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No. 71143-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DARLENE HOBBS and JOEL HOBBS

Plaintiffs-Appellants

v.

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

Defendants-Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
No. 13-2-22970-6 SEA (Hon. Bruce Heller)

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

Appellants Joel and Darlene Hobbs (the Hobbs) agreed that if they did not repay their loan according to its terms, the beneficiary of their deed of trust could have their property sold via nonjudicial foreclosure to satisfy the debt. The Hobbs admit that they defaulted on their loan in May 2011.

Under Washington's Deed of Trust Act (DTA), the "beneficiary" entitled to begin the foreclosure process is expressly defined as the "holder" of the obligation secured by the Deed of Trust. The use of the word "holder" is not random.

The Hobbs' note is a negotiable instrument subject to Washington's version of the Uniform Commercial Code (UCC). The UCC defines "holder" in relevant part as the person in possession of the instrument, if like the Note here, the instrument is indorsed in blank. All parties to this appeal agree that Wells Fargo was the person in possession of the Note when foreclosure proceedings began.

The Hobbs' legal theory is wrong. Based on a DTA provision describing how a person ***may*** prove to the ***trustee*** that it is a beneficiary, the Hobbs claim that Wells Fargo Bank, N.A. (Wells Fargo) was unauthorized to initiate nonjudicial foreclosure proceedings because it held and serviced the Note, but did not own the beneficial interest in it. The Hobbs' theory ignores the plain language of the DTA and the UCC as

well as the relevant case law, legislative history, and commentary.

Even if the Court does accept the Hobbs' interpretation of the DTA and imposes a judicial "ownership" requirement that is contrary to the UCC's dichotomy between owners and holders and wholly absent from the DTA's definition of "beneficiary," the summary judgment in favor of Wells Fargo should still be affirmed. The record does not contain any evidence that would be sufficient to impose the vicarious liability necessary for a pre-sale DTA damages causes of action against Wells Fargo or that the Hobbs were prejudiced. Nor is there sufficient evidence to establish all five of the elements of the Hobbs' Consumer Protection Act (CPA) cause of action.

II. COUNTERSTATEMENT OF ISSUES

1. Whether Wells Fargo was a "beneficiary" authorized to initiate nonjudicial foreclosure proceedings in its own name where it is undisputed that (a) Wells Fargo had actual physical possession of the promissory note securing the deed of trust, (b) the note was indorsed in blank, and (3) the Hobbs were in default on the note.

2. Whether a person must own the note secured by the deed of trust in order to be a "beneficiary" under RCW 61.24.005(2), where (a) the term "beneficiary" is defined in relevant part as "the holder of the instrument or document evidencing the obligations secured by the deed of

trust," (b) Wells Fargo satisfies the UCC's definition of a "holder," and (3) the UCC states that holders are persons entitled to enforce instruments, and that persons entitled to enforce instruments are so entitled "even though the person is not the owner of the instrument."

3. Whether Wells Fargo's delivery to the trustee under the Hobbs' deed of trust of a "Beneficiary's Declaration of Ownership of Note," that correctly identified Wells Fargo as the actual holder of the Note and Freddie Mac as the actual owner of the Note gives rise to a cause of action for damages against Wells Fargo under the DTA or the CPA.

4. In the alternative, if the Hobbs' interpretation of the DTA is correct, whether the grant of summary judgment to Wells Fargo should still be upheld because the Hobbs cannot establish the requirements for a pre-sale DTA damages cause of action or a CPA cause of action against a loan servicer.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

On or about September 11, 2006, Darlene Hobbs executed a promissory note payable to MortgageIT, Inc. (MortgageIT) evidencing a loan of $235,200.00 (the Note). CP 471; 309-18; 538-546. The Hobbs secured the Note with a Deed of Trust against certain real property commonly known as 9224 36th Avenue South, Seattle, Washington 98118

(the Property). CP 471; 135-163. The Hobbs agreed to repay the loan according to the terms set forth in the Note, and understood that MortgageIT could transfer the Note to subsequent "Note holders." CP 309-310; 538.

The Deed of Trust identified MortgageIT as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary in a nominee capacity for MortgageIT and its successors and assigns. CP 135-136. The Deed of Trust granted to the original trustee and any duly appointed successor trustee the power to sell the Property if the Hobbs defaulted on the terms of the Note. CP 137-138. The Deed of Trust also specified that all or some of the interest in the Note and Deed of Trust could be sold without notice to the Hobbs, and that that the identity of the Hobbs' loan servicer could change without a sale of the Note. CP 146.

Thereafter, MortgageIT specifically indorsed the Note to Wells Fargo and then Wells Fargo indorsed the Note in blank. CP 541. Freddie Mac purchased the loan and Wells Fargo retained the right to service the loan. Brief of Appellants (Br. of App.) at 6; CP 322. As is customary[1], Wells Fargo stored the Note and Deed of Trust at its corporate trust

[1] Contrary to the Hobbs' implication, the fact that a servicer would store a note in a corporate vault is entirely expected and appropriate. *See Barton v. JP Morgan Chase Bank, N.A.*, No. C13-0808RSL, 2013 WL 5574429, *1 (W.D. Wash. Oct. 9, 2013) (recognizing that "[o]riginal promissory notes are bearer paper: the holder of the note has the right to collect payments thereunder according to its terms. It is hardly surprising that original notes are not bandied about or otherwise put at risk of loss or destruction.").

services facility located at 1015 10th Avenue SE, Minneapolis, Minnesota. *See id.*

The Hobbs acknowledge that, beginning in May 2011, they failed to make the payments required by the Note. CP 471; 486; 498. Accordingly, on August 27, 2012, Wells Fargo requested the original collateral file, including the Note and Deed of Trust, from its corporate trustee services facility; the documents were released on August 30, 2012. CP 322.

On September 25, 2012, Northwest Trustee Services, Inc. (NWTS), in its capacity as Wells Fargo's agent, issued a notice of default identifying a default of almost $30,000. CP 293-298. On October 30, 2012, Wells Fargo executed a "Beneficiary's Declaration of Ownership of Note," identifying Wells Fargo as the actual holder of the Note and Freddie Mac as the actual owner of the Note. CP 298. On or about November 16, 2012, MERS executed a Corporate Assignment of Deed of Trust (CADT) in favor of Wells Fargo, which CADT was recorded in the King County Auditor's Office. CP 170. On January 17, 2013, NWTS was appointed the successor trustee under the Deed of Trust. CP 172.

On January 22, 2013, NWTS recorded a Notice of Trustee's Sale of the Property, scheduling a trustee's sale for May 31, 2013. CP 178-180. NWTS subsequently postponed the trustee's sale to June 21, 2013. CP

184.

B. Procedural Background.

Acting *pro se*, the Hobbs filed this lawsuit on June 11, 2013, seeking to restrain the trustee's sale and to recover damages against Wells Fargo and NWTS for alleged violations of the DTA and CPA. CP 469-473. NWTS postponed the sale a second time and, on July 10, 2013, pursuant to stipulation, the trial court enjoined the trustee's sale subject to the requirement that the Hobbs make the monthly payments required by RCW 61.24.130. CP 504; Br. of App. at 8.

On August 28, 2013, the trial court granted Wells Fargo and NWTS' motions for summary judgment. CP 440-444. The trial court thereafter denied the Hobbs' motion for reconsideration, and the Hobbs appealed to this Court. CP 466.

IV. STANDARD OF REVIEW

This Court reviews summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to

judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

V. ARGUMENT

A. Wells Fargo Had Authority To Enforce the Hobbs' Note Through Nonjudicial Foreclosure Proceedings.

The Hobbs assert that Wells Fargo was not authorized to initiate nonjudicial foreclosure proceedings against the Property because Wells Fargo was not the Deed of Trust's "beneficiary," as that term is defined by the DTA. CP 472; Br. of App. at 2. According to the Hobbs, to be a beneficiary, Wells Fargo must be both "owner" and "holder" of the Note. *See id.*. For the reasons explained below, this Court must reject the Hobbs' argument because it is contrary to the DTA, the UCC and the relevant case law. Because Wells Fargo was a "beneficiary" in its capacity as a "holder" of the Note, the judgment below must be affirmed.

1. As The "Holder" of the Note, Wells Fargo Was Also the "Beneficiary" Entitled to Foreclose Under the DTA.

Since 1998, the DTA has defined "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012) (citing RCW 61.24.005(2)). Washington's version of the UCC defines "holder" in relevant part as "the person in possession [of the instrument] if the instrument is payable to bearer." RCW 62A.1-

201(21)(A); *Bain*, 175 Wn.2d at 104. A promissory note is payable to bearer if, as is the case with the Note, it is indorsed in blank. RCW 62A.3-205(b); CP 538-546.

When Ms. Hobbs executed the Note, it was specifically payable to MortgageIT. CP 538; Br. of App. at 5. Thus, at that time, MortgageIT was both the "holder" of the note and "beneficiary" of the Deed of Trust. RCW 62A.1-201(21)(A); RCW 61.24.005(2). MortgageIT subsequently indorsed the Note to Wells Fargo, which in turn indorsed the Note in blank and maintained possession of the Note. CP 541; 322. At that point, because the Note was "payable to bearer," Wells Fargo was the "holder" of the Note for as long as the Note remained in Wells Fargo's possession. RCW 62A.1-201(21)(A).

Because Wells Fargo physically possessed the Note indorsed in blank[2] prior to the issuance of the Notices of Default and Foreclosure, it was the note holder prior to the commencement of the nonjudicial

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[2] Wells Fargo has supplemented the appellate record with the version of the Note its counsel intended to affix to the declaration of the Wells Fargo representative submitted in support its summary judgment motion. CP 535-546. Counsel for Wells Fargo also produced the original indorsed in blank note at the hearing. Verbatim Report of Proceedings (VRP) at 5:25 to 6:8. The trial court and Mr. Hobbs declined to inspect the note. *See id.* In any event, even if the Note were specifically indorsed to Wells Fargo, it would be payable to and enforceable by Wells Fargo, as Wells Fargo would qualify as a holder and person entitled to enforce the note. *See* RCW 62A.1-201(21)(A) (defining "holder" of a negotiable instrument in relevant part as the "person in possession of a negotiable instrument that is payable...to...an identified person that is the person in possession.").

foreclosure process.[3]

Because Wells Fargo was the "holder" of the Note, Wells Fargo was also the "beneficiary" of the Hobbs' Deed of Trust with the right to initiate foreclosure proceedings under the DTA. RCW 61.24.005(2); *Bain*, 175 Wn.2d at 104 (quoting with approval UCC definition of "Holder" in reference to interpretation of DTA's definition of "Beneficiary"). This is true even through Wells Fargo was "holder" of the Note by virtue of Wells Fargo's status as a loan servicer in possession of the Note indorsed in blank. *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1107-1108 (W.D. Wash. 2011) (stating "even if Fannie Mae has an interest in Plaintiffs' loan, Flagstar [holder of note indorsed in blank] has the authority to enforce it."). This outcome is also consistent with the Freddie Mac loan servicing guidelines, which require that a foreclosure be conducted in the servicer's name. CP 428-429. *See also Rouse v. Wells Fargo Bank, N.A.*, C13-5706 RBL, 2013 WL 5488817, at *3 (W.D. Wash. Oct. 2, 2013) (noting in a case where Wells Fargo serviced a Freddie Mac loan that "courts have uniformly rejected that only the 'owner' of the note

[3] CP 471; Br. of App. at 6 (Hobbs default in 2011); CP 322 (possession of Note by Wells Fargo in and before August 2012); CP 293-296 (Notice of Default issued September 25, 2012); CP 320 (Beneficiary Declaration executed in October 2012); CP 320 (Appointment of Successor Trustee executed on November 8, 2012 and recorded in January 2013); CP 300 ((Notice of Foreclosure with effective date of January 17, 2013); CP 320 (CADT executed in October 2012 and recorded on November 16, 2012); CP 178-182 (Notice of Sale recorded on January 22, 2013).

may enforce it.").

2. A Holder Is Entitled To Enforce A Note Even If It Is Not The Note's Owner.

The Hobbs seek to avoid the straightforward application of the UCC and the DTA by arguing that the note holder must also be the note "owner" in order to nonjudicially foreclose. Br. of App. at 2. The Hobbs' argument rests on a misinterpretation of RCW 61.24.030(7)(a), which states that the "trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust," but also provides that a declaration "stating that the beneficiary is the actual holder of the promissory note ... shall be sufficient proof ...." *See* Br. of App. at 10-22.[4]

In reality, there is no separate "owner" requirement. It is well-established that ownership of a note and the right to enforce it are separate and distinct concepts. RCW 62A.3-203, cmt. 1 ("The right to enforce an instrument and ownership of the instrument are two different concepts."). One does not need to be the owner in order to have a right to enforce a note as a holder or otherwise. RCW 62A.3-301 (person may be entitled to

[4] Instead of defining "owner," RCW 61.24.030(7)(a) simply defines the proof that the beneficiary may provide to the trustee before a notice of trustee's sale may issue. RCW 61.24.030(7)(a). The proof deemed sufficient by the Legislature under RCW 61.24.030(7)(a) is intended simply to confirm that the beneficiary did, in fact, hold the note – i.e., that it was the beneficiary.

enforce even though not the "owner"); *see also John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969) ("It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds."); *Corales*, 822 F. Supp. 2d at 1107-08.

The text of RCW 61.24.030(7) does not compel a different result. [5] It is a well-settled canon of statutory construction that courts must give effect to all statutory language and provisions, harmonizing them if necessary to avoid unlikely or absurd results. *Evergreen Wash. Healthcare Frontier LLC v. Dep't of Social and Health Servs.*, 171 Wn. App. 431, 444, 287 P.3d 40 (2012). The first sentence of RCW 61.24.030(7)(a), which uses the word "owner," cannot be read without reference to the statute's second sentence, which uses the word "holder" to describe an individual with authority to order the trustee to record a notice of sale. When both parts of the statute are read together, as they must be, it is clear that the legislature did not intend to limit the class of beneficiaries who can order trustees to issue a notice of trustee's sale. *See* RCW 61.24.030(7)(a).

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[5] It bears noting that a beneficiary that chooses to show that it has authority to foreclose by providing the type of declaration permitted by the second sentence of RCW 61.24.030(7)(a) does so by providing a declaration to the ***trustee***, not the borrower. *See Salmon v. Bank of Am. Corp.*, No. CV-10-446-RMP, 2011 WL 2174554, at *17 (E.D. Wash. May 25, 2011) ("the Deeds of Trust Act does not require that the trustee or beneficiary provide the grantor/debtor with proof of ownership of the promissory note").

When it construes an ambiguous statute, this Court also considers relevant case law to aid its interpretation. *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004). The Washington Supreme Court has already recognized that the DTA and UCC were adopted by the Washington legislature in the same year, and the interpretation of the DTA, including RCW 61.24.030(7), should be guided by the sections of the UCC applicable to negotiable instruments secured by deeds of trust, including the definition of "holder." *Bain*, 175 Wn.2d at 103-104 (finding UCC Article 3 and definition of "Holder" relevant to interpretation of DTA definition of "Beneficiary"). That is why the DTA defines "beneficiary" in terms of "holder" as that term is used in the UCC. RCW 61.24.005(2). It would be absurd to conclude that the legislature would expressly give a "holder" the right to enforce the deed of trust, but at the same time prevent the trustee from effectuating that right unless the holder is an "owner."

This is particularly true since neither the DTA nor the UCC define the term "owner." *See* RCW 62A.1-201; RCW 61.24.005. And, perhaps more importantly, nowhere in the definition of "beneficiary" in the DTA or "holder" in the UCC is there a suggestion, much less a requirement, that an ownership interest in the borrower's loan or proceeds of the note is required to enforce a note or the a deed of trust. *See* RCW 62A.1-

201(21)(A); RCW 61.24.005(2). Instead, as noted, Washington's UCC Article 3 explicitly establishes the opposite: "A person may be a person entitled to enforce the instrument ***even though the person is not the owner of the instrument***[.]" RCW 62A.3-301 (emphasis added).

The United States District Court for the Western District of Washington recently rejected the same argument the Hobbs advance here. That court held that the term "owner," as used in RCW 61.24.030(7)(a), "does not mean the entity or entities that have a beneficial interest in the note." *Mulcahy v. Fed. Home Loan Mortgage Corp.*, C13-1227RSL, 2014 WL 1320144, *3 (W.D. Wash. Mar. 28, 2014). That court also held that "[b]ecause the note is bearer paper, the DTA defines 'beneficiary' as the 'holder' of the note, *i.e.,* the entity that has actual physical possession of the paper itself... NWTS was therefore obligated to ascertain only whether Wells Fargo was the holder of the promissory note before issuing the notice of trustee's sale, not whether some other entity had a beneficial interest in the proceeds of the note." *Id.*

The holding of *Mulcahy* is the only interpretation of RCW 61.24.030(7)(a) that harmonizes the first and second sentences of the statute with the DTA's own definition of "beneficiary," and Washington's UCC (including its dichotomy between owners and holders of negotiable instruments), and avoids absurd results. Washington's UCC determines

who may enforce a negotiable instrument such as the Note. *See* RCW 62A.3-104. As noted above, the person in possession of a note indorsed in blank is a holder entitled to enforce the instrument. *See* RCW 62.A1-201(21)(A); .3-301. The DTA creates the remedy of non-judicial foreclosure in the event of the obligor's default of a secured negotiable instrument such as the Note. *See* RCW 61.24.040. It is therefore entirely logical that the Legislature would designate the "holder" of the promissory note under the UCC as the "beneficiary" of the corresponding security instrument under the DTA. *See* RCW 61.24.005(2). By equating "holder" and "beneficiary," the Legislature provided that the person entitled to enforce a promissory note would be the person entitled to the remedy of non-judicial foreclosure. *See* RCW 62A.3-301; RCW 62A.1-201(21)(A); RCW 61.24.005(2).

In sum, RCW 61.24.030(7) does not impose a separate ownership requirement that trumps the status of beneficiary as defined in RCW 61.24.005(2). The legislature would not create a scenario in which the "beneficiary," despite being the "holder" of the promissory note and entitled to enforce the note, nevertheless could not initiate nonjudicial foreclosure.

The Hobbs' interpretation of RCW 61.34.030(7)(a) is also contrary the express terms of the Note and Deed of Trust and longstanding

commercial practice. The Note specifically states that the original lender can transfer it to subsequent noteholders. CP 538. And under the Deed of Trust, the "Note or ***a partial interest in the Note***...can be sold one or more times without prior notice...which might result in a change in the...Loan Servicer that collects Periodic Payments due under the Note." CP 146.

Like the rest of the nation, Washington has long recognized that an owner of a negotiable instrument may use a servicer or other agent to collect payments on its behalf, even if not in actual possession of the instrument itself. *See Smith v. Keating*, 52 Wn.2d 391, 394, 326 P.2d 60 (1958) (stating "[r]epeated decisions of this court hold that the agent's possession or nonpossession of a note is merely evidence, but is not conclusive of authority or lack of authority to receive payment").

Loan servicers have long served an integral role in mortgage lending and are regulated by federal and state laws. *See, e.g.,* 12 U.S.C. § 2605; 12 C.F.R. 3500.2(b)(defining "servicer" and "servicing"); RCW 19.148 *et seq.* (Washington Mortgage Loan Servicing Act). In fact, RCW 61.24.030 itself recognizes that loan servicers and loan owners may be different entities. *See, e.g.,* RCW 61.24.030(8)(l) (requiring notice of default for residential loans to include the "name and address of the ***owner*** of any promissory notes"...secured by the deed of trust and the name, address, and telephone number of a party acting as a ***servicer*** of the

obligations").

Adopting the Hobbs' interpretation of RCW 61.24.030(7) would eliminate a loan owner's ability to confer holder status on its servicing agent through the transfer of bearer paper. This result would be directly at odds with the UCC's carefully crafted commercial rules governing negotiable instruments and the DTA itself.

3. Legislative History Confirms that RCW 61.24.030(7) Does Not Impose an "Ownership" Requirement on Beneficiaries.

"[I]n interpreting conflicting statutory language, a court may ascertain legislative intent by examining the legislative history of particular enactments." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 211, 118 P.3d 311 (2005). Thus, courts can consider subsequent amendments and bills, even those that fail, as a tool to ascertain legislative intent. *Costanich v. Dep't of Soc. and Health Servs.*, 164 Wn.2d 925, 932, 194 P.3d 988 (2008); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 362, 841 P.2d 752 (1992). If the Legislature intended to limit those entitled to initiate nonjudicial foreclosure to only "holders" who are also "owners," it could have said so explicitly by amending the definition of "beneficiary" in RCW 61.24.005(2). But the legislature chose not to do so. Specifically, the legislature recently considered a bill that would have changed the definition of "beneficiary" from its current meaning of

"holder" to:

> [O]wner of the instrument or document, including a promissory note, evidencing the obligations secured by the deed of trust, ***even if another party or parties are named as the holder, seller, mortgagor, nominee, or agent,*** excluding persons holding the same as security for a different obligation.

SB 5191, § 1(1) (CP 280) (emphasis added). This rejected bill would also have required: "That ***only*** the owner of the beneficial interest or the authorized agent of the owner of the beneficial interest may foreclose a deed of trust . . . . ***The foreclosure must be in the name of the owner of the beneficial interest.***" CP 285-286. (emphasis added). Critically, SB 5191 did not pass, demonstrating that the legislature prefers the current scheme.[6]

By the same token, the legislative history of RCW 61.24.030(7)(a) confirms that the statute does not impose an additional "ownership" requirement on beneficiaries. *See Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 753, 675 P.2d 592 (1984) (it is appropriate to consider "sequential drafts of a bill" when examining legislative history because it is "presumed that members of the Legislature were aware of prior drafts"). This legislative history shows that RCW 61.24.030(7)(a) was intended to prevent entities from claiming to be

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[6] *See* CP 280-288; 289.

beneficiaries and initiating foreclosure proceedings when, in fact, they did not actually hold the note secured by the deed of trust.

The 2009 amendment that added subsection (7)(a) to RCW 61.24.030 began as SB 5810, the original version of which was devoid of any requirement that the trustee have proof that the beneficiary held the note. Senate Bill 5810, 61st Legislature, 2009 Regular Session (Feb. 3, 2009).[7] The Senate revised SB 5810 to include a requirement that the trustee obtain "proof that the beneficiary is the actual holder" of the note or has "possession of the original" note "with the proper endorsements so that the entity initiating the foreclosure sale has the authority to enforce the terms of the promissory note." First Engrossed SB 5810, § 7(7)(k)(i) 61st Legislature, 2009 Regular Session (Mar. 12, 2009). This amendment would have required that "[p]roof that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust must be made by way of an affidavit made by a person with personal knowledge of the physical location of the promissory note or other obligation." *Id.* § 7(7)(k)(ii). While the core of this section – requiring the beneficiary to prove to the trustee that it was the "actual holder" of the note – survived, the legislature changed the proof that was required. *See id.*

[7] Publicly available at: http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5810.pdf.

The House of Representatives subsequently amended the proof requirement regarding the beneficiary's authority to foreclose, replacing the Senate's language with the language that is now found in RCW 61.24.030(7)(a). Engrossed Senate Bill 5810, 61st Legislature, 2009 Regular Session. Under this amendment, the trustee's proof of beneficiary status may be in the form of a beneficiary's declaration and the language regarding the trustee having possession of the original note is removed. *Id.* While the final version of the bill referenced proof of the beneficiary's ownership of the note, there is no indication in the legislative record that the legislature intended the word "owner" to impose a separate requirement – apart from "actually holding" the note – on beneficiaries.[8]

On the contrary, in statements made at the March 23, 2009 House Judiciary Committee hearing, Senator Kauffman, who sponsored SB 5810, confirmed that RCW 51.24.030(7)(a) does not impose a separate "ownership" requirement on beneficiaries, but merely requires

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[8] The after-the-fact affidavits and letters proffered by Hobbs at the trial court level are inadmissible as statements of legislative intent. *City of Yakima v. Int'l Ass'n of Firefighters*, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991) (citing *Woodson v. State*, 95 Wn.2d 257, 264, 623 P.2d 683 (1980); *Pannell v. Thompson*, 91 Wn.2d 591, 598, 589 P.2d 1235 (1979)). *See also Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 520, 84 P.3d 1241 (2004) (refusing to consider declaration of city councilman when determining City Council's intent); *Eugster v. City of Spokane*, 118 Wn. App. 383, 411 n.6, 76 P.3d 741 (2003) (holding that "the post hoc affidavits of various city staff and attorneys are not admissible evidence of legislative intent"). In contrast, contemporaneous statements of individual lawmakers and others before the Senate Judiciary Committee, while not conclusive of legislative intent, are proper for consideration and instructive. *In re Marriage of Kovacs*, 121 Wn.2d 795, 807-808, 854 P.2d 629, 636 (1993).

beneficiaries to submit proof that they actually hold the promissory note: "[W]hen there is a foreclosure, you need to know who actually holds that note, and there are actual cases in the United States in which when challenged, they cannot produce the note."[9] To address this issue, Senator Kauffman explained that SB 5810 required "you [the beneficiary] have to have the note, or at least know where the note is . . . you have to have at least the note and so that you can move forward on that."[10]

Similarly, legislative staff counsel Trudes Tango explained to the House Judiciary Committee on March 26, 2009 – the final committee meeting on SB 5810 – that the bill had "technical, clarifying changes made," and that the trustee "has to have proof from the beneficiary that the beneficiary is actually the holder of the promissory note securing the deed of trust, and that proof can be by declaration of the beneficiary."[11] This testimony is the same as Ms. Tango's testimony at the March 23, 2009 hearing.[12] Thus, the legislative history reveals that SB 5810 – and by extension RCW 61.24.030(7)(a) – was merely intended to require the

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[9] Publicly available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181. Senator Kauffman's testimony, quoted above, may be found at 47:30-48:05.

[10] Publicly available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181. Senator Kauffman's testimony, quoted above, may be found at 48:40 -49:00.

[11] Publicly available at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030190. Ms. Tango's statement, quoted above, is available at 12:19-12:47

[12] *See* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181, at minute 46:10-46:37.

beneficiary to demonstrate to the trustee that it was in possession of the promissory note, not to impose a separate "ownership" requirement.

The various bill reports for SB 5810 also confirm this. *See Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 727, 153 P.3d 846 (2007) (useful legislative history may include bill reports). The Senate Bill Report for SB 5810 notes that "[t]here must be proof that the beneficiary is the actual holder of the obligation secured by the Deed of Trust."[13] Similarly, both the House Judiciary Committee Bill Analysis on ESB 5810 and the House Bill Report on ESB 5810 state that the bill "[r]equires that before a notice of sale may be recorded, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust."[14] For this reason as well, the Hobbs' argument that RCW 61.24.030(7)(a) requires trustee's to demand proof of "ownership" and "holder" status is contrary to both the text and history of the statute.

4. A Holder's Right to Initiate Nonjudicial Foreclosure Under the DTA is Governed by UCC Article 3, Not Article 9A.

Apparently realizing that their statutory construction argument lacks merit, the Hobbs argue that Wells Fargo is not a "holder," and therefore not a beneficiary under the DTA, because "legal possession" of the Note remained with Freddie Mac, the note's owner." Br. of App. 27-

[13] CP 259-263.
[14] CP 265-268; 270-274.

43. The Hobbs are incorrect because the UCC Article 9A provisions on which they rely for this argument do not apply to the relationship between a loan servicer that institutes a nonjudicial foreclosure to enforce a default on the note secured by the deed of trust.

The lynchpin of the Hobbs' argument is the premise that the concept of "possession" reflected in RCW 62A.9A.313(h) applies to a nonjudicial foreclosure of a deed of trust. *See* Br. of App. at 32-43. This premise is incorrect. The creation and transfer of deed of trust liens against real property are specifically exempted from Article 9A, except in certain limited circumstances not applicable here. RCW 62A.9A-109(11)(A). The Official Comments to 9A-109 provide a useful example:

> O borrows $10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O's land. ***This Article does not apply to the creation of the real-property mortgage. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X.*** The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected.

Comment 7 (Security Interest in Obligation Secured by Non-Article 9 Transaction) (emphasis added). Simply put, Article 9A applies to a ***third***

party's security interest in the ***note***; Article 3 and the DTA apply to Wells Fargo's enforcement of the Note against the Hobbs and the foreclosure of the Deed of Trust.

As the UCC's Permanent Editorial Board 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."*** *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) (PEB Report) at 2 (emphasis added).[15]

The inapplicability of RCW 62A.9A-313(h) is also clear from a review of the statute itself. 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, the statute does not bear on the issue of which entity is entitled to enforce the default on a negotiable instrument. That issue is clearly governed by Article 3, which makes it clear that holders of

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

negotiable instruments, such as Wells Fargo 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. The Hobbs' "legal possession" argument fails because Article 3 and the DTA govern the Hobbs' relationship with Wells Fargo, not Article 9A.

Finally, the cases the Hobbs cite are mostly 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 which the Hobbs rely. *See* Br. of App. at 37-39.

In *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304 (D.S.C.. 1994), the dispute was between an originating lender and Midfirst Bank, the servicing agent for defaulted loans guaranteed by

Ginnie Mae.[16] The relevant issue for purposes of this case was whether Ginnie Mae was a "holder in due course," such that Midfirst was entitled to enforce the mortgage loans and collect payments due thereunder. *Id.* at 1314-1315. In concluding that Ginnie Mae was a "holder" under Article 3 of South Carolina's version of the UCC, the *Midfirst* court relied on the well-recognized principal that an entity can be a "holder" through constructive possession where its agent maintains physical possession of the note on its behalf. *Id.* That principle applied because, at the relevant times, Ginnie Mae's custodian, Bank of America, held the notes in a custodial capacity for Ginnie Mae, while the note was serviced by Inland, the issuer of the mortgage backed security Ginnie Mae had guaranteed. *See id.*

An entity can certainly enjoy holder status through constructive possession of a note indorsed in blank in this manner, but whether it does depends on the facts. *See* RCWA 62A.3–201, cmt. 1 (recognizing that a holder can possess a note "directly or through an agent") But here, in dispositive contrast to *Midfirst*, Freddie Mac did not constructively possess the note through Wells Fargo and, thus, is not the note's "holder." Simply put, Wells Fargo is not Freddie Mac's custodian. Rather, Wells Fargo is the note's holder because Wells Fargo had physical possession of

[16] "Ginnie Mae" is the trade name of the Government National Mortgage Association.

the indorsed-in-blank note all relevant times. Br. of App. at 6; CP 322; 305-306.

In *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1110 (S.D.N.Y. 1978), plaintiff guarantor sought a declaratory judgment that its guarantees of multi-million dollar loans were null and void and rescission of its guarantees and the underlying loan agreements. The loan originator and several banks that purchased participating interests in the promissory notes issued in connection with the underlying financing transaction counterclaimed for the amounts due and owing on the notes. *See id.* at 1116. In an attempt to defeat the intervening banks' holder in due course status, the guarantor argued that the banks were not "holders" of the promissory notes. *See id.*

In *Corporacion Venezolana*, the parties agreed that holder status could be achieved through constructive delivery and possession, and the court found that Merban, the original lender and seller of the Notes, made constructive delivery of the notes to the intervenor banks through the custodian banks that issued the certificates of participation. *See id.* at 1117-1118. Thus, the *Corporacion Venezolana* court held, the intervenor banks met the "holder" element of the holder in due course analysis because it was permissible for delivery and possession to have occurred constructively through the custodian banks. *See id.* As is the case with

Midfirst, *Corporacion Venezolana* is simply inapposite because Wells Fargo has never actually or constructively possessed the Note in the capacity as Freddie Mac's custodian; instead, Wells Fargo holds the Note in its own name.

B. Even if the Hobbs' Interpretation of the DTA Is Correct, Summary Judgment Dismissal of Wells Fargo Was Proper.

Wells Fargo properly initiated nonjudicial foreclosure proceedings in its own name because Wells Fargo was a holder of the Note and the beneficiary of the Deed of Trust. RCW 62A.1-201(21)(A); RCW 61.24.005(2). This Court can, however, affirm the trial court's summary judgment on any basis supported by the record, *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn. App. 616, 624, 246 P.2d 822 (2011), and it should do so here even if it accepts the Hobbs' interpretation of the DTA.

1. The DTA Cause of Action Was Properly Dismissed Because There Is No Evidence in the Record to Support Imposition of Vicarious Liability on Wells Fargo Under *Walker*.

The Hobbs' first cause of action against Wells Fargo was for alleged violation of the DTA. CP 472-473. The Washington Court of Appeals recently recognized a pre-sale claim for damages against *foreclosure trustees* who commit material violations of the DTA or act without proper authority, while recognizing that a *beneficiary* might have *vicarious liability* for the trustee's actions if its control over the trustee

makes it an agent rather than a neutral third party. *Walker v. Quality Loan Svc. Corp.*, 176 Wn. App. 294, 313, 308 P.3d 716 (2013).[17]

In other words, a beneficiary can be liable under a *Walker* pre-sale DTA claim—if at all—*only* when (1) the current trustee violates the DTA and (2) the beneficiary exercises the requisite degree of control over the trustee so as to make the trustee its agent. *See also In re Butler*, 12-01209-MLB (W.D. Wash. Bankr. Oct. 2, 2013), *slip op.* at 5 (recognizing that any pre-sale DTA claim against loan owner and servicer in light of *Walker* must be based on conduct of successor trustee *after* its appointment). The Hobbs do not and cannot point to any evidence in the record that would establish that Wells Fargo so controlled NWTS as to give rise to the imposition of the vicarious liability necessary for a pre-sale DTA damages claim against Wells Fargo.

Moreover, even if Wells Fargo could be vicariously liable for NWTS' actions, there can be no actionable pre-sale claim under the DTA without prejudice. It is settled that technical violations of the DTA are not grounds for avoiding a trustee's sale; the borrower must make a showing of prejudice. *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005); *Koegel v. Prudential Mut.*

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[17] *Walker* represents a change in the law in that previously Washington courts did not recognize a pre-sale cause of action under the DTA. The question of whether the DTA supplies a pre-sale claim for damages has been certified to the Washington Supreme Court in *Frias v. Asset Recovery Svcs.*, Case No. 89343-8.

Sav. Bank, 51 Wn. App. 108, 112-13, 752 P.2d 385 (1988); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988).

There is even greater reason to adhere to a prejudice requirement in pre-sale cases, as the Property has not been lost and the borrower has typically availed itself of the statutorily prescribed injunction remedy. *See* RCW 61.24.130(1). *See also Siliga v. Mortgage Electronic Registrations Systems, Inc.*, 219 Cal. App. 4th 75, 85 (2013) (borrowers lacked standing to complain about loan servicer's and assignee's alleged lack of authority to foreclose on deed of trust where borrowers were in default under the note, absent evidence that the original lender would have refrained from foreclosure).

Even if the Supreme Court recognizes a pre-sale cause of action under the DTA, it should be contingent upon a showing of prejudice, which the Hobbs did not and cannot make on this record. Indeed, Hobbs obtained a pre-sale injunction and still own the Property. Thus, even if *Frias* affirms *Walker*, the Hobbs' pre-sale claim for violation of the DTA fails as a matter of law.

2. The CPA Cause of Action Was Properly Dismissed Because the Hobbs Did Not Demonstrate an Actionable Injury Proximately Caused by Wells Fargo's Alleged Conduct.

The Hobbs' second cause of action against Wells Fargo was for

violation of the CPA. "The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties." *Clark Cnty. v. Western Wash. Growth Mgmt. Hrgs. Rev. Bd.*, 177 Wn.2d 136, 144-145, 298 P.3d 704 (2013). Under RAP 10.3(g) the "appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." To be considered, any assignments of error that a party does make must be supported by citation to legal authority and the relevant portions of the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Here, the Hobbs assign error to dismissal of their CPA claim but do not offer specific argument in support of their claim aside from their general legal argument. *See* Br. of App. at 3-4. Indeed, the Hobbs do not even mention their CPA claim in their erroneous request for entry of judgment in their favor. *See id.* at 43-44.

This is insufficient to preserve the issue for appeal. To overturn the summary judgment dismissal of their CPA claim, the Hobbs have to point to admissible evidence in the summary judgment record that, if believed, would prove the following five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, and (4) injures them in their business or property; (5)

the injury must be causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The Hobbs make no effort to do so and, thus, they have not shown they that they could establish their claim even if their underlying legal theory is correct. *See Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001) ("The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.").

For all of the reasons above, the Hobbs' legal theory that Wells Fargo was not the beneficiary fails. Because Wells Fargo was authorized to initiate nonjudicial foreclosure proceedings, the Hobbs cannot establish the first element of an unfair or deceptive act or practice.

But, even if the Court agrees with the Hobbs' legal theory and finds the unfair and deceptive act or practice or other elements met, dismissal of the CPA should be affirmed because the Hobbs cannot establish injury or causation.

Although the general threshold for a CPA injury is not high, where, as here, the plaintiff claims an unfair or deceptive act or practice based on an affirmative misrepresentation (in this case, that Wells Fargo was the "beneficiary," when it held but did not own the Note) the plaintiff must show "a causal link between the misrepresentation and the plaintiff's

injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10, 22 (2007). Critically, in this analysis, causation cannot be established "merely by a showing that money was lost." *Id.* at 81.

It is undisputed that the Hobbs defaulted on their loan. CP 471, 486, 498. It is also undisputed that the Hobbs agreed that if they defaulted, that nonjudicial foreclosure proceedings could be instituted to sell the Property to satisfy their default. CP 471, 486, 498. The institution of nonjudicial foreclosure proceedings were caused by the Hobbs' failure to repay their loan as agreed, not because of some independent illegal act of any Respondent.

As the Ninth Circuit recently explained, "[p]laintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied." *Bhatti v. Guild Mortgage Co.*, 550 F. App'x 514 (9th Cir. 2013). *See also Babrauskas v. Paramount Equity Mortg.*, No. C13–0494RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) at *4 (plaintiff's "failure to meet his debt obligations is the "but for" cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title").

Merely "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property." *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992). *See also Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (subsequent purchaser's prosecution of CPA claim brought to protect property against lender's non-judicial foreclosure insufficient to establish CPA injury); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, * 3-4 (W.D. Wash. Aug. 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas*, 2013 WL 5743903 at *4 (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation").

Finally, because the CPA allows recover only for injury to a plaintiff's business or property, personal injuries, including emotional distress, cannot be recovered under the CPA. *See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) (damages for mental pain and suffering are not recoverable for a violation of the CPA because the statute, by its terms, only allows recovery for harm to "business or property"); *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 369-370, 770 P.2d 671 (1989)

("[A]ctions for personal injury do not fall within the coverage of the CPA."); *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998) ("[W]e note that emotional distress damages are not available for a violation of the CPA."). Because the record is devoid of evidence sufficient to establish the injury and causation elements of the Hobbs' CPA claim, the dismissal of the Hobbs' CPA claim should be affirmed.

VI. CONCLUSION

For the reasons above, Respondent Wells Fargo respectfully requests that the Court affirm the Superior Court's summary judgment rulings.

RESPECTFULLY SUBMITTED this 30th day of May 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 30th day of May 2014, I caused to be served a copy of the attached document to the following person(s) via the manner(s) indicated, at the following address(es):

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