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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF SNOHOMISH

MICHAEL RAETHER AND SAVANNA  
RAETHER,

Plaintiffs,

v.

DEUTSCHE BANK NATIONAL TRUST  
COMPANY; SELECT PORTFOLIO SERVICING,  
INC.; UNKNOWN INVESTORS IN HSI ASSET  
SECURITIZATION CORPORATION TRUST  
2007-HE1,

Defendants.

No. 16-2-03164-0

**DEFENDANTS' REPLY BRIEF  
RE MOTION TO JOIN AND  
SUBSTITUTE INDISPENSABLE  
DEFENDANT**

**A. Summary of the Argument**

1. The Raethers sued to quiet title against a note and deed of trust held by the Trust, a claim against Deutsche Bank National Trust Company in its representative capacity, not the individual investors nor Deutsche Bank National Trust Company in its individual capacity;<sup>2</sup>

<sup>1</sup> Defendant Deutsche Bank National Trust Company, as Trustee for the holders of HSI Asset Securitization Corporation Trust 2007-HE1, Mortgage Pass-Through Certificates, Series 2007-HE1 (the "Trust").

<sup>2</sup> No individual investor has been served in this case to the knowledge of the Trust.

1           2.       Over the course of approximately a year since this case was filed, the Raethers did  
2 not object--indeed, stipulated and consented---to the Trust filing answers, counterclaims, and  
3 responding to and arguing prior substantive motions<sup>3</sup>;

4           **3.       A typographical error in pleadings in this case has no substantive relevance;**

5           4.       The Raethers are not parties to the securitization of the Raethers' loan in a  
6 mortgage trust and are not parties to the Pooling and Servicing Agreement for the mortgage trust  
7 (“PSA”)<sup>4</sup>;

8           5.       The PSA creates an express trust with Deutsche Bank National Trust Company as  
9 the trustee, and expressly provides that the certificate holders are not partners or members of an  
10 organization and that they do not have any rights to control the operation and management of the  
11 trust (Declaration of John E. Glowney Re Pooling and Service Agreement (“Glowney Decl.”)  
12 Ex. A)<sup>5</sup>;

13           6.       *Americold Realty Trust v Conagra Foods, Inc.* 136 S. Ct. 1012, 194 L.Ed.  
14 71(2016) and *U.S. Bank Trust, N. A. v Dupre* 2016 Lexis 127848, cited by the Raethers, do not  
15 apply here because the “trusts” in those cases were business trusts – REITs or Delaware statutory  
16 trusts – which are business trusts which are legal entities that can be sued.

17           Accordingly, the trustee of the mortgage trust is the proper defendant here under CR 19  
18 and the trustee should be joined and substituted herein as provided by CR 19 and CR 21.

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22 <sup>3</sup> This Court also recognized that the Trust was the proper party by granting the Trust’s summary  
judgment motion and directing that this motion be filed.

23 <sup>4</sup> The Raethers suggest the Trust “belatedly” brought the PSA to the attention of the Court. But until the  
Raethers raised this meritless argument based on *Americold*, the Trust had no reason to submit the PSA.

24 <sup>5</sup> The lengthy PSA is attached to Glowney Decl. as Ex. A. The Glowney Declaration was submitted in  
25 response to the Raethers’ motion for reconsideration and is incorporated here as part of the Trust’s  
26 response hereto.

1 **B. The Typographical Error of an Misplaced Comma In Pleadings in this Case Is**  
2 **Trivial and Irrelevant**

3 The Raethers make a veritable mountain out of a molehill by arguing about a  
4 typographical error in pleadings in this case that mistakenly inserted a comma between “Trust”  
5 and “Company” in the name of the trustee, “Deutsche Bank National Trust Company.” A  
6 misplaced comma in pleadings is just that, a typographical error, without any substantive  
7 relevance to this case.<sup>6</sup> That this is a typo is made clear by the PSA and the limited power of  
8 attorney submitted herein, both of which refer to “Deutsche Bank National Trust Company.”  
9 Glowney Decl. Ex A, B.

10 It is also clear that the Raethers themselves know that “Deutsche Bank National Trust  
11 Company” is the correct name for the trustee of this trust, because the Raethers themselves,  
12 albeit based upon a meritless legal theory, sued “Deutsche Bank National Trust Company” in its  
13 individual capacity and the individual investors as defendants. The parties dispute which entities  
14 or entity are the proper defendants, but a misplaced comma has no bearing on that issue.

15 Beyond the fact that the comma is misplaced, the Raethers offer only rank speculation  
16 about “suspicious entities” and “suspicious activities.” A misplaced comma in pleadings in this  
17 case does not facilitate “money laundering” or anything else. A misplaced comma doesn’t  
18 create, or provide evidence of, a different entity. Whatever the purport of the lengthy order  
19 related to money laundering quoted by the Raethers in their brief, the Raethers fail to show how  
20 it bears any relation to claims in this case against the Raethers on their note, or to the Raethers  
21 statute of limitations defense. It is frivolous for the Raethers to suggest that a misplaced comma  
22 in pleadings creates a substantive issue.

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25 <sup>6</sup> The fact that the typographical error was carried forward through various pleadings only demonstrates  
26 that it was so trivial that it was not noticed or addressed, at least until these arguments were filed.

1 **C. The Relevant Provisions of the PSA Demonstrate that this Case Involves an Express**  
2 **Trust; *Americold* Does Not Apply**<sup>7</sup>

3 The Raethers assert that the Trust is not a proper defendant in this case by relying upon a  
4 recent U.S. Supreme Court case, *Americold Realty Trust v Conagra Foods, Inc.* 136 S. Ct. 1012,  
5 194 L.Ed. 71(2016). In *Americold*, the Supreme Court addressed federal court diversity  
6 jurisdiction in cases involving unincorporated organizations. The Court determined that, for the  
7 purposes of diversity jurisdiction, the citizenship of a REIT, a real estate investment trust, should  
8 be determined by the citizenship of its shareholders. The Court treated the REIT in question as a  
9 business entity like a joint-stock company or a limited partnership: the shareholders “appear to  
10 be in the same position as the shareholders of a joint-stock company or the partners of a limited  
11 partnership — both of whom we viewed as members of their relevant entities.” *Americold*, 136  
12 S. Ct at 1016. *Americold* involved a Maryland REIT, which is considered a ““separate legal  
13 entity’ that itself can sue or be sued” under Maryland law. *Id.*, at 1016 (citing Md. Corp. &  
14 Assns. Code Ann. §§ 8-102(2), 8-301(2)).

15 The PSA<sup>8</sup> in this case establishes an express trust which acts through its named trustee,  
16 not a separate legal entity, and contains a number of relevant provisions demonstrating that the  
17 mortgage trust at issue here is not a business trust like the REIT in *Americold*.

18 **1. The PSA Creates an Express Trust and Expressly Defines the Investors as**  
19 **not being Members of an Association**

20 The PSA establishes an express trust with Deutsche Bank National Trust Company as its  
21 trustee:

22 <sup>7</sup> The following argument regarding *Americold* and related cases was also submitted in the same form in  
23 the Trust’s brief on the Raethers’ motion for reconsideration.

24 <sup>8</sup> Most pooling and service agreements for mortgage trusts are public documents available on the SEC  
25 website. The copy provided here was provided by Select Portfolio Servicing, Inc. the loan servicer for the  
26 Raethers’ loan. Ms. Cyndee Estrada, the Raethers’ purported expert, fails to address any of the provisions  
relevant to express trusts cited herein. In any event, these are legal issues and Ms. Estrada’s opinions on  
legal issues are not admissible.

1 The Depositor does hereby establish, pursuant to the further provisions of the  
2 Agreement and the laws of the State of New York, an express trust (the "Trust")  
3 to be known, for convenience as "HIS Asset Securitization Corporation Trust  
2007-HE1" and Deutsche Bank National Trust Company is hereby appoint as  
Trustee...."

4 Glowney Decl. Ex A PSA<sup>9</sup> Section 2.01(c)(Emphasis added).<sup>10</sup> The PSA expressly provides that  
5 the investors in the mortgage trust are not "partners or members of an association."

6 No Certificateholder shall have any right to vote (except as provided herein) or in  
7 any manner otherwise control the operation and management of the Trust Fund,  
8 or the obligations of the parties hereto, nor shall anything herein set forth or  
9 contained in the terms of the Certificates be construed so as to constitute the  
10 Certificateholders from time to time as partners or members of an association; nor  
shall any Certificateholder be under any liability to any third party by reason of  
any action taken by the parties to this Agreement pursuant to any provision  
hereof.

11 Glowney Decl. Ex. A, PSA Section 12. 07 (emphasis added.). Deutsche Bank National Trust  
12 Company is established as the trustee throughout the PSA (Section 2.01(c) *supra.*) and accepted  
13 the assets--including the Raethers' loan--in its trustee capacity.

14 Section 2.01 Conveyance of Mortgage Loans. (a) The Depositor, concurrently  
15 with the execution and delivery hereof, hereby sells, transfers, assigns, sets over  
16 and otherwise conveys to the Trustee for the benefit of the Certificateholders,  
17 without recourse, all the right, title and interest of the Depositor in and to the  
Trust Fund including all interest and principal received on or with respect to the  
Mortgage Loans on or after the Cut-off Date (other than Scheduled Payments due  
on the Mortgage Loans on or before the Cut-off Date).

18 (d) The Trust shall have the capacity, power and authority, and the Trustee on  
19 behalf of the Trust is hereby authorized, to accept the sale, transfer, assignment,  
20 set over and conveyance by the Depositor to the Trust of all the right, title and  
21 interest of the Depositor in and to the Trust Fund (including, without limitation,  
the Mortgage Loans) pursuant to Section 2.01(a).

22 \_\_\_\_\_  
23 <sup>9</sup> From the PSA's definitions section: "Trust: The express trust created hereunder in Section 2.01(c);  
Trustee: Deutsche Bank National Trust Company, a national banking association, and its successors in  
interest and, if a successor trustee is appointed hereunder, such successor." Glowney Decl. Ex A.

24 <sup>10</sup> The Trustee is empowered to act through agents: Section 8.02(e) "the Trustee may execute any of the  
25 trusts or powers hereunder or perform any duties hereunder either directly or by or through agents,  
accountants, custodians, nominees or attorneys...;". Glowney Decl. Ex A.

1 .....  
2 Section 2.04 Execution and Delivery of Certificates. The Trustee acknowledges  
3 the transfer and assignment to it of the Trust Fund and, concurrently with such  
4 transfer and assignment, the Securities Administrator has executed and delivered  
5 to, or upon the order of the Depositor, the Certificates in authorized  
6 denominations evidencing directly or indirectly the entire ownership of the Trust  
7 Fund. The Trustee agrees to hold the Trust Fund<sup>11</sup> and exercise the rights referred  
8 to above for the benefit of all present and future Holders of the Certificates.

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10 Glowney Decl., Ex A (Emphasis added). In sum, the mortgage trust here is a traditional trust.  
11 Deutsche Bank holds the Raethers loan in its capacity as trustee.

## 12 2. *Americold* Does Not Change the Law Regarding Express Trusts

13 The mortgage trust which holds the Raether note and deed of trust, and for which  
14 Deutsche Bank National Trust Company is the trustee, is an express trust – not a REIT. The  
15 “investors” in the trust, the certificate holders, are not members or partners, and have no ability  
16 or authority to control the operation or management of the trust. The Raethers have submitted no  
17 contrary evidence, and the ruminations of Ms. Estrada are not admissible and fail to address any  
18 of these relevant provisions.

19 *Americold* does not apply to an express trust, whether in the context of determining  
20 federal court diversity jurisdiction or otherwise. *Americold* analyzed the citizenship of a real  
21 estate investment trust where the trust’s shareholders retained ownership interests and rights to  
22 vote on the management of the trust. *Id.* 136 S. Ct. at 1016. None of that has any relevance to  
23 the express trust involved in this case.

24 Indeed, *Americold* recognized that the established rules applied to express trusts.

25 Traditionally, a trust was not considered a distinct legal entity, but a “fiduciary  
26 relationship” between multiple people. *Klein v. Bryer*, 227 Md. 473, 476–477,  
177 A. 2d 412, 413 (1962); Restatement (Second) of Trusts §2 (1957). Such a

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<sup>11</sup> Trust Fund: The corpus of the trust created hereunder consisting of (i) the Mortgage Loans....”  
Glowney Decl. Ex A PSA definitions (Emphasis added).

1 relationship was not a thing that could be haled into court; legal proceedings  
2 involving a trust were brought by or against the trustees in their own name.

3 *Americold* 136 S. Ct. at 1016 (Emphasis added).

4 *U.S. Bank Tr., N.A. v. Dupre*, No. 15-CV-558, 2016 WL 5107123, at \*2 (N.D.N.Y. Sept.  
5 20, 2016) is equally inapposite. The business organization at issue there was a Delaware  
6 statutory trust, organized under the Delaware Statutory Trust Act (DSTA), 12 Del. C. 3801 et.  
7 seq. which is also recognized as a legal entity separate from its trustee.<sup>12</sup>

8 Other courts recognize that PSAs with provisions like the PSA in this case establish  
9 express trusts, not business trusts.

10 These are powers that the CWABS Trust has wholly and actually ceded to  
11 BONYM, which BONYM shares with its loan servicers. The Pooling and  
12 Services Agreement (“PSA”) between CWABS, Inc. and BONYM, among others,  
13 endows BONYM with all interest in Plaintiff’s Loan. This includes the right to  
14 enforce it. Section 2.01 of the PSA provides that the Depositor wholly  
15 “transfer[red], assign[ed], set[ ] over and otherwise convey[ed] to the Trustee ‘all  
16 right, title, and interest’ ” in all mortgage loans. And Section 10.04 of the PSA  
17 reiterates that the conveyance of the mortgage loans is “to be construed as, an  
18 absolute sale thereof to the Trustee.”

19 Plaintiff alleges that “any decisions to be made on [his] loan or any modification  
20 therein would require the approval of the investors of the Trust and not  
21 BONYM,” making the CWABS Trust the real and substantial party in the action.

22 But the PSA indicates that the Certificate holders do not have the right to vote or  
23 any meaningful way to otherwise control the operation and management of the  
24 CWABS Trust. Cf. *Americold*, 136 S. Ct. at 1016 (analyzing the citizenship of a  
25 real estate investment trust where the trust’s shareholders retained ownership  
26 interests and rights to vote on the management of the trust).

27 *Jones v Select Portfolio* 2016 WL 6581279.

28 And, in *Moore v. Ameriquest Mortgage Company* 2016 WL 6159377, the court analyzed  
29 a PSA virtually identical to the one governing the trust at issue in this case and concluded that

30 \_\_\_\_\_  
31 <sup>12</sup> Notably, the trustee in *Dupre* failed to provide the PSA to the court, except in such a severely redacted  
32 state that the court largely disregarded it. (“While the Court asked U.S. Bank to provide evidence on this  
33 point (namely, the trust instrument), it has utterly failed to do so.”). Here, the Trust has provided the  
34 entire PSA, and has identified the relevant provisions.

1 because the PSA transferred title to all of the assets comprising the “Trust Fund” to the trustee,  
2 significantly limits the rights of beneficiaries, and empowered the trustee to hold, manage, and  
3 dispose of trust assets, the trust was a “traditional trust.” *Id.* at \*4.

4 In sum, *Americold* has no applicability here. *Americold* was addressing diversity issues,  
5 but squarely acknowledged the traditional rules continue to apply to express trusts. A traditional  
6 trust was established here by the PSA, and therefore the long-established rules applicable to  
7 traditional trusts cited by the Trust apply. Neither the investors in the mortgage trust, nor  
8 Deutsche Bank in its individual capacity are relevant parties to the Raethers’ claim to quiet title  
9 against the holder of their note and deed of trust. At a minimum the Trust should be joined as a  
10 defendant, and because they are not the proper or relevant defendants the individual investors  
11 and Deutsche Bank in its individual capacity should be dismissed.

12 **D. The Raethers Are Not Parties to the Express Trust Created by the PSA And Lack**  
13 **Standing**

14 The Raethers point to various provisions of the PSA relating to servicing of the loan, and  
15 various indemnification provisions, but none of these provisions change the express trust created  
16 under the PSA to a business trust. The Raethers provide no legal authority to support their bald  
17 assertions.<sup>13</sup>

18 Moreover, the Raethers are not parties to the PSA and have no standing to raise claims of  
19 other parties under the PSA.<sup>14</sup> As the Trust has previously noted, the fact that the Raethers’ note  
20 and deed of trust was “securitized” creates a separate contract that “does not change the  
21 relationship of the parties in any way.”<sup>15</sup>

22 <sup>13</sup> Select Portfolio Servicing Inc. is the servicer for this mortgage trust. Glowney Decl. Ex B (limited  
23 power of attorney).

24 <sup>14</sup> The general rule is that the doctrine of standing prohibits a litigant from asserting another’s legal right.  
25 *Haberman v. WPPSS*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), appeal dismissed, 488  
26 U.S. 805, 109 S. Ct. 35, 102 L.Ed.2d 15 (1988).

<sup>15</sup> *Bhatti v. Guild Mortg. Co.*, No. C11-0480-JLR, 2011 U.S. Dist. LEXIS 145181, at \*\*15-16 (W.D.  
Wash. Dec. 16, 2011); *Lamb v. MERS, Inc.*, No. CJ0-5856-RJB, 2011 U.S. Dist. LEXIS 133547, at \*16

1 The Raethers also offer a number of conclusory legal conclusions and observations by  
2 Ms. Estrada. But erroneous opinions by experts on legal issues are not admissible. E.g. *Stenger*  
3 *v. State*, 104 Wn. App. 393, 407–08, 16 P.3d 655 (2001).

4 **E. The Raethers Fail to Submit Any Evidence Challenging the Original Note**

5 To challenge the validity of an original promissory note, the Raethers bear the burden of  
6 providing contrary evidence to the court, not simply alleging that they challenge the note in their  
7 pleadings. The Uniform Commercial Code (“UCC”) provides rules for challenging the  
8 originality of a note. What makes an original note the original is the original signature of the  
9 maker. Under RCW 62A.3-308, the Raethers must “specifically den[y]” the validity of their  
10 signatures in their pleadings, or the signatures are “admitted.”<sup>16</sup>

11 In an action with respect to an instrument, the authenticity of, and authority to  
12 make, each signature on the instrument is admitted unless specifically denied in  
13 the pleadings. If the validity of a signature is denied in the pleadings, the burden  
14 of establishing validity is on the person claiming validity, but the signature is  
15 presumed to be authentic and authorized unless the action is to enforce the  
16 liability of the purported signer and the signer is dead or incompetent at the time  
17 of trial of the issue of validity of the signature.

18 RCW 62A-308(a) (emphasis added).<sup>17</sup> As the official UCC § 3-308 comment explains, even if  
19 the Raethers have made such a specific denial, they must put on evidence to show that the  
20 signatures are forged or unauthorized or the presumption of validity remains:

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21 (W.D. Wash. Nov. 18, 2011); *Moseley v. CitiMortgage, Inc.*, No. C11-5349-RJB, 2011 U.S. Dist. LEXIS  
22 125805, at \*\*19-20 (W.D. Wash. Oct. 31, 2011).

23 <sup>16</sup> CP 1, paragraph 20.

24 <sup>17</sup> A general denial is not sufficient. See, e.g., *Wesla Fed. Credit Union v. Henderson*, 655 So. 2d 691,  
25 693 (La. Ct. App. 1995) (determining general denial of paragraphs insufficient to constitute a specific  
26 denial of the authenticity of the signature); *Dryden v. Dryden*, 621 N.E.2d 1216, 1219 (Ohio Ct. App.  
1993) (defining specific denial as “statement that denies a particular fact and then states what actually  
occurred” and ruling general denial without more was insufficient (citation omitted)); *Bank of New  
England, N.A. v. Greer*, 1991 Mass. App. Div. 202, 1991 WL 285755, at \*2 (Mass. Dist. Ct. 1991)  
(holding general denials in defendants’ answer were insufficient to put the genuineness of signatures on  
the note into controversy); *Coupounas v. Madden*, 514 N.E.2d 1316, 1320 (Mass. 1987) (defendant  
disputing validity of notes “had to do more than ‘call into question’ the ‘integrity’ of the notes”); *Triffin v.  
Somerset Valley Bank*, 777 A.2d 993 (N.J. Super. Ct. App. Div. 2001) (general denial insufficient).

1 The question of the burden of establishing the signature arises only when it has  
2 been put in issue by specific denial. “Burden of establishing” is defined in  
3 Section 1-201. The burden is on the party claiming under the signature, but the  
4 signature is presumed to be authentic and authorized except as stated in the  
5 second sentence of subsection (a). “Presumed” is defined in Section 1-201 and  
6 means that until some evidence is introduced which would support a finding that  
7 the signature is forged or unauthorized, the plaintiff is not required to prove that it  
8 is valid. The presumption rests upon the fact that in ordinary experience forged or  
9 unauthorized signatures are very uncommon, and normally any evidence is within  
10 the control of, or more accessible to, the defendant. The defendant is therefore  
11 required to make some sufficient showing of the grounds for the denial before the  
12 plaintiff is required to introduce evidence. The defendant’s evidence need not be  
13 sufficient to require a directed verdict, but it must be enough to support the denial  
14 by permitting a finding in the defendant’s favor. Until introduction of such  
15 evidence the presumption requires a finding for the plaintiff.

16 UCC § 3-308 Official Comment 1 (emphasis added). In other words, “[t]he defendant is  
17 therefore required to make some sufficient showing of the grounds for the denial before the  
18 plaintiff is required to introduce evidence.” *Id.*; see *In re Bass*, 738 S.E.2d 173, 177 (N.C. 2013).

19 **F. Conclusion**

20 The Raethers sued Deutsche Bank National Trust Company in its individual capacity  
21 instead of its representative capacity. The Trust has appeared and acted as the defendant in this  
22 case since its inception. The Raethers never objected to the Trust amending its answer or adding  
23 a counterclaim. CR 21 permits the Court to add the correct parties to a lawsuit “at any stage.”  
24 There are no valid legal theories permitting the Raethers to sue the individual investors or  
25 Deutsche Bank National Trust Company in its individual capacity on a claim of statute of  
26 limitations against the note held by the Trust. The Trust should be joined and substituted under  
CR 19 and 21 as the proper defendant and the caption for this case should be changed.

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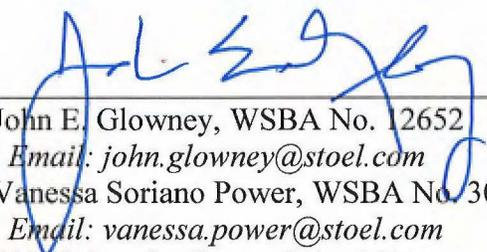
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1 DATED: June 22, 2017.

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11 Attorneys for Defendants Select Portfolio Servicing,

12 Inc. and Deutsche Bank National Trust, Company,

13 as Trustee for the holders of HSI Asset

14 Securitization Corporation Trust 2007-HE1,

15 Mortgage Pass-Through Certificates, Series 2007-  
16 HE1

**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing to be served on the following counsel of record via email and U.S. Mail, postage prepaid:

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