No. 92865-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN J. SELKOWITZ,

Petitioner,

v.

LITTON LOAN SERVICING LP, et al.,

Respondents.

ANSWER OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., TO PETITION FOR REVIEW BY KEVIN J. SELKOWITZ

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Mortgage Electronic Registration Systems, Inc. (MERS), did not injure the business or property of Kevin Selkowitz. MERS was named as a beneficiary in a nominee (agency) capacity under Selkowitz's deed of trust, but that didn't cause Selkowitz's default, interfere with his negotiations with his lender, or otherwise cause him injury. MERS also appointed a successor trustee under Selkowitz's deed of trust. But Selkowitz never even saw the recorded appointment until his deposition, years after he first filed this lawsuit.

This Court's recent decision in *Brown v. Washington State Department of Commerce* deprived Selkowitz of his central theory on appeal: That because Litton Loan Servicing LP was the servicer of the loan, but not the owner of the loan, Litton lacked authority to enforce Selkowitz's promissory note. This Court rejected a similar argument in *Brown*, observing that Washington's Uniform Commercial Code and its Deed of Trust Act authorize a servicer to hold and enforce a note even if the owner is some other person.

The Court of Appeals properly rejected Selkowitz's other theories. Litton did not cease to be the holder of Selkowitz's note just because Litton prudently kept the original note locked up in a bank. (That's really all that Selkowitz's argument about "constructive possession" boils down to.) And although Selkowitz identifies purported imperfections in the non-judicial-foreclosure documents, those documents were nevertheless consistently clear that Litton was Selkowitz's servicer and the actual holder of his note. As Selkowitz himself explained in his deposition,

"there's no denying the note holder's right to foreclose on the property if not paid." CP 416 (104:14-19). This Court should deny review for the following reasons.

First, there are no unsettled legal questions about the Court of Appeals' determination that Litton was entitled to enforce Selkowitz's deed of trust in its capacity as the holder of the note. Selkowitz does not identify a single case supporting his theory of "constructive possession" nor any conflicting precedents that this Court must reconcile.

Second, there is no legal controversy about the Court of Appeals' decision dismissing claims against MERS and Quality Loan. Each acted at the direction of the holder and owner of Selkowitz's note. MERS, in particular, never held itself out as the holder of Selkowitz's note.

Third, the Court of Appeals committed no legal error when it enforced Selkowitz's promise to pay fees under his note and deed of trust.

IDENTITY OF ANSWERING PARTY

MERS is a respondent and a defendant in this case.

STATEMENT OF THE CASE

A. Selkowitz borrowed money and promised to repay his lender and its successors and assigns.

In 2006, Selkowitz bought a condominium. CP 391 (6:11-20); CP 392 (11:2-4). He paid about $380,000 for the property (CP 393 (15:14-15)) and borrowed almost all of the money (CP 414 (99:11-13)). Selkowitz took out two loans, each secured by a deed of trust on the

property. CP 393 (15:25-16:2). The first loan, for $309,600, is the subject of this case.

As evidence of his obligation to repay the loan, Selkowitz signed a promissory note. CP 329-39. Selkowitz understood he was promising to repay the money he borrowed. CP 396 (24:18-22). Selkowitz also understood the economic terms of the loan. Selkowitz received disclosures identifying his monthly payments. CP 324-27. He was never asked to make payments inconsistent with the disclosures. CP 395 (22:18-23:7). His broker did not misrepresent any terms of the loan. CP 394 (18:22-24).

New Century Mortgage Corporation was Selkowitz's original lender. CP 329 ¶ 1. Selkowitz agreed that New Century could transfer the note. "*I understand that Lender may transfer this Note.* Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" CP 329 ¶ 1, emphasis added. Selkowitz also agreed that "[a] sale [of the Note] might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument . . . . There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note." CP 352.

Just as Selkowitz agreed it could, New Century transferred the note to U.S. Bank National Association, as trustee for GSAA Home Equity Trust 2007-1, Asset-Backed Certificates, Series 2007-1. CP 438 (21:3-12); CP 437 (14:18-22). U.S. Bank and its servicers, including Litton, have had

physical possession of the loan documents since 2006 through a custodian, Deutsche Bank. CP 441 (42:17-43:15). As custodian, Deutsche Bank kept the documents for U.S. Bank and its servicers and was required to provide the documents to the servicer on demand. CP 384, 386-88.

To secure his obligations, Selkowitz executed a deed of trust stating that if he defaulted on the loan, the noteholder could foreclose. CP 341-66. The deed of trust listed New Century as the "Lender"—which made it beneficiary as a matter of law, under RCW 61.24.005(2)—and identified MERS as the beneficiary, but *solely* as nominee for New Century (as the original lender) and its successors and assigns. CP 341-66. Selkowitz understood if he broke his promise to repay the loan, the noteholder would have the right to sell the property in a foreclosure sale to recoup loan proceeds. CP 396 (25:20-23). "Bottom line, if you don't pay, the note holder has the right to foreclose." CP 396 (27:5-6).

B. Selkowitz stopped making payments because he had no money.

Selkowitz made payments for at least a year after borrowing the money. CP 398 (33:13-16). At first, Selkowitz made payments to New Century directly. CP 398 (34:18-22). He then made payments to Avelo, a servicer for the loan, and then to Litton, another servicer. CP 398 (34:23-35:9, 35:19-25).

In 2008 or 2009, Selkowitz stopped making payments. CP 398 (35:19-21). The only reason Selkowitz stopped making payments was because he did not have "enough money to pay [the] loan."

CP 398 (33:10-12). The "economy tanked," which "seriously impacted the revenue of [Selkowitz's] business." CP 399 (37:25-38:13). Selkowitz had to make choices about whom to pay, and he chose not to pay his loan. CP 399 (39:13-18).

Selkowitz did not default because he was confused about who he needed to pay. Selkowitz understood Litton was the servicer when he stopped making payments. CP 398 (35:19-25). Selkowitz made payments to Litton before he defaulted. CP 399 (37:5-6). Selkowitz had no reason to believe anyone other than Litton was his servicer. No one else was demanding payment from Selkowitz. CP 399 (36:12-20).

Selkowitz did not stop making payments because he thought the deed of trust contained deceptive or illegal statements. CP 411 (86:14-22). Nor did Selkowitz stop making payments because his loan had been "securitized." CP 411 (87:10-19). Selkowitz stopped making payments because he didn't have enough money to make the payments. CP 399 (37:22-38:2).

C. Litton was entitled to enforce the note and deed of trust.

After Selkowitz defaulted, Litton, as servicer for U.S. Bank, was in possession of Selkowitz's promissory note (through a custodian) and thus entitled to enforce it. *See* CP 441 (42:17-43:15). Selkowitz recognized the original promissory note when it was shown to him during his deposition. CP 413-14 (95:17-96:13). Selkowitz also recognized his signatures on the original deed of trust. CP 414 (97:21-98:9).

After Selkowitz's default, Litton directed Quality Loan Service Corporation of Washington to give Selkowitz notice of his default on Litton's behalf. CP 450 (59:8-14). MERS—acting for the note's owner, U.S. Bank, and at the direction of Litton, the holder—then appointed Quality Loan to serve as trustee under Selkowitz's deed of trust. CP 368-70. Selkowitz does not recall ever seeing the recorded appointment (CP 403 (52:9-18)), which is not a document delivered to a borrower under the Deed of Trust Act, RCW 61.24 *et seq.*

Quality Loan commenced a non-judicial foreclosure. CP 372-75. Quality Loan warned Selkowitz that unless he cured his default by paying $15,421, Quality Loan would sell the property. CP 372-75. Selkowitz agreed he was not paying his loan at the time of the notice (CP 404 (56:14-21)), and Selkowitz had no reason to believe the amount he needed to pay was inaccurate (CP 404 (56:1-9)). The only reason Selkowitz did not pay $15,421 to avert foreclosure was because he was not able to pay. CP 404 (56:14-24). Selkowitz did not even consider curing the default because he didn't have the money. CP 404 (57:3-12).

D. Selkowitz had no meaningful relationship with MERS.

Selkowitz had no meaningful interactions with MERS. Selkowitz did not recall ever receiving any document from MERS (and there is no evidence he did). CP 403 (52:19-21). Selkowitz never spoke with anyone at MERS. CP 403 (52:22-23). Selkowitz never communicated by letter or

in any other way with MERS. CP 403 (52:24-53:1). MERS did not prevent Selkowitz from seeking a loan modification. CP 412 (88:5-8).

MERS was listed as the beneficiary under Selkowitz's deed of trust, as nominee/agent for the original lender/principal (New Century) and as a continuing agent for the lender's successors and assigns. CP 341-66. The deed of trust explained MERS was "acting solely as a nominee for Lender and Lender's successors and assigns." CP 342.

Through the deed of trust and by virtue of their membership in the MERS® System, MERS was granted the authority by U.S. Bank and/or Litton to take actions with respect to Selkowitz's loan, such as substituting the trustee (as requested by U.S. Bank). Under MERS's membership agreements, in the absence of instructions from U.S. Bank, MERS was entitled to rely on instructions issued by Litton, as servicer. CP 425-26 (73:22-74:14). U.S. Bank authorized MERS to take direction from Litton with respect to this particular loan because Litton was the servicer of the loan. CP 428 (92:21-93:10).

MERS's role in the transaction was not important to Selkowitz when he borrowed the money, and he did not know or think much about MERS when he signed the deed of trust. CP 397 (31:11-21). Selkowitz came up with claims against MERS only *after* he hired a lawyer. CP 410 (81:9-11). Selkowitz did not allege MERS did anything wrong, except (1) MERS was listed as beneficiary in a nominee capacity on his deed of trust, and (2) Selkowitz believed (but cited no evidence) that

MERS allegedly claimed to hold the note, although he does not dispute MERS never made that representation to *him*. CP 409-10 (79:25-80:22); CP 411 (85:2-86:3).

E. This Court answered certified questions of law.

After Selkowitz filed his first complaint, defendants removed the case to federal district court and moved to dismiss the complaint. *See Selkowitz v. First Am. Title Ins. Co.*, No. 10-5523, ECF No. 1, 7-8 (W.D. Wash. 2010). Before the parties conducted discovery, the district court certified to this Court three legal questions arising in connection with the case, along with questions from another case before Judge Coughenour. (*Id.*, ECF No. 26.) The district court asked this Court: (a) whether MERS could act as beneficiary of a deed of trust (in its own right) if MERS was not the noteholder; (b) what the legal effect of MERS's actions might be if it took actions only a beneficiary can take; and (c) whether a CPA claim lies against MERS if it took actions only a beneficiary can take. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 91 (2012).

This Court answered that MERS was not a valid beneficiary in its own right, as defined by RCW 61.24.005(2) (rather than as an agent), unless MERS was entitled to enforce the note secured by the deed of trust. *Id.* at 110. On the limited record before it, the Court could not determine the legal effects of MERS taking actions as if it were beneficiary in its own right (rather than as an agent). *Id.* at 110-11. But the Court rejected the idea that MERS's mere designation as beneficiary in an agency

capacity somehow voided the deed of trust, eliminated the debt, separated the note from the deed of trust, or caused injury as a matter of law. *Id.* at 112-14, 120.

In this Court (indeed, throughout the case), MERS did not argue that it was the holder of the note; MERS simply held the title of nominee under the deed of trust, in an agency capacity. *See Bain*, 175 Wn.2d at 89. The Court held that it was "likely true" that MERS *could* act as agent for a noteholder, that "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note," and that "Washington law, and the deed of trust act itself, approves of the use of agents." *Id.* at 106. Nothing in *Bain* suggests it is improper to designate MERS as beneficiary in a deed of trust as an agent for the disclosed principal (e.g., the lender).

To the contrary, in examining whether having a beneficiary-of-record that differs from the noteholder splits the note from the deed, the Court recognized that MERS *could* be a proper beneficiary so long as a principal authorized its actions. "If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened." *Id.* at 112. This is consistent with more than 100 years of Washington law, holding that noteholders may designate agents as beneficiaries to pursue foreclosure. *See, e.g.*, *Carr v. Cohn*, 44 Wash. 586, 588 (1906) (nominee can bring quiet-title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36 (1923) (bondholders' agent authorized to prosecute foreclosure);

Fid. Trust Co. v. Wash. & Or. Corp., 217 F. 588, 596 (W.D. Wash. 1914) (same).

Addressing the CPA claims, the Court held that, "[d]epending on the facts of a particular case," a borrower might show injury if MERS took some action as beneficiary that prevented the borrower from knowing who to deal with to resolve questions about the owner of the loan, loan modification, loan servicing, or who to sue. *Bain*, 175 Wn.2d at 118-19. But the Court also noted that "it is unclear whether the plaintiffs [in *Bain* and *Selkowitz*] can show any injury," it was unclear whether MERS had any "causal role," and "*the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.*" *Id.* at 119-20, emphasis added. *Compare Bain v. Metro. Mortg. Grp. Inc.*, 2013 WL 6193887, at *6 (Wash. Super. Ct. 2013) (on remand from the federal district court, the Superior Court entered summary judgment for MERS because there was no evidence of injury caused by MERS).

F. Further proceedings in the Superior Court and the Court of Appeals resulted in judgment against Selkowitz.

After this Court delivered its answers to the certified questions, the federal district court vacated its prior dismissal order and remanded the case to the Superior Court for King County, Washington, based on a lack of federal claims. The parties then took discovery. That was necessary because the district court and this Court lacked an evidentiary record upon which to base any findings of fact. This Court, in particular, was articulating legal principles and answering certified questions of law.

The defendants took Selkowitz's deposition, and his answers revealed crucial deficiencies in his claims. Selkowitz could not have commenced the lawsuit because of anything MERS said or did to him. Selkowitz admitted he had never even seen the appointment of a successor trustee executed by MERS. CP 403 (52:9-18). Selkowitz also made crucial admissions about his alleged injuries. He could identify no colorable injury to his business or property apart from legal fees, expenses, and other inconveniences associated with the commencement of this action.

After considering an extensive evidentiary record, the Superior Court granted defendants' motions for summary judgment. The Court of Appeals affirmed and ordered Selkowitz to pay Litton's fees on appeal, in accordance with Selkowitz's written commitments to pay fees under his note and deed of trust.

ARGUMENT

A. The Superior Court and the Court of Appeals properly determined that Litton was the holder of Selkowitz's promissory note.

The Superior Court properly entered summary judgment for Litton and others because Litton was the holder of Selkowitz's promissory note when Litton commenced a non-judicial foreclosure. The Court of Appeals affirmed that judgment based on uncontroversial principles articulated by this Court in its recent decisions, including *Bain* and *Brown*. *See* 175 Wn.2d at 101-02; 184 Wn.2d 509, 535-37 (2015). Selkowitz, by contrast, has not identified any precedent for his novel argument that Litton lost its

rights by keeping the original promissory note locked up at a bank. The Court should not accept review because there are no controversial legal issues for the Court to decide.

The holder of a note secured by a deed of trust is entitled to foreclose on the deed of trust. *See Bain*, 175 Wn.2d at 101-02; *Brown*, 184 Wn.2d at 535-37. A holder is simply a person "in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . ." RCW 62A.1-201(21)(a). A person may be a holder if that person is in actual or constructive possession of the note, even if that person is not the note's owner. *See Brown*, 184 Wn.2d at 523. In *Brown*, a borrower argued that Freddie Mac (the owner of the borrower's promissory note) was the holder of the note. But Freddie Mac provided the servicer "with actual *or constructive* possession of the original note." *Id.* at 523 (emphasis added). Accordingly, this Court held that the servicer was the holder of the note, even though the servicer was just acting for the owner. *Id.* at 537-38.

Washington law allows a person to hold a note through an agent. RCW 62A.3-201, cmt. 1 ("[N]obody can be a holder without possessing the instrument, either directly *or through an agent*.") (emphasis added); RCW 62A.3-420, cmt. 1 ("Delivery to an agent [of a payee] is delivery to the payee."); RCW 62A.9-313, cmt. 3 (may possess through an agent); RCW 62A.1-103(b) (common law, including agency law, applies to UCC transactions); *State v. Spillman*, 110 Wash. 662, 667 (1920) (constructive

possession exists "where there is a right to the immediate, actual possession of property."); *Gleeson v. Lichty*, 62 Wash. 656, 659 (1911) ("But, if we assume that the note was not in [defendant's] actual possession, it was clearly under his control, and constructively therefore in his possession.").

In that respect, Washington law is the same as the law in other jurisdictions. *See, e.g.*, Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes*, at 5 (Nov. 14, 2011) (possession under "UCC Section 3-301 includes possession by a third party on behalf of the holder); *see also In re McFadden*, 471 B.R. 136, 175 (Bankr. D.S.C. 2012) (owner of the note can have constructive possession of the note through an agent servicer, and be a holder, even if the note never leaves the servicer's office); *Banker's Trust (Del.) v. 236 Beltway Invest.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (constructive possession where note held by agent); *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1314-15 (D.S.C. 1994) ("cases generally hold that constructive possession exists when an authorized agent of the owner holds the note on behalf of the owner").

A federal court in Washington rejected exactly the argument that Selkowitz is making here (through the same counsel). *See Butler v. One W. Bank, FSB* (*In re Butler*), 512 B.R. 643, 654-55 (Bankr. W.D. Wash. 2014), *aff'd* 2015 WL 9309511 (W.D. Wash. 2015). The court in that case

concluded the custodian was just an agent for the noteholder for purposes of keeping the note physically secure. *Id.* The court held the bank in question (Deutsche Bank, the same custodian here) was always acting at the direction of the servicer and note owner. *Id.*

Here, Litton was entitled to foreclose. Litton qualified as a "person entitled to enforce" the note because Litton possessed the note, indorsed in blank. The undisputed evidence showed Litton was the noteholder when it began the non-judicial foreclosure. CP 569 ¶¶ 2-5; CP 441 (42:17-43:15). Selkowitz recognized the original note (CP 413-14 (95:17-96:13)) and introduced no evidence invalidating the indorsement by New Century. *See* RCW 62A.3-308; ER 902(i). Litton did not lose its right to foreclose on Selkowitz's deed of trust by prudently keeping the original note in a secure file room at Deutsche Bank. The note was deposited with Deutsche Bank to keep it safe from harm or loss. Deutsche Bank was always responsible for delivering the note at the instructions of Litton and U.S. Bank. CP 822 ¶ 7; CP 384-85 at 93; CP 386-88.

The Court of Appeals properly rejected Selkowitz's attempt to distinguish between "possession" and "constructive possession." Selkowitz does not identify a single precedent supporting his theory. (Litton does not claim to be in possession of a mere copy of the note, distinguishing this case from *Bavand v. Onewest Bank, FSB*, 176 Wn. App. 475, 498 (2013).) Selkowitz's argument is also inconsistent with Washington's Uniform Commercial Code, which expressly authorizes a

person to hold a note through an agent. (Indeed, corporations can *only* hold notes in that fashion because corporations are incorporeal entities that have no choice but to act through agents.) And Selkowitz's argument is inconsistent with a century of Washington precedents, including this Court's recent opinion in *Brown*, and with precedents from other jurisdictions.

For those reasons, the Superior Court correctly entered judgment against Selkowitz on his claims under the CPA. Apart from his theory of "constructive possession," Selkowitz came forward with no evidence to support his claim that someone other than Litton was entitled to enforce his note. Likewise, his assertion that Litton acted unfairly and deceptively when it commenced a non-judicial foreclosure collapsed under the weight of evidence showing that Litton was entitled to do precisely that.

In connection with the non-judicial foreclosure, Litton accurately described itself (and was described as) the servicer and the actual holder of the promissory note. Selkowitz received a notice of default identifying Litton as the servicer and providing Selkowitz with contact information necessary to answer any questions that he might have. CP 1136. Likewise, a declaration provided by Litton to Quality Loan accurately identified Litton as the "actual holder of the Promissory Note." CP 478. Although MERS identified itself as the beneficiary, in a nominee capacity, of the deed of trust, MERS never claimed to hold the note. As Selkowitz admitted in his deposition, he knew Litton was his servicer and was not

confused about who he needed to contact in connection with his loan. *See* CP 398 (35:19-25); CP 401 (44:15-18).

B. MERS properly acted at the direction of Litton and U.S. Bank when it appointed Quality Loan as trustee.

MERS had the authority to appoint a successor trustee because MERS was authorized to take action at the direction of Litton and U.S. Bank. This Court need not accept review because the undisputed evidence showed that MERS was not acting alone and without authority, satisfying the test set by this Court in *Bain*.

According to the deed of trust, MERS was the nominee for New Century and its successors and assigns (which included U.S. Bank, the subsequent owner of the promissory note). A nominee is an agent, albeit one with a limited role and purpose. "A nominee is one who holds bare legal title to property for the benefit of another." *Fourth Inv. LP v. United States*, 720 F.3d 1058, 1066 (9th Cir. 2013) (citation omitted).

By statute, regulation, and at common law, Washington has recognized that parties may use nominees as limited agents to hold title for them. *See, e.g.*, RCW 11.98.070(8) (trustee may hold "property in the name of a nominee or nominees without mention of the trust relationship"); RCW 30A.08.170 (trust company or national bank may hold property through "nominee"); WAC 458-61A-214 ("A 'nominee' is a person who acts as an agent on behalf of another person in the purchase of real property."); *Carr*, 44 Wash. at 588 (nominee can bring quiet title action on deed); *Andrews*, 124 Wash. at 534-36 (agent could prosecute

foreclosure); *Fid. Trust Co.*, 217 F. at 596 (same); *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 641-42 (1941) (mortgage remains valid even where named mortgagee "held the bare legal title" for real party in interest).

MERS's role as nominee included the power to act on behalf of its principal as an agent. *Ward v. Sec. Atl.*, 858 F. Supp. 2d 561, 567 n.5 (E.D.N.C. 2012) ("As long as the sale of the note involves a member of MERS, MERS remains the beneficiary of record on the deed of trust and continues to act as nominee for the new beneficial owner"); *Kiah v. Aurora Loan Servs., LLC*, 2011 WL 841282, at *4 (D. Mass. 2011) ("dissolution of [lender] would not and could not prevent [noteholder] from obtaining an assignment of the mortgage from MERS, both as a matter of law and according to the arrangement that existed between MERS and [noteholder] as a 'successor and assign'"); *Long v. One W. Bank, FSB*, 2011 WL 3796887, at *3 (N.D. Ill. 2011) ("whether [lender] was in bankruptcy prior to the assignment by MERS to Deutsche is irrelevant and does not show that the assignment was invalid"); *In re Tucker*, 441 B.R. 638, 646 (Bankr. W.D. Mo. 2010) ("MERS was the agent for New Century under the Deed of Trust from the inception, and MERS became agent for each subsequent note-holder under the Deed of Trust"); *see also* Restatement (Third) of Property § 5.4 cmt. ("Courts should be vigorous in seeking to find such [an agency] relationship").

When MERS appointed Quality Loan as trustee under Selkowitz's deed of trust, it did so at the direction of Litton and U.S. Bank. MERS is

listed as the beneficiary under Selkowitz's deed of trust, as nominee/agent for the original lender/principal (New Century) and as a continuing agent for the original lender's successors and assigns. CP 341-66. The deed of trust explained MERS was "acting solely as a nominee for Lender and Lender's successors and assigns." CP 342.

Through the deed of trust and as members of the MERS® System, Litton and U.S. Bank each gave MERS the authority to take actions with respect to Selkowitz's loan, such as substituting the trustee (as requested by U.S. Bank). In the absence of instructions from U.S. Bank, MERS was entitled to rely on instructions issued by Litton, as servicer. CP 425-26 (73:22-74:14). U.S. Bank authorized MERS to take direction from Litton, the servicer of Selkowitz's loan. CP 428 (92:21-93:10).

Selkowitz produced no evidence suggesting MERS was acting alone or without instruction or authority. To the contrary, representatives of Litton and MERS explained the source of MERS's authority to act and its relationship with Litton and U.S. Bank. Quality Loan was properly appointed by MERS to serve as trustee because MERS was acting at the direction of Litton and U.S. Bank.

In the document appointing Quality Loan, MERS accurately stated that, under the deed of trust, Selkowitz appointed MERS to serve as beneficiary in its capacity as a nominee. CP 475-76. Contrary to Selkowitz's assertions, MERS did not claim to be the holder of the note or assert any independent right to enforce Selkowitz's obligations. *See*

CP 475-76. MERS simply noted that the deed of trust identified MERS as the beneficiary, in a nominee capacity, which was true. CP 475-76. As Selkowitz admitted, he neither saw the document appointing a successor trustee before his deposition in this case, nor relied on that document to his detriment. CP 403 (52:9-18)

C. The Court of Appeals properly awarded attorneys' fees in accordance with the written commitment made by Selkowitz.

The Court of Appeals properly awarded attorneys' fees in accordance with Washington law and the contracts signed by Selkowitz.

Under RAP 18.1, the Court of Appeals may award fees if "applicable law grants to a party the right to recover reasonable attorney fees or expenses." *See Hudson v. Condom*, 101 Wn. App. 866, 877 (2000). Washington law permits an award of attorneys' fees when authorized by contract. *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 76 (2014). Courts frequently award fees in connection with suits brought against lenders. *See Podbielancik v. LLP Mortg. Ltd.*, 362 P.3d 1287, 1293 (Wn. App. 2015); *Shepherd v. Holmes*, 185 Wn. App. 730 (2014); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676 (2013).

The Court of Appeals was right to award fees because Litton asked for them in its opening brief. *See* RAP 18.1(a), (b). Litton was entitled to ask for costs and fees incurred in connection with the appeal even though it did not ask for fees from the trial court. *See Scheib v. Crosby*, 160 Wn. App. 345, 353 (2011). Litton limited its request for fees to those incurred

in connection with the appeal. Litton neither asked for nor was awarded fees for the considerable expenses it likely incurred in the trial court.

The Court of Appeals was only enforcing Selkowitz's commitments when the court awarded fees. In his deed of trust, Selkowitz promised to reimburse his lender and its successors and assigns, including Litton, for "reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument" as well as "reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." CP 18 ¶ 9, CP 24 ¶ 26. Selkowitz made similarly commitments in his promissory note, where he agreed to pay "costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." CP 827 at ¶ 7(E).

* * *

The Court should deny Selkowitz's petition for review.

RESPECTFULLY SUBMITTED this 16th day of March, 2016.

Davis Wright Tremaine LLP
Attorneys for Mortgage Electronic
Registration Systems, Inc.

By _____
Fred Burnside, WSBA No. 32491
Hugh McCullough, WSBA No. 41453

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on March 16, 2016, I caused the foregoing "Answer of Mortgage Electronic Registration Systems, Inc., to Petition for Review by Kevin J. Selkowitz" to be delivered to the following as indicated:

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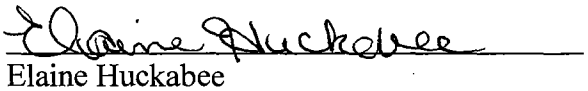
Certified in Seattle, Washington on March 16, 2016.



Elaine Huckabee