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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALEX C. BARKLEY,

Appellant,

v.

JPMORGAN CHASE BANK, N.A., et al.,

Respondents.

ANSWER OF JPMORGAN CHASE BANK, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND U.S. BANK NATIONAL ASSOCIATION TO ALEX C. BARKLEY'S PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ANSWER

As the superior court and the court of appeals each recognized, the undisputed facts show Alex C. Barkley has no claims. Barkley wants to avert foreclosure on his investment property; he is collecting about $6,400 a month in rent. CP 751-52 ¶ 17.A. But Barkley defaulted in August 2010 and doesn't have enough money to pay the arrears on his loan. Nor is he willing to sell the property to pay his debt, even though he testified there is equity to spare.

U.S. Bank, through its agents, is in actual possession of the original note. CP 496 ¶ 5. Barkley admits he has no evidence to dispute that. CP 486 at 87:10-88:3; CP 487 at 92:7-22. U.S. Bank is also the owner of the original note. And Respondents did nothing wrong by telling Barkley that unless he cured his default, U.S. Bank would enforce his promises by foreclosing on his investment property. This Court should deny Barkley's petition for review.

First, this Court should not accept review because the court of appeals properly applied this Court's precedents when it concluded U.S. Bank was entitled to enforce the note as both the owner *and* holder.

Second, this Court should deny review because the trial court properly admitted the declarations of John Simionidis and Jeff Stenman; the testimony they provided and the documents they authenticated were also independently verified by several other sources.

Third, this Court should deny review because the trial court properly declined to give Barkley more time to conduct discovery.

Barkley had an ample opportunity to take discovery, and could not explain why additional discovery would change the outcome.

IDENTITY OF ANSWERING PARTIES

JPMorgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association, as trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1, are respondents and defendants in this case.

STATEMENT OF THE CASE

A. Barkley is a real-estate agent and investor.

Barkley is an experienced real-estate investor and agent. Barkley has been a real-estate agent since 1999. CP 472 at 18:15-17. He rents out the investment property at issue in this case. CP 751-52 ¶ 17.A. Barkley also buys and sells real estate on his own behalf. CP 472 at 19:4-21. He is actively interested in buying and selling more properties. CP 485 at 72:16-24. Barkley would have enjoyed borrowing more money to purchase more properties, but his defaults under his existing loans have prevented him from doing that. CP 485 at 72:16-24.

B. Barkley borrowed money secured by a deed of trust.

On November 19, 2002, Barkley borrowed money through Greenpoint Mortgage Funding, Inc., to refinance his existing debt on property at 3428 37th Avenue S.W., Seattle (the "*Property*"). CP 2 ¶ 1.1; CP 4 ¶ 3.2. As evidence of Barkley's obligations to repay the loan, Barkley executed an adjustable rate note (the "*Note*") in favor of Greenpoint in an original principal amount of $291,900. CP 4 ¶ 3.2;

CP 395-400. The Note explains that the Note could be transferred, and in fact the Note reflects that Greenpoint indorsed the Note in blank, making it bearer paper. CP 395, 399.

To secure Barkley's obligations, Barkley executed a deed of trust (the "*Deed of Trust*") stating that if Barkley defaulted on the loan, the noteholder could foreclose. CP 402-22. The Deed of Trust identified Greenpoint as "Lender," and identified MERS as "Beneficiary," but solely as nominee for Greenpoint (as the disclosed lender) and any successor or assign of Greenpoint. CP 4-5 ¶ 3.3; CP 402-22.

C. Barkley agreed Greenpoint could transfer the Note and Deed of Trust.

Barkley agreed Greenpoint could transfer the right to enforce obligations arising under the Note and Deed of Trust. The Note states that the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" CP 395 at ¶ 1. In the Deed of Trust, Barkley likewise agreed that his Note could be sold one or more times without prior notice to him, and that the identity of his servicer might change, too. CP 413 at ¶ 20. Barkley even signed a disclosure statement, which explained that the right to collect Barkley's mortgage-loan payments might be transferred. CP 477 at 38:13-23.

D. U.S. Bank acquired the Note and Deed of Trust.

U.S. Bank became the owner of the Note on or around January 30, 2003, the closing date under the Pooling and Servicing Agreement. CP 425, 427. In connection with the acquisition of the Note, U.S. Bank,

through its servicer and agents, took delivery of the "Mortgage File," which included the original Note. CP 426, 428.

Barkley does not have any basis to dispute that U.S. Bank, acting through its servicer, is the holder of the Note. CP 486 at 87:10-88:3; CP 487 at 92:7-22. Barkley recognized his original signature on the Note during his deposition. CP 478 at 43:4-14, 44:14-22; CP 481 at 56:21-57:1. Barkley, as an experienced real-estate professional, understands that the holder of his Note is entitled to enforce the Note, and upon default, is entitled to foreclose on the Property. CP 484-85 at 69:5-70:8.

U.S. Bank is also beneficiary of record of the Deed of Trust. On September 18, 2012—before any foreclosure sale was even scheduled—MERS, acting in its capacity as nominee (i.e., agent) for U.S. Bank (i.e., Greenpoint's successor and assign as to the Note), assigned its nominee/agency interest under the Deed of Trust to its principal, U.S. Bank, as trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1. CP 8-9 ¶ 3.14; CP 453-54. This assignment had no effect on Barkley's debt or his obligation to pay his loan. It only recorded the end of MERS's role as agent under the Deed of Trust. MERS did not assign or purport to assign any interest in the Note. CP 453-54.

E. Chase acted as servicer and attorney-in-fact for U.S. Bank.

Chase is the servicer for Barkley's loan. CP 435-51. Chase, acting as servicer for U.S. Bank, took possession of the original Note on or around July 17, 2009, years before commencing the nonjudicial foreclosure. CP 496 ¶ 5. Under a power of attorney, Chase is authorized to

execute and deliver, on behalf of U.S. Bank, all documents necessary to conduct any foreclosure, as well as all documents necessary to assign any deeds of trust. CP 429-33; CP 435-51. Chase's authority from U.S. Bank is also derived from the Pooling and Servicing Agreement. CP 429-33.

Barkley knew Chase was his loan servicer—the point of contact for his loan—when he defaulted. Barkley knew he needed to talk to Chase if he wanted a loan modification (*see* CP 479 at 47:2-48:7), and he made payments to Chase through August 2010 (CP 483 at 63:13-23). When the foreclosure started, Barkley knew no entity other than Chase was claiming to be his loan servicer. CP 482-83 at 61:25-62:2. The notice of default correctly identified Chase, as servicer, and U.S. Bank, the owner of Barkley's Note. CP 49.

No one other than Chase and U.S. Bank sought to collect payments from Barkley since his default. CP 480 at 52:9-15; CP 482 at 61:10-15. No one other than U.S. Bank claims to own Barkley's loan, or hold his original Note. CP 483 at 64:3-5. Barkley has no reason to believe anyone other than U.S. Bank is entitled to payment (by way of U.S. Bank's agent and servicer, Chase). CP 486 at 87:10-88:3; CP 487 at 92:7-22.

F. U.S. Bank held the Note through Chase, its servicer.

Chase, as servicer for U.S. Bank, had possession of the original Note when Northwest Trustee Services, Inc. ("*NWTS*"), commenced the nonjudicial foreclosure. CP 496 ¶ 5; *see also* CP 491. After Barkley launched this action, Chase delivered the original Note to counsel for Chase, MERS, and U.S. Bank. CP 496 ¶ 5. Barkley recognized his

signature on the original Note when it was shown to him during his deposition. CP 478 at 43:4-14, 44:14-22; CP 481 at 56:21-57:1. Barkley admits he should be paying the person entitled to enforce his Note. CP 484-85 at 69:5-70:8. Barkley admits the person entitled to payments is also entitled to foreclose. CP 484 at 69:18-23.

G. Barkley defaulted, and profited from his default.

Except for one or two subsequent payments, Barkley made his last payment on the loan around August 2010—more than four years ago. CP 475 at 32:18-23; CP 478-79 at 45:20-46:14. Barkley did not have enough money to cure his default in full without selling the Property. CP 482 at 60:1-18; CP 480 at 53:3-19. Barkley believes there is equity in the property after accounting for all the liens encumbering it. CP 473 at 23:6-14. Instead of selling the Property, Barkley started renting it out in a series of short-term leases, some as short as three days. CP 469 at 9:7-23.

Even if Barkley were making his regular monthly payments—which he is not—Barkley still would be profiting. His loan carries a variable rate of interest, which would have required monthly payments of principal and interest of only $1,440.82 (not including amounts required to cure his arrearage). CP 496 ¶ 6. Barkley collects roughly $6,400 a month in rent, which he is not paying to his noteholder. CP 751-52 ¶17.A.

H. Barkley received accurate foreclosure notices.

Barkley knew he needed to pay his loan to avoid foreclosure. Barkley received a notice of default that informed him of what he owed and who he could contact to make payments. CP 48-52. At the time of the

notice of default, Barkley was in arrears by not less than the $16,090.51. CP 48-52. The notice of default accurately identified U.S. Bank as the owner of the Note and as the beneficiary of the Deed of Trust. CP 48-52. The notice of default also provided Barkley with contact information for U.S. Bank's servicer, Chase. CP 48-52.

Barkley asserts that "[n]o Respondent represented they were the owner of the subject Note and Deed of Trust, but claimed, for purposes of this foreclosure, that they merely '*held*' Mr. Barkley's Note as purported agents for an 'undisclosed investor.'" Barkley Pet. for Rev. at 13. That is false. U.S. Bank acquired the loan in 2003. CP 424, 427. U.S. Bank was identified as the owner of the Note in the notice of default. CP 252.

Although Barkley received the notice of default and understood what it meant, he did not cure his default because he did not have enough money to make the required payments. *See* CP 480 at 53:3-19. Barkley has no reason to doubt U.S. Bank is entitled to payment. CP 486 at 87:14-88:3. His default had nothing to do with purported inaccuracies in the notice of default. *See* CP 480 at 53:14-19. When asked, Barkley could not identify any basis for disputing the information contained in the notice of default. CP 486 at 87:10-88:3; CP 487 at 92:7-93:4.

Barkley was unable to identify anything inaccurate about the documents executed by Chase, MERS, and U.S. Bank. Apart from his lawyer's legal arguments concerning the effect of *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), Barkley is not aware of

anything inaccurate about the assignment of the Deed of Trust. CP 482 at 59:4-7. Barkley does not recall ever having seen the appointment of a successor trustee, and he is not aware of anything inaccurate about that document either. CP 482 at 59:12-20.

I. Barkley took discovery and was sanctioned for failing to meet his own discovery obligations.

Barkley received an ample opportunity to take discovery. Although Barkley chose not to take any depositions, he was deposed in February 2014. CP 467. Barkley served discovery requests on MERS and NWTS in March 2014, well before the discovery cutoff, and MERS and NWTS served timely responses. CP 703-44. The superior court heard argument on the Respondents' dispositive motions in May 2014, just a few months before the trial date set for August 2014.

After Respondents filed their motion for summary judgment, Barkley—for the first time—insisted he wanted to take more discovery. Barkley did not, however, specifically identify what discovery he needed to take, the facts he believed he could elicit, or the legal significance of those facts. Instead, he generally asserted that he wanted to "flesh out the ownership" of the Note (CP 568:3-5), even though he had already recognized his signature on the original Note during his deposition, and even though he had been repeatedly shown that U.S. Bank owned his note (CP 478 at 43:4-14, 44:14-22; CP 481 at 56:21-57:1).

It was Respondents—not Barkley—who had difficulty obtaining discovery. Barkley was the subject of two motions to compel because he

would not respond to discovery requests. CP 1120-45, 1176-82. Barkley even paid Chase's fees and costs in connection with the second motion to compel. CP 1334-35, 1351-52.

J. Barkley lost on summary judgment.

The superior court granted summary judgment in favor of Respondents on all counts. CP 1097-1102. The superior court properly considered the undisputed evidence submitted by Respondents, including the declarations of John Simionidis and Jeff Stenman. Each submitted testimony based on personal knowledge. And the superior court did not just rely on declarations from Respondents' representatives. In his deposition, Barkley made crucial admissions. Barkley himself authenticated most of the important documents. *See* CP 391-392. Nor was his testimony the only source of authentication. Most documents considered by the superior court were self-authenticating. *See* CP 391-392.

ARGUMENT

A. The court of appeals' decision does not merit review because U.S. Bank is both the holder and the owner of Barkley's promissory note.

1. The court of appeals' decision does not conflict with this Court's decisions in *Bain*, *Lyons*, or *Trujillo*, and would not conflict with *Brown*, however it is decided.

This Court should not grant review under RAP 13.4(b)(1) because the decision of the court of appeals does not conflict with this Court's decision in *Bain*, or *Lyons v. U.S. Bank*, 181 Wn.2d 775 (2014), or *Trujillo v. Northwest Trustee Services, Inc.*, 2015 WL 4943982 (Wash. 2015), and would not conflict with this Court's decision in *Brown v. Washington State*

Department of Commerce, now pending in this Court under case number 90652-1, however the Court may choose to rule. The undisputed evidence presented to the superior court demonstrated that U.S. Bank was both the holder and the owner of Barkley's note.

Several of this Court's recent decisions interpret RCW 61.24.005(2), which, for purposes of Washington's Deed of Trust Act, defines the "beneficiary" of a deed of trust as the "holder of the instrument." Those decisions also deal with RCW 61.24.030(7)(A), which identifies certain prerequisites to a nonjudicial foreclosure sale. The court of appeals properly applied those precedents, and no matter what the Court decides in *Brown*, it will not change the results of this appeal.

In *Bain*, this Court explained that to foreclose under the Deed of Trust Act, "a beneficiary must either actually possess the promissory note or be the payee" because that comports with Washington's Uniform Commercial Code. 175 Wn.2d at 104. This Court concluded that "the legislature meant to define 'beneficiary' to mean the actual holder of the promissory note or other debt instrument." *Id.* at 101. And this Court quoted RCW 62A.3-301, which says, in pertinent part, that "[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

In *Lyons*, this Court observed that RCW 61.24.030(7)(A) seemed to require the beneficiary of a deed of trust to prove it was an "owner" of

the secured obligation. This Court went on to explain that a person could prove it owned a note by providing a declaration "stating that the beneficiary is the actual holder of the promissory note" under RCW 61.24.030(7)(A). That would be sufficient evidence to allow a trustee under a deed of trust to conclude that RCW 61.24.030(7)(A) had been satisfied. The trustee would only be required to investigate further if "there [was] an indication that the beneficiary declaration might be ineffective." 181 Wn.2d at 790.

In *Trujillo*, this Court continued its analysis of beneficiary declarations by noting that a declaration was insufficient if it said a person "could be the 'actual holder' 'or' it could be something else." 2015 WL 4943982, at *4. The Court expressly did not "address whether RCW 61.24.030(7)(A) allows a trustee to rely on an unambiguous declaration stating that the beneficiary is the actual holder of the note, even though the owner is a different party." *Id.*, at *4. The Court said it would address that question in another case, presumably referring to *Brown.*

The decision of the court of appeals is consistent with *Bain* because U.S. Bank is the actual holder of Barkley's note. Barkley identified the original note during his deposition. U.S. Bank even had a copy of the original note available for inspection during argument in the court of appeals. The foreclosure notices that Barkley received, and the other documents prepared in connection with the foreclosure, never identified anyone other than U.S. Bank as the holder of the original note.

The decision of the court of appeals is also consistent with *Lyons* and *Trujillo*. Unlike the beneficiary declarations in *Lyons* and *Trujillo*, the declaration here is not ambiguous. It accurately identifies U.S. Bank as the holder of the note, without any qualification of the kind that this Court found objectionable in *Lyons* and *Trujillo*. Nor was there any evidence to suggest the beneficiary declaration was inaccurate. Barkley introduced no evidence to suggest there is any difference between a "holder" and an "actual holder" in this case. And Barkley introduced no evidence that anyone other than U.S. Bank and its agents has ever claimed to hold his note or sought to enforce his lawful obligations.

The decision of the court of appeals would also be consistent with this Court's impending decision in *Brown*, even if this Court determines that a person must be both the holder and owner of a note to foreclose. None of the foreclosure documents identified anyone other than U.S. Bank as the owner or holder of Barkley's note. U.S. Bank is, in fact, *both* the holder and the owner of Barkley's note.

2. There is no dispute that U.S. Bank is the actual holder and owner of Barkley's note.

The court of appeals properly agreed with the superior court that U.S. Bank is the actual holder and owner of Barkley's note, even though U.S. Bank deposited the note with its servicer (and then with its attorneys) for safekeeping, and even though U.S. Bank is the owner of the note in its capacity as trustee for various certificate-holders. Aside from being a

correct decision on the merits, the court of appeals' ruling does not create any conflict with any decisions of this Court or the court of appeals.

Just because Chase kept the Note safe for U.S. Bank does not mean U.S. Bank stopped being the holder and owner. Barkley's argument about the distinction between "possession" and "custody" defies Washington law. A federal bankruptcy court recently rejected the same argument because there is no reason why a noteholder cannot instruct its agents to act on its behalf. *See In re Butler*, 512 B.R. 643, 652-54 (Bankr. W.D. Wash. 2014). U.S. Bank *must* act through agents because U.S. Bank is not a physical person.

There is no genuine dispute that Chase is U.S. Bank's servicer and attorney-in-fact. Mr. Simionidis testified that Chase is U.S. Bank's attorney-in-fact. CP 496 ¶ 4. Chase and U.S. Bank submitted a power of attorney, which is self-authenticating. CP 435-51. And they submitted a copy of the pooling and servicing agreement by which U.S. Bank acquired Barkley's loan. Barkley came forward with no evidence to contest Chase's power to act for U.S. Bank. Lacking any evidence of his own, Barkley attacks the declarations submitted by Chase and U.S. Bank. But, as discussed below, those attacks are unavailing.

Barkley also speculates that there are unknown investors who would benefit from the foreclosure, if it ever occurred, or who would benefit from Barkley's payments, if he were making any. Barkley's arguments about a purported "unknown investor" do not matter because

U.S. Bank's role as trustee for various investors does not give those investors an interest in the Note or Deed of Trust. *See Cashmere Valley Bank v. State of Wash.*, 181 Wn.2d 622, 636-41 (2014). This Court rejected the proposition that an investor in a securitization transaction is a beneficiary under a Washington deed of trust. "While it is true that the interest received by Cashmere from the REMICs ultimately comes from promissory notes secured by mortgages and deeds of trust, Cashmere has no interest in the underlying mortgages and deeds of trust and is not a beneficiary of those instruments." *Cashmere*, 181 Wn.2d at 634.

U.S. Bank is acting as a trustee for various certificate-holders, but U.S. Bank's relationship with those certificate-holders has no effect on Barkley. He is not a party to those contracts. Securitization did not and could not relieve Barkley of the obligation to repay his loan to the noteholder, U.S. Bank. *In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011). This makes sense because "securitization merely creates a separate contract, distinct from plaintiffs' debt obligations under the Note and does not change the relationship of the parties in any way." *Lamb v. MERS, Inc.*, 2011 WL 5827813, *6 (W.D. Wash. 2011); *see also Vasquez v. U.S. Bank, N.A.*, 2015 WL 5158538, *3-4 (N.D. Cal. 2015).

B. The court of appeals' decision does not merit review because the trial court properly considered the declarations of John Simionidis and Jeff Stenman.

This Court should not grant review because the court of appeals properly applied the law when it affirmed the superior court's decision to

admit two declarations. Under CR 56(e), declarations must be made on personal knowledge, must set forth facts admissible in evidence, and must show that the declarant is competent to testify to the information contained in the declaration. Importantly, Washington courts consider the requisite of personal knowledge to be satisfied if the proponent of the evidence satisfies the business-records statute. *See Discover Bank v. Bridges*, 154 Wn. App. 722, 726 (2010); *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-75 (2012) (rejecting challenge to bank employee declaration, holding that affiant's personal knowledge of how records are kept generally was sufficient for business-records exception).

Washington's business-records statute, RCW 5.45.020, allows a "qualified witness" to submit business records into evidence, even records that witness did not create. Courts broadly interpret the term "qualified witness" under the business-records statute. *State v. Smith*, 55 Wn.2d 482, 419-20 (1960); *State v. Ben-Neth*, 34 Wn. App. 600, 603 (1983); *State v. Quincy*, 122 Wn. App. 395, 399 (2004). Under the statute, a qualified witness need not have created the record to authenticate it. *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 608 (1953); *Ben-Neth,* 34 Wn. App. at 603.

Testimony by a witness who has access to the record as a regular part of his work suffices. *Quincy*, 122 Wn. App. at 399; *Ben-Neth,* 34 Wn. App. at 603. Admissibility hinges upon the opinion of the court that the sources of information, method, and time of preparation were such as to justify its admission. *Quincy*, 122 Wn. App. at 401; *Ben-Neth*, 34 Wn.

App. at 603. Computerized records are treated the same as any other business records. *Quincy*, 122 Wn. App. at 399.

The Simionidis declaration squarely meets these requirements and is indistinguishable from evidence routinely approved by Washington courts. For instance, in *Discover Bank v. Bridges*, Discover Bank relied on affidavits from employees of DFS, an affiliated entity that assisted Discover Bank in collecting delinquent debts. The affiants stated that (1) they worked for DFS, (2) two of the affiants had access to the Bridges' account records in the course of their employment, (3) the same two affiants testified based on personal knowledge and review of those records, and (4) the attached account records were true and correct copies made in the ordinary course of business. *Discover Bank*, 154 Wn. App. at 726. The court of appeals rejected the Bridges' contention that the trial court improperly admitted the affidavits into evidence. *Id.*

As in *Discover Bank*, Simionidis stated in his declaration that he has personal knowledge of Chase's business records. Simionidis states he personally reviewed those records. CP 495 ¶ 3. Furthermore, he has personal knowledge of how Chase's business records were "created or collected as part of Chase's regular practices, and were kept by Chase in the course of its regularly-conducted business activities." *Id.* While Simionidis does not state he was a custodian of the records, neither did the affiants in *Discover Bank.* The superior court correctly allowed into evidence the Simionidis declaration and its supporting documents.

Compare Walsh v. Microsoft Corp., 63 F. Supp. 3d 1312, 1318 (W.D. Wash. 2014) (discussing parallel language in federal rule and admitting declaration: "'A witness does not have to be the custodian of documents offered into evidence to establish Rule 803(6)'s foundational requirements. The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the record-keeping system.'").

This Court's decision in *State v. Fricks*, 91 Wn.2d 391 (1979), did not compel a different result. In that case, a record could not be admitted into evidence because the authenticating witness's testimony "was not adequate under the statute to lay such a foundation." *Id.* at 397-98. That is essentially all that *Fricks* says on the issue. By contrast, in this case, Simionidis and Stenman each explained their positions with their respective companies, explained how they acquired their personal knowledge, and explained why the documents submitted in connection with those declarations were admissible into evidence. Nor do the other authorities cited by Barkley help him. Each is just an ordinary restatement of the rule contained in RCW 5.45.020.

Importantly, the superior court did not need the Simionidis declaration to admit all the documents that Simionidis referred to in his declaration. Every one of those documents was both self-authenticating and authenticated by other testimony. *See* CP 391-92. For example, the Simionidis declaration attached a copy of the limited power of attorney, which was self-authenticating by a certificate of acknowledgement under

ER 902(b). (This power of attorney, by the way, along with the pooling and servicing agreement filed with the SEC, each satisfies Barkley's purported need for independent evidence of agency. Anyway, the cases Barkley cites do not stand for the proposition that, under modern rules of evidence, agents cannot testify to the nature and scope of their authority.) Barkley came forward with no evidence to create a genuine issue of fact about those documents.

C. The court of appeals' decision does not merit review under RAP 13.4(b)(4) because the trial court properly denied Barkley's belated request for additional discovery.

One year after filing his complaint, and three weeks after being served with Respondents' motion for summary judgment, Barkley's opposition asked the superior court to continue the motion for additional discovery. The superior court properly denied Barkley's CR 56(f) request because: (1) Barkley failed to state what evidence he would establish through additional discovery, (2) the evidence sought would not have raised a genuine issue of fact rendering delay and further discovery futile, and (3) Barkley failed to offer good reason for his delay in obtaining the evidence desired. *See Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400 (1997). Failure to meet one of these requirements is fatal, and the timing of a motion for summary judgment is irrelevant to whether a continuance should be denied. *See, e.g., Manteufel v. SAFECO Ins. Co.*, 117 Wn. App. 168, 175 (2003) (denying request to continue motion for summary judgment one month after filing of the complaint).

A delay for additional discovery "is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Molsness*, 84 Wn. App. at 400-01. "Vague, wishful thinking is not enough." *Id.* at 401 (trial court did not abuse discretion by denying continuance). Barkley needed to identify, by affidavit, specific evidence he would obtain that was necessary to oppose summary judgment. *See* CR 56(f); *Molsness*, 84 Wn. App. at 401. Barkley failed to present any such affidavit to the superior court.

Barkley failed to identify any specific evidence he might uncover through additional discovery. While Barkley claimed to require additional discovery "to flesh out the ownership of the subject Note and Deed of Trust and the agency relationships, if any, among the [Respondents], and learn the identity of the 'undisclosed investor'" (CP 567-68), Respondents showed that U.S. Bank, through its agent, had physical possession of the original Note, and was also the owner. Barkley himself saw the original Note during his deposition and recognized his signature. CP 478 at 43:4-14, 44:14-22; CP 481 at 56:21-57:1.

Barkley also did not and could not demonstrate that additional discovery could raise a genuine issue of fact. *Stranberg v. Lasz*, 115 Wn. App. 396, 406-07 (2003). The mere possibility that discoverable evidence exists that may be relevant is not sufficient. *Molsness*, 84 Wn. App. at 401. Barkley did not and could not submit any material facts because U.S. Bank was indisputably the holder and owner of the Note.

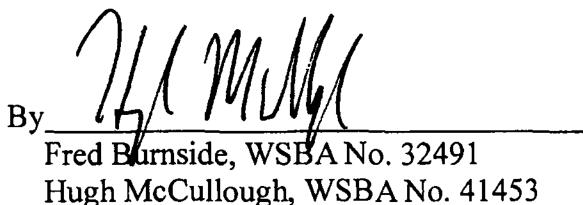
Finally, Barkley failed to offer good reason for his delay in obtaining the evidence desired. CR 56(f) is not intended to endorse inaction and delay. *See Bridges v. ITT Research Inst.*, 894 F. Supp. 335, 337 (N.D. Ill. 1995). "The failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002). Washington courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989). Barkley had almost one year to take discovery, but he waited until the deadline for responding to Respondents' motion before asking for a continuance.

CONCLUSION

The Court should deny Barkley's petition for review.

RESPECTFULLY SUBMITTED this 1st day of October, 2015.

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association



By____________________
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CERTIFICATE OF SERVICE

I certify that on October 1, 2015, I caused the foregoing *Answer to Barkley's Petition for Review* to be delivered to the following as indicated:

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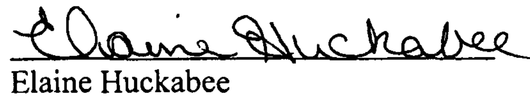
Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 1st day of October, 2015.



Elaine Huckabee

OFFICE RECEPTIONIST, CLERK

To: Huckabee, Elaine
Cc: 'rlj@kovacandjones.com'; hbuckmorrison@northwesttrustee.com; Burnside, Fred; McCullough, Hugh
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Received on 10-01-2015

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Subject: Alex C. Barkley v. JPMorgan Chase Bank, N.A., et al., No. 92187-3

Attached please find Answer of JPMorgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association to Alex C. Barkley's Petition for Review to be filed in the above matter.

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