NO. 1018932

(Court of Appeals NO. 833472-I)

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

21st Mortgage Corporation,

Respondent,

v.

Linda C. Nicholls; Duncan K. Robertson,

Petitioner.

RESPONDENT 21ST MORTGAGE CORPORATION'S ANSWER TO PETITION FOR REVIEW

Eleanor A. DuBay, WSBA #45828
Tomasi Bragar DuBay
121 SW Morrison St., Suite 1850
Portland, OR 97204
(503) 894-9900
Of Attorneys for Respondent 21st Mortgage Corporation

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I. IDENTITY OF ANSWERING PARTY

21st Mortgage Corporation ("21st") is Respondent / Cross-Appellant in the appeal and Plaintiff in the Superior Court action. 21st hereby answers the Petition for Review ("Petition") of Appellant Duncan K. Robertson ("Robertson") who was a Defendant in the Superior Court action.

Ocwen Loan Servicing ("Ocwen") also took part in the appellate proceeding regarding Robertson's cross-claims against Ocwen, a third-party defendant in the Superior Court action. Ocwen did not participate in the jury trial. The majority of the appellate decision relates solely to 21st and Robertson only petitioned for review those portions relating to 21st.

II. SUMMARY OF GROUNDS FOR DENYING REVIEW

The Court of Appeals ("COA") properly determined that the trial court erred by including jury instructions and a verdict question unsupported by applicable law. The COA also properly determined that 21st is entitled to a judgment as a matter of law based upon the law and facts of the case: 21st is

in possession of the original Note and Allonges, and, therefore, under the Uniform Commercial Code ("UCC"), is the holder entitled to enforce the Note. Lastly, the COA correctly determined that the exhibits to which Robertson objected were admissible under ER 902(i) as commercial paper.

Review of an appellate decision is appropriate in only four narrowly prescribed circumstances under RAP 13.4(b). This Court should not accept review because the issues are narrow, discrete, and specific to the facts of this particular matter. Robertson fails to show that the COA decision is in conflict with either a decision of this Court or a published decision of another COA, or involves an issue of substantial public interest. This Court should deny review.

III. COUNTERSTATEMENT OF THE CASE

Robertson's statement of the case is incomplete and contains several misleading statements. 21st presents the following Counterstatement of the Case in order to correct the inaccurate statements and aid the Court's review of the Petition.

A. Statement of Facts Relevant to Review.

On November 15, 1999, Nicholls obtained a loan from Old Kent Mortgage Company dba National Pacific Mortgage by executing and delivering an Adjustable Rate Note ("Note") for the original sum of $100,000.00. EX 1; CP 5520-32. Nicholls granted a Deed of Trust ("DOT") encumbering the property located at 12002 4th Ave., SW, Seattle, WA 98146 ("Property"), to secure the Note. EX 2; CP 5533-49. The Note and DOT are referred to as the "Nicholls Loan".

Through a series of transfers, Residential Funding Company, LLC, ("RFC") purchased the Nicholls Loan. CP 5529, 6173-6185. On May 14, 2012, RFC, and fifty other related companies, filed a petition in U.S. Bankruptcy Court for the Southern District of New York in a consolidated case captioned In re: RESIDENTIAL CAPITAL LLC, et al., Case No. 12-12020(MG) ("Bankruptcy Case"). CP 6216-21. The Bankruptcy Case liquidated certain assets, including the Nicholls Loan. On November 21, 2012, the court entered an

order in the Bankruptcy Case ("Sale Order") approving, among other things, the sale of the Nicholls Loan to Berkshire Hathaway, Inc. ("Berkshire"). EX 4, 12.

Pursuant to the Sale Order, Berkshire became the owner of the Nicholls Loan and thereafter held the beneficial interest in the DOT free and clear of any claims against the prior owners of the Nicholls Loan. *Id*.; EX 13, 5. Berkshire deposited the Nicholls Loan into the Knoxville 2012 Trust, a Delaware statutory trust ("Knoxville Trust"), and appointed Wilmington Savings Fund Society, FSB, dba Christiana Trust as Trustee ("Christiana"). EX 6. Christiana then elected 21st as the Master Servicer and Custodian for the Knoxville Trust. EX 7, 8. To date, the Nicholls Loan has remained in the Knoxville Trust with 21st appointed as the Master Servicer and Custodian. CP 5521; RP 329-339. Pursuant to the Servicing Agreement and the Power of Attorney, 21st is authorized and entitled to bring the foreclosure action in its own name. EX 7, 8.

The original Note with original Allonges affixed thereto is in the possession of 21st. CP 5524-32; RP 370-71, 467. At the time of the Sale Order, RFC endorsed the Note in blank and delivered it to 21st. EX 1; CP 5532; RP 370-71, 459-468. In addition, RFC, acting pursuant to the terms of the Sale Order, assigned the DOT to 21st by Assignment of Deed of Trust, recorded in the records of King County. EX 9. 21st is the current beneficiary of the DOT and the holder of the original Note and Allonges. RP 477.

In 2006, Robertson loaned money to Nicholls and secured that loan by recording a junior Deed of Trust encumbering the Property, naming Robertson as beneficiary ("Robertson DOT"). EX 10. Robertson subsequently foreclosed the Robertson DOT, which foreclosure sale was voided as it was in violation of RCW 61.24.040(10).

B. Statement of Proceedings Relevant to Review.

21st commenced this judicial foreclosure by filing a complaint against Nicholls and Robertson on July 24, 2014. CP

1-38. Robertson subsequently filed a cross-claim against numerous defendants, only Ocwen being a party to this appeal. CP 39-87. On July 7, 2015, the trial court entered an Order of Default against Nicholls. CP 5980-81.

On March 14, 2016, the trial court entered an Order on Motions for Summary Judgment ("MSJ Order") which found 21st entitled to a decree of foreclosure, struck Robertson's affirmative defenses, denied Robertson's motion for summary judgment, and continued the stay of Robertson's counterclaims and third-party claims. CP 797-800. Thereafter, the trial court entered an order to certify the judgment under CR 54(b). CP 6105-09.

On October 30, 2017, the COA issued its decision in the first appeal, affirming in part and reversing in part the MSJ Order. *21st Mortg. Corp. v. Robertson*, No. 75262-6-I, 2017 Wash. App. LEXIS 2471 (Oct. 30, 2017) ("Robertson I"). The COA, considering the record in the light most favorable to Robertson, including Robertson's "expert" reports without

determining admissibility thereof, found only one error: that the Kelley Affidavit (CP 5982-6013) "create[d] a genuine issue of material fact as to whether the note and its allonges are original, and thus whether 21st is the holder entitled to enforce the note." CP 5728. In all other respects, the COA affirmed the MSJ Order and all associated rulings, including invalidating Robertson's Trustee's Sale and voiding the Trustee's Deed. *Id*.

The Mandate was entered on June 26, 2018. CP 6173-85. The parties proceeded with the case, including filing various motions for summary judgment related to Robertson's counterclaims. On July 30, 2020, the trial court granted 21st summary judgment on 10 of Robertson's counterclaims (CP 2151-59) and on September 1, 2020, granted 21st summary judgment of the final remaining counterclaim (CP 2260-62).

Trial commenced on September 22, 2021. 21st submitted a number of pretrial motions to exclude Robertson's "experts" Marie McDonnell ("McDonnell") and James Kelley ("Kelley"). CP 6394-6409; 6524-6676; 6806-6940; 7087-7094.

The trial court set a *Frye* hearing regarding Kelley's admissibility, but did not set a hearing on McDonnell's admissibility. CP 5957-59. After a three-day *Frye* hearing, the trial court granted 21st's motion to exclude Kelley. RP 303-08.

The parties submitted their proposed jury instructions and verdict forms. CP 2842-84; 6987-7029; RP 998-1000. The trial court did not consider the proposed instructions or verdict forms until nine days into trial, four days after the jury was impaneled, and two days after 21st rested its case. RP 955-1021. Further, the parties did not receive a copy of the trial court's jury instructions (CP 3361-79) and verdict form until October 3, which was then further modified ("Verdict") (CP 3383-84). RP 1028-31, 1037-38.

21st moved for a directed verdict pursuant to CR 50(a) at the close of evidence, which was denied. RP 1138-40. The case was then submitted to the jury on October 5, which returned its Verdict that day, finding that 21st is in possession of the *original* Note (Verdict 1) and the *original* Allonges (Verdict 2),

but that the original Allonges were not affixed to the original Note on July 24, 2014, the date the Complaint was filed (Verdict 3). CP 3383-84.

The trial court entered final Judgment on January 20, 2022. CP 7193-96. 21st filed its Motion for Judgment as Matter of Law Under CR 50 and, in the Alternative, for a New Trial Under CR 59 on January 27, 2022 (CP 7197-7234), which the trial court ultimately denied (CP 7721-23).

Robertson filed a Notice of Appeal appealing, essentially, all of the trial court's decisions which pertained to Robertson. 21st filed a Notice of Cross-Appeal, alleging that the trial court erred in (1) failing to grant 21st's post-trial CR 50 motion for judgment as a matter of law; and (2) alternatively, failing to grant 21st's CR 59 motion for a new trial.

On review, the COA reversed Verdict 3 on the grounds that the verdict question was improper and remanded the matter to the trial court to enter judgment in favor of 21st, among other holdings not relevant here. *21st Mortg. Corp. v. Nicholls*, ____

Wn. App. 2d ___, 525 P.3d 962 (2023) ("Robertson II"). The decision correctly holds that Verdict 3, requiring a finding of whether 21st possessed the Note and Allonges on the date the complaint was filed, was incorrectly given on the law and facts of the case. *Id*. The COA concluded that whether 21st possessed the Note and Allonges on the date the complaint was filed did not affect the outcome of the foreclosure; rather, the question was whether 21st possessed the Note and Allonges at the time of trial, which 21st did. *Id*.

IV. AUTHORITY AND ARGUMENT

A. Standard for Review.

Discretionary acceptance of a decision terminating review may be granted only if: (1) the decision of the COA is in conflict with the decision of the Supreme Court; (2) the decision of the COA is in conflict with a published decision of the COA; (3) a significant question of law under the constitution of the state of Washington or of the United States is involved; or (4) the petition involves an issue of substantial

public interest that should be determined by the Supreme Court. RAP 13.4(b).

B. The Issues Raised by the Petition are Inadequate for Review Under RAP 13.4(b).

At the outset, this Court should not accept review under RAP 13.4(b) because Robertson has failed to identify the considerations governing acceptance of review and review should be denied on this basis alone. The Petition claims several times that the decision of the COA conflicts with other decisions, but fails to include specific references to the applicable portions of the appellate decision and citations to existing case law in Washington that are in conflict.

Indeed, Robertson concedes that subsections (1) and (2) of RAP 13.4(b) do not apply, noting that this matter is one of "first impression" for the Court. Petition, 23; 17. As a matter of first impression, it cannot be contrary to either a prior opinion of this Court or a published decision of the COA.

Moreover, RAP 13.4(b)(4) cannot apply. The issues decided in this matter are narrow, discrete, and specific to the

facts of this very long-running litigation. It is extremely unlikely that the same facts will occur in the future, particularly since the connection between plaintiff and defendant is that of senior lienholder and junior lienholder, not lender-borrower. Robertson has failed to establish that an issue of substantial public interest is at stake in this proceeding.

1. Robertson's First Issue for Review is Based on a Misunderstanding of the Decision.

Robertson's first issue for review is based on a fundamental misunderstanding of the COA's decision and review should be denied. Robertson alleges that "the Court of Appeals['] decision that an allonge endorsed in blank constitutes a valid endorsement of the note, giving the person in possession of that allonge a right to enforce the promissory note, regardless of whether it is affixed to the note, involves an issue of substantial public interest." Petition, 8. While Robertson claims that the issue involves a substantial public interest, he confusingly argues that there are contrary statutes

and opinions requiring review. Robertson fails to show that review of the first issue should be granted under any subsection of RAP 13.4(b).

Robertson also mischaracterizes the decision, as well as the issues before the trial court. The Petition argues extensively that the COA wrongly analyzed the UCC's sections on indorsements and what "affix" means. But, contrary to Robertson's contentions, the decision is not about *whether* the Allonges were affixed to the Note; rather, it is about whether the UCC includes a *timing* element for allonges to be affixed in order for a plaintiff to be entitled to enforce a note – it is the *when*, not *whether*. Robertson II at 971. ("In short, none of the authority Robertson adduced, or this court can locate, concludes that a fact finder must determine ***when*** allonges were possessed or affixed to a note to establish standing to enforce the note.") The COA reviewed the timing element because Robertson's entire case at trial boiled down to his argument that 21st did not have the Allonges at the time the complaint was filed and, thus,

did not have standing to foreclose, as evidenced by the verdict question that the COA found questionable: "were the allonges affixed to the original Adjustable Rate Note *at the time of the commencement of the judicial foreclosure on July 24, 2014*?" CP 3383-84 (emphasis added).

Attempting to create law where there is none, Robertson cites to the Washington Practice Manual and UCC forms as a basis for claiming that a separate piece of paper "pinned or clipped" is insufficient to create an indorsement. Petition, 10. Not only is the cited material irrelevant to the issues in this proceeding, but it contradicts RCW 62A.3-203 which allows a "paper" with signatures to be affixed to the negotiable instrument. Tellingly, Robertson appears to have copied this argument from an unpublished COA opinion, without providing any citations, *Del Fierro v. BSI Fin. Servs*., 215 Wash. App. LEXIS 2844, *9-10 (2015). Robertson neglects to mention that the *Del Fierro* court held there was "no error in the trial court's finding that the Note was properly endorsed in blank and the

allonge was 'firmly affixed' …." *Id.*, *11. Indeed, the court noted that there was ample evidence and testimony submitted by the lender "showing that the allonge in blank was affixed to the original Note." *Id*.

Further, Robertson II did not hold that "RCW 62A.3204(a)'s [sic] requirement, that an allonge be affixed to the instrument in order for the signature on the allonge to become part of the instrument, is not relevant to whether a judicial foreclosure plaintiff has standing, where standing is meant as the right to enforce the Note." Petition, 9. The COA was instead analyzing *Robertson's* argument that RCW 62A.-204(a) requires that 21st show "the allonges were 'permanently' affixed to the note *at the time of the indorsement in blank*" in order for 21st to have standing to enforce the Note. Robertson II at 971 (emphasis original).

The COA found there is neither a timing element in RCW 62A.204(a) nor a requirement that an allonge be "permanently" affixed to the Note. *Id*. Looking at the language

of the statute, the court held that "the inquiry to which affixation is relevant is, not standing to enforce, but whether the signature is evidence of negotiability or, more accurately, whether it 'unambiguously' somehow shows that negotiability was *not* the purpose of the signature." *Id.* (emphasis original), citing RCW 62A.3-204(a). The decision further rebuts Robertson's argument by noting that RCW 62A.3-204(a) is not relevant for determining who is entitled to enforce, which is found in RCW 62A.3-203, stating nothing about affixing. *Id.*, 16-17.

Robertson laments that the decision results in "an absurd interpretation" applying the UCC piecemeal. Petition, 7. But Robertson goes on to misquote and misinterpret the UCC in a piecemeal fashion. For example, Robertson states that "RCW 62A.3-203 only addresses the right to enforce when the note itself is endorsed in blank – not when the blank indorsement is on the allonge." *Id.*, 12. RCW 62A.3-203 says nothing of the kind. Further, such a reading entirely disregards other sections

of the UCC which provide, among things, that an indorsement signature can be made on a separate paper affixed to the instrument. RCW 62A.3-204(a). Notably, the COA did not review RCW 62A.3-204 in a vacuum. The court spends more than a page providing "relevant background on the Uniform Commercial Code" and goes to great lengths to analyze the relevant sections of the UCC. Robertson II at 968-69.

Robertson also argues that "this Court should accept review because the lower courts need guidance on how to apply the UCC in the context of Allonges and standing" but then proceeds to cite an *unpublished* case of the COA claiming that it evidences inconsistent rulings regarding affixation of allonges. Petition, 14-15, citing *Alpert v. Cal-Western Reconveyance Corp*., 2020 Wash. App. LEXIS 1221 (2020). There are several problems with reliance on *Alpert*.

First, it is an unpublished opinion and, thus, does not meet the standard required by RAP 13.4(b)(2) allowing review only if the decision is in conflict with a ***published*** decision of

the COA.

Second, Robertson mischaracterizes the decision in *Alpert*, wrongfully claiming the court "held that an Allonge must be 'affixed' to the note to constitute a valid indorsement" and implying that the court "adopted the dictionary definition of 'affix' which means 'to attach physically (as by nails or glue)."[1] Petition, 15. What the court actually held was that on a summary judgment standard, viewing the evidence in the light most favorable to Alpert, there was an issue of fact as to whether the allonges were affixed to the note. *Alpert*, 2020 Wash. App. LEXIS 1221 at *23-24. The court specifically noted that the lender did not present <u>any evidence</u>, "not even a declaration" to establish that the allonge was affixed to the note. *Id*. Further, in a footnote, the court stated that "[t]here appear to be no reported Washington cases interpreting the term 'affix' as used in RCW 62A.3-204(a). … Because the parties do not

[1] Query: how does one nail a piece of paper to another piece of paper? Answer: a staple. RP 380, ln 13:16.

adequately brief the issue and because its resolution is not necessary to resolve this appeal, **we express no opinion as to the degree of physical attachment required to satisfy the affixation requirement set forth in RCW 62A.3-204(a)**." *Id.* at *23, fn. 7 (emphasis added).

Clearly, *Alpert* is distinguishable as Robertson II was based upon a jury trial, not summary judgment, and there was ample evidence at trial regarding the original Note and Allonges, including testimony and exhibits. Thus, the unpublished *Alpert* opinion is not contrary to Robertson II because (1) Robertson's claims regarding *Alpert* are false and (2) nowhere in Robertson II does the court even address whether affixing requires an allonge to be "permanently" affixed to the note.

Accordingly, this Court should deny review of the first issue raised in the Petition.

2. Robertson's Second Issue for Review is Insufficient Under RAP 13.4.

Robertson's second issue for review claims that the COA erred in "holding that a judicial foreclosure Plaintiff does not have to have standing at the time the Plaintiff files the complaint" which holding is allegedly contrary to a Supreme Court case, published decisions of the Court of Appeals and, to cover all his bases, an issue of substantial public concern. Petition, 18. Robertson misconstrues the COA's decision and continues to misunderstand what standing means in the context of a judicial foreclosure. The decision is not contrary to *Grant Cty. Fire Prot. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), nor does Robertson identify any published decision of the COA to which it is contrary, and Robertson fails to articulate any substantial public concern related to the second issue. Thus, the Court should deny review.

Further, the second issue is riddled with contradictions. On the one hand, Robertson claims that the "Court of Appeals

erroneously held there is no authority 'that a fact finder must determine when Allonges were possessed or affixed to a Note to establish standing to enforce the Note.'" Petition, 19. But then states that "there does not appear to be any case in Washington that expressly states whether a Plaintiff in a judicial foreclosure must have standing for foreclosure at the time the complaint is filed" (*Id*.) and this matter is an "issue of first impression" (*Id*., 23). Robertson concedes that not only did the COA not err, but that RAP 13.4(1) and (2) cannot apply.

The Court should deny review of the second issue because the decision is not contrary to *Grant Cty. Fire Prot. No. 5* as that case is not applicable. *Grant Cty. Fire Prot. No. 5* established a two-prong test for a plaintiff to bring an action under the Uniform Declaratory Judgments Act, which is not relevant to 21st's judicial foreclosure. 150 Wn.2d 791. Robertson's arguments that plaintiffs under specific statutory schemes must have standing at the time a complaint is filed are not applicable in a judicial foreclosure action, which is not

based upon a statutory scheme, such as the Uniform Declaratory Judgments Act, The Trust and Estate Dispute Resolution Act, or the Washington Nonprofit Corporation Act. Petition, 20.

Indeed, Robertson ignores more relevant holdings, including *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016) (presentation of the original note and allonges at summary judgment hearing is sufficient evidence of holder status) and *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 328, 387 P.3d 1139 (2016) ("The '[m]ere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible.'"). As the COA adduced, these holdings, along with CR 8 which does not require standing to be plead in a complaint (unlike in federal court), support the holding that 21st's production of the original Note and Allonges at the time of trial was sufficient to make 21st the holder within the meaning of the UCC.

Lastly, review of the issues identified by Robertson

would be futile because he ignores the COA's holding that "verdict question 3 was improperly presented to the jury because there was no factual support for the basis of the verdict." Robertson II at 972. Even if Robertson's contention is correct that a foreclosing plaintiff must prove standing in its operative complaint, which he is not, the evidence presented at trial shows that 21st was in possession of the original Note with affixed original Allonges at the time the complaint was filed. The COA agreed with 21st that only 21st had personal knowledge of whether and when 21st came into possession of the Note and Allonges; neither Robertson nor any of his witnesses had such knowledge. Accordingly, the COA concluded that the third verdict question was improperly given based upon the ***facts*** of the case, a holding which Robertson wholly ignores. Thus, even if this Court considered Robertson's legal arguments, accepting review would be futile because of the COA's holding relating to the facts presented at trial.

It is inconceivable that the jury determined that 21st is in

possession of the original Note and original Allonges, but 21st is not the holder entitled to enforce the Note under the UCC. Such a result would be a paradox, entirely contradicted by the statutory framework of the UCC.

Based on the forgoing, the Court should deny review of Robertson's second issue.

3. The Court Should Deny Review of Robertson's Third Issue for Review.

Robertson's final issue for review claims that the COA erred in holding that the Note and Allonges were admissible under ER 902(i) as commercial paper. Robertson conflates the UCC and evidence rules by artificially creating a conflict between RCW 62A.3-308 and ER 902(i), arguing that review should be accepted because the lower courts need guidance on RCW 62A.3-308. But one has nothing to do with the other.

First, Robertson claims that he denied the authenticity of the Note in his operative pleadings which was sufficient to invoke RCW 62A.3-308. Robertson is incorrect. He never denied the validity of the *signature* on the Note in his pleadings

(as he is careful to distinguish in the Petition); rather, Robertson merely claimed that *the entirety* of the Note was a copy based upon the alleged findings of Kelley. Robertson I, *6-7. Indeed, Robertson never argued in Robertson I that RCW 62A.3-308 applied and at no point cited to or relied upon that section in Robertson II, other than briefly at oral argument.

Second, RCW 62A.3-308 does not apply in this proceeding. RCW 62A.3-308 states in relevant part

> If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, **but the signature is presumed to be authentic and authorized <u>unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent</u> at the time of trial of the issue of validity of the signature**.

RCW 62A.3-308(a) (emphasis added). Here, the signor, Nicholls, was not dead or incompetent at the time of trial and Robertson, the only appearing defendant, was not the signor. Thus, the signature of Nicholls is presumed to be authentic under RCW 62A.3-308. Other Washington courts have held the same, so evidently the lower courts do not need guidance on

the application of RCW 62A.3-308. *See e.g., Citibank, NA v. Peterson*, No. 53747-8-II, 2021 Wash. App. LEXIS 516, at *10 (Mar. 9, 2021); *CitiMortgage, Inc. v. Moseley*, No. 50895-8-II, 2019 Wash. App. LEXIS 492 (Mar. 5, 2019).

The decision cites RCW 62A.3-308 only to refute *Robertson's* contention at oral argument that the section required the Allonges to be affixed at the time the complaint was filed. As the COA noted, RCW 62A.3-308 was contrary to Robertson's position, stating that "the time of trial" was the "proper time to verify the validity of signatures … ." Robertson II at 971.

Furthermore, as noted, Robertson failed to present any evidence to rebut 21st's evidence that the signature was valid. Robertson's only purported evidence was the affidavit of Kelley. But Kelley was excluded prior to trial and Robertson had no other admissible evidence to present rebutting 21st's evidence. And, while Robertson appealed Kelley's exclusion, he does not now seek review of the decision as to Kelley.

Therefore, 21st satisfied its burden of establishing the validity of the signature pursuant to RCW 62A.3-308, to the extent that section even applies, and Robertson failed to present any evidence to the contrary.

As the jury found, and the decision affirmed, 21st satisfied its burden of proving the originality of the Note and Allonges. So, even if RCW 62A.3-308 did apply, 21st has satisfied its burden. *See Larson v. Snohomish Cty.*, 20 Wn. App. 2d 243, 275, 499 P.3d 957, 976 (2021). Accordingly, since 21st satisfied its burden of proving the originality of the Note and Allonges, under RCW 62A.3-308(b), 21st is entitled to payment under the Note.

Additionally, Robertson mistakes authentication for admissibility purposes under ER 902 and the factual determination of originality remanded by Robertson I. Authentication under ER 901 is a threshold determination merely requiring a scintilla of proof sufficient to support a prima facie showing that evidence is authentic. *State v.*

Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007). ER 901 does not limit the *type* of evidence allowed, but identifies examples of evidence satisfying the rule. *Id.*; ER 901(b). In making a determination as to authenticity, a trial court is not bound by the ERs and may rely on any information, including lay opinions, hearsay, or the proffered evidence itself. *Williams*, 136 Wn. App. 486 (citing ER 104(a), 1101 (c)(1)). ER 902 details certain categories of evidence for which "extrinsic evidence of authenticity as a condition precedent to admissibility is not required" including commercial paper and related documents. ER 902(i); *Bucci*, 197 Wn. App. 318 ("[T]he mere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible.").

Courts in Washington have held that a promissory note is commercial paper under ER 902(i). Although not noted in the decision because it is unpublished, the decision's ER 902(i) analysis tracks with prior decisions of the COA. *See e.g.*,

Deutsche Bank Nat'l Tr. Co. v. Erickson, No. 73833-0-I, 2017 Wash. App. LEXIS 350, at *7-9 (Ct. App. Feb. 13, 2017) citing *United States v. Varner*, 13 F.3d 1503, 1508 n.5 (11th Cir. 1994) (a promissory note "is commercial paper … Under ER 902(i), commercial paper qualifies as a self-authenticating document."). And just like Robertson II quoting the same case and treatises, the *Erickson* court held that "statements that have 'operative legal effect' are not subject to the prohibition on hearsay. … The note is a legally enforceable promise to pay and it therefore has independent legal significance. … The promissory note was self-authenticating and not subject to the prohibition on hearsay." *Id*. at *9 (internal citations omitted). Even Washington's local district courts have held that "Promissory notes are self-authenticating under Federal Rule of Evidence 902(9)." *Theros v. First Am. Title Ins. Co.*, No. C 10-2021, 2011 U.S. Dist. LEXIS 11087, at *4 (W.D. Wash. Feb. 3, 2011); *see State v. Terrovona*, 105 Wn.2d 632, 716 P.2d 295 (1986) (application of federal civil rules).

In short, there is no need to accept review based on Robertson's flawed logic because the lower courts already have the application of ER 902(i) and RCW 62A.3-308 well in hand.

V. CONCLUSION

This Court should decline to accept discretionary review of the issues raised by the Petition. The Petition falls far short of showing that (1) the decision conflicts with another decision either of this Court or of a published decision of the COA; or (2) involves an issue of substantial public interest that should be determined by this Court. The essential flaw in Robertson's arguments remains the same: he cannot point to any authority contrary to the COA's decision. And he cannot rebut that 21st ***is*** in possession of the ***original*** Note ***and*** Allonges.

Certificate of Compliance: I certify that this brief contains 4,999 words, in compliance with RAP 18.17(c)(10).

Respectfully submitted this 12th day of May, 2023.

TOMASI BRAGAR DUBAY

Eleanor A. DuBay, WSBA # 45828
Tomasi Bragar DuBay
121 SW Morrison St., Suite 1850
Portland, OR 97204
P: (503) 894-9900
F: (971) 544-7236
edubay@tomasilegal.com

CERTIFICATE OF SERVICE

I certify that on May 12, 2023, I served a copy of the foregoing document, described as **RESPONDENT 21ST MORTGAGE CORPORATION'S ANSWER TO PETITION FOR REVIEW** on the following persons by electronic service through the Washington State Appellate Courts' Electronic Filing System:

Douglas C. Stastny
Severson & Werson
19100 Von Karman Ave., Ste. 700
Irvine, CA 92612-6578
dcs@severson.com
Of Attorneys for Respondent Ocwen Loan Servicing, LLC

Erin C. Sperger
Legal Wellspring, P.S.
2367 Tacoma Ave. S
Tacoma, WA 98402
Erin@legalwellspring.com
Attorney for Petitioner Duncan K. Robertson

Mary C. Anderson
Guidance to Justice Law Firm
19125 N Creek Pkwy, Suite 120
Bothell, WA 98011-8000
mary@guidancetojustice.com
Attorney for Petitioner Duncan K. Robertson

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct, and that this Declaration was executed in Portland, Oregon.

Dated: May 12, 2023.

/s/ Keeley Greene
Keeley Greene, Legal Assistant
Tomasi Bragar DuBay

TOMASI BRAGAR DUBAY PC

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