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(Court of Appeals No. 73406-7)
(King County Superior Court No. 13-2-29758-2)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FRANK BUCCI,

Petitioner/Plaintiff,

v.

NORTHWEST TRUSTEE SERVICES, INC, et al.,

Respondents/Defendants.

ANSWER OF JPMORGAN CHASE BANK, N.A., TO PETITION FOR REVIEW BY FRANK BUCCI

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I. INTRODUCTION

Petitioner Frank Bucci is being intellectually inconsistent—he ignores the false equivalency between a line of credit and a negatively amortizing note—to claim that the majority view (involving lines of credit) holds a negatively amortizing note is non-negotiable.[1] A line of credit note (which is not a negotiable instrument) is fundamentally different from a negatively amortizing note (which is a negotiable instrument) because the amount disbursed at consummation cannot be determined by the language in the note. Thus, whether an instrument is negotiable boils down to what determines the exact amount disbursed—the note, or something else. Bucci's Note details exactly what was disbursed—$1.53 million—so his negatively amortizing note is a negotiable instrument.

Ignoring the differences between the two types of loans, Bucci asserts that this Court should review his case because there is a public interest in determining whether a negatively amortizing note is a negotiable instrument. Bucci's misguided argument relies on a mistaken view that a negatively amortizing note sets a range of the repayment amount, making it like a line of credit. His cases espousing the "majority view" (cited for the first time) do not involve negatively amortizing notes—they involve lines of credit that were non-negotiable because the disbursement(s) are not fixed in the note. The negatively amortizing

[1] A negatively amortizing note could be suited for sophisticated borrowers like Bucci who may need flexibility in making payments but will have a certain income over a year's time where they can "make up" the negative amortization.

interest feature on Bucci's Note is independent of the fixed sum that was disbursed to him in another section of his Note. Adjustable rate payments are not unusual in promissory notes and the majority view holds negatively amortizing notes are negotiable.

Bucci also argues the Court of Appeal's decision conflicts with *Anderson v. Hoard*, 63 Wn.2d 290, 292-293 (1963). It does not. *Anderson* involves a superseded version of RCW 62A.3-104 that made a note non-negotiable if the borrower had to repay other charges (such as insurance and taxes) with the note. But under the operative version of RCW 62A.3-104, a sum is fixed "with or without interest or other charges described in the promise or order" that may be added to the amount due to be repaid. Bucci's reasoning would make all adjustable rate notes non-negotiable, not just negatively amortizing notes. In essence, a negatively amortizing loan just creates a special method of calculating interest payments. It does not change the amount disbursed, which is the key.

Further, Bucci summarily argues that there was a "dispute" about the indorsement on the Note. The facts and pleadings show his dispute is non-existent.

Finally, Bucci has not sought review of any issue affecting Respondent JPMorgan Chase Bank, N.A. ("Chase")'s judgment. Chase was granted judgment for reasons unaffected by the negotiability of the Note. Any determination the Court could make regarding negatively amortizing notes would not reverse Chase's judgment. If the Court were

to grant review, it should exclude any review of Chase's judgment.

The Court should deny review for the following reasons:

First, there is no substantial public interest at issue because the majority view holds negatively amortizing loans are negotiable instruments.

Second, the appellate court's decision does not conflict with *Anderson v. Hoard* because RCW 62A.3-104 was revised to allow interest provisions in negotiable notes.

Third, all parties provided evidence that the Note was indorsed-in-blank before the foreclosure started.

Fourth, if the Court is inclined to grant review, Chase's judgment should be excluded from the review because it was granted for reasons unaffected by the negotiability of the Note.

II. IDENTITY OF RESPONDENT

Chase is a respondent and a defendant in this case.

III. STATEMENT OF CASE

A. Factual Background

Bucci Borrows $1.53 Million from Washington Mutual. On or about May 22, 2007, Bucci, a sophisticated borrower, signed a (potentially) negatively amortizing Adjustable Rate Note ("Note") to repay a $1.53 million refinance loan from Washington Mutual Bank, F.A. ("WaMu"), which was secured by a Deed of Trust ("Deed of Trust") on the Property. CP 6 ¶ 20; CP 26-42; CP 922; CP 926-951.

WaMu Fails and Chase Acquires Bucci's Loan from the FDIC.

WaMu held the original Note as custodian and serviced the loan, which included executing assignments and initiating foreclosure. CP 922-23; *see also* CP 985-1000. On September 25, 2008, the FDIC placed WaMu in receivership, transferring WaMu's loan assets to Chase. CP 923 ¶ 9. Chase began servicing the Note. CP 923.

On June 29, 2009, Chase executed an Assignment of Deed of Trust reflecting the transfer of ownership of the loan and Deed of Trust to Bank of America, N.A. ("BANA") (which succeeded LaSalle Bank) as trustee. The Assignment of Deed of Trust was recorded July 10, 2009. CP 6 ¶ 22; CP 45-46. Chase remained servicer on Bucci's loan and retained physical possession of the Note on behalf of the WaMu Trust. CP 923 ¶ 10.

BANA, U.S. Bank N.A. ("U.S. Bank"), and several other financial entities entered into a Purchase Agreement whereby U.S. Bank succeeded BANA as the trustee of the WaMu Trust. CP 924 ¶ 12; CP 1054-1073.

Bucci Defaults on the Loan. As of March 1, 2009—more than 8 years ago—Bucci failed to make any further payments. CP 720 at 252:6-253:1. Bucci, under penalty of perjury, submitted a series of false loan modification applications to Chase. CP 724 at 287:19-288:6; CP 849 at 13:20-20; CP 857 at 202:21-25; CP 203:1-5, 851 at 20:21-25 and 21:1; CP 867 at 293:19-22. Even if Bucci's statements had been true, he did not qualify for a loan modification because the loan amount was too high. CP 898-890. Bucci also unilaterally cancelled his request for a short sale and for mediation under Washington's Foreclosure Fairness Act ("FFA"). CP

651-661; CP 697 at 107:6-23; CP 789; CP 904.

NWTS Commences Non-Judicial Foreclosure. NWTS issued a Notice of Default on March 12, 2013. CP 7 ¶ 23; CP 47-51. On June 24, 2013, NWTS executed a Notice of Trustee's Sale setting an October 25, 2013 sale. CP 8 ¶ 27, CP 76-80. On August 1, 2013, Select Portfolio Servicing, Inc. took over loan servicing from Chase. CP 924 ¶ 13.

B. Procedural Background

Bucci Filed Suit to Enjoin the Pending Trustee's Sale. Bucci filed this lawsuit on August 16, 2013, seeking, among other things, to enjoin the foreclosure sale. CP 1850-1914. The trustee's sale was postponed several times (and still has not occurred). CP 681 at 20:24-21:1; CP 1294-1301.

The Trial Court Grants Summary Judgment to All Parties. Between January 30, 2015 and February 27, 2015, all parties moved for summary judgment. CP 203-219; CP 538-561; CP 1074-1098; CP 1101-1112; CP 1139-1163. On March 27, 2015, the trial court granted Chase's Motion for Summary Judgment, dismissing all claims against Chase with prejudice. Additionally, it granted Chase judgment on the pleadings, ruling that the federal Home Owners Loan Act ("HOLA"), 12 U.S.C. § 1461, *et seq.*, preempted Bucci's claims. CP 1841-1842; CP 1845-1848.

Bucci Appeals the Judgments. Bucci filed his notice of appeal on April 21, 2015. Bucci claimed the trial court committed three errors: 1) it accepted testimony by a defendant's attorney; 2) it found the note to be negotiable; and 3) it weighed the evidence. *Bucci v. Nw. Tr. Servs.,*

Inc., 197 Wn. App. 318, 387 P.3d 1139, 1143–44 (2016). The appellate court found no errors and affirmed the judgments. *Id.* at 1147.

IV. ARGUMENT

Bucci petitions this Court for review of the appellate court decision under Rule of Appellate Procedure 13.4(b)(1) and (4).

A. Bucci Fails to Show Any Basis for Review

Bucci argues three reasons for review: 1) there is a substantial public interest in whether a negatively amortizing note is a negotiable instrument; 2) the appellate court's decision in this case conflicts with *Anderson v. Hoard*; and 3) there is a (manufactured) question about the indorsement on the Note. Review is not warranted on any basis.

1. There is No Issue of Substantial Public Interest because Negatively Amortizing Loans are Negotiable Instruments

Bucci argues a negatively amortizing Note is not a negotiable instrument under the UCC/RCW 62A.3-104. He does not explicitly indicate ***how*** the public would benefit from the Court's review of the issue. He claims negatively amortizing loans are prohibited in Washington since June 2008 and he fails to explain why the issue will repeat in the future. The issue of negotiability of negatively amortizing loans is thus largely moot. Even if an issue of public interest were present, no review is merited under these facts. Indeed, the public interest would be negatively affected if the Court accepted Bucci's arguments.

a. Negatively Amortizing Loans Set a Fixed Amount to Be Disbursed

Bucci argues that a borrower signing a negatively amortizing note does not promise "to pay a fixed amount of money, with or without interest or other charges described in the promise or order." RCW 62A.3-104(a). He is mistaken. The easiest way to determine if an amount is "fixed" is to look at what is disbursed at consummation, and if anything more is ever disbursed.[2] On its face, the Note, in section 1, sets a fixed amount–-$1.53 million. The $1.53 million amount disbursed is all that would be disbursed and is what he needs to pay if he repaid the entire loan minutes after disbursement. Thus, his Note is for a fixed amount.

The negative amortization component is set forth in section 4, relating to interest and interest payments. Section 4 does not affect what is lent or disbursed, it relates to what interest is to be paid. An uncertain interest provision (which may require outside documents to calculate) does not make a note non-negotiable. *See* 6B Ronald A. Anderson, *Anderson on The Uniform Commercial Code*, § 3-104:19 (3d ed. 1994) ("U.C.C. § 3-112 [Rev] permits virtually any type of interest provision, including ones that, in fact, make the actual amount payable quite uncertain"); RCW 62A.3-104(a) and 62A.3-112.

Bucci conflates the term "fixed amount" under RCW 62A.3-104 with the total amount he must repay (commonly called "unpaid principal"). Boiled down to its basics, his argument is that if the unpaid

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[2] For example, lines of credit are not negotiable because the amount disbursed upon consummation is not set, and additional disbursements may occur during the loan term.

principal amount ever changes after consummation (especially if it increases), the lender did not lend a fixed amount. This is wrong.

> Furthermore, the court finds that were the defendant's assertion that a fixed sum certain cannot exist in an "option ARM [negatively amortizing note]," then the only way that a negotiable instrument would ever feasibly exist is when a borrower pays exactly the monthly interest accrued, not a penny more or less, so as to keep the principal exactly the same from month to month, as any other payment amount would change the principal, and thus, create a variable sum. This is clearly an implausible result.

Bank of New York v. Baldwin, 2009 WL 2962445, at *4 (Conn. Super. Ct. Aug. 13, 2009) (unpublished); 6B Ronald A. Anderson, *Anderson on The Uniform Commercial Code*, § 3-104:16 (3d ed. 1994) ("As a result, the fixed amount of principal may be increased by the addition of interest or other charges that are set forth in the instrument").

Indeed, Bucci's theory implies that if a borrower obtained any loan requiring interest and never paid any amount, the Note is suddenly non-negotiable because the "unpaid principal balance" increased. Such a result is contrary to the UCC since the fixed amount does not include any additional payments for interest. *See* RCW 62A.3-104, 3-112. Unpaid interest on a negatively amortizing loan is only added to the "principal" to calculate a new interest payment—so the borrower is paying interest on interest, not receiving more money. While the "unpaid principal balance" "increases," a new amount is not disbursed. Thus, the "increased principal" does ***not*** increase the fixed amount lent, it reflects the principal plus any unpaid interest payments.

Bucci does not have to repay a "range" of money. The Note does not require him to pay more than the $1.53 million disbursed (not including interest). While, with interest, he does have to repay more than $1.53 million, this is the same as any note with interest payments. It does not make a note non-negotiable; otherwise, an interest requirement of any kind would render a note non-negotiable. And, as the appellate court noted, the negatively amortizing Note does not necessarily increase the unpaid balance if Bucci pays all of the interest due. *See also Lyons v. Homecomings Fin. LLC*, 770 F. Supp. 2d 1163, 1168 (W.D. Wash. 2011) ("because Mr. Lyons could have paid more than the minimum payment and avoided negative amortization, negative amortization was not certain to occur"). He simply is not in default if he fails to pay all of the interest due but instead makes the minimum required payment.

The inclusion of a warning that the "principal amount" Bucci has to repay could increase up to $1,759,500 does not mean that the fixed sum is a range. The negatively amortizing interest could have been described without reference to increasing the principal.[3] The warning merely makes the negative amortization component obvious. A note's negotiability cannot depend on how a permitted interest charge is described.

Bucci also argues that the appellate court conflated the ideas of the unconditional promise to pay with the fixed-amount requirement. It did

[3] For example, it could have said the interest provision calculates interest charged on interest, and the amount charged in interest may be more than the monthly interest payment without ever stating that the "principal" may increase.

not. Although the court could have made it clearer, it made two holdings—1) the promise to pay was unconditional even if the interest rate referred to indices outside the Note (citing *Alpacas of America. LLC v. Groome*, 179 Wn. App. 391, 397 (2014)) and 2) that the amount to pay was fixed ("The note here describes Bucci's obligations on its face: 'I promise to pay U.S. $1,530,000.00 plus any amounts added in accordance with Section 4(G) below, (this amount called "Principal"), plus interest, to the order of the Lender'"). *Bucci*, 387 P.3d at 1146. Thus, review is not necessary to clarify anything.

b. The Majority View Holds Negatively Amortizing Loans are Negotiable Instruments

Bucci misrepresents the majority view—it does **not** hold that negatively amortizing loans are non-negotiable instruments. The courts around the nation considering the issue have found the *opposite*—a negatively amortizing Note **is** a negotiable instrument.[4] *See, e.g., Goss v. Trinity Sav. & Loan Ass'n*, 813 P.2d 492, 499 (Okla. 1991) ("Therefore, for this court to construe the note [which negatively amortized] as anything other than negotiable would in our opinion thwart the basic mandate laid down by the drafters that the Code remain flexible and responsive to the business community. Moreover, we see it as our responsibility to recognize and adopt established business practices"); *In*

[4] There do not appear to be any post-amendment cases holding a negatively amortizing note is non-negotiable. Article 3 of the UCC was revised in 1990 to provide that a note was negotiable even if it had a variable interest rate and the revisions were adopted by Washington in 1993. Some pre-1990 revisions cases find that an adjustable interest rate renders a note non-negotiable. These holdings are obsolete under the 1990 revisions.

re Mortg. Store, 509 B.R. 292, 296 (Bankr. D. Haw. 2014) ("The TMS trustee acknowledges that the [negatively amortizing] promissory note is a negotiable instrument and that it was endorsed in blank. HSBC has established that its counsel has possession of it. Thus, HSBC is a person entitled to enforce the note"); *OneWest Bank FSB v. Prestano*, 49 Misc. 3d 1209(A), 26 N.Y.S.3d 725 (N.Y. Sup. Ct. 2015) ("Under the UCC § 3-204 it [is] a 'blank indorsement' which makes it [the negatively amortizing note] 'bearer' paper capable of being negotiated by delivery alone until it is specifically indorsed" but finding OneWest was not a holder on other grounds); *Doyle v. Trinity Sav. & Loan Ass'n*, 940 F.2d 592 (10th Cir. 1991) (overruling 869 F.2d 558 on reh'g); *Wells Fargo Bank, N.A. v. Lee*, 20 N.E.3d 1236, 1247–48 (Ohio Ct. App. 2014).

Unpublished cases are in accord. *See Brooks v. ComUnity Lending, Inc.*, 2010 WL 2680265, at *11 (N.D. Cal. July 6, 2010) ("Plaintiff argues that the [negatively amortizing] loan is a non-negotiable instrument . . . The SAC makes only a conclusory allegation that the loan is a non-negotiable instrument. A court need not accept such conclusory allegations as true"); *In re Kelley*, 2012 WL 314879, at *4 (Bankr. N.D. Cal. Feb. 1, 2012) ("Plaintiff claims that the negative-amortization feature of the loan's 'option adjustable rate mortgage' does not meet the requirements of being a fixed amount of money . . . Because the variable interest rate would not make either note non-negotiable, Plaintiff's claim regarding 'UCC enforceability' is likely futile . . ."); *Wane v. Loan Corp.*,

552 Fed. Appx. 908, 916 (11th Cir. 2014) ("Mr. Wane's contention that BankUnited has failed to pay the documentary stamp taxes on an increased principal resulting from negative amortization does not create a genuine issue of material fact regarding BankUnited's enforceable interest [making the Note a negotiable instrument]"); *Nationstar Mortg., LLC v. Joyce Decormier*, 2015 WL 5136748, at *7 (Conn. Super. Ct. July 30, 2015) ("While the defendant alleged that the note contains provisions allowing for changes to the interest rate and monthly payments, that the accrued but unpaid interest would be added to the principal, and that the note's payment options caused unpredictable monthly payments and an unpredictable principal amount, these allegations do not sufficiently allege that the note does not contain a fixed amount money [so it is negotiable under UCC 3-104(a)]"); *Wachovia Mortg., FSB v. Toczek*, 2016 WL 7134841, at *8 (Conn. Super. Ct. Oct. 11, 2016) ("The defendant has failed to furnish any legal authority that negative amortization loans violate General Statutes § 42a–3–104(a) [Connecticut's version of the UCC and RCW 62A.3-104(a)]"); *Baldwin*, 2009 WL 2962445, at *4. The majority view in fact supports the conclusion that negatively amortizing loans are negotiable.

c. Bucci Inappropriately Relies on Cases involving Lines of Credit to Manufacture an Incorrect "Majority View"

Bucci's "majority view" about the negotiability of negatively amortizing notes involves inapposite cases. His reliance on *Cobb Bank & Trust Co. v. Am. Mfrs. Mut. Ins. Co.*, 459 F. Supp. 328, 333 (N.D. Ga.

1978), *aff'd*, 624 F.2d 722 (5th Cir. 1980), *Wattles v. Agelastos*, 27 Mich. App. 624, 627–28 (1970), *Bank of Am., N.A. v. Alta Logistics, Inc.*, 2015 WL 505373, at *3 (Tex. App. Feb. 6, 2015), *Heritage Bank v. Bruha*, 283 Neb. 263, 269–71 (2012) and *Resolution Trust Corp. v. Oaks Apartments Joint Venture*, 966 F.2d 995, 997 (5th Cir. 1992) is misplaced. These cases do not involve negatively amortizing loans at all but rather, lines of credit or other irrelevant situations. Again, lines of credit are non-negotiable because a fixed amount is not disbursed upon consummation, unlike a negatively amortizing loan.

In *Alta Logistics*, 2015 WL 505373, at *3, the court found that the note was not negotiable because it was a revolving line of credit. It was not a negatively amortizing loan. Likewise, *Bruha*, 283 Neb. at 269–71, involved a revolving line of credit, and the court held a note evidencing the credit line was not negotiable. It did not involve a negatively amortizing loan. *Oaks Apartments*, 966 F.2d at 997, involved a note that was essentially a line of credit since it lent "two million dollars 'or so much thereof as may be advanced in accordance with the terms of a certain Loan Agreement executed on even date herewith.'" Again, the note was not a negatively amortizing loan. In *Cobb*, the "instrument" at issue was a financial guaranty bond "payable in some indeterminate balance left unpaid" in the future by the insured, not a negatively amortizing loan. *Cobb Bank*, 459 F. Supp. at 333. Moreover, the bond was not indorsed to pay the bearer, so the court found that it was not a

negotiable instrument under UCC 3-104 [RCW 62A.3-104]. *Alta Logistics*, *Bruha*, *Oaks Apartments* and *Cobb Bank* all involved a situation where the monetary disbursement (or insured in *Cobb Bank*) was not fixed upon consummation, but instead, variable based upon factors outside the note.

The *Wattles* court did not even address the actual note. In *Wattles*, 27 Mich. App. at 627–28, a borrower and lender executed a memorandum altering the payment schedule under a promissory note. The court found that the memorandum was not a negotiable note itself but merely a modification of the negotiable note that did not vary any other term. The court affirmed summary judgment for the lender for the amount in default on the note. But *Wattles* is of limited use since the negotiable nature of the original note was not at issue; the court only considered whether a separate modification to the original note was independently a negotiable note.

The fundamental difference between Bucci's cited cases and the negatively amortizing loan at issue here is that his cases all involved the situation where the initial amount disbursed varied—if the borrower wanted to pay off the loan the instant after consummation, he would not know what to repay, as something other than the note determined the amount disbursed. By contrast, negatively amortizing notes disburse a fixed amount upon consummation—the borrower instantly knows how much he needs to repay if he wanted to repay the loan upon

consummation.

2. There is No Conflict Between *Anderson v. Hoard* and the Appellate Court's Opinion

Bucci argues the appellate court's decision conflicts with *Anderson v. Hoard*, 63 Wn.2d 290, 292-293 (1963) (a note was not a negotiable instrument because it included charges for taxes and assessments). This is wrong—the appellate court's decision is compatible with *Anderson.* The appellate court noted that the parameters of the "fixed amount" clause of the negotiable instrument definition have changed since *Anderson* was decided: "[a]t the time of the Anderson decision, former RCW 62.01.001 (1995) [now codified as RCW 62A.3-104], required a negotiable instrument to 'contain an unconditional promise or order to pay a sum certain in money.'" *Bucci*, 387 P.3d at 1145. The appellate court then correctly noted that the current definition of a negotiable instrument in RCW 62A.3-104 provides that the Note can include interest and other charges and still be a negotiable instrument:

> "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.

RCW 62A.3-104. Further,

> Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument.

RCW § 62A.3-112. The appellate court correctly held that including interest does ***not*** destroy the negotiable nature of Bucci's Note—this comports with RCW 62A.3-104 and 3-112. *Bucci*, 387 P.3d at 1145. It did not find that there was a non-permitted charge included in the Note, unlike in *Anderson*.

Bucci also argues that to be negotiable, the fixed amount must be precise and equivalent to money. Bucci's argument again would prohibit the inclusion of any interest—not just negatively amortizing interest. But RCW 62A.3-104 and 62A.3-106 expressly allow the inclusion of interest and they do not exclude negatively amortizing interest. Bucci fails to explain why the negative amortization interest feature is anything but an exotic form of interest payment. Again, this provision was in the interest section of his Note, not the promise section.

Finally, Bucci wrongly claims the full repayment amount must be stated to make a note negotiable. According to Bucci's reasoning, all notes with an adjustable interest rate are non-negotiable because they could not state the full repayment amount. This is not the law under the current version of RCW 62A.3-104 and the UCC. *See Gossen v. JPMorgan Chase Bank*, 819 F. Supp. 2d 1162, 1168 (W.D. Wash. 2011); *Alexander v. Capital One, N.A.*, 191 Wn. App. 1029, 2015 WL 7736383 *1, 8 (2015) (unpublished); *Goss*, 813 P.2d at 499; *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 794 (Tex. 1992)[5] (under previous

[5] The cases cited to the opposite in *Amberboy* involve the previous version of the UCC.

version of the UCC, an adjustable interest rate does not make a note non-negotiable); *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 619 (Ill. App. Ct. 1987) (adjustable rate note negotiable under previous version of UCC); *Thompson v. First Union Nat. Bank*, 643 So. 2d 1179, 1180 (Fla. Dist. Ct. App. 1994); *Anderson v. Burson*, 196 Md. App. 457, 471 (2010), *aff'd*, 424 Md. 232 (2011); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470 (2011); *U.S. Bank Nat. Ass'n v. Kimball*, 190 Vt. 210, 216 (2011); *Deutsche Bank Nat. Trust Co. v. Pietranico*, 33 Misc. 3d 528, 551, 928 N.Y.S.2d 818, 834–35 (N.Y. Sup. Ct. 2011), *aff'd*, 102 A.D.3d 724, 957 N.Y.S.2d 868 (N.Y. App. Div. 2013); *Thomas v. Wells Fargo Bank, N.A.*, 116 So. 3d 226, 233 (Ala. Civ. App. 2012). In order to hold for Bucci, this Court would have to effectively rewrite RCW 62A.3-104 and 62A.3-106 to allow adjustable interest rates but create a carve-out for negatively amortizing loans. This Court should not revise statutes or legislate public policy. It also should not invalidate the negotiable nature of many thousands of adjustable rate notes in Washington. Accepting review and finding for Bucci would do just that.

3. Bucci's Manufactured Argument about the Indorsed Copies of the Note is Wrong and Does Not Warrant Review

Bucci asserts this Court should accept review based upon a manufactured dispute about who possessed the original Note between September 2009 and August 2013. Bucci claims that, because Chase attached an un-indorsed copy of the Note to its summary judgment brief,

there is an issue about the indorsement. There is not.

First, this issue has been waived. Bucci did not assert this issue in the trial court at all. CP 1464-1489. He also did not raise it in his appellate Opening Brief; he raised it first in his reply brief. He has waived review of this issue. RAP 2.5, 12.1; *Mangat v. Snohomish Cty.*, 176 Wn. App. 324, 334 (2013); *US W. Commc'ns, Inc. v. Wash. Utilities & Transp. Comm'n*, 134 Wn.2d 74, 112 (1997), as corrected (Mar. 3, 1998).

Second, Bucci misrepresents the evidence. While Chase's summary judgment motion attached an un-indorsed copy (for an unknown reason), its concurrently filed motion for judgment on the pleadings attached an indorsed copy. CP 1113, 1118-1123. Moreover, Chase's summary judgment declaration states the Note was endorsed-in-blank by WaMu before September 2009 and Chase physically held it since September 2009. CP 922-923 ¶ 3-10. The evidence also shows the chain of assignments from LaSalle Bank to BANA to US Bank, so regardless of whether the Note was negotiable, each entity could foreclose at the time it had an interest in the loan. CP 922 ¶5, 953-1000, 1055-1073. Bucci's argument is a red herring that does not support review.

Third, this issue is inherently limited to the facts of this case. The supposed copies that create an issue (which, as discussed, do not) are limited to the filings in this case. It is unlikely to reoccur, and this Court could not offer any guidance that would be helpful in future cases.

B. No Review is Warranted as to Chase's Judgment

Even if this Court were to accept review and find that a negatively

amortizing note was not a negotiable instrument, that review would not affect Chase's judgment in its favor. Thus, the review should not encompass Chase's judgment.

The claims against Chase (and affirmed by the appellate court) involved alleged inducements to default to obtain a loan modification. The negotiability of the negatively amortizing Note is irrelevant. Bucci did not provide any evidence to support his theories.

Further, Chase held the original Note from January 29, 2009 to August 1, 2013. The mortgage security trust's Pooling and Servicing Agreement gave Chase the power to execute assignments and foreclose for the securitized mortgage trust Trustee—BANA between 2009 and May 2011, and then US Bank from May 2011 to present. CP 922-923 ¶ 5-10; *Bucci*, 387 P.3d at 1142–43. Thus, Chase was authorized to execute substitutions of trustees, assignments and foreclosure documents and Chase was acting for the Note owner/holder as an agent—which the law has always allowed. *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wash.2d 83, 106 (2012) ("nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents"); *Barkley v. GreenPoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 69 (2015), *review denied sub nom. Barkley v. JPMorgan Chase Bank*, 184 Wn.2d 1036 (2016). Chase did not deceive anyone on a CPA claim and was not negligent in any

way.[6] Since Chase is not liable under Bucci's theory, the Court should not review the judgment in its favor.

C. The Court should Award Chase its Costs

The Court should award Chase its costs in connection with Bucci's petition for review under RAP 18.1(j). That rule permits an award "to the party who prevailed in the Court of Appeals . . . for the prevailing party's preparation and filing of the timely answer to the petition for review." Bucci's petition has no merit and fails to show any public interest in any of the issues raised in it.

V. CONCLUSION

For the reasons set forth above, the Court should deny Bucci's Petition.

RESPECTFULLY SUBMITTED this 12th day of April, 2017.

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By */s/Frederick A. Haist*
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[6] Bucci's appellate brief only challenged Chase's judgment on the CPA and negligence claims. Bucci has waived review on any other claim. *Mangat*, 176 Wn. App. at 334; *US W. Commc'ns,* 134 Wash.2d at 112.

CERTIFICATE OF SERVICE

The undersigned hereby declares that on this 12th day of April, 2017, she served a copy of the foregoing document on the following parties of record via email and first class mail:

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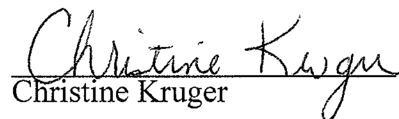
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated at Seattle, Washington this 12th day of April, 2017.



Christine Kruger