No. 92187-3

SUPREME COURT FOR THE STATE OF WASHINGTON

ALEX C. BARKLEY,

Appellant/Plaintiff,

v.

JPMORGAN CHASE BANK, N.A., et al.,

Respondents/Defendants.

ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO ALEX C. BARKLE'S PETITION FOR REVIEW

Heidi Buck Morrison, WSBA No. 41769
Northwest Trustee Services, Inc.
Attorney for Respondent
Northwest Trustee Services, Inc.

13555 SE 36th St., Suite 100
Bellevue, WA 98006
(425) 213-5534 Phone
(425) 283-5968 Fax
hbuckmorrison@northwesttrustee.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes

Court Rules

I. IDENTITY OF ANSWERING PARTY

Respondent Northwest Trustee Services, Inc. ("NWTS") hereby answers the Petition for Review of Appellant Alex C. Barkley ("Petition for Review") as follows below.

II. STATEMENT OF RELIEF SOUGHT

NWTS requests that the Washington Supreme Court decline to accept discretionary review of the published decision in *Barkley v. GreenPoint Mortgage Funding, Inc.*,-- Wn. App. --, 2015 WL 4730175, (Aug. 10, 2015), *publication req. granted* Sep. 11, 2015.

III. FACTS RELEVANT TO THE PETITION FOR REVIEW

On or about November 19, 2002, in order to refinance an existing mortgage, Alex C. Barkley ("Barkley") executed a promissory note (the "Note") in the amount of $291,900.00, payable to GreenPoint Mortgage Funding, Inc. ("Greenpoint"). CP 499-504. Greenpoint indorsed the Note in blank making it bearer paper. CP 369.

Barkley also executed a Deed of Trust securing the Note. CP 228-247. The recorded Deed of Trust encumbers a piece of real property commonly known as 3428 37th Ave. S.W., Seattle, WA 98126 (the "Rental Property"), that Barkley uses strictly for investment purposes. *Id*;

see also CP 276 (Barkley Dep. at 9:7-25).[1] Barkley agreed that the Note and Deed of Trust could be sold one or more times without prior notice to him. *Id.*, ¶ 20. He also agreed that the lender could appoint a successor trustee, who would acquire all "title, power and duties" of the original trustee. *Id.*, ¶ 24; *see also* CP 294 (Barkley Dep. at 81:9-23).

Chase presented uncontroverted evidence to the trial court that U.S. Bank became the owner of the blank indorsed Note in January 2003, and that in connection with its acquisition of the Note, it also became the holder when it took possession of the original Note, through its servicer and agents. CP 425-428.

Chase also presented evidence to the trial court demonstrating that U.S. Bank became the beneficiary of record of Barkley's Deed of Trust on September 18, 2012, when MERS, acting in its capacity as nominee (i.e. agent) for U.S. Bank (i.e. Greenpoint's successor and assign as to the Note), assigned its nominee interest to its principal, U.S. Bank. The assignment was recorded on November 26, 2012. CP 453-54.

Moreover, Chase presented uncontroverted evidence to the trial court that (JPMorgan Chase Bank, N.A., hereinafter "Chase") is the loan

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[1] An Assignment of Deed of Trust was later recorded in favor of U.S. Bank National Association, as Trustee, Successor in Interest to State Street Bank and Trust as Trustee for Washington Mutual MSC Mortgage Pass-Through Certificates Series 2003-AR1 ("U.S. Bank"), on November 26, 2012 with the King County Auditor. CP 249.

servicer for U.S. Bank, and in that capacity was authorized by U.S. Bank to execute and deliver, on behalf of U.S. Bank, all documents and instruments necessary to conduct any foreclosure. CP 429-33; CP 435-51. Chase also presented evidence to the trial that when NWTS commenced foreclosure, Chase, as servicer for U.S. Bank, had possession of the original Note. CP 496, 491.

On or about January 19, 2011, as a result of Barkley's August 2010 default on payments due under the Note secured by the Deed of Trust, NWTS issued a Notice of Default as duly authorized agent of the beneficiary, U.S. Bank. CP 251-253. The Notice informed Barkley of the arrearage, then exceeding $16,000. It also correctly identified the Note's owner (U.S. Bank) and the loan servicer (Chase). *Id.*

On or about October 18, 2012, an unequivocal sworn declaration was executed averring to U.S. Bank's status as actual holder of the Note. CP 255. On October 29, 2012, NWTS received that declaration. CP 354.

On November 26, 2012, an Appointment of Successor Trustee was recorded with the King County Auditor, naming NWTS as the successor trustee under the Deed of Trust. CP 257-259.

On December 13, 2012, a Notice of Trustee's Sale was recorded with the King County Auditor, setting sale of the Rental Property for March 15, 2013. CP 261-264.

On March 4, 2013, Barkley's counsel wrote a letter to NWTS requesting "cooperation" to postpone the scheduled sale. CP 266. On March 6, 2013, NWTS' counsel responded that the sale would be postponed to allow time for a purported review of "Barkley's loan and foreclosure documents." CP 268-269. The sale was then postponed again after Barkley's lawsuit was filed. CP 271-272. The trustee's sale did not occur. CP 354.

In addition to avoiding a completed foreclosure, Barkley continued to reap nearly $4,000/month in profit from using the Rental Property as a "vacation rental" while not making loan payments. CP 751-752.

B. Procedural History.

On May 22, 2013, Barkley filed a complaint against Greenpoint, U.S. Bank, Chase, Mortgage Electronic Registration Systems, Inc. ("MERS"), and NWTS. CP 1-130.

On March 14, 2014, Chase, U.S. Bank, and MERS were awarded $1,068 in attorneys' fees and costs based on a successful motion to compel Barkley's compliance with discovery demands. CP 1351-1352.

In April 2014, all Defendants respectively moved for summary judgment. CP 187-349; CP 359-494. On May 23, 2014, the trial court granted those motions. CP 1097-1102. On June 9, 2014, Barkley filed a Notice of Appeal. CP 1105-1113.

By Order dated September 21, 2015, the opinion of the Court of Appeals was ordered to be published. *See Barkley v. GreenPoint Mortgage Funding, Inc.*,-- Wn. App. --, 2015 WL 4730175, *1 and *4 (Aug. 10, 2015), *publication req. granted* Sep. 11, 2015.

IV. ANSWER TO ISSUES PRESENTED

1. The Court of Appeals decision in this case at bar does not conflict with any Supreme Court precedent, including *Trujillo v. NWTS*, -- Wn.2d --, 2015 WL 4943982 (Aug. 20, 2015) and *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014) because (1) Barkley did not present any allegation or challenge similar to that made in the *Trujillo* or *Lyons* cases and (2) the uncontroverted evidence demonstrated U.S. Bank's authority to foreclose as the beneficiary.

2. The declarations submitted by Chase and NWTS were admissible and competent evidence in support of summary judgment.

3. The Court correctly denied Barkley's request for a continuance to conduct additional discovery after he capably responded to the Defendants' summary judgment motions with a 41-page brief plus other documentation.

4. The trial court did not err in granting summary judgment to NWTS on Mr. Barkley's Consumer Protection Act ("CPA") claim, and that decision was properly affirmed on appeal.

5. The issues presented by Barkley in this case are not of substantial public interest.

V. AUTHORITY AND ARGUMENT[2]

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

The Court should not accept review under RAP 13.4(b) in the case at bar. The issues here are covered by established case law and are narrow, discrete, and specific to the facts of this particular matter.[3]

A. The Court of Appeals' Decision Does Not Conflict With Supreme Court Precedent.

Mr. Barkley contends that the Court of Appeals incorrectly found that NWTS satisfied RCW 61.24.030(7)(a) in light of *Trujillo v.*

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[2] NWTS incorporates the argument section of the Answer to Barkley's Petition for Review by JPMorgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association already submitted in this case.
[3] Mr. Barkley addresses only the first and fourth criteria. Petition for Review at 1-4.

Northwest Trustee Services, Inc. and *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014). Petition for Review at 8-9.

First, Mr. Barkley should not be permitted to raise this issue, and the Supreme Court should not accept review on this issue.[4] Unlike the operative complaint in *Trujillo* and *Lyons*, Mr. Barkley did not attack the sufficiency of the declaration pursuant to RCW 61.24.030 received and considered by NWTS. Rather, Barkley's complaint alleged that "Northwest Trustee failed to have executed the Beneficiary Declaration that is required under RCW 61.24.030." CP 6. This allegation is nonsensical in that RCW 61.24.030 does not require execution of any declaration **by the trustee.** Rather, that provision requires a trustee to have proof the beneficiary is entitled to enforce the obligation prior to recording a notice of trustee's sale, and provides that "[a] declaration **by the beneficiary** made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this

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[4] Generally, if an issue is not raised in the trial court it may not be raised on appeal. *See* RAP 2.5(a); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). The rule contains three express exceptions (none of which apply here): "a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a).

subsection." RCW 61.24.030(7)(a). (Emphasis added). Thus, the allegations in Barkley's complaint simply do not support review of this issue.

Second, even if Mr. Barkley was entitled to put forth issues on appeal that were not raised at the trial court, the present case is not analogous to either *Trujillo* or *Lyons*. Both *Trujillo* and *Lyons* remanded claims based on the presence of an "ambiguous" beneficiary declaration, while this case involves no such evidence. CP 352-354; CP 255.

Indeed, *Lyons* permits reliance on a beneficiary declaration – or numerous other forms of proof – *unless* "there is an indication that the beneficiary declaration might be ineffective," in which case "a trustee should verify its veracity...." 181 Wn.2d at 790. Here, not only was the beneficiary declaration unambiguous and compliant with RCW 61.24.030(7)(a), but U.S Bank, through its servicer Chase, actually did hold the Note at all relevant times during the entire unfinished foreclosure process. CP 369-371. Moreover, the record demonstrates NWTS was not presented with any legitimate reason to call U.S Bank's declaration into question. *Cf. Lyons, supra.*

Mr. Barkley also argues NWTS could not rely on the beneficiary declaration in this case because the declaration states U.S. Bank is the "holder" rather than the "actual holder." Petition for Review, at *8.[5]

However, this is a red herring. The beneficiary declaration in the present case is accurate and does not require the word "actual." As noted *supra*, the DTA requires a trustee to have "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). *One possible means* of accomplishing this requirement is through a declaration averring that "the beneficiary is the actual holder of the

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[5] Contrary to Barkley's assertions, neither *Trujillo* nor *Brown* addresses the propriety of a declaration stating the beneficiary is the "holder" vs. "actual holder." *Trujillo* addressed the propriety of a declaration that was "ambiguous whether the declaration proves Wells Fargo is the holder or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3–301" because of the phrase "or has requisite authority under RCW 62A.3–301 to enforce said obligation" contained in the declaration. *See Trujillo v. Nw. Tr. Servs., Inc.*, 2015 WL 4943982, at *4. *Brown* is similarly off point, and whatever the decision that is rendered in *Brown* is will not be at odds with the Court of Appeals' decision in this case because here, the uncontroverted evidence showed that U.S. Bank is both the owner and holder. *See Brown v. Washington State Department of Commerce*, Case No. 90652-1 (considering the issue of whether, for purposes of a mediation under Washington's Foreclosure Fairness Act ("FFA"), the entity required to participate in an FFA mediation must be both the holder and owner of the subject promissory note).

promissory note or other obligation." *Id*; *see also Trujillo v. Nw. Tr. Servs., Inc.*, -- P. 3d --, 2015 WL 4943982, at *4 (Aug. 20, 2015).

Further, "[u]nless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection." RCW 61.24.030(7)(b).

The term "actual holder" is not defined in either the DTA or UCC. When a statutory term is undefined, the court should look to "the ordinary meaning of the term." *McLain v. Kent Sch. Dist., No. 415*, 178 Wn. App. 366, 378, 314 P.3d 435 (2013); *accord F.A.A. v. Cooper*, 132 S. Ct. 1441, 1450, 182 L. Ed. 2d 497 (2012) (definition of "actual damages" in Privacy Act must be considered in "the particular context in which the term appears.").

In *State v. C.A.E.*, Division Two of the Court of Appeals evaluated the term "actual" in the context of a restitution order for "actual expenses." 148 Wn. App. 720, 201 P.3d 361 (2009). The majority found that "to be an 'actual expense,' it should be 'in existence,' 'present,' or 'current'." *Id.* at 727. The dissent in *C.A.E.* added that "actual" has two dictionary definitions: 1) "existing in fact or reality," and 2) "existing at the present or at the time." *Id.* at 732.

The term "actual" does not restrict the *manner* of being a note

holder; rather, it compels an expression of *when* an entity *is* the holder. As noted above, the State Supreme Court found in *Bain* that "a beneficiary must either actually possess the promissory note *or* be the payee." 175 Wn.2d at 104 (emphasis added). It is therefore permissible to enforce the obligation as the instrument's payee regardless of where the note is physically located. *See Bain v. Metropolitan Mortg. Group, Inc.*. 175 Wn.2d, 83, 103-104, 285 P.3d 34 (2012) (Making reference Article 3 of the UCC as appropriate for purpose of the Deeds of Trust Act."); *see also* RCW 62A.3-201, cmt. 1.

Defining "actual" to mean a current factual reality comports with the present tense emphasized in RCW 61.24.030(7)(a), *i.e.* the use of "is" to define the point at which a beneficiary must declare its status.[6] In other words, 61.24.030(7)(a) requires an averment to being the "actual" holder because it directs a beneficiary to state its status at the point when the declaration *is* signed – not at some prior or future time when another entity may have been, or become, the holder. This interpretation is logical because RCW 61.24.030(7)(a) affords the assurance to a trustee of knowing who holds the note at a point before the sale notice is recorded.

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[6] Oral Argument at 22:25, *Lyons v. Northwest Trustee Services*, Case No. 89132-0 (May 27, 2014) (Wiggins, J.), *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014050021 (statute emphasizes present tense).

Thus, a beneficiary declaration stating "holder" is no different than one using the phrase "actual holder" because it remains a sworn statement of the beneficiary's status at the time it is signed. The word "actual" is not a magic incantation that destroys a reliance on the entire declaration simply because it is omitted.

Indeed, the Supreme Court's decision in both *Lyons* and *Trujillo* supports this position as the Supreme Court makes *no distinction* between "holder" and "actual holder." The Court wrote: "[o]n its face, it is ambiguous whether the declaration proves Wells Fargo is the **holder** or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3–301." *Trujillo v. Nw. Tr. Servs., Inc.*, -- P.3d --, 2015 WL 4943982, at *4 (Wash. Aug. 20, 2015) (citing *Lyons*, 181 Wn.2d at 791) (Emphasis added). Thus, both *Lyons* and *Trujillo* expressly agree that the status of being a "holder" is the critical consideration in foreclosure, and the Court pays no heed to using the word "actual" as a means of describing that fact. Here, the October 2012 declaration at issue plainly says "U.S. Bank... *is* the holder...." CP 255.[7] The declaration even reflects "Note Holder" in the header. *Id.* Furthermore, we know the declaration to be accurate

[7] The record reflects that NWTS received the declaration on October 28, 2012, prior to when it recorded the Notice of Trustee's Sale on December 13, 2012. CP 354; CP 261-64.

because the Court held that U.S. Bank has held the blank endorsed note since 2003. *Barkley v. GreenPoint Mortgage Funding, Inc.*,-- Wn. App. --, 2015 WL 4730175, *1 and *4 (Aug. 10, 2015), *publication req. granted* Sep. 11, 2015.

Additionally, U.S. Bank, as the present beneficiary under the Deed of Trust, appointed NWTS as the successor trustee, and there has been no recorded assignment evidencing a different beneficiary. *Id.*, at *2; *see also* CP 257-259, CP 249.

In sum, the Court of Appeals, in accordance with both *Lyons* and *Trujillo*, correctly held that NWTS was entitled to rely on the unambiguous beneficiary declaration before recording the Notice of Trustee's Sale. The declaration accurately stated that U.S. Bank *is* the Note holder, and that fact was actually true whether the word "actual" was used or not.

Ultimately, this case presented a different challenge than that waged in either *Trujillo* or *Lyons*, but even if Barkley could demonstrate he had raised a similar challenge at the trial court, the facts of this case are not analogous to *Trujillo* or *Lyons* as NWTS received and considered the very form of declaration approved by the Supreme Court. Mr. Barkley has not demonstrated that further appellate review is necessary under RAP 13.4(b) on this issue.

B. The Court of Appeals Properly Admitted Declarations From Chase and NWTS.

NWTS' Motion for Summary Judgment relied, in part, on the arguments presented by Chase and U.S. Bank. CP 187-349; CP 359-494. Co-Defendant Chase submitted a supporting declaration confirming information about possession of the Note. CP 359-494; CP 495-525.

In support of its Motion for Summary Judgment, NWTS also submitted the Declaration of Jeff Stenman, an employee and corporate representative of NWTS. CP 352-354

Mr. Barkley argues that the declaration testimony was inadmissible hearsay and the Court of Appeals erred affirming the trial court's admittance of such evidence. Petition for Review, at 10.

Courts broadly interpret the terms "custodian" and "other qualified witness" under RCW 5.45.020, the business records statute. *See State v. Quincy*, 122 Wn. App. 395, 95 P.3d 353 (2004); *State v. Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983). The person who created a record need not be the same individual identifying it. *See Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 257 P.2d 179 (1953); *Ben–Neth, supra.* at 603. Indeed, "the requirement of personal knowledge imposes only a 'minimal' burden on a witness; if reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness's testimony is

admissible." *Schultz v. Wells Fargo Bank*, 2013 WL 4782157 (D. Or. Sept. 5, 2013), *citing* 1 *McCormick on Evidence* § 10 (Kenneth S. Broun, 7th ed. 2013).

In *Amer. Express Centurion Bank v. Stratman*, Division One upheld the admissibility of an employee declaration expressing the contents of business and financial records. 172 Wn. App. 667, 292 P.3d 128 (2012); *see also Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc.*, 172 Wn. App. 328, 289 P.3d 735 (2012) (use of declaration upheld although the corporate vice-president did not state personal knowledge of certain aspects related to an insurance policy).

In *Discover Bank v. Bridges*, Division Two affirmed the propriety of declarations where a creditor's employees stated who they worked for, that they had access to relevant account records, testified based on personal knowledge from a review of those records, and the records were made in the ordinary course of business. 154 Wn. App. 722, 226 P.3d 191 (2010).

The declarations Barkley challenges each met the same criteria as the declarations analyzed in *Stratman* and *Bridges*. There is no conflict with existing precedent and no public interest in accepting further review of the evidence supporting summary judgment in this case.

C. The Court of Appeals Correctly Affirmed the Trial Court's Decision Denying Barkley's Motion for Continuance for Additional Discovery.

A trial court "may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003). Here, Barkley failed to offer *any* valid reason for a continuance to the trial court.

First, Barkley's lawsuit was filed in May 2013, and yet he conducted no depositions during the 11 month period before NWTS filed its Motion for Summary Judgment. CR 56(f) is not designed to reward procrastination. Moreover, Barkley did send two rounds of written discovery (Requests for Admission in October 2013 and Requests for Production in March 2014) to NWTS, and NWTS answered both within the required timeframe. CP 570-744 (Jones Dec. at Ex. 3).

Second, Barkley did not indicate how further discovery would be of assistance to him. NWTS answered his Interrogatories and Requests for Production (the only discovery he sought from NWTS), and NWTS' responses were signed by counsel per CR 26(g). CP 744.

Third, Barkley did not identify how he was somehow unable to defend against summary judgment. Quite the opposite – he filed a 41-page opposition brief articulating his position on every legal issue and provided declarations to the trial court. CP 528-569; CP 570-744; CP 745-835; CP 836-982;

The record demonstrates that the Court of Appeals correctly affirmed the trial court's denial of Mr. Barkley's CR 56(f) request for continuance; no further review is warranted. *See also Butler*, *supra.*

D. Barkley Presents No Viable Reason for Review Based on the Assignment of Deed of Trust or NWTS' Reliance on the Beneficiary Declaration.

Mr. Barkley calls for review arguing "[t]o issue its Notice of Trustee's Sale, NWTS relied on the Assignment of Deed of Trust by MERS and the Beneficiary Declaration." Petition for Review, at 15.

First, merely Mr. Barkley cites to his own response brief to support his contention that NWTS relied on the Assignment of Deed of Trust in issuing the Notice of Trustee's Sale. Petition for Review, at 15 (citing CP 824). Yet, review of the record demonstrates that at no time did NWTS present any evidence or argue that it relied on the Assignment of Deed of Trust for proof of U.S. Bank's beneficiary status prior to issuing the Notice of Trustee's Sale. Indeed, NWTS merely referenced the

Assignment of Deed of Trust (because it is part of the public record) in its factual statement and noted that "[n]oticeably absent [in the DTA] is any requirement to 'prove' one's authority as a beneficiary, or execute or record an Assignment of the Deed of Trust" as well as cited authority that stands for the proposition that an "[a]ssignment is not only irrelevant to a foreclosure in Washington, and does not confer Beneficiary status, but it does not involve NWTS." CP 187-349; NWTS' Answering Brief, at 2 and 17-18.

Moreover, in rejecting Barkley's theories relating to MERS, the Court of Appeals, citing to the Supreme Court's decision in *Bain*, held that "[t]he mere fact that the deed of trust identified MERS as beneficiary will not support a claim." *Barkley*, 2015 WL 4730175, at *4 (*citing Bain*, at 120). Barkley has provided no reason pursuant to RAP 13.4(b) for further appellate review on this issue.

Second, as discussed *supra* in Sec. (V)(A), the beneficiary declaration in this case complied with RCW 61.24.030(7)(a) as did NWTS' consideration of the declaration. In fact, the declaration considered by NWTS is precisely what is proscribed by the statute. Moreover, to the extent Barkley challenges the declaration because it was signed by U.S. Bank's attorney in fact, Chase, Barkley can cite no Supreme Court authority that conflicts with the Court of Appeals'

validation of the declaration. *See Bain* (Supreme Court acknowledging the DTA provides for the use of agents); *see also Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 778 (W.D. Wash. 2015) *reh'g denied,* No. 14-00297RSM, 2015 WL 3609238 (W.D. Wash. June 9, 2015) (The fact that U.S. Bank's attorney in fact signed the beneficiary declaration did not affect the trustee's ability to rely on such a declaration regardless of whether the trustee had proof of the power of attorney document conferring such authority); *and see U.S. Bank Nat. Ass'n v. Woods,* 2012 WL 2031122 (W.D.Wash.2012) ("rejecting borrowers' claims under the DTA where lenders submitted evidence showing that NWTS was in possession of a declaration signed by Wells Fargo as attorney-in-fact for U.S. Bank"); *see also Knecht v. Fid. Nat. Title Ins. Co.*, 2013 WL 7326111 (W.D.Wash.2013) ("Mr. Knecht complains that there is no recorded power-of-attorney document establishing AHMSI's right to act on DB's behalf, but he points to no authority requiring AHMSI to record such a document. He also fails to establish his own standing to object to AHMSI's acting on DB's behalf.").

In sum, Barkley has identified no conflicting Supreme Court decision and fails to demonstrate how this is a matter of substantial public interest to warrant review under RAP 13.4(b). Barkley's conclusory statement that the issue is "clearly…a matter of substantial public interest

and contradicts existing precedent of this Court" is wholly unsupported. Petition for Review, at 16. Review should be denied.

E. The Trial Court Did Not Err in Granting Summary Judgment to NWTS on Barkley's CPA Claim.

Barkley assigns error to the trial court's finding that U.S. Bank was the proper beneficiary based on "mere custody of... [the] Note, endorsed in blank...." Petition for Review at 16. Yet, Washington law recognizes that a noteholder may act through its agent. *In re Butler,* 512 B.R. 643, 652-54 (Bankr. W.D. Wash. 2014). Indeed, because U.S. Bank is not a physical person, it must act through its agents.

Further, Barkley seeks to mislead the Court about NWTS' statutory duty, insisting that trustees owe a "fiduciary" duty to borrowers. Petition for Review at 18, *citing Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013); *cf. Bavand v. Chase Home Fin., LLC,* 2015 WL 4400739, *10, n. 25 (Jul. 20, 2015). In *Klem,* the Court addressed a trustee's "fiduciary duty" only because the underlying facts dated from an earlier version of the Deed of Trust Act.[8] The *current* statute provides:

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[8] As Chief Justice Madsen noted:

> [t]he majority repeatedly refers to the fiduciary duty of the trustee. In the present case, the trustee owed fiduciary duties because among other things the nonjudicial foreclosure sale occurred early in 2008. However, the judicially imposed 'fiduciary' standard applies, at the latest, only in

"[t]he trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor." RCW 61.24.010(4) (emphasis added).

Nowhere in the record has Barkley shown that he produced testimony or documentation supporting the requisite prongs of a CPA claim.

Indeed, Barkley failed to prove how it was unfair or deceptive for NWTS to have carried out its duties as trustee on behalf of the *correct* beneficiary, and he introduced no evidence below establishing that some entity other than U.S. Bank was actually holding (or owning) the Note, or that NWTS had reason to believe the same.

Barkley failed to prove that NWTS engaged in a broad sweep of activity likely to affect the general public. *See e.g., Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement).

Barkley likewise failed to prove that receiving legally-mandated foreclosure notices due to his own failure to pay the secured loan led to compensable injury. *Barkley*, at *4. If the simple act of initiating a non-

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cases arising prior to the 2008 amendment of RCW 61.24.010. The 2008 amendment expressly rejected the 'fiduciary' standard. *Id.*

judicial foreclosure were to serve as grounds for damages to a plaintiff who may experience a "loss of time," denigration of credit, or desire to "investigate" the lender's authority after defaulting on a secured loan, then *every* non-judicial foreclosure in Washington State would give rise to CPA liability. Instead, the CPA requires a causal connection between harm and unfair or deceptive conduct, which is notably absent in this case. *See Cooper's Mobile Homes, Inc. v. Simmons,* 94 Wn.2d 321, 617 P.2d 415 (1980) (alleged deceptive acts must result in injury).

The Court of Appeals observed that "[i]t was not deceptive to refer to U.S. Bank as the beneficiary on the notice of default and notice of trustee's sale and foreclosure. NWTS sent the notices the DTA requires, and Barkley does not show that these notices were unfair or deceptive so as to support a claim under the CPA. *Barkley v. GreenPoint Mortgage Funding, Inc.*, 2015 WL 4730175, at *4.

Finally, Barkley argues review is warranted because the Court of Appeals' decision "discounted the foreclosing trustee's duty of good faith to Mr. Barkley." Petition for Review, at *17. Barkley then re-hashes his baseless accusation that NWTS relied on the Assignment of Deed of Trust (*see supra*, Sec. (V)(D)) and that NWTS improperly relied upon the Beneficiary Declaration and failed to obtain authority from the beneficiary

before initiating foreclosure (*see supra*, Sec. (V)(A) and (D)). Petition for Review, at 17.[9]

As NWTS argued to the Court of Appeals, Mr. Barkley's allegations of lack of good faith contradicts his prior deposition testimony that NWTS did not violate its duty of good faith *at all* before the Notice of Trustee's Sale was issued. CP 298 (Barkley Dep. at 97:15-22).

NWTS obtained a beneficiary declaration that precisely satisfied the mandate of RCW 61.24.030(7)(a) as interpreted in *Lyons* and *Trujillo*, *i.e.* an unequivocal averment of U.S. Bank's holder status. This proof was sufficient as set forth in RCW 61.24.030(7)(b). The CPA claim was correctly adjudicated in NWTS' favor, and no further review is warranted.

F. Barkley's Lawsuit Does Not Present a Substantial Public Interest.

What has become unfortunately "typical" based on expansive readings of recent case law is the proliferation of lawsuits designed to stall foreclosure through vague, burden-shifting claims of malfeasance against every company involved in the process. *Cf.* Petition for Review at 18-19. Purely private transactions have been brought within the scope of the

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[9] Barkley also points out that he contended, on appeal, that NWTS ignored competing claims by various entities claiming to be "holder" or "beneficiary" and relied on improperly dated and notarized documents". Petition for Review, at 17. Just as he did at the trial court level and Court of Appeals, Barkley fails to cite to any evidence in support of these "contentions."

CPA, and bare assertions of "questioning" the identity of one's lender – despite information contained in the plain language of loan documents – have led to threats of liability against trustees such as NWTS. The Court should quell this tide by bringing Barkley's legal challenge to a close.

VI. CONCLUSION

NWTS delivered notices to Barkley that his loan was in default, and the rental Property was subject to foreclosure. NWTS then stopped the process upon learning of Barkley's procedural concerns, which were ultimately determined to be unsubstantiated. Summary judgment was the appropriate outcome.

Thus, NWTS respectfully requests that the Supreme Court decline to accept Ms. Barkley's Petition for Review. R.A.P. 13.4(b)(1) and (4). The Court of Appeals' decision does not conflict with established precedent and it does not give rise to a matter of substantial public interest.

DATED this 2nd day of October, 2015.

NORTHWEST TRUSTEE SERVICES, INC.

By: _____
Heidi Buck Morrison, WSBA #41769
Attorney for Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on October 2, 2015, I caused a copy of the **ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO ALEX C. BARKLE'S PETITION FOR REVIEW** to be served to the following in the manner noted below:

Richard Llewelyn Jones Kovac & Jones, PLLC 1750 112th Ave. NE, Suite D-151 Bellevue, WA 98004-2976 Attorneys for Alex C. Barkley	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
Hugh R. McCullough Fred B. Burnside Davis Wright Tremaine, LLP 1201 Third Ave., Suite 2200 Seattle, WA 98101-3045 Attorneys for JPMorgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

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

Signed this 2nd day of October, 2015.

Angela Beardsley, Assistant

OFFICE RECEPTIONIST, CLERK

To: Javier Trasvina
Cc: Heidi Buck Morrison
Subject: RE: Alex C. Barkley v. JPMorgan Chase Bank N.A., et al. (Petition for Review) / Supreme Court No. 92187-3 / Court of Appeals No. 72051-1-I

Received on 10-02-2015

Supreme Court Clerk's Office

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

From: Javier Trasvina [mailto:jtrasvina@northwesttrustee.com]
Sent: Friday, October 02, 2015 3:20 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Heidi Buck Morrison <hbuckmorrison@northwesttrustee.com>
Subject: Alex C. Barkley v. JPMorgan Chase Bank N.A., et al. (Petition for Review) / Supreme Court No. 92187-3 / Court of Appeals No. 72051-1-I

Alex C. Barkley (Appellant) v. JPMorgan Chase Bank, N.A., et al. (Respondents)
Supreme Court No. 92187-3
Court of Appeals No. *72051-1-I*
Filed by: Heidi Buck Morrison
WSBA #41769
425-213-5534
hbuckmorrison@northwesttrustee.com

Please file the attached **Answer to Petition for Review.**

If there are any questions, please contact us. Thank you.

Javier Trasvina
Paralegal

Direct: 808.315.7390
Fax: 425.974.8603
jtrasvina@northwesttrustee.com