

No. 71724-3-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

MARISA BAVAND

Appellant/Plaintiff,

v.

CHASE HOME FINANCE LLC; a Delaware limited liability company;
FLAGSTAR BANK FSB, a federal savings bank; FEDERAL NATIONAL
MORTGAGE ASSOCIATION, a United States government sponsored
enterprise; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., a Delaware Corporation; NORTHWEST TRUSTEE SERVICES,
INC. a Washington corporation, DOE DEFENDANTS 1-10,

Respondents/Defendants.

OPENING BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in accepting the testimony of Lisa Mahony and Karie Mullen on summary judgment, in the absence of compliance with the provisions of *RCW 5.45.020* and *ER 803(a)(6)*.

B. The trial court erred in striking the Declaration of Tim Stephenson.

C. The trial court erred in granting summary judgment and dismissing Appellant’s claims on March 26, 2014, pursuant to *CR 56*, when there were genuine issues of material fact in dispute, including the existence of material defects in the original Deed of Trust; the existence of evidence of violation of the Washington Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter “DTA”); violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter “CPA”); violation of *RCW 9A.82, et seq.*; and the existence of injury and damages that are directly and proximately caused by Respondent’s misconduct.

D. The trial court erred in refusing to continue the hearing on summary judgment to permit Appellant an opportunity to obtain discovery previously requested of Respondents, pursuant to *CR 56(f)*.

II. STATEMENT OF THE CASE

On March 18, 2004, Appellant, MARISA BAVAND (hereinafter “Ms. Bavand”) executed a Promissory Note in favor of Capital Mortgage Corporation, as lender and the party entitled to receive payments according to its terms. CP 1853-1856. This transaction was purportedly registered with

Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS"). Various versions of this Note have been offered during discovery, including one that bears two endorsements, one in blank, by Respondent, FLAGSTAR BANK FSB (hereinafter "Flagstar"). CP 1502-1505. There is no means to verify the authenticity of these endorsements as the original Note has never produced for verification. No evidence of any consideration for these endorsements has been adduced.

To secure repayment of the Promissory Note, Ms. Bavand executed a Deed of Trust which was recorded March 31, 2004. CP 1858-1875. "Joan H. Anderson, EVP" on behalf of Flagstar, was named the trustee.

At no time relevant to this cause of action did Ms. Bavand owe any monetary or other obligation to MERS, nor has MERS ever been an owner or holder of the subject Promissory Note or other evidence of debt executed contemporaneously with the subject Deed of Trust. At no time has MERS been the beneficiary of the obligation within the terms of *RCW 61.24.005(2)*. While Ms. Bavand acknowledges that she may owe money under the subject Note to someone, she has consistently maintained that she does not owe money or any other obligation to any Respondent named herein.

On February 1, 2011, Chris Ashcraft, believed to be an employee of Respondent, NORTHWEST TRUSTEE SERVICES, INC (hereinafter "NWTs"), claiming to act on behalf of MERS as its "Vice President",

executed an Assignment of Deed of Trust “for value received”, assigning all beneficial interest under the Deed of Trust from “lender” to Respondent, CHASE HOME FINANCE, LLC. (hereinafter “Chase Finance”). CP 1885. The identity of the “lender” referred to or the Note holder granting this authority was not specified. Said Assignment was recorded on February 2, 2011. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this Assignment has been adduced.

On February 1, 2011, Ken Patner, in his capacity of “Assistant Vice President” of NWTs, pursuant to the authority purportedly vested by a Limited Power of Attorney from Chase Finance, executed an Appointment of Successor Trustee appointing his own company, NWTs, the successor trustee. CP 1891. Said Appointment of Successor Trustee was recorded on February 2, 2011. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this Appointment has been adduced.

On February 1, 2011, NWTs, claiming authority as the “duly authorized agent” for Chase Finance, issued a Notice of Default which states that the “Beneficiary (Note Owner)” of the Deed of Trust is Chase Finance. CP 1887-1889. At the time this document was prepared, this was false and known to be false at that time by all Respondents.

On April 1, 2011, Ms. Bavand prepared and mailed a Qualified Written Request to JPMorgan Chase Bank NA (hereinafter “JP Morgan

Chase”), the then alleged servicer of the subject loan obligation. CP 1878-1881. This the Qualified Written Request was delivered on April 8, 2011. CP 1883. At no time relevant to this cause of action has JPMorgan Chase Bank NA, or any Respondent named herein, responded to Ms. Bavand’s Qualified Written Request.

On December 21, 2011, MERS executed a second Corporate Assignment of Deed of Trust “for good and valuable consideration”, this time in favor of JP Morgan Chase. CP 996 and 1437. This Assignment was apparently never recorded, but was provided during the course of discovery. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this second assignment has been adduced.

On April 18, 2012, apparently on the basis of the Assignment of Deed of Trust of December 21, 2011, Payne Davis, as “Vice President” of JP Morgan Chase, executed a second Appointment of Successor Trustee, again appointing NWTS as a successor trustee. CP 1433. This Appointment of Successor Trustee was not recorded, but was provided through discovery. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this second Appointment has been adduced.

On May 8, 2012, Winston Kahn, as “Assistant Vice President” of NWTS executed a Notice of Trustee’s Sale, setting a sale date for August 10, 2012, and a Notice of Foreclosure, pursuant to *RCW 61.24.040*. CP 1441-1446. The Notice of Trustee’s Sale was dated May 2, 2012, but was not

notarized until May 8, 2012. This Notice of Trustees' Sale was recorded on May 10, 2012. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this Notice of Trustee's Sale and Notice of Foreclosure has been adduced.

Frustrated by the lack of response to her Qualified Written Report, Ms. Bavand researched her loan on the internet. From a printed copy of Respondent, FEDERAL NATIONAL MORTGAGE ASSOCIATION's (hereinafter "Fannie Mae") web loan lookup page, dated August 13, 2012, Ms. Bavand learned that Fannie Mae owned her loan and had owned her loan since April 1, 2004, approximately two weeks after the loan transaction closed. CP 1893. Further, Fannie Mae's web loan lookup page states that the servicer of Plaintiff's loan was JPMorgan Chase Bank, NA. This information is essentially confirmed by the Declaration of Karie Mullen of January 24, 2014. CP 1554. However, this information and the sworn statement of Ms. Mullen contradict the representations contained in the Notice of Default of February 1, 2011, in which NWTS, as agent for "Chase Home Financial, LLC", represents that the owner and holder of the obligation is Chase Finance – not Fannie Mae or JP Morgan Chase. CP 1889. See also the Declaration of Tim Stephenson. CP 1368-1386.

On August 20, 2012, Ms. Bavand brought suit against the Respondents for violation of the DTA, seeking damages and declaratory

relief, violation of the CPA, violation of *RCW 9A.82, et seq.*, and reserving claims for violation of RESPA and FDCPA.

In January of 2014, Respondents move for summary judgment on all of Ms. Bavand's claims, pursuant to *CR 56*. CP 1515-1531, 1604-1623, 1624-1706.

On March 26, 2014, the trial court granted Respondents' motions for summary judgment. CP 52-56. At the same time the trial court entered an Order striking the Declaration of Tim Stephenson. CP 57-59.

On April 3, 2014, Ms. Bavand filed a Notice of Appeal, seeking review of the trial court's Orders of March 26, 2014. CP 41-51.

III. ARGUMENT

A. Standard of Review.

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*"); *Bavand v. OneWest Bank, FSB*. 176 Wn.App 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *Schroeder*; *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *Bavand*, at page 485.

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56*. Sworn statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App. 252, 11 P.3d 883 (2000).

In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary material must be taken as true. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963).

Summary judgment is appropriate if reasonable persons can reach only one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Shows v. Pemperton*, 73 Wn.App. 107, 868 P.2d 164 (1994); *Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996); *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997). When there is contradictory evidence, or the moving parties' evidence is impeached, an issue of credibility is presented. The trial court should not resolve issues of credibility on summary judgment, but should reserve the issue of credibility for trial. *Balise v. Underwood, supra*.

B. The trial court erred in accepting the testimony of Lisa Mahony and Karie Mullen.

On summary judgment, Respondents relied primarily on the Declarations Lisa Mahony and Karie Mullen. CP 1498-1507; 1552-1603. However, the sworn statements of Ms. Mahony and Ms. Mullen failed to demonstrate sufficient personal and testimonial knowledge of the facts they offered the trial court and should have been stricken. However, the testimony they did offer, presuming its truth, revealed the existence of disputes as to material issues fact between the Respondents that should have defeated their motions.

Ms. Mahony offered the trial court only her conclusory statement that she has “personal knowledge” and that she had reviewed the “records regularly kept by Flagstar,” but failed to provide the trial court facts that would establish (1) that the computer equipment used by Flagstar is standard; (2) the identity of who compiled the information contained in the computer printouts; (3) a statement of how the information is maintained, (4) when the entries were made and whether they were made at or near the time of the happening or event; (5) how Flagstar relies on these records; or (6) what specific records she reviewed. 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).

Ms. Mahony asserts that Flagstar received the endorsed Note on April 2, 2004, but was not apparently there at the time. CP 1499. She relies on Flagstar's "business records" and review of a copy of the Note, but fails to indicate who provided this information, whether they personally witnessed the endorsement of the Note, when this information was provided and how the information has been maintained over time. Ms. Mahony fails to state why Flagstar kept the Note in storage. CP 1499. Was Flagstar acting as a servicer or as a custodian and for whom? Ms. Mahony does not say.

Ms. Mahony states that in May of 2004 the loan was sold to JP Morgan Chase Bank, but apparently relies on computer compiled information for this fact. CP 1499. There certainly is no collateral or documentary evidence to support Ms. Mahony's assertion that the loan was sold to JP Morgan Chase in the record before trial court. Was the entire interest in the obligation sold or merely the servicing rights? More surprising is the fact that Ms. Mahony's testimony is contradicted by the testimony of Karie Mullen, who testifies that Note was sold to Fannie Mae on April 8, 2004.¹ There is no indication in Ms. Mullen's testimony to corroborate the sale to JP. Morgan

¹ What Ms. Mullen states is that "Fannie Mae became the investor of the obligation on April 8, 2004." CP 1554. However, the term "investor" is synonymous with the term "owner" as the terms are understood by professionals in the mortgage lending industry. See Declaration of Counsel of February 11, 2014. CP 468 and 532.

Chase. In sum, Ms. Mahony appears to be merely parroting what she has seen on someone else's computer screen.

For her part, all Ms. Mullen says about her basis of knowledge is that she is "familiar with the manner in which Chase maintains its books and records, including its computer records relating to the serving of this loan," but, like Ms. Mahony, fails to provide the trial court facts that would establish (1) that the computer equipment used by Chase Financial is standard; (2) the identity of person or entity that compiled the original information contained in the computer printouts; (3) a statement of how the information is maintained by the person or entity that created the information or how it has been maintained by Chase Financial since, (4) when the entries were made and whether they were made at or near the time of the happening or event; (5) how Chase Financial relies on these records; (6) or what specific books and records she is referring to. See *RCW 5.45.020*; *State v. Smith, supra.*; *State v Kane, supra.*

Although Ms. Mullen's asserts that Chase Financial or JP Morgan Chase is the "holder" and "servicer" of the mortgage loan, she provides no evidence of Chase Financial's appointment as servicer by Fannie Mae or any true and lawful owner and holder of the subject obligation. As noted above, the testimony of Ms. Mullen is contradicted by the testimony of Ms. Mahony on key issues, which undercuts her credibility and creates genuine issues of material fact as to the facts upon which the two women disagree.

Neither Ms. Mahony nor Ms. Mullen offered the trial court the sort of personal and testimonial knowledge required under *CR 56(e)*. There were simply no facts offered by Ms. Mahony or Ms. Mullen that would justify the trial court's reliance on the information provided. There was simply no basis to establish "personal knowledge. We know nothing about Ms. Mahony's or Ms. Mullen's actual work activities or how they are qualified to speak to the issues they attempt to address. Absent a proper foundation, Ms. Mahony's and Ms. Mullen's testimony constituted rank hearsay. See *ER 803(a)(6)* and *RCW 5.45.020*.

Both Ms. Mahony and Ms. Mullen appear to suggest they are records custodians for their respective employers. However, their testimony fails to comply with *ER 803(a)(6)* and *RCW 5.45.020*.

Ms. Mahony offered the trial court testimony as an agent of Flagstar that currently did not then own or hold Ms. Bavand's Note and was not then actively servicing Ms. Bavand's loan. The copies of records Ms. Mahony apparently relies upon appear to have been initially generated by Capital Mortgage Corporation. But, there is no assurance that the information obtained by Flagstar from Capital Mortgage Corporation or any other Respondent named herein and reviewed by Ms. Mahony is reliable without verification by the entity the provided the information as to the means by which the information was created and maintained. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982).

Ms. Mullen offered the trial court testimony as an agent of Chase Financial. The copies of records she relies upon appear to have been initially generated by Capital Mortgage Corporation and Flagstar. But, there is no assurance that the information allegedly obtained by Chase Financial from Capital Mortgage Corporation or Flagstar and reviewed by Ms. Mullen is any more reliable than Ms. Mahony's without verification of the information received and the means by which the information was originally created and maintained by each entity. See *State v. Mason, supra*.

Under *CR 56(e)*, conclusory statements or "mere averment" that the affiant has personal knowledge is 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).

Since neither Ms. Mahony nor Ms. Mullen can establish or verify the reliability of the "business records" and computer entries they reviewed and rely upon, their testimony is rank hearsay and is not the sort of personal and testimonial knowledge required under *CR 56(e)*. The trial court should not have considered or relied upon their testimony. But, the trial court should have taken judicial notice of the contradictions in the two women's testimony, without relying on the same for the truth of the matters asserted, to establish the existence of material issues in dispute as the facts upon which they disagreed.

C. **The trial court erred in striking the Declaration of Tim Stephenson.**

The trial court erred in striking the testimony of Tim Stephenson. His testimony was permissible under *ER 702*. The fact that his testimony “embraced an ultimate issue to be decided by the trier of fact” based on information “reasonably relied upon by experts in the particular field” did not make his testimony inadmissible. *ER 703* and *ER 704*.

Generally, a trial court has wide discretion in its consideration of expert testimony. *Miller v. Likins*, 109 Wn.App. 140, 34 P.3d 835 (2001). But this discretion should be “exercised liberally in favor of admitting evidence” that would assist the Court in evaluating the issues before it. *State v Hansen*, 46 Wn.App. 656, 731 P.2d 1140 (1987); *Davis v. Baugh Industrial Contractors, Inc.*, 159 W.2d 413, 420-421, 150 P.3d 545 (2007) (“It should not be fatal to a party's claim or defense that an expert used legal jargon, so long as an appropriate foundation for the conclusion can be gleaned from the testimony).

Indeed a review of Washington case law reveals that evaluation of an expert’s opinions is more critical when the opinions are being provided to a jury in a criminal trial than when the opinions are being offered to the savvy trial judge on a civil motion, where the judge would be less swayed by the expert’s opinion than a jury. Certainly the case of *State v. Olmedo*, 112 Wn.App. 525, 49 P.3d 960 (2002), cited by Respondents at hearing, is

representative of that group of cases in which jury prejudice was a crucial consideration (“Evidence is not improper when the testimony is not a direct comment on the Respondent’s guilt, is helpful to the jury, and based on inference from the evidence.”).

At hearing, Respondents offered a number of criminal and federal trial court decisions to support their motion to strike Mr. Sephenson’s testimony, but the cases cited are distinguishable from the present situation, largely because they are related to testimony offered to a jury in criminal matters or are federal trial court decisions that involve application of federal rules of evidence, not Washington state rules of evidence. Respondents reliance of *Fidel v. Deutsche Bank* was misplaced as a reference to a federal trial court that has not been published. *GR 14.1*. Likewise, Respondents reliance on *Abarquez v. OneWest Bank*, was misplaced as it, too, is an unpublished opinion and relied on a burden of proof that has been rejected by Washington.

Turning to the specific statements objected to in Respondents’ moving papers, the opinions stricken by the trial court are those that would be reached by a professional of Mr. Stephenson’s experience in the mortgage banking industry. Specifically:

A. Mr. Stephenson’s comment that there are material issues of fact is not a legal conclusion but an observation that there is a lack of evidence a reasonably competent mortgage lender would expect to find in the normal course of businesses necessary to support the

Respondent's allegations of authority to conduct a non-judicial foreclosure against Appellant.

B. Mr. Stephenson's comments regarding the Declarations of Ms. Mahony and Ms. Mullen state the obvious. He is merely commenting on the evidence that supports his other conclusions and is warranted under *ER 703*.

C. Use of the term "holder" is a term of art within the mortgage lending industry and is being interpreted by Mr. Stephenson based upon its use in the Trust Agreement. Mr. Stephenson's comments, which the Court can readily confirm for itself, should not have adversely influence the trial court's contrary conclusion, should the evidence have warranted a contrary conclusion.

D. Mr. Stephenson's interpretation of how the Trust Agreement was supposed to operate from a mortgage lender's perspective and the lack of supporting documentation that a reasonably competent mortgage lender would expect to find offered, if Respondents' allegations are to be believed, is merely a comment on the evidence, warranted by *ER 703*. The trial court could have review the Trust Agreement to verify that delivery of the subject Note to FNMA was required. In any event, Mr. Stephenson's comments should not have adversely influence the trial court's contrary conclusion, should evidence have warranted a contrary conclusion.

E. Mr. Stephenson's interpretation of how the Trust Agreement was supposed to operate from a mortgage lender's perspective and his comment that there is a lack of supporting documentation of a contract between the servicer and the trust is merely a comment on the evidence, warranted by *ER 703*. The Court can review the Trust Agreement to verify this requirement for such a contract for itself. In any event, Mr. Stephenson's comments should not adversely influence the trial court's contrary conclusion, should the evidence have warranted a contrary conclusion.

F. Mr. Stephenson's comment that an assignment of the Deed of Trust to FNMA was required is an interpretation of how the Trust Agreement was supposed to operate from a mortgage lender's perspective and a comment on a lack of evidence supporting Respondents' claims. It is also a comment on the terms of the Custodial Agreement itself, under *ER 703*, which the trial court had before it. This comment on the lack of evidence of a contract

between the servicer and the trust should not have adversely influence the trial court's contrary conclusion, should the evidence have warranted a contrary conclusion.

G. Whether Chase has presented an authenticated Custodial Agreement is a statement of fact, not opinion. This is merely a comment on the absence of facts by Mr. Stephenson – not a legal conclusion. *ER 703*. If an authenticated Custodial Agreement is available, Respondents should have had the burden of proof to present it in rebuttal to Mr. Stephenson's observation of a lack of such proof.

H. Whether FNMA approval was necessary, is an opinion based upon banking policies and custom in trade. However, this statement should not have adversely influence the trial court's contrary conclusion, should the evidence have warranted the conclusion.

I. Whether Chase had ownership rights or interest in the note is an opinion that can be inferred from the absence of other documents that an expert in the mortgage lending industry would expect to find if the proposition were true. This is merely a comment on the lack of evidence to support Chase's allegations and a statement on an ultimate issue – not a legal conclusion. *ER 703* and *ER 704*.

J. If Respondents failed to produce the Custodial Agreement that an expert in the mortgage lending industry would expect to be produced, its absence would reasonably suggest that Chase does not hold the note. Again, this is a comment on the lack of evidence offered by Chase to support an allegation it has the burden of proving on summary judgment. *ER 703* and *ER 704*. However, this statement would not have adversely influenced the trial court's contrary conclusion, should the evidence have warranted the conclusion.

K. Mr. Stephenson's conclusions that Fannie Mae is not the owner or beneficiary of the Deed of Trust comes from Mr. Stephenson's review of the documents presented and the facts reviewed by him and based on the record before the trial court and the custom in trade. These are the conclusions an expert in the mortgage lending industry would be expected to make, under *ER 703* and *ER 704*. Moreover, Mr. Stephenson's comments on status of the parties, based on the documents adduced, should not have adversely influenced the trial court's contrary conclusion, should the evidence have warranted the conclusion.

L. Mr. Stephenson's opinion that the Beneficiary Declaration is "erroneous, misleading and false" is an opinion based upon the absence of other information an expert in the mortgage lending industry would expect to file if the Declaration were true. This is also a comment based on the contradictory statements made by Respondents' own witnesses. Certainly, this statement should not have influenced the trial court's contrary conclusion, should the evidence have warranted the conclusion.

M. Mr. Stephenson's reference to MERS' ineligibility is merely a restatement of a case a reasonably competent mortgage lender in Washington should know. Moreover, Mr. Stephenson correctly recites the outcome of *Bain*, where the court holds, at page 99: "if MERS never 'held the promissory note,' then it is not a 'lawful beneficiary'". The trial court was not misled by Mr. Stephenson's reference to *Bain* because the trial court could have read and understood the consequences of the *Bain* decision for itself.

N. Mr. Stephenson's comment regarding the lack of evidence to support the existence of an agency relationship is not necessarily a legal opinion. The existence of language creating an agency relationship within a document generally relied upon by mortgage lenders in this state is a comment on the evidence that an expert in the mortgage lending industry can make under *ER 703* and *ER 704*. Certainly, this statement would not have influenced the trial court's contrary conclusion, should the evidence have warranted the conclusion.

O. Mr. Stephenson's comments with regard to the Appointment of Successor Trustee are merely a comment on the lack of evidence to support the appointment. *ER 703*. Specifically, Mr. Stephenson comments on the lack of evidence of transfer to Chase that would support the conclusion that Chase did not have the authority to appoint NWTS as successor trustee. This is certainly within the range of comments warranted by *ER 704*.

P. Finally, Mr. Stephenson's conclusion that NWTS was not properly appointed and acted without authority follows from his review of the information, or lack thereof, to support Respondents' contrary assertions. This is nothing more than a comment on an ultimate fact – not a legal conclusion. *ER 704*. And, as noted above, these statements should not have adversely influenced the trial court's

contrary conclusion, should the evidence have warranted the conclusion.

In sum, Mr. Stephenson's statements generally reflect comments on the evidence or lack thereof, his conclusions, based on the evidence or lack thereof, and comments as to ultimate facts, which are permissible under *ER 703* and *ER 704*. Moreover, given these statements are being offered to the trial court, rather than a jury, in a civil matter, rather than a criminal matter, it is unlikely that Respondents would have been prejudiced in any way. There was no jury involved here to be improperly swayed or confused, no potential due process violations and no potential jail sentence in the balance. Accordingly, the trial court should have considered the testimony to Tim Stephenson on summary judgment.

D. Material Defects in the Deed of Trust.

The subject Deed of Trust names as the original trustee "JOAN H. ANDERSON, EVP ON BEHALF OF FLAGSTAR BANK, FSB." Unfortunately, Ms. Anderson does not meet any of the criteria set forth in *RCW 61.24.010*.

In response to Ms. Bavand's challenge to the propriety of Ms. Anderson's designation as a trustee, Respondents argued to the trial court that "employees, agents or subsidiaries of beneficiaries" can serve as trustee, based upon 1975 amendments to the DTA. However, at the time Ms.

Anderson was appointed trustee, the beneficiary of the Deed of Trust was Capital Mortgage Corporation or, arguably MERS, acting as nominee for Capital Mortgage Corporation – not Flagstar. According to Ms. Mahony, if her testimony can be believed, Flagstar didn't become a "beneficiary" until April 4, 2004, approximately seventeen days after the execution of the subject Deed of Trust. Therefore, at the time Ms. Anderson was appointed by Capital Mortgage Corporation, there is no credible evidence that: (1) either she or Flagstar was the named beneficiary of the Note and Deed of Trust; (2) either she or Flagstar was an employee, agent, or subsidiary of Capital Mortgage Corporation; or (3) either she or Flagstar were otherwise qualified to act as a trustee under *RCW 61.24.010*.² On this basis, there were genuine issues of material fact before the trial court as to whether the subject Deed of Trust was valid at the time of its execution, given the apparent defect in the qualification of the alleged trustee and the ineligibility of the purported beneficiary: MERS. See *RCW 61.24.010* and *Bain v. Metropolitan Mortgage Group*, 176 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*").

² In this regard, it is important to note that that Flagstar endorsed the subject Note in blank, thus divesting itself of any and all interest in the Note, under *RCW 62A.3-203*. The endorsement was not dated, so there was no way to determine if the endorsement was affixed prior to, contemporaneously with or after the sale of the obligation to Fannie Mae. Arguably, this endorsement rebuts Flagstar's assertion that it was a "holder" of the obligation at any time relevant to this cause of action – a material issue of fact in dispute between the parties.

E. **Wrongful Foreclosure/Violation of the DTA.**

i. **Respondents' Reliance on Repudiated Federal Trial Court Decisions and State Case Law.**

On summary judgment, Respondents and, presumptively, the trial court, erroneously relied on a number of federal trial court decisions that have been largely repudiated by more recent Washington state appellate cases. Specifically, Respondents relied on the progeny of *Vawter v. Quality Loan Service Corp*, 707 F.Supp.2d 1115 (2012), among others. Many of these cases are on appeal. However, Respondents' reliance on these federal trial court decisions and their progeny was misplaced as having been repudiated in *Bain*, at page 109, *Walker*, at pages 310-312 and *Bavand*, at pages 496-497. In fact, the cases cited by Respondents to the trial court are even contrary to more recent decisions by the U.S. District Court. See *Knecht v. Fidelity National Title Insurance Co., et al.*, U.S. District Court Case No. C12-1575 RAJ (2014 U.S. Dist. LEXIS 113131) (hereinafter "*Knecht*"), attached hereto at *Appendix "A"*. Moreover, Respondents' relied on a number of Washington state appellate decision that were decided before *Bain*, *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) (hereinafter "*Klem*"), *Schroeder*, *Walker* and *Bavand*. Clearly, the cases cited by Respondents should not have been weighed by the trial court at hearing.

ii. **Strict Compliance with DTA Required.**

In reviewing Respondents conduct, it must be kept in mind that the

Washington Supreme Court has often stated that the DTA must be strictly complied with and construed in the borrower's favor. *Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (hereinafter "*Albice*") (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007)); *Bain*, at page 93; *Schroeder*, at page 105. See also *In re Fritz*, 225 BR 218 (E.D. Wash. 1997); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988); *Walker*, at page 306; *Bavand*, at pages 485-486. Substantial compliance with the statutory provisions of the DTA is not enough. Strict compliance with the provisions of the DTA and construction of the statute in favor of the borrower is necessary and justified because "of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Klem* at page 789.

Here, there are numerous issues of material fact as to whether Respondents strictly complied with the provisions of the DTA.

iii. **Only the true and lawful owner and holder of a Note and Deed of Trust can initiate a non-judicial foreclosure.**

Under the DTA, only the duly authorized "beneficiary" has the right to declare a default, under *RCW 61.24.030(8)(c)*, or appoint a successor trustee, under *RCW 61.24.010(2)*.

RCW 61.24.005(2) defines the term "beneficiary" as the "holder of the instrument or document evidencing the obligations secured by the deed of

trust, excluding persons holding the same as security for a different obligation.” As the court in *Bain* noted, the definition of “note-holder” has remained unchanged since the definitions were added to the DTA in 1998, and is consistent with certain portions, but not all, of *RCW 62A., et seq.*, (hereinafter “the UCC”), as adopted by the Washington legislature.³ *Bain*, at pages 103-104. Under *RCW 62A.3-301*, the person entitled to enforce the terms of a promissory note is the holder, a non-holder in possession, or transferee who obtains the right to enforce pursuant to *RCW 62A.3-309* or *RCW 62A.3-418(d)*. However, the DTA does not use all of the Article 3 language regarding who may enforce.⁴ The DTA only refers to “the holder of the note or other obligation.” *RCW 61.24.005(2)*. Significantly, there is nothing in the DTA that would allow a non-holder, who might otherwise be able to enforce the terms of a note through other means under Article 3, to enforce the terms of the note through the initiation of a non-judicial foreclosure. *RCW 61.24.005(2)*. Rather, it appears the legislature has

³ This is not to suggest the Article 9 of the UCC does not come into play when analyzing a secured transaction, such as the one now before the Court – it does. Moreover, the *Bain* court emphasized the terms “actual holder” to suggest that the term has a more specific and limited meaning under the DTA than would be generally presumed under the UCC.

⁴ In her Declaration, counsel for JP Morgan Chase, Fannie Mae and MERS offers this Court a November 2011 Report from the Editorial Board of the UCC. CP 1532-1551. The comments of the Editorial Board have not been adopted by the Washington legislature, have not been cited as authority by any Washington appellate court and were issued prior to *Bain*, *Klem*, *Schroeder*, *Walker* and *Bavand*, and, accordingly, do not represent Washington law on the issues. To the extent the trial court relied on these materials, it did so erroneously.

specifically limited who may initiate a non-judicial foreclosure under the DTA and, until 2009, that was solely and exclusively the note-holder. *RCW 61.24.005(2)*. But, as noted by the Supreme Court in *Bain*, focus is on the “actual holder”, which clearly differs from the foregoing UCC definitions. *Bain*, at pages 104 (“thus a beneficiary must either actually possess the promissory note or be the payee.”); *RCW 61.24.030(7)(a)*.

However, the trial court did not need to resort to the UCC. The Note signed by Ms. Bavand on or about March 18, 2004 contains a specific definition of “Note Holder” and states that the Note Holder is the party “entitled to payments under this Note.” CP 1853-1856. If it is true that Capital Mortgage Corporation sold the Note to Fannie Mae on or about April 4, 2004, then the contractual definition of the “Note Holder” governs and Fannie Mae, who supposedly paid consideration for the loan, would be the entity “entitled” to mortgage payments, the only party entitled to declare Ms. Bavand in default and otherwise entitled to exercise all the other rights and privileges described in the loan documents and the DTA. Since the “Note Holder” is specifically defined within the parties’ contract (the Note), the trial court did not need to resort to any other body of law, including the DTA or the UCC, for the definition of “Note Holder.” *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990); *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164

Wn.2d 411, 425, 191 P.3d 866 (2008); *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 734 P.2d 17 (1987).

However, in 2009, the legislature amended the DTA to require certain sensitive actions in the foreclosure process be only undertaken by the “owner” of the note. See *RCW 61.24.030(7)(a)* and *(b)*, *RCW 61.24.030(8)(l)* and *RCW 61.24.163(5)(c)*. Drawing on these changes in the DTA, the *Bain* court specifically held that “if the original lender had sold the loan, the purchaser (arguably Fannie Mae in this case) would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.” *Bain*, at page 111. The *Bain* court’s emphasis was on the ownership of the obligation and saw the right to hold the note as an incident of ownership. To illustrate this point, the *Bain* court cited to *RCW 61.24.030(7)(a)*, which 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).

But *RCW 61.24.030(7)* is not the only provision found in the Deed of Trust Act in which the terms “beneficiary”, “owner” and “holder” are equated. Please see *RCW 61.24.040(2)*, which has been in force since 1998:

(2) In addition to providing the borrower and grantor the notice of sale described in subsection (1)(f) of this section, the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

NOTICE OF FORECLOSURE

Pursuant to the Revised Code of Washington, Chapter 61.24 RCW

- The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to, the **Beneficiary** of your Deed of Trust and **owner** of the obligation secured thereby. (Emphasis added)

Similar language is found in *RCW 61.24.163(5)(c)*.

There is no reasonable way to read *Bain* and the statutory provisions cited above 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.⁵ *RCW 61.24.030* and *RCW 61.24.010*.

⁵ It is important to note that in this case, the provisions of *RCW 61.24.030(7)* requiring the trustee “have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust” were in effect at the time the notice of trustee’s sale was issued on May 10, 2012, unlike the situation addressed by the court in *Walker*, where the notice of trustee’s sale was issued on July 21, 2009 and apparently prior to the effective date of the current statutory requirements. See CP 1680-1683.

It is Ms. Bavand's position that Respondents misrepresented the identity of the owner and holder of her loan in a clear attempt (conspiracy) to frustrate her efforts to contact her lender directly to modify or renegotiate her loan – an issue the *Bain* court believed to be of vital importance to property owners in foreclosure like Ms. Bavand. See *Bain*, at page 119.

In contradiction to the foregoing argument, this Court has recently addressed the issue in *Trujillo v. Northwest Trustees Services, Inc.*, --- Wn.App. ---, 326 P.3d 768 (2014) (hereinafter "*Trujillo*").⁶ However, *Trujillo* is not dispositive and is distinguishable from the facts of the present controversy.

First, *Trujillo* was reviewed under the standard of *CR 12(b)(6)* and this case involves a summary judgment by the trial court under *CR 56*. In *Trujillo*, the facts were apparently undisputed or "presumed." But here, Ms. Bavand challenged everything: the validity, veracity, form and substance of all of the documents relied upon by the Respondents to foreclose on her home, as well as the declarations filed in support of the Respondents' motion for summary judgment.

Second, since the *Trujillo* court decided the case on a pure question of law, its interpretation of *RCW 61.24.030(7)(a)* was sharply focused and must be examined for compliance with the rules of statutory construction. *Trujillo*

⁶ References to *Trujillo* are to the published opinion of June 2, 2014, a copy of which is attached hereto at *Appendix "B"*.

held that a party's status as holder is dispositive on the question of who had authority to enforce the a note and that ownership is largely irrelevant for purposes of enforcement and discharge. The logical question raised by this holding is this: if that were the case, why did the legislature, in amending the DTA, decide to include the first sentence of *RCW 61.24.030(7)(a)*, requiring the trustee to "have proof that the beneficiary is the owner", as it did? The *Trujillo* court had no answer. Unable to harmonize the provision of *RCW 61.24.030(7)*, the *Trujillo* court entirely ignored the first sentence of *RCW 61.24.030(7)(a)* in favor of the second sentence that permits the trustee to rely only upon a declaration that the beneficiary is the holder: "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 17. This violates all established rules of statutory construction.

In *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310-311, 237 P.3d 256 (2012), the Supreme Court reversed the Court of Appeals on the ground of faulty statutory construction:

Turning first to the question of the purpose of the local BNG tax, the Court of Appeals declined to consider any expression of legislative intent, stating that it could not "resort to extrinsic sources in interpreting a statute unless we find more than one reasonable interpretation of the statutory language." We have previously criticized such a crabbed notion of statutory interpretation, holding instead that a statute's plain meaning should be "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Moreover, an enacted statement of legislative purpose is included in a plain reading of a statute.

Id., (internal citations omitted).

Follow the Supreme Court’s mandate set out above, the plain reading of *RCW 61.24.030(7)(a)* provides that the primary requirement is proof of ownership. To fulfill this requirement and assuming that the trustee acts in good faith, the trustee may accept a declaration from the entity who can swear that ownership is genuine and provable *via* “actual holder” status. The primary proof requirement of ownership comports with the Legislature’s concerns that the mass securitization of mortgage loans leads, and in fact has led, to many unscrupulous practices where the loan servicers and other third-parties, who have no skin in the game, process foreclosures on an assembly line in total disregard for proof of ownership and the concerns of the *Bain* court for accountability and access to effective dispute resolution. *Bain* at pages 97, 103 and 118. As noted above, mortgage lenders and their agents must strictly comply with the DTA in the borrower's favor – all of the language in the DTA. *Albice*, at page 568 and *Schroeder*. See also *State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996) (when interpreting a statute, court will assume that the “legislature did not intend to create an inconsistency”).

Third, the *Trujillo* court erroneously relied on *Davis v. Cedar Glen # Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969). Unlike this case and *Trujillo*, *Davis* involved a dispute pre-dated adoption of the UCC. Moreover,

unlike *Trujillo* court and this matter, the foreclosing party in *Davis* was, in fact, both the owner and the holder of the obligation.

Unlike the *Trujillo* court's interpretation, Ms. Bavand's interpretation of *RCW 61.24.030(7)* harmonizes the first and second sentences and gives effect to all the language adopted by the legislature. Under Ms. Bavand's interpretation, the second sentence does not create an exception to the proof of ownership requirement in the first sentence; rather, the second sentence allows the trustee to rely on a beneficiary's declaration as a proxy to meet the proof of ownership requirement in the first sentence. By a plain reading of *RCW 61.24.070(3)*, a trustee is allowed to rely on an "actual holder" declaration when it can do so in good faith, but not when it knows or should by investigation know that the beneficiary is not the owner of the note or has taken no action to investigate the issue.

Finally, Ms. Bavand urges this Court to consider that its decision in *Trujillo* was demonstrably incorrect or harmful and, therefore, does not constitute binding precedent on this case. In *King v. W. United Assurance Co.*, 100 Wn. App. 556, 561, 997 P.2d 1007 (2000), the court declined to follow its own precedent in *Castronuevo v. Gen. Acceptance Corp.*, 79 Wn. App. 747, 905 P.2d 387 (1995), because its holding "conflicts with the statutory scheme set forth by the Legislature and inequitably shields a promisor from liability for attorney's fees in the context of an unmeritorious

action on a note brought under the usury statute.” The Supreme Court similarly approved the court of appeal’s approach to overruling a previous decision based on legal and equitable considerations. *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002).

Ms. Bavand respectfully submits that *Trujillo* was incorrect as to the statutory construction applied by the Court and is distinguishable from the facts of this dispute. Aside from the broad and unequivocal legislative mandate that the non-judicial foreclosure process strictly comply with the statutory mandates, be transparent and the parties who have a direct stake in the loan transaction be identified so that they can engage in a meaningful discussion, the Court was required to harmonize the two sentences of *RCW 61.24.030(7)(a)* together where the conclusion is certain: where **A [Owner] = B [Beneficiary] and B [Beneficiary] = C [Holder]; ergo: A [Owner] should equal C [Holder]**. This is incontrovertible logic.

Once the application of *Trujillo* is addressed and over-come and the Court reviews the evidence before it, there is a genuine issue of material fact as to who might be the true and lawful owner and holder of the subject obligation. As Mr. Tim Stephenson declares in his Declaration of February 13, 2014:

21. It is my expert opinion that Fannie Mae is not the owner, or beneficiary of the Deed of Trust, of the subject loan. Fannie Mae's role is merely as "Trustee on behalf of the Certificates of the Guaranteed Mortgage Pass-Through Certificates, Pool Number 773853, CUSIP 31404NWN2". **This "Trust" would be the beneficiary, or owner, of the subject loan.**

CP 1382. (Emphasis added)

Mr. Stephenson's testimony is clear: the owner and holder of the subject obligation is held in the FNMA Guaranteed Mortgage Pass-Through Certificates, Pool Number 773853, CUSIP 31404NWN2" (hereinafter "the Trust"). Although both Ms. Mahony and Ms. Mullen identify Fannie Mae as the "owner" of the obligation, they fail to qualify Fannie Mae's status as trustee for the Trust or otherwise acknowledge the Trust's apparent ownership of Ms. Bavand's Note and Deed of Trust. Based upon Mr. Stephenson's testimony, Fannie Mae is apparently nothing more than a trustee/servicer for the Trust.

But even assuming the testimony of Ms. Mahony and Ms. Mullen to be accurate, which Ms. Bavand does not, there is no credible evidence before this Court of any assignment of this obligation to Fannie Mae, either as principal or as trustee for the Trust, as the Flagstar endorsement appears on a separate page, unrelated to the Note, is undated and in blank. CP 1505. The Assignment of Deed of Trust of February 1, 2011 purports to convey the obligation from MERS to Chase Finance – not to Fannie Mae

or the Trust. CP 1885. The Corporate Assignment of Deed of Trust of December 21, 2011, purports to convey the obligation from MERS to JP Morgan Chase – not to Fannie Mae or the Trust. CP 1437. None of these conveyances convey the obligation to either Fannie Mae or the Trust. There is no credible evidence before the Court that Flagstar, Chase Finance or JP Morgan Chase purchased this obligation, beyond the conclusory statements of Ms. Mahony and Ms. Mullen. As Mr. Stephenson states: “[w]ith the information provided by the foreclosing party, it is yet unknown what role JP Morgan Chase, Chase Home Finance, Chase Bank, or any affiliate of Chase is playing in this transaction, if any. . . .” CP 1383. In part, this is the result of selective production of information or the non-existence of evidence of authority by Respondents’ and their failure to reveal the Trust’s ownership of the obligation, a justifiable basis for Ms. Bavand’s request for additional discovery under *CR 56(f)*. In any event, there are material issues of fact in dispute concerning the ownership of the obligation, the named Respondents’ status and their authority to act on behalf of the Trust.

If the Trust is the true and lawful owner and holder of the obligation, the Trust is the only entity that can declare Plaintiff to be in

default (*RCW 61.24.030*).⁷ Unfortunately, there is no credible evidence adduced to date to suggest that Fannie Mae, as trustee, or the Trust ever declared Ms. Bavand to be in default, as required under *RCW 61.24.030(8)(c)*. In fact, the Notice of Default of February 1, 2011 wrongfully suggests that Chase Finance, as “owner” and “holder” of the obligation, and was the party who has declared Ms. Bavand to be in default. CP 1426-1428. This suggestion of “ownership” with right to declare Ms. Bavand in default was both false and an attempt to mislead Ms. Bavand and is rebutted by JP Morgan Chase’s and Chase Finance’s own witness, Ms. Mullen, who testifies that the loan was sold to Fannie Mae on April 8, 2004, seven years before the Notice of Default was prepared and served, and that Chase was merely acting as a servicer for Fannie Mae. CP 1554. Well, even this is not exactly accurate. Based on Mr. Stephenson’s review of the record, Chase services the loan for Fannie Mae, as trustee for the Trust – the real-party-in-interest and the entity with any “skin in the game.”

The Beneficiary’s Declaration of January 26, 2012, attached as Exhibit H to Ms. Mullen’s Declaration, carries on the fiction by identifying

⁷ Under the DTA, there is a difference between failing to make payment and being in default. One can fail to make payment without being declared in default. Under *RCW 61.24.030(8)(c)*, only the owner and holder of the obligation (the beneficiary) has the right to declare a borrower to be in default.

JP Morgan Chase as the “beneficiary”. CP 1599. But, in the Notice of Trustee’s Sale, Chase Finance – not JP Morgan Chase - is again referred to as the “beneficiary” who declared Ms. Bavand to be in default. CP 1601-1604.

Neither JP Morgan Chase nor Chase Finance had any authority to declare Ms. Bavand to be in default under *RCW 61.24.030* and there is no credible evidence presented by Respondents that the true and lawful owner and holder of the subject obligation (the Trust) ever made any such declaration.

Finally, there is no credible evidenced offered by Respondents that Fannie Mae, as trustee, or the Trust were ever consulted or approved the actions of the Respondents against Ms. Bavand.

In sum, Respondents have used false and misleading representations and fraudulently prepared documentation to conduct a sham foreclosure of Ms. Bavand’s property without first obtaining the express authority to so act from the true and lawful owner and holder of the obligation. At the very least, the foregoing raises material issues of disputed fact that should have militated against the trial court’s summary judgment.

iv. **Only a duly authorized trustee may initiate a non-judicial foreclosure.**

In Washington, only a lawful beneficiary of a deed of trust has the power to appoint a successor trustee under *RCW 61.24.010(2)*, and only a lawfully appointed successor trustee has the authority to foreclose a deed of trust. *Walker*, at page 306 (citing *Bain*, at page 89, and *RCW 61.24.010*); *Bavand*, at pages 486-487. As noted by this Court in *Walker*, “when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale.” *Walker*, at page 306.

Here, there is no credible proof that JP Morgan Chase or Chase Finance were “beneficiaries”, “owners” or “holders” of the obligation or had otherwise obtained the express authorization to act on behalf of the Trust at the time the Appointment of Successor Trustee was executed and recorded.⁸ Accordingly, absent status as a beneficiary or proof of authority, all actions taken by NWTs, based upon JP Morgan Chase’s or Chase Finance’s Appointments of Successor Trustee, were unlawful. *Walker*, at page 306; *Bavand*, at page 488.

⁸ It is significant to note that it is unclear as to who may have actual possession of Plaintiff’s Note and Deed of Trust at the time of the Appointment of Successor Trustee – another issue of fact in dispute.

v. **NWTS failed to comply with the DTA and its fiduciary duty of good faith.**

Notwithstanding serious doubts whether any named Respondent had standing as a qualified “beneficiary” to initiate a non-judicial foreclosure against Ms. Bavand and the lawfulness of JP Morgan Chase’s or Chase Finance’s appointment of NWTS as successor trustee, there are genuine issues of material fact raised on summary judgment as to whether NWTS breached its fiduciary duty of good faith to Ms. Bavand. See *Klem*, at page 790.

NWTS breached its fiduciary duty to Ms. Bavand by engaging in an unethical process of unreasonably relying upon documents it knew or should have known to be false and misleading. By (1) relying on a Deed of Trust in which the original trustee was patently unqualified and the beneficiary was ineligible; (2) relying on an undated endorsement by Flagstar (an endorsement that does not appear to have been “affixed” to the Note) that was inconsistent with its claim of status, either as owner, holder, servicer or investor; (3) ignoring the competing claims of JP Morgan Chase and Chase Finance to status as “beneficiary” on the face of contradictory beneficiary declarations; (4) failing to verify the ownership of the obligation; (5) relying on improperly dated and notarized documents and multiple assignments of Ms. Bavand’s Note and Deed of Trust (that in at least one instance was executed by NWTS itself), without seeking the express authority from the

true and lawful owner and holder of the obligation; 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.

NWTS failed to verify the ownership of the obligation, in violation of its duty under *RCW 61.24.030(7)(a)*. While a trustee may ordinarily rely on a beneficiary declaration to initiate a non-judicial foreclosure under *RCW 61.24.030(7)*, it cannot so rely on such a declaration where the trustee is presented with conflicting assertions of beneficiary status – one indicating that Chase Financial is the beneficiary, the other indicating that JP Morgan Chase is the beneficiary – or has actual knowledge or should have known that the “owner” of the obligation (the Trust) and entity purportedly in possession of the note and deed of trust (Flagstar, Chase Finance or JP Morgan Chase) are separate and unaffiliated entities, as is the case here. Moreover, when confronted with documents that identify different entities as “beneficiary”, the trustee can no longer rely on the Beneficiary’s Declaration and has a duty to verify its information and be sure that the documents properly reflect the proper parties and are properly dated and notarized. However, it is a fact that NWTS has no procedures in place to verify the information it obtains from its “clients” and, therefore, could not

comply with its statutory mandate. See *In re Meyer*, 506 B.R. 533 (2014), at page 539.

Moreover, the documents prepared by NWTS materially misrepresented the facts and materially failed to comply with portions of the DTA.

First, the Notice of Default deceptively and deliberately confused the “beneficiary” with the “note owner” and the “note holder”, as the terms are defined under the DTA. Specifically, the Notice of Default identifies the “beneficiary (Note Owner)” as “Chase Home Finance LLC.” NWTS knew or should have known that “Chase Home Finance LLC” was not the true and lawful owner or holder of the subject Note and Deed of Trust on February 1, 2011. Moreover, the Notice of Default does not identify the “note holder”, as the term is defined in the DTA, using instead the terms “beneficiary” and “note owner”. Finally, the Notice of Default fails to include any “Beneficiary Declaration” upon which it might rely to establish its authority to commence a non-judicial foreclosure as required under the DTA.

Second, the Notice of Foreclosure issued by NWTS on or about May 2, 2012 fails to comply with statutory form provided in *RCW 61.24.040(2)*, by failing to specifically identify the “owner of the obligation secured thereby.”⁹ CP. 1961-1962. While it could be argued that the language

⁹ The Notice of Foreclosure provides “The attached Notice of Trustee’s Sale is a consequence of default(s) in the obligation to the Beneficiary of your Deed of

employed by NWTS in the subject Notice of Foreclosure “substantially” complies with *RCW 61.24.040(2)*, substantial compliance is not sufficient. Strict compliance with the DTA is mandatory. *Albice, Bain*, at page 93; *Schroeder*, at page 105; *In re Fritz, supra*; *Koegel v. Prudential Mut. Sav. Bank, supra*; *Walker*, at page 306; *Bavand*, at pages 485-486. The failure to identify the owner of the obligation in the Notice of Foreclosure is significant because it was yet another means by which Respondents attempted to conceal the ownership of the obligation to frustrate Ms. Bavand’s attempt to “resolve the dispute”. See *Bain*, at page 118.

Third, NWTS appears to have engaged in a practice of falsely dating mandated foreclosure documents. Specifically, the Notice of Trustee’s Sale was executed by Winston Khan of NWTS “effective” May 2, 2012, but not notarized until May 8, 2012. CP 1957-1960. This misconduct was specifically addressed in *Klem*,¹⁰ where the Washington State Supreme Court held that the act of false dating by a notary employee of the trustee in a non-judicial foreclosure constitutes a misdemeanor under *RCW 42.44.160* and

Trust and owner of the obligation secured thereby.” CP 1961-1962. Completely left out of this Notice is any identification of the beneficiary or owner specifically being referred to, leaving Ms. Bavand to believe that Chase Financial who is misidentified as the “owner” in the Notice of Default, is the entity now being referred to in the Notice of Trustee’s Sale and Notice of Foreclosure.

¹⁰ While the *Klem* Court specifically addressed the issue of “pre-dating” notarial signatures, this case involves the “post-dating” of notarial signatures. Under *RCW 42.44* there should be no distinction between the two forms of misconduct for purposes of this Court’s analysis of NWTS’ actions and for purposes of evaluating Ms. Bavand’s claims under *RCW 19.86*.

constitutes an unfair and deceptive act and practice and satisfies the first three elements of a claim under *RCW 19.86, et seq. Klem*, at pages 792-795. As noted by the *Klem* court: “the court does not take lightly the importance of a notary’s obligation to verify the signor’s identity and the date of signing by having the signature performed in the notary’s presence.” *Klem* at page 793, citing *Werner v. Wener*, 84 Wn.2d 360, 526 P.2d 370 (1974). Clearly, Mr. Khan’s signature was affixed on the Notice of Trustee’s Sale before the notary in this case; otherwise the “effective” date of execution and the date of the notary would be the same.

NWTS argued on summary judgment that use of the term “effective date” refers to the date of drafting. CP 315-317. However, this explanation makes no sense. NWTS’ use of the term has no statutory basis within the DTA and deviates from the form adopted by the Washington Legislature in *RCW 61.24.040(f)*. Moreover, one of the primary definitions of the term “effective” is to “execute”. See Black’s Law Dictionary, 4th Ed., Rev. (1968). A similar definition is found elsewhere: “concerning with, or having the function of, carrying into effect, executing, or accomplishing. . . .” Oxford English Dictionary, Oxford Press (1979). None of these definitions would support NWTS’ definition of the term. NWTS’ explanation of its use of the term “effective” is suspect and draws NWTS’ credibility into question. Such questions should never be resolved on summary judgment. *Balise v. Underwood*, *supra*.

Finally, when NWTS executed the Notice of Default, it did so as the “duly authorized agent” of Chase Finance. CP 1949-1951. This Notice of Default was executed on the same day that NWTS was appointed successor trustee. If NWTS was acting as the “agent” of Chase Finance on February 1, 2011 at the same time it is appointed successor trustee, how could it exercise its fiduciary “duty of good faith to the borrower, beneficiary, and grantor”? It couldn’t. There is an inherent conflict of interest. This is the very issue at the heart of *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985), where the Washington Supreme Court noted: “a trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.” NWTS’ claim of an agency relationship with the “lender”/“servicer” and its role as successor trustee are mutually exclusive and inconsistent with fiduciary duty of good faith expected of trustee’s under *RCW 61.24.010*.

Based upon the foregoing, there were clear issues of material fact before the trial court regarding Respondents’ compliance with the provisions of the DTA and NWTS’ fulfillment of its fiduciary duties of good faith.

F. Violation of CPA.

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105

Wn.2d 778, 719 P.2d 531 (1986) (hereinafter "*Hangman Ridge*"). The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920*; *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984).

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pages 115-120. Here, MERS took action by wrongfully issuing the Assignment of Deed of Trust, upon which other Respondents relied, when it had no apparent authority to do so. CP 1885. The *Bain* court specifically ruled that the unfair and deceptive act or practice element can be presumed based upon MERS' business model and the manner in which it has been used.¹¹ *Bain* at pages 115-117; *Klem*, at pages 784-788; *Walker*, at pages 318-319 and *Bavand*, at pages 504-506. Indeed, the improper assignment and appointment of NWTS, among other violations of the DTA alleged herein, constitute unfair and deceptive acts or practices. *Walker*, at pages 319-320, and *Bavand*, at page 505.

The *Bain* court specifically ruled that the public interest impact element can also be presumed based on the number of mortgages that

¹¹ This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem*.

utilized MERS as a nominee for an undisclosed principal. *Bain*, at page 118; *Bavand*, at pages 506-507.

Although the *Bain* court did not specifically address the trade or commerce element, that could also be presumed from the court's analysis of the public interest element. See *Walker*, at page 318. All of the named Respondents are in the business of making or servicing loans for hundreds, if not thousands, of businesses and residents in the State of Washington. See *Bain*, at page 118.

In sum, the only elements that cannot be presumed in a typical MERS case are the fourth and fifth elements: the elements of damages/injury and causation. Thus, on summary judgment, Ms. Bavand needed only to allege facts regarding the fourth and fifth elements of a CPA claim by asserting her claims of injury/damages and causation.

As to the damages/injury and causation elements of a CPA claim, the analysis set forth in *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009) is the most useful to the present case, because it also involved improper efforts to collect on a debt. There the Washington Supreme Court held that:

Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *NW. Airlines, Inc. v. Ticket Exch., Inc.*, (proof of injury satisfied by "stowaway theory" where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Fisons*, (damage to professional reputation);

Sorrel v. Eagle Healthcare, Inc., (injury by delay in refund of money); *Webb v. Ray*, (loss of use of property).

Panag at pages 58. (internal citations omitted). The *Panag* analysis was cited with approval by this Court in *Walker*, at page 320, and *Bavand*, at pages 508-509. Thus, “investigation expenses and other costs” establish injury and are compensable under a CPA claim. *Panag* at page 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association v. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), and *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one’s credit reputation constitutes injury).

In addition to her claims for declaratory relief, injunctive relief and damages, Ms. Bavand claims that by concealing the April 8, 2004 sale of the loan to the Trust, the Respondents have deceived and prevented her from meaningfully pursuing her options under the federal Home Affordable Modification Program (HAMP). In particular by failing to disclose the sale and the existence of an agent-principal relationship, Ms. Bavand was not aware of her full legal rights. Had Ms. Bavand known that Fannie Mae, as trustee, and the Trust owned her loan, she could have pursued Fannie Mae sponsored programs that might have provided her a modification of her loan. Ms. Bavand did not become aware of Fannie Mae’s involvement until

receiving a copy of Ms. Mahony's Declaration on January 28, 2014 and confirmation of the fact with the Declaration of Tim Stephenson on February 13, 2014. By that time Ms. Bavand owed tens of thousands of dollars in payments, late fees and costs, making any modification problematic.

Specifically, as a direct and proximate result of Respondents' misconduct, Ms. Bavand suffered damages in excess of \$10,357.00. CP 1394-1395.

In addition to incurring damages, Ms. Bavand has suffered injury through (1) the threat of losing all of her equity in her property without compensation, (2) a substantial reduction of her ability to sell the house as a result of the recording of the Notice of Trustee's Sale; (3) a substantial reduction in any equity to borrow against as a result of the recording of the Notice of Trustee's Sale; (4) injury to her credit as a result of Respondents' unlawful acts, and (5) the inability to take full advantage of the protections of the federally mandated HAMP program and the FFA; and (6) consequential injury arising from the wrongful foreclosure action. CP 1394-1395.

Injury to a person's business or property is broadly construed and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem*. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are

sufficient proof of an injury under *Hangman Ridge. Panag*, at pages 59-65. Here, the subject property is a rental, a source of business income and Ms. Bavand had to repeatedly take time off from her work schedule at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of her Note and to address Respondents' misconduct. CP 1387-1396.

All of the injuries and damages alleged by Ms. Bavand were the direct and proximate cause of Respondents' misconduct and viewing the evidence in a light most favorable to the non-moving party, Ms. Bavand's testimony, the testimony of Tim Stephenson and all inferences that could be inferred therefrom, all five elements for a private cause of action under the CPA were met on summary judgment.

G. Violation of RCW 9A.82.

There is little Washington law construing the civil limits of *RCW 9A.82*, but the statute has been applied to misconduct associated with the DTA. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999).

While Plaintiff expects the Court to respond incredulously at the suggestion that well-heeled banks, mortgage lending and servicing companies could be accused of "racketeering", the allegations contained in Plaintiff's Declaration of February 12, 2014, her verified Complaint, and the Declaration

of Tim Stephenson, which the Court was obliged to accept as true under *CR 56*, clearly establish such a claim. CP 1368-1386, 1387-1449, 1834-1976.

Proof that these unscrupulous lending behaviors, as is amply documented in the cases offered by Ms. Bavand herein: *Bain, Klem, Schroeder, Walker, Bavand, Knecht*, etc. See also the materials attached to the Declaration of Counsel, submitted herewith. CP 349-1369. The facts plead in *Bain, Walker, Bavand, Klem, Schroeder* and *Knecht* are enough to establish a pattern of felonious misconduct with these lending practices, had the claim been plead, to fulfill *RCW 9A.82.010* and *RCW 9A.82.100*, and are present in this case. First, Respondents attempted to collect a debt for which they have no lawful interest constitutes a violation of *RCW 9A.82.045*. Second, Respondents' efforts in demanding payment on a debt to which they have no lawful interest and threatening to take Ms. Bavand's property by non-judicial means constitutes extortion, within the terms of *RCW 9A.56.120* and *RCW 9A.56.130*. See also *RCW 9A.04.110(27)(j)*. Third, the pattern of misconduct alleged herein is the similar to what others in the State of Washington in Ms. Bavand's position suffer. See *Bain, Walker, Bavand, Klem, Schroeder* and *Knecht*. The pervasiveness of MERS transactions in the mortgage lending marketplace were noted by the *Bain* court at page 118. The misconduct of the servicers takes on fairly predictable patterns as they are intentionally transacted as "cookie cutter" transactions to lower costs and speed the process. See *Bain, Klem, Schroeder, Walker, Bavand*, etc.

The foregoing all raise issues of material fact that militate against the trial court's summary judgment on this claim.

H. Application of CR 56(f).

Finally, to the extent that there remained discovery that needed to be done, particularly in view of the recent disclosure that the Trust is the owner and holder of the obligation, the boiler-plate objections and computer dumps of information in response to Ms. Bavand's reasonable discovery requests, there was a 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 Respondents, Fannie Mae and the Trust. Despite Ms. Bavand request for additional time to conduct additional discovery, pursuant to *CR 56(f)*, the trial court erroneously refused to grant Ms. Bavand's request.

IV. CONCLUSION

As argued above, there were simply too many genuine issues of material fact in dispute before the trial court for it to have entered summary judgment on Ms. Bavand's claims. The apparent conflicts in the testimony of Ms. Mahony and Ms. Mullen; the issue of who owns and holds the subject obligation, who should be properly characterized as "owners" "holders" "servicers" or "beneficiaries"; questionable, defective and misleading documentation regarding the subject Assignments of Note and Deed of Trust, Appointments of Successor Trustee, Notice of Default, Beneficiary Declarations, Notice of Trustee's Sale and Notice of Foreclosure; and

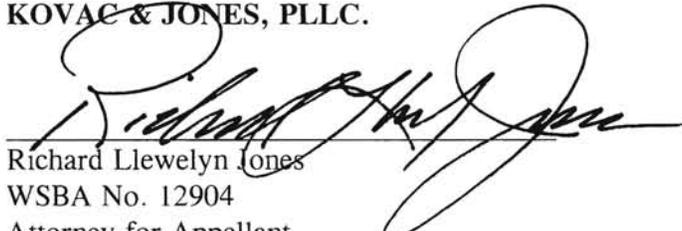
Respondents' right and authority to foreclose and NWTs' compliance with its fiduciary duty of good faith all raise numerous questions of material fact that mitigated against the trial court's entry of summary judgment. Ms. Bavand has always recognized she owes money to someone – just not these Respondents.

The trial court could have mitigated the problems by granting Ms. Bavand's request for time to conduct additional discovery, particularly the recently disclosed involvement of Fannie Mae and the Trust in the transaction, pursuant to *CR 56(f)*. But the trial court refused.

In view of the foregoing, Ms. Bavand respectfully requests this Court: (1) reverse the trial court's Orders of March 26, 2014; (2) remand this matter for trial on the merits; and (3) award Ms. Bavand her taxable costs and reasonable attorney's fees incurred herein, pursuant to *RAP 18.1* and Paragraph 26 of the subject Deed of Trust. CP 1886.

REPECTFULLY SUBMITTED this 18th day of August, 2014.

KOVAC & JONES, PLLC.


Richard Llewelyn Jones
WSBA No. 12904
Attorney for Appellant

APPENDIX

- A. *Knecht v. Fidelity National Title Insurance Co., et al.*, U.S. District Court Case No. C12-1575 RAJ (2014 U.S. Dist. LEXIS 113131).
- B. *Trujillo v. Northwest Trustees Services, Inc.*, --- Wn.App. ---, 326 P.3d 768 (2014).

APPENDIX A

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN KNECHT, et al.,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE
INSURANCE COMPANY, et al.,

Defendants.

CASE NO. C12-1575RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on a motion for summary judgment from Defendants Deutsche Bank National Trust Company (“DB”) and Mortgage Electronic Registration Systems, Inc. (“MERS”), a motion for summary judgment from Defendant Fidelity National Title Insurance Company (“Fidelity”), and a motion for partial summary judgment from Plaintiff John Knecht. The court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS Defendants’ motions in part and DENIES them in part, (Dkt. ## 67, 69) and DENIES Mr. Knecht’s motion (Dkt. # 64). A bench trial on the claims that survive Defendants’ motions will begin on November 12, 2014. A schedule for pretrial submissions concludes this order.

II. BACKGROUND

The court has already considered this dispute in a March 11, 2013 order granting in part and denying in part Defendants’ motions to dismiss. Although the court dismissed

1 some of Mr. Knecht's claims without prejudice, he declined to amend his complaint. The
2 court now considers whether to grant summary judgment on the claims that survived the
3 motions to dismiss: Mr. Knecht's claim for specific violations of the Washington Deed of
4 Trust Act (RCW Ch. 61.24), his claim to enjoin a trustee's sale of his North Bend
5 residential property, his claim for violations of the Washington Consumer Protection Act
6 (RCW Ch. 19.86, "CPA"), and a few claims for declaratory relief.

7 Each of those claims arises from a \$315,000 loan in 2006 from American Brokers
8 Conduit ("ABC") to Mr. Knecht, which is memorialized in an adjustable-rate promissory
9 note. ABC secured that loan with a deed of trust to Mr. Knecht's North Bend residential
10 property. The deed of trust named ABC as the lender, Fidelity National Title Company
11 of Washington (a different entity than Fidelity, the Defendant in this case) as the trustee,
12 and MERS as the beneficiary of the deed of trust. The deed of trust stated that MERS
13 acted "solely as a nominee for [ABC] and [ABC]'s successors and assigns."

14 Mr. Knecht is in default on that loan, which no one disputes. He has been in
15 default since 2010. Mr. Knecht does not dispute that he has not made loan payments
16 since then, and he does not dispute that he cannot afford to pay what he owes.

17 DB and Fidelity have three times attempted to foreclose Mr. Knecht's deed of
18 trust. DB purports to be the owner of Mr. Knecht's note, and thus purports to be the
19 beneficiary entitled to foreclose. It purports to have appointed Fidelity in September
20 2010 as the trustee entitled to conduct the foreclosure, and it was Fidelity who recorded
21 notices of trustee's sales in October 2010, September 2011, and June 2012. Fidelity and
22 DB ultimately abandoned each of these attempted foreclosures. There is no trustee's sale
23 currently pending,¹ although Defendants are conspicuously silent about whether they
24 intend to conduct a sale in the future. It is difficult to imagine that they have any other
25

26
27 ¹ As the court noted in its previous order, the King County Superior Court issued a preliminary
28 injunction enjoining any trustee's sale before Defendants removed the case to this court. Mar.
11, 2013 ord. (Dkt. # 20) at 2-3, 8. No Defendant has asked the court to set aside that injunction.

1 intent. Mr. Knecht is still in default on the loan; it would appear that DB's only means of
2 cutting its losses is to foreclose.

3 The dispute at the core of this dispute requires two critical determinations. First,
4 the court must decide if DB is entitled to summary judgment that it was, throughout its
5 foreclosure efforts, the beneficiary of Mr. Knecht's deed of trust. If it was not, it had no
6 authority to appoint Fidelity as a successor trustee, and Fidelity had no authority to
7 conduct foreclosure proceedings. Second, the court must decide if either Fidelity or Mr.
8 Knecht are entitled to summary judgment that Fidelity complied with RCW 61.24.030(7),
9 the provision of the Deed of Trust Act that requires a trustee to have proof that the
10 beneficiary is the owner of the note secured by the deed of trust. As the court will
11 explain in Part III of this order, DB is not entitled to summary judgment that it was the
12 beneficiary, and neither Mr. Knecht nor Fidelity is entitled to summary judgment that
13 Fidelity had the requisite proof of DB's beneficiary status. Resolving both of those
14 issues will require a bench trial. In Part IV, the court will address Mr. Knecht's specific
15 claims to determine which will be at issue at trial.

16 The court applies the familiar summary judgment standard, which requires it to
17 draw all inferences from the admissible evidence in the light most favorable to the non-
18 moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).
19 Summary judgment is appropriate where there is no genuine issue of material fact and the
20 moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The
21 moving party must initially show the absence of a genuine issue of material fact. *Celotex*
22 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must then show a
23 genuine issue of fact for trial. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475
24 U.S. 574, 586 (1986). The opposing party must present probative evidence to support its
25 claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558
26 (9th Cir. 1991). The court defers to neither party in resolving purely legal questions. *See*
27 *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999).

III. ANALYSIS

A. Is DB the Beneficiary of Mr. Knecht's Deed of Trust?

A deed of trust is a three-party transaction in which a borrower (the grantor of the deed of trust) conveys title to her property to a trustee, who holds the title in trust for the lender, who is the beneficiary of the deed of trust. *Bain v. Metro. Mortgage Group, Inc.*, 285 P.3d 34, 38 (Wash. 2012). The deed of trust grants the beneficiary a power of sale that it can invoke if the borrower defaults, in which case the trustee is empowered to sell the property at a trustee's sale. *Id.* Washington's Deed of Trust Act places non-waivable restrictions on the power of sale and the means by which the trustee can conduct a sale. *Id.* ("The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication that the legislature intended to allow the parties to vary those procedures by contract.") Provided the trustee and beneficiary comply with the Deed of Trust Act, the trustee can sell the property without judicial oversight.

Mr. Knecht contends that DB is not (and was not) the beneficiary of his deed of trust.

1. MERS Falsely Declared Itself the Beneficiary of Mr. Knecht's Deed of Trust, and Purported to Convey to DB Rights That MERS Never Held.

From its inception, Mr. Knecht's deed of trust ran afoul of the Deed of Trust Act by designating MERS as its beneficiary. The Act declares that the beneficiary of a deed of trust is "the holder of the instrument or document evidencing the obligations secured by the deed of trust" RCW 61.24.005(2). Banks and other well-heeled financial interests, in an effort to facilitate the easy transfer of mortgage obligations, created MERS in the mid 1990s. *Bain*, 285 P.3d at 39-40. MERS is, in essence, a database for tracking mortgage rights that permits MERS's member institutions to transfer mortgage obligations without publicly recording the transfers. *Id.* In Washington, lenders hoping to take advantage of the MERS system designated MERS as the beneficiary of deeds of trust, just as ABC did in Mr. Knecht's deed of trust. But it is now clear that Washington

1 law does not permit MERS to act as a beneficiary unless it is also the “holder” of the note
2 secured by the deed of trust. *Bain*, 285 P.2d at 47.

3 There is no suggestion that MERS ever held Mr. Knecht’s note, and yet it
4 purported in April 2010 to assign to DB “the Promissory Note secured by [the Knecht]
5 deed of trust and also all rights accrued or to accrue under said Deed of Trust.” The
6 assignment, which is recorded in King County, was executed by “MERS as nominee for
7 [ABC],” but there is no evidence that ABC actually authorized MERS to effect the
8 transfer. *See Bavand v. OneWest Bank, FSB*, 309 P.3d 636, 649 (Wash. Ct. App. 2013)
9 (noting MERS’s failure to establish its agency relationship with a noteholder).

10 There is no dispute in this case that MERS lacked the power to transfer anything
11 to DB. DB does not rest its claim to be the beneficiary of Mr. Knecht’s deed of trust on
12 the MERS assignment, or at least it does not do so in these motions. Indeed, DB
13 consistently refuses to acknowledge that MERS purported to assign not only the deed of
14 trust, but Mr. Knecht’s note as well. DB avoids the MERS assignment, it appears,
15 because it prefers that the court not focus on that apparently void transfer of the deed of
16 trust and note. DB prefers that the court conclude that it acquired its interest in the deed
17 of trust and note without MERS’s assistance.

18 **2. The Declaration from Mr. Knecht’s Bankruptcy Does Not Entitle DB**
19 **to Summary Judgment.**

20 The court now considers DB’s evidence that it obtained its alleged interest in Mr.
21 Knecht’s Note from a source other than MERS. DB relies on a version of Mr. Knecht’s
22 note that is endorsed in blank by ABC. Ewbank Decl. (Dkt. # 68), Ex. B. There is no
23 evidence as to how DB acquired that note. The note is in the record via a declaration
24 from DB’s counsel stating merely that the endorsed document is a true and correct copy
25 of the note. *Id.* ¶ 3. That statement raises more questions than it answers. The
26 endorsement is undated, but it was plainly executed after Mr. Knecht signed the note.
27

1 There is no direct evidence that DB acceded to ABC's rights as the lender on the note and
2 the beneficiary of the deed of trust.

3 Instead of direct evidence, DB asks the court to rely on documents filed in Mr.
4 Knecht's 2010 bankruptcy proceeding, which preceded the foreclosure attempts at issue
5 in this case. In the bankruptcy proceeding, a person claiming to be the authorized agent
6 of American Home Mortgage Servicing, Inc. ("AHMSI"), filed a March 2010 declaration
7 stating that AHMSI was a servicer for DB. Ewbank Decl. (Dkt. # 68), Ex. C. It also
8 stated that DB was "the holder and owner" of the Knecht note. *Id.* ¶ 6. The declaration
9 purports to attach "documents evidencing the ownership of the loan including the Note
10 and Deed of Trust," *id.*, but the only documents attached to it are the note and deed of
11 trust.² The declarant (a "Bankruptcy Specialist" residing in Florida) stated that he had
12 "personal knowledge" of the facts to which he attested. *Id.* ¶ 1. But the only basis he
13 states for his "personal knowledge" of the ownership of the note is that he "personally
14 reviewed the business records related to this loan" *Id.* ¶ 4. He does not reveal what
15 those business records are. If DB (or anyone else) has business records that establish
16 DB's ownership of Mr. Knecht's note, those records are not before the court.

17 DB relied on the declaration in the bankruptcy proceedings in its motion for relief
18 from the automatic bankruptcy stay. No one opposed that motion, and the Bankruptcy
19 court merely signed DB's proposed order. DB does not argue that the order is entitled to
20 res judicata or issue preclusive effect. It nonetheless suggests that because no one
21 objected in the bankruptcy court to its assertion that it was entitled to foreclose, its status
22 as beneficiary is now an established fact. The court disagrees.

23 DB does not explain the apparent inconsistency between the bankruptcy
24 declaration and MERS's assignment of the note and deed of trust on April 1, 2010. If the
25 bankruptcy declaration accurately claimed that DB was the "holder and owner" of Mr.

26 ² DB did not include the exhibits to the declaration when it filed the bankruptcy declaration in
27 this court. The court verified the existence of the attachments by examining the bankruptcy
28 court's records.

1 Knecht's note as of late March 2010, why did MERS purport to assign the note to DB at
2 the beginning of April 2010? DB suggests no answer.

3 **3. Trial is Necessary to Determine Whether DB Is the Beneficiary of the**
4 **Deed of Trust.**

5 Perhaps recognizing that its own proof is shaky, DB insists that it is Mr. Knecht's
6 burden to prove that DB does not own the note. The only authority it cites for that
7 proposition is a decision from one of this District's judges in which the court held that
8 where the beneficiary attempting to foreclose "was the original lender," conclusory
9 allegations that the beneficiary had no authority to foreclose were inadequate to state a
10 claim. *Coble v. Suntrust Mort., Inc.*, No. C13-1978JCC, 2014 U.S. Dist. LEXIS 23921,
11 at *10 (W.D. Wash., Feb. 18, 2014). The court in *Coble* did not address anyone's burden
12 of proof, and granted the borrower leave to amend to more particularly state allegations
13 that the original lender did not own the note. *Id.* at *10-12. Here, DB was not the
14 original lender, and *Coble* is of no assistance to DB.

15 Even assuming that Mr. Knecht bears the burden to prove that DB is not the
16 beneficiary of his deed of trust, an issue the court does not decide,³ the evidence he has
17 provided is sufficient to create a genuine issue of material fact that only a trial can
18 resolve. Mr. Knecht has offered two pieces of evidence: his original note and deed of
19 trust, in which DB held no interest; and the MERS assignment, which was a legal nullity.
20 A trier of fact could determine that this evidence makes it more likely than not that DB
21 has no valid interest in Mr. Knecht's note or deed of trust.

22 On this record, a reasonable trier of fact could conclude that DB was the
23 beneficiary of Mr. Knecht's deed of trust or that it was not. A trier of fact would likely
24 wonder why DB, which claimed to have its interest in Mr. Knecht's deed of trust as of

25 ³ The court observes that it is the beneficiary, not the borrower, who can be expected to possess
26 evidence that it is the holder or owner of a promissory note. The court finds it unlikely that a
27 Washington court would burden the borrower alone with providing that evidence. As the *Bain*
28 court observed, in cases where "the original lender ha[s] sold the loan, th[e] purchaser would
need to establish ownership of that loan, either by demonstrating that it actually held the
promissory note or by documenting the chain of transactions." 285 P.3d at 47-48.

1 March 2010, needed to record an assignment of that interest executed in April 2010. The
2 trier of fact would likely be puzzled by DB's paltry evidence. If DB holds or owns the
3 note, it is surprising that it has not offered evidence from a DB representative with
4 personal knowledge about how DB acquired the note. Instead, DB relies on the
5 bankruptcy declaration, sworn by a person whose claim to personal knowledge is
6 dubious. Mr. Knecht's evidence is no better. He apparently conducted no discovery to
7 help prove his contention that DB does not own the note. Despite these evidentiary
8 shortcomings, the court can only rule on the record before it, and on that record, no one is
9 entitled to judgment as a matter of law on the factual question of whether DB acquired a
10 beneficiary interest that permitted it to foreclose Mr. Knecht's deed of trust.

11 **B. Did Fidelity Comply With Its Obligations as a Trustee?**

12 DB purported to appoint Fidelity as the trustee for Mr. Knecht's deed of trust in
13 September 2010. The beneficiary of a deed of trust has authority to appoint a successor
14 trustee. RCW 61.24.010(2). The purported appointment of a trustee by a non-
15 beneficiary is a void act, and the purported trustee has no authority to foreclose. *See, e.g.,*
16 *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716, 721 (Wash. Ct. App. 2013); *Bavand*,
17 309 P.3d at 649. For purposes of examining whether Fidelity is liable for its actions as a
18 trustee, the court assumes that DB had the power to appoint Fidelity.

19 The Deed of Trust Act imposes duties on a trustee. First, although a trustee has no
20 fiduciary duty, RCW 61.24.010(3), it has a "duty of good faith to the borrower,
21 beneficiary, and grantor." RCW 61.24.010(4). In addition, one of the statutory requisites
22 of a trustee's sale is as follows:

23 [F]or residential real property, before the notice of trustee's sale is
24 recorded, transmitted, or served, the trustee shall have proof that the
25 beneficiary is the owner of any promissory note or other obligation secured
26 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.

27 RCW 61.24.030(7)(a).

1 **1. Fidelity Had No Beneficiary Declaration That Complied with the Final**
2 **Sentence of RCW 61.24.030(7)(a).**

3 According to Fidelity, it received two declarations that satisfy RCW
4 61.24.030(7)(a). The declarations are nearly identical. Yellin Decl. (Dkt. # 70), Exs. 1 &
5 2. Both suggest that someone other than DB prepared them, because they state:
6 “PLEASE COMPLETE AND EXECUTE THE BELOW DECLARATION:” *Id.* Both
7 declarations state as follows:

8 The undersigned beneficiary or authorized agent for the beneficiary hereby
9 represents and declares under the penalty of perjury that the beneficiary is
10 the owner of the Promissory Note or other obligation secured by the Deed
11 of Trust[.]

12 *Id.* DB signed neither declaration. Instead, a representative of AHMSI signed each.
13 Below each signature was the notation “Signature of Mortgagee, Beneficiary of
14 Authorized Agent.” *Id.* One declaration plainly bears a September 24, 2010 date. *Id.*,
15 Ex. 1. The other appears to be dated May 14, 2014, or about 7 weeks *before* Fidelity
16 filed it in this case. *Id.*, Ex. 2. DB and Fidelity refuse to acknowledge that the document
17 facially bears a 2014 date, and Fidelity attempts to demonstrate that the document was
18 “uploaded” to Fidelity’s computer systems in August 2012. Yellin Decl. (Dkt. # 75) ¶ 3
19 & Ex. 1. The earlier declaration does not mention DB. Yellin Decl. (Dkt. # 70), Ex. 1.
20 The later declaration has DB’s name sandwiched between the date and the signature of
21 the AHSMI representative. *Id.*, Ex. 2.

22 These declarations are woeful. Taken literally, they state that AHMSI is the
23 “Mortgagee, Beneficiary of Authorized Agent.” But AHMSI is not the mortgagee (*i.e.*,
24 the entity holding the security interest that secures the deed of trust), and the phrase
25 “Beneficiary of Authorized Agent” is nonsense in this context. Assuming a
26 typographical error, the declarations meant to state that AHMSI was the “Mortgagee,
27 Beneficiary, *or* Authorized Agent,” without stating which of those three labels applies to
28 AHMSI. The declarations do not identify who the beneficiary is. One declaration
 appears to bear the wrong date. Although the declarations themselves are dated, there is

1 no evidence as to when Fidelity received either declaration. As to the later one, which
2 Fidelity asserts is dated May 14, 2011, Fidelity asserts that it “uploaded” the document 15
3 months later, in August 2012, which was two months *after* Fidelity recorded the last of
4 the three notices of trustee’s sale it issued with respect to Mr. Knecht’s property.

5 On this record, Fidelity had no beneficiary declaration that complied with RCW
6 61.24.030(7). First, there is no evidence that Fidelity had those declarations before it
7 issued notices of trustee’s sales to Mr. Knecht. Second, the first of the declarations does
8 not identify DB, and thus is of no value (without more evidence) in asserting DB’s
9 beneficiary status. The second of the declarations at least states DB’s name, but it does
10 not do so in a way that compels the conclusion that DB purports to be the beneficiary.
11 Third, neither declaration is executed “by the beneficiary,” as the statute requires. It is
12 possible that a declaration issued by an appropriately-authorized agent of a beneficiary
13 would suffice to comply with RCW 61.24.030(7), but the declarations on which Fidelity
14 purports to have relied neither squarely declare that AHMSI is an appropriately-
15 authorized agent nor provide any reason to believe that AHMSI is an appropriately-
16 authorized agent.⁴

17 In ruling that Fidelity had no statutorily-compliant beneficiary declaration, the
18 court has considered the recent ruling of the Washington Court of Appeals in *Trujillo v.*
19 *NW Trustee Servs., Inc.*, 326 P.3d 768 (Wash. Ct. App. 2014). There, the court
20 considered whether a trustee could rely on a beneficiary declaration from the beneficiary
21 itself declaring that it was “the actual holder of the promissory note . . . evidencing the
22 [borrower’s] loan or has the requisite authority under RCW 62A.3-301 to enforce said
23 [note].” *Id.* at 770. The court explained the difference between the “owner” of a note
24 (the person or entity entitled to the note’s economic benefits) and the “holder” of a note

25 _____
26 ⁴ Mr. Knecht asserts that the beneficiary declaration is invalid because it does not comply with
27 RCW 9A.72.085, which contains requirements for declarations under penalty of perjury that
28 Fidelity’s declarations plainly do not satisfy. The statute, however, applies only to declarations
submitted in an “official proceeding.” A declaration from a beneficiary to a trustee in
accordance with RCW 61.24.030(7) is not a declaration submitted in an official proceeding.

1 (the person or entity entitled to enforce the note). *Id.* at 774-76. It explained that a
2 person or entity can be both the holder and owner of a note, or a note can have an owner
3 and a separate holder. *Id.* at 775-76. It concluded that despite ambiguity in RCW
4 61.24.030(7)(a), a beneficiary declaration need only establish that the beneficiary is the
5 *holder* of the note secured by the deed of trust. *Id.* at 776 (“RCW 61.24.030(7)(a),
6 properly read, does not require [the beneficiary] to also be the ‘owner’ of the note.
7 Rather, it requires that a person entitled to enforce a note be a holder and need not also be
8 an owner.”). *Trujillo* suffices to dispense with Mr. Knecht’s argument that the
9 beneficiary declarations on which Fidelity relied are invalid because they do not declare
10 anyone to be the “owner” of his note. It does not, however, shelter Fidelity from the
11 other deficiencies the court has identified in its beneficiary declarations.

12 **2. Trial Is Necessary to Determine Whether Fidelity Had Sufficient Proof**
13 **That DB Was the Beneficiary.**

14 That Fidelity had no beneficiary declaration that complied with the Deed of Trust
15 Act is not dispositive of whether Fidelity followed the law. A beneficiary declaration is
16 “sufficient proof” under RCW 61.24.030(7)(a), not necessary proof. A trustee who has
17 no beneficiary declaration can act as long as it has “proof that the beneficiary is the
18 owner of any promissory note or other obligation secured by the deed of trust.” RCW
19 61.24.030(7)(a).

20 On this record, a trier of fact could reach different conclusions as to whether
21 Fidelity had proof of DB’s beneficiary status. This is, again, primarily a consequence of
22 the paltry record before the court. The beneficiary declarations that Fidelity has
23 submitted did not materialize out of thin air, but the evidence before the court is silent as
24 to their provenance. Fidelity offers no evidence of where they came from and neither
25 does Mr. Knecht. A finder of fact considering this evidence would likely be flummoxed.
26 The court cannot say with any certainty what conclusions a finder of fact would reach.

IV. ANALYSIS OF MR. KNECHT'S INDIVIDUAL CLAIMS

The court's March 2013 order identified which claims in Mr. Knecht's complaint survived Defendants' motion to dismiss. Mr. Knecht did not amend his complaint thereafter. The court now considers which of those claims will proceed to trial.

The claims that survived the motions to dismiss are:

- 1) Violations of the Deed of Trust Act:
 - a. DB's initiation of foreclosure, including the appointment of Fidelity as a trustee, when it had no authority to do so because it was not the beneficiary of Mr. Knecht's deed of trust;
 - b. Violation of RCW 61.24.030(7), based on Fidelity's lack of proof that DB was the beneficiary of Mr. Knecht's deed of trust; and
 - c. Violation of RCW 61.24.030(8), 61.24.030(9), 61.24.031, and 61.24.040(1), which govern the timing of a letter explaining a borrower's pre-foreclosure right to request a meeting with the beneficiary, a subsequent notice of default, and the timing of a notice of trustee's sale.
- 2) A claim to enjoin a future trustee's sale based on the Deed of Trust Act violations identified above.
- 3) A claim for violation of the CPA based on the Deed of Trust Act violations identified above.
- 4) Requests for declaratory judgment
 - a. that MERS's assignment of the note and deed of trust to DB is void
 - b. that DB is not the holder of Mr. Knecht's note, is not the beneficiary of his deed of trust, and that its purported appointment of Fidelity as trustee was invalid
- 5) A claim to quiet title by voiding Defendants' interests in the property and declaring the deed of trust void.

1 Mr. Knecht attempted to introduce a new claim in his motion for partial summary
2 judgment, contending that Defendants violated the requirements of RCW
3 61.24.030(8)(g)-(j), which require certain content in a notice of default. That claim
4 appears nowhere in Mr. Knecht's complaint, the court did not acknowledge it as a claim
5 that survived the motions to dismiss, and Mr. Knecht made no timely request to amend
6 his complaint to include that claim. It is not part of this case.

7 Also not part of this case is a claim Mr. Knecht presented for the first time in his
8 opposition to Fidelity's motion – a claim that Fidelity breached the duty of good faith that
9 RCW 61.24.040 imposes.

10 **A. The Core Disputes Identified Above Are Sufficient to Carry Several Claims
11 to Trial.**

12 The dispute over whether DB was the beneficiary of Mr. Knecht's deed of trust
13 means that trial is necessary to resolve many of Mr. Knecht's claims. The Deed of Trust
14 Act itself permits a cause of action against a beneficiary and a trustee who wrongfully
15 initiate foreclosure proceedings, even where no trustee's sale occurred. *Walker*, 308 P.3d
16 at 720 (eschewing "wrongful foreclosure" label, characterizing borrower's claim "as a
17 claim for damages arising from DTA violations").⁵ A Deed of Trust Act claim arises
18 "when an unlawful beneficiary appoints a successor trustee," *Walker*, 308 P.3d at 721,
19 just as DB may have done in this case.

20 Mr. Knecht has triable CPA claims for the same reasons. That claim would
21 require Mr. Knecht to prove "(1) [an] unfair or deceptive act or practice; (2) occurring in
22 trade or commerce; (3) public interest impact, (4) [an] injury to plaintiff in his or her
23 business or property, [and] (5) causation." *Hangman Ridge Training Stables, Inc. v.*

24 _____
25 ⁵ Another judge in this District has certified to the Washington Supreme Court some of the same
26 questions that *Walker* answered. See *Frias v. Asset Foreclosure Servs., Inc.*, No. C13-760MJP,
27 2013 U.S. Dist. LEXIS 147444 (W.D. Wash. Sept. 25, 2013). The court takes judicial notice of
28 the Washington Supreme Court docket, which reveals that the court heard oral argument in *Frias*
in February of this year, but has yet to issue a decision. Pending that court's decision, the court
will follow *Walker*. The court observes that Defendants' failure to cite *Walker* or address its
reasoning did not serve them well in the motions before the court.

1 *Safeco Title Ins.*, 719 P.2d 531, 523 (Wash. 1986). Mr. Knecht may be able to prove a
2 variety of unfair or deceptive acts or practices. MERS purported to transfer interests in
3 Mr. Knecht's deed of trust and note to DB even though it had no interests to assign. *See*
4 *Bain*, 285 P.3d at 51 (“[C]haracterizing MERS as the beneficiary has the capacity to
5 deceive and thus . . . presumptively the first element [of a CPA claim] is met.”). For the
6 same reason, DB's appointment of Fidelity as a trustee is unfair or deceptive if the trier of
7 fact concludes that DB had no authority to make the appointment. DB and MERS
8 contend that their acts had no public interest impact, but that contention is wholly
9 unpersuasive. *See Bain*, 285 P.3d at 51 (holding that MERS's deceptive conduct
10 “presumptively” meets the public interest requirement of a CPA claim); *Bavand*, 309
11 P.3d at 652 (holding that action based on unlawful beneficiary's unlawful appointment of
12 successor trustee was sufficient to withstand summary judgment).

13 Mr. Knecht has evidence of damages caused by MERS's and DB's conduct. Mr.
14 Knecht did what many homeowners faced with the prospect of foreclosure would do: he
15 investigated. His evidence establishes that he spent substantial time on that investigation,
16 and that suffices to establish a CPA injury. *Walker*, 308 P.3d at 727 (“Investigative
17 expenses, taking time off from work, travel expenses, and attorney fees are sufficient to
18 establish injury under the CPA.”). DB and MERS insist that the cause of Mr. Knecht's
19 injury was his default, not their wrongdoing, but they are mistaken. If a jury concludes
20 that DB had no authority to foreclose, then a trier of fact could infer that the cause of his
21 need to investigate was DB's wrongfully-initiated foreclosure proceedings. Mr. Knecht
22 already knew he was in default on his loan; he appears to have never disputed that. As to
23 MERS, a trier of fact could conclude that Mr. Knecht needed to investigate, at least in
24 part, because of MERS's attempt to assign rights in the deed of trust and note to DB.

25 Defendants assert that the purpose of the MERS assignment is to “provide notice to third
26 parties of the security interest, not to provide notice to the borrower.” Defs.' Mot. (Dkt.
27 # 67) at 9. Whatever the purpose of the assignment, it is a recorded document visible to

1 the borrower. It has the capacity to deceive the borrower into believing that a valid
2 transfer of rights has occurred. It also has the capacity to deceive the borrower into
3 believing that the assignee rests its claim to lawful beneficiary status on the assignment.
4 And even if it lacks the capacity to deceive, it may nonetheless be an “unfair” act within
5 the scope of the CPA. *See Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1187 (Wash. 2013)
6 (“We note in passing that an act or practice can be unfair without being deceptive . . .”).

7 The court also declines to decide whether Mr. Knecht’s claim to enjoin a trustee’s
8 sale is moot. As the court has noted, DB steadfastly refuses to state whether it intends to
9 resume foreclosure efforts, and it is reasonable to suspect that DB will do so. In future
10 foreclosure efforts, DB might take a different approach, perhaps an approach that
11 complies with the Deed of Trust Act. That does not prevent the court, however, from
12 enjoining DB from repeating the potentially unlawful conduct of its first three foreclosure
13 attempts. Trial will determine to what extent an injunction is appropriate.

14 Because a trier of fact might conclude that Fidelity lacked proof of DB’s
15 beneficiary status, Mr. Knecht has a claim against Fidelity arising under both the Deed of
16 Trust Act and the CPA.

17 Mr. Knecht’s requests for declaratory judgment are ancillary to the core dispute
18 underlying his Deed of Trust Act and CPA claims. For that reason, the court will not
19 grant summary against his request for a declaration that the MERS assignment was void,
20 or that DB is not the holder of Mr. Knecht’s note and thus has no authority to initiate a
21 nonjudicial foreclosure.

22 **B. Mr. Knecht May Try His Claim Regarding the Pre-Foreclosure Letter**
23 **Requirement and Its Impact on the Timing of the Notices of Default and**
24 **Notices of Trustee’s Sales.**

25 Mr. Knecht raised only one claim that does not implicate the core disputes the
26 court has identified. He declares that Defendants did not provide him with the pre-
foreclosure disclosures that the Deed of Trust Act mandates. Knecht Decl. (Dkt. # 80),

27 ¶ 3.

1 Defendants offer no evidence that they provided the pre-foreclosure letter that
2 RCW 61.24.031 mandates, nor that they complied with the timing requirements for the
3 notice of default and notice of trustee's sale that depend on when that letter is sent. RCW
4 61.24.030(8) (requiring notice of default at least thirty days before a notice of trustee's
5 sale); RCW 61.24.030(9) (requiring compliance with RCW 61.24.031 before notice of
6 trustee's sale); RCW 61.24.031(1)(a) (requiring 30 or 90 days before issuing notice of
7 default, depending on borrower's response to pre-foreclosure letter); RCW 61.24.040(1)
8 (requiring notice of trustee's sale 90 or 120 days before sale, depending on whether pre-
9 foreclosure letter is required). They instead insist that this issue is moot, because they
10 have abandoned their past foreclosure efforts. That does not, however, moot Mr.
11 Knecht's claims for damages arising out of those past efforts.

12 Mr. Knecht has no evidence of damages caused by the timing of the notices, but
13 he has evidence of damages that may have been caused by Defendants' apparent failure
14 to send the pre-foreclosure letter. That letter is important, because it advises borrowers of
15 their right to request a meeting with the beneficiary of their deed of trust. RCW
16 61.24.031(1)(c)(iv). It also requires a beneficiary to make telephone calls to the borrower
17 to follow up on the letter. RCW 61.24.031(5). A trier of fact could reasonably infer from
18 the evidence before the court that Mr. Knecht may have been able to stop these
19 foreclosure efforts sooner if DB or its authorized agent had complied with these
20 requirements. A trier of fact could also reasonably infer that he would have spent less
21 time investigating the foreclosure if Defendants had provided the pre-foreclosure letter.

22 Because the parties have paid little attention to Mr. Knecht's claims arising under
23 these portions of the Deed of Trust Act, they have provided no analysis of when the
24 requirements related to the pre-foreclosure letter first took effect. The court declines to
25 conduct that analysis for them. It assumes, without deciding, that the requirements
26 applied to all three of DB's foreclosure efforts.

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C. Some of Mr. Knecht's Claims Cannot Proceed to Trial.

Mr. Knecht provides no evidence from which any trier of fact could conclude that his note has become split from his deed of trust. The *Bain* court acknowledged the possibility that a deed of trust in which MERS falsely claimed a beneficial interest might “split the deed of trust from the obligation, making the deed of trust unenforceable,” but it did not chart a path for a borrower to prove as much. 285 P.3d at 48. Mr. Knecht offers neither evidence nor argument sufficient to chart that path, and the court rules that he has not demonstrated a “split” in his note and deed of trust as a matter of law. Moreover, he does not establish that he would benefit from showing a “split” of the note from the deed of trust. *See Bain*, 285 P.3d at 48 (noting possibility that current noteholder would become equitable mortgagee if a split occurred).

The court also rejects Mr. Knecht's claim that his note was not negotiable, either because it was an adjustable rate note or because it was sold to an entity that pooled it with other loans to issue mortgage-backed securities. He offers no evidence, precedent, or argument that necessitates further discussion of that issue.

Similarly unavailing is Mr. Knecht's claim to quiet title to his property. He may succeed at trial in proving that DB has no interest in his note or deed of trust, which would quiet title as to DB. Nonetheless, someone is presumably entitled to enforce the note and deed of trust. As noted, Mr. Knecht fails as a matter of law to demonstrate a “split” between the note and deed of trust. Mr. Knecht admits he has not paid the note and does not contend that he can do so. So, just like the state courts who have considered similar claims, the court rules that Mr. Knecht cannot quiet title as a matter of law. *See, e.g., Walker*, 308 P.3d at 729 (dismissing quiet title claim premised on designation of MERS as beneficiary of deed of trust); *Bavand*, 309 P.3d at 650 (following rule from *Walker* that plaintiff seeking to quiet title “must succeed on the strength of his own title and not on the weakness of his adversary”).

1 **D. Mr. Knecht's Invocation of the Washington Constitution is Unavailing.**

2 Finally, the court rejects Mr. Knecht's invitation that the court rewrite RCW
3 61.24.030(7) (and perhaps much more of the Deed of Trust Act) in the guise of
4 interpreting the Act to comply with the Washington Constitution. Mr. Knecht does not
5 dispute that he has failed to timely assert a claim that the Deed of Trust Act (or any
6 portion of it) is unconstitutional. He also does not dispute that he has not notified
7 Washington's Attorney General of a constitutional challenge, as Federal Rule of Civil
8 Procedure 5.1 requires. Instead, citing the canon of statutory construction requiring a
9 court to construe statutes such that they do not violate the Washington constitution, he
10 contends that the court should "interpret" RCW 61.24.030(7) in a manner wholly
11 divorced from its plain meaning.

12 Citing the Washington Constitution's declaration that the State's superior courts
13 "shall have original jurisdiction in all cases at law which involve the title or possession of
14 real property," Art. IV, § 6, Mr. Knecht contends that the Deed of Trust Act's decision to
15 vest discretionary authority in a trustee is unconstitutional. How the court could
16 "interpret" any aspect of the Deed of Trust Act consistent with this argument, he does not
17 explain. The Deed of Trust Act unambiguously permits nonjudicial foreclosures. Mr.
18 Knecht advances no "interpretation" of the words of any portion of the Act that would
19 prohibit nonjudicial foreclosures, and the court cannot conceive of one. Mr. Knecht asks
20 the court to rewrite the Deed of Trust Act, not to interpret it.

21 Citing the Washington Constitution's guarantee of due process, Art. I, § 3, Mr.
22 Knecht contends that the court should "interpret" the Deed of Trust Act so that it gives
23 borrowers the right to be heard before they lose their homes. Of course, the Deed of
24 Trust Act does just that, it permits a homeowner to seek relief from a court (as Mr.
25 Knecht did) to enjoin a trustee's sale. Four of the Washington Supreme Court's current
26 justices have contended that their Court has had "no occasion to fully analyze whether the
27 nonjudicial foreclosure act" complies with the Washington Constitution's due process

1 clause. *Klem*, 295 P.3d at 1189 n.11. If Mr. Knecht wished to take up this invitation to
2 challenge the constitutionality of the Deed of Trust Act, he ought to have made a proper
3 constitutional challenge. To require more process than the Deed of Trust Act's explicit
4 right to challenge a trustee's sale is not to "interpret" the statute, it is to rewrite it. For
5 example, Mr. Knecht asks the court to "interpret" RCW 61.24.030(7)'s statement that a
6 trustee may rely on a beneficiary declaration to require the trustee to provide the
7 declaration to the borrower. That is not interpretation, is writing into the statute a
8 requirement that the legislature did not impose.

9 Also unavailing is Mr. Knecht's invitation to "interpret" the Deed of Trust Act to
10 comply with the Washington Constitution's guarantee that "[j]ustice in all cases shall be
11 administered openly" Art. I, § 10. Mr. Knecht believes that because nothing
12 obligates a trustee to prove to the borrower in advance of a foreclosure sale that it has
13 complied with the Deed of Trust Act, the Act ought to be construed to impose that
14 obligation in order to guarantee the open administration of justice. He relies on that
15 argument to insist again that the court "interpret" the Deed of Trust Act to require a
16 trustee to provide a borrower with a copy of a beneficiary declaration. Again, this is not
17 "interpreting" the Deed of Trust Act, it is rewriting it.

18 In addition to his demands for statutory "interpretation," Mr. Knecht asks the court
19 to certify his questions of interpretation to the Washington Supreme Court. The court
20 will not exercise its discretion to do so. The court declines to have the Washington
21 Supreme Court confirm that rewriting the Deed of Trust Act as Mr. Knecht prefers is not
22 an exercise in statutory interpretation.

23 **V. CONCLUSION**

24 For the reasons previously stated, the court GRANTS Defendants' motions in part
25 and DENIES them in part, (Dkt. ## 67, 69) and DENIES Mr. Knecht's motion (Dkt.
26 # 64). A bench trial on the claims that survive Defendants' motions will begin on
27 November 12, 2014. The court imposes the following pretrial schedule:

28 ORDER – 19

- 1) The parties must file motions in limine no later than October 2, 2014. Those motions shall comply with Local Rules W.D. Wash. LCR 7(d)(4). Defendants must cooperate in filing their motions in limine such that the cumulative length of their motions is 18 pages or fewer, and must do the same with respect to their oppositions to Mr. Knecht's motion in limine. Mr. Knecht's opposition to each Defendants' motion may contain no more pages than the motion to which it responds. All parties' motions must take into account that this case will be decided at a bench trial, not a jury trial.
- 2) The parties must file their agreed pretrial order no later than October 14, 2014.
- 3) The parties must submit trial briefs of 15 pages or fewer no later than October 29, 2014.
- 4) The parties must submit trial exhibits and deposition designations no later than October 31, 2014. The format of the trial exhibits shall comply with the court's previous scheduling order. Dkt. # 27.
- 5) The parties shall not submit proposed findings of fact or conclusions of law unless the court requests them.

DATED this 14th day of August, 2014.



The Honorable Richard A. Jones
United States District Court Judge

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROCIO TRUJILLO, an unmarried woman,)	No. 70592-0-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation,)	PUBLISHED
)	
Respondent,)	FILED: <u>June 2, 2014</u>
)	
WELLS FARGO, NA,)	
)	
Defendant.)	
)	

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

Cox, J. — The question that we decide is whether the successor trustee under a deed of trust securing a delinquent note in this case breached its duty of good faith under the Deeds of Trust Act, RCW 61.24.010(4).¹ Specifically, we decide whether Northwest Trustee Services Inc. (NWTS), the successor trustee, was entitled to rely on the beneficiary declaration of Wells Fargo Bank, N.A. for authority to schedule a trustee's sale of property owned by Rocio Trujillo. We hold that the declaration satisfies the requirements of RCW 61.24.030(7)(a). Under the circumstances of this case, NWTS was entitled to rely on that

¹ Brief of Appellant (Oct. 7, 2013) at 7.

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declaration as evidence of the proof required under this statute. NWTS did not violate its duty of good faith under the Deeds of Trust Act.

The trial court properly granted NWTS's CR 12(b)(6) motion to dismiss. We affirm.

The material facts are not disputed. In 2006, Trujillo obtained a loan for \$185,900 from Arboretum Mortgage Corp. This loan was evidenced by a promissory note that was secured by a deed of trust dated March 29, 2006 encumbering her real property.² The deed of trust was recorded in King County, Washington on March 31, 2006.³

Trujillo claims that Arboretum sold this loan to Wells Fargo in 2006.⁴ She further claims that Wells Fargo sold the loan to the Federal National Mortgage Association ("Fannie Mae") and retained the loan servicing rights.⁵

This record reflects that the deed of trust was assigned to Wells Fargo from Arboretum by the Assignment of Deed of Trust dated February 2, 2012.⁶ The assignment was recorded in King County, Washington on February 2, 2012.⁷

² Clerk's Papers at 17.

³ Id.

⁴ Brief of Appellant at 6.

⁵ Id.

⁶ Clerk's Papers at 35.

⁷ Id.

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Trujillo admits that she “defaulted on [her loan] on November 1, 2011.”⁸

By its beneficiary declaration dated March 14, 2012, delivered to NWTS, Wells Fargo declared under penalty of perjury that Wells Fargo “is the actual holder of the promissory note . . . evidencing the [delinquent Trujillo] loan or has requisite authority under RCW 62A.3-301 to enforce said [note].”⁹

The Notice of Default dated May 30, 2012, which NWTS transmitted to Trujillo, itemized the amounts in arrears for the delinquent loan.¹⁰ Moreover, the notice provided to Trujillo contained certain contact information for her delinquent loan.¹¹ Specifically, this notice states, “The owner of the note is Federal National Mortgage Association (Fannie Mae),” and it further provides Fannie Mae’s address.¹² The same page of this notice states, “The loan servicer for this loan is Wells Fargo Bank, N.A.,” and it further states Wells Fargo’s address.¹³

NWTS recorded the Notice of Trustee’s Sale dated July 3, 2012.¹⁴ The notice was recorded on July 10, 2012, and it scheduled a sale date of November

⁸ Plaintiff Trujillo’s Complaint Against Foreclosure in Violation of Washington Deed of Trust Act at 3; Brief of Appellant at 6.

⁹ Clerk’s Papers at 36.

¹⁰ Id. at 37-39.

¹¹ Id. at 38.

¹² Id.

¹³ Id.

¹⁴ Id. at 41-44.

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9, 2012 for Trujillo's property.¹⁵ Although this record does not tell us, we assume that sale did not occur, as originally scheduled. We reach this conclusion because this action followed that November 2012 scheduled sale date.

In February 2013, Trujillo, acting pro se, commenced this action against NWTS and Wells Fargo. She claimed that NWTS and Wells Fargo violated various provisions of the Deeds of Trust Act. She also claimed violations of the Criminal Profiteering Act and the Consumer Protection Act. She sought damages for these alleged violations as well as for claimed intentional infliction of emotional distress. Moreover, she sought injunctive relief to restrain the successor trustee's sale of her property as well as an award of attorney fees.

NWTS moved to dismiss Trujillo's complaint pursuant to CR 12(b)(6). The trial court granted this motion and dismissed with prejudice her claims against NWTS. From this record, it appears that the trial court allowed separate claims against Wells Fargo to stand unaffected by the court's decision on this NWTS motion.¹⁶

Trujillo appeals. Wells Fargo is not a party to this appeal.¹⁷

STANDARD OF REVIEW

Trujillo argues that we should review the trial court's order as a summary judgment order under CR 56(c). NWTS argues that the trial court's order should be reviewed as a dismissal under CR 12(b)(6). We agree with NWTS.

¹⁵ Id. at 41-42.

¹⁶ Report of Proceedings (May 31, 2013) at 20-21.

¹⁷ Notice of Appeal at 1.

In Cutler v. Phillips Petroleum Co., the supreme court explained that courts should “dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery.”¹⁸ “Under this rule, a plaintiff’s allegations are presumed to be true’, and ‘a court may consider hypothetical facts not part of the formal record.’”¹⁹ “CR 12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’”²⁰

CR 12(b)(6), in part, provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . . If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. ***If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.***^[21]

¹⁸ 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

¹⁹ Id.

²⁰ Id. (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

²¹ (Emphasis added.)

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A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court.²²

In contrast, under CR 56(c), a party may move for summary judgment if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment is also reviewed de novo.²³

An appellate court treats a motion to dismiss as a motion for summary judgment "when matters outside the pleading are presented to and not excluded by the court."²⁴ But as the rule and case authority plainly indicate "[d]ocuments 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."²⁵ Correspondingly, where matters outside the pleadings are not considered by the court, the motion is not treated as one for summary judgment.²⁶

²² Cutler, 124 Wn.2d at 755.

²³ Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

²⁴ Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985).

²⁵ Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

²⁶ Id. at 725.

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Additionally, 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.²⁷

Here, the trial court entered an order granting NWTs’s motion to dismiss under CR 12(b)(6). 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).²⁸

RCW 61.24.030(7)(a)

In her briefing, Trujillo identifies the sole issue on appeal as: Whether NWTs breached its duty of good faith by “recording, transmitting and serving the [notice of trustee’s sale] after receiving a declaration from Wells [Fargo] stating that [the bank] was the actual holder of the Note.”²⁹ The essence of the claim that she asserts is that the beneficiary declaration that Wells Fargo signed under penalty of perjury and delivered to NWTs did not satisfy the requirements of RCW 61.24.030(7)(a).³⁰ We hold that the declaration satisfied this statute.

²⁷ Ortblad v. State, 85 Wn.2d 109, 111, 530 P.2d 635 (1975).

²⁸ Id.

²⁹ Brief of Appellant at 7.

³⁰ Id. at 12-16, 26-27.

“When construing a statute, our goal is to determine and effectuate legislative intent.”³¹ We first “give effect to the plain meaning of the language used as the embodiment of legislative intent” where possible.³² “We determine plain meaning ‘from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.’”³³ “In general, words are given their ordinary meaning, but when technical terms and terms of art are used, we give these terms their technical meaning.”³⁴

This court reviews de novo questions involving the interpretation of statutes.³⁵

The Deeds of Trust Act, specifically RCW 61.24.030, states certain requisites for a trustee's sale for a nonjudicial foreclosure of a deed of trust. The version of this statute that was in effect at the time of commencement of the nonjudicial foreclosure proceeding involving Trujillo's real property in early 2012 stated, in relevant part:

It shall be requisite to a trustee's sale:

³¹ Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology, 178 Wn.2d 571, 581, 311 P.3d 6 (2013).

³² Id.

³³ Id. (internal quotation marks omitted) (quoting TracFone Wireless, Inc. v. Wash. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)).

³⁴ Id.

³⁵ Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

(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.**^[36]

Both the former and current versions of RCW 61.24.030(7)(a) require a trustee or successor trustee to have proof that the beneficiary has authority to enforce a note "secured by the deed of trust" before recording a notice of a trustee's sale.³⁷ Prior to the 2011 amendments to this statute, there was no such proof requirement.³⁸

RCW 61.24.030(7)(a) specifies what proof of authority to enforce such a note "shall be sufficient." Finally, unless the trustee or successor trustee violates his or her duty under RCW 61.24.010(4), he or she is "entitled to rely on the beneficiary's declaration" to satisfy the proof requirement of the statute.³⁹

Here, the parties advance conflicting views on how to read and properly apply RCW 61.24.030(7)(a). Trujillo claim that NWTS was required to obtain

³⁶ Former RCW 61.24.030 (Laws of 2011, ch. 58, § 4) (emphasis added).

³⁷ Compare *id.*, with RCW 61.24.030 (Laws of 2012, ch. 185, § 9); see also RCW 61.24.010(2) (permitting the resignation of a trustee named in a deed of trust and the appointment of a successor trustee).

³⁸ See former RCW 61.24.030 (Laws of 2009, ch. 292, § 8).

³⁹ RCW 61.24.030(7)(b).

proof from Wells Fargo that it was the “owner” of her delinquent note.⁴⁰ She further claims that without such proof the successor trustee was not authorized to record the notice of trustee’s sale.⁴¹ This argument is primarily based on the first sentence of this statute, which refers to the beneficiary as the “owner” of the note.

NWTS disagrees with this argument. It argues that Wells Fargo, the beneficiary, was the “holder” of the note and, as such, had the authority to provide the proof required under this statute.⁴² This argument is primarily based on the second sentence of the statute, which refers to the beneficiary as the “holder” of the note. NWTS further argues that it both complied with this statute and its duty of good faith under the Deeds of Trust Act. Thus, it claims it was entitled to rely on the beneficiary declaration that Wells Fargo provided.

Commentators have noted that there has been considerable confusion both in judicial decisions and statutes over the distinction between the “owner” of a note and the “holder,” who has the right to enforce the note.⁴³ They have also identified Washington’s Deeds of Trust Act as an example of this confusion.⁴⁴

⁴⁰ Brief of Appellant at 7.

⁴¹ Id.

⁴² Opening Brief of Appellee Northwest Trustee Services, Inc. at 5-6.

⁴³ Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21, 26 (2013).

⁴⁴ Id. at 26 n.23.

Resolution of the conflicting views in this case requires that we determine the legislature's intent in enacting this statute. To determine legislative intent, we focus our inquiry by examining certain key terms of this statute—"beneficiary," "owner," and "holder." In examining these key terms, we determine their plain meanings from what this statute and related statutes say about them.⁴⁵ And where these technical terms are used, we give them their technical meanings.⁴⁶

The first of these technical terms in RCW 61.24.030(7)(a) is "beneficiary." There is no dispute in this case that Wells Fargo is the "beneficiary" of the deed of trust securing Trujillo's delinquent note. This record contains the beneficiary declaration of Wells Fargo dated March 14, 2012 that states:

BENEFICIARY DECLARATION
(NOTE HOLDER)
(Executed by Officer of Beneficiary)

...

The undersigned, under penalty of perjury declares as follows:

Wells Fargo Bank, NA is the actual holder of the [Trujillo] promissory note . . . or has requisite authority under RCW 62A.3-301 to enforce said obligation.

...

[s/ Vice President of Loan Documentation]^[47]

There is no evidence in this record that contests either the validity or truthfulness of this beneficiary declaration, signed by an officer of Wells Fargo

⁴⁵ Swinomish Indian Tribal Cmty., 178 Wn.2d at 581.

⁴⁶ Id.

⁴⁷ Clerk's Papers at 36.

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under penalty of perjury and delivered to NWTS for the purpose of complying with this statute. Absent conflicting evidence, the declaration should be taken as true.

We note that our conclusion about the status of Wells Fargo is consistent with the supreme court's analysis in Bain v. Metropolitan Mortgage Group, Inc. regarding the Deeds of Trust Act's definition of "beneficiary."⁴⁸ As that court held, the 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."⁴⁹ The "instrument . . . evidencing the obligation secured" by the deed of trust is the note in this case.⁵⁰ And the Uniform Commercial Code further clarifies that the "'holder'" of the note means "'the person in possession'" of the note.⁵¹

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]."⁵² This concession is significant in that it is consistent with the beneficiary declaration before us. It is also consistent

⁴⁸ 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012).

⁴⁹ Id. (emphasis added) (quoting RCW 61.24.005(2)).

⁵⁰ See id. at 101-03.

⁵¹ Id. at 103-04 (quoting former RCW 62A.1-201(20) (2001)).

⁵² Plaintiff Trujillo's Complaint Against Foreclosure in Violation of Washington Deed of Trust Act at 4 (emphasis added).

with Bain's discussion of who constitutes a beneficiary for purposes of the Deeds of Trust Act.

For these reasons, we conclude that Wells Fargo, which states under penalty of perjury, that it is the holder of the note, has provided proof that it is the "beneficiary" of the deed of trust securing the delinquent note for purposes of this statute.

We next consider the technical term "owner" in this statute. The term "owner" is not defined in the Deeds of Trust Act. Likewise, the UCC does not define the term for purposes of Article 3, Negotiable Instruments. Nevertheless, commentators have characterized ownership as "the right to economic benefits of the note."⁵³

The UCC does, however, make clear that the "person entitled to enforce" a note is not synonymous with the "owner" of the note. That distinction is explained in UCC Comment 1 to RCW 62A.3-203, which states in relevant part:

...
Although transfer of an instrument might mean in a particular case that title to the instrument passes to the transferee, that result does not follow in all cases. ***The right to enforce an instrument and ownership of the instrument are two different concepts.*** A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check. If the thief transfers the check to a purchaser the transferee obtains the right to enforce the check. If the purchaser is not a holder in due course, the owner's claim to the check may be asserted against the purchaser. Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203.

⁵³ Whitman, supra note 43, at 25.

Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

[54]

The 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 say so for several reasons.

First, the use of different words in the same statute ordinarily means that the legislature did not intend them to mean the same thing.⁵⁵ Applying that principle here, we conclude that the legislature intended the words "owner" and "holder" to mean different things. Indeed, as we explained earlier in this opinion, the UCC states that these terms are not synonymous.⁵⁶

Second, the supreme court stated decades ago that although these terms are not synonymous, this does not preclude the possibility that an "owner" of a note may also be its "holder." Where one has the status of both "owner" and "holder," it is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive.

⁵⁴ (Emphasis added.)

⁵⁵ Guillen v. Contreras, 169 Wn.2d 769, 776-77, 238 P.3d 1168 (2010).

⁵⁶ See UCC Comment 1 to RCW 62A.3-203.

The supreme court stated these principles in John Davis & Co. v. Cedar Glen No. Four, Inc.⁵⁷ In that case, the supreme court had before it an appeal of a mortgage foreclosure in which John Davis & Company had foreclosed on real property to satisfy delinquent notes of a corporation.⁵⁸ James R. Scott and his wife held mortgages against the same property.⁵⁹ The superior court decided that the mortgages of John Davis securing the delinquent notes had lien priority over the mortgages held by the Scotts.⁶⁰ The Scotts appealed.

On appeal, the Scotts contested the priority of the liens of the John Davis mortgages.⁶¹ They argued that John Davis did not have authority to foreclose the mortgages.⁶² This was based on the fact that a corporation other than John Davis had advanced to the borrower the funds for the loans evidenced by the notes that were secured by the mortgages held by John Davis at the time of the foreclosure.⁶³ The supreme court rejected that contention by stating:

[John Davis] is the **holder and owner** of the notes and mortgages of the [borrower]. The **holder** of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. See RCW 62.01.051. It is not

⁵⁷ 75 Wn.2d 214, 450 P.2d 166 (1969).

⁵⁸ Id. at 215.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id. at 222.

⁶² Id.

⁶³ Id.

necessary for the **holder** to first establish that he has some beneficial interest in the proceeds.^[64]

This passage explains that, at common law, the holder of a note could also be its owner at the same time. In that case, John Davis was both “holder and owner” of the notes, as the court expressly stated in the opinion.

Significantly, the quoted language also makes clear that, at common law, it was the status of holder of the note that was dispositive on the question of who had authority to enforce the note and mortgage. Likewise, payment to the holder discharged the debt evidenced by the note, regardless of ownership. The question of ownership was irrelevant to both enforcement and discharge, as evidenced by the omission of the term “owner” in the above discussion by the supreme court concerning enforcement and discharge.

It is also noteworthy that the supreme court cited former RCW 62.01.051 in support of its analysis in John Davis. The case was decided in 1969, but the events it described occurred before enactment of the UCC in Washington in 1965.

Significantly, the principles of former RCW 62.01.051 were incorporated into Article 3, Negotiable Instruments, when the UCC was enacted in Washington.⁶⁵ Specifically, RCW 62A.3-301 now states:

“Person entitled to enforce” an instrument means (i) the **holder** of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to

⁶⁴ Id. at 222-23 (emphasis added).

⁶⁵ See former RCW 62.01.051 (1955).

RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the **owner** of the instrument or is in wrongful possession of the instrument.^[66]

The language of subsection (i) of this provision of the current UCC makes clear, as did the John Davis court, that the “holder” of a note is entitled to enforce the note. It also makes clear that a “holder” may enforce the note “even though the [holder] is not the owner” of the note.⁶⁷

We have no reason to conclude that the legislature intended to depart from either the common law, as articulated in John Davis, or the UCC, as articulated in RCW 62A.3-301, in enacting RCW 61.24.030(7)(a) regarding proof of who is entitled to enforce a note that is secured by a deed of trust. The language of the first sentence of RCW 61.24.030(7)(a) could have more clearly stated that a beneficiary who is the owner of a note is not always the holder of the note. The holder is entitled to enforce it. Better still, the legislature could have eliminated any reference to “owner” of the note in this provision because it is the “holder” of the note who is entitled to enforce it, regardless of ownership.

Nevertheless, when we consider the second sentence of this statute, specifying that the beneficiary must be the holder of the note for purposes of proof, together with the case authority and other related statutes we have discussed, we must conclude that the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note.

⁶⁶ (Emphasis added.)

⁶⁷ RCW 62A.3-301.

We next address the meaning of the technical term “holder.” In doing so, we follow the analysis and conclusion set forth by the supreme court in Bain.⁶⁸

There, the supreme court explained that the interpretation of the Deeds of Trust Act should be guided by relevant provisions of the Washington UCC, which include Article 3, Negotiable Instruments, and Article 1, general provisions.⁶⁹

RCW 62A.1-201 provides the definition of “holder” of a note:

(21) “Holder” with respect to a negotiable instrument, means:

(A) The person in **possession** of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;^[70]

Like the definition for “beneficiary,” the definition of “holder” does not include any reference to the term “owner.”

Here, as we observed early in this opinion, the record reflects that Wells Fargo had possession of Trujillo’s note from the beginning of the foreclosure proceeding.⁷¹ By definition, it is the “holder” of that note.

Moreover, as the beneficiary declaration states, Wells Fargo is also entitled to enforce the note, a negotiable instrument, under RCW 62A.3-301 because it is the “holder of the instrument.” RCW 61.24.030(7)(a), properly read, does not require Wells Fargo to also be the “owner” of the note. Rather, it

⁶⁸ Bain, 175 Wn.2d at 103-04.

⁶⁹ Id.

⁷⁰ (Emphasis added.)

⁷¹ See Plaintiff Trujillo’s Complaint Against Foreclosure in Violation of Washington Deed of Trust Act at 4.

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requires that a person entitled to enforce a note be a holder and need not also be an owner.

In sum, the beneficiary declaration in this case is sufficient under RCW 61.24.030(7)(a). Proof that Wells Fargo was the holder of the note was sufficient under this statute.

At oral argument of this case, recently retained appellate counsel for Trujillo made a new argument on appeal. Counsel conceded, as the record reflects, that “as soon as Wells [Fargo] began the foreclosure process, Fannie Mae transferred **possession** of the Note to Wells [Fargo].”⁷² Nevertheless, counsel took the position that such possession was not “legal possession of the promissory note as required to be the ‘holder’ under the UCC, RCW 62A.1-201(b)(21), and to be the ‘beneficiary’ under the Deed[s] of Trust Act, RCW 61.24.005(2).”⁷³ In support of this argument, counsel cites the Report of the Permanent Editorial Board for the Uniform Commercial Code dated November 14, 2011 (“Report”).⁷⁴ Counsel also cites § 18.31 of Washington Practice, “Powers of Collection Agents.”⁷⁵ Because these authorities have nothing to do with this case, we reject this new argument on appeal.

⁷² Id. (emphasis added).

⁷³ Statement of Additional Authorities (April 3, 2014) at 1-2.

⁷⁴ Id. (citing REPORT OF PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 9 n.38 (2011)).

⁷⁵ Id. at 2 (citing 18 WILLIAM B. STOEUBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE TRANSACTIONS § 18.31, at 364-66 (2d ed. 2004)).

This argument is primarily based on footnote 38 of the Report. That footnote cites UCC § 9-313 and then discusses how possession of collateral may not be relinquished when it is delivered to another person.⁷⁶ However, it is vital to understand the context of this footnote. The main text of the Report that is associated with this footnote states:

Section 9-203(b) of the Uniform Commercial Code provides that **three** criteria must be fulfilled **in order for the owner of a mortgage note effectively to create a "security interest"** (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.

The third criterion may be fulfilled in either one of two ways. Either the debtor/seller must "authenticate" a "security agreement" that describes the note ***or the secured party must take possession of the note pursuant to the debtor's security agreement.***^[77]

Reading footnote 38 in the context of the main text, it is clear that this portion of the Report addresses the criteria for the owner of a mortgage note to create a security interest in that note. One of the ways is for the secured party to take possession of the note.

But that has nothing to do with the nonjudicial foreclosure proceeding that is the subject of this action. That is because the foreclosure proceeding is not based on the creation of a personal property security interest in the note. Rather, the security interest underlying the foreclosure proceeding is the lien created by the deed of trust in the real property securing the note that is in the possession of

⁷⁶ See REPORT OF PERMANENT EDITORIAL BOARD, supra note 74, at 9 n.38.

⁷⁷ Id. (emphasis added) (footnotes omitted).

Wells Fargo. Thus, UCC § 9-313, which is concerned with security interests in notes, has no bearing on this case.

Another section of the Report makes this point clear:

Article 3 of the UCC provides a largely complete set of rules governing the obligations of parties on the note, including how to determine who may enforce those obligations and, thus, to whom those obligations are owed.

UCC Section 3-301 provides only three ways in which a person may qualify as the person entitled to enforce a note, two of which require the person to be in possession of the note (which may include possession by a third party that possesses it for the person):

- The first way that a person may qualify as the person entitled to enforce a note is to be its “holder.”^[78]

Thus, Article 3, specifically § 3-301, is dispositive on the question of who is entitled to enforce the note. And, as we also previously discussed in this opinion, Bain and other authorities make reference to Article 3 of the UCC appropriate for purpose of the Deeds of Trust Act.⁷⁹ There is no authority supporting the proposition that Article 9 of the UCC applies to this nonjudicial foreclosure proceeding. We reject counsel’s attempt to use UCC § 9-313 for a purpose for which it was not intended.

The reference to § 18.31 of Washington Practice adds nothing of substance to counsel’s new argument. We also reject that reference to the extent it is used to support the argument that possession of the note in this case

⁷⁸ Id. at 4-5 (footnote omitted).

⁷⁹ See Bain, 175 Wn.2d at 103-04; Whitman, supra note 43, at 26 n.23.

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is inadequate to establish either the ability to enforce the note or the beneficiary status of Wells Fargo.

For these reasons, counsel's reliance on RCW 62A.9A-313, which addresses security interests in personal property, is wholly unpersuasive.

In the Statement of Additional Authorities dated March 5, 2014, counsel for Trujillo cites In re Meyer.⁸⁰ Counsel states that the United States Bankruptcy Court for the Western District of Washington has determined that being an owner of the note is a requirement of RCW 61.24.030(7)(a).⁸¹ That case says no such thing.

Rather, that court expressly stated that it did not have to address the argument that counsel now makes in this case:

The Meyers argue that a trustee may not rely on a beneficiary declaration executed by anyone other than the beneficiary. Further, they argue that the trustee must have proof, in the words of the statute, that the beneficiary is the "owner" of the note as opposed to the holder of the note. ***It is not necessary to address either of these arguments***, however, because the Court concludes that NWTS could not rely on the Beneficiary Declaration because it had no proof that Wells Fargo had authority to execute that declaration on behalf of U.S. Bank.^[82]

Thus, Meyer does not provide any support for this new argument.

Counsel also cites Beaton v. JPMorgan Chase Bank, N.A. in a Statement of Additional Authorities dated March 5, 2014 to support the argument that RCW

⁸⁰ Statement of Additional Authorities (March 6, 2014) at 1 (citing In re Meyer, 506 B.R. 533 (Bankr. W.D. Wash. 2014)).

⁸¹ Id.

⁸² Meyer, 506 B.R. at 548 (emphasis added).

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61.24.030(7)(a) requires proof that the beneficiary must be the "owner" of the note.⁸³ We decline to follow that decision for several reasons.

There, the federal district court for the Western District of Washington considered whether the successor trustee under a deed of trust in that case violated the Deeds of Trust Act.⁸⁴ Specifically at issue was whether proof that the beneficiary is the owner of a note secured by a deed of trust is required by 61.24.030(7)(a).⁸⁵ That court held that the beneficiary declaration in that case was deficient because it relied on RCW 62A.3-301 to show authority to enforce the note.⁸⁶ According to that court, this was deficient because the beneficiary who provided the declaration "could be a nonholder in possession or a person not in possession who is entitled to enforce the instrument."⁸⁷ In short, the court decided that ownership of the note was required.⁸⁸

⁸³ Statement of Additional Authorities (March 6, 2014) at 1 (citing Beaton v. JPMorgan Chase Bank, N.A., 2013 WL 1282225 at *4-5 (W.D. Wash. March 26, 2013)).

⁸⁴ Beaton, 2013 WL 1282225, at *4.

⁸⁵ Id. at *4-*5.

⁸⁶ Id.

⁸⁷ Id. at *5.

⁸⁸ Id.

First, until now, no state appellate court has decided the meaning of RCW 61.24.030(7)(a). Thus, there has been no authoritative decision on this question of state law.⁸⁹

Second, the Beaton court omitted any analysis of the portion of the beneficiary declaration in that case that expressly stated that the beneficiary was “the actual holder of the promissory note.”⁹⁰ For the reasons we explained earlier in this opinion, proof of that status is what entitles a beneficiary to enforce a note secured by a deed of trust. Ownership of the note is irrelevant.

Third, the Beaton court also misread RCW 62A.3-301 as an impediment to proof of the right to enforce a note. Properly read, this statute merely clarifies that one entitled to enforce a note may be any of three specified persons:

(i) the **holder** of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d).^[91]

The plain words of this statute also make clear that:

A person may be a person entitled to enforce the instrument even though the person is not the **owner** of the instrument or is in wrongful possession of the instrument.^[92]

For these reasons, we decline to follow the decision in Beaton.

⁸⁹ See Bain, 175 Wn.2d at 90-91 (certifying questions regarding the Deeds of Trust Act to the Washington State Supreme Court).

⁹⁰ See RCW 61.24.030(7)(a).

⁹¹ RCW 62A.3-301 (emphasis added).

⁹² Id. (emphasis added).

Counsel also cites Pavino v. Bank of America, N.A. in his Further Statement Re Additional Authority dated May 7, 2014.⁹³ There, the federal district court for the Western District of Washington stated that there is no “legal authority holding that a ‘person entitled to enforce’ an instrument within the meaning of RCW 62A.3-301 qualifies as a ‘beneficiary’ within the meaning of RCW 61.24.005(2).”⁹⁴ But in Bain, the supreme court rejected that view.⁹⁵ Thus, this argument is not persuasive.

Counsel further argues that “[t]he rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing these requirements might result in a loss of the opportunity to prosecute . . . a lawsuit on the merits.”⁹⁶ He cites Garoux v. Pulley in support of this argument.⁹⁷

There, the court had before it a motion to dismiss.⁹⁸ The issue was whether the district court had abused its discretion in applying certain procedural rules relating to the motion.⁹⁹ The court held the district court had abused its

⁹³ Further Statement Re Additional Authority (May 7, 2014) at 1 (citing Pavino v. Bank of America, N.A., 2011 WL 834146 (W.D. Wash. March 4, 2011)).

⁹⁴ Pavino, 2011 WL 834146, at *4.

⁹⁵ See Bain, 175 Wn.2d at 104.

⁹⁶ Supplemental Statement of Additional Authorities (April 29, 2014) at 1 (quoting Garoux v. Pulley, 739 F.2d 437 (1984)).

⁹⁷ Id. (citing Garoux v. Pulley, 739 F.2d 437 (1984)).

⁹⁸ Garoux, 739 F.2d at 437.

⁹⁹ Id. at 439-40.

discretion in applying the rule that disadvantaged a pro se litigant.¹⁰⁰ That is the context in which the Ninth Circuit made the following statement:

District courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings. We hold that where the non-moving party is appearing *pro se*, the notice requirements of Rule 56(c) must be strictly adhered to when a motion to dismiss under Rule 12(b)(6) is converted into one for summary judgment.^[101]

Here, there is no procedural rule that is being applied to disadvantage Trujillo. Rather, we construe the relevant statutes to determine what the laws require. There is no violation of the principle cited in that federal case.

Trujillo makes a number of arguments in her briefs asserting that Wells Fargo must prove that it is the owner of her delinquent note. None are persuasive.

Trujillo argues that the idea that the beneficiary, note holder, and note owner are the same person “permeates” the Deeds of Trust Act.¹⁰² She points to a number of provisions to support this argument.¹⁰³ Nothing about these citations undercuts our conclusion that owner and holder are not legally synonymous terms for purposes of this act.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Reply Brief of Appellant at 4-7.

¹⁰³ Id. (citing RCW 61.24.040(2); RCW 61.24.070(2); RCW 61.24.163; RCW 61.24.005(2), (7); RCW 61.24.020).

First, she cites RCW 61.24.040(2) and the language in the notice of foreclosure form.¹⁰⁴ It states, “The attached Notice of Trustee’s Sale is a consequence of default(s) in the obligation to, the Beneficiary of your Deed of Trust and owner of the obligation secured thereby.”¹⁰⁵ This form is nothing more than that. It does not state the law. Our discussion earlier in this opinion extensively discusses the controlling law. In any event, the statute states that the form need only be “substantially” followed.¹⁰⁶

Second, Trujillo cites RCW 61.24.070(2), which states who may bid at a trustee’s sale.¹⁰⁷ It states, “The trustee shall, at the request of the beneficiary, credit toward the beneficiary’s bid all or any part of the monetary obligations secured by the deed of trust.”¹⁰⁸ Trujillo argues that this “type of bid would not be possible if the ‘beneficiary’ of the DOT was not the ‘owner’ of the debt obligation secured by the DOT.”¹⁰⁹ This argument makes no sense. As we made clear earlier in this opinion, the holder of the note is entitled to enforce the note. Bidding at the sale is merely one of the rights to enforce the note. There simply is no requirement that the bidder at the foreclosure sale must be the owner of the note.

¹⁰⁴ Reply Brief of Appellant at 5 (citing RCW 61.24.040(2)).

¹⁰⁵ RCW 61.24.040(2) (alteration in original).

¹⁰⁶ Id.

¹⁰⁷ Reply Brief of Appellant at 5-6 (citing RCW 61.24.070(2)).

¹⁰⁸ RCW 61.24.070(2).

¹⁰⁹ Reply Brief of Appellant at 6.

Third, Trujillo cites RCW 61.24.163, which outlines the foreclosure mediation program.¹¹⁰ Subsection (5) explains the required documents that the beneficiary must transmit to the mediator.¹¹¹ These 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).¹¹²

This statute's references to the beneficiary declaration in RCW 61.24.030(7)(a) does nothing to undercut the law that the terms "owner" and "holder" are not legal synonyms. We reach this conclusion despite the reference in the above text that mentions "owner" but not "holder."

Trujillo also argues that statements by two senators at a senate and house judiciary committee meeting show that certain legislators believed that the "beneficiary" of a deed of trust should be the "holder" **and** the "owner" of the promissory note.¹¹³ In view of our analysis detailed earlier in this opinion, we reject the argument that these comments by only two legislators show legislative intent contrary to what we discussed previously in this opinion.

In sum, the Wells Fargo beneficiary declaration in this case is sufficient to comply with RCW 61.24.030(7)(a).

¹¹⁰ Id. (citing RCW 61.24.163).

¹¹¹ RCW 61.24.163(5).

¹¹² RCW 61.24.163(5)(c).

¹¹³ Reply Brief of Appellant at 7-11.

RCW 61.24.030(7)(b)

Trujillo next argues that the requirements of RCW 61.24.030(7)(b) were not met.¹¹⁴ We disagree.

RCW 61.24.030(7)(b) states:

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.***^[115]

RCW 61.24.010(4) provides that a “trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”

Here, Trujillo fails to substantiate that there was any breach of any duty by NWTS under RCW 61.24.010(4). Accordingly, NWTS was entitled to rely on this Wells Fargo declaration, as the plain words of the statute provide.

In her Statement of Additional Authorities dated April 3, 2014, Trujillo cites Schroeder v. Excelsior Management Group, LLC and Klem v. Washington Mutual Bank to support her argument that NWTS breached its duty of good faith.¹¹⁶ While these cases discuss the duty a trustee owes the beneficiary and the debtor, they do nothing to substantiate that NWTS breached its duty of good faith when it relied on this beneficiary declaration. Thus, these cases are not helpful.

¹¹⁴ Id. at 13.

¹¹⁵ (Emphasis added.)

¹¹⁶ Statement of Additional Authorities (April 3, 2014) at 1 (citing Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 102 n.3, 107, 114, 297 P.3d 677 (2013); Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 788-92, 295 P.3d 1179 (2013)).

MOTION TO SUPPLEMENT THE RECORD

Trujillo moves to supplement the record pursuant to RAP 9.6(a) with certain documents, some of which have already been authorized by this court. We deny the motion to the extent of the remaining documents.

Trujillo asserts that her response to Wells Fargo's motion for attorney fees and costs and its attachment, a letter from a state senator, are "necessary" because it explains the legislature's intent underlying SB 5191. In SB 5191, the legislature considered but declined to adopt a bill that would have changed the definition of "beneficiary" from its current meaning of "holder" to "owner."¹¹⁷

We deny the request to supplement the record with Trujillo's response to Wells Fargo's motion and its attachment. Trujillo's response to Wells Fargo's motion for attorney fees and costs was not before the trial court when it granted NWTS's motion to dismiss. And these materials are not necessary to our decision.

We affirm the order granting NWTS's CR 12(b)(6) motion to dismiss.

Cox, J.

WE CONCUR:

Jay, J.

Schindler, J.

¹¹⁷ See Opening Brief of Appellee Northwest Trustee Services, Inc. at 9-10.