No. 96032-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KRISTIN BAIN,

Petitioner,

v.

METROPOLITAN MORTGAGE GROUP, INC., et al.,

Respondents.

ANSWER OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., TO KRISTIN BAIN'S PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should deny Kristin Bain's over-length petition for review. Bain complains about steps taken by other parties to foreclose on her property. But the trial court properly dismissed all claims against Mortgage Electronic Registration Systems, Inc. ("MERS") because MERS did not foreclose on Bain's property (or even attempt to foreclose). To the contrary, all MERS did was assign its nominee interest in Bain's deed of trust before other parties began to foreclose. The MERS assignment admittedly contained an inconsequential scrivener's error. But the Court of Appeals affirmed because MERS did not cause injury to Bain's business or property, given its limited pre-foreclosure role, and given Bain's admission that she never saw the allegedly deceptive assignment.

Neither court announced any new principle of law or disagreed with prior decisions. Both the trial court and the Court of Appeals properly applied governing precedents, including this Court's decision in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). It was Bain's burden to show MERS had any "causal role," and this Court noted it was unclear whether Bain could "show any injury" because "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Id*. at 119-20. The undisputed facts developed on summary judgment showed Bain was not confused about the identity of her loan servicer. She defaulted for reasons having nothing to do with MERS, and nothing that MERS did caused her any injury.

The Court should deny Bain's petition for the following reasons:

First, the decision of the Court of Appeals does not conflict with any decision of this Court, or any other decision of the Court of Appeals. Bain does not even attempt to identify such a conflict beyond simply stating, without support, that one exists.

Second, both the trial court and the Court of Appeals properly applied existing law in determining that MERS did not cause any injury to Bain's business or property. MERS was named as the beneficiary of Bain's deed of trust, but MERS assigned away any interest it had before the commencement of a non-judicial foreclosure by other parties. MERS did not foreclose or attempt to foreclose on Bain's property. MERS did not deceive Bain or prevent her from negotiating with her lender.

Third, both the trial court and the Court of Appeals properly applied existing law when they determined Bain had not sustained any injury. In deposition, Bain admitted her only identifiable injury consisted of the costs of filing this action, but Bain also conceded that she commenced this action as leverage to compel her lender to modify the terms of her loan, not because of any unfair or deceptive act or practice.

II. ANSWERING PARTY'S IDENTITY

MERS is a respondent, an appellee, and a defendant in this case.

III. STATEMENT OF THE CASE

A. Bain borrowed money from IndyMac in a loan secured by her property.

Bain borrowed $193,000 from IndyMac Bank FSB and promised to repay the loan by executing a promissory note (the "Note"). CP 128-29, 255-60. Bain knew IndyMac was her lender and that she needed to pay IndyMac (not MERS) to avoid defaulting on her loan. CP 134, 176-77, 179, 191-92. MERS did not loan money to Bain or seek to collect any money Bain owed. CP 134, 176-77, 179, 191-92, 195-96, 204.

To secure the Note, Bain executed a deed of trust (the "Deed of Trust") providing that if she defaulted on her loan, the lender could sell the property. CP 128-30, 273 ¶ 22. The Deed of Trust explained that IndyMac was the lender and had designated MERS to serve as the beneficiary of the Deed of Trust, but only as nominee (agent) for the lender (IndyMac) and the lender's successors and assigns. CP 264.

B. IndyMac sold Bain's Note, as Bain agreed it could.

In June 2007, IndyMac sold Bain's Note to Deutsche Bank National Trust Company, which purchased the Note in its capacity as the trustee for the beneficiaries of a trust known as the Home Equity Mortgage Loan Asset-Backed Trust, Series INABS 2007-B. CP 302-303; Huelsman Appellate Decl. Bain003514-15. Deutsche Bank owned the Note and acted as custodian, storing Bain's Note in a secure vault. *Id.* Bain's loan documents disclosed that the lender could sell the Note without notice to her. CP 255, 262, 272 ¶ 20.

Although Deutsche Bank owned the Note and was its custodian, Deutsche Bank itself did not deal directly with Bain. CP 208-09. Instead, Deutsche Bank appointed IndyMac as the servicer to handle day-to-day interactions with borrowers. CP 338-43. In a Pooling and Servicing Agreement governing the trust, Deutsche Bank authorized IndyMac to execute instruments on its behalf, to register any mortgage loan with the MERS® System for Deutsche Bank, to execute assignments and other comparable instruments in the name of MERS (as nominee), and to foreclose. CP 338-43 §§ 3.01, 3.06, 3.12.

MERS itself had contracts with Deutsche Bank and IndyMac governing the parties' relationships and establishing the contours of its agency authority. *See* CP 396-97, 400, 404-05. The officers signing documents on behalf of MERS acted within the scope of their authority. *See Bain v. Metro. Mortg. Grp. Inc.*, 2010 WL 891585, at *5-6 (W.D. Wash. 2010) ("for purposes of signing these papers, [Defendant] misrepresented nothing. … The employees' use of the titles was expressly authorized by contracts with IndyMac and MERS.").

C. MERS assigned away its Deed of Trust interest.

Before IndyMac commenced a non-judicial foreclosure, IndyMac instructed MERS to execute an assignment of MERS's nominee interest in the Deed of Trust back to IndyMac, thereby terminating MERS's role as a nominee for IndyMac and its successors or assigns.[1] CP 32-33, 293-94,

[1] IndyMac failed in 2008, and the Federal Deposit Insurance Corporation ("FDIC") took it into receivership, creating IndyMac Federal Bank, FSB, which assumed IndyMac's servicing rights and obligations. *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83

418-19. The assignment admittedly contains a scrivener's error, but that error had no effect on Bain. Instead of explaining that MERS was assigning its interest as nominee for "the Lender and" its successors and assigns, the assignment omits the reference to "the Lender," suggesting (incorrectly) that MERS was acting as beneficiary on behalf of itself (rather than as a nominee for the holder of the Note). CP 32-33. This omitted language had no effect on Bain because she never saw the assignment before her 2012 deposition in this case (after remand from this Court). CP 195.

D. Bain defaulted on her Note in May 2008.

Bain breached her obligations under the Note in May 2008. CP 150, 192, 230-31, 283-86. Bain concedes MERS did not cause her default. CP 243. Bain knew she needed to pay IndyMac and no one else to prevent foreclosure. CP 152-54, 191-92, 194-95. Bain admits she had the means to cure her default but chose not to do so in hopes of strong-arming a lower payment. CP 155-57, 202. She was not confused about whom to pay, who her lender was, or about the default. CP 147-48, 191-92.

Because of her default, Indy Mac (acting through an agent) delivered a notice of default on August 26, 2008, which Bain admits receiving. CP 147, 277-81. Bain understood she received the notice of

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(2012). The FDIC had the power to sell and assign Indy Mac's assets and contract rights through the receivership, which it did by transferring rights to IndyMac Federal Bank. 12 U.S.C. § 1821(d)(2); *see also Sahni v. Am. Diversified Partners*, 83 F.3d 1054, 1058 (9th Cir. 1996). In March 2009, OneWest Bank, FSB purchased certain former IndyMac assets and assumed certain obligations, including the obligation to service Bain's loan for Deutsche Bank. *See* Huelsman Appellate Decl. Bain003008.

default because she had defaulted on her loan to IndyMac; she was not confused about whom she should pay and did not think she owed MERS anything. CP 147-49.

E. IndyMac, not MERS, appointed Regional Trustee Services Corporation ("RTS") to serve as trustee under the Deed of Trust, and RTS (not MERS), commenced a foreclosure.

On September 8, 2008—after MERS's role had ended—IndyMac (not MERS) replaced the original trustee under the Deed of Trust with Regional Trustee Services Corporation ("RTS"). CP 296-97.[2] IndyMac had authority to appoint RTS because IndyMac was an agent and attorney-in-fact for Deutsche Bank under the Pooling and Servicing Agreement and under a limited power of attorney expressly authorizing IndyMac to make such appointments. CP 32-33, 35-36, 338-43, 345-60. After IndyMac appointed RTS as trustee under the Deed of Trust, RTS (not MERS) issued and recorded a notice of sale on September 25, 2008, scheduling a sale for December 26, 2008. CP 160, 283-86. RTS never completed the non-judicial foreclosure because Bain filed this lawsuit to compel her lender to amend the terms of her loan. CP 201-02, 299-336.

F. Bain admitted MERS did not cause her any injury.

When she was finally deposed in late 2012, Bain admitted she did not know how MERS injured her, other than alleging that MERS made an unspecified misrepresentation of some sort. CP 236. But Bain admits that

[2] Most likely due to the incomplete records available to it when it was answering certified questions of law, the Court's prior opinion suggested MERS appointed RTS as trustee under the Deed of Trust. *Bain*, 175 Wn.2d at 89. The appointment itself shows IndyMac, not MERS, appointed RTS as trustee under the Deed of Trust. *Bain*, 175 Wn.2d at 90; CP 35-36. Bain does not argue MERS appointed RTS as trustee.

she never relied on any advice or statement from MERS. CP 234-35. MERS did not originate Bain's loan. CP 129, 134, 176-177, 179, 191-92, 195-96, 204, 255-60. MERS did not service Bain's loan. CP 130-31, 134, 152, 287-91. MERS did not correspond with Bain about her loan. CP 195, 196-97, 214-15, 232, 235, 239-240. Bain has never spoken with anyone at or received any communication from MERS. CP 195, 196-97, 214-15, 232, 235, 239-40.

MERS also took no action that injured Bain's business or property. MERS did not have "anything to do" with Bain's default. CP 242-43. MERS did not prevent Bain from contacting IndyMac to work out a loan modification to address her default. CP 214-15. MERS did not attempt to foreclose on Bain's property. CP 233-34. MERS's role ended on September 3, 2008, a full three weeks before RTS commenced the foreclosure by recording a notice of sale. CP 32-33.

Bain did not even incur fees or costs due to MERS's actions. CP 192, 230-31. Bain admitted she never saw the flawed MERS assignment before her 2012 deposition and did not take any action based on the assignment. CP 195. After her default, Bain expended no resources investigating MERS's role, although she did hire a lawyer to file this lawsuit in an effort to procure a loan modification. CP 156, 241.

G. Defendants removed the case to federal court, which dismissed several claims.

After Bain filed this case, defendants removed the action to the U.S. District Court for the Western District of Washington. The federal

district court issued two opinions that act as law of the case and, read together, dismissed all claims against MERS except for Bain's claim under Washington's Consumer Protection Act (the "CPA"). *Bain*, 2010 WL 891585, at *5-6 (it was not unfair or deceptive for MERS or IndyMac to give LPS employees the authority as signing officers to execute documents on behalf of MERS or IndyMac); *Bain v. Onewest Bank FSB*, 2011 WL 917385, at *3-6 (W.D. Wash. 2011) (dismissing, with prejudice, Bain's claims for emotional distress and breach of fiduciary or quasi-fiduciary duties against MERS).

H. The federal district court certified three questions to this Court.

The federal district court asked this Court three legal questions: (a) whether MERS could act as beneficiary of a deed of trust (in its own right) if MERS was not the noteholder; (b) what the legal effect of MERS's actions might be if it took actions only a beneficiary can take; and (c) whether a borrower can assert a claim against MERS under the CPA if MERS took actions only a beneficiary can take. *See Bain*, 175 Wn.2d at 91. Throughout the case, MERS did not argue that it was the holder of the Note; MERS simply held a nominee interest in the Deed of Trust. *See Bain*, 175 Wn.2d at 89.

This Court answered that under RCW 61.24.005(2), MERS was not a valid beneficiary in its own right (rather than as an agent), unless MERS was entitled to enforce the note secured by the deed of trust. *Id.* at 109-10. It also held that, on the limited record before it, it could not

determine the legal effects of MERS taking actions as if it were beneficiary in its own right (rather than as an agent). *Id.* at 110-11. Addressing the CPA claim, this Court held that, "[d]epending on the facts of a particular case," a borrower might show injury if MERS took some action as beneficiary that prevented the borrower from knowing who to deal with to resolve questions about who owns the loan, loan modifications, loan-servicing questions, or whom to sue. *Bain*, 175 Wn.2d at 118-19. But the Court also noted that "it is unclear whether the plaintiffs [in *Bain* and the companion *Selkowitz* case] can show any injury," it was unclear whether MERS had any "causal role," and "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Id.* at 119-20. After this Court returned those answers, the federal district court remanded the case to King County Superior Court, as there were no federal claims remaining.

I. After remand to the trial court, discovery revealed MERS did not injure Bain.

MERS took Bain's deposition in late 2012, and her answers revealed crucial deficiencies in her claims based on facts that were not available to this Court when it was answering certified questions of law. For example, Bain admitted she had never even seen the allegedly deceptive assignment executed by MERS. CP 195. Bain also admitted she could identify no colorable injury to her business or property apart from legal costs associated with the commencement of this action. CP 143, 156,

192, 241. Bain has never spoken with anyone at or received any communication from MERS. CP 195, 196-97, 214-15, 232, 235, 239-40.

MERS moved for summary judgment because Bain had no injuries, let alone any injury caused by MERS. The trial court—on a complete record, which this Court lacked—granted summary judgment to MERS. RP 41:14-18.[3] Bain appealed, and when the Court of Appeals affirmed the judgment for MERS, she filed this petition for review.

IV. ARGUMENT

A. The opinion of the Court of Appeals does not conflict with another opinion of the Court of Appeals or any opinion of this Court.

This Court should deny Bain's petition for review because the decision of the Court of Appeals is consistent with existing law. Under Rule of Appellate Procedure 13.4(b)(1), (2) and (4), this Court accepts a petition for review only if a decision conflicts with decisions of this Court or another decision by the Court of Appeals. RAP 13.4; *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 125 (1993). Bain seeks review because the Court of Appeals' opinion supposedly conflicts with existing law, and for no other reason. But Bain does not identify any decision from the Court or

[3] Similarly, after remand in the companion *Selkowitz* case (certified with *Bain* to this Court), the trial court granted summary judgment to MERS on the CPA claim, even though MERS appointed a successor trustee in that case, because MERS's appointment did not have the capacity to injure anyone: "[T]here really was no injury even alleged that flowed from anything that MERS did." *Selkowitz v. Litton Loan Servicing, LP*, 2014 WL 3953195, at *2 (Wash. Super. Ct. 2014). The Court of Appeals affirmed, and this Court denied review. *Selkowitz v. Litton Loan Servicing LP*, 191 Wn. App. 1025 (2015), *review den.* 185 Wn.2d 1037 (2016).

the Court of Appeals that conflicts with the opinion here. She argues that the opinion was wrong, but that is not a "conflict" under Rule 13.4.

B. MERS did not cause Bain injury.

MERS did not cause injury to Bain's business or property because it did not foreclose or attempt to foreclose. Washington's Consumer Protection Act requires evidence that Bain suffered an injury that MERS caused. *See Guijose v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001). Bain must show that but for MERS's actions, she would not have suffered an injury. *Indoor Billboard v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84 (2007). MERS was involved in this loan in only two ways: It was named as the beneficiary of the original Deed of Trust as a nominee for the lender and its successors and assigns; and MERS assigned any interest it had in the Deed of Trust to IndyMac. Bain admitted MERS did not foreclose and had nothing to do with her default. CP 233, 243. As both the trial court and the Court of Appeals determined, MERS's two actions could not, as a matter of law, have caused her injury.

1. MERS is not liable for being named as the beneficiary of Bain's Deed of Trust.

As this Court held, "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Bain*, 175 Wn.2d at 120; *see also Barkley v. Greenpoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 69 (2015). That decision is consistent with years of precedents. By statute, regulation, and at common law, Washington has recognized that parties may use nominees as limited agents to hold title for them. *See, e.g.*,

RCW 11.98.070(8) (trustee may hold "property in the name of a nominee or nominees without mention of the trust relationship"); RCW 30A.08.170 (trust company or national bank may hold property through "nominee"); WAC 458-61A-214 ("A 'nominee' is a person who acts as an agent on behalf of another person in the purchase of real property."); *Carr v. Cohn*, 44 Wash. 586, 588 (1906) (nominee can bring quiet-title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36 (1923) (agent could prosecute foreclosure); *Fid. Tr. Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same); *Anderson Buick Co. v. Cook*, 7 Wn.2d 632, 641-42 (1941) (mortgage is valid even if named mortgagee "held the bare legal title" for real party in interest). MERS is not liable simply because it was designated as the nominee beneficiary of the Deed of Trust, as Bain now suggests.

2. MERS is not liable for assigning its interest in the Deed of Trust to IndyMac.

MERS is not liable for assigning away any interest it had in the Deed of Trust before IndyMac commenced a non-judicial foreclosure by transmitting a notice of sale. There is no reason why MERS could not surrender any interest it had to IndyMac through an assignment. *See, e.g.*, *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 842 (2015), *review den.* 184 Wn.2d 1011 (2015) (MERS "terminated its agency interest when it assigned its nominee interest in the deed of trust back to its principal, U.S. Bank as trustee"); *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 230-33 (2016) (affirming dismissal of CPA claims

and holding that "McAfee raises no genuine issue of material fact supporting an allegation that MERS's assignment of the deed to Wells Fargo was unlawful or ineffective under the DTA."). MERS could not and did not injure Bain by executing the assignment, which is consistent with other decisions of the Court of Appeals in similar cases.

> Thus, MERS's characterization in the assignment of deed of trust did not cause any injury that Bavand has identified. OneWest's authority to enforce the note and deed of trust arose by operation of law due to the bank's status as holder of the delinquent note. The purported assignment of a nonexistent beneficial interest in Bavand's deed of trust is immaterial. Therefore, Bavand fails to satisfy the "but for" test to show causation.

Bavand v. Onewest Bank, FSB, 196 Wn. App. 813, 843 (2016).

The assignment could not have caused injury to Bain. She never even saw the assignment executed by MERS before her 2012 deposition in this case—four years after she filed this action. CP 194-95. She admitted she did not see or rely on the assignment in taking any actions. CP 238. The assignment did not cause her to default. MERS signed the assignment after she defaulted, and she admitted her default was caused by a decrease in pay from voluntarily reducing her work hours. CP 32-33, 135, 137-41. Bain hired an attorney to negotiate a loan modification, not to investigate the beneficiary or MERS's involvement. CP 157-58.

3. MERS did not participate in the foreclosure.

MERS did not foreclose or attempt to foreclose on Bain's property. IndyMac (not MERS) substituted RTS as the new trustee under the Deed

of Trust. CP 296-97. RTS (not MERS) issued a notice of default and a notice of sale. CP 160, 277-86. "This is not a case in which MERS itself is seeking to foreclose; a separate bank, OneWest, was assigned the deed of trust and is pursuing foreclosure." *Onewest Bank, FSB v. Erickson*, 185 Wn.2d 43, 73-74 (2016). MERS could not have caused Bain any injury in connection with the foreclosure. *Zalac v. CTX Mortg. Corp*., 628 F. App'x 522, 522-23 (9th Cir. 2016) (unpublished) ("[A]lthough MERS was named as the initial beneficiary in the deed of trust, it had no connection to the foreclosure proceedings and can thus play no role in the causation of any of Zalac's purported damages.").

MERS did not sign any foreclosure documents. CP 35-36, 277-86. RTS or IndyMac signed them all. CP 160, 277-86, 296-97. Nor did the execution of the assignment cause the foreclosure. As Bain concedes (Bain Pet. at 6), IndyMac did not need the assignment from MERS because IndyMac was already an agent for the holder of the Note. CP 299-336, 338-43, 345-60; *see also Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011); *Blair v. Nw. Tr. Servs., Inc*., 193 Wn. App. 18, 39 (2016), *as am. on den. of recons.* (May 12, 2016), *review den.* 186 Wn.2d 1019 (2016); *McAfee*, 193 Wn. App. at 231; *Barkley*, 190 Wn. App. at 69; *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 536 (2015); *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 168 (2016), *review den.* 185 Wn.2d 1037 (2016); *John Davis & Co. v. Cedar Glen No. Four, Inc*., 75 Wn.2d 214, 222–23 (1969).

4. Bain knew she needed to pay and negotiate with IndyMac, not MERS.

MERS did not prevent Bain from negotiating with her lender. IndyMac was an agent and attorney-in-fact for Deutsche Bank, the holder of the Note. CP 208-09, 338-43, 345-60. Bain knew she needed to pay IndyMac to avoid defaulting on her loan. CP 134, 176-77, 179, 191-92, 194-95. She was not confused about whom to pay, who she should contact to negotiate the loan, and conceded MERS "had nothing to do with this." CP 147-48, 191-92. She admits that she never relied on any advice, statement, or correspondence from MERS because it never communicated with her. CP 95, 195, 196-97, 214-15, 232, 234-35, 239-40. Bain had the means to cure her loan default but chose not to do so in hopes of compelling her lender to offer her a lower payment. CP 155-57, 202. She knew she needed to negotiate with IndyMac. CP 134, 176-77, 179, 191-92, 194-95. And, in fact, she did—she contacted IndyMac once about her default and options before it issued a notice of default, but she voluntarily stopped any negotiation. CP 153:22-154:14.

C. This Court should not accept review because Bain sustained no injury.

Bain suffered no injury. Washington's Consumer Protection Act (the "CPA") requires evidence that Bain sustained an injury to her business or property. *See Guijose*, 144 Wn.2d at 917. Bain's allegations of emotional distress do not qualify as injury under the CPA. Bain hired an attorney to seek a loan modification and to file this action based on the conduct of the foreclosing parties, not because of MERS, and the

foreclosure (which MERS did not participate in) complied with the deadlines in Washington's Deed of Trust Act.

1. Emotional distress is not an injury under the CPA.

Bain cannot recover for stress under the CPA because the CPA requires evidence of injury to business or property. "Personal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement. Thus, damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 57 (2009). *Lyons* didn't change that rule. *See Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 786 n.4 (2014) ("emotional distress, embarrassment, and inconvenience are excluded" from injury under the CPA). Bain alleges she suffered stress and mental anguish (Bain Pet. at 11), but those are not injuries to business and property, and they arise from her default, not anything MERS did.

2. Bain cannot recover fees and costs spent pursuing her CPA claims.

Bain cannot recover for fees, costs, or time spent in pursuing her CPA claims. The CPA requires evidence of an actual injury, distinct from attorneys' fees incurred pursuing a lawsuit. Accordingly, while investigation expenses "and other costs resulting from a deceptive business practice" can be an injury, the cost of "consulting an attorney to institute a CPA claim" is not an injury. *See Panag*, 166 Wn.2d at 62 (the cost of consulting an attorney to institute a CPA claim is "insufficient to

show injury to business or property."); *see also Demopolis v. Galvin*, 57 Wn. App. 47, 54 (1990).

In *Demopolis*, the Court of Appeals held that a plaintiff who borrowed money at a high interest rate failed to meet the CPA's injury requirement, even though the underlying loan agreement was allegedly usurious, because the plaintiff had not actually paid any usurious interest and so had suffered no injury. This Court cited *Demopolis* with approval when it observed that the cost of consulting an attorney to institute a CPA claim is "insufficient to show injury to business or property." *Panag*, 166 Wn.2d at 62.

Bain admits that after her default she expended no resources investigating MERS's role, other than hiring a lawyer to file a lawsuit to stop the foreclosure initiated by other defendants. CP 156-57. Bain did not incur those costs as a result of any act or omission of MERS because nothing MERS did caused Bain to bring this suit. CP 155-57, 201-02, 241. Bain had the power to cure her default when it first occurred but chose not to in hopes of forcing her lender to accept less than it was owed. CP 201-02. Bain made a conscious decision not to cure her default so she could "fix the loan" through litigation. CP 155-57. Bain was not injured by paying any fees or costs associated with the foreclosure itself. CP 192, 230-31. Bain did not pay those fees or charges or make any other payments on her loan. CP 192, 230-31.

3. The foreclosure was not "accelerated" because it complied with Washington's Deed of Trust Act.

Even if MERS had participated in the foreclosure—and it did not—the foreclosure was not improperly accelerated at all, let alone as a result of something MERS did. Washington's legislature intended for non-judicial foreclosures to be quick and efficient. *See Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 405 (2016), *review den.* 187 Wn.2d 1022 (2017). As the Court of Appeals noted,

> Under RCW 61.24.030(8), the trustee must transmit written notice of default to the grantor by mail and by posting or serving the notice at least 30 days before notice of sale is recorded. The trustee must record the notice of sale at least 90 days before the foreclosure sale.

Bain v. Metro. Mortg. Grp Inc., 2018 WL 2018553, at *3 n.25 (Wn. App. 2018).

The foreclosure met the deadlines set by the Deed of Trust Act. Bain defaulted in May 2008. CP 150, 283-86. IndyMac (acting through RTS) issued a notice of default on August 26, 2008. CP 277-81. RTS recorded a notice of sale on September 25, 2008—exactly 30 days after the notice of default. CP 283-86. RTS scheduled the sale for December 26, 2008, 92 days later. CP 283-86. The foreclosure would have proceeded on that schedule regardless of MERS. CP 160, 283-86, 338-43, 345-60. And as Bain admits (Bain Pet. at 6), the MERS assignment had no bearing on IndyMac or Deutsche Bank's right to foreclose. *See also In re Allen*, 472 B.R. 559, 569 (B.A.P. 9th Cir. 2012) ("an assignment of the DOT is not relevant because under Washington law, the security for an obligation follows the debt.").

Even had Bain received more time, it would not have made a difference. Bain admitted she knew she needed to discuss her default with IndyMac. CP 148-49. She testified she contacted IndyMac once about her loan before it gave notice of her default, but she did not try to contact anyone thereafter. CP 153:22-154:14. Bain had almost three months to cure her default before IndyMac and RTS commenced foreclosure. Notably, she does not provide any facts (or even argument) as to what a "slower" foreclosure looks like, or why this Court should change the deadlines set by the legislature in the Deed of Trust Act.

V. CONCLUSION AND REQUEST FOR COSTS

For the foregoing reasons, this Court should deny Bain's petition for review. The Court should award also MERS its costs in connection with Bain's petition for review under RAP 18.1(j).

RESPECTFULLY SUBMITTED this 7th day of August, 2018.

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By /s/ Hugh McCullough
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CERTIFICATE OF SERVICE

On this date, I caused to be served a copy of the ANSWER OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., TO KRISTIN BAIN'S PETITION FOR REVIEW via E-file notification on the following:

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Dated this 7th day of August, 2018, in Seattle, Washington.

s/ Hugh McCullough
Hugh McCullough

DAVIS WRIGHT TREMAINE LLP

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