No. 99895-7
COA No. 53772-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

US BANK NATIONAL ASSOCIATION AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST, its successors in interest and/or assigns,

Plaintiff-Respondent,

v.

TARMO PAUL ROOSILD; SAMANTHA CASTRONOVO; OCCUPANTS OF THE PREMISES,

Defendants-Appellants.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

I. IDENTITY OF THE RESPONDENT

Plaintiff-Respondent US Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust ("US Bank") respectfully asks this Court to deny the petition for discretionary review (the "Petition") filed by Defendant-Appellant Samantha Castronovo ("Appellant").

II. ISSUES PRESENTED FOR REVIEW

1. Is the Petition moot following Appellant's sale of the Property?

2. Did the Court of Appeals correctly affirm the trial court's ruling following an analysis of all of the issues presented on appeal?

III. STATEMENT OF THE CASE

A. Adoption of Facts from Court of Appeals

US Bank strongly disagrees with Appellant's attempt to provide a Statement of the Case because it is incomplete, argumentative, and misleading. As its Statement of the Case, US Bank adopts the Facts as set forth in the Court of Appeals' Opinion ("Op.") at pages 2 through 6, with the exception noted below.

B. Clarification to Statement of Facts

US Bank further writes to clarify that, contrary to Appellant's Statement of the Case, the evidence in the record is that Christiana Trust

acquired the Note prior to BSI Financial Services, Inc.'s ("BSI") mailing of the Notice of Default and Intent to Accelerate ("Notice") in May of 2015. CP 94-97. While the assignment of the Deed of Trust was not recorded until after the Notice was sent, Appellant introduced no evidence to contradict the evidence that Christiana Trust was the holder in due course of, and the person entitled to enforce, the Note when BSI mailed the Notice. Appellant's reference to the Deed of Trust as evidence of when the Note was acquired is inconsistent with Washington law, as Washington courts have long recognized that the security instrument (here, the Deed of Trust) follows the Note that it secures. *See Mut. Sec. Fin. v. Unite,* 68 Wn. App. 636, 639, 847 P.2d 4 (1993) (assignment of promissory note secured by deed of trust carried with it the deed of trust). Thus, contrary to Appellant's assertions, the formality of recording the assignment of the Deed of Trust provides no evidence of when ownership of the Note transferred—the BSI letter supports that before the Notice was sent, Christiana Trust had acquired the Note.

C. Appellant Recently Sold the Property

On August 2, 2021, sixteen (16) days prior to Appellant filing her Petition, Appellant sold the property at issue, 20250 Bond Road NE,

Poulsbo WA, 98370 (the "Property) to a third-party.[1] As part of that transaction, Pacific Northwest Title of Kitsap County sent a redemption check to US Bank on behalf of Appellant for the full redemption amount, and the Kitsap County Sheriff issued a Certificate of Redemption to Appellant. Therefore, Appellant has redeemed the Property and simultaneously conveyed it to a third-party. Neither Appellant nor US Bank have any further ownership interest in the Property as of August 18, 2021, the date Appellant filed her Petition.

IV. ARGUMENT

A. Legal Standard

This Court may grant review of a decision of the Court of Appeals under the limited circumstances set forth in RAP 13.4(b). Appellant seeks review under sections (1) and (4), which apply if (1) the Court of Appeals' decision conflicts with a decision by this Court; or (4) if "the petition involves an issue of substantial public interest that should be determined by" this Court. RAP 13.4(b).

[1] US Bank requests this Court take judicial notice of the document included as Appendix A. ER 201. This document is not subject to reasonable dispute. The document is recorded with Kitsap County, and it is capable of accurate and ready determination and its accuracy cannot reasonably be questioned. Under ER 201(f), judicial notice may be taken at any stage of the proceeding, including a Petition for Review.

For the reasons set forth below, the Petition does not satisfy any of the criteria set forth in RAP 13.4(b)(1) or (4), because the opinion is consistent with this Court's prior case law, and there is no substantial public interest implicated as the Court of Appeals rightly decided the case. Additionally, as will be addressed first, the Appellant's Petition is now moot, based on Appellant's sale of the Property.

B. Appellant's Petition is Moot.

US Bank filed a complaint to foreclose on its deed of trust. CP 4-36. Appellant answered and asserted no counterclaim. CP 37-41. Recently, Appellant sold the Property, rendering this case moot. "It is a general rule that, where only moot questions or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal . . . should be dismissed." *Harvest House Restaurant, Inc. v. City of Lynden*, 102 Wn.2d 369, 373, 685 P.2d 600 (1984) quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 469 P.2d 512 (1972).

The trial court granted a judgment of foreclosure in favor of US Bank on the Deed of Trust following Appellant's undisputed default on the Note. Subsequently, Appellant redeemed and sold the Property. Neither US Bank nor Appellant retain any interest in the Property. On that basis alone, no controversy present in the trial court remains in this case. Should this Court reverse and remand, what issue will the Superior Court be left to

decide? The trial court cannot grant the relief prayed for by US Bank—a judgment of foreclosure—as the Deed of Trust no longer encumbers the Property. Additionally, Appellant asserted no affirmative claims against US Bank. Nothing remains to be adjudicated following Appellant's redemption and sale of the Property. Thus, the case is moot.

An exception to the mootness rule exists when there is an issue of substantial or continuing public interest (*see Sorenson*, 80 Wn.2d at 558), but this case does not present either exception. As the Court of Appeals correctly held, substantial compliance is the law when it comes to the common law of contracts, and the notice substantially complied with the requirements of the Deed of Trust. Because the Court of Appeals' Opinion pertains to judicial foreclosures only, a point that Appellant fails to discuss, any potential abuses conjured up by Appellant will be significantly ameliorated or eliminated altogether by the judicial oversight that will scrutinize whether any foreclosing plaintiff has met its burden to be entitled to a judgment of foreclosure. Appellant's Petition is moot and should be denied on that basis.

C. The Court of Appeals Correctly Concluded Substantial Compliance is Sufficient Under Washington Law for Judicial Foreclosures.

Appellant fails to cite a single case from any jurisdiction where a court held that strict compliance with the notice provision in a Deed of Trust

is required in a judicial foreclosure. Notwithstanding the dearth of any supporting case law, Appellant argues Washington law requires strict compliance. Likely, this is because Appellant misunderstands (or perhaps misapprehends) the narrowness of the Court of Appeals' Opinion, and thus overstates its application. Appellant repeatedly cites Washington's Deed of Trust Act (RCW 61.24) as supporting her position, but this case involves a judicial foreclosure, not a nonjudicial foreclosure, a distinction that neutralizes each of Appellant's policy concerns and renders RCW 61.24 completely inapplicable. As discussed below, the Opinion expressly limits its application to judicial foreclosures. Equally important, Appellant argued that the Court of Appeals should apply Washington's common law of contracts to interpret the Deed of Trust. The Court of Appeals did so, and it correctly held that the common law includes the doctrine of substantial compliance. Finally, the Court of Appeals correctly held that the Notice substantially complied.

1. *The Court of Appeals' Opinion is Limited to Judicial Foreclosures.*

Appellant fails to appreciate the limited nature of the Court of Appeals' holding. The Opinion is limited to instances involving judicial foreclosure. For example, the Opinion's section B.3.a. is titled "Substantial compliance prior to judicial foreclosure" and the Court of Appeals

specifically emphasizes therein that "[o]ther jurisdictions have concluded that substantial compliance with section 22 (a standard deed of trust provision) satisfies deed of trust terms that constitute conditions precedent to *judicial* foreclosure." Op. at 11 (*emphasis* in original). This distinction is critical because Washington law allows for both judicial and nonjudicial foreclosures. *See* RCW 61.12.040 (judicial foreclosure initiated by filing suit in county where land is situated); *cf.* RCW 61.24 (nonjudicial foreclosure statutes).

In judicial foreclosures, the trial court ensures that the foreclosing party meets its legal and evidentiary burdens and is entitled to prevail before issuing a judgment of foreclosure. By contrast, Washington law demands strict compliance with the enacted statutory scheme for nonjudicial foreclosures found at RCW 61.24. *See, e.g., Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012). The Washington Legislature enacted a comprehensive statutory scheme governing nonjudicial foreclosures; it did not do the same for judicial foreclosures.[2] Therefore, the Legislature declared Washington's policy to

[2] *See, e.g.,* RCW 61.12.040 ("When default is made in the performance of any condition contained in a mortgage, the mortgagee or his or her assigns may proceed in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage.")

be that the common law of contracts applies in judicial foreclosures. Like every other jurisdiction cited in the Opinion and in Appellant's Petition, Washington's common law of contracts requires substantial compliance with conditions precedent, such as notice provisions, not strict compliance.

The Court of Appeals' Opinion correctly applied Washington's common law of contracts to judicial foreclosure cases. In her Opening Brief to the Court of Appeals (App. Op. Br.) on pages 14 through 17, Appellant argued that because the "detailed statutory procedure" for a non-judicial foreclosure "is not required, the Court of Appeals should apply the common law of contracts." App. Op. Br., p. 17. The Court of Appeals did exactly what Appellant asked. The doctrine of substantial compliance is well-established precedent in Washington in cases involving contracts with notice provisions as conditions precedent to enforcement. *See, e.g., Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 555-56, 730 P.2d 1340 (1986). Substantial compliance has long been the law in Washington. *See, e.g., Taylor v. Ewing*, 74 Wash. 214, 219-20, 132 P. 1009 (1913) (finding substantial compliance with the contract, rather than strict performance, as a condition precedent to recovery).

In holding that substantial compliance is the correct rule to apply under Washington contract law, the Court of Appeals also found support for

its holding in cases from Florida[3] and Connecticut.[4] Those states also required substantial compliance with notice provisions involving judicial foreclosures.[5] Florida and Connecticut each, like Washington, view deeds of trust and other security instruments as contracts, where the general rule with contract provisions is substantial compliance, rather than strict compliance.

Appellant plainly misapprehends this basic distinction. The cases cited by Appellant where "strict compliance" with the notice provision of Paragraph 22 was required are all nonjudicial foreclosure cases.[6] *See, e.g.,*

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[3] *Green Tree Servicing, LLC v. Milam*, 177 So.3d 7, 12-13 (Fla. Dist. Ct. App. 2015).

[4] *Fidelity Bank v. Krenisky*, 72 Conn. App. 700, 807 A.2d 968, 978 (2002).

[5] The Court of Appeals also relied on a case from Georgia, *Reese v. Provident Funding Associates*, 327 Ga. App. 266, 268, 758 S.E.2d 329 (2014), which involved a nonjudicial foreclosure where substantial compliance with the notice provisions of security instruments was deemed sufficient. This case does not involve a nonjudicial foreclosure, and neither the Court of Appeals' Opinion holds, nor does US Bank contend, that "substantial compliance" is sufficient in nonjudicial foreclosures.

[6] Appellant misguidedly cites to *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 515, 667 P.2d 1127 (1983), a case that mentions neither strict compliance nor substantial compliance, for the proposition that "[a] condition must be exactly fulfilled." That case is not on point. In *CHG*, CHG and Robin Lee had a contract where Robin Lee agreed to sell a property to CHG "contingent upon [Robin Lee's] being able to purchase the interest of the other tenant in common at a price satisfactory to it prior to closing." *Id.* at 513. The closing date in the contract was July 31, 1978. Robin Lee was unable to secure the purchase of the other half interest in the

McDonald v. OneWest Bank, FSB, 929 F.Supp.2d 1079, 1086 (W.D. Wash. 2013); *Woel v. Christiana Trust as Trustee for Stanwich Mortgage Loan Trust Series 2017-17*, 228 A.3d 339, 345 (R.I. 2020) ("strict compliance with the notice requirements in a mortgage is especially important given that Rhode Island is a nonjudicial foreclosure state"); *Ex Parte Turner*, 254 So.3d 207, 209 (Ala. 2017) (foreclosure done by power of sale, not through judicial foreclosure)[7]; and *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226, 227, 33 N.E.3d 1213 (2015) (foreclosure "by exercise of the power of sale contained in the mortgage"). The distinction is of paramount importance because Washington already requires strict compliance with the statutory scheme in nonjudicial foreclosures. *See Albice*, 174 Wn.2d at 568.

Based on her flawed interpretation of the Opinion, Appellant claims that the decision "will allow lenders to foreclose on homes without giving borrowers an opportunity to avoid foreclosure by curing their default or negotiating a loan modification." Petition, p. 9. But Appellant could not cure her default, as she has repeatedly conceded. Second, prior to the

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hotel prior to July 31 and the parties did not extend the closing date. *Id.* at 514. Because the entire contractual obligation itself was conditioned on Robin Lee's ability to purchase the other interest before a set date, there was no chance for "substantial performance," because the entire contract was void when the condition was not met. *Id.* at 515.

[7] *Turner* relies on *Jackson v. Wells Fargo Bank, N.A.*, 90 So.3d 168 (Ala. 2012), which is also a nonjudicial foreclosure case.

Notice, Appellant had already applied for and been denied a modification. CP 118, ¶ 5 ("Our first modification was denied"). Under Regulation X (12 CFR 1024.41(i)), Appellant was not entitled to "avoid foreclosure" through the consideration of a subsequent modification applications, nor is there any evidence that she submitted any subsequent applications.

Appellant's policy arguments are based on her conflation of this Court's requirement of strict compliance under the statutory provisions of the Deed of Trust Act (RCW 61.24) with the common law of contracts in judicial foreclosures. Based on the foregoing, and consistent with Washington law and policy, the Court of Appeals correctly determined that substantial compliance with the notice requirements of deeds of trust is sufficient in judicial foreclosure cases.

2. *The Notice Substantially Complied with Paragraph 22.*

As an initial matter, the Court of Appeals properly noted that Appellant did not contest that BSI was the proper servicer and thus BSI had "party entitled to enforce an instrument" (PETE) status. Notwithstanding Appellant's attempt to rewrite the underlying factual record, Appellant never challenged BSI's status as a valid servicer in either the trial court or on appeal. In any event, Appellant was denied a modification and was incapable of curing the default at any point prior to the commencement of the judicial foreclosure. It was only after a sale of the property to a third-

party that Appellant was able to redeem the property and convey clear title to the buyer. Appellant simply could not cure the default.

The Notice, at the very least, substantially complied[8] with requirements of paragraph 22. Undisputedly, Appellant received the Notice and therefore received a description of (1) the nature of the default, (2) what action the borrower could take to cure the default, (3) the date (at least 30 days from when notice was sent) by which the borrower had to cure the default, (4) a statement informing the borrower that failure to cure could result in acceleration of the entire amount due, (5) a statement informing the borrower of her "right to reinstate after acceleration, the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale, and any other matters required to be included in the notice by Applicable Law." *See* Op. at 12 quoting CP at 28. The Notice informed Appellant that BSI had the right to work out the loan, which means that Appellant had all the information she needed to work out her loan default under the notice requirement of paragraph 22 of the Deed of Trust.

[8] US Bank argues that the letter fully complied with paragraph 22's requirements. US Bank asserted below and now that the evidence in the record plainly shows that when the Notice was sent, Christiana Trust was the holder of the Note and, therefore, had the "party entitled to enforce an instrument" (PETE) status. CP 94-97.

D. US Bank is Entitled to Reasonable Attorneys' Fees and Costs.

US Bank is entitled to its fees and costs. Appellate courts may award attorneys' fees if authorized by contract, statute, or recognized ground in equity. *Parker Estates Homeowners Ass'n v. Pattison*, 198 Wn. App 16, 391 P.3d 481 (2016). A contractual provision in a deed of trust will support an award of attorney's fees under RAP 18.1. *Edmundson v. Bank of America*, 194 Wn. App 920, 932-33, 378 P.3d 272 (2016). Appellant agrees that the Deed of Trust and Promissory Note allow for an award of fees and costs.

Pursuant to RAP 18.1, the Deed of Trust, and the Promissory Note, US Bank is entitled to its fees and costs as the prevailing party. US Bank requests it be awarded its fees and costs incurred in defending against this appeal. Pursuant to RAP 14.2, "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." US Bank respectfully requests an award of its reasonable fees and costs incurred herein.

V. CONCLUSION

The Petition presents an issue that Appellant's own conduct in selling the Property has rendered moot. Moreover, the Court of Appeals

correctly applied Washington law, and nothing in its Opinion conflicts with Washington law or policy as previously declared by this Court.

Dated: September 17, 2021.

Respectfully submitted,

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CERTIFICATE OF FILING

I certify that on September 17, 2021, I filed the foregoing ANSWER TO PETITION FOR DISCRETIONARY REVIEW with the Appellate Court Clerk using the appellate court's electronic filing system.

CERTIFICATE OF SERVICE

I certify that on September 17, 2021, service of the foregoing ANSWER TO PETITION FOR DISCRETIONARY REVIEW will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system.

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DATED: September 17, 2021.

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Deed Rec Fee: $205.50
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When recorded return to:
Jennifer Lee Babcock
Daniel Paul Christenson
20250 Bond Road Northeast
Poulsbo, WA 98370

Filed for Record at Request of:
Pacific Northwest Title of Kitsap County
Order Number: **1-508104**

Statutory Warranty Deed

Grantor(s): Samantha Castronovo
Grantee(s): Jennifer Lee Babcock and Daniel Paul Christenson
Abbreviated Legal:
Lot C SP AFN 9202200072, Ptn Govt Lot 3, Section 15, Township 26 North, Range 1 East
Additional legal(s) on page: 3
Assessor's Tax Parcel Number(s): 152601-1-131-2008

THE GRANTOR(S) Samantha Castronovo, as her separate estate, for and in consideration of **Ten dollars and other good and valuable consideration** in hand paid, conveys, and warrants to Jennifer Lee Babcock and Daniel Paul Christenson, a married couple the following described real estate, situated in the County of Kitsap, State of Washington:

AS SET FORTH IN EXHIBIT "A" ATTACHED WHICH BY THIS REFERENCE IS MADE A PART HEREOF.

SUBJECT TO:
AS SET FORTH IN EXHIBIT "A" ATTACHED WHICH BY THIS REFERENCE IS MADE A PART HEREOF.

Dated: July 26, 2021

Samantha Castronovo

Samantha Castronovo

2021EX06374
2021-08-02
HSWANSON
$8272.00

Document SerialID: 02XXXXX2191611115267X53231629936

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of SAN DIEGO)

On 28 JULY 2021 before me, PAOLA DIAZ, NOTARY PUBLIC
(insert name and title of the officer)

personally appeared Samantha Castronovo,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

PAOLA DIAZ
Commission No. 2346847
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
Commission Expires February 12, 2025

Signature _____ (Seal)

Document SerialID: 02XXXXX2191611115267X53231629936

EXHIBIT A
LEGAL DESCRIPTION

PARCEL I:

LOT C OF SHORT PLAT RECORDED FEBRUARY 20, 1992 UNDER AUDITOR'S FILE NO. 9202200072, BEING A PORTION OF GOVERNMENT LOT 3, SECTION 15, TOWNSHIP 26 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON.

PARCEL II:

AN EASEMENT FOR ACCESS AS DELINEATED ON AND DESCRIBED IN SAID SHORT PLAT.

SUBJECT TO:

1. Easement for electric transmission and distribution line, and the terms and conditions thereof, together with necessary appurtenances, as granted by instrument recorded on April 26, 1945, under Kitsap County Auditor's File No(s). 406744 in the official records.
To: Puget Sound Power and Light Company/Puget Sound Energy

2. Easement, and terms and conditions thereof, affecting a portion of said premises and for the purposes hereinafter stated, as disclosed by instrument recorded on December 14, 1954, under Kitsap County Auditor's File No(s). 607437 in the official records.
For: A road

3. Easement, and terms and conditions thereof, affecting a portion of said premises and for the purposes hereinafter stated, as disclosed by instrument recorded on December 14, 1954, under Kitsap County Auditor's File No(s). 607437 in the official records.
For: The right to maintain a water lien and light wires

4. Covenants, conditions, restrictions, easements and matters delineated, described and noted, if any, in short plat:
Recorded: February 20, 1992
Auditor's File No(s).: 9202200072 in the official records

5. Local improvement assessments, and/or special assessment, if any, levied by the City of Poulsbo. Investigation should be made with the city for amounts due or past due, if any.

Initials: _____ _____

Thursday, September 16, 2021
Time: 10:14:53 PST
Digitally Certified By: Andrew Green, Office Support Specialist,Kitsap (Auditor), Washin

I, Paul Andrews Kitsap (Auditor) County Auditor **for** Kitsap (Auditor) County **in the State of Washington, certify that the document** SerialID: 02XXXXX2191611115267X53231629936 **containing** 3 **pages that was transmitted is a true and correct copy of the original that is of record in my office and that this image of the original has been transmitted pursuant to statutory authority under RCW 5.52.050. In Testimony whereof, I have electronically certified and attached the Seal on this date.**

County Auditor Paul Andrews

Seal of the Superior Court STATE OF WASHINGTON Of Kitsap County Auditor

Andrew Green

Date: Thursday, September 16, 2021

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MB LAW GROUP LLP

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