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Division II
State of Washington
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No. 50523-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DANIEL G. SZMANIA
Defendant/Appellant,

Vs.

WELLS FARGO BANK N.A., AS.
TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3
Plaintiff/Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR CLARK COUNTY
The Honorable Bernard F. Veljacic
No. 16-2-02606-4

APPELLANT'S REPLY BRIEF

ORAL ARGUMENTS REQUESTED

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- 10) Main v. Thiboutot, 100 S. Ct. 2502 (1980). Page 23.
- 11) Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248, 1254–55 (11th Cir. 1988) (internal citation omitted); see DB50 2007-1 Tr. v. Dixon, 723 S.E.2d 495, 496 (Ga. Ct. App. 2012) Pages 13, 15, 21, 22.

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- 1) Wikipedia.org –Removal Jurisdiction. Page 21.
- 2) <https://www.linkedin.com/pulse/evictions-federal-court-david-s-schonfeld> Page 15, 21.
- 3) https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Pages 13, 15, 16, 21, 23.

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1. CP 2 Summons For Unlawful Detainer, 12/22/2016, Pages 3.
2. CP 3 Complaint For Unlawful Detainer, 12/22/2016, Pages 3, 5.
3. CP 8 Order For Alternative Service- Exparte, 01/23/2017, Pages 3, 14.
4. CP 13 Declaration Of Daniel G. Szmania, 02/16/2017, Pages 1, 3, 4, 6, 7, 9,13,16,18.
5. CP 14 Defendant's Motion To Dismiss, 02/16/2017, Pages 1, 2, 3, 6, 7, 8, 9, 10,12, 13,14, 16,19,22.
6. **CP 18 Notice To Clerk Of Removal To Federal Court, 05/18/2017.** Pages 6, 7, 9, 10, 11, 12, 15, 17, 18, 20.
7. CP 20 Findings And Order To Proceed, 05/26/2017, Pages 2, 7, 19.
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11. CP 24 Writ Of Restitution Issued, 05/26/2017, Page2, 8, 19.
12. CP 25 Notice Of Appeal To Court Of Appeal, 06/23/2017, Pages 2.

I. INTRODUCTION

Appellant files this Reply Brief in accordance with RAP 10.1 (b) (3), RAP 10.2 (d) and RAP 10.4 (b).

The Superior Court ruled incorrectly and erred in not allowing Appellant Daniel G. Szmania (Szmania) Motion to Dismiss (MTD) CP 14 under CR 12, (b) one (1) through six (6), CR 12(f) and erred in allowing Wells Fargo Bank N.A., as Trustee for Bear Stearns ARM TRUST 2007-3, (Wells) to proceed in their Unlawful Detainer action.

This case presents many issues of well settled law:

- (a) Removal terminates the State Courts Jurisdiction and only a Remand allows it to proceed 28 U.S.C. § 1446(d).
- (b) Remand must be done within 30 days of the Removal 28 U.S. Code § 1447 (c).
- (c) Jurisdiction lies in The United States Court of Appeals for the Ninth Circuit Case No. 16-36055 (**Ninth**) since the appeal was active under 28 U.S. Code § 1367 (a) - Supplemental Jurisdiction:

“the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy” See CP 13 Ex A. (Emphases added!)

(d) Res Judicata: The U.S. District Court Western District of Washington At Tacoma, Case No. 3:16-CV-05644-RBL, (**Federal Case**) ruled on 11/18/16: **“This is not a foreclosure case.”** Dkt 64 page 2 at 14. *See* CP 14, page 2 at 7-12. Otherwise request for certification of two (2) questions must be answered as asked in **Federal Case**. Also this Court in No. 39763-3-II, page 2-3 ruled: **“passing title to the loan to EMC Mortgage Corporation trust”** (EMC) There is NO proof EMC transferred to Wells! Wells is therefore barred to seek relief of anything to do with their alleged and illegal foreclosure of Szmania’s home. (*Emphases added!*)

This Court should overturn the following Orders and Writ:

- 1) FINDINGS AND ORDER TO PROCEED, NOTWITHSTANDING DEFENDANT’S NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, May 26, 2017, CP 20.
- 2) ORDER DENYING DEFENDANT’S MOTION TO DISMISS, AND SETTING TIME FOR HEARING, May 26, 2017, CP 21.
- 3) ORDER FOR DEFAULT AND DEFUALT JUDMENT, May 26, 2017, CP 22.
- 4) ORDER TO ISSUE WRIT OF RESTITUTION WITHOUT BOND, May 26, 2017, CP 23. And CP 24 WRIT OF RESTITUTION May 26, 2017. *See* Notice of Appeal CP 25 and Appellant’s Opening Brief page 2.

The Court should further rule that:

- 1) Venue and Jurisdiction where never held by the Superior Court and that both are still vested in the **Ninth** since a Remand was never accomplished in prior case or the instant case on appeal. **Page 2**

- 2) Service of the Unlawful Detainer action was not appropriately served by only posting the Summons CP 2 and Complaint CP 3 on the gate of the Hawk Meadows Home Owners Association and not as the Order for Alternative Service CP 8 specifically directed. *See* CP 13, Ex K, Ex L, Ex N Ex O, Ex P, Ex Q and Ex R
- 3) Respondent was not entitled to the relief granted for it was barred by Res Judicata and title is held by Szmania. *See* CP 13 Ex B. The Superior Court rulings and the eviction process itself are in error. Szmania further contends that the following defenses Pursuant to CR 12 (b) penned in Szmania's MTD CP 14, pages 1 and 2, when properly examined and ruled upon de novo, weigh in Szmania's favor for Wells and the Superior Court fails in all the CR 12

DEFENSES AND OBJECTIONS:

- (1) lack of jurisdiction over the subject matter;
- (2) lack of jurisdiction over the person;
- (3) improper venue;
- (4) insufficiency of process;
- (5) insufficiency of service of process; and
- (6) failure to state a claim upon which relief can be granted.

And CR 12(f) Motion to Strike, CR 12 (h) (3) Lack of Jurisdiction: “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” See RP Volume I, Page 9 at 1 to 11. Also See CP 13 Ex J specifically pages 4 & 7. Deed of Reconveyance and Chase declares they have nothing to do with Szmania’s loan!

- 4) Based upon the above, reversal of the above Superior Court Orders and Writ, **Szmania asks for possession of the property known as: 17005 NE 164th Ave, Brush Prairie, WA 98606.**

II. ARGUMENT IN REBUTTAL TO RESPONDENT’S STATEMENT OF THE CASE

(A) The Illegal Foreclosure and Illegal Trustee Sale

Szmania’s loan is paid in FULL. See CP 13 Ex C. (Deed of Reconveyance). And **EMC** holds title per this Court!* Wells alleged argument through out is that they are successors in interest to Countrywide and its purchaser Bank of America, NOT **EMC**!* Szmania and Countrywide were in litigation in 2008 in the Superior Court of Washington for Clark County; Case No. 08-2-07251-1. Than Szmania appealed to this very Court of Appeals, Division II State of Washington, Case No. 39763-3-II in 2011.* Than Szmania appealed to the Washington State Supreme Court, Case No. 856869 in 2011. Than Szmania appealed to the U.S. Supreme Court, Case No. 11-6137 in 2011. Collectively called **the 2008 appeals** for latter reference. **Page 4**

Wells argues they are successors to Countrywide rather than **EMC?** Res Judicata must be applied to this Court's ruling that **EMC holds title!*** Wells Brief page 1 states that on October 28, 2016 the trustee sale occurred? Their Complaint CP 3 p. 2 #5 & Ex A p. 2 #7 says 7/8/2016 was date of trustee sale? **A trustee sale never occurred!** Also stated in *Id.*, that no action was pending #8** & all requirements of trustee sale meet #9. Not so on both; thus **Primary State Case** (Wells Brief p. 2) & **Federal Case!** All of Wells claims including the Unlawful Detainer was raised or could have been raised in a previous action(s) between the parties or their privies that resulted in a final judgment on the merits.

See Holcombe v. Hosmer, 477 F.3d 1094, 1097 (9th Cir. 2007) (federal courts apply state law regarding the res judicata effect of state court judgments); *Williams v. Leone & Keeble, Inc.*, 254 P.3d 818, 821 (Wash. 2011) (en banc) (setting forth elements of the doctrine of res judicata under Washington law); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1285 (1989) (en banc) (“[A] successor in interest to a party to an action that determines interests in property is subject to the preclusive effects of that action.” (Citations omitted)).

So if the predecessors did not make claims to foreclose either Judicially or Non Judicially & did not make claims & obtain a Writ of Restitution in the above cited cases, & EMC did not pass title to Wells, they are now barred by the Doctrine of Res Judicata! **Page 5**

Wells used Bear Stearns an out of business entity & phony address.
See CP 13 Ex D, Ex E, Ex F & was non complaint in RCW
61.24.030(6), CP 13 Ex G shows an illegal trustee not in
Washington State. Furthermore; since Szmania pre-foreclosure
filed Case No. 16-2-01214-4 in June 2016 **Primary State Case** in
the Superior Court of Washington for Clark County and properly
argued every defense allowed by law, and properly plead those
defenses, Szmania did not waive any of them! As Wells pens on
page 2 of their Responsive Brief, on July 20, 2016 ** Wells
Removed case to The U.S. District Court Western District of
Washington At Tacoma, Case No. 3:16-CV-05644-RBL **Federal
Case** which ruled on 11/18/16: ***“This is not a foreclosure case.”***
Dkt 64 page 2 at 14. *See* CP 14, page 2 at 7-12. Wells is therefore
barred to seek relief of anything to do with their alleged and illegal
foreclosure and possession of Szmania’s home based on Res
Judicata and that above order. Also, since Wells removed the
Primary State Case to Federal Case and a Remand was NOT
accomplished in their removal or Szmania’s (CP 18) Wells gave up
Jurisdiction of the State Court and the State Court lost Jurisdiction.

Their pleadings read: *“Pursuant to 28 U.S.C. § 1446(d), the Notice of Removal terminates this Court’s jurisdiction and all proceedings in this forum.”* See CP 13 Ex H, page 13 at 25-26 and CP 14, Page 5 at 12-25. Supplemental Jurisdiction in 28 U.S. Code § 1367 (a) lies in Federal Court still! See CP 13, Ex I.

(B) Eviction

An eviction or Unlawful Detainer action by Wells is also barred by Res Judicata from **the 2008 appeals** and the State Court lacked Jurisdiction based on Wells Removal of the above **Primary State Case** to the **Federal Case** than Szmania’s Removal of the instant case on appeal on 5/18/2017. See CP 18. Wells acknowledges Szmania’s Removal to Federal Court on page 3 of their Responsive Brief. Furthermore, Wells has Insufficiency of Service of Process CR 12 (b) (5) by posting the Summons & Compliant on someone else’s property. See Appellant’s Opening Brief p. 7 p. 10 & p. 26-27. And MTD CP 14, p. 2, p. 10 at 1 to p. 13 at 19. Based on the above, the following should be overturned:

FINDINGS AND ORDER TO PROCEED, NOTWITHSTANDING DEFENDANT’S NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, May 26, 2017, CP 20.

ORDER DENYING DEFENDANT’S MOTION TO DISMISS, AND SETTING TIME FOR HEARING, May 26, 2017, CP 21.

ORDER FOR DEFAULT AND DEFUALT JUDMENT, May 26, 2017, CP 22.

ORDER TO ISSUE WRIT OF RESTITUTION WITHOUT BOND,
May 26, 2017, CP 23 AND CP 24 WRIT OF RESTITUTION May
26, 2017.

(C) The Instant Appeal

Wells Unlawful Detainer action is barred by the Doctrine of Res
Judicata from **the 2008 appeals** and the State Court lacked
Jurisdiction based on Wells Removal of the **Primary State Case**
to the **Federal Case** and than Szmania's Removal of the instant
case on appeal and further lacked Jurisdiction based on
Insufficiency of Service of Process of the Summons & Complaint.
This Court should REVERSE all the Superior Courts rulings.

**III. ARGUMENT IN REBUTTAL TO
RESPONDENT'S ARGUMENT**

No. 1 Superior Court Lack of Jurisdiction & Improper Venue

The lower court erred in not dismissing the case for lack of
jurisdiction under CR 12 (b) (1), (2) (3) (4) (5) (6) and (h) (3) Lack
of Jurisdiction:

*“Whenever it appears by suggestion of the parties or
otherwise that the court lacks jurisdiction of the subject matter, the
court shall dismiss the action.” See MTD CP 14, page1 at 21 to
page 2 at 1-7. See RP Volume I, Page 9 at 1 to 11.*

On July 20, 2016 Wells gives up Jurisdiction in the **Primary State
Case** when they Removed to the **Federal Case, no remand!**

See CP 13 Ex H. Page 2 at 5 of NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, clearly states: *“This removal terminates this Court’s jurisdiction and all proceedings in this forum pursuant to 28 U.S.C. § § 1446(d).”* Also, in the NOTICE TO PLAINTIFF OF REMOVAL TO FEDERAL COURT, Page 1 at 25 also reads:

“Pursuant to 28 U.S.C. § 1446(d), the Notice of Removal terminates this Court’s jurisdiction and all proceedings in this forum.” See CP 13 Ex H, page 14 at 25-26 and CP 14, Page 5 at 12-25.

See RP Volume I, Page 9 at 14 to p.11 at 5 and p. 16 at 9 to 12.

Since the **Federal Case** was not Remanded twice, Venue is also improper under CR 12 (b) (3). See RP Volume I, page 42 at 2-23.

28 U.S.C. § 1446(d) reads:” *(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.— Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court, (SEE CP 18) which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.* (Emphases added!) See MTD CP 14, page 5 at 22-25. See Appellant’s Opening Brief pages 5-6.

Since the **Federal Case** did NOT dismiss the action it kept Jurisdiction. Wells was the Removing party in the **Primary**

State Case so they plead and won their argument that their Removal meet the Diversity and Controversy Exceeding \$75,000.00 amount in their pleadings since Szmania's Motion to Remand was DENIED in the **Federal Case**. (28 U.S.C. § 1332) *See* Appellant's Opening Brief pages 9-10. (There was NO Federal question(s) posed in Respondent's Removal. 28 U.S.C. § 1331? Obviously Well's counsel is unfamiliar with the case history.) With out a proper Remand (for the Two (2) Removals), under 28 U.S.C. § 1446(d) and 28 U.S. Code § 1447 (c). Wells has no legal course of action to bring a case or claims back to the **Primary State Case** or its jurisdiction and venue.

28 U.S.C. § 1446(d) reads: " (d) *NOTICE TO ADVERSE PARTIES AND STATE COURT.*—

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court., (SEE CP 18) which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded. (Emphases added!) See MTD CP 14, page 5 at 22-25. See RP Volume I, page 42 at 2-23.

The **Federal Case** was on appeal in the **Ninth** Circuit, Case No. 16-36055 when Wells filed this case. Jurisdiction still sits

in the Federal Courts. Appellate Jurisdiction is established in 28 U.S.C. § 1291, the Diversity Jurisdiction of 28 U.S.C. § 1332, the Supplemental Jurisdiction of 28 U.S.C. § 1367 and the Original Jurisdiction of 28 U.S.C. § 1441 and 28 U.S.C. § 1446. *See* CP 18 page 4, at 8-25. The **Federal Case** properly accepted the removal and jurisdiction. *See* Appellant’s Opening Brief pages 18-19.

In Dkt 39 p.2 at 1-16 in **Federal Case**-Opposition to Remand

Wells argued the following on Jurisdiction which must apply here:

“A. Removal is Appropriate Where State and Federal Courts have Concurrent Jurisdiction. *Szmania argues that this matter should not have been removed because Clark County Superior Court had original jurisdiction over this dispute.² On original jurisdiction Defendants do not disagree – the state court does have original jurisdiction, but so does this Court under 28 U.S.C. § 1332(a). Szmania’s Motion does not make any allegation or argument that this Court does not have diversity jurisdiction. Where both state and federal courts have original jurisdiction over a dispute, concurrent jurisdiction exists. Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748 (2012) (noting strong presumption in favor of concurrent jurisdiction). In such case, a defendant may exercise their right to remove consistent with 28 U.S.C. § 1441, 1446. Accord id. at 753 (acknowledging the removability of suits where state and federal courts have concurrent jurisdiction); and see 28 U.S.C. § 1441(a) (any suit where district court has original jurisdiction may be removed). Indeed, the entire removal statute assumes concurrent jurisdiction and exists to offset the advantage a plaintiff has in choosing the suit’s original forum. The fact that the state court has concurrent jurisdiction over this suit is no basis to remand. Accordingly, Szmania’s motion should be denied. “*

On 9/8/16 Dkt 49 at page 6 at 23. The U.S. District Court Denied the Motion to Remand Back to State Court saying: “*The Motion to Remand [Dkt. #23] is DENIED*” Thus denying the State Court Jurisdiction once again and maintaining Jurisdiction in the U.S. District Court. See Appellant’s Opening Brief pages 9-10 and MTD CP 14 page 6 at 13-16.

Regarding the instant case on appeal, the requirement for diversity or Federal Question or any other means to remove a case is now in nullity since Szmania’s Notice To Clerk Of Removal To Federal Court filed on 05/18/2017; CP 18 removed the case to the Federal Court. Wells waived their right to remove or argue that point by failing to file in the Federal Court a motion to Remand under which must be done within 30 days of the Removal 28 U.S. Code § 1447 (c). This Court is the wrong Court to make that argument in. The removal also terminated this State Courts Jurisdiction under 28 U.S.C. § 1446(d). See Appellant’s Opening Brief pages 5-6.

28 U.S.C. § 1446(d) reads in part: ” (d) *NOTICE TO ADVERSE PARTIES AND STATE COURT. — and shall file a copy of the notice with the clerk of such State Court., (SEE CP 18) WHICH shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.* (Emphases added!) See MTD CP 14, page 5 at 22-25.

Wells plead in the **Federal Case:**

See CP 13 Ex H. Page 2 at 5 of NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, clearly states: “*This removal terminates this Court’s jurisdiction and all proceedings in this forum pursuant to 28 U.S.C. s/s 1446(d).*” Also, in the NOTICE TO PLAINTIFF OF REMOVAL TO FEDERAL COURT, Page 1 at 25 also reads: “*Pursuant to 28 U.S.C. s/s 1446(d), the Notice of Removal terminates this Court’s jurisdiction and all proceedings in this forum.*” See MTD CP 14 page 5.

Wells can’t play both sides of the field! 28 U.S.C. § 1446(d) terminates the State Courts Jurisdiction! Period! **“the filing of a removal petition terminates the state court’s jurisdiction until the case is remanded, even in a case improperly removed.”** *Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir.), cert. denied, 355 U.S. 842, 78 S.Ct. 65, 2 L.Ed. 52 (1957).* (Emphases added!)

“*BILBREY, J., concurring. I agree with Judge Benton’s thorough legal analysis that as 28 U.S.C. § 1446 is currently written, a state court lacks subject matter jurisdiction after a notice of removal is filed, even if the removal is improper.* See *Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248 (11th Cir. 1988).*”

https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 20. (Emphases added!)

Wells is also barred by the Doctrine of Res Judicata from **the 2008 appeals cases.** **“no court—state or federal—is free to revisit as a matter of res judicata”.** See generally *Farm Credit Bank of St. Paul v. Ziebarth, 485 N.W.2d 788, 791 (N.D. 1992).* (Emphases added!)

Szmania asks the Court in the Instant State Case on Appeal, what authority it had to override 28 USC 1446 subsection (d)? **MR. SZMANIA:** *I just want to clarify, because 28 USC 1446 subsection (d) clearly says that once a notice is filed with the clerk of the court, which shall affect the removal, and the state court shall proceed no further unless and until the case is remanded. In my humble opinion, from my view, you're proceeding in the case by entering an order. So do you have an authority that overrides 28 USC 1446 subsection (d)?* **THE COURT:** *I haven't heard a question so I'm not going to respond. And moreover, I'm typically not the one to respond to questions.”* See RP Volume I, Page 28 at 14 to 24.

The case has NEVER been Remanded thus Jurisdiction is in the Federal Court! See RP Volume I, page 10 at 10. **“This case has not been remanded.”** (Emphases added!)

No. 2 Insufficiency of Process & Service of Process

The Order For Alternative Service, CP 8 pages 1- 2, specifically page 2, 1-10 gives very specific instructions for service by Wells on Szmania. These instructions were NOT followed at all! See CP 14 page 10 at 17 to page 13 at 23. **Insufficiency of Service of Process CR 12 (b) (5):** The lower court erred in not dismissing the case for lack of Insufficiency of Service of Process. Wells failed to meet those ordered instructions. See Appellant’s Opening Brief pages 26-27. In Sum, Wells posted the Summons and Complaint on someone else’s property and NEVER mailed them to Szmania, thus making them never properly before the Court.

Szmania prefers not to be repetitive when possible for the Court.

No. 3 Wells is NOT Entitled to any relief in a Foreclosure or Unlawful Detainer for they Lacking in Jurisdiction with NO Remand for Two Removals and they are Further Barred by the Doctrine of Res Judicata

Wells is barred by the Res Judicata doctrine from **the 2008 appeals** cases and precluded from seeking jurisdiction in the State Court again per 28 U.S.C. § 1446(d) and is now outside the narrow scope of the 30 day window for such a Remand found in and 28 U.S. Code § 1447 (c) which

has closed in both the **Primary State Case** & the Instant State Case which is in this Appeal. *See* CP 18 Szmania's Notice To Clerk Of Removal To Federal Court, 05/18/2017 of the instant case. Wells waived their right to Remand by wining the first time in denying Szmania's Motion to Remand in the **Federal Case** were they first Removed to Federal Court and furthermore Wells NEVER motioned in the Federal Court on Szmania's CP 18 Removal in the instant case. *See* above argument pages 8-13. In Sum, lack of Jurisdiction and Res Judicata are valid defenses along with all the other CR 12 defenses mentioned. *See* Appellant's Opening Brief pages 2-3.

Removal; The State Court said: **"And I have seen from both parties a notice of removal."** *See* RP Volume I, Page 25 at 15-16.

"A Federal Removal divests the State Court jurisdiction and places it in the hand of the Federal District Court judge. Removal is merely exercising ones legal rights to the fullest extent possible under the law." (Emphases added! To both above)

<https://www.linkedin.com/pulse/evictions-federal-court-david-s-schonfeld>

"Hence, after removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case. Any subsequent proceedings in state court on the case are void ab initio." *Maseda v. Honda Motor Co., Ltd.*, 861 F.2d 1248, 1254-55 (11th Cir. 1988) (internal citation omitted); *see* DB50 2007-1 Tr. v. Dixon, 723 S.E.2d 495, 496 (Ga. Ct. App. 2012) ("**[A]ny proceedings in a state court after removal of a case to federal court are null and void and must be vacated.**" (citation omitted)). (Emphases added!)

https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 4.

Wells cite RCW 59.12.032 page 10 of their Brief. It reads:
“*Unlawful detainer action—Compliance with RCW 61.24.040 and 61.24.060.*

An unlawful detainer action, commenced as a result of a trustee's sale under chapter [61.24](#) RCW, must comply with the requirements of RCW [61.24.040](#) and [61.24.060](#).”

Federal Case ruled this was “***This is not a foreclosure case.***” Dkt

64 page 2 at 14. This order is Prima Facia evidence that Szmania rebutted Wells illegal foreclosure. Wells is barred by Res Judicata and can not foreclose by this Order and **the 2008 appeals** and thus can NOT be in compliance of RCW 61.24.040 or RCW 61.24.060 which makes them NOT in compliance with RCW 59.12.032.

Szmania prefers not to be repetitive when possible for the Court with the Jurisdiction and Res Judicata arguments.

No. 4 Szmania Waived NO CLAIMS & WELLS IS BARRED

As Wells pens on page 2 of their Responsive Brief, on July 20, 2016 Wells Removed **Primary State Case** to the **Federal Case** and it ruled on 11/18/16: “***This is not a foreclosure case.***” Dkt 64 page 2 at 14. *See* MTD CP 14, page 2 at 7-12. *See* CP 13 Ex H.

Wells is therefore barred to seek relief of anything to do with their

alleged and illegal foreclosure and possession of Szmania's home based on Res Judicata in that above order and **the 2008 appeals!** Plus that order declares there is **NO FORECLOSURE CASE**, so Szmania seeking an injunction is a mute point. (Szmania did however move twice for injunctions once in state court before removal and once in federal after the removal and before the above order.) Also, since Wells removed the **Primary State Case** to **Federal Case** and a Remand was NOT accomplished, Wells gave up Jurisdiction of the State Court and the State Court lost Jurisdiction. PERIOD! Plus Szmania Removed the instant case on appeal CP 18 and Wells waived their right by NOT motioning in the Federal Court for a Remand. Thus under 28 U.S.C. § 1446(d) the State Court has NO Jurisdiction, it reads "and shall file a copy of the notice with the clerk of such State Court., (SEE CP 18) WHICH shall effect the removal and the State Court shall proceed no further unless and until the case is remanded." Wells time to file a Motion to Remand is outside the narrow scope of the 30 day window for such a Remand found in and 28 U.S. Code § 1447 (c) it reads: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." (Emphases added to both!) See Appellant's Opening Brief page 5-6 for the case numbers, and anyone can clearly see that Szmania well plead every defense possible and thus waived no claims! Szmania asked the Court to Judicially Notice the four (4) cases listed on page 17 of Appellant's Opening Brief.

Also, no amount of payments were ever proven to be owed to Wells or put in any court order? So no conditions of any injunction would apply to Wells very misguided point. *See* CP 13 Ex C Deed of Reconveyance & CP 13 Ex J specifically pages 4 and 7 where Chase, the owner of Bear Stearns clearly says they have NOTHING to do with Szmania's alleged loan! They said: **"We were unable to locate your property in our records. The loan you contacted us about is not affiliated with Chase."** (*Emphases added!*) So who was Wells trying to foreclose for? What scam are they running?

No. 5 The "Waiver Doctrine" can not be applied when Wells is Barred by Res Judicata and State Court has No Jurisdiction!

Wells has the "cart in front of the horse" on the waiver argument using RCW 61.24.127 First Wells must overcome the Res Judicata hurdle of the **Federal Case** were that Federal ruling of: **"This is not a foreclosure case."** Secondly Wells must overcome the Res Judicata hurdle of **the 2008 appeals**. Thirdly, Wells must overcome the lack of Jurisdiction from their own Removal of the **Primary State Case to Federal Case** when Remand was NOT accomplished by Szmania. In fact their adamant argument to keep the case in the Federal Jurisdiction is prima facia material evidence that they fully accept Original Jurisdiction of the Federal Court. Lastly, Wells waived their right to State Court Jurisdiction by not motioning in Federal Court within 30 days when Szmania Removed the instant case on appeal. *See* CP 18

IV. CONCLUSION AND RELIEF REQUESTED

Szmania asks for a reversal of the following orders

regarding: The Defendant's Motion To Dismiss, CP 14.

The Findings And Order To Proceed, CP 20.

The Order Denying Defendant's Motion To Dismiss, CP 21.

The Order For Default And Default, Judgment, CP 22 and
The Order To Issue Writ Of Restitution Without Bond, CP 23 AND CP 24 Writ of Restitution.

All of them should be reversed based upon the well settled
legal doctrines of:

- A) **Res Judicata** in the **Federal Case** the ruling of: **“This is not a foreclosure case.”** Dkt 64, p. 2 at 14. Also in all of **the 2008 appeals** specifically this Court in No. 39763-3-II on pages 2-3 ruled: **“passing title to the loan to EMC Mortgage Corporation trust”** There is NO proof EMC transferred title to Wells in the record on appeal!
- B) **Lack of Jurisdiction.** Not once but twice the Original Jurisdiction was established in the Federal Courts by Wells themselves! First when they removed it and fought to win their argument as they did to Szmania’s Motion to Remand. Secondly by their failing to motion to Remand

when Szmania Removed the instant case that is on appeal. *See* CP 18. Removal 28 U.S.C. § 1446(d) and Wells is now outside the narrow scope of the 30 day window for such a Remand found in and 28 U.S. Code § 1447 (c). Since the **Federal Case** was not Remanded, Venue is also improper under CR 12 (b) (3). *See* RP Volume I, page 42 at 2-23. The case has NEVER been Remanded! *See* RP Volume I, page 10 at 10. **“This case has not been remanded.”** (*Emphases added!*)

C) ALL CR 12 DEFENSES AND OBJECTIONS:

- (1) lack of jurisdiction over the subject matter;
- (2) lack of jurisdiction over the person;
- (3) improper venue;
- (4) insufficiency of process;
- (5) insufficiency of service of process; and
- (6) failure to state a claim upon which relief can be granted.

And CR 12(f) Motion to Strike, CR 12 (h) (3) Lack of Jurisdiction: *“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”* *See* RP Volume I, Page 9 at 1 to 11. *See* Appellant’s Opening Brief page 3.

For these reasons, the Court of Appeals SHOULD REVERSE the

Superior Court Orders and Writ and give Possession back to

Szmania the property known as: **17005 NE 164th Ave, Brush**

Prairie, WA 98606.

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Further more:

“State courts do not adjudicate whether an action could be properly removed. Once a defendant has filed a notice to remove a case, jurisdiction is transferred automatically and immediately by operation of law from the state court to the federal court. Any objection to removal must be presented to the federal court. If a federal court finds that the notice of removal was in fact defective, or that the federal court does not have jurisdiction, the case is remanded to the state court.” (Emphases added!) https://en.wikipedia.org/wiki/Removal_jurisdiction

“A Federal Removal divests the State Court jurisdiction and places it in the hand of the Federal District Court judge. Removal is merely exercising ones legal rights to the fullest extent possible under the law.” (Emphases added!)
<https://www.linkedin.com/pulse/evictions-federal-court-david-s-schonfeld>

“Hence, after removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case. Any subsequent proceedings in state court on the case are void ab initio.” *Maseda v. Honda Motor Co., Ltd.*, 861 F.2d 1248, 1254–55 (11th Cir. 1988) (internal citation omitted); see *DB50 2007-1 Tr. v. Dixon*, 723 S.E.2d 495, 496 (Ga. Ct. App. 2012) (“**[A]ny proceedings in a state court after removal of a case to federal court are null and void and must be vacated.**” (citation omitted)). (Emphases added!)
https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 4.

“when an application to remove a cause (removable) is made in proper form, and no objection is made . . . **‘it is the duty of the State court to ‘proceed no further in the cause.’**”” *Virginia v. Rives*, 100 U.S. 313 (1879) (Emphases added!)

“no court—state or federal—is free to revisit as a matter of res judicata”. See generally *Farm Credit Bank of St. Paul v. Ziebarth*, 485 N.W.2d 788, 791 (N.D. 1992). (Emphases added!)

“the filing of a removal petition terminates the state court’s jurisdiction until the case is remanded, even in a case improperly removed.”

Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir.), cert. denied, 355 U.S. 842, 78 S.Ct. 65, 2 L.Ed. 52 (1957). (Emphases added!)

“BILBREY, J., concurring. I agree with Judge Benton’s thorough legal analysis that as 28 U.S.C. § 1446 is currently written, **a state court lacks subject matter jurisdiction after a notice of removal is filed, even if the removal is improper.** See *Maseda v. Honda Motor Co., Ltd.*, 861 F.2d 1248 (11th Cir. 1988).”

https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 20. (Emphases added!)

“If one court acquires jurisdiction over property first, no other court may take jurisdiction for common sense reasons.” *Sexton v. NDEX West, et al.*, U.S. Court of Appeals for the Ninth Circuit, Case No. 11-17432, D.C. No. 3:11-cv-00440-LRH-VPC (2013) (Emphases added!)

Once the Court in the Instant State Case on Appeal read Szmania’s Motion to dismiss filed on 2/16/17, which challenged jurisdiction. The Court should have dismissed the case! See CP 14.

“Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but, rather, should dismiss the action.” *Melo v. US*. 505 F2d 1026. (Emphases added!)

In the Melo court, we see the same standard of law upheld as CR 12 (h)

(3) Lack of Jurisdiction, prescribes:

“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” (Emphases added!)

“[W]aiver is an equitable doctrine, and ‘we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.’” *Klem v. Wash. Mut. Bank*. 17 6 W n.2d 771, 783 n. 7, 295 P.3d 1179, 1185 (2013) (quoting *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012)). **Page 22**

“The law provides that once State and Federal Jurisdiction has been challenged, it must be proven.” *Main v. Thiboutot*, 100 S. Ct. 2502 (1980). (Emphases added!)

“A judgment rendered by a court without personal jurisdiction over the defendant is void. It is a nullity. [A judgment shown to be void for lack of personal service on the defendant is a nullity.]” *Sramek v. Sramek*, 17 Kan. App. 2d 573, 576-77, 840 P.2d 553 (1992), rev. denied 252 Kan. 1093 (1993). (Emphases added!)

“Court must prove on the record, all jurisdiction facts related to the jurisdiction asserted.” *Latana v. Hopper*, 102 F. 2d 188; *Chicago v. New York*, 37 F Supp. 150

“Defense of lack of jurisdiction over the subject matter may be raised at any time, even on appeal.” *Hill Top Developers v. Holiday Pines Service Corp.*, 478 So. 2d. 368 (Fla 2nd DCA 1985)

Dismissals based on res judicata have been affirmed where the defense was raised by way of CR 12(b)(6) motion. *See, e.g., Begala v. PNC Bank*, 214 F.3d 776 (6th Cir.2000) (affirming 12(b) (6) dismissal on basis of res judicata); *Kane v. Magna Mixer Co.*, 71 F.3d 555(6th Cir.1995) (same).

“After a notice of removal is filed in federal court, notice thereof is given to adverse parties, and a copy of the notice of removal is filed in state court, removal is effected and “the State court shall proceed no further unless and until the case is remanded.” 28 U.S.C.A. § 1446(d) (West 2015). As a court of the United States, we must, under the Supremacy Clause, give force to the express language of 28 U.S.C.A. § 1446 (West 2015). **We hold the final judgment entered by the court below after removal of the case to federal court (and prior to remand) is void because the circuit court no longer had jurisdiction.”**

https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 19.

Removal; The State Court said: **“And I have seen from both parties a notice of removal.”** (Emphases added!) See RP Volume I, Page 25 at 15 to 16. See Appellant’s Opening Brief page 8.

“There is no discretion to ignore lack of jurisdiction!” *Joyce v. U.S.* 474 2D 215.

The well settled law of **Lack of Jurisdiction after Removal** found in 28 U.S.C. § 1446(d) that terminates the Jurisdiction in the State Court of the Instant Case on Appeal and further bars Wells from bringing the unlawful detainer action in said court .

“A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court”. *OLD WAYNE MUT. L. ASSOC. v. McDONOUGH*, 204 U. S. 8, 27 S. Ct. 236 (1907). (Emphases added!)

Also, being that Jurisdiction upon inception of this case was in the Jurisdiction of the **Federal Case**, on appeal in the **Ninth**, also further employs the doctrines of claim and issue preclusion, Res Judicata and Collateral Estoppel.

“[w]hen an appeal is pending, a party is precluded by res judicata from starting a new action ... in hopes of obtaining a contrary result while the appeal is pending.” *Spokane Cnty. v. Miotke*, 158 Wn. App. 62, 67, 240 P .3d 811 (20 1 0) (internal quotation marks omitted).

“In an unlawful detainer action, plaintiff bears the burden to prove, by a preponderance of the evidence, the right to possession of the premises.” *Duprey v. Donahoe*, 52 Wn.2d 129, 135, 323 P.2d 903 (1958). (Emphases added!)

The Court in the Instant State Case on Appeal asked if estoppel applied:
THE COURT: “Has title been called into question in that action? Is there some sort of estoppel effect because of that action? (Emphases added!) “See RP Volume I, Page 13 at 23 to 25. Wells mislead and lied to the Court, See RP Volume I, Page 14 at 1 to page 15 at 22. Szmania correctly answered: See RP Volume I, Page 15 at 23 to page 18 at 13.

Once again, for all the above noted reasons and the well settled law of Res Judicata and Jurisdiction, the Court of Appeals SHOULD REVERSE the Superior Court Orders and Writ and give Possession back to Szmania the property known as:

17005 NE 164th Ave, Brush Prairie, WA 98606.

Szmania is also available for oral arguments and request oral arguments.

Respectfully submitted;

s/ Daniel G. Szmania

Daniel G. Szmania, Defendant/Appellant, Pro Se’, March 14, 2018
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CERTIFICATE OF SERVICE

Case No. 50523-1-II

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the United States and the State of Washington, that on the 14th day of March, 2018, I served via: (Indicated by and X) to the following persons, a true and correct copy of the Foregoing:

 X by CM/ECF XX by First Class Mail

1) DEFENDANT’S/ APPELLANT’S REPLY BRIEF,

TO PLAINTIFF/RESPONDENT:

**1) Wells Fargo Bank, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3. C/o Zieve, Brodnax & Steele, LLP Janaya L Carter
6100 219TH ST SW STE 480, MOUNTLAKE TERRACE, WA, 98043-2222
206-209-0375 – Ext. 552 jcarter@zbslaw.com **CM/ECF & First Class****

Mail

**2) Wells Fargo Bank, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3. C/o Dale W. Read, JR
211 East McLoughlin Blvd, Vancouver, WA 98663-3368
360-696-5976 **Not on CM/ECF by First Class Mail Only.****

I certify under penalty of perjury under the laws of the United States and the laws of the State of Washington that the foregoing is true and correct. **AND** Per GR 30 ELECTRONIC FILING AND SERVICE: (d) (2) (B) and (C) (ii): I ensure these electronic documents has the digital signature of the signer, myself; s/ Daniel G. Szmania.

Dated this 14th day of March, 2018, at Brush Prairie, Washington.

s/ Daniel G. Szmania

Presented: Daniel G. Szmania, Defendant/Appellant, Pro Se’.
HM1 USNR Retired, U.S. Supreme Court No. 11-6137.
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**CERTIFICATE OF SERVICE FOR:
DEFENDANT’S/ APPELLANT’S REPLY BRIEF, Page 1 of 1**

DANIEL SZMANIA - FILING PRO SE

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Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50523-1
Appellate Court Case Title: Wells Fargo Bank, Respondent v. Daniel G. Szmania, Appellant
Superior Court Case Number: 16-2-02606-4

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