Supreme Court No. 921431

(Court of Appeals No. 71402-3-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VALMARI RENATA,

Petitioner/Plaintiff,

v.

FLAGSTAR BANK, F.S.B., et al.,

Respondents/Defendants.

ANSWER OF FLAGSTAR BANK, F.S.B. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Flagstar Bank, F.S.B. ("Flagstar") and Mortgage Electronic Registration Systems, Inc. ("MERS") are Respondents in the appeal and Defendants in the trial court action.

II. SUMMARY OF GROUNDS FOR DENYING REVIEW

This Court should deny Ms. Valmari Renata's Petition for Review. The Court of Appeals correctly affirmed the trial court's decision to grant summary judgment in favor of Flagstar and MERS on Renata's claims. Renata's Petition for Review merely quibbles with the Court of Appeals' decision, advancing the same erroneous arguments that the Court of Appeals erred by affirming the trial court's decision. Her conviction that the Court of Appeals got it wrong falls far short of showing that its decision: (i) conflicts with a decision of the Supreme Court, RAP 13.4(b)(1); (ii) involves an issue of substantial public interest that should be determined by this Court, RAP 13.4(b)(4); or (iii) conflicts with another Court of Appeals decision, RAP 13.4(b)(2). This Court should deny her Petition for Review for the following reasons:

First, the Court of Appeals properly applied this Court's precedents in holding Flagstar was Note holder, and there are no conflicting Court of Appeals decisions.

Second, the trial court properly admitted the Morgan Declaration.

Third, the Court of Appeals correctly considered whether the Note indorsement was forged, finding that even if it were, Capital ratified it.

Fourth, the trial court properly refused to continue the summary judgment hearing because she did not meet the standard for doing so.

Fifth, Renata has not petitioned for review, and thus has not preserved the right to appeal the granting of summary judgment of her CPA claims against Flagstar and MERS.

Sixth, there is no public policy or other reasons why the Supreme Court should accept review. Renata does not have a genuine grievance, much less one affecting the public interest.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

Capital Brokers Renata's Loan from Flagstar. In July 2006, Renata retained Capital to act as a mortgage broker to find her a loan to buy a home. Clerk's Papers ("CP") 477. Capital had entered into a Wholesale Lending Broker Agreement ("Broker Agreement") with Flagstar, under which Flagstar funded loans Capital brought to Flagstar—so long as the loan documentation met Flagstar's underwriting standards—and Capital agreed to immediately indorse and deliver the promissory Note to Flagstar. CP 463-475. Capital thus "table funded" the loan with funds from Flagstar, whereby Capital closed the loan in its own name, but was acting as an intermediary for the true creditor, Flagstar, which assumed the financial risk of the transaction. On August 4, 2006, Capital submitted the loan to Flagstar for underwriting review, and submitted a "Table Funding Request" to Flagstar. CP 458, 479. The Closing Instructions explained Flagstar would fund the loan, but required Capital to indorse the promissory note (the "Note") as follows: "Pay to the Order of Flagstar Bank, FSB, Without Recourse, Capital Mortgage Corporation, By: ____, Its _____." CP 485-88.

Renata's Note. On August 7, 2006, Renata borrowed $200,800, in a loan funded by Flagstar but in the name of Capital. CP 485-492. Indeed, the HUD-1 Settlement Statement Renata executed at closing lists Flagstar as lender. CP 490-492. Consistent with the Closing Instructions, the Note bears an indorsement to Flagstar (and then a Flagstar indorsement in blank on the back side of page two). *Id.*

Capital's Indorsement and Delivery of the Loan to Flagstar. Consistent with its Broker Agreement with Flagstar, Capital delivered and Flagstar received the original, indorsed Note on August 11, 2006, and Flagstar has held it ever since. CP 459, 494. The record shows Flagstar paid Capital (out of the loan proceeds) for its broker services, as required by the Broker Agreement.[1] Flagstar immediately made an "imaged" copy of the Note for its records on August 11, 2006, and that imaged copy reflects the Capital indorsement to Flagstar, showing the Note was indorsed to Flagstar upon receipt. CP 494.

The Note defined Capital as the initial "Lender" (despite it acting as an intermediary for Flagstar) but required Renata to acknowledge that she "underst[ood] that the Lender may transfer this Note," and 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 496-498. The Note explained that the parties entered into a Deed of Trust the same day,

[1] *See, e.g.*, CP 182-84 (HUD-1 signed by Renata, listing Flagstar as lender, and listing fees paid to Capital at lines 801 & 811); CP 264 (itemization of amount financed, showing Capital paid origination and processing fees); CP 481 (Table Funding Request form, listing Flagstar as funder, listing fees to Capital for Broker and origination services); CP 486-88 (listing broker fees to Capital on closing instructions with wiring instructions from Flagstar).

and that the Note holder would have certain rights upon Renata's default: "In addition to the protections given to the Note holder under this Note, ... a 'Deed of Trust' ... dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make under this Note." *Id*

Renata's Deed of Trust. To secure repayment of the Note, Renata executed a deed of trust (the "Deed of Trust") encumbering real property located in Everett, Washington 98201 (the "Property").

Like the Note, the Deed of Trust explained that Renata's initial "Lender" was Capital, but that Capital or any subsequent Note holder could sell the Note without providing prior notice. This meant Capital (as Note holder) was beneficiary of the Deed of Trust as a matter of law, until it transferred the Note to a new party. *See* RCW 61.24.005(2). Renata and Capital also agreed, however, to label MERS as nominee beneficiary under the Deed of Trust, but ***solely*** as agent for Capital and any successor or assign of Capital. CP 415 ¶ (E). Thus, in the Deed of Trust, MERS was listed as an agent for a disclosed principal (Capital), and the parties agreed MERS would continue to act as an agent for any successor Note holder until that Note holder terminates MERS's agency interest.[2]

[2] The term "beneficiary" under the Deed of Trust is a contractual label (not a legal conclusion), useful for designating MERS as an agent for the Note holder (i.e., the beneficiary as a matter of law), to ensure MERS will get notice of any competing claims recorded against the property; this allows MERS (as agent) to relay that information to its principal (the Note holder), whomever that may eventually be. This Court in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 (2012), recognized that MERS's role is "plainly laid out in the deeds of trust," that there is "no reason to doubt that lenders and their assigns control MERS," and that MERS "certainly" provides "significant benefits," by creating "efficiency," and overcoming "a drawback of the traditional mortgage financing model: lack of liquidity." *Id.*at

Flagstar Sells the Right to Payments on (but not Enforcement of) the Loan. As noted above, the Note was transferred to Flagstar by Capital (indeed Flagstar, funded the loan) immediately after origination in August 2006. CP 459, ¶ 9. In September 2006, Flagstar sold to Freddie Mac an ownership interest in payments due under the Note, but Flagstar at all times held the indorsed Note. *Id.*, ¶ 12. Thus, under a separate agreement with Freddie Mac, Flagstar was obligated to pass on the payments it received to Freddie Mac, but as Note holder, Flagstar at all times had possession of the indorsed Note (and thus the right to enforce the Note, as well as the Deed of Trust securing the Note).

Renata Defaulted on Her Loan in December 2009. Renata defaulted under the Note and Deed of Trust by failing to make payments starting in December 2009—***almost six years ago***. CP 459, ¶ 13. As a result, Flagstar delivered (through its agent) a Notice of Default on July 23, 2010, listing arrears at that point of $15,230.26. CP 460, 501 ¶ D. The Notice of Default explained that failure to cure the default within 30 days would result in recordation of a Notice of Trustee's Sale and a sale of the

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105, 107, 109 (citation omitted). Thus, MERS's beneficiary designation is a matter of routine agency and contractual convenience, not an attempt to contract around Washington law. Indeed, the Deed of Trust discloses Capital as Note holder (and thus beneficiary as a matter of Washington law), and the Deed of Trust explains that to the extent any term in the Deed of Trust conflicts with applicable law, that law controls. CP 39, ¶ (C), 49 ¶ 16. Nothing in the Deed of Trust suggests MERS is claiming that it is Note holder (i.e., beneficiary as a matter of Washington law). *See Bain*, 175 Wn.2d at 106 (recognizing DTA "approves the use of agents" and it is "likely true" that "lenders and their assigns are entitled to name MERS as its agent"). It also worth noting that on remand, on a complete record, MERS obtained summary judgment because the Deed of Trust was not split, MERS did have a principal for whom it acted, and MERS caused no injury. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, 2013 WL 6193887, *5 (Wash. Super. 2013). *See also Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248-49 (2008) (court may consider trial court orders).

property within 120 days. *Id.*, ¶ G. Finally, the Notice of Default explained Flagstar was beneficiary of the Deed of Trust (as Note holder), was Renata's creditor, and was also the loan servicer. CP 502, ¶¶ K, L(2).

MERS Terminates its Nominee Role. On August 16, 2010, MERS—acting as nominee for Flagstar (*i.e.*, the successor and assign of Renata's loan)—assigned its nominee interest in the Deed of Trust back to its principal, Flagstar, thereby terminating MERS's agency interest. CP 428-29.[3] MERS has no employees and takes action through MERS signing officers appointed by MERS as assistant secretaries and vice presidents of MERS, and who are also officers of the MERS® System members who own and service loans associated with MERS deeds of trust.[4] In this case, the assignment was executed by Sharon Morgan, who was a MERS signing officer and also a Flagstar officer. CP 460, ¶¶ 16-19.[5]

Flagstar Appoints a New Trustee and Initiates Foreclosure. Flagstar, as Note holder (and thus beneficiary), recorded its appointment of Northwest Trustee Services, Inc. ("NWTS") as successor trustee. CP 431-32. As required by RCW 61.24.030(7), Flagstar executed and delivered to NWTS a declaration ("Beneficiary Declaration"). CP 460, 507.

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[3] *See, e.g., Jackson v. Quality Loan Serv. Corp. of Wash.*, 186 Wn. App. 838, 842 (2015) ("MERS, acting as the nominee for U.S. Bank as trustee for WMALT 2006–AR4 trust, terminated its agency interest when it assigned its nominee interest in the deed of trust back to its principal, U.S. Bank").

[4] . *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (2011) (explaining MERS's operations).

[5] Contrary to Plaintiff's suggestions otherwise, Pet. at 18, there is nothing improper about having a dual role at more than one entity. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, 2010 WL 891585, *5-*6 (W.D. Wash. 2010) (nothing unfair or deceptive about dual role).

NWTS Schedules a Trustee's Sale. Because Renata did not cure her default, on September 7, 2010, NWTS recorded a Notice of Trustee's Sale ("Notice of Sale") with a sale date of December 10, 2010. CP 434-39. The Notice of Sale listed arrears of $18,574.82. CP 435 § III.

Renata Files for Bankruptcy. The day before the trustee's sale Renata filed a bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington, staying the trustee's sale. CP 1125. Notably, in her bankruptcy petition, Renata acknowledged under penalty of perjury that Flagstar was a secured creditor with a valid lien on the Property (*i.e.*, Flagstar held her note and could enforce the Deed of Trust). CP 445. Renata's bankruptcy was dismissed on April 26, 2011. CP 1125. With the bankruptcy case over, NWTS recorded an Amended Notice of Trustee's Sale on May 3, 2011, setting a new sale date of June 10, 2011. CP 448-52. The foreclosure sale did not occur.

B. Procedural Background

Renata's Complaint. Renata filed her Complaint in June 2011 alleging various claims against Flagstar, MERS, and NWTS. *See* CP 1121-1168. Renata's Complaint, however, does not dispute her default, does not dispute that Flagstar was disclosed to her in the Notice of Default, does not claim any other entity has ever tried to foreclose on her, and does not claim she can reinstate her loan but is afraid of paying the wrong entity. The gravamen of Renata's Complaint is ***not*** that she does not know ***who*** to pay, but that she wants to find some way to ***avoid*** the consequences of default.

Flagstar and MERS's Motion for Summary Judgment. Flagstar and MERS sought summary judgment in November 2013. CP 511-54. The

motion was supported by the declaration of Sharon Morgan, a Flagstar employee and MERS signing officer, who based her testimony on personal review of Flagstar's business records. CP 457-61. Attached to the Declaration were copies of loan documents from Flagstar's loan file, reflecting Flagstar's contracts with Capital the transfer of the loan to Flagstar, the indorsed Note, the HUD-1 Settlement Statement, the Notice of Default, the Beneficiary Declaration, the Corporate Resolution between MERS and Flagstar, and the Assignment of the Deed of Trust. CP 462-510. At the conclusion of the Morgan Declaration, Ms. Morgan identified herself as an Assistant Vice President of Flagstar as well as a MERS signing officer. CP 460, ¶¶ 16, 19. On November 15, 2013, NWTS joined the motion of Flagstar and MERS. CP 407-08.

On December 2, 2013, Renata filed an untimely opposition to the motion. CP 383-406. Renata did not provide any evidence disputing the authenticity of any of the documents attached in support of the motion (or disputing her default)—nor did her briefing address those issues. *Id.*

In reply, Flagstar and MERS pointed out that Renata did not dispute the debt, her default, or that if Flagstar is entitled to enforce the Note, its foreclosure efforts were proper. CP 72-104. Flagstar further noted that Renata did not dispute that Flagstar purchased and possesses her original Note, making it Note holder—or at a minimum, because Capital delivered the Note to Flagstar for the purpose of allowing Flagstar the right to enforce it, that Flagstar has all the rights of a Note holder. *Id*

The Trial Court Granted Summary Judgment. Finding no controverting evidence, the trial court awarded Flagstar and MERS summary judgment, and Renata timely appealed. CP 8-11; CP 1-7.

The Court of Appeals Affirmed Summary Judgment. On July 27, 2015, the Court of Appeals affirmed the order granting Flagstar and MERS summary judgment, prompting Renata's Petition for Review.

IV. ARGUMENT

Review is appropriate in four narrowly prescribed circumstances. RAP 13.4(b). The Washington Supreme Court accepts a petition for review only if: (1) the Court of Appeals' decision conflicts with a decision of the Supreme Court; (2) the decision conflicts with another appellate decision; (3) the case involves a significant question of constitutional law; or (4) the decision involves "an issue of substantial public interest." *Id.*

The Court should not accept review under RAP 13.4(b). The issues here are narrow, discrete, and specific to the facts of this particular matter and covered by established case law.

A. The Decision of the Court of Appeals Does Not Conflict with this Court's Decisions in *Lyons* or *Trujillo* or any Washington Court of Appeals Decisions.

This Court should not grant review under RAP 13.4(b)(1) because the decision of the Court of Appeals does not conflict with *Lyons v. U.S. Bank National Ass'n*, 181 Wn.2d 775 (2014) and *Trujillo v. Nw. Tr. Servs., Inc.*, 2015 WL 4943982, --Wn.2d --- (Aug. 20, 2015). The evidence presented to the trial court showed Flagstar was Note holder.

Several of this Court's recent decisions interpret RCW 61.24.005(2), which, for purposes of the Deed of Trust Act, defines "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.

In *Lyons*, this Court observed that RCW 61.24.030(7)(a) seemed to require a beneficiary of a deed of trust to prove it was an "owner" of the right to enforce the secured obligation. This Court went on to explain that a person could prove it owned the right to enforce 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). *Lyons,* 181 Wn.2d at 790. 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." *Id.* In *Trujillo*, this Court continued its analysis of beneficiary declarations by noting that a declaration was insufficient if was ambiguous as to who had the rights of a holder. *Trujillo*, 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 n.8.

Moreover, the decision of the Court of Appeals is consistent with this Court's decision in *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83 (2012) because Flagstar is undisputedly the actual holder of Renata's Note

(which by extension means it owns the right to enforce the Note, even if it also agreed to pass those payments on to Freddie Mac). 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. *Id.* 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." *Id.* at 104.

Here, the Court of Appeals properly agreed with the trial court that Flagstar is the actual holder of Renata's Note and is entitled to foreclose. Opinion at 1, 10-11. 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 with other decisions of the Court of Appeals.

B. This Court Does Not Need to Review the Court of Appeals' Treatment of the Declaration of Sharon Morgan.

Renata contends that the Declaration of Sharon Morgan and its supporting documents should not have been allowed into evidence and considered by the trial court because Ms. Morgan's "mere averment" of personal knowledge of how Flagstar's records are kept fails to satisfy the business records statute, RCW 5.45.020. Pet. at 11. Renata argues that while Ms. Morgan claims to have personal knowledge of all the facts

contained within her declaration as well as familiarity with Flagstar's record-keeping practices, Ms. Morgan's testimony is "rank hearsay" because no evidence was submitted indicating how the records she refers to were compiled or reviewed. *Id.* at 10-13. Renata also argues Flagstar failed to establish Ms. Morgan's qualifications. *Id.* at 10-11.

The Court of Appeals did not abuse its discretion in affirming the decision to admit Ms. Morgan testimony; and this decision does not conflict with any decision of the Supreme Court or the Washington Courts of Appeal. As a result, this Court should deny review of this issue.

CR 56(e) requires competent declarants with personal knowledge:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Thus, under CR 56(e), affidavits have three substantive requirements: (i) they must be made on personal knowledge, (ii) be admissible in evidence, and (iii) show affirmatively that the declarant is competent to testify to the information contained in the declaration. CR 56(e). The requirement of personal knowledge might require someone who signed or witnessed the signing of a document to establish its authenticity. Nevertheless, Washington courts consider the requisite of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute. *Discover Bank v. Bridges,* 154 Wn. App. 722 (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). Indeed, the identical argument made by the same counsel for Renata here, was recently rejected on this same basis. *See Barkley v. Greenpoint Mortg. Funding, Inc.*, --- Wn. App. ---, 2015 WL 4730175, *3-*4 (Aug. 10, 2015), *publication req. granted* Sep. 11, 2015.

Washington's business records statute, RCW 5.45.020, states:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Courts broadly interpret the statutory terms "custodian" and "other qualified witness" under the business records statute. *State v. Smith,* 55 Wn.2d 482 (1960); *State v. Ben–Neth,* 34 Wn. App. 600, 603 (1983); *State v. Quincy,* 122 Wn. App. 395, 399 (2004).

In support of her argument that Ms. Morgan's testimony was inadmissible hearsay, Renata's cites *State v. Fricks,* 91 Wn.2d 391 (1979). Pet. at 12. In *Fricks*, the Supreme Court determined that a gas station manager's testimony concerning the contents of a tally sheet of receipts kept by gas station employees could not be admitted into evidence because the manager's testimony "was not adequate under the [business records] statute to lay such a foundation." *Fricks,* 91 Wn.2d at 397-98. Under these circumstances, the Supreme Court determined that the testimony of the manager as to the contents of the tally sheet was not an acceptable method

of proof and not necessarily admissible under Washington's business records statute, RCW 5.45.020. *Id.*

Contrary to Supreme Court's decision in *Fricks*, none of Ms. Morgan's testimony was offered to prove the contents of an inadmissible document. Indeed, the Court of Appeals determined that Ms. Morgan's testimony satisfied the requirements of RCW 5.45.020 because she declared under penalty of perjury that: (1) she was an employee of Flagstar, (2) she had personal knowledge of her employer's practice of maintaining business records, (3) she had personal knowledge from her own review of the relevant records related to Renata's Note and Deed of Trust, and (4) the supporting documents attached to her declaration were true and correct copies of documents made in the ordinary course of business at or near the time of the transaction. *See* Opinion at 7-8.

Citing *Discover Bank v. Bridges*, the Court of Appeals held that Ms. Morgan's declaration is indistinguishable from evidence the Court of Appeal has approved previously. *Id.* at 7. In that case, Discover Bank relied on three affidavits from employees of DFS, an affiliated entity that assisted Discover Bank in collecting delinquent debts. The three affiants stated in their respective affidavits that (1) they worked for DFS, (2) that 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. Division II of the Court of

Appeals rejected the Bridges' contention that the trial court improperly admitted the affidavits into evidence. *Id.* And in *Barkley*, Division One just last month rejected the same arguments, for the same reasons. *Barkley*, 2015 WL 473015, at *3-*4.

Similar to *Barkley* and *Discover Bank*, Ms. Morgan stated in her declaration that she has personal knowledge of and access to Renata's loan documents. Moreover, Ms. Morgan states she personally reviewed those records. CP 457-58, ¶ 3. She has personal knowledge of how Flagstar's business records were "ma[d]e, collect[ed], and maintain[ed] ... and "how each document attached to [her] declaration was retrieved and compiled." *Id.* While Ms. Morgan does not expressly state she was a custodian of the records, neither did the affiants in *Discover Bank*. Thus, the Court of Appeals decision does not conflict with a decision of the Supreme Court or with another appellate decision.

C. Renata's Argument that Flagstar Failed to Establish that it was Agent for Freddie Mac Was Not Raised on Appeal and is Waived.

Renata argues that neither Flagstar, nor any other Respondent, established its agency relationship with Freddie Mac, the investor in Renata's loan, thus justifying review under RAP 13.4(b)(1). Pet. at 13. Notwithstanding that Flagstar was the holder of the Note and had the right to enforce the Note at all relevant times, an agency relationship need not necessarily be established because Freddie Mac merely owned the right to payment on the Note as an investor. And as this Court has already held, as Note holder, Flagstar did not need authorization from Freddie Mac to

initiate foreclosure or enforce the Note: "[i]t is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222-223 (1969)

More importantly, Renata failed to raise (and thus waived) this argument either in the trial court below or in her opening brief to the Court of Appeals. The appellate court may refuse to review any claim of error that was not raised in the trial court, with limited exceptions not applicable here. RAP 2.5(a). An appellate court will not consider new issues not raised to the trial court or in a party's initial brief to the Court of Appeals. *State v. Shale*, 182 Wn.2d 882, 886 n.2 (2015). Renata waived this ground to appeal and the Court should deny review on this basis. In addition, Renata's allegations fail as a matter of law.

D. This Court Does Not Need to Review the Court of Appeals' Treatment of the Butler Indorsement.

Renata argues that this Court should grant her review under RAP 13(b)(4) because the Court of Appeals ignored the question whether the Capital indorsement under Ms. Butler's name was "forged." Pet. at 15. As a result, Renata argues that Flagstar was not the Note holder and, thus, lacked authority to initiate foreclosure proceedings.

But nowhere does Ms. Butler—also a client of Plaintiff's counsel—state that the signature was "forged" or otherwise unauthorized, and nothing in her declaration refutes Flagstar's evidence showing that Capital delivered the Note to Flagstar with the indorsement and was paid for doing so, such that Capital clearly knew and approved of the indorsement.

Under RCW 62A.3-401(b), the UCC allows a signature to be made by "a device or a machine," or by any "word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing." Indeed the Official Comments to that UCC provision explain that the "signature may be made ...by an ***agent*** authorized to act for the obligor," and that "signature may be handwritten, typed, printed or made in any other manner. ... It may be made by mark, or even by thumb-print." RCW 62A.3-401 Official Comments 1 & 2 (emphasis added). Thus, that Ms. Butler claims she typically signs her name differently does not mean that mark reflecting an indorsement on behalf of Capital—the Note is not payable to Ms. Butler, after all—is somehow invalid.[6]

But even if the indorsement were somehow unauthorized, Capital clearly ratified any indorsement on the Note. Because Capital was contractually required to indorse and deliver the Note to Flagstar as a precondition to payment by Flagstar, and it did deliver an indorsed Note and accepted payment, Capital's delivery and retention of payment is sufficient to ratify any indorsement. *See Stround v. Beck*, 49 Wn. App. 279, 286 (1987) (acceptance of payment ratified unauthorized indorsement of Note by agent). Under the UCC, "[a]n unauthorized signature may be ratified for all purposes of this Article." RCW 62A.3-403(a) (emphasis added). Once

[6] Moreover, under RCW 62A.3-308 and ER 902, any signature on a promissory Note is presumed authentic unless disputed in a pleading. RCW 62A.3-308(a) ("signature is presumed to be authentic"); ER 902(i) (signatures on commercial paper presumed authentic). Nowhere in the Complaint does Plaintiff plead the indorsement is unauthorized and nothing in the Butler declaration states the indorsement is unauthorized (even if not her typical signature). Thus, under the UCC and Washington's evidence rules, the signature is presumptively valid, and there is no evidence of an unauthorized "forgery" at all.

Capital accepted the benefits of payment from Flagstar for delivery of an indorsed Note, it ratified the indorsement, making Flagstar a Note holder.

And contrary to Renata's arguments, the Court of Appeals ***did consider*** the question whether the indorsement was forged and determined that: "Capital Mortgage ratified the signature, [and] the indorsement was effective even if Butler's signature was forged." Opinion at 11. Moreover, the Court of Appeals affirmed the trial court's order because Ms. Butler's testimony failed to "state that she did not authorize another person to indorse the note on her behalf, a common practice." *Id.* at 10-11. Thus, Capital "ratified the indorsement when it complied with its contractual duty owed to Flagstar by intentionally delivering the indorsed note to Flagstar and accepting payment." *Id.* at 11. Thus, no public importance exists to justify review of the Court of Appeals' ruling.[7]

E. This Court Should Not Review the Court of Appeals' Decision Regarding Petitioner's Continuance Request.

Without explaining how her request for a continuance involves an issue of substantial public importance justifying review under RAP 13.4(b)(4), Renata's Petition argues this Court should review the denial of her request for a continuance to allow more discovery. In reviewing the denial of her continuance request, the Court of Appeals held: "[a] trial court may deny a motion for continuance when: (1) the requesting party does not

[7] And even if it were not ratified, Flagstar would still be a "transferee" under the UCC because there was delivery of the Note and a contract transferring the rights to enforce the Note to Flagstar; this "chain of transactions" gives Flagstar all the rights of a holder, which this Court has sufficient to foreclose. RCW 62A.3-203; *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 111 (2012) (to foreclose one must either hold the Note or "document[] the chain of transactions" giving the lender the right to enforce the Note).

have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369 (2007).

Because Renata failed to file any affidavit providing a good reason for her delay in obtaining the evidence desired, the Court of Appeals determined that the trial court did not abuse its discretion in denying her request. Opinion at 17. *See also Barkley*, 2015 WL 4730175, *5-*6.

F. Renata Has Only Petitioned for Review of Her CPA Claim Against the Trustee, Not Flagstar or MERS (and Does Not Appeal Any Claim Against MERS).

Renata has not petitioned for review, and thus has not preserved the right to appeal, the dismissal of her CPA claims against Flagstar or MERS. Renata's petition identifies only the trustee's alleged failure to adequately inform itself regarding Flagstar's right as the beneficiary to foreclose as a basis for a CPA claim. That said, given this Court's ruling in *Trujillo*, Flagstar's status as the beneficiary as discussed above, there is also no basis for review of Renata's claim against the Trustee.

Additionally, no evidence or testimony provided to the trial court showed any indication that any of the Respondents were not attempting to comply with the requirements of the DTA. Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair or deceptive conduct in violation of the consumer protection act. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155 (1997). Here, given that multiple courts have agreed with the Flagstar's interpretation of the DTA that possession of the Note indorsed in blank authorized Flagstar to

proceed with foreclosure. As such, even if this Court somehow agrees with Renata's reading of the DTA, her CPA claims would still fail. Indeed, as to MERS, Plaintiff's does not seek review of dismissal of any claims. Thus, Plaintiff has waived any further review of claims against MERS. RAP 10.3(c); *Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 809 (1992).

G. There Are No Other Reasons for the Supreme Court to Accept Renata's Petition for Review.

There is no public policy or other reasons why the Supreme Court should accept Renata's petition for review. RAP 13.4(b) says the Supreme Court will accept a petition for review if the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." Renata has no genuine grievance affecting the public interest because she does not deny borrowing money, does not deny the terms of her loan, and does not provide any evidence that she has a legitimate reason to fear someone other than Flagstar will try and make her pay back her loan. It has been nine years since she took out his loan and almost six years since first defaulting. There is no evidence that Renata has suffered any real injury, much less an injury implicating a substantial public interest.

V. CONCLUSION

Flagstar and MERS respectfully request the Court deny review.

RESPECTFULLY SUBMITTED this 23rd day of September, 2015.

Davis Wright Tremaine LLP
Attorneys for Flagstar Bank, FSB and Mortgage Electronic Registration Systems, Inc.

By _____
Fred B. Burnside, WSBA #32491
David A. Abadir, WSBA #46259

PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

Richard Llewelyn Jones	( )	By Hand Delivery
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Dated at Seattle, Washington this 23rd day of September, 2015.

s/ Lisa Bass
Lisa Bass

OFFICE RECEPTIONIST, CLERK

To: Bass, Lisa
Cc: Burnside, Fred; Abadir, David
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Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: Renata v. Flagstar Bank,F.S.B., et al., Washington State Supreme Court No. 921431 -- Answer of Flagstar Bank, F.S.B., and Mortgage Electronic Registration Systems, Inc. to Petition for Review

Re: Renata v. Flagstar Bank, F.S.B., et al.
Washington State Supreme Court No. 921431
Answer of Flagstar Bank, F.S.B., and Mortgage Electronic Registration Systems, Inc. to Petition for Review

Dear Clerk,

Please find attached for filing with the Court *Answer of Flagstar Bank, F.S.B., and Mortgage Electronic Registration Systems, Inc. to Petition for Review.*

This Answer is being submitted by:

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Thank you.

Sent on behalf of Fred B. Burnside by:

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