No. 95502-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Respondent,

v.

RICHARD J. ZALAC, et al.,

Petitioners.

ANSWER OF JPMORGAN CHASE BANK, N.A., TO RICHARD AND SARAH ZALAC'S PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

No fewer than four separate courts have rejected the claims asserted by Richard and Sarah Zalac, including the U.S. District Court for the Western District of Washington, the Ninth Circuit Court of Appeals, the King County Superior Court, and the Washington Court of Appeals. The Zalacs' petition for review is the latest—and one hopes, the last—in a series of claims brought by the Zalacs since 2012. In each case, the Zalacs complained they did not know they needed to pay Chase to cure their default on a substantial loan, even though: 1) they had made payments to Chase for years before default; 2) the default had nothing to do with Chase; and 3) they received repeated communications from Chase explaining in detail why Chase was entitled to foreclose.

There has never been a genuine dispute that Chase was and is entitled to enforce the promissory note executed by Richard Zalac. The Ninth Circuit determined that "[b]y holding the note, Chase was the true beneficiary under Washington law, and there was nothing unfair or deceptive about representing itself as such," and it was therefore authorized to direct a trustee under a deed of trust to foreclose. *Zalac v. CTX Mortg.*, 628 Fed. App'x 522, 523 (9th Cir. 2016). And when the Zalacs asserted claims again in the Superior Court based on the same transactions and the same facts, the Superior Court properly held, on summary judgment, that the Ninth Circuit was right that Chase was entitled to enforce Mr. Zalac's promissory note as the holder of the note.

Undeterred, Zalacs now have a new legal theory—one raised for the first time in their petition to this Court. They base their theory on a statute that they originally mentioned in passing in a reply brief to the Washington Court of Appeals (but which they never raised as a basis for relief in the trial court). Like their other theories, however, this latest theory is deficient. The statute they cite, 12 U.S.C. § 2605(k), was not enacted until January 10, 2014—years after the events in 2010 and 2011 that the Zalacs complain about. Even if that statute had existed in 2011, the Zalacs cannot use it to reverse the judgment or revive their counterclaims—the statute is subject to a three-year limitations period, and this lawsuit started in June 2015—after the statute of limitations expired.

But even setting those legal deficiencies aside, the real problem with the Zalacs' theories is that they base them on allegations contrary to undisputed facts. The Zalacs knew whom to pay to cure their default because they had been making payments to Chase for over four years before first defaulting, and Chase repeatedly explained to the Zalacs and their lawyers why it was entitled to foreclose. The Zalacs simply ignore those communications in their petition for review to this Court.

There are no good reasons for this Court to accept review under RAP 13.4(b). The Zalacs identify no conflict between the decision of the Court of Appeals in this case and a decision of this Court. There is no significant constitutional question and no substantial issue of public interest. That leaves the alleged conflict with *Deegan v. Windermere Real*

Estate/Center-Isle, Inc., but the Zalacs manufactured that conflict by citing a federal statute that does not even apply to their case. The Court should deny review for the following reasons:

First, 12 U.S.C. § 2605(k) does not even apply to the Zalacs' claims based on events in 2010 and 2011. If it did, the statute of limitations expired years ago. The Zalacs never raised the argument in the Superior Court or elsewhere until it cited the statute in a footnote in a reply brief to the Court of Appeals. And even if Section 2605 did apply, even if the statute of limitations had not expired, and even if the Zalacs had preserved the argument, they would have lost because Chase substantially satisfied the statute by repeatedly answering the Zalacs' questions in detail.

Second, the Court of Appeals' opinion does not conflict with existing law because the definition of noteholder in the Note does not conflict with the Uniform Commercial Code—the two are harmonious—and the definition does not vary the rule that the noteholder can foreclose.

II. IDENTITY OF RESPONDENT

Chase is a respondent, a plaintiff, and a counter-defendant in this case.

III. STATEMENT OF CASE

A. Mr. Zalac Borrowed $352,500, Secured by Real Property

In June 2005, Mr. Zalac borrowed $352,500 from CTX; as evidence of his obligation to re-pay the loan, he signed a promissory note (the "*Note*"). CP 8–11. Simultaneously, Mr. Zalac signed a deed of trust

(the "*Deed of Trust*") securing the Note. CP 13–27. Sarah Zalac, his wife, also signed the Deed of Trust. CP 26.

Mr. Zalac promised to make payments "every month" and to do so "until I have paid all of the principal and interest and any other charges described below that I may owe under this Note." CP 8. He also agreed "I understand that the Lender may transfer this Note. The Lender [CTX] or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'." CP 8.

The Deed of Trust stated: "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." CP 24 § 20. It also stated:

> If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer . . . and are not assumed by the Note purchaser unless provided by the Note purchaser.

CP 24 § 20. The "Loan Servicer" is defined as the entity "that collects Periodic Payments due under the Note and this Security Instrument [Deed of Trust] and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law." *Id.*

B. The Zalacs Admitted That Chase Was Their Mortgage Servicer

CTX transferred the Note shortly after making the loan, just as the Zalacs agreed it could. Chase became the servicer of the loan.[1] CP 143–44.

[1] Chase Home Finance LLC took over servicing in 2006; Chase is the successor by merger to Chase Home Finance after 2011. *See, e.g.*, *Willis v. Chase Home Fin.*, 923 F. Supp. 2d 89, 94 (D.D.C. 2013).

Federal National Mortgage Association ("Fannie Mae") owned the Note. CP 144 ¶ 9. CTX indorsed the Note in blank. CP 11. The Zalacs do not dispute that Chase held the indorsed-in-blank Note from 2006 onward. Verbatim Report of Proceedings dated March 25, 2016 and July 22, 2016 ("RT") 50:11–17; CP 97:14–15, 144. Chase is also the beneficiary of record of the Deed of Trust under a February 2012 document reflecting the transfer. CP 180–81.

The Zalacs received notice of each servicing change. CP 223-226, 444, 472. Effective November 1, 2006, Chase took over the servicing of the loan. CP 444, 474-475. The Zalacs received notice that Chase thereby acquired "the right to collect payments from you" and that the Zalacs should send "all payments on or after [November 1] to your new servicer [Chase]." CP 444.

The Zalacs in fact made payments to Chase, as Chase asked them to do. CP 399-400, 444, 517-591. They defaulted in 2007 but were able to cure that default, expressing appreciation for Chase because it "goes to great lengths to retain and serve its customers." CP 477. "For the first five years of our home ownership, there were no issues." CP 399-400.

C. Mr. Zalac Defaulted on His Loan

The Zalacs always knew whom to pay—they paid Chase between October 2006 and November 2010. CP 2, 37, 76, 144, 401 ¶ 10. Mr. Zalac admits defaulting on his payments; he has not paid anything on the loan since November 1, 2010. CP 22, 401, 509–24. The Zalacs only finally stopped making payments to Chase in 2010 because "[w]e have lost our

customer base, and have been unable to secure employment sufficient to meet our financial obligations." CP 420. Mr. Zalac admitted Chase was his "mortgage servicer[]" (CP 401) and repeatedly addressed letters to Chase in connection with his loan. CP 410-26. The Zalacs contacted Chase to determine with whom they should negotiate their default. CP 401–03, 410–26. On April 14, 2011, Chase gave Mr. Zalac notice that Fannie Mae owned the loan and, as servicer, Fannie Mae authorized Chase to handle any concerns on its behalf. CP 81.

D. The Zalacs Received Ample Disclosures, But Refused to Believe Them

The Zalacs received several notices identifying Chase as the servicer of the loan and the person that Mr. Zalac needed to pay. He received a notice from Countrywide Home Loans instructing him that Chase had the "right to collect payments from you." CP 400-401, 444. Mr. Zalac acknowledged receiving letters from Chase dated December 4, 2010, and December 7, 2010, each addressing his "late November payment on the referenced home mortgage." CP 413-415; *see also* CP 509-515. Zalac acknowledged receiving more communications in his letter dated January 10, 2011. CP 416-419. Chase did more than simply send written communications to Mr. Zalac—Chase offered to meet Mr. Zalac in person to discuss his mortgage options. CP 479-480.

It is not clear what could have satisfied the Zalacs' demands for more information. In a letter dated July 5, 2011, the Zalacs received a lengthy explanation of Chase's right to enforce the defaulted obligations.

That letter included an accounting of amounts due under the loan, a copy of the promissory note endorsed in blank, and a copy of the Zalacs' deed of trust. CP 482-504. The Zalacs would receive at least two more replies to substantially the same inquiry. *See* CP 482-507. The Zalacs then complained to the Washington attorney general and Northwest Trustee Services, Inc.'s attorney (the trustee under the Deed of Trust) sent the Zalacs a letter attaching a copy of Mr. Zalac's promissory note and enclosing several other letters, each explaining Chase's right to service the loan and enforce Zalacs' obligations. CP 312-314.

The Zalacs also received a notice of default identifying Chase as the servicer of the loan, the beneficiary of the deed of trust, and the creditor to whom they owed the debt. CP 440-442; *see also* CP 509-511. The Zalacs received Chase's letter explaining it was acting as servicer on behalf of Fannie Mae. CP 443. And public records maintained by King County reflected an assignment of the rights under the deed of trust for the benefit of Chase. CP 447.

The Zalacs do not explain why they refused, against all evidence, to believe that Chase was the servicer and the person to whom Mr. Zalac owed payments. Mr. Zalac was the one who cut off communications, not Chase. CP 416-419. Mr. Zalac insisted there "will be no further communication" because Chase had purportedly not proven "beyond a shadow of doubt" that Chase was the legitimate holder of his mortgage. CP 416-419. Mr. Zalac's skepticism is difficult to understand because he

made payments to Chase for almost four years before defaulting. *See* CP 399-400, 444, 517-591.

E. Mr. Zalac Sued Chase Under the CPA and Lost, and the Decision Was Affirmed by the Ninth Circuit

On July 12, 2012, Mr. Zalac filed an action asserting claims for wrongful foreclosure and Consumer Protection Act ("CPA") violations ("Zalac I"), and then amended the CPA claim alleging Chase misinformed him about the identity of the holder of the Note. CP 189–251, 256–59, 262. Chase removed the case and the federal court dismissed Mr. Zalac's claims. CP 253–316, 318–29. It held that "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." CP 328. The Ninth Circuit affirmed, finding that "[b]y holding the note, Chase was the true beneficiary under Washington law, and there was nothing unfair or deceptive about representing itself as such." CP 335–39.

F. Chase Sued to Foreclose on the Note, and the Zalacs Asserted the Same CPA Claim They Lost in Federal Court

On June 2, 2015, Chase filed this lawsuit, seeking to enforce the Note and Deed of Trust ("Zalac II"). CP 1–29. Even after losing in the federal courts, the Zalacs asserted a counterclaim under the CPA, alleging many of the same theories rejected in Zalac I. CP 36–38. The Zalacs later withdrew two other counterclaims. RT 11:20–12:3.

Chase moved for summary judgment on its claims and the Zalacs' counterclaim, and the Zalacs responded. CP 116–342, 592–900. The Zalacs filed a cross-motion for summary judgment on their counterclaim,

and Chase responded. CP 343–591, 901–09. The Superior Court granted Chase's motion and denied the Zalacs' motion, finding Chase held the Note, and later awarded fees and costs. CP 910–12; *See also* CP 56, 59–60, 958–1174, 1175–78, 1199–1202.

On December 11, 2017, the Court of Appeals affirmed the Superior Court in an unpublished opinion. The Zalacs filed motions for reconsideration and for publication; the Court of Appeals denied both.

IV. ARGUMENT

This Court should deny review because the Court of Appeals' opinion does not conflict with another Court of Appeals decision, and there is no public-interest issue. Because those are the only grounds under RAP 13.4(b)(2) and (4) the Zalacs identify, there is no basis for review.

Contrary to their petition to this Court, the decision by the Court of Appeals does not conflict with *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 889–90 (2017) because 12 U.S.C. § 2605(k) did not exist in 2010 and 2011, when the Zalacs allege Chase had a duty to comply with that statute by providing responses to their questions in a particular form. Even if the statute had existed, the Zalacs never asserted a claim under section 2605(k); in fact, they did not even mention the statute until a reply brief to the Court of Appeals. Had they done so, they would have lost because the Zalacs already knew that Chase was their loan servicer, and in that capacity, Chase repeatedly provided them with detailed answers to their questions.

The Zalacs also do not establish any substantial public interest. To determine whether there is a substantial public interest, the Court should consider "(1) the public or private nature of the issue; (2) the desirability of an authoritative determination that will provide future guidance to public officers; and (3) the likelihood that the issue will recur." *In re Det. of June Johnson*, 179 Wn. App. 579, 584 (2014), *rev. den. sub nom. In re Det. of Johnson*, 181 Wn.2d 1005 (2014).

This case is a private dispute between Chase and the Zalacs arising from communications exchanged in 2010 and 2011. The law the Zalacs cite in support of their petition did not exist then. There is no reasonable likelihood that an opinion from this Court on this case would provide helpful guidance because the case is far more likely to be decided on other grounds, including the fact that: 1) the Zalacs' claims are barred by res judicata arising from the prior federal action; 2) the Zalacs would lose after the application of the limitations period; and 3) the Zalacs were not confused about whom they need to pay, and why.

Chase was the holder of the Zalacs' Note and, in that capacity, had the right to enforce the Zalacs' defaulted obligations under the terms of the Note and Washington law. This Court already held that the holder of a promissory note can foreclose in *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509 (2015), which provides the necessary guidance to litigants.[2] Reviewing the decision of the Court of Appeals in this case will

[2] *See also OneWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 74 (2016); *Bavand v. OneWest Bank*, 196 Wn. App. 813, 846 (2016), *as modified* (Dec. 15, 2016) ("the supreme court

not provide useful additional guidance.

A. The Decision of the Court of Appeals Is Compatible With *Deegan* and Does Not Implicate Any Public Interest

1. Chase Did Not Violate 12 U.S.C. § 2605(k) Because It Was Not in Effect Until January 10, 2014

Chase did not violate 12 U.S.C. § 2605(k), so the Zalacs' incorrect interpretation of *Deegan* does not create a conflict with the decision of the Court of Appeals in this case. The statute that the Zalacs rely on, 12 U.S.C. § 2605(k), states that a servicer shall not "fail to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan." The Zalacs argue that Chase identified the owner of their Note in early 2011 instead of in late 2010, when the Zalacs claim that they first asked; and the Zalacs use that supposed violation to suggest that Chase must also have violated Washington's CPA in accordance with *Deegan*.

The Zalacs neglect to mention that 12 U.S.C. § 2605(k) did not take effect until January 10, 2014. *See Boardley v. Household Fin. Corp. III*, 39 F. Supp. 3d 689, 703 (D. Md. 2014) ("This means that alleged violations prior to January 10, 2014—a year later than even Defendants suggest—are not actionable"). Accordingly, even if *Deegan* did hold that

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concluded that the status of "holder" is dispositive for purposes of enforcing a promissory note"); *River Stone Holdings NW, LLC v. Lopez*, 199 Wn. App. 87, 97 (2017); *Blair v. Nw. Tr. Servs., Inc*., 193 Wn. App. 18, 33–34 (2016), *as amended on denial of reconsideration* (May 12, 2016), *review denied* 186 Wn.2d 1019 (2016); *McAfee v. Select Portfolio Servicing, Inc*., 193 Wn. App. 220, 228 (2016); *Marts v. U.S. Bank Nat'l Ass'n*, 166 F. Supp. 3d 1204, 1209 (W.D. Wash. 2016) ("The note holder, however, is the beneficiary and the entity with legal authority to enforce the obligation, foreclose, negotiate modifications, etc."); *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 175–76 (2016), *review denied* 185 Wn.2d 1037 (2016).

the failure to provide information required by statute was automatically a violation of the CPA (and as discussed below, it did not), *Deegan* could not apply to this case because Chase could not have violated 12 U.S.C. § 2605(k). That means there is no conflict between the decision of the Court of Appeals in this case and *Deegan*, even under the Zalacs' interpretation of *Deegan*.

2. The Zalacs Did Not Raise 12 U.S.C. § 2605(k) Within the Applicable Limitations Period or At Any Time Before a Reply Brief in the Court of Appeals

The Zalacs' argument under 12 U.S.C. § 2605(k) is untimely in two respects. First, the Zalacs raised this argument for the first time in a reply brief submitted to the Court of Appeals. They did not mention, much less argue, it in the Superior Court. Second, even if the Zalacs had raised it, the claim would have failed because claims under 12 U.S.C. § 2605(k) are subject to a three-year limitations period, which passed well before the commencement of this case.

The Zalacs waived any argument under 12 U.S.C. § 2605(k) by failing to timely raise it below. Under RAP 12.1, "[o]nly issues raised in the assignments of error, or related issues, and argued to the appellate court are considered on appeal." *US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 112 (1997), as amended (Mar. 3, 1998); *Mangat v. Snohomish Cty.*, 176 Wn. App. 324, 334 (2013).

The Zalacs first cited 12 U.S.C. § 2605(k) in passing, in a footnote, in their reply brief filed with the Court of Appeals. Appellate Reply Brief

p. 10 n.5. Raising a new issue in an appellate reply brief is far too late for this Court to consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992); *Centrum Fin. Servs., Inc. v. Union Bank, N.A.*, 1 Wn. App. 2d 749, 761 n.6 (2017). While the Zalacs did argue Chase's response was untimely below, that argument did not reference any legal statute or requirement and was only first asserted in their opening appellate brief—it was not made in the Superior Court in their summary judgment motion or reply, their opposition to Chase's motion, or their motion for reconsideration. CP 116–909, 913–57. The Court should not review a new matter that the Zalacs only discussed in any detail for the first time in their petition.

Even if the Zalacs had preserved an argument under 12 U.S.C. § 2605(k) by raising it in the trial court, they cannot now use it to avoid Chase's correctly entered judgment and revive their counterclaims. They must assert claims under 12 U.S.C. § 2605(k) within three years of the alleged violation. *See* 12 U.S.C. § 2614. Their 12 U.S.C. § 2605(k) theory is premised on the idea that Chase should have responded to their inquiries before April 14, 2011 (Pet. p. 4-5, 13-15), so the limitations period expired before June 2, 2015 (the date Chase filed the lawsuit) or September 1, 2015 (the date they filed their counterclaims). And they cannot avoid the judgment or revive their counter-complaint using the CPA. CPA claims are subject to a four-year statute of limitations. RCW 19.86.120. Again, Chase

filed its lawsuit, and the Zalacs asserted their counterclaims in this case, in and after June 2015—after the CPA statute of limitations expired.

Because the Zalacs never raised 12 U.S.C. § 2605(k) below, it is not clear why the Zalacs believe they can use it to avoid Chase's foreclosure judgment against them. They might argue that they could not bring those claims because Zalac I addressed the very same facts. But Zalac I did not prevent them from asserting these claims; quite to the contrary, it gave the Zalacs a ready forum to raise exactly those claims. They failed to do so, and cannot reverse that failure now.

3. There Is No Conflict With *Deegan* Because the Zalacs Knew Whom to Pay; Chase Repeatedly Answered Their Questions

The decision of the Court of Appeals in this case does not conflict with *Deegan* because Chase did not withhold any information from the Zalacs. In *Deegan*, the plaintiffs bought a house but did not receive a county-ordinance-mandated disclosure warning about aircraft noise. They sued under the CPA, claiming the listing agents' failure to provide them with the mandated disclosure deceived them. The listing agents moved to dismiss under CR 12(b)(6) and the trial court granted the motion. *Deegan*, 197 Wn. App. at 879–80. The Court of Appeals reversed, holding that:

> [V]iewing the alleged omissions of material fact and consistent hypothetical facts, the complaint adequately alleges an unfair or deceptive act or practice, in trade or commerce, affecting public interest. . . . And, in view of the rebuttable presumption of reliance applicable to an omission of material fact [for a CPA claim], there are

> adequate allegations that the omissions caused Deegan and O'Grady harm.

Id. at 892. That is not at all like the undisputed facts in this case.

First, Chase did not fail to make a disclosure required by law. The Zalacs now cite 12 U.S.C. § 2605(k) as the source of an obligation to make quicker disclosures, but, as discussed above, section 2605(k) did not take effect until January 10, 2014.

Second, the trial court in this case did not dismiss the Zalacs' claims under CR 12(b)(6). Instead, it entered summary judgment for Chase after considering an ample record, including cross-motions for summary judgment and several declarations. The Zalacs cannot rely on speculation about hypothetical reliance nor hypothetical injuries.

Third, the undisputed facts developed on summary judgment show that the Zalacs knew they needed to pay Chase, and were not confused, because Chase repeatedly provided the Zalacs (and their attorneys) with comprehensive responses to their questions.

The Zalacs knew Chase was their servicer to whom they should make payments. CP 37–38, 70, 81, 193, 201, 257, 290, 400–03, 406–47; *Marts*, 166 F. Supp. 3d at 1209 ("Thus, there was no need to investigate who owned their Note; they could have discharged their obligations through the servicer"). Chase told the Zalacs: 1) the identity of the owner and servicer of their Note; 2) that they could negotiate with Chase; and 3) Chase was the beneficiary of their Deed of Trust with the authority to foreclose. CP 2, 11, 29, 38, 78–79, 81, 83, 85, 193, 257–59, 262, 336–338,

400–02, 407, 434–35, 439–44. This was all true because, as the Zalacs discreetly omit from their petition for review, Chase held the indorsed-in-blank Note since 2006. CP 144. And, as the Zalacs do admit in their petition, the servicer—that is, Chase—was the entity they needed to deal with in discussing their loan, so knowing who owned or held the Note was immaterial. Pet. p. 15–17.

There is no evidence Chase made a promise it did not keep or failed to provide information. The Zalacs received no fewer than 10 communications giving them information about their default and the actions that they needed to take to cure their default. *See supra*, Section III.D. The undisputed facts developed in the trial court showed that the Zalacs' default was not because of perplexity about the identity of their servicer nor the nature of their obligations. CP 420-423. It was only after making payments to Chase for more than four years, and then defaulting for reasons having nothing to do with Chase, that the Zalacs began professing confusion about the nature of their obligation. Even now, however, the Zalacs admit their servicer (*i.e.*, Chase) was the borrower's prime contact regarding payments and defaults. Pet. p. 15–17.

B. The Note and UCC Definitions of Note Holder Are Harmonious, and Chase Satisfied Them, So No Public Interest Would Be Served by Review

There is no real confusion about the law of negotiable instruments, as applied to the Zalacs' note, and therefore no issue of public interest requiring review. Both the express terms of the promissory note and Article 3 of the Uniform Commercial Code required Mr. Zalac to make

payments to Chase to cure his default. Chase was and remains the holder of the promissory note executed by Mr. Zalac. As such, it was the noteholder under both the terms of the note and under applicable law, giving it the right to enforce the instrument.

The definitions of noteholder in the Note and the UCC are harmonious. The common law, including basic principles of contract, supplements the UCC. RCW 62A.1-103. The UCC explains that the holder of an indorsed-in-blank note is entitled to payments. RCW 62A.3-109. It also explains that the original holder of a note can transfer the right to enforce the note by transferring possession. *See* RCW 62A.3-109, 62A.3-203. The holder of an indorsed-in-blank note may enforce the note and exercise remedies with respect to the note, including the remedy of foreclosure under Washington law. *See* RCW 62A.3-109-110, RCW 62A.3-203; *Brown*, 184 Wn.2d at 536; *Slotke*, 192 Wn. App. at 168; *Blair*, 193 Wn. App. at 32; *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23 (1969).

Chase is the "holder" of Mr. Zalac's note, with the right to enforce it. "Washington's UCC defines a 'holder' to be the 'person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.'" *Brown*, 184 Wn.2d at 525.

As the holder of Zalac's note, Chase qualified as a person entitled to enforce the instrument. *Id.* at 526 ("By definition, the PETE [person-

entitled-to-enforce] is the person entitled to enforce the note, i.e., to sue in its own name and collect on the note if the obligation has been dishonored."). Chase also became the beneficiary of the deed of trust signed by Richard and Sarah Zalac by operation of law. "We follow *Bain's* affirmation of the plain language of the definition of beneficiary in RCW 61.24.005(2). That statute defines a beneficiary as 'the holder of the instrument' and makes no mention of ownership." *Brown*, 184 Wn.2d at 540.

The Zalacs seem to suggest that the note itself imposes some other definition. To the contrary, the note simply says that Mr. Zalac's original lender, CTX, and "anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" CP 146. Chase acquired the Note through a transfer. *See* RCW 62A.3-109, RCW 62A.3-203. Under Washington law, Chase "is entitled to receive payments" under the note, which means that Chase qualifies as the noteholder by any definition.

Although Chase is the "holder" of the note, Fannie Mae is the owner of the note. That does not affect Chase's right to enforce Zalac's obligations. "The PETE and the owner of the note can be the same entity, but they can also be different entities. . . . [A] person *need not* own a note to be entitled to enforce the note . . . ." *Brown*, 184 Wn.2d at 524-25 (emphasis in original). As owner, Fannie Mae had the right to appoint Chase, as the servicer of the loan, to collect payments. *Id*. at 537–38

("'Servicer' is not a legal term of art. Homeowners use the word to refer to the bank to which they send mortgage payments because they reasonably believe the servicer is the person entitled to enforce the note and because paying the servicer will discharge their obligation.").

V. CONCLUSION AND REQUEST FOR COSTS

For the reasons set forth above, the Court should deny the petition for review by Richard and Sarah Zalac. The Court should also award Chase its costs in connection with the Zalacs' petition for review under RAP 18.1(j). That rule permits an award "to the party who prevailed in the Court of Appeals . . . for the prevailing party's preparation and filing of the timely answer to the petition for review." The Zalacs' petition has no merit and fails to identify any issue of public interest.

RESPECTFULLY SUBMITTED this 9th day of March, 2018.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this 9th day of March 2018, she electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record listed below. The attorneys of record listed below were also served with the foregoing document via email.

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DATED this 9th day of March 2018 at Seattle, Washington.

Christine Kruger

Christine Kruger, Legal Secretary

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