No. 98132-9
(Court of Appeals No. 51375-7-II)
(Mason County Superior Court No. 14-2-00045-0)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL L. ROGERS,

Petitioner,

v.

QUALITY LOAN SERVICE CORPORATION
OF WASHINGTON, et al.,

Respondents.

JPMORGAN CHASE BANK, N.A. AND WELLS FARGO BANK N.A. AS TRUSTEE FOR THE WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR1'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Daniel Rogers concedes: "The Court of Appeals held 'Rogers fails to identify any constitutional or statutory right to the appointment of counsel for actions under the DTA.' That is true." Pet. at 11. Yet he seeks review, claiming his "right to counsel" argument raises significant public and constitutional issues. It does not. He is not entitled to counsel under state and federal law because the Counterclaim he challenges only threatens a property interest (foreclosure). He next asserts the appellate court ignored precedent on disputed facts in affirming the foreclosure Counterclaim judgment on behalf of Wells Fargo Bank N.A. acting as trustee for the WaMu Mortgage Pass-through Certificates Series 2005-PR1 Trust (the "Trust"). He is wrong. He argues there were disputed facts over whether the servicer credited payments, but offered no evidence to support that contention, so the courts below rejected his conclusory argument. This Court should deny Mr. Rogers's Petition because:

First, Mr. Rogers's right to counsel argument does not raise any constitutional or public interests to review, because he waived the issue, is not entitled to counsel, and the trial court treated him fairly.

Second, the appellate court opinion does not conflict with summary-judgment standards. Mr. Rogers did not show a factual dispute because the Trust credited Mr. Rogers's "disputed" payments.

II. IDENTITY OF RESPONDENT.

The Trust is a respondent, defendant, and counterclaimant. Mr. Rogers's Petition does not contain issues pertaining to JPMorgan Chase Bank N.A.; Chase was a party only to Mr. Rogers's now resolved affirmative Complaint.

III. STATEMENT OF THE CASE.

Mr. Rogers's case statement outlines his contentions, embellishing and conflating them with argument, factual assumptions, and irrelevant digressions. The Trust provides a concise statement below.

A. Mr. Rogers Borrows $240,000, Secured by Real Property, and the Trust Purchases the Loan.

On or about November 2, 2004, Mr. Rogers borrowed $240,000 from Washington Mutual Bank ("WaMu"), evidenced by a promissory Note that was secured by a Deed of Trust on his property in Tahuya, Washington (Property). CP 1107-08, 1256-88, 1424-36, 1438-61. The Deed of Trust allows the loan beneficiary to foreclose on the Property if Mr. Rogers defaults on his loan. CP 1280, 1453. The Note is indorsed-in-blank, making it enforceable by possession alone. CP 1434. WaMu sold the loan/Note to the Trust in 2005, but remained loan servicer and Note custodian. CP 916, 1249-50.

B. Chase Becomes WaMu's Successor and Physically Holds the Note, Acting for the Trust (the Note Owner).

In September 2008, WaMu failed and the FDIC took WaMu into receivership. *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 323 (2016); *Rundgren v. Wash. Mut. Bank, FA*, 760 F.3d 1056, 1059 (9th Cir. 2014); *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1209 (9th Cir. 2012). On September 25, 2008, Chase became the successor-in-interest as to WaMu's rights in plaintiff's loan by purchase of WaMu's assets from the FDIC, acting as receiver, which included Mr. Rogers's Note. CP 1108, 1424-26, 1463-1506. While the Trust owns the Note, Chase services the loan and physically possesses the Note, and the Trust gave Chase a Limited Power of Attorney to enforce the Note and Deed of Trust. CP 1169, 1425-26, 1509-14.

C. Mr. Rogers Defaults on the Loan.

Mr. Rogers admitted he defaulted on his loan in 2007 and declared bankruptcy multiple times. CP 1108, 1426. After Mr. Rogers defaulted, he made payments (Mr. Rogers argued they totaled $32,475.75) to the bankruptcy trustee, which Chase, as servicer, ultimately credited to his loan (in payments of $14,440.00 and $18,035.75). CP 607, 1426, 1633-36, 1685-1720; RT 132-42, 209-12, 215-17, 236-42.

D. The Trust Successfully Obtains Judgment on Its Judicial Foreclosure Counterclaim and Against Mr. Rogers's Claims.

In 2014, Mr. Rogers, through counsel, filed this lawsuit, seeking to stop a non-judicial foreclosure on the Property. CP 1102-36. Chase and the Trust answered Mr. Rogers's Complaint, and the Trust filed a judicial foreclosure Counterclaim. CP 1332-90. After his counsel withdrew in 2015, Mr. Rogers represented himself. *See* CP 1208-13.

In 2015, Mr. Rogers filed a fee waiver motion with the trial court and argued he needed more time because he did not have counsel, not that he was entitled to counsel. CP 476-94. This Court denied his motion because it found he was not indigent. CP 552-53.

Chase and the Trust filed a motion for summary judgment against Mr. Rogers's Complaint and on the Trust's affirmative judicial foreclosure Counterclaim. CP 1424-1594.[1] The trial court granted summary judgment to Chase and the Trust and against Mr. Rogers on his Complaint. CP 1078-86. The trial court also granted foreclosure on the Trust's Counterclaim but denied, without prejudice, judgment on: (1) the total amount due and owing; (2) Mr. Rogers's redemption right; and (3) the Trust's recoverable costs. CP 1078-86. The trial court indicated these

[1] The Court also granted Defendants McCarthy and Holthus and Quality Loan Service Corp. of Washington summary judgment on Mr. Rogers's Complaint.

issues were "disputed," but only because it found that the Trust had not yet submitted sufficient evidence to prove those items. CP 847, 855-56.

E. Mr. Rogers Fails to Dispute the Amount Due on the Trust's Second Summary Judgment Motion.

The Trust subsequently successfully moved a second time for judgment to address the trial court's three remaining issues.[2] CP 1076-77, 1737-43. The Trust provided a declaration and payment histories showing what was unpaid and due, and what the loan servicer credited. CP 1633-36, 1673-1720. Mr. Rogers did not formally oppose the Trust's motion; instead, on September 26, 2017, his then-former counsel filed his own untimely declaration (unsupported by Mr. Rogers) that attached documents without properly authenticating or explaining them. CP 965-91. Then, on the October 5, 2017 continued hearing date, Mr. Rogers filed documents he claimed showed the servicer failed to credit certain payments. CP 991-1071. While the trial court struck the October 5, 2017 filing, it nevertheless considered the September 26 documents and allowed Mr. Rogers to argue the September 26 and October 5 late-filed documents' contents and the purported missing payments. RT 191, 192, 196, 198; 206-13; *see generally*, RT 188-236.

[2] The hearing was originally set for October 2, 2017.

The trial court explained why Mr. Rogers's September 26 documents did not establish a factual dispute as to the principal balance of the loan, which is what was at issue:

> And the issue that Mr. Rogers is pointing out is that the total that is said to be due in this letter does not match the total that is claimed due at this time.
>
> That is not what this letter says. The letter indicates that these are the monthly payments that are in arrears, plus interest, escrow payments that weren't made, late fees—and gives a total with regard to that figure. But what we're here today to look at is the principal balance after an acceleration of the loan. And so, that is not raising an issue of material fact.

RT 238:18-239:6. The trial court also found that evidence showed the servicer ***did*** credit the payments Mr. Rogers "disputed" as being uncredited:

> Mr. Rogers indicated that he didn't believe he got credit for an $18,000 payment. The Court located on page 32 at reference number 35 a payment in the amount of $18,035.75 being credited. Thereafter, on page 31, there are eight payments that are credited on page 30. There is an additional payment that's credited and we're still in the year 2009.
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> On page 29, there are payments – six payments that are credited. On page 27 at reference line 74, there's a payment credited of $14,440. And again, that was a specific amount – $14,000 – that Mr. Rogers did not believe was credited. And further, the page 27 –
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> MR. ROGERS: No, that's credited.
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> THE COURT: Do not interrupt me. On page 27, there's also an additional payment credited as well as page 26 that

> has seven payments credited. And so, the Court –all in this timeframe of 2009, 2010, now I'm up to page 24, lines or reference numbers 94 and 92, two more payments credited. So, the Court finds that the attempt to raise issues with regard to non-payment or non-crediting payments that were made does not raise an issue of material fact.

RT 239:18-240:13. Thus, the Court considered Mr. Rogers's arguments, addressed them, and rejected them as unsupported by the evidence.

F. Mr. Rogers Unsuccessfully Appeals the Counterclaim Judgment.

Mr. Rogers appealed the trial court's order granting Chase and the Trust judgment on his Complaint and on the judicial foreclosure Counterclaim. CP 1072-73. Mr. Rogers argued the trial court should have appointed counsel for him, with a skeletal argument (lacking evidence) disputing the default amount, even though the Trust's evidence contradicted his argument. *See Rogers v. Quality Loan Serv. Corp.*, 2019 WL 2774320, *3 (2019) (unpublished).

1. Mr. Rogers Waives Review of the Judgment on His Complaint.

Mr. Rogers's appellate assignments of error did not assert the trial court erred in granting judgment on his Complaint. The appellate court agreed he waived review of the judgment on his Complaint (and therefore any issues involving Chase). RAP 5.3(a); *Clark Cnty. v. W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 145, 147-48 (2013); *Rogers*, 2019 WL 2774320 at *4.

2. The Appellate Court Rejects Mr. Rogers's Right to Counsel Arguments.

The appellate court held that Mr. Rogers did not identify any constitutional right to counsel and did not show that the judgment threatened a fundamental liberty interest or his physical liberty. *Rogers*, 2019 WL 2774320 at *3. It also found that Washington holds pro se litigants to the same standards as attorneys. *Id*. at *4.

3. The Appellate Court Correctly Finds Mr. Rogers Did Not Raise any Factual Dispute.

The appellate court considered the Trust's judgment on the foreclosure Counterclaim.[3] Rogers argued he raised a factual issue regarding the amount due on his loan, but the appellate court found that:

> Rogers fails to provide any evidence that the payment history on the amounts due was inaccurate. The superior court correctly determined that the payment history was accurate and correctly ruled that entry of judgment in favor of Chase and the Trust was proper.

Rogers, 2019 WL 2774320 at *5.

IV. ARGUMENT.

Mr. Rogers seeks review of two issues: (1) whether he was entitled to counsel; and (2) whether the trial and appellate courts followed summary judgment law when they found he failed to show a factual

[3] Mr. Rogers's statement of issues does not present for review here the appellate court's opinion on his Consumer Protection Act claim.

dispute about his default amount. Pet. at 2. But he fails to provide any compelling reason or constitutional basis for this Court to review either issue because he is not entitled to counsel and did not establish a factual dispute.

A. Mr. Rogers's Right-to-Counsel Argument Does Not Raise Any Public and Constitutional Issues To Review.

Mr. Rogers's brief centers on his claim that the trial court should have appointed counsel. He is wrong; and because he waived his argument and has no right to counsel, there is nothing for this Court to review.

1. Mr. Rogers Waived his Right to Counsel Arguments.

Mr. Rogers did not raise his right to counsel issue before the trial court. In 2015-2016, Mr. Rogers filed a fee waiver motion with the trial court; he argued the Courts should treat him leniently and give him more time to respond to motions. CP 476-94. But he did not make a right to counsel argument in the trial court, as the appellate court correctly found. *Rogers*, 2019 WL 2774320 at *3. "Generally, this court will not review any claim of error that was not raised in the trial court." *State v. Strine*, 176 Wn.2d 742, 749 (2013); RAP 2.5. Thus, Mr. Rogers waived his right to counsel argument because he did not raise it below.

While RAP 2.5(a) allows a party to assert constitutional issues that it did not raise in the trial court, Mr. Rogers fails to satisfy the exception because the record is insufficient to fulfill it. The record is insufficient because he never claimed a constitutional right to counsel below. "If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted." *State v. WWJ Corp.*, 138 Wn.2d 595, 602 (1999). But even if he had argued the issue (and he did not), he has no right to counsel.

2. Mr. Rogers is Not Entitled to Counsel.

Mr. Rogers concedes the appellate court correctly found he failed to identify a constitutional or statutory right to counsel: "The Court of Appeals held 'Rogers fails to identify any constitutional or statutory right to the appointment of counsel for actions under the DTA.' That is true." Pet. at 11. But he claims Washington law gives him a right to counsel because otherwise, he would not obtain justice. He also asserts federal constitutional due process gives him a right to counsel. He is wrong.

a. Washington Law Does Not Require Counsel on Foreclosure Cases.

Mr. Rogers does not have a Washington constitutional right to counsel, as this Court has already held. "We hold there is no constitutional right to appeal at public expense in civil cases in which only

property or financial interests are threatened." *In re Grove*, 127 Wn.2d 221, 240 (1995). The Trust's judicial foreclosure only threatened Mr. Rogers's property interests.

Mr. Rogers argues that pro se litigants do not receive justice because they often cannot afford attorneys. Pet. at 11-14. He ignores that this Court (the Supreme Court) already found that he was not indigent. CP 552-53.[4] And he does not point to any statutory or constitutional provision that requires appointed counsel. He has no general right to counsel because no one threatened to divest him of a physical or fundamental liberty.

b. Federal Law Does Not Require Counsel in Foreclosure Cases.

Under the federal Constitution, "there is no absolute right to counsel in civil proceedings." *Hedges v. Resolution Tr. Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994). While there is a federal right to counsel in some circumstances, that right is even more limited than under Washington law because: "such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 25

[4] Mr. Rogers claimed in his motion that his counsel withdrew because he could not afford it, but the same counsel now represents him here. CP 476-94.

(1981). Ignoring this, Mr. Rogers argues that *Lassiter* and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) require appointed counsel. But *Lassiter* analyzed *Mathews* and reaffirmed that the federal Constitution requires appointed counsel **only** when a party may lose his physical liberty. *Lassiter*, 452 U.S. at 31-33.

Here, Mr. Rogers did not lose his physical liberty—the trust merely foreclosed on his property—***as he agreed it could do in the Deed of Trust securing the loan he defaulted on***. This affects liberty even less than in *Lassiter*, because there, the United States Supreme Court held a parent has no right to counsel in a hearing to terminate parental rights. And federal courts recognize that foreclosure does not trigger the federal right to counsel. "The State of [Washington] did not violate [Rogers's] constitutional rights when it failed to appoint [him] counsel in [his] foreclosure action." *Swindell v. Accredited Home Lenders, Inc.*, 442 Fed. Appx. 444, 445 (11th Cir. 2011) (unpublished); *Marks v. Cook*, 347 Fed. Appx. 915, 917 (4th Cir. 2009) (unpublished).

3. Mr. Rogers Has No Right to Be Treated Differently Than an Attorney.

The appellate court correctly rejected Rogers's arguments that the trial court treated him unfairly, because it treated him better than an attorney. *Rogers*, 2019 WL 2774320 at *4.

a. Mr. Rogers Waived Review.

Here, Mr. Rogers's argument consists of a section heading and a throw-away sentence implying the trial court would have found a factual dispute if counsel had represented him. Pet. at 17, 19. But because he failed to include this issue in his Petition's statement of issues, he waived review. Pet. at 2. "We decline to review portions of Court of Appeals decisions when the petition or answer fails to clearly state the issues for review pertaining to these portions." *State v. Coria*, 146 Wn.2d 631, 655 n.8 (2002).

b. Mr. Rogers Must be Treated Like an Attorney Under Washington Law.

Even if Mr. Rogers had preserved this issue, and he did not, he ignores that Washington courts "must hold pro se parties to the same standards to which it holds attorneys." *Edwards v. Le Duc*, 157 Wn. App. 455, 460 (2010); *In re Marriage of Olson*, 69 Wn. App. 621, 626 (1993). Thus, he has no right to be treated differently under state law.

c. Mr. Rogers Must be Treated Like an Attorney Under Federal Law.

Federal law is similar to Washington law. While federal law construes pleadings filed by pro se parties less stringently than those filed by attorneys, that standard is a procedural, not constitution-based rule. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). Generally applicable

federal procedural rules do not apply in state court. *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 191 Wn.2d 392, 446 (2018), *as amended* (2018), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 68 (2019); *Johnson v. Fankell*, 520 U.S. 911, 918–21 (1997). But even under the laxer federal law standard, a pro se litigant must follow federal procedural rules. "[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113 (1993); *see also Faretta v. Cal.*, 422 U.S. 806, 834 n.46 (1975) ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law").

d. The Trial Court Treated Mr. Rogers Fairly.

Mr. Rogers implies the trial court treated him unfairly by excluding his untimely October 5, 2017 "declaration" (which he contends creates a factual dispute—it does not) because he represented himself. Pet. at 18-19. It did not because a trial court has discretion to exclude untimely filings. *Idahosa v. King Cnty.*, 113 Wn. App. 930, 937 (2002), *as amended* (2002). He also wrongly implies a trial court would consider an attorney's untimely filings, despite case law showing the

opposite. *See, e.g., id.*; *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 301 (2008); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th Cir. 1990). And he fails to argue that the trial court's decision would have been different had it considered his untimely filing.

Neither federal nor state law require that the trial court judge must negate Mr. Rogers's arguments or do his work for him simply because he was pro se: a "district court does not have a duty to search for evidence that would create a factual dispute. . . . A district court lacks the power to act as a party's lawyer, even for *pro se* litigants." *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007); *Edwards*, 157 Wn. App. 464 ("On this record, it appears that the trial court felt obliged to assist a pro se litigant, but the trial court must treat pro se parties in the same manner it treats lawyers").

Ultimately, the trial court treated Mr. Rogers better than it was required to. While the trial court found he had not provided any timely evidence contradicting the loan balance the Trust proffered, it still considered his lengthy arguments—the hearing transcript on the second summary judgment motion is 52 pages—where he argued over the omitted documents' contents. RT 188-90, 191-95, 198-236, 238-40. The trial court compared the evidence the Trust proffered to Mr. Rogers's "facts," finding that the servicer ***did*** credit the amounts he contended it omitted.

RT 238:18-239:6, 239:18-240:13. The trial court also gave Mr. Rogers several breaks to accommodate his needs. RT 196, 209, 215, 226-27. There is no basis to review the trial and appellate courts' decisions because the trial court was more than fair with Mr. Rogers.

B. The Appellate Court's Opinion Does Not Conflict With Summary Judgment Law.

Although Mr. Rogers buries it deep within his Petition, he argues this Court should also review this matter under RAP 13.4 (b)(1) and (2) because he contends the appellate court should have found a factual dispute. Pet. at 19. He is wrong because both the appellate and the trial courts considered the admitted evidence and arguments and correctly found no factual dispute.

1. The Trust Provided Evidence that the Servicer Credited the Payments Mr. Rogers "Disputed."

For the second summary judgment motion, the Trust provided a declaration and detailed transaction and payment history showing what was unpaid and due. CP 1633-36, 1673-20. The payment history showed numerous credits, including ones for $14,440.00 and $18,035.75 (for a total of $32,475.75) which match the bankruptcy payments Mr. Rogers relies upon. CP 1426, 1711, 1716. Thus, the Trust met its burden and Mr. Rogers failed to rebut that evidence to show a dispute.

2. Mr. Rogers Failed to Provide Any Evidence Creating a Factual Dispute.

Instead of timely opposing the second motion, Mr. Rogers filed an untimely declaration from his then-former counsel on September 26, 2017. CP 965-91. He also filed documents on the October 5, 2017 hearing date. CP 991-1071. He claims these documents show the servicer did not credit $32,475.75 (consisting of $14,000 and $18,000 payments) he paid in his bankruptcy case; but again, he is wrong, because the record shows the opposite. CP 607; RT 209-12, 215-17.

For Mr. Rogers's September 26 documents, his Petition argues he showed a factual dispute, but he again fails to cite evidence—he only cites the Note and Deed of Trust, which are irrelevant to the payment issue. Pet. at 17; *Matter of Estate of Lint*, 135 Wn.2d 518, 531–32 (1998), *as amended* (1998). In any event, the trial court correctly held the September 26 documents (in particular, one letter) did not create a factual issue because they did not contradict the Trust's evidence on the amount due. CP 965-91; RT 196, 238-21. The trial court explained why:

> And the issue that Mr. Rogers is pointing out is that the total that is said to be due in this letter [found in his September 26 documents, CP 979-981] does not match the total that is claimed due at this time.
>
> That is not what this letter says. The letter indicates that these are the monthly payments that are in arrears, plus interest, escrow payments that weren't made, late fees—

> and gives a total with regard to that figure. But what we're here today to look at is the principal balance after an acceleration of the loan. And so, that is not raising an issue of material fact.

RT 238:18-239:6.

The trial court also properly ignored the October 5, 2017 documents because they were late under CR 56(c). *West v. Wash. State Ass'n of Dist. & Mun. Court Judges*, 190 Wn. App. 931, 943–44 (2015); *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 638–41 (2009) (affirming dismissal for local rule violation). Mr. Rogers argues the trial court could not omit an untimely declaration if the declaration created a factual issue. He ignores that the trial court allowed him to try to dispute the amounts the Trust proffered (he failed to do so) ***and*** argue the contents of his declaration. RT 191, 209-36.

Nor does Mr. Rogers show how the October 5 documents would have created a factual issue in any event. He argues that they show the servicer did not credit the $32,475.75 that he paid in his bankruptcy case. Pet. at 17; CP 607; RT 209-12, 215-17. But there is no factual dispute because the trial court found that the servicer credited the payments:

> Mr. Rogers indicated that he didn't believe he got credit for an $18,000 payment. The Court located on page 32 at reference number 35 a payment in the amount of $18,035.75 being credited. Thereafter, on page 31, there are eight payments that are credited on page 30. There is

> an additional payment that's credited and we're still in the year 2009.
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> THE COURT: Do not interrupt me. On page 27, there's also an additional payment credited as well as page 26 that has seven payments credited. And so, the Court – all in this timeframe of 2009, 2010, now I'm up to page 24, lines or reference numbers 94 and 92, two more payments credited. So, the Court finds that the attempt to raise issues with regard to non-payment or non-crediting payments that were made does not raise an issue of material fact.

RT 239:18-240:13. Mr. Rogers did not show a factual dispute because none existed. The trial court correctly granted summary judgment, as the appellate court correctly affirmed.

V. CONCLUSION.

Mr. Rogers's Petition fails to identify any conflict of law, constitutional issue, or public interest issue. He is not entitled to counsel and did not show a factual dispute. The Court should deny his Petition.

RESPECTFULLY SUBMITTED this 4th day of March, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this 4th day of March, 2020, he electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record at their email addresses listed below.

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DATED this 4th day of March, 2020, at Seattle, Washington.

s/ Frederick A. Haist
Frederick A. Haist, WSBA #48937

DAVIS WRIGHT TREMAINE LLP

March 04, 2020 - 8:33 AM

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Appellate Court Case Title:	Daniel L. Rogers v. Quality Loan Service Corporation, et al.
Superior Court Case Number:	14-2-00045-0

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