

Supreme Court No. 94214-5

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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FRANK BUCCI

Appellant,

v.

NORTHWEST TRUSTEE SERVICES INC., SUCCESSOR BY  
MERGER TO NORTHWEST TRUSTEE SERVICES PLLC FKA  
NORTHWEST TRUSTEE SERVICES, LLC, a Washington corporation;  
RCO LEGAL, P.S., a Washington Professional Services Organization;  
JPMORGAN CHASE BANK, N.A., a national banking association; U.S.  
BANK, NATIONAL ASSOCIATION, a national banking association;  
SELECT PORTFOLIO SERVICING, INC., a Foreign Corporation  
registered in Washington,

Respondents.

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**RESPONDENTS USB AS TRUSTEE AND SPS ANSWER TO  
PETITION FOR REVIEW**

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## I. SUMMARY OF THE ARGUMENT

Respondents<sup>1</sup> submit this Answer in opposition to Appellant Frank Bucci's Petition for Review to the Supreme Court ("Bucci's Brief").<sup>2</sup> Bucci's Brief fails to identify any issue of substantial public interest for review by this Court and fails to identify any error by the Court of Appeals or the trial court below. The Court of Appeals' ruling does not create a minority rule and, in fact, follows well-established legal principles. Review by this Court is not warranted. The petition should be denied.

Even though promissory notes with negative amortization features have been around for years, if not decades, Bucci fails to cite any court that has ruled that a negative amortization feature destroys the negotiability of a note.<sup>3</sup> The face amount of Bucci's note satisfies the negotiability requirement because it contains a promise to pay a "fixed amount."<sup>4</sup> There is no requirement under the rules of negotiability that the transferee of the note should be able to find the *current* principal balance

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<sup>1</sup> Select Portfolio Servicing, Inc. ("SPS") and U.S. Bank N.A., successor trustee to Bank of America, N.A., successor in interest to LaSalle Bank N.A., as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-OA6 ("USB as Trustee") (collectively, "Respondents").

<sup>2</sup> Bucci's arguments are addressed in the Appellate Brief of Respondents USB as Trustee and SPS ("Respondents' Appellate Brief") submitted to the Court of Appeals.

<sup>3</sup> As Bucci suggests, this Court should note that rejecting Bucci's negative amortization arguments would align it with other courts applying this uniform law.

<sup>4</sup> Bucci's note provided that Bucci will pay the amount of "\$1,530,000."

of the note – as opposed to rights, duties, and obligations – from the face of the note. The *current balance* of all notes changes as time passes and payments are made, or not made, without destroying negotiability. Negotiability does not perform a “ledger” function, and the current balance of a note, whatever it is, is not required by the rules of negotiability to appear on the face of the note.

Negative amortization is a form of interest rate and accrual. The applicable U.C.C. rules (RCW 62A.3-112(b)) provide that the interest rate and amount may be stated in any way, and so long as it is stated on the face of the note, the rules of negotiability are satisfied. Those rules were satisfied here.

Bucci characterizes negative amortization notes as “predatory” lending. The purpose of the rules of negotiability is to provide commercial certainty to the transfer of promissory notes. It is not a device to police consumer lending issues. Whether negative amortization is regarded as a good or bad thing, no court has found that a note with such a feature violates the rules of negotiability. Nor would making a promissory note “non-negotiable” somehow address a predatory lending issue. It would only change the way in which such notes were transferred. Instead, as the Washington Legislature did in RCW 19.144.050, separate consumer

legislation is enacted to address or restrict the use of negative amortization features in promissory notes.<sup>5</sup>

Bucci also argues that Respondents' production of Bucci's original promissory note in court was insufficient to authorize Respondents to foreclose on Bucci. Bucci failed to properly challenge the original note under long-established rules and raises no review-worthy issue here.<sup>6</sup>

The Court of Appeals and trial court correctly ruled on these issues and no review is appropriate. Respondents respectfully request that Bucci's petition for review be denied.

## **II. AUTHORITY AND ARGUMENT**

### **A. Bucci's Note Contains A Promise To Pay A Fixed Amount**

The current holder of Bucci's note and deed of trust is USB as Trustee. CP 220 at ¶ 4. The original note and deed of trust were submitted to the court at summary judgment by USB as Trustee. CP 203 (evidence relied upon section); CP 1099-1100.

Bucci's note provided that Bucci will pay the fixed amount of "\$1,530,000."<sup>7</sup> The authorities hold that to meet the fixed amount

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<sup>5</sup> Bucci's note was made in 2006, two years before Washington enacted RCW 19.144.050.

<sup>6</sup> See Respondents' Appellate Brief pp. 3-10.

<sup>7</sup> A "negotiable instrument" means "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." RCW 62A.3-104(a).

requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source.<sup>8</sup> 4 William D. Hawkland & Lary Lawrence, *Uniform Commercial Code Series* § 3-106:2, Westlaw (database updated Dec. 2016).<sup>9</sup> Because Bucci's note satisfies this rule, the note is negotiable.

None of the cases cited in Bucci's Brief at p.16 addresses negative amortization and therefore provide no support for Bucci's argument. These cases either represent, like *Hoard*,<sup>10</sup> analysis of notes under older UCC rules no longer applicable,<sup>11</sup> or notes that were lines of credit. *Resolution Trust Corp. v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001-02 (5th Cir. 1992) (statement of principal on face of the note included "or so much thereof as may be advanced..."); *Heritage Bank v. Bruha*, 812 N.W.2d 260 (2012) (note represented a revolving line of

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<sup>8</sup> It is when the uncertainty appears on the face of the note that this requirement is violated. *Cf., e.g., In re Hipp, Inc.*, 71 B.R. 643, 649 (Bankr. N.D. Tex. 1987) (the "principal sum of TWO MILLION AND NO/100 (\$2,000,000.00) DOLLARS, or so much thereof as may be advanced to the undersigned" (emphasis added) (quoting note)). Unlike the present case, in *Hipp* the sum was uncertain on the face of the note, and there was no description of how interest accrual would be calculated or stated on the face of the note.

<sup>9</sup> Former section 3-104(1)(b) recognized that a "sum certain" was being paid even if the note provided that it could be paid "with a stated discount or addition if paid before or after the date fixed for payment." Respondents have found no case law or other authority suggesting that the outcome is different when the language employed is "fixed amount" of money.

<sup>10</sup> *Anderson v. Hoard*, 63 Wn.2d 290, 387 P.2d 73 (1963).

<sup>11</sup> In the early 1990's, to reflect modern banking practices, many states, including Washington, amended their UCC statutes to recognize variable interest rate notes.



credit); *Bank of Am., N.A. v Alta Logistics, Inc.* 2015 WL 505373 at \*3 (Tex. App. Feb. 6, 2015) (note was revolving line of credit); *Cobb Bank & Trust Co. v. American Mfr's. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978) (addressing bond given as guaranty); *Wattles v Agelastos* 183 N.W. 2nd 906 (1970) (memorandum agreement analyzed under older UCC negotiability rules).

**B. There Is No Requirement That A Note Disclose The Current Principal Balance On Its Face**

Nevertheless, Bucci argues that the current outstanding note balance will change as interest accrues, and payments are made or not made, and that the rules of negotiability are violated because the *current balance* of the note cannot be found on the face of the note.

As explained in the following sections, this argument fails for multiple reasons. First, the rules of negotiability do not require that the *current balance* of a note must be found on the face of the note, as Bucci argues. Negotiability requires that a promise to pay a fixed amount appear on the face of the note. Bucci's note provided that Bucci will pay the fixed amount of "\$1,530,000."

Second, negative amortization is a form of interest rate and accrual, and under RCW 62A.3-112(b), "[i]nterest may be stated in an instrument as a fixed or variable amount of money or it may be expressed

as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument.” (Emphasis added.)

Negative amortization may change the *subsequent current* balance of a note if the borrower chooses not to pay all interest accrued in a particular month. But the *subsequent current* principal balance of a note always changes – that is true of every note upon which payments are made, or not made, and interest accrues.

Bucci’s argument, that a *subsequent* principal balance cannot increase and must be found on the face of the note, is not supported by any legal authority.<sup>12</sup> A principal balance that may increase as a result of negative amortization of interest does not render a note non-negotiable. Bucci submitted no cases, from Washington or elsewhere, holding otherwise.

### **C. The Face Of The Note Fully Discloses The Note’s Transferee’s Rights, Duties, And Obligations**

Bucci’s argument does not follow from the modern U.C.C. rules. Bucci’s reliance upon an outdated 1963 case, *Hoard, supra*, dealing with

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<sup>12</sup> Under Bucci’s theory, every note would lose its negotiable status once a payment of principal is made, because the current balance changes due to payments, and cannot be found on the face of the note. No court has adopted this reasoning, which demonstrates the fallacy of Bucci’s theory.

payment of taxes, insurance, and other like charges under an earlier version of the U.C.C. repealed in 1965, is misplaced. Under the modern U.C.C. provisions, such “other charges” can be described in the instrument without destroying negotiability. RCW 62A.3-104(a).<sup>13</sup>

The courts apply a version of the “four corners” or “face of the note” rule to determine negotiability from the face of the instrument, although that rule has been changed to comport with modern commercial practices.<sup>14</sup>

In general, and as expanded under the modern U.C.C., “[n]egotiability is determined from the face, the four-corners, of the instrument without reference to extrinsic facts.” *Holsonback v. First State Bank of Albertville*, 394 So. 2d 381, 383 (Ala. Civ. App. 1980), *cert.*

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<sup>13</sup> As is plain from this language, the inclusion of “other charges” in the note does not affect negotiability because they are described in the note. *Hoard* is not applicable.

<sup>14</sup> If the intent of the Code was to aid in the continued expansion of commercial practices, then common sense would tell us that when faced with a widespread commercial practice, such as in the present case, this court should acknowledge it.

“The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the function of negotiable instruments in the judgment of business men ought not to be regarded by the courts. . . . The whole question is, do [the provisions] render the instruments so uncertain as to destroy their fitness to pass current in the business world?”

*Goss v. Trinity Sav. & Loan Ass’n*, 813 P.2d 492, 498 (Okla. 1991) (ellipsis and brackets in original) (quoting *Taylor v. Roeder*, 360 S.E.2d 191, 196 (Va. 1987) (Compton, J., dissenting)).

*denied*, 394 So. 2d 384 (Ala. 1981).<sup>15</sup> This rule, which is reflected throughout the U.C.C. negotiability provisions and the related comments, follows from the purpose and policy behind the concept of a negotiable instrument.<sup>16</sup>

A recent Washington case demonstrates this approach. *See Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 397, 317 P.3d 1103 (2014) (“We analyze the promissory notes’ contents to determine whether the notes’ holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any

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<sup>15</sup> RCWA 62A.3-106 cmt. 1 states,

“The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment.” And an instrument can retain its negotiability when it merely refers to the existence of another writing and does not require reference to the other writing as to whether or when payment is due. 6B Lary Lawrence, *Anderson on the Uniform Commercial Code* § 3-106:14R (3d ed. 2003).

*Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 397 n.1, 317 P.3d 1103 (2014).

<sup>16</sup> The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of notes and instruments requires that a transferee be able to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language in the note itself.

*First State Bank at Gallup v. Clark*, 570 P.2d 1144, 1147 (N.M. 1977). Whether an instrument is negotiable is a question of law to be determined by the court. *See N. Bank v. Pefferoni Pizza Co.*, 562 N.W.2d 374, 376 (Neb. 1997); *Cartwright v. MBank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App. 1993); 5A David Frisch, *Lawrence’s Anderson on the Uniform Commercial Code* § 3-101:48, Westlaw (3d ed., database updated Dec. 2016).

other documents.” (citing RCWA 62A.3-106 cmt. 1)). Notably, the rights, duties, and obligations of the transferee – not the current balance – must be found on the face of the note.

Bucci submits no case holding that the holder of a negotiable note must be able to determine the current principal balance of a note at points in time subsequent to the issuance of the note. Instead, the negotiability “face of the note” rule focuses on whether the transferee can determine from the face of the note the “*rights, duties, and obligations* with respect to the payment on the notes” (*id.* (emphasis added)), not the *current* principal balance. Bucci’s note is negotiable because it sets forth the parties’ rights, duties, and obligations on the face of the note and because “[t]he amount or rate of interest may be stated or described in the instrument in any manner.” RCW 62A.3-112(b).

A further example of this principle is reflected in Official Comment 1 to U.C.C. § 3-106:

Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment. A statement of rights and obligations concerning collateral, prepayment, or acceleration does not prevent the note from being an instrument if the statement is in the note itself. See Section 3-104(a)(3) and Section 3-108(b).

(Emphasis added.)

Negative amortization is a function of interest rate and amount provisions that, consistent with the “face of the note” rule, are fully disclosed in Bucci’s note. Bucci’s note fully discloses, in detail, how interest accrual may result in negative amortization, depending on the amount Bucci chooses to make as a monthly payment.<sup>17</sup> Negative amortization will occur only if Bucci chooses not to pay the full amount of interest due each month and only if the monthly payment is insufficient to cover the accrued interest. Bucci’s note provides for a monthly payment, but Bucci is not limited to paying only the “monthly” payment. The note expressly permits Bucci to make prepayments of principal. CP 220, Ex. A at Section 5.<sup>18</sup>

In accordance with the negotiability rules set out above, the amount and rates of interest, including the potential for negative amortization, are set forth in detail on Bucci’s note. Bucci’s argument

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<sup>17</sup> The provisions of Bucci’s note for the accrual and payment of variable amounts of interest and interest rates, some of which may, under specified circumstances as stated on the face of the instrument, be recharacterized as principal up to a maximum limit, are disclosed and set out in detail on the face of the note.

<sup>18</sup> The courts have recognized that prepayment terms in notes do not destroy negotiability, because prepayment is voluntary. *Cf. HSBC Bank USA, Nat’l Ass’n v. Gouda*, No. F-20201-07, 2010 WL 5128666, at \*3 (N.J. Super. Ct. App. Div. Dec. 17, 2010) (“Quite the opposite, the right of prepayment is a voluntary option that [borrowers] may elect to exercise solely at their discretion. Indeed, such an allowance confers a benefit, not a burden, upon [borrowers], who can freely choose to decline the opportunity.”); *In re Steinberg*, 498 B.R. 391 (table), 2013 WL 2351797, at \*4 & n.34 (B.A.P. 10th Cir. 2013) (unpublished opinion) (prepayment voluntary).

therefore fails because Bucci's note states a fixed amount, and the interest rate and accrual is fully described on the face of the instrument.

In sum, the Court of Appeals ruled correctly under the applicable U.C.C. negotiability rules. Bucci's note is negotiable. Bucci's "predatory lending" negative amortization argument, which was not before the courts below, would be addressed by RCW 19.144.050, not by the U.C.C. negotiability rules.

**D. The Original Note And Deed Of Trust Are Non-Hearsay And Self-Authenticating, And Establish A Prima Facie Case For The Note Holder**

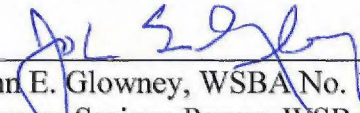
Because Bucci failed to challenge the originality of the note as required by the U.C.C., and because Respondents produced the original note at the summary judgment hearing in this case, Bucci failed to raise any issue regarding Respondents' possession of Bucci's original note or their authority to proceed to enforce the note. *See* Respondents' Appellate Brief pp. 3-10. Bucci fails to identify any issue requiring further review by this Court.

**E. Conclusion**

The Court of Appeals applied established law in its ruling. Bucci identifies no issues requiring or meriting review by this Court. Respondents respectfully request that Bucci's petition be denied.

Respectfully submitted this 3rd day of April 2017.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that I caused **RESPONDENTS USB AS TRUSTEE AND SPS ANSWER TO PETITION FOR REVIEW**, to be filed with the Court of Appeals (original and one copy); and caused a true and correct copy of same to be served upon the party listed below by email/pdf and via U.S. Mail:

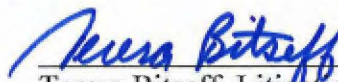
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