

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

NO. 477779-3-II

FILED  
COURT OF APPEALS  
DIVISION II  
2016 FEB - 1 PM 2:55  
STATE OF WASHINGTON  
BY DEPUTY

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CYRIL J. WORM, a married man, as his sole and separate  
property,

Appellant,

vs.

BANK OF NEW YORK MELLON FKA THE BANK OF NEW  
YORK AS TRUSTEE FOR THE HOLDERS OF CWALT, INC.,  
ALTERNATIVE LOAN TRUST 2004-J12, MORTGAGE PASS-  
THROUGH CERTIFICATES, SERIES 2004-J12; BAC HOME  
LOANS SERVICING, LP; RESIDENTIAL CREDIT SOLUTIONS,  
INC.; NORTHWEST TRUSTEE SERVICES OF WASHINGTON;  
and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
INC.

Respondents.

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

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APPELLANT WORM'S OPENING BRIEF

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## I ASSIGNMENTS OF ERROR

1. The trial court erred by granting Defendants Motion to Dismiss.
2. Trial court erred by failing to rule Defendant Trust was not entitled to foreclose because Defendant neither “owned” nor “held” the Note.
3. Trial court erred by failing to rule each of the assignments of deeds of trust invalid.
4. Trial court erred by failing to rule Defendant NWTs was required to issue a new notice of default prior to commencing the foreclosure proceedings that is the subject of this litigation.
5. Trial court erred in awarding attorney fees pursuant to the subject deed of trust.

### A. Issues Pertaining to Assignments of Error

1. Is it Possible for the foreclosing Trust to “own” or “hold” the Note if the Note was purchased by Bank of America on March 7, 2011?
2. Does the Supreme Court’s Decision in *Brown v. Washington Dep’t of Commerce*, that a person need only be the holder of a secured mortgage note to enforce the DOT associated with the note, overrule the requirement of RCW 62A.9A-203(a), (b), and (g) that a person *must* be the “owner” of a secured note to enforce the DOT that secures the note?

3. Has the “security follows the note” legal axiom ever meant a DOT follows the transfer of the right to enforce a note?

4. Does Plaintiff have standing to challenge an unlawful assignment of the DOT?

5. Must a DOT be transferred by deed in Washington before the “owner” and “holder” of a secured mortgage note is entitled to enforce the DOT that secures the note?

6. After *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3<sup>rd</sup> 1277 (2012), may a *new* foreclosure proceeding commence without the re-issuance of all of the statutory notices, including the notice of default?

## II STATEMENT OF THE CASE

RBC Mortgage Co. originated Plaintiff’s mortgage loan on October 28, 2004. *CP*, at 136. As part of the loan transaction, Plaintiff executed a note (“Note”) and deed of trust (“DOT”) on October 28, 2004. *Id.* True and correct copies of the Note and DOT are included in the Appendix at A-1 through A-4 (Note) and A-5 through A-21 (DOT), respectively. According to the Alternative Loan Trust 2004-J12 Trust’s (“Trust’s”) Pooling & Servicing Agreement (“PSA”), sometime on or before December 30, 2004 the Trust purchased Plaintiff’s loan. Allegedly, the Note and DOT then became two of the thousands of notes and deeds of trust in the Trust.

On June 9, 2010, MERS, on behalf of itself and not acting as nominee for anyone, attempted to assign Appellant's Note and DOT to the Trust. *CP 59*. A true and correct copy of the attempted assignment ("Attempted Assignment 1") is included in the Appendix at A-22. ReconTrust Company recorded Attempted Assignment 1 on June 11, 2010 under Mason County Auditor's No. 1958547. *Id.*

On or about March 7, 2011, BAC Home Loans Servicing, LLP ("BAC"), modified Plaintiff's loan, thereby—according to the terms of the Loan Modification Agreement ("LMA")--becoming the new "owner" and "holder" of the Note and "beneficiary" of the DOT. *Id.*, at 66. The LMA was recorded in the Mason County Auditor's Office under file no. 1981711 on March 16, 2011. *Id.* A true and correct copy of the LMA is included in the Appendix at A-23 through A-29.

There have been two attempts to foreclose that are relevant to this litigation. *Id.*, at 81 and 89. Each of those attempts has occurred since March 7, 2011. *Id.* BAC, the owner and holder of the Note and beneficiary of the DOT since March 7, 2011, was not the foreclosing entity in either of the two attempts to foreclose. *Id.*

On September 25, 2012, MERS, again acting in its individual capacity and not as a nominee for anyone, attempted to assign the Note and DOT to the Trust for a second time ("Attempted Assignment 2"). *Id.*, at 60. A true and correct copy of Attempted Assignment 2 is included in the Appendix at A-30-31. Corelogic recorded Attempted Assignment 2 in

the Mason County Auditor's Office under Auditor's No. 1996298 on October 1, 2012.

Approximately 16 months later, on January 30, 2014, the Bank of New York Mellon FKA the Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2004-J12, Mortgage Pass-Through Certificates, Series 2004-J12 ("Trust 1"), the alleged beneficiary of the DOT, attempted to assign the DOT to the Bank of New York Mellon FKA the Bank of New York as Trustee for the Holders of CWALT, Inc., Alternative Loan Trust 2004-J12 ("Trust 2") ("Attempted Assignment 3"). *Id.*, at 62. A true and correct copy of Attempted Assignment 3 is included in the Appendix at A-32. Residential Credit Solutions, Inc. recorded Attempted Assignment 3 in the Mason County Auditor's Office under Auditor's No. 2020654 on February 4, 2014.

But on December 16, 2013, one and one-half months before Trust 1 assigned the DOT to it, Trust 2 appointed Northwest Trustee Services, Inc. ("NWTS") the successor trustee. *Id.*, at 74. A true and correct copy of the Appointment of Successor Trustee is included in the Appendix at A-33. NWTS recorded the Appointment on February 4, 2014. Thus, NWTS was appointed the successor trustee by an entity that, for at least two reasons, could not have been the beneficiary of the DOT: (1) MERS, an entity that never held the Note or DOT, assigned the Note and DOT to

Trust 1, the entity that subsequently “assigned” the DOT to Trust 2; and  
(2) Trust 1 assigned the DOT to Trust 2, but did not assign the Note.<sup>1</sup>

Examination of Defendants own recorded documents indisputably reveals Trust 2 was not the beneficiary of the DOT at the moment it amounted NWTS the successor trustee. *Id.*, at 62 and 74. As a result, everything NWTS has done in the foreclosure proceedings has been done unlawfully.

Claiming that it had been informed by the lender that Plaintiff had defaulted on the loan, NWTS recorded a notice of trustee’s sale (“NOTS 1”) in the Mason County Auditor’s Office under file no. 2022502 on March 25, 2014. *Id.*, at 81-85. A true and correct copy of NOTS 1 is included in the Appendix at A-34 through A-38. As demonstrated above, on March 25, 2014, NWTS was not a lawful successor trustee and therefore had no lawful authority to record a NOTS.

Paragraph VI of NOTS 1 indicates the notice of default (“NOD”) that was issued before NOTS 1 was recorded was issued on February 14, 2014. *Id.*, at 84. A true and correct copy of the February 14, 2014 NOD is included in the Appendix at A-39 through A-42.

NOTS 1 set an August 1, 2014 sale date. *Id.*, at 82. Because NWTS had no lawful authority to record a NOTS, the property could not have been sold lawfully on August 1, 2014.

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<sup>1</sup> Transfer of the DOT in the absence of the Note is a nullity. Such a transfer violates the universally-accepted “security follows the note” legal axiom. That axiom is codified at RCW 62A.9A-203(a), (b), and (g). *See Official Comment 9 to UCC 9-203.*

On September 24, 2014, Defendants recorded a Notice of Discontinuance of Trustee's Sale ("NDTS"),<sup>2</sup> the same day on which NWTS recorded the second NOTS ("NOTS 2"). *Id.*, at 87 and 89-93. True and correct copies of the NDTS and NOTS 2 are included in the Appendix at A-43 and A-44 through A-48, respectively. Plaintiff filed the Complaint objecting to the illegalities herein recited and seeking injunctive relief until the merits of the objections could be adjudicated on January 12, 2015. *Id.*, at 133-142.

NOTS 2 set a January 23, 2015 sale date. *Id.*, at 90. January 23, 2015 was 175 days after August 1, 2014. Additionally and impermissibly, NOTS 1 and NOTS 2, respectively, rely on the same NOD--the February 14, 2014 NOD--as their antecedent in the foreclosure process.<sup>3</sup> *Id.*, at 84 and 92.

The sale did not occur on January 23, 2015. Instead, following institution of the lawsuit that is the subject of this appeal, NWTS postponed the sale until March 23, 2015. Almost immediately thereafter, Defendants removed this case to federal district court. Respondents claimed there was "complete diversity" under 28 U.S.C. §1332, even

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<sup>2</sup> It should be noted the discontinuance obviously discontinued the *entire foreclosure process* that created the August 1, 2014 sale date--*meaning each of the 4 steps that made up that process*. Issuance of the February 14, 2014 NOD was one of the four steps in that process. Accordingly, without even considering the 120-day statute of limitations contained in RCW 61.24.040(6), the February 14, 2014 NOD was not available for use after September 24, 2014; and, therefore, NOTS 2 was issued in the absence of the prior issuance of a NOD.

<sup>3</sup> Defendants undoubtedly will claim the law does not require re-issuance of a NOD. But NWTS's actions speak louder than Defendants' words. If NOD's need not be re-issued, why has NWTS re-issued NOD's in hundreds of foreclosure cases in this state over the last seven years?

though Plaintiff had named NWTS, a Washington corporation, a defendant.

Shortly after removing the case to federal district court, Defendants moved for dismissal.

Plaintiff contested the removal; and the district court remanded the case to Mason County Superior Court. The dismissal motion was heard in by Mason County Superior Court Judge Daniel L. Goodell. He decided the motion in Defendants' favor on June 8, 2015.

For the reasons given herein above, Plaintiff timely appealed.

### **III LEGAL STANDARDS OF REVIEW**

#### **A. INJUNCTIVE RELIEF**

Plaintiff seeks a preliminary injunction under RCW 61.24.130 and RCW 19.86.090. This Court is authorized by RCW 7.40.020 to grant the requested relief. To obtain such relief, however, the moving party must demonstrate: (1) possession of a clear legal right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of have resulted, or will result, in actual and substantial injury to him. *Kucera v. State Dept. of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000). To determine whether a party has a clear legal right, the court must analyze the party's likelihood of prevailing on the merits. *Tyler Pipe Indus. v. Dept. of Revenue*, 96 Wn.2d 785 (1982).

#### **B. RCW CHAPTER 19.86**

##### **(1) RCW 19.86.090**

[A]ny person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars[.]

**(2) Pursuant to RCW 19.86.020**, “unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful.

**C. RCW CHAPTER 61.24**

1. RCW 61.24.005(2) defines the beneficiary as the “holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.”

2. RCW 61.24.010(2) authorizes the “beneficiary” only to appoint a successor trustee.

3. Under RCW 61.24.010(4), the successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

4. RCW 61.24.030(7)(a) requires the trustee to have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust before the trustee is authorized to record, transmit or serve a notice of trustee’s sale.

5. RCW 61.24.040(6) prohibits the trustee from selling real property non-judicially more than 120 days beyond the original sale date set by the recording of an original notice of trustee's sale ("NOTS").

6. RCW 61.24.127(1)(c) authorizes a borrower or grantor to bring a civil action if the trustee materially fails to comply with the provisions of RCW Chapter 61.24.

**D. RCW 62A.3**

1. RCW 62A.3-301 authorizes the "holder" of a note to enforce the note.

**E. RCW 62A.9A**

1. RCW 62A.9A-203(a) determines that a security interest (i.e., ownership interest (RCW 62A.1-201(b)(35)) in a note attaches to the note when the security interest becomes *enforceable* against the debtor (i.e., seller (RCW 62A.9A-102(a)(28)(B)) and third parties.

2. RCW 62A.9A-203(b) lists the requirements that must be met for a Note to become *enforceable* against the seller (i.e., debtor) of the note and third parties .

3. RCW 62A.9A-203(g) is the codification of the common law legal axiom, "the security follows the note." It is important to understand that the axiom is no longer a common law axiom in Washington; it is a statutory provision.

**F. RCW 64.04**

1. RCW 64.04.010 requires the transfer of any interest in real property to be accomplished *by deed*.

2. RCW 64.04.020 requires a deed to be in writing, acknowledged by the party to be bound thereby, before a person authorized by statute to take acknowledgements.

#### IV ARGUMENT

##### **A. Trust 2 does not “own” Note or DOT and therefore not entitled to foreclose.**

In addition to the problems with the various assignments of the DOT, Defendants admit a LMA between Plaintiff and BAC was recorded on November 16, 2011. *CP*, at 17: 19 – 21. But they steadfastly fail to mention any of the terms of the LMA.

In relevant part, the following statements about the LMA are true and undisputed. Plaintiff and BAC are the only parties to the LMA. Neither Trust 1 nor Trust 2 is a party to the LMA. The LMA amends and supplements Plaintiff’s Note and DOT.

In the LMA, Plaintiff and BAC agree: (1) *BAC* becomes the “Lender” under the Note and DOT as amended; (2) the amount payable under the Note or DOT increases from \$367, 250 to \$426, 790.86; (3) Plaintiff agrees to pay the unpaid principal of the loan, plus interest, to BAC; (4) Plaintiff and BAC agree that Plaintiff still owes the amounts under the original note and DOT as amended; and (5) except as amended, the original note and DOT remain unchanged and both the lender and borrower are bound by the agreement. *Id.*, at 66.

Following execution of the LMA on March 7, 2011, the right to payment that is Plaintiff's Note became BAC's property, not the property of either Trust 1 or Trust 2, if it had ever been the property of either Trust. Additionally, the *lien interest* represented by the DOT also became BAC's property on March 7, 2011, though, on March 7, 2011, BAC also would not have been entitled to foreclose in the event of default because the *lien interest* had *not* been transferred to BAC by deed. *See RCW 64.04.010.*

Given the facts recited in the two immediately preceding paragraphs, on what basis does the Trust 2 claim the right to foreclose? Well, the Trust's representatives claim to have the Note, and the Trust relies on the "security follows the note" legal axiom, using the recently decided *Brown v. Washington Department of Commerce*, No. 90652-1 (2015) decision as support.

Pursuant to more than 140 years of Washington mortgage law history, RCW 62A.9A-203(a), (b), and (g),<sup>4</sup> and RCW 61.24.030(7)(a), merely holding a mortgage note does not give the holder the right to enforce the deed of trust that secures the note. And though RCW 62A.3-301 is often cited as support for the proposition that the "mere holder" of a secured note<sup>5</sup> is entitled to enforce the security for the note, there is

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<sup>4</sup> The codification of the "security follows the note" doctrine.

<sup>5</sup> In this context, the term "mere holder" means a noteholder that does not "own" the note it holds.

nothing in the text of 3-301, or, for that matter, any of the provisions of Article 3, that supports such a proposition.

Indeed, RCW 62A.3-310(b) makes clear (to those who understand how Article 3 actually works) if the “holder” of a secured mortgage note does not “own” the note he holds, then neither the note holder nor the note owner is entitled to enforce the security for the note. This fact is not widely known or generally understood in Washington yet, but it soon will be.

Because Trust 2 is not the beneficiary of the DOT, it does not have the right to foreclose. Since only a “beneficiary” is entitled to appoint a successor trustee, Trust 2 has never had the right to appoint a successor trustee. Hence, Trust 2’s appointment of NWTS as successor trustee on February 4, 2014 was a violation of RCW 61.24.010(2), and NWTS did not gain the powers of the trustee through that appointment. As such, every action NWTS has taken has been unlawful.

**B. PSA, Trust’s governing document, supports Claim BAC Owns Loan.<sup>66</sup>**

Section 3.11(b) of the PSA gives the Master Servicer the authority to agree to a modification of any loan in the Trust Fund *if*: (1) the modification is in lieu of a refinancing; (2) the mortgage rate on the

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<sup>66</sup> The analysis contained in this Section B. is not an attempt to enforce the provisions of the Pooling & Servicing Agreement (“PSA”). The analysis is offered solely for the purpose of demonstrating that the intent of the parties to the PSA, as expressed to the Securities & Exchange Commission in the PSA, is in complete agreement with the analysis provided by Plaintiff in Section A of this Argument. Thus, if Respondents now offer an explanation for the meaning of the LMA that differs significantly from the analysis contained in Section A of this Argument, the court can be sure that the explanation is recently conceived.

modified mortgage loan is approximately a prevailing market rate for newly-originated loans having similar terms; and (3) the Master Servicer purchases the modified mortgage loan from the Trust Fund. See *Alternative Loan Trust 2004-J12 Mortgage Pass-Through Certificates, Series 2004-J12, Pooling & Servicing Agreement, Article III, §3.11(b)*. A true and correct copy of § 3.11(b) is included in the Appendix at A-49. Find entire PSA here: <http://www.secinfo.com/drjtj.z1U9.htm>.

On the same day on which the modification occurs, all interest of the Trustee in the modified mortgage loan is automatically deemed transferred and assigned to the Master Servicer. And all benefits and burdens of ownership, including the risk of default, pass to the Master Servicer. *Id.* If anyone had the right to foreclose (and there is a real question whether anyone had the right to foreclose when the foreclosure proceedings commenced), it was BAC, not Trust 2.

The Master Servicer must then deposit the purchase price for the modified loan into the Trust's Certificate Account within one business day after the purchase of the modified mortgage loan. And upon receipt of written notification that the deposit has been made, the Trustee is required to release the Mortgage File to the Master Servicer and to execute and deliver such instruments of transfer or assignment as are necessary to vest full ownership in the Master Servicer. *Id.*

On March 7, 2011, BAC, as the successor-in-interest to Countrywide, was the Master Servicer for the Trust. The modification was

done in lieu of a refinancing of Plaintiff's loan, and the 5.75% interest rate was the prevailing market rate for loans made under similar factual circumstances during that period of time. Consequently, BAC unquestionably owned the loan and the DOT after March 7, 2011.

**C. PSA corroborates IV(A) Analysis.**

Defendants will argue Appellant is not a party to, or third-party beneficiary of, the PSA and therefore is not allowed to enforce the PSA's provisions. This argument is correct. But Appellant is not attempting to enforce §3.11(b). The references to §3.11(b) merely corroborate the information provided in Section A of this Argument and establish that the Trust intended precisely the outcome that the execution of the LMA brought about – BAC became the owner of Plaintiff's Note and DOT.

Since March 7, 2011, Trust 2, if it ever had a right to foreclose, has not had a right to foreclose Plaintiff's ownership interest in the property. Additionally, each of the Defendants knew, or should have known, Trust 2, for numerous reasons, had no right to foreclose Plaintiff's interest in the property.

**D. Plaintiff has standing to challenge legality of assignments.**

Respondents will almost certainly claim Plaintiff lacks standing to challenge the three MERS assignments.

Plaintiff Walker occupied precisely the same position in *Walker v. Quality Loan Services Corporation of Washington*, No.65975-8-1 (2013) as Appellant occupies in this case – a borrower foreclosed against by a

lender utilizing the services of a successor trustee. Walker, like Appellant in this case, claimed MERS was not a lawful beneficiary and therefore lacked authority to assign the note and deed of trust to a subsequent “beneficiary.”<sup>7</sup> Select was the alleged beneficiary, just as Trust 2 is the alleged beneficiary in this case. Because the assignment to Select was ineffective, Walker claimed, Select’s designation of Quality as successor trustee was equally ineffective; meaning Quality lacked authority to initiate non-judicial foreclosure proceedings.

Plaintiff has made the exact same claim that Walker made in *Walker*: because the assignment to the Trust, for several reasons, was legally ineffective, the Trust’s selection of NWTs as successor trustee was equally ineffective; meaning NWTs lacks authority to initiate or continue non-judicial foreclosure proceedings.

The *Walker* court stated:

Walker alleges that MERS never held his note and, therefore, never had authority to act as beneficiary under the DTA. He further alleges that Select derived its authority to act from MERS’s assignment and Quality derived its authority to foreclose from Select. Thus, he argues that Select had no authority to proceed with a non-judicial foreclosure and violated the DTA by starting one. . . . For purposes of this appeal, we must accept Walker’s factual allegations as true. *If proved, these allegations would establish material violations of the DTA.*

*Id.* (emphasis and underlining added).

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<sup>7</sup> Respondents will claim Appellant lacks standing to challenge the two MERS assignments in this case. The *Walker* Court clearly disagrees. The right to assign deeds of trust is purely a matter of state law. Plaintiff does not lack standing to challenge the two MERS assignments in this case.

The *Walker* Court did not refuse to hear Mr. Walker's case. It heard the case and concluded that if the allegations were proven, the proof would establish material violations of the DTA. If Walker, who stood in precisely the same position in *Walker* that Plaintiff stands in in this case, had lacked standing to contest the assignments, Division 1 of the Washington Court of Appeals would not have made the above-quoted statement.

Moreover, Plaintiff is a party to the Note and DOT. The DOT contract gives three entities, and three entities only, the right to enforce the DOT: (1) the Lender; and (2) the Lender's successor; and (3). Trust 2 is none of these. If a party to a contract does not have the right to assert that a non-party to the contract may not utilize provisions of the contract against the party to the contract, then Washington law has been stood on its head. As a party to the DOT contractual agreement, Plaintiff had a right to challenge a transfer by anyone other than the Lender, the Lender's successor, or the Lender's assign.

Even if Trust 2 still owned the loan, which it does not, there would be an insurmountable problem to non-judicial foreclosure: Trust 2 would have no enforceable interest in the DOT because its "interest" in the DOT would have been transferred to it by Trust 1, whose interest in the DOT was in turn transferred to it by MERS, an entity which had no interest in the DOT to transfer.

NWTS was appointed the successor trustee by the Trust 2. Since Trust 2 has never become the beneficiary of the DOT, consistent with the holding in *Walker* Trust 2's appointment of NWTS did not confer the powers of the trustee on NWTS. NWTS had no authority to proceed with a non-judicial foreclosure and violated the WDTA by starting one. *See Walker*, No.65975-8-1 at 10.

There has never been a subsequent assignment of the Note or DOT to Trust 2. RCW 62A.9A.203(b)(2) requires that the security interest in the mortgage note (i.e., ownership interest in the mortgage note [RCW 62A.1-201(b)(35)]), to be enforceable against the debtor, must be transferred by someone who has rights in the mortgage note or who has the power to transfer rights in the mortgage note to a purchaser of the mortgage note. Neither MERS nor RBC had rights in the mortgage note or the power to transfer rights in the mortgage note to Trust 1 on either June 9, 2010 or September 25, 2012. Therefore neither MERS nor RBC had the right to transfer Plaintiff's Note and DOT to Trust 1 on June 9, 2010 or on September 25, 2012. And Trust 1 had no right to transfer Plaintiff's DOT to Trust 2 on January 30, 2014.

**E. In Washington, DOT must be Assigned.**

Defendants claim "an assignment of the deed of trust is not *necessary* for a note holder to foreclose[.]" *CP*, at 8: 3 – 4. Defendants are wrong.

**1. Note holder must be note “owner” to foreclose.**

Under RCW 61.24.030(7)(a), RCW 62A.3-310(b), RCW 62A.9A-203(a), (b), and (g), and the DOT itself, the “note holder,” to be entitled to foreclose, must also be the note “owner.”

**2. Transfer of DOT must be accomplished by deed.**

RCW 64.04.010 requires that every transfer of an interest in real property be accomplished by deed. The lien interest created by a DOT in a borrower’s real property -- which interest includes the right to sell the property in the event of a default -- is “*an interest in real property.*” *Brown*, No. 90652-1, at 3. Resultantly, the interest conferred by a DOT, to be lawfully transferred, *must* be transferred by deed.

RCW 64.04.020 list the requirements for a lawful deed in Washington. A deed must be: (1) in writing; (2) signed by the person to be bound by the transfer of the interest conveyed by the deed;<sup>8</sup> and (3) acknowledged by the person to be bound before a person authorized by statute to take acknowledgements. RCW 64.08.010 authorizes notary publics to take acknowledgements.

**3. MERS’ assignments did not meet the requirements of RCW 64.04.020, and therefore did not comply with RCW 64.04.010.**

Each of MERS’ assignments of the DOT was: (1) in writing; (2) signed by MERS, the person that purported to transfer the interest created

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<sup>8</sup> This requirement insures that the person who signs the deed must possess the property interest that is being transferred. One can’t lawfully transfer, or be bound by the transfer of, an interest that one does not possess.

by the DOT; and (3) acknowledged by a notary public. Accordingly, each assignment by MERS was an attempt to transfer by deed the lien interest created by the DOT. However, each assignment was legally ineffective because MERS *never* possessed the lien interest it purported to transfer. Moreover, MERS never “held” or “owned” the Note.

In addition to being unable to foreclose because it does not own Plaintiff’s Note, Trust 2 would not have been entitled to foreclose even if it owned Plaintiff’s Note because the lien interest contained in the DOT has never been transferred to Trust 2 by lawful deed.

**4. RCW 62A.9A-607(b) is irrelevant to case and, Defendants do not correctly interpret meaning of provision.**

Defendants make the following statement:

Washington law provides that a creditor may record an assignment reflecting a transfer of beneficial interest, even though it is not necessary to proceed non-judicially under the Deed of Trust Act (“DTA”). *See, e.g.*, RCW 62A.9A-607(b). Mr. Worm’s contentions about the Assignments – including the 2014 Assignment, which simply re-confirmed Bank of New York’s authority – would mean that taking advantage of a statutory right is a CPA violation, which cannot be correct.  
CP, at 9: 15-20.

In the above quote, Respondents attempt to use RCW 62A.9A-607(b) to prove Defendants have the right, but not the obligation, to record an assignment of the DOT, and that recording MERS’ assignments therefore cannot be a CPA violation.

First, our claim that the CPA has been violated has nothing whatsoever to do with Defendants recording of MERS’ assignments. Our

CPA claim relates to the legal ineffectiveness of MERS' assignments, recorded or unrecorded. Those assignments did not convey any interest in the Note or DOT because MERS never had any interest in the Note or DOT to convey.

Second, RCW 62A.9A-607(b) does not support the above-quoted text from Respondents motion to dismiss, as Official Comment 8 to UCC 9-607(b) makes clear:

**8. Rights Against Mortgagor of Real Property.**

Subsection (b) addresses the situation in which the collateral consists of a mortgage note (or other obligation secured by a mortgage on real property). After the debtor's (mortgagee's) default, the secured party (assignee) may wish to proceed with a nonjudicial foreclosure of the mortgage securing the note but may be unable to do so because it has not become the assignee of record. The assignee/secured party may not have taken a recordable assignment at the commencement of the transaction (perhaps the mortgage note in question was one of hundreds assigned to the secured party as collateral). Having defaulted, the mortgagee may be unwilling to sign a recordable assignment. This section enables the secured party (assignee) to become the assignee of record by recording in the applicable real property records the security agreement and an affidavit certifying default. Of course, the secured party's rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.

RCW 62A.9A-607(b) has relevance only in a situation in which a person owns a secured mortgage note and then utilizes that secured mortgage note as security for a separate obligation that the person incurs to a third party.<sup>9</sup>

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<sup>9</sup> Such a situation has no bearing on the facts in this case.

Under 607(b), if the debtor<sup>10</sup> (i.e., seller of a secured mortgage note that has been used as security for a separate obligation) defaults on the separate obligation, then the “secured party”<sup>11</sup> (i.e., the person to whom the separate obligation is owed) might want to foreclose on the underlying secured mortgage note that the debtor owns, but might be unable to foreclose because the secured party has not become the mortgagee of record of the underlying secured mortgage note that the debtor owns. Please notice that this situation implies a state statutory scheme that requires a lender to record its interest in a DOT before the lender is authorized to foreclose. Washington has no such requirement. RCW 62A.9A-607(b), therefore, is irrelevant to this case.

Washington, however, does require the secured party’s interest in the DOT to be transferred to the security party *by deed*. Again, in Washington, an “Assignment of DOT” is a deed. After the interest is acquired by deed, Washington law does not require the deed (i.e., the “Assignment of DOT”) to be recorded.

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<sup>10</sup> Under the peculiar nomenclature of the UCC, a person who sells a secured mortgage note is a “debtor.” RCW 62A.9A-102(a)(28)(A).

<sup>11</sup> (A) A person in whose favor a *security interest* is created or provided for under a *security agreement*, whether or not any obligation to be secured is outstanding[.] RCW 62A.9A-102(a)(73)(A).

“*Security Agreement*” means “an agreement that creates or provides for a security interest.” RCW 62A.9A-102(a)(74).

“*Security Interest*” means “any interest of a . . . buyer of . . . a promissory note in a transaction that is subject to Article 9A of this title.

5. **With initiation of each new foreclosure proceeding, except those provided for in RCW 61.24.130, new NOD must be issued.**

Defendants undoubtedly will claim that a NOD, once issued, need never be re-issued because all a NOD does is inform the borrower that he is in default. If this was all a NOD accomplished, Defendants' position would be correct. But Defendants' position is incorrect because the NOD does much more than simply notify the borrower that he is in default.

RCW 61.24.030(8) mandates issuance of a NOD and a waiting period of at least 30 days after the NOD is issued before the trustee is legally authorized to record a NOTS.<sup>12</sup> Among other things, in addition to informing the borrower that he is in default, the NOD must: (1) provide the borrower with 'an itemized account of the amount or amounts' the obligation is in arrears (RCW 61.24.030(8)(d)); (2) provide the borrower with "an itemized account of all other specific charges, costs, or fees that the borrower, . . . is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale" (RCW 61.24.030(8)(e)); (3) provide a statement showing the total of subparts (d) and (e) of RCW 61.24.030(8), "designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale" (RCW 61.24.030(8)(f)); and (4) provide "a statement that failure to cure the alleged default within thirty days of the date of

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<sup>12</sup> Because the WDTA removes many of the protections enjoyed by borrowers in judicial foreclosures, "lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

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, . . . .”<sup>13</sup> (RCW 61.24.030(8)(g)).

Several of the rights granted to the borrower in the NOD are time sensitive. By “time sensitive” is meant the lender is required to provide the borrower with very specific information at very specific times. For example, the lender is required to inform the borrower of how much he must pay in arrearages and other specific charges, costs, and fees to reinstate the deed of trust. (RCW 61.24.030(8)(d)); and (RCW 61.24.030(8)(e)). And if the borrower pays the arrearages and other specific charges, costs, and fees within the 30-day period following service of the NOD, then the trustee never gains statutory authority to record, transmit, or serve a NOTS. (RCW 61.24.030(8)(f)).<sup>14</sup>

- a. *Albice v. Premier Mortgage Services of Washington, Inc.* 174 Wn.2d 560, 276 P.3d 1277 (2012)

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<sup>13</sup> If Defendants’ analysis is correct, then after a NOD is filed a single time, NOTS’s can be recorded, into the infinite future, using the initial NOD as their antecedent. Completely aside from the fact that both the Washington Supreme Court in *Albice* and the Washington Court of Appeals in *Watson* definitively said no to this idea; the idea makes no sense. If a NOD is filed in year X that informs the borrower of Y amount of arrearages and additional charges, costs, and fees, and then the property is actually sold three years later pursuant to a NOTS that utilizes the original NOD as its antecedent, the amount of arrearages and additional charges, costs, and fees reflected in the NOD will be wildly at odds with the actual amount of arrearages and additional charges, costs, and fees. Yet, the WDTA gives the borrower the right to re-instate the deed of trust for the amounts reflected in the NOD.

<sup>14</sup> If Defendants’ claim that a NOD, once issued, need never be re-issued is correct, then this right to be told, at least 30 days before the NOTS is recorded, the specific amount that is owed and to prevent the trustee from ever gaining the legal authority to record the NOTS by paying the amount within the 30-day period is lost forever.

The question whether the NOD must be re-issued if the originally-scheduled sale does not occur within 120 days following the originally-scheduled sale date has already been definitively decided against Defendants by the Washington Supreme Court. In *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) the *Albice* Plaintiff claimed the trustee violated RCW 61.24.040(6) by selling Plaintiff's property 161 days after the original sell date without re-issuing the statutory notices. The trustee postponed the sale six times between September 8, 2006 and February 16, 2007, a total of 161 days, without re-issuing the statutory notices. The Washington Supreme Court made the following ruling:

Under RCW 61.24.040(6), a trustee may continue a sale "for any cause the trustee deems advantageous... for a period or periods *not exceeding a total of one hundred twenty days*" (emphasis added). A plain reading of this provision permits a trustee to continue a sale once or more than once but unambiguously limits the trustee from continuing the sale past 120 days.

When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required. *Udall*, 159 Wash.2d at 915-16, 154 P.3d 882. Therefore, strictly applying the statute as required, we agree with the Court of Appeals and hold that under RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory notices, to conduct a sale after 120 days from the original sale date, and such a sale is invalid.

*Id.* at 1281 – 82. (Underscoring, italics, and bolding added).

After *Albice*, the only real question is whether a NOD – a notice that is required by RCW 61.24.030(8) of the DTA -- is a statutory notice. If it is, and it surely is, then RCW 61.24.040(6) and *Albice* require the NOD be re-issued if the original sale date has been extended by more than 120 days.

**6. Acts capable of repetition and have substantial impact on public interest.**

Defendants contend all of their actions in this case have been lawful. But, it is surely illegal for Trust 2 to foreclose when it does not own Plaintiff's loan. It is also unlawful for Defendants to attempt to conduct a foreclosure sale more than 120 days after the original sale date without re-issuing all of the statutory notices. Yet Defendants contend both these actions are lawful.

Defendants conduct foreclosure sales every week. Doubtless some of those sales occur as a result of the second, third, or even fourth attempt to sell the property. Since Defendants do not believe it is necessary to re-issue the NOD, surely many of the second, third, and fourth attempts occur more than 120 days after the original sale date without the statutory notices being re-issued.

Respondents acknowledge that “[i]n order to schedule a sale beyond the 120 day limit, a trustee must reissue the statutory notices[.]” (*CP*, at 30: 10-11.) then proceed to inform the Court that a new notice of trustee's sale –unassociated with a new NOD– complies with the requirement to re-issue the statutory notices. *Id.* at 30: 12-17

Clearly Respondents actions have the capacity to have a wide public impact.

#### **7. Damage and Causation.**

Finally, the loss of the Property will be entirely due to Respondents' unlawful conduct. Maybe someone has the right to foreclose, but that someone has not stepped forward. Instead, the Trust, with the help of the other Defendants, has stepped forward.

Appellant has had to expend large amounts of time away from his business investigating this matter. Also, Appellant has had to pay professional consultants to investigate this matter on Appellants' behalf. The income Appellant has lost because of his inability to be present in the work place at times is substantial; and Appellant has spent thousands having very competent professionals investigate Respondents' actions. Respondents' illegal actions are the sole cause of all that loss.

#### **F. Discovery Rule**

Defendants assert the statute of limitations. The discovery rule applies in cases in which the facts that comprise the elements of a cause of action are hidden from an appellant's view. In the case before this Court, the lender required Appellant to agree the lender could sell Appellant's loan without Appellant's knowledge permission.

The original lender did sale the loan without Appellant's knowledge or permission. Recordings of the transfers of ownership are maintained in a private record keeping system. MERS is the private record

keeper. The MERS system is available to MERS members only. Appellant is not a member of MERS.

Appellant never had notice of any facts that would have led him to believe a cause of action existed against Respondents until shortly after the NOD was issued on February 4, 2014.

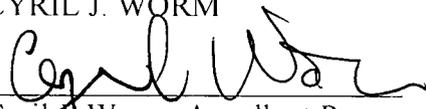
Under the circumstances of this case, the discovery rule applies and the statute of limitations has not run. *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 953 P.2d 1162 (1998); *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192 (D.C. Cir. 1984).

## V CONCLUSION

For the reasons listed herein above, the court should reverse the trial court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

Respectfully submitted,

CYRIL J. WORM



Cyril J. Worm, Appellant Pro se

**DECLARATION OF SERVICE**

**THE UNDERSIGNED** declares under penalty of perjury under the laws of the State of Washington that he caused Plaintiff's Amended Opening Brief to be served on the following representative for Defendants at the below stated address by U.S. Mail as previously agreed between the parties to this litigation:

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**DONE** this 1<sup>st</sup> day of February, 2016 at Tacoma, WA.

FILED  
COURT OF APPEALS  
DIVISION II  
2016 FEB - 1 PM 2:55  
STATE OF WASHINGTON  
BY  DEPUTY

**CYRIL J. WORM**

  
Cyril J. Worm, Plaintiff Pro se