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DIVISION II

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STATE OF WASHINGTON

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

NO. 51232-7-3

FLOYD and MARGARET SCOTT, husband and wife,
Plaintiffs/Appellants,

vs.

**NORTHWEST TRUSTEE SERVICES, INC; and WELLS FARGO
BANK, NA,**

Defendants/Respondents.

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

APPELLANT SCOTTS' OPENING BRIEF

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I INTRODUCTION

A. Case of First Impression in Washington

Because this appeal is based on provisions of the DOT and sections of the U.S. and Washington State Constitutions, this is a case of first impression in Washington. For reasons that are apparent throughout this brief, the importance of the issues Plaintiffs ask this Court to decide -- not only to thousands, perhaps 10's of thousands, of current and future Washington homeowners, but also to countless homeowners across the United States -- cannot be overstated.

B. Mortgage Note Arrearages No Longer Exist.

Plaintiffs' promissory note ("Note") arrearages, which served as Wells Fargo Bank, NA ("Wells"), Northwest Trustee Services, Inc. ("NWTS"), and Federal Home Loan Mortgage Corporation's ("Freddie Mac's") basis for the non-judicial foreclosure proceeding, no longer exist. Months ago, while making it clear that we reserved our right to continue to contest the unlawful foreclosure, Plaintiffs reinstated the Note and deed of trust ("DOT") by paying the arrearages.

C. Summary Judgment should be reversed.

The trial court's grant of summary judgment, which is based on the holding in *Brown v. Department of Commerce*, 184 Wn.2d 509 (2015) ("*Brown*"); Defendants' claims that Plaintiffs did not properly serve them; and the application of res judicata (claim preclusion) and collateral estoppel (issue preclusion) principles, should be reversed.

The holding in *Brown* does not control the outcome of this case because Plaintiffs have primarily founded their defense on controlling sections of the DOT. The *Brown* Court reached its opinion without considering any sections of the DOT. *See Brown*, 184 Wn.2d at 529 n. 9. Hence, the reach of the *Brown* ruling does not touch the basis for Plaintiffs' claim. Moreover, as we shall demonstrate throughout the remainder of this brief, the *Brown* decision is fatally flawed.

D. Defendants have waived Lack of Proper Service Claim.

Defendants have waived the lack-of-proper-service claim. Based on the holding in *Brown*, Defendants moved the trial court to grant dismissal. They submitted documents outside the pleadings in support of the motion. Citing Defendants' use of documents outside the pleadings, the trial court converted the motion to a summary judgment motion and granted the motion.

Summary judgment is a final judgment on the merits of a case. *Emeson v. Dept. of Corr.*, 194 Wn. App 617, 627 (2016). A court cannot grant summary judgment unless it has jurisdiction over the parties to a dispute. By not appealing the trial court's summary judgment ruling, Defendants have waived the lack of jurisdiction defense.

E. Neither Res Judicata nor Collateral Estoppel apply.

Neither res judicata nor collateral estoppel apply in this case. Defendants base their res judicata and collateral estoppel claims on the

decision of Judge David Gregerson in a foreclosure case Plaintiffs filed in September of 2016. Judge Gregerson's dismissal does not provide a basis for the application of either res judicata or collateral estoppel.

Defendants moved for dismissal of the case *with prejudice*. Judge Gregerson granted the dismissal *without prejudice*. A dismissal without prejudice does not constitute a "final judgment" because it is not a formal decision or determination leaving nothing further to be determined by the court. *Emerson v. Department of Corrections*, 194 Wn.App. 617, 635 (2016); *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 487 (2009).

F. Wells Unlawfully appointed NWTS the Successor Trustee.

RCW 61.24.010(2) authorizes the *beneficiary* to appoint a successor trustee. As we shall prove in numerous ways, Wells is not the Beneficiary; Freddie Mac is. Wells had no lawful authority to appoint NWTS the Successor Trustee.

G. RCW 61.24.030(7)(a) Unconstitutionally Impairs DOT Contract.

Paragraph 22 of the DOT requires the Lender, the Successor Lender, or the Assignee Lender to be the owner of the note and underlying mortgage debt and the holder of the note at the commencement of a non-judicial foreclosure action. CP at 264. Wells holds the note, but does not own it. Freddie Mac owns the note and the underlying mortgage debt, but does not hold the Note. RCW 61.24.030(7)(a), as amended June 7, 2018, defines the beneficiary as the noteholder. This statutory provision

irreconcilably conflicts with the sections of the DOT that determine who is the beneficiary of the DOT; who has the power to declare the note in default; who may appoint a successor trustee; and, most importantly, who has the authority to *invoke the power to sell* the property and under what circumstances the power may be utilized. These conflicts destroy the meaning of the DOT agreement and thereby violate Article 1, Section 10 of the United States Constitution and Article 1, Section 23 of the Washington State Constitution.

II ASSIGNMENTS OF ERROR

1. The trial court erred by finding that *Brown* is controlling authority in this case.
2. The trial court erred by finding it lacked personal jurisdiction over the Defendants while simultaneously granting summary judgment based on the Supreme Court's Decision in *Brown*.
3. The trial judge erred by granting Defendants' dismissal motion based on res judicata and collateral estoppel.
4. The trial court erred by ruling Wells lawfully appointed NWTs the Successor Trustee even though there were competing promissory notes, neither of which established Wells was the note holder, and the court never resolved which note proved Wells was the noteholder.

5. The trial court erred by ruling the competing beneficiary declarations did not raise an issue of material fact as to whether:
(a) Wells had authority to appoint NWTS the Successor Trustee;
and (b) NWTS had authority to record the amended notice of trustee's sale.
6. RCW 61.24.030(7)(a), as amended on June 7, 2018, violates Article 1, Section 10 of the U.S. Constitution and Article 1, Section 23 of the Washington State Constitution and therefore is void.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Given that *Brown* did not identify or analyze: (1) any provisions in the DOT; (2) RCW 61.24.080(2); (3) RCW 61.24.030(1); (4) RCW 61.24.030(3); (5) Article 1, Section 10 of the U.S. Constitution; or (6) Article 1, Section 23 of the Washington State Constitution, is *Brown* controlling authority in this case?
2. Does DOT follow transfer of noteholder status, absent transfer of note ownership?
 - a. Does transfer of noteholder status, while transferor retains ownership of note, change DOT agreement in any way?
 - b. May person who is neither a party to DOT agreement nor intended third-party beneficiary of DOT agreement enforce terms of DOT agreement?
 - c. Is noteholder who does not own note he holds secured by a DOT?
 - d. Does "*security follows the note doctrine*" apply to transfer of noteholder status absent simultaneous transfer of note ownership?
 - e. Who is secured by DOT, Freddie Mac or Wells?

3. Did Defendants waive lack of proper service claim by not appealing trial court's summary judgment ruling?
4. Do either res judicata or collateral estoppel apply given facts in this case?
5. Is RCW 61.24.030(7)(a) as presently constituted unconstitutional impairment of Plaintiffs' DOT agreement?
6. Did Wells lawfully appoint NWTS the successor trustee?
7. Did Defendants Wells and Freddie Mac's submission of promissory note as part of motion to dismiss that differed from promissory note Defendant NWTS claimed it received from Defendants Wells and Freddie Mac raise question of material fact?
8. Does DOT require secured party to be owner and holder of Note?

III STATEMENT OF THE CASE

A. Factual Background.

Mrs. Scott executed the Note and DOT on or about September 28, 2010. *CP* at 13. The Note lists Wells as the payee. *Id.* The parties agree that on an unspecified date in 2010 or 2011 Wells sold Mrs. Scott's loan to Freddie Mac. Allegedly, Freddie Mac returned the Note to Wells prior to the commencement of the non-judicial foreclosure proceeding. Freddie Mac had not endorsed the Note that Wells presented to the trial court to prove Wells held the Note. *Id.* at 15.

The DOT lists Wells as the Lender (i.e., the person *from whom* Plaintiffs borrowed the mortgage money (*Black's Law Dictionary* (Fifth ed. 1979) at 812)) (*Id.* at 17) and the *Beneficiary of the DOT* (aka the *Secured Party*). *Id.* at 18. The dual designations are clear, explicit, and

unambiguous. Section 13 of the DOT extends the security provided by the DOT to any person who becomes a Successor Lender or an Assignee Lender. *CP* at 26..

On December 1, 2014 (*Id.* at 93), or January 1, 2015 (*Id.* at 85), Plaintiffs stopped making payments on the Note. Approximately four months later, on April 3, 2015, Wells executed the “BENEFICIARY DECLARATION PURSUANT TO CHAPTER 61.24 RCW AND FORECLOSURE LOSS MITIGATION FORM.” *Id.* at 45-46. Defendants Wells and Freddie Mac claim, incorrectly, this declaration satisfied RCW 61.24.030(7)(a)’s declaration requirements. *Id.*

On August 14, 2015, Wells, *by then the servicer and no longer the owner of the loan, acting in its individual capacity as the purported Beneficiary of the DOT*, executed an Appointment of Successor Trustee (“AST”). *CP* at 36-38. The AST removed Northwest Trustee Services, LLC as Trustee and *appointed* NWTS¹ as the Successor Trustee. *Id.* at 37. NWTS then e-recorded the AST in the Clark County Recorder’s Office on August 19, 2015. *CP* at 37-38.

Two days later, on August 21, 2015, NWTS, acting on behalf of Wells, issued a Notice of Default (“NOD”). *CP* at 40-44. The NOD lists

¹ In November 2017 the U.S. Justice Department sued NWTS for *routinely* selling the homes of U.S. service members while they were serving on active duty, a blatant violation of the Servicemember’s Civil Relief Act. U.S. Attorney Annette L. Hayes explained the suit this way: “Our investigation revealed that Northwest Trustee Services repeatedly failed to comply with laws that are meant to ensure our servicemembers do not have to fight a two-front war – one on behalf of all of us, and the other against *illegal foreclosures*.” *Justice News*, The United States Department of Justice (Office of Public Affairs (November 9, 2017)).

Freddie Mac as the *owner* of the Note and Wells as the *loan servicer*. *Id.* at 43.

On or about August 4, 2016, NWTS issued an Amended Notice of Trustee's Sale (ANOTS"). *CP* at 91-95. The ANOTS indicated the Property would be sold at public auction on September 30, 2016.² *Id.* at 92.

B. Procedural Background

In response to Defendants' non-judicial foreclosure activity, Plaintiffs filed suit on or about September 16, 2016. Defendants immediately removed the case to the U.S. District Court for the Western District of Washington. With equal swiftness, Plaintiffs successfully moved to remand the case to Clark County Superior Court.

In or about February 2017, Wells moved for dismissal of the case. During the March 31st hearing of the motion, Wells argued that the court should dismiss the case *with prejudice* because, given the holding in *Brown*, Plaintiffs could never prove the "deceptive act" element of a CPA claim. *VRP* 1 at 13: 12-15. The court granted a dismissal *without prejudice* and *without leave to amend*. *Id.* at 13: 16-20.

Not realizing the earlier motion had been granted *without leave to amend*, Plaintiffs filed a Revised Complaint in the 2016 case in June 2017. *CP* at 176-184. Wells again moved for dismissal *with prejudice*. It based

² The sale never occurred.

the motion on the “without leave to amend” portion of the March 31st ruling. At the August 25th hearing, Plaintiffs conceded the Revised Complaint had been filed in error and withdrew the Complaint. The court then granted Wells’ motion—again *without prejudice* and without leave to amend.

On the same day, August 25, 2017, Plaintiffs commenced the lawsuit that is the subject of this appeal by filing a new Complaint, with several significant changes to the Original Complaint, as the basis for the new action. *CP* at 3-11. In or about September 2017, Wells and Freddie Mac moved to dismiss the action.

1. The October 27th Hearing.

By detailing below the arguments Plaintiffs made during the October 27th hearing, Plaintiffs hereby make those arguments an official part of this brief.

a. The CPA Claim.

During the October 27th hearing, Wells and Freddie Mac’s counsel claimed he had read through “all three different iterations of the Complaint[,]” and they all appeared to advance *the same CPA claim*. *VRP* 2 at 5: 7-14 and 17-21. For this reason, according to Wells and Freddie Mac, *res judicata* and *collateral estoppel* applied.

The claim is patently false. The final iteration of the Complaint, the iteration upon which this litigation is based, made the following changes to the Original Complaint:

1. deleted paragraph 3.12 of the Original Complaint;
2. added Freddie Mac as a Defendant;
3. added a deceptive-act allegation against Freddie Mac in a new paragraph 3.15;
4. added a claim that Wells, Freddie Mac, and NWTS had voluntarily participated in Wells' unlawful dismissal of the original trustee and appointment of NWTS as the Successor Trustee;
5. added a claim that Wells, Freddie Mac, and NWTS had voluntarily participated in NWTS's unlawful and deceptive recording of the ANOTS;
6. added a claim that the act of unlawfully recording NOTSs was a regular part of each Defendant's foreclosure-related activities;
7. added new paragraphs 4.3, 4.4, and 4.5 to the Cause of Action Section of the Revised Complaint; deleted the original eighth unfair and/or deceptive act allegation from

the list of unfair and/or deceptive practices listed in the Original Complaint;

8. inserted a new eighth unfair and/or deceptive act allegation as paragraph 4.6 of the Revised Complaint;

9. added a new claim -- to paragraph 4.10 of the Revised Complaint -- that if the holding in *Brown* is correct, then the *power of sale* clause in the DOT is illegal and unenforceable;

10. asserted that Defendants were not entitled to foreclose; and

11. deleted paragraph 4.9 of the Original Complaint.
CP at 3-11.

Plaintiffs do allege a CPA cause of action in this litigation. But the CPA claim is different from the CPA claim in the Original Complaint in the ways outlined immediately above. *Id.*

b. The Noteholder Claims.

Further, Plaintiffs argued, the fact that Wells failed to present the court with the then-current Note meant Wells, even under the *Brown* standard, had failed to prove it was the Noteholder, the Beneficiary of the DOT, and the Secured Party under the DOT on the day it sent the NOD to Plaintiffs (*Id.* at 13: 4-8); had failed to prove it was the Noteholder, the beneficiary of the DOT, and the Secured Party on the day it appointed NWTS the Successor Trustee (*Id.* at 13: 8-10); and had failed to show it

was the Noteholder, the Beneficiary of the DOT, and the Secured Party on the day NWTS recorded the ANOTS. *Id.* at 13: 10-11.

c. The Beneficiary Declaration Claims.

Further, Plaintiffs informed the court that Wells and Freddie Mac asserted that by delivering to NWTS a copy of the document entitled “BENEFICIARY DECLARATION PURSUANT TO CHAPTER 61.24 RCW AND FORECLOSURE LOSS MITIGATION FORM” (“FORM”) they had again proven to NWTS that Wells held the Note. *CP* at 214. Other than this FORM and the unendorsed Note, Wells provided no other proof to NWTS that it held the Note. *VRP 2* at 13: 14 through 17: 4. Plaintiffs disputed that the FORM met the requirements of RCW 61.24.030(7)(a). *Id.* at 14: 15-18.

At the conclusion of the hearing, the court took the matter under advisement and promised a written decision on or before December 1, 2017. *Id.* at 21: 14-17.

d. The Hearing Decision.

On or about November 28, 2017, in writing and unknown to Plaintiffs, the court granted Wells and Freddie Mac’s motion to dismiss on res judicata and lack of proper service grounds and, after converting the third basis for the motion to dismiss to a summary judgment motion, granted summary judgment based on the *Brown* decision. *VRP 3* at 7: 2-7.

2. The December 1, 2017 Hearing.

NWTS had filed a separate motion for dismissal on or about October 2, 2017, and they had noted the hearing of that motion for December 1, 2017.

At the hearing, to prove NWTS had satisfied RCW 61.24.030(7)(a) prior to recording the ANOTS, NWTS submitted a beneficiary declaration—purportedly received from Wells—different from the FORM (CP at 214) Wells had claimed (during the October 27, 2017 hearing) it had delivered to NWTS to prove it was the Noteholder, the Beneficiary, and the Secured Party. Neither Wells and Freddie Mac nor NWTS made any effort to explain the discrepancies between Wells' FORM and NWTS's version of the beneficiary declaration. Despite Plaintiffs objections, the court ignored these material discrepancies.

Plaintiffs advised the court that the beneficiary declaration allegedly provided to NWTS by Wells did not satisfy the requirements of RCW 61.24.030(7)(a). *Id.* at 7: 21-24. The declaration states, “Wells Fargo Bank, NA is the actual holder of the Promissory Note or other obligation *evidencing the above-referenced property.*” *Id.* at 7: 14-20; CP at 272. In relevant part, RCW 61.24.030(7)(a) reads, “the trustee shall have proof that the beneficiary is the holder of any promissory note or other obligation *secured by the deed of trust.*” The meaning of the

italicized language in NWTS's declaration does not reflect the meaning of the relevant language in RCW 61.24.030(7)(a).

The above quote taken from RCW 61.24.030(7)(a) means the trustee must have proof that the person claiming to be the beneficiary holds the promissory note secured by the DOT. What does, "I am 'the actual holder of the promissory note or other obligation *evidencing the above-referenced property.*' mean?"

Mortgage notes do not evidence property; they evidence debt. *See CP* at 18. The statute does not require the trustee to obtain proof that the alleged beneficiary holds a promissory note *that evidences property*. It requires the trustee to obtain proof that the alleged beneficiary holds the promissory note *secured by the deed of trust*. And holding an "other obligation' *evidencing the above-referenced property*" makes you something other than "the actual holder of the promissory note . . . *secured by the deed of trust.*" *See VRP* at 7: 14 through 10: 23.

The NWTS version of Wells' declaration did not meet the requirements of RCW 61.24.030(7)(a). Moreover, Wells declared it had delivered a declaration to NWTS that was materially different from the declaration NWTS acknowledged it received from Wells. *Compare* NWTS's version of Wells' beneficiary declaration (*CP* at 272) to Wells' version of Wells' beneficiary declaration (*CP* at 45-46).

Finally, Freddie Mac requires every Lender who sells a note to Freddie Mac to place a blank endorsement on the Note before delivering the loan package to Freddie Mac. Wells' version of the Note did not contain the blank-endorsement. *See CP* at 15. NWTS's version of the Note, which it could not have obtained from Wells because Wells' version lacks an endorsement, contains a right-side-up, backward stamped endorsement. *See CP* at 249. The competing versions raised a second material question of fact. The question being, "Which version of the Note, if either, proved Wells held the Note. *VRP 3* at 10: 20-23.

By the time the December 1st hearing occurred, Plaintiffs had not yet received Judge Fairgrieve's written decision of the Wells/Freddie Mac motion. During the December 1st hearing, Judge Fairgrieve revealed he had granted Wells and Freddie Mac's motion to dismiss on two of the three grounds on which they had brought the motion and had converted the third ground to a motion for summary judgment and granted it. *VRP 3* at 7: 2-7.

At the conclusion of the December 1st hearing, Judge Fairgrieve granted NWTS's motion to dismiss. *Id.* at 12: 13-18.

Plaintiffs appealed.

IV ARGUMENT

A. Nature of Borrower/Lender Agreement.

The *security follows the note doctrine* means the security follows a sale of the secured note. As we prove repeatedly below, that fact is the law in Washington today. *RCW 62A.9A-203(a), (b), and (g)*. But, in Washington, as in numerous other states, it is also the law that the *security follows the note doctrine* means the security follows the transfer of noteholder status, regardless of note ownership. *RCW 61.24.030(7)(a)* and *Brown v. Department of Commerce*, 184 Wn.2d 509 (2015).

Historically, there is only one security follows the note doctrine. Consequently, one of these two interpretations of the doctrine *must* be incorrect. Which is the correct meaning of the doctrine? To answer that question, one must possess an accurate, thorough understanding of the general nature of a mortgage loan transaction. Plaintiffs provide that understanding in this Section A of the Argument by analyzing the loan transaction that is the subject of this litigation. The following analysis applies to all mortgage loans in the State of Washington.

1. The Loan Transaction.

To close Plaintiffs' mortgage loan, Wells, the loan originator, required Mrs. Scott to execute the Note and the DOT. The Note reads that it is given in return for a loan Mrs. Scott received from Wells. *CP* at 13.

The money lent by Wells, plus interest, equaled Mrs. Scott's debt to Wells. As the Lender, Wells automatically *owned* the debt.

In the same way a grocery store, by accepting a shopper's personal check, makes the check the mutually agreed upon method of paying for the groceries until the check is either paid or dishonored (*RCW 62A.3-310(b)(1)*); Wells, by accepting Mrs. Scott's Note, made the Note the mutually agreed upon method of paying for the money borrowed (i.e., the mutually agreed upon method of repaying the mortgage debt) until Mrs. Scott paid the Note or dishonored it. *RCW 62A.3-310(b)(2)*. Moreover, pursuant to *RCW 62A.3-310(b)(2)*, Wells' acceptance of the Note as the mutually-agreed-upon method of repaying the mortgage debt suspended Mrs. Scott's obligation to repay the mortgage debt until she paid off or dishonored the Note.

The UCC treats a personal check transaction and a promissory note transaction the same. Compare *RCW 62A.3-310(b)(2)* to *RCW 62A.3-310(b)(1)*.

2. The Mortgage Loan Agreement.

At the close of the mortgage loan transaction, Wells became the Noteholder.³ *RCW 62A.3-412* requires the issuer of a note to make note payments to the *person entitled to enforce the note*. The noteholder is entitled to enforce the note. *RCW 62A.3-301*. Therefore, at the close of the

³ Wells possessed the Note, and the Note named Wells the payee. *RCW 62A.1-201(b)(21)(A)*.

mortgage loan transaction, Mrs. Scott was required to make Note payments to Wells directly. But she was required to make Note payments directly to Wells because RCW 62A.3-301 entitled Wells to enforce the Note, *not because Wells loaned her the money.*

Under RCW 62A.3-412 the issuer of a note must make note payments to the noteholder, *regardless of whether the noteholder owns the note.* See RCW 62A.3-301. However, if the noteholder is not the note owner, the note owner continues to own the *economic benefit* of the note payments RCW 62A.3-412 requires the note issuer to make to the noteholder. *Brown*, 184 Wn.2d at 529. Understanding the fact related in the preceding sentence is one of the critical keys to understanding why the security does not follow a transfer of the right to enforce the note absent a simultaneous transfer of note ownership. Plaintiffs will repeat this fact several times in the remaining pages of this brief. Please keep it firmly in mind as you read.

Laws that relate to any material aspect of a contractual agreement become part of the agreement as though those laws had been written into the agreement. *Von Hoffman v. Quincy*, 71 U.S. 535, 550, 18 L. Ed. 403 (1866); *Gruen v. Tax Com.*, 35 Wn.2d 1, 55 (1949); *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346 (2011). Accordingly, the requirements of RCW 62A.3-301 and RCW 62A.3-412 were part of the loan agreement between Mrs. Scott (the Borrower) and Wells (the Lender)

from the start. They remained part of the agreement after Wells sold the loan to Freddie Mac. *CP* at 26.

Armed with the information in this Section A, we can now fully identify and articulate the agreement Mrs. Scott and Wells enter into at the close of the mortgage loan transaction: By law, as long as Wells remained the owner of the Note and of the debt, *Wells and Mrs. Scott mutually agreed that Mrs. Scott would repay the mortgage debt owed to Wells by paying the \$799.95 monthly Note payment to the Noteholder, as required by RCW 62A.3-412 and RCW 62A.3-301.* This is the *precise* agreement Mrs. Scott and Wells entered upon closing the mortgage loan transaction. Precision in the use of language is a second critical key to understanding why the *security follows the note doctrine* does not mean the security follows the transfer of noteholder status absent a simultaneous transfer of note ownership.

Mrs. Scott's obligation – and the obligation of every mortgage loan borrower – is not simply to pay the Note, as so many of the cases, including *Brown*, misguidedly assert. That assertion is an imprecise misreading of the Borrower's obligation caused by inattentiveness to the details of the transaction. Neither is the Borrower's obligation simply to repay the debt. Again, the *precise* agreement every Lender and Borrower enters at the close of a mortgage loan transaction is *the Borrower's agreement to repay the mortgage debt to the Lender by paying the monthly*

note payments to the Noteholder. THIS IS THE AGREEMENT THE DOT SECURES!

Armed with this *precise* understanding of the nature of the agreement between the Borrower and the Lender, the Court can now properly review the arguments contained in the remainder of this brief.

B. *Brown* is not Controlling Authority in This Case.

1. *Brown* does not address Issues Upon Which Plaintiffs' CPA Claim Rests.

At the conclusion of the hearings of both the October 27th and December 1st motions to dismiss, Judge Fairgrieve decided the holding in *Brown* controlled the outcome of this case and granted summary judgment. The trial court's grant of summary judgment forms the primary basis for this appeal.

For numerous reasons, *Brown* is wrongly decided. As we shall prove repeatedly in the remaining pages of this brief, the *security follows the note doctrine* means the DOT follows a transfer of the debt and of the "*beneficial interest in the note.*"⁴

Plaintiffs know, all too well, that the prevailing opinion in this state, purportedly based on *Brown* and some provisions of the Washington Deeds of Trust Act ("DTA"), directly opposes Plaintiffs' position on the meaning of the *security follows the note doctrine*. But Plaintiffs also know

⁴ By law, the *right to enforce the note* (a right that the *noteholder* possesses) and the *beneficial interest in the note* (an interest that the *note owner* owns) may be separated. RCW 62A.3-301.

that the DOT itself (the *Transfer of Rights in the Property Section*; *Section 13*; *Section 22*; and *Section 24*); *Sub-Sections (1) and (3)* of RCW 61.24.030; *Sub-Section (2)* of RCW 61.24.080; *Sub-Sections (a), (b), and (g)* of RCW 62A.9A-203; Article 1, § 10 of the United States Constitution; Article 1, § 23 of the Washington State Constitution; and the members of the Permanent Editorial Board (“PEB”) of the Uniform Commercial Code (“UCC”) all support Plaintiffs’ position on the true meaning of the *doctrine*. The *Brown* Court did not address any of the above-recited statutory and constitutional provisions. Thus, this Court’s consideration of the arguments raised in this brief is not constrained by the holding in *Brown*. This is a case of first impression.

Plaintiffs do not ask the Court to accept on faith our assertion that the statutory and constitutional provisions listed above support our position. And we do not ask the Court to park at the door its understanding of the current state of the law. What we do ask, and believe we have a right as citizens of this state to expect, is that each member of the Court will approach the decision of this case with a mind that is open to the *possibility*, however infinitesimal the possibility is in the Court member’s mind, that *Brown* was wrongly decided. Do that, and our analysis will do the rest.

**2. DOT does not follow transfer of Noteholder Status
Absent transfer of Note Ownership.**

Notwithstanding *Brown* and the line of cases that follow its holding, the DOT did not follow Freddie Mac's transfer of the Note to Wells. We begin with the simplest methods of proving the point and progress, steadily and methodically, to the recitation of more complex methods.

a. Plaintiffs' DOT is a contract, and Wells is not a party to, or intended third-party beneficiary of, the contract.

Wells originated Plaintiffs' loan⁵ ("Loan") and therefore was the Original Lender. Shortly after originating the Loan, Wells sold it to Freddie Mac. Plaintiffs and Defendants agree on these two points.

Pursuant to Section 13 of the DOT, Wells relinquished the Lender role, and Freddie Mac assumed the *Assignee Lender* role, on the day Wells *sold* the Loan to Freddie Mac:

The covenants and agreements of this Security Instrument shall *bind* (except as provided in Section 20) and *benefit* the *successors* and *assigns* of Lender.

CP at 26.

⁵ The DOT defines the word "Loan" as the *debt evidenced by the Note*. *CP* at 18. This definition proves that the *mortgage debt* and the *Note* are separate pieces of property. See *RCW 62A.3-310(b)(2)* ("if a note . . . is taken for an [mortgage debt] obligation, the [mortgage debt] obligation is suspended to the same extent the [mortgage debt] obligation would be discharged if an amount of money equal to the amount of the instrument [the note] were taken[.]"). (bracketed terms added).

The language quoted above makes sense *only if* the *note* and the *mortgage debt obligation* are *separate pieces of property*. Substitute "note" for "obligation" in the quote. The nonsensical result proves the point: "if a *note* is taken for the *note*, the *note* is suspended to the same extent the *note* would be discharged if an amount of money equal to the amount of the *note* were taken." Gibberish!

Property cannot evidence itself. Understanding this simple fact is the third critical key to understanding why the transfer of noteholder status alone does not carry the DOT with the transfer.

Hence, after the date on which it sold the Loan to Freddie Mac, Wells' role as Lender permanently ended, unless Wells subsequently became a Successor Lender or an Assignee Lender. *CP* at 26 (Section 13).

1. "Successor Lender" defined.

Washington courts have long held that a *successor in interest* is a person who succeeds to all a predecessor's interests in property. *Puget Sound Machine Depot v. Clapp*, 191 Wash. 410, 412, 71 P.2d 174, 176 (1937); *Green v. Community Club*, 137 Wn. App. 665, 682-683, 151 P.3d 1038, 1046-1047 (2007); *Fidelity Mutual Saving Bank v. Mark*, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989); *Ford v. Nokomis State Bank*, 135 Wash. 37, 46-47, 237 P. 314 (1925); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 432, 780 P.2d 1282 (1989); *McConnell v. Kaufman*, 5 Wash. 686, 688, 32 P. 782 (1893). Black's Law Dictionary (5th ed. 1979) supports this definition. *Black's*, at 1283-84.

It is undisputed that Freddie Mac retained ownership of the Note and of the underlying mortgage debt when it transferred the Note to Wells. Because Wells took the Note by transfer and did not become the owner of the mortgage debt or of the Note as a result of the transfer, Freddie Mac remained the Lender under the terms of the DOT after transferring the Note to Wells. Wells did not become the Lender after the note transfer because Freddie Mac remained the Lender after the transfer.

2. “Assignee Lender” defined.

An assignee *steps into the shoes of the assignor* and acquires the assignor’s entire interest in the subject property. *Estate of K.O. Jordan v. Hartford Accident & Indemnity Co.*, 120 Wn.2d 490, 495, 844 P.2d 403, 407 (1993); *Puget Sound National Bank v. Dept. of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424, 191 P.3d 866 (2009).

In this case, after transferring the blank-endorsed Note to Wells, Freddie Mac retained ownership of the Note and ownership of the underlying mortgage debt for which Freddie Mac accepted the Note as payment. The DOT secures to the Lender (currently Freddie Mac) repayment of the debt by Mrs. Scott’s payment -- to the Noteholder (currently Wells) -- of the Note according to its terms.⁶

In other words, while transferring Noteholder status to Wells, Freddie Mac never --not for one nanosecond! -- stepped out of its Lender shoes. And if Freddie Mac never stepped out of those shoes, Wells could not have stepped into them. In addition, Wells did not acquire Freddie Mac’s entire interest in the Note. Freddie Mac remains the owner of the most important interest in the Note – the beneficial interest in the Note payments.

A transfer of *ownership of the debt* and of the economic benefit of the Note payments – payments that, by law (RCW 62A.3-412), must be made to the Noteholder -- for value concurrently transfers “Secured Party”

⁶ Again, this is the precise agreement the DOT secures.

status (i.e., Beneficiary status) under the DOT (i.e. the Security Instrument). *RCW 62A.9A-203(b)(1)*. In simpler terms, the DOT follows a sale of the Note and of the mortgage debt.⁷

b. Transfer of Noteholder status, without transfer of Note Ownership, leaves Terms of DOT Unaffected.

The Agreement between Mrs. Scott and Wells – and any subsequent Successor or Assignee Lender -- did not specify the person to whom Mrs. Scott had to tender Note payments. Nor could it have. From the date on which the mortgage loan closed until today, uninterrupted, *RCW 62A.3-412* has always dictated the person to whom Mrs. Scott must make the Note payments. Moreover, had the DOT mandated that Mrs. Scott make monthly Note payments directly to Wells, in addition to setting the stage for a potential intentional violation of *RCW 62A.3-412*, the DOT would have granted Wells an unconscionable windfall.

Under *RCW 62A.1-201(b)(21)(A)*, a “noteholder” is anyone who *possesses* a blank-endorsed note. *RCW 62A.3-412* mandates that the note issuer (Mrs. Scott in this case) must make the note payments to the person entitled to enforce the note. The noteholder is a person entitled to enforce.

⁷ By far the most common way of transferring a debt, the payment for which is represented by a note, is by selling the note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 88, 285 P.3d 34 (2012); *Columbia St. Bank v. Canzoni*, 2014 Wash. App LEXIS 1614 * 15; *Blair v. NWTs*, 193 Wn. App 18, 31, 372 P.3d 127 (2016). The DOT secures repayment of the *debt* and the economic benefit of the payments required by the note (i.e., the agreed upon method of repaying the debt).

In this litigation, the right to repayment of the debt and the economic benefit of the payments required by the Note belonged to Freddie Mac *before* and *after* it transferred the right to enforce the Note to Wells. Nothing of significance to the Security Instrument (i.e., the DOT) changed. Therefore, Freddie Mac was the Secured Party (i.e., the Beneficiary of the Security Instrument (the DOT)) *before* the transfer, and Freddie Mac remained the Secured Party *after* the transfer.

RCW 62A.3-301. Therefore, simply by blank-endorsing the Note and delivering it to a third person, Wells (and all subsequent Successor Lenders and Assignee Lenders) would have been able to force Mrs. Scott either to default on the DOT-mandated requirement to make note payments directly to the Lender or to violate RCW 62A.3-412 and run the risk that the noteholder would come after her.

RCW 62A.3-412 dictates the person to whom Mrs. Scott must make Note payments to pay off the mortgage debt. That person is not determined by any covenant or agreement in the DOT. Thus, a change in the person to whom Note payments must be made *changes nothing* about the DOT agreement. Charts 1 and 2 below graphically illustrate the point.

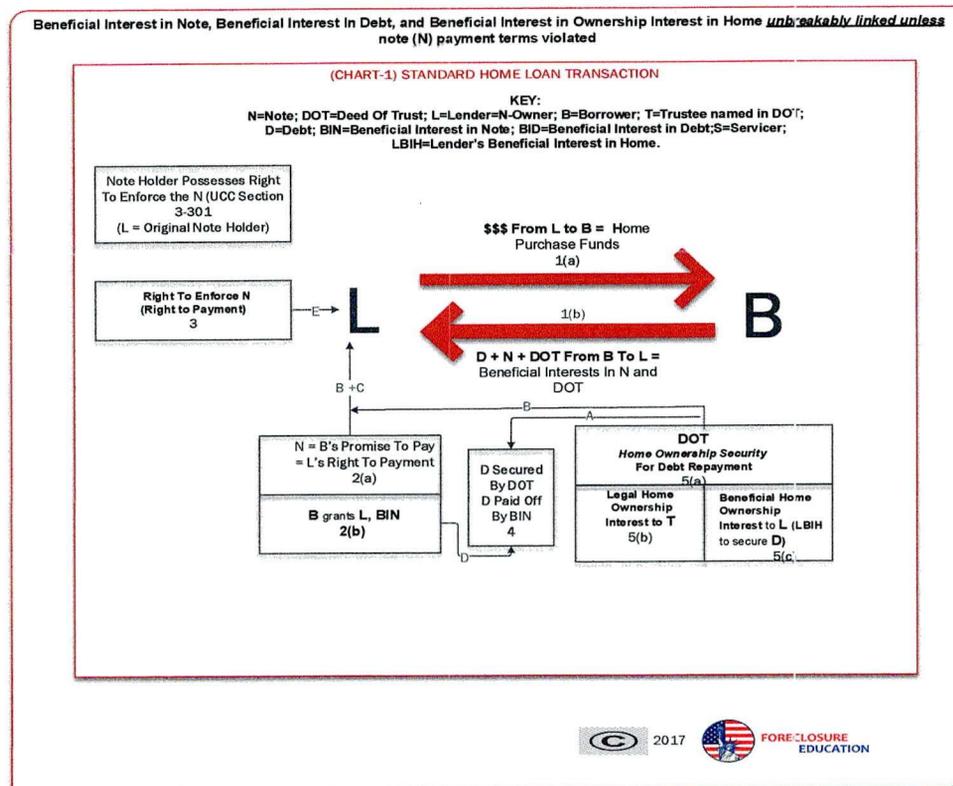


Chart 1 depicts a standard mortgage loan transaction. Line E, which emanates from Box 3, indicates the right to enforce the right to payment belongs to the Lender. At the close of a mortgage loan transaction, the Lender almost always *holds* the note.⁸ The arrow beneath 1(a) shows the Home-purchase funds moving from the Lender (Freddie Mac) to the Borrower (Mrs. Scott). The arrow beneath (1)(b) illustrates the mortgage debt, the Note, and the DOT simultaneously moving from Mrs. Scott to Freddie Mac.

Box 2(a) points out an obvious fact that is almost always overlooked: From Mrs. Scott's perspective (the Borrower's perspective), the Note represents her promise to pay \$799.95 per month for 360 consecutive months. But from Freddie Mac's perspective (the Lender's perspective), the same Note is a right to the payment of \$799.95 per month for 360 consecutive months. Thus, in more general terms, the *Borrower's promise to pay* (i.e., the Note) equals the *Lender's right to payment* (the same Note).

The \$799.95 Freddie Mac receives from Mrs. Scott each month is the *economic benefit* Freddie Mac derives from its *ownership* of Mrs. Scott's *performance* of her promise to pay \$799.95 each month.⁹ Box 2(b)

⁸ Lender is always in possession of a note made payable to a specific person, and the Lender is that person. RCW 62A.1-201(b)(21)(A).

⁹ The DOT does not secure Mrs. Scott's *promise to pay* \$799.95 each month. It secures Mrs. Scott's *performance* of the promise to pay \$799.95 per month. See *TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT (CP at 19)*. The *performance* of a promise to pay \$799.95 is the \$799.95 payment. The DOT secures to the Lender the payment itself, not the promise to pay (i.e., not the Note). In other words, the DOT

represents Freddie Mac's (and any subsequent Successor Lender's or Assignee Lender's) *beneficial interest* in the \$799.95 monthly payments required by the Note ("BIN").

Box 4 in Chart 1 shows two things: The DOT secures to the Lender (Freddie Mac) repayment of the mortgage debt ("D") by the economic benefit of the payments required by the Note (i.e., the BIN), made to the Noteholder, which, again, is the precisely agreed upon method of paying off the mortgage debt obligation.

Boxes 5(a), (b), and (c) illustrate a critical point that is never considered in the case law. These boxes show that Mrs. Scott conveyed the ownership interest in the home to the trustee in trust (Box 5(b)) *for the benefit of Freddie Mac* (Box 5(c)). Therefore, the DOT conveyed the *beneficial interest* in Mrs. Scott's ownership of the home to Freddie Mac (i.e. the Successor Lender) as security for Mrs. Scott's obligation to repay the mortgage debt to Freddie Mac by paying the monthly \$799.95 payments to Wells (i.e., the *person entitled to enforce the note*).

If Wells had been the Lender, then Mrs. Scott would have made the monthly payments directly to the Lender (Wells). If, on the other hand, Freddie Mac had been the Lender – which is the case before this Court -- then Mrs. Scott would have made the payments indirectly to Freddie Mac by making the payments to Wells (i.e., the person entitled to enforce the

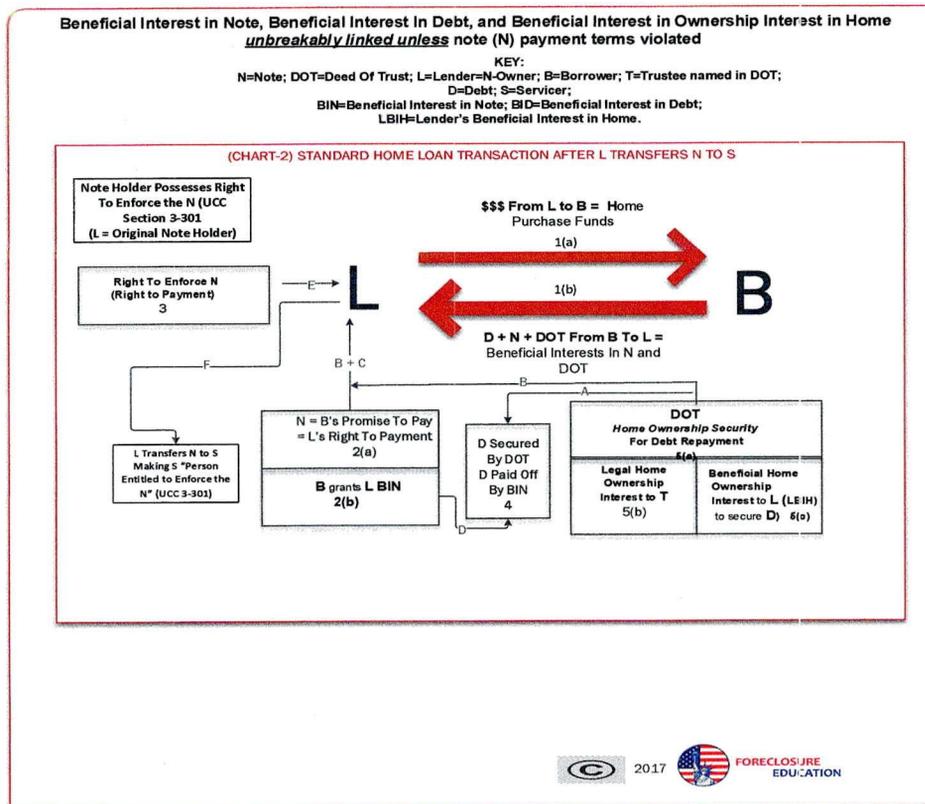
secures to the Lender the economic benefit of the payments. The economic benefit of the payments, not the promise to make the payments, repays the mortgage debt.

Note). Either way, Mrs. Scott's payments repay Freddie Mac, not Wells. And the DOT secures Freddie Mac, not Wells. *See Brown*, 184 Wn.2d at 523 and *RCW 61.24.080(2)*.

Box 3 represents the right to enforce Freddie Mac's right to a \$799.95 payment from Mrs. Scott each month.

The right to enforce the right to payment and the right to payment are two different things. As the Court is aware, the right to enforce the right to payment automatically attaches to the right to payment without negotiation between the contracting parties. *Von Hoffman*, 71 U.S. at 552. The right to enforce the right to payment is also granted by statute. *RCW 62A.3-412*. Therefore, it is part of the DOT agreement. *Von Hoffman*, 71 U.S. at 550. Nothing in the DOT agreement requires Freddie Mac to continue to hold the Note to continue to be the Secured Party. If Freddie Mac continues *to own* the Note (and, consequently, continues *to own* the *beneficial interest in the Note payments*) and the mortgage debt -- the two interests the DOT secures -- then Freddie Mac continues to be the Secured Party (i.e., the *Beneficiary* of the Security Instrument). Thus, transfer of the right to enforce the payment right, without a simultaneous transfer of ownership of the payment right, has no effect on the DOT agreement.

Chart 2 illustrates the point.



In Chart 2, line F, which emanates from L, represents Freddie Mac's transfer to Wells of the right to enforce the right to payment (i.e., Freddie Mac's transfer of the blank-endorsed note to Wells). Notice, in Wells' hands, there is no connection between the interests secured by the DOT (the mortgage debt and the beneficial interest in the payments required by the Note) and the right to enforce the Note.

Also, there is no connection between the security provided by the DOT (the beneficial interest in Mrs. Scott's ownership interest in the home) (Box 5(c)) and the right to enforce the right to payment. Freddie Mac owns the mortgage debt, the beneficial interest in the Note, and the beneficial interest in Mrs. Scott's ownership interest in the home. The

DOT secures *to the Lender* repayment of the mortgage debt by the beneficial interest in the Note payments. It provides that security by placing the beneficial interest in Mrs. Scott's ownership of the home in the trust *for the benefit of the Lender*. See *TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT* (CP at 19). Wells, in addition to not being a party to the DOT agreement, possesses none of the interests secured by the DOT. How then can Wells possibly be the Beneficiary of the DOT?

3. DOT is a Three-Party Agreement, and Wells is not One of Those Parties.

Under Washington law, a DOT is a *three-party agreement* – the Borrower (Mrs. Scott), the Lender (or Successor Lender (Freddie Mac) or Assignee Lender), and the Trustee (NWTS). *Bain v. Metropolitan Mortgage Grp., Inc.*, 175 Wn.2d 83, 92-93 (2012); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 791 (2013); *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 515 (2015). It is undisputed that Wells is not Mrs. Scott; Wells is not Freddie Mac; and Wells is not NWTS. Therefore, Wells is not a party to the agreement.

In addition, Wells is not an intended third-party beneficiary of the DOT agreement. The creation of a third-party beneficiary contract requires the parties to the contract to intend that the promisor assume a direct obligation to the intended third-party beneficiary *at the time they enter into the contract*. *Postlewait Constr. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986).

Plaintiffs do not know what Wells and Freddie Mac were thinking when they entered the loan agreement. But when Mrs. Scott entered the agreement, she had no intention of making Wells a third-party beneficiary of the DOT. Wells became the original Lender, the Secured Party, and the beneficiary of the DOT at the close of the mortgage loan transaction. These are the only titles Mrs. Scott ever intended to bestow on Wells when she entered into the loan agreement.

a. Wells Lacks Standing to enforce Terms of DOT.

Washington courts have consistently held that homeowners lack standing to challenge years-late assignments of DOTs into securitized trusts because homeowners are not parties to, or intended third-party beneficiaries of, the pooling and servicing agreements (“PSAs”) violated by these late assignments. *Deutsche Bank National Trust Co. v. Slotke*, 192 Wn. App. 166, 177 (2016); *U.S. Bank, NA v. LaMothe*, 16 Wash. App. LEXIS 394, *9 (“And to the extent La Mothe is attempting to challenge Liberty’s compliance with the pooling and servicing agreement, he lacks standing to do so because he is not a party to the agreement.” (citing *In re Davies*, 565 F. App’x 630, 633 (9th Cir. 2014) as support for the proposition)).

If homeowners lack standing to challenge late assignments of deeds of trust because they are not parties to the PSA agreements that prohibit such assignments, then, by the same principle, Wells lacks standing to foreclose. Wells is not a party to the DOT. If legal principles

apply equally to all persons, Wells should be precluded from enforcing terms of the DOT agreement.

4. Article 9A applies to *Sales of Promissory Notes Only*.

Article 9A (Uniform Commercial Code – Secured Transactions) contains the rules that govern secured transactions. A mortgage loan transaction is a secured transaction that is governed by Article 9A.

RCW 62A.9A-109(a)(3) indicates what type of promissory note transactions Article 9A governs: “(a) **General scope of Article.** Except as otherwise provided in subsections (c) and (d) of this section, this Article applies to: . . . (3) A sale of . . . *promissory notes*.” (emphasis added).

RCW 62A.9A-203 is part of Article 9A, the UCC Article that governs the sale of promissory notes. It was not placed in Article 9A by accident. A group of the ablest commercial-law minds in the country placed it there. RCW 62A.9A-203(g), the codification of the common-law *security follows the Note doctrine*, is in Article 9A because the security follows the Note doctrine means the security follows a sale of the Note.

a. Brown Court applied RCW 62A.9A-203(g) to Facts, though Freddie Mac did not Sell Note to MTB.

In *Brown*, Freddie Mac did not sell the promissory note to M & T Bank (“MTB”). Yet the *Brown* Court applied RCW 62A.9A-203(g) to the facts in *Brown*. *Brown*, 184 Wn.2d at 528-529. This is yet another sign of the *Brown* Court’s confusion about the meaning of the security follows the note doctrine.

The UCC's creators placed RCW 62A.9A-203(g) in Article 9A because the *security follows the note doctrine* explains what happens to the security for a secured promissory note when the owner of the note transfers the note to a third party for value. See RCW 62A.9A-203(a), (b), and (g). That is, when the owner of the secured note sells the note.

The *Brown* Court erroneously applied RCW 62A.9A-203(g). And, the trial court, following the *Brown* Court's lead, erroneously applied the doctrine in this case.

5. Article 9A does not apply to Assignment of Note for Purpose of Collection.

Freddie Mac did not transfer Plaintiffs' Note to Wells *for value*. It temporarily transferred the Note to Wells, without value, for the purpose of enabling Wells to collect the outstanding mortgage debt. Under RCW 62A.9A-109(d)(5), Article 9A does not apply to an assignment of a promissory note for the purpose of collection.

Thus, for at least three reasons, the *security follows the note doctrine* does not apply to Freddie Mac's transfer of the Note to Wells: (1) Article 9A only applies to *sales* of promissory notes (Freddie Mac did not sell the Note to Wells); (2) Article 9A explicitly does not apply to assignments of promissory notes for the purpose of collection (Freddie Mac assigned Mrs. Scott's Note to Wells for the purpose of collection); and (3) RCW 62A.9A-203(g), the codification of the common-law *security follows the note doctrine*, is located in Article 9A, which means

the doctrine refers to what happens when a promissory note is sold (Again, Freddie Mac did not sell the Note to Wells).

Defendants base the legality of their foreclosure actions on the claim that Wells holds the Note and therefore is entitled to foreclose. The *security follows the note doctrine* does not apply to Freddie Mac's transfer of the Note to Wells. Wells holds an unsecured Note. *See UCC Official Comment 3 to RCW 62A.3-310*. Accordingly, Defendants have taken all their foreclosure-related actions without legal authority. Their actions, made under the color of state law, have been highly deceptive.

6. RCW 62A.9A-203 supports Plaintiffs' position.

This subsection of the brief will be difficult to read and understand, even for those who understand the meaning of the UCC provisions employed in writing this highly-complex subsection of the brief. For those, if any, who have difficulty understanding the meaning of the UCC provisions employed, Plaintiffs apologize in advance for the difficulty of this subsection. But this is the journey one must take to arrive at the correct meaning of the *security follows the note doctrine*.

RCW 62A.9A-203(g) reads as follows:

(g) Lien securing right to payment.¹⁰ The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also

¹⁰ You should immediately understand that whatever this section states is stated from the perspective of the *owner of the promissory note*. The term "right to payment" refers to the promissory note *viewed from the note owner's perspective*. From the Borrower's perspective, the note is a "promise to pay" – a promissory note. But the Borrower's promise to pay, viewed from the note owner's perspective, is the *note owner's right to payment*. Hence, just from the terms that the UCC's creators use to explain the *security follows the Note doctrine*, every truly knowledgeable reader of the provision instantly knows the doctrine relates to the interests of the *owner* of a promissory note.

attachment of a security interest in the security interest, mortgage, or other lien.

The provision contains three terms of art: *attachment*, *security interest*, and *right to payment*. You cannot uncover the true meaning of RCW 62A.9A-203(g) without first learning the meaning of these three terms of art and then substituting their respective meanings for the terms in RCW 62A.9A-203(g).

a. Right to Payment.

We already know the term “right to payment” references the promissory note viewed from the perspective of the *note owner*. That leaves the terms “security interest” and “attachment.”

b. Security Interest.

In relevant part, “Security Interest” is defined in RCW 62A.1-201(b)(35) as any interest of a *buyer* of a promissory note in a transaction that is *subject to Article 9A*. Instantly, before we go any further in the analysis, we know Freddie Mac’s transfer of the Note to Wells does not fall within the boundaries of RCW 62A.9A-203(g), the codification of the common-law *security follows the note doctrine*.

How do we know? The transfer was not subject to Article 9A because it did not involve the *sale* of a promissory note. *See RCW 62A.9A-109(a)(3)*. And Wells did not *buy* the Note in a transaction that was *subject to Article 9A*. *See RCW 62A.1-201(b)(35)*.

Wells did not buy the Note at all. So, Wells never acquired a “security interest” in the Note. Therefore, in Wells’ hands, a “security

interest” never “attached” to the “right to payment” (i.e., Mrs. Scott’s Note). And under RCW 62A.9A-203(g), a *security interest* attaches to the DOT only after a security interest first attaches to the right to payment.

The DOT did not follow Freddie Mac’s transfer of the Note to Wells. Wells holds an unsecured Note.

c. Attachment.

Finally, the term “attachment” is defined in RCW 62A.9A-203(a):

(a) **Attachment.** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

RCW 62A.9A-203(a) contains five terms of art: *security interest*, *attaches*, *collateral*, *enforceable*, and *debtor*. It is impossible to figure out what the word “attachment” means in 9A-203(a) and (g) without figuring out the meaning of these five terms of art. We have already defined the term “security interest.” That leaves *collateral*, *attaches*, *enforceable*, and *debtor*.

“Collateral” is defined in RCW 62A.9A-102(a)(12)(B) as a *promissory note that has been sold*. The term “enforceable” is defined in RCW 62A.9A-203(b) as “a security interest (i.e., any interest of a buyer of a promissory note in a transaction subject to Article 9A [again, Article 9A applies only to sales of promissory notes]) is “enforceable” against the *debtor* (the seller of a promissory note (RCW 62A.9A-102(a)(28)(B)) and third parties with respect to the collateral if, and only if, value has been given for the security interest.

How many times must one see the words “seller,” “buyer,” “sold,” “sale,” and “for value” associated with the analysis of RCW 62A.9A-203(g) before it begins to dawn on one that RCW 62A.9A-203(g), the codification of the common law *security follows the note doctrine*, applies only to the sale of secured promissory notes?

Here is what an unfiltered, correct analysis of RCW 62A.9A-203(g) looks like.

RCW 62A.9A-203(a) states a *security interest* (ownership interest (See RCW 62A.1-201(b)(35)) attaches to *collateral* (a promissory note that has been sold (RCW 62A.9A-102(a)(12)(B))) when the *ownership interest* in the note becomes enforceable against the *debtor* (the seller of the note (RCW 62A.9A-102(a)(28)(B))).

RCW 62A.9A-203(b) indicates that a *security interest* (ownership interest (RCW 62A.1-201(b)(35)) in *collateral* (a promissory note that has been sold (RCW 62A.9A-102(a)(12)(B))) becomes enforceable against the debtor (the seller of a note (RCW 62A.9A-102(a)(28)(B)) the instant three conditions have been met: (1) value has been given for the note (RCW 62A.9A-203(b)(1)); (2) the seller has rights in the note or the power to transfer rights in the note to a purchaser (RCW 62A.9A-203(b)(2)); and (3) either (a) the *debtor* (the seller of the note (RCW 62A.9A-102(a)(28)(B)) has signed a *security agreement* (a *security agreement* is an agreement that creates or provides for a security interest (RCW 62A.9A-102(a)(74)) that provides a description of the note (RCW

62A.9A-203(b)(3)(A)), or (b) pursuant to the terms of the *debtor's security agreement*, is possessed by someone other than the *secured party* (the *purchaser* of the note (RCW 62A.9A102(a)(73)(D)) under RCW 62A.9A-313 solely for the *purchaser's* benefit (RCW 62A.9A-203(b)(3)(B)). See RCW 62A.9A-203(b)(3)(A) and (B) and RCW 62A.9A-313.

In other words, the security follows a *sale* of the Note.

7. PEB's Analysis supports Plaintiffs' Position.

The Permanent Editorial Board for the UCC ("PEB") provides the most authoritative interpretations of the meaning of UCC provisions of any organization in the country. The 17-member board is comprised of this country's most decorated, most able commercial lawyers, law professors, and legal commentators. The PEB issues *the* official commentaries regarding the meaning of UCC provisions.

On November 14, 2011, the PEB issued an official commentary concerning four questions related to mortgage loan transactions. The *Brown* Opinion references this Report numerous times and calls the Report, correctly, "authoritative." *Brown*, 184 Wn.2d at 524.

The third of four questions addressed in the Report is "What is the Effect of Transfer of an Interest in a Mortgage Note on the Mortgage Securing It?" The litigants herein have asked this Court to decide the same question. Look at how the PEB answers the question:

What if a note secured by a mortgage is *sold* . . . , but the parties do not take any additional actions to assign the

mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? *UCC § 9-203(g)* [the codification of the common law security follows the note doctrine] *explicitly provides that, in such cases,*¹¹ the assignment of the interest of the seller or other grantor of a security interest¹² in the note automatically transfers a corresponding interest in the mortgage to the assignee: “The attachment of a security interest in a right to payment [a promissory note viewed from the purchaser’s perspective] . . . secured by a security interest or other lien on . . . real property is also attachment of a security interest in the . . . mortgage. . . .” (As noted previously, a “security interest” in a note includes the right of a buyer of the note.)

PEB Report, at 12.

This passage from the Report is in perfect harmony with Plaintiffs’ analysis of RCW 62A.9A-203(a), (b), and (g). The DOT follows the note when a transferee buys the note from the note and debt owner. It does not follow the Note when the note owner simply transfers the note to a transferee (Wells in this case) for the purpose of empowering the transferee to collect the note owner’s debt. *RCW 62A.9A-109(d)(5)*.

In the absence of a sale of the note, a transfer of the right to enforce the note does not carry the DOT with it.

The Brown court concluded – correctly, but without fully appreciating the implications of their conclusion -- that a “transfer of the

¹¹ Which cases? Cases in which a note secured by a mortgage is sold.

¹² Under the UCC, the term “security interest” includes the interest of a purchaser of a promissory note in a [purchase] transaction that is governed by Article 9A (Article 9A governs only the sale of promissory notes). The term does not include the interest of a transferee of a blank-endorsed promissory note in a transaction that is not governed by Article 9A.

The transfer of the Note from Freddie Mac to Wells did not involve a purchase of the Note. Article 9A did not govern Freddie Mac’s transfer of the Note to Wells. Therefore, the *Brown* Court erroneously applied RCW 62A.9A-203(g), the codification of the “security follows the note doctrine” and part of Article 9A,” to the transfer. If RCW 62A.9A-203(g) did not apply to the transfer, which it did not, then the common-law *security follows the note doctrine*, which is codified at RCW 62A.9A-203(g), did not apply to the transfer

note for value” means the transferee must end up owning the note. *Brown*, 184 Wn.2d at 528. In other words, the DOT follows a sale of the note.

No doubt many courts across the country are confused by the failure to recognize the difference between the Note and the mortgage debt. They write about the two pieces of property as though they are a single piece of property.¹³ Again, they are not the same thing. Debt differs from the Note in a most significant respect: Debt, unlike a promissory note, can only be owned, not held. There is no “debt holder” concept that corresponds to the “noteholder” concept. And for a debt that is evidenced by a note, the most common way to transfer the debt, other than by gift, is by selling the note that evidences it.

¹³ *Carpenter v. Longan*, 83 U.S. 271, 275 (1873) (in an appeal from the Supreme Court of Colorado Territory, the United States Supreme Court stated: “The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”); *Armour Fertilizer Works v. Zills*, 177 So. 136, 138 (Ala. 1937) (“when the note is secured by a mortgage, such mortgage follows the note”); *Holmes v. McGinty*, 44 Miss. 94, 1870 WI 4406, at *4 (“[T]he mortgage . . . follows the debt as an incident, and is a security for whomsoever may be the beneficial owner of it.”); *Lagow v. Badollet*, 1 Blackf. 416, 1826 WI 1087, at *3 (ind. 1826) (“a mortgage . . . follows the debt into whose hands soever it may pass”). *Bremer County Bank v. Eastman*, 34 Iowa 392, 1872 WI 254, at *1 (Iowa 1872) (“The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever.”). *Southerin v. Mendum*, 5 N.H. 420, 1831 WI 1104, at *7 (N.H. 1831) (“When a mortgagee transfers to another person the debt which is secured by the mortgage, he ceases to have any control over the mortgage. . . . And we are of the opinion, that the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt.”); *In re Kennedy Mort. Co.*, 17 B.R. 957, 966 (Bankr. D. N.J. 1982) (“Anyone interested in acquiring an interest in the mortgage would be obliged to obtain an interest in the debt.”). *Dixie Grocery Co. v. Hoyle*, 204 N.C. 109, 167 S.E. 469 (1933) (“The mortgage follows the debt.”); *Zorn v. Van Buskirk*, 111 Okla. 211, 239 p. 151 (1925) (“the mortgage follows the note”); *In re Miller*, No. 99-25616JAd, 2007 WI 81052, at *6 & n.7 (Bankr. W.D. Pa. Jan. 9, 2007) (citing and quoting with approval gray, mortgages in Pennsylvania at § 1-3 (1985) (“the mortgage follows the note”)). *Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market* (ASF White Paper Series Nov. 16, 2010). *App.* at ____.

Freddie Mac did not sell the Note to Wells. So, the Note is unsecured in Wells' hands.

8. Freddie Mac, the Lender, is the Beneficiary of the DOT.

In preparing this brief, Plaintiffs conducted an extensive survey of trust relationships subjected to litigation in the United States, Guam, Puerto Rico, the District of Columbia, and the Virgin Islands over the past 50 years. In the cases surveyed, universally, entitlement to the benefits distributed by the trust determined beneficiary status.¹⁴

As a result of this universal observation about trust beneficiaries, this Court can determine the Beneficiary of Plaintiffs' DOT with 100% accuracy by answering four questions: (1) What is the purpose of the trust; (2) What property has been placed in the trust to achieve the trust purpose; (3) what is the process by which the trust property will be distributed to achieve the trust purpose; and (4) who will receive the benefit of the fulfillment of the purpose of the trust. The person who receives the *benefit* of the fulfillment of the Trust purpose is, ipso facto, the Beneficiary of Mrs. Scott's trust.

a. Trust Purpose

¹⁴ *Rock Springs Land & Timber, Inc. v. Lore*, 2003 Wyo. 152, 75 P.3d 614 (2003); *In re Estate of Parsons*, 122 Wis. 2d 186, 361 N.W. 2nd 687 (1985); *Hemphill v. Aukamp*, 164 W. Va. 368, 264 S.E. 2nd 163 (1980); *Rafalko v. Georgiadis*, 290 Va. 394, 777 S.E. 870 (2015); *Proctor v. Woodhouse*, 127 Vt. 148, 241 A.2nd 781 (1968); *Flake v. Flake (In re Estate of Flake)*, 2003 UT 17, 71 P.3d 589; *Sayers v. Baker*, 171 S.W. 2nd 547, 1943 Tex. App. LEXIS 363; *Cartwright v. Jackson Capital Partners, Limited Partnership*, 478 S.W. 3rd 596, 2015 Tenn. App. LEXOS 361; 2005 SD 51, 696 N.W.2D 553; *Floyd v. Floyd*, 365 S.C. 56, 615 S.E. 2d 465; *Seattle First Nat'l Bank v. Crosby*, 42 Wn.2nd 234, 254 P. 2nd 732 (1953); *Fowler v. Lanpher*, 193 Wash. 308, 75 P.2d 132 (1938); *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008).

In relevant part, the TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT provides: “This Security Instrument secures to Lender (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note.” *TRANSFER OF RIGHT IN THE PROPERTY Section of DOT (CP at 19)*.

The purpose of the trust is to secure to the Lender (Freddie Mac) repayment of the Loan *by Mrs. Scott monthly Note Payments to the Noteholder*.

b. Property placed in Trust to Fulfill Trust Purpose.

The property placed in the trust to fulfill the trust purpose is revealed in the same section of the DOT:

*For this purpose,*¹⁵ Borrower irrevocably grants and conveys to Trustee, in trust, with the power of sale, the following property located in the COUNTY OF CLARK . .

. . .
2907 Drummond Ave.
Vancouver, WA 98661.

Plaintiffs placed the Drummond Property in the trust to fulfill the trust’s purpose.

c. Process by which trust property will be distributed to fulfill trust’s purpose

¹⁵ For *what* “purpose?” For the purpose of securing to the Lender repayment of the debt by the economic benefit of the Note payments made by Mrs. Scott to the Noteholder.

The process by which the property must be distributed to achieve the trust's purpose is spelled out in detail in Section 22 of the DOT.

d. Recipient of Distribution of Trust Property.

The DOT names the intended recipient of the distribution of the trust property with unmistakable clarity: "This Security Instrument secures *to Lender . . .*" CP at 254.

The word *Lender* is not defined in the DOT. Therefore, it has its ordinary meaning, which can be determined by reference to a dictionary. *Black's Law Dictionary* (5th ed. 1979) defines the word "Lender" as "He from whom a thing or money is borrowed." *Black's* at 812.

Pursuant to the last sentence of the second paragraph of Section 13 of the DOT, the DOT also provides security to *Successors* and *Assigns* of the *Lender*: "The covenants and agreements of this Security Instrument shall *bind* and *benefit* the *successors* and *assigns* of Lender." CP at 261.

Hence, by the terms of the DOT, only three possible categories of person qualify as potential "beneficiaries" (i.e., potential secured parties) – a *Lender*, a *Successor Lender*, and an *Assignee Lender*. Wells does not fit into any of these three categories; Accordingly, Wells is not secured; and Wells may not lawfully foreclose.

Freddie Mac – the person to whom the beneficial interest in the Note payments is owed -- is the "Secured Party" and, consequently, the Beneficiary of the DOT. Proof of this fact can be found in RCW 61.24.080(2) and in the *Brown* decision (*Brown*, 184 Wn.2d at 523).

By law, the proceeds of the trustee's sale, which represents the monetization of the beneficial interest in Plaintiffs' ownership of the property, must be paid to the person secured by the DOT. *RCW 61.24.080(2)*. Since the purpose of the DOT is to secure repayment of the debt, the person secured is, by definition, the beneficiary of the DOT (the Security Instrument).

In *Brown*, under material factual circumstances the same as the material factual circumstances in this case – Freddie Mac owned the loan, and M & T Bank serviced it – the Brown Court ruled Freddie Mac would have been entitled to the proceeds if the property had been sold at public auction. *Brown*, 184 Wn.2d at 524. Therefore, by law (*RCW 61.24.080(2)*), the DOT secured Freddie Mac; and Freddie Mac, not M & T Bank, enjoyed Beneficiary status.

9. Trial Court failed to apply RCW 61.24.030(1) and (3).

a. RCW 61.24.030(1).

RCW 61.24.030(1) requires the DOT to contain a power of sale clause. RCW 61.24.030(1) is one of the *requisites* to a lawful trustee's sale. By the Court's own observation, the *Brown* Defendants never placed the DOT in the court record. *Brown*, 184 Wn.2d at 529 n.9. Thus, neither the trustee nor the *Brown* Court ever examined the DOT to determine whether it contained a valid power of sale clause. This failure violated RCW 61.24.030(1).

If the DOT contains a power of sale clause, it does, the record contains no evidence that either the trustee or the trial court applied the law to the facts of this case to determine whether Wells had the lawful authority to exercise the power to foreclose. The failure to do so, a failure that occurs routinely in courts across the state, violated RCW 61.24.030(1), a requisite to a lawful trustee's sale. The violation invalidated the foreclosure proceeding.

b. RCW 61.24.030(3).

The violation of RCW 61.24.030(3), another *requisite* to a lawful trustee's sale, is even more egregious. Like the trial court in this case, the *Brown Court* never determined whether a default had occurred in the obligation secured by the DOT, which by the terms of the DOT made operative the power to sell the property. Under RCW 61.24.030(3), for the trustee to conduct a lawful trustee's sale, inter alia, a default in the obligation secured by the DOT, which by the terms of the DOT makes operative the power to sell the property, must have occurred.

Did such a default occur in *Brown*? The *Brown Court* answered that question affirmatively; but it did so without examining the relevant section of the DOT – Section 22. The Court's failure to compare the terms of the DOT that operationalize the power to sell the property to the material facts in *Brown* violated RCW 61.24.030(3), the third *requirement* of a lawful trustee's sale. This failure of the *Brown Court*, standing alone,

invalidates the *Brown* decision. The trial court in this case also failed to examine RCW 61.24.030(3). This failure invalidates the trial court's ruling.

C. Trial Court Erred by Ruling Wells Lawfully Appointed NWTS the Successor Trustee.

RCW 61.24.010(2) authorizes the *beneficiary* to appoint a successor trustee. Wells is not the Beneficiary; Freddie Mac is. Wells had no lawful authority to appoint NWTS the successor trustee. Consequently, NWTS had no lawful authority to conduct a non-judicial foreclosure proceeding. The unlawful appointment makes unlawful and deceptive every action Defendants have taken in the foreclosure proceeding.

D. RCW 61.24.030(7)(a) is Unconstitutional Impairment of DOT Contract.

Paragraph 22 of the DOT requires the lender, the successor lender, or the Assignee lender to be the *holder and owner of the note* and *owner of the underlying mortgage debt obligation* at the commencement of a foreclosure action. *CP* at 264. Wells holds the note but does not own it. Freddie Mac owns the note and underlying mortgage debt but does not hold the Note.

Freddie Mac cannot sell the property because it cannot declare the note in default (*i.e.*, Freddie Mac is not the PETE), and Wells cannot enforce the rights under the DOT because Wells is not a Lender, is not a Successor Lender, and is not an Assignee Lender (*i.e.*, Wells is not a party

to the underlying DOT contract). Official Comment 3 to RCW 62A.3-310 removes any doubt about the correctness of Plaintiffs assertion:

("If the . . . note is dishonored, the seller [Freddie Mac] may sue on either the dishonored note or the contract of sale [the DOT contract] if the seller [Freddie Mac] has possession of the instrument and is the person entitled to enforce it. If the right to enforce the instrument is held by somebody other than the seller [Wells], the seller [Freddie Mac] can't enforce the right to payment of the price under the sales contract [the DOT contract] because that right is represented by the instrument which is enforceable by somebody else [Wells]. Thus, if the seller sold the note . . . to a holder and has not reacquired it after dishonor, the only right that survives is the right to enforce the instrument." (italics and bracketed material added).

Notice, the comment doesn't contemplate the possibility that the person entitled to enforce the note, who does not own the note he holds, might have the right to enforce the underlying DOT contract. The PETE is not a party to the DOT contract. How could he have the right to enforce it?

RCW 61.24.030(7)(a) irreconcilably conflicts with RCW 62A.3-310. More importantly, it *destroys* the DOT contract. If a statutory provision *substantially* impairs, let alone *destroys*, a private contract, then two conditions must be met for the statutory provision to be constitutional: (1) the State must have a significant and legitimate public purpose behind the legislation, and (2) the change in the rights of the parties must be reasonable in relations to the public purpose.

Here, the State has articulated no public purpose, significant and legitimate or otherwise, for the June 7th change in RCW 61.24.030(7)(a). How could there be a legitimate and significant public purpose when the

change in RCW 61.24.030(7)(a) has created irreconcilable conflicts between RCW 61.24.030(7)(a) and RCW 61.24.030(1), RCW 61.24.030(3), RCW 61.24.080(2), RCW 62A.3-310, RCW 62A.9A-203(a), (b), and (g), and controlling sections of the DOT.

These conflicts do not simply impair the DOT contract; they destroy the DOT contract. The rights to determine to whom one's property is transferred and on what terms the property is transferred are two of the most sacred private property rights. Washington homeowners no longer have the right to make those determinations in their private DOT contracts.

RCW 61.24.030(7)(a), as presently worded, violates Article 1, § 10 of the United States Constitution and Article 1, § 23 of the Washington Constitution. *Ketcham v. King County Medical Serv. Corp.*, 81 Wn.2d 565 (1972); *Housing Auth. of Sunnyside v. Sunnyside Valley Irrigation Dist.*, 112 Wn.2d 262, 274, 772 P.2d 473 (1989); *Fed'n of Employees v. State*, 127 Wn.2d 544 (1995). The provision is unconstitutional.

V CONCLUSION

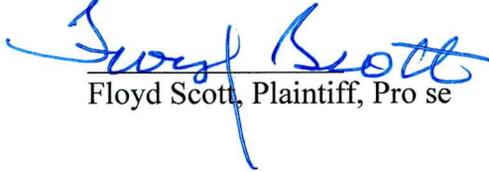
For all the foregoing reasons, Plaintiffs request that the Court reverse the trial court's summary judgment ruling and remand the case to the trial court with instructions to reinstate Plaintiffs' CPA claim and to grant summary judgment that Wells is not the Secured party or Beneficiary under the terms of the DOT.

Dated this 12th day of December 2018 at Ridgefield,

Washington.

Respectfully Submitted

FLOYD SCOTT



Floyd Scott, Plaintiff, Pro se

MARGARET SCOTT



Margaret Scott, Plaintiff,
Pro se

APPENDIX

RCW 61.24.010

Trustee, qualifications—Successor trustee.

(1) The trustee of a deed of trust under this chapter shall be:

(a) Any domestic corporation or domestic limited liability corporation incorporated under Title 23B, 25, *30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; or

(b) Any title insurance company authorized to insure title to real property under the laws of this state, or any title insurance agent licensed under chapter 48.17 RCW; or

(c) Any attorney who is an active member of the Washington state bar association at the time the attorney is named trustee; or

(d) Any professional corporation incorporated under chapter 18.100 RCW, any professional limited liability company formed under chapter 25.15 RCW, any general partnership, including limited liability partnerships, formed under chapter 25.04 RCW, all of whose shareholders, members, or partners, respectively, are either licensed attorneys or entities, provided all of the owners of those entities are licensed attorneys, or any domestic corporation wholly owned by any of the entities under this subsection (1)(d); or

(e) Any agency or instrumentality of the United States government; or

(f) Any national bank, savings bank, or savings and loan association chartered under the laws of the United States.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

(3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.

(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

RCW 61.24.030

Requisites to trustee's sale.

It shall be requisite to a trustee's sale:

(1) That the deed of trust contains a power of sale;

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is

used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

(3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver, or the filing of a civil case to obtain court approval to access, secure, maintain, and preserve property from waste or nuisance, shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;

(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default and, for residential real property, the beneficiary declaration specified in subsection (7)(a) of this section shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

(a) A description of the property which is then subject to the deed of trust;

(b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;

(c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;

(d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;

(e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

(f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;

(g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future, or no less than one hundred fifty days in the future if the borrower received a letter under RCW [61.24.031](#);

(h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;

(j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW [61.24.130](#) to contest the alleged default on any proper ground;

(k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

"THIS NOTICE IS ONE STEP IN A PROCESS THAT COULD RESULT IN YOUR LOSING YOUR HOME.

You may be eligible for mediation in front of a neutral third party to help save your home. **CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW** to assess your situation and refer you to mediation if you might benefit. Mediation **MUST** be requested between the time you receive the Notice of Default and no later than twenty days after the Notice of Trustee Sale is recorded.

DO NOT DELAY. If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale.

BE CAREFUL of people who claim they can help you. There are many individuals and businesses that prey upon borrowers in distress.

REFER TO THE CONTACTS BELOW for sources of assistance.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: Web site:

The United States Department of Housing and Urban Development

Telephone: Web site:

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: Web site:"

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice;

(l) In the event the property secured by the deed of trust is residential real property, the name and address of the holder of any promissory note or other obligation secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust;

(m) For notices issued after June 30, 2018, on the top of the first page of the notice:

(i) The current beneficiary of the deed of trust;

(ii) The current mortgage servicer for the deed of trust; and

(iii) The current trustee for the deed of trust;

(9) That, for owner-occupied residential real property, before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW [61.24.031](#) and, if applicable, RCW [61.24.163](#);

(10) That, in the case where the borrower or grantor is known to the mortgage servicer or trustee to be deceased, the notice required under subsection (8) of this section must be sent to any spouse, child, or parent of the borrower or grantor known to the trustee or mortgage servicer, and to any owner of record of the property, at any address provided to the trustee or mortgage servicer, and to the property addressed to the heirs and devisees of the borrower.

(a) If the name or address of any spouse, child, or parent of such deceased borrower or grantor cannot be ascertained with use of reasonable diligence, the trustee must execute and record with the notice of sale a declaration attesting to the same.

(b) Reasonable diligence for the purposes of this subsection (10) means the trustee shall search in the county where the property is located, the public records and information for any obituary, will, death certificate, or case in probate within the county for the borrower and grantor;

(11) Upon written notice identifying the property address and the name of the borrower to the servicer or trustee by someone claiming to be a successor in interest to the borrower's or grantor's property rights, but who is not a party to the loan or promissory note or other obligation secured by the deed of trust, a trustee shall not record a notice of sale pursuant to RCW [61.24.040](#) until the trustee or mortgage servicer completes the following:

(a) Acknowledges the notice in writing and requests reasonable documentation of the death of the borrower or grantor from the claimant including, but not limited to, a death certificate or other written evidence of the death of the borrower or grantor. The claimant must be allowed thirty days from the date of this request to present this documentation. If the trustee or mortgage servicer has already obtained sufficient proof of the borrower's death, it may proceed by acknowledging the claimant's notice in writing and issuing a request under (b) of this subsection.

(b) If the mortgage servicer or trustee obtains or receives written documentation of the death of the borrower or grantor from the claimant, or otherwise independently confirms the death of the borrower or grantor, then the servicer or trustee must request in

writing documentation from the claimant demonstrating the ownership interest of the claimant in the real property. A claimant has sixty days from the date of the request to present this documentation.

(c) If the mortgage servicer or trustee receives written documentation demonstrating the ownership interest of the claimant prior to the expiration of the sixty days provided in (b) of this subsection, then the servicer or trustee must, within twenty days of receipt of proof of ownership interest, provide the claimant with, at a minimum, the loan balance, interest rate and interest reset dates and amounts, balloon payments if any, prepayment penalties if any, the basis for the default, the monthly payment amount, reinstatement amounts or conditions, payoff amounts, and information on how and where payments should be made. The mortgage servicers shall also provide the claimant application materials and information, or a description of the process, necessary to request a loan assumption and modification.

(d) Upon receipt by the trustee or the mortgage servicer of the documentation establishing claimant's ownership interest in the real property, that claimant shall be deemed a "successor in interest" for the purposes of this section.

(e) There may be more than one successor in interest to the borrower's property rights. The trustee and mortgage servicer shall apply the provisions of this section to each successor in interest. In the case of multiple successors in interest, where one or more do not wish to assume the loan as coborrowers or coapplicants, a mortgage servicer may require any nonapplicant successor in interest to consent in writing to the application for loan assumption.

(f) The existence of a successor in interest under this section does not impose an affirmative duty on a mortgage servicer or alter any obligation the mortgage servicer has to provide a loan modification to the successor in interest. If a successor in interest assumes the loan, he or she may be required to otherwise qualify for available foreclosure prevention alternatives offered by the mortgage servicer.

(g) (c), (e), and (f) of this subsection (11) do not apply to association beneficiaries subject to chapter [64.32](#), 64.34, or [64.38](#) RCW; and

(12) Nothing in this section shall prejudice the right of the mortgage servicer or beneficiary from discontinuing any foreclosure action initiated under the deed of trust act in favor of other allowed methods for pursuit of foreclosure of the security interest or deed of trust security interest.

RCW 61.24.080

Disposition of proceeds of sale—Notices—Surplus funds.

The trustee shall apply the proceeds of the sale as follows:

(1) To the expense of sale, including a reasonable charge by the trustee and by his or her attorney: PROVIDED, That the aggregate of the charges by the trustee and his or her attorney, for their services in the sale, shall not exceed the amount which would, by the superior court of the county in which the trustee's sale occurred, have been deemed a reasonable attorney fee, had the trust deed been foreclosed as a mortgage in a noncontested action in that court;

(2) To the obligation secured by the deed of trust; and

(3) The surplus, if any, less the clerk's filing fee, shall be deposited, together with written notice of the amount of the surplus, a copy of the notice of trustee's sale, and an affidavit of mailing as provided in this subsection, with the clerk of the superior court of the county in which the sale took place. The trustee shall mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to RCW 61.24.040(1). The clerk shall index such funds under the name of the grantor as set out in the recorded notice. Upon compliance with this subsection, the trustee shall be discharged from all further responsibilities for the surplus. Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property, as determined by the court. A party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited. Notice of the motion shall be personally served upon, or mailed in the manner specified in RCW 61.24.040(1)(b), to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding, not less than twenty days prior to the hearing of the motion. The clerk shall not disburse such surplus except upon order of the superior court of such county.

UCC ARTICLE 1

RCW 62A.1-201

General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of this title that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this title that apply to particular articles or parts thereof:

(1) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in RCW 62A.1-303.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this title may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this title as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery," with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock

receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:

(A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Article 5 of this title, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) The person in control of a negotiable electronic document of title.

(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:

(A) Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) Being unable to pay debts as they become due; or

(C) Being insolvent within the meaning of federal bankruptcy law.

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party," as distinguished from "third party," means a person that has engaged in a transaction or made an agreement subject to this title.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A of this title. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under RCW 62A.2-401, but a buyer may also acquire a "security interest" by complying with Article 9A of this title. Except as otherwise provided in RCW 62A.2-505, the right of a seller or lessor of goods under Article 2 or 2A of this title to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9A of this title. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under RCW 62A.2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to RCW 62A.1-203.

(36) "Send" in connection with a writing, record, or notice means:

(A) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

UCC ARTICLE 3

RCW 62A.3-301

Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.3-310

Effect of instrument on obligation for which taken.

(a) Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in subsection (b)(4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) is taken for an obligation, the effect is (i) that stated in subsection (a) if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) in any other case.

RCW 62A.3-412

Obligation of issuer of note or cashier's check.

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in RCW 62A.3-115 and 62A.3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under RCW 62A.3-415.

UCC ARTICLE 9

RCW 62A.9A-102

Definitions and index of definitions.

(a) **Article 9A definitions.** In this Article:

(1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2)(A) "Account," except as used in "account for," means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables.

(B) The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) "Accounting," except as used in "accounting for," means a record:

(A) Authenticated by a secured party;

(B) Indicating the aggregate unpaid secured obligations as of a date not more than thirty-five days earlier or thirty-five days later than the date of the record; and

(C) Identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest, other than a security interest, in farm products:

(A) Which secures payment or performance of an obligation for:

(i) Goods or services furnished in connection with a debtor's farming operation; or

(ii) Rent on real property leased by a debtor in connection with its farming operation;
(B) Which is created by statute in favor of a person that:
(i) In the ordinary course of its business, furnished goods or services to a debtor in connection with a debtor's farming operation; or
(ii) Leased real property to a debtor in connection with the debtor's farming operation;
and

(C) Whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) Oil, gas, or other minerals that are subject to a security interest that:

(i) Is created by a debtor having an interest in the minerals before extraction; and

(ii) Attaches to the minerals as extracted; or

(B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:

(A) To sign; or

(B) With present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. The term includes another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this subsection, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term "chattel paper" does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:

(A) The claimant is an organization; or
(B) The claimant is an individual, and the claim:
(i) Arose in the course of the claimant's business or profession; and
(ii) Does not include damages arising out of personal injury to, or the death of, an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(17) "Commodity intermediary" means a person that:

(A) Is registered as a futures commission merchant under federal commodities law; or

(B) In the ordinary course of its business, provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(18) "Communicate" means:

(A) To send a written or other tangible record;

(B) To transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) In the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing-office rule.

(19) "Consignee" means a merchant to which goods are delivered in a consignment.

(20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) The merchant:

(i) Deals in goods of that kind under a name other than the name of the person making delivery;

(ii) Is not an auctioneer; and

(iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) With respect to each delivery, the aggregate value of the goods is one thousand dollars or more at the time of delivery;

(C) The goods are not consumer goods immediately before delivery; and

(D) The transaction does not create a security interest that secures an obligation.

(21) "Consignor" means a person that delivers goods to a consignee in a consignment.

(22) "Consumer debtor" means a debtor in a consumer transaction.

(23) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.

(24) "Consumer-goods transaction" means a consumer transaction in which:

(A) An individual incurs a consumer obligation; and

(B) A security interest in consumer goods secures the obligation.

(25) "Consumer obligation" means an obligation which:

(A) Is incurred as part of a transaction entered into primarily for personal, family, or household purposes; and

(B) Arises from an extension of credit, or commitment to extend credit, in an aggregate amount not exceeding forty thousand dollars, or is secured by personal property used or expected to be used as a principal dwelling.

"Consumer obligor" means an obligor who is an individual and who incurred a consumer obligation.

(26) "Consumer transaction" means a transaction in which (i) an individual incurs a consumer obligation, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

(27) "Continuation statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(28) "Debtor" means:

(A) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) A consignee.

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(30) "Document" means a document of title or a receipt of the type described in RCW [62A.7-201\(b\)](#).

(31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(33) "Equipment" means goods other than inventory, farm products, or consumer goods.

(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) Crops grown, growing, or to be grown, including:

(i) Crops produced on trees, vines, and bushes; and

(ii) Aquatic goods produced in aquacultural operations;

(B) Livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) Supplies used or produced in a farming operation; or

(D) Products of crops or livestock in their unmanufactured states.

(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(36) "File number" means the number assigned to an initial financing statement pursuant to RCW [62A.9A-519\(a\)](#).

(37) "Filing office" means an office designated in RCW [62A.9A-501](#) as the place to file a financing statement.

(38) "Filing-office rule" means a rule adopted pursuant to RCW [62A.9A-526](#).

(39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying RCW 62A.9A-502 (a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(43) [Reserved.]

(44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction or a manufactured home converted to real property under chapter 65.20 RCW.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card, (iv) writings that do not contain a promise or order to pay, or (v) writings that are expressly nontransferable or nonassignable.

(48) "Inventory" means goods, other than farm products, which:

(A) Are leased by a person as lessor;

(B) Are held by a person for sale or lease or to be furnished under a contract of service;

(C) Are furnished by a person under a contract of service; or

(D) Consist of raw materials, work in process, or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(50) "Jurisdiction of organization," with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

(51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:

(A) A creditor that has acquired a lien on the property involved by attachment, levy, or the like;

(B) An assignee for benefit of creditors from the time of assignment;

(C) A trustee in bankruptcy from the date of the filing of the petition; or

(D) A receiver in equity from the time of appointment.

(53) "Manufactured home" means a manufactured home or mobile home as defined in RCW 46.04.302.

(54) [Reserved]

(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.

(56) "New debtor" means a person that becomes bound as debtor under RCW 62A.9A-203(d) by a security agreement previously entered into by another person.

(57) "New value" means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) "Noncash proceeds" means proceeds other than cash proceeds.

(59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) "Original debtor", except as used in RCW 62A.9A-310(c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under RCW 62A.9A-203(d).

(61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

(62) "Person related to," with respect to an individual, means:

(A) The spouse or state registered domestic partner of the individual;

(B) A brother, brother-in-law, sister, or sister-in-law of the individual;

(C) An ancestor or lineal descendant of the individual or the individual's spouse or state registered domestic partner; or

(D) Any other relative, by blood or by marriage or other law, of the individual or the individual's spouse or state registered domestic partner who shares the same home with the individual.

(63) "Person related to," with respect to an organization, means:

(A) A person directly or indirectly controlling, controlled by, or under common control with the organization;

(B) An officer or director of, or a person performing similar functions with respect to, the organization;

(C) An officer or director of, or a person performing similar functions with respect to, a person described in (63)(A) of this subsection;

(D) The spouse or state registered domestic partner of an individual described in (63)(A), (B), or (C) of this subsection; or

(E) An individual who is related by blood or by marriage or other law to an individual described in (63)(A), (B), (C), or (D) of this subsection and shares the same home with the individual.

(64) "Proceeds", except as used in RCW [62A.9A-609\(b\)](#), means the following property:

(A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) Whatever is collected on, or distributed on account of, collateral;

(C) Rights arising out of collateral;

(D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record authenticated by a secured party, which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to RCW [62A.9A-620](#), [62A.9A-621](#), and [62A.9A-622](#).

(67) "Public-finance transaction" means a secured transaction in connection with which:

(A) Debt securities are issued;

(B) All or a portion of the securities issued have an initial stated maturity of at least twenty years; and

(C) The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(68) "Public organic record" means a record that is available to the public for inspection and is:

(A) A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States which amends or restates the initial record;

(B) An organic record of a business trust consisting of the record initially filed with a state and any record filed with the state which amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state; or

(C) A record consisting of legislation enacted by the legislature of a state or the congress of the United States which forms or organizes an organization, any record amending the

legislation, and any record filed with or issued by the state or the United States which amends or restates the name of the organization.

(69) "Pursuant to commitment," with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(70) "Record," except as used in "for record," "of record," "record or legal title," and "record owner," means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(71) "Registered organization" means an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or the United States. The term includes a business trust that is formed or organized under the law of a single state if a statute of the state governing business trusts requires that the business trust's organic record be filed with the state.

(72) "Secondary obligor" means an obligor to the extent that:

(A) The obligor's obligation is secondary; or

(B) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(73) "Secured party" means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under RCW 62A.2-401, 62A.2-505, 62A.2-711(3), 62A.2A-508(5), 62A.4-210, or 62A.5-118.

(74) "Security agreement" means an agreement that creates or provides for a security interest.

(75) "Send," in connection with a record or notification, means:

(A) To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) To cause the record or notification to be received within the time that it would have been received if properly sent under (75)(A) of this subsection.

(76) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(77) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(78) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(79) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(80) "Termination statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(81) "Transmitting utility" means a person primarily engaged in the business of:

(A) Operating a railroad, subway, street railway, or trolley bus;

(B) Transmitting communications electrically, electromagnetically, or by light;

(C) Transmitting goods by pipeline or sewer; or

(D) Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) **Definitions in other articles.** "Control" as provided in RCW 62A.7-106 and the following definitions in other articles apply to this Article:

applicant."	RCW <u>62A.5-102.</u>
beneficiary."	RCW <u>62A.5-102.</u>
broker."	RCW <u>62A.8-102.</u>
perfected security."	RCW <u>62A.8-102.</u>
check."	RCW <u>62A.3-104.</u>
chartering corporation."	RCW <u>62A.8-102.</u>
contract for sale."	RCW <u>62A.2-106.</u>
customer."	RCW <u>62A.4-104.</u>
title holder."	RCW <u>62A.8-102.</u>
financial asset."	RCW <u>62A.8-102.</u>
holder in due course."	RCW <u>62A.3-302.</u>
holder" with respect to documents of title.	RCW <u>62A.7-102.</u>
holder" with respect to a letter of credit or letter-of-credit right.	RCW <u>62A.5-102.</u>
holder" with respect to a security.	RCW <u>62A.8-201.</u>
lease."	RCW <u>62A.2A-103.</u>
lease agreement."	RCW <u>62A.2A-103.</u>
lease contract."	RCW <u>62A.2A-103.</u>
leasehold interest."	RCW <u>62A.2A-103.</u>
lessee."	RCW <u>62A.2A-103.</u>
lessee in ordinary course of business."	RCW <u>62A.2A-103.</u>
lessor."	RCW <u>62A.2A-103.</u>
lessor's residual interest."	RCW <u>62A.2A-103.</u>
letter of credit."	RCW <u>62A.5-102.</u>
merchant."	RCW <u>62A.2-104.</u>

negotiable instrument."	RCW <u>62A.3-104.</u>
nominated person."	RCW <u>62A.5-102.</u>
or."	RCW <u>62A.3-104.</u>
proceeds of a letter of credit."	RCW <u>62A.5-114.</u>
value."	RCW <u>62A.3-103.</u>
or."	RCW <u>62A.2-106.</u>
securities account."	RCW <u>62A.8-501.</u>
securities intermediary."	RCW <u>62A.8-102.</u>
security."	RCW <u>62A.8-102.</u>
security certificate."	RCW <u>62A.8-102.</u>
security entitlement."	RCW <u>62A.8-102.</u>
certificated security."	RCW <u>62A.8-102.</u>

(c) **Article 1 definitions and principles.** Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

RCW 62A.9A-109

Scope.

(a) **General scope of Article.** Except as otherwise provided in subsections (c) and (d) of this section, this Article applies to:

(1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) An agricultural lien;

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) A consignment;

(5) A security interest arising under RCW 62A.2-401, 62A.2-505, 62A.2-711(3), or 62A.2A-508(5), as provided in RCW 62A.9A-110; and

(6) A security interest arising under RCW 62A.4-210 or 62A.5-118.

(b) **Security interest in secured obligation.** The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

(c) **Extent to which Article does not apply.** This Article does not apply to the extent that:

(1) A statute, regulation, or treaty of the United States preempts this Article;

(2) Another statute of this state expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state or a governmental unit of this state;

(3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or

(4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under RCW 62A.5-114.

(d) **Inapplicability of Article.** This Article does not apply to:

(1) A landlord's lien, other than an agricultural lien;

- (2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but RCW [62A.9A-333](#) applies with respect to priority of the lien;
- (3) An assignment of a claim for wages, salary, or other compensation of an employee;
- (4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;
- (5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;
- (6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;
- (7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;
- (8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but RCW [62A.9A-315](#) and [62A.9A-322](#) apply with respect to proceeds and priorities in proceeds;
- (9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;
- (10) A right of recoupment or set-off, but:
 - (A) RCW [62A.9A-340](#) applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and
 - (B) RCW [62A.9A-404](#) applies with respect to defenses or claims of an account debtor;
- (11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:
 - (A) Liens on real property in RCW [62A.9A-203](#) and [62A.9A-308](#);
 - (B) Fixtures in RCW [62A.9A-334](#);
 - (C) Fixture filings in RCW [62A.9A-501](#), [62A.9A-502](#), [62A.9A-512](#), [62A.9A-516](#), and [62A.9A-519](#); and
 - (D) Security agreements covering personal and real property in RCW [62A.9A-604](#);
- (12) An assignment of a claim arising in tort, other than a commercial tort claim, but RCW [62A.9A-315](#) and [62A.9A-322](#) apply with respect to proceeds and priorities in proceeds;
- (13) An assignment in a consumer transaction of a deposit account on which checks can be drawn, but RCW [62A.9A-315](#) and [62A.9A-322](#) apply with respect to proceeds and priorities in proceeds; or
- (14) A transfer by this state or a governmental unit of this state.

RCW [62A.9A-203](#)

Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) **Attachment.** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) **Enforceability.** Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under RCW [62A.9A-313](#) pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under RCW [62A.8-301](#) pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under RCW [62A.7-106](#), [62A.9A-104](#), [62A.9A-105](#), [62A.9A-106](#), or [62A.9A-107](#) pursuant to the debtor's security agreement.

(c) **Other UCC provisions.** Subsection (b) of this section is subject to RCW [62A.4-210](#) on the security interest of a collecting bank, RCW [62A.5-118](#) on the security interest of a letter-of-credit issuer or nominated person, RCW [62A.9A-110](#) on a security interest arising under Article 2 or 2A, and RCW [62A.9A-206](#) on security interests in investment property.

(d) **When person becomes bound by another person's security agreement.** A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this Article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) **Effect of new debtor becoming bound.** If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subsection (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) **Proceeds and supporting obligations.** The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by RCW [62A.9A-315](#) and is also attachment of a security interest in a supporting obligation for the collateral.

(g) **Lien securing right to payment.** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) **Security entitlement carried in securities account.** The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) **Commodity contracts carried in commodity account.** The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

RCW 62A.9A-313

When possession by or delivery to secured party perfects security interest without filing.

(a) **Perfection by possession or delivery.** Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under RCW 62A.8-301.

(b) **Goods covered by certificate of title.** With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in RCW 62A.9A-316(d).

(c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) **Time of perfection by possession; continuation of perfection.** If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) **Time of perfection by delivery; continuation of perfection.** A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under RCW 62A.8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) **Acknowledgment not required.** A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) **Effectiveness of acknowledgment; no duties or confirmation.** If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or RCW 62A.8-301(1), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this Article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) Secured party's delivery to person other than debtor. A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) Effect of delivery under subsection (h) of this section; no duties or confirmation. A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article otherwise provides.

**REPORT OF THE PERMANENT EDITORIAL BOARD
FOR THE
UNIFORM COMMERCIAL CODE**

**APPLICATION OF THE UNIFORM COMMERCIAL CODE TO
SELECTED ISSUES RELATING TO MORTGAGE NOTES**

NOVEMBER 14, 2011

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PREFACE

In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the Uniform Commercial Code, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries “and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law.” Such commentaries and other articulations are issued directly by the PEB rather than by action of the American Law Institute and the Uniform Law Commission.

This Report of the Permanent Editorial Board is such an articulation, addressing the application of the Uniform Commercial Code to issues of legal, economic, and social importance arising from the issuance and transfer of mortgage notes. A draft of this Report was made available to the public for comment on March 29, 2011, and the comments that were received have been taken into account in preparing the final Report.

**REPORT OF THE PERMANENT EDITORIAL BOARD
FOR THE
UNIFORM COMMERCIAL CODE**

**APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES
RELATING TO MORTGAGE NOTES**

Introduction

Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real property law and local rules of foreclosure procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC).¹ Although the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting.

The Permanent Editorial Board for the Uniform Commercial Code² has prepared this Report in order to further the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage³ on real property. The UCC, of course, does not resolve all issues in this field. Most particularly, as to both substance and procedure, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made

¹ The UCC is a uniform law sponsored by the American Law Institute and the Uniform Law Commission. It has been enacted in every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) in whole or significant part. This Report is based on the current Official Text of the UCC. Some states have enacted some non-uniform provisions that are generally not relevant to the issues discussed in this Report. Of course, the enacted text of the UCC in the state whose law is applicable governs. See note 6, *infra*, regarding the various different versions of Article 3 of the UCC in effect in the states.

² In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the UCC, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries "and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law."

³ This Report, like Article 9 of the UCC, uses the term "mortgage" to include a consensual interest in real property to secure an obligation whether created by mortgage, trust deed, or the like. See UCC § 9-102(a)(55) and Official Comment 17 thereto and former UCC § 9-105(1)(j). This Report uses the term "mortgage note" to refer to a note secured by a mortgage, whether or not the note is a negotiable instrument under UCC Article 3.

pursuant to the UCC are typically relevant under that law). Accordingly, this Report should be understood as providing guidance only as to the issues the Report addresses.⁴

Background

Issues relating to the transfer, ownership, and enforcement of mortgage notes are primarily governed by two Articles of the UCC:

- In cases in which the mortgage note is a negotiable instrument,⁵ Article 3 of the UCC⁶ provides rules governing the obligations of parties on the note⁷ and the enforcement of those obligations.
- In cases involving either negotiable or non-negotiable notes, Article 9 of the UCC⁸ contains important rules governing how ownership of those notes may be transferred, the effect of the transfer of ownership of the notes on the ownership of the mortgages securing those notes, and the right of the transferee, under certain circumstances, to record its interest in the mortgage in the applicable real estate recording office.

This Report explains the application of the rules in both of those UCC Articles to provide guidance in:

- Identifying the person who is entitled to enforce the payment obligation of the maker⁹ of a mortgage note, and to whom the maker owes that obligation; and

⁴ Of course, the application of the UCC rules to particular factual circumstances depends on the nature of those circumstances. Facts raising legal issues other than those addressed in this Report can result in different rights and obligations than would be the case in the absence of those facts. Accordingly, this Report should not be read as a statement of the total legal implications of any factual scenario. Rather, the Report sets out the UCC rules that are common to the transactions discussed so as to provide a common basis for understanding the application of those rules. The impact of non-UCC law that applies to other aspects of such transactions is beyond the scope of this Report.

⁵ The requirements that must be satisfied in order for a note to be a negotiable instrument are set out in UCC § 3-104.

⁶ Except for New York, every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) has enacted either the 1990 Official Text of Article 3 or the newer 2002 Official Text (the latter having been adopted in ten states as of the date of this Report). Unless indicated to the contrary all discussions of provisions in Article 3 apply equally to both versions. Much of the analysis of UCC Article 3 in this Report also applies under the older version of Article 3 in effect in New York, although many section numbers differ. The Report does not address those aspects of New York's Article 3 that are different from the 1990 or 2002 texts.

⁷ In this Report, such notes are sometimes referred to as "negotiable notes."

⁸ Unlike Article 3 (which has not been enacted in its modern form in New York), the current version of Article 9 has been enacted in all 50 states, the District of Columbia, and the United States Virgin Islands. Some states have enacted non-uniform provisions that are generally not relevant to the issues discussed in this Report (but see note 31 with respect to one relevant non-uniformity). A limited set of amendments to Article 9 was approved by the American Law Institute and the Uniform Law Commission in 2010. Except as noted in this Report, those amendments (which provide for a uniform effective date of July 1, 2013) are not germane to the matters addressed in this Report.

⁹ A note can have more than one obligor. In some cases, this is because there is more than one maker (in which case they are jointly and severally liable; see UCC § 3-116(a)). In other cases, there may be an indorser. The obligation

- Determining who owns the rights represented by the note and mortgage.

Together, the provisions in Articles 3 and 9 of the UCC (along with general principles that appear in Article 1 and that apply to all transactions governed by the UCC) provide legal rules that apply to these questions.¹⁰ Moreover, these rules displace any inconsistent common law rules that might have otherwise previously governed the same questions.¹¹

This Report does not, however, address all of the rules in the UCC relating to enforcement, transfer, and ownership of mortgage notes. Rather, it reviews the rules relating to four specific questions:

- Who is the person entitled to enforce a mortgage note and, correspondingly, to whom is the obligation to pay the note owed?
- How can the owner of a mortgage note effectively transfer ownership of that note to another person or effectively use that note as collateral for an obligation?
- What is the effect of transfer of an interest in a mortgage note on the mortgage securing it?
- May a person to whom an interest in a mortgage note has been transferred, but who has not taken a recordable assignment of the mortgage, take steps to become the assignee of record in the real estate recording system of the mortgage securing the note?¹²

of an indorser is different from that of a maker in that the indorser's obligation is triggered by dishonor of the note (see UCC § 3-415) and, unless waived, indorsers have additional procedural protections (such as notice of dishonor; see UCC § 3-503)). These differences do not affect the issues addressed in this Report. For simplicity, this Report uses the term "maker" to refer to both makers and indorsers.

¹⁰ Subject to limitations on the ability to affect the rights of third parties, the effect of these provisions may be varied by agreement. UCC § 1-302. Variation by agreement is not permitted when the variation would disclaim obligations of good faith, diligence, reasonableness, or care prescribed by the UCC or when the UCC otherwise so indicates (see, e.g., UCC § 9-602). But the meaning of the statute itself cannot be varied by agreement. Thus, for example, private parties cannot make a note negotiable unless it complies with UCC § 3-104. See Official Comment 1 to UCC § 1-302. Similarly, parties may not avoid the application of UCC Article 9 to a transaction that falls within its scope. See *id.* and Official Comment 2 to UCC § 9-109.

¹¹UCC § 1-103(b). As noted in Official Comment 2 to UCC § 1-103:

The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.

¹² The Report does not discuss the application of common law principles, such as the law of agency, that supplement the provisions of the UCC other than to note some situations in which the text or comments of the UCC identify such principles as being relevant. See UCC § 1-103(b).

Question One – To Whom is the Obligation to Pay a Mortgage Note Owed?

If the mortgage note is a negotiable instrument,¹³ Article 3 of the UCC provides a largely complete set of rules governing the obligations of parties on the note, including how to determine who may enforce those obligations and, thus, to whom those obligations are owed. The following discussion analyzes the application of these rules to that determination in the context of mortgage notes that are negotiable instruments.¹⁴

In the context of mortgage notes that have been sold or used as collateral to secure an obligation, the central concept for making that determination is identification of the “person entitled to enforce” the note.¹⁵ Several issues are resolved by that determination. Most particularly:

- (i) the maker’s obligation on the note is to pay the amount of the note to *the person entitled to enforce the note*,¹⁶
- (ii) the maker’s payment to *the person entitled to enforce the note* results in discharge of the maker’s obligation,¹⁷ and
- (iii) the maker’s failure to pay, when due, the amount of the note to *the person entitled to enforce the note* constitutes dishonor of the note.¹⁸

Thus, a person seeking to enforce rights based on the failure of the maker to pay a mortgage note must identify the person entitled to enforce the note and establish that that person has not been paid. This portion of this Report sets out the criteria for qualifying as a “person entitled to enforce” a mortgage note. The discussion of Question Two addresses how ownership of a mortgage note may be effectively transferred from an owner to another person.

¹³ See UCC § 3-104 for the requirements that must be fulfilled in order for a payment obligation to qualify as a negotiable instrument. It should not be assumed that all mortgage notes are negotiable instruments. The issue of the negotiability of a particular mortgage note, which requires application of the standards in UCC § 3-104 to the words of the particular note, is beyond the scope of this Report.

¹⁴ Law other than Article 3, including contract law, governs this determination for non-negotiable mortgage notes. That law is beyond the scope of this Report.

¹⁵ The concept of “person entitled to enforce” a note is not synonymous with “owner” of the note. See Official Comment 1 to UCC § 3-203. A person need not be the owner of a note to be the person entitled to enforce it, and not all owners will qualify as persons entitled to enforce. Rules that address transfer of ownership of a note are addressed in the discussion of Question 2 below.

¹⁶ UCC § 3-412. (If the note has been dishonored, and an indorser has paid the note to the person entitled to enforce it, the maker’s obligation runs to the indorser.)

¹⁷ UCC § 3-602. The law of agency is applicable in determining whether a payment has been made to a person entitled to enforce. See *id.*, Official Comment 3. Note that, in states that have enacted the 2002 Official Text of UCC Article 3, UCC § 3-602(b) provides that a maker is also discharged by paying a person formerly entitled to enforce the note if the maker has not received adequate notification that the note has been transferred and that payment is to be made to the transferee. This amendment aligns the protection afforded to makers of notes that have been assigned with comparable protection afforded to obligors on other payment rights that have been assigned. See, e.g., UCC § 9-406(a); Restatement (Second), Contracts § 338(1).

¹⁸ See UCC § 3-502. See also UCC § 3-602.

UCC Section 3-301 provides only three ways in which a person may qualify as the person entitled to enforce a note, two of which require the person to be in possession of the note (which may include possession by a third party that possesses it for the person)¹⁹:

- The first way that a person may qualify as the person entitled to enforce a note is to be its “holder.” This familiar concept, set out in detail in UCC Section 1-201(b)(21)(A), requires that the person be in possession of the note and either (i) the note is payable to that person or (ii) the note is payable to bearer. Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement²⁰ so that, for example, a note payable to the order of a named payee that is indorsed in blank by that payee becomes payable to bearer.²¹
- The second way that a person may be the person entitled to enforce a note is to be a “nonholder in possession of the [note] who has the rights of a holder.”
 - How can a person who is not the holder of a note have the rights of a holder? This can occur by operation of law outside the UCC, such as the law of subrogation or estate administration, by which one person is the successor to or acquires another person’s rights.²² It can also occur if the delivery of the note to that person constitutes a “transfer” (as that term is defined in UCC Section 3-203, see below) because transfer of a note “vests in the transferee any right of the transferor to enforce the instrument.”²³ Thus, if a holder (who, as seen above, is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder (as in the example below). Similarly, a

¹⁹ See UCC § 1-103(b) (unless displaced by particular provisions of the UCC, the law of, *inter alia*, principal and agent supplements the provisions of the UCC). See also UCC § 3-420, Comment 1 (“Delivery to an agent [of a payee] is delivery to the payee.”). Note that “delivery” of a negotiable instrument is defined in UCC § 1-201(b)(15) as voluntary transfer of possession. This Report does not address the determination of whether a particular person is an agent of another person under the law of agency and the agency law implications of such a determination.

²⁰ “Indorsement,” as defined in UCC § 3-204(a), requires the signature of the indorser. The law of agency determines whether a signature made by a person purporting to act as a representative binds the represented person. UCC § 3-402(a); see note 12, *supra*. An indorsement may appear either on the instrument or on a separate piece of paper (usually referred to as an *allonge*) affixed to the instrument. See UCC § 3-204(a) and Comment 1, par. 4.

²¹ UCC Section 3-205 contains the rules concerning the effect of various types of indorsement on the party to whom a note is payable. Either a “special indorsement” (see UCC § 3-205(a)) or a “blank indorsement” (see UCC § 3-205(b)) can change the identity of the person to whom the note is payable. A special indorsement is an indorsement that identifies the person to whom it makes the note payable, while a blank indorsement is an indorsement that does not identify such a person and results in the instrument becoming payable to bearer. When an instrument is indorsed in blank (and, thus, is payable to bearer), it may be negotiated by transfer of possession alone until specially indorsed. UCC § 3-205(b).

²² See Official Comment to UCC § 3-301.

²³ UCC § 3-203(b).

subsequent transfer will result in the subsequent transferee being a person entitled to enforce the note.

- Under what circumstances does delivery of a note qualify as a transfer? As stated in UCC Section 3-203(a), a note is transferred “when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” For example, assume that the payee of a note sells it to an assignee, intending to transfer all of the payee’s rights to the note, but delivers the note to the assignee without indorsing it. The assignee will not qualify as a holder (because the note is still payable to the payee) but, because the transaction between the payee and the assignee qualifies as a transfer, the assignee now has all of the payee’s rights to enforce the note and thereby qualifies as the person entitled to enforce it. Thus, the failure to obtain the indorsement of the payee does not prevent a person in possession of the note from being the person entitled to enforce it, but demonstrating that status is more difficult. This is because the person in possession of the note must also demonstrate the purpose of the delivery of the note to it in order to qualify as the person entitled to enforce.²⁴
- There is a third method of qualifying as a person entitled to enforce a note that, unlike the previous two methods, does not require possession of the note. This method is quite limited – it applies only in cases in which “the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.”²⁵ In such a case, a person qualifies as a person entitled to enforce the note if the person demonstrates not only that one of those circumstances is present but also demonstrates that the person was formerly in possession of the note and entitled to enforce it when the loss of possession occurred and that the loss of possession was not as a result of transfer (as defined above) or lawful seizure. If the person proves those facts, as well as the terms of the note, the person is a person entitled to enforce the note and may seek to enforce it even though it is not in possession of the note,²⁶ but the court may not enter judgment in favor of the

²⁴ If the note was transferred for value and the transferee does not qualify as a holder because of the lack of indorsement by the transferor, “the transferee has a specifically enforceable right to the unqualified indorsement of the transferor.” See UCC § 3-203(c).

²⁵ UCC § 3-309(a)(iii) (1990 text), 3-309(a)(3) (2002 text). The 2002 text goes on to provide that a transferee from the person who lost possession of a note may also qualify as a person entitled to enforce it. See UCC § 3-309(a)(1)(B) (2002). This point was thought to be implicit in the 1990 text, but was rejected in some cases in which the issue was raised. The reasoning of those cases was rejected in Official Comment 5 to UCC § 9-109 and the point was made explicit in the 2002 text of Article 3.

²⁶ To prevail the person must establish not only that the person is a person entitled to enforce the note but also the other elements of the maker’s obligation to pay such a person. See generally UCC §§ 3-309(b), 3-412. Moreover, as is the case with respect to the enforcement of all rights under the UCC, the person enforcing the note must act in good faith in enforcing the note. UCC § 1-304.

person unless the court finds that the maker is adequately protected against loss that might occur if the note subsequently reappears.²⁷

Illustrations:

1. Maker issued a negotiable mortgage note payable to the order of Payee. Payee is in possession of the note, which has not been indorsed. Payee is the holder of the note and, therefore, is the person entitled to enforce it. UCC §§ 1-201(b)(21)(A), 3-301(i).
2. Maker issued a negotiable mortgage note payable to the order of Payee. Payee indorsed the note in blank and gave possession of it to Transferee. Transferee is the holder of the note and, therefore, is the person entitled to enforce it. UCC §§ 1-201(b)(21)(A), 3-301(i).
3. Maker issued a negotiable mortgage note payable to the order of Payee. Payee sold the note to Transferee and gave possession of it to Transferee for the purpose of giving Transferee the right to enforce the note. Payee did not, however, indorse the note. Transferee is not the holder of the note because, while Transferee is in possession of the note, it is payable neither to bearer nor to Transferee. UCC § 1-201(b)(21)(A). Nonetheless, Transferee is a person entitled to enforce the note. This is because the note was transferred to Transferee and the transfer vested in Transferee Payee's right to enforce the note. UCC § 3-203(a)-(b). As a result, Transferee is a nonholder in possession of the note with the rights of a holder and, accordingly, a person entitled to enforce the note. UCC § 3-301(ii).
4. Same facts as Illustrations 2 and 3, except that (i) under the law of agency, Agent is the agent of Transferee for purposes of possessing the note and (ii) it is Agent, rather than Transferee, to whom actual physical possession of the note is given by Payee. In the facts of Illustration 2, Transferee is a holder of the note and a person entitled to enforce it. In the context of Illustration 3, Transferee is a person entitled to enforce the note. Whether Agent may enforce the note or mortgage on behalf of Transferee depends in part on the law of agency and, in the case of the mortgage, real property law.
5. Same facts as Illustration 2, except that after obtaining possession of the note, Transferee lost the note and its whereabouts cannot be determined. Transferee is a person entitled to enforce the note even though Transferee does not have possession of it. UCC § 3-309(a). If Transferee brings an action on the note against Maker, Transferee must establish the terms of the note and the elements of Maker's obligation on it. The court may not enter judgment in favor of Transferee, however, unless the court finds that Maker is adequately protected against loss that might occur by reason of a claim of another person (such as the finder of the note) to enforce the note. UCC § 3-309(b).

²⁷ See *id.* UCC § 3-309(b) goes on to state that "Adequate protection may be provided by any reasonable means."

Question Two – What Steps Must be Taken for the Owner of a Mortgage Note to Transfer Ownership of the Note to Another Person or Use the Note as Collateral for an Obligation?

In the discussion of Question One, this Report addresses identification of the person who is entitled to enforce a note. That discussion does not address who “owns” the note. While, in many cases, the person entitled to enforce a note is also its owner, this need not be the case. The rules that determine whether a person is a person entitled to enforce a note do not require that person to be the owner of the note,²⁸ and a change in ownership of a note does not necessarily bring about a concomitant change in the identity of the person entitled to enforce the note. This is because the rules that determine who is entitled to enforce a note and the rules that determine whether the note, or an interest in it, have been effectively transferred serve different functions:

- The rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note, providing the maker with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged.
- The rules concerning transfer of ownership and other interests in a note, on the other hand, primarily relate to who, among competing claimants, is entitled to the economic value of the note.

In a typical transaction, when a note is issued to a payee, the note is initially owned by that payee. If that payee seeks either to use the note as collateral or sell the note outright, Article 9 of the UCC governs that transaction and determines whether the creditor or buyer has obtained a property right in the note. As is generally known, Article 9 governs transactions in which property is used as collateral for an obligation.²⁹ In addition, however, Article 9 governs the sale of most payment rights, including the sale of both negotiable and non-negotiable notes.³⁰ With very few exceptions, the same Article 9 rules that apply to transactions in which a payment right is collateral for an obligation also apply to transactions in which a payment right is sold. Rather than contain two parallel sets of rules – one for transactions in which payment rights are collateral and the other for sales of payment rights – Article 9 uses nomenclature conventions to apply one set of rules to both types of transactions. This is accomplished primarily by defining the term “security interest” to include not only an interest in property that secures an obligation

²⁸ See UCC § 3-301, which provides, in relevant part, that “A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument”

²⁹ UCC § 9-109(a)(1).

³⁰ With certain limited exceptions not germane to this Report, Article 9 governs the sale of accounts, chattel paper, payment intangibles, and promissory notes. UCC § 9-109(a)(3). The term “promissory note” includes not only notes that fulfill the requirements of a negotiable instrument under UCC § 3-104 but also notes that do not fulfill those requirements but nonetheless are of a “type that in ordinary business is transferred by delivery with any necessary indorsement or assignment.” See UCC §§ 9-102(a)(65) (definition of “promissory note”) and 9-102(a)(47) (definition of “instrument” as the term is used in Article 9).

but also the right of a buyer of a payment right in a transaction governed by Article 9.³¹ Similarly, definitional conventions denominate the seller of such a payment right as the “debtor,” the buyer as the “secured party,” and the sold payment right as the “collateral.”³² As a result, for purposes of Article 9, the buyer of a promissory note is a “secured party” that has acquired a “security interest” in the note from the “debtor,” and the rules that apply to security interests that secure an obligation generally also apply to transactions in which a promissory note is sold.

Section 9-203(b) of the Uniform Commercial Code provides that three criteria must be fulfilled in order for the owner of a mortgage note effectively to create a “security interest” (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.

- The first two criteria are straightforward – “value” must be given³³ and the debtor/seller must have rights in the note or the power to transfer rights in the note to a third party.³⁴
- The third criterion may be fulfilled in either one of two ways. Either the debtor/seller must “authenticate”³⁵ a “security agreement”³⁶ that describes the note³⁷ or the secured party must take possession³⁸ of the note pursuant to the debtor’s security agreement.³⁹

³¹ See UCC § 1-201(b)(35) [UCC § 1-201(37) in states that have not yet enacted the 2001 revised text of UCC Article 1]. (For reasons that are not apparent, when South Carolina enacted the 1998 revised text of UCC Article 9, which included an amendment to UCC § 1-201 to expand the definition of “security interest” to include the right of a buyer of a promissory note, it did not enact the amendment to § 1-201. This Report does not address the effect of that omission.) The limitation to transactions governed by Article 9 refers to the exclusion, in cases not germane to this Report, of certain assignments of payment rights from the reach of Article 9.

³² UCC §§ 9-102(a)(28)(B); 9-102(a)(72)(D); 9-102(a)(12)(B).

³³ UCC § 9-203(b)(1). UCC § 1-204 provides that giving “value” for rights includes not only acquiring them for consideration but also acquiring them in return for a binding commitment to extend credit, as security for or in complete or partial satisfaction of a preexisting claim, or by accepting delivery of them under a preexisting contract for their purchase.

³⁴ UCC § 9-203(b)(2). Limited rights that are short of full ownership are sufficient for this purpose. See Official Comment 6 to UCC § 9-203.

³⁵ This term is defined to include signing and its electronic equivalent. See UCC § 9-102(a)(7).

³⁶ A “security agreement” is an agreement that creates or provides for a security interest (including the rights of a buyer arising upon the outright sale of a payment right). See UCC § 9-102(a)(73).

³⁷ Article 9’s criteria for descriptions of property in a security agreement are quite flexible. Generally speaking, any description suffices, whether or not specific, if it reasonably identifies the property. See UCC § 9-108(a)-(b). A “supergeneric” description consisting solely of words such as “all of the debtor’s assets” or “all of the debtor’s personal property” is not sufficient, however. UCC § 9-108(c). A narrower description, limiting the property to a particular category or type, such as “all notes,” is sufficient. For example, a description that refers to “all of the debtor’s notes” is sufficient.

³⁸ See UCC § 9-313. As noted in Official Comment 3 to UCC § 9-313, “in determining whether a particular person has possession, the principles of agency apply.” In addition, UCC § 9-313 also contains two special rules under which possession by a non-agent may constitute possession by the secured party. First, if a person who is not an agent is in possession of the collateral and the person authenticates a record acknowledging that the person holds the collateral for the secured party’s benefit, possession by that person constitutes possession by the secured party. UCC § 9-313(c). Second, a secured party that has possession of collateral does not relinquish possession by delivering the collateral to another person (other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business) if the delivery is accompanied by instructions to that person to hold possession of the collateral for the benefit of the secured party or redeliver it to the secured party. UCC § 9-313(h).

- Thus, if the secured party (including a buyer) takes possession of the mortgage note pursuant to the security agreement of the debtor (including a seller), this criterion is satisfied even if that agreement is oral or otherwise not evidenced by an authenticated record.
- Alternatively, if the debtor authenticates a security agreement describing the note, this criterion is satisfied even if the secured party does *not* take possession of the note. (Note that in this situation, in which the seller of a note may retain possession of it, the owner of a note may be a different person than the person entitled to enforce the note.)⁴⁰

Satisfaction of these three criteria of Section 9-203(b) results in the secured party (including a buyer of the note) obtaining a property right (whether outright ownership or a security interest to secure an obligation) in the note from the debtor (including a seller of the note).⁴¹

Illustrations:

6. Maker issued a mortgage note payable to the order of Payee.⁴² Payee borrowed money from Funder and, to secure Payee's repayment obligation, Payee and Funder agreed that Funder would have a security interest in the note. Simultaneously with the funding of the loan, Payee gave possession of the note to Funder. Funder has an attached and

See also Official Comment 9 to UCC § 9-313 ("New subsections (h) and (i) address the practice of mortgage warehouse lenders.") Possession as contemplated by UCC § 9-313 is also possession for purposes of UCC § 9-203. See UCC § 9-203, Comment 4.

³⁹ UCC §§ 9-203(b)(3)(A)-(B).

⁴⁰ As noted in the discussion of Question One, payment by the maker of a negotiable note to the person entitled to enforce it discharges the maker's obligations on the note. UCC § 3-602. This is the case even if the person entitled to enforce the note is not its owner. As between the person entitled to enforce the note and the owner of the note, the right to the money paid by the maker is determined by the UCC and other applicable law, such as the law of contract and the law of restitution, as well as agency law. See, e.g., UCC §§ 3-306 and 9-315(a)(2). As noted in comment 3 to UCC § 3-602, "if the original payee of the note transfers ownership of the note to a third party but continues to service the obligation, the law of agency might treat payments made to the original payee as payments made to the third party."

⁴¹ For cases in which another person claims an interest in the note (whether as a result of another voluntary transfer by the debtor or otherwise), reference to Article 9's rules governing perfection and priority of security interests may be required in order to rank order those claims (and, in some cases, determine whether a party has taken the note free of competing claims to the note). In the case of notes that are negotiable instruments, the Article 3 concept of "holder in due course" (see UCC § 3-302) should be considered as well, because a holder in due course takes its rights in an instrument free of competing property claims to it (as well as free of most defenses to obligations on it). See UCC §§ 3-305 and 3-306. With respect to determining whether the owner of a note has effectively transferred a property interest to a transferee, however, the perfection and priority rules are largely irrelevant. (The application of the perfection and priority rules can result in the rights of the transferee either being subordinate to the rights of a competing claimant or being extinguished by the rights of the competing claimant. See, e.g., UCC §§ 9-317(b), 9-322(a), 9-330(d), and 9-331(a).)

⁴² For this Illustration, as well as Illustrations 7-11, the analysis under UCC Article 9 is the same whether the mortgage note is negotiable or non-negotiable. This is because, in either case, the mortgage note will qualify as a "promissory note" and, therefore, an "instrument" under UCC Article 9. See UCC §§ 9-102(a)(47), (65).

enforceable security interest in the note. UCC § 9-203(b). This is the case even if Payee's agreement is oral or otherwise not evidenced by an authenticated record. Payee is no longer a person entitled to enforce the note (because Payee is no longer in possession of it and it has not been lost, stolen, or destroyed). UCC § 3-301. Funder is a person entitled to enforce the note if either (i) Payee indorsed the note by blank indorsement or by a special indorsement identifying Funder as the person to whom the indorsement makes the note payable (because, in such cases, Funder would be the holder of the note), or (ii) the delivery of the note from Payee to Funder constitutes a transfer of the note under UCC § 3-203 (because, in such case, Funder would be a nonholder in possession of the note with the rights of a holder). See also UCC §§ 1-201(b)(21)(A), 3-205(a)-(b), and 3-301(i)-(ii).

7. Maker issued a mortgage note payable to the order of Payee. Payee borrowed money from Funder and, in a signed writing that reasonably identified the note (whether specifically or as part of a category or a type of property defined in the UCC), granted Funder a security interest in the note to secure Payee's repayment obligation. Payee, however, retained possession of the note. Funder has an attached and enforceable security interest in the note. UCC § 9-203(b). If the note is negotiable, Payee remains the holder and the person entitled to enforce the note because Payee is in possession of it and it is payable to the order of Payee. UCC §§ 1-201(b)(21)(A), 3-301(i).
8. Maker issued a mortgage note payable to the order of Payee. Payee sold the note to Funder, giving possession of the note to Funder in exchange for the purchase price. The sale of the note is governed by Article 9 and the rights of Funder as buyer constitute a "security interest." UCC §§ 9-109(a)(3), 1-201(b)(35). The security interest is attached and is enforceable. UCC § 9-203(b). This is the case even if the sales agreement was oral or otherwise not evidenced by an authenticated record. If the note is negotiable, Funder is also a person entitled to enforce the note, whether or not Payee indorsed it, because either (i) Funder is a holder of the note (if Payee indorsed it by blank indorsement or by a special indorsement identifying Funder as the person to whom the indorsement makes the note payable) or (ii) Funder is a nonholder in possession of the note (if there is no such indorsement) who has obtained the rights of Payee by transfer of the note pursuant to UCC § 3-203. See also UCC §§ 1-201(b)(21)(A), 3-205(a)-(b), and 3-301(i)-(ii).
9. Maker issued a mortgage note payable to the order of Payee. Pursuant to a signed writing that reasonably identified the note (whether specifically or as part of a category or a type of property defined in the UCC), Payee sold the note to Funder. Payee, however, retained possession of the note. The sale of the note is governed by Article 9 and the rights of Funder as buyer constitute a "security interest." UCC § 1-201(b)(35). The security interest is attached and is enforceable. UCC § 9-203(b). If the note is negotiable, Payee remains the holder and the person entitled to enforce the note (even though, as between Payee and Funder, Funder owns the note) because Payee is in

possession of it and it is payable to the order of Payee. UCC §§ 1-201(b)(21)(A), 3-301(i).

Question Three – What is the Effect of Transfer of an Interest in a Mortgage Note on the Mortgage Securing It?

What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not take any additional actions to assign the mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that, in such cases, the assignment of the interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.” (As noted previously, a “security interest” in a note includes the right of a buyer of the note.)

While this question has provoked some uncertainty and has given rise to some judicial analysis that disregards the impact of Article 9,⁴³ the UCC is unambiguous: the sale of a mortgage note (or other grant of a security interest in the note) not accompanied by a separate conveyance of the mortgage securing the note does not result in the mortgage being severed from the note.⁴⁴

It is important to note in this regard, however, that UCC Section 9-203(g) addresses only whether, as between the seller of a mortgage note (or a debtor who uses it as collateral) and the buyer or other secured party, the interest of the seller (or debtor) in the mortgage has been correspondingly transferred to the secured party. UCC Section 9-308(e) goes on to state that, if the secured party’s security interest in the note is perfected, the secured party’s security interest

⁴³See, e.g., the discussion of this issue in *U.S. Bank v. Ibanez*, 458 Mass. 637 at 652-53, 941 N.E.2d 40 at 53-54 (2011). In that discussion, the court cited Massachusetts common law precedents pre-dating the enactment of the current text of Article 9 to the effect that a mortgage does not follow a note in the absence of a separate assignment of the mortgage, but did not address the effect of Massachusetts’s subsequent enactment of UCC § 9-203(g) on those precedents. Under the rule in UCC § 9-203(g), if the holder of the note in question demonstrated that it had an attached security interest (including the interest of a buyer) in the note, the holder of the note in question would also have a security interest in the mortgage securing the note even in the absence of a separate assignment of the mortgage. (This Report does not address whether, under the facts of the *Ibanez* case, the holder of the note had an attached security interest in the note and, thus, qualified for the application of UCC § 9-203(g). Moreover, even if the holder had an attached security interest in the note and, thus, had a security interest in the mortgage, this would not, of itself, mean that the holder could enforce the mortgage without a recordable assignment of the mortgage to the holder. Whatever steps are required in order to enforce a mortgage in the absence of a recordable assignment are the province of real property law. The matter is addressed, in part, in the discussion of Question 4 below.)

⁴⁴ Official Comment 9 to UCC § 9-203 confirms this point: “Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” Pursuant to UCC § 1-302(a), the parties to the transaction may agree that an interest in the mortgage securing the note does not accompany the note, but such an agreement is unlikely. See, e.g., Restatement (3d), Property (Mortgages) § 5.4, comment *a* (“It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed.”).

in the mortgage securing the note is also perfected,⁴⁵ with result that the right of the secured party is senior to the rights of a person who then or later becomes a lien creditor of the seller of (or other grantor of a security interest in) the note. Neither of these rules, however, determines the ranking of rights in the underlying real property itself, or the effect of recordation or non-recordation in the real property recording system on enforcement of the mortgage.⁴⁶

Illustration:

10. Same facts as Illustration 9. The signed writing was silent with respect to the mortgage securing the note and the parties made no other agreement with respect to the mortgage. The attachment of Funder's interest in the rights of Payee in the note also constitutes attachment of an interest in the rights of Payee in the mortgage. UCC § 9-203(g).

Question Four – What Actions May a Person to Whom an Interest in a Mortgage Note Has Been Transferred, but Who Has not Taken a Recordable Assignment of the Mortgage, Take in Order to Become the Assignee of Record of the Mortgage Securing the Note?

In some states, a party without a recorded interest in a mortgage may not enforce the mortgage non-judicially. In such states, even though the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage,⁴⁷ this may be insufficient as a matter of applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker if the buyer or secured creditor does not have a recordable assignment. The buyer or other secured party may attempt to obtain such a recordable assignment from the seller or debtor at the time it seeks to enforce the mortgage, but such an attempt may be unsuccessful.⁴⁸

Article 9 of the UCC provides such a buyer or secured creditor a mechanism by which it can record its interest in the realty records in order to conduct a non-judicial foreclosure. UCC Section 9-607(b) provides that “if necessary to enable a secured party [including the buyer of a mortgage note] to exercise ... the right of [its transferor] to enforce a mortgage nonjudicially,” the secured party may record in the office in which the mortgage is recorded (i) a copy of the security agreement transferring an interest in the note to the secured party and (ii) the secured

⁴⁵ See Official Comment 6 to UCC § 9-308, which also observes that “this result helps prevent the separation of the mortgage (or other lien) from the note.” Note also that, as explained in Official Comment 7 to UCC § 9-109, “It also follows from [UCC § 9-109(b)] that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective.”

⁴⁶ Similarly, Official Comment 6 to UCC § 9-308 states that “this Article does not determine who has the power to release a mortgage of record. That issue is determined by real-property law.”

⁴⁷ See discussion of Question Three, *supra*.

⁴⁸ In some cases, the seller or debtor may no longer be in business. In other cases, it may simply be unresponsive to requests for execution of documents with respect to a transaction in which it no longer has an economic interest. Moreover, in cases in which mortgage note was collateral for an obligation owed to the secured party, the defaulting debtor may simply be unwilling to assist its secured party. See Official Comment 8 to UCC § 9-607.

party's sworn affidavit in recordable form stating that default has occurred⁴⁹ and that the secured party is entitled to enforce the mortgage non-judicially.⁵⁰

Illustration:

11. Same facts as Illustration 10. Maker has defaulted on the note and mortgage and Funder would like to enforce the mortgage non-judicially. In the relevant state, however, only a party with a recorded interest in a mortgage may enforce it non-judicially. Funder may record in the relevant mortgage recording office a copy of the signed writing pursuant to which the note was sold to Funder and a sworn affidavit stating that Maker has defaulted and that Funder is entitled to enforce the mortgage non-judicially. UCC § 9-607(b).

Summary

The Uniform Commercial Code provides four sets of rules that determine matters that are important in the context of enforcement of mortgage notes and the mortgages that secure them:

- First, in the case of a mortgage note that is a negotiable instrument, Article 3 of the UCC determines the identity of the person who is entitled to enforce the note and to whom the maker owes its payment obligation; payment to the person entitled to enforce the note discharges the maker's obligation, but failure to pay that party when the note is due constitutes dishonor.
- Second, for both negotiable and non-negotiable mortgage notes, Article 9 of the UCC determines whether a transferee of the note from its owner has obtained an attached property right in the note.
- Third, Article 9 of the UCC provides that a transferee of a mortgage note whose property right in the note has attached also automatically has an attached property right in the mortgage that secures the note.
- Finally, Article 9 of the UCC provides a mechanism by which the owner of a note and the mortgage securing it may, upon default of the maker of the note, record its interest in the mortgage in the realty records in order to conduct a non-judicial foreclosure.

As noted previously, these UCC rules do not resolve all issues in this field. The enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law, but legal determinations made pursuant to the four sets of UCC rules described in this Report will, in many cases, be central to administration of that law. In such cases, proper application of real property law requires proper application of the UCC rules discussed in this Report.

⁴⁹ The 2010 amendments to Article 9 (see fn. 8, *supra*) add language to this provision to clarify that "default," in this context, means default with respect to the note or other obligation secured by the mortgage.

⁵⁰ UCC § 9-607(b) does not address other conditions that must be satisfied for judicial or non-judicial enforcement of a mortgage.

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I, Margaret Scott, hereby certify under penalty of perjury under the laws of the State of Washington that, on the 12th day of December, 2018, I mailed with delivery confirmation a true copy of the Appellant Scott's Opening Brief for case No. 51232-7-3.

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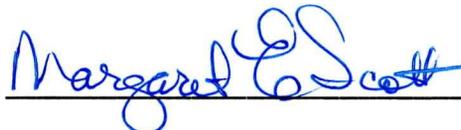
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