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Court of Appeals Division I No. 72526-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BLAIR LA MOTHE,

Petitioner,

U.S. BANK N.A., AS TRUSTEE, ON BEHALF OF THE
HOLDERS OF THE THORNBURG MORTGAGE SECURITIES
TRUST 2005-4 MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2005-4, ITS SUCCESSORS IN INTEREST AND/OR ASSIGNS,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. RELEVANT FACTS	1
III. PROCEDURAL BACKGROUND.....	2
IV. ARGUMENT	3
A. The Business Records Declaration Submitted At Summary Judgment Raises No Substantial Public Interest Issues.....	3
B. USB Is The Holder of La Mothe’s Original Note.....	6
V. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bridge v. Ocwen Fed. Bank FSB</i> , No. 1:07 CV 2739, 2013 WL 4784292 (N.D. Ohio Sept. 6, 2013)	8
<i>Brown v. Dep't of Commerce</i> , 184 Wn.2d 509, 359 P.3d 771 (2015).....	8
<i>Cantrill v. Am. Mail Line, Ltd.</i> , 42 Wn.2d 590, 257 P.2d 179 (1953).....	4
<i>Deutsche Bank Nat'l Trust Co. v. Slotke</i> , No. 73631-1-1 slip. Op. (Wash. Ct. App. Jan. 11, 2016).....	9
<i>Livonia Props. Holdings, LLC v. 12840–12976 Farmington Rd. Holdings, LLC</i> , 717 F. Supp. 2d 724 (E.D. Mich.), aff'd, 399 F. App'x 97 (6th Cir. 2010).....	8
<i>In re New Century TRS Holdings, Inc.</i> , 502 B.R. 416 (Bankr. D. Del. 2013)	5
<i>OneWest Bank v. Erickson</i> , 185 Wn.2d 43, 367 P.3d 1063 (2016).....	8
<i>In re Sia</i> , 2013 Bankr. LEXIS 3559 (Bankr. N.J. Aug. 27, 2013).....	4
<i>State v. Bellerouche</i> , 129 Wn. App. 912 917, 120 P.3d 971 (2005).....	4
<i>State v. Ben-Neth</i> , 34 Wn. App. 600, 663 P.2d 156 (1983).....	4, 5
<i>State v. Link</i> , 136 Wn. App. 685, 150 P.3d 610 (2007).....	8

<i>State v. Quincy</i> , 122 Wn. App. 395, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).....	4, 5
<i>In re Trafford Distribution Center, Inc.</i> , 414 B.R. 858, 862 (Bktrcy. S.D. Fla. 2009)	5
<i>Tuttle v. Rose</i> , 430 N.E.2d 356 (Ill. App. Ct. 1981)	7, 10, 12
<i>U.S. Bank v. Kimball</i> , 27 A.3d 1087 (2011).....	11
<i>United States v. Carriger</i> , 592 F.2d 312 (6th Cir. 1979)	7
<i>United States v. Varner</i> , 13 F.3d 1503 (11th Cir. 1994)	7, 10, 12
<i>Washington Cent. Railroad Co., Inc. v. Nat'l Mediation Board</i> , 830 F. Supp. 1343 (E.D. Wash. 1993).....	4
<i>Zalac v. CTX Mortg. Corp.</i> , 2013 U.S. Dist. LEXIS 20269 (Feb. 14, 2013).....	6
Statutes	
RCW 5.45.020	3, 5
RCW 62A.3-205(b).....	6
RCW 62A.3-301	6
Rules	
CR 56(e).....	3
RAP 13.4(b)(4)	1, 3

Other Authorities

2 James J. White & Robert S. Summers, Uniform
Commercial Code § 16.4.b (5th ed. 2008).....7

5C Karl B. Tegland, Washington Practice: Evidence Law
and Practice § 803.42 (5th ed. 2007)4

I. INTRODUCTION

Respondent USB,¹ Plaintiff below, submits this Answer in opposition to Petitioner La Mothe's Petition for Review ("La Mothe's Petition"). USB is the holder of La Mothe's original note and deed of trust, which USB submitted into evidence at summary judgment, and is the proper party to enforce the note and deed of trust. The two issues upon which La Mothe seeks review were correctly decided below and raise no issues of substantial public interest. RAP 13.4(b)(4). La Mothe suffers no damage when his original note is being enforced by its current holder against a borrower who has not made any payments for almost six years. La Mothe's Petition should be denied.

II. RELEVANT FACTS²

This lawsuit is a deed of trust foreclosure action. USB, the party holding La Mothe's original note and deed of trust, seeks to enforce the note and deed of trust through judicial foreclosure. In October 2005, La Mothe borrowed \$1,500,000 from Liberty Financial Group, Inc., and executed a promissory note to evidence the debt and gave a deed of trust

¹ "U.S. Bank N.A., as Trustee, on behalf of the Holders of the Thornburg Mortgage Securities Trust 2005-4 Mortgage Pass-Through Certificates, Series 2005-4" (sometimes the "Trust").

² La Mothe's Petition recites many facts extraneous and/or irrelevant to his Petition mixed with unsupported allegations and speculation. The relevant facts have been set forth in USB's briefs filed in the Court of Appeals and herein.

against certain real property located in Kirkland, Washington as collateral to secure payment.³ Respondent USB is the current holder of the La Mothe note and deed of trust.⁴

La Mothe stopped making the monthly loan payments in July 2009, and has made no payments on the note and deed of trust since that date, or for almost six years.⁵ Through May 6, 2014, there was due and owing a total amount of principal, interest and other charges of \$1,980,479.19.⁶

III. PROCEDURAL BACKGROUND

The parties filed cross-motions for summary judgment below.⁷ The trial court granted USB's motion and denied La Mothe's motion.⁸ La Mothe appealed. The Court of Appeals denied the appeal in the unpublished opinion from which La Mothe seeks review.

³ CP 103 (Sub 35) (Declaration of David Recksiek ("Recksiek Decl."), Exs. B, C.

⁴ *Id.* (Recksiek Decl., ¶ 3); CP 1834 (Sub 50) (Supplemental Declaration of David Recksiek").

⁵ *Id.* (Recksiek Decl., ¶ 4). La Mothe asserts that he made one payment in or about November 2009, which, as provided by the terms of La Mothe's deed of trust, was placed in a suspense account. *Id.*

⁶ *Id.*

⁷ CP 95 (Sub 34) (Respondent U.S. Bank's Motion for Summary Judgment); CP 75 (Sub 31) (Petitioner La Mothe's Motion for Summary Judgment).

⁸ CP 1865 (Sub 56) (Order Granting Plaintiff's Summary Judgment Motion, dated April 8, 2014).

IV. ARGUMENT

La Mothe raised a variety of claims before the trial court and the Court of Appeals,⁹ all of which have been abandoned in La Mothe's Petition to this Court except an argument over the validity of a business records declaration by an SPS¹⁰ agent and an argument that USB was required to prove it held the note and deed of trust at the time it commenced the lawsuit. Both issues were properly decided by the Court of Appeals and neither issue is a matter of substantial public interest. RAP 13.4(b)(4).

A. The Business Records Declaration Submitted At Summary Judgment Raises No Substantial Public Interest Issues

La Mothe argues that the two declarations submitted by David Recksiek do not meet the evidentiary standard for a business records declaration. The Court of Appeals correctly ruled that the standards of RCW 5.45.020 and CR 56(e) were met. Court of Appeals' Opinion at 4-6. Recksiek properly authenticated as business records documents used by SPS on behalf of the Trust in the everyday conduct of its business. The

⁹ USB's arguments on all of these now abandoned arguments are set forth in USB's appellate briefs in the Court of Appeals, and in its summary judgment briefs in the trial court, and are not repeated here in light of the limited issues raised by La Mothe's Petition.

¹⁰ Select Portfolio Servicing, Inc. ("SPS") is the loan servicer for this loan. *See* Recksiek Decl. CP 103; 1834.

trial court's business record evidentiary rulings raise no issue of substantial public interest.

Foundational testimony from a "qualified witness," is a term that has been "broadly interpreted" by Washington courts. *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005); *State v. Ben-Neth*, 34 Wn. App. 600, 603-05, 663 P.2d 156 (1983) (bank's computer records admitted, over objections, that foundation witnesses did not create or supervise creation of computer records, did not understand how records were assembled at the computer center, and had never been to the computer center); *State v. Bellerouche*, 129 Wn. App. 912 917, 120 P.3d 971 (2005) (testimony that record "filed, kept, and accessed in accordance with the routine record-keeping procedures" was sufficient foundation). Identification by a custodian may be sufficient even though the custodian was hired after the record was made. 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.42, at 107 (5th ed. 2007). The person who created the record need not identify it. *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 257 P.2d 179 (1953); *Ben-Neth*, 34 Wn. App. at 603. Courts have held that "personal knowledge can come from [a] review of the contents of files and records." *In re Sia*, 2013 Bankr. LEXIS 3559 *5 (Bankr. N.J. Aug. 27, 2013) quoting *Washington Cent. Railroad Co., Inc. v. Nat'l*

Mediation Board, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993); *In re Trafford Distribution Center, Inc.*, 414 B.R. 858, 862 (Bktrcy. S.D. Fla. 2009) (same); *In re New Century TRS Holdings, Inc.*, 502 B.R. 416 (Bankr. D. Del. 2013).

Ultimately, admissibility hinges upon the opinion of the court that the sources of information, method and time of preparation were such as to justify its admission. *Quincy*, 122 Wn. App. at 401; *Ben-Neth*, 34 Wn. App. at 603. The Court of Appeals and the trial court properly followed these rules and standards and Recksiek's declarations met the business records requirements.

La Mothe also claims that Recksiek should have provided testimony about the chain of custody of the note, the identity of the previous loan servicer, and various other matters. La Mothe Petition at 18 et. seq.¹¹ But these arguments do not address the business records requirements of RCW 5.45.020, the issue upon which La Mothe seeks review. These are arguments that appear to be made in service of a

¹¹ La Mothe complains about Recksiek's deposition, which is not germane to the issues upon which he seeks review. In any event, La Mothe's counsel, in fact, obtained responses from Recksiek to a number of questions about SPS's business records practices. See DR Dep. 41-52, 145-147 (review and audit of loan information from prior server), 158:10-17 (assimilation of records from prior server, extensive audits and recalculations of loan documents), 168:25-169:2 (witness intended to testify at trial based upon facts contained in business records); 162-166 (series of questions regarding how SPS proceeds to foreclosure). CP 404-614.

different contention by La Mothe, i.e., that Recksiek did not provide an authentication foundation for admission of the note and deed of trust.

But La Mothe's arguments over authentication of the note and deed of trust by Recksiek are both wrong and beside the point. USB submitted the *original* note and deed of trust at the summary judgment hearing.¹² The original note and deed of trust are self-authenticating and non-hearsay¹³ (and make a prima facie case for recovery by the holder of the note). No authenticating witness is needed for a self-authenticating document. Recksiek's declaration was not necessary for the note and deed of trust to be admissible at summary judgment. The trial court and the Court of Appeals' ruling on the admissibility of business records were correct and raise no issue of substantial public interest.

B. USB Is The Holder of La Mothe's Original Note

USB submitted the original promissory note and deed of trust at summary judgment.¹⁴ "Mere production of a note establishes prima facie

¹² Respondent's Appellate Brief at pp. 3-4.

¹³ Respondent's Appellate Brief at pp. 7-9.

¹⁴ Because La Mothe's note was endorsed in blank, it was a bearer note transferable by possession. "Under Washington law an instrument endorsed in blank becomes payable to the bearer and may be negotiated. RCW 62A.3-205(b). The holder of a negotiable instrument is the person in possession and is entitled to enforce it. RCW 62A.3-301; 62A.1-201(20). Here, Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law." *Zalac v. CTX Mortg. Corp.*, 2013 U.S. Dist. LEXIS 20269 *9 (Feb. 14, 2013).

authenticity and is sufficient to make a promissory note admissible.” *United States v. Varner*, 13 F.3d 1503, 1509 (11th Cir. 1994) (citing *United States v. Carriger*, 592 F.2d 312, 316-17 (6th Cir. 1979)). “[M]erely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder.” 2 James J. White & Robert S. Summers, Uniform Commercial Code § 16.4.b (5th ed. 2008) (emphasis added); *Tuttle v. Rose*, 430 N.E.2d 356, 358 (Ill. App. Ct. 1981) (“[W]hen the signatures on a note are admitted or established, production of the instrument entitles a holder to recover unless the defendant establishes a defense. This means that once the holder produces the instrument, he is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any defense, including payment, by a preponderance of the evidence.”) (emphasis added).

La Mothe, by his own admission, engages in fanciful speculation about the note residing with the original lender until days before the summary judgment hearing.¹⁵ La Mothe Petition at 15-16. But the evidence submitted by USB was not only sufficient to establish a prima facie case for recovery, the submission of the original note and deed of

¹⁵ La Mothe of course provided no evidence in support of his speculation and identified no other party seeking payment from him on this note, despite his six years of non-payment.

trust assures the court that the party who is entitled to enforce the note and deed of trust is the party before the court.¹⁶ This Court's recent rulings recognize that the holder of the note is the party entitled to enforce the deed of trust. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015) (non-judicial foreclosure); *OneWest Bank v. Erickson*, 185 Wn.2d 43, 367 P.3d 1063 (2016).

Nevertheless, La Mothe asserted "standing" as an affirmative defense¹⁷ and argued, relying on factual speculation but no contrary evidence, and no legal authority, that there is a question whether USB was the holder of the note at the time of filing the complaint. There is no such requirement in Washington law, and La Mothe identifies no Washington authority for this position. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007). By submitting the original note

¹⁶ Production of the original note demonstrates that the party entitled to enforce the note – the holder of the original note – is before the Court and the borrower is not at risk for paying the wrong party or making double payments. *See Livonia Props. Holdings, LLC v. 12840–12976 Farmington Rd. Holdings, LLC*, 717 F. Supp. 2d 724, 735 (E.D. Mich.), *aff'd*, 399 F. App'x 97 (6th Cir. 2010); *Bridge v. Ocwen Fed. Bank FSB*, No. 1:07 CV 2739, 2013 WL 4784292, at *6 (N.D. Ohio Sept. 6, 2013) ("Where, as here and in Livonia, the foreclosing party produces the original note, the obligor 'cannot credibly claim to have standing to challenge' the assignments and other agreements to which they were not a party." (citation omitted)).

¹⁷ USB alleged in its complaint that it was the holder of the note and deed of trust. CP 1 at paragraph 15. La Mothe's fifth affirmative defense was a generic "standing" defense. CP 70. But USB clearly established it had "standing."

endorsed in blank, USB established itself as the holder of La Mothe's note and made a prima facie case to enforce the note. As holder of La Mothe's original note, USB is plainly the proper party to seek judicial enforcement of the note and deed of trust. The Court of Appeals correctly ruled that:

“But La Mothe cites to no relevant or controlling authority in support of his proposition. The presentation of the note at the time of the summary judgment hearing is sufficient to prove U.S. Bank's status as holder of the note. See *Deutsche Bank Nat'l Trust Co. v. Slotke*, No. 73631-1-1 slip. Op. at 9 (Wash. Ct. App. Jan. 11, 2016).

Court of Appeals' Opinion at 7.

La Mothe didn't identify his alleged additional requirement when he identified “standing” generically as an affirmative defense to the complaint. And when USB moved at summary judgment to dismiss all of La Mothe's affirmative defenses (CP 95), La Mothe made a host of arguments, including various arguments that might be characterized as types of “standing” arguments – but La Mothe never made the “standing” argument upon which he now seeks review. La Mothe provided no evidence that USB did not hold the note when it filed this lawsuit or even assert this argument to the trial court. The trial court granted USB's motion. CP 1865.

Consequently, this argument was not raised below and has not been briefed or has been minimally briefed, at best, in the courts below.¹⁸ Because La Mothe did not argue the issue in the trial court, USB had no reason or opportunity to further address La Mothe's allegation. Nevertheless, USB submitted the original note and two declarations from David Reckseik at summary judgment. Among other things, Reckseik testified that SPS had been the loan servicer for this loan since 2010, and that "[t]he originals of the note and deed of trust are maintained by a custodian on behalf of the Trust and USB as trustee . . ." CP 103.

By producing the original note in court, USB complied with well-established law that it thereby made a prima facie case that it is the party entitled to enforce the note and deed of trust (*Varner, supra; Tuttle, supra*), and demonstrated conclusively there is no risk that some other party may later attempt to sue La Mothe on this debt. La Mothe's argumentative allegations provides no evidence to contradict Reckseik's statements, and as noted above, La Mothe did not even make this argument to the trial court.

¹⁸ In the Court of Appeals, La Mothe belatedly raised this argument, for the first time, in his reply appellate brief. USB objected, but the Court of Appeals denied USB's motion to strike the argument, and then rejected La Mothe's argument as noted above.

La Mothe cites to a Vermont Supreme Court case, *U.S. Bank v. Kimball*, 27 A.3d 1087 (2011). But that case presented a wholly different set of facts and actions by the foreclosing bank than presented here. There, “the complaint did not allege U.S. Bank held the original note.” *Kimball*, 27 A.3d at 1092. Here, USB alleged it was the holder of the note and deed of trust. CP 1.

In *Kimball*, the homeowner provided “an affidavit and documentary evidence” supporting the homeowner’s claim that U.S. Bank did not hold an interest in the note. *Id.* U.S. Bank responded by abandoning its original claim of assignment of the mortgage and asserted it held the original note. *Id.*¹⁹ Here, La Mothe failed to provide any evidence showing USB did not hold the note and deed of trust as USB alleged in its complaint, and provided no evidence to contradict the original note and deed of trust submitted at summary judgment or the declarations of Recksiek. Indeed, La Mothe did not even bother to raise or argue this standing argument to the trial court. In short, *Kimball* provides no reason to question the Court of Appeals’ ruling in this case.

As the Court of Appeals correctly ruled, there is no relevant or controlling authority in Washington that supports La Mothe’s argument.

¹⁹ As described by the Court in *Kimball*, the bank’s contradictory actions created confusion and doubt about its documents. No such conduct or confusion occurred here.

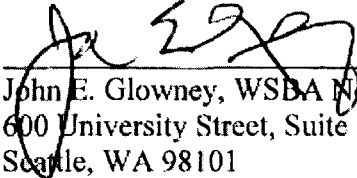
To the contrary, it is well-established that production of the original note and deed of trust establishes a prima facie case for enforcement. *Varner, supra; Tuttle, supra*. On the record in the trial court and Court of Appeals, La Mothe provided no evidentiary or legal record from the courts below upon which this Court could address the issue. Because the party holding La Mothe's original note is enforcing it, La Mothe has wholly failed to show that there is an issue of substantial public interest that this Court should address.

V. CONCLUSION

In sum, the admission of business records in this foreclosure case was proper, and presents no issue of substantial public interest. Likewise, enforcement of an original note and deed of trust by the party who submits the original note and deed of trust to the trial court against a borrower, almost six years in default, is unremarkable and presents no issue of substantial public interest. This Court is respectfully requested to deny La Mothe's Petition for Review.

Respectfully submitted this 8th day of June 2016.

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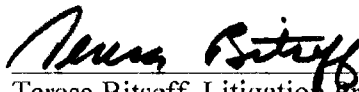
Attorneys for Respondent U.S. Bank N.A.,
as trustee, on behalf of the holders of the
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Certificates, Series 2005-4, its successors
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused **Respondent's Answer to Petition for Review** to be filed with the Court via email/pdf; and caused a true and correct copy of same to be served upon the party listed below by Legal Messenger/Hand-Delivery and by U.S. Mail:

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DATED: June 8, 2016, at Seattle, Washington.



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