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Supreme Court No. 90509-6

Court of Appeals No. 70592-0-1

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ROCIO TRUJILLO,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.

Respondent,

and

WELLS FARGO BANK, N.A.

Defendant.

**SUPPLEMENTAL BRIEF OF RESPONDENT
NORTHWEST TRUSTEE SERVICES, INC.
PURSUANT TO R.A.P. 13.7(d)**

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I. INTRODUCTION

Respondent Northwest Trustee Services, Inc. (“NWTS”) hereby offers the following supplemental briefing for the Court’s consideration.

For many years, there has been confusion among both trial courts and parties to litigation brought by borrowers regarding authority to foreclose under the Deed of Trust Act (“DTA”). The confusion centers on the use of the terms “owner” and “holder” in RCW 61.24.030(7)(a).

However, principles of statutory interpretation lead to the conclusion that “owner” in the context of RCW 61.24.030(7)(a) means the party having a possessory right to the promissory note, and a declaration by the holder is but one way to provide trustees with such knowledge. This construction is the only means of harmonizing RCW 61.24.030(7)(a) with the definition of beneficiary found in RCW 61.24.005(2).

Because Trujillo’s Complaint admitted that she “defaulted on the... loan,” and that Wells Fargo had “possession of the Note” when it “began the foreclosure process,” Trujillo could not state a claim based on the allegation NWTS was “attempting to foreclose without lawful authority.” CP 84 (Compl., ¶ 17), 85 (Compl., ¶ 26), 91 (Compl., ¶ 51).¹

¹ As noted to the Court of Appeals, Trujillo failed to assign error to the dismissal of three specific claims against NWTS. Rather, she focused solely on advancing a legal issue designed to attack Wells Fargo’s foreclosure. The absence of substantive argument on the elements of each claim should, by itself, provide a basis to affirm the decisions below.

Further, because Trujillo selectively appealed only NWTS's dismissal and not Wells Fargo's successful summary judgment, she should be estopped from challenging the veracity of Wells Fargo's beneficiary status, shown in the complete record below. *See* Case No. 13-2-06928-8 SEA, Dkt. Nos. 27 (Dep. of Trujillo) at 21 (admitting modification from Wells Fargo and her default); 28 (Dec. of Weatherly) at ¶ 6 (Wells Fargo held Note indorsed in blank since 2006); 36 (order in favor of Wells Fargo, and ordering funds to be disbursed to Wells Fargo for application to the loan balance).² Thus, the trial court's ruling should again be upheld.

II. STATEMENT OF THE CASE

Trujillo is appealing an order of dismissal issued by the King County Superior Court in NWTS' favor. CP 80-81. On June 2, 2014, the Court of Appeals, Division One, affirmed the dismissal in a published opinion. *Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014), *as modified* (Nov. 3, 2014). On April 2, 2015, this Court accepted review.

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² The Court "may take judicial notice of the record in the case presently before us or 'in proceedings engrafted, ancillary, or supplementary to it.'" *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003), *quoting Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 240 P.2d 560 (1952); *see also Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 178 P.2d 981 (2008) (trial court orders may be considered; R.A.P. 9.11; ER 201(f); *but see Swak* at 54 (no notice of "independent and separate judicial proceedings.")).

III. SUPPLEMENTAL ARGUMENT

A. The Note Holder is the Beneficiary.

The DTA defines a beneficiary as “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2) (S.S.B. 6191, Laws of 1998, ch. 295 § 1); *see also Jackson v. Qual. Loan Serv. Corp.*, Slip Opin. No. 72016-3-1 (Div. 1, Apr. 6, 2015).

One becomes a note holder through possession of the instrument either payable to that party or to bearer. RCW 62A.3-201 (“ ‘Negotiation’ means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who... becomes its holder.”); *see also* RCW 62A.3-109. Possession may be either actual or constructive; “[t]he UCC makes no requirement of actual physical possession to be deemed a ‘holder’ of a note.” *Coble v. Suntrust Mortg.*, 2015 WL 687381, *6 (W.D. Wash. Feb. 18, 2015), *citing* RCW 62A.3-201 (“under the UCC a holder may possess a note ‘directly or through an agent.’ ”); *see also In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. 2014).

If there is negotiation of a note, that holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note’s repayment, *e.g.*, a deed of trust. *See Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872); *see also* RCW 62A.3-203, cmt. 1 (“the right to enforce an instrument and ownership of the instrument are two different

concepts.”); Whitman & Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 Ark. L. Rev. 21, 22 (2013) (“The [legal] distinction between ownership and PETE status has been widely misunderstood in the past and has been responsible for considerable confusion in judicial decisions and statutes.”); Permanent Editorial Bd. for the UCC, *Application of the UCC to Selected Issues Relating to Mortgage Notes* (2011) (“[A] change in ownership of a note does not necessarily bring about a concomitant change in the identity of a person entitled to enforce the note.”).

If the borrower defaults on the note, a secured party may exercise its rights with respect to property securing such obligation; this can occur through either judicial or non-judicial foreclosure of a deed of trust. *See, e.g., Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 565 P.2d 812 (1977); RCW 62A.9A-203(g), RCW 62A.9A-308(e).

Trujillo’s Complaint pled that Wells Fargo took possession of both the Note and Deed of Trust prior to commencing a non-judicial foreclosure. CP 86 (Compl., ¶ 28). Nonetheless, Trujillo believes that only Fannie Mae, as “owner,” and not Wells Fargo, was entitled to foreclose. *Id.* at 6. Trujillo maintains this position despite not challenging the trial court’s grant of summary judgment in Wells Fargo’s favor – which was based on evidence demonstrating Wells Fargo acted as the

beneficiary during all times relevant to the uncompleted foreclosure process. *See* Case No. 13-2-06928-8 SEA, *supra.* at Dkt. Nos. 27, 28, 36.

B. The Concept of “Ownership” is Not Determinative of Authority to Foreclose in Washington.

Trujillo’s argument seeks to alter the express definition of beneficiary found in RCW 61.24.005(2), *i.e.* holder, by suggesting that only a note “owner” can non-judicially foreclose under the DTA. Brief of Appellant (Court of Appeals) at 15, *inter alia*; *cf. Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 99, 285 P.3d 34 (2012) (declining to accept a “more expansive view” of the DTA).³

Trujillo’s position focuses on a DTA requirement added in 2009 that 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 recording a sale notice. RCW 61.24.030(7)(a). But Trujillo’s attempt to divorce the statute’s use of “owner” from its core meaning of a possessory right, is unsupported by case law and principles of statutory interpretation.

1. The Context of the Term “Owner” in RCW 61.24.030(7)(a) Evidences a Concern that Trustees Learn Who Possesses the Note.

To address the substance of Trujillo’s argument, it is important to

³ The Attorney General’s Office likewise disagrees with the same arguments put forward by the Appellant’s counsel (who also represents Trujillo) in the pending case of *Brown v. Dep’t of Commerce*. *See* Case No. 90652-1 (Supr. Ct.), Corrected Response Brief at 20-25 (urging adoption of the Court of Appeals’ reasoning in *Trujillo*).

analyze the context of “owner” as it appears in RCW 61.24.030(7)(a).
See, e.g., State v. Lilyblad, 163 Wn.2d 1, 9, 177 P.3d 686 (2008) (“[a]ll words must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary.”); *State v. Gonzales Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008) (“a single word in a statute should not be read in isolation. Rather, the meaning of a word may be indicated or controlled by reference to associated words.”); *Farmers Ins. Co. of Wash. v. USF&G Co.*, 13 Wn. App. 836, 841, 537 P.2d 839 (1975) (finding the term “owner” in an insurance contract is “a Nomen generalissimum and its meaning should be gathered from the context in which it is used.”).

Because the term “owner” found in RCW 61.24.030(7)(a) has no statutory definition in either the DTA or Uniform Commercial Code (“UCC”) as adopted in Washington, the Court should look to its common meaning. *See Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 283, 313 P.3d 395 (2013) (“To determine the plain meaning of an undefined term, courts often refer to standard English dictionaries.”); *Vance v. Dep’t of Ret. Sys.*, 114 Wn. App. 572, 577, 59 P.3d 130 (2002) (“[i]n the absence of such a definition, statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary.”) (Citation omitted).

An “owner” is “one who has the right to possess, use, and convey something.” See Black’s Law Dictionary at 1214 (9th Ed. 2009); *id.* at 1215 (“ownership” is the “right to possess a thing, regardless of any actual or constructive control.”); see also Webster’s New College Dictionary at 804 (3d ed. 2005) (“own” means “[t]o have or possess.”); <http://merriam-webster.com> (“own” defined as “to have {something} as property; to legally possess {something}.”).

In the context of RCW 61.24.030(7)(a), these common definitions comport with one of the requirements for being a note holder discussed above, *i.e.* a transfer of *possession* and indorsement. See RCW 62A.3-201(a); see also RCW 62A.3-203(a) (“An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.”).⁴

Defining “owner” in RCW 61.24.030(7) as having the right to a possessory interest also comports with the Court’s holding in *Bain*, because one necessarily has possession if one is a “holder,” or if one can document the chain of transactions. 175 Wn.2d at 104 (“[a] beneficiary must either actually possess the promissory note or be the payee.”); see

⁴ Constructive possession is essentially the immediate right to become an actual possessor; as was observed nearly 100 years ago in *State v. Johnson*:
[c]onstructive possession consists of the legal title or ownership of the thing and the right to immediate actual possession.
129 Wash. 62, 66, 224 P. 602 (1924).

also *Deutsche Bank Nat. Trust Co. v. Pietranico*, 33 Misc. 3d 528, 545, 928 N.Y.S.2d 818 (Sup. Ct. 2011), *aff'd*, 102 A.D.3d 724, 957 N.Y.S.2d 868 (2013) (“The mere possession of a... note endorsed in blank {just like a check} provides presumptive ownership of that note by the current holder. Such is the foundation of negotiable instruments law.”); M.B.W. Sinclair, *Codification of Negotiable Instruments Law: A Tale of Reiterated Anachronism*, 21 U. Tol. L. Rev. 625 (1990) (discussing the history of negotiable instruments); RCW 62A.9A-607(b) (transferee in possession can non-judicially enforce mortgage through recording); RCW 62A.3-203(b) & cmt. 2 (providing example of where transferor does not indorse the note, but nonetheless the person entitled to enforce it can “account for possession of the unindorsed note by proving the transaction through which the transferee acquired.”).⁵

⁵ *Accord In re Veal*, 450 B.R. 897, 917 (B.A.P. 9th Cir. 2011) (one can be an owner and yet not qualify as a “person entitled to enforce” [“PETE”]; likewise, one can be a PETE and not have ownership, because PETE status under UCC § 3-301 does not automatically require possession). The Sinclair article succinctly explains one situation where one is deemed a note owner without also being a holder:

[f]inally, the debtor has attacked the process whereby the owner of the note came into possession of it. If that was not by the method prescribed by the U.C.C. for negotiation, then its present owner is not a holder, and so cannot be a holder in due course. Negotiation, for an order instrument, requires the indorsement of the assignor on the instrument or on an allonge, ‘a paper so firmly affixed to the instrument as to become a part thereof.’ A signature on a paper that is not ‘so firmly affixed to the instrument as to become a part thereof’ is not an indorsement. Thus, the person who takes an instrument but with the assignor’s signature on a supplementary paper infirmly attached to the instrument will not be a holder....

By comparison, Trujillo’s interpretation of RCW 61.24.030(7)(a) invites the Court to erroneously “read a statute [the DTA, here] in a way that renders ‘unlikely, absurd, or strained’ results” for two reasons. See *City of Yakima v. Godoy*, 175 Wn. App. 233, 236, 305 P.3d 1100, review denied, 178 Wn.2d 1019, 312 P.3d 650 (2013), citing *State v. Elgin*, 118 Wn.2d 551, 825 P.2d 314 (1992); see also *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting) (“a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.”).

First, Trujillo’s argument absurdly gives rise to a “magic” declaration under RCW 61.24.030(7)(a) that converts an averment of holder status into proof of being a loan’s investor or other entity receiving economic proceeds.⁶ It is unlikely the Legislature intended the DTA to allow for a bizarrely transformative and false declaration.

Second, Trujillo provides no support for her contention that the beneficiary *must simultaneously be* an investor, in this case, Fannie Mae.

Id. at 662-63; see also *Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163, 166 (3d Cir. 1988) (addressing indorsement; observing “[m]ere ownership or possession of a note is insufficient to qualify an individual as a ‘holder.’”); UCC § 3-203, cmt. 1 (an example of how possessory rights to a negotiable instrument through an agreement can make one an “owner,” but not convey sufficient authority to become a “person entitled to enforce”).⁶ As mentioned above, RCW 61.24.030(7)(a) requires proof “the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” The statute adds, “[a] declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the... note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.” (Emphasis added.)

Requiring the foreclosing entity to strictly be a loan's investor would improperly stretch the statutory definition of beneficiary beyond just "holder," and depart from both the UCC and common law by limiting who can enforce a negotiable instrument. *See, e.g.*, RCW 61.24.005(2).

However, when "owner" is defined as the right to a possessory interest in the context of RCW 61.24.030(7)(a), the statute's import becomes clearly understood: a trustee must have proof that the beneficiary has a right to possess the Note. A beneficiary's declaration that it is the actual holder of the Note satisfies this requirement because being a holder *ipso facto* establishes possession of the instrument. *See* RCW 62A.3-201(a); *see also Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 336 P.3d 1142 (2014) (Court used "holder" and "owner" almost interchangeably); *accord Bank of Am., N.A. v. Cloutier*, 2013 ME 17, 61 A.3d 1242 (2013) ("[t]he phrase 'certify proof of ownership of the mortgage note' requires only that a foreclosure plaintiff identify the owner or economic beneficiary and, if it is not itself the owner, prove that it has power to enforce the note.").

In other words, when RCW 61.24.030(7)(a) mandates that trustee have proof the "beneficiary is the owner" of a secured note subject to foreclosure, the statute compels a trustee to become aware of who has the

right to a note's possession before recording a sale notice.⁷

Because the ability to non-judicially foreclose in Washington rests with the note holder, ownership rights are not material to a determination of beneficiary status.

2. Washington Law Allows Wells Fargo to Foreclose as the Note's Holder.

Numerous courts – in Washington and elsewhere – have reached the same conclusion as the Court of Appeals in this case, namely that the concept of “ownership” is not dispositive when analyzing the right to enforce a note. *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.”); *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

⁷ It is important to observe the beneficiary declarations are not publicly-recorded or issued to borrowers; rather, they are solely intended as a safe harbor to trustees in the event the beneficiary purporting to have authority does not. *See Meyer v. U.S. Bank Nat. Ass'n*, -- F.Supp.3d --, 2015 WL 1619048, *8 (W.D. Wash. Apr. 10, 2015) (“as with the Beneficiary Declaration, the Act provides trustees a safe harbor to rely on this declaration, absent a violation of the trustee's duty of good faith to the borrower.”).

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) (“Whether the FDIC reacquired the ownership of the note... is irrelevant to the issue of whether SMS is the holder....”); *In re Brown*, 2013 WL 6511979, *14 (B.A.P. 9th Cir. Dec. 12, 2013) (“Washington law makes clear that the distinction between an owner of the Note and a beneficiary who is a holder of the relevant note is not significant.”).⁸

A loan’s ownership is simply not germane to non-judicial foreclosure because the DTA was “designed to supplement the existing

⁸ The application of the term “ownership” to possessory rights in a note was evident to the Ohio Supreme Court in 1885. *See Osborn v. McClelland*, 43 Ohio St. 284, 309, 1 N.E. 644 (1885) (“The law-merchant... or the statute in regard to negotiable instruments, has no special application in this case. It is a mere question of ownership, - nothing more, nothing less.... Smith proposed to transfer them to McClelland. His (Smith’s) possession was *prima facie* evidence of his ownership.”) (emphasis added).

foreclosure procedure of the trust deed.” Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94 (1966). The DTA was first created to correct the “shortcomings” of a foreclosure process that had become “complicated and inconsistent with the needs of modern real estate financing.” *Id.* at 94, 95-96 (DTA created to permit time savings; trade-off is that lender cannot seek deficiency judgment against borrower).

At the same time, the DTA was *not* intended to restrict non-judicial foreclosures to a small subset of loans where an investor is concurrently the note’s holder. *Id.*, Appx. B (diagram showing relationships between lender, trustee, and borrower during foreclosure; an investor plays no role).⁹ In fact, the DTA’s recent mediation statute clearly differentiates the terms “beneficiary” and “investor,” substantiating that an investor and beneficiary *are not per se synonymous*. See RCW 61.24.163(5)(j).¹⁰

It is a maxim in Washington that “when the legislature has defined a term by statute, that definition controls its interpretation.” *Durland v.*

⁹ Legislative history also favors this conclusion. The Senate Report for the bill that created a beneficiary declaration observes: “[t]here must be proof that the beneficiary is the actual holder of the obligation secured by the deed of trust.” 5810.E SBR HA 09. The Legislature’s focus was clearly on ensuring that a trustee establish the holder’s identity, even though the word “owner” was inserted in the bill before its adoption.

¹⁰ RCW 61.24.163(5)(j) requires that, in mediation, a beneficiary must provide:
[t]he portion or excerpt of the pooling and servicing agreement or other *investor restriction that prohibits the beneficiary from implementing a modification*, if the beneficiary claims it cannot implement a modification due to limitations in a pooling and servicing agreement or other investor restriction, and documentation or a statement detailing the *efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement or other investor restriction provisions*.
(Emphasis added.)

San Juan Cnty., 174 Wn. App. 1, 23, 298 P.3d 757 (2012), *citing State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). The key term related a note's enforceability pursuant to the DTA is "holder," which is plainly defined in RCW 61.24.005(2).¹¹ For a trustee to proceed with recording the sale notice, what matters is knowledge of the holder's identity.

As such, Fannie Mae's ownership interest in the Note should not change an interpretation of RCW 61.24.030(7)(a). *See Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 5664706, *3 (W.D. Wash. Oct. 16, 2013), *citing Corales v. Flagstar Bank, FSB*, 822 F.Supp.2d 1102, 1107 (W.D. Wash. 2011) ("Flagstar derived... authority from its position as the *holder* of the indorsed Note, a position that is not undermined by the fact that Fannie Mae *also had* an ownership interest in the Note at the time the appointment was made.") (Secondary emphasis added).

The Court should affirm the conclusion reached below that "[a]t common law, it was the status of the holder of the note that was dispositive on the question of who had authority to enforce the note and mortgage. Likewise, payment to the holder discharged the debt evidenced by the note, regardless of ownership." 181 Wn. App. at 499-500.

¹¹ "Although ownership can be proved in different ways," this Court recently noted "the statute itself suggests one way: 'A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual *holder* of the promissory note... shall be sufficient proof as required by this subsection.'" *Lyons* at 789-790 (emphasis added).

C. *Bain Suggests the Beneficiary Declaration's Reference to RCW 62A.3-301 Was Permissible.*

The Court of Appeals stated that “Article 3 [of the UCC], specifically § 3-301, is dispositive on the question of who is entitled to enforce the note.... *Bain* and other authorities make reference to Article 3... appropriate for purpose of the... [DTA].” *Trujillo, supra.* at 504.

Bain specifically cited to both the definition of “holder” in former RCW 62A.1-201(20) and the definition of “person entitled to enforce” an instrument in RCW 62A.3-301. 175 Wn.2d at 104. The Court wrote:

The plaintiffs argue that our interpretation of the deed of trust act should be guided by *these UCC definitions*, and thus a beneficiary must either actually possess the promissory note or be the payee. *We agree.* This accords with the way the term “holder” is used across the deed of trust act and the Washington UCC.

Id. (emphasis added; citation omitted).

Here, the beneficiary declaration’s form should not be fatal to reliance on it, as *Trujillo* expressly pled Wells Fargo acquired possession of the Note prior to initiating foreclosure. CP 85 (Compl., ¶ 26); *cf. Lyons, supra.* at 788 (finding the borrower questioned who had the note).

Consequently, accepting *Trujillo’s* facts as true for purposes of CR 12(b)(6), Wells Fargo cannot be “a nonholder in possession of the instrument who has the rights of a holder, or... a person not in possession of the instrument who is entitled to enforce the instrument pursuant to

RCW 62A.3-309 or 62A.3-418(d).” See RCW 62A.3-301.¹² Thus, Wells Fargo’s declaration would not relate to any form of “requisite authority” besides “note holder” – as the document also states in its header. CP 36.

Moreover, Trujillo’s Complaint does not describe how NWTs violated its duty of good faith apart from “accepting the [beneficiary] declaration....” CP 87, 88 (Compl., ¶ 30). Reliance on a beneficiary declaration cannot create the very lack of good faith that circularly defeats an ability to rely on it under RCW 61.24.030(7)(b). See, e.g., *Jackson v. Quality Loan Serv. Corp.*, *supra*. at *5 (“Since there was no allegation of bad faith here, the beneficiary declaration is sufficient.”); *Brodie v. NWTs*, 579 F. App’x 592, 593 (9th Cir. 2014) (“Brodie has not alleged any facts that would have prevented Northwest Trustee Services from relying on U.S. Bank’s beneficiary declaration.”); *Meyer*, *supra*. at *10 (W.D. Wash. Apr. 10, 2015) (“Absent a showing that NWTs violated its duty of good faith *independent* of its reliance on the declarations, the vast weight of case law now deems NWTs’s reliance without further inquiry to be proper.”) (emphasis in original); *Arnett v. Mortg. Elec. Registration Sys., Inc.*, 2014 WL 5111621, *4 (W.D. Wash. Oct. 10, 2014) (finding it is

¹² CR 12(b)(6) requires assuming that “all facts alleged in the plaintiff’s complaint are true.” *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). As such, the rule applies regardless of whether such facts ultimately benefit a plaintiff’s position or not.

“nonsensical” that acceptance of a declaration alone violates the duty of good faith).

Therefore, upon reviewing the beneficiary declaration and Trujillo’s Complaint, the record establishes that Wells Fargo was in fact entitled to foreclose and NWTS was permitted to record a sale notice. *Accord Forsberg v. Ocwen Loan Serv., LLC*, 2014 WL 6791956, *3 (W.D. Wash. Oct. 30, 2014) (“Contrary to Plaintiff’s argument about this issue, the Court finds no contradiction between *Bain* and *Trujillo*, which is indeed binding precedent. Because the beneficiary is the holder of the note, Northwest Trustee’s Beneficiary Declaration was not misleading.”). NWTS should not face the prospect of further litigation on these issues.

D. Trujillo’s Complaint Did Not Plead Prejudice.

All of Trujillo’s claims were based on alleged DTA violations. CP 82-94 (Compl.). Thus, she needed to have shown prejudice to support her allegations. *See Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005), *citing Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 752 P.2d 385 (1988) (court will not consider DTA-based violation absent prejudice); *see also Mickelson v. Chase Home Fin. LLC*, 579 F. App’x 598, 601 (9th Cir. Jun. 18, 2014) (where beneficiary held the note, there could be no prejudice to the borrower even

if allegations relating to the propriety of the trustee's "proof" were true).¹³

Because of the DTA's anti-deficiency provision, *i.e.*, after nonjudicial foreclosure, a borrower is absolved of liability on the Note, where a borrower concedes default and cannot cure, he or she is economically indifferent to asserted procedural defects and cannot suffer prejudice. *Udall v. T.D. Escrow Serv., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007) (reversing holding that vacated foreclosure), *citing Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (1988), *review denied*, 111 Wn.2d 1004 (1988). Strict construction of the DTA does not mean strict liability.

Likewise, in *Mickelson*, the Ninth Circuit recognized prejudice is necessary to prove claims predicated on a DTA violation, stating:

[t]he Mickelsons allege that NWTs failed to secure adequate proof that Chase owned the note. Chase actually held the promissory note during the relevant period. For this reason, even if the Mickelsons were correct that Chase's beneficiary declaration was inadequate under Washington Revised Code § 61.24.030(7)(a), any such failing could not have prejudiced them....

2014 WL 2751033 at *1 (citation omitted), *citing Udall v. T.D. Escrow Servs., Inc., supra.*; *see also Bavand v. OneWest Bank, FSB*, 587 F. App'x 392 (9th Cir. 2014) (no prejudice arising from foreclosure); *Meyer, supra.*

¹³ A showing of prejudice should be maintained even in a CPA claim predicated on DTA liability. It would be inapposite to require prejudice in a post-sale DTA action, under RCW 61.24.127, yet eliminate the same requirement for "DTA violations that could be compensable under the CPA." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014).

at *19 (no prejudice when information NWTs received was correct).

Here, just like in *Mickelson* and related cases, NWTs' actions did prejudice Trujillo; further, she failed to plead any factual basis for the existence of prejudice. No other entity besides Wells Fargo sought to enforce the Note. CP 86 (Compl., ¶ 28). Trujillo also conceded default. CP 84 (Compl., ¶ 17). Consequently, the entirety of Trujillo's Complaint failed to state a claim upon which relief could be granted as to NWTs.

E. Trujillo Should Also be Estopped From Continuing to Allege that Wells Fargo is Not the Beneficiary.

The doctrine of collateral estoppel is "well-known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal."

Reninger v. Dep't of Corr., 134 Wn.2d 437, 449, 951 P.2d 782 (1998).¹⁴

Here, Trujillo's entire litigation against both Wells Fargo and NWTs was predicated on the erroneous argument that only Fannie Mae "had a right to foreclose." See Case No. 13-2-06928-8 SEA, Dkt. No. 31 at 12 (Trujillo's Response to Wells Fargo's summary judgment motion). Trujillo conceded, however, that "my causes of action must fail if Wells is

¹⁴ The doctrine requires a showing that "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice." *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 263, 956 P.2d 312 (1998).

the holder of the note... and beneficiary of the deed of trust.” *Id.* at 2.

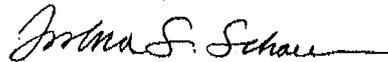
Indeed, Trujillo’s claims did fail, with the trial court rejecting her position and resolving all issues in the Defendants’ favor. *Id.* at 22, 36 (orders). Thus, Trujillo is estopped from contending Wells Fargo was not the beneficiary when she failed to appeal the summary judgment granted to Wells Fargo – which also directed “funds held in the Court registry to [be disbursed to]... Wells Fargo’s attorneys of record, to be applied to the past due balance on Plaintiff’s loan.” *Id.* at 36. To hold otherwise would produce an inconsistent result whereby NWTS might be found liable despite Wells Fargo’s demonstration of its authority to foreclose.¹⁵

IV. CONCLUSION

Like the Court of Appeals, this Court should affirm the dismissal of Trujillo’s Complaint.

DATED this 30th day of April, 2015.

RCO LEGAL, P.S.



By: /s/ Joshua S. Schaer
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¹⁵ Alternatively, any ostensible error by the trial court in dismissing NWTS was rendered harmless by the subsequent summary judgment on the same issues in favor of Wells Fargo, which Trujillo did not appeal. *See Marvin v. Yates*, 26 Wash. 50, 56, 66 P. 131 (1901) (“Even if it should be said that the demurrer was technically erroneously overruled upon that ground, it, in any event, proved to be harmless to appellant, in view of subsequent developments of the case.”).

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Rocio Trujillo (Petitioner) v. Northwest Trustee Services, Inc. (Respondent)
Case No. 90509-6
Filed by: Joshua Schaer
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Please file the attached **Supplemental Brief of Respondent Northwest Trustee Services, Inc. Pursuant to R.A.P. 13.7(d)** and the **Declaration of Service** in the referenced matter.

If there are any questions, please contact us. Thank you.

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