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SUPREME COURT  
STATE OF WASHINGTON  
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No. 97356-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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WILLIAM MOORMAN,

Appellant,

v.

CLEAR RECON CORP.; U.S. BANK, National Association, as Trustee  
for Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-  
Through Certificates, Series 2006-2; HSBC BANK USA, N.A.; PHH  
MORTGAGE CORPORATION, NATIONSTAR MORTGAGE and DOE  
DEFENDANTS 1 through 20, inclusive,

Respondents.

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ON APPEAL FROM CHELAN COUNTY SUPERIOR COURT  
(Case No. 16-2-00703-6)

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**RESPONDENTS PHH MORTGAGE CORPORATION AND HSBC  
BANK U.S.A., N.A.'S OPPOSITION TO APPELLANT'S  
AMENDED PETITION FOR REVIEW**

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## **I. INTRODUCTION**

Pursuant to RAP 13.4(d), Respondents HSBC Bank, USA N.A. and PHH Mortgage Corporation (“Respondents”) respectfully submit this answer to the Petition for Review (“Petition”) filed by Appellant William Moorman (“Moorman”).

This is a “wrongful foreclosure” case on appeal from Chelan County Superior Court. US Bank, as trustee for an asset-backed trust, was the beneficiary of a deed of trust Moorman granted encumbering waterfront property on Lake Chelan.<sup>1</sup> HSBC was the loan servicer and PHH was the loan subservicer.

On appeal, the issue became not whether US Bank was a proper beneficiary or whether Moorman was actually in default – these points were uncontested. Rather, Moorman focused his energy on attempting to demonstrate that HSBC and/or PHH were not authorized to act as servicing agents on behalf of US Bank. In essence, Moorman argued that HSBC and/or PHH injected themselves into the lawful foreclosure process to benefit the undisputed beneficiary – *without* the authorization of that beneficiary. The process resulted in a benefit to U.S. Bank, yet Moorman argues that the foreclosure was somehow improper even though U.S. Bank got exactly what it was entitled to recover due to Moorman’s default.

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<sup>1</sup> U.S. Bank is not a party to this appeal.

Moorman made this argument even though PHH submitted sworn and uncontroverted testimony that it was acting on US Bank's behalf. Moorman failed to do any discovery in support of this "lack of authority" theory. He propounded no discovery, served no subpoenas, and conducted no depositions.

Ultimately, the trial court found, and the court of appeals agreed, that Moorman had failed to raise a genuine issue of material fact in support of his contention that PHH lacked authority to subservice the loan. The trial court granted summary judgment and the court of appeals affirmed. As will be argued below, these decisions do not require or merit the further attention of this Court and so, with respect, Moorman's Petition for Review should be denied.

## **II. STATEMENT OF THE CASE**

For the purpose of this answer, Respondents respectfully adopt the factual findings and descriptions contained in the court of appeals' opinion, which is attached as Attachment A to Moorman's Petition. The argument section of this motion also includes citations to the Clerk's Papers on file with the Court of Appeals.

### **III. ARGUMENT**

#### **A. Moorman Fails to Directly Address the RAP 13.4(b) Factors.**

RAP 13.4(b) sets forth the criteria under which this Court will grant a petition for discretionary review:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Moorman does not directly refer to the 13.4(b) factors in his Petition. He rather structures his argument around his conviction that the court of appeals and the trial court simply got it wrong in their rulings. However, within the Petition Moorman does claim that the decision below contradicts this Court's opinion in *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012).<sup>2</sup> Respondents construe this as an appeal to RAP 13.4(b)(1) and respond accordingly.

#### **B. The Court of Appeals' Decision Does Not Conflict With *Bain*.**

The *Bain* case was presented to this Court on a certified question from the United States District Court for the Western District of

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<sup>2</sup> Petition pp. 14-15.

Washington. *Bain*, 175 Wn.2d at 89. This Court’s main conclusion was to reaffirm the plain reading of RCW 61.24.005(2) that the term “beneficiary” meant the holder of the promissory note secured by the deed of trust. *Id.* Thus, if the MERS mortgage registration system did not actually hold a specific note, it could not be the beneficiary of the corresponding deed of trust and could not initiate foreclosure. *Id.*

As one of its alternative arguments, MERS reasoned that it had authority to foreclose as an agent for the original lenders. *Id.* at 106. The Court agreed that it is “likely true” that lenders or their assigns could name MERS as agent and “nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note.” *Id.* at 107. The Court observed, however, that agency required both (1) control of the agent; and (2) that control must be exercised by a specific principal. *Id.* (citing *Moss v. Vadman*, 77 Wash.2d 396, 463 P.2d 159 (1970)).

Of these two factors, the *Bain* court was not concerned about control at all but instead focused on whether MERS had a specific principal:

**While we have no reason to doubt that the lenders and their assigns control MERS**, agency requires a specific principal that is accountable for the acts of its agent. If MERS is an agent, its principals in the two cases before us remain unidentified.

*Id.* (emphasis added).

Here, there is no confusion or ambiguity about PHH and HSBC's principal – that principal is U.S. Bank. Even if Moorman were correct that U.S. Bank lacked requisite control of PHH (it did not), the court of appeals' ruling could not contradict *Bain* because *Bain* was not about control, it was about identity of the principal. Thus, Moorman does not satisfy the RAP 13.4(b) factors and the Court should deny his petition.

**C. There is Ample Evidence in the Record Establishing PHH's Authority to Act.**

The final section of Moorman's argument deals with his contention that there was insufficient evidence in the record to support the trial court and court of appeals' conclusions that PHH had authority to act as agent for U.S. Bank. Once again, this argument is not directed at the 13.4(b) factors and instead claims that the lower courts were simply wrong. Despite this, PHH and HSBC must point out that there was ample evidence in the record to support their roles as servicing agents:

- The Trust Agreement establishing the U.S. Bank trust explicitly contemplated the appointment of servicers and subservicers, including the authority granted to these parties. CP 678, 981, 693-96.
- PHH employee Jane Spare offered uncontroverted sworn testimony that PHH had authority to act as subservicer for U.S. Bank. CP 574.



- The sworn notarization on the appointment of successor trustee affirms that the document was executed in PHH's authorized capacity as agent for U.S. Bank. CP 488.
- HSBC, the original lender for Moorman's loan, sent him a letter informing him that PHH would be taking over as subservicer. CP 607.

Moorman offered no evidence to contradict any of this evidence because he did no discovery in this context and did not depose PHH's declarant or any other declarant. As the court of appeals found, this uncontradicted evidence was sufficient to establish PHH's role as loan subservicer.

#### **IV. CONCLUSION**

Moorman's Petition fails to directly address the RAP 13.4(b) factors. Where Moorman does address the factors tangentially, his argument does not hold water. There is no dispute that Moorman took out the subject loan, defaulted on that loan, and was foreclosed on by U.S. Bank – the holder of the note and thus beneficiary of the deed of trust. With respect, this case does not merit Supreme Court review and so Moorman's Petition should be denied.

RESPECTFULLY SUBMITTED this 24th day of July, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of July, 2019, I caused to be served a copy of the foregoing **RESPONDENTS PHH MORTGAGE CORPORATION AND HSBC BANK U.S.A., N.A.'S OPPOSITION TO APPELLANT'S AMENDED PETITION FOR REVIEW** on the following person(s) in the manner indicated below at the following address(es):

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DATED this 24th day of July, 2019.

*s/Kathryn Savaria*  
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710758.0011/7707918.2

**LANE POWELL PC**

**July 24, 2019 - 10:27 AM**

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