Supreme Court No. 92187-3

Court of Appeals No. 72051-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ALEX C. BARKLEY,

Appellant/Plaintiff,
v.

GREEN POINT MORTGAGE FUNDING, INC., a New York corporation; U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR TRUSTEE IN INTEREST TO STATE STREET BANK AND TRUST AS TRUSTEE FOR WASHINGTON MUTUAL MSC MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2003-AR1, a nationally chartered bank; JPMORGAN CHASE BANK NATIONAL ASSOCIATIONS, a nationally chartered bank; NORTHWEST TRUSTEE SERVICES, INC., a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; and DOE DEFENDANTS 1-10,

Respondents/Defendants.

APPELLANT'S PETITION FOR REVIEW

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I. Identity of Petitioner.

The Petitioner is ALEX BARKLEY (hereinafter "Mr. Barkley"), who was the Plaintiff in the original action under King County Superior Court Case No. 13-2-20722-2 SEA and the Appellant in Court of Appeals, Division I, Case No. 72051-1-I.

II. Court of Appeals Decision.

Mr. Barkley seeks review by the Supreme Court of the unpublished decision of the Court of Appeals filed August 10, 2015 (hereinafter "subject decision"), a copy of which is attached hereto at ***Appendix "A".***

III. Issues Presented for Review.

A. Whether the subject decision to disregard the proof of ownership requirement in *RCW 61.24.030(7)(a)* conflicts with the Supreme Court's decision in *Trujillo v. NWTS,* __ Wn.2d __, __ P.3d __ (August 20, 2015) (hereinafter *"Trujillo"*)[1], the Supreme Court's anticipated decision in the direct review of *Brown v Department of Commerce*, No. 90652-1, as well as *Bain v. Metropolitan Mortgage Group,* 175 Wn.2d 83, 111, 285 P.3d 34 (2012) (hereinafter "*Bain*"), and *Lyons v. U.S. Bank*, 181 Wn. 2d 775, 336 P.3d 1142 (2014) (hereinafter "*Lyons*"), and conflicts with this Court's precedents requiring that statutes be interpreted to avoid rendering statutory language superfluous and to harmonize their provisions, and that the Deed of Trust Act

[1] In *Trujillo*, the Supreme Court reversed in part and remanded for further proceedings Appellant's CPA claims the decision of the Court of Appeals reported at 181 Wn.App. 484, 326, P.3d 768 (2014). A copy of the Supreme Court decision in *Trujillo* of August 20, 2015 is attached hereto in the Appendix at ***Appendix "B".*** Citation to *Trujillo* is to this version.

(*RCW 61.24, et seq.*) (hereinafter "DTA") be strictly construed in favor of the borrower, thus meriting review under *RAP 13.4(b)(1).*

B. Whether the subject decision determining the Declarations of John Simionidis and Jeff Stenman: (1) are admissible for the purposes of *CR 56(e)* and *RCW 5.45, et seq.*, and/or (2) if so, are sufficient to establish Respondent, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR TRUSTEE IN INTEREST TO STATE STREET BANK AND TRUST AS TRUSTEE FOR WASHINGTON MUTUAL MSC MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2003-AR1 (hereinafter "U.S. Bank") and/or Respondent, JPMORGAN CHASE BANK NATIONAL ASSOCIATIONS (hereinafter "Chase") are the owners and actual holders of the subject obligation entitling them to appoint Respondent, NORTHWEST TRUSTEE SERVICES, INC. (hereinafter "NWTS") as successor trustee when the hearsay Declarations characterize the nature of documents *not attached* contrary to the Supreme Court's decision in *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (hereinafter "*Fricks*"), thus meriting review under *RAP 13.4(b)(1).*

C. Whether the subject decision's reliance on averments in the Declarations of John Simionidis and Jeff Stenman purporting to attest to the "holder" or "loan servicer" of the note are incompetent to establish any agency relationship with the "undisclosed investor" to whom the Note and Deed of Trust were sold by U.S. Bank, because agency may only be proved upon

declarations or acts of the principal rather than the purported agent, contrary to Supreme Court precedent, meriting review pursuant to *RAP 13.4(b)(1).*

D. Whether the subject decision affirming the trial court's denial of Mr. Barkley's request for additional discovery to challenge Respondents' Motions for Summary Judgment was contrary to existing precedent, thus meriting review under *RAP 13.4(b)(4).*

E. Whether NWTS violated its duty of good faith to Mr. Barkley by relying on a Beneficiary Declaration (CP 255) that was not executed by either the owner or actual holder of the debt, was executed by an unverified attorney-in-fact and otherwise failed to verify the ownership of the subject obligation and Respondents' right to foreclose is contrary to *Lyons, Trujillo* and other precedent of this Court, thus meriting review of this Court under *RAP 13.4(b)(1).*

F. Whether the subject decision holding that substantial evidence of a violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA") did not existed, in view of the fact that: (1) the Beneficiary Declaration relied upon by the foreclosing trustee, NWTS, was not executed by either the owner or actual holder of the subject obligation and could not be reasonably relied upon to comply with the provisions of *RCW 61.24.030(7)(a);* (2) NWTS unreasonably relied on an Assignment of Deed of Trust of an ineligible beneficiary (MERS); (3) NWTS unreasonably relied upon an Appointment of Successor Trustee, executed by an attorney-in-fact without verifying the validity of the document; (4) NWTS ignored the competing claims by various entities as "beneficiary" and failed to verify the ownership of the

obligation; (5) relied on improperly dated and notarized documents and issued documents that improperly identified the owner and holder of the subject obligation and materially failed to comply with various provisions of the DTA; and (6) Respondents failed to obtain authority from the true and lawful owner and actual holder of the obligation (purportedly an "undisclosed investor" – CP 915), before initiating foreclosure and the Supreme Court precedent in *Bain, Trujillo, Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013) (hereinafter *"Klem"),* and *Lyons*, thus meriting review of this Court under *RAP 13.4(b)(1).*[2]

G. Whether any or all of the issues set forth above are of substantial public interest, thus meriting review under *RAP 13.4(b)(4).*

IV. Statement of the Case.

On November 19, 2002, Mr. Barkley executed a Promissory Note in favor of Respondent, GREENPOINT MORTGAGE FUNDING, INC. (hereinafter "GreenPoint"), as lender. CP 755-760. Contractually defining the term "note holder", the Note specifically provides that "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'". This transaction was purportedly registered with Respondent, MERS. CP 915. To secure repayment of the Promissory Note, Mr. Barkley executed a Deed of Trust naming Transnational Title Insurance Company as the trustee and naming MERS as the beneficiary, solely as a nominee for Lender and Lender's successors and assigns. CP 762-781. It

[2] See footnote 4, below.

is undisputed that at no time relevant to this cause of action did MERS ever own or hold the subject Note. CP 746-747; CP 836-862.

At some point in 2007, GreenPoint went out of business. CP 749-750.

On January 19, 2011, NWTS issued a Notice of Default. CP 783-787. This Notice of Default contained numerous false and misleading statements. CP 747-748. First, *inter alia*, there has been no evidence that the true and lawful owner and holder of the subject Note and Deed of Trust ever declared Mr. Barkley in default, in violation of *RCW 61.24.030(8)(c)*. Second, the subject Notice of Default misleadingly and falsely claims that "U.S. Bank" is the "Beneficiary (Note Owner)" and identifies Chase as the "loan servicer", but there was no evidence that NWTS made any attempt to verify or to adequately inform itself of the truth of the facts contained in the Notice of Default. Indeed, at this time, NWTS had no procedures to verify the information. *In re Meyer*, 506 B.R. 533 (2014) (hereinafter "*In re Meyer*").

On February 12, 2012, U.S. Bank relinquished all interest in the subject transaction, allegedly transferring the Note and Deed of Trust to an "undisclosed investor". CP 915.

On September 18, 2012, an Assignment of the Deed of Trust was purportedly executed by MERS, an ineligible beneficiary, as nominee for GreenPoint, in favor of U.S. Bank for "good and valuable consideration." CP 824. See *Bain.* There was no evidence that MERS ever obtained the consent or authority from GreenPoint, the true and lawful owner and holder of the obligation or the "unknown investor" to execute the Assignment of Deed of

Trust. CP 749-750, 915. Certainly no investigation was ever conducted by NWTS to verify the information contained in the Assignment of Deed of Trust. *In re Meyer.*

On October 18, 2012, Chase, as alleged attorney-in-fact for U.S. Bank, executed a Beneficiary Declaration that asserts that U.S. Bank "is the holder of the promissory note" to fulfill NWTS' obligations under *RCW 61.24.030(7).*[3] CP 255. However, U.S. Bank transferred whatever interest it may have had in the subject transaction eight (8) months prior. CP 915. Finally, there was no evidence offered to the trial court to establish that NWTS ever conducted any investigation to verify the statements contained in the Beneficiary Declaration. See *In re Meyer, Lyons* and *Trujillo.*

On November 7, 2012, an Appointment of Successor Trustee was executed and recorded by Chase, as alleged attorney-in-fact for U.S. Bank, appointing NWTS the successor trustee. CP 258. This document was executed and recorded over nine (9) months after U.S. Bank assigned its interest in this obligation to an "undisclosed investor", raising issues of fact as to the propriety of the Appointment under *RCW 61.24.010.* CP 915.

On November 28, 2012, NWTS executed, posted and served a Notice of Trustee's Sale, setting a Trustee's Sale date of March 15, 2013. 830-833.

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[3] All relevant documents identify the entity conducting the foreclosure as: 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". CP 783-787, 255, 826-828, 830-833, 353. However, no power of attorney from this entity empowering any Respondent to act on its behalf has ever been produced. If Chase did not have authority under a duly executed power of attorney to execute the Beneficiary Declaration or the Appointment of Successor Trustee, the documents upon which NWTS purportedly relied to initiate foreclosure proceedings against Mr. Barkley, Respondents foreclosure efforts were wrongful and lawful.

The subject Notice of Trustee's Sale was signed on November 28, 2012 but was not notarized until December 12, 2012. CP 833. See *Klem.* No evidence was offered to the trial court on summary judgment to establish that NWTS conducted any investigation to verify the information contained in its Notice of Trustee's Sale. *In re Meyer, Lyons, Trujillo.*

In conjunction with the subject Notice of Trustee's Sale, NWTS prepared, posted and served a Notice of Foreclosure that failed to strictly comply with language proscribed by *RCW 61.24.040(2),* requiring identity of the "owner of the obligation secured thereby." CP 834-835. The Notice of Foreclosure merely notes "an obligation to U.S. Bank" and misleadingly identified U.S. Bank as the party to whom Mr. Barkley was obligated. However, as noted above, the evidence offered to the trial court suggests U.S. Bank assigned its interest in this obligation to an "undisclosed investor" nine (9) months prior to execution of the Notice of Foreclosure. CP 915.

On or about May 22, 2013, Mr. Barkley initiated the above-captioned matter. CP 1-130.

In April of 2014, Respondents moved the trial court for summary judgment in two separate motions, pursuant to *CR 56.*

On May 23, 2014, the trial court granted Respondents' Motions for Summary Judgment and Mr. Barkley timely appealed. CP 1105-1113.

V. Argument and Authority.

A. Review should be granted to determine the validity of the Court of Appeals' holding that the foreclosing trustee need not have proof ownership of the note before recording a notice of trustee's sale as required under *RCW 61.24.030(7)(a).*

The issue of the trustee's possession of proof of ownership of the Note herein is the same as the issue that was the subject of review in *Trujillo.*[4] The subject decision relies on the Court of Appeals' decision in *Trujillo* (181 Wn.App. 484), recently reversed by the Supreme Court, in two respects: (1) it claims that Mr. Barkley's evidentiary challenges to the Declarations of John Simionidis and Jeff Stenman are immaterial insofar as they create material issues of fact as to the ownership of Mr. Barkley's Note; and (2) discounts the duty of the NWTS to act in good faith to determine whether the claimed beneficiary is the owner of the Note as well as the actual holder, with authority to foreclose. See *Lyons* and *Trujillo.*

The subject decision raises an issue of public importance as to whether all provisions of the DTA, specifically *RCW 61.24.030(7)(a),*[5] should be so construed and interpreted so as to avoid rendering the language of the statutes superfluous and to harmonize their provisions for the benefit of all borrowers in

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[4] It has been Mr. Barkley's contention throughout these proceedings that only the true and lawful owner and actual holder of a note and deed of trust has the right to foreclose under the DTA. CP 542-550. This issue was addressed in *Bain* and *Lyons* and is currently before this Court in *Brown v. Department of Commerce*, Case No. 90652-1 (hereinafter "*Brown*"). The arguments in support of this contention are outlined in the Brief of Appellant in *Brown*, attached hereto at ***Appendix "C"***, and the Revised *Amicus* Brief filed by Coalition for Civil Justice in the *Trujillo* matter, attached hereto at ***Appendix "D".***

[5] *RCW 61.24.030(7)(a)* and *(b)* provides as follows:

(a) That, for residential real property, 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. A declaration by the beneficiary made under penalties 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 subsection.

(b) Unless the trustee has violated his or her duty [of good faith] under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under the subsection. (Emphasis added)

the State of Washington. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.,* 128 Wn.2d 745, 762, 912 P.2d 472 (1996); *In re Detention of C.W.,* 147 Wn.2d 259, 272, 53 P.3d 979 (2002); *State v. Johnson,* 179 Wn.2d 534, 546-547, 315 P.3d 1090 (2014).

RCW 61.24.005(2) defines the term "beneficiary" as the "holder of the instrument," but does not define the term "holder". *RCW 61.24.030(7)(a)* does not reference the "holder", but the "actual holder", without defining that term either. The statutory command of *RCW 61.24.030(7)(a)* that as a prerequisite to sale the trustee have proof that the beneficiary is the owner, can only be read to mean that the actual holder must be the owner to render a consistent interpretation of the statute as a whole. Harmonizing the language of *RCW 61.24.005(2)* and *RCW 61.24.030(7)(a)* merits Supreme Court review and resolution.

The subject Beneficiary Declaration of October 18, 2012 at issue herein merely states that U.S. Bank is merely the "holder", which could include a thief under *RCW 62A.3-301*, rather than "actual holder" as statutorily mandated and is contradicted by the evidence of U.S. Bank's assignment of the obligation to an "undisclosed investor" on February 12, 2012. CP 255, 915. Given the Supreme Court's decision in *Trujillo* and in anticipation of its decision in *Brown*, the remedy here may be to remand this matter to the Court of Appeals for reconsideration, or may simply be to grant review on all issues, insofar as the subject decision conflicts with *Trujillo, Bain*, and *Lyons*, pursuant to *RAP 13.4(b)(1).* This issue is of substantial public importance under *RAP 13.4(b)(4),* which is acknowledged in Respondents' motion to publish the subject decision.

There Respondents assert that the subject decision "clarifies" that the "'beneficiary' does not have to be both the owner and holder of the note." This is a much litigated issue and is currently before the 9th Circuit Court of Appeals in the matter of *Meyers v. NWTS*, 9th Circuit Case No. 15-35560.

B. Review should be granted to determine whether hearsay narrative statements may be admitted under the Business Records Act (*RCW 5.45.020*) and contrary to *CR 56(e).*

The facts upon which the trial court relied on summary judgment were set out in the Declarations of John Simionidis of April 15, 2014 (CP 495-525) and Jeff Stenman of April 18, 2014 (CP 352-354), to which Mr. Barkley made timely objection. CP 536-542, 567-568. The issue presented for review is whether *CR 56(e)'s* requirement that summary judgment declarations be based on personal knowledge and set forth matters admissible into evidence may be circumvented by a hearsay narrative declaration characterizing "business records", rather than laying a proper foundation for the receipt of the records relied upon into evidence.

All Mr. Simionidis about the basis of his/her knowledge is that he is "familiar with Chase's record-keeping practices" and that based on this familiarity, he "believes", but does not know, that the information and "business records submitted with his declaration are all records made at or near the time of the events and acts recorded by the individuals with personal knowledge." CP 495-497. Like Mr. Simionidis, all Mr. Stenman says about the basis of his knowledge is that he has "reviewed the records that pertain to the Barkley Nonjudicial Foreclosure," without identifying the specific documents he is referring to. CP 353. But neither provided the trial court

either the documents reviewed or facts that would establish the reliability of the information provided. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v. Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Under *CR 56(e),* conclusory statements or "mere averment" that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *Blomster v. Nordstrom, Inc., supra;* Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4th Cir. 1972).

Many of the records reviewed and relied upon by Mr. Simionidis and Mr. Stenman were necessarily prepared, compiled and maintained by third parties, such as GreenPoint, MERS, the FDIC or U.S. Bank. Such third-party records must be separately authenticated by the third party who compiled the records to meet the business records exception to the hearsay rule and meet the requirement that such testimony be based on personal knowledge from the third party's records custodian to satisfy each of the elements of *RCW 5.45.020. State v. Weeks*, 70 Wn.2d 951, 953, 425 P.2d 885 (1967); *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 631 & n. 9, 218 P.3d 621 (2009). For example, Mr. Simionidis states:

> . . . . I believe the business records submitted with this declaration are all records made at or near the time of the events and acts recorded by individuals with personal knowledge of the events and acts, were created or collected as part of Chase's regular practices. . . . CP 495.

Collected from whom? Mr. Simionidis goes on to assert that Chase is the attorney-in-fact for U.S. Bank, without providing the document related to this specific securitized trust (see footnote 3, above); claims that Chase took possession of the Note in July of 2009, without providing the transfer

documents; and discusses MERS assignment of the Note to U.S. Bank without acknowledging U.S. Bank's assignment of the same to an "undisclosed investor" in February of 2012. CP 914. This hearsay narrative statement and many others in the two declarations relied upon by the trial court was not offered to authenticate business record or offer them into evidence, but was offered to set forth Mr. Simionidis hearsay version of events acquired from third party sources and not based on his personal knowledge. If some business record indicates what Mr. Simionidis says it does, then the proper procedure would be to offer the document into evidence after laying a proper foundation – not to testify about what the document says or, much less, what it means. This is a serious but not uncommon departure in these kinds of cases[6] and from Supreme Court precedent, justifying review under *RAP 13.4(b)(1)*. *Fricks*, at page 391, is on point.

Mr. Stenman testifies that "on January 12, 2011, NWTS received a referral to commence a non-judicial foreclosure" without identifying the source of the referral. While Mr. Stenman testifies that he has "reviewed the records that pertain to the Barkley Nonjudicial Foreclosure," he fails to identify the specific documents he is referring to: is he referring to the "records" submitted in the referral from the unnamed source or records generated by NWTS? Mr. Stenman does not say.

The rolling narrative hearsay from Mr. Simionidis and Mr. Stenman were the sole basis upon which the trial court concluded that Mr. Barkley was in default, that U.S. Bank and/or Chase were the holders of the obligation and

[6] See *McDonald v. OneWest*, 929 F. Supp. 2d 1079, 1090-1091 (2013).

had the right to initiate non-judicial foreclosure proceedings against Mr. Barkley and appoint NWTS as successor trustee, despite the apparent transfer of ownership to "an undisclosed investor" in February of 2012. CP 915. But Mr. Simionidis' and Mr. Stenman's testimony was rank hearsay and the subject decision affirming this testimony contradicts opinions of this Court, justifying review under *RAP 13.4(b)(1)* and, given the number of wrongful foreclosure cases before the courts of this state in which similar testimony is offered by the mortgage lending industry, is of substantial public importance justifying review under *RAP 13.4(b)(4).*

C. Review of the subject decision should be granted because the opinion permitted an alleged agent (holder) to establish its agency by an employee's declaration rather than the words and actions of its alleged principal, contrary to this Court's precedent, justifying review under *RAP 13.4(b)(1).*

No Respondent represented that they were the owner of the subject Note and Deed of Trust, but claimed, for purposes of this foreclosure, that they merely "held" Mr. Barkley's Note as purported agents for an "undisclosed investor". But the only basis for any alleged agency relationship between Respondents and the "undisclosed investor" comes, if at all, from the Declarations of Mr. Simionidis and Mr. Stenman.[7] No sworn statement was ever offered by the "undisclosed investor" or any true and lawful owner and actual holder of the obligation acknowledging: (1) the existence of any agency relationship with any Respondent; or (2) the scope of Respondents' agency relationship, if any, with Fannie Mae.

[7] Please see the Declaration of Tim Stephenson that was largely ignored by the trial court. CP 836-982.

Precedent of this Court and other divisions of the Court of Appeals clearly hold that an agency relationship can only be established through the words and acts of the principal, not the alleged agent. *Auwarter v. Kroll*, 89 Wash. 347, 351, 154 Pac 438 (1916); *Ford v. UBC&J of America*, 50 Wn.2d 832, 836, 315 P.2d 299 (1957); *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 (1962); *Equico Lessors Inc. v. Tow*, 34 Wn.App. 333, 338, 661 P.2d 600 (1983); *Smith v. Hansen, Hansen & Johnson*, 63 Wn.App. 355, 366-368, 818 P.2d 1127 (Div. II 1991).

The question of how one proves his or her status as "holder", "owner" and/or "beneficiary" of an obligation under the DTA is fundamental to the non-judicial foreclosure process where owners frequently act through agents to initiate and prosecute foreclosures. This issue recurs in almost every wrongful foreclosure case brought in this State and is a matter of substantial public interest. The Court of Appeals affirmed the efforts of purported foreclosing agents without the proper proof of agency, which clearly contradicts prior precedent of this Court. Therefore, review is merited under *RAP 13.4(b)(1), (2)* and *(4)*.

D. Review should be granted to determine whether Mr. Barkley's request for additional discovery under *CR 56(f)* was justified.

The hearsay problem created by the submission of and the trial court's erroneous reliance on the Declarations of John Simiondis and Mr. Jeff Stenman, argued above, was exacerbated by the affirmation of the trial court's refusal to permit additional discovery, pursuant to *CR 56(f)*. CP 567-568. There is no way to anticipate what might be offered in a declaration before it is filed and

served. A challenge to the admissibility of a declaration based upon the declarant's competency to attest to its contents and its cure is categorically different than a plea to initiate discovery that has been neglected or has been frustrated and should not require a separate motion and declaration justifying a delay to obtain new evidence. Indeed, the incompetence of the Declarations of Mr. Simionidis and Mr. Stenman by itself should be sufficient to warrant a continuance to cure the deficiencies without the need for a separate motion and declaration outlining the testimony sought.

The subject decision affirming the trial court's denial of an opportunity to test the testimony of Mr. Simionidis and Mr. Stenman, in view of Chase's clearly defective hearsay Beneficiary Declaration and the number of wrongful foreclosure cases before the courts of this State in which similar testimony is offered by the mortgage lending industry, is of substantial public importance justifying review under *RAP 13.4(b)(4).*

E. Review should be granted to determine whether NWTS had the right to rely on the MERS Assignment of Deed of Trust and Beneficiary Declaration and whether such reliance violated its duty of good faith to Mr. Barkley under the DTA, pursuant to *RAP 13.4(b)(1).*

To issue its Notice of Trustee's Sale, NWTS relied on the Assignment of Deed of Trust by MERS (CP 824) and Chase's defective hearsay Beneficiary Declaration (CP 255) alleging U.S. Bank and/or Chase to be the "holder" of the promissory note. The subject decision affirmed the trial court's implicit finding that NWTS could reasonable rely on these documents to foreclose.

As to the MERS Assignment of Deed of Trust, this Court has held that as an ineligible beneficiary acting without express authority, MERS had

nothing to assign. *Bain,* at page 111. There was no evidence offered the trial court that MERS ever obtained authority to execute the Assignment of Deed of Trust from the purported owner of the Note.

As to NWTS' reliance on the Beneficiary Declaration, the document is suffers the same problems as the Declarations of Mr. Simionidis and Mr. Stenman argued above: the document necessarily relies on unverified or offered third party business records, including an unverified and unrecorded power of attorney, fails to identify the holder as the "actual holder" pursuant to *RCW 61.24.030(7)(a),* and is patent hearsay.

Clearly, the subject decision affirming NWTS' reliance on the Assignment of Deed of Trust and Beneficiary Declaration, is a matter of substantial public interest and contradicts existing precedent of this Court. Therefore, review is merited under *RAP 13.4(b)(1)* and *(4).*

F. Review of the subject decision's holding that substantial evidence of a CPA violation does not exist given the foreclosing trustee's violation of its duty of good faith under the DTA is justified.

Once again, the Court of Appeals' handling of Mr. Barkley's CPA claims is a direct consequence of its reliance on its *Trujillo* ruling (181 Wn.App. 484). Specifically, ignoring the plain terms of *RCW 61.24.030(7)(a),* the Court of Appeals held that mere custody, rather that legal possession of Mr. BarkleyGuttomsen's Note is enough to establish Chase and/or U.S. Bank, as the "beneficiary" of the obligation with the right to foreclose. However, see 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 18.31 at 365 (2d ed. 2004). This holding ignored the "undisclosed investor's" purported ownership of the Note and the absence of

any grant of authority for Chase and or U.S. Bank to act on behalf of the "undisclosed investor". Indeed, no evidence of an agency relationship between Chase, U.S. Bank and the true and lawful owner and actual holder of the obligation was ever provided the trial court.

Moreover, by embracing its *Trujillo* decision (181 Wn.App. 484), the Court of Appeals discounted the foreclosing trustee's duty of good faith to Mr. Barkley to assure that the "beneficiary" is the owner as well as the actual holder of the obligation before serving and recording its Notice of Trustee's Sale. *RCW 61.24.010(4); RCW 61.24.030(7)(a); Lyons.*[8] Specifically, it was Mr. Barkley's contention on appeal that Respondents, and NWTS specifically, violated the DTA and created claims under the CPA by (1) relying on the Beneficiary Declaration that was not prepared by the "owner" or "actual holder" of the obligation, based on an unverified power-of-attorney, that could not be reasonably relied upon to comply with the provisions of *RCW 61.24.030(7)(a);* (2) relying on an Assignment of Deed of Trust executed by an ineligible beneficiary (MERS); (3) relying on an Appointment of Successor Trustee, executed by an attorney-in-fact without verifying the validity of the power-of attorney; (4) ignoring the competing claims by various entities as "holder" or "beneficiary" and failing to verify the ownership of the obligation and right to foreclose; (5) preparing documents that failed to comport with the provisions of the DTA; (6) relying on improperly dated and notarized documents; and (7) failing to obtain authority from the true and lawful owner and actual holder of the obligation before initiating foreclosure. By these acts,

[8] See footnote 4, above.

NWTS breached the "fiduciary duty of good faith" by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale. See *Klem*, at page 790. Based on its *Trujillo* decision (181 Wn.App. 484), the Court of Appeals ignored these concerns, despite this Court's ruling in *Lyons* that held that foreclosing trustees, such as NWTS, have an affirmative duty to '"adequately inform' itself regarding the purported beneficiary's right to foreclose." *Lyons*, at page 787. Moreover, the Court of Appeals ignored Mr. Barkley's injuries and damages, based on *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) and *Lyons*. Thus, the subject decision affirming the trial court's dismissal of Mr. Barkley's wrongful foreclosure and CPA claims was contrary to existing law of this Court and merits review under *RAP 13.4(b)(1)*.

G. Review of the subject decision is justified under *RAP 13.4(b)(4)* given the existence of substantial public interest in the issues.

Homeowners facing non-judicial foreclosure, such as Mr. Barkley, rely upon the DTA's protections to ensure fair treatment by the foreclosing trustee and the entities that authorize them. This Court's prior decisions amply demonstrate that mortgage industry compliance with the DTA has been problematic, at best, making it all the more important that the Supreme Court accept review in this case. See *Klem*, at pages 788-792, *Schroeder v. Excelsior Management Group,* 177, Wn.2d, 94, 105-106, 297 P.3d 677 (2013); *Bain,* at pages 94-110. The misconduct alleged herein by Mr. Barkley is typical of what homeowners across this State face at the hands of unscrupulous servicers,

foreclosing trustees and lenders and will continue to face in the future, given the continuing mortgage foreclosure crisis.[9]

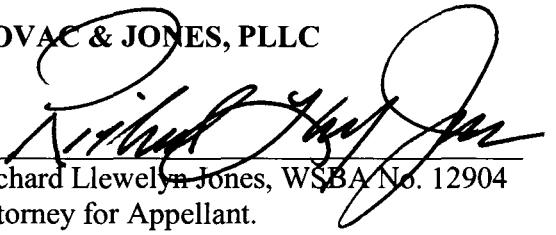
Accordingly, the issues raised herein by Mr. Barkley are of substantial public interest and warrant this Court's review of the subject decision pursuant to *RAP 13.4(b)(4).*

VI. Conclusion.

Based upon the foregoing and the briefing submitted below, this Court should accept review of the subject decision of the Court of Appeals, pursuant to *RAP 13.4(b)(1)* and *RAP 13.4(b)(4).*

REPECTFULLY SUBMITTED this 2nd day of September, 2015.

KOVAC & JONES, PLLC



Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellant.

[9] Despite a decrease in national foreclosure filings from 2012 to 2013, the foreclosure rate in Washington increased during the same period by 13%. See http://www.realtytrac.com/Content/foreclosure-market-report/2013-year-end-us-foreclosure-report-7963. In 2014, scheduled foreclosures have increased by 36% in Washington according to the same source. In 2015, scheduled foreclosures have increased by 17%. See http://www.realtytrac.com/content/foreclosure-market-report/us-foreclosure-activity-down-4-percent-in-february-to-lowest-level-since-july-2006-despite-9-percent-rise-in-reos-8211. See also statement of public impact set forth in the Brief of Appellant at ***Appendix "D".***

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on September 2, 2015, I arranged for service of the foregoing Appellant's Petition for Review to the following parties in the manner indicated:

Fred B. Burnside, WSBA No. 32491 Hugh R. McCullogh, WSBA No. 41453 DAVIS WRIGHT TREMAINE LLP 1201 3rd Avenue, Suite 2200 Seattle, WA 98101-3045 Telephone (206) 757-8016 Facsimile (206) 757-7016	_____ X _____ X	Facsimile Messenger U.S. 1st Class Mail Electronic *(courtesy copy)*
Joshua S. Schaer, WSBA No. 31491 RCO LEGAL PS 13555 SE 36th Street, Suite 300 Bellevue, WA 98006 Telephone (425) 458 2121 Facsimile (425) 458 2131	_____ X _____ X	Facsimile Messenger U.S. 1st Class Mail Electronic *(courtesy copy)*
Washington State Court of Appeals Division One – Court Clerk 600 University Street One Union Square Seattle, WA 98101-1176 Telephone (206) 464-7750 Facsimile (206) 389-2613	_____ _____ _____ X	Facsimile Messenger U.S. 1st Class Mail Electronic

DATED this 2nd day of September, 2015.

Susan L. Rodriguez

Susan L. Rodriguez

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALEX C. BARKLEY, Appellant, v. GREENPOINT MORTGAGE FUNDING, INC., a New York corporation; and DOE DEFENDANTS 1-10, Defendants, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR TRUSTEE IN INTEREST TO STATE STREET BANK AND TRUST AS TRUSTEE FOR WASHINGTON MUTUAL MSC MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2003-ARI, a nationally chartered bank; JPMORGAN CHASE BANK NATIONAL ASSOCIATION, a nationally chartered bank; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, Respondents.	No. 72051-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 10, 2015

LEACH, J. — After Alex Barkley's lender initiated nonjudicial foreclosure proceedings following Barkley's default on his mortgage loan, Barkley filed suit.

He appeals the summary judgment dismissal of his complaint for injunctive relief and damages against U.S. Bank NA, JPMorgan Chase Bank NA, Northwest Trustee Services Inc. (NWTS), and Mortgage Electronic Registration Systems Inc. (MERS). He claims that genuine issues of material fact exist as to the respondents' alleged violations of the deeds of trust act (DTA or act), chapter 61.24 RCW, the Consumer Protection Act (CPA), chapter 19.86 RCW, and the Criminal Profiteering Act, chapter 9A.82 RCW. He challenges certain trial court evidence rulings and its denial of his request for a continuance of the summary judgment hearing. We conclude that the trial court did not err in its evidentiary decisions or in denying Barkley's request for a continuance. And because no trustee's sale of Barkley's property occurred and Barkley identifies no genuine issue of material fact related to any deceptive, unfair, or criminal act by the respondents, summary dismissal of his claims was proper. We affirm.

FACTS

In November 2002, real estate agent and investor Alex Barkley borrowed $291,900 from GreenPoint Mortgage Funding Inc. to refinance real property in Seattle, executing an adjustable rate note and a companion deed of trust. The deed was recorded in King County on November 26, 2002. It lists GreenPoint as lender, Transnational Title Insurance Co. as trustee, and MERS, "a separate corporation that is acting solely as a nominee for Lender and Lender's

successors and assigns," as beneficiary. GreenPoint endorsed the note in blank. In a January 2003 pooling services agreement, U.S. Bank acquired the note.[1] Chase, to whom Barkley made all his mortgage payments from 2002 to 2010, serviced the loan.

In 2010, Barkley's income as a real estate agent dropped significantly. In August 2010, he defaulted on his loan. Also in August, he began renting the property, receiving roughly $20,000 in short-term vacation rental fees between August and December 2010.[2]

Barkley contacted Chase about the "possibility of a modification" but did not complete an application to modify his loan. In January 2011, Northwest Trustee Services Inc., acting as U.S. Bank's agent, sent Barkley a notice of default. This notice identified U.S. Bank as beneficiary of the deed of trust and Chase as loan servicer. The notice included contact information for U.S. Bank, Chase, and NWTS. In July 2011, U.S. Bank executed a limited power of attorney, authorizing Chase to execute and deliver all documents and instruments necessary to conduct any foreclosure.

On September 18, 2012, MERS, "as nominee for GreenPoint Mortgage Funding, Inc.," executed an assignment of deed of trust, transferring its beneficial

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[1] The trust, for which U.S. Bank is trustee, "shall have all of the rights and remedies of a secured party and creditor under the Uniform Commercial Code."

[2] His monthly mortgage payment, by comparison, was approximately $1,400.

interest in Barkley's deed to U.S. Bank.[3] On October 18, 2012, U.S. Bank, by "JPMorgan Chase Bank, NA, its Attorney in Fact," executed a beneficiary declaration, stating that U.S. Bank was "the holder of the promissory note or other obligation evidencing" Barkley's loan.

On November 7, 2012, U.S. Bank, by its attorney-in-fact, Chase, appointed NWTS as successor trustee. On December 13, 2012, NWTS recorded a notice of trustee's sale, scheduling the sale for March 15, 2013. The notice identified U.S. Bank as the beneficiary of the deed of trust, and the attached notice of foreclosure explained that it was "a consequence of default(s) in the obligation to the U.S. Bank National Association." The notice of foreclosure informed Barkley that he had until 11 days before the sale to cure the default, which totaled more than $54,000 in arrearages and fees. The notices informed Barkley of his right to contest the default and the procedures to do so and gave contact information for NWTS.

On March 4, 2013, Barkley's counsel sent a letter requesting NWTS's "cooperation" in postponing the sale to allow Barkley sufficient time "to make a determination of whether it is appropriate to move forward with a lawsuit and motion to restrain the sale." NWTS first agreed to postpone the sale one week, postponing it twice more before canceling it.

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[3] This assignment was recorded in King County on November 26, 2012.

On May 22, 2013, Barkley filed suit against GreenPoint, U.S. Bank, Chase, NWTS, and MERS, alleging wrongful foreclosure, violations of the DTA, the CPA, and the Criminal Profiteering Act. Barkley has continued to rent out the property, receiving short-term vacation rental fees of $6,400 a month, on average.

In January and February 2014, the defendants filed motions to compel discovery, which the trial court granted, also awarding the defendants $1,068 in costs and reasonable attorney fees. In April 2014, the defendants moved for summary judgment. In his responding brief, Barkley requested a continuance to obtain additional discovery.

On May 23, 2014, the trial court granted the defendants' motions for summary judgment. Following a stipulation by the parties,[4] the court also granted a motion for voluntary nonsuit, dismissing GreenPoint and all Doe defendants without prejudice.

Barkley appeals.

STANDARD OF REVIEW

We review de novo a trial court's order granting summary judgment.[5] We use the de novo standard to review all trial court rulings made in conjunction with

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[4] CR 41(a)(1)(A).

[5] Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

a summary judgment decision.[6] Summary judgment is appropriate if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law.[7] A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the outcome of the lawsuit.[8]

A defendant may move for summary judgment by demonstrating an absence of evidence to support the plaintiff's case.[9] If the defendant makes this showing, the burden shifts to the plaintiff to establish the existence of an element essential to his or her case.[10] If the plaintiff fails to meet his or her burden as a matter of law, summary judgment for the defendant is proper.[11]

ANALYSIS

Deeds of Trust Act

The DTA creates a three-party transaction, in which a borrower conveys the mortgaged property to a trustee, who holds the property in trust for the lender

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[6] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).
[7] Michak, 148 Wn.2d at 794-95.
[8] Hulbert v. Port of Everett, 159 Wn. App. 389, 398, 245 P.3d 779 (2011).
[9] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Sligar v. Odell, 156 Wn. App. 720, 725, 233 P.3d 914 (2010)), review denied, 181 Wn.2d 1023 (2014).
[10] Knight, 181 Wn. App. at 795 (citing Sligar, 156 Wn. App. at 725).
[11] Knight, 181 Wn. App. at 795-96.

as security for the borrower's loan.[12] If a borrower defaults, a lender may nonjudicially foreclose by a trustee's sale.[13] The act furthers three goals: (1) an efficient and inexpensive foreclosure process, (2) adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) stability of land titles.[14] Because the DTA eliminates many of the protections afforded borrowers under judicial foreclosures, "lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor."[15] A trustee has a duty of good faith to all parties and "is not merely an agent for the lender or the lender's successors."[16]

The DTA describes the steps a trustee must take to start a nonjudicial foreclosure. Among other requirements, before scheduling a sale, a trustee must confirm that the beneficiary of the deed of trust holds the note and thus has authority to enforce the obligation. The act requires

> (7)(a) That, for residential real property, 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

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[12] Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012); Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

[13] Bain, 175 Wn.2d at 93; Albice, 174 Wn.2d at 567.

[14] Albice, 174 Wn.2d at 567 (citing Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)).

[15] Albice, 174 Wn.2d at 567 (citing Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988)).

[16] RCW 61.24.010(4); Bain, 175 Wn.2d at 93.

> or other obligation secured by the deed of trust. 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 subsection.
>
> (b) Unless 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.[17]

Declarations of John Simionidis and Jeff Stenman

First, Barkley contends that the court should not have considered the declarations of John Simionidis, assistant secretary for Chase, and Jeff Stenman, vice-president and director of operations for NWTS. To be considered on summary judgement, CR 56(e) requires a declaration be made on personal knowledge and describe facts admissible in evidence:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Statements in a declaration based on a review of business records satisfy the personal knowledge requirement of CR 56(e) if the declaration satisfies the business records statute, RCW 5.45.020.[18] A business record is admissible as competent evidence

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[17] RCW 61.24.030.

[18] Discover Bank v. Bridges, 154 Wn. App. 722, 726, 226 P.3d 191 (2010).

> if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.[19]

Reviewing courts interpret the statutory terms "custodian" and "other qualified witness" broadly.[20]

Both declarations satisfy the requirements of CR 56(e) and RCW 5.45.020. Simionidis and Stenman declared under penalty of perjury that (1) they were officers of Chase and NWTS, respectively; (2) they had personal knowledge of their company's practice of maintaining business records; (3) they had personal knowledge from their own review of records related to Barkley's note and deed of trust; and (4) the attached records were true and correct copies of documents made in the ordinary course of business at or near the time of the transaction. Though Barkley asserts that the testimony is "conclusory" and does not demonstrate personal knowledge, he does not identify any genuine issue of material fact as to the qualifications of Stenman and Simionidis, their statements, or the authenticity of the attached documents. The trial court did not err by considering the declarations and attached business records.

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[19] RCW 5.45.020.

[20] State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

Deeds of Trust Act Claims

Barkley makes a number of claims alleging violations of the DTA. The DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions when, as here, no foreclosure sale has occurred.[21]

Consumer Protection Act Claims

Next, Barkley alleges claims under the CPA, including "reduced rental, damage to his credit and emotional distress." Although he cannot bring a claim for damages under the DTA without a foreclosure sale, he may bring claims for violating this act under the CPA.[22] To prevail on an action for damages under the CPA, the plaintiff must establish "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation."[23] "[W]hether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law."[24]

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[21] Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 417, 334 P.3d 529 (2014).

[22] Lyons v. U.S. Bank NA, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014).

[23] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[24] Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

Under our Supreme Court's Hangman Ridge[25] test, a plaintiff may base a claim under the Washington CPA upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of the public interest.[26]

Barkley does not allege any per se violations, and his allegations of unfair or deceptive acts are somewhat vague. He makes general statements such as, "The Bain court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary" and "the improper appointment of NWTS, among other violations of the DTA alleged herein, can constitute unfair and deceptive acts or practices." These general statements do not prove, nor does the record support, any claim for unfair or deceptive practices here.

The mere fact that the deed of trust identified MERS as beneficiary will not support a claim.[27] U.S. Bank, through its agent, Chase, was the holder of the note, which GreenPoint had endorsed in blank. Therefore, U.S. Bank had the authority to appoint NWTS as successor trustee. It was not deceptive to refer to U.S. Bank as the beneficiary on the notice of default and notice of trustee's sale

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[25] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[26] Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

[27] Bain, 175 Wn.2d at 120.

and foreclosure. NWTS sent the notices the CPA requires, and Barkley does not show that these notices were unfair or deceptive so as to support a claim under the CPA.

Criminal Profiteering Act Claims

Next, Barkley argues that the trial court improperly dismissed his claims under chapter 9A.82 RCW, the Criminal Profiteering Act. This act provides a civil cause of action to a person if injured in his or her "person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in [several criminal statutes]."[28]

Here, the record does not support any claim for criminal profiteering. The respondents' actions related to Barkley's loan consist of servicing the loan and sending lawfully issued notices about the foreclosure following Barkley's undisputed default. We find the case Barkley cites in support, Bowcutt v. Delta North Star Corp.,[29] distinguishable on its facts and not supportive of Barkley's assertions. Bowcutt involved a criminal conspiracy between "a convicted felon and bankrupt to whom no reputable lender would advance funds" and an unscrupulous private lender. This complicated scheme exploited vulnerable homeowners, who were left with nothing following unlawful foreclosures.[30] Here,

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[28] RCW 9A.82.100(1)(a).
[29] 95 Wn. App. 311, 976 P.2d 643 (1999).
[30] Bowcutt, 95 Wn. App. at 315.

by contrast, Barkley is an experienced real estate agent and investor who has avoided foreclosure through litigation and continued to profit from renting the property while making no mortgage payments. And he raises no genuine issue of material fact as to the lawfulness of the foreclosure of his loan. The trial court did not err by granting summary judgment on this claim.

In its oral ruling, after opining that "it would be reversible error for this Court not to grant summary judgment to the defendants in this case," the trial court observed,

> It is not enough to simply raise arguments and ask questions. And the Court finds that that is pretty much all that was done in this case on the plaintiff's part to try to—try to convince the Court that there is a genuine issue of material fact. In the Court's view there is not.

"[B]are assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence."[31] We affirm the trial court's summary dismissal of Barkley's claims.

Request for CR 56(f) Continuance

Finally, Barkley claims that the trial court erred by denying his request to continue discovery under CR 56(f). Under this rule,

> [s]hould it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit

[31] Trimble v. Wash. State Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

> affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A party seeking a continuance must provide an affidavit stating what evidence it seeks and how this evidence will raise an issue of material fact precluding summary judgment.[32] We review a trial court's denial of a CR 56(f) motion for abuse of discretion.[33]

> 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."[34]

Here, Barkley filed no motion or affidavit, simply making the request at the conclusion of his response to the defendants' motions for summary judgment. More importantly, he articulated no good reason for delay. As the basis for his request, he cited "the clear need for additional discovery to flesh out the ownership of the subject Note and Deed of Trust and the agency relationships, if any, among the Defendants, and learn the identity of the 'undisclosed investor.'" But over the course of a year of litigation, Barkley conducted extensive discovery while resisting the respondents' discovery requests, until the court compelled him

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[32] Durand v. HIMC Corp., 151 Wn. App. 818, 828, 214 P.3d 189 (2009).

[33] Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 369, 166 P.3d 667 (2007).

[34] Qwest, 161 Wn.2d at 369 (quoting Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)).

to comply. And under Trujillo v. Northwest Trustee Services, Inc.,[35] the ownership of the note is not relevant to the authority of the holder, U.S. Bank, to foreclose. Barkley presents no evidence raising a genuine issue of material fact that would justify a continuance. The trial court did not abuse its discretion by denying his request.

Motion to Strike

NWTS filed with this court a motion to strike portions of Barkley's brief, arguing that Barkley impermissibly raised new theories for the first time in his response to the respondents' summary judgment motions.[36] These theories are related to Barkley's allegations that NWTS had a conflict of interest as U.S. Bank's agent and that the notice of foreclosure failed to comply with RCW 61.24.040(2).

We deny the motion to strike. Barkley's complaint alleged that NWTS had a conflict of interest. And although Barkley made no specific contentions about RCW 61.24.040(2) in his complaint, he alleged "violation of RCW 61.24, et seq." While NWTS is correct that "a complaint generally cannot be amended through

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[35]181 Wn. App. 484, 498, 326 P.3d 768 (2014), review granted, 182 Wn.2d 1020 (2015).

[36] Motion to Strike Portions of Appellant's Opening Brief at 3 (moving to strike portions of pages 10-11 ("In conjunction" through "Notice of Foreclosure"), 34-35 ("First" through "resolve the dispute"), 37 ("Finally" through "good faith to Mr. Barkley").

arguments in a response brief to a motion for summary judgment,"[37] Barkley raised both arguments, albeit in a general way, before summary judgment.

Attorney Fees

Barkley requests his costs and reasonable attorney fees under RAP 18.1 and paragraph 26 of his deed of trust. Because he has not prevailed, Barkley is not entitled to recover his costs and fees.

NWTS requests its costs on appeal under RAP 14.2: "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." NWTS prevails here. We grant NWTS's request upon its timely filing and serving of a cost bill under RAP 14.4.

CONCLUSION

Because the trial court did not err in its evidentiary rulings, in denying Barkley's request for a continuance, or in granting the defendants' motions for summary judgment, we affirm. We deny NWTS's motion to strike and Barkley's

[37] Camp Finance, LLC v. Brazington, 133 Wn. App. 156, 162, 135 P.3d 946 (2006).

request for costs and attorney fees. We grant NWTS's request for costs on appeal upon its timely compliance with RAP 14.4.

Leach, J.

WE CONCUR:

Becker, J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROCIO TRUJILLO, Petitioner, v. NORTHWEST TRUSTEE SERVICES, INC., Respondent; WELLS FARGO BANK, NA, Defendant.	NO. 90509-6 EN BANC Filed AUG 20 2015

GORDON McCLOUD, J.— Rocio Trujillo's home loan was secured by a deed of trust encumbering the home. She defaulted, and Northwest Trustee Services Inc. (NWTS), the successor trustee, sent a notice of default and scheduled a trustee's sale of her property. Under the deeds of trust act (DTA), a trustee may not initiate such a nonjudicial foreclosure without "proof that the beneficiary [of the deed of trust] is the *owner* of any promissory note . . . secured by the deed of trust." RCW 61.24.030(7)(a) (emphasis added). But the very next sentence of that statute says,

"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 subsection." *Id.* (emphasis added).

NWTS had a beneficiary declaration from Wells Fargo Bank. It did not contain that specific statutory language. Instead, it stated under penalty of perjury, "Wells Fargo Bank, NA is the actual holder of the promissory note . . . *or* has requisite authority under RCW 62A.3-301 to enforce said [note]." Clerk's Papers (CP) at 36 (emphasis added). This declaration language differs from the language of RCW 61.24.030(7)(a), quoted above, by adding the "or" alternative.

Following our recent decision in *Lyons v. U.S. Bank National Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014), we hold that a trustee cannot rely on a beneficiary declaration containing such ambiguous alternative language. Trujillo therefore alleged facts sufficient to show that NWTS breached the DTA and also to show that that breach could support the elements of a Consumer Protection Act (CPA) claim. Ch. 19.86 RCW. However, her allegations do not support a claim for intentional infliction of emotional distress or criminal profiteering. We therefore reverse in part and remand for trial.

FACTUAL ALLEGATIONS[1]

In 2006, Trujillo took out a loan for $185,900 from Arboretum Mortgage Corporation to buy her home. This loan was evidenced by a promissory note secured by a deed of trust dated March 29, 2006 encumbering the home. CP at 17.[2] The deed of trust was recorded in King County on March 31, 2006. *Id.*

Arboretum sold this loan to Wells Fargo in 2006. CP at 86. Wells Fargo sold the loan to Federal National Mortgage Association (Fannie Mae) and retained the loan servicing rights. *Id.*

In 2012, Arboretum assigned the deed of trust to Wells Fargo. CP at 35. The assignment was recorded in King County on February 2, 2012. *Id.*

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[1] When reviewing the denial of a CR 12(b)(6) motion, we presume that the complaint's factual allegations are true. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

[2] Some of these allegations are taken from documents contained in the record that are not part of the complaint, but the complaint references these documents. "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may . . . be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008). Further, where the "basic operative facts are undisputed and the core issue is one of law," the motion to dismiss need not be treated as a motion for summary judgment. *Ortblad v. State*, 85 Wn.2d 109, 111, 530 P.2d 635 (1975). Here, the trial court entered an order granting NWTS's motion to dismiss under CR 12(b)(6). The supporting documents the trial court considered were alleged in the complaint, and the "basic operative facts are undisputed and the core issue is one of law."

Trujillo admits that she defaulted on her loan on November 1, 2011. CP at 86.

Then, in a beneficiary declaration dated March 14, 2012 and delivered to NWTS, Wells Fargo stated, "Wells Fargo Bank, NA is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." CP at 36.

NWTS, the successor trustee, sent Trujillo a notice of default dated May 30, 2012, itemizing the amounts in arrears on the delinquent loan. CP at 37-39. This notice also gave Trujillo certain information about both Fannie Mae and Wells Fargo. CP at 38. Specifically, it stated, "The owner of the note is Federal National Mortgage Association (Fannie Mae)," and it listed Fannie Mae's address. *Id.* This notice also stated, "The loan servicer for this loan is Wells Fargo Bank, N.A.," and it listed Wells Fargo's address. *Id.* Additionally, the notice of default identified NWTS as Wells Fargo's "duly authorized agent." CP at 39.[3]

NWTS recorded the notice of trustee's sale on July 10, 2012, and it scheduled a sale date of November 9, 2012, for Trujillo's property. CP at 41-44.[4]

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[3] RCW 61.24.031 authorizes a trustee, a beneficiary, or an authorized agent to issue a notice of default.

[4] The record indicates that no sale occurred. CP at 45-53. The record is unclear about whether Wells Fargo actually possessed the note when NWTS issued the notice of

PROCEDURAL BACKGROUND

On February 27, 2013, Trujillo, acting pro se, sued NWTS and Wells Fargo. CP at 84-94. She claimed that NWTS and Wells Fargo violated the DTA. CP at 88-91.[5] Trujillo also claimed violations of the CPA and the Criminal Profiteering Act, as well as intentional infliction of emotional distress. CP at 91-94; ch. 9A.82 RCW. She sought an injunction to restrain the successor trustee's sale of her property, damages, and attorney fees. CP at 94.

NWTS filed a CR 12(b)(6) motion to dismiss. CP at 1-16. NWTS argued that RCW 61.24.030(7) authorized it to rely on Wells Fargo's beneficiary declaration signed in March 2012 as the basis for asserting that Wells Fargo was the

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trustee sale. *See* CP at 87-88 ("On information and belief, as soon as Wells [Fargo] began the foreclosure process, Fannie Mae transferred possession of the Note to Wells [Fargo]"; "[s]hortly after obtaining [the note and the deed of trust], Wells [Fargo] commenced the foreclosure process."); Verbatim Report of Proceedings (May 31, 2013) (VRP) at 20 ("And it's true that Wells Fargo has a copy of the Note, but that is just a copy."); Suppl. Br. of Pet'r at 18-19 (arguing that allegations in her complaint did not constitute judicial admissions). Possession of a copy of the original note does not establish possession of the original note. *See Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 498, 309 P.3d 636 (2013). Wells Fargo would constitute a "holder," and therefore a valid beneficiary under the DTA, if it actually held the note when it made the declaration at issue.

[5] Specifically, Trujillo alleged that Wells Fargo was not the beneficiary of the deed of trust and therefore could not initiate nonjudicial foreclosure. CP at 88-89. She also alleged that NWTS, as successor trustee, violated its duty of good faith under the DTA and initiated the foreclosure before it had authority to do so. CP at 89-90.

"beneficiary" in its notice of default. The trial court granted this motion and dismissed Trujillo's claims against NWTS with prejudice. CP at 80-81.[6]

Trujillo appealed. CP at 95-98. The Court of Appeals affirmed, holding that NWTS could lawfully rely on Wells Fargo's beneficiary declaration for authority to initiate a trustee's sale of Trujillo's property and that NWTS did not breach its DTA duty of good faith. *Trujillo v. Nw Tr. Servs., Inc.*, 181 Wn. App. 484, 487, 326 P.3d 768 (2014).

We granted Trujillo's petition for review but deferred consideration pending our decision in *Lyons*. *Trujillo v. Nw Tr. Servs., Inc.*, 182 Wn.2d 1020, 345 P.3d 784 (2014).

ANALYSIS

Trujillo alleged three causes of action against NWTS: one under the CPA, one under the Criminal Profiteering Act, and one for intentional infliction of emotional distress. She bases all of these claims on NWTS's reliance on Wells Fargo's March 2012 beneficiary declaration as a basis for sending the notice of trustee's sale.

[6] In granting NWTS's motion, the trial court told Trujillo, "[I]t could very well be that Wells [Fargo] doesn't have the authority to foreclose because it doesn't own the Note, but that's a different issue then [sic] whether [NWTS] could be separately liable for issuing the Notice of Default or the Notice of Trustee Sale." VRP at 18. The court explained, "Today, the only issue before me is whether you can recover monetary damages from [NWTS] for anything they did. . . . You still have your claim pending against Wells Fargo." VRP at 21.

Trujillo alleges that this conduct violates RCW 61.24.030(7), which requires a trustee to have proof that the beneficiary is the owner of the promissory note before issuing a notice of trustee sale, and RCW 61.24.010(4), which imposes a duty of good faith on the trustee. CP at 89. Because Trujillo's CPA, profiteering, and intentional infliction of emotional distress claims hinged on her theory that NWTS could not lawfully rely on the beneficiary declaration, the trial court dismissed all of her claims after determining that the declaration sufficed under the DTA.

I. Standard of Review

This court reviews CR 12(b)(6) dismissals de novo.[7] *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is proper if the court concludes that the plaintiff can prove no set of facts that would justify recovery. *Id.* We presume that the plaintiff's factual allegations are true and draw all reasonable inferences from the factual allegations in the plaintiff's favor. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012) (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)). We may even consider hypothetical

[7] In the Court of Appeals, the parties disputed whether the court should review the trial court's order as a CR 12(b)(6) dismissal or a CR 56(c) summary judgment order. *Trujillo*, 181 Wn. App. at 490. Noting that the trial court's order granted NWTS's motion to dismiss under CR 12(b)(6), the Court of Appeals concluded, "Because the supporting documents the trial court considered were alleged in the complaint and the 'basic operative facts are undisputed and the core issue is one of law,' we review the order under CR 12(b)(6), not as a summary judgment under CR 56(c)." *Id.* at 492.

facts to determine if dismissal is proper. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922 n.9, 296 P.3d 860 (2013). "But, '[i]f a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.'" *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 963, 331 P.3d 29 (alteration in original) (quoting *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005)).

II. Trujillo Alleges Facts Sufficient To Prove NWTS Violated the DTA

A. DTA Statutory Framework

The first statute at issue here is RCW 61.24.030. It provides a mandatory prerequisite to notice of a trustee's sale:

> It shall be requisite to a trustee's sale:
>
> . . . .
>
> (7)(a) That, for residential real property, 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. 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 subsection.
>
> (b) Unless 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) (emphasis added).

The DTA defines the key term "beneficiary" elsewhere. RCW 61.24.005(2) provides that a "beneficiary" is "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." The DTA does not define the term "holder."

RCW 61.24.010(4) then requires a foreclosure trustee to act in good faith toward the borrower, beneficiary, and grantor. This duty "requires the trustee to remain impartial and protect the interests of all the parties." *Lyons*, 181 Wn.2d at 787. We described this duty in *Lyons*:

> A foreclosure trustee must "adequately inform" itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a "cursory investigation" to adhere to its duty of good faith. . . . [A] trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith.

Id. (internal quotation marks omitted) (quoting *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 309-10, 308 P.3d 716 (2013)).

B. DTA Analysis

The first question that we must address is whether NWTS violated the DTA by relying on a beneficiary declaration stating that Wells Fargo "is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or

has requisite authority under RCW 62A.3-301 to enforce said obligation." CP at 36. Trujillo claims that NWTS's decision to rely on this declaration was unlawful. Suppl. Br. of Pet'r at 17-18; CP at 89-90. She argues that the trustee must have proof that the beneficiary is the "owner" of the note before sending a notice of trustee sale, and that NWTS knew Wells Fargo did not own the note before sending that notice. Pet. for Review at 9; CP at 90. She also asserts that the beneficiary declaration here "did not authorize NWTS to record the notice of trustee's sale because it contained the unauthorized additional ["or"] language," which is "different from the language of the second sentence of RCW 61.24.030(7)(a)" and which this court declared improper in *Lyons*. Suppl. Br. of Pet'r at 17; CP at 88.

We agree with Trujillo for the most part. The DTA requires a trustee to have proof that the beneficiary actually *owns* the note on which the trustee is foreclosing. *Lyons*, 181 Wn.2d at 789 (citing *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 102, 111, 285 P.3d 34 (2012)). But the DTA also says, "'A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual *holder* of the promissory note . . . shall be sufficient proof'" of this requirement. *Id.* at 789-90 (emphasis added) (alteration in original) (quoting RCW 61.24.030(7)(a)). Thus, a trustee is entitled to rely on such a beneficiary declaration when initiating a trustee's sale, unless the trustee violated its good faith duty. *Id.* at 790 (citing RCW

61.24.030(7)(b)). In this case, however, we don't have such a declaration. We have a declaration stating that Wells Fargo could be the "actual holder" "or" it could be something else. The question is whether reliance on that ambiguous declaration suffices.[8]

Our decision in *Lyons*—which did not issue until after the Court of Appeals resolved Trujillo's case—answers that question. In *Lyons*, a case decided on summary judgment, we considered the validity of a beneficiary declaration containing the same "or" language.[9] We ruled that it did not satisfy RCW 61.24.030(7)(a). *Lyons*, 181 Wn.2d at 791. We explained, "On 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." *Id.*

Lyons controls the outcome in this case. Here, as in *Lyons*, the language in Wells Fargo's declaration is ambiguous about whether Wells Fargo actually held the

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[8] Thus, we do not address whether RCW 61.24.030(7)(a) allows a trustee to rely on an *un*ambiguous declaration stating that the beneficiary is the actual holder of the note, even though the owner is a different party. That issue is raised in a pending case, and we express no opinion on it here.

[9] The beneficiary declaration at issue in *Lyons* similarly stated, "'Wells Fargo Bank, NA, is the actual holder of the promissory note or other obligation evidencing the above-referenced loan *or* has requisite authority under RCW 62A.3-301 to enforce said obligation.'" *Lyons*, 181 Wn.2d at 780 (emphasis added).

note when it initiated the foreclosure. CP at 36. This ambiguity indicated that the declaration might be ineffective. *Lyons*, 181 Wn.2d at 790. Because this declaration fails to satisfy RCW 61.24.030(7)(a), NWTS could not lawfully rely on it to prove that Wells Fargo was an "owner" of the note. Under *Lyons*, because Trujillo alleges that NWTS deferred to this ambiguous declaration to initiate foreclosure on her home, she alleges facts sufficient to prove a violation of the DTA. *Id.* at 790; *see also Beaton v. JPMorgan Chase Bank NA,* No. C11-0872 RAJ, 2013 WL 1282225, at *5 (W.D. Wash. Mar. 26, 2013) (court order).

We therefore reverse the Court of Appeals decision that Trujillo failed to allege a violation of the DTA. On remand, Trujillo must have the opportunity to prove that NWTS actually relied on the impermissibly ambiguous declaration as a basis for issuing the notice of trustee's sale. [10]

[10] A trustee must have the requisite proof of the beneficiary's ownership of the note *before* recording, transmitting, or serving the notice of trustee's sale. *See* Br. of Amicus Curiae of Att'y Gen. of State of Wash. at 10; RCW 61.24.030(7)(a) ("[*B*]*efore* 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." (emphasis added)). A court must assess the propriety of the trustee's conduct based upon the trustee's evidence and investigation at that time.

III. The Alleged Violation of the DTA Is Sufficient To Support Trujillo's CPA Claim

A. CPA Statutory Framework

Trujillo cannot bring a claim for damages under the DTA absent a completed trustee's sale of her property. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 428-30, 334 P.3d 529 (2014); *Lyons*, 181 Wn.2d at 784. She may, however, bring a CPA claim based on a defendant's wrongful conduct during a nonjudicial foreclosure process, even without a completed sale. *See Frias*, 181 Wn.2d at 429-30; *Bain*, 175 Wn.2d at 119.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. To succeed on a CPA claim, a plaintiff must establish (1) an unfair or deceptive act (2) in trade or commerce (3) that affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)).

B. Analysis

Trujillo alleges that NWTS violated the CPA. Turning to the first element of a CPA claim, she alleges that NWTS's attempted foreclosure was unfair or

deceptive. CP at 93.[11] Whether an act is unfair or deceptive is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). "A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (citing *Leingang*, 131 Wn.2d at 150).

Following *Lyons*, NWTS's alleged conduct had the capacity to deceive. It therefore supports a CPA claim. *See Lyons*, 181 Wn.2d at 785.

To satisfy the second and third elements of her CPA claim—that NWTS's acts occurred in trade or commerce and that they affected the public interest—Trujillo alleges, "Wells [Fargo] makes these unfounded claims to foreclose on defaulting borrowers as a routine part of its foreclosure activities on behalf of Fannie Mae. Its foreclosure activities are conducted in the course of trade and commerce and certainly impact the public interest." CP at 93. In a private action, a plaintiff can establish that the lawsuit would serve the public interest by showing a likelihood that other plaintiffs have been or will be injured in the same fashion. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (quoting *Hangman*

[11] None of the acts alleged in Trujillo's complaint constitute per se violations of the DTA that would automatically satisfy the first element of a CPA claim. RCW 61.24.135.

Ridge, 105 Wn.2d at 790). The court considers four factors to assess the public interest element when a complaint involves a private dispute: (1) whether the defendant committed the alleged acts in the course of his/her business, (2) whether the defendant advertised to the public in general, (3) whether the defendant actively solicited this particular plaintiff, and (4) whether the plaintiff and defendant have unequal bargaining positions. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 791). The plaintiff need not establish all of these factors, and none is dispositive. *Id.* Trujillo's allegations satisfy the second and third elements because they relate to the sale of property, RCW 19.86.010(2), and they state that other plaintiffs have or will likely suffer injury in the same fashion. *Id.* (citing *Hangman Ridge*, 105 Wn.2d at 790).[12]

To meet the final two elements of her CPA claim—injury and causation—Trujillo alleges, "[NWTS] is attempting to help Wells [Fargo] sell the Property on

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[12] As Trujillo points out in support of her argument on this element, numerous lawsuits have involved similar beneficiary declarations. *See, e.g.*, *Beaton,* 2013 WL 1282225, at *5 (beneficiary declaration stated that JPMorgan Chase Bank NA "'is the actual holder . . . or has requisite authority under RCW 62A.3-301'" was insufficient (emphasis omitted)); *In re Butler,* 512 B.R. 643, 644, 655-56 (Bankr. W.D. Wash. 2014) (beneficiary declaration stating that OneWest Bank "'is the actual holder of the promissory note . . . or has requisite authority under RCW 62A.3-301 to enforce said obligation'" was sufficient (quoting RCW 61.24.030(7)(a))); *Mulcahy v. Fed. Home Loan Mortg. Corp.*, No. C13-1227RSL, 2014 WL 1320144, at *4 (W.D. Wash. Mar. 28, 2014) (declaration stating that Wells Fargo "'is the actual holder . . . or has requisite authority under RCW 62A.3-301'" was sufficient); *Mickelson v. Chase Home Fin. LLC,* 579 F. App'x 598, 601 (9th Cir. 2014) (Mem. Op.) (beneficiary declaration stated that Chase Home Finance LLC is the actual holder or has requisite authority under RCW 62A.3-301 was sufficient).

the basis that Wells [Fargo] is the Note Holder and beneficiary" when "[i]t has been shown, beyond reasonable dispute, that it was neither." CP at 93. In contrast, NWTS moved to dismiss, arguing, "The Plaintiff does not contend that any action by NWTS causes [sic] or induced her to default on the loan. Nor does Plaintiff assert that no party is entitled to foreclose on the property." CP at 14-15. NWTS concludes, "[R]egardless of NWTS' role as successor trustee under the deed of trust, Plaintiff's property would still be foreclosed upon based on the failure to make payments on the loan." CP at 15.

While emotional distress, embarrassment, and inconvenience are not compensable injuries under the CPA, Trujillo does not have to lose her property completely to prove injury. *Frias*, 181 Wn.2d at 430-31. Trujillo can satisfy the CPA's injury requirement with proof that her property interest or money is diminished as a result of NWTS's unlawful conduct, even if the expenses incurred by the statutory violation are minimal. *Panag*, 166 Wn.2d at 57 (quoting *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). Trujillo's investigation expenses and other costs associated with dispelling the uncertainty about who owns the note that NWTS's allegedly deceptive conduct created are therefore sufficient to constitute an injury under the CPA. Br. of Amicus Curiae of

Att'y Gen. of State of Wash. at 14-15; *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1098 (W.D. Wash. 2013) (citing *Panag*, 166 Wn.2d at 62-63).

IV. The Alleged DTA Violation Does Not Support a Criminal Profiteering Claim

A. Criminal Profiteering Statutory Framework

Trujillo also alleges that NWTS violated the Criminal Profiteering Act. CP at 91-92. "Criminal profiteering" is defined as commission of specific enumerated felonies for financial gain. RCW 9A.82.010(4). Trujillo alleges violations of RCW 9A.82.010(4)(e), which defines "theft" as a predicate criminal profiteering act, and RCW 9A.82.010(4)(s), which defines "leading organized crime" as a criminal profiteering act. CP at 91-92.

But the definition "profiteering," alone, is not actionable. Only a violation of RCW 9A.82.100(1)(a) can support a private profiteering action. Assuming that Trujillo actually intended to proceed under that statute, it provides that a person who sustains injury to his or her person, business, or property may sue to recover damages and costs, including reasonable investigative and attorney fees, if the injury is caused by an act of criminal profiteering that is part of a pattern of criminal profiteering activity or by a violation of RCW 9A.82.060, which involves leading organized crime. *Winchester v. Stein*, 135 Wn.2d 835, 850, 959 P.2d 1077 (1998) (citing RCW 9A.82.100(1)(a)). Trujillo never explains whether she is asserting a claim under the

pattern-of-profiteering-acts prong of RCW 9A.82.100(1) or the leading-organized-crime portion of that statute.

B. Analysis

Assuming that Trujillo meant to allege a profiteering claim based on leading organized crime, Trujillo would have to establish that NWTS (1) intentionally organized, managed, directed, supervised, or financed (2) three or more persons (3) with the intent to engage in a pattern of criminal profiteering activity. RCW 9A.82.060(1)(a). Trujillo fails to allege such a claim because she does not allege the involvement of three or more persons. *Id.*

Assuming instead that Trujillo intended to allege a profiteering claim based on a "pattern" of profiteering acts, she would have to establish that NWTS committed an enumerated felony that was part of a pattern of profiteering activity. The statute has a very detailed definition of "pattern of criminal profiteering activity." It means, in very general terms, three or more acts of criminal profiteering within a five-year period that have specific similarities or are "interrelated" with a "nexus to the same enterprise." RCW 9A.82.010(12). "Enterprise" means "any individual, sole proprietorship, partnership, corporation, business trust, or other profit or nonprofit legal entity, and includes any union, association, or group of

individuals associated in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities." RCW 9A.82.010(8).

Even if we construe facts alleged throughout the pro se complaint liberally, they are still wanting. In her complaint, Trujillo alleges,

> Well[s Fargo's] attempt to obtain the Property at the trustee's sale by bidding the amount of Plaintiff's debt obligation when Wells [Fargo] knows it is neither the owner nor the holder of the Note is nothing short of attempted theft. Claiming that it is the Beneficiary and Note holder as the essence of its attempt to obtain the Property means that the attempted theft is an attempt to steal by employing deceptive means.

CP at 91. She also alleges, "[NWTS] has acted in concert with Wells [Fargo] in Wells [Fargo's] attempt to bring about the sale of the Property." CP at 92. She further alleges, "Allowing the servicer to foreclose in its own name, where applicable law permits, is such a normal part of Freddie Mac's [(Federal Home Loan Mortgage Corporation)] foreclosure activity that Freddie Mac has developed standard procedures for using this method to foreclose." *Id.* And she alleges that Wells Fargo engaged in "leading organized crime" under RCW 9A.82.060 because "Wells [Fargo] has foreclosed on hundreds, if not thousands, of homes in the last five years. Scores of those homes, at least, have been Fannie Mae homes." *Id.*

No Washington case has provided a test to determine whether an "enterprise" exists. But the Supreme Court has indicated what is required to show an enterprise under the federal RICO statute (Racketeer Influenced and Corrupt Organizations

Act), 18 U.S.C. § 1964(c).[13] An enterprise is an entity or a group of people "associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). A plaintiff can prove the existence of an enterprise with "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*

Trujillo fails even to identify an enterprise in her complaint.[14] Although she mentions NWTS, Wells Fargo, Freddie Mac, and Fannie Mae, CP at 92, she is not clear about which of these entities, or which combination of them, constitute the "enterprise." Given that defect alone, she fails to allege a profiteering claim.

V. Trujillo Alleges Insufficient Facts To Prove Intentional Infliction of Emotional Distress

Finally, Trujillo claims intentional infliction of emotional distress. CP at 93-94. This requires proof of the following elements: "'(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual

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[13] We may apply federal case law in this area to interpret the Criminal Profiteering Act. *Winchester*, 135 Wn.2d at 848.

[14] Several United States Courts of Appeals have interpreted *Turkette* and expanded on what must be shown to prove an enterprise. *E.g.*, *United States v. Pelullo*, 964 F.2d 193, 211 (3d Cir. 1992). We need not address the exact contours of that "enterprise" element here, however, because Trujillo has not even alleged an enterprise at all.

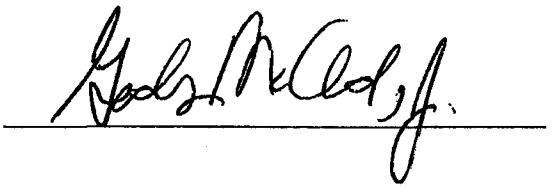
result to plaintiff of severe emotional distress.'" *Lyons*, 181 Wn.2d at 792 (quoting *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003)). Although a jury ultimately determines if conduct is sufficiently outrageous, the court makes the initial determination of whether reasonable minds could differ about "'whether the conduct was sufficiently extreme to result in liability.'" *Id.* (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)). To establish extreme and outrageous conduct, a plaintiff must show that the conduct was "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* (internal quotation marks omitted) (quoting *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002)).

Once again, *Lyons* controls. It held that allegations identical to those in Trujillo's complaint fail to describe conduct sufficiently outrageous to support an intentional infliction of emotional distress claim. *Id.* at 793.

CONCLUSION

NWTS's decision to rely on Wells Fargo's ambiguous declaration violated the DTA. This violation, combined with Trujillo's additional allegations, supports a CPA claim. It does not, however, support a profiteering claim or a claim of

intentional infliction of emotional distress. We therefore reverse the Court of Appeals in part and remand for further proceedings on the CPA claim.



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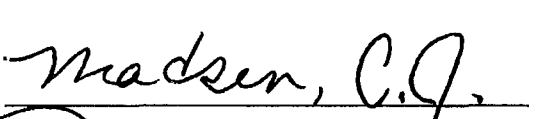

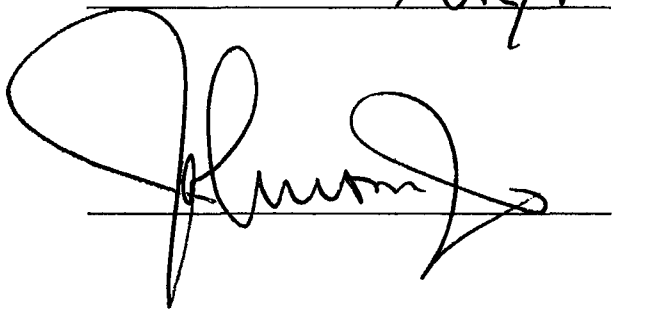

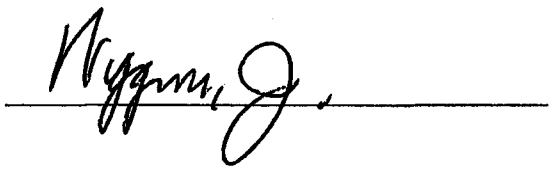

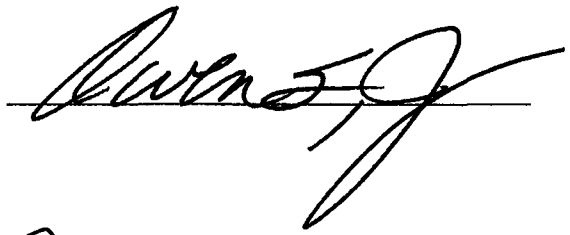

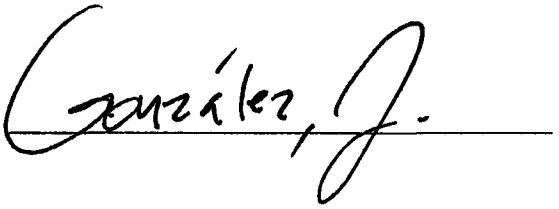

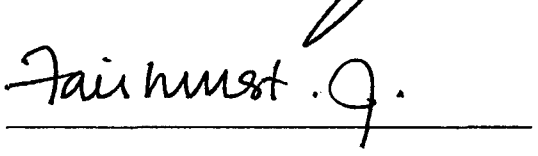

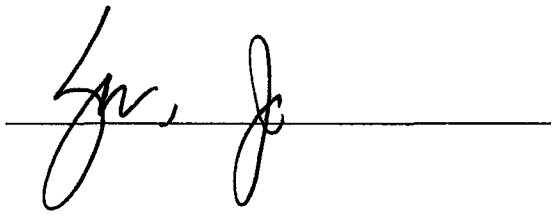

APPENDIX C

No. 90652-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DARLENE BROWN,

Petitioner-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF COMMERCE,

Respondent-Appellee.

BRIEF OF APPELLANT
WITH CORRECTED TABLE OF AUTHORITIES

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I. INTRODUCTION AND SUMMARY

The Legislature enacted the Foreclosure Fairness Act (FFA) in response to the foreclosure crisis. The purpose of the FFA is to avoid preventable foreclosures by creating "a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible."[1] If an attorney or housing counselor refers to mediation a homeowner who has received a Notice of Default (NOD), the FFA requires the homeowner and the owner of the obligation to engage in mediation to try to prevent foreclosure. RCW 61.24.163(5).

The Legislature created one exception: Federally insured depository institutions[2] that have been the "beneficiaries of deeds of trust" in 250 or fewer foreclosures in the preceding year are not subject to FFA mediation requirements. RCW 61.24.166 (full text below at page 14). At issue in this case is the scope of this exemption and the legal standard for determining a homeowner's eligibility for FFA mediation.

Appellant Darlene Brown's loan is owned by the very large Federal Home Loan Mortgage Corporation (Freddie).[3] Freddie is not

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[1] Laws 2011, ch. 58, § 1, set forth at RCW 61.24.005, Reviser's Note.

[2] As defined in 12 U.S.C. Sec. 461(b)(1)(A).

[3] Freddie is a Government Sponsored Enterprise (GSE) as is the Federal National Mortgage Association (Fannie). The promissory notes of two additional parties below, Brian Longworth and John Michael Lewis, were owned by Fannie and serviced by SunTrust Bank and HomeStreet Bank, respectively. Mr. Longworth and Mr. Lewis were also denied mediation because both SunTrust and HomeStreet are on the exempt list even though the owner of their loans, Fannie, is not exempt. As with Ms. Brown's loan, if the Longworth and Lewis loans had been serviced by Bank of America, both would have gotten mediation.

exempt from FFA mediation because it is not a federally insured depository institution. After Ms. Brown received a NOD, she was referred by a lawyer to the Department of Commerce (Commerce) for mediation as specified in the FFA. However, Commerce denied Ms. Brown's referral, even though it regularly approves other referrals where Freddie owns the promissory note.

The FFA exemption was designed to exclude small financial institutions whose impact on the foreclosure crisis has been minimal. Commerce denied Ms. Brown's referral to mediation based on its determination that the "beneficiary" for FFA exemption purposes was not Freddie, the *owner* of her note (and thus the party that would have to be represented at FFA mediation) but rather the depository institution that was the *holder* of the note. In Ms. Brown's case this non-owner holder was the very large bank, M&T Bank. M&T was on Commerce's 2013 exemption list because it had not conducted more than 250 foreclosures in Washington during the preceding calendar year. When a Freddie-owned note is serviced by a *non-exempt* bank, like Bank of America, Commerce allows mediation.

Commerce thus grants or denies mediation based on the identity of the third-party loan servicer instead of the owner of the note. Homeowners have no control over who services their loan because servicing rights are bought and sold by the trillions of dollars by banks, nonbanks, and, more

recently, by private equity firms and hedge funds.[4] Under Commerce's interpretation of the FFA, a homeowner who may be eligible for mediation one day may be ineligible the next, depending on who happens to be servicing the loan at the moment of mediation referral.

Ms. Brown shows that pursuant to the language of RCW 61.24.166, RCW 61.24.163(5)(c) and RCW 61.24.030(7)(a), and based on the Legislature's intent, the entity required to participate in mediation must be both the holder *and* owner of the promissory note. The entity that must be assessed for FFA exemption is the one that *owns* the promissory note. The superior court instead agreed with Commerce that ownership of the loan is irrelevant to the exemption, and that as long as a claimed beneficiary shows it is the holder of a borrower's note and is on the exemption list at the moment of referral, it is exempt from mediation.

Commerce's disparate treatment of similarly situated borrowers – all borrowers whose notes are owned by Fannie or Freddie – raises constitutional concerns. Commerce allows mediation based on which

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[4] *See* Kate Berry and Robert Barba, *SunTrust Shows Some Banks Still Willing, Able to Buy MSRs*, Mortgage Servicing News (July 3, 2014), *available at* http://www.nationalmortgagenews.com/news/servicing/suntrust-shows-some-banks-still-willing-able-to-buy-msrs-1042082-1.html (bank-to-bank sale); Michael Corkery, *Wells Fargo Sells Servicing Rights on $39 Billion in Mortgages*, New York Times (January 22, 2014) *available at* http://dealbook.nytimes.com/2014/01/22/wells-fargo-sells-servicing-rights-on-39-billion-in-mortgages/?_php=true&_type=blogs&_r=0 (bank-to-nonbank sale); Kathleen M. Howley and John Gittelsohn, *GSO Drawn to Mortgage Servicing as Banks Retreating*, Bloomberg (September 17, 2013), *available at* http://www.bloomberg.com/news/2013-09-17/gso-drawn-to-mortgage-servicing-as-banks-retreating.html (sale to private equity and hedge funds); and Pamela Lee, *Nonbank Specialty Servicers, What's the Big Deal?* Urban Institute (August 2014), *available at* http://s3.documentcloud.org/documents/1264380/nonbank-speciality-servicers-whats-the-big-deal.pdf (growing market for nonbank servicers).

servicer happens to be associated with the loan, even though Fannie and Freddie are never exempt from FFA mediation. The record shows that hundreds of homeowners with Fannie or Freddie loans who went to mediation were able to negotiate modification agreements or other workout options that prevented foreclosure. Yet Ms. Brown has been denied mediation on her Freddie-owned loan solely due to Commerce's interpretation of the exemption.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in its Finding of Fact (FF) 1.14 that for purposes of FFA mediation M&T Bank was the correct beneficiary and was exempt from mediation.

2. The superior court erred by refusing to adopt Ms. Brown's proposed FF 1.12 that the beneficiary of a deed of trust must also be the owner of the promissory note secured by the deed of trust.

3. The superior court erred by refusing to adopt Ms. Brown's proposed FF 1.13 that she was aggrieved by Commerce's refusal to refer her to FFA mediation.

4. The superior court erred by refusing to adopt Ms. Brown's proposed Conclusion of Law (CL) 2.1 that the legislature intended that owners of loans must mediate with the homeowner when mediation occurs.

5. The superior court erred by refusing to adopt Ms. Brown's proposed CL 2.2 that whether the FFA exemption provision, RCW

61.24.166, applies must be determined based on whether the owner of the loan is exempt.

6. The superior court erred by refusing to adopt Ms. Brown's proposed CL 2.3 that Commerce failed to perform a duty required by law under RCW 34.05.570(4)(b) and that its failure to perform that duty was a violation of RCW 34.05.570(4)(c)(ii).

7. The superior court erred in its CL 2.12 that the owner of a loan is a beneficiary for purposes of FFA mediation is in conflict with the *Bain* and *Trujillo* decisions.

8. The superior court erred in its CL 2.13 that Ms. Brown's argument that Commerce could not rely upon the beneficiary declaration was in conflict with principles of statutory interpretation and the holding in *Trujillo*.

9. The superior court erred in its CL 2.15 that Commerce was entitled to rely on the beneficiary declaration from M&T Bank when Commerce determined M&T Bank was exempt from mediation under RCW 61.24.166.

10. The superior court erred in its CL 2.16 that Ms. Brown's claim in an as-applied challenged requires a showing of unconstitutionality beyond a reasonable doubt.

11. The superior court erred in its CL 2.17, 2.18 and 2.19 that Ms. Brown had to prove beyond a reasonable doubt that Commerce was applying the exemption provision unconstitutionally, *i.e.*, that

Commerce's actions to deny Ms. Brown FFA mediation were unconstitutional under RCW 34.05570(4)(c)(i).

12. The superior court erred in its CL 2.20 that Ms. Brown failed to prove that Commerce acted outside its statutory authority in violation of RCW 34.05.570(4)(c)(ii).

13. The superior court erred in its CL 2.21 that Ms. Brown failed to prove Commerce's actions were arbitrary and capricious under RCW 34.05.570(4)(c)(iii).

B. Issues Pertaining to Assignments of Error

1. Does the FFA require the beneficiary of the deed of trust to also be the owner of the promissory note for purposes of determining the correct counter-party at mediation with the homeowner/borrower? *See* Assignment of Error (A/E) 1 – 5, 7-9, and Part V. A. below.

2. Did Commerce's actions violate RCW 34.05.570(4)(b) and RCW 34.05.570(4)(c)(i)-(iii) because Commerce failed to perform its duty to refer Ms. Brown to FFA mediation and because its failure to perform that duty was outside its statutory authority, arbitrary and capricious, and unconstitutional? *See* A/E 6, 10-14 and Part V. B. below.

III. STATEMENT OF THE CASE

Darlene Brown lives in the Kennewick home she inherited from her father and stepmother. AR 000036-37.[5] Countrywide Bank originated Ms. Brown's loan in 2008. AR 000156-57. The loan was later sold to Freddie. CP 00036. When Ms. Brown had difficulty paying, a Notice of Default (NOD) was issued on May 21, 2013, identifying Freddie as the owner and M&T Bank as the servicer. AR 000037.

Ms. Brown was referred to FFA mediation on July 10, 2013. AR 000035-37. The referral form listed Freddie as the beneficiary and Bayview Loan Servicing as the servicer.[6] *Id.* About two hours after Commerce received the referral, it sent an email to Northwest Trustee Services (NWTS) about it. AR 000038. NWTS emailed Commerce a beneficiary declaration about twenty minutes later. AR 000039, AR 000041. NWTS told Commerce it believed Ms. Brown was ineligible for mediation. AR 000039. The beneficiary declaration indicated that M&T was the holder of the note. AR 000041. Commerce denied the referral less than three hours after getting it. AR 000042.

Ms. Brown disputed the denial and asked if there was an appeal process. AR 000043. Commerce said that Ms. Brown could submit an

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[5] The agency record is not assigned Clerk's Papers numbers. Commerce affixed Bates numbers when it prepared the agency record. For the combined Brown and Longworth agency records, Commerce used: 000001-000215; for the Lewis agency record it used: AGO 001-AGO 0082. References herein to the Brown-Longworth agency records are preceded by "AR." References to the Lewis agency record use AGO.

[6] Bayview Loan Servicing was acting as M&T's Attorney in Fact.

appeal to Commerce by email for review. *Id.* Commerce later said there was no appeal procedure. AR 000062.

After Ms. Brown was denied mediation, emails show Commerce staff discussed the matter internally. AR 000045, 000048. The upshot of this discussion was a July 16, 2013 email from Commerce to NWTS asking for a "complete, accurate Beneficiary Declaration." AR 000094. Susana Davila, an attorney with RCO Legal, responded for NWTS, disagreeing with Commerce that the earlier-provided declaration was insufficient, and asked Commerce to "provide the statutory guidance" justifying its position. AR 000105. Two days later, Commerce sent NWTS an email asking whether NWTS had "located the document" Commerce had requested on July 16, 2013. AR 000115. On July 23, 2013, Commerce sent NWTS another email threatening to accept the referral for mediation unless Commerce received "a Beneficiary Declaration as indicated" in its July 16, 2013 email to NWTS. AR 000137-38. On July 23, 2013, NWTS provided Commerce a new beneficiary declaration dated July 23, 2013. AR 000142-43. The new declaration said M&T was the actual holder of the note. AR 000142.

Later on July 23, 2013, Commerce emailed the referring attorney explaining that because M&T is exempt and had provided a declaration that said it was the "actual holder" of the note, Commerce "cannot assign a mediator to this case." AR 000165. Ms. Brown filed her petition for judicial review in Thurston County Superior Court on August 9, 2013. CP 0006-28.

Joining Ms. Brown as a petitioner below was Brian Longworth. *Id.* Mr. Longworth, who is not participating in this appeal, was also denied FFA mediation. AR 000013. Commerce acknowledged his promissory note was owned by Fannie. *Id.* The loan was serviced by SunTrust Bank. AR 000003. Commerce questioned Mr. Longworth's eligibility because SunTrust "is exempt from FFA." AR 000004. Mr. Longworth's housing counselor at Parkview Services, sent a copy of the NOD listing Fannie as the owner of the note and SunTrust as the loan servicer. AR 000006-11. Commerce denied mediation on May 29, 2013. It told Parkview: "[I]t looks like the beneficiary (holder of note) is SunTrust. (The owner is Fannie Mae, but the definition of beneficiary for FFA purposes is "holder of note.") Unfortunately, SunTrust is exempt from mediation. ... This means that this referral is ineligible and will not be processed." AR 000013 (emphasis in original).

Parkview Services challenged the denial. AR 000027. Commerce then asked NWTS for the "bene declaration" for Mr. Longworth. AR 000019. Commerce then exchanged email with NWTS about the first beneficiary declaration NWTS supplied because it did not contain the "actual holder" language. AR 000206-000203. Fresh from its dustup with Commerce in Ms. Brown's referral, NWTS supplied a second declaration containing the 'actual holder" language. AR 000204, 000215. Commerce sent the declaration to Parkview on July 29, 2014. AR 000211.

John Michael Lewis was also a petitioner below. CP 999-1016. He is not participating in this appeal. Mr. Lewis's promissory note was also

owned by Fannie. AGO 0041. His loan was serviced by HomeStreet Bank. AGO 006. HomeStreet is on the exempt list. AGO 0055. As it did with NWTS, Commerce sent notice of the referral to Regional Trustee Services (RTS). AGO 007. There is nothing in the record indicating RTS responded to this email. Two days after sending RTS notice of the referral, Commerce appointed a mediator and sent notice to Mr. Lewis, his lawyer, the trustee, and Fannie, announcing that "this action has been referred for foreclosure mediation in accordance with RCW 61.24." AGO 0011-15. At that point, RTS objected and said HomeStreet would not be participating in mediation because it was exempt. AGO 0031. Commerce then asked RTS to provide a beneficiary declaration. AGO 0037. RTS did so.[7] AGO 0037, 0041. Commerce then denied Mr. Lewis mediation. AGO 0055. Mr. Lewis filed his petition for judicial review separately from the Brown-Longworth petition. CP 999-1016. Mr. Lewis's case was consolidated with the Brown and Longworth case. CP 82-84.

Commerce prepared and filed agency records. The petitioners successfully moved to supplement the agency records over Commerce's objections. CP 85-702, CP 703-23, CP 724-34; 735-76.[8] The superior court held oral argument on the merits on June 11, 2014. CP 1069-75.

Findings of Fact, Conclusions of Law, and an Order were entered on July 22, 2104. CP 965-71. The superior court entered Corrected

[7] The Lewis beneficiary declaration said Fannie Mae was the owner and HomeStreet was the actual holder of the note. AGO 0041.

[8] The Supplemental Record was assigned Clerk's Papers numbers.

Findings of Fact, Conclusions of Law, and an Order on October 17, 2014. CP 1069-75.

IV. STANDARD OF REVIEW

This Court's review of the superior court's decision is *de novo*. When reviewing agency action an appellate court sits in the same position as the superior court, applying the standards of the Administrative Procedure Act (APA) directly to the record. *Washington Independent Telephone Ass'n v. Washington Utilities and Transportation Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003) (citation omitted).

Because Commerce's denial of mediation constitutes "other agency action" under the APA, the Court must review and determine whether in denying mediation to Ms. Brown, Commerce failed to perform a duty required by law, acted outside its statutory authority, was arbitrary and capricious, or violated Ms. Brown's constitutional rights. RCW 34.05.570(4)(c)(i)-(iii) & RCW 34.05.570(4)(b); *see also Rios v. Dept. of Labor and Industries*, 145 Wn.2d 483, 491-92; 505-508, 39 P.3d 961 (2002). Commerce's denial of mediation violated the APA and was unlawful on all of these grounds.

V. ARGUMENT

Commerce's actions violated RCW 34.05.570(4). When a state agency engages in actions based on its interpretation of a statute, judging whether the agency's actions violate the APA requires the reviewing court to consider the plain language of the statute, legislative intent, the statutory scheme, and the ramifications of interpreting the statute as the

agency has done. *See, e.g., Rios*, 145 Wn.2d 483, 493-500, 39 P.3d 961 (2002) (holding agency's "other agency action" unlawful under RCW 34.05.570(4) based in part on agency's incorrect interpretation of language and intent of the governing statute); *Children's Hospital v. Dept. of Health*, 95 Wn. App. 858, 873-74, 975 P.2d 567 (1999) (same). Here, as discussed below, Ms. Brown's rights were violated by Commerce's failure to perform its duty to refer her to FFA mediation, in violation of RCW 34.05.570(4)(b). Ms. Brown's rights were also violated because Commerce's denial of mediation was outside the agency's statutory authority, arbitrary and capricious, and unconstitutional, in violation of RCW 34.05.570(4)(c)(i)-(iii).

A. Commerce's interpretation of the FFA exemption is at odds with the plain language and statutory scheme of the FFA, thwarts legislative intent, and creates constitutional problems.

In interpreting the FFA's exemption provision, this Court's "primary obligation is to give effect to the legislature's intent." *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 681-82, 80 P.3d 598 (2003). In determining the legislative intent behind the FFA, the Court looks to the "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The FFA's provisions "should be harmonized whenever possible," *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007), and the Court should interpret the statute to avoid "absurd results." *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704

(2010). Moreover, legislative declarations are ordinarily deemed conclusive as to the circumstances asserted in the Legislature's declaration of the basis and necessity for enactment. *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002); *see also* FFA Findings-Intent-2011, ch. 58, set forth at RCW 61.24.005, Reviser's Note, discussed *infra* at 22-23 & 45.

Importantly, as a remedial statute, the FFA should be liberally construed in favor of homeowners to achieve the FFA's overarching goal of avoiding foreclosure. *Jametsky v. Rodney A.*, 179 Wn.2d 756, 764, 317 P.3d 1003, (2014). And, because the nonjudicial foreclosure process under the Deeds of Trust Act (DTA) lacks many of the protections enjoyed by borrowers under judicial foreclosures, courts "must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortg. Services of Washington*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). The superior court erred when it failed to apply these principles.

1. The FFA's plain language, formal statement of legislative intent, statutory scheme, and legislative history all establish that the intended parties to mediation are homeowners and the owners of their loans.

a. The plain language of the FFA makes clear that the exemption provision applies to the owner of the promissory note.

Commerce is allowing loan servicers to be treated as the "beneficiary" by relying on the definition of "beneficiary" in RCW 61.24.005 while also purporting to comply with a provision in the FFA that expressly requires that the "beneficiary" in FFA mediation must prove

it is the "owner" – RCW 61.24.163(5)(c). The plain language of the FFA establishes that the identity of the owner of the promissory note is the determining factor that controls the mediation exemption question.[9] By focusing instead on the identity of the loan servicer, Commerce erroneously interpreted the statute.

Two key FFA provisions are RCW 61.24.166 (the exempt-from-mediation provision) and RCW 61.24.163 (the mediation provision), the heart of the FFA.[10] RCW 61.24.166, provides:

> The provisions of RCW 61.24.163 do not apply to any federally insured depository institution, as defined in 12 U.S.C. Sec. 461(b)(1)(A), that certifies to the department under penalty of perjury that it was not a *beneficiary of deeds of trust* in more than two hundred fifty trustee sales of owner-occupied residential real property that occurred in this state during the preceding calendar year. A federally insured depository institution certifying that RCW 61.24.163 does not apply must do so annually, beginning no later than thirty days after July 22, 2011, and no later than January 31st of each year thereafter.

(Emphasis added).

RCW 61.24.166 thus exempts certain financial institutions that are small players in the foreclosure market and that are *beneficiaries of deeds of trust.* It does not exempt a *beneficiary* of a promissory note from

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[9] The FFA was codified in the DTA, RCW 61.24. *See* FFA Session Law http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/House/1362-S2.SL.pdf CP 0788-815.

[10] This brief discusses provisions of the FFA and DTA provisions *not* part of the FFA. FFA provisions are: RCW 61.24.005: Reviser's Note, Laws 2011, C. 58, Findings-Intent 2011, RCW 61.24.033(2), RCW 61.24.163, RCW 61.24.166, and RCW 61.24.172. DTA provisions are: RCW 61.24.005(2); RCW 61.24.010(4), RCW 61.24.030, and RCW 61.24.040.

mediation. "Beneficiary" was not defined separately in the FFA. The DTA defines beneficiary as the "holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2). The distinction between "beneficiary" and "beneficiary of deed of trust" is significant. A "beneficiary of deed of trust" is expressly linked to note ownership status in the DTA and the FFA, and this Court's *Bain* decision, as discussed below. *See* RCW 61.24.040(2) (requiring notice of foreclosure and equating "the Beneficiary of your Deed of Trust and owner of the obligation secured thereby"), and *infra* at 17-18.

The heart of the FFA is RCW 61.24.163.[11] To achieve the FFA's goal of ensuring that mediation takes place between homeowners and the owners of their loan, RCW 61.24.163(5)(c) requires the beneficiary to prove to the mediator that it is the *owner* of the promissory note:

> Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include:
>
> ...
>
> (c) Proof that the entity claiming to be the beneficiary is the *owner of any promissory note or obligation secured by the deed of trust.* Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a).

Id. (emphasis added).

[11] The mediation program is described there, procedures are set out, participants' duties are described, as are the consequences for not mediating in good faith.

The second sentence of RCW 61.24.163(5)(c) refers to RCW 61.24.030(7). That referenced provision, entitled *Requisites to Trustee's Sale*, provides:

> (a) That, for residential real property, 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.* 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 subsection.
>
> (b) Unless 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.
>
> (c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.[12]

Id. (emphasis added).

Under RCW 61.24.030(7), which has to do with the process of *foreclosure*, a trustee is entitled to rely on the beneficiary's declaration as proof of ownership, provided that it meets the requirements of RCW 61.24.030(7)(a) and does not violate its duty of good faith owed to the homeowner under RCW 61.24.030(7)(b). The FFA provision, which has to do with *avoiding foreclosure,* says something different. Under RCW 61.24.163(5)(c), a beneficiary declaration supplied in an FFA mediation

[12] Association beneficiaries are homeowners' associations and condominium associations.

"*may*" be sufficient to establish the required proof that the beneficiary is the owner of the promissory note. *Id.* (emphasis added). There are two important points here. First is that RCW 61.24.163(5)(c) – a provision at the heart of the FFA – explicitly requires the beneficiary to be the *owner* of the promissory note. Second, because "may" is different from "shall," logic dictates there must be circumstances, with respect to FFA mediation, where the beneficiary declaration is *insufficient* proof of ownership of the note.

Here, Commerce ignores the first sentence in RCW 61.24.163(5)(c) which could not be more plain: a beneficiary must transmit to the mediator "Proof that the entity claiming to be the beneficiary *is the owner* of any promissory note or other obligation secured by the deed of trust." RCW 61.24.163(5)(c) (emphasis added). Applying the plain language of the first sentence of RCW 61.24.163(5)(c) here, it is clear M&T Bank is not the owner of Ms. Brown's promissory note.

RCW 61.24.040(2) likewise expressly equates the "beneficiary of the deed of trust," – the operative term used in the FFA exemption provision, RCW 61.24.166 – with the *owner* of the obligation secured by the deed of trust. Thus, at the same time the trustee transmits and records a Notice of Trustee's Sale, it must also send a Notice of Foreclosure to the borrower that includes the following language:

> The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . . . ., the *Beneficiary of your Deed of Trust* <u>*and*</u> *owner of the obligation secured*

> *thereby*. Unless the default(s) is/are cured, your property will be sold at auction on the .... day of ....., ...

RCW 61.24.040(2) (emphasis added).

This Court has also recognized that the statutory deed of trust is a three-party transaction in which the "beneficiary of the deed of trust" is the lender who owns the loan and to whom the loan proceeds secured by the deed of trust are owed:

> In Washington, "[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure." *Pratt v. Pratt*, 121 Wash. 298, 300, 209 P. 535 (1922) (citing *Gleason v. Hawkins*, 32 Wash. 464, 73 P. 533 (1903)); *see also* 18 STOEBUCK & WEAVER, *supra*, § 18.2, at 305. Mortgages come in different forms, but we are only concerned here with mortgages secured by a deed of trust on the mortgaged property. These deeds do not convey the property when executed; instead, "[t]he statutory deed of trust is a form of a mortgage." 18 STOEBUCK & WEAVER, *supra*, § 17.3, at 260. "More precisely, it is a three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' *who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower.*" *Id.* Title in the property pledged as security for the debt is not conveyed by these deeds, even if "on its face the deed conveys title to the trustee, because it shows that it is given as security for an obligation, it is an equitable mortgage." *Id.* (citing GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.6 (4th ed. 2001)).

Bain v. Metropolitan Mort. Group, 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012) (emphasis added); *see also id.* at 88 & 111, n. 15 (reiterating that the "beneficiary of deed of trust" is the "lender").

Commerce erroneously denied Ms. Brown's request because it believes the identity of the owner of the promissory note is irrelevant. AR 00165-66. Commerce relied exclusively on and misinterpreted RCW 61.24.163(5)(c)'s provision that a beneficiary declaration *may* be sufficient proof of ownership while ignoring every other statutory provision that, for FFA mediation purposes, equates beneficiary with owner of the promissory note. Commerce focuses exclusively on the last sentence in RCW 61.24.030(7)(a), which is not the FFA exemption provision but a different section of the DTA:

> 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 subsection.

Commerce's focus on this one sentence merely cross-referenced (with the qualifying "may") in the FFA, stripped of the surrounding context of the FFA, is faulty in many key respects. First, Commerce erroneously relies on the definition of "beneficiary" in RCW 61.24.005(2),[13] *see* AR 000062 (July 11, 2012 email from Commerce to Ms. Bruch, Ms. Brown's referring lawyer), despite the fact that the operative term used in the exemption provision, RCW 61.24.166, is "beneficiary of deed of trust," a term that both the statute and *Bain* equate

[13] "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons hold the same as security for a different obligation. RCW 61.24.005(2).

with *ownership* of the note. Second, Commerce ignores the first sentence of RCW 61.24.030(7)(a) (requiring proof that beneficiary is the "*owner*" of the promissory note) and all of RCW 61.24.030(7)(b) (providing that trustee may not rely on beneficiary declaration as proof of ownership if it would violate trustee's duty of good faith under RCW 61.24.010(4)). The superior court repeated these errors.

Commerce's focus on the DTA definition of "beneficiary" is also internally contradictory and ignores the introductory sentence to RCW 61.24.005, which states that the DTA definitions apply "*unless the context clearly requires otherwise.*" RCW 61.24.005 (emphasis added). On one hand, Commerce says it relies on the DTA definition of "beneficiary" which "means the holder of the instrument," while on the other, it requires servicers to provide beneficiary declarations swearing that the servicer is the "actual holder" because the second sentence of RCW 61.24.030(7)(a) states that a declaration containing this language may constitute proof of *ownership*. AR 000207-08.

Even if Commerce's exclusive reliance on the DTA's term "beneficiary," instead of the term "beneficiary of deed of trust" were correct, Commerce's interpretation of the FFA also ignores the expanding phrase in the DTA's definitions section, "*unless the context clearly requires otherwise.*" RCW 61.24.005 (emphasis added).[14] Here, as Ms.

[14] *See State v. Sweat*, 180 Wn.2d 156, 160, 322 P.3d 1213 (2014) (rejecting party's reliance on general definition because it failed "to take into account the definitional statute's statement that its definitions apply '[u]nless the context clearly requires otherwise,'" and holding that under the circumstances "the context . . . clearly requires us to use a broader definition").

Brown has shown, the exemption provision expressly focuses on the "beneficiary of deed of trust," which the DTA and *Bain* equate with the "owner" of the promissory note. The relevant context, *i.e.*, the plain language of the FFA expressly states in RCW 61.24.163(5)(c) that the "beneficiary" for FFA mediation must be the "owner" of the note.

b. The Legislature's formal declaration of purpose makes clear that it intended FFA mediation to occur between homeowners and lenders.

Whether by design or incompetence, banks and other servicers have done a dismal job, on their own, of working with homeowners facing foreclosure.[15] The FFA mediation process forces the beneficiary to "play ball" by holding it and the homeowner to a good faith standard. The FFA is the tool the Legislature offered homeowners at risk of foreclosure to level the playing field.[16] However, many borrowers like Ms. Brown cannot participate because Commerce misinterpreted the exemption statute, hence padlocking the gate.

The Legislature intended to "create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and

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[15] The New York Attorney General's description of Wells Fargo's conduct is representative of the conduct of many banks and other servicers and their treatment of homeowners. *See* http://www.ag.ny.gov/pdfs/NMS%20MOL.pdf at pp. 10-15.

[16] *See, e.g., Wheeler v. Wells Fargo Home Mortgage*, 2014 WL 442575, *3 (W.D. Wash. Feb. 4, 2014) As noted in fn. 2, a not-in-good-faith certification by the FFA mediator constitutes a basis to enjoin a trustee's sale. In *Wheeler*, the homeowner sought to enjoin a trustee's sale based on the mediator's finding that Wells Fargo had not participated in mediation in good faith. The district court found that "it would not be in the public interest to allow a trustee sale to go forward where there are serious questions regarding whether Wells Fargo acted in good faith in its attempt to modify the loan to avoid foreclosure as required under the FFA").

avoid foreclosure whenever possible." Findings-Intent-2011 c. 58, set forth at RCW 61.24.005, Reviser's Note. The FFA Statement of Findings-Intent provides:

> (1) The legislature finds and declares that:
>
> (a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;
>
> (b) Prolonged foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state;
>
> (c) In recent years, the legislature has enacted procedures to help encourage and strengthen the communication between homeowners and lenders and to assist homeowners in navigating through the foreclosure process; however, Washington's nonjudicial foreclosure process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way; and
>
> (d) Several jurisdictions across the nation have foreclosure mediation programs that provide a cost-effective process for the homeowner and lender, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.
>
> (2) Therefore, the legislature intends to:
>
> (a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;
>
> (b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and
>
> (c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in

> person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation.

Id. CP 0789-90.

In (1)(c) of this formal statement of legislative purpose, the Legislature acknowledged it had made an effort with past legislation to "help encourage and strengthen the communication between homeowners and *lenders*," but that Washington did not have a "mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way." *Id.* (emphasis added). The Legislature further acknowledged in (1)(d) that other states' mediation programs provided a "cost-effective process for the homeowner and *lender*, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure." *Id.* (emphasis added). In (2)(b) the Legislature also declared that it intended to "Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible." *Id.*

Through all of these statements, the Legislature expressly stated its intent that homeowners communicate with the owners of their loans in order to prevent foreclosure. The lender is the original owner of the promissory note. A subsequent *owner* of the promissory note steps into the original lender's shoes. "Lender" is synonymous with "owner." Thus, the

Legislature intended that in FFA mediations homeowners would negotiate with the promissory note owners, not with loan servicers.[17] [18]

c. Commerce fails to interpret the FFA in context, and ignores related provisions and the logic of the statutory scheme as a whole.

Commerce's interpretation ignores what the FFA and the DTA say, what logic requires, and the legislative scheme as a whole. Issuance of an NOD is the trigger for FFA mediation referral. A homeowner may not be referred for mediation until *after* the NOD is issued. RCW 61.24.163(1) (housing counselors and attorneys may make referrals any time *after* NOD is issued, but no later than twenty days after the date the notice of trustee's sale has been recorded). At this point, the homeowner has not seen a beneficiary declaration – neither the DTA nor the FFA requires that it be recorded or provided to the homeowner.

It is the NOD that the homeowner receives. The NOD *must* tell the homeowner is the *promissory note owner's name* and *any party acting as a servicer* of the obligation secured by the deed of trust. RCW 61.24.030(8)(1).[19] The DTA does not require the NOD to disclose the name of the "beneficiary."

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[17] Legislative findings are entitled to "great deference" which courts "ordinarily will not controvert or even question ..." *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012).

[18] Note owner," "promissory note owner," "owner of the note," "owner of the loan," and "loan owner" are used interchangeably.

[19] The legislature is presumed to know what the NOD does and does not say. The Legislature provided that issuance of the NOD is the mediation trigger. *See* RCW 61.24.163(1).

Commerce's interpretation of the FFA creates an illogical system where the information it asks for on the referral form, namely the identity of the beneficiary, cannot be obtained by a referrer from the NOD – the issuance of which triggers the right to ask for FFA mediation. Only Ms. Brown's interpretation, which is that the owner is the beneficiary for purposes of FFA mediation, is workable and logical.[20] *See Eaton*, 168 Wn.2d at 480 ("In construing a statute, we presume the legislature did not intend absurd results.").

Neither Commerce nor the homeowner's referring lawyer or housing counselor knows the identity of the purported beneficiary/holder until after Commerce asks the trustee for and receives the beneficiary declaration. The Legislature did not intend to make it impossible for Commerce, housing counselors and lawyers to know who may be appropriately referred to mediation, or to give trustees the first bite as to whether or not mediation is allowed. It is the identity of the owner that matters and the *owner's* presence on the exemption list.

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[20] Commerce unfortunately does not understand that neither the beneficiary nor the "holder" of the note is listed on the NOD. CP 0449 (Commerce email telling referring housing counselor that mediation is denied because HSBC Bank is exempt and suggesting review of NOD to determine if HSBC is correct beneficiary or Holder of this loan.) Only the "owner" and "servicer" are listed on an NOD. AR 000009-11 (Longworth NOD where Fannie listed as owner on lower left hand corner of 00010 and SunTrust listed as servicer at top of 000011). *See also* CP 0188-89 (Cutshall NOD listing Freddie as owner and M&T Mortgage as servicer at bottom of CP 0189). *See also* CP 0270-72 (Barbee NOD listing Fannie as owner and BOA as servicer at top of CP 0272). *See also* CP 0407-09 (Sidzinski NOD listing Fannie as owner at bottom of CP 0408 and Central Mortgage Company as the servicer at top of CP 0409). The legislature required NODs to disclose the owner and the servicer, not the holder. RCW 61.24.030(8)(l).

The primary goal of statutory construction is to carry out legislative intent as derived primarily from the statute's language. *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). The meaning of a "particular word in a statute is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole." *Dept. of Labor and Industries v. Granger*, 159 Wn.2d 752, 762, 153 P.3d 839 (2007) (provisions of Title 51 to be construed liberally in favor of workers). The FFA must be interpreted in context, considering "related provisions and the statutory scheme as a whole." *In re Marriage of Chandola*, 180 Wn.2d 632, 648, 327 P.3d 644 (2014) (other citations omitted) (statute to be interpreted must be read in light of statutory policy statement contained in the chapter). On the issue before the Court, the context and purpose of the statute show that the FFA exemption is unavailable to a servicer who is not the owner. Considering the statutory scheme as a whole, the Legislature intended the homeowner and the *owner* of the promissory note to participate in FFA mediation.

d. The FFA's legislative history confirms that the Legislature intended that FFA mediation take place between note owners and homeowners.

Based on the plain language of the FFA and the DTA, the Legislature's findings, legislative intent, and the statutory scheme as a whole, it is unnecessary for the Court to consider the FFA's legislative history. Should the Court find, however, that the FFA exemption is susceptible to more than one reasonable interpretation, the Court should interpret the FFA consistent with its legislative history.

The FFA was originally introduced on January 19, 2011 as House Bill (HB) 1362. It provided that "community banks and credit unions organized under the laws of this state" would be exempt from FFA mediation.[21] CP 0820-53. A hearing on the bill was held on January 26, 2011.[22] At the 1:45:00 point in the hearing, Al Ralston of BECU began testifying. Mr. Ralston said BECU was concerned that exempting state banks and credit unions would violate the dormant Commerce Clause.[23]

Three weeks later, Substitute HB 1362 (SHB) was introduced.[24] CP 0855-80. Section 9 of HB 1362 was changed in SHB 1362 to the exemption provision now found in RCW 61.24.166. Nothing in the legislative history indicates any reason for the change from the language in the original bill to the current language other than BECU's constitutional concern. The language in the original bill indicated the Legislature's desire to allow smaller financial institutions organized under

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[21] http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1362.pdf *See* Section 9 of HB 1362.

[22] http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2011011189 Only the audio of this hearing is available on TVW by hovering over the DOWNLOADS button on the lower right of the screen that appears when clicking on the link above. A button labelled AUDIO MP3 appears. Clicking the AUDIO MP3 button offers the option of opening the audio part of the hearing.

[23] The Commerce Clause grants Congress the authority to regulate commerce among the states. If Congress has not granted states authority to regulate interstate commerce, the dormant Commerce Clause applies and a court must determine whether the language of the statute openly discriminates against out-of-state entities in favor of in-state ones or whether the direct effect of the statute evenhandedly applies to in-state and out-of-state entities. *Rousso v. State*, 170 Wn.2d 70, 75-76, 239 P.3d 1084 (2010).

[24] http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1362-S.pdf

Washington law to continue their own foreclosure prevention programs. The only explanation for changing the exemption provision exempting state banks and credit unions was the dormant Commerce Clause. The Legislature never intended that big banks like M&T, acting as servicers for Fannie and Freddie-owned loans, be exempt from mediation.[25]

2. Commerce's interpretation violates the settled rule that statutes should be interpreted to sustain their constitutionality.

The law is well-settled that courts should adopt a construction that sustains a statute's constitutionality if such construction is also consistent with the statute's purposes. *In re Estate of Duxbury*, 175 Wn. App. 151, 170, 304 P.3d 480 (2013) (citing *Matter of Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993)), interpreting statute to "avoid the important equal protection problems the Department's interpretation could raise" where "such construction [was] consistent *with the purpose of the statute.*") (emphasis added).[26] [27]

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[25] The FFA was passed as Second Substitute House Bill 1362. CP 0788-0815. No changes pertinent to this case were made between SHB 1362 and the final bill.

[26] *Matter of Williams* involved the Department of Corrections' interpretation of the good-time statute. This Court held that Corrections' interpretation could raise equal protection problems because of the:

> ... differential treatment that may be accorded the indigent as a result of his inability to post bail before superior. Of course, the very fact of bail and presentence incarceration raises the possibility of disparate treatment based upon wealth. In general, however, the needs of the justice system in assuring the presence of defendants at superior are deemed sufficient to validate such a system. Nevertheless, we should endeavor to minimize this disparate treatment when possible. Allowing the Department to give legal force to a [good-time] certification [from a county jail] which is based on an error of law would magnify rather than alleviate disparities in treatment."

Commerce's interpretation calls into question the constitutionality of the FFA's exemption provision. Commerce has never contested that its interpretation creates an unfair classification between similarly situated homeowners nor does it try to justify that unfair treatment. Not only does Ms. Brown's interpretation solve the statutory construction question, it is also consistent with the statute's purposes.[28]

3. This Court's decisions discussing the DTA's requirement that the foreclosing beneficiary must be both the owner and holder of the note further establish that the exemption provision applies only to financial institutions that own promissory notes securing residential deeds of trust.

Several appellate courts have interpreted or discussed RCW 61.24.030(7)(a), which provides:

> That, for residential real property, 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. 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 subsection.

Id. at 666.

[27] This Court held in *Parentage of J.M.K.*, 155 Wn.2d 374, 389-90, 119 P.3d 840 (2005) that a former artificial insemination statute should not be interpreted to create the constitutional problems associated with treating children born out of wedlock differently than marital children. While *J.M.K.* did not use the words "equal protection", the Court's discussion leaves no doubt that the Court was concerned that interpreting the statute as the child's father urged would violate the child's right to equal protection. *Id.* at 390; *see also Arnljo v. Wesselius*, 73 Wn.2d 716, 721-22, 440 P.2d 471 (1968) where this Court said that Washington statutes will not be interpreted to distinguish between children born in or out of wedlock to the detriment of nonmarital children because to do so would violate the latter's right to equal protection of the laws.

[28] *See also* discussion of unconstitutionality of Commerce's actions, *infra* at 40-46.

In *Bain*, this Court held that the "legislature meant to define "beneficiary" as the actual holder of the promissory note or other debt instrument" rather than simply an entity such as MERS which was a "holder" on paper only and which never had the note in its possession. *Bain*, 175 Wn.2d at 98-110. In reaching that conclusion, the Court stated that "a beneficiary must either actually possess the promissory note or be the payee." *Id.* at 104. The Court also emphasized, however, that there must be proof that the beneficiary is the *owner* of the loan. Before a trustee may proceed with a foreclosure, it "shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust," *id.* at 93-94 (emphasis added), and "[i]f the original lender had sold the loan, that purchaser would need to establish ownership of that loan ..." *Id.* at 111 (emphasis added).

This Court very recently reiterated this requirement that the foreclosing beneficiary must be the owner of the promissory note in *Lyons v. U.S. National Bank Ass'n*, ___ Wn.2d ___, 336 P.3d 1142 (2014). In *Lyons*, the Court held that "RCW 61.24.030(7)(a) . . . instructs that a trustee must have proof the beneficiary is the *owner* prior to initiating a trustee's sale." *Lyons* at 1148 (emphasis added). The Court found that the beneficiary failed to prove to the trustee that it was the owner of the note, and accordingly, reversed and remanded to the superior court for determination of ownership as required under the DTA. *Id.* 1151

(concluding there was a "material issue of fact as to whether Wells Fargo was the *owner*") (emphasis added).

Contrary to the holding in *Lyons*, the superior court in this case relied on the Court of Appeals' decision in *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014), which states that a beneficiary need not be the note owner in order to foreclose nonjudicially. *Id.* at 502; *see* Corrected Findings of Fact, Conclusions of Law, and Order Denying Amended Petition for Declaratory and Injunctive Relief at CP 1073. That ruling in *Trujillo*, however, is now suspect, if not impliedly abrogated, as a result of this Court's decision in *Lyons* as explained above.[29]

Further, the question presented in this case, namely who should be mediating with homeowners, was not before the *Trujillo* court, nor was it addressed in *Bain*. While M&T Bank may be the holder of the note as it claimed in the beneficiary declaration, it is undisputed that it is *not* the owner of the promissory note securing the deed of trust on Ms. Brown's home. It is the servicer.[30]

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[29] The plaintiff in *Trujillo* filed a Petition for Review on July 2, 2014, asking this Court to accept review of the Court of Appeals' decision. *See Trujillo* Petition for Review Supreme Court Case No. 90509-6. On November 5, 2014, the Court issued an order stating that its decision on the *Trujillo* Petition for Review would be deferred pending issuance of the mandate in *Lyons*.

[30] As servicer, Freddie has instructed M&T Bank to declare itself the holder of the note, with the intent of authorizing the bank to foreclose. Holding a note was historically indicia of ownership. That is no longer the case. The contracts and manuals governing the servicing of Fannie and Freddie loans specifically direct servicers to claim holder status for purposes of foreclosure despite the fact that Fannie and/or Freddie authorize the foreclosure process and continue to own the note and the rights to collect payments under the note. *See, e.g.*, Freddie Mac Single Family Seller/Servicer Guide Vol. 1, Ch. 18.6 e

Ms. Brown asks this Court to hold that the proper party for determining the exemption from FFA mediation is the promissory note owner. None of the appellate courts, when interpreting or discussing RCW 61.24.030(7)(a), have considered whether the use of the word "owner" in RCW 61.24.163(5)(c) means that the beneficiary, for purposes of FFA mediation, need not be the promissory note owner. RCW 61.24.163(5)(c) says:

> Within twenty days of the beneficiary's receipt of the borrower's documents, the beneficiary shall transmit the documents required for mediation to the mediator and the borrower. The required documents include: Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust. Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a).

Ms. Brown has explained above why the Legislature could not have intended non-owner beneficiaries to be the party at mediation. This observation in *Bain* drives that home:

(2014). http://www.freddiemac.com/singlefamily/guide/ Click on the AllRegs link for access to the Guide. *See also Johnson v. Federal Home Loan Mort. Corp.*, 2013 WL 308957, *6 (W.D. Wash. Jan. 25, 2013) (taking judicial notice of Freddie Mac Single-Family Sellers and Servicers Guide, noting that "the Guide is a publicly available document").

While Freddie and Fannie's servicers typically handle foreclosures, the fact that a GSE is the *owner of the notes* a legal verity. In Florida, for example, it is Fannie, as the owner of the note, that is pursuing deficiency judgments against borrowers. *See* Gretchen Morgenson, *Borrowers Beware: the Robosigners Aren't Finished Yet*, N.Y.Times, Nov. 16, 2014, at BU1, *available at* http://www.nytimes.com/2014/11/16/business/borrowers-beware-the-robosigners-arent-finished-yet.html?mabReward=RI%3A18&action=click&pgtype=Homepage&region=CColumn&module=Recommendation&src=rechp&WT.nav=RecEngine&_r=0.

> [T]here is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests.

Bain, 175 Wn.2d at 98 fn.7 (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011)).

Beneficiaries who service loans they do not own may not have incentives to modify loans because "[t]he complex incentive structure for servicers means that servicers can sometimes make more money from foreclosing than from modifying ..." *Foreclosing Modifications*, 86 WASH. L. REV. at 761. It would be naïve to conclude that financial institutions that service mortgages have anything other than their own pecuniary interests in mind. The securitization of residential mortgages is well-known. *See Bain*, 175 Wn.2d at 94-96 (MERS was established to reduce costs, increase efficiency, and facilitate securitization of mortgages. Many loans are pooled into securitized trusts). Professor Thompson states:

> Although servicers are nominally accountable to investors, investors exercise little control or oversight of modifications. The result is that servicers may, when they choose, evade modifications, even when doing so would serve investors' interests.

Foreclosing Modifications, 86 WASH. L. REV. at 770. The Legislature recognized this dynamic and intended to prevent foreclosure by requiring note owners and homeowners, the parties with "skin-in-the-game," to be the ones engaged in FFA mediation.

B. When Commerce denied Ms. Brown mediation, it failed to perform a duty required by law, acted outside its statutory authority, acted arbitrarily or capriciously, and violated her constitutional rights.

Commerce has a duty to refer eligible homeowners to mediation, but by but denying Ms. Brown, it failed to perform that duty. In addition, because Commerce's denial was based on erroneous interpretation of the law, it acted outside of its statutory authority. Commerce's actions were also arbitrary and capricious because those actions were willful and unreasoning and failed to consider all the facts and circumstances. Finally, Commerce's refusal to refer Ms. Brown to FFA mediation was unconstitutional agency action based on its erroneous interpretation of the FFA.

1. Commerce failed to perform a duty required by law when it denied mediation to Ms. Brown, and that failure was arbitrary and capricious.

In *Rios*, this Court held that an agency fails to perform a duty as required by RCW 34.04.570(4)(b) when a statute mandates that the agency perform the duty and the agency refuses to do so. *Rios*, 145 Wn.2d at 487. *Rios* also held that Labor and Industries' (L&I) failure to perform that duty was arbitrary and capricious. In the present case, Commerce likewise failed to perform a required statutory duty – to refer Ms. Brown to FFA mediation – and that failure was arbitrary and capricious.

The *Rios* petitioners successfully challenged L&I's refusal to adopt mandatory pesticide handling monitoring rules in 1997. This Court described the case:

> At issue in this case is whether the Court of Appeals properly concluded that the Washington Department of Labor and Industries (the Department) had violated a statutory duty to promulgate a rule requiring mandatory blood testing for agricultural pesticide handlers.

Rios, 145 Wn.2d at 486.

Rios held that L&I's refusal to adopt a mandatory monitoring rule was a failure to perform a duty required by Washington's Industrial Safety and Health Act (WISHA), RCW 49.17.050(4), which imposed on L&I a duty to adopt rules setting a standard that most adequately assured no worker would suffer material impairment of health to the extent feasible and on the basis of the best available evidence. *Id.* at 496. L&I's refusal to do so violated that duty and thus, violated pesticide handlers' rights. *See* RCW 34.05.570(4)(b). This Court also held that its failure to adopt rules was arbitrary and capricious because:

> [T]he pesticide handlers were not asking the Department to embark on a new enterprise—they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds. In fact, the Department had already made cholinesterase monitoring enough of a priority to draft the nonmandatory guidelines and to convene a team of experts "to identify the essential components of a successful monitoring program." And that report announced in its introductory summary that "[t]he TAG recommends cholinesterase monitoring for all occupations handling Class I or II organophosphate or carbamate pesticides." Because the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department's 1997 denial of the pesticide handlers'

> request was "unreasoning and taken without regard to the attending facts or circumstances."

Id. at 507-08 (citations omitted); *see also* RCW 34.05.570(c)(iii).

Here, Commerce is required to refer eligible homeowners to FFA mediation. RCW 61.24.163(3)(a). Commerce must exercise that authority in accordance with the FFA so that eligible homeowners get FFA mediation. Commerce does not dispute that it *must* refer *eligible* homeowners to mediation. RCW 61.24.163(3) (emphasis added). Commerce's refusal to carry out its duty is arbitrary and capricious because its refusal is willful and unreasoning and taken without regard to the attending facts or circumstances. *Rios*, 145 Wn.2d at 501.

In *Children's*, the Court of Appeals reviewed the Department of Health's interpretation of the Certificate of Need (CN) statute and its own rules to determine whether the agency was required to engage in a CN review process or could dispense with that process when Tacoma General applied for permission to begin offering certain pediatric open heart services. *Children's*, 95 Wn. App. at 873-74.[31] The Department of Health (DOH) decided to forego the CN process, which prompted Children's Hospital to file suit arguing that CN review was required. The court

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[31] "The legislature created the CN program to control costs by ensuring better utilization of existing institutional health services and major medical equipment. Those health care providers wishing to establish or expand facilities or acquire certain types of equipment are required to obtain a CN, which is a nonexclusive license." *Id.* at 865. "The department is authorized and directed to implement the certificate of need program in this state pursuant to the provisions of this chapter." RCW 70.38.105(1).

agreed with Children's, holding that the CN statute imposed a duty on DOH to engage in a CN review process in this instance and that its failure to do so was arbitrary and capricious. *Id.* The court noted that DOH was required to enforce the law in accordance with the statute. *Id.* at 871. Statutes must be given a "rational, sensible construction." *Id.* at 864. To determine whether CN review was "necessary", the court examined "whether the Department acted arbitrarily or capriciously in light of the relevant facts and statutory provisions." *Id.* at 871.

> [The Department's] determination appears to have been based on an erroneous interpretation of the statutes and its own regulations applied to the facts. Given the undisputed medical evidence, the language of the CN law, and the regulations interpreting it, we hold that the Department's conclusion, that CN review of Tacoma General's plan was not required by statute, was arbitrary and capricious.

Id. at 873-74.

Just as the CN statute imposes duties on the Department of Health to carry out legislative intent with respect to the CN law, the FFA imposes duties on Commerce to carry out the FFA's central intent which is to avoid foreclosure whenever possible.[32]

The Legislature intended the NOD to have all the information housing counselors and lawyers need to know for referral purposes – including the name of the promissory note owner. Commerce's

[32] In addition to its other duties set forth in the FFA, Commerce "may create rules to implement the mediation program under RCW 61.24.163 and to administer the funds as required under RCW 61.24.172." RCW 61.24.033 (2). However, Commerce has chosen to not do any rulemaking for these programs.

interpretation disregards this in favor of its approach where the note owner is irrelevant and where Commerce bars the mediation gate based on information not available to homeowners or housing counselors, but available *only* to trustees. Nothing in the FFA authorizes this – explicitly or implicitly. Commerce should not be allowed to interpret the FFA to bar mediation when the homeowner is actually *eligible* for mediation. Because loan owner Freddie is not on the exemption list, Ms. Brown is eligible for mediation. Commerce's failure to refer Ms. Brown violated its statutory duty to do so, violated her rights under the FFA, and was arbitrary and capricious because Commerce's determination was based on an "erroneous interpretation" of the FFA "applied to the facts." *Children's*, 95 Wn. App. at 873-74. Given the language of the FFA and the express statement of legislative intent, Commerce's conclusion that it was not required to refer Ms. Brown to FFA mediation by the FFA was arbitrary and capricious. *Id.*

2. Commerce's denial of Ms. Brown's request for mediation was outside its statutory authority.

Commerce's denial of FFA mediation was based on its erroneous interpretation of the FFA. A state agency exceeds its statutory authority and violates RCW 34.05.570(4)(c)(ii) when its actions are based on an erroneous interpretation of the law. In *Rios*, the Court examined L&I's 1993 rulemaking decision to adopt *voluntary* pesticide handler blood testing *and* its 1997 decision *not* to adopt *mandatory* pesticide handler blood testing. *Rios*, 145 Wn.2d at 491-92. Although the Court held that the

1993 rulemaking decision was not arbitrary and capricious under 570(2), the Court observed that if L&I had assessed the feasibility of a mandatory monitoring rule in 1993 arbitrarily and capriciously, the "resulting rule would arguably meet another basis for judicial review ("exceed[ing] the statutory authority of the agency")." *Id.* at 501 n.11.

In *Pierce County v. State*, 144 Wn. App. 783, 812, 185 P.3d 594 (2008), the Court of Appeals affirmed the superior court's ruling that the Department of Social and Health Services' (DSHS) refusal to timely accept 90 or 180 day long-term involuntarily committed mental health patients for admission to Western State Hospital violated RCW 71.05.320 because DSHS failed to perform a duty required by law and acted outside its statutory authority.[33] As in *Rios*, Pierce County's claims were reviewed under RCW 34.05.570(4). *Id.* at 804.

The *Pierce County* decision turns on the meaning of the phrase "shall remand him or her to the custody of the department." [34] DSHS

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[33] The superior court in that case entered Conclusion of Law 3 which said:

> When WSH declines to timely accept Pierce County RSN or PSBH 90 or 180 day long-term patients committed to the custody of DSHS for reasons related to WSH census or staffing and not related to the safety of the patient, and thereby requires that these patients remain at PSBH or under Pierce County RSN's responsibility, DSHS fails to perform a duty required by law and acts outside its statutory authority.

Pierce County, 144 Wn. App. at 805. This is the only Conclusion of Law cited in *Pierce County* that discusses the superior court's decision to find that DSHS had failed to perform a duty and acted outside its statutory authority. The Court of Appeals affirmed this Conclusion. *Id.* at 812.

[34] RCW 71.05.320(1) provides:

argued that RCW 71.05.320(1) did not create a legal duty. *Id.* at 806. The court, in interpreting the statute, noted the word "shall" is mandatory except under very limited circumstances. *Id.* at 807. The use of the word "shall" in a statute is "imperative and operates to create a duty rather than to confer discretion." *Id.* at 808 (citation omitted). *Pierce County* held that the superior court did not err when it interpreted RCW 71.05.320(1) to impose a mandatory duty on DSHS requiring it to assume the immediate and sole responsibility for patients committed for long-term treatment. *Id.* at 812.

Commerce's actions are outside its statutory authority because those actions are based on an erroneous interpretation of the FFA.

3. Commerce's denial of mediation to Ms. Brown was unconstitutional agency action.

Because Commerce's actions are unconstitutional, this Court should find they violate RCW 34.05.570(4)(c)(i). Commerce mischaracterized Ms. Brown's argument below. While Commerce accurately stated in its Response Brief before the superior court that statutes are presumed constitutional and the burden of proof to

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If the court or jury finds that grounds set forth in RCW 71.05.280 have been proven and that the best interests of the person or others will not be served by a less restrictive treatment which is an alternative to detention, the court shall remand him or her to the custody of the department or to a facility certified for ninety day treatment by the department for a further period of intensive treatment not to exceed ninety days from the date of judgment. If the grounds set forth in RCW 71.05.280 (3) are the basis of commitment, then the period of treatment may be up to but not exceed one hundred eighty days from the date of judgment in a facility certified for one hundred eighty day treatment by the department.

demonstrate unconstitutionality is beyond a reasonable doubt, citing *School Districts' Alliance for Adequate Funding of Special Education v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010), *see* CP 900-904, Ms. Brown has *not* mounted a facial challenge to the FFA. She did not argue that any part of the FFA is unconstitutional. Rather, Ms. Brown argued that the FFA should be interpreted to avoid constitutional problems. She said it was Commerce's interpretation of the statute – how it applied the statute – that created the constitutional problems and that it was Commerce's actions that were unconstitutional and violated her constitutional rights.

While the Legislature has "wide discretion" in designating classifications, these classifications may not be "manifestly arbitrary, unreasonable, inequitable, and unjust, and reasonable grounds must exist for making a distinction between those within and those without the class." *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 744, 630 P.2d 441 (1981) (citations omitted). In *Johnson*, this Court interpreted former RCW 51.52.130 which provided for an award of reasonable attorney fees and witness costs to eligible injured workers payable from L&I's administrative fund. *Johnson* resolved a split between two divisions of the Court of Appeals.[35] The workers' compensation statute this Court

[35] Division I had allowed an award of attorney's fees and costs from the administrative fund to Johnson, an injured worker of a self-insured employer. *Johnson v. Tradewell Stores, Inc.*, 24 Wn. App. 53, 57-58, 600 P.2d 583 (1979). Division II had denied an award of attorney's fees and costs from the administrative fund to Maxwell, who, like Johnson, was an injured worker of a self-insured employer. *Maxwell v. Department of Labor and Industries*, 25 Wn. App. 202, 209-10, 607 P.2d 310 (1980).

interpreted in *Johnson* did not itself include the impermissible classification, just as the FFA, properly interpreted, does not contain an impermissible classification. This Court held in *Johnson* that it could not reasonably be claimed that the "object, purpose and spirit of the industrial insurance act is to exclude workers whose only deficiency is the *chance* that their employers choose to be self-insured." *Johnson*, 95 Wn.2d 743 (emphasis added; citation omitted). *Johnson* interpreted the statute, without striking it down, so that the two classes of injured workers were treated the same. *Id.*

Beyond the aggregate data, the most graphic evidence of Commerce's unequal treatment of Fannie and Freddie borrowers, and the lack of a rational connection between Commerce's interpretation of the exemption and the stated purpose of the FFA, lies in the specific homeowner examples.[36] The Barbees and Roberta Starne, discussed below, received loan modifications following mediation.[37] Because their

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[36] The aggregate data in the record shows at least 208 referrals listing Fannie or Freddie as the beneficiary that participated in FFA mediation. CP 0687-99. Many of these referrals resulted in mediated agreements where the borrower retained their home. CP 0701-02. According to RCW 61.24.163(8)(a), the borrower, the beneficiary or authorized agent, and the mediator must meet in person for the mediation session. In practice, Fannie and Freddie have their authorized agents appear at mediation on their behalf, when they are listed as the beneficiary of the deed of trust on the referral form.

[37] The record shows Commerce has treated Freddie and Fannie, the loan owners, as beneficiaries for FFA mediation in some cases – facts that Commerce could not explain even under its erroneous interpretation of the statute. Ms. Brown called two documents to the superior court's attention. CP 0277-281; CP 0330-334; RP 27. Commerce wrote these letters to Fannie and Freddie naming them as beneficiaries for FFA mediation, advising Fannie and Freddie that FFA mediation would proceed, and demanding payment of the $200 mediation fee. The homeowners in these two cases were Joe and Carla Barbee and Roberta Starne. The record shows that the loan servicer, Bank of America, represented Fannie and Freddie at these mediations, both of which resulted in loan modifications

Fannie- and Freddie-owned loans were serviced by BOA, who was not on the exempt list, Commerce allowed mediation. Ms. Brown and the other homeowners who participated below also had loans owned by Freddie and Fannie, just as the Barbees and Ms. Starne did, but were arbitrarily denied mediation.

Where there is no connection between the challenged statutory classification and the plain purpose of the statute, Washington courts have held that the challenged interpretation is unconstitutional under Article I, § 12, even under the rational basis test. *See, e.g., Johnson*, 95 Wn.2d at 745. ("[W]e hold it to be a violation of . . . Art. I, § 12 to classify one group of employees so they receive fewer benefits than similarly situated employees simply because the employer chooses to be self-insured."); *see also State v. Marintorres*, 93 Wn. App. 442, 450-52, 969 P.2d 501 (1999) (observing that under Article I, § 12, "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment," and holding that there was "no reasonable rationale for treating hearing-impaired convicts differently from non-English speaking convicts in deciding who should reimburse the State for the cost of interpreters.")

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memorialized on Fannie and Freddie approved forms. CP 0313-17; CP 0353-58. The mediation referrals in each case named Bank of America as the loan servicer and Freddie or Fannie as the beneficiary. CP 0268-69; CP 0320-21. The superior court asked Commerce why it had decided to call Fannie and Freddie the beneficiaries, instead of Bank of America, the loan servicer, the beneficiary and why it sent the FFA mediation letters to Fannie and Freddie instead of Bank of America. RP 40-41. Counsel for Commerce said he did not know. RP 42.

(citations omitted).[38] Here, there is similarly no logical reason consistent with the purposes of the FFA for Commerce to distinguish between these two classes of homeowners.

The Washington Constitution also guarantees that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Art. I, § 3. This includes the requirement that a challenged statutory classification must be "fundamentally fair" and, similar to the equal protection guarantee, that it be "rationally related" to a legitimate governmental interest. *Nielsen v. Washington Dept. of Licensing*, 177 Wn. App. 45, 57 n. 8, 309 P.3d 1221 (2013) (citation omitted).

Because the right to FFA mediation is not a fundamental right, but a right created by statute, Commerce's interpretation of the exemption provision and its actions are reviewed under this "fundamental fairness" and "rational relationship" standard. *Nielsen*, 177 Wn. App. at 53.

Commerce's disparate treatment of different homeowners with Fannie and Freddie loans, based solely on the identity of the loan servicer, violates this constitutional due process standard as well, based on the same facts and evidence set forth above. The Court of Appeals' recent decision in the *Nielsen* case is instructive. The statute at issue there, RCW 46.20.385, provided for the issuance of an ignition interlock driver's

[38] *See also State v. Anderson*, 132 Wn.2d 203, 211-12, 937 P.2d 581 (1997) (rejecting State's interpretation of RCW 71.06.020 on equal protection grounds, stating: "Both groups are sent to the hospital for 'treatment' and not 'punishment' yet the former group receives full sentence credit for their hospital time while the latter group, under the State's analysis, would be denied the same credit. There is no logical reason for distinguishing between [the two groups].").

license (IIDL) to drivers whose regular licenses had been revoked for violating drunk driving laws. *Nielsen*, 177 Wn. App. at 50. The Department of Licensing (DOL) argued that when a driver applies for and receives an IIDL, he or she waives the right to challenge the underlying license revocation. *Id.* at 51-52. The court held that if the statute worked that way, it would violate due process, because "[d]enying to licensees who obtain IIDLs the right to access to the courts in order to challenge a Department revocation ruling does not further the state's interest in maintaining the deterrent effect of its drunk driving laws" because drivers forced to choose between the appeal waiver provision and an IIDL might forego an IIDL which greatly reduces drunk driving. *Id.* at 60. There was "no rational basis" supporting the statute as applied by DOL. *Id.* at 60-61. Again, the statute was not struck down. It was interpreted to *avoid* having the constitutional problem that the state's interpretation had caused.

Commerce's interpretation of the FFA similarly fails the fundamental fairness test because there is no rational basis for denying mediation to some homeowners with Fannie or Freddie loans, while allowing mediation to others, when the underlying goal of the FFA program is achieved by allowing all of them to have mediation. *See* Laws 2011, c. 58, Findings-Intent-2011, set forth at RCW 61.24.005, Reviser's Note. Commerce's interpretation and the actions it takes based on that interpretation irrationally narrow the pool of homeowners eligible for mediation based on an irrelevant factor, the identity of the servicer.

Homeowners have no control over who services their Fannie or Freddie loans, and those servicers can change frequently.[39] The Legislature did not intend the decision about whether a homeowner gets mediation to be a random lottery. Commerce has acted unconstitutionally based on its interpretation of the FFA. That interpretation has thwarted the Legislature's stated goal of getting lenders and homeowners together in mediation to avoid foreclosure whenever possible; it is fundamentally unfair, and it bears no rational connection to the stated goals of the FFA.

Commerce offers no rational basis for distinguishing between Ms. Brown and other homeowners with Freddie-or Fannie-owned notes who got mediation. Compare M&T Bank, Ms. Brown's loan servicer, with loan servicer Bank of America. Both are huge companies with billions in assets.[40] There is no rational basis to distinguish between homeowners whose loans are serviced by M&T Bank and those whose loans are serviced by Bank of America. In denying Ms. Brown her right to mediation under the FFA, Commerce violated her right to equal protection and due process.

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[39] "[I]n today's market mortgage servicing rights often are bought and sold." *See* http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/res/rightsmtgesrvcr

[40] Both banks are on the S&P 500 list. *See* http://www.stockmarketsreview.com/companies_sp500/

C. The Court should award attorney fees and costs to Ms. Brown pursuant to RCW 4.84.350.

Ms. Brown is entitled to an award of reasonable attorneys' fees and costs under RCW 4.84.350 unless Commerce can demonstrate that its actions were substantially justified or other circumstances make an award unjust. An agency must prove substantial justification as an affirmative defense. *Hunter v. University of Washington*, 101 Wn. App. 283, 294, 2 P.3d 1022 (2000). Agency action that is arbitrary and capricious is not substantially justified. *Raven v. Department of Social and Health Services*, 177 Wn.2d 804, 832, 306 P.3d. 920 (2013).[41]

VI. CONCLUSION

For all of the foregoing reasons, Ms. Brown respectfully requests the Court to find that because the plain language, legislative intent, and overall statutory scheme of the FFA all make clear that it is the *owner* of the loan that is required to mediate with a homeowner when mediation occurs, the entity to which the FFA exemption applies under RCW 61.24.166 must also be determined based on who owns the loan. Accordingly, because the owner of Ms. Brown's loan, Freddie Mac, was not exempt, and Commerce knew that, the Court should hold that by

[41] Ms. Brown can demonstrate that she is a "qualified party" as defined in RCW 4.84.340 to recover under RCW 4.84.350. She is a qualified party because her net worth at the time she filed the petition for judicial review did not exceed one million dollars. She will file a declaration attesting to that fact if she prevails.

refusing to allow mediation to Ms. Brown, Commerce failed to perform a duty required by law, was arbitrary and capricious, acted outside its statutory authority, and engaged in unconstitutional agency action.

Brief of Appellant with Corrected Table of Authorities respectfully submitted this 2nd day of December, 2014.

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DECLARATION OF SERVICE

I, Carla Sevenster, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Brief of Appellant With Corrected Table of Authorities to be served, by email in accordance with an e-service agreement, upon the following counsel of record:

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APPENDIX D

Supreme Court No. 90509-6

(Court of Appeals No. 70592-0-I)

SUPREME COURT OF THE STATE OF WASHINGTON

ROCIO TRUJILLO,

Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Respondent.

REVISED *AMICUS CURIAE* MEMORANDUM OF COALITION FOR CIVIL JUSTICE IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

This Court has held that in the context of *RCW 61.24, et seq.* (hereinafter "DTA"), the borrowers' ability to negotiate directly with the owner and holder of the obligation is crucial to the effective administration of the statute. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 93-94, 97-98, 118, 285 P.3d (2012) (hereinafter "*Bain*"). At issue in this case, *Trujillo v. Northwest Trustee Services, Inc.*, --- Wn. App. ---, 326 P.3d 768 (2014) (hereinafter "*Trujillo*"), is the proper interpretation of *RCW 61.24.030(7)(a)*, that requires as a precondition to foreclosure, the trustee "have ***proof*** that ***the beneficiary is the owner***". *RCW 61.24.030(7)(a)* (emphasis added). The proper interpretation and enforcement of this provision, *RCW 61.24.030(7)(a)*, is a question issue of first impression for the Supreme Court, and the answer will affect tens of thousands of Washington homeowners.[1]

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[1] Based on the 2012 Census figure of combined family and non-family households in Washington State, between 8% and 9% of total households in Washington have likely been affected by a foreclosure being started on their home (Sources, Mortgage Bankers Assoc. & U.S. Census Bureau). In the 1st Quarter of 2014 alone, nearly 50,000 mortgage loans are seriously delinquent; this number is lower than last year, but higher than 2009. Source: Mortgage Bankers Assoc., cited by Washington Department of Financial Institutions.

We are nearly eight years removed from the beginnings of the foreclosure crisis, with over five million homes lost. So it would be natural to believe that the crisis has receded. Statistics point in that direction. Financial analyst CoreLogic reports that the national foreclosure rate fell to 1.7 percent in June, down from 2.5 percent a year ago. Sales of foreclosed properties are at their lowest levels since 2008, and the rate of foreclosure starts—the beginning of the foreclosure process—is at 2006 levels. At the peak, 2.9 million homes suffered foreclosure filings in 2010; last year, the number was 1.4 million.

But these numbers are likely to reverse next year, with foreclosures spiking again. And it has nothing to do with recent-vintage loans, which actually have performed as well as any in decades. Instead, a series of temporary relief measures and legacy issues

II. ARGUMENT

It is undisputed for purposes of this appeal that the trustee, Northwest Trustee Services, Inc. ("NWTS"), knew that the loan servicer, Wells Fargo Bank, N.A. ("Wells Fargo"), was ***not*** the owner of the note. Yet despite lack of compliance with the proof of ownership requirement in *RCW 61.24.030(7)(a)*, NWTS issued its Notice of Trustee's Sale anyway.

A. *RCW 61.24.030(7)(a)* is not ambiguous.

RCW 61.24.030(7)(a), provides as follows:

> It shall be requisite to a trustee's sale:
>
> * * *
>
> (7) (a) That, for residential real property, 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. A declaration by the beneficiary made under 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 subsection. (Emphasis added).

RCW 61.24.030(7) is not the only provision found in the DTA in which the terms "beneficiary", "owner" and "holder" are equated. Please see *RCW 61.24.040(2) and RCW 61.24.163(5)(c)*.

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from the crisis will begin to bite in 2015, causing home repossessions that could present economic headwinds. In other words, the foreclosure crisis was never solved; it was deferred. And next year, the clock begins to run out on that deferral.

http://www.newrepublic.com/article/119187/mortgage-foreclosures-2015-why-crisis-will-flare-again

The *Trujillo* court's ruling notwithstanding, there is really nothing ambiguous about the provisions of *RCW 61.24.030(7)(a)* and there is no reasonable way to read the statute in any other manner except that being the holder is a necessary, but not a sufficient condition to identifying the party entitled to initiate, authorize and conduct a non-judicial foreclosure: the "holder" must also be the "owner" of the obligation, particularly when declaring a default in the obligation and when appointing a successor trustee. *RCW 61.24.030* and *RCW 61.24.010*. These apparently contradictory sentences are easily harmonized: where **A [Owner] = B [Beneficiary] and B [Beneficiary] = C [Holder]; *ergo*: A [Owner] should equal C [Holder]**. This is incontrovertible logic.

But this is not how the *Trujillo* court addressed the statute, which has prompted the Appellant, ROCIO TRUJILLO (hereinafter "Ms. Trujillo"), to petition this Court for discretionary review.

For purposes of this brief, the undersigned adopts the arguments and authorities offered by Ms. Trujillo in support of her Petition for Discretionary Review.

B. *Trujillo* Conflicts with Prior Decisions of this Court.

This Court has repeatedly held that the DTA must be strictly construed in favor of the homeowner. See *Bain*, at page 93 (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915, 154 P.3d 882 (2007)); *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn.2d 560, 567. 276 P.3d 1277 (2012); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771,

789, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Management Group, LLC,* 177 Wn.2d 94, 105, 297 P.3d 677 (2013). Substantial compliance is not enough. However, in judicially rewriting the provisions of *RCW 61.24.030(7)(a)* to eliminate the trustee's requirement to obtain proof of ownership, the *Trujillo* court necessarily favored the lender and trustee over the borrower by approving the short cuts adopted by NWTS, in violation of this Court's requirement of strict compliance with the DTA in favor of the borrower.

Moreover, in *Bain,* this Court emphasized the need for the borrower to know who the "actual holder" of the loan is to "resolve disputes" and to "correct irregularities in the proceedings." As this Court noted in *Bain,* at pages 93-94:

> Trustees have obligations to all of the parties to the deed, including the homeowner. *RCW 61.24.010(4)* . . . . Among other things, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust' and shall provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust' before foreclosing on an owner-occupied home. *RCW 61.24.030(7)(a), (8)(l).*"). (Emphasis added).

This Court went on to explain the need for the borrower to have contact information of the owner or "actually holder" of the obligation in *Bain,* at page 118:

> But there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance. Further, if there have been misrepresentations, fraud or irregularities in the proceedings, and if the homeowner-borrower cannot locate the party accountable and with authority to correct the irregularity, there

certainly could be injury under the CPA.

In construing the provisions of *RCW 61.24.030(7)*, the *Trujillo* court wrote the first sentence out of the statute: "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." *Trujillo*, at page 776. In an apparent disregard of long standing rules of statutory construction, the *Trujillo* court justified its holding by noting that the first sentence of *RCW 61.24.030(7)(a)* was a legislative error and should be disregarded in its entirety: "Better still, the legislature could have eliminated any reference to 'owner' of the note of the note in the provision because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." *Trujillo*, at page 776. While writing the first sentence of *RCW 61.24.030(7)*(a) out of the statute, the *Trujillo* court failed entirely to address the provisions of *RCW 61.24.030(8)(l)* and *RCW 61.24.040(2)*, which now conflict with the judicially re-written provisions of *RCW 61.24.030(7)(a)*. Although the trustee now does not need to require proof that the beneficiary is the owner of the obligation under *RCW 61.24.030(7)(a)*, the trustee must nevertheless provide "the name and address of the owner of any promissory notes" to the borrower under *RCW 61.24.030(8)(l)* and identify the "owner of the obligation" in the Notice of Foreclosure under *RCW 61.24.040(2)*. Thus, *Trujillo* conflicts with *Bain* and leaves homeowners vulnerable to the mischief this Court sought to ameliorate in *Bain*. A loan servicer whose MERS authorized employee executes an assignment of a note and deed of trust in favor of the servicer, is unlikely to

"correct the irregularities" that arise from the servicer's wrongful foreclosure efforts.

The *Trujillo* court's approval of substantial compliance with the DTA over strict compliance, the favoring of the trustee's and lender's interest over the borrower's and its re-writing of *RCW 61.24.030(7)(a)* to further frustrate the borrower's ability to meet and confer with the true and lawful owner and holder of her loan conflict with *Bain* and other prior decisions of this Court.

C. Petition Involves Issues of Substantial Public Interest.

Washington case law is replete of this very fact pattern, due to the bundling of mortgages, where the original lender is no longer around; MERS is the nominee/beneficiary; the loan servicer as agent for an undisclosed principal is the initiator or the referrer of foreclosure, but the loan is owned by a securitized trust, or a GSE, and the original note is held by yet another unidentified entity who acts as custodian of records.[2] Because this fact pattern is so pervasive and the issue is recurring, the issue is of substantial public interest warranting review under *RAP 13.4(b)(4)*.

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[2] *McDonald v. OneWest*, 929 F.Supp.2d 1079 (W.D.Wash. 2013) (Lender as Indymac, MERS as nominee/beneficiary, OneWest as servicer and purported note holder while Freddie Mac is owner); *Bavand v. OneWest*, 176 Wn.App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Serv. Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (Credit Suisse as Lender, MERS as nominee/beneficiary, Select Portfolio Serv. as loan servicer and holder); *Lucero v. Bayview Loan Serv.,LLC*, 2013 U.S. Dist. LEXIS 144317 (W.D. Wash. Oct. 4, 2013) (Taylor Bean Whitaker as Lender, Freddie Mac as owner, Cenlar as servicer and purported holder of note); *Massey v. BAC Home Loans*, 2013 U.S. Dist. 148402 (W.D.Wash. 2013) (Countrywide Bank as Lender, MERS as nominee/beneficiary, BAC Home Loans as servicer and Freddie Mac is owner). See also *Walker v. QLS Service Corp.*, 176 Wn.App. 294, 306, 308 P.3d 716 (2013) and *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 499, 309 P.3d 636 (2013).

The volume of potential cases is borne out in documents prepared by the Washington Department of Financial Institutions (hereinafter "DFI"), that puts out quarterly reports of Defaults and Foreclosure Statistics. According to the Washington State Department of Financial Institutions, between 208,000 to 237,000 foreclosures were initiated in Washington between June of 2007 and March of 2014. A remarkable number of these foreclosures were initiated by NWTS during this period of time. According to Mr. Jeff Stenman, the current Director of Operations for NWTS and an employee of the company since 1996 in publicly available court records, NWTS conducts between "a hundred to two hundred" foreclosures per month in the Seattle/King County area alone. This would mean that NWTS has conducted between 8,400 and 16,800 foreclosures in the Seattle/King County area, and that does not included foreclosures conducted by NWTS in adjacent counties, such as Snohomish County, Pierce County, Kitsap County, Kittitas County and throughout the state, California and Alaska. The over-whelming number of these were initiated on behalf of out-of-state loan servicers, national lenders and banks and mortgage backed security trusts.

In dealing with the volume of foreclosures referred to their offices, NWTS necessarily relies on standard forms, such as the Beneficiary Declaration utilized in this matter. According to Mr. Stenman, this form is prepared and submitted to the "clients" by NWTS for signature, service and filing, as a general business practice. This would necessarily mean that the sort of violations of *RCW 61.24.030(7)(a)* and *(8)(l)*, where someone other

than the true owner and holder of the obligation is identified, will continue to occur into the future, adversely affecting several thousands of families across this State. This is not a unique situation with NWTS. The other major corporate trustees, including Quality Loan Servicing of Washington and Regional Trustee Service, conduct their business in essentially the same way.

NWTS stated that the Court of Appeals' decision involves "solely a private dispute over whether Wells Fargo . . . could non-judicially foreclose" and that "there is no issue of substantial public interest." NWTS Answer at 18-19. Nothing could be further than the truth, as the numbers discussed above demonstrate. In addition to the thousands of foreclosures initiated in the state each month, NWTS is currently involved in a multitude lawsuits in various courts throughout the State over its notices of default that identify the holder of the note as someone other than the owner: *Williams v. Northwest Trustee Services, Inc.* Pierce County Superior Court, 14-2-11106-7 (removed by 3:14-cv-05631-RJB, W.D. Wash.) (alleging a pattern or practice of issuing notices of default declaring that the loan servicer is also the note holder and the creditor to whom the debt is owed while simultaneously disclosing the GSE Freddie Mac as the owner of the note); *Lucero v. Bayview Loan Servicing LLC, et al.*, 2:13-cv-00602-RSL (same); *Butler v. OneWest Bank, et al.* (*In re Butler*), Adversary Proceeding No. 12-01209-MLB, W. Dist. Wash. Bankruptcy Court; *Bowman v. Suntrust Mortgage et al.*, Court of Appeals, Div. I, Case 70706-0-I, *Hobbs v. NWTS*, Court of Appeals, Div. I, No. 71143-1-I. Thus, in the interest of avoiding piecemeal litigation, which

will certainly produce inconsistent results, the Court should review the Court of Appeals' decision to resolve this recurring issue of substantial public interest.

III. CONCLUSION

Washington case law is replete of this very fact pattern, due to the bundling of mortgages: the original lender is no longer around; MERS is the nominee/beneficiary; the loan servicer is the initiator or the referrer of foreclosure who acts on behalf of an undisclosed principal: the loan is owned by a securitized trust, or a GSE, and the original note is held by yet another unidentified entity who acts as custodian of records.[3] Since the *Trujillo* fact pattern is so pervasive and the issue is recurring, consideration of *Trujillo* is of substantial public interest warranting review under *RAP 13.4(b)(4)*.

NWTS' actual knowledge that the servicer is not the owner of the note is commonplace. In the Notice of Default NWTS stated, as trustee, that the note was owned by Fannie Mae, but the entity authorizing the foreclosure was the loan servicer, Wells Fargo, who is a complete stranger to the three-party deed of trust. This is typical in the industry. NWTS has been sending

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[3] See *McDonald v. OneWest*, 929 F.Supp.2d 1079 (W.D.Wash. 2013) (Lender as Indymac, MERS as nominee/beneficiary, OneWest as servicer and purported note holder while Freddie Mac is owner); *Bavand v. OneWest*, 176 Wn.App. 475, 309 P.3d 636 (2013) (hereinafter "*Bavand*"); *Walker v. Quality Loan Serv. Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter "*Walker*") (Credit Suisse as Lender, MERS as nominee/beneficiary, Select Portfolio Serv. as loan servicer and holder); *Lucero v. Bayview Loan Serv.,LLC*, 2013 U.S. Dist. LEXIS 144317 (W.D. Wash. Oct. 4, 2013) (Taylor Bean Whitaker as Lender, Freddie Mac as owner, Cenlar as servicer and purported holder of note); *Massey v. BAC Home Loans*, 2013 U.S. Dist. 148402 (W.D.Wash. 2013) (Countrywide Bank as Lender, MERS as nominee/beneficiary, BAC Home Loans as servicer and Freddie Mac is owner).

tens of thousands of these cut-and-paste-template based notices of default to Washingtonians, under *RCW 61.24.030(7)* and *RCW 61.24.030(8)(l)*.

For the foregoing reasons, Coalition for Civil Justice asks the Court to grant the pending Petition for Review and accept review of Division One's published decision in this case.

RESPECTFULLY SUBMITTED this 1st day of October, 2014, on behalf of Coalition for Civil Justice.

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CERTIFICATE OF SERVICE

I certify that today I served a true and correct copy of this *Amicus Curiae* Memorandum of Coalition for Civil Justice in Support of Petition for Review, by first-class mail, postage prepaid, upon:

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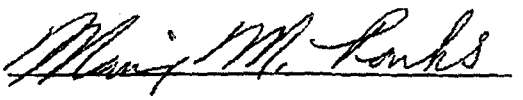
DATED this 15th day of October, 2014.



KOVAC & JONES PLLC

September 02, 2015 - 10:03 AM

Transmittal Letter

Document Uploaded: 720511-Petition for Review.pdf

Case Name: Barkley v Green Point Mortgage Funding, Inc. et al

Court of Appeals Case Number: 72051-1

Party Respresented: Appellant

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

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Subject: RE: Barkley v GreenPoint et al_COA Division I # 72051-1-I_Petition for Review

Thank you. Received on 09-02-2015

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.

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Cc: Richard Jones <rlj@kovacandjones.com>; Dan Williams <dwilliams@kovacandjones.com>; Marie Parks <marie@kovacandjones.com>
Subject: Barkley v GreenPoint et al_COA Division I # 72051-1-I_Petition for Review

Re: Barkley v GreenPoint et al. Court of Appeals, Division One of the State of Washington Case # 72051-1-I Petition for Review

Good Morning:

The attached was filed earlier this morning with COA Division I. A hard copy is being sent to your office today, along with payment in the amount of $200.00. The reason the hard copy is being mailed, is because of the number of pages included in the Appendices.

Thank you.

Sincerely,

Susan L. Rodriguez
Kovac & Jones, PLLC
1750 – 112th Ave NE
Suite D-151
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Susan L. Rodriguez

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Subject: Barkley v GreenPoint et al_COA Division I # 72051-1-I_Petition for Review

Re: Barkley v GreenPoint et al. Court of Appeals, Division One of the State of Washington Case # 72051-1-I Petition for Review

Susan L. Rodriguez

From:	Susan L. Rodriguez
Sent:	Wednesday, September 02, 2015 10:13 AM
To:	'Supreme@courts.wa.gov'
Cc:	Richard Jones (rlj@kovacandjones.com); Dan Williams; (marie@kovacandjones.com)
Subject:	Barkley v GreenPoint et al_COA Division I # 72051-1-I_Petition for Review
Attachments:	Barkley_Petition for Review_090215.pdf; Barkley_COA Transmittal Letter_090215.pdf

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