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Supreme Court No. 90509-6

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ROCIO TRUJILLO,  
Plaintiff-Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,  
Defendant-Respondent;

and

WELLS FARGO BANK, N.A.,  
Defendant.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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 ORIGINAL

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## I. INTRODUCTION

This case involves the meaning of the provision in the Deed of Trust Act (“DTA”), RCW 61.24.030(7)(a), stating that before a trustee can record a notice of trustee’s sale to foreclose on residential real property, it must have proof that the beneficiary is the *owner* of the note secured by the deed of trust. This proof of ownership requirement must be applied as written because the Court presumes the legislature says what it means and means what it says. To be reasonable, an interpretation must account for all the words in a statute. Courts are not permitted to ignore statutory language as the Court of Appeals did here by ignoring—and writing out of the statute—the ownership requirement in RCW 61.24.030(7)(a).

Based on the undisputed facts before the Court that Northwest Trustee Services, Inc. (“NWTS”) recorded the notice of sale without the required proof that Wells Fargo was the owner of the note, and that NWTS knew at the time Wells Fargo was *not* the owner, the Court should reverse the Court of Appeals’ decision that affirmed the trial court’s CR 12(b)(6) dismissal, hold that NWTS’s recording of the notice of sale was unlawful under RCW 61.24.030(7), and remand Ms. Trujillo’s CPA claim for trial.

## II. SUPPLEMENTAL STATEMENT OF THE CASE

Ms. Trujillo has previously summarized the facts and procedural history. Petition for Review at 2-6. What follows is a

brief restatement of the facts most pertinent to NWTS's recording of the notice of trustee's sale, and a summary of the Court of Appeals' decision.

**A. NWTS's Recording of Notice of Trustee's Sale.**

After Ms. Trujillo took out her mortgage loan and signed the deed of trust, CP 17-34, her original lender sold the loan to Wells Fargo which, in turn, sold it to Fannie Mae. CP 38; CP 86, ¶¶ 13-14. In March 2012, after Ms. Trujillo fell behind on the loan payments, a Wells Fargo officer executed a declaration stating that Wells Fargo was "the actual holder of the promissory note or other obligation evidencing [Ms. Trujillo's] loan *or* has requisite authority under RCW 62A.3-301 to enforce said obligation." CP 36 (emphasis added).

In May 2012, NWTS sent Ms. Trujillo a notice of default stating that Fannie Mae, not Wells Fargo, was the owner of her note. CP 38. In July 2012, relying on the declaration from Wells Fargo, CP 36, NWTS recorded a notice of trustee's sale which scheduled the sale for November 2012. CP 41-44. NWTS knew when it recorded the notice of sale that Fannie Mae, not Wells Fargo, was the owner of the note. CP 38 (notice of default previously issued by NWTS stating that Fannie Mae owned the note); CP 89-90, ¶ 30; *see also* Verbatim Report of Proceedings ("RP") at 13 (admission by NWTS's counsel that Fannie Mae owned the note).

**B. The Court of Appeals' Decision.**

Despite the first sentence of RCW 61.24.030(7)(a) stating that “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,”

61.24.030(7)(a) (emphasis added), the Court of Appeals held:

[W]hen we consider the second sentence of this statute, specifying that a “declaration by the beneficiary . . . stating that [it] is the actual holder of the promissory note . . . shall be sufficient proof as required” under the statute, 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.*

181 Wn. App. 484, 501, 326 P.3d 768 (2014) (emphasis added).

The Court of Appeals acknowledged that it was ignoring the first sentence of RCW 61.24.030(7)(a), stating that “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.” *Id.*

In reaching this holding, the Court of Appeals relied on a *judicial* foreclosure case even though the statutory requirements for nonjudicial foreclosure are substantially different from the requirements for judicial foreclosure. *See* 181 Wn. App. at 498-501 (relying on *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969)); *see also Albice v. Premier Mortg.*

*Serv. of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (requirements for nonjudicial foreclosure are “extensively spelled out” in DTA, and lenders must “strictly comply” with those requirements including the “requirements for conducting a trustee’s sale . . . in RCW 61.24.030”).

The Court of Appeals did not harmonize the first sentence of RCW 61.24.030(7)(a) with the second sentence. *See* 181 Wn. App. at 492-511. Nor did it consider the rule that the DTA should be interpreted in favor of borrowers. *Id.*; *compare Albice*, 174 Wn.2d at 567 (discussing that rule). The Court of Appeals held that the declaration Wells Fargo provided to NWTs stating that Wells Fargo was “the actual holder of the promissory note or other obligation evidencing [Ms. Trujillo’s] loan *or* has requisite authority under RCW 62A.3-301 to enforce said obligation,” CP 36 (emphasis added), proved Wells Fargo’s ownership of the note under the second sentence of RCW 61.24.030(7)(a). *See* 181 Wn. App. at 505-07. It held that the declaration was adequate proof of Wells Fargo’s ownership of the note even though that alternative language, “or has requisite authority under RCW 62A.3-301 to enforce said obligation,” is not in the second sentence of .030(7)(a), and even though it was undisputed that NWTs knew Wells Fargo was not the owner of the note. *Id.* at 488-89 & 505-07; *see also* CP 38.

Finally, the Court of Appeals held that Ms. Trujillo failed to establish that NWTs violated its duty of good faith owed to her under RCW 61.24.030(7)(b) and RCW 61.24.010(4), even though, again, it was undisputed that NWTs knew when it recorded the notice of sale that Wells Fargo was *not* the owner of the note as Wells Fargo was required to prove under RCW 61.24.030(7)(a), and even though the declaration upon which NWTs relied had unauthorized alternative language different from the language in the second sentence of RCW 61.24.030(7)(a). *See* 181 Wn. App. at 510-11. Applying a summary judgment standard to this CR 12(b)(6) appeal, the Court of Appeals held that Ms. Trujillo “fail[ed] to substantiate” any breach of the duty of good faith by NWTs. *Id.* at 511.

### III. SUPPLEMENTAL ARGUMENT

- A. **RCW 61.24.030(7) Requires the Trustee to Have Proof that the Beneficiary Is the Owner of the Note Secured by the Deed of Trust Before Recording the Notice of Trustee’s Sale.**
1. **The Plain Language of RCW 61.24.030(7) Requires the Trustee to Have Proof that the Beneficiary Is the Owner of the Note.**

The language of RCW 61.24.030(7) is clear. It provides, in full, as follows:

(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.

RCW 61.24.030(7) (emphasis added) (Appendix A hereto). The Court of Appeals read this proof of ownership requirement out of the statute by holding that a foreclosing beneficiary “need *not* show that it is the owner of the note,” and that “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.” 181 Wn. App. at 501 (emphasis added).<sup>1</sup>

The Court of Appeals substituted its judgment for that of the legislature by treating this statutory proof of ownership requirement as language that “could have [been] eliminated,” *id.*, and violated the rule that “[c]ourts are not permitted to simply ignore terms in a statute.” *In the Matter of the Parentage of J.M.K. and D.R.K.*, 155

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<sup>1</sup> It is undisputed that the “owner” of the note is the party that has the right to the economic benefits. *See* 181 Wn. App. at 497 n. 53 (ownership means “right to economic benefits of the note”) (citation omitted); *see also* *Cashmere Valley Bank v. Dep’t of Revenue*, 181 Wn.2d 622, 625, 334 P.3d 1100 (2014) (when the original lender sells loan, the “secondary market buyer acquires the right to receive the borrower’s principal and interest payments on the home loan *and also the right to foreclose on the loan if the borrower fails to make timely payments*”) (emphasis added).

Wn.2d 374, 393, 119 P.3d 840 (2005) (rejecting interpretation that “effectively ignore[d] the term ‘artificial insemination’ in statute at issue). Most importantly, when interpreting the DTA, it “must not be judicially construed in a way that renders any part of the statute superfluous.” *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

This Court’s analysis in *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090 (2014), is instructive. Johnson was convicted of driving while license suspended under the last clause of former RCW 46.20.342 for failing to comply with terms of an underlying traffic citation. *Id.* at 540-41. Johnson challenged the conviction and argued that the Court should reverse his conviction despite the plain language of that last clause which supported it. *Id.* at 542. The Court rejected the argument because it failed to “account for all the words in a statute,” and held that the Court did “not have the option of ignoring that explicit legislative directive.” *Id.* at 544 & 547. The Court concluded, “[w]e thus cannot ignore that final clause . . . ; we must instead assume that clause was intended to serve some purpose ‘because we presume the legislature says what it means and means what it says.’” *Id.* at 544 (citation omitted).

The Court of Appeals should have harmonized the first and second sentences of RCW 61.24.030(7)(a) by ruling that a trustee can only rely on declarations from beneficiaries who claim to both

hold and own the note in question. The first sentence of .030(7)(a) says that the beneficiary must prove it is the owner of the note. The second sentence says the proof of ownership declaration provided to the trustee which may satisfy the proof of ownership requirement in the first sentence (assuming the trustee can rely on it in good faith without violating RCW 61.24.030(7)(b)) must be provided by that same beneficiary. Thus, when the two sentences are read together, it follows that the beneficiary that provides the declaration must be the *owner* of the note. See *Timberline Air Serv., Inc. v. Bell Helicopter- Textron, Inc.*, 125 Wn.2d 305, 313-14, 884 P.2d 920 (1994) (“The meaning given the same language in the first sentence of the provision should accord with that given this language in the second sentence.”); see also *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006) (“statutory provisions are interpreted in relation to each other and all provisions harmonized”) (citation omitted).<sup>2</sup>

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<sup>2</sup> The DTA requires the trustee to determine the owner of the note by providing that at least thirty days before the trustee records the notice of trustee’s sale, it must send the borrower a notice of default that identifies the owner. RCW 61.24.030(8)(i). Thus, harmonizing the first and second sentences of RCW 61.24.030(7)(a) to mean that the trustee can only rely on declarations from beneficiaries who claim to both hold and own the note does not impose any additional duty of inquiry on the trustee, which is already required to identify and disclose to the borrower who owns the note under RCW 61.24.030(8)(i).

That the two sentences of RCW 61.24.030(7)(a) are in harmony is further bolstered by RCW 61.24.030(7)(b), which says the trustee cannot rely on the declaration described in the second sentence to meet the proof of ownership requirement in the first sentence if the trustee “has violated” its duty of good faith to the borrower under RCW 61.24.010(4). Under RCW 61.24.030(7)(b), if the trustee knows the beneficiary is *not* the owner, the trustee cannot accept the declaration from the beneficiary as proof of the known non-owner beneficiary’s “ownership,” because in so doing it will have violated the trustee’s duty of good faith. *See Lyons v. U.S. Bank National Ass’n*, 181 Wn.2d 775, 790, 336 P.3d 1142 (2014) (discussing RCW 61.24.030(7)(b) and stating, “if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee’s sale to comply with its statutory duty”).

The term “has violated” in RCW 61.24.030(7)(b) is in the present-perfect tense, which is a tense that describes an action that began in the past and is, or may be, still going on. *Oxford Dictionary of English Grammar* 329 (2d ed. 2014) (present-perfect “expresses that a situation began in the past and continues up to the moment of speaking, and possibly beyond”). Thus, the term “has violated” does not require a prior, separate violation of NWT’s duty of good faith because it includes a violation of the duty of good faith that, as here,

began in the past and is still ongoing. In addition, it would make no sense to interpret RCW 61.24.030(7)(b) to allow NWTS to accept a declaration as proof of “ownership” from Wells Fargo, when NWTS knew that Wells Fargo was *not* the owner. See *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012) (courts construe statutes to “avoid absurd results”).

Ms. Trujillo’s plain language reading also avoids the absurd result created by the Court of Appeals’ decision, under which even a *thief* who stole the note could authorize the trustee to foreclose. As the Court of Appeals noted, “[a] thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it.” 181 Wn. App. at 497. If, as the Court of Appeals held, RCW 61.24.030(7)(a) merely “require[d] that a person entitled to enforce a note be a holder,” *id.* at 502, and the proof of ownership requirement could be eliminated as it further held, *id.* at 501, then thieves could authorize foreclosure.

In short, under the plain language of RCW 61.24.030(7), the beneficiary must provide the trustee with proof that the beneficiary is the *owner* of the note before the trustee can record the notice of trustee’s sale. RCW 61.24.030(7)(a). As proof of the beneficiary’s ownership of the note, the trustee may rely on a declaration stating that the beneficiary is the actual holder of the note, *id.*, but that declaration must be provided by a beneficiary that is also the owner,

*id.*, and the trustee cannot rely on the declaration as proof of the beneficiary's ownership of the note if in so doing it will have violated the trustee's duty of good faith—as, for example, where the trustee knows the beneficiary is *not* the owner of the note. RCW 61.24.030(7)(b).

**2. The Court's Decisions in *Lyons*, *Schroeder* and *Bain* All Reinforce the Conclusion that the Plain Language of RCW 61.24.030(7) Requires the Beneficiary to Prove It Is the Owner of the Note.**

This Court's decisions in *Lyons*, *Schroeder* and *Bain* reinforce the conclusion that under RCW 61.24.030(7)'s plain language, the trustee must have proof that the beneficiary is the *owner* of the note before the trustee is authorized to record the notice of sale. Most recently in *Lyons*, the Court emphasized that “RCW 61.24.030(7)(a) . . . instructs that a trustee must have proof the beneficiary is the *owner* prior to initiating a trustee's sale.” *Lyons*, 181 Wn.2d at 786 (emphasis added). Similarly, in *Schroeder*, the Court held that RCW 61.24.030 imposes non-waivable limits on the trustee's authority to foreclose, including the requirement under RCW 61.24.030(7)(a) that the trustee must “have proof that the beneficiary is the *owner* of the obligation secured by deed of trust.” *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (emphasis

added; citing 61.24.030(7)(a)).<sup>3</sup> In *Bain*, likewise, the Court again made clear that the DTA requires trustees to “‘have proof that the beneficiary is the *owner* of [the] promissory note’ . . . before foreclosing on an owner-occupied home.” *Bain v. Metropolitan Mort. Group*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012) (emphasis added; citing RCW 61.24.030(7)(a)). In each case, the Court recognized that the proof of ownership requirement means what it says.

**3. The Drafting History of RCW 61.24.030(7) Further Demonstrates the Legislature’s Intent that the Beneficiary Must Prove Ownership of the Note.**

If the Court goes beyond the plain statutory language and considers secondary evidence of legislative intent, it should consider the sequential drafting history of SB 5810, the 2009 bill that led to the adoption of the proof of ownership requirement in RCW 61.24.030(7).<sup>4</sup> This drafting history further demonstrates the legislature’s intent to require that the beneficiary be the “owner” of the note in order to authorize a trustee’s sale. *See Spokane County*

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<sup>3</sup> In *Schroeder*, the Court held that each of the eight “requisites” to a trustee’s sale listed in RCW 61.24.030, including the proof of ownership requirement in RCW 61.24.030(7), is a limitation on the trustee’s power to foreclose that cannot be waived. *Id.* at 106-07.

<sup>4</sup> The Court of Appeals erroneously stated that prior to the 2011 amendments to the DTA, there was no proof of ownership requirement. *See* 181 Wn. App. at 494 & n. 38. In fact, RCW 61.24.030(7)’s proof of ownership requirement was enacted in 2009 as part of Engrossed Senate Bill 5810. *See* ESSB 5810, adopted April 9, 2009, at 12-13.

*Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992) (“In determining legislative intent it is appropriate to consider sequential drafts.”); *State v. Turner*, 98 Wn.2d 731, 735-37, 658 P.2d 658 (1983) (changes made during bill revisions demonstrated legislative intent).

The most significant change in the drafting history was the change from the requirement in the original version of the bill that the beneficiary must prove it is the “*actual holder*” of the note, to the requirement in the final, enacted version that the beneficiary must prove it is the “*owner*” of the note. The original version of SB 5810 proposed on February 3, 2009 did not have any of the language now contained in RCW 61.24.030(7)(a). The next version, proposed on March 12, 2009, had language almost identical to the language now in RCW 61.24.030(7)(a)<sup>5</sup>, *except* it used the phrase “actual holder” where the word “owner” now appears.<sup>6</sup> Under this version as passed by the Senate, before the notice of trustee’s sale was recorded, the trustee would have been required to have either “proof that the beneficiary is the *actual holder* of any promissory note or other obligation secured by the deed of trust,” or “possession of the

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<sup>5</sup> See Senate Bill 5810, as originally proposed on February 3, 2009, available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5810.pdf>.

<sup>6</sup> See Senate Bill 5810, as amended March 12, 2009, at 11, available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Amendments/Senate/5810%20AMS%20KAUF%20S2359.1.pdf>.

original of any promissory note secured by the deed of trust . . .”<sup>7</sup> In the *final* version, however, as proposed on April 9, 2009 and as ultimately enacted, the “actual holder” language was stricken and replaced by the current language requiring the trustee to have proof that the beneficiary is the “owner” of the note before issuing the notice of trustee’s sale.<sup>8</sup> See *Turner*, 98 Wn.2d at 735 (finding that sequential drafting history “lay to rest all doubts about the legislative intent”).<sup>9</sup>

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<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> See Engrossed Senate Bill 5810, as adopted April 9, 2009, at 12-13, available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Amendments/House/5810.E%20AMH%20JUDI%20TANG%20072.pdf> (emphasis added). The final bill report summarized this change, stating “[t]here must be proof that the beneficiary is the *owner* of the obligation secured by the deed of trust.” Final Bill Report on ESB 5810, as enacted, available at <http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5810.E%20SBR%20FBR%2009.pdf> (emphasis added).

<sup>9</sup> Another telling example where the legislature changed the language of the DTA from “holder” to “owner” lies in RCW 61.24.040(2), which now requires that in addition to sending the borrower a notice of trustee’s sale, the trustee must provide a notice of foreclosure stating that foreclosure is a result of a default on the borrower’s obligation to the “Beneficiary of your Deed of Trust and *owner* of the obligation.” RCW 61.24.040(2) (emphasis added). This statutory language equating the beneficiary of the deed of trust with the *owner* of the note was enacted in 1985, and replaced the prior language of RCW 61.24.040(2) which had equated the beneficiary of the deed of trust with the *holder* of the note. Compare Laws of 1985, ch. 193, § 4 with Laws of 1975, 1st Ex. Sess., ch. 129, § 4.

**B. NWTS Violated RCW 61.24.030(7) and Its Duty of Good Faith Under RCW 61.24.010(4) by Recording the Notice of Trustee's Sale Without the Required Proof that Wells Fargo Was the Owner of the Note, and Despite Its Knowledge that Fannie Mae Was the Owner.**

RCW 61.24.030(7) required Wells Fargo to supply NWTS with proof that Wells Fargo was the *owner* of Ms. Trujillo's note before NWTS could be authorized to record a notice of trustee's sale. Because it is undisputed that NWTS knew Fannie Mae, not Wells Fargo, was the owner, CP 38, and because the declaration Wells Fargo supplied to NWTS contained unauthorized alternative language different from the language of the second sentence of RCW 61.24.030(7)(a), CP 36, NWTS violated the statute by recording the notice of trustee's sale.

First, as shown above, under the first sentence of RCW 61.24.030(7)(a), the beneficiary must prove it is the owner of the note. Under the second sentence, that beneficiary may satisfy its proof of ownership requirement by providing a declaration stating it is the "actual holder" of the note (without qualifying or alternative language). Because it is undisputed NWTS knew Wells Fargo was *not* the owner of Ms. Trujillo's note, as shown by its prior issuance of the notice of default stating that Fannie Mae was the owner, CP 38, NWTS not only did not have the required proof that Wells Fargo owned the note, but it knew Wells Fargo was *not* the owner, and so was not authorized to record the notice of trustee's sale.

Second, NWTS's reliance on the Wells Fargo declaration when NWTS knew Fannie Mae was the owner violated RCW 61.24.030(7)(b), which says the trustee cannot rely on the declaration as proof of ownership if the trustee "has violated" its duty of good faith owed to the borrower under RCW 61.24.010(4). As this Court held in *Lyons*, the trustee's duty of good faith under RCW 61.24.030(7)(b) and RCW 61.24.010(4) requires it to verify a beneficiary declaration before accepting it as proof of ownership, and "if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty." *Lyons*, 181 Wn.2d at 790. NWTS cannot accept the declaration from a party NWTS knows was *not* the owner to prove that same party *was* the owner, because in doing so NWTS "has violated," RCW 61.24.030(7)(b), its duty of good faith under RCW 61.24.010(4).<sup>10</sup>

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<sup>10</sup> Contrary to NWTS's assertion that Ms. Trujillo failed to raise this issue in her Complaint and Petition for Review, *see* Answer to Petition at 11, she expressly raised it in both pleadings. *See* CP 89-90 (Complaint, ¶ 30, citing RCW 61.24.010(4) and alleging "If the term 'good faith' means anything, it certainly means that Northwest may not pretend not to know material information that it does know to help the beneficiary at the borrower's expense," and that because NWTS "knew Fannie Mae, not Wells, was the owner of the Note months before it accepted Wells' declaration" NWTS "violated its duty of good faith by accepting the declaration, and, resultantly, has never been authorized . . . to record, transmit or serve" the notice of trustee's sale; *see also* Petition at 12 (citing RCW 61.24.030(7)(b) and RCW 61.24.010(4), arguing "NWTS could not in good faith rely on the

Third, the Wells Fargo declaration NWTS relied on as proof of Wells Fargo's purported ownership of the note did not authorize NWTS to record the notice of trustee's sale because it contained the unauthorized additional language—"or has requisite authority under RCW 62A.3-301 to enforce said obligation," CP 36 (emphasis added)—different from the language of the second sentence of RCW 61.24.030(7)(a). As this Court held in *Lyons*, an "actual holder" declaration provided under the second sentence of .030(7)(a) must strictly comply with the language set forth there, and this additional alternative language does not satisfy that statutory proof of ownership requirement.<sup>11</sup> See *Lyons*, 181 Wn.2d at 791 (finding that same

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declaration from Wells Fargo as proof of Wells Fargo's ownership of the note, because NWTS knew that Wells Fargo did not own the note.").

<sup>11</sup> Ms. Trujillo has not waived this issue. See Answer to Petition at 14-15. Her second assignment of error was sufficiently broad to encompass all arguments now before the Court. See Brief of Appellant at 5. While she could have framed her arguments more clearly in her *pro se* briefing, NWTS had sufficient notice, and the Court of Appeals considered and rejected her argument on this issue. See 181 Wn. App. at 500-07. Both parties submitted supplemental authorities to the Court of Appeals on this issue, and both sides addressed it at oral argument. NWTS cannot claim insufficient notice or that it has been unfairly prejudiced. Whether the declaration satisfies the second sentence of RCW 61.24.030(7)(a) should also be considered because it is directly pertinent to and affects NWTS's rights to proceed with the trustee's sale. See *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). Because the central issue here is whether NWTS was authorized to record the notice of trustee's sale, the adequacy of the declaration under the second sentence of RCW 61.24.030(7)(a) must be considered. In all events, the Court has discretion and should consider whether the declaration was adequate because "it is necessary to

declaration language did not comply with RCW 61.24.030(7)(a)). The Court of Appeals' conclusion to the contrary, 181 Wn. App. at 506-08, cannot stand, given this Court's holding in *Lyons*.

The Court of Appeals further erred in finding that Ms. Trujillo conceded in her complaint that Wells Fargo had possession of her note from the beginning of the foreclosure process and that this concession was "consistent with the beneficiary declaration." See 181 Wn. App. at 496 n.52, 501-02 n.71, & 502 n.72; see also Answer to Petition at 17-18. The Court of Appeals also stated that "[c]ounsel conceded" this at oral argument, *id.* at 502 & n. 72, but the hearing transcript does not bear that out.<sup>12</sup> In each instance, including in its reference to oral argument, the Court of Appeals cited Ms. Trujillo's *pro se* Complaint at 4, CP 87, ¶ 26, overlooking the critical fact that her allegation was on "information and belief," and as such could not be a judicial admission. See, e.g., *Smith v. Das*, 126 A.D.3d 462, 463 (N.Y. App. 2015) ("the allegations were made 'on information and belief,' . . . and therefore, were not a judicial admission") (citation omitted). Judicial admissions "generally pertain to matters that a party is uniquely positioned to

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render a proper decision" and "to serve the ends of justice." *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 692, 169 P.3d 14 (2007).

<sup>12</sup> See April 24, 2014 Oral Argument Recording, available at [https://www.courts.wa.gov/appellate\\_trial\\_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20140424](https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20140424).

know and concede, as opposed to facts uniquely known or controlled by an adverse party.” *Diarama Trading Co. v. J. Walter Thompson U.S.A., Inc.*, 2005 WL 2148925, \*9 (S.D.N.Y. Sept. 6, 2005) (citations omitted). By contrast, when a party makes allegations “on information and belief,” it implies that the facts are “uniquely known or controlled” by another party, which prevents the allegations from constituting judicial admissions. *Id.*

This argument by NWTS is also irrelevant because Ms. Trujillo filed her complaint on September 17, 2012, CP 87, two months *after* NWTS recorded the notice of trustee’s sale on July 10, 2012. CP 41. Because the issue before the Court is whether NWTS was authorized to record the notice of trustee’s sale *at the time*, in July 2012, Ms. Trujillo’s purported concession two months later is irrelevant.

Finally, NWTS violated its duty of good faith owed to Ms. Trujillo under RCW 61.24.030(7)(a) & (b) and RCW 61.24.010(4), and acted unfairly or deceptively under the CPA, by recording the notice of trustee’s sale without the requisite proof that Wells Fargo owned the note, and despite actual knowledge that Wells Fargo was *not* the owner. *See* CP 89-90 & 92-93, ¶¶ 30 & 50-53 (allegations supporting CPA claim); *Lyons*, 181 Wn.2d at 789 (trustee’s initiation of foreclosure in violation of DTA is actionable under the CPA); *Frias v. Asset Foreclosure Serv., Inc.*, 181 Wn.2d 412, 430, 334 P.3d

529 (2014) (same). The Court of Appeals thus erred in rejecting Ms. Trujillo's allegations that NWTs violated its duty of good faith as the trustee, *see* 181 Wn. App. at 510-11, and in affirming the trial court's CR 12(b)(6) dismissal of her CPA claim as well. *Id.* at 512.

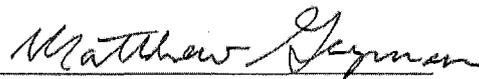
#### IV. CONCLUSION

Because NWTs knew when it recorded the notice of trustee's sale that Fannie Mae, not Wells Fargo, was the owner of Ms. Trujillo's note, NWTs did not have the proof of Wells Fargo's ownership of the note that was required under RCW 61.24.030(7). Accordingly, the Court should reverse the Court of Appeals' decision, hold that NWTs violated the DTA, RCW 61.24.030(7), by recording the notice of trustee's sale without authorization, and remand Ms. Trujillo's CPA claim for trial.

DATED this 4th day of May, 2014.

Respectfully submitted,

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## **APPENDIX A**

### **RCW 61.24.030**

#### **Requisites to trustee's sale.**

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 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.

## DECLARATION OF SERVICE

I, Annabell Joya, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Supplemental Brief of Petitioner to be served by first-class mail, postage prepaid, and by email, on the following counsel of record:

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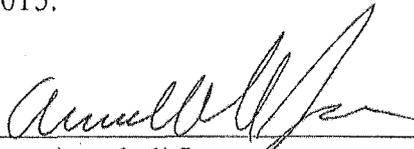
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\_\_\_\_\_  
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Thank you

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