

74871-8

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

NO. 74871-8-I

CONCEPCION HERMOSILLO, a single woman.

Appellant/Defendant,

vs.

ELIAS HAYDARI and AMIR BAHANDARI,
Respondents/Plaintiffs

**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF
SNOHOMISH
Case No. 16-2-02014-1**

APPELLANT'S REPLY TO RESPONDENT'S OPENING BRIEF

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STATE OF WASHINGTON
SUPREME COURT
APPEAL FILED

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RULES OF APPELLATE PROCEDURE

RAP 8.1 (b), (b)(2), (b)(4), (c), (c)(2), (c)(3), (d)(1)(2), (f), (g), (h).

STATUTES

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RCW Chapter 61.24

(1) RCW 61.24.030 5, 10

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CASES

Albice v. Premier Mortgage Services of Washington, Inc 174 Wn.2d 560,
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Bain v. Metropolitan Mortgage Grp. 175 Wn.2d 83 (2012)
Inherent equitable powers of the court to fashion relief. **Pages 9, 11**

TRANSCRIPT

Court Reporter Verbatim Transcript of February 9, 2016 Show Cause
Hearing before Hon. Commissioner Linda Passey, Presiding,
Snohomish County Superior Court Case 16-2-02014-1

DESIGNATION OF CLERK'S PAPERS

STATEMENT OF ARRANGEMENTS

I. INTRODUCTION and SUMMARY OF PROCEDURAL BACKGROUND.

Defendant Hermosillo had filed a Complaint and Motion for Preliminary Injunction to enjoin the Trustee's Sale of her home on December 04, 2015.

Defendant's Motion for Preliminary Injunction was denied December 14, 2015.

Defendant's home was sold on December 04, 2016 to Plaintiffs and their Hard Money lender for \$230,000.

Defendant filed a Notice of Appeal against Quality Loan Services Corporation of Washington (foreclosing Trustee) and New York Community Bank of the underlying wrongful foreclosure and Trustee's sale of her property on March 24, 2016.

Appellant Defendant filed an opening Appellant Brief Case No. 74871-I on August 12, 2016 with respect to the denial on February 26, 2016 by Commissioner of Defendant's right to a Jury Trial (Snohomish County Superior Court Case No. 16-2-02014-1) pursuant to RCW 59.12.130 and right to post a bond to stay the issuance of a writ as set forth in RCW 59.12.100 and regarding the finality of the sale referenced in RCW 61.24.050 and regarding issues of fact raised in Hermosillo's Answer to the

Complaint for Unlawful Detainer and argued at the Show Cause hearing on February 09, 2016.

Appellant Defendant, as set forth in the Designation of Clerk's Papers between February 16 - 26, 2016 filed a Motion for Reconsideration with Exhibits, CP (148 – 270); Declaration of James A Wexler, CP (330 – 335); Declaration of Supplemental Authorities, CP (137 – 140); Declaration of Dave Caraway, CP (276 - 329); and Defendant's Reply to Plaintiff's Response to Motion for Reconsideration, CP (28 – 109) to Commissioner Passey setting for the specific questions of fact to be tried by jury and as set forth in Defendant's Answer to the Unlawful Detainer Complaint pursuant to RCW 59.12.130 with Exhibits identifying the documents and that portion of such documents that are false, misleading and otherwise void as false and fraudulent recorded documents in violation of RCW 40.16.030 by referencing on the face of the documents MERS and QLS.

Appellant Defendant filed a Notice of Appeal and thereafter an Opening Appellant Brief on August 5, 2016 with respect to the Summary Judgment granted Quality Loan Services Corporation of Washington and New York Community Bank in the underlying suit, Snohomish County Superior Court Case No. 16-2-02014-1 which also sets forth the specific questions of fact none of which were resolved by that case.

Plaintiffs Haydari and Banhandari filed an Unlawful Detainer action against Defendant following Plaintiffs purchase of the property from Quality Loan Services Corporation of Washington, Trustee for foreclosure. Defendant Answered the Complaint and at the Show Cause hearing and in its Answer raised Issues of Fact related to the issuance of the Trustee's Deed Upon Sale and demanded a Jury Trial as required by RCW 59.12.130, provision for Defendant to provide a bond to stay the issuance of a writ of restitution per RCW 59.12.100 and issues regarding the finality of the sale pursuant to RCW 61.24.050. The Snohomish County Commissioner denied Defendant/Appellant's Motion for a Jury Trial and authorized issuance of a Writ of Restitution to evict Defendant from her home.

Defendant Appealed the Court Commissioner's ruling which appeal is also currently before this Court.

At the bond hearing, the Snohomish County Superior Court set a bond of \$37,500 which Defendant paid into the court on March 9, 2016 as ordered.

Defendant filed an Expedited Motion for a Review of the increase in the Bond Amount and paid her filing fee of \$290.00.

Defendant's objection to the Motion for Increased Bond partially granted and partially denied and Defendant's cross-motion to reduce the bond was

denied. Plaintiffs were granted an increase of bond in the amount of \$18,000.00 plus \$1,200.00 per month from which Defendant appeals at this time. Defendant is unable to deposit the \$18,000.00 which will result in Defendant's eviction from her home she has so tenaciously defended by filing the appeals and has already payed \$37,500.00 into the court registry despite the value of the property being more than adequate to collateralize even Plaintiff's unfounded basis for the original supersedeas amount or any increase therein.

Defendant Hermosillo has since, nevertheless paid into the registry of the Snohomish County Clerk the increased supersedeas cash amount of \$18,000.00 added to the previous supersedeas amount of \$37,500.00. The total amount of cash deposited with the court at this time is \$63,500.00 plus \$1,800.00 monthly that commenced October, 2016 and includes having paid \$2,000.00 attorney fees to Respondent's counsel due to one late payment increase in supersedeas bond which itself is under Appeal in this court. Respondents/Plaintiffs have been amply protected by the Court with such amounts on deposit.

II. ASSIGNMENT OF ERRORS

1. The Commissioner erred in denying Appellant Hermosillo her statutory right to a trial, pursuant to RCW 59.12.130, right to post a bond pursuant

to RCW 59.12.100 and finality of the Deed Upon Sale pursuant to RCW 61.24.050, all issues of fact raised in Answer to the Unlawful Detainer Complaint and pleadings on file with the Court and set forth in the Designation of Clerk's Papers and as set forth in the Transcript of the Commissioner's Show Cause Hearing as to whether the Unlawful Detainer Complaint or the Trustee's Deed Upon Sale upon which Respondent's Complaint is based was legally issued that contained false and misleading information on its face and sufficient material questions of fact that affect the legality of the issuance of the Trustee's Deed Upon Sale that entitle Appellant to have such issues of fact determined by a jury trial prior to the issuance of a writ of restitution and Appellant Hermosillo being evicted.

A. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Is Appellant Hermosillo entitled to a trial by jury on the issues of fact raised in her Answer to the Unlawful Detainer Complaint, pleadings on file with the Designation of Clerk's Papers, Statement of Arrangements and actual Transcript of the Show Cause Hearing before Commissioner Passey and oral argument? (YES).

III. ARGUMENT

A. Neither the Notice of Trustee's Sale nor the Trustee's Deed Upon Sale were legally issued and Respondents/Plaintiffs acquired nothing. The property is subject to Appellant/Defendant's litigation claims and Recovery by Appellant/Defendant.

1. Contrary to Respondents/Plaintiffs argument in its Opening Brief, Questions of Fact exist on the face of the Pleadings and were fully identified in the Answer, Affirmative Defenses and related Pleadings.

- a. The Complaint for Unlawful Detainer (Complaint) Snohomish County Superior Court Case No. 16-2-02014-1. CP (359 -381);
- b. Plaintiffs' Motion for Show Cause. CP (352 – 354);
- c. Notice of Appointment of Successor Trustee, Snohomish County Auditor's Office Recording No. 201303070465 (AST) (Fidelity/MERS to NYCB) referenced in Trustee's Deed Upon Sale CP (373 -375);
- d. Notice of Trustee's Sale (NOTS) Snohomish County Auditor's Recording No. 201504081086 MERS assigned Note and DOT to NYCB. CP (368 – 371);
- e. Trustee's Deed Upon Sale (QLS as trustee to Respondents/Plaintiffs Haydari and Bahandari and Eastside Funding, LLC (TDUS) which

Respondents/Plaintiffs base their claim upon are contrary to Appellant/Defendant Hermosillo's Pleadings. CP (373 – 375);

f. Appellant/Defendant Hermosillo's Answer and Affirmative Defenses to the Complaint for Unlawful Detainer. CP (336 – 344);

g. The Motion for Reconsideration with Exhibits CP (148 – 270), CP (149|17-23), CP (150 |10-24), CP (151|1-25, 5), Declaration of James A. Wexler in Support of Motion CP (141 – 147), Declaration of James A. Wexler CP (330 – 335) and Declaration of David Caraway CP (276 -329).

h. Reply to Respondents/Plaintiffs' Response to Hermosillo's Motion for Reconsideration CP(28 – 109), Oral Argument at the Show Cause Hearing before Commissioner Passey as set forth in the **Report of the Proceedings (RP)**, Snohomish County Superior Court Case 16-2-02014-1 and part of the record with this Court pursuant to the Statement of Arrangements. The Court did not receive or review the Answer, Affirmative Defenses, Declarations, and Exhibits RP(6), RP(7|1-6), RP(9|13-25), RP(10). MERS illegal beneficiary causing assignment of DOT and Appointment of Successor Trustee, RP (11|19-25), RP (12), RP (13) *Bain v. Metropolitan Mortgage Grp.* 175 Wn.2d 83 (2012), RP (14), RP (15|1-17), RP (16|17-25), RP (17), RP (18).

Respondents/Plaintiffs acquired the property subject to Appellant/Defendant's claims set forth in the Complaint against QLS, MERS, Ernst Inc., NYCB et al. Specifically, Respondents/Plaintiffs conducted their own thorough search of the records including the court records which do contain the filing of the Lis Pendens in the court on November 4, 2015, before the Trustee's Sale. They also submitted as evidence in their briefing, a copy of their Title Insurance Policy for the property that they obtained before the sale instructing them that no title insurance coverage existed for claims out of title defects. They could also ascertain information by their own inspection of the property or upon reasonable inquiry about the property by simply going to the property and asking the Appellant/Defendant if she had any claims to the property since she was being foreclosed upon and was still residing in the property. If that were too difficult then they could simply call the Trustee whose contact information was on the NOTS and ask if they were aware of any litigation that the Trustee was aware of, such as litigation involving the Trustee itself, as a party at that time, or other litigation involving the property and possible claims of the Appellant/Defendant. Further, the trustee has a duty to disclose any defects concerning the property or its title as a seller. The Respondents/Plaintiffs also conducted their own research concerning the property as represented by them in the TDUS.

paragraph 10 CP (374). Further, it is noted that RCW 61.24 et seq. provides that the purchaser at a Trustee's Sale is entitled to a full refund of the purchase price paid to the trustee if Appellant/Defendant prevails in her underlying Complaint on appeal. RP (19), RP (20|1-18), RP (21|7-9, &14-16), RP (22|5-8 & 24-25), RP (23|1-16), RP (24|15-25), RP (25|6-10), RP 26|14-15 (Commissioner denies Jury Trial after doubting she had authority to order a Jury Trial).

The foregoing all reference Questions of Fact raised in the Answer and Affirmative Defenses to the Complaint for Unlawful Detainer to which Appellant Hermosillo has been denied a Jury Trial at any level in any court which she is statutorily entitled to and which is the issue in this Appeal. Those issues of fact raised in the Show Cause Hearing and pleadings therein and in the underlying Snohomish County Superior Court Case No. 15-2-07011-6 (Court of Appeals Case No. 75020-8-I, Appellant Hermosillo v. Quality Loan Service Corp of Washington; Ernst, Inc.; MERS Inc. and New York Community Bank et al.) referred to by Respondents/Plaintiffs in their pleadings in Court of Appeals Case No. 75872-8-I; and in their responsive pleadings in Appellant Hermosillo's Appeal of Expedited Motion on

Increased Supersedeas Bond in Snohomish County Superior Court Case No.

16-2-02014-1 should have been heard by a Jury Trial. They were not.

Appellant has been denied her mandatory right to a jury trial on the issues of fact raised in the Unlawful Detainer action and which she prays this court to reverse and order she have her jury trial.

i. Only a beneficiary can appoint a successor trustee and can be the holder of the Note. *Bain v. Metropolitan Mortgage Corp., 175 Wn.2d 83 (2012)*.

j. The NOTS Exhibit B and the TDUS Exhibit C of Respondent/Plaintiffs Complaint for Unlawful Detainer, CP (368 - 371) recites MERS as the transferor Owner and holder of the Note and Deed of Trust. That is deceptive and fraudulent misrepresentation of its position. The NOTS is a recorded document Auditor's Number 201504081086 in Snohomish County, CP (368 - 371). It is a violation of RCW 40.16.130 to record a document with false or misleading information and is a fraud punishable by fine and imprisonment. The document is void.

k. The TDUS, CP (373 - 375) recites MERS as a beneficiary and transferor of the Note and DOT. That document likewise is void for the same reason as it violates RCW 40.16.130 by reciting on its face is false and misleading material information that is deceptive.

l. There is no documentation submitted by Respondents as Plaintiffs in

the Unlawful Detainer action that provide any support for how QLS became appointed successor trustee or how or when Fidelity the former trustee resigned as trustee or to have been the holder of the Note. The party asserting it has authority to enforce the foreclosure has the burden of proof.

m. RCW 62A.1-201(b)(21)

RCW 62A.1-201(b)(21) defines the holder of the Note as a person entitled to enforce the Deed of Trust as a person in physical possession of an endorsed in blank note if the note is a negotiable instrument.

B. Trustee's Deed Upon Sale was based and is not a negotiable instrument. (CP| 373 -375).

1. RCW Chapter 62A.3 defines and governs what constitutes a negotiable instrument. Under RCW 62A.3-104(a)(3) the term "negotiable instrument" means "[A]n unconditional promise or order to pay a fixed amount of money, and it does not state any other undertaking by the person promising or ordering payment to do any act in addition to the payment of money. The Note herein is not a negotiable instrument as defined by RCW 62A.3.104 because it is not an unconditional promise to pay money, as there are numerous other conditions required of the obligor set forth in the DOT and as the Note incorporates the separate obligations of the DOT.

2. RCW 62A.3-106(a), defines “unconditional” by stating those conditions that prevent a promise from being unconditional:

Except as provided in this section, for the purposes of RCW 62A.3-104(a), a promise or order is unconditional unless it states:

An express condition to payment; and that the promise or order is subject to or governed by another writing; or that rights or obligations with respect to the promise or order are stated in another writing.

3. Paragraph 10 of Plaintiffs' Promissory Note herein provides:

In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of these conditions are described as follows...

4. The additional protections are those set forth in a separate document in addition to the Note, and tie the Note obligations to those obligations set forth in the DOT.

5. Uniform Covenant paragraph 1 of the DOT specifically links the DOT to the Note.
6. Uniform Covenant paragraph 4 of the DOT requires the borrower to pay all taxes, which is an obligation separate from the payment of principal and interest under the Note and affects the amount due under the Note.
7. Uniform Covenant paragraph 5 of the DOT requires the borrower to obtain and maintain insurance on the property, and that the Lender may “force place” insurance. This affects the amount due under the Note.
8. Uniform Covenant paragraph 7 of the DOT requires the borrower to maintain the property, which is an additional obligation other than the payment of money and which is not described in the Note.
9. Uniform Covenant paragraph 9 of the DOT provides that funds disbursed for the protection of the lender's interest shall become additional debt and bear interest. These additional obligations are not described in the Note.

10. Uniform Covenant 10 of the DOT requires mortgage insurance, which is a separate obligation other than the payment of money and which affects the amount due under the Note.
11. Uniform Covenant paragraph 14 of the DOT provides for the refund of loan charges, which affects the “fixed amount of money” due under the Note.
12. The Note requires payment only of principal, interest, late fees and costs and expenses associated with enforcement of the Note. Thus, the taxes and insurance on the property, interest on additional disbursements, and the requirement to maintain the property are “other charges” that are not “described in” the Note as required by RCW 62A.3-104(a). Thus, Plaintiffs’ Note is, and has always been, non-negotiable. Since it is non-negotiable, the provisions in Article 3 (RCW Chapter 62A.3) do not apply to it.
13. These obligations alter the fixed amount of money due under the promissory note and require additional undertakings and instructions beyond the mere repayment of money, thereby rendering the Note non-negotiable pursuant to the statutory definition and limitations governing negotiable instruments.

14. The Note is effectively "subject to or governed by" the DOT, which in turn means the promises contained in the Note are not unconditional. *See RCW 62A.3-106.* The lack of an *unconditional promise* also destroys negotiability.

15. Since Article 3 of the Uniform Commercial Code as set proscribed in RCW 62A.3-106 then the other provisions of Article 3 are not applicable including the provision that the Party Entitled To Enforce the Note and Deed of Trust (the "PETE" is the holder of the Note. The provisions of the Note itself thereby define who can enforce the Note. That person would by definition of the Note be a "lawful" transferee from the original or through the original transferee from Grantor borrower. Ownership of the Note is required. Ownership requirements are consistent with the axiom that the Deed of Trust follows the Note- the ownership of the Note by an effective assignment-in writing, from a person against whom the Note is enforceable (not MERS) and was traded for consideration. No valid assignment is provided by the beneficiary relied upon by QLS to be legally appointed as trustee authorized to conduct the non-judicial foreclosure and issue the Trustee's Deed Upon Sale relied upon by Respondents/Plaintiffs in this case. A material question of fact remains to be resolve by a jury

trial of whether or not consideration was provided for the transfer, a valid writing existed, that the ownership of the note was transferred.

16. Defendant CMI has also taken the position that the MERS ADOT, where Defendant MERS purported to act as the "beneficiary", transferred the DOT to Defendant CMI. This is a factual and legal impossibility, as MERS cannot, as a matter of law, be the "beneficiary" of a DOT under Washington law.

17. Further, the MERS "Terms and Conditions" by which Defendant MERS agreed to be bound do not permit the use of the MERS system to either create or transfer beneficial interests in mortgage loans.

18. It is axiomatic that Defendant MERS was not the lender, did not extend any credit to Plaintiff, and is not the "beneficiary". The ADOT is thus a legal nullity.

19. It is also without dispute that Defendant MERS, which never had any interest in the Note, could not (and did not) transfer any interest in the Note to Defendant CMI.

20. In view of the above, neither Defendant NYCB nor Defendant MERS had any power or authority to appoint Defendant QLS as the "successor trustee" (as only the true "beneficiary" may appoint a successor

trustee), and thus Defendant QLS was never legally appointed as the successor trustee.

21. The NOTS was thus issued in violation of applicable law, and is of no force or effect.

22. The Deed Upon Sale and the Complaint do not recite facts that establish that Fidelity ever relinquish its authority as trustee and that if there are such facts that QLS was subsequently legally appointed to be the successor trustee and thereby authorized to conduct the Trustee's Sale and issue the Deed Upon Sale relied upon by Respondent's to have acquired the property and upon which they base the Unlawful Detainer action. Such facts would include when Fidelity ceased to be the Trustee, how they ceased to be trustee, by whom and when QLS was appointed as successor Trustee, whether and if so when, the entity appointing Fidelity was in possession of the Note; and whether on such date the Note was endorsed in blank and that it was a negotiable instrument.

23. Material questions of fact exists as to whether or not the Note contains facts sufficient for it to be a fixed obligation to pay money without reference or linkage to any other instrument or type of obligation as required by RCW. The Note in this case does reference at Paragraph 10 that a default in obligations outside the note can cause a default of the note

and thereby destroying its negotiability. Absent any other evidence, a blank or any endorsement of the Note is ineffective. The Notice of Trustee's Sale and Deed Upon Sale are based on Appellant Hermosillo's actual note being in default but her note is not a negotiable instrument and hence the Article 3 PETE provisions that otherwise would allow the legal holder of the Note to foreclose the DOT are not applicable and therefore that only the legal *owner* and legal holder of the Note can foreclose the DOT. This requirement to foreclose and issue a legal Deed Upon Sale (DUS) by the trustee is a false presumption of material fact underlying the NOTS and TDUS.

24. All of the requirements of the DTA must be complied with for a lawful non-judicial foreclosure and subsequent lawful issuance of a Deed Upon Sale by a lawful Trustee. None of these essential elements are recited in the Respondents/Plaintiffs' Complaint.

25. The Commissioner conducted no evidentiary hearing of her own during the Show Cause to discover the facts and the available procedure for doing so was the statutory mandate. Questions concerning the legality of the Deed Upon sale are not raised every day. When they are, the Commissioners duty is to continue the matter to an evidentiary stage by referring it to trial. Since UD matters have the highest civil procedure just below criminal matters, there is little risk of any unnecessary delay.

26. *Albice v. Premier Mortgage Services of Washington, Inc.* 174 Wn.2d 560, 276 F.3d 272 (2012), held that a trustee's failure to comply with the factual-recitals of RCW 61.24.040 destroys the alleged preclusive presumption given a correctly prepared trustees deed. Once a discontinuance is issued, additional notices as required by the DTA which including a new Pre-Foreclosure Letter, new Notice of Default and new Notice of Trustee's Sale with a new 120-day period in which to conduct a non-judicial foreclosure are required.
27. RCW 59.12.130 requires the Commissioner to have ordered a jury trial as requested by Appellant. The purpose of the Show Cause hearing is not to conduct that evidentiary proceeding since it is required to be done by a jury, not the court. The Show Cause hearing was to determine if there were *issues of fact* to be tried- not to try those issues itself at the hearing. RCW 59.12.100 then sets forth the right for Defendant to post a bond.

IV. RELIEF REQUESTED.

Appellant Hermosillo requests the Court of Appeals to reverse the Commissioner's Denial of Appellant's Request for a Jury Trial pursuant to RCW 59.12.130 on the issues of fact raised in her Answer, Affirmative

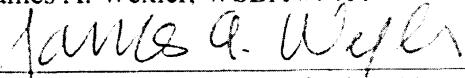
Defenses, Motion for Reconsideration, related pleadings, Exhibits, Declarations and the oral argument at the Show Cause hearing. Pursuant to RCW 59.12. 100, Appellant has deposited with the registry of the court more than \$63,000.00 to date and continues to deposit monthly \$1200.00 per month per Order of Snohomish County Superior Court Judge Okrent. as part of the supersedeas cash bond. Together with the value of the property itself, more than adequate collateral for the supersedeas amount is available during the appeals of Appellants right to a jury trial prior to a writ of restitution being enforced and Appellant and her family being evicted on the few days the sheriff will provide for her to remove herself, her family and her property that is in her home.

V. CONCLUSION

Appellant Hermosillo is entitled to a Jury Trial on issues of fact raised in her Answer to the Unlawful Detainer Complaint.

Respectfully submitted this 23th day of December, 2016.

James A. Wexler, WSBA #7411



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VI. CERTIFICATE OF SERVICE

I certify that on December 23, 2016, I caused a true and correct copy of Appellant/Defendant's REPLY TO RESPONDENT'S BRIEF and this Certificate of Service to be served on the following in the manner indicated below:

On Joshua Dabling, Attorney-at-Law, WSBA # 44792, Dabling Law Firm LLC, 23607 Highway 99, Suite 3E, Edmonds, WA. 98026, Tel: 425-310-5495, Attorney for Plaintiffs/Respondents by causing a copy of said document to be delivered by email as agreed to by email at jarabarow@hotmail.com, as agreed:

AND TO the Clerk of the Court of Appeals, Division I, with a Judge's working copy hand delivered and filed with:

Court of Appeals, Division I
State of Washington
One Union Square
600 University Street
Seattle, Washington 98101-4170

DATED this 23rd day of December, 2016 at Issaquah, Washington.

BY: JAMES A. WEXLER


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