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Washington State Supreme Court

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No. 90509-6

SUPREME COURT
OF THE STATE OF WASHINGTON

ROCIO TRUJILLO,

Petitioner,

v.

Northwest Trustee Services, Inc..

Respondent

Filed *E*
Washington State Supreme Court

MAY 20 2015

Ronald R. Carpenter
Clerk *h/L*

AMICUS BRIEF OF FEDERAL HOME LOAN MORTGAGE
CORPORATION

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ORIGINAL

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 1

ARGUMENT..... 2

 A. Foreclosures are an Unfortunate but Necessary Part
 of the Residential Real Estate Finance Business 4

 B. Freddie Mac’s Business Model is Consistent with
 This Court’s Precedent and the Interplay Between
 the DTA and the U.C.C. 6

 C. Freddie Mac’s Business Model Furthers the Goals
 of the DTA..... 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

<u>CASES</u>	Page(s)
<i>Bain v. Metro Mtg. Gp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	6, 7, 10, 13
<i>Bank of Am., N.A. v. Inda</i> , 48 Kan. App. 2d 658, 303 P.3d 696 (2013).....	7
<i>Bavand v. OneWest Bank, F.S.B.</i> , 176 Wn. App. 475, 309 P.3d 636 (2013).....	7
<i>Coble v. SunTrust Mortg.</i> , No. C13-1878-JCC, 2015 WL 687381, at *7 (W.D. Wash. Feb. 18, 2015).....	10
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985).....	11
<i>Frizzell v. Murray</i> , 179 Wn.2d 301, 313 P.3d 1171 (2013).....	11
<i>John Davis & Co. v. Cedar Glen No. Four, Inc.</i> , 75 Wn.2d 214, 450 P.2d 166 (1969).....	13
<i>JPMorgan Chase Bank, N.A. v. Erlandson</i> , 821 N.W.2d 600 (Minn. Ct. App. 2012).....	8
<i>Lyons v. U.S. Bank, N.A.</i> , 181 Wn.2d 775, 336 P.3d 1142 (2014).....	10
<i>Martin v. New Century Mortg. Co.</i> , 377 S.W.3d 79 (Tex. App. 2012).....	8
<i>PHH Mortg. Corp. v. Powell</i> , 2014 PA Super 197, 100 A.3d.....	7
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	11
<i>Rucker v. Novastar Mortgage, Inc.</i> , 177 Wash. App. 1, 311 P.3d 31 (2013)	7

<i>SMS Fin. Liab. Co. v. ABCO Homes, Inc.</i> , 167 F.3d 235 (5th Cir. 1999)	8
<i>Trujillo v. NWTS</i> , 181 Wn. App. 484, 326 P.3d 768 (2014)	3, 9, 10, 14

STATUTES AND COURT RULES

12 U.S.C. § 1451	2
RAP 10.6(b)	1
RCW 61.24.005(2)	9
RCW 61.24.030(7)	11, 13
RCW 61.24.030(7)(a)	11
RCW 61.24.031	12
RCW 61.24.100(1)	11
RCW 62A.1-201(21)(A)	7, 9
RCW 62A.3-109	8
RCW 62A.3-201	9
Uniform Commercial Code (“U.C.C.”)	passim
Washington U.C.C.	7, 13

OTHER AUTHORITIES

Freddie Mac Guide ¶ 66.11(a)	8, 9
http://www.freddiemac.com/singlefamily/guide/	4

INTRODUCTION

Amicus curiae Federal Home Loan Mortgage Corporation (“Freddie Mac”) is filing the following amicus brief with its motion for permission to file an amicus brief, pursuant to RAP 10.6(b). Freddie Mac’s amicus brief concisely addresses the unfortunate but necessary role the non-judicial foreclosure process plays in the residential real estate finance industry, describes how Freddie Mac’s business is consistent with this Court’s precedent and the interplay between the Deed of Trust Act (“DTA”) and the Uniform Commercial Code (“U.C.C.”) as enacted in Washington, and explains how Freddie Mac’s business model furthers the three main goals of the DTA: (1) an efficient and inexpensive foreclosure process; (2) adequate safeguards against wrongful foreclosure; and (3) promoting the stability of land titles.

STATEMENT OF THE CASE

Freddie Mac joins the factual recitation submitted by Respondent Northwest Trustee Services, Inc. (“NWTS”) and incorporates by this reference the background information about Freddie Mac set forth in Freddie Mac’s motion for permission to file an amicus brief filed with this brief.

ARGUMENT

Amicus curiae Federal Home Loan Mortgage Corporation (“Freddie Mac”) is a Government-Sponsored Enterprise, who, along with the Federal National Mortgage Association (“Fannie Mae”), is the largest owner of residential mortgages in the United States. Both are critical to the Nation’s housing market.

Congress chartered Freddie Mac in 1970 to “provide ongoing assistance to the secondary market for residential mortgages” and “to promote access to mortgage credit throughout the Nation.” 12 U.S.C. § 1451. Congress also directed Freddie Mac to focus on making homeownership more accessible to “low- and moderate-income families,” as well as individuals living in “central cities, rural areas, and underserved areas.” *Id.* Like Fannie Mae, Freddie Mac carries out its federal mission by participating in the secondary mortgage market by purchasing and guaranteeing qualifying mortgage loans and issuing mortgage-backed securities in global capital markets.

As a participant in the secondary mortgage market, Freddie Mac does not lend money directly to homeowners. Rather, Freddie Mac infuses billions of dollars into the primary mortgage market by purchasing mortgage loans from lenders and, in many instances, pooling the mortgages and issuing securities to investors to ensure that sufficient

capital exists across the Nation for lenders to continue to make mortgage loans to prospective homeowners in Washington and elsewhere.

During 2014 and 2015, Freddie Mac purchased (or otherwise guaranteed) \$255.3 billion and \$422.7 billion of single-family mortgage loans, representing approximately 1.2 million and 2.1 million homes, respectively. See Federal Home Loan Mortgage Corporation Form 10-K, at 2 (Dec. 31, 2014). Freddie Mac estimates that Fannie Mae, Freddie Mac, and Ginnie Mae collectively guaranteed more than 90% of the single-family conforming mortgages originated in 2014. As of February 28, 2015, Freddie Mac owns or guarantees 287,378 loans secured by single-family homes in Washington, which amount to a total unpaid principal balance (“UPB”) of over \$53 billion dollars. Of these loans, 7,890 loans – for a total UPB of approximately \$1.5 billion – are delinquent.

Because Freddie Mac relies upon its mortgage servicers to carry out the day-to-day functions of servicing mortgage loans, Freddie Mac has a compelling interest in the outcome of this case and the settling of Washington law regarding whether an entity’s “beneficiary” status under the DTA turns on entitlement to the ultimate economic benefit of payments on the note or, as the Washington Court of Appeals has ruled in *Trujillo v. NWTs*, 181 Wn. App. 484, 496, 326 P.3d 768 (2014), on note

“holder” status. Freddie Mac therefore submits this brief to help this Court better understand the practical implications of Petitioner’s arguments.

A. **Foreclosures are an Unfortunate but Necessary Part of the Residential Real Estate Finance Business**

Freddie Mac’s primary business objective is to support homeowners by maintaining mortgage availability and to support and improve the secondary mortgage market, consistent with its congressionally-mandated mission. To achieve its key federal missions, Freddie Mac relies on its servicers to service the loans that it buys. In addition to invoicing borrowers, collecting mortgage payments, and generally interfacing with borrowers, servicers also work to remediate delinquent loans by pursuing collection efforts, conducting loss mitigation activities, and, if necessary, initiating foreclosures. Servicers carry out these functions pursuant to the terms of the Freddie Mac Single Family Seller/Servicer Guide (the “Guide”).¹

Foreclosures are, unfortunately, an inevitable aspect of the secondary mortgage market. The existence of efficient foreclosure processes ultimately affect Freddie Mac’s ability to carry out its congressionally mandated mission to support the Nation’s housing market

¹ The Guide is publicly available at: <http://www.freddiemac.com/singlefamily/guide/>, last accessed April 28, 2015.

because such processes minimize the impact of defaults on its ability to provide mortgage capital throughout the Nation. This is so because when Freddie Mac issues securities to investors, Freddie Mac guarantees the monthly payments of principal and interest (net of a servicing fee and Freddie Mac's management and guarantee fee), which is passed through to the securities investors. If a borrower stops making monthly payments, Freddie Mac steps in and, pursuant to its guarantee, makes the payments to the investors.

Foreclosures are a last resort. When homeowners, like Petitioner, are unable to meet their mortgage obligations, Freddie Mac requires servicers to intervene early to evaluate alternatives to foreclosure, such as loan modifications, repayment or forbearance plans, or other workout options. *See, e.g.*, Guide ¶¶ 64.4 (servicer must contact borrower early in delinquency cycle); 65.4 (Freddie Mac's loss mitigation philosophy includes helping borrowers find solutions to delinquency and the concept that servicers should pursue alternatives to foreclosure even after foreclosure proceedings have been initiated); 65.6 (listing servicer's required loss mitigation activities); 65.11 (temporary relief options include repayment plans, short term forbearance and long term forbearance); C65 (setting forth eligibility and process for HAMP modification program).

When suitable solutions to helping homeowners stay in their homes have been fully explored and exhausted, and no other alternatives to foreclosure exist, foreclosures must then occur in a time-efficient manner to ensure that Freddie Mac recovers as much of its investment as possible to minimize the impact of defaults on Freddie Mac's ability to assist with the continued flow of capital into the mortgage market. As such, the Guide requires servicers to pursue foreclosure "in a cost-effective, expeditious and efficient manner." Guide ¶ 66.1. Delays in the foreclosure process increase Freddie Mac's expenses and may adversely affect the values of, and Freddie Mac's losses on, the other mortgage-related securities it holds. Delays in the foreclosure process may also adversely affect trends in home prices regionally or nationally. All of these factors ultimately affect, in turn, Freddie Mac's ability to support the Nation's housing market in accordance with its federal charter.

B. Freddie Mac's Business Model is Consistent with This Court's Precedent and the Interplay Between the DTA and the U.C.C.

The current state of the law in Washington is that the party enforcing a borrower's default through non-judicial foreclosure must be the holder of the note secured by the deed of trust being foreclosed. *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012) (citing RCW 61.24.005(2)). As this Court explained in *Bain*, since 1998, the

DTA has defined a “beneficiary” of a deed of trust as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” *Bain*, 175 Wn.2d at 98-99 (quoting RCW 61.24.005(2) (emphasis added)).

This definition is consistent with the Washington U.C.C. definition of a “Holder” of a negotiable instrument: “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.” RCW 62A.1-201(21)(A); *Bain*, 175 Wn.2d at 104; *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 488, 309 P.3d 636 (2013) (“beneficiary... must be a ‘holder of the note’”); *Rucker v. Novastar Mortgage, Inc.*, 177 Wash. App. 1, 14, 311 P.3d 31, 37 (2013) (same).

This approach is also consistent with Washington’s version of the U.C.C. and the majority view in other states. *See, e.g., PHH Mortg. Corp. v. Powell*, 2014 PA Super 197, 100 A.3d 611, 621 (2014) (“[t]he entity with the right to enforce the Note may well not be the entity entitled to receive the economic benefits from payments received thereon.”); *Bank of Am., N.A. v. Inda*, 48 Kan. App. 2d 658, 667, 303 P.3d 696 (2013) (“Bank of America had the authority under the UCC to enforce the Note even though it had sold the beneficial interest in the Note to Freddie Mac.”);

JPMorgan Chase Bank, N.A. v. Erlandson, 821 N.W.2d 600, 607 (Minn. Ct. App. 2012) (“[o]wnership or possession of the note associated with a security instrument is not relevant to identifying who has the authority to foreclose that security instrument....”); *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App. 2012) (“[u]nder common-law principles of assignment, a party who fails to qualify as a ‘holder’ for lack of an indorsement may still prove that it owns the note.”); *SMS Fin. Liab. Co. v. ABCO Homes, Inc.*, 167 F.3d 235, 239 (5th Cir. 1999)

Freddie Mac’s Guide follows this well-settled principle by requiring that the original notes memorializing the loans it purchases to be indorsed in blank, consistent with the U.C.C. and common law principles that mortgage notes are negotiable instruments payable to bearer. Guide ¶ 16.4(a). *See also* RCW 62A.3-109. Freddie Mac adopted this policy so that its servicers are the note holders thus have standing to initiate foreclosures in Washington and elsewhere.

Under the Guide, absent special circumstances not applicable to standard non-judicial foreclosures, Freddie Mac’s servicers must foreclose in their own name, not Freddie Mac’s. *See* Guide ¶ 66.11(a). A servicer needing to initiate non-judicial foreclosure proceedings, bring a judicial foreclosure action, or defend litigation involving a Freddie Mac loan

obtains either actual or constructive possession of the note. See Guide ¶ 18.6(d), (e).

A servicer obtains constructive possession on: (1) the date the legal action commences or (2) the date that the document custodian receives Freddie Mac's designated form for obtaining possession², whichever is earlier. Guide ¶ 18.6(d). Alternatively, a servicer can also obtain actual possession of the Note prior to initiating foreclosure, commencing litigation on behalf of Freddie Mac, or in the course of defending litigation involving a Freddie Mac note. *See id.* ¶ 18.6(e).

Either method of possessing an indorsed in blank note confers "holder" status and thus "beneficiary" status. *See* RCW 62A.1-201(21)(A) (defining holder as person in possession of indorsed in blank instrument without reference to actual or constructive possession); RCW 62A.3-201 (recognizing that "nobody can be a holder without possessing the instrument, either directly or through an agent."); RCW 61.24.005(2) (defining "beneficiary" for DTA purposes as the "holder" of the obligation secured by the Deed of Trust).

By affirming the Court of Appeals' well-reasoned analysis in *Trujillo* that the "beneficiary" of a Deed of Trust is determined by

² The servicer may request actual or constructive possession of the note using Freddie Mac's Form 1036. *See* Guide, Form 1036; 18.6(d), (e).

reference to note holder status under the U.C.C., this Court will put to rest a significant question that would otherwise threaten to undermine the certainty associated with the current manner in which Freddie Mac loans are nonjudicially foreclosed in Washington.³

Petitioner, however, seeks to impose an additional requirement that the enforcing party must be the “owner” of the loan as well. Imposing such a requirement would not only contravene well-settled industry principles, as explained in the next section, such a requirement would undermine the well-established goals of the DTA, causing foreclosures to become more burdensome and expensive. *See Bain*, 175 Wn. 2d at 94 (2012).

Freddie Mac relies on the current state of the law in Washington to abide by the “holder” requirement as well as to use its servicers to reduce costs and create efficiencies in its business activities. By affirming the Court of Appeals’ well-reasoned analysis in *Trujillo* that the “beneficiary” of a Deed of Trust is determined by reference to note holder status under

³ The recent decision in *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 336 P.3d 1142 (2014) should not impact the Court’s analysis on this issue. Notably, *Trujillo* was modified on November 3, 2014 – after the Washington Supreme Court’s decision in *Lyons*. Although *Lyons* “touched on the issue of ‘holder’ versus ‘owner’ for negotiable instrument enforcement, this case did not overrule *Trujillo*” *Coble v. SunTrust Mortg.*, No. C13-1878-JCC, 2015 WL 687381, at *7 (W.D. Wash. Feb. 18, 2015). As correctly explained in *Coble*, “[b]ased on the current state of the law, a note holder is a beneficiary entitled to enforce the note . . . [the servicer] is, therefore, a ‘holder’ and the beneficiary as a matter of law.” Now that the “owner/holder” issue is squarely presented, this Court should reach the result advocated by Respondent NWTs and Freddie Mac.

the U.C.C., this Court will put to rest a significant question that would otherwise threaten to undermine the certainty associated with the current manner in which Freddie Mac loans are non-judicially foreclosed in Washington.

C. Freddie Mac's Business Model Furthers the Goals of the DTA.

In Washington, the DTA allows for an efficient and cost-effective foreclosure process by permitting the note holder to pursue a non-judicial foreclosure in exchange for waiving the right to pursue a deficiency judgment, consistent with Freddie Mac's needs. *See* RCW 61.24.100(1).

This Court "has repeatedly established that an interpretation of the DTA must consider the three goals of the [DTA]." *Frizzell v. Murray*, 179 Wn.2d 301, 317, 313 P.3d 1171 (2013). Thus, this Court's interpretation of RCW 61.24.030(7) must take into consideration the following three goals: (1) an efficient and inexpensive non-judicial foreclosure process, (2) an adequate opportunity to prevent wrongful foreclosure, and (3) the promotion of the stability of land titles. *Frizzell*, 179 Wn.2d at 317; *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003); *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Interpreting RCW 61.24.030(7)(a) in the manner urged by Respondent NWTs and Freddie Mac would further these goals because it is Freddie Mac's servicers, not Freddie Mac itself, that are best

operationally equipped to process non-judicial foreclosures consistent with the requirements of Washington law and the Guide. For example, the Guide and the DTA both require early outreach to borrowers and evaluation of potential loss mitigation options. *See, e.g.* Guide ¶¶ 64.4; 65.4; 65.11; C65; RCW 61.24.031 (establishing various initial contact, and foreclosure avoidance processes such as mediation). Because servicers perform the day-to-day functions in servicing loans, servicers are in the best position to evaluate borrowers for loss mitigation options. Servicers are thus tasked with making the initial contact with delinquent borrowers to explore whether borrowers qualify for repayment plans, forbearance agreements, or loan modifications, and if applicable, implementing one of these options. Freddie Mac's servicers are also better suited to participate in state programs such as Washington's Foreclosure Fairness Act. In the event that home retention is not possible, it is the servicers, not Freddie Mac, that have the operational capability to quickly move the non-judicial foreclosure process from initiation to conclusion.

The interpretation urged by Petitioner, however, would substantially undermine the goals of the DTA because the non-judicial process would be effectively closed to both Fannie Mae and Freddie Mac. Freddie Mac, through its servicers, would likely have to pursue judicial foreclosures, which would inevitably extend foreclosure timelines and

increase costs, thereby frustrating Freddie Mac's federal mission. And an increase in judicial foreclosures would also likely overwhelm the Washington Courts.

Freddie Mac's business model also helps to promote the stability of land titles. As noted above, interpreting RCW 61.24.030(7) to require the beneficiary to prove that it has some "ownership" interest in the ultimate economic benefit of the loan payments as opposed to holder status under the U.C.C. would be inconsistent with this Court's longstanding precedent and the recognized relationship between the DTA and the U.C.C. it has previously recognized. *See, e.g., John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 223, 450 P.2d 166 (1969) ("The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds."); *Bain*, 175 Wn.2d at 104 (agreeing that "our interpretation of the [DTA] should be guided by these UCC definitions" and that defining beneficiary as the party in possession of the note "accords with the way the term 'holder' is used across the deed of trust act and the Washington UCC."). To deviate from this precedent would inject tremendous uncertainty into the non-judicial foreclosure process, thereby

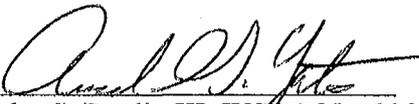
threatening the stability of title to property that has been or will be transferred through that process.

CONCLUSION

Amicus curiae Freddie Mac respectfully requests that this Court affirm the Court of Appeals' holding and analysis in *Trujillo v. NWTS*, 181 Wn. App. 484, 496, 326 P.3d 768 (2014).

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

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CERTIFICATE

I certify that on the 8th day of May, 2015, I mailed a copy of the foregoing Amicus Brief of Federal Home Loan Mortgage Corporation to the below counsel of record, postage prepaid, as well as emailed to the addresses indicated.

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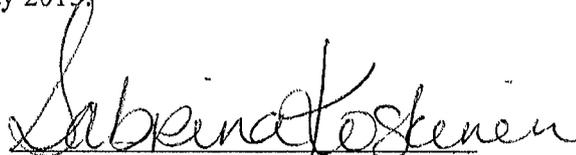
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Attached for filing in the above referenced case, please see:

- Amicus Brief of Federal Home Loan Mortgage Corporation

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Thank you for your assistance and feel free to contact me directly with any questions or concerns.

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