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DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

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

**NO. 48716-1-II**

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**ALICE LOPEZ**, an unmarried woman,

Appellant,

vs.

**JPMORGAN CHASE & CO.**, a New York Company; **JPMORGAN  
CHASE BANK, NA**, an Illinois National Association; **DEUTSCHE  
BANK NATIONAL TRUST CO.**, a California Company;  
**NORTHWEST TRUSTEE SERVICES, INC.**, a Washington  
Corporation; and **JOHN DOES 1-10**,

Respondents.

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

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**APPELLANT LOPEZ'S OPENING BRIEF**

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## TABLE OF CONTENTS

<b>I</b>	<b>ASSIGNMENTS OF ERROR</b>	<b>7</b>
<b>A.</b>	<b>Assignments of Error</b>	<b>7</b>
<b>B.</b>	<b>Issues Pertaining to Assignments of Error</b>	<b>7</b>
<b>II</b>	<b>STATEMENT OF THE CASE</b>	<b>8</b>
<b>A.</b>	<b>Relevant Facts</b>	<b>8</b>
<b>1.</b>	<b>The Trust</b>	<b>10</b>
<b>2.</b>	<b>Statutes Applicable to the Trust</b>	<b>10</b>
<b>B.</b>	<b>Procedural Facts</b>	<b>11</b>
<b>III</b>	<b>ARGUMENT</b>	<b>12</b>
<b>A.</b>	<b>The trial court erred in granting summary judgment even though a significant issue of constitutional magnitude and several issues of material fact remained unresolved.</b>	<b>12</b>
<b>1.</b>	<b><i>Brown v. Washington Dept. of Commerce</i>, irreconcilably conflicts with RCW 62A.9A-203 and must yield.</b>	<b>12</b>
<b>2.</b>	<b>If an assignment of a note and deed of trust is void ab initio, not voidable, Plaintiff-Appellant may assert the invalidity of the assignment.</b>	<b>14</b>

a.	<b>FDIC assigned Note and DOT.</b>	<b>14</b>
b.	<b>NWTS had no lawful authority to commence this foreclosure.</b>	<b>17</b>
c.	<b>The Foreclosure is Forbidden by 26 U.S.C. §860(F)(a)(2)(B).</b>	<b>18</b>
1.	<b>Plaintiff's loan is not a "qualified mortgage."</b>	<b>18</b>
a.	<b>FDIC assigned the DOT in violation of RCW 64.04.010.</b>	<b>18</b>
b.	<b>Loan assigned to Trust more than five years after Trust's Startup Date and therefore was not a "qualified mortgage."</b>	<b>19</b>
c.	<b>FDIC did not receive "Regular" or "Residual" Interests in Exchange for Loan and therefore Loan was not a "Qualified Mortgage."</b>	<b>19</b>
2.	<b>The loan is not "permitted investment."</b>	<b>20</b>
3.	<b>Even if Loan was Lawfully in Trust, which It was not, 26 U.S.C. §860(F)(a)(2)(B) would forbid any Transaction Respecting Loan that produced Income to the Trust.</b>	<b>20</b>

	<b>B. The Unlawful Detainer Action.</b>	<b>21</b>
<b>VII</b>	<b>CONCLUSION</b>	<b>21-22</b>

## TABLE OF AUTHORITIES

### CASES

1. *Bain v. Metropolitan Mortgage Group, Inc.*,  
175 Wn.2d 83 (2012) 14
2. *Brown v. Dept. of Commerce*, 184 Wn. 2d 509 (2015) 12, 13, 14
3. *Glaski v. Bank of America*, 218 Cal. App. 4<sup>th</sup> 1079,  
1097 (2013) 16
4. *Walker v. Quality Loan Service Corporation of  
Washington*, 176 Wn.App. 294 (2013) 18
5. *Washington State Farm Bureau Federation, v. Gregiore*,  
162 Wn.2d 284, 290, 174 P.3d 1142, 2007 Wash.  
LEXIS 871. 13
6. *Yvanova v. New Century Mortgage Corporation*

### STATUTES

- A. RCW 59.12  
RCW 59.12.130 21
- B. RCW 61.24  
RCW 61.24.005 11  
RCW 61.24.010 11
- C. RCW 62A.3  
RCW 62A.3-301 13
- D. RCW 62A.9A.  
RCW 62A.9A.-203 12, 13, 14, 15, 22  
RCW 62A.9A.-313 14
- E. RCW 64.04  
RCW 64.04.010 8, 18, 22

RCW 64.04.020	8, 18
RCW 64.08.010	9
F. <u>26 USC § 860</u>	
26 USC § 860(A)-(G)	9, 10, 18, 19, 20, 21, 22
<b><u>OTHER AUTHORITIES</u></b>	
Official Comment 9 to UCC §9-203	12, 13

## I ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in granting summary judgment even though a significant issue of constitutional magnitude and several issues of material fact remained unresolved.
2. The trial court erred in entering the Judgment and Decree of Foreclosure.

### B. Issues Pertaining to Assignments of Error

1. If a court decision irreconcilably conflicts with a constitutionally enacted statute, must the court decision yield?
2. If an assignment of a note and deed of trust is void ab initio, not voidable, may Plaintiff-Appellant assert the invalidity of the assignment ownership of the note and beneficiary status to the assignee?
3. In the absence of proof of *ownership* of a mortgage note secured by a deed of trust, is the alleged *holder* of the note authorized by Washington law to enforce the deed of trust?
4. If the acceptance of an assignment of a note and deed of trust into a trust by the trustee is void, may Plaintiff-Appellant utilize assert the void assignment as a basis for denying the trustee the right to foreclose?

## II STATEMENT OF THE CASE

### A. Relevant Facts

On or about November 29, 2004, Plaintiff executed a promissory note (“Note”) and deed of trust (“DOT”). *CP I.* at 5: 9-10. The DOT listed Fidelity National Title as Trustee, and Washington Mutual Bank, a Washington corporation (“WMB”), as the beneficiary and the Lender. *Id.*, at 10-11. The DOT granted WMB a security interest in Plaintiff’s residence located at 14030 SE 35<sup>th</sup> Loop, Vancouver, WA 98683 (Hereinafter “Property”). *Id.*, at 15-16. The DOT was recorded in the Clark County Auditor’s Office under Recording Number 3917334 on December 7, 2004. *Id.*, at 11-13. The DOT provided WMB with a lien interest in the Property. *Id.*, at 15-16.

RCW 64.04.010 requires all transfers of interests in real property to be conveyed by deed.

RCW 64.04.020 lists the elements a document must contain to fulfill the deed requirement of RCW 64.04.010. A document must be: (1) in writing; (2) signed by the party to be bound by the transfer of the interest transferred by the deed; and (3) acknowledged by the party to be bound by the transfer before a person authorized by statute to take the acknowledgement of a deed. A standard “Assignment of Deed of Trust” meets each of these three requirements and is therefore a “deed” under Washington law.

Pursuant to RCW 64.08.010, a notary public is authorized to take the acknowledgement of a deed (i.e., an assignment of a DOT). This is one of the primary reasons, long forgotten by many, why all assignments of DOT's are acknowledged, and the acknowledgement is witnessed by a notary public.

The Federal Deposit Insurance Corporation ("FDIC") purportedly assigned the Note and DOT on July 19, 2012 to Deutsche Bank National Trust Company as Trustee for WaMu Mortgage Pass-Through Certificate Series 2005-AR6 ("Trust") ("Assignment"). *Id.*, at 6: 7-9. JPMorgan Chase Bank, NA ("JPM") recorded the Assignment on August 7, 2012. *Id.*, at 9-10.

The Assignment was (1) in writing; (2) signed by JPM, as the alleged attorney-in-fact for the FDIC (*Id.*, at 6: 13-14), the party allegedly bound thereby; and (3) acknowledged by JPM before a person authorized by statute to take acknowledgements (i.e., a notary republic). *Id.*, at 6: 14-15.

On July 19, 2012, neither JPM, nor JPMorgan Chase & Co., nor the FDIC held or owned any interests in either the Note or DOT. Additionally, on August 7, 2012, the date on which JPM recorded the Assignment, neither JPM, nor JPMorgan Chase & Co., nor the FDIC held or owned any interests in either the Note or DOT.

The Trust's "Closing Date" is April 26, 2005. *PSA § 1.01. Id.*, at 7: 8. By federal statute, 26 U.S.C. §860(A) – (G), and the Trust's Pooling and Servicing Agreement ("PSA"), the Trust had to purchase Plaintiff's loan and transfer it into the Trust *no later than July 25, 2005.* *Id.*, at 6: 21-23. The FDIC assigned the Note and DOT on July 19, 2012, almost seven years after July 25, 2005. *Id.*, 6: 7-9. The FDIC did not own or hold any interest in the Note or DOT on July 19, 2012. *Id.*, at 6: 24-25.

### **1. The Trust**

The creation and day-to-day operation of the Trust is governed by the PSA. *Id.*, at 7: 2-3. The parties to the PSA are Washington Mutual Mortgage Securities Corporation ("Depositor"), Deutsche Bank National Trust Company ("Trustee"), and Deutsche Bank Trust Company Delaware ("Delaware Trustee"). *Id.*, at 7: 4-6. .

Plaintiff is neither a party to the PSA nor a third-party beneficiary of that agreement. *Id.*, at 7: 7.

### **2. Statutes Applicable to the Trust.**

As of April 26, 2005, the Trust's Closing Date, the Depositor warranted it had transferred all "right, title, and interest in the Mortgage Loans" to the Trust, including Plaintiff-Appellant's loan. *Id.*, at 7: 10-12. In addition, pursuant to 26 U.S.C. Section 860(G)(a)(3), the federal statute that incorporates the requirements for creating REMICs, the Depositor was *required* to make such a warranty. *Id.*, at 7: 12-13.

Plaintiffs' mortgage loan (i.e., Note and DOT) was not transferred to the Trust until July 19, 2012, *nearly seven years after the Trust closed*.

On October 16, 2012, the Trust appointed NWTs the successor trustee. *Id.*, at 9: 2. Only the "beneficiary," as that term is defined in RCW 61.24.005(2), is authorized to appoint a successor trustee. *RCW 61.24.010(2)*.

There is no evidence in this record that JPM was the Trust's agent. Thus, even if agents are authorized by RCW 61.24.010(2) to appoint successor trustees, there is no evidence in the record that NWTs was appointed the successor trustee by the Trust's agent.

**B. Procedural Facts.**

The property that is the subject of this litigation was scheduled to be sold on November 13, 2015. *Id.*, at 78: 14-15. Plaintiff-Appellant commenced suit on October 8, 2015 by filing and serving the summons and complaint. *Id.*, at 1.

On November 6, 2015, Plaintiff brought on for hearing a motion for preliminary injunction. *Id.*, at 72. After reviewing the pleadings and hearing the arguments of counsel, the court denied the motion. *Id.*, at 111: 20. On November 9, 2016, Plaintiff filed a motion for discretionary review in the Court of Appeals seeking to have the Court review the trial court's denial of Plaintiff's motion for preliminary injunction. *Id.*, at 116-117, 121-122, and 126-127. This court refused to grant discretionary review.

The property was sold at public auction on Friday, November 13, 2015.

On December 8, 2015, commenced an unlawful detainer action in Clark County Superior Court. *CP II*, at 1-6. The hearing to show cause why writ of restitution should not issue was held on January 5, 2016. At the conclusion of the hearing, issuance of a writ of restitution was ordered. *Id.*, at 115-117.

On January 19, 2016, Plaintiff-Appellant brought on for hearing a motion post-entry of order for writ of restitution to set an appeal bond amount. *Id.*, at 145 and 159-162. The bound amount was set at \$50,000. *Id.*, at 224. The next day, Plaintiff appeared in this court to request the Court accept discretionary review of the trial court's refusal to grant Plaintiff's motion for preliminary injunction and reduce the bond amount set by the unlawful detainer court. *Id.*, at 225. This Court refused to accept discretionary review and lowered the bond amount from \$50,000 to \$25,000.

Plaintiff timely appealed the unlawful detainer court ruling granting writ of restitution on January 11, 2016 (*Id.* at 228) and the lower court summary judgment ruling on April 11, 2016.

### III ARGUMENT

- A. The trial court erred in granting summary judgment even though a significant issue of constitutional magnitude and several issues of material fact remained unresolved.**

1. ***Brown v. Washington Dept. of Commerce*, irreconcilably conflicts with RCW 62A.9A-203 and therefore must yield.**

In *Brown v. Dept. of Commerce*, 184 Wn. 2d 509 (2015), the Washington Supreme Court held the *holder* of secured note, regardless of *ownership* of that note, is entitled to enforce the security for the note. That is, the Court upheld a judicially-created version of the common law *security follows the note* doctrine. That doctrine, however, has been codified at RCW 62A.9A-203(a), (b), and (g). *Official Comment 9 to UCC § 9-203*. RCW 62A.9A-203(a), (b), and (g) requires an entity to both own and hold a secured note to be entitled to enforce the deed of trust. Thus, by holding as it did, the Court unwittingly, unintentionally and unconstitutionally amended RCW 62A.9A-203(a), (b), and (g).

Since, under RCW 62A.3-301, the holder of a note need not be the owner of the note to be entitled to enforce it (indeed, a thief, if in possession of a blank endorsed note, is entitled to enforce it), the *Brown* decision and RCW 62A.9A-203(a), (b), and (g) are, at least in part, irreconcilably opposed to one another.

This is a matter of constitutional magnitude. The Washington Legislature enacted RCW 62A.9A-203. The provision's constitutionality has never been challenged. Pursuant to Article II, Section 1 of the Washington Constitution, the Washington Legislature has plenary power to enact laws. *Washington State Farm Bureau Federation, v. Gregiore*, 162 Wn.2d 284, 290, 174 P.3d 1142, 2007 Wash. LEXIS 871. Accordingly, when there is an irreconcilable conflict between a constitutionally enacted Washington statute (in this case RCW 62A.9A-203) and a Washington court decision (*Brown*), even a decision of the Washington Supreme Court, the court decision must yield. There is such a

conflict between *Brown* and RCW 62A.9A-203(a), (b), and (g).

Accordingly, *Brown* must yield.

Moreover, *Brown* is founded on a historically unsustainable version of the *security follows the note* doctrine. RCW 62A.9A-203(g) is the codification of that centuries-old common law doctrine. *Official Comment 9 to UCC § 9-203*. The court version of the doctrine (i.e., the holder of a secured note, *regardless of ownership*, is entitled to enforce the security for the note) is diametrically opposed to the statutory version of the doctrine (i.e., *only the owner* of a secured note is entitled to enforce the security for the note). Again, under such circumstances, *Brown* must yield. As a result, this court is not only not bound by *Brown*; it is bound to ignore *Brown*. Plaintiff-Appellant realizes Plaintiff has stated a mouth full. Nevertheless, the statement is accurate.

To have an enforceable ownership interest in the Note attach to the Note, Defendant-Respondent was obligated to meet the three requirements of RCW 62A.9A.-203(b). Defendant had to prove: (1) *value* was given for the Note; (2) rights in the note were transferred to Defendant by someone who had rights in the note or who had the right to transfer rights in the note; and (3) Defendant had “*possession*” of the note, as the term “possession” is understood in the UCC,<sup>1</sup> before it commenced this litigation. If Defendant failed to meet any one of these three requirements, then it failed to obtain an enforceable security interest (i.e., “ownership interest”) in the Note and, because of RCW 62A.9A.-203(g), simultaneously failed to obtain an enforceable security interest in the

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<sup>1</sup> Under the UCC, “physical custody” does not necessarily equal “possession.” Under RCW 62A.9A.-313, if the person with physical custody of the note acknowledges that he holds the note for the benefit of a third party, the third party has “possession” of the note, not the person who has physical custody of the Note. In the Pooling and Servicing Agreement, which Defendant-Appellant referenced in its Reply to Plaintiff’s Motion for Preliminary Injunction, Plaintiff-Respondent repeatedly acknowledges that it holds the Note for the sole benefit of the certificate holders.

DOT. The only one of the three requirements arguably met by Defendants was the *possession* requirement.

**2. If an assignment of a note and deed of trust is void ab initio, not voidable, Plaintiff-Appellant may assert the invalidity of the assignment.**

**a. FDIC assigned Note and DOT.**

In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), the Washington Supreme Court ruled that MERS could not be a lawful beneficiary. MERS, the Court reasoned, had never “held” or “owned” the note, and therefore had never had any interest in the note. Since the DOT follows the note (*RCW 62A.9A.-203[a],[b] and [g]*), had no right to assign the beneficial interest in the DOT. One may assign only an interest that one possesses.

While it is true that recordation of an assignment of a deed of trust puts everyone on constructive notice that ownership of the beneficial interest in the DOT has changed hands, the beneficial interest in a deed of trust is transferred by assignment primarily because, as an interest in real property, the beneficial interest in a DOT must be transferred by deed, and a standard assignment of DOT is the preferred form of deed for transferring DOT’s in Washington and every other state in the Union.

Assignments of DOT’s are such a standard part of the transfer of beneficial interests in DOT’s in Washington that many jurists appear to have forgotten the primary reason why assignments are utilized to make

such transfers. In the absence of a lawful assignment of the DOT, the beneficial interest in the DOT is never transferred.

In this case, the assignment was unlawful because it was untimely. The FDIC assigned the Note and DOT to the Trust on July 19, 2012. The Trust, however, is a 2005 trust that closed on April 26, 2005. Thereafter, pursuant to the Pooling and Servicing Agreement and federal statute, placement of a loan in the Trust was strictly prohibited.

Every sale, conveyance or other act of a trustee in contravention of the trust's governing documents is void, not voidable. Therefore Deutsche's acceptance of the Note and DOT into the Trust more than seven years after the Trust closed is void. *Glaski v. Bank of America*, 218 Cal. App. 4<sup>th</sup> 1079, 1097 (2013) (The reasoning of this case—which was in the solitary minority in California at one point—has since been approved by the California Supreme Court in *Yvanova v. New Century Mortgage Corporation*). Consequently, Plaintiff-Appellant's claims should not have been dismissed. See *Glaski*, 218 Cal. App. 4<sup>th</sup> at 1097-98.

In the trial Defendants claimed a violation of the REMIC statutes is irrelevant to the case because that statute merely determines tax consequences to the Trust. The REMIC statute does much more than that. Placement of a loan in a trust after the closing date places the entire trust's REMIC status at risk. *Id.* Voiding the attempted transfer protects the beneficiaries of the trust by preventing the potential adverse consequence, to each beneficiary, of the entire REMIC losing its tax status as a REMIC.

The trust would then be taxed on all revenue that passed through the Trust on its way to the beneficiaries, and the beneficiaries would be taxed on the same revenue. This double taxation would severely reduce, if not completely eliminate, the beneficiaries' profits. REMIC trusts would quickly cease to exist, and the international market for securitized assets that REMIC's make possible (and the massive United States homeowner financing that the international market produces) would quickly dry up and cease to exist.

By far the most consequential potential danger to this country's financial markets is not the product of allowing borrowers to assert that a late assignment is void. The most consequential potential danger is in *not* allowing borrowers to assert such transfers are void.

Because the transfer was void ab initio, and also because RCW 64.04.010 requires all interests in real property to be lawfully transferred by deed, and the FDIC assignment was not a lawful transfer by deed of the beneficial interest in the DOT, the Trust never obtained an interest in the Note or DOT. As a consequence, the Trust has never had lawful authority to foreclose.

The FDIC did not sell Washington Mutual's assets to JPMorgan until September 25, 2008. Thus, the FDIC had no interest in the Note or DOT to transfer on July 19, 2012, almost 4 years after the FDIC had allegedly transferred any interest it had in Washington Mutual's assets to JPMorgan. The FDIC could not assign interests that it did not possess.

*Bain* 175 Wn.2d at ¶ 50. Thus, the beneficial interest in the DOT has never been transferred to the Trust – a violation of the RCW 64.04.010 requirement that all interest in real property be transferred by deed.

**b. NWTS had no lawful authority to commence this foreclosure.**

The Trust derived its authority to act from FDIC’s assignment of the Note and DOT to the Trust – an assignment that, for several reasons,<sup>2</sup> was legally ineffective. NWTS was appointed the successor trustee by the Trust – an appointment that, because of the ineffectiveness of the FDIC’s assignment, was also legally ineffective. Accordingly, NWTS had no authority to proceed with a non-judicial foreclosure and has violated the DTA by starting one. *Walker v. Quality Loan Service Corporation of Washington*, 176 Wn.App. 294 (2013) at ¶ 14.

**c. The foreclosure is forbidden by 26 U.S.C. §860(F)(a)(2)(B).**

26 U.S.C. §860(F)(a)(2)(B) prohibits any transaction that produces income from an asset that is neither a “qualified mortgage” nor a “permitted investment.

**1. Plaintiff’s loan is not a “qualified mortgage.”**

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<sup>2</sup> The assignment was legally ineffective because: (1) the FDIC had no interest to assign; (2) even if the FDIC had had an interest to assign, (a) the loan was assigned more than 7 years *after* the Trust closed and (b) the FDIC did not receive a regular or residual interest in exchange for the assignment of the loan.

When the FDIC assigned Plaintiff's loan (Note and DOT) into the Trust on July 19, 2012, the loan did not become a "qualified mortgage" for three reasons.

**a. FDIC assigned the DOT in violation of RCW 64.04.010.**

The assignment was legally invalid because it was made by the FDIC, an entity that did not own any interest in the Note or DOT. As a result, the assignment violated the requirement in RCW 64.04.020 that an interest in real property be transferred by the person to whom the interest transferred is owed. There has never been any other attempt to assign the DOT to the Trust. Accordingly, pursuant to the requirements of RCW Chapter 64.04, the lien interest in the Property represented by the DOT has never been lawfully transferred into the Trust.

**b. Loan assigned to Trust more than five years after Trust's Startup Date and therefore was not a "qualified mortgage."**

The loan was not assigned to the Trust until more than 7 years after the Trust closed. According to the Trust Agreement, *the Trust closed on April 26, 2005*. The Assignment occurred on *July 19, 2012*, more than 7 years after the Trust closed. Pursuant to 26 U.S.C. §860(G)(a)(3)(A)(i) and (ii), to be a "qualified mortgage" a loan must be assigned into the Trust, at the very latest, *no later than 90 days after the Trust's closing date*. Transfer of a loan into a REMIC trust after the 90<sup>th</sup> day is prohibited by federal law. *See 26 U.S.C. §860(F) and (G)*. Such a transfer puts at risk

the tax status of the entire REMIC, including its thousands of monthly loan transactions. Since the loan was not assigned into the Trust until more than 7 years after the Trust's closing date, if it has ever been assigned into the Trust, the loan is not legally part of the Trust. And the Trust is prohibited by federal statute from conducting any transactions related to Plaintiff's loan.

Moreover, this court has an obligation not to aid anyone in the violation of federal law.

**c. FDIC did not receive "Regular" or "Residual" Interests in Exchange for Loan and therefore Loan was not a "Qualified Mortgage."**

When the FDIC assigned the loan into the Trust, it did not receive a "regular" or "residual" interest in the Trust in exchange for the loan. Pursuant to 26 U.S.C. §860(G)(a)(3)(A)(i), to be a "qualified mortgage," a loan must be transferred into a Trust in exchange for regular or residual interests in the Trust. Consequently, even if the FDIC did actually transfer the loan into the Trust, the loan would not have become a "qualified mortgage," even if it had been lawfully transferred into the Trust.

**2. The loan is not "permitted investment."**

Pursuant to 26 U.S.C. §860(G)(a)(5), the term "permitted investment" means a "cash flow investment," a "qualified reserve asset," or a "foreclosure property." The term "Cash flow investment" is defined in 26 U.S.C. §860(G)(a)(6). Plaintiff's loan does not fit the definition and

therefore is not a “cash flow investment.” A “qualified reserve asset” is defined in 26 U.S.C. §860(G)(a)(7). Plaintiff’s loan does not fit the definition and therefore is not a “qualified reserve asset.” “Foreclosure property” is defined in 26 U.S.C. §860(G)(a)(8), by way of incorporation of the definition of “foreclosure property” contained in 26 U.S.C. §856(e). Plaintiff’s loan does not fit the definition of “foreclosure property” contained in 26 U.S.C. §856(e). Plaintiff’s loan is not “foreclosure property.” Accordingly, Plaintiff’s loan is not a “permitted investment.”

**3. Even if Loan was Lawfully in Trust, which It was not, 26 U.S.C. §860(F)(a)(2)(B) would forbid any Transaction Respecting Loan that produced Income to the Trust.**

Under 26 U.S.C. §860(F)(a)(2)(B), transactions that result in the receipt of any income from an asset that is neither a “qualified mortgage” nor a “permitted investment” are strictly forbidden. As demonstrated above, under these circumstances, Plaintiff’s loan is neither a “qualified mortgage” nor a “permitted investment.” Consequently, the Trust – Even if it lawfully had the Property, which it does not. – would be forbidden to sell the property. As such, NWTS had no lawful right to conduct the sale and violated federal law by doing so.

**B. The Unlawful Detainer Action.**

In the unlawful detainer action, Plaintiff sought a trial by jury. Plaintiff intended to raise all of the same issues in the unlawful detainer trial that it had raised in the initial lawsuit and herein above. The material

factual issues were raised in Plaintiff's answer to the unlawful detainer complaint. The court refused to grant a jury trial on those or any other issues.

RCW 59.12.130 provides the trial court shall grant a jury trial when an issue of fact is presented by the pleadings. The court denied Plaintiff-Appellant a statutorily mandated right. It was prejudicial error to refuse to grant the jury trial. Plaintiff seeks a reversal of this error.

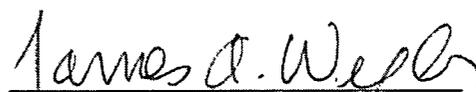
#### IV CONCLUSION

Each Defendant's participation in the preparation, execution and implementation of the numerous false documents that have been prepared and executed in this case violated the DTA. Defendants actions have also violated RCW 64.04.010(2), RCW 62A.9A-203(a),(b), and (g) (i.e., the "security follows the note" legal axiom) and 26 U.S.C. §860(A)-(G).

There are clearly issues of material fact that remain to be decided in both Plaintiff Consumer Protection Act case and Defendants' unlawful detainer action.

For all of the reasons recited herein above, this Court should reverse the trial court's ruling on summary judgment and unlawful detainer court's ruling granting the writ of restitution and remand this case to the trial court with instructions to the trial court that the case be reinstated and permitted to continue.

Respectfully submitted,



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*Attorney for Appellant*

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

Case No. 48716-1-II

CERTIFICATE OF SERVICE

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I certify that on the AUGUST 8, 2016, I caused a true and correct copy of (1) Appellant/  
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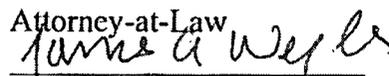
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DATED this 08<sup>th</sup> day of August, 2016 at Sammamish, Washington.

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