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NO. 51556-3-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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U.S. BANK, N.A., AS TRUSTEE FOR LSF8  
MASTER PARTICIPATION TRUST,

Plaintiff/Respondent,

vs.

JACK W. BAILEY, an individual, *et al*,

Defendants,

JASON HAGEN, an individual,

Defendant/Appellant.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE GREGORY GONZALES

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BRIEF OF APPELLANT

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## ASSIGNMENT OF ERROR

The Trial Court Erred by Entering the Order on Motions.

### ISSUES PRESENTED

The overriding issue in this case is whether the six year statute of limitations bars Plaintiff's judicial foreclosure action. That issue presents the following substantive sub-issues:

1. Was the obligation of Jack Bailey and Sharon Bailey to Household Realty Corporation accelerated in June of 2009 thereby commencing the six year limitation period?

2. Was the six year limitation period extended by time spent in connection with a non-judicial foreclosure proceeding that was ultimately abandoned?

3. Was the six year limitation period extended by time after the Baileys filed for bankruptcy protection?

### STATEMENT OF THE CASE

#### I. Operative Facts.

Jack Bailey and Sharon Bailey owned a residence located at 16203 N.E. 36<sup>th</sup> Ave., Ridgefield, Washington (the Property). (CP 24; CP 46) In July of 2002, the Baileys borrowed \$269,997.77 from Household Realty Corporation (Household). The loan is evidenced by a Loan and Repayment

Agreement. It called for monthly payments of \$2,754.46 over a period of thirty years. (CP 165-67) The Baileys executed a Deed of Trust pledging the Property as security for the loan.<sup>1</sup> The Deed of Trust named Household as the beneficiary. (CP 215-220)

The Baileys fell behind in making their payments by the first part of 2009. Household appointed Regional Trustee Services Corporation (the Trustee) as successor trustee under the Deed of the Trust. (CP 55-56) The Trustee prepared a Notice of Default to the Baileys dated May 15, 2009. (CP 172-74) It alleged that the Baileys owed \$42,320.11 in overdue payments and other charges. It went on to state in paragraph 5(c):

If the default(s) described above is (are) not cured within thirty days of the mailing of this notice, the lender hereby gives notice that the entire principal balance owing on the notes secured by the Deed of Trust. . . and all accrued and unpaid interest, as well as costs of foreclosure, shall immediately become due and payable. Notwithstanding acceleration, the grantor or the holder of any junior lien or encumbrance shall have the right after acceleration to reinstate by curing all defaults and paying all costs, fees and advances, if any, made pursuant to the terms of the obligation and/or deed of trust on or before 11 days prior to a Trustee's sale.

(CP 173) This notice was mailed to the Baileys on May 18, 2009. (CP 59)

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<sup>1</sup> Other relevant terms of the documents will be discussed in the Argument section of this brief.

The Baileys made no further payments. (CP 265; CP 409) The Trustee then recorded a Notice of Trustee's Sale on June 19, 2009. (CP 58-61) It set a trustee's sale for September 18, 2009. The notice stated that the principal of the amount due was \$270,336.87, an amount greater than that initially borrowed. (CP 59)

On September 17, 2009, the Baileys filed for Chapter 7 bankruptcy protection. (CP 63-118) In their petition, they stated that the Property had a value of \$274,000.00 but that it was security for debt totaling \$338,411.00. (CP 72) They agreed to surrender the Property. (CP 107-108) The Baileys subsequently moved out of the Property by no later than October 31, 2009. (CP 409)

Meanwhile, the trustee's sale scheduled for September 18, 2009, did not go forward because of the automatic stay imposed by the Baileys' bankruptcy filing. Neither Household nor the Trustee moved for relief from the automatic stay to proceed with foreclosure. (CP 132-38) The Baileys were granted a discharge in their bankruptcy on December 16, 2009. (CP 120)

In September of 2011, the Baileys executed a quit claim deed conveying their interest in the Property to Jason Hagen. (CP 169) In August of 2014, Household assigned the Deed of Trust to Plaintiff U.S. Bank, N.A. as Trustee for LSF8 Master Participation Trust. (CP 406-407)

## II. Procedural Facts.

Plaintiff filed this action on September 22, 2015. (CP 1-22) It sought to judicially foreclose the Deed of Trust that the Baileys had executed in 2002. This was the first judicial or non-judicial foreclosure action that had been taken since 2009 when the Baileys had filed for bankruptcy protection.

After the filing of an amended complaint, Mr. Hagen answered and counterclaimed to quiet his title in the Property based on RCW 7.28.300. He alleged that the obligation secured by the Deed of Trust had been accelerated in June of 2009 and that Plaintiff's action was barred by the applicable statute of limitations because it was filed after June of 2015. (CP 23-48)

On August 21, 2017, Plaintiff moved for judgment on the pleadings to dismiss Mr. Hagen's counterclaim. The motion assumed that acceleration had occurred in June of 2009 but argued that the action had been filed before the limitation period had run. It claimed that the limitation period had been extended by the abandoned 2009 non-judicial foreclosure and the by Baileys' bankruptcy filing. (CP 122-28) Mr. Hagen responded to the motion. (CP 139-53) On October 18, 2017, he filed a summary judgment motion. He contended that the obligation had in fact been accelerated in June of 2009 and that the limitation period had not been

effectively extended by either the abandoned 2009 non-judicial foreclosure or the Baileys' bankruptcy. (CP 186-212)

The two motions were heard together. On February 15, 2018, the trial court entered the Order on Motions. That order granted Plaintiff's motion for judgment on the pleadings; denied Mr. Hagen's motion for summary judgment; and dismissed Mr. Hagen's counterclaim with prejudice.<sup>2</sup> (CP 431-33) Mr. Hagen then appealed.

### ARGUMENT

#### I. Summary of Argument.

The Notice of Default accelerated the Baileys' obligation to Household effective June 19, 2009, at the latest. Plaintiff's judicial foreclosure action had to be filed within six years thereafter, or by June 19, 2015. It was filed on September 22, 2015, which was ninety-five days late. The six year limitation period was not extended by the time during which the 2009 non-judicial foreclosure proceeding may have been pending. It was also not extended for ninety-five days by the Baileys' bankruptcy filing.

The trial court erred by granting Plaintiff's Motion for Judgment on the Pleadings because, assuming that acceleration occurred in June of 2009,

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<sup>2</sup> The order also contained appropriate findings and language to comply with CR 54(b) and RAP 2.2(d). (CP 433)

the foreclosure action was not timely filed. The trial court also erred by denying Mr. Hagen's summary judgment motion. There is no genuine issue of material fact on the issues presented. The obligation was in fact accelerated in June of 2009, and neither the abandoned non-judicial foreclosure nor the Baileys' bankruptcy effectively extended the six year limitation period for ninety-five days under the facts presented in this case.

## II. Standard of Review.

The trial court granted Plaintiff's motion for judgment on the pleadings and denied Mr. Hagen's motion for summary judgment. Both decisions are subject to *de novo* review. *Tenore v. A.T. & T. Wireless Services*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998); *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009)

The nature of the review is different for each type of motion, however. A motion for judgment on the pleadings is authorized by CR 12(c). Under such a motion, dismissal of Mr. Hagen's counterclaim would be appropriate only if it appears beyond doubt that there is no set of facts consistent with his counterclaim that would entitle him to relief. Mr. Hagen's allegations are presumed to be true, and the court may consider hypothetical facts not included in the record. The alleged facts and the hypothetical facts must be viewed in the light most favorable to the nonmoving party. Such a motion should be granted sparingly and with

care and only if the pleadings show some insuperable bar to relief. Any hypothetical situation conceivably raised by Mr. Hagen's counterclaim defeats the motion if these facts are legally sufficient to support his claim. *Tenore v. A. T. & T. Wireless Services, supra*, 136 Wn.2d at 330; *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 122-23, 11 P.3d 726 (2000)

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. When determining whether an issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. A genuine issue of material fact exists only where reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy, supra*, 165 Wn.2d at 601.

The relative burdens of proof are important in evaluating summary judgment motions. A party is entitled to move for summary judgment on the basis that the opposing party cannot create a genuine issue of material fact on a matter on which that party has the burden of proof. *Young v Key Pharmaceuticals*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) That rule is critical here. Mr. Hagen's counterclaim is based on the statute of limitations. That is an affirmative defense. CR 8(c) Therefore, he must come forward with evidence that the action was not timely filed. *Haslund*

*v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976) Plaintiff will claim that the applicable statute of limitations has been tolled and that its claim is not barred. It carries the burden of proof on this issue. *Rivas v. Overlake Hospital Medical Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008)

As will be discussed below, there are facts which if believed would entitle Mr. Hagen to relief on his counterclaim. Therefore, the trial court erred when it granted Plaintiff's motion for judgment on the pleadings. Furthermore, there is no genuine issue of material fact on the questions presented and Mr. Hagen is entitled to judgment as a matter of law on his counterclaim. The trial court erred when it denied that motion.

### III. Basic Principles.

The Baileys conveyed the Property to Mr. Bailey in 2011. That made him the Property's record owner. With that status, he became entitled by RCW 7.28.300 to sue to quiet title against time barred obligations. That statute reads as follows:

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

In this context, Plaintiff's suit for judicial foreclosure is barred if suit on the underlying obligation is also barred. *Chatos v. Levas*, 14 Wn.2d 317, 128 P.2d 284 (1942).

The relevant statute of limitation is RCW 4.16.040. *Westar Funding, Inc. v. Sorrels*, 157 Wn.App. 777, 784-85, 239 P.3d 1109 (2010)

As is pertinent, it provides as follows:

The following actions shall be commenced within six years:

- (1) An action upon a contract in writing, or liability express or implied arising out of a written agreement. . .

The Baileys were required to repay Household in monthly installments. The six year statute of limitations on such an obligation begins to run when the lender declares all sums immediately due and payable. Such an action is referred to as acceleration. *Westar Funding, Inc., v. Sorrels, supra*, 157 Wn.App. at 784

The policies surrounding statutes of limitation must be considered here. The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. When plaintiffs sleep on their rights, evidence may be lost and memories may fade. They operate to protect both defendants and courts from such stale claims. Any statute or rule that tolls a

period of limitation conflicts with these policies.<sup>3</sup> *Douchette v. Bethel School District*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991); *Huff v. Roach*, 125 Wn.App. 724, 731-32, 106 P.3d 268 (2005) Therefore, a plaintiff is required to be diligent in pursuing remedies.

For example, the discovery rule applicable to tort actions requires diligence. It can effectively extend a period of limitation. It allows a tort claim to accrue when the plaintiff knew or should have known of the essential elements of the cause of action. The plaintiff must be diligent in discovering the facts to support the cause of action. *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) The test is an objective one. If the plaintiff is not diligent in discovering the facts, the limitation period will continue to run.

A similar rule applies to claims based on fraud. As RCW 4.16.080(4) provides, “an action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.” Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. *Strong v. Clark*, 56

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<sup>3</sup> We see this problem here. The Baileys gave declarations to the best of their recollection of events that occurred eight years earlier.

Wn.2d 230, 232, 352 P.2d 183 (1960) And notice of facts that would lead a diligent party to further inquiry is notice of everything to which such inquiry would lead. *Busenius v. Horan*, 53 Wn.App. 662, 667, 769 P.2d 869 (1989) Therefore, if a defrauded party is not diligent in discovering facts, the limitation period will run anyway.

IV. The Baileys' Obligation Was Accelerated by No Later Than June 19, 2009.

a. Introduction.

The language used in the Notice of Default was sufficiently unambiguous to accelerate the Baileys' obligation to Household. Subsequent events leave no doubt that acceleration occurred. Under the terms of the Deed of Trust, acceleration is a prerequisite to exercise of the power of sale and non-judicial foreclosure. The recording of the Notice of Trustee's Sale on June 19, 2009, therefore confirmed that acceleration had occurred by that date at the latest. That acceleration is not belied by later notices.

b. Acceleration Occurred by No Later than June 19, 2009.

The Loan and Repayment Agreement does not address acceleration. The Deed of Trust at issue here authorizes acceleration in

paragraph 17 after the giving of notice. As is relevant, it provides as follows:

... (U)pon Borrowers' breach of any covenant or agreement of Borrower in this Deed of Trust, including the covenants to pay when due any sums secured by this Deed of Trust, Lender, prior to acceleration, shall give notice to Borrower... specifying (1) the Breach; (2) the action required to cure such breach; (3) a date not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust; and sale of the Property at public auction at a date not less than 120 days in the future. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the nonexistence of a default or any other defense of Borrower to acceleration and sale. If the breach is not cured on or before the date specified in the notice, Lender, at lender's option may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law. . .

(CP 218)

The Notice of Default was dated May 15, 2009, and was mailed on May 18, 2009. It was signed by a representative of the Trustee as "Trustee and/or Agent of Beneficiary." The beneficiary, of course, was Household. The notice itemized the amounts that the Baileys had not paid.

It then stated, once again:

If the default(s) described above is (are) not cured within thirty days of the mailing of this notice, the lender hereby

gives notice that the entire principal balance owing on the notes secured by the Deed of Trust. . . and all accrued and unpaid interest, as well as costs of foreclosure, shall immediately become due and payable. Notwithstanding acceleration, the grantor or the holder of any junior lien or encumbrance shall have the right after acceleration to reinstate by curing all defaults and paying all costs, fees and advances, if any, made pursuant to the terms of the obligation and/or deed of trust on or before 11 days prior to a Trustee's sale.

When, as here, the obligation is to make monthly installments, some affirmative action is required by which the holder of the note makes known to the payor an intention to declare the whole debt due. *4518 S. 256<sup>th</sup> LLC v. Karen L. Gibbons, P.S.*, 195 Wn.App. 423, 434-36, 382 P.3d 1 (2016) The language in the Notice of Default was clear and unequivocal. It stated that all sums would be immediately due and payable unless the Baileys made all payments then due within thirty days. It did not indicate that any further notices would be coming or that any further notices were required. This was in keeping with the language in paragraph 17 of the Deed of Trust which states that, in the absence of a cure of the defaults that acceleration can be made "without further demand."

The acceleration language in the Notice of Default was not statutorily required. A party seeking non-judicial foreclosure must transmit a notice of default before recording a notice of trustee's sale. The notice of default must contain a number of statements. Those requirements do not

include language that all sums will become immediately due and payable in the absence of a cure. RCW 61.24.030(8)<sup>4</sup>

The Deed of Trust, however, required acceleration prior to exercise of the power of sale. As paragraph 17 set out above says:

. . .If the breach is not cured on or before the date specified in the notice, Lender, at Lender’s option may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law.

The Deed of Trust contains no other language granting a power of sale. This point is critical. A trustee’s sale can proceed only when “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.” RCW 61.24.030(3) (emphasis added) The Notice of Default provided the notice of acceleration that the Deed of Trust required. Without this language, a trustee’s sale could not go forward. The statement was placed in the Notice of Default for that reason.

The language of paragraph 17 of the Deed of Trust requires a notice that states that the failure to cure “may result in acceleration.” But the Notice of Default says that the failure to cure “will” result in all sums

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<sup>4</sup> This section of RCW 61.24.030 was redesignated as (8) from (7) by Laws of Washington 2009, Chapter 292 § 8, effective July 26, 2009. To avoid confusion, all references will be to RCW 61.24.030(8)

becoming immediately due and payable. The use of this language in the Notice of Default further leaves no doubt that acceleration will occur if the obligation is not brought current within thirty days. In other words, the use of the word “will” in the Notice of Default means that the Lender has already made the choice to accelerate if all sums due are not paid. There is no ambiguity here. In this context, the language used leads to only one conclusion—acceleration will occur if there is no cure.

When the Baileys did not bring the obligation current, the Notice of Trustee’s Sale was then recorded on June 19, 2009, on the thirty-first day after the Notice of Default was mailed. This invoked the power of sale. Since the Deed of Trust made acceleration a prerequisite to non-judicial foreclosure, the recording of the Notice of Trustee’s Sale removed any doubt that the Lender had opted to accelerate the obligation. The acceleration was effective by no later than the recording of the Notice of Trustee’s Sale on June 19, 2009.

Language of the kind used in the Notice of Default has been held to be sufficient to effectuate acceleration by the courts of the State of New York. That state, like Washington, requires some clear and unequivocal affirmative action evidencing the holder's election to take advantage of the accelerating provision. *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 943 N.Y.S. 2d 540, 542 (2012) The following language in

default notices have been held to be sufficient to amount to acceleration in the absence of any subsequent notice:

If (the lender) is not in possession of the amount that is necessary to cure the default within 30 days of the date of this notice, American Home Mortgage Servicing, Inc. will accelerate the Loan balance and proceed with foreclosure. In such case, the Encumbered Property, as referenced above, will be sold at a duly held foreclosure sale or sheriff's sale and all occupants will be required to vacate.

*Deutsche Bank National Trust Company v. Unknown Heirs of Souto*, 2016 N.Y. Misc. Lexis 2641 (2016)

We must receive payment in CERTIFIED FUNDS, in the amount of \$17,734.95 on or before August 18, 2009 (which date is not less than 30 calendar days from the date of this notice), the payment of which sum will cure the default. Only the TOTAL AMOUNT DUE to reinstate the loan will be accepted. If payment is not received by August 18, 2009, additional costs, including attorneys' fees may be incurred for which you will be responsible. Your failure to cure said default on or before said date shall result in the acceleration (immediately becoming due and payable in full) of the entire sum secured by the loan security instrument and the immediate institution of foreclosure proceedings by either strict foreclosure or by sale of the property by public auction.

*Mazella v. Capital One, N.A.* 2017 N.Y. Misc. Lexis 1367 (2017)

Your failure to cure the default on or before March 07, 2008, will result in the acceleration of the sums secured by the above mortgage and sale of the mortgaged premises.

*Costa v. Deutsche Bank National Trust Company*, 247 F.Supp.3d 329, 341 (S.D.N.Y. 2017) The opinions in each of these cases stressed that language in the notices to the effect that the failure to bring the loan current “will” or “shall” result in acceleration was the sort of unequivocal language that amounts to acceleration. As the Court stated in *Deutsche Bank National Trust Company v. Unknown Heirs of Souto*, *supra*, quoted verbatim in *Costa v. Deutsche Bank National Trust Company*, *supra*, 247 F.Supp.3d at 344:

This is not a wishy-washy notice. The Court finds that the phrase "will accelerate the Loan balance" means that plaintiff will accelerate the loan balance. It means that unless plaintiff gets the money within thirty days, the note comes due and foreclosure will be the next step. There is no indication that plaintiff is only kidding about the thirty day deadline, and that as long as the payment is received before the foreclosure action is commenced, the default will be cured. There is no indication that there will be any other notices between the letter in the borrower's hands and the commencement of the foreclosure case. The thirty days is the last chance to cure. Your failure to cure the default on or before March 07, 2008, will result in the acceleration of the sums secured by the above mortgage and sale of the mortgaged premises.

The opinion in *Costa v. Deutsche Bank National Trust Company*, *supra*, 247 F.3d at 341-45, distinguished other cases where the notice was not as conclusive, such as when it stated that the Lender “may” accelerate if there is no cure. 247 F.Supp.3d 329, 341-45 (S.D.N.Y. 2017)

The Court in *Fujita v. Quality Loan Service Corp. of Washington*, 2016 U.S. Dist. Lexis 111756 (W.D. Wash. 2016), came to the same conclusion as did the New York courts in the cases set out above. In that case, the deed of trust and the notice of default were indistinguishable from ours. The notice of default said that if "the default is not cured on or before July 16, 2009, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full and foreclosure proceedings will be initiated at that time." Opinion, p. 2 The Lender argued that some additional notice was necessary before there could be acceleration. The Court disagreed. It stated:

The Deed of Trust provides that if "the default is not cured on or before the date specified in the notice [of acceleration], Lender at its option, may require immediate payment in full of all sums ... without further demand. . ." Accordingly, US Bank was not required to send any additional notification in order to trigger the acceleration. US Bank advised that acceleration would result from a failure to cure, clearly evidencing that it "intend[ed] to declare the entire sum due and payable." Plaintiffs did not cure, and thus the debt accelerated.

Opinion, p. 5-6.

Plaintiff may claim that some other or further notice was needed to make out acceleration. As the decisions cited above make clear, the Notice of Default was sufficient. It is not a "wishy-washy" notice. It gives a clear intention to accelerate.

Any argument that some other notice is required misconstrues what is necessary for acceleration to occur. Notice is not necessary. Some affirmative action is. If there was any doubt, the recording of the Notice of Trustee's Sale was that affirmative act because paragraph 17 of the Deed of Trust makes acceleration a precondition to exercising the power of sale through non-judicial foreclosure.

In conclusion, the Notice of Default was sufficient to cause acceleration thirty days after it was mailed. Since acceleration is a precondition of exercise of the power of sale, acceleration occurred at the latest when the Notice of Trustee's Sale was recorded on June 19, 2009.

c. The Notice of Trustee's Sale and Subsequent Acts Do Not Negate the Occurrence of Acceleration.

The Notice of Trustee's Sale states that the sale will not go forward if all sums then due—as opposed to the entire balance of the obligation—are paid not later than eleven days before the date of the sale. (CP 59) This statement does not detract from the conclusion that acceleration occurred. The Deed of Trust makes this clear in paragraph 18 which states:

Notwithstanding Lender's acceleration of the sums secured by this Deed of Trust due to Borrower's breach, Borrower shall have the right have any proceedings begun by Lender to enforce this Deed of Trust discontinued...if (a) Borrower pays Lender all sums which would then be due under this

Deed of Trust and the Note had no acceleration occurred. .  
. (c) Borrower pays all reasonable expenses incurred by  
Lender and Trustee in enforcing the covenants and  
agreement of borrower contained in this Deed of Trust, and  
in enforcing Lender's and Trustee's remedies. . including by  
not limited to, reasonable attorneys' fees. . Upon such  
payment and cure by Borrower, the Deed of Trust and the  
obligations secured hereby shall remain in full force and  
effect as if no acceleration had occurred. . .

(CP 219)

After the trustee's sale was discontinued, Household or its affiliates prepared other notices. These notices state, among other things, that the lender intends to declare the loan immediately due and payable if certain payments are not made. (CP 279-288) Plaintiff may argue that these notices show that there was no acceleration in 2009 despite the fact that acceleration was required in order for non-judicial foreclosure to go forward. This argument must fail.

These letters cannot be considered because there is no competent evidence that they were sent to the Baileys.<sup>5</sup> These notices are on the letterhead of Household or its affiliates. They were attached to the Declaration of Nathaniel Mansi, an employee of Caliber Home Loans, Inc. (Caliber), Plaintiff's loan servicer. Any statement in a declaration

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<sup>5</sup> Mr. Hagen objected to the consideration of this and other portions of Mr. Mansi's declaration. *Bonneville v. Pierce County*, 148 Wn.App. 500, 508-509, 202 P.3d (2008) See CP 413-14 The trial court did not rule on these objections. CP 433

submitted in connection with a summary judgment motion must be admissible in evidence and must show that the declarant is competent to testify to what is stated in the declaration. CR 56(e) His statement in paragraph 5 of his declaration that these notices were sent to the Baileys cannot be considered because he has shown no knowledge of the practices of Household and its affiliates that this occurred. ER 602 By the same token, Mr. Mansi's statement in paragraph 8 of his declaration that no acceleration had occurred must be limited. Once again, he can have no knowledge of what was or was not done prior to Plaintiff and Caliber becoming involved. At best, his statement means only that Caliber took no action to accelerate the obligation prior to the filing of suit here.

Secondly, counsel has not been able to locate any authority in Washington to the effect that a party who once accelerates an obligation can later retract the acceleration when it is convenient to do so and especially to avoid the running of the statute of limitations. The notices are therefore ineffective to undo what was previously done in 2009.

Finally, the sending of the notices to the Baileys would violate the injunction contained in 11 U.S.C. § 524(a)(2) against collection efforts against a person who has received a discharge in bankruptcy.<sup>6</sup> Such notices

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<sup>6</sup> Prohibited actions can include accelerating an obligation. *In re Tucker*, 526 B.R. 616 (Bkcty. W.D. Va. 2015)

can only be sent when the debtor retains an interest in real property that is the debtor's residence and the notice is designed to precede *in rem* relief—such as foreclosure—on behalf of a party having a valid security interest. 11 U.S.C. 524(j) All but one of the notices attached to Mr. Mansi's declaration are dated after the Baileys had conveyed their interest in the Property to Mr. Hagen in September of 2011. Sending these notices to them was therefore forbidden. *In re Nordlund*, 494 B.R. 507 (Bkctcy. E.D. CA. 2011); *In re Golston*, 2016 Bankr. Lexis 1064 (Bkctcy. S.D. Ohio 2016) Actions that violate the automatic stay are void. *Schwartz v. United States*, 954 F.2d 569 (9<sup>th</sup> Cir. 1992) Plaintiff cannot rely on notices that should never have been sent.<sup>7</sup> The notice dated shortly before the Property was conveyed to Mr. Hagen did not in fact precede “*in rem*” relief because no foreclosure action was taken.

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<sup>7</sup> Household maintained the right to foreclose on the Property although it could not collect any money from or obtain a judgment against the Baileys. There would have been no impediment to Household sending another Notice of Default as required by RCW 61.24.030(8) as a step toward non-judicial foreclosure. *In re Gill*, 529 B.R. 31, 41-42 (Bkrtcy. W.D.N.Y. 2015) The notices are not Notices of Default, however. They do not describe the Property; they do not state where the deed of trust has been recorded or its recording number; and they do not itemize the breaches. RCW 61.24.030(8)(a), (b), (d), (e)

d. Summary.

The facts are clear and lead to only one conclusion. Since the Baileys did not cure, the Notice of Default was sufficient to allow acceleration thirty days after it was mailed, or on June 18, 2009. The recording of the Notice of Trustee's Sale confirmed acceleration as of June 19, 2009, at the latest. Plaintiff's Motion for Judgment on the Pleadings assumed this to be the case. The proposition was established in Mr. Hagen's summary judgment motion.

V. The Limitation Period Was Not Extended by Non-Judicial Foreclosure Proceedings.

a. Introduction.

Plaintiff claims that the recording of the Notice of Trustee's Sale on June 19, 2009, served to add time to the six year limitation period. There is no support for that claim in either the relevant statutes or case law. It is also at odds with the policies governing statutes of limitation. The argument must be rejected for those reasons.

b. Relevant Statutes Do Not Allow for Such an Extension.

The various statutes of limitation set out the time periods for filing an action. The effect of these statutes is governed by their plain meaning. *Tingey v. Haisch*, 159 Wn.2d 652, 152 P.3d 1020 (2007)

Furthermore, a Court cannot read language into a statute that the legislature may have omitted. In other words a Court cannot adopt an interpretation of a statute that adds language that simply isn't there. *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981); *Restaurant Development, Inc., v. Cannawill, Inc.*, 150 Wn.2d 674, 80 P.3d 598 (2003); *Taplett v. Khela*, 60 Wn.App. 751, 755, 807 P.2d 885 (1991); *Jespersen v. Clark County*, 198 Wn.App. 568, 578, 399 P.3d 1209 (2017)

This rule applies to statutes of limitation. Courts will not read into such statutes an exception that the statute does not contain though the exception might be reasonable and equitable. *Rushlight v. McLain*, 28 Wn.2d 189, 199, 182 P.2d 62 (1947); *O'Neill v. Estate of Murtha*, 89 Wn.App. 67, 73-74, 947 P.2d 1252 (1997) This rule must be applied vigorously where non-judicial foreclosure is at issue because non-judicial foreclosure statutes must be strictly construed in favor of borrowers. *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012)

There is nothing in the RCW 4.16.040 that excludes the time that a non-judicial foreclosure is pending from the six year limitation or effectively adds that time to the six year period. There is nothing in either RCW 61.24—the statute governing non-judicial foreclosures—or in RCW 61.12—the statute governing mortgages—that sets addresses or qualifies

the six year period set out in RCW 4.16.040. The six year period simply cannot be extended by the time during which an abandoned non-judicial foreclosure was pending without some language in the statute authorizing that result.

There is also nothing in the statute dealing with tolling of limitation periods, RCW 4.16.170, that discusses the effect of a non-judicial foreclosure proceeding. That statute provides as follows:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

As the statute states, the limitation period is tolled by the filing and service of a summons and complaint. It does not also say that the limitation period is stopped or tolled by beginning non-judicial foreclosure procedures. That means that the commencement of non-judicial foreclosure proceedings cannot toll the limitation period.

The legislature has provided that limitation periods can be tolled or effectively extended without the necessity of filing suit. For example, a party seeking to sue a governmental entity for tortious conduct must first present a claim to the responsible entity and then wait sixty days before suing. The period of limitation is tolled during this sixty day period. RCW 4.92.110; RCW 4.96.020(4) A party desiring to sue an insurer under RCW 48.30.015 must first give the insurer written notice of the claim and then wait twenty days before filing suit. The statute of limitations for any such claim is tolled during that twenty day period. RCW 40.30.015(8)(d) The absence of any similar language pertaining to non-judicial foreclosures shows that the legislature has not intended to stop the running of the six year period by the sending of a Notice of Default or the recording of a Notice of Trustee's Sale. The contrary conclusion would violate the rule that Courts cannot add language to statutes that the legislature has chosen not to include or is simply not there as discussed above.

In the absence of any grounding in statute, the commencement of non-judicial foreclosure proceedings or the recording of a Notice of Trustee's Sale can have no effect—one way or another—on the running of the six year limitation period.

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c. An Abandoned Non-Judicial Foreclosure Proceeding Cannot Effectively Extend the Limitation Period.

An action that is filed but later dismissed without prejudice has no effect on the period of limitation. The limitation period continues to run as though the action had never been brought. *Fittro v. Alcombrack*, 23 Wn.App. 178, 180, 596 P.2d 665 (1979); *Hintz v. Kitsap County*, 92 Wn.App. 10, 16, 960 P.2d 946 (1998)

Household and the Trustee abandoned whatever non-judicial foreclosure proceedings were instituted against the Baileys in 2009. Assuming that those proceedings somehow tolled the limitation period at that time, they have no further effect on the limitation period because they were abandoned and not taken through to the trustee's sale. Any argument to the contrary must be rejected. If the limitation period continues to run as if the dismissed suit had never been filed, then the limitation period should continue as if the abandoned non-judicial foreclosure had never commenced. There is no reason to treat non-judicial foreclosure proceedings differently.

Such a rule is in accord with two of the purposes of non-judicial foreclosure—insuring an efficient and inexpensive process and the promotion of stable land titles. *Bain v. Metropolitan Mortgage Group*,

*Inc.*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012) Any rule that favors a process that is delayed and repeated multiple times is not efficient and inexpensive. And lengthy delay by the beneficiary in asserting its rights does not advance stable land titles.

In short, since whatever non-judicial foreclosure process was abandoned, it can have no effect on the running of the limitation period.

d. There Is No Support in Case Law for Extension of the Limitation Period by Recording a Notice of Trustee's Sale.

Plaintiff is expected to rely on *Bingham v. Lechner*, 111 Wn.App. 118, 45 P.3d 562 (2002), and *Edmundson v. Bank of America*, 194 Wn.App. 920, 378 P.3d 272 (2016), to support its position. As a close reading of each shows, neither stands for the proposition advanced by Plaintiff here—that an abandoned non-judicial foreclosure proceeding extends the period of limitation by time during which it was pending. Each will be discussed in turn.

In *Bingham v. Lechner*, *supra*, Mr. Demopolis made loans secured by deeds of trust on real property. One was due on July 25, 1989. Mr. Demopolis pursued non-judicial foreclosure and scheduled a trustee's sale for December of 1993. He did not complete the sale even after the borrower unsuccessfully moved to restrain it. The parties then litigated

whether some or all of the notes were usurious. In 1996, the trial court entered a judgment finding that the 1989 note was not usurious but reserving whether the non-judicial foreclosure of that note should be restrained. Mr. Demopolis still took no action to foreclose. In 1999, Mr. Demopolis recorded an amended notice of trustee's sale. The trial court restrained the sale on the grounds that the underlying obligation—the note due in 1989—was barred by the statute of limitations. Mr. Demopolis appealed. The Court discussed the parties' contentions as follows:

The trial court found, and the parties agree, that the commencement of a nonjudicial foreclosure tolls the statute of limitations. Demopolis instituted his nonjudicial foreclosure on the January 1989 note in July 1993, and thereby tolled the statute of limitations. The question presented is for how long the statute was tolled. Demopolis contends that the tolling never ended and the statute of limitations never restarted. Thus, he argues, the statute of limitations did not bar him from reinstating foreclosure proceedings in 1999. The trial court concluded that the statute was tolled at most only 120 days after the originally scheduled sale date.

111 Wn.App. at 127-28 The Court then affirmed. It agreed with the trial court that an extension of the time for the trustee's sale could serve to toll for only an additional 120 days.

Critically, the Court never decided whether commencement of a non-judicial foreclosure proceeding actually tolls or stops the running of the statute of limitations. As the opinion states, it merely relied on the

parties' agreement that, as stated above, "the commencement of a nonjudicial foreclosure tolls the statute of limitations." It also did not decide the precise question presented in this case—whether the time between the recording of a notice of trustee's sale and the abandoned date of sale is added to the six year period of limitation. It simply rejected Mr. Demopolis' argument that the tolling period never ended. An opinion cannot serve as authority for a proposition that was neither raised nor decided in the case. *In re Registration of Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994); *Kucera v. Department of Transportation*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) Since *Bingham v. Lechner, supra*, did not decide the critical question presented in our case, it is not helpful authority. Moreover, it did not even decide the more basic proposition—whether a non-judicial foreclosure proceeding can ever toll or stop the running of the statute of limitations. The parties simply agreed that it did. Its holding should not guide the Court is deciding this case.

Plaintiff also cannot rely on *Edmundson v. Bank of America, supra*. In that case, the Edmundsons borrowed money from Bank of America to be repaid in monthly installments over thirty years. The obligation was secured by a deed of trust that allowed for acceleration at the holder's option. The Edmundsons failed to make any payments after November 1, 2008. They then sought bankruptcy protection and ultimately

received a discharge. In October of 2014, the successor trustee properly served a notice of default and later scheduled a trustee's sale. The Edmundsons then successfully moved to quiet title to the property and to restrain the sale on the basis that, among other things, the foreclosure was barred by the statute of limitations. The Court reversed. As is relevant here, it ruled that the statute of limitations had not run because the installment obligation had never been accelerated. 194 Wn.App. at 930-32

In the course of its discussion, the Court stated:

First, this argument is based on the incorrect premise that there was no resort to the remedies under the Deeds of Trust Act before November 1, 2014. The record plainly shows otherwise. Specifically, a written notice of default dated October 23, 2014 was transmitted by first class and certified mail to the Edmundsons. Pursuant to RCW 61.24.030(8), this notice is evidence of resort to the remedies of the Deeds of Trust Act for the defaults of the Edmundsons under this deed of trust. This preceded the running of the six-year period of the statute of limitations. That is all that is required under the circumstances of this case.

194 Wn.App. at 930 (Emphasis added) This language should be considered dictum given the underlined portion. At most, it means that if a Notice of Default is properly served and posted prior to six years from acceleration, the non-judicial foreclosure process can go forward even if the trustee's sale is scheduled after six years from acceleration. It certainly doesn't mean that time is added to the limitation period if the non-judicial foreclosure effort is abandoned.

The most sensible interpretation of both *Bingham v. Lechner*, *supra*, and *Edmondson v. Bank of America*, *supra*, was given by the Court in *Hartley v. Bank of America*, 2017 U.S. Dist. Lexis 32610 (W.D. Wash. 2017). The Court said at pages 9-11 of its ruling:

As for the notices of default issued from January 2013 to July 2014, their impact is not as sweeping as defendants suggest. Defendants rely on *Edmondson v. Bank of Am., NA*, 194 Wn.App. 920, 930, 378 P.3d 272 (2016), to argue that initiation of non-judicial foreclosure proceedings under the Deed of Trust Act satisfies the statute of limitations. Defendants are essentially arguing that a lender can sleep on its contractual rights indefinitely as long as it issues a notice of default before the statute runs. That is not an accurate statement of Washington law. In *Edmondson*, the successor trustee initiated a non-judicial foreclosure proceeding by issuing a notice of default shortly before the limitations period was to expire. The lender pursued the process set forth in the Deed of Trust Act and had scheduled a trustee's sale when the borrowers filed suit to restrain the foreclosure. 194 Wn.App. at 923-24. In that context, the court found that the timely resort to the remedies in the Deed of Trust Act "is all that is required . . . ." 194 Wn.App. at 930.

Simply sending a notice through the mail does not satisfy the statute of limitations, however. Like other types of actions aimed at resolving outstanding disputes, such efforts may toll the limitations period while they are on-going, but they are not a substitute for timely judicial action if an order of the court is ultimately needed. In *Bingham v. Lechner*, 111 Wn.App. 118, 127-31, 45 P.3d 562 (2002), for example, the court found that the initiation of a non-judicial foreclosure action tolled the statute of limitations, but only for the period of time in which the non-judicial efforts were pursued. When the lender failed to take the steps necessary to continue the sale, the statute of limitations clock restarted.

In other words, these two cases mean at most that commencement of non-judicial foreclosure proceedings will toll the statute of limitations as long as those proceedings are ongoing. They have no effect, however, if the non-judicial foreclosure effort is abandoned or discontinued, as here.

At any rate, the opinions in *Bingham v. Lechner, supra*, and *Edmondsdson v. Bank of America, supra*, did not mention or consider RCW 4.16.040 or RCW 4.16.170 in making statements concerning tolling of the statute of limitations in this context. Any suggestion in either opinion that something other than the filing and service of a lawsuit will toll a statute of limitations is subject to substantial question for that reason. Furthermore, the suggestions in each opinion made concerning tolling are quite limited. The most that can be said is, as the Court observed in *Hartley v. Bank of America, supra*, is that the limitation period is tolled only while the non-judicial foreclosure proceeding is ongoing. Such proceedings do not extend the limitation period. Just as when a case is filed and then dismissed, the abandoned non-judicial foreclosure proceeding is treated as if it never occurred.

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e. Plaintiff Did Not Effectively Commence a Non-Judicial Foreclosure Proceeding.

Plaintiff's entire argument assumes that an effective non-judicial foreclosure proceeding was in fact commenced by Household and the Trustee. Plaintiff has not come forward with evidence that this actually occurred. Since Plaintiff bears the burden of showing that the limitation period was tolled, this failure to produce evidence is fatal to its claim that non-judicial foreclosure somehow tolled or extended the limitation period.

Tolling the limitation period requires a party to complete certain procedural steps. As RCW 4.16.170 provides, these consist of filing and serving a summons and a complaint. If those steps are not properly completed, the limitation period continues to run. See, e.g., *Lund v. Benham*, 109 Wn.App. 263, 34 P.3d 902 (2001); *Banzeruk v. Estate of Howitz*, 132 Wn.App. 942, 135 P.3d 512 (2006) If filing a Notice of Trustee's Sale or other resort to non-judicial foreclosure is sufficient to toll a limitation period, then all necessary procedures must also be followed. Such a rule is sensible since the failure to comply with all procedural steps voids a trustee's sale. *Udall v. T.D. Escrow Service, Inc.*, 159 Wn.2d 903, 914-15, 154 P.3d 882 (2007)

There is support for this requirement in *Edmundson v. Bank of America, supra*, a case upon which Plaintiff relies. When the Court suggested that sending a Notice of Default toll the limitation period, it took pains to note that the Notice of Default in that case had been sent by both first class and certified mail as required by RCW 61.24.030(8) 194 Wn.App. at 930

Non-judicial foreclosure requires a number of procedural steps that must be taken at least ninety days before the sale. As relevant here, a copy of the notice of trustee's sale must be sent to the borrower/grantor by both regular mail and certified mail return receipt requested. RCW 61.24.040(1)(b)(i)(A) The mailing must include a notice of foreclosure that also complies with the statutory form. RCW 61.24.040(4)<sup>8</sup> Finally, the trustee must post the notice of trustee's sale on the premises or serve it on the occupants. RCW 61.24.040(1)(e) There simply is no evidence of timely mailing and posting of notices. There is no evidence at all of the preparation or mailing of the notice of foreclosure.

Plaintiff produced no evidence that the Notice of Trustee's Sale was properly served or posted or any evidence that a notice of

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<sup>8</sup> The relevant provision was RCW 61.24.040(2) in 2009. RCW 61.24.040 was amended by Laws of Washington 2018, Chapter 306, § 2 to renumber this subsection as (4). It will be referred to as (4) to avoid confusion.

foreclosure had ever been prepared much less served and posted. Therefore, there was no evidence that any non-judicial foreclosure proceeding was properly commenced. Plaintiff cannot rely on the Notice of Trustee Sale to toll or extend any statute of limitations for that reason.

f. The Policies Underlying Statutes of Limitation Will Not Be Served by Allowing Abandoned Non-Judicial Foreclosure Proceedings to Extend the Limitation Period.

As discussed above, statutes of limitation are enacted to protect parties and the Courts from stale claims. Allowing an abandoned non-judicial foreclosure proceeding to extend the limitation period has the opposite effect. It is anticipated that Plaintiff will argue that sending a Notice of Default extends the limitation period by stopping the limitation clock from running. This would allow a lender to accelerate an obligation, send multiple Notices of Default, and even multiple Notices of Trustee's Sale, abandon them all, and obtain numerous extensions of the limitation period. The limitation period could thus be extended for years. It would reward the lender's lack of diligence—its sleeping on its rights—in failing to follow through with the foreclosure. Such a result is not warranted.

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g. Summary.

The six year limitation period was not extended or tolled by the non-judicial foreclosure proceeding that was abandoned in 2009 for several reasons. First of all, there is no support in the applicable statutes for such a conclusion. Secondly, there is no adequate proof that the procedures required for a non-judicial foreclosure were followed. Third, the cases upon which Plaintiff bases its claim do not hold that the limitation period is extended by a non-foreclosure proceeding that is abandoned. Finally, such an extension conflicts with the policies inherent in statutes of limitation.

V. The Limitation Period Cannot Be Sufficiently Extended by RCW 4.16.230.

a. Introduction.

Plaintiff has argued that RCW 4.16.230 requires the period of limitation to be extended from the time that the Baileys filed for bankruptcy protection on September 17, 2009, until they received their discharge, on December 16, 2009. (CP 127-28; CP 239) That statute provides as follows:

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.

The Bailey's bankruptcy initiated an automatic stay of non-judicial foreclosure proceedings. This stay was subject to being lifted, but Household took no action to lift it.

Plaintiff filed its foreclosure action ninety-five days after the six year limitation period limitation expired. Since it bears the burden to show tolling, it must demonstrate that Household could not have lifted the stay within ninety-five days of the Baileys' bankruptcy filing. It produced no such evidence. Therefore, the pendency of the bankruptcy proceedings will not yield a sufficiently large enough extension of the limitation period.

b. Household Could Have Lifted the Automatic Stay.

The Baileys' bankruptcy filing operated as an automatic stay of foreclosure proceedings. As 11 U.S.C. § 362(a)(5) provides in pertinent part:

(a) . . . a petition (for bankruptcy protection). . . operates as a stay, applicable to all entities, of—

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title. . .

The automatic stay is viewed as an injunction on collection efforts. *St. Catherine's Hospital of Indiana, LL v. Family & Social Services Administration*, 800 F.3d 312, 315 (7<sup>th</sup> Cir. 2015); *Contractor's License*

*Board v. Dunbar*, 245 F.3d 1058, 1064 (9<sup>th</sup> Cir. 2001) It is also a statutory prohibition, defined as an act of forbidding by law.<sup>9</sup> Random House Unabridged Dictionary (2018) located at [www.Dictionary.com](http://www.Dictionary.com). As such, the automatic stay comes within the events that can lead to tolling under RCW 4.16.230.

The Court is required to lift the automatic stay, however, if there is no equity in the property and the property is not necessary to any reorganization. As 11 U.S.C. § 362(d)(2) says:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective organization.

(Emphasis added)

Neither Household nor the Trustee moved to lift the automatic stay. The Bankruptcy Court would have been required to grant such a request. As their petition makes clear, the Baileys had no equity in the Property. The term “equity” means the difference between the value of

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<sup>9</sup> The term “prohibition” is not defined in the statute. It must be given its plain meaning which should correspond to its dictionary definition. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009)

property and the sum of all encumbrances upon it. *Stewart v. Gurley*, 745 F.2d 1194, 1195-96 (9<sup>th</sup> Cir. 1984) The Baileys stated in their bankruptcy filing that the Property was worth \$274,000 but that it was encumbered by obligations totaling \$338,411.00. The Baileys did not seek any reorganization in their bankruptcy. They also agreed to surrender the Property. A party that surrenders property must vacate within thirty days of filing for bankruptcy protection. 11 U.S.C. § 521(a)(2) The Baileys acted on their intention to surrender by vacating the Property by no later than October 31, 2009.

If Household had requested that the stay be lifted, it would have been entitled this relief within thirty days of making its request. As 11 U.S.C. § 362(e)(1) states in part:

Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section.

In short Household had the power to lift the stay within thirty days of making a request to do so. Viewed another way, since Plaintiff bears the burden of showing tolling of the limitation period, it must come forward with evidence to show that a request to lift the stay

would not have been granted. It clearly knew of the bankruptcy filing early on since the foreclosure sale scheduled for September 18, 2009, did not go forward. No reason appears in the record as to why this motion was not made. Therefore, Plaintiff's ability to lift the automatic stay within thirty days of the Baileys' bankruptcy filing is established.

c. Tolling Under RCW 4.16.230 Must Be Limited When the Automatic Stay Can Be Lifted.

RCW 4.16.230 allows for tolling during the "the time of the continuance of the injunction or statutory prohibition." When a party has the means to end the injunction, the tolling allows by the statute should not extend beyond that time.

This result follows from the interpretation that has been given to a similar statute RCW 4.16.180. It provides as follows in pertinent part:

If the cause of action shall accrue against any person who is a nonresident of this state, or who is a resident of this state and shall be out of the state . . .such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state. . . and if after such cause of action shall have accrued, such person shall depart from and reside out of this state...the time of his or her absence...shall not be deemed or taken as any part of the time limit for the commencement of such action.

In essence, the statute provides that the period of limitation does not include the time that the defendant resides outside the State. In *Summerrise*

*v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969), the Court held that the tolling provisions of the statute would not apply when the defendant could be served with process out-of-state under RCW 4.28.185, Washington's long arm statute. It noted that the purpose of RCW 4.16.180 was to preserve a limitation period when service on the defendant was not possible. It then stated that there was no good reason to allow tolling if the non-resident defendant could nonetheless be served. 75 Wn.2d at 813-14. The Court came to a similar conclusion in *Smith v. Forty Million*, 64 Wn.2d 912, 395 P.2d 201 (1964), when it held that RCW 4.16.180 would not toll the statute of limitations against non-resident motorists who cause collisions because they can be served under the provisions of RCW 46.64.060.

As RCW 4.16.170 makes clear, filing and service are necessary to toll any limitation period. RCW 4.16.180 was enacted to deal with issues of service of process while RCW 4.16.230 addresses the inability to file suit. If tolling is unavailable when the plaintiff can serve a non-resident plaintiff, then tolling should also be unavailable when the plaintiff can take steps to lift an injunction like the automatic stay. Also, if a plaintiff is required to exercise diligence by serving a non-resident, a plaintiff should also be required to exercise diligence by seeking to lift the automatic stay. Finally, if the existence of a statutory mechanism such as

RCW 4.28.185 eliminates the tolling in RCW 4.16.180, then the statutory mechanism to lift the automatic stay should also eliminate the tolling provisions of RCW 4.16.230. There is no principled reason to differentiate between the two. Critically, interpreting RCW 4.16.230 as not requiring a plaintiff to seek relief from the automatic stay would reward a lack of diligence, an absurd result. And no statute should be interpreted to allow for an absurd result. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004)

Clearly, anything that extends a period of limitation is at odds with the policies underlying statutes of limitation discussed above. This policy concern was part of the Court's concern in *Summerrise v. Stephens*, *supra*, 75 Wn.2d at 811. This provides yet another reason for requiring a plaintiff to seek relief from the automatic stay.

Plaintiff may argue that it may have been reasonable for Household not to have moved to lift the automatic stay. But that doesn't mean that it should have the benefit of an extended limitation period when it didn't do so. That is especially true here when no reason is given for the failure of Household or Plaintiff to sue to foreclose before June of 2015.

Just as RCW 4.16.180 was not interpreted to allow tolling when a non-resident defendant could be served, the "the time of the continuance of the injunction or statutory prohibition" in RCW 4.16.230 should not

include the time that could have been avoided if the plaintiff had requested relief from the automatic stay. What is clear is that Household could have lifted the stay within ninety-five days of the Bailey's bankruptcy filing. Conversely, there is nothing in the record to show it would have been unable to do so.

d. *Merceri v. Deutsche Bank AG* Should Not Be Followed.

The Court of Appeals reached the opposite conclusion in *Merceri v. Deutsche Bank AG*, 2 Wn.App.2d 143, 408 P.3d 1140 (2018). In that case, Ms. Merceri's had filed for Chapter 7 bankruptcy protection. The parties agreed that automatic stay precluded the lender's ability to foreclose on her residence for approximately two years. The Court considered RCW 4.16.230 and concluded that the automatic stay (1) amounted to a "prohibition" that suspended the running of the limitation period; (2) that the "prohibition" remained in place even if the lender failed to move for relief from the stay; and (3) the fact that Bankruptcy Court would have been required to grant relief from the automatic stay did not affect the result. It based its ruling, at least in part, on the fact that there is nothing in RCW 4.16.230 that requires a party to attempt to remove the "prohibition" if such removal is possible. 2 Wn.App.2d at 153-54

The decision in *Merceri v. Deutsche Bank AG*, *supra*, is distinguishable on its facts. In that case, it does not appear that Ms.

Merceri surrendered her residence as the Baileys' did. She also sought foreclosure mediation under RCW 61.24.163(1) after her bankruptcy was concluded. Participants in that program must be owner occupants. RCW 61.24.165(1) By contrast, the Baileys vacated the Property by no later than October 31, 2009. This consideration is important. By their surrender and vacation, the Baileys were not able to oppose a motion to lift the stay. The same cannot be said of Ms. Merceri.

The Court's reasoning in *Merceri v. Deutsche Bank AG, supra*, should not be adopted.<sup>10</sup> The Court concluded that automatic stay is a statutory prohibition for the purposes of RCW 4.16.230. It defined the term "prohibition" in RCW 4.16.230 to mean "prohibiting by authority." 2 Wn.App.2d at 151 It ruled that the automatic stay is a prohibition even if the lender can move to lift the stay. That conclusion is simply at odds with the plain meaning of the term "prohibition." There can be no prohibition is steps can be taken to end it.

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<sup>10</sup> The Divisions of the Court of Appeals have disagreed on other issues. These include but are not limited to the trial court's jurisdiction to rule on discovery motions in the absence of a CR 26(i) conference and the disclosure that must be made when citing to an unpublished opinion. See *Case v. Dundom*, 115 Wn.App. 199, 203, 58 P.3d 919 (2002) and *Amy v. K-Mart of Washington*, 153 Wn.App. 846, 853-54, 223 P.3d 1247 (2009); *Crosswhilte v. DSHS*, 197 Wn.App. 539, 544, 389 P.3d 731 (2017), and *Karanjah v. DSHS*, 199 Wn.App. 902, 912-13, 401 P.3d 381 (2017).

The Court's decision was based in large part on the absence of anything in RCW 4.16.230 that requires a plaintiff to take action. The Court did not consider how RCW 4.16.180 has been construed.<sup>11</sup> There is nothing in the language of that statute that limits tolling to when the defendant can be served outside of Washington. Nonetheless, the Supreme Court had no difficulty in ruling that the limitation period is not tolled against non-resident motorists or any other defendant who can be served out of state.

Finally, the opinion is at odds with the policies underlying statutes of limitation and the diligence that is required of a plaintiff.

e. Summary

Had it attempted to do so, Household could have lifted the automatic stay. All the evidence it needed to do so was contained in the public record, the Baileys' bankruptcy petition. There is no showing that it could not have lifted the stay within nine-five days of the Baileys' bankruptcy filing.

VI. Recapitulation.

As has been demonstrated, the obligation was accelerated, at the latest, on June 19, 2009. Therefore, Plaintiff's foreclosure action had to be

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<sup>11</sup> From the opinion, it appears that RCW 4.16.180, *Summerrise v. Stephens, supra*, and *Smith v. Forty Million, supra*, were not brought to the Court's attention.

filed within six years, or by no later than June 19, 2015. It was filed on September 22, 2015—some ninety-five days late. The period of limitation was not extended by either the discontinued non-judicial foreclosure proceeding. The automatic stay in the Baileys’ bankruptcy filing may have extended the limitation period. However, that extension did not last ninety-five days. And RCW 4.16.230 cannot be interpreted to allow extension beyond the time that the automatic stay could have been lifted has Household chosen to do so.

Plaintiff’s Motion for Judgment on the Pleadings assumed that the obligation had been accelerated. It further argued that the limitation period was extended by both the time spent in the non-judicial foreclosure and the Baileys’ bankruptcy. The trial court erred by granting this motion. Mr. Hagen moved for summary judgment on the basis that there was acceleration in June of 2009 and that the limitation period had not been sufficiently extended. The trial court erred by denying this motion.

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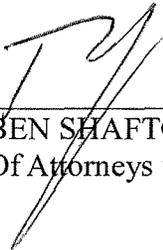
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CONCLUSION

The Order on Motions should be reversed. This matter should be remanded with directions to grant Mr. Hagen's motion for summary judgment on his counterclaim quieting his title in the Property free of Plaintiff's claim.

DATED this 11 day of June, 2018.

  
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BEN SHAFTON WSB#6280  
Of Attorneys for Jason Hagen

APPENDIX OF WASHINGTON STATUTES

RCW 4.16.080(4)

The following actions shall be commenced within three years. . .

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. . .

RCW 4.92.110

No action subject to the claim filing requirements of RCW 4.92.100 shall be commenced against the state, or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim is presented to the office of risk management in the department of enterprise services. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

RCW 4.96.020(4)

No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

RCW 46.64.060

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington. Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident: PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail: PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal

service of summons outside of this state shall relieve the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's address, if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action. The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

RCW 48.30.015(8)

(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the twenty-day period of time in (a) of this subsection.

RCW 61.24.030(3), (8)(a) – (j) as the statute read in 2009

It shall be requisite to a trustee's sale. . . :

(2) 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. . .

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default 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. . .

(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 6124.130 to contest the alleged default on any proper ground. . .

RCW 61.24.040(1)(b)(i)(A), (e) as they existed in 2009

(1) At least ninety days before the sale, the trustee shall. . .

(b) To the extent the trustee elects to foreclose its lien or interest, or the beneficiary elects to preserve its right to seek a deficiency judgment against a borrower or grantor under RCW 61.24.100(3)(a), and if their addresses are stated in a recorded instrument evidencing their interest, lien, or claim of lien, or an amendment thereto, or are otherwise known to the trustee, cause a copy of the notice of sale described in subsection (2) of this section to be transmitted by both first-class and either certified or registered mail, return receipt requested, to the following persons or their legal representatives, if any, at such address:

(i)

(A) The borrower and grantor. . .

(e) Cause a copy of the notice of sale described in subsection (2) of this section to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of said notice to be served upon any occupant of the property

RCW 61.24.040(4)

In addition to providing the borrower and grantor the notice of sale described in subsection (2) of this section, the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

NOTICE OF FORECLOSURE

Pursuant to the Revised Code of Washington,

Chapter 61.24 RCW

The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to , the Beneficiary of your Deed of Trust and holder of the obligation secured thereby. Unless the default(s) is/are cured, your property will be sold at auction on the day of .....,

RCW 61.24.163(1)

The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney. The referral to mediation may be made any time after a notice of default has been issued but no later than twenty days after the date a notice of sale has been recorded. If the borrower has failed to elect to mediate within the applicable time frame, the borrower and the beneficiary may, but are under no duty to, agree in writing to enter the foreclosure mediation program. The mediation program under this section is not governed by chapter 7.07 RCW and does not preclude mediation required by a court or other provision of law.

RCW 61.24.165(1)

RCW 61.24.163 applies only to deeds of trust that are recorded against owner-occupied residential real property of up to four units. The property must have been owner-occupied as of the date the initial contact under RCW 61.24.031 was made.

APPENDIX OF FEDERAL STATUTES

11 U.S.C. § 521(a)(2)

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title (11 USCS §§ 701 et seq.) et seq.] or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a) (11 U.S.C. § 341(a)), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title (11 U.S.C. §§ 101 et seq.), except as provided in section 362(h) [11 U.S.C. § 362(h)];

11 U.S.C. § 524(a)(2)

(a) A discharge in a case under this title (11 U.S.C. §§ 101, et seq.)—

2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . .

11 U.S.C. § 524(j)

Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

- (1) such creditor retains a security interest in real property that is the principal residence of the debtor;
- (2) such act is in the ordinary course of business between the creditor and the debtor; and
- (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

#### WASHINGTON COURT RULES

ER 602

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

CR 8(c)

**Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a non-party, fault of a non-party, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

CR 56(e)

**Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FILED  
Court of Appeals  
Division II  
State of Washington  
6/11/2018 2:25 PM

NO. 51556-3-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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U.S. BANK, N.A., AS TRUSTEE FOR LSF8  
MASTER PARTICIPATION TRUST,

Plaintiff/Respondent,

vs.

JACK W. BAILEY, an individual, *et al*,

Defendants,

JASON HAGEN, an individual,

Defendant/Appellant.

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APPEAL FROM THE SUPERIOR COURT

---

HONORABLE GREGORY GONZALES

---

DECLARATION OF MAILING

---

BEN SHAFTON  
Attorney for Defendant/Appellant  
Caron, Colven, Robison & Shafton  
900 Washington Street, Suite 1000  
Vancouver, WA 98660  
(360) 699-3001

COMES NOW Anastasiya Zavrazhina and declares under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of her knowledge, information, and belief:

1. My name is Anastasiya Zavrazhina. I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to this action.

2. On June 11, 2018, I placed a copy of this declaration and the Brief of Appellant in the mails of the United States, first class postage prepaid, and addressed as follows:

Joshua Schaer, Attorney at Law  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579

DATED at Vancouver, Washington, this 11 day of June, 2018.

  
ANASTASIYA ZAVRAZHINA

**CARON, COLVEN, ROBISON & SHAFTON PS**

**June 11, 2018 - 2:25 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51556-3  
**Appellate Court Case Title:** U.S. Bank, N.A., Respondent v. Jason Hagen, Appellant  
**Superior Court Case Number:** 15-2-02626-1

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