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No. 71143-1-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

DARLENE HOBBS and JOEL HOBBS,

Plaintiffs-Appellants,

v.

NORTHWEST TRUSTEE SERVICES, INC. and
WELLS FARGO BANK, N.A.,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. REPLY ARGUMENT

A. NWTS Was Not Authorized to Issue the Notice of Trustee's Sale Because Wells Fargo Did Not Own the Note and NWTS Knew That.

It is undisputed that the beneficiary declaration that Wells Fargo provided to NWTS stated that Freddie Mac, not Wells Fargo, owned the Hobbs' note, and that NWTS knew Wells Fargo did not own the note when it issued the notice of trustee's sale. *See* CP 320 (Wells Fargo's beneficiary declaration); *see also* Wells Fargo Br. at 4 (admitting that Freddie Mac owned the note). Based on these undisputed facts, and following established rules of statutory construction, including the rule that the Deed of Trust Act ("DTA") must be strictly construed in favor of the borrower, the plain language of RCW 61.24.030(7)(a) compels the conclusion that NWTS was not authorized to issue the notice of trustee's sale on behalf of Wells Fargo because Wells Fargo did not own the note.

1. The Plain Language of RCW 61.24.030(7)(a) Requires that Before a Trustee Issues a Notice of Trustee Sale, the Trustee Must Have Proof that the Beneficiary Is the Owner of the Note.

RCW 61.24.030(7)(a) is unambiguous in requiring that the trustee must have proof the claimed beneficiary, here Wells Fargo, is the owner of the promissory note before the trustee is authorized to schedule a trustee's sale. As the statute states, "before the notice of trustee's sale is recorded, transmitted or served, the trustee ***shall*** have proof that the beneficiary is

the ***owner*** of any promissory note or other obligation secured by the deed of trust." 61.24.030(7)(a) (emphasis added). This mandatory language was an absolute limit on NWTS's authority to foreclose. *See Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (stating that RCW 61.24.030 "sets up a list of 'requisite[s] to a trustee's sale'" that impose absolute limits on the trustee's authority to foreclose, and citing RCW 61.24.030(7)).[1]

It is fundamental that when the language of a statute is clear, the Court must give effect to that language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (if statutory language is plain on its face, "court must give effect to that plain meaning"). Because the first sentence of RCW 61.24.030(7)(a) says on its face that before a notice of trustee's sale is issued, "the trustee shall have proof that the beneficiary is the ***owner***" of the note, and the beneficiary declaration that Wells Fargo provided told NWTS that Wells Fargo was ***not*** the owner, this proof of ownership requirement in RCW 61.24.030(7)(a) was not met.

Wells Fargo and NWTS rely on the second sentence of RCW 61.24.030(7)(a), which says that a declaration stating that a beneficiary is

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[1] *See also Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 93-94, 285 P.3d 34 (2012) (stating that before foreclosing on an owner-occupied home, "the trustee shall have proof that the beneficiary is the owner of any

the "actual holder" of the note is sufficient proof to establish ownership. Wells Fargo Br. at 11; NWTS Br. at 6-10. Under their interpretation, the trustee can rely on a beneficiary declaration stating that the beneficiary is an "actual holder" to satisfy the proof of ownership requirement in the first sentence of RCW 61.24.030(7)(a), even though the declaration says that the beneficiary is ***not*** the owner and the trustee knows that the proof of ownership requirement in the first sentence is not met. *Id.*

The problem with Wells Fargo's and the trustee's interpretation is that it renders the first sentence of RCW 61.24.030(7)(a) superfluous and violates the rule that statutes should be interpreted to avoid rendering any language superfluous. *See State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014) ("We do not interpret statutes in a way that would render any statutory language superfluous"); *Campbell & Gwinn, LLC*, 146 Wn.2d at 11 (same); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 762, 912 P.2d 472 (1996) (courts must "construe statutes so as to give effect to all words, clauses and sentences"). To allow the trustee to issue a notice of trustee's sale after the beneficiary has told the trustee that the beneficiary is not the owner would read the proof of

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promissory note or other obligation secured by the deed of trust," citing RCW 61.24.030(7)(a)).

ownership requirement in the first sentence of RCW 61.24.030(7)(a) out of the statute entirely.

Wells Fargo admits that RCW 61.24.030(7)(a) must be interpreted in a way that gives effect to and harmonizes all of the statutory language. Wells Fargo Br. at 11; *see also In re Detention of C.W.*, 147 Wn.2d 259, 272, 53 P.3d 979 (2002) ("statute must be construed to give effect to all language and to harmonize all provisions"). Wells Fargo does not explain how its interpretation gives effect to the proof of ownership language in the first sentence and harmonizes the first and second sentences of RCW 61.24.030(7)(a). *Id.* Because the first sentence requires the trustee to have proof that the beneficiary owns the note before the trustee issues the notice of trustee's sale, Wells Fargo's and NWTS's interpretation under which the trustee could rely on a declaration stating that the beneficiary does ***not*** own the note as proof of the beneficiary's ownership under the first sentence renders RCW 61.24.030(7)(a) self-contradictory, and does ***not*** harmonize the statutory language.

Wells Fargo and NWTS also ignore the language at the beginning of the second sentence of RCW 61.24.030(7)(a) which requires that the declaration must be made "***by the beneficiary***," the same "***beneficiary***" that is required to prove it is the owner of the note under the first sentence of RCW 61.24.030(7)(a). *See* Wells Fargo Br. at 10 (quoting part of the

second sentence but omitting the "by the beneficiary" language). This use of the term "beneficiary" expressly links the first sentence to the second. Because the first sentence requires the trustee to have proof that the "beneficiary" owns the note before it schedules the trustee's sale, the declaration "by the beneficiary" in the second sentence must be made by the same "beneficiary" that must be the owner of the note in the first sentence. *See Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313-14, 884 P.2d 920 (1994) ("The meaning given the same language in the first sentence of the provision should accord with that given this language in the second sentence").

Any other conclusion creates an irreconcilable inconsistency between the two sentences of RCW 61.24.030(7)(a) and contradicts the plain language of the provision. The Court should reject such a result. *See State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996) (when interpreting statute, court should assume that the "legislature did not intend to create an inconsistency").

The Hobbs' interpretation of RCW 61.24.030(7)(a), in contrast, harmonizes the first and second sentences and gives effect to all of the language of RCW 61.24.030(7)(a). As explained in the opening brief, the correct interpretation is that second sentence does not create an exception to the proof of ownership requirement in the first sentence. Rather, the

second sentence allows the trustee to rely on a beneficiary's declaration stating that the beneficiary is the "actual holder" of the note as a ***proxy*** to meet the proof of ownership requirement in the first sentence, but it does not negate this requirement. *See* Opening Br. at 20-21. The trustee is allowed to rely on the "actual holder" declaration when it can do so in good faith, but not when it knows the beneficiary is not the owner of the note. RCW 61.24.030(7)(b) harmonizes the language and makes this clear by stating that the trustee is ***not*** permitted to rely on a beneficiary's declaration stating that the beneficiary is the "actual holder" as proof of the beneficiary's ownership if the trustee will have violated its duty of good faith to the borrower by doing so. *See* RCW 61.24.030(7)(b) (cross-referencing trustee's duty of good faith under RCW 61.24.010(4)).

When Wells Fargo provided a declaration to NWTS stating that Freddie Mac owned the note, NWTS could not rely on it as proof of Wells Fargo's ownership of the note, because by accepting the declaration as proof of Wells Fargo's ownership when it knew that Wells Fargo did not own the note, NWTS violated its good faith duty to the Hobbs under 61.24.030(7)(b) and RCW 61.24.010(4). Thus, NWTS could not rely on the beneficiary declaration as proof that Wells Fargo owned the note, and it had no authority to schedule the trustee's sale.

Finally, Wells Fargo's and NWTS's interpretation should be rejected because it violates the settled rule that the DTA must be strictly construed in the borrower's favor. *See Schroeder*, 177 Wn.2d at 105 (the DTA "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight"); *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915, 154 P.3d 882 (2007) (same); *Albice v. Premier Mortg. Serv. of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (because the DTA "dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor").[2] Wells Fargo's and the trustee's interpretation, and the trial court's decision that followed it, violate this principle as well. Thus, if the Court determines that there is any ambiguity or lack of clarity in RCW 61.24.030(7)(a), the Court should strictly construe the language against Wells Fargo and NWTS and in favor of the Hobbs.

[2] Even though the Hobbs highlighted this rule in their opening brief, *see* Opening Br. at 13, Wells Fargo and NWTS have completely ignored it in their arguments regarding the interpretation of RCW 61.24.030(7).

2. The Legislative History Further Supports the Hobbs' Interpretation of RCW 61.24.030(7)(a).

The Court can resolve this statutory interpretation question based on the plain language of RCW 61.24.030(7)(a) and the rules of statutory construction discussed above, without resorting to legislative history. If the Court considers legislative history, however, it should focus on the sequential drafting history of SB 5810, the 2009 bill that added the proof of ownership language to RCW 61.24.030(7). This sequential drafting history further demonstrates that the legislature intended to distinguish between the "owner" and "holder" of a promissory note and to limit the beneficiaries who can authorize a trustee's sale to beneficiaries who also own the note.

In its discussion of the legislative history of RCW 61.24.030(7)(a), Wells Fargo virtually ignores the most significant change that occurred during the drafting of the bill, which was the change from the requirement, in the original version of the bill, that the beneficiary must prove that it is the "actual holder" of the note, to the requirement in the final version as enacted that the beneficiary must prove that it is the "***owner***" of the note. Unlike the individual legislator and staff comments cited by Wells Fargo, *see* Wells Fargo Br. at 20, this sequential drafting history is strong further

evidence of the legislature's intent to limit the class of beneficiaries who can authorize foreclosure to those who own the note.[3]

The original version of SB 5810 proposed on February 3, 2009 had none of the language that is now in RCW 61.24.030(7)(a).[4] The next version, proposed on March 12, 2009, contained language almost identical to the language now in RCW 61.24.030(7)(a), ***except*** it used the phrase "actual holder" where the word "owner" now appears.[5] Under the version of the bill as it came out of the Senate, before the notice of trustee sale was recorded, the trustee would have been required to have either "proof that the beneficiary is the ***actual holder*** of any promissory note or other obligation secured by the deed of trust," or "possession of the original of any promissory note secured by the deed of trust . . ." *Id.* In the ***final*** version, however, as proposed on April 9, 2009 and as ultimately enacted,

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[3] *See Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992) ("In determining legislative intent it is appropriate to consider sequential drafts"); *State v. Turner*, 98 Wn.2d 731, 735-37, 658 P.2d 658 (1983) (changes during bill revisions laid to rest all doubts about legislative intent); Philip A. Talmadge, "A New Approach to Statutory Interpretation in Washington," 25 Seattle U. L. Rev. 179, 204 (2001) ("Various drafts of a proposed bill can be very revealing as to the legislature's intent").

[4] *See* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5810.pdf (SB 5810 as originally proposed on February 3, 2009).

[5] *See* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Amendments/Senate/5810%20AMS%20KAUF%20S2359.1.pdf (striker amendment to Senate Bill 5810, adopted March 12, 2009) at 11.

the "actual holder" language was stricken and replaced by the current language that requires the trustee to have proof that the beneficiary is the "***owner***" of the note before issuing the notice of trustee's sale.[6] This sequential drafting thus reinforces the plain language reading of RCW 61.24.030(7)(a) and further supports the Hobbs' interpretation.[7]

In arguing that the legislative history shows that SB 5810 was merely intended to impose a holder requirement on the beneficiary, and not an ownership requirement, Wells Fargo cites bill reports from earlier versions of SB 5810 before it was amended. *See* Wells Fargo Br. at 21. It fails to cite the Final Bill Report, however, which stated, "There must be proof that the beneficiary is the ***owner*** of the obligation secured by the deed of trust."[8]

Wells Fargo selectively quotes isolated statements made by an individual legislator, Senator Claudia Kauffman, and staff counsel, Trudes Tango, at committee hearings on the bill. *See* Wells Fargo Br. at 19-20.

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[6] *See* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Amendments/House/5810.E%20AMH%20JUDI%20TANG%20072.pdf (ESB 5810, adopted April 9, 2009) (emphasis added) at 12-13.

[7] *See Turner*, 98 Wn.2d at 735 (discussing sequential drafting history and concluding that the "changes . . . lay to rest all doubts about the legislative intent").

[8] *See* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/5810.E%20SBR%20FBR%2009.pdf at 3 (emphasis added).

Such statements, however, are generally not considered as evidence of legislative intent, and should be given no weight.[9] The Court also should reject Wells Fargo's argument in which it seeks to draw significance from the legislature's failure to adopt a bill introduced in early 2013, SB 5191, which would have changed the definition of "beneficiary" from "holder" to "owner." *See* Wells Fargo Br. at 16-17. Wells Fargo ignores the rule that nothing can be inferred from the legislature's inaction on a proposed bill,[10] particularly where, as here, the bill has different parts, any of which might have affected the decision not to enact it. *See Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 816, 872 P.2d 507 (1994).[11]

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[9] *See Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 610, 998 P.2d 884 (2000) (noting court's "reluctance to discern legislative intent from testimony of a single legislator"); *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972) ("statements and opinions of individual legislators generally are not considered"); *see also Louisiana-Pacific Corp. v. Asarco, Inc.*, 131 Wn.2d 587, 599, 934 P.2d 685 (1997) (testimony by house staff member not evidence of legislative intent).

[10] *See City of Medina v. Primm*, 160 Wn.2d 268, 280, 157 P.3d 379 (2007) ("nothing can be inferred from the legislature's inaction on the proposed bill"); *State v. Conte*, 159 Wn.2d 797, 813, 154 P.3d 194 (2007) ("legislative intent cannot be gleaned from the failure to enact a measure").

[11] SB 5191 had several parts, including a requirement that assignments must be recorded. *See* http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Senate%20Bills/5191.pdf.

3. Wells Fargo's Statement that a Holder Is Entitled to Enforce a Note Without Being the Owner Is True But It Ignores the Requirements of the DTA.

Wells Fargo's statement that a holder can enforce a note without being the owner, Wells Fargo Br. at 10-16, is true, but is a red herring here because it ignores the requirements of RCW 61.24.030(7)(a). There are three ways to enforce a mortgage note: (1) an action on the note, separate from the mortgage or deed of trust securing it; (2) a judicial foreclosure under RCW 61.12; and (3) a nonjudicial foreclosure under the DTA. *See* Washington Real Property Deskbook, "Beneficiary's Remedies After Default," § 21.3 at 21-5 (4th ed. 2009). In an action on the note, a holder can enforce the note without being the owner and must simply meet the enforcement requirements under UCC Article 3 as set forth in RCW 62A.3. In a judicial foreclosure, a holder can judicially foreclose without being the owner, provided that it is entitled to enforce the note under UCC Article 3 and also holds the beneficial interest under the mortgage or deed of trust.

In a nonjudicial foreclosure, however, while it ***necessary*** to be the holder to be the beneficiary under RCW 61.24.005(2), it is not ***sufficient***, because the DTA imposes additional requirements, including the proof of ownership requirement in RCW 61.24.030(7)(a). As the Supreme Court stated in *Albice*:

> Because the [DTA] dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders ***must strictly comply with the statutes*** . . . The procedural ***requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030*** and RCW 61.24.040.

Albice, 174 Wn.2d at 567 (emphasis added); *see Kennebec v. Bank of the West*, 88 Wn.2d 718, 725, 565 P.2d 812 (1977) (discussing the difference between judicial and nonjudicial foreclosure and stating that if the creditor elects to use "the deed of trust foreclosure device, that statute regulates its manner of operation").[12]

4. The Court Should Independently Consider This Question Based on the Hobbs' Arguments Made Here With the Benefit of Counsel.

In *Trujillo v. Northwest Trustee Services, Inc.*, ___ P.3d ___, 2014 WL 2453092 (Wash. App. June 2, 2014), another panel of this Court recently held that:

> [W]hen we consider the language of the second sentence of [RCW 61.24.030(7)(a)], specifying that the beneficiary must be the holder of the note for purposes of proof, together with the case authority and other related statutes we have discussed, we must conclude that the required proof is that the beneficiary must be the holder of the note. ***It need not show that it is the owner of the note.***

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[12] *See also Queen City Savings & Loan Ass'n v. Mannhalt*, 111 Wn.2d 503, 515, 760 P.2d 350 (1988) (Dore, J., dissenting) ("Since the judiciary is not involved in deed of trust foreclosures under the Act, only the words of the Act itself stand between the borrower and the lender eager to foreclose. Unless we strictly construe the Act, that protection will quickly erode away to zero.") (cited in *Klem v. Washington Mut. Bank,* 176 Wn.2d 771, 789, 295 P.3d 1179 (2013)).

Trujillo, 2014 WL 2453092 at *8 (emphasis added). The *Trujillo* court concluded that as long as a beneficiary is a person entitled to enforce a note under Article 3, RCW 62A.3-301, the beneficiary can authorize the issuance of a notice of trustee's sale under RCW 61.24.030(7)(a), even if it is not the owner, and regardless of the explicit proof of ownership requirement contained in the first sentence of RCW 61.24.030(7)(a). *Id.*

In reaching this conclusion, the *Trujillo* court relied on a ***judicial*** foreclosure case, *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969). *Trujillo*, 2014 WL 2453092 at *6-7. It relied on that judicial foreclosure case, *John Davis*, even though the requirements for a foreclosure under the DTA are substantially different from the requirements for a judicial foreclosure or an action on a note, as discussed above. *See Albice*, 174 Wn.2d at 567 (observing that statutory requirements for a nonjudicial foreclosure are "extensively spelled out" in the DTA, and that the lender must "strictly comply" with those statutory requirements, including the "requirements for conducting a trustee sale . . . spelled out in RCW 61.24.030").

By holding that under RCW 61.24.030(7)(a) a beneficiary "need not show that it is the owner of the note," *Trujillo*, 2014 WL 2453092 at *8, the *Trujillo* court read the first sentence of RCW 61.24.030(7)(a) and its requirement that before a notice of trustee's sale is issued, "the trustee

shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust," completely out of the statute.[13]

The *Trujillo* court made no effort to harmonize the first sentence of RCW 61.24.030(7)(a) with the second sentence.[14] Nor did it consider the rule repeatedly stated by the Supreme Court that the DTA must be strictly construed in favor of the borrower.[15] The *Trujillo* court's failure to apply that rule in *Trujillo* is in stark contrast to this Court's decision in *Walker*, where it "construe[ed] RCW 61.24.127(1)(c) in [the] borrower's favor" in reaching its holding that the statute demonstrates that the legislature recognizes a cause of action for damages for DTA violations.[16] Nor did the *Trujillo* court consider the sequential drafting history that led to the enactment of RCW 61.24.030(7)(a), presented here, that further supports the Hobbs' interpretation of RCW 61.24.030(7)(a).

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[13] *See Johnson*, 179 Wn.2d at 546-47 (statute should not be interpreted to render any language superfluous); *Campbell & Gwinn, LLC*, 146 Wn.2d at 11 (same); *Gilbert H. Moen Co.*, 128 Wn.2d at 762 (same).

[14] *See In re Detention of C.W.*, 147 Wn.2d at 272 (statutes must be construed so as to give effect to harmonize all provisions).

[15] *See Schroeder*, 177 Wn.2d at 105 (court should strictly construe DTA in favor of borrower); *Albice,* 174 Wn.2d at 567 (same); *Udall*, 159 Wn.2d at 915 (same).

[16] *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 306, 308 P.3d 716 (2013).

This Court should also bear in mind that the plaintiff in the *Trujillo* case, Ms. Trujillo, was *pro se* throughout the entire trial court proceeding and was also *pro se* until after all of the appellate briefing in that case had been completed. Most of the strongest arguments made by the Hobbs in this appeal either were not made in Ms. Trujillo's *pro se* briefing at all, or they were not made clearly.

With due respect to the *Trujillo* court, the Hobbs ask that this Court engage in its own analysis of RCW 61.24.030(7) in this case. *See International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37 n.9, 42 P.3d 1265 (2002) (Court of Appeals can "overrule itself" if previous decision is demonstrably incorrect). Because *Trujillo* is a sweeping published decision that was reached despite having no briefing received from counsel for the homeowner, the Hobbs request that this Court independently consider this question regarding the proper interpretation RCW 61.24.030(7)(a) based on the briefing that the Hobbs have presented having the benefit of counsel.

B. As a Loan Servicer with Temporary Custody of the Note, Wells Fargo Did Not Have Legal Possession as Required to Be a Beneficiary under the DTA.

As a loan servicer for Freddie Mac, with temporary custody of the note, Wells Fargo did not have legal possession of the note as required to be a "holder" and therefore a "beneficiary" as those terms are used in the

DTA.[17] Because of this, NWTS lacked legal authority to foreclose. *See, e.g., Walker*, 176 Wn. App. at 306 (only a lawful beneficiary is authorized to appoint a successor trustee).

Wells Fargo's assertions concerning possession of the Hobbs' note, *see* Wells Fargo Br. at 25-27, are unsupported by the record. Its own affidavits and exhibits show that Freddie Mac had constructive possession of the Hobbs' note because the note was in the custody of Freddie Mac's "custodian," Wells Fargo Bank, N.A., Corporate Trustee Services, under a Custodial Agreement. CP 305-07; CP 322. When Freddie Mac's custodian released the note to the temporary custody of Wells Fargo as loan servicer, that was done through the use of Freddie Mac Form 1036, and in such a manner that Freddie Mac did not relinquish its legal possession of the note. *Id.*

In *Bain*, the Supreme Court held that MERS was not a DTA "beneficiary," because MERS never held the promissory note secured by the deed of trust. *Bain*, 175 Wn.2d at 110. In reaching its holding, the Court looked to the UCC and ruled that in interpreting the term "holder"

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[17] *See* RCW 61.24.005(2) (defining "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation").

as used in the DTA's "beneficiary" definition, RCW 61.24.005(2), it should be guided by the definition of "holder" under the UCC. *Id.* at 104.

UCC Article 1 now defines the "holder" of a note or other negotiable instrument, in relevant part, as "[t]he person in ***possession*** of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(21)(A). (emphasis added). The term "possession" as used in the definition of "holder" is not defined anywhere in the UCC. *In re Kelton Motors, Inc.*, 97 F.3d 22, 26 (2d Cir. 1996); *see also* RCW 62A.1-201. The UCC does, however, provide that the principles of law and equity, including common law agency, supplement its provisions. RCW 62A.1-103.

Relying on common law agency principles, courts have found parties to be holders entitled to enforce notes and other negotiable instruments where such documents were in the custody of their agents.[18]

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[18] *See, e.g., In re Kelton Motors, Inc.*, 97 F.3d at 26-27 (holding based on common law agency principles that party with "possession" of checks under the UCC's "holder" definition was the party that had the legal right to control the checks, not the party with physical custody of the checks); *MidFirstBank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304, 1314-15 (D.S.C. 1994) (holding that owner of loan had "possession" and was thus the "holder" under the UCC where its agent, Bank of America had physical custody of the notes for the owner); *Corporación Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1116-18 (S.D.N.Y. 1978) (holding that the owners of the promissory notes had "possession" and were "holders" as defined in UCC, where the notes were delivered to its document custodians).

Wells Fargo's attempt to distinguish these cases is unavailing. *See* Wells Fargo Br. at 24-27. In each of these cases, the courts applied principles of agency law, consistent with RCW 62A.1-103, and held that the owners of the notes whose agents had physical custody of them, had acquired possession of the notes as required for holder status under UCC Article 3.

As Wells Fargo appears to concede, Freddie Mac had constructive possession of the Hobbs' note and remained the holder while the note was in possession of its custodian. *See* Wells Fargo Br. at 25 (citing RCW 62A.3-201, cmt. 1, which states that a holder can possess a note "through an agent"). Wells Fargo fails, however, to acknowledge that, as explained below, Freddie Mac did not relinquish possession of the note when through its custodian, Wells Fargo Bank, N.A., Corporate Trustee Services, it released the Hobbs' note into the temporary custody of its loan servicer, Wells Fargo Home Mortgage. *See* CP 322.

To determine whether Freddie Mac relinquished possession of the note when it was released from one arm of Wells Fargo to the other, the Court should look to Article 9 of the UCC as well as Articles 1 and 3, because they are all parts of the same statute and should be construed together. *See, e.g., Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assoc.*, 168 Wn.2d 421, 433, 228 P.3d 1260 (2010) ("In coming to the proper interpretation, we turn to related provisions of

the same statute"); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (when same words appear in different parts of a statute, their meaning is presumed to be the same throughout).

In 2000, Washington adopted the revised model version of Article 9. As part of these revisions to Article 9, the legislature enacted RCW 62A.9A-313(h). The Official Comments to this section are important. Comment 3 makes clear that the section does not define "possession." RCW 62A.9A-313(h), cmt. 3. Instead, it adopts the common law agency concept of "possession" as developed under former Article 9. *Id.* As a result, in cases where collateral, which includes a promissory note, is in the possession of an agent of the secured party (which includes a person to which . . . a promissory note has been sold as provided in RCW 62A.9A-102(72)(D)), the secured party has taken actual possession.[19]

Under RCW 62A.9A-313(h), Freddie Mac and its custodian did not relinquish possession of the Hobbs' note by releasing the note to Wells Fargo as loan servicer, because its Form 1036 instructed the loan servicer that custody was being transferred solely for the purpose of foreclosure and that the servicer held the note in trust for the benefit of Freddie Mac,

[19] As Wells Fargo acknowledges, this same concept of possession through an agent is also reflected in Article 3. *See* Wells Fargo Br. at 25 (citing RCW 62A.3-201, cmt. 1),

CP 322. The language in Form 1036 exactly mirrored the requirements of RCW 62A.9A-313(h)(1) which states that when custody of a note is transferred on these terms, the owner "does not relinquish possession." Accordingly, the trial court erred in finding that Wells Fargo's physical custody of the note as loan servicer was sufficient to confer upon Wells Fargo holder and beneficiary status under the DTA. CP 436-37.

Wells Fargo's argument that Article 9 has no bearing on this case is incorrect. Just as the Supreme Court in *Bain* looked to the definition of "holder" in Articles 1 and 3 in determining whether MERS was a lawful "beneficiary" under the DTA, this Court should look to common law of agency and Article 9's provision governing transfer of temporary custody of a note to decide whether Freddie Mac retained legal "possession." These are all related statutes. *Bain*, 175 Wn.2d at 103-04.

In *Trujillo*, discussed above, a panel of this Court recently concluded that Article 9 has no bearing on whether a loan servicer has sufficient possession to qualify as a holder and lawful beneficiary under the DTA. *Trujillo*, 2014 WL 2453092 at *8-10. As noted above, however, Ms. Trujillo was *pro se* until after all of her appellate briefing was completed, and the *Trujillo* court gave this issue only cursory review.

The Hobbs thus respectfully request that this Court independently consider the merits of their argument on this issue as it is allowed to do.[20]

C. The Hobbs May Assert a Pre-Sale Claim Based on a Material Violation of the DTA Even Though They Were in Default.

The Court should also reject Wells Fargo's assertion that a borrower may not assert a pre-sale claim under the DTA without a showing of prejudice and that there can be no prejudice where the borrower is in default on the note. *See* Wells Fargo Br. at 28-29. The fact that the Hobbs are in default does not deprive them of their rights to enjoin a wrongfully-initiated foreclosure and seek damages for their injuries. *See Walker*, 176 Wn. App. at 312-13 (holding that borrower who defaulted on the note had an actionable pre-sale claim based on a material violation of the DTA, even though no foreclosure sale occurred).

Koegel v. Prudential Mutual Savings Bank, 51 Wn. App 108, 752 P.2d 385 (1988), and *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (1988), *see* Wells Fargo Br. at 28-29, are not on point. Both involved challenges to completed sales. In each case, the court found that the party seeking to avoid the sale waived its right to contest the nonjudicial foreclosure by failing to pursue presale remedies provided in the DTA, and by failing to bring actions to restrain the sale. *Koegel*, 51 Wn. App. at

[20] *See International Association of Fire Fighters,* 146 Wn.2d at 37 n. 9.

112-16; *Steward*, 51 Wn. App. at 154-55. That rationale does not apply to a pre-sale challenge where, as here, the borrowers availed themselves of their right to enjoin the sale under RCW 61.24.130.[21]

This Court should reject any attempt to deprive the Hobbs and other Washington borrowers who are in default of their right to enjoin a trustee's sale or pursue a *Walker* claim for damages, provided they can establish injury. A contrary rule would be at odds with the oft-stated maxim that the DTA should be construed to further three basic objectives. *See, e.g., Bain*, 175 Wn.2d at 94. It would deprive borrowers of an adequate opportunity to prevent wrongful foreclosures and remove an important tool for encouraging compliance with the material prerequisites of the DTA. *See Walker*, 176 Wn. App. at 311-12.[22]

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[21] Wells Fargo's reliance on *Amresco Independence Funding, Inv. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005), is also misplaced. *See* Wells Fargo Br. at 28. While the court stated that a plaintiff must show prejudice to set aside a trustee sale, agreeing with *Koegel*, it ultimately held the trustee had complied with the statute's notice requirements. *Id.* at 540. As a result, *Amresco*'s statements about prejudice were unnecessary to the holding of the case and are dicta.

[22] The California case that Wells Fargo cites, *Siliga v. Mortgage Electronic Registrations Systems, Inc.*, 219 Cal. App. 4th 75, 85 (2013), Wells Fargo Br. at 29, does not reflect Washington law. There are no Washington cases holding that a borrower cannot seek to enjoin a trustee's sale or bring a pre-sale claim for wrongful foreclosure simply because the borrower is in default under the note, and *Walker* holds directly to the contrary.

D. Wells Fargo and NWTS Did Not Raise the Issues of Vicarious Liability, Proximate Cause, Injury, or Good Faith in the Trial Court and the Record Is Not Sufficiently Developed to Consider Affirmance on Those Grounds.

There is no basis for affirming the summary judgment on any of the alternative grounds suggested by Wells Fargo and NWTS. *See* Wells Fargo Br. at 27-34; NWTS Br. at 13-15. While the Hobbs acknowledge that the Court can affirm the summary judgment on any basis supported by the record, as explained in *Davidson Series & Associates v. City of Kirkland*, 159 Wn. App. 616, 624, 246 P.3d 822 (2011), that is only permissible if the "record has been sufficiently developed to fairly consider" the alternative ground for affirmance. RAP 2.5(a). Here, the record was not sufficiently developed to resolve the issues of vicarious liability, proximate cause, injury, or good faith because Wells Fargo did not raise those issues in its motion for summary judgment and NWTS did not assert them in its joinder in that motion. See CP 1-17; CP 323-24.

As the court stated in *Davidson*, "[i]t is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." 159 Wn. App. at 637 (citing *White v. Kent Med. Ctr., Inc., PS*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991)). In *White*, the court emphasized that allowing a moving party to raise new issues in its reply materials in the trial court (or as here

on appeal) is improper because it leaves the non-moving party with no fair opportunity to respond. *Id.* at 169.

II. CONCLUSION

For all the foregoing reasons, the Court should reverse the summary judgment that was entered in favor of Wells Fargo and NWTS, enter partial summary judgment for the Hobbs, *see* Opening Br. at 43-44, and remand this case for trial on the remaining elements of the Hobbs' claims.

DATED this 30th day of June, 2014.

Respectfully submitted,

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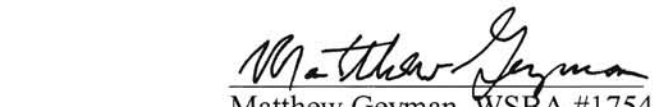

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DECLARATION OF SERVICE

I, Annabell Joya, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Appellants' Reply Brief to be served both by email and by first-class mail, postage prepaid, upon the following counsel of record:

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