

No. 73908-5-I

**COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

DAVID AND ROBBIN MANNING, HUSBAND AND WIFE;

PLAINTIFFS-APPELLANTS

vs.

**MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
("MERS"); THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF
NEW YORK, SOLELY AS TRUSTEE FOR THE CERTIFICATE
HOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH
TRUST 2004-5, (A NEW YORK REMIC TRUST), MORTGAGE PASS
THROUGH CERTIFICATES, SERIES 2004-5; REGIONAL TRUSTEE
SERVICES PACIFIC, INC. ("RTS"); RESIDENTIAL CREDIT
SOLUTIONS, INC.; JOHN DOES NOS. 1 – 20;**

DEFENDANTS-APPELLEES

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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I. Assignments of Error:

(a) The trial court committed reversible error by granting the defendant-appellee's CR 12(b)(6) motion to dismiss with prejudice, and without leave to amend.

II. Issues:

(a) Should the trial court have considered case law that is not recognized in Washington?

(b) Should the trial court have considered all reasonable facts, pleaded or not pleaded, that could support *any* of the plaintiffs' claims?

(c) Should the trial court have concluded that all the plaintiffs' claims were waived for failure to seek pre-sale injunctive relief?

III. Statement of the Case:

The facts alleged in the plaintiffs-appellants' (Mannings')¹ verified complaint provide the basis for this appeal. *Complaint*; CP 3-41.

Countrywide Home Loans, Inc. was allegedly the original lender, but there has been no transparency that proves this entity actually funded any loan to the Mannings. *Complaint*; CP 8-9. There has been no full disclosure of what entity, if any, actually provided funds. There is no history of wire transfers, cashiers' checks, bank deposits, or receipts indicating an actual loan was funded by Countrywide Home Loans, Inc. *Complaint*; CP 8-9. Appellee MERS was designated as the original beneficiary of the deed of trust ("DOT"). *Complaint*; CP 9. The appellees did not produce a properly endorsed promissory note, and the Mannings assert the appellees do not have standing to assert nonjudicial foreclosure relief. *Complaint*; CP 8-9.

¹ For clarity, the appellants shall be referred to as "Mannings," and the defendants-appellees shall be referred to by name or as "appellee/appellees."

There is no clear identification of any legitimate party who can claim a debt is owed by the Mannings. *Complaint*; CP 9. There is a recitation of a schedule of payments allegedly required to be paid by the Mannings, but there is no proof of a debt, nor is there competent evidence that there is a true and actual beneficiary of a legitimate DOT that is entitled to receive any payments from the Mannings. *Complaint*; CP 9.

There is no chain of title to any DOT that authorizes the appellees to assert a legitimate security interest that encumbers the Mannings' real property. *Complaint*; CP 10. The original alleged loan promoted by these appellees (the promissory note and the deed of trust) has been securitized, with investors having paid the obligations described in the alleged note, or the alleged loan has been otherwise discharged, and the appellees cannot prove the note is due and owing. *Complaint*; CP 11. The note has been paid in full, and/or the loan is not owned by any of the appellees, and/or there is no standing of any kind for these appellees to proceed with a nonjudicial foreclosure of the Mannings' real property. *Complaint*; CP 11.

Pursuant to an Assignment of Deed of Trust recorded in the San Juan County Auditor's Office, the appellees' contested loan was securitized by a Mortgage Backed Securitized Trust, CHL Mortgage Pass-Through Trust 2004-5. *Complaint*; CP 13. However, the purported assignment of the DOT was almost eight years too late for acceptance of the DOT, thus the assigned promissory note has been separated from the note and the note is unsecured. *Complaint*; CP 13-14.

The Pooling and Service Agreement that controls the procedures for Bank of New York ("BONY") to accept an assignment of a DOT requires that the assignment be executed on or before the "closing date" for all instruments to be assigned to the securitized trust, defendant CHL Mortgage Pass-Through Trust 2004-5. The closing date for the securitized trust occurred on or about April 29, 2004. *Complaint*; CP 13.

The attempted assignment of the contested DOT by MERS into the securitized trust occurred on or about March 7, 2012, almost eight years after the final date allowable for any such assignment.

Complaint; CP 14. The attempted assignment is void, and therefore defendant BONY has no standing to (a) assert any claim as a legitimate beneficiary of the contested DOT and to (b) appoint any substituted DOT trust trustee, either directly or through any agent claiming to hold a power of attorney for such an assignment.

Complaint; CP 14.

The substituted DOT trustee, appellee Regional Trustee Services Pacific, Inc. (“RTS”) had no standing to initiate a DOT trustee’s sale, and any such nonjudicial foreclosure trustee’s sale was illegal and void *ab initio*, causing the Mannings great financial losses and damages. *Complaint*; CP 14. The Mannings have claimed RTS has independent, separate, and joint and several liability with the other appellees for the damages sustained, and to be sustained, by the wrongful actions of these appellees. *Complaint*; CP 14, 25-26. RTS has not protected the Mannings and has not provided minimal due diligence as a neutral DOT trustee. *Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985) (en banc) (the trustee has fiduciary duties to borrower and lender); *Complaint*; CP 14, 25-26.

Appellees relied upon robo-signed instruments to nonjudicially foreclose the Mannings' property, as illustrated in the Complaint. Robo-signed instruments are fraudulent. *Complaint*; CP 14-18.

This foreclosure action is fraudulent. There is no direct link between the originator, the unknown lender who ostensibly funded a loan to the Mannings, and the party allegedly initiating the foreclosure. *Complaint*; CP 18.

The Mannings' contested loan has changed beneficial interested parties more than once. *Complaint*; CP 18. There is no legal basis for MERS to have assigned any DOT, nor could MERS have endorsed any note allegedly executed by the Mannings as payors. *Complaint*; CP 18. The chain of title for any security interests has been fraudulently manipulated. *Complaint*; CP 18. The true DOT trustee, if any, for the loan promoted by these appellees is not RTS, nor can BONY claim a legitimate interest as a DOT beneficiary, capable of appointing RTS as a substituted trustee. The true DOT trustee has not been identified. *Complaint*; CP 18.

A complete chain of endorsements of any Note does not exist in this action, where each endorsement must be sufficient to transfer all rights, title, and interest of the party endorsing the Note. *Complaint*; CP 18. The “chain of title and endorsements” on the contested loan fails for lack of completeness and accuracy, as well as for fraudulent document manipulation. *Complaint*; CP 18.

The above illustrative facts support the Mannings’ claims that the nonjudicial foreclosure was fraudulent and void, and there is no curative action available to these appellees, and thus this is not a case where the doctrine of waiver cuts off the Mannings’ claims. *Complaint*; CP 18-19.

The trial court ruled:

“...to the extent Plaintiffs' claims identify *only formal technical violations of the DTA, with no suggestion that any such violations could not have been corrected if they had been timely raised* under RCW 61.24.130, Plaintiffs have waived their right to raise them***

*** only two of Plaintiffs' claims are arguably not barred: violation of Chapter 19.86, RCW; and the fraud claim. As to the former, the Court is persuaded by Defendants that *the claim is barred by the statute of limitations*.² Per RCW 61.24.127(2)(a) that claim is therefore not

² There is a factual dispute concerning the statute of limitations; the wrongful foreclosure did not occur until 2015.

exempt from the waiver and, in any event, cannot survive Defendants' Motion. As to the latter, *the Court concludes that Petitioners have not met the particularity standard contemplated by CR 9(b).*" *Court's Decision*; CP 590-591 (emphasis added).

The Mannings sued for (a) violation of the Washington Unfair Business Practices Act, RCW 19.86; (b) injunctive relief (to reinstate the possession and title to the property if it were lost due to a void trustee's sale); (c) declaratory judgment; (d) slander of title; (e) quiet title; and (f) fraud. *Complaint*; CP 3-26. The trial court dismissed all claims with prejudice and without leave to amend. *Court's Decision*; CP 590-591.

The Mannings seek reversal of the trial court's dismissal order, citing case law indicating CR 12(b)(6) does not support the trial court's decision.

IV. Argument:

1. The trial court considered case law that is not applied in Washington for disposition of CR 12(b)(6) claims.

This court has recently ruled:

"Whether a complaint was properly dismissed under CR 12(b)(6) is a question of law this court reviews de novo. *Tenore v. AT&T Wireless*

Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998), *cert. denied*, 525 U.S. 1171 (1999). On-Site incorrectly presents its argument under the standard set for Federal Rule of Civil Procedure 12(b)(6), which requires dismissal of a complaint when plaintiffs “have not nudged their claims across the line from conceivable to plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Our Supreme Court does not follow *Twombly* and *Iqbal*. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101-02, 233 P.3d 861 (2010). Under CR 12(b)(6), dismissal is appropriate only if it appears beyond doubt that the plaintiffs cannot prove any set of facts that would justify recovery. *Tenore*, 136 Wn.2d at 329-30; *McCurry*, 169 Wn.2d at 101. The Handlins' allegations must be accepted as true, and a court may consider hypothetical facts not included in the record. *Tenore*, 136 Wn.2d at 330. CR 12(b)(6) motions should be granted sparingly and with care. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).” *Handlin v. On-Site Manager, Inc.*, 187 Wn. App. 841; 351 P.3d 226 (2015).

Here, the appellees urged the trial court to consider the narrower treatment of CR 12(b)(6) used in federal courts. *Motion to Dismiss*; CP 63-64. Furthermore, the appellees urged the trial court to ignore a leading case in California. See *Glaski v. Bank of America, N.A., et al.*, 218 Cal. App.4th 1079 (2013); *Motion to Dismiss*; CP 93-96.

Glaski was recently discussed in *Yvanova v. New Century Mortgage Corporation*, Cal. Supreme Court, *Slip Opinion*, February 18, 2016:

“On the narrow question before us—whether a wrongful foreclosure plaintiff may challenge an assignment to the foreclosing entity as void—we conclude *Glaski* provides a more logical answer than *Jenkins*. As explained in part I, *ante*, only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure. (§ 2924, subd. (a)(1); *Barrionuevo v. Chase Bank, N.A.*, *supra*, 885 F.Supp.2d at p. 972.) If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever (*Colby v. Title Ins. and Trust Co.*, *supra*, 160 Cal. at p. 644; Rest.2d Contracts, § 7, com. a), the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure. (*Barrionuevo v. Chase Bank, N.A.*, at pp. 973-974.)***

*** In embracing *Glaski*'s rule that borrowers have standing to challenge assignments as void, but not as voidable, we join several courts around the nation. (*Wilson v. HSBC Mortgage Servs., Inc.*, *supra*, 744 F.3d at p. 9; *Reinagel*, *supra*, 735 F.3d at pp. 224-225; *Woods v. Wells Fargo Bank, N.A.* (1st Cir. 2013) 733 F.3d 349, 354; *Culhane*, *supra*, 708 F.3d at pp. 289-291; *Miller v. Homecomings Financial, LLC*, *supra*, 881 F.Supp.2d at pp. 831-832; *Bank of America Nat. Assn. v. Bassman FBT, LLC*, *supra*, 981 N.E.2d at pp. 7-8; *Pike v. Deutsche Bank Nat. Trust Co.* (N.H. 2015) 121 A.3d 279, 281; *Mruk v. Mortgage Elec. Registration Sys., Inc.*, *supra*, 82 A.3d at pp. 534-536; *Dernier v. Mortgage Network, Inc.* (Vt. 2013) 87 A.3d 465, 473.) Indeed, as commentators on the issue have stated: “[C]ourts generally permit challenges to assignments if such challenges would prove that the assignments were void as opposed to voidable.” (Zacks & Zacks, *Not a Party: Challenging Mortgage Assignments* (2014) 59 St. Louis U. L.J. 175, 180.)” *Yvanova v. New Century Mortgage Corporation*, Cal. Supreme Court, *Slip Opinion*, February 18, 2016, at pp. 13-14; 18 (emphasis added).

However, the trial court did not have the benefit of *Yvanova*, and the appellees attacked *Glaski* as being an aberration, with no precedential value, asserting the Mannings had no standing to challenge the illegal assignment. *Motion to Dismiss*; CP 93-96. Now, the California Supreme Court has definitively decided against these defendants, and *Glaski* is the supreme law of California. The arguments submitted in contravention, urged by these defendants before the trial court, are now moot. *Yvanova v. New Century Mortgage Corporation*, pp. 13-14, 18.

2. The trial court did not observe the procedural requirements of CR 12(b)(6).

Handlin v. On-Site Manager, Inc., 187 Wn. App. 841; 351 P.3d 226 (2015) provides the standard for treatment of Washington CR 12(b)(6) motions. Here, there are several aspects of the verified complaint that merit trial on the contested facts. The wrongful foreclosure of the Mannings' property is actionable, as is the claim for damages for violation of RCW 19.86.020, 030. The claim for injunctive relief, requiring the reconveyance of the real property by

the trustee, is actionable. Essentially all of the Mannings' claims remain intact, and should be subject to trial on the merits.

In *Walker v Quality Loan Service Corp. of Washington*, 176 Wn.App. 294, 308 P.3d 716 (2013), the Washington Court of Appeals determined a homeowner could prove harm for wrongful initiation of a nonjudicial foreclosure action, characterizing the claim as a failure of the defendants to strictly comply with the Washington Deeds of Trust Act. The court found that Walker's "wrongful foreclosure claim" was more accurately characterized as one for "damages arising from [Deed of Trust Act] violations." Citing *Bain*, the court reasoned that only a beneficiary has the power to appoint a successor trustee, and only a lawfully appointed successor trustee has the authority to issue a notice of trustee's sale. The court agreed with Walker that because MERS never held the note, it never had the authority to act as beneficiary under the Deed of Trust Act and lacked the authority to assign the Note and Deed of Trust to Select. Because SPS was not a lawful beneficiary at the time it appointed Quality, it followed that Quality had no authority to commence the foreclosure. The court

added that the current version of the Deed of Trust Act, RCW 61.24.030, requires the trustee to have proof that the beneficiary is the owner³ of the obligation secured by the deed of trust before issuing a notice of trustee's sale, which was a step that Quality failed to perform. Here, MTC Financial, Inc. d/b/a Trustee Corps ("MTC"--the alleged deed of trust trustee) has also failed its duty to remain neutral and complete its due diligence to protect the plaintiffs from harm by violations of the WDTA.

The court concluded that Walker may be able to show that Quality and SPS violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692f(6), and the Consumer Protection Act (CPA), RCW 19.86.020, by threatening nonjudicial foreclosure when they had no authority to do so. In discussing proof of harm sufficient to establish a CPA violation, the court cited *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), where the Washington Supreme Court held that the injury requirement of the CPA "is met upon proof

³ Here lies the rub: these appellees have not, and cannot, prove that the DOT trustee, RTS, was provided unequivocal, unambiguous proof that RCS was the *actual holder* of the note.

the plaintiff's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." On this basis, the court concluded that "investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA." These are damages the plaintiff can equally assess against the defendants in this case.

At minimum, the Washington Deeds of Trust Act ("WDTA") requires a beneficiary to be a "holder of an instrument." RCW 61.24.005(2). The WDTA does not define "instrument;" however, "instrument" is defined by RCW 62A.3-104(b) as a **negotiable instrument** (a fundamental course in UCC law explains that a **negotiable instrument must be an unconditional promise to pay—which is not the case in this action**). RCW 62A.3-104(b); *accord Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 103-104, 285 P.3d 34 (2012) (looking to UCC definition of "holder" for definition of "holder" under the WDTA). In order to qualify as a beneficiary under the WDTA, BONY/RCS must at least be the holder of a negotiable

instrument whose obligations are secured by a deed of trust, and these defendants cannot hold that negotiable instrument as security for an obligation different from the obligations in the negotiable instrument itself. RCW 61.24.005(2).

Under RCW 62A.3-104(a), a negotiable instrument is:

“An **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) (emphasis added).

In *Anderson v. Hood*, 63 Wn.2d 290, 387 P.2d 73 (1963) the Washington Supreme Court examined a promissory note permitting the holder to apply the installment payments as reimbursements for taxes, assessments, insurance premiums, or other charges related to preserving the security under the note, before applying them to the principal balance. *Anderson*, at 291. The Court held that this note was non-negotiable because the amount of money to be paid back, i.e., the principal, was not certain as to the amount because future taxes and insurance premiums are uncertain as to amount and any such charges paid would increase the amount due upon the note. *Id.* at 293-294. The conditions expressed in the Mannings’ note also defy computation of a fixed amount due and owing, because the conditions necessarily shall modify the balance owed.

By inspection of the note, **the note is not an unconditional promise to pay, and it is non-negotiable.** See Renuart, E., *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 38 Wake Forest

L. Rev. 1204, 1231-32 (2013) (citing Mann, R. J., *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. Rev. 951, 971-72 (1997)); *see also* Whitman, D. and Milner, D., *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to Enforce the Note*, 66 Ark L. Rev. 21, 28-29 (2013) (observing that, at best, negotiability of the notes used by the secondary market giants Fannie Mae and Freddie Mac is “uncertain”).

Here, the note clearly includes a provision similar to the provision at issue in *Anderson*, in that they create a situation where there is no fixed amount of principal and there is uncertainty in the amount due; therefore, just like the note at issue in *Anderson*, the note in this case is nonnegotiable. BONY/RCS are invoked the statutory provisions of the Washington Deeds of Trust Act, Ch. 61.24 RCW, to justify a nonjudicial foreclosure of the Deed of Trust. The WDTA plainly requires that if an instrument is the evidence of indebtedness, the instrument must meet the requirements of RCW 62A.3-104(a).⁴

⁴ The WDTA also allows for a “holder of...a document” to be a beneficiary. RCW 61.24.005(2). If the document is the evidence of

Because the note is not a promise to pay a fixed amount of money and it contains impermissible conditions on the payment of money, **the note is not negotiable and does not qualify as an instrument under RCW 61.24.005(2)**, meaning BONY/RCS are not beneficiaries.

3. The trial court erroneously applied the doctrine of waiver to dismiss the action with prejudice and without leave to amend.

The *Court's Decision*, CP 590-591, relied heavily upon a Division III case, *Merry v. Northwest Trustee Services, Inc.*, 188 Wn.App. 174, 352 P.3d 830 (Wash.App. 2015), to conclude the Mannings waived their claims because they did not seek a pre-sale injunction. However, factually *Merry* is a narrow case, inapposite to the Mannings' issues. The trial court used the same language found in *Merry*, describing the Mannings' claims as those that were "*only formal technical violations of the DTA.*" *Court's Decision*; CP 590; *Merry v. Northwest Trustee Services, Inc.* at 174-175.⁵

indebtedness, then the document must comply with the terms of the document and relevant law, **including Ch. 62A.9 RCW.**

⁵ The *Merry* court distinguished *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) and *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 104,

V. Conclusion:

The Washington Supreme Court has repeatedly stated that the Deeds of Trust Act “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (quoting *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Bain*, 175 Wn.2d at 93 (quoting *Udall*, 159 Wn.2d at 915-16)). This includes examination of the legitimacy of standing and fraudulent behavior for

297 P.3d 677 (2013), which are controlling authority when the conduct of a foreclosure sale does not strictly comply with the WDTA. In those cases a court can set aside a sale if it would be inequitable under the circumstances and inconsistent with the goals of the WDTA to apply the defense of waiver. The *Merry* test to distinguish those controlling cases is very narrow: “technical, formal, likely correctable and nonprejudicial violations of the DTA.” The trial court committed error by characterizing the Mannings’ claims in like manner, because there is no reasonable way for the appellees to correct the gross violations of the WDTA, and the wrongful foreclosure of their real property. Waiver should not apply to the Mannings case. The trial court committed error in dismissing this case.

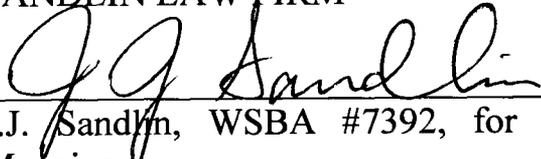
these defendants-appellees to nonjudicially foreclose the Mannings' real property.

A CR 12(b)(6) order of dismissal without leave to amend and with prejudice is reviewed *de novo*. This court should engage in the same inquiry as the trial court and view the facts, both stated and reasonably inferred, in the light most favorable to the nonmoving party, the Mannings. *Handlin v. On-Site Manager, Inc.*, 187 Wn. App. 841; 351 P.3d 226 (2015). Dismissal by way of CR 12(b)(6) motion was inappropriate in this action. Reference to federal court case law for CR 12(b)(6) analysis was error.

The Plaintiffs-Appellants, Mannings, respectfully request this Court reverse the trial court's CR 12(b)(6) dismissal, and remand for further trial proceedings.

Respectfully submitted this 9th day of March, 2016.

SANDLIN LAW FIRM



J.J. Sandlin, WSBA #7392, for Plaintiffs-Appellants
Manning

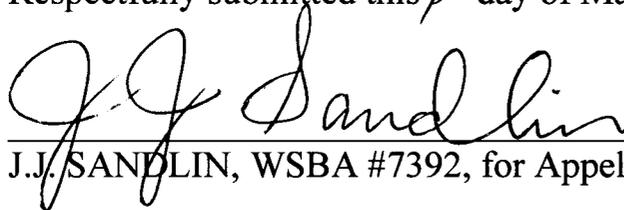
Certificate of Service:

J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

1. On March 9, 2016, I faxed, emailed and ^{3/10/16} mailed a copy of the ^{JJS} above Opening Brief to opposing counsel, Reneé M. Parker, SBN 36995, Attorney for Defendants-Appellees, at WRIGHT, FINLAY & ZAK, LLP, 4665 MacArthur Boulevard, Suite 200, Newport Beach, California 92660 [tel. 949-477-5050; fax 949-608-9142; and email rmparker@wrightlegal.net]; and

^{JJS} 2. I mailed ^{VIA FEDEX} the appellants' Opening Brief to the Clerk of the Court, Washington State Court of Appeals, Division I, One Union Square, 600 University St., Seattle, WA 98101-1176 [fax: 206-389-2613] on March ¹⁰ 9, 2016. ^{JJS}

Respectfully submitted this ^{10th} 9th day of March, 2016. ^{JJS}



J.J. SANDLIN, WSBA #7392, for Appellants Manning