*, 385 F. App’x 712 (9th Cir. 2010), to argue that causation should be interpreted broadly to include actions that merely “facilitated” the purported harm. Petition 14-17.

However, this argument was not briefed in the Court of Appeals. Plaintiff’s opening brief on appeal raised a variety of arguments about the trial, but none of them addressed the “but for” standard of causation and injury that were raised in the petition. Appellant’s Opening Br. 41-47. Plaintiff’s opening brief only quotes *Indoor Billboard* to analyze the issue about Nationstar’s authority to foreclose on summary judgment, and not the trial about damages. Appellant’s Opening Br. 38-39. Plaintiff also never cited *FTC v. Wells* or made any comparable arguments in his opening brief. See Appellant’s Opening Br. 41-47. Plaintiff did not file a



reply brief on appeal, and as a result, no issues about the “but for” standard of causation and injury were litigated on appeal.

Nonetheless, the Court of Appeals correctly acknowledged the “but for” standard in its opinion. It wrote: “Where a more favorable loan modification would have been granted but for bad faith in mediation, the borrower may have suffered an injury to property within the meaning of the CPA.” Opinion 15 (citation omitted)). The Court of Appeals, however, did not need to analyze that standard further because Plaintiff had not raised any challenge to it. Plaintiff only started discussing the trial court’s use of the “but for” standard in a motion for reconsideration in the Court of Appeals, but at that point, the issue had not been preserved and the Court of Appeals denied Plaintiff’s motion. Motion for Reconsideration 10-13; Reconsideration Order.

If Plaintiff wanted to raise an issue about the causation standard under the Consumer Protection Act, he should have done so in a timely manner on appeal. Because he failed to do so, the Court of Appeals did not analyze any such issue, and this Court has no such ruling to review. This Court should therefore deny Plaintiff’s Petition because Plaintiff failed to preserve on appeal the issue he raises in his Petition.

C. **This Case is Not a Good Vehicle for Review Because of Its Unusual Factual and Procedural History.**

Plaintiff asserted that he had been injured by Nationstar's incomplete explanation of the escrow calculations after the in-person mediation session, and he needed to prove these facts at trial. But this case does not involve a typical mediation under the Foreclosure Fairness Act, and the actions of Plaintiff's counsel at trial sets the procedural history of this case apart from other cases.

At trial, the court heard testimony from Plaintiff and from a corporate representative for Nationstar. CP 1450. The court also considered the CR 30(b)(6) deposition testimony from a Nationstar representative and the exhibits admitted at trial. CP 1450. Plaintiff had a full opportunity to present his evidence and make his case at trial.

Plaintiff testified at trial that he only participated in one mediation session, which was in December 2012. Trial RP 747. He continued to be satisfied with Nationstar's calculations until he received his permanent loan modification offer almost a year later in September 2013, which was when he first had questions about Nationstar's escrow calculations. Trial RP 748-49. But despite Plaintiff's confusion over the escrow calculations, Plaintiff did not request another mediation session; he simply exchanged emails about the permanent loan modification offer. Trial RP 481, 748-

49. In January 2014, the mediator found that “[a]ttorneys for the beneficiary made great effort to escalate the matter with Nationstar and get an explanation for the increase [in escrow payments],” but “[n]one [was] forthcoming.” CP 895.

As the trial was coming to a close, Plaintiff’s counsel realized that she had forgotten to present evidence of causation and Plaintiff’s purported injuries:

[Plaintiff’s Counsel]: So Your Honor, I had one issue I needed to address, and I apologize, because obviously I want this to move along also. In going through my preparation for closing, I was going through my checklist of everything that I had on my checklist, and I’m concerned that in the rush to get Mr. Villegas’s testimony completed, I forgot to ask him the specific question about the amount of money that he paid me.

Trial RP 776. Without any evidence of legal fees, Plaintiff’s counsel agreed to stipulate to the existence of Plaintiff’s injuries. Trial RP 784-85; CP 1460. Specifically, Plaintiff stipulated that he had paid \$350 for an initial consultation with his attorney after he received the notice of trustee’s sale in August 2012, and then spent \$4,000 in legal fees in connection with the mediation. Trial RP 784-85; CP 1460. The \$350 initial consultation fee was incurred before Plaintiff hired his attorney, and it was therefore incurred before September 2013. *See* Trial RP 784-85; CP 1460. As for the \$4,000 of legal fees, Plaintiff failed to present any

evidence showing that these fees were incurred after September 2013. Trial RP 781. The trial court therefore had substantial evidence showing that Plaintiff's legal fees were not caused by Nationstar's incomplete explanation of its escrow calculations. CP 1462, 1768.

Plaintiff also testified that the mediation damaged his credit, but he did not provide any documentation to support this assertion and he also did not provide specific numbers to quantify the purported injury to his credit score. Trial RP 765-66. Furthermore, his testimony was inconsistent with his deposition testimony, in which he admitted that his credit score had been damaged by his default on the loan in January 2012, and not Nationstar's inability to explain its escrow calculations in September 2013. *See* CP 593, 602. And Plaintiff's credit score would have suffered from two other mortgages that he had, and he defaulted on at least one of them at the same time that he defaulted on his loan in this case. Trial RP 659-60, 654-55, 697, 700. The trial court therefore had substantial evidence to conclude that any damage to Plaintiff's credit "occurred as a result of his non-payment of his mortgage long before the mediation, and not as a result of Nationstar's mediation conduct." CP 1462.

Indeed, instead of injuring Plaintiff, the record shows that Plaintiff actually *profited* from the sale of the secured property. In October 2015,

Plaintiff sold the property for a profit of \$7,246.84. Trial RP 176, 697, 756. He testified that he sold the property, not as a result of anything that happened at mediation, but because he wanted “to avoid the judicial foreclosure going through.” Trial RP 756. Even if Plaintiff’s injury could consist of the \$4,350 that he spent on legal fees, the profit that he made from the sale would still be greater than his injuries.

Based on this evidence, the trial court found that Plaintiff “failed to prove that Nationstar’s [Consumer Protection Act] violation caused him to incur any injury to his business or his property.” CP 1462. Plaintiff moved for reconsideration of this ruling, and after reexamining the evidence, the trial court again found that, “[b]ased on the evidence presented at trial,” Plaintiff had indeed failed “to establish that Nationstar’s bad faith caused him any injury.” CP 1768. This was the correct ruling, based on the unique facts of this case and the unusual fact-finding at trial.

In the Petition for Review, Plaintiff acknowledges that the trial was conducted in unusual circumstances. Petition 8. Plaintiff writes in his Petition for Review:

On the last day of trial, [Plaintiff’s counsel] realized that as a result of being rushed to conclude on the day prior by [the trial court], she needed to put [Plaintiff] back on the stand to testify about his out of pocket expenses. [Plaintiff’s counsel] was then required by [the trial court] to merely

make an offer of proof as to [Plaintiff's] out of pocket expenses because [the trial court] wanted to expedite the matter.

*Id.* This explanation of Plaintiff's lack of evidence unfairly tries to blame the trial court for the mistakes made by Plaintiff's counsel.<sup>4</sup> Nonetheless, the quote demonstrates that even Plaintiff acknowledges that the procedural history of this case is unusual and he suggests that it affected the outcome of his case. All of these facts, taken together, show that the mediation and the facts adduced at trial do not present a good vehicle for analyzing the causation requirement of the Consumer Protection Act.

## VI. CONCLUSION

For each of the three reasons stated above, Defendants ask this Court to deny Plaintiff's Petition for Review.

RESPECTFULLY SUBMITTED, this 9<sup>th</sup> day of September, 2019.

WITHERSPOON · KELLEY



Christopher G. Varallo, WSBA No. 29410

Counsel for Defendants/Respondents  
Nationstar Mortgage, LLC and U.S. Bank,  
N.A.

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<sup>4</sup> Plaintiff did not raise any challenges to the judge's management of the trial in his motion for reconsideration in the trial court, CP 1658-72, and he did not do so on appeal, Appellant's Opening Br. 41-47.

**DECLARATION OF SERVICE**

I declare that I sent a true and correct copy of the foregoing brief by the method indicated below and addressed to the following:

<p>Melissa A. Huelsman Law Offices of Melissa A. Huelsman, P.S. 705 Second Avenue, Suite 606 Seattle, WA 98104</p> <p><i>Counsel for Plaintiff/Appellant Steven J. Villegas</i></p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail: <a href="mailto:mhuelsman@predatorylendinglaw.com">mhuelsman@predatorylendinglaw.com</a>; <a href="mailto:paralegal@predatorylendinglaw.com">paralegal@predatorylendinglaw.com</a></p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9<sup>th</sup> day of September, 2019.

  
TERRY ERICKSON  
Legal Assistant

# WITHERSPOON KELLEY

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