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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WINNIE LYONS,

Appellant/Petitioner

vs.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for Stanwich
Mortgage Loan Trust Series 2012-3, by Carrington Mortgage Services,
LLC; CARRINGTON MORTGAGE SERVICES, LLC; WELLS FARGO
BANK, N.A., a chartered national bank; WELLS FARGO BANK, N.A.,
as servicer; and NORTHWEST TRUSTEE SERVICES, INC., as Trustee,

Respondent

REPLY BRIEF OF APPELLANT WINNIE LYONS

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INTRODUCTION

Millions of Washington homeowners, including Ms. Lyons, are at risk of foreclosing trustee failing to adhere to the strict compliance of the DTA. In fact, most if not all Washington foreclosing trustee's believe that it has complied with the DTA and acted in good faith if it has received a beneficiary declaration that represents that the beneficiary is the actual owner of the promissory note, and does nothing more to verify the truthfulness of the beneficiary declaration. The record is clear that NWTS continually violated the Deed of Trust Act, RCW 61.24 ("DTA"), as the complaint, reply to summary judgment and motion for reconsideration allege in detail. The record is clear that NWTS failed to comply with the DTA's plain language when it relied upon an outdated, defective beneficiary declaration. NWTS admitted that Wells Fargo transferred its servicing rights to Carrington Mortgage Services, LLC ("Carrington") on or about April 2012. The DTA required NWTS to act in good faith toward both Lyons and the beneficiary; however, it is transparent that NWTS only safeguarded the beneficiary's interest. Instead of investigating the service release transfer on or about April 2012, it proceeded with the scheduled foreclosure sale of Lyons' property. A cursory review of this transfer would have alerted NWTS of its ownership

change to Stanwich Mortgage Loan Trust Series 2012-3 with an effective date of March 29, 2012 and would have prevented damage and harm to Ms. Lyons and her business.

However, NWTS transmitted, served and recorded the NOTS before verifying that Wells Fargo was the present beneficiary of the Lyons' loan; thus, in direct violation of the DTA. .

Even more, NWTS knew that Ms. Lyons was offered and accepted a loan modification as early as April 2012. Ms. Lyons presented this information to NWTS and in return NWTS stated that the new servicer Carrington had directed them to proceed with the foreclosure. Had NWTS rejected the beneficiary declaration executed on June 30, 2010 because of the defective language and or investigated the proper owner of Lyons' promissory note, Ms. Lyons would not have suffer emotional and monetary damages and loss of income from her business.

CLARIFICATION OF FACTS

Lyons inadvertently signed a declaration that did not accurately represent where she currently resided. However, the record is clear that Ms. Lyons' primary residence is located at: 13205 12th Avenue SW, Burien, Washington ("Property"). At all times since she obtained the mortgage, including in April 2012 when she accepted the loan modification, Wells Fargo knew that Ms. Lyons owned and operated an

adult family home at the Property. In fact, it was that income which qualified Ms. Lyons for the loan modification.

On or about April 26, 2012, Lyons' attorney contacted NWTS and requested the scheduled foreclosure sale be discontinued as she had accepted Wells Fargo's offer to modify the loan and sold its interest to a new creditor as of March 29, 2012. NWTS refused to continue or stop the foreclosure sale. Instead, Nancy Lambert, an employee of NWTS, indicated that the new servicer had instructed them to proceed with the foreclosure sale and NWTS chose to ignore its duty to Ms. Lyons entirely by moving forward with the sale. Ms. Lyons' counsel then contacted the new servicer, Carrington and spoke with Max Varrone, Mr. Varrone indicated that the Lyons property was not in foreclosure and it had not instructed NWTS to foreclosure upon Ms. Lyons' property.

On or about June 11, 2012 Ms. Lyons' attorney contacted NWTS again and requested that they discontinue or cancel the sale, providing the information obtained from Carrington. NWTS again refused to continue the sale and to ignore its obligation to Ms. Lyons. After Lyons' counsel verified that Carrington did not direct NWTS to proceed with the sale, she drafted and faxed a cease and desist letter requesting that NWTS

discontinue the sale.¹ NWTS referred the matter to its counsel, Routh Crabtree Olsen. At that time, Lyons had less than eight (8) days to enjoin the sale or risk losing her home and business. She filed a lawsuit on June 21, 2012 at 12:36 pm.² Only after Lyons filed the lawsuit, did NWTS voluntarily discontinue the sale.

Lastly, in the Verbatim Report of Proceedings Judge White made a statement suggesting he believed that taking three (3) months to investigate was reasonable for NWTS, but did not state what steps NWTS took during that time to comply with its statutory duties of good faith.³

A. NWTS waived its right to argue Ms. Lyons has no standing because it failed to raise it below.

Appellate courts will only review issues argued and decided on the record below, with a few exceptions.⁴ NWTS has argued for the first time on appeal that Ms. Lyons has no standing to pursue a cause of action under RCW 61.24.127(1)(c). RAP 2.5(a) is only satisfied where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. *Washburn v. Beatt Equipment Co.* 120 Wn.2d 246, 291, 840 P.2d 860 (1992). Because NWTS did not advance this issue

¹ CP 122-123.

² CP 96-143 (Decl. of Mary Anderson showing the court record of the time stamped filed suit).

³ CP 26-27.

⁴ *See State v. Davis*, 41 Wash.2d 535, 250 P.2d 548 (1952).

below, the trial court did not have an opportunity to consider it, let alone rule on it. RAP 2.5 provides for three exceptions where a party can raise an issue for the first time on appeal: 1) lack of trial jurisdiction; 2) failure to establish facts upon which relief can be granted; and 3) manifest error affecting a constitutional right. NWTS has failed to show any of these exceptions apply. Therefore, this Court should refuse to review this new issue and argument on appeal pursuant to RAP 2.5(a).

B. Ms. Lyons sufficiently preserved the pre-foreclosure damage issue for appeal because the trial court was apprised of it and ruled on it. She is not raising this issue for the first time on appeal, but making additional, more concise legal arguments.

Generally, a party must raise an issue at trial to preserve it on appeal. RAP 2.5(a). Preservation encourages efficiency of judicial resources and avoids unnecessary appeals by ensuring that the trial court has the first opportunity to correct any errors.⁵ RAP 2.5(a) is satisfied when the “issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority.” *Washburn*, 120 Wn.2d at 291⁶ (plaintiffs did not argue their interpretation of relevant statutes below, but the trial court recognized it as one possible interpretation.)

This court distinguished an issue raised at the trial level and subsequent arguments. *State v. Quismundo*, 164 Wash.2d 499, 505, 192

⁵ *State v. Fenwick*, 164 Wn. App. 392, 398, 264 P.3d 284 (2011) citing *State v. Robinson*, 171 Wn. 2d 292, 304-05, 253 P.3d 84 (2011).

⁶ Citing *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990).

P.3d 342 (2008). Quismundo erroneously moved for dismissal with prejudice based on insufficient information after the state rested its case. The trial court erroneously granted the state permission to re-open its case and amend the information. *Quismundo*, 164 Wn. 2d at 501-02. The court of appeals affirmed because it only looked at the “with prejudice” part of the dismissal issue, as that was the issue Quismundo raised in the trial court. This court reviewed the entire “dismissal” issue. It did not focus on whether the trial court properly refused the incorrect remedy, but on whether it erred in allowing an equally erroneous remedy. Our Supreme Court then stated, “A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it” and this court enforces that notion by allowing an issue to be preserved as a whole.⁷ *Quismundo*, 164 Wash.2d at 505-06.

In this case, the trial court recognized and considered Ms. Lyons’ pre-foreclosure damage claims before it granted summary judgment. Because the trial court was sufficiently apprised of the issue and it was briefed, RAP 2.5(a) is satisfied, and, like *Quismundo* and *Washburn*, Lyons preserved the issue on appeal. This court should review the issue as a whole, including new arguments based upon recently published case law

⁷ *Quismundo*, 164 Wash.2d at 505,06, 192 P.3d 342.

on the same issue.⁸ It is necessary for this court to hear Lyons' more detailed and concise legal arguments because the bench and the bar need a specific interpretation on this difficult issue. NWTs is correct that *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn.App. 294, 324, 308 P.3d 716 (Ct. App. 2013) is the first case to interpret RCW 61.24.127(1)(c) to make clear that because there are causes of action clearly delineated if a homeowner sits on her rights and allows the foreclosure to occur, these same causes of action exist pre-foreclosure.⁹ Not only did *Walker* provide specific guidance on this issue, but it also directly rejected the federal court's interpretation of state law in *Vawter v. Quality Loan Serv. Corp.*, 707 F.Supp.2d 1115 (2010).¹⁰ Ms. Lyons respectfully asserts that the *Walker* Court's interpretation of the interplay between RCW 61.24.127 and the rest of the Deed of Trust Act's plain language and intent is correct and its holding should be affirmed by this Court in this case, in which this Court is provided with more information and specific facts that support Ms. Lyons' position because it was decided on summary judgment.

⁸ CP 17-20: 10-15 (The record is clear that Lyons continued to contend she is entitled to pre-foreclosure damages based on a violation of the DTA).

⁹ Respondent reply brief, pg. 8.

¹⁰ *Vawter* held that a trustee cannot be liable for any cause of action for damages that arises under the Deed of Trust Act ("DTA") when a trustee's sale has been discontinued – even where discontinuance was by injunction of plaintiff/borrower, no matter how harmful the effect on the enjoining plaintiff or dilatory the conduct of the defendant trustee.

C. Lyons has standing for a cause of action under RCW

61.24.127(1)(c).

First, because the legislature made clear that RCW 61.24.127 allows claims for damages which survive the foreclosure sale, it necessarily follows that there must be an avenue to recover for damages and injury which have occurred pre foreclosure. *See Walker*, 176 Wn.App. at 324.

RCW 61.24.010(4) explicitly recognizes a claim for damages and injury resulting from a trustee's failure to materially comply with the provisions of this chapter apart from any equitable remedy or any other remedy that would affect the property's title. *See Beaton*, WL 1282275 (W.D. Wash 2013); RCW 61.24.127(1)(c). Lyons enjoined the sale before the foreclosure auction occurred, thus preserving all equitable and/or injunctive relief. Both *Walker* and the legislature support this proposition. *Walker*, 176 Wn.App. 294; RCW 61.24.040(4). More importantly, because the Property was not foreclosed, there is no limitation on the claims she can bring because the cutoff provisions in RCW 61.24.127 does not apply. Because the Legislature was concerned with the impact of rescinding a foreclosure sale under certain circumstances in order to promote the stability of land titles, there are some limitations upon invalidating the sale in RCW 61.24.127; however, that is not the case

when the homeowner acts to mitigate her damages and stops the sale. Obviously, this Court has made clear that when the foreclosure is not conducted in conformity with the strict requirements of the DTA, the sale is invalid, but RCW 61.24.127 deals with those circumstances where the sale was done in conformity with the requirements of the DTA such that the sale is valid, but the homeowner nevertheless suffered an injury. *See Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277(2012); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677(2013).

NWTS acknowledges no foreclosure auction took place, but nonetheless argues that RCW 61.24.127(3) limits claims pre-foreclosure to those resulting from foreclosures of owner-occupied residential real property only. This assertion is ingenuine. First, Ms. Lyons' Property was owner-occupied residential property. She occupied it as her primary residence at the time of the initiation of the foreclosure sale and she continues to occupy it as her residence, despite an inadvertent mistake on her filed declaration. All of the loan documents and loan modification documents make this clear. The complaint, reply to summary judgment, oral argument and motion for reconsideration properly reflect the correct information and the efforts of NWTS at this late juncture to raise a new factual issue on appeal should be viewed for precisely what it is – an

attempt to manipulate the facts of this case to mislead this Court about the factual record.

Second, even if Ms. Lyons did not occupy the Property, she is still an owner of real property who may utilize the provisions of the DTA to protect her real property interest. The DTA provides for pre-foreclosure remedies for every property owner whose interest is affected by the wrongful actions of entities involved in the nonjudicial foreclosure process, including purported foreclosing trustees such as NWTs. The DTA does not discriminate against certain kinds of property owners except in limited circumstances, but allows every property owner, including Lyons, to sue for pre-foreclosure auction damages. RCW 61.24.130; RCW 61.24.040.

Lyons suffered pre-foreclosure damages when NWTs proceeded to foreclose upon her home in a nonjudicial manner; thus, she falls within this class of homeowners the statute was designed to protect. She does not fall outside its protection simply because the sale was not completed.

Here, it was the purported beneficiary under the DTA that directed NWTs to commence the non-judicial foreclosure sale of Lyons' property; thereby, allowing Ms. Lyons to enjoin the sale and bring forth causes of actions for damages and injunctive relief. Lastly, NWTs argues that the statute "prohibits a borrower who files such a claim from

recording a “lis pendens.” Again, RCW 61.24.127 places no limitation on claims a borrower can bring when that borrower files suit and enjoins the scheduled foreclosure sale. Ms. Lyons brought a suit to enjoin the scheduled foreclosure sale, so no limitations apply to her. Thus, Ms. Lyons has standing to pursue a cause of action under RCW 61.24.127(1)(c).

D. NWTS was required to obtain proof that the beneficiary had the statutory authority to commence a nonjudicial foreclosure sale. By relying on an outdated beneficiary declaration which disregarded the plain language of the statute, NWTS violated its duty of good faith to Ms. Lyons and the beneficiary and loan owner.

Without judicial oversight, there is significant room for error in the conduct of a foreclosure sale. Therefore, the DTA requires strict compliance when a beneficiary forecloses nonjudicially. NWTS acknowledged there were two conflicting beneficiary declarations.¹¹ However, NWTS ignored the beneficiary declaration executed October 25, 2009 and admittedly relied upon the beneficiary declaration executed June 30, 2010 to issue the notice of trustee sale on March 29, 2012. Under the DTA, NWTS did not have the prerequisite to issue the notice of trustee sale because Wells Fargo was not the present beneficiary when the notice of trustee sale was transmitted, served and recorded. RCW 61.24.030(7)(a).

¹¹See CP 58-95 (Beneficiary declaration dated 2009 and another which was relied upon in 2010.)

A statute is ambiguous only “if it is susceptible to two or more *reasonable* interpretations.” *State v. Hall*, 147 Wn. App. 485, 489, 196 P.3d 151 (2008) (emphasis added). RCW 61.24.030(7) is plain and unambiguous. The statute reads in part:

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. RCW 61.24.030(7)(a).

RCW 61.24.030(7) (emphasis added).

First, the plain language of this Declaration expressly contradicts the requirements of RCW 61.24.030(7). RCW 61.24.030(7) does **not** permit an entity with “requisite authority to enforce it under Article 3 of the UCC” to foreclose nonjudicially. *Id.* Rather, RCW 61.24.030(7) **requires** that the trustee obtain proof that the “beneficiary”, defined at RCW 61.24.005(2) as the “note holder”, is the “owner of any promissory note or other obligation secured by the deed of trust”. The declarant can make this offer of proof by providing a declaration that the “beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust”. *Id.* Here, no such declaration in conformity with the statutory requirements was ever provided to NWTs because the

declarations provided did not comply with the statute. NWTS and/or its clients, the loan servicers, made a conscious choice to create their own declaration and to alter the language required by the statute. The result of this decision by NWTS is that they were using and acting upon a declaration which did not comply with the statute, and the nonconformity with the statute is obvious. The qualifying language “requisite authority to enforce” is found nowhere in the DTA and in fact, RCW 61.24.030(7) has contradictory language which indicates that it is the loan “owner” who is supposed to initiate the foreclosure and the fact that the loan “owner” is being required to act is the precise point of RCW 61.24.030(7). The record is clear in this case that the loan “owner”, Stanwich Mortgage Loan Trust Series 2012-3, never provided NWTS with any instructions and was not involved in the foreclosure at all.

Second, the declaration upon which NWTS purportedly relied was completely out of date and was not current, as required by the statute. RCW 61.24.030(7) indicates that the declaration needs to be current by using the phrase “is”. *Id.* When a statutory phrase includes a verb it is interpreted consistent with its tense. *State v. Coucil*, 151 Wn. App. 131, 210 P.3d 1058 (Ct. App. 2009). Here, the statute uses the verb *is*, indicating a present tense. NWTS relied on the long out-of-date beneficiary declaration which was inconsistent with the statutory

requirement and which indicated Wells Fargo WAS the “actual holder of the note or had requisite authority to enforce it under Article 3 of the UCC”. This not only violates the principle of statutory construction, but also creates an absurd result. The statute requires contemporaneous proof that the purported beneficiary, Wells Fargo, IS the “actual holder . . .” at the time when NWTS issued the NOTS¹² and, if the foreclosing trustee relies on a declaration alone, it must be made under the penalty of perjury. While it may be true that “RCW 61.24.030(7)(a) is not the exclusive manner in which a trustee can satisfy RCW 61.24.030(7)”¹³, NWTS continues to ignore what RCW 61.24.030(7) expressly requires – the reason that it was added to the DTA in 2009 – the trustee must have proof that it is being directed to foreclosure by the loan **owner**. Nothing in the record of this case gives any indication that NWTS received direction from the loan owner or that it had any proof of a beneficiary declaration signing by the loan owner. In fact, all of the evidence is to the contrary.

By relying on an out-of-date declaration, NWTS did not strictly comply with the statute’s proof requirement that Wells Fargo was the loan owner because it was the “actual holder” of the note or other obligation secured by the deed of trust. There is no indication in the DTA or in the Legislative History to RCW 61.24.030(7) that the Legislature intended

¹² Respondent brief, pg. 3, NOTS was issued on March 29, 2012.

¹³ Respondent brief, pg. 17.

that there be any qualification of the requirements of RCW 61.24.030(7) regarding owner or that it ever intended someone with “authority to act under Article 3 of the UCC” to be able to utilize the provisions of the nonjudicial foreclosure statute. In fact, nowhere in Article 3 of the UCC is there any reference to a loan “owner”, which differentiates it from the plain language of the DTA and makes clear that the Legislature intended there to be restrictions on those who can use the DTA beyond the more broad provisions of Article 3 of the UCC. *See, RCW 62A.3, et al.* For instance, under Article 3, a thief who obtains possession of a promissory note indorsed in blank may enforce its terms under Article 3. RCW 62A.3-109, 62A.3-201. It is understandable that the Legislature did not intend to allow a thief who has possession of a note indorsed in blank and secured by a deed of trust to foreclose on real property. Whether or not Wells Fargo had the ability to enforce the note under UCC Article 3 is irrelevant to whether or not it could foreclose under Washington’s nonjudicial foreclosure statute and it certainly does not satisfy NWTS’ duty to obtain a correct beneficiary declaration nor to adhere to its duty of good faith owed to Ms. Lyons.¹⁴ NWTS perpetuated its violations of the

¹⁴ Respondent reply brief, pg. 16 mischaracterizes Lyons’ argument regarding the interpretation of the DTA allowing UCC language to be part of the beneficiary declaration. In fact, strict compliance is required and therefore the UCC qualifying language cannot be included in the beneficiary declaration if it is going to be used to comply with RCW 61.24.030(7)(a).

DTA by relying on an out-of-date beneficiary declaration which asserted that Wells Fargo was at some point the actual holder of the note or entitled to enforce under Article 3. Thus, NWTS violated its duty to Ms. Lyons to act in good faith conformity with the statute and potentially to other Washington residents as well.

Nancy Lambert of NWTS indicated that the new servicer, Carrington, told them to proceed with the sale.¹⁵ However, Carrington's records did not indicate the property was in foreclosure status.¹⁶ NWTS and its counsel repeatedly refused to discontinue the sale even when confronted with evidence Wells Fargo no longer had any beneficial interest in the Deed of Trust.¹⁷ In fact, the change in servicers from Wells Fargo to Carrington, each with conflicting positions regarding the foreclosure, makes it clear why the Legislature was focused in RCW 61.24.030(7) on identifying the loan **owner**. As noted in *Bain*, the actions of mortgage loan servicers are suspect and often conflict with what is most beneficial to the property owner, Ms. Lyons, and the loan owner, Stanwich Mortgage Loan Trust Series 2012-3. *See Bain*, 175 Wn.2d 83; Diane Thompson, *Foreclosing Modifications: How Servicer Incentives*

¹⁵ See CP 96-143 (Decl. of Mary Anderson, p.15)

¹⁶ See CP 96-143 (Decl. of Mary Anderson, p. 17)

¹⁷ See CP 109-110 (Proof of sale of Lyons' loan to another creditor)

Discourage Loan Modification, Wash. L. Rev. Assoc. Vol. 86: 755, 2011 at 758-838.

Importantly, Nancy Lambert during deposition, acknowledged the conflicting information, but confirmed that NWTS still refused to postpone the sale, even though it and Ms. Lambert had authority to do so. From this evidence, a jury could reasonably find that NWTS violated its duty to Ms. Lyons and other property owners under the DTA. Therefore, the trial court erred when it granted summary judgment.

E. The record shows that NWTS violated its statutory duty to act in good faith when it ignored conflicting evidence and continued with the foreclosure sale of Lyons' property without statutory authority.

As the largest foreclosing trustee in Washington State, NWTS knew or should have known its statutory duties toward both the borrower and beneficiary included more than obtaining a beneficiary declaration.¹⁸ The DTA requires foreclosing trustees, like NWTS, to act in good faith toward beneficiaries, borrowers and grantors alike. NWTS breached that duty when it relied on a defective, outdated declaration that did not strictly comply with the statutory language of the DTA. RCW 61.24.030(7)(a). Nonjudicial foreclosures require strict compliance. The DTA specifically enumerates how to carry out a nonjudicial foreclosure sale. Any act taken

¹⁸ CP 144-45; CP 146-69; CP 182-86

by a trustee that is not specifically enumerated in the DTA is without statutory authority. Washington courts have continuously held without statutory authority any act taken is a violation of the DTA. *See Schroeder*, 177 Wn.2d 94; *Bain*, 175 Wn.2d 83; *Albice*, 174 Wn.2d 560; *Klem*, 176 Wn.2d 771; *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007). NWTS continues to argue it complied with the DTA and it acted in good faith when it initiated a nonjudicial foreclosure sale upon Lyons' property. We disagree.

The DTA offers one way to obtain proof that the beneficiary is the actual owner of a promissory note. A trustee must have “proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust” before it may issue a notice of trustee sale. RCW 61.24.030(7)(a) (emphasis added) NWTS did not have that proof. The declaration stated that Wells Fargo was the owner sometime in the past and contained language about UCC article 3. The declaration deviated from the proof enumerated in the DTA and was therefore in violation of it. In fact, when NWTS issued the notice of trustee sale, Wells Fargo was neither the beneficiary nor the actual owner of the loan.

The record reflects that NWTS intentionally disregarded the plain reading of the statute when it relied upon a declaration that did not strictly comply with the plain reading of RCW 61.24.030(7)(a). NWTS admits

that it relied on the outdated beneficiary declaration. (executed on June 30, 2010.)¹⁹ It is undisputed that NWTS did not have proof that Wells Fargo was the beneficiary and holder of the promissory note before it transmitted and served the trustee sale upon Lyons, on or about March 29, 2012, or before it recorded the trustee sale on March 30, 2012 as required by statute. RCW61.24.030(7)(a). Having the required proof is a prerequisite of serving, transmitting and recording the notice of trustee sale. When NWTS received the June 30, 2010 declaration on July 6, 2010 it did not verify with the purported beneficiary that it [IS] the owner of the promissory note. Instead it transmitted and served the notice of trustee sale upon Lyons' home on March 29, 2012 without the prerequisite proof, which is a breach of its statutory duty of good faith.

Even if this Court finds that NWTS was permitted to rely upon an outdated declaration, NWTS still violated its duty of good faith because the declaration did not strictly comply with the required statutory language of the DTA. Specifically, a trustee must have proof that the beneficiary is the owner of the note or obligation secured by the deed of trust prior to the trustee sale. RCW 61.24.030(7)(a). A beneficiary declaration must make that assertion without qualifying language or it does not comply with the statute. Anything added to it or taken away from it renders it defective.

¹⁹ CP 58-95.

To allow the foreclosing trustees to use the language used by the defendants in this case, and upon which NWTs relied, contradicts the plain language of the statute and the intent of the Legislature, as well as this Court's decision in *Bain* where it clarified that the DTA defines "beneficiary" as the actual holder of the note or other obligation secured by the deed of trust (RCW 61.24.005(2)). *Bain*, 175 Wn.2d at 103, 110 (MERS is not a lawful beneficiary under the DTA because it never held the promissory note or other debt instrument secured by the deed of trust). Article 3 allows that the person entitled to enforce the terms of a Promissory Note can be the holder, a non-holder in possession, or transferee who obtains the right to enforce directly from the holder. RCW 62A.3-203. However, it is essential to note that the DTA does NOT use the additional Article 3 language regarding who may enforce..." RCW 61.24.005(2).

Here, the declaration relied upon reads in relevant part:

Wells Fargo Bank, NA is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or *has the requisite authority under RCW 62A.3-301 to enforce said obligation.*

This language deviates from that required by RCW 61.24.030(7)(a) and is therefore defective. This Court should conclude that NWTs knew or should have known that adding language to the declaration, not

enumerated in the statute, rendered it defective. Therefore, it knowingly and intentionally violated its duty of impartiality toward Lyons. If NWTS had acted impartially and obtained a declaration from the owner of the promissory note and/or the “actual holder”, it would have found out that Wells Fargo sold the note and no longer had any beneficial interest²⁰ because NWTS knew on or about April 2012 that Wells Fargo transfers its servicing to Carrington; thus, NWTS knew or should have known that Wells Fargo sold its interest to Stanwich Mortgage Loan Trust Series 2012-3 with an effective date of March 29, 2012. Thus, NWTS violated its duty of good faith to Lyons when it did not do its due diligence and verify that Wells Fargo sold its interest to Stanwich Mortgage Loan Trust Series 2012-3 and it was Stanwich Mortgage Loan Trust Series 2012-3 who was the present beneficiary of the Lyons’ loan **not** Wells Fargo. It would have taken only a phone call.

Lyons alleges the following facts. When NWTS issued the notice of foreclosure sale on March 29, 2012 it did not have the proper statutory authorization to do so. First, the loan was sold on March 29, 2012 and the notice of trustee sale was recorded on March 30, 2012 one day after the

²⁰CP 96-143 (Decl. of Mary Anderson and documented proof of sale of loan effective March 29, 2012).

loan was sold to a different creditor.²¹ Second, the declaration NWTS relied upon was defective because it did not comply with the statutory language of the DTA. Third, NWTS did not obtain proof that Wells Fargo was the owner of the note when it commenced the foreclosure sale upon Lyons. Fourth, NWTS admits it knew about the transfer change from Wells Fargo to Carrington, and in fact, made the internal change but failed to verify that Wells Fargo was the present beneficiary after the transfer of the servicing. Fifth, even when confronted with other evidences to suggest the notice of trustee sale was issued in error, NWTS, still continued to foreclose upon Lyons' property. If all these facts are proven, NWTS failed to act in good faith. Therefore it cannot rely on the beneficiary declaration to commence the foreclosure sale on Lyons' property because the DTA only allows reliance on a declaration as proof when it is done in good faith. RCW 61.24.030(7)(b); RCW 61.24.010(4).(emphasis added).

When these facts are interpreted in the light most favorable to Lyons, there are several genuine issues of material facts that should have gone to the trier of fact. Therefore, the trial court erred when it granted summary judgment.

F. NWTS violated the CPA by committing an unfair or deceptive practice that has a capacity to deceive a substantial portion of

²¹ CP 96-143 (Decl. of Mary Anderson and documented proof that was faxed over to NWTS to demonstrate that the loan was sold effective March 29, 2012.)

the public is a question of fact that should have been determined by a trier of fact.

Violating the requirements of acting under DTA is a violation of the CPA if the plaintiff satisfies the *Hangman Ridge* test. *Bain*, 175 Wn.2d 83. To prove NWTS violated the CPA, Lyons must, and can, show the following: 1) NWTS' practices of relying upon beneficiary declarations which are outdated and which include improper language were unfair or deceptive; and refusing to stop a foreclosure sale even after it received information about conflicting information about the intention to foreclose from the loan owner and/or new servicer; 2) its practices occur in trade or commerce; 3) its actions impact the public interest; 4) its actions injured Ms. Lyons' business or property in quantifiable amounts; and 5) but for the unfair or deceptive actions of NWTS, Ms. Lyons would not have suffered that injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); RCWA 19.86.010

Whether a practice is unfair or deceptive is a question of law and can be demonstrated two ways. First, a plaintiff can show the act or practice has a capacity to deceive a substantial portion of the public. This is a question of fact. Second, a plaintiff can show the act constitutes a per

se unfair trade practice. *Walker*, 176 Wn.App. at 324; *Klem* 176 Wn.2d 771.

NWTS' acts were unfair and deceptive as a matter of law. NWTS argues that it complied with its statutory duty of good faith by refusing to unilaterally rely on Lyons' directive. Reply Brief p. 26. But, because the loan had been sold, NWTS was required to establish ownership of that loan, "either by demonstrating that [Wells Fargo] actually held the promissory note or by documenting the chain of transactions."²² Instead, NWTS chose to rely upon an outdated and defective Beneficiary Declaration. It made this choice after counsel for Lyons repeatedly informed it that Wells Fargo had no beneficial interest, that Lyons had received a loan modification and the loan had been sold.²³ Lyons and her counsel confronted NWTS with undisputed evidence that she received a loan modification, she complied with its terms – including a payment of \$10,000 as early as April 2012, that Wells Fargo sold the loan to U.S. Bank National Association as trustee for Stanwich Mortgage, Loan Trust Series 2012-3 as early as April 2012, and that Wells Fargo transferred its servicing obligations to Carrington as early as April 2012.²⁴ NWTS not only had the statutory authority to discontinue and/or postpone the sale,

²² *Bain*, 175 Wn.2d at 111. (citing RCW61.24.030(7)(a))

²³ CP-98, 100.

²⁴ CP-98, 100, 122-160.

but had a statutory obligation under its duty of good faith to do so.²⁵

Because two different employees and its counsel all refused to exercise its statutory obligation, their behavior demonstrates a larger pattern that was injurious to Lyons and is potentially injurious to other Washington residents.

NWTS did not exercise the kind of impartiality and good faith contemplated by the DTA, especially when NWTS admitted it had the statutory authority to stop the sale unilaterally. RCW 61.24.040(6) (Trustee may, for any cause the trustee deems advantageous, continue the sale up to 120 days); 61.24.030(7)(a) (proof of ownership of note or other obligation is prerequisite of recording, transmitting or serving notice of trustee's sale). NWTS' actions were not committed in good faith under any reasonable interpretation of existing law. RCW 61.24.030(7)(a) requires that NWTS have proof of ownership, which could be in the form of a properly executed beneficiary declaration, before the sale was recorded, transmitted or served. The statute requires proof before going forward and the burden is on the trustee. NWTS argues that the sale was in motion, and they needed proof to stop it. This is not an arguable interpretation of existing law. In fact, it is in direct contradiction of this

²⁵See *Bain*, 175 Wn.2d at 93-94. (citing trustee's statutory obligation to obtain proof of beneficiary's ownership of the note as element of its duty to the grantor of the deed of trust); RCW 61.24.010(4); RCW 61.24.030(7)(a); 61.24.040(6).

court's previous rulings in *Klem, Bain and Walker*²⁶. NWTS did not act in good faith because it purported it was acting under the direction of the new servicer, Carrington, but, Carrington did not direct them to continue with the sale. Moreover, when a trustee fails to exercise its authority to decide whether to delay a sale, it is an unfair or deceptive act or practice under the CPA. *Klem*, 176 Wn.2d at 797. Here, NWTS had the authority to discontinue the sale, but failed to exercise that authority. This in itself was an unfair or deceptive act.

NWTS did have a statutory obligation to investigate the service release from Wells Fargo to Carrington, the out-dated beneficiary declaration, and not to act in the first place when the beneficiary declaration had additional language qualifying language that did not conform to the requirements of the DTA. *See, Klem*, 176 Wn.2d 771. But again, it should have been done before transmitting or serving notice of the sale. Even more, NWTS disregarded Lyons' plea to discontinue the sale and acted on its own accord, without statutory authority and proceeded with the scheduled foreclosure sale. NWTS' actions directly contradicted the statute. That practice is unfair and deceptive as a matter of law.

²⁶ *Klem*, 176 Wn.2d 771; *Bain*, 175 Wn.2d 83; *Walker*, 176 Wn. App. 294

Because NWTS alleges they were acting within their statutory duties and is defending its practices in this litigation and in others, it is likely that this behavior will continue and that a substantial portion of the public is likely to be deceived by its practices. NWTS conducted approximately 20,000 foreclosures in 2012 in the western states.²⁷ It is not the sheer numbers that gives NWTS the capacity to deceive a substantial portion of the public, but it is one factor. Another factor is the unequal bargaining power between NWTS and the borrower. The average borrower is legally unsophisticated and unlearned in the foreclosure process. Without being aware of their options, they may not know they can object to the sale because of the trustee's misplaced interpretation of the DTA.

NWTS' superior bargaining power, purported legal sophistication and its sheer numbers coupled with the lack of judicial oversight, created a situation where Lyons' voice was lost in the shuffle. This is why the DTA requires strict compliance when a beneficiary forecloses nonjudicially and why the courts have repeatedly held that without statutory authority any act taken is a violation of the DTA.²⁸ Without judicial oversight, it is more likely that a trustee will cut corners and take away someone's house

²⁷ CP-144-45, 182-86.

²⁸ See *Schroeder*, 177 Wn.2d 94; *Bain*, 175 Wn.2d 83; *Albice*, 174 Wn.2d 560; *Klem*, 176 Wn.2d 771; *Udall*, 159 Wn.2d 903.

without due process of the law, resulting in many unnecessary and unjustified foreclosures. The Consumer Protection Act was put in place to protect consumers, like Ms. Lyons from such situations.

Finally, NWTS advertises that it is experienced and well versed in non-judicial foreclosures²⁹. Beneficiaries choose NWTS to benefit from their experience. Many servicers depend on NWTS for correct information and conformity to the requirements of the DTA. All of these factors show that a trier of fact could reasonably find that NWTS's unfair practices have the capacity to deceive a substantial portion of the public. Therefore, the trial court erred in granting summary judgment.

G. Because of NWTS' actions, Lyons almost lost her house and incurred costs associated with stopping the sale in the fact of NWTS' refusal to stop. Thus, the trial court erred when it granted summary judgment as to the outrage claim.

To prove the tort of outrage, the plaintiff must show the defendant 1). engaged in extreme and outrageous conduct; 2). intentionally or recklessly inflicted emotion distress; and 3). actually caused severe emotional distress. *Womack v. Von Rardon*, 133 Wn. App. 254, 260-61, 135 P.3d 542 (2006). The trial court must make an initial determination as to whether the conduct may reasonably be regarded as so "extreme and

²⁹ Northwest Trustee Services, Inc., <http://www.northwesttrustee.com>

outrageous” as to warrant a factual determination by the jury. *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979).

NWTS argues that Lyons cannot show its conduct was so extreme as to satisfy the “extreme and outrageous” element of outrage because NWTS simply conducted its own due diligence. Lyons can show that NWTS’ conduct was extreme for several reasons. First, NWTS was informed the loan had been sold and did not discontinue the sale. The appropriate response under RCW 61.24.040(6) and 61.24.030(7)(a) would have been to discontinue the sale. NWTS alleges that it was conducting its own investigation and needed to confirm Lyons’ testimony before discontinuing the sale. But, the statute requires the investigation be done before the sale is scheduled. Because NWTS was a successor trustee and came into the situation in the middle of the process, NWTS argues that it was within their statutory duty to continue with the foreclosure sale until its investigation proved it should not.

It is unthinkable that a trustee, when confronted with the fact that the original beneficiary has no further interest and the loan has been modified, can still sell someone’s house from underneath them. Had Lyons not hired an attorney Lyons would have lost her home and her only source of income. It shocks the conscience.

Lyons can also prove the other 4 elements. NWTS intentionally inflicted emotion distress when it refused to exercise good faith, it refused to discontinue the foreclosure even after it was informed that the beneficiary declaration was outdated, and it purported to rely on instructions from Carrington (even though Carrington did not direct them to continue with the sale). Even more, NWTS could have postponed the sale anytime after April 2012 but refused to do so.³⁰ Every one of these actions were unnecessary. NWTS could have called Wells Fargo to confirm it sold the loan. It could have asked counsel to fax or email the letter notifying Lyons of the loan sale. It could have called Carrington to confirm. It did not do any of those things.

Because NWTS proceeded with the foreclosure sale, Lyons suffered fear, sadness, anger, stress, nausea sleeplessness and anxiety. She also struggled to simply engage in everyday activities. By refusing to stop the sale, NWTS perpetuated the disintegration of Lyons' mental health. There was no reason to continue. Lyons obtained a loan modification, Wells Fargo no longer had any interest in the property and Carrington did not want to foreclose. This is behavior that may reasonably be regarded as so extreme and outrageous that it warrants a factual determination by the jury.

³⁰RCW 61.24.040(6).

CONCLUSION

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Based on the above-stated facts and applicable law, the trial court erred when it granted summary judgment in favor of Respondent Trustee; therefore, Petitioner Lyons request that this Court vacate the trial court's Order on June 10, 2013 and remand the matter back to the trial court for a trial on the merits. Also, request this Court grants petition for review as there are urgent issues that continued to affect Washington Resident's in regards to pre-foreclosure remedies/damages and a trustee's belief that a beneficiary declaration is the only document needed to rely upon to commerce a nonjudicial foreclosure sale and if the beneficiary provides the declaration then the trustee has acted in good faith, we urge this Court to accept review of this case so this Court may bring clarifications in regards to trustees duty to act in good faith and impartial between beneficiaries and borrowers.

Dated at Bellevue, Washington this 23rd day of December, 2013.

By: /s/ Mary C. Anderson

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CERTIFICATE OF SERVICE

I, Mary C. Anderson, declare under penalty of perjury of laws of the State of Washington that on December 23, 2013, before 5:00pm, I served the REPLY BRIEF to which this Certificate of Service is attached by electronic mail to the attorney for Respondent, Northwest Trustee Services, named below at party's legal counsel email below:

Sakae S. Sakai RCO Legal, P.S.
Attorneys for Respondent Northwest Trustee Services, Inc.
Telephone: 425.247.2025
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DATED December 23, 2013.

/s/ Mary C. Anderson
Mary C. Anderson, WSBA No. 44137

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