

**FILED**  
MAY 13 2016  
WASHINGTON STATE  
SUPREME COURT

SC#93123.2  
Court of Appeal Cause No. 46906-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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Key K. Kim, Appellant

v.

Fay Servicing, Respondent

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PETITION FOR REVIEW

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James K. Kim, WSBA# 28331  
3520 96<sup>th</sup> Street South, Suite 109  
Lakewood, WA 98499  
253-274-0201

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A. Identity of Petitioners

Key Kim asks the Court to accept review of the Court of Appeals decision termination review designated in Part B of this petition.

B. Court of Appeals Decision

Key Kim asks this Court to review the decisions terminating review by the Court of Appeals. The appeal was denied by the Court of Appeals on March 16, 2016. The motion for reconsideration was denied April 12, 2016. A copy of the unpublished opinion is in the Appendix at page A-1. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-2.

C. Issue Presented for Review

- I. Is the capacity to deceive a substantial portion of the public necessary to constitute unfair or deceptive practice in a private Consumer Protection Act claim?

D. Statement of the Case

Procedural and Substantive Facts

On October 17, 2014, the trial court granted summary judgment in favor of Respondent Fay Servicing, Inc. Appellant's appeal was denied by the Court of Appeals on March 16, 2016. Appellant's motion for reconsideration was denied by the Court of Appeals on April 12, 2016.

On or about August 2, 2013, Fay Servicing prepared and mailed a letter to Petitioner Kim (hereinafter "Kim") notifying him that the servicing of Kim's mortgage was transferred to Fay Servicing. Kim then contacted Fay Servicing and discussed to mortgage with Fay Servicing on numerous occasions from August 2013 to October 2013. Kim advised Fay Servicing that although he would be receiving \$300,000.00 from a

a settlement related to his previous business, he would be investing the funds in a business to be determined to have a regular income. During October 2013, Fay Servicing apparently started explaining the technical terms about Kim's modification request. Kim advised Fay Servicing that he did not understand the technical terms due to his limited English skills. Fay Servicing then advised that they would call Plaintiff again with a Korean interpreter. The call never came and the property was sold at a trustee's sale.

**Standard of Review**

In reviewing an order of summary judgment the standard is *de novo*, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). A trial court may grant summary judgment only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Dep't of Labor & Indus. v. Fankhauser*, 121 Wash.2d 304, 308, 849 P.2d 1209 (1993) (citing CR 56(c)). In reviewing a summary judgment, "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed *de novo*." *Coppernoll v. Reed*, 155 Wash.2d 290, 296, 119 P.3d 318 (2005) (citing *Berger v. Sonneland*, 144 Wash.2d 91, [102-03,] 26 P.3d 257 (2001)).

E. Argument Why Review Should Be Accepted

- I. THE CAPACITY TO DECEIVE A SUBSTANTIAL PORTION OF THE PUBLIC IS NOT NECESSARY TO CONSTITUTE UNFAIR OR DECEPTIVE PRACTICE IN A PRIVATE CONSUMER PROTECTION ACT CLAIM.

1. A plaintiff may also establish the public interest element through satisfaction of the test established by the court in *Anhold v. Daniels*, 94 Wn.2d 40, 46, 614 P.2d 184 (1980):

[T]he presence of public interest is demonstrated when the proof establishes that (1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition.

2. This is a private dispute and the capacity to deceive a substantial portion of the public is not necessary to meet the public interest element. In a private dispute, it is sufficient to show: (1) The alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 917 P.2d 531 (1986).

It is undisputed that Fay Servicing's act was in the course of its business and that the parties occupied unequal bargaining positions. They had the apparent power to modify the loan and to stop the foreclosure sale. If they did not have such final authority, they did have the ability to influence the party with such authority. Fay Servicing certainly knew of the impending foreclosure sale and although it may not have been intentional, Fay Servicing's statement that they would call again with an interpreter did induce Kim to refrain from acting to prevent the foreclosure sale, either through an injunction or a payment. It unknown if Fay Servicing did in fact have the discretion to postpone the foreclosure sale as was the case for the trustee in *Klem v. Wash. Mut. Bank*,

176 Wn.2d 771; 295 P.3d 1179 (2013). Nevertheless, Fay Servicing was acting on behalf of the lender. Fay Servicing's act does have a potential for repetition. While such a repetition may not be of same facts and circumstances, it should not be the requirement in a private transaction. Rather, the act here would be any statement that: (i) would or could cause a borrower to act or refrain from acting, (ii) that results in injury to the borrower, (iii) that the borrower would or could have otherwise avoided but for the statement. The argument here is not whether a modification was in fact being offered. It is the fact that Fay Servicing stated that it would call again with an interpreter; that Kim waited for the phone call that never came; and that Kim relied on Fay Servicing's statement in not acting to prevent the foreclosure sale.

F. Conclusion

The trial court erred by granting summary judgment when there are genuine issues of material facts, issues that are not mere assertions. Kim proffered evidence rising at least to the level of raising genuine issue of a material fact that he relied on a statement made by Fay Servicing in choosing to refrain from acting to prevent the foreclosure sale. Finally, Fay Servicing's conduct need not necessarily have had the capacity to substantial portion of the public as it is a private dispute. It should instead be a determination based on the *Hangman Ridge* factors at 790.

RESPECTFULLY Submitted this 11<sup>th</sup> day of May, 2016



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James K. Kim, WSBA# 28331  
Attorney for Petitioner

**Appendix:**

1. **Copy of Court of Appeals, Division II's Decision**
2. **Copy of Order Denying Motion for Reconsideration**

March 15, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

KEY K. KIM, an individual,

Appellant,

v.

FAY SERVICING, a Delaware Corporation,

Respondent,

FLAGSTAR BANK, FSB, a Michigan  
Corporation; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., a  
Delaware Corporation; and IH3 PROPERTY  
WASHINGTON LP; a Delaware Corporation,

Defendants.

No. 46906-5-II

UNPUBLISHED OPINION

MELNICK, J. — Key Kim appeals the trial court’s order granting summary judgment in favor of Fay Servicing, dismissing Kim’s Consumer Protection Act (CPA) claim.<sup>1</sup> Kim argues that he created a genuine dispute of material fact; however, because Kim failed to establish a genuine dispute of material fact as to each element of his CPA claim, the trial court did not err by granting Fay Servicing’s summary judgment motion. We affirm.

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<sup>1</sup> Originally Kim filed multiple claims against multiple defendants. This claim is the only one remaining.

## FACTS

In January 2006, Kim purchased property in Lakewood.<sup>2</sup> He borrowed money from Flagstar Bank and took out a mortgage on the house. Kim stopped paying the mortgage for six months between 2012 and 2013. In April 2013, Flagstar appointed Northwest Trustee Services (NWTS) as successor trustee. In August 2013, NWTS transferred servicing of Kim's loan to Fay Servicing. Fay Servicing contacted Kim to notify him of the change and to attempt to avoid foreclosure on his house.

Between August and October 2013, Kim and Fay Servicing spoke on the phone several times about Kim's mortgage. On September 11, Kim submitted a hardship letter to Fay Servicing with a bank statement showing a \$1,076.99 balance. In the letter, Kim wrote he was delinquent due to a lack of income from his business and he wanted Fay Servicing to work with him to modify his loan. The bank statement and letter did not show proof of income. In August 2013, Kim received a check for \$300,000 from the sale of his stake in his ex-wife's business. According to Kim, he told Fay Servicing about the \$300,000 and Fay Servicing suggested he use the money to repay the loan. Kim told Fay Servicing that he intended to use the money to invest in a small business so he could have regular income.

Kim's property was sold at a trustee's sale. Subsequently, on November 21, 2013, Kim filed the complaint underlying this appeal.<sup>3</sup> On July 17, 2014, prior to filing its motion for summary judgment, Fay Servicing deposed Kim. During the deposition Kim stated, "[Michael

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<sup>2</sup> Fay Servicing cites to the complaint in both its motion for summary judgment and its appellate brief. However, Fay Servicing did not provided the complaint or the original loan documents for our review.

<sup>3</sup> Originally, the suit included five defendants: Flagstar Bank, Mortgage Electronic Registration Systems, NWTS, IH3, and Fay Servicing. The trial court either granted summary judgment or dismissed the claims against all of the defendants except Fay Servicing.

Crawley]<sup>4</sup> said he will do the modification. I bought the house when the interest rate was the highest, so that he said he will adjust the rate and told me to wait. I waited for his phone call. He didn't call me back, so I called him back." Clerk's Papers (CP) at 40. According to Kim, "Mike okayed it," but then "there [was] a lot of expert terminology that came out like terms like you used now, so I couldn't understand" and Crawley said "he [would] get an interpreter." CP at 41. Fay Servicing did not call him back.

Kim also explained, "I was told that I [would] be qualified for modification if I d[idn't] pay for six months, so I did that." CP at 46. He credited this advice to "[p]eople, friends around and people I know." CP at 47. He acknowledged that no one at Fay Servicing gave him this advice. He also stated,

In case it wasn't successful, I have to pay the mortgage, so for every month I saved the mortgage amount so I could pay. So if you look at my credit report, it's perfect, I was never late in paying any payments including car payments, but just with this loan itself, it was intentional.

CP at 47. Kim explained that he believed he was getting a modification "[b]ecause Mike was very positive about it and he spoke positively. So I told [my attorney] that according to Mike, I think modification is possible. I don't know how much it will be modified, but I believe it would be modified." CP at 49.

Additionally, the following exchange occurred in reference to the letter Kim wrote to Fay Servicing asking for a modification:

[Attorney]: So at the time that you are writing this letter in September 2013, you have over \$300,000 in cash, but you are still writing a hardship letter; is that correct?

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<sup>4</sup> An account manager for Fay Servicing.

[Kim]: Well, doesn't everybody? I mean, if you have millions of dollars, like you want to modify the loan, you don't say I have a lot of money; please modify my loan for me.

CP at 51.

Fay Servicing filed a motion for summary judgment, arguing that Kim had no competent evidence to support three out of the five elements required to establish a prima facie CPA case. In his response, Kim argued that three genuine disputes of material fact existed: whether Fay Servicing offered a loan modification, whether Kim was misled into believing the trustee's sale "would not be held on November 1," and whether Kim was injured because he was misled. CP at 72.

In support of its motion for summary judgment, Fay Servicing filed declarations by two account managers: Michael Crawley and Michael Kerber.<sup>5</sup> Both Crawley and Kerber stated that they attempted to obtain Kim's financial information to look into a loan modification but were unsuccessful.

Kim answered an interrogatory question, "Fay Servicing engaged in discussions that led me to believe that my mortgage would be modified and it is presumed that there are other Washington residents whose mortgages are being serviced by Fay Servicing." CP at 35. Michael Crawley stated, "[A]t no point during any of our conversations did I ever advise [Kim] that he was being offered a loan modification." CP at 64. Michael Kerber similarly stated,

The last time I spoke with [Kim] was on October 17, 2013, and at no point during that or any of our conversations did I ever advise [him] that he was being offered a loan modification. To the contrary, I attempted to emphasize to [Kim] that if he did not provide us with financial information showing that he would be able to make his mortgage payments in the future, Fay Servicing would not be able to provide him with a loan modification. [Kim] told me that he was unable to cure his

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<sup>5</sup> Kim opined in his declaration that he spoke on the phone with Michael Crawley on October 17, 2013. However, based on the declarations, he seems to have spoken with Michael Kerber.

default and that he wanted to only pay \$1,500.00 per month for his mortgage. I explained to [Kim] that in my experience, that was not realistic.

CP at 69.

Michael Kerber also declared that the language barrier between himself and Kim, a Korean speaker, made further discussions “unproductive” and he told Kim he wanted to “see if [he] could find an interpreter to assist, and that if [he] could find one, [he] would call [Kim] back.” CP at 70. Kim stated that he “was under the impression that the trustee’s sale would be postponed again, pending finalization of the modification” and that he “would otherwise have sought an injunction to halt the sale of the house or sought other relief to keep [his] house.” CP at 78.

On October 17, 2014, the trial court heard argument on Fay Servicing’s summary judgement motion. The trial court granted the motion. Kim appeals the order granting summary judgment.

#### ANALYSIS

Kim argues that the trial court erred by granting summary judgment and dismissing his CPA claim. We disagree.

##### I. STANDARD OF REVIEW

We review an order for summary judgment *de novo*, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). We construe all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment–Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516.

The response, by affidavits or as otherwise provided under CR 56, must set forth specific facts that reveal a genuine issue for trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988), *see also* CR 56. “[C]onclusory statements of fact will not suffice.” *Grimwood*, 110 Wn.2d at 360. If the nonmoving party fails to do so, and reasonable persons could reach but one conclusion from all the evidence, then summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Granville Condo. Homeowners Ass’n v. Kuehner*, 177 Wn. App. 543, 551, 312 P.3d 702 (2013) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

## II. CPA CLAIM

Kim argues that he established a genuine dispute of material fact as to his CPA claim and the trial court erred by granting summary judgment. We disagree.

The CPA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. To establish a private CPA action, a plaintiff must prove five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting public interest; (4) injuring the plaintiff in his or her business

or property; (5) and causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). If any element of the prima facie case is not satisfied, a plaintiff cannot prevail. *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001). The CPA should be liberally construed. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009).

Fay Servicing contends that Kim lacked competent evidence to support the first, third, and fifth elements. Because the failure of one element is fatal to a claim, *see Robinson*, 106 Wn. App. at 114, and we conclude that Kim failed to establish the first element, we need not continue our analysis further.

Kim argues that Fay Servicing engaged in unfair or deceptive tactics. Where there is no dispute about what the parties did, whether conduct constitutes an unfair or deceptive trade practice under the CPA is an issue of law that we review de novo. *Robinson*, 106 Wn. App. at 114. “A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public.” *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 835, 355 P.3d 1100 (2015) (quoting *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009)). The element may also be established by showing a per se unfair trade practice. *Hangman Ridge*, 105 Wn.2d at 785-86.

“A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.” *Hangman Ridge*, 105 Wn.2d at 786. Kim makes no such argument here; therefore, we consider whether Kim showed that Fay Servicing’s conduct had the capacity to deceive a substantial portion of the public.

Kim contends several material facts are in dispute, including whether Fay Servicing offered him a modification and whether Fay Servicing misled him into believing the trustee's sale would not go forward. However, the following facts are undisputed. Kim was intentionally delinquent on his loan. Fay Servicing contacted him several times to discuss his delinquency and during those conversations, addressed loan modification. An agent of Fay Servicing told Kim that he would try to get an interpreter. But, at that time, Fay Servicing and Kim did not formalize a loan modification and Kim did not take action to enjoin the trustee's sale. Based on Kim's own deposition and declaration, along with the declarations of Crawley and Kerber, we conclude there is no genuine dispute of material fact as to whether Fay Servicing and Kim formalized a modification. It is clear they did not.

Despite these undisputed facts, Kim also appears to argue he was offered a modification. The agent from Fay Servicing stated in his declaration, "[A]t no point during any of our conversations did I ever advise [Kim] that he was being offered a loan modification." CP at 64. During his deposition, Kim stated, "Mike okayed [the modification]," but then "there [was] a lot of expert terminology that came out like terms like you used now, so I couldn't understand." CP at 41. Kim stated that at that point, the agent from Fay Servicing said he would get an interpreter and call Kim back. Kim went on to say that he believed he was getting a modification "[b]ecause Mike was very positive about it and he spoke positively. So I told [my attorney] that according to Mike, I think modification is possible. I don't know how much it will be modified, but I believe it would be modified." CP at 49.

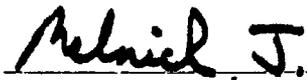
While the offer of a modification under some circumstance may arguably have the capacity to deceive by inducing inaction, Kim fails to demonstrate that Fay Servicing offered a loan modification, or that discussing a modification in these circumstances had the capacity to deceive.

Additionally, Kim contends a genuine dispute of material fact existed as to whether or not Fay Servicing intentionally misled him to ensure his own inaction relating to the trustee sale. Kim argues that Fay Servicing declined to communicate with him through his lawyer, stating, "Fay insisted on talking with [me] instead of [my] attorney." Br. of Appellant at 6. Fay Servicing acknowledges that it was contacted by Kim's attorney. However, Kim fails to demonstrate that Fay Servicing's actions had the capacity to deceive a substantial portion of the public beyond his own conclusory statements and opinions. See *Grimwood*, 110 Wn.2d at 360 (finding deficient plaintiff's affidavit in opposition that only presented his conclusions and opinions). Kim knew he had not paid on the loan for six months, knew he had money to pay, and he had a lawyer to consult with but failed to take action to prevent the sale. Kim also stipulated that Fay Servicing properly provided him with notice of the trustee sale.

Finally, Kim asserts that Fay Servicing told him it would call back with an interpreter and that he believed this was to go over a modification. He argues that whether or not his belief was reasonable is a genuine issue of material fact. His belief is not material as to whether or not Fay Servicing performed unfair business practices. The material issue is whether the conduct had the capacity to deceive a substantial portion of the public, not whether it actually deceived Kim personally. See *Trujillo*, 183 Wn.2d at 835. Kim has failed to demonstrate how this act, even if believed, would constitute an unfair or deceptive practice. He had knowledge of the trustee sale. We conclude that Kim did not create a genuine dispute of material fact as to the first element of his CPA claim and therefore, summary judgment was proper. See *Robinson*, 106 Wn. App. at 114.

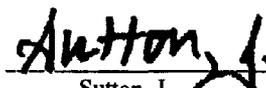
We affirm the trial court's grant of summary judgment in favor of Fay Servicing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Melnick, J.

We concur:

  
\_\_\_\_\_  
Maxa, P.J.

  
\_\_\_\_\_  
Sutton, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

KEY K. KIM,

Appellant,

v.

FLAGSTAR BANK, FSB, ET AL,

Respondents.

No. 46906-5-II

ORDER DENYING MOTION FOR  
RECONSIDERATION

APPELLANT moves for reconsideration of the Court's March 15, 2016 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

PANEL: Jj. Maxa, Melnick, Sutton

DATED this 12<sup>th</sup> day of April, 2016.

FOR THE COURT:

*M. Maxa A.C.J.*  
ACTING CHIEF JUDGE

cc: Adam G Hughes  
James Kyongkon Kim

FILED  
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STATE OF WASHINGTON  
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5 THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON – DIVISION II

6 KEY K. KIM, an individual,

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8 v.

9 Fay Servicing, a Delaware Corporation,

10 Respondent

NO. 46906-5-II

CERTIFICATE OF SERVICE

11 I certify under penalty of perjury that on the 11<sup>th</sup> day of May, 2016, I caused a copy of Petition  
12 for Review to be served upon Adam Hughes via electronic mail at the following electronic mail  
13 address:

14 ahughes@afrc.com

15 Dated this 11<sup>th</sup> day of May, 2016

16  
17 

18 \_\_\_\_\_  
James K. Kim

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21  
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23 Certificate of Service- 1

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Tue 5/10/2016  
1:59 PM

Court of Appeal Cause No. 46906-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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Key K. Kim, Appellant

v.

Fay Servicing, Respondent

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PETITION FOR REVIEW

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