70706-0

70706-0

No. 70706-0-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

KELLY BOWMAN,

Plaintiff-Appellant

v.

SUNTRUST MORTGAGE, INC., a Virginia corporation, a subsidiary of SUNTRUST BANKS, INC.; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; a Delaware corporation; and DOE DEFENDANTS 1-10

Defendants-Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Monica J. Benton)

SUNTRUST, MERS AND FANNIE MAE'S SUPPLEMENTAL BRIEF RE: *TRUJILLO V. NORTHWEST TRUSTEE SERVICES*, NO. 70592-0-I

John S. Devlin, WSBA. No. 23988
Andrew G. Yates, WSBA. No. 34239
Abraham J. Lorber, WSBA No. 40668
Attorneys for Respondents
SunTrust Mortgage, Inc., Federal National Mortgage Association and Mortgage Electronic Registration Systems, Inc.

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. The *Trujillo* Decision Resolves the Dispositive Issues in This Appeal in Respondents' Favor. 2

B. Bowman's Attempt to Dispute SunTrust's Evidence of Holder Status Does Not Dictate a Different Result than in *Trujillo*. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Bain v. Metro. Mortg. Grp. Inc.,
175 Wn.2d 83, 285 P.3d 34 (2012) 3

Beaton v. JPMorgan Chase Bank, N.A.,
2013 WL 1282225 (W.D. Wash. March 26, 2013) 4

Corporacion Venezolana de Fomento v. Vintero Sales Corp.,
452 F. Supp. 1108 (S.D.N.Y. 1978) 6

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992) 4

In re Cook,
457 F.3d 561 (6th Cir. 2006) 8

In re Meyer,
506 B.R. 553 (Bankr. W.D. Wash. 2014) 4

John Davis & Co. v. Cedar Glen No. Four, Inc.,
75 Wn.2d 214, 450 P.2d 166 (1969) 3

Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.,
893 F. Supp. 1304 (D.S.C.. 1994) 6

Pavino v. Bank of America,
2011 WL 834146 (W.D. Wash. March 4, 2011) 4

Theros v. First Am. Title Ins.
Co., No. C10-2021, 2011 WL 462564 (W.D. Wash. Feb. 3,
2011) 9

Trujillo v. Nw. Trustee Srvs., Inc.,
--- Wn. App. ---, --- P.3d ---, 2014 WL 2453092 (Wash. Ct.
App. Div. I) ..... passim

United States v. Pang,
362 F.3d 1187 (9th Cir. 2004) 8

STATUTES AND COURT RULES

RCW 61.24.005(2) 3

RCW 61.24.030(7)(a) 2, 3

RCW 62A.1-201(21)(A) 3

RCW 62A.3-203, Cmt. 1 ..... 3, 4

RCW 62A.3-301 ..... 3, 6

RCW 62A.9A-109(11)(A) 5

RCW 62A.9A-313(a)-(h) 5

ER 902 ..... 8, 9

ER 902(i) 8

UCC § 9-313 5

OTHER AUTHORITIES

Report of the Permanent Editorial Board for the Uniform Commercial Code, "Application of Uniform Commercial Code to Selected Issues Relating to Mortgage Notes." (ALI Nov. 14, 2011) 5

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the Court's June 13, 2014 notation ruling, Respondents SunTrust Mortgage, Inc. (SunTrust), Mortgage Electronic Registration Systems, Inc. (MERS) and Federal National Mortgage Association (Fannie Mae) (sometimes collectively Respondents) respectfully submit the following supplemental brief addressing the impact of *Trujillo v. Nw. Trustee Srvs., Inc.*, --- Wn. App. ---, --- P.3d ---, 2014 WL 2453092 (Wash. Ct. App. Div. I) on this appeal.

In *Trujillo*, this Court correctly concluded it is a loan servicer's "holder" status that makes it a "beneficiary" under the Deed of Trust Act (DTA) and that it need not own the note. 2014 WL 2453092 at *5-6. Thus, *Trujillo* resolves in Respondents' favor the central issue in this appeal. In reaching this holding, the *Trujillo* Court properly rejected the same arguments that Appellant Kelly Bowman (Bowman) makes in this appeal – that an entity must "own" and "hold" the note in order to qualify as a beneficiary and that, under Article 9A of the Uniform Commercial Code, a servicer's possession of a Note indorsed in blank is insufficient possession required for "holder" status. This Court should follow its ruling and analysis in *Trujillo*, and affirm the grant of summary judgment to SunTrust, MERS and Fannie Mae in the case at bar.

ARGUMENT

A. The *Trujillo* Decision Resolves the Dispositive Issues in This Appeal in Respondents' Favor.

The premise of Bowman's legal theory is that "[o]nly the true and lawful owner and holder of Note and Deed of Trust can initiate a non-judicial foreclosure." Brief of Appellant (Br. of App.) at 15. Respondents (and this Court in *Trujillo*) take a different position –that a loan servicer holding the note secured by the deed of trust meets the DTA's definition of "beneficiary," and is thus authorized to initiate foreclosure proceedings in its own name and appoint a successor trustee. *See Trujillo*, 2014 WL 2453092 at *4-8; Brief of Respondents (Br. of Resp.) at 7-21. When this Court held that the holder of a promissory note was the beneficiary entitled to foreclose in its own name, regardless of whether the holder owned the note, this Court resolved the dispositive issues in this case in Respondents' favor.

Critically, *Trujillo* rejects Bowman's interpretation of RCW 61.24.030(7)(a). *Compare* Br. of App. at 23 (arguing "under *RCW 61.24.030(7)(a)* a trustee must ensure that the beneficiary is the *owner and holder* of any promissory note or other obligation secured by the deed of trust") (italics and underlining in original) *with* 2014 WL 2453092 at *4-8 (rejecting claim that "NWTS was required to obtain proof from Wells

Fargo that it was the 'owner' of [Trujillo's] delinquent note" and holding that "the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note"). As stated in *Trujillo*, "[t]he absence of a definition of "owner" in either the Deeds of Trust Act or the UCC is not fatal to our determination of the effect of that term in RCW 61.24.030(7)(a)... we conclude that the legislature intended the words "owner" and "holder" to mean different things." *Trujillo*, 2014 WL 2453092 at *6. Thus, as *Trujillo* correctly recognized, "it is the status of holder of the note that entitles the entity to enforce the obligation[,] [o]wnership of the note is not dispositive." *Id.*

In reaching this conclusion, the *Trujillo* Court relied upon the same statutes, cases and commentary that Respondents rely upon in this case. *Compare* 2014 WL 2453092 at *4-8 *with* Br. of App. at 7-11. This Court and Respondents agree that *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) and RCW 61.24.005(2) control the meaning of "beneficiary" and that RCW 62A.1-201(21)(A) and RCW 62A.3-301's definitions of "holder" and "person entitled to enforce, " govern whether an entity qualifies as a beneficiary and confirm that a person need not own a note in order to enforce it. *See id.* Further, Respondents and the *Trujillo* decision recognize that under *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969) and RCW 62A.3-203, Cmt. 1,

"holder" and "owner" are different concepts and that it is unnecessary for a holder to establish not ownership as prerequisite to enforcement of instrument. *See id.* Finally, *Trujillo* confirms that Respondents are correct that Article 3, not Article 9A, governs the enforcement of mortgage notes.[1]

On this last point, *Trujillo* specifically rejects the same belated UCC Article 9A argument that Bowman impermissibly raises in his reply brief.[2] Like the plaintiff in *Trujillo*, Bowman argued that SunTrust's physical possession of the note was insufficient to give it the status of "holder" and "beneficiary" because it did not have requisite "legal possession" of the note under certain principles in UCC Article 9A. *See* Reply Brief of Appellant (Reply Br. of App.) at 7-15; 2014 WL 2453092 at *8-10. As *Trujillo* correctly found, Article 9A has nothing to do with the situation where a servicer enforces a default on a note through nonjudicial foreclosure proceedings under the DTA. *See* 2014 WL 2453092 at *9. Rather, Article 3 principles govern in this situation. *See id.* The creation and transfer of deed of trust liens against real property are specifically exempted from Article 9A, except in certain limited

---

[1] *Trujillo* rejects the reasoning in *In re Meyer*, 506 B.R. 553 (Bankr. W.D. Wash. 2014), *Beaton v. JPMorgan Chase Bank, N.A.*, 2013 WL 1282225 (W.D. Wash. March 26, 2013), and *Pavino v. Bank of America*, 2011 WL 834146 (W.D. Wash. March 4, 2011), as well as the argument that the concept of "owner" "permeates the DTA. *See* 2014 WL 2453092 at *9-13.

[2] "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

circumstances not applicable here. *See* RCW 62A.9A-109(11)(A). As *Trujillo* recognizes, Article 9A applies to a ***third party's*** security interest in the ***note***; Article 3 and the DTA apply to SunTrust's enforcement of the note against Bowman through foreclosure of the Deed of Trust. As the UCC's Permanent Editorial Board (PEB) has recognized, "[i]n cases in which the mortgage note is a negotiable instrument, ***Article 3 of the UCC*** provides rules governing ***the obligations of parties on the note and the enforcement of those obligations.***" PEB Report at 2 (emphasis added).[3]

As recognized in *Trujillo*, the inapplicability of RCW 62A.9A-313(h) is also clear from a review of the statute itself. 2014 WL 2453092 at *9 (stating "UCC § 9-313, which is concerned with security interests in notes, has no bearing on this case"). This is undoubtedly correct. The statute is entitled "When possession by or delivery to secured party perfects security interest without filing," and enumerates examples of circumstances in which a secured party's security interest in negotiable documents, goods, money, chattel paper and other items is perfected by possession or delivery. RCW 62A.9A-313(a)-(h). Thus, the statute's discussion of "possession" concerns the perfection of a security interest, it does not apply to the issue of which entity is entitled to enforce the default on a negotiable instrument. That issue is clearly governed by Article 3,

[3] Publicly available at: http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf.

which makes it clear that holders of negotiable instruments, such as SunTrust here, can enforce such instruments. RCW 62A.3-301 (identifying holder as "person entitled to enforce" negotiable instrument). *See also* PEB Report at 4 ("[i]n the context of mortgage notes that been sold or used as collateral to secure an obligation," determination of who may enforce the note is the identification of the "person entitled to enforce" the note under Article 3).

In contrast to Article 3 and the DTA's rules, Article 9A's rules determine whether a creditor or buyer has obtained a property right in a note. PEB Report at 8. Bowman's untimely "legal possession" argument fails because Article 3 and the DTA govern his relationship with SunTrust, not Article 9A.

The cases Bowman cites in support of his untimely reply argument are inapposite because they do not involve the enforcement of a promissory note against the maker by a holder, or a nonjudicial foreclosure, much less one conducted under Washington's DTA. Nor do they cite or discuss the provision of Washington's Article 9A on that Bowman cited in his reply brief. *See* Reply Br. of App. at 11-12. *See, e.g., Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304 (D.S.C.. 1994); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1110 (S.D.N.Y. 1978). Further, *Trujillo*

squarely rejected the argument Bowman makes based on these cases, namely that the transfer of possession from Fannie Mae to its servicers when foreclosure proceedings begin does not amount to sufficient "legal possession" to confer "holder status." *See* 2014 WL 2453092 at *5, 8. In rejecting this argument, this Court clearly explained that this transfer of possession was "consistent with *Bain*'s discussion of who constitutes a beneficiary for purposes of the Deeds of Trust Act." *Id.* at 5.[4] Because SunTrust enjoyed holder status by virute of its own possession of the Note at all relevant times, Bowman's cases are distinguishable.

B. Bowman's Attempt to Dispute SunTrust's Evidence of Holder Status Does Not Dictate a Different Result than in *Trujillo*.

Respondents anticipate that Bowman will argue that this case should be decided differently because he disputes the admissibility of the testimony that SunTrust has held the Note from loan origination to the present, during which period the Note was originally payable to SunTrust and then indorsed in blank. *See* CP 255-260, 665. Bowman is mistaken.

---

[4] Specifically, the *Trujillo* Court stated:

> This record reflects that Trujillo concedes in her pleadings that "as soon as Wells [Fargo] began the foreclosure process, Fannie Mae transferred possession of the Note to Wells [Fargo]." This concession is significant in that it is consistent with the beneficiary declaration before us. It is also consistent with Bain 's discussion of who constitutes a beneficiary for purposes of the Deeds of Trust Act.

2014 WL 2453092 at *5.

First, for all of the reasons set forth at pages 31 to 38 of Respondent's brief, the trial court properly exercised its discretion to admit the testimony of SunTrust's witness, Carmella T. Norman Young.

Second, Bowman's attack on Young's testimony would not make a difference to the outcome even if it were successful in some respect. Bowman does not and cannot dispute that SunTrust was the company that made him the loan at issue, that the Note was originally payable to SunTrust, that SunTrust indorsed the Note in blank, and that SunTrust sold the Note to Fannie Mae. *See* Br. of App. at 2. Under *Trujillo*, the truly dispositive facts for establishing that SunTrust is the holder and beneficiary are also uncontested in this case. Moreover, any attempt to argue for exclusion of the indorsed-in-blank Note on the basis that Ms. Young somehow cannot authenticate the document fails because the instrument is self-authenticating commercial paper under ER 902. ER 902 provides: "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following … Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." ER 902(i). *See also United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004) ("As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating."); *In re Cook*, 457 F.3d 561, 566 (6th Cir. 2006) ("the

promissory note is self-authenticating pursuant to Rule 902 . . ."); *Theros v. First Am. Title Ins.* Co., No. C10-2021, 2011 WL 462564, at *2 (W.D. Wash. Feb. 3, 2011) ("Promissory notes are self-authenticating ..."). As commercial paper, the Note is self-authenticating and testimony from a party with personal knowledge is unnecessary to authenticate it in any event.

Third, the record in this case contains a beneficiary declaration stating "SunTrust ... is the holder of the promissory note ... evidencing [Bowman's loan]." CP 171. As in *Trujillo*, there is nothing in the record that contests accuracy or truthfulness of this statement, which was made under the penalty of perjury. *See, e.g.,* Br. of App. at 3; *Trujillo*, 2014 WL 2453092 at *5. Thus, even if it questions the Young Declaration in some respect, the Court can (and should) reach the same result in this case as in *Trujillo*.

CONCLUSION

For the reasons above and in their response brief, SunTrust, MERS and Fannie Mae respectfully request an order affirming the trial court in all respects.

RESPECTFULLY SUBMITTED this 3rd day of July 2014.

LANE POWELL PC

By _____

John S. Devlin, WSBA No. 23988
Andrew G. Yates, WSBA No. 34239
Abraham K. Lorber, WSBA No. 40668
Attorneys for Respondents SunTrust Mortgage, Inc., Federal National Mortgage Association and Mortgage Electronic Registration Systems, Inc.

123986.0019/5918949.1

CERTIFICATE OF SERVICE

I certify, under penalty of perjury and the laws of the State of Washington that on the 3rd day of July 2014, I served a copy of the foregoing document on the following persons in the following manner:

Richard Llewelyn Jones
Kovac & Jones, PLLC
2050 112th Avenue NE, Suite 230
Bellevue, WA 98004-2976
rlj@kovacandjones.com

- ☐ by CM/ECF
- ☑ by Electronic Mail
- ☐ by Facsimile Transmission
- ☐ by First Class Mail
- ☑ by Hand Delivery
- ☐ by Overnight Delivery

Joshua Schaer
RCO Legal, P.S.
13555 SE 36th Street, Suite 300
Bellevue WA 98006-1489
jschaer@rcolegal.com

- ☐ by CM/ECF
- ☑ by Electronic Mail
- ☐ by Facsimile Transmission
- ☑ by First Class Mail
- ☐ by Hand Delivery
- ☐ by Overnight Delivery

SIGNED this 3rd day of July 2014 at Seattle, Washington.

Sabrina Koskinen

Sabrina Koskinen