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No. 354237

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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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FIBIA AND RADU BAHNEAN,

Plaintiffs and Counterclaim Defendants-Appellants,

v.

HSBC BANK USA, N.A., AS TRUSTEE FOR DEUTSCHE  
ALT-A SECURITIES INC. MORTGAGE LOAN TRUST,  
MORTGAGE PASS-THROUGH CERTIFICATES SERIES  
2006-AR,

Defendant and Third-Party Plaintiff-Respondent.

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**ANSWERING BRIEF OF RESPONDENT HSBC BANK  
USA AS TRUSTEE**

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**I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

This litigation arises out of Plaintiffs Fibia and Bahnean's (the "Bahneans") misguided attempt to obtain title to their Property free and clear of a mortgage lien, despite their admitted default, by filing a Complaint for Quiet Title and Declaratory Judgment. The Trust responded to their lawsuit by filing a Counterclaim and Third-Party Complaint for Judicial Foreclosure based on the Bahneans' failure to pay their loan, which is due for the March 2009 installment. The crux of the Bahneans' Complaint was that the Trust is time-barred from collecting loan payments from the Bahneans under a six-year statute of limitations for breach of a written contract, RCW 4.16.040. The Trial Court rejected this argument, finding, in part, that the Note is a negotiable instrument governed by Article 3 of the Uniform Commercial Code ("UCC"), as adopted in Washington. Under the UCC, codified as RCW 62A.3-118(a), the Trust was only precluded from obtaining installment payments due more than six years prior to the filing of the Trust's foreclosure complaint, but it was not precluded from foreclosing on the remainder of the amounts due on the loan. After rejecting the Bahneans' statute of limitations argument, the Trial Court granted summary judgment on the Trust's foreclosure claim, without further objection by the Bahneans.

On appeal, the Bahneans argue without citation to authority that the note at issue in this case was not a negotiable instrument, in spite of the clear Washington precedent analyzing similar notes and finding that they are negotiable. They therefore conclude that the Trial Court erred in applying RCW 62A.3-118(a), the statute of limitations for negotiable instruments, and should have instead applied RCW 4.16.040, the statute of limitations for written contracts. The Bahneans also raise novel theories unsupported by any authority, asserting (1) that the parties' contract required the statute of limitations period to start earlier than the relevant statute would otherwise dictate and (2) that the Trial Court should have rejected over 100 years of Washington case law in deciding how to apply the statute of limitations.

The arguments are woefully unsupported. The Table of Authorities for the Bahneans' Opening Brief lists only two cases, (Opening Br. at ii), one of which the Bahneans admit this Court would need to reject or distinguish. (Opening Br. at 1.) On review, this Court should affirm. The note at issue is clearly a negotiable instrument, and the language of RCW 62A.3-118(a) and cases interpreting it are clear that the provision is applicable to negotiable instruments. Under RCW 62A.3-118(a), the statute of limitations on an installment note runs individually from the date that each installment payment is due, and does not run on

the entire note when there is a missed payment *unless* the lender *chooses* to accelerate the note, which did not occur here.

Moreover, even if RCW 4.16.040 applied to the parties' contract, the result would be the same because Washington courts interpret the statute as providing a limitations period with regard to the due date for each installment payment. Therefore, it is irrelevant which statute is applied. Under either statute, the Trust was entitled to foreclose on the note for the bulk of the amounts due under it. This Court should affirm.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the Trial Court correctly determine that the Note executed by the Bahneans was a negotiable instrument, and therefore the statute of limitations set forth in the UCC for negotiable instruments, RCW 62A.3-118(a), applied?

2. Did the Trial Court correctly determine that the statute of limitations did not preclude enforcement of the Note, but only precluded the Trust from collecting on installment payments that came due more than six years prior to the Trust's foreclosure action?

3. Was a question of fact raised as to whether the Bahneans reaffirmed the debt they owed through their written correspondence sent in 2014 to the servicer of the loan?

4. Is the Trust entitled to attorney fees for defending this appeal?

As explained below, each of these questions is answered in the affirmative and this Court should uphold the Trial Court's ruling.

### **III. COUNTERSTATEMENT OF THE CASE**

The underlying facts and procedure pertinent to this appeal are as follows:

#### **A. The Bahneans Take Out a Loan to Purchase Property**

On or about October 23, 2006, the Bahneans executed a promissory note ("Note") in favor of Greenpoint Mortgage Funding, Inc., secured by a deed of trust ("Deed of Trust")<sup>1</sup> encumbering real property the Bahneans had purchased two years earlier, located at 132 Hyak Drive, Snoqualmie Pass, Washington (the "Property"). (CP 44, ¶¶ 7-8; CP 257, ¶ 7.)<sup>2</sup> The Loan was obtained for the purpose of paying off debt incurred to build a structure on the Property. (CP 253 at 15:15-16:2.) Pursuant to the terms of the Note, the Bahneans agreed to pay \$490,000.00, plus interest, in monthly installments, beginning on December 1, 2006, for a term of 30-

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<sup>1</sup> Collectively, the Note and Deed of Trust are referred to as the "Loan" or the "Loan Documents."

<sup>2</sup> The address reflected in the Deed of Trust for the Property has now changed to 183 East Hyak Drive, Snoqualmie Pass, Washington. (CP 44, ¶ 5.)

years. (CP 257, ¶ 6; CP 270, §§ 1, 3.) The maturity date of the Note is November 1, 2036. (*Id.* § 3.)

With regard to failure to pay under the Note, the Note stated explicitly: “If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.” (CP 104, ¶ 7(B).) The Note also advised the Bahneans that if they were in default, the Note Holder “may require [the Bahneans] to pay immediately the full amount of Principal that has not been paid and all the interest that [the Bahneans] owe on that amount,” and that the failure to accelerate the Loan in this fashion did not waive the Note Holder’s right to do so at a future date. (CP 104 § 7).

Similarly, the Deed of Trust stated the following about the Trust’s remedies and right to accelerate, in bold text:

**22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument 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, the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale,**

**and any other matters required to be included in the notice by Applicable Law. If the default is not cured on or before the date specified in the notice, Lender at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.**

(CP 60, § 22.) In sum, both the Note and the Deed of Trust provided that in the event of default, the note holder would give notice to the borrower of the default and the holder's intent to accelerate the Loan if the default was not cured. (*Id.*) If the default was not cured by the date provided to cure, the holder, "at its option," could then accelerate the loan by "requir[ing] immediate payment in full of all sums" due. (*Id.*)

The Loan was subsequently transferred to the HSBC Bank USA, N.A., as Trustee for the Deutsche Alt-A Securities Inc. Mortgage Loan Trust, Mortgage Pass-through Certificates Series 2006-AR (the "Trust"), and Ocwen Loan Servicing, LLC, became the servicer of the Loan. (CP 36 at 4-16; CP 96 ¶ 1; CP 99, ¶ 11.)

**B. The Bahneans Default on the Loan and File for Bankruptcy**

It is undisputed that the Bahneans fell into default under the terms of the Note and Deed of Trust. There is a factual dispute regarding the

date of default: the Bahneans initially stated in their pleadings below that they fell into default by failing to pay their monthly obligation beginning with the September 2008 installment, (CP 19, ¶ 14), but they later submitted evidence stating they became delinquent on the Loan on July 23, 2008. (CP 44 ¶ 10.) At the time this dispute arose, Ocwen's records established that the Bahneans were currently due for the March 2009 installment. (CP 257, ¶ 9.)

As noted above, pursuant to the Deed of Trust, the Trust had the option to accelerate the loan following the Bahneans' default, calling for all amounts due and owing under the Note and secured by the Deed of Trust. (CP 121, § 22.) However, the Trust did not opt to accelerate the Loan. (CP 99, ¶ 13.)

On July 31, 2009, the Bahneans voluntarily filed for Chapter 7 bankruptcy in the United States Bankruptcy Court, Western District of Texas. (Compl., pp. 2-3.) On October 28, 2009, an order was entered granting the Bahneans a discharge under the Bankruptcy Code. (*Id.* at 2.)

**C. A Notice of Default is Issued and the Bahneans File a Lawsuit to Stop Foreclosure Efforts; the Trust Counterclaims for Foreclosure**

On June 4, 2014, Ocwen sent a notice of default ("Notice of Default") to the Bahneans regarding their Loan. (CP 99, ¶ 13; CP 137-142.) The Notice of Default advised the Bahneans of the default, the

actions and deadlines to cure the default, and that failure to cure the default could result in acceleration of the Loan, and foreclosure. (CP 99, ¶ 13; CP 137-142.) The Notice of Default itself did not accelerate the Loan, but only warned that failure to cure may result in acceleration and/or foreclosure. (CP 99, ¶ 13; CP 139.) Pursuant to the Notice of Default, as of June 4, 2014, the total arrears under the Loan was \$164,614.56, rather than the entire amount due under the \$490,000.00 loan. (CP 99, ¶ 13; CP 138.)

On October 28, 2014, Ocwen received written correspondence from the Bahneans, dated October 21, 2014 (“2014 Letter”). (CP 99, ¶ 14; CP 144-145.) The 2014 Letter is signed by both Radu and Fibia Bahnean (CP 145) and references the mortgage loan number assigned by Ocwen to the Bahneans’ Loan. (CP 99, ¶ 14.) Notwithstanding their 2009 Bankruptcy Discharge and failure to make any payments for years, the Bahneans expressed concerns in the Letter that their mortgage payments may not have been properly applied to their mortgage account. (CP 144.) The 2014 Letter did not state that the Bahneans disputed the existence of the Loan; instead, it stated they disputed the *amount* of the Loan. The letter said in the opening paragraph: “We are making this request because we have received statements indicating that the mortgage is in default. We dispute the amount alleged to be due and owing and believe that

certain payments may not have been properly credited to the account.” (CP 144.) The 2014 Letter then noted that a Chapter 7 Bankruptcy had been filed on July 31, 2009, and requested a breakdown of the amount of monthly principal and interest due on that date and thereafter. (CP 144.) The Bahneans requested other information about the loan, including “[t]he total unpaid principle, interest and escrow balances due and owing as of October 21, 2014.” (*Id.*) The 2014 Letter also asked if the Note had been accelerated and the date of acceleration. (CP 145.) Nowhere in the 2014 Letter did the Bahneans state they disputed the Loan or did not plan to pay the Loan. (CP 144-145.)

Nonetheless, on March 9, 2015, the Bahneans filed the underlying action, seeking a judgment to quiet title to the Property pursuant to RCW 7.28.300<sup>3</sup> and requesting a declaration that the Deed of Trust had expired and the Trust had no right to the Property or right to foreclose. (CP 1; 3-4.) The Trust appeared in the case and subsequently filed an Answer, Affirmative Defenses, Counterclaim, and Third-Party Complaint for Judicial Foreclosure. (CP 11-24.)

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<sup>3</sup> RCW 7.28.300 provides that 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 of sufficiency to satisfy the court, may have judgment quieting title against such lien.”

**D. The Trial Court Rules that the Statute of Limitations Has Not Run on the Note and Enters a Judgment of Foreclosure**

On August 10, 2015, the Bahneans filed a Motion for Summary Judgment, arguing that the statute of limitations entitled them to quiet title to the Property and to dismissal of the Trust's foreclosure action. (CP 34-42.) According to the Bahneans, they had last made a payment on the underlying debt on June 23, 2008 (CP 44, ¶ 9), and the failure of the Trust to sue on the Note or foreclose during the six years following that date now precluded their ability to do so pursuant to RCW 4.16.040(1), which the Bahneans argued was the relevant statute of limitations. (CP 38-39.) The Motion further argued that the Bahneans' October 21, 2014 letter to Ocwen did not reinstate or acknowledge the Loan, which would reset the statute of limitations. (CP 39-40.)

In support of the Motion, Radu and Fibia Bahnean each filed a declaration attesting to the date of their default and declaring that their 2014 Letter was not intended to acknowledge the debt, but merely to "dispute and understand, post-bankruptcy, the amount of the debt which they had successfully avoided." (CP 44, ¶¶ 9, 15-18; CP 76, ¶¶ 9, 14-17.) The Bahneans were deposed the following month, and the assertions in their declarations contradicted their sworn deposition testimony. In her deposition taken September 11, 2015, Fibia Bahnean testified that the

letter was prepared by her attorney and she did not know why the letter was prepared except that it was in response to correspondence from the servicer, and she did not know why any specific question in the letter was asked. (CP 184:18-21; CP 184:24-185:7; CP 185:23-186:25.) In Radu Bahnean's deposition, he testified that he could not recall the 2014 Letter, could not recall any communications with Ocwen, did not even know who Ocwen was, did not recall if he had concerns about how his mortgage payments were applied, and could not even recall signing the declaration submitted in support of his Motion for Summary Judgment. (CP 177:15-16; 178:12-179:3; 179:17-19.) Moreover, Mr. Bahnean was asked to examine the statement in his declaration that he "never intended to acknowledge any debt to HSBC via our 10/21/14 letter; [but] merely sought to dispute and understand, post-bankruptcy, the amount of the debt which we had successfully avoided." (CP 179:12-180:9.) Reviewing that sentence, Mr. Bahnean was asked if he could explain what he meant by that sentence. (CP 180:8-9.) He testified, "No, I can't. Because I can't understand it. I can't understand what's written here." (CP 180:10-11.)

Defendants opposed the motion and submitted the declaration of an Ocwen representative in support, arguing that under Washington law, the statute of limitations on negotiable instruments and installment contracts does not start to run until maturity or acceleration of the Loan;

that the Loan did not mature until 2036 and had not been accelerated; and that the 2014 Letter was a clear acknowledgment of the debt that reset the statute of limitations. (CP 81-93.) The Declaration submitted by Ocwen indicated that, as of the date of the declaration, the Trust had not yet elected to accelerate the Loan. (CP 99, ¶ 13.)

On November 10, 2015, the Trial Court entered an Order Partially Granting and Partially Denying Plaintiffs' Motion for Summary Judgment. (CP 199-203.) The Trial Court found that the maturity date of the Note was November 1, 2036 and found that the Bahneans defaulted under the terms of the Note and Deed of Trust by failing to perform their monthly payment obligations beginning with the September 2008 installment. (CP 201, ¶¶ 2, 4.) The Court also concluded that the Loan had not yet been accelerated. (CP 202, ¶ 5.) Based on these findings, the Trial Court held that: (1) the Note was a negotiable instrument governed by Article 3 of Uniform Commercial Code, as adopted in Washington, and as such, RCW 62A.3-118(a) sets forth the applicable statute of limitations which governs the Trust's ability to enforce the Note and Deed of Trust; (2) The Trust was not precluded from enforcing the Note and Deed of Trust by the statute of limitations because the Loan had not been accelerated and the debt did not mature until November 1, 2036; and (3) the Bahneans' Declaratory Relief and Quiet Title claims failed as to all payments coming

due after February 15, 2009, because an action to enforce the obligation of the Bahneans as to all other payments was not time barred under the statute of limitations. (CP 202, ¶¶ 1-4.) The Counterclaim and Third-Party Complaint filed by the Trust was otherwise timely filed prior to the expiration of the limitations period with respect to all payments due after February 15, 2009 under the Bahneans' Loan. (CP 202-203, ¶ 4.)<sup>4</sup>

In light of this Order, the Trust moved for summary judgment on March 30, 2017. (CP 204.) The Trust established that its counsel was in possession of the original Note and Deed of Trust on behalf of the Trust (CP 257, ¶ 8; CP 233, ¶ 1) and that the Note contained a blank endorsement. (CP 275.) Per the Trial Court's earlier order, the Trust adjusted its calculation of the total owed on the debt to remove payments coming due prior to February 15, 2009. (CP 207; CP 257-258, ¶ 9.) At the time of the Motion for Summary Judgment, the current unpaid principal balance of the loan was \$490,000.00 and the total debt calculated

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<sup>4</sup> Due to the Bahneans' failure to secure a transcript, the record is not clear how the Court reached the February 15, 2009 date. The Trust filed its counterclaim for foreclosure on May 15, 2015. (*See* Case No. 15-2-00062-7, Doc. 4.) However, the Trial Court did not preclude recovery on payments due prior to May 15, 2009 (six years prior to the date of filing for foreclosure), but instead precluded recovery on installment payments due prior to February 15, 2009. Presumably, the Court found that the statute of limitations was tolled three months by the Bahneans' bankruptcy, which lasted from their petition on July 31, 2009 to discharge on October 28, 2009. (CP 2, ¶¶ 10-11). This is consistent with the law in Washington. *See Merceri v. Deutsche Bank Ag*, 408 P.3d 1140, 1146 (2018) (finding the filing of a Chapter 7 Bankruptcy Petition tolled the six year limitations period for foreclosing on a deed of trust.)

due as of March 30, 2017, was \$689,329.21. (CP 258, ¶ 9; CP 307.) The Court granted summary judgment. (CP 326-330.) On June 2, 2017, the Court entered a Judgment and Decree of Foreclosure for the total amount of \$689,329.21, with post-judgment interest. (CP 331-336.)

**E. The Bahneans' Appeal**

The Bahneans filed a Notice of Appeal on June 30, 2017. (CP 337.) On appeal, the Bahneans contend the Trial Court erred in applying RCW 62A.3-118(a) rather than RCW 4.16.040. (Opening Br. at 7.) They also argue that even if RCW 62A.3-118(a) was the correct statute to apply, the Trial Court failed to apply the statute correctly because under the plain language of the Note, the statute of limitations on all amounts due under the Note should have run from the date of the Bahneans' first default under the Note. (Opening Br. at 3, 7.) The Bahneans also argue that this case is distinguishable from common law cases providing that the statute of limitations only applies to each installment as it comes due because the plain language of the note places the Bahneans in default as to the entire note when a monthly payment is due on the note. (*Id.*)<sup>5</sup>

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<sup>5</sup> The Bahneans' Opening Brief contains assignments of error asserting that there was a genuine issue of material fact whether the Trust was the holder of the Note, and that discovery should have been allowed before granting summary judgment. (Opening Br. at 1-2.) However, the Bahneans make no argument about these issues and provide no citation to authority in the Argument section of their Brief, and on conferring with the Bahneans' counsel, he has agreed that these were not intended assignments of error. The assignments of error specified in the Opening

#### IV. STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 698, *rev. den.*, 181 Wn. 2d 1008 (2014). Summary judgment is appropriate where there is no genuine issue of material fact. *Id.* Although the moving party has the initial burden of showing there is no issue of material fact, once this is accomplished, the burden shifts to the non-moving party to show why summary judgment should not be granted. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989).

Additionally, this Court may affirm a summary judgment order on any ground supported by the record, even if it was not the ground relied on by the trial court. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453 (2011).

#### V. ARGUMENT

The Trial Court's grant of summary judgment in this case was not in error. The Trial Court correctly found that RCW 62A.3-118(a) was the relevant statute of limitations applicable to the Note, and correctly applied the statute, determining that the statute had not run as to the entire debt,

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Brief at pages 1-2 are therefore mistaken and waived. RAP 9.12; RAP 10.3(a)(6); *Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn.App. 258, 265-66, 268 P.3d 958 (2011); *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008).

but only to installment payments due more than six years before the foreclosure litigation and bankruptcy tolling period. The Bahneans can provide no reasoned argument or authority supporting their claim that RCW 62A.3-118(a) does not apply or that the language of the Note precludes the normal application of the statute. Further, even if the Bahneans are correct that RCW 4.16.040 applies instead of RCW 62A.3-118(a), the distinction is immaterial because both statutes apply individually to each installment payment due on a loan as that payment comes due; therefore, application of RCW 4.16.040 does not change the result in this case.

**A. The Trial Court Correctly Determined RCW 62A.3-118(a) was the Applicable Statute of Limitations and Correctly Applied the Statute**

On appeal, the Bahneans argue that RCW 62A.3-118(a) is not the correct statute of limitations applicable to the instant action because the Note is not a negotiable instrument. They further argue that even if RCW 62A.3-118(a) applies, language in the Note compels a determination that the statute of limitations has passed. A review of the Uniform Commercial Code (“UCC”) provisions on negotiability and the statute of limitations, Washington law discussing the same, and the language in the Note reveal that none of these arguments have merit.

1. The applicable limitations period is codified in RCW 62A.3-118(a)

The crux of Plaintiffs' appeal is their argument that the six-year statute of limitations set forth in RCW 4.16.040 applies to the Note and Deed of Trust, rather than the six-year statute of limitations provided in RCW 62A.3-118(a). Their argument is unavailing. Although RCW 4.16.040 purports to apply to any "action upon a contract in writing," Washington Code clarifies that the limitations periods set forth in Chapter 4.16 apply "*except* when in special cases a different limitation is prescribed by a statute not contained in this chapter . . . ." RCW 4.16.005 (emphasis added). Here, the special limitations period for negotiable instruments is provided in the UCC.

Specifically, Article 3 of the UCC, set forth in the Revised Code of Washington, Chapter 62A, governs negotiable instruments, which includes promissory notes. *Alpacas of America, LLC v. Groome*, 179 Wn. App. 391, 396, (2014); RCW 62A.3-102(a). Among the controlling UCC provisions is a special statute of limitations for negotiable instruments, RCW 62A.3-118(a). That statute provides that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note

or, if a due date is accelerated, within six years after the accelerated due date.” RCW 62A.3-118 (emphasis added).

2. The Bahneans’ Note is a negotiable instrument and the Bahneans raise no credible argument to the contrary

On appeal, the Bahneans contend that RCW 62A.3-118 does not apply because the Note is not a negotiable instrument. (Opening Br. at 9-11.) The argument contradicts, without authority, numerous Washington decisions finding that a promissory note secured by a deed of trust, such as the standard note in this case, is a negotiable instrument.<sup>6</sup> The following provides an overview of the authorities regarding negotiability of the Note, and discusses the Bahneans’ various arguments against negotiability.

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<sup>6</sup> See *Brown v. Washington State Dep’t of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771, 777 (2015) (“The promissory note at issue in this case is a negotiable instrument governed by article 3 of the UCC.”) See also *JP Morgan Chase Bank, N.A. v. David Morton, et al.*, No. 49846-4-II, 2018 WL 1505501, at \*2 (Wash. Ct. App. Mar. 27, 2018) (unpublished) (considering note and deed of trust in foreclosure case before it and noting it is a negotiable instrument subject to Chapter 62A.3 RCW); *N. W. Mortgage Inv’rs Corp. v. Slumkoski*, 3 Wn. App. 971, 972, 478 P.2d 748, 749 (1970) (same); *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 332, 387 P.3d 1139, 1146 (2016), review denied sub nom. *Bucci v. Nw. Tr. Servs.*, 188 Wn.2d 1012, 394 P.3d 1011 (2017) (rejecting borrowers’ argument that note secured by deed of trust was not a negotiable instrument.); *Manning v. Mortgage Elec. Registration Sys., Inc.*, No. 73908-5-I, 196 Wn. App. 1043, 2016 WL 6534890, at \*5 (2016) (unpublished) (same).

*a. Washington authorities confirm that the Bahneans' Note is a negotiable instrument*

The Bahnean Note accurately states that it “is a uniform instrument with limited variations in some jurisdictions.” (CP 103, § 11.) *OneWest Bank, FSB v. Nunez*, 193 So. 3d 13, 14 (Fla. Dist. Ct. App. 2016) (noting same form of note is used across the country). Washington code and case law is clear that promissory notes such as the instant one are negotiable instruments. Under RCW 62A.3-104, a negotiable instrument is defined as:

“[A]n unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

- (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) Is payable on demand or at a definite time; and
- (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.”

RCW 62A.3-104(a)(1)-(3). Revised Code of Washington 62A.3-106 further clarifies that, for the purpose of negotiability, a promise or order is considered unconditional “unless it states (1) an express condition to payment, (ii) that the promise or order is subject to or governed by another

writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. **A reference to another writing does not of itself make the promise or order conditional.**” RCW 62.3-106(a) (emphasis added). Further, RCW 62A.3-106(b) explicitly provides “[a] **promise or order is not made conditional . . . by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration . . .**” (emphasis added.) Accordingly although a negotiable instrument must in general be an unconditional promise to pay, without further commitments, the Note is allowed to cross-reference other writings that describe commitments with regard to collateral, prepayment, or acceleration. RCW 62.3-106(a); RCW 62A.3-106(b).

“Negotiability is determined from the face, the four corners, of the instrument at the time it is issued without reference to extrinsic facts.” *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 329, 387 P.3d 1139, 1145 (2016), *review denied sub nom. Bucci v. Nw. Tr. Servs.*, 188 Wn.2d 1012, 394 P.3d 1011 (2017). The Note here is clearly a negotiable instrument. The Note sets forth the Bahneans’ unconditional promise to pay \$490,000, plus interest, to GreenPoint Mortgage Funding, Inc. (CP 102, § 1.) Moreover, the Note is payable upon a definite time, November 1, 2036, the date of maturity. (CP 102, § 3.) Finally, the Note does not set forth

any other undertaking or instruction that would render the Note non-negotiable. (*See generally* CP 102-106.)

Indeed, a very similar note was analyzed by the Washington Court of Appeals, Division I, in the *Bucci* case. *See id.* at 321-323. The note was described in detail by the court and contained many of the same provisions as the instant Note, such as a preamble in capital letters explaining that the note was adjustable;<sup>7</sup> a section containing a promise to pay a specified amount plus interest;<sup>8</sup> and a section “explain[ing] that the interest rate charged is subject to change on a monthly basis and determined by adding [specified] percentage points to the ‘index.’”<sup>9</sup> The note in *Bucci* appears to have been nearly identical to the instant Note, except the Note in this case does not contain a provision for negative amortization and accelerated amortization, which was the disputed provision in *Bucci* that caused appellant to claim the note was non-negotiable. *Id.* at 322-323, 331-332. The *Bucci* Court disagreed, finding the note provided an unconditional promise to pay a fixed amount plus any amounts added pursuant to the clear terms of the note, and therefore qualified as a negotiable instrument. *Id.* at 332.

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<sup>7</sup> Compare *id.* at 321-322 to CP 102.

<sup>8</sup> Compare *id.* at 322 (discussing Section 1) with CP 102, §1.

<sup>9</sup> Compare *id.* at 322 (discussing sections 4(A) through (C) with CP 103 ,§ 4(A)-(C)).

Examination of the Note in this case should lead the Court to arrive at the same result. The “note concerns only [the Bahneans] obligation to pay money and no other performance.” *Djigal v. Quality Loan Serv. Corp. of Washington, Inc.*, No. 47595-2-II, 196 Wn. App. 1038, 2016 WL 6216252, n. 10 (2016) (unpublished). The Note contains an unconditional promise to pay a fixed amount, plus interest. (CP 102, § 1.) While the Note provides further details about how to make those payments, how interest is calculated, and other details a Note holder would need to know what his rights are under the Note, the Bahneans fail to point to any conditions on payment within the Note.

Instead, the Bahneans argue that the Note is not a negotiable instrument because it is subject to “additional writing[s]” prohibited by RCW 62A.3-104(a)(3). (Opening Br. at 9.) However, “[a] reference to another writing does not of itself make the promise or order conditional,” *Bucci*, 197 Wn. App. at 331, and the writings the Bahneans cite are not problematic.

*b. Section 11 of the Note, cross-referencing the Deed of Trust, does not render the Note non-negotiable*

The Bahneans argue that the Note’s language cross-referencing the Deed of Trust imports all of the conditions set forth in the Deed of Trust into the Note, imposing new obligations on the Bahneans in addition to the

obligation that they pay the Note. (Opening Br. at 10.) This argument was rejected more than 100 years ago by the Washington Supreme Court, in *Bright v. Offield*, 81 Wash. 442, 446–47, 143 P. 159, 161 (1914). There, the Court held that “a mortgage securing a note, though referred to in the note, but without expressly adopting its conditions, is merely ancillary to the note, and the conditions found in the mortgage alone will not change the character of the note as a negotiable instrument. The promise to pay is held to be a distinct agreement from the mortgage, and if couched in proper terms, the note is negotiable.” *Id.* (citing Rem. & Bal. Code, § 3394; case citations omitted.) *See also Bank of California v. Nat'l City Co.*, 138 Wash. 517, 524, 244 P. 690, 693 (1926), *modified sub nom. Bank of California, N.A. v. Nat'l City Co.*, 141 Wash. 243, 251 P. 561 (1926) (“We are of the opinion that this general reference, by the language of the bonds, to the mortgage does not have the effect of importing into the bonds any of the provisions of the mortgage as affecting the negotiability of the bonds.”)

Here, the section the Bahneans complain of is Section 11 of the Note, entitled “UNIFORM SECURED NOTE.” (CP 105.) The section states that –

[i]n addition to the protections given the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note,

protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows.

(CP 105 § 11.) The Note then recites possible conditions in the Deed of Trust, noting that the Deed of Trust may contain a provision indicating that if any part or interest in the Property is sold or transferred without the Lender’s consent, Lender may require immediate payment in full” (CP 105 § 11(A)) or it may contain a provision allowing the assumption of the loan by the new transferee. (CP 105 § 11(B).)

As required under *Bright v. Offield*, Section 11 of the Note does not adopt the conditions itself in the Deed of Trust, but simply refers to the possible conditions. (CP 105.) Section 11 “is standard in mortgage notes across the country.” *OneWest Bank, FSB*, 193 So. 3d at 14. Although not explicitly discussed by Washington courts, numerous courts in other jurisdictions have analyzed Section 11 and determined that it does not destroy the negotiability of the Note. *See In re AppOnline.Com, Inc.*, 290 B.R. 1, 11–12 (Bankr. E.D.N.Y. 2003) (holding inclusion of acceleration language like that in Section 11 does not destroy negotiability); *OneWest Bank, FSB*, 193 So. 3d 13 at 15 (agreeing with other authorities “that Section 11 of the note refers to the mortgage for a ‘statement of rights with

respect to . . . acceleration’ [under the Florida corollary to RCW 62A.3-106] and thus does not render the note nonnegotiable.”); *Mesina v. Citibank, NA*, ADV 10-2304 RTL, 2012 WL 2501123, at \*2 (Bankr. D.N.J. Jun. 27, 2012) (“I find that paragraph 11 is a statement with respect to collateral and acceleration that is specifically permitted by section 3–106(b) of the UCC and does not destroy negotiability.”) *Deutsche Bank Natl. Tr. Co. v. Najar*, No. 98502, 2013 WL 1791372, at \*12 (Ohio Ct. App. Apr. 25, 2013) (unpublished) (determining Section 11 does not render note nonnegotiable and referencing the Ohio corollary to RCW 62A.3-106(b) in support). These Courts note that Section 11 is specifically allowed under the Uniform Commercial Code provision stating that a note is not rendered conditional (and non-negotiable) “by reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration . . . .” RCW 62A.3-106(b).

The Bahneans argue inexplicably that Section 11 is not related to a “requirement to *maintain the value* of the collateral.” (Opening Br. at 11) (emphasis added). But RCW 62A.3-106 is not limited only to provisions about maintaining the value of collateral; rather, its scope is broader, pertaining to provisions about “collateral, prepayment, or acceleration.” RCW 62A.3-106(b). Here, Section 11 falls squarely within RCW 62A.3-106, as it pertains both to ensuring that the collateral will remain available

in the event of default (rather than potentially being transferred away to a bona fide purchaser) and to acceleration rights. Therefore, under both Washington Code and the numerous authorities analyzing Section 11, it is clear that Section 11 does not render the Note non-negotiable. The Bahneans fail to provide any authorities to the contrary.

*c. Riders to the Deed of Trust do not render the Note non-negotiable*

Defendants also contend a “Second Home Rider” and “Adjustable Rate Rider” render the Note non-negotiable. Both riders are attached to the Deed of Trust, not the Note. (*See* CP 125 (stating rider “shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed.”); CP 133 (same).) The Uniform Commercial Code allows a note to be subject to a deed of trust (RCW 62A.3-104(3)) and, as discussed above, the fact that there are extra conditions in a deed of trust does “not change the character of the note as a negotiable instrument.” *Bright*, 81 Wash. at 446–47.

Further, as to the Adjustable Rate Rider, Washington Courts have explicitly held that the existence of an adjustable rate does not obviate negotiability of the Note. *Bucci*, 197 Wn. App. at 330. The Bahneans fail to explain how the rider is problematic, and this Court should therefore not consider the argument. *Saviano v. Westport Amusements, Inc.*, 144 Wn.

App. 72, 84, 180 P.3d 874, 879 (2008) (“We do not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority.”) *See also* RAP 10.3(a)(6).

As to the Second Home Rider, the rider falls within the clear direction of RCW 62A.3-106(b) that a promise is not rendered non-negotiable by reference to another writing for a statement of rights with respect to collateral. *See also* RCW 62A.3-104(a)(3) (acknowledging that a Note may contain or refer to an undertaking to “give, maintain, or protect collateral to secure payment.”)<sup>10</sup>

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<sup>10</sup> *See also Barker v. Sartori*, 66 Wn. 260, 264-65, 119 P. 611 (1911) (“[The note and mortgage] may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt, and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms, such as the payment of taxes, the insurance of the houses, and the like. While the two instruments will be construed together wherever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which, ordinarily, is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may disregard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, will cut no figure.”) (internal citations omitted.)

3. Pursuant to the undisputed terms of the Note and Deed of Trust, as well as RCW 62A.3-118, the statute of limitations has not passed

Because the Note is a negotiable instrument, it is governed by the statute of limitations set forth in the Uniform Commercial Code, as codified in RCW 62A.3-118. Pursuant to the provision, and subject to exceptions not applicable here, “an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within **six years after the due date or dates stated in the note** or, if a due date is accelerated, within six years after the accelerated due date.” RCW 62A.3-118 (emphasis added). The Note at issue here was “payable at a definite time” because the Note set forth the schedule for each payment, which was “on the first day of every month, beginning on December 1, 2006.” (CP 102 § 3(A).) RCW 62A.3-108(b). The Note had not been accelerated at the time of the litigation, and the Bahneans make absolutely no argument to the contrary in their Opening Brief.

Accordingly, the applicable limitation period for each payment due under the Note is six years from the “due dates stated in the [N]ote.” RCW 62A.3-118(a). The Trust filed its foreclosure claim on May 15, 2015, and the statute of limitations was tolled three months during the Bahneans’ bankruptcy. *Merceri v. Deutsche Bank Ag*, 408 P.3d 1140, 1146 (2018) (finding the filing of a Chapter 7 Bankruptcy Petition tolled

the six year limitations period for foreclosing on a deed of trust.) Accordingly, the Trial Court's decision that the Trust could seek installment payments that became due after February 15, 2009 was correct under the statute of limitations. *See Peterson v. Groves*, 111 Wn. App. 306, 44 P.3d 894 (2002) (determining statute of limitations ran from due date under the note.)

4. The Bahneans' argument that the statute of limitations has passed under RCW 62A.3-118(a) due to language in the Note has no merit

The Bahneans make an alternative argument that, even if RCW 62A.3-118(a) applies, the Note's language indicates that the Bahneans were in default on the entire Note the first time they failed to make a payment on it, and therefore the entire Note was due on the date of their default. (Opening Br. at 12.) In support, they cite the Note provision stating, "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default," (CP 104 ¶ 7(B)), and argue that the default date is the date of accrual for the statute of limitations.

The Bahneans fail to cite a single case or other authority in support of their theory that the date of default is the date of accrual for the statute of limitations, and it is not supported by the plain language of the statute. RCW 62A.3-118(a) does not say that an action on a note must be commenced within six years of default, it states that the action must be

“commenced within six years after the **due date or dates stated in the note,**” or within six years of the date of acceleration. (emphasis added.) The default date for one payment does not alter the due date for other payments, and the Bahneans provide no authority or reasoned argument why this would be the case.

Although it is true that the Note allows the lender, at its option, to accelerate a debt and then sue for the entire debt, Washington law is clear that “[d]efault in payment alone does not work an acceleration.” *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 931-32, 378 P.3d 272, 278 (2016) (quoting *A.A.C. Corp. v. Reed*, 73 Wn. 2d 612, 616, 440 P.2d 465 (1968)). Rather, “[u]nder the plain terms of the deed of trust, [acceleration] is an option to be exercised by the lender, not something triggered by [outside events].” *Id.* at 932. Indeed, even if a provision in an installment note provides for the automatic acceleration of the due date upon default (which is not true of the instant Note), Washington law is clear that default alone will not accelerate the note for the purpose of beginning the statute of limitations. *A.A.C Corp.*, 73 Wn.2d at 615 (citations omitted). Rather, the lender must exercise its right to accelerate. *Id.*

Here, it is undisputed that the Bahneans are in default and the Trust has not accelerated the Loan. The lack of acceleration is evidenced by the

Notice of Default, where the total amount owing did not include all amounts owing under the \$490,000.00 loan, rather only \$164,613.56, which represents past due amounts as of June 4, 2014. (CP 99, ¶ 13; CP 138.) Accordingly, “the statute of limitations for each monthly payment accrued as the payment became due. There was no acceleration of the maturity date of the note.” *A.A.C. Corp.*, 73 Wn.2d at 615.

**B. Even if RCW 4.16.040 Applied, the Result Would be the Same as the Statute of Limitations Applies Separately to Each Payment Due on an Installment Contract**

The Bahneans dispute the applicability of RCW 62A.3-118(a), contending that the legislature intended that claims arising from a mortgage secured by real property be governed by RCW 4.16.040 when they added an exception to RCW 4.16.040 for actions to recover on a released deed of trust or mortgage. (Opening Br. at 8.) *See* RCW 64.04.007(2). If the legislature did so intend, their mistake cannot override the clear language of the Revised Code of Washington as set forth in RCW 62A.3-118(a) or the Washington case law interpreting the statute as applying to promissory notes that are negotiable instruments. *See Fed. Fin. Co. v. Gerard*, 90 Wn. App. 169, 172, 949 P.2d 412, 413 (1998) (noting RCW 4.16.040 was not the correct statute of limitations and stating RCW 62A.3-118 “is the statute of limitations applicable to negotiable instruments.”); *Alpacas of Am., LLC*, 179 Wn. App. at 396

(“Under WUCC article 3, an action to enforce a party’s obligation to pay a note payable at a definite time that qualifies as a negotiable instrument must be commenced within six years after the due date stated on the instrument. RCW 62A.3–118(a).”)

Importantly, however, even if RCW 4.16.040 applied, the result would be the same. RCW 4.16.040(1) provides that “[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement,” shall be commenced within six years. Washington case law is clear that “when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” *In re Parentage of Fairbanks*, 142 Wn. App. 950, 960 (2008) (emphasis added) (citing *Herzog v. Herzog*, 23 Wn.2d 382, 388 (1945)). In other words, the statute begins to run as to a particular installment when the amount of that installment becomes due. *See Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109, 1113 (2010). The full amount only becomes due either upon maturity of the note or if an obligation to pay in installments is fully accelerated. *Bly v. Field Asset Services*, No. No. C14-0254JLR, 2014 WL 2452755, at \*3 (Jun. 2, 2014, W.D. Wash.); *Erickson v. America’s Wholesale Lender, et al.*, No. 77742-

4-I, 2018 WL 1792382, at \*2 (Wash. Ct. App. Apr. 16, 2018)  
(unpublished).

The Bahneans insist that these cases are wrong because they fail to account for RCW 4.16.005's direction that "an action to enforce a claim must be filed within a set period of time after the cause of action accrues." (Opening Br. at 14) (emphasis in original). To the contrary, the case law simply makes clear *when* the cause of action accrues. Contrary to the Bahneans' argument that a cause of action accrues on an the entire amount of an installment note on the day an installment payment is missed (which is not in the statute), Washington courts are clear that, while a cause of action accrues on the date a payment is missed, the cause of action that accrues is *for that payment only*. *Kirsch v. Cranberry Fin., LLC*, 178 Wn. App. 1031 (2013) ("The general rule for debts payable by installment provides, [a] separate cause of action arises on each installment, and the statute of limitations runs separately against each . . . .")

No cause of action accrues for the entire loan unless the lender accelerates the loan, at its option. This is explained well in *Edmundson*, wherein the Court notes: "when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Edmundson*, 194 Wn. App. at 930

(quoting *Herzog*, 23 Wn. 2d at 388). Multiple authorities since the enactment of RCW 4.16.005 in 1989 confirm that an action on an installment contract accrues as to each installment separately.

*Edmundson*, 194 Wn. App. at 930; David K. Dewolf, Keller W. Allen & Darlene Barrier Caruso, *Washington Practice: Contract Law and Practice* § 16:21, at 511 (3rd ed. 2014) (“Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due.”); *Silvers v. U.S. Bank Nat. Ass’n*, 15-5480 RJB, 2015 WL 5024173, at \*4 (W.D. Wash. Aug. 25, 2015).

The principle that an option to accelerate is made at the option of the lender only and cannot be utilized by the borrower to invoke a statute of limitations defense on the entire loan has been the law of Washington for over 100 years. *White v. McMillan*, 37 Wash. 34, 36, 79 P. 495, 496 (1905) (rejecting argument that “statute of limitations commenced to run immediately upon the first default in payment,” holding that a provision making the entire note due on default is one that can be “waived by [the lender], and one that could not be taken advantage of by the mortgagor.”) *See also Weinberg v. Naher*, 51 Wash. 591, 99 P. 736 (1909) (holding failure to pay installment of interest, under clause in mortgage note authorizing payee to declare whole debt due, does not start running of

statute of limitations.) Accordingly, even if this Court concludes that RCW 4.16.040 is the applicable limitations period, the result is the same because a cause of action for payment on an installment contract only accrues as to each missed installment payment individually, until and unless the lender accelerates the loan.

**C. Even if the Court were to Find the Statute of Limitations had Run, the Bahneans Acknowledged Their Debt in the 2014 Letter**

Further, even if this Court found the statute of limitations began to run on the date of the Bahneans' initial default, the Bahneans re-started the statute of limitations when they sent their 2014 Letter to Ocwen Loan Servicing to ask questions about the amount due on the Loan. This is an issue the Trial Court did not reach due to the fact that the Trial Court determined the statute of limitations had not run. However, under Washington Code, a writing by borrowers can restart the statute of limitations where there is a written and signed acknowledgment of the debt. RCW 4.16.280; *Matson v. Weidenkopf*, 101 Wn. App. 472, 478 (2000) ("A written and signed acknowledgment or promise to pay a debt restarts the statute of limitations.") This written acknowledgment, "must recognize the existence of the debt; be communicated to the creditor or to another person with intent that it be communicated to the creditor; and not

indicate an intent not to pay.” *Jewell v. Long*, 74 Wn. App. 854, 857 (1994).

Here, the 2014 Letter is a written document, signed by both of the Bahneans, and expressly inquires about “[t]he total unpaid principal, interest and escrow balances due and owing as of October 21,2014” in reference to the Loan and Property. (CP 144-145.) The 2014 Letter also states the Bahneans believed certain payments were not properly credited to the account, and disputed the amount alleged to be due and owing. (*Id.*) In other words, the Bahneans asked for an accounting of how much they owed on the Loan, and how their payments were applied to the Loan, after their initiation of the Chapter 7 bankruptcy case. This is the hallmark of a debtor’s acknowledgement of the existence of a debt. Accordingly, even if this Court found that the statute of limitations had run on the Note, the Bahneans acknowledged the debt, thereby restarting the statute of limitations.

In the proceedings below, the Bahneans attempted to argue that they sent the Letter merely to “understand ... the amount of the debt which they had successfully avoided.” (Motion, at pp. 8-9.) This self-serving, *post-hoc* explanation attempts to imply an intent and meaning to the letter that is contrary to the express words of the Letter, as well as the Bahneans’ own deposition testimony. While the Letter does state that the Bahneans

“dispute the amount alleged to be due and owing,” it was in the context of their inquiry into whether “certain payments [were] properly credit to the account.” (CP 144-145.) Notably, if the Bahneans actually disputed the existence of the debt, they would not ask for an accounting of the amounts owed, and how their mortgage payments were applied to the Loan. Instead, they would ask for a refund of all payments made after the July 31, 2009 bankruptcy. Indeed, the sheer scope of the Bahneans’ questions into the accounting of the loan belies any notion that the Letter was a product of mere curiosity.

Tellingly, the Plaintiffs’ own deposition testimony also undercuts their self-serving testimony that the Letter was sent to get a better understanding of the debt avoided through bankruptcy. Fibia Bahnean testified that she did not know why the letter was sent or why any specific question in the letter was asked, contradicting the statement in her declaration that the 2014 Letter was intended to obtain information about the amount of debt she had avoided post-bankruptcy. (CP 184:18-21; CP 184:24-185:7; CP 185:23-186:25.) Radu Bahnean’s deposition testimony revealed that he actually did not understand the words in his own declaration about his intent in sending the 2014 Letter. (CP 180:10-11.) He also did not recall signing the declaration, sending the letter, or having any concerns about how his mortgage payments were applied. (CP

177:15-16; 178:12-179:3; 179:17-19.) Accordingly, it is clear that neither of the Bahneans' declarations testifying to the purpose of the 2014 Letter were made with personal knowledge, and they were not adequate to support summary judgment as a matter of law. Civil. R. 56(e). Moreover, the declarations constituted "self-serving hearsay evidence . . . conclusory in nature," and inadequate to support summary judgment. *Weinstock v. Alamo Rental (US), Inc.*, 174 Wn. App. 1045, fn. 9 (2013). The 2014 Letter showed on its face that it was an acknowledgment of the debt, and no credible evidence established otherwise. Accordingly, the statute of limitations had been reset by the 2014 Letter and this Court should affirm on the grounds that the statute of limitations has not passed.

#### VI. ENTITLEMENT TO ATTORNEY FEES

The Trust respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. The Trust also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. It is undisputed that the Deed of Trust and Note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. (CP 55, §9; CP 57 § 14; CP 58 § 19; CP 61 § 26.) The Trust's defense of this appeal has been necessary to enforce its right to foreclose under the Deed of Trust. Attorney fees are therefore appropriately awarded to the

Trust pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1 (2012) (awarding attorney fees to prevailing party on appeal where contract allowed fees); *IBF, LLC v. Heuft*, 141 Wn. App. 624, 638-39 (2007) (“[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.”)

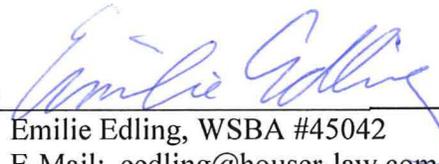
## VII. CONCLUSION

For the reasons set forth above, the Trust respectfully requests that this Court affirm the Trial Court’s decision in this matter and award attorney fees to the Trust for handling defense of the instant appeal.

DATED this 19th day of April, 2018.

HOUSER & ALLISON, APC

By



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Mortgage Pass-through Certificates  
Series 2006-AR

**CERTIFICATE OF SERVICE**

I certify that on the 19th day of April 2018, I caused a true and correct copy of this ANSWERING BRIEF OF RESPONDENT HSBC BANK USA AS TRUSTEE to be served on the following via first class

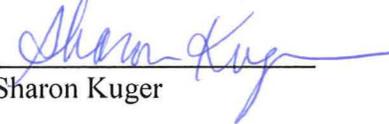
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Dated: April 19, 2018

HOUSER & ALLISON, APC

By

  
Sharon Kuger

**HOUSER & ALLISON, APC (SEATTLE)**

**April 19, 2018 - 4:48 PM**

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