Supreme Court No. 101931-9
Court of Appeals No. 38769-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHELLE E. LOUN, Petitioner

v.

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE ON BEHALF OF AND WITH RESPECT TO AJAX MORTGAGE LOAN TRUST 2018-B, MORTGAGE-BACKED NOTES, its successors-in-interest and/or assigns, Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

U.S. Bank, National Association ("U.S. Bank"),[1] the current holder of the Note and Deed of Trust described below submits this Answer to the Petition for Review filed by Petitioner Michelle Loun ("Ms. Loun" or "Loun"). Ms. Loun's motion for summary judgment was granted by the trial court. Division III of the Court of Appeals reversed and remanded. Ms. Loun has failed to demonstrate any basis for discretionary review under RAP 13.4(b). Therefore, the Petition for Review should be denied.

[1] "U.S. Bank" is used in this brief to reference (i) the Appellant, U.S. Bank National Association, as Indenture Trustee on Behalf of and with Respect to Ajax Mortgage Loan Trust 2018-B, Mortgage-Backed Notes; (ii) all of U.S. Bank's predecessors-in-interest that held the relevant note and deed of trust; and (iii) all of the mortgage servicers to service Ms. Loun's loan. This is done in the interest of clarity because Ms. Loun's debt has been transferred and assigned multiple times during the relevant period.

II. RESPONDENT'S ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE.

Whether Ms. Loun has raised grounds for discretionary review under RAP 13.4(b)(4)? As stated below, she has not.

III. STATEMENT OF THE CASE.

The relevant facts are summarized in the Court of Appeals' published decision, __ Wn. App. __, 525 P.3d 1280 (2023) (the "Published Decision"). However, additional detail is necessary to properly consider the Petition.

A. Ms. Loun Purchased Property with a Home Loan; She Never Repaid the Loan.

In 2006, Ms. Loun took out the loan at issue, a $399,900.00 residential home loan. CP 00098, 00233, 00955-56, 01018, 01028-01031. Ms. Loun used the home loan to purchase residential property located at 4615 Vantage Hwy., Ellensburg, WA 98926 (the "Property"). CP 00955-56, 00960-66; CP 00233; 00998. Ms. Loun's obligation to repay the loan was evidenced by an InterestFirst Adjustable Rate Note (the "Note") and secured by a Deed of Trust (the "Deed of Trust") covering the Property.

CP 00234, 01018-19, 01028-01031, 01034-01049, CP 00098-99, 00781, 00794.

On December 1, 2011, Ms. Loun executed a Home Affordable Modification Agreement (the "Loan Modification"). CP 01019, 01053-01069. Among other things, the Loan Modification extended the Note's maturity date to May 1, 2046. CP 01058. Notwithstanding the Loan Modification, Ms. Loun defaulted in March 2012. CP 00521, 00794, 01019. Ms. Loun has not made a payment on the Note since February 24, 2012. *Id.*

Ms. Loun does not live on the Property. VRP 155-56. After residing in, leasing, or otherwise using the Property since 2006, in or about November 2021, Ms. Loun sold the Property for $825,000, the net proceeds of which are currently being held in the registry of the Superior Court. *Id.*

Section 17 of the Deed of Trust permits the lender to accelerate the debt. Section 19 of the Deed of Trust permits the borrower to reinstate the loan after an acceleration demand. CP

01042-43. Ms. Loun still has the right to reinstate the loan as of today. CP 01042.

B. Ms. Loun Twice Avoided Foreclosure.

On May 21, 2014, U.S. Bank initiated a judicial foreclosure (the "2014 Lawsuit"). CP 00956, 00968-77. The Complaint alleged:

> [T]he Borrower's loan is in default. Because of the default, Plaintiff has exercised and hereby exercises the option granted in the Note and Deed of Trust to declare the whole of the balance of both the principal and interest thereon due and payable.

CP 00973. While the 2014 Lawsuit was pending, the Deed of Trust was assigned twice among U.S. Bank's predecessors-in-interest. CP 01020, 01071, 01074-75. In July 2016, the Kittitas County Superior Court Clerk dismissed the 2014 Lawsuit for want of prosecution. CP 00956, 00979. The lender moved to vacate the dismissal, but Ms. Loun successfully contested that motion. CP 00956, 00981-82.

On October 5, 2017, U.S. Bank's predecessor-in-interest initiated another judicial foreclosure (the "2017 Lawsuit"). CP 00956, 00984-90. That Complaint alleged:

> Defendant MICHELLE E. LOUN is in default. As a result of the default, Plaintiff exercised, and hereby exercises, the option granted to it in the Note and Deed of Trust to declare all amounts due and owing under the Note and Deed of Trust immediately due and payable.

CP 00987.

In early September 2018, U.S. Bank acquired the Note and Deed of Trust. CP 01020, 01078-79. Instead of allowing U.S. Bank to substitute into the 2017 Lawsuit as the real party in interest, the Kittitas County Superior Court granted Ms. Loun's contested Motion to Strike the Complaint. CP 00522, 00590-95, 01007-08.

C. U.S. Bank Informed Ms. Loun Regarding the Note's Maturity Date and Status.

On September 29, 2016, after the 2014 Lawsuit's dismissal but before the 2017 Lawsuit's commencement, Ms. Loun's

attorney, Douglas W. Nicholson, asked U.S. Bank about the loan's status. CP 01020, 01081. He wrote:

> Please be advised that this law firm . . . represents Michelle Loun regarding [her] mortgage account . . . Accordingly, please make sure that all further communication of any kind regarding this matter are directed to the undersigned, and not to Ms. Loun . . . This includes . . . all written or electronically generation (sic) information of any kind, including mortgage statements . . .
>
> Lastly, I am hereby requesting that [you] promptly provide copies of all documents and information, including any documents and information that are electronically stored and/or maintained, relating to Ms. Loun; and, in particular, her alleged mortgage . . . .

CP 01081; CP 01020. On October 16, 2016, U.S. Bank responded:

> Payments are to be made on the 1st of each month, beginning April 1, 2006, ***plus any remaining amount due on the maturity date of May 1, 2046***. The date of the last full payment was May 10, 2016 (sic). As of the date of this letter, the loan is due for the March 1, 2012, installment.

CP 01082 (emphasis added). Nowhere in this communication was it stated that the loan was accelerated, and the maturity date was clearly stated as May 1, 2046. CP 01082-01124; CP 01020.

Furthermore, on July 23, 2018, counsel for U.S. Bank sent a letter to Mr. Nicholson, acknowledging Ms. Loun's right to reinstate the loan, as well as U.S. Bank's solicitation of the amount necessary for reinstatement. CP 01514; 01516. In the letter, U.S. Bank's attorney wrote, "**As of 7/1/18, $184,798.70 was needed to reinstate the loan, i.e., bring the account current.**" CP 01531 (emphasis added); *see also* CP 01514, 01516. This information was provided in direct response to a letter from Mr. Nicholson, on behalf of Ms. Loun, wherein Mr. Nicholson stated "**I would like to discuss with you . . . what comprises [the loan's servicer's demand for immediate] payment . . . of $184,709 vis-à-vis the alleged principal balance of $483,310 72 (sic - $483,310.72)**." CP 01527-28 (emphasis added). Thus, Ms. Loun's attorney was fully apprised that the loan's **maturity date was 2046**, rather than being

immediately due, and that **only** payment of the arrearage was necessary to reinstate the Note, rather than the full balance of $483,310.72, if the Note had been in accelerated status.

D. Monthly Mortgage Statements Solicited Less than the Accelerated Amount of the Loan.

From July 2016 to July 2018, Ms. Loun received monthly mortgage statements inviting her to reinstate the loan and resume monthly payments. CP 01127-01249; CP 01020-21. For example, the July 19, 2016 (the "July 2016 Statement"), statement did not state that the loan was accelerated. CP 01119-21, 01127-29. Rather, it solicited payment of $106,934.54—the sum of the monthly installments, late charges, interest, and escrow charges in arrears as of August 1, 2016. CP 01119, 01127. At the bottom of the July 2016 Statement was a detachable slip for Ms. Loun to fill out and send with her payment. *Id.* The detachable slip reiterated that the amount due was only $106,934.54. *Id.* Ms. Loun received similar mortgage statements until August 2018, at which point a loan servicing

change occurred. CP 01020-21; CP 01154-55, 01271-75.

On August 21, 2018, U.S. Bank commenced sending more monthly statements to Ms. Loun. CP 01156-01249; CP 01020-21. Like the prior statements, these statements made no reference to an acceleration and instead solicited only the sum of monthly installments, late charges, interest, and escrow charges in arrears. *Comp.* CP 01127-01155*, with*, CP 01156-01249. Further, like the prior statements, the new mortgage statements never stated the entire balance of the loan was due and did not solicit more than the arrearage due as of the date of each statement. CP 01127-01249; *see also* CP 01020-21.

E. Late Payment Notices Solicited Monthly Installments, Referenced Past Due Balances, and Assessed Charges for Late Payments.

In addition to the monthly statements, U.S. Bank sent monthly late payment notices to Ms. Loun. CP 01251-69; CP 01021. The first such letter was sent on October 18, 2018. CP 01251. The letter advised Ms. Loun that:

> Our records indicate that your payment(s) is past due. As a result, late charges have been added to your account. Late charges in the amount of $98.79 for the 10/01/2018 installment, $94.70 for the 7/01/2018 installment, $94.70 for the 08/01/2018 installment, $94.70 for the 09/01/2018 installment have been added to your account. Please remit your payment plus **any other charges due** which as of the date of this letter **is $169,758.71.**

Id. (emphasis added). Other late payment notices included substantially similar language. CP 01251-69. The late payment notices relate to *each individual monthly* payment that Ms. Loun missed subsequent to her default in 2012 and solicit **only** the arrearage due on the loan. *Id.* Again, these notices do not state or imply that Ms. Loun owed the accelerated amount of the loan; rather, they stated she was being assessed a late fee for each monthly payment missed. *Id.*

F. Ms. Loun Commenced a Quiet Title Action; U.S. Bank Commenced a Judicial Foreclosure Action.

U.S. Bank has continually held the Note and Deed of Trust since 2018. CP 01018, 01020, 01078. On August 27, 2020, U.S. Bank's servicer sent Ms. Loun a Notice of Intent to Accelerate

and a Notice of Intent to Foreclose. CP 01288-93; CP 01021. Those notices were based upon Ms. Loun's initial default in 2012 and her continuing and repeated defaults between 2012 and 2020. CP 01288, 01291.

On October 12, 2020, Ms. Loun commenced a quiet title action against U.S. Bank under Kittitas County Superior Court Cause No. 20-2-00262-19 ("*Loun v. U.S. Bank*"). CP 00098-00126. Unaware of that action, U.S. Bank filed a judicial foreclosure action against Ms. Loun under Kittitas County Superior Court Cause No. 20-2-00269-19 ("*U.S. Bank v. Loun*"). CP 00001-97, 00127-29. Before the commencement of this appeal, the trial court consolidated the two actions. CP 01474-76.

G. Proceedings Before the Superior Court and Court of Appeals.

On January 11, 2021, Ms. Loun filed a motion for summary judgment in *Loun v. U.S. Bank*, where she sought to void the Deed of Trust and quiet title to the Property. CP 00232-

43. The Superior Court denied Ms. Loun's Motion on February 11, 2021, concluding that a question of fact existed as to whether the 2014 Lawsuit's acceleration demand had been revoked. CP 00931-33; VRP 82-83.

On August 16, 2021, Ms. Loun filed a second motion for summary judgment, this time in *U.S. Bank v. Loun*. CP 00776-00930. The basis of Ms. Loun's second motion was the same as the first. *See generally* CP 00776-91. U.S. Bank opposed the Motion by briefing the same evidence and arguments it successfully raised in response to Ms. Loun's first motion. CP 00934-53. Nevertheless, on December 22, 2021, the Trial Court entered an order granting Ms. Loun's Motion (the "Summary Judgment Order"). CP 01625-28.

On December 30, 2021, U.S. Bank asked the Superior Court to make a CR 54(b) finality determination of the Summary Judgment Order. CP 01814-18. On January 3, 2022, U.S. Bank timely filed a Motion for Reconsideration of the Summary Judgment Order. On February 7, 2022, the Trial Court: (i)

entered an order denying U.S. Bank's Motion for Reconsideration; and (ii) entered a finality order, pursuant to CR 54(b)(4) (the "Finality Order"). CP 01789-97. The Finality Order rendered the Summary Judgment Order a final and immediately appealable judgment, pursuant to RAP 2.2(d). CP 01789-93. On February 17, 2022, U.S. Bank timely filed a Notice of Appeal. CP 01798-01818.

On March 28, 2023, the Court of Appeals issued the Published Decision, reversing the Superior Court and remanding for further proceedings. Published Decision, p. 1. In total, **Loun received over one hundred pages** of statements, notices and correspondence indicating that *less* than the full accelerated balance of the loan was due, assessing late fees on missed payments, and stating the maturity date of her mortgage was May 1, 2046. CP 01082-01124, 01127-01249, 01251-69. All of these documents were sent to Loun during the alleged limitations period, between May 21, 2014, and May 21, 2020. Accordingly,

the Court of Appeals held genuine issues of material fact precluded summary judgment. Published Decision, pp. 8-11.

IV. ARGUMENT.

RAP 13.4(b) provides:

> A petition for review will be accepted by the Supreme Court **only**: (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.

(emphasis added). The Court of Appeals properly found that genuine issues of material fact precluded summary judgment. Ms. Loun does not argue that the Published Decision conflicts with a decision of the Supreme Court, or that the Published Decision conflicts a published decision of the Court of Appeals and does not argue that the Published Decision involves a significant question of law under the Constitution of the State of Washington or of the United States. Rather, the sole basis

asserted for discretionary review is reversing her motion for summary judgment due to the existence of genuine issues of material fact raises an issue of "state-wide significance in residential mortgage foreclosures…." Petition p. 2.

A. Loun Has Failed to Demonstrate an Issue of Substantial Public Interest.

As stated above, Loun's sole ground for requesting discretionary review is RAP 13.4(b)(4). Petition, p. 12. However, she has not demonstrated any issue of substantial public interest that should be determined by the Supreme Court. She has not identified any similar appeal, has not identified any similar pending Superior Court case, and has not identified any other foreclosure in the State of Washington involving revocation of acceleration. This stands in stark contrast to other cases where this Court has granted discretionary review. *See e.g. State v. Watson*, 155 Wn.2d 574, 577 (2005) ("The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce

County after November 26, 2001, where a DOSA sentence was or is at issue."); *In re Personal Restraint of Flippo*, 185 Wn.2d 1032 (2016) ("Here, the Court of Appeals noted that there are numerous now-pending personal restraint petitions challenging the imposition of LFOs …. I am aware that petitions raising some of these issues are pending in other divisions of the Court of Appeals. In these circumstances, review by this court is warranted on the basis the motion raises an issue of substantial public interest under RAP 13.4(b)(4).") (citations omitted).

While authority within Washington regarding revocation of acceleration is limited, the issues raised in this appeal are discrete and unique. As stated by the Court of Appeals this is a private dispute. Published Decision, p. 9. Loun has failed to demonstrate a substantial public interest. The Petition should be denied.

B. Loun's Arguments Were Rejected by the Court of Appeals, and Do Not Demonstrate a Basis for Discretionary Review.

Being unable to identify any issue of substantial public

interest, Loun instead reiterates the arguments rejected by the Court of Appeals. This includes asking that evidence be ignored, a contrived argument of conflict between federal law and Washington law, incorrectly arguing that the statute of limitation could be indefinitely tolled, and even attacking the concurring opinion. Petition, pp. 12-29.

Loun devotes nearly six pages to arguing that the monthly statements, notices and correspondence sent to her should be ignored. Petition, pp. 13-15, 23-25. This argument contradicts the established rules governing summary judgment. "Thus, where a motion for summary judgment is made, it is the duty of the trial court **to consider all evidence** and **all reasonable inferences** therefrom **in a light most favorable to the nonmovant**." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349 (1979) (*citing Maki v. Aluminum Bldg. Prods.*, 73 Wn.2d 23(1968)) (emphasis added). Notably, Loun cites no authority for the proposition that because loan servicers are required to provide periodic statements and information to

borrowers under federal regulations, that such evidence may be disregarded at summary judgment. Nor could she given the long-established rule that **all** evidence must be considered at summary judgment, and that **all** reasonable inferences from the evidence must be viewed in a light most favorable to the non-moving party. Furthermore, the weight to be assigned to evidence and credibility of witnesses is a matter determined by the trier of fact. *See e.g., State v. Stewart*, 141 Wn. App. 791, 795 (2007). Nothing in the Published Decision precludes Loun, or U.S. Bank, from arguing weight and credibility at trial.

As the Court of Appeals stated, "When ruling on a motion for summary judgment, a court views the facts submitted and the reasonable inferences that may be drawn from those facts in the light most favorable to the nonmoving party. *Id*. A court may grant a motion for summary judgment if reasonable minds could reach only one conclusion from the facts submitted." Published Decision, p. 5. The Published Decision certainly comports with binding precedent regarding the standard for summary judgment.

Oddly, despite her many protests regarding the Published Decision, Loun does not dispute that whether revocation occurred is a question of fact. Again, Loun received **over one hundred pages** of statements, notices and correspondence showing acceleration had been affirmatively revoked. CP 01082-01124, 01127-01249, 01251-69. Ms. Loun's argument that the black letter law governing summary judgment be set aside and evidence ignored does not raise any issue necessitating review by the Supreme Court. Therefore, the Petition should be denied.

C. Loun's Argument that the Published Decision Allows a Noteholder to Indefinitely Toll the Statute of Limitations is Incorrect.

Loun ignores the plain language of the Published Decision and attempts to manufacture a holding that does not exist in hopes of obtaining discretionary review. Petition, p. 13. Loun's argument that "The decision allows a noteholder to indefinitely toll the statute of limitations…." is simply wrong and contradicts the Published Decision. As stated in the Published Decision, "An

action on a written contract is subject to the six-year statute of limitations. RCW 4.16.040(1). When a contract, such as a promissory note, calls for installment payments, 'the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.' *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)." Published Decision, p. 6.

Nothing in the Published Decision changes the rule that the statute of limitations would bar action on a promissory note that is more than six years past its maturity date (absent tolling). Nor does the Published Decision support any notion that an installment more than six years old can continue to be collected (again, absent tolling). Here, as the Court of Appeals found, there are genuine issues of material fact regarding whether acceleration was revoked before six years had elapsed since the 2014 Lawsuit was filed. The Petition should be denied.

D. There is No Conflict Between Federal Law and Washington Law.

Next, Loun contrives an alleged conflict between the six-year statute of limitation and Washington's quiet title statute, and federal law and regulations regulating loan servicers. Petition, p. 13-15. Nothing in 12 U.S.C. § 2605(e) (regarding the home loan servicer's duty to respond to borrower inquiries) or 12 C.F.R. § 1026.41 (regarding periodic statements for residential loans) conflicts with RCW 4.16.040 or (Washington's six-year statute) or RCW 7.28.300 (the Washington quiet title statute). Ms. Loun's disagreement that evidence precluded summary judgment does not necessitate discretionary review. Rather, this argument is another belabored attempt to advocate that evidence should be ignored. As stated above, the sole ground advanced by Loun for discretionary review is RAP 13.4(b)(4), which requires Loun to show an issue of substantial public interest that should be determined by the Supreme Court. She has cited no authority for the proposition that any supposed conflict of law,

either real or imagined, provides a basis for discretionary review under RAP 13.4(b)(4). Again, the Petition should be denied.

E. The Court of Appeals Correctly Rejected *PNC Bank, N.A. v. Robert C. Keck Revocable Living Trust*.

Ms. Loun's next grievance is that the Court of Appeals declined to adopt *PNC Bank, N.A. v. Robert C. Keck Revocable Living Trust*, 2020 OK Civ. App. 60, 479 P.3d 238 (2020), which is the sole authority Loun has located supporting her argument that revocation of acceleration may **only** occur if such a right is expressly stated in a promissory note or deed of trust. As the Court of Appeals stated, *PNC Bank* cited no legal authority for its holding, and its holding has not been cited with approval in any other jurisdiction. Published Decision, p. 10. Further, the reasoning of *PNC Bank* is questionable at best. Lacking authority, the Oklahoma Court of Civil Appeals stated "Deacceleration is likewise a fundamental change in the debtor-creditor relationship…. Therefore, it is mandatory that there must be a deacceleration clause in the instrument evidencing the debt

or the instrument evidencing the security of for the debt." 479 P.2d at 247. However, the *PNC Bank* court does not explain why "deacceleration" which has the effect of simply **returning the loan to its prior status and maturity**, is such a momentous action as to require an express contract provision.

Rather, than adopting *PNC Bank's* unsupported and questionable reasoning, the Court of Appeals adopted the holding of every other authority cited for the proposition that deacceleration, waiver, abandonment or other revocation of acceleration that does not require an express contractual provision. Doing so was in accord with Washington law. *Panorama Residential Protective Ass'n v. Panorama Corp. of Wash.*, 97 Wn.2d 23, 28 (1982) (a waiver of contractual remedies such as acceleration may be unilateral and without consideration); *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 498-99, 502 (1988) (lender waived acceleration by sending monthly statements and accepting partial payment). Likewise, other jurisdictions hold that the lender need

only engage in an affirmative act to revoke acceleration, regardless of whether revocation is expressly set forth in a contract. *Andra R. Miller Designs LLC v. U.S. Bank, N.A.*, 244 Ariz. 265, 271, 418 P.3d 1038, 1044 (Ariz. Ct. App. 2018); *Ayala v. Carrington Mortgage Servs. LLC*, CV-16-02156-PHX-ROS, 2017 WL 6884299, *3 (D. Ariz. 2017); *Waiver of Right to Accelerate*, AM. JUR. 2D, BILLS AND NOTES, § 167 (Sept. 2016); *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009 (Fla. 2016); *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1069-70, 58 N.Y.S.3d 118, 120 (N.Y. App. Div. 2017); *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1, 32, 169 N.E.3d 912, 92, 146 N.Y.S.3d 542, 556 (N.Y. 2021); *Khan v. GBAK Props, Inc.*, 371 S.W.3d 347, 353 (Tex. App. 2012); *Dunn v. Gen. Equities of Iowa, Ltd.*, 319 N.W.2d 515, 517 (Iowa 1982); *Holland v. Paddock*, 142 Cal. App. 2d 534, 298 P.2d 587 (Cal. Ct. App. 1956).

The Court of Appeals correctly adopted the standard set forth in *Engel* and numerous other cases that revocation of

acceleration need not be expressly set forth in the promissory or deed of trust. Further, the Court of Appeals correctly held that a genuine issue of material fact precluded summary judgment because Loun was sent numerous statements, notices and other correspondence showing acceleration was affirmatively revoked. Published Decision, pp. 8-11. Loun's displeasure that the Court of Appeals did not adopt *PNC Bank* is not grounds for discretionary review under RAP 13.4(b)(4). The Petition should be denied.

F. Adoption of A Preponderance of the Evidence Standard Provides No Issue of Substantial Public Interest Necessitating Review by the Supreme Court.

Again, Loun's disappointment that the Court of Appeals reversed and remanded because evidence showed acceleration was affirmatively revoked is not a basis for discretionary review. Rather than accepting that summary judgment should have been denied, as it was in February of 2021, Loun instead appears to advocate for a heightened standard of proof in this contract dispute between two private parties. Petition, pp. 3-5, 19-23. In

doing so, Loun simply ignores the Court of Appeals reasoning in adopting the preponderance of the evidence standard, and of course fails to identify any reason why the preponderance of the evidence standard should result in the Supreme Court accepting review. Consistent with the standard of proof for nearly all matters of civil law, the Court of Appeals held that revocation of acceleration need be shown by a preponderance of the evidence. Published Decision, p. 8. Notably, Loun does not identify any conflict with a Supreme Court decision or published decision of the Court of Appeals or other basis for discretionary review.

Instead, Loun conveniently asks this Court to impose a clear, cogent and convincing standard of proof, as is required for matters such as fraud and termination of parental rights. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596 (1990) (fraud must be established by clear and convincing evidence); *In re Welfare of H.S.*, 94 Wn. App. 511, 518 (1999) (termination of parental rights requires clear, cogent and convincing evidence). Loun advances no reason for such a high standard of proof for a

private, civil dispute, other than her serving her own interests.

Moreover, Loun conflates the **standard of proof** with the legal test for acceleration of a debt. While it is true that the Washington case law provides acceleration must occur in a clear and unequivocal manner, nothing in any Washington decision requires the standard of proof in a case regarding acceleration be clear, cogent and convincing evidence. Loun has not cited any case that holds the **standard of proof** for acceleration is anything other than preponderance of the evidence. There is no reason to impose such a rule. Nor would doing so comport with Washington law. As the Court of Appeals held, "preponderance of the evidence applies to civil actions, because society has a minimal interest in the outcome of private disputes." Published Decision, p. 8. Imposing a rule equating a private, civil contract dispute to fraud or termination of parental rights is not supported by any authority. The Court of Appeals determination to apply a preponderance of the evidence standard was correct, well-supported by the law, and does not raise any basis for

discretionary review. Again, the Petition should be denied.

G. Loun's Criticism of the Concurring Opinion Is Not a Basis for Discretionary Review.

Chief Judge Siddoway's concurring opinion is not signed by other members of the appellate panel and has no precedential value. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, n. 8 (2019) ("Justice Chambers's concurring opinion is precedential because it received five votes from justices who also signed the majority opinion."). Loun's argument that the concurring opinion would "reverse established Washington law" is incorrect. Again, Ms. Loun's disagreement with the Published Decision, no matter how vehement, is not a basis for discretionary review under RAP 13.4(b).

H. Attorney's Fees.

U.S. Bank is entitled to an award of its reasonable and necessary attorney fees and costs. RAP 18.1 allows for the recovery of attorney fees and costs where applicable law provides for such an award. Here, the foreclosure / quiet title

action giving rise to this appeal arises out of the Deed of Trust and Note. Paragraph 26 of the Deed of Trust and Paragraph 7(E) of the Note provide that U.S. Bank may recover its attorney fees and costs incurred in any proceeding to construe or enforce the documents. CP 01030, 01043.

V. CONCLUSION.

For the reasons stated above, Ms. Loun has failed to establish grounds for discretionary review under RAP 13.4(b). In tacit acknowledgement that she lacks grounds for discretionary review, the vast majority of the Petition simply reiterates the arguments on the merits the Court of Appeals rejected. Accordingly, the Petition should be denied.

VI. CERTIFICATE OF COMPLIANCE.

Pursuant to RAP 18.17(b), U.S. Bank hereby certifies that this Answer to Petition for Review complies with the formatting requirements of RAP 18.17(a) and consists of 4,859 words.

RESPECTFULLY SUBMITTED, this 25th day of May, 2023.

HAWLEY TROXELL ENNIS & HAWLEY LLP

/s/ Daniel J. Gibbons
DANIEL J. GIBBONS, WSBA No. 33036
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 25th day of May, 2023, the foregoing was delivered to the following persons in the manner indicated:

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DATED, this 25th day of May, 2023.

/s/ Daniel J. Gibbons
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HAWLEY TROXELL ENNIS & HAWLEY LLP

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Appellate Court Case Title:	Michelle E. Loun v. US Bank National Association
Superior Court Case Number:	20-2-00262-6

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