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NO. 72016-3

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

SANDRA SHELLEY JACKSON, an individual

Petitioner;

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, et. al.,

Respondents.

RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND MCCARTHY & HOLTHUS, LLP'S ANSWER TO PETITIONER'S PETITION FOR REVIEW

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I. Identity of Answering Party

Quality Loan Service Corporation of Washington, a Washington corporation, and McCarthy & Holthus, LLP, a Washington limited liability partnership (collectively, "Respondents") are Respondents in the appeal and Defendants in the Superior Court action. Respondents hereby answer the Petition for Review of Appellant Shirley Jackson ("Petition") as follows. Respondents also join the arguments set forth in the Answer of Co-Respondents J.P. Morgan Chase Bank, N.A., Mortgage Electronic Registration Systems, Inc. and US Bank, N.A. ("Co-Respondents").

II. Summary of Grounds for Denying Review

The Superior Court's order dismissing Jackson's Amended Complaint pursuant to CR 12(b)(6) was correctly affirmed by the Court of Appeals. Jackson's Petition fails to acknowledge that her own procedural and substantive failures waived appellate review of her tort and statutory claims. Her claim that the Deed of Trust Act, RCW 61.24 ("DTA") is unconstitutional is also barred as a result of her failure to provide notice to the Washington Attorney General and does not raise a meritorious constitutional challenge in any event. Nevertheless, Jackson persists in raising the same issues this Court declined to consider on direct review. Jackson also raises new arguments, none of which merit review. In the end, Jackson's Petition fails to show that the Court of Appeals' decision is in conflict with either a decision of this Court or a decision of another Court of Appeals or involves an issue of substantial public interest. This Court should deny Jackson's Petition.

III. Counterstatement of Facts Relevant to the Petition for Review

Respondents adapt and incorporate herein by this reference the Counterstatement of Relevant Facts in Section IV of Co-Respondent's Answer to Jackson's Petition.

IV. Answer to Issues Presented

Jackson's characterization of the issues which would be presented if review is granted reflects a misguided attempt to divert this Court's focus from the procedural and substantive bars to her claims. The issues that will actually be presented, if review is granted, are as stated in Co-Respondent's Answer:

1. Did the Court of Appeals properly affirm the Superior Court's Order Dismissing Jackson's Amended Complaint, even though the Superior Court considered publicly recorded documents and documents discussed in Jackson's Complaint;

2. Did the Court of Appeals properly determine that Jackson failed to preserve her Consumer Protection Act claims on appeal;

3. Did the Court of Appeals properly affirm the Superior Court's dismissal of Jackson's constitutional challenge to the DTA?

V. Authority and Argument

A. Standard for Review.

Discretionary acceptance of a decision terminating review may be granted only if: (1) the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; (2) the decision of the Court of

Appeals is in conflict with another decision of the Court of Appeals; (3) a significant question of law under the constitution of the state of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

B. The Issues Jackson Raises are Resolved by Existing Case Law.

This Court should not accept review under RAP 13.4(b). The discrete issues Jackson's Petition presents are readily resolved by existing case law and statutes. Jackson's claim that the DTA is unconstitutional is barred by her failure to notify the Washington Attorney General. Her presale DTA claim fails as a result of this Court's recent decision in *Frias v. Asset Foreclosure Services Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014). Finally, Jackson's claim that the Superior Court should have converted the motions to dismiss into motions for summary judgment in order to consider documents which were part of the public record, repeatedly referenced in Jackson's Complaint, and otherwise undisputed, does not present an issue of substantial public interest that merits discretionary review.

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C. Jackson's Challenge to the Constitutionality of the DTA is Procedurally Barred and is Without Merit.

1. Jackson's Failure to Notify the Attorney General is a Jurisdictional Bar.

The Court of Appeals held that Jackson's challenge to the constitutionality of the DTA was procedurally barred because she failed to notify the attorney general of her claim. *Jackson v. Quality Loan Service Corp.*, 347 P3d 487 (Wash. Ct. App. 2015). The *Jackson* court relied on RCW 7.24.110 which expressly requires notification to the state attorney general when there is a constitutional challenge to state legislation. The failure to notify the attorney general deprives both the trial and the appellate courts of jurisdiction to address the constitutionality of the DTA. *Camp Finance, LLC v. Brazington*, 133 Wn.App. 156, 160, 135 P3d 946 (2006) (service upon the attorney general is mandatory and a prerequisite to the Court's jurisdiction). In any event, Jackson does not take issue with the Court of Appeals' finding that her failure to provide notice to the attorney general bars her constitutional challenge. *See*, Petition at 1-2.

2. The DTA Does Not Violate the Washington State Constitution.

The *Jackson* court found that "[t]he legislature had authority to enact the DTA and its enactment did not encroach upon the jurisdiction of the Superior Court. *Jackson*, 347 P.3d 493. Nevertheless, Jackson persists in arguing that a nonjudicial foreclosure involves a "judicial inquiry" and usurps the Superior Court's exclusive jurisdiction over cases

involving title and possession to real property. But Jackson is wrong on both counts. Jackson's position that a nonjudicial foreclosure involves a "judicial inquiry" is based on a misreading of *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). In *Klem* the court addressed the duties of the trustee and noted distinctions between the judicial and nonjudicial foreclosure process, one of which was that a nonjudicial foreclosure trustee acts as "an impartial third party." But, the court in *Klem* did not convert nonjudicial foreclosure proceedings into judicial proceedings.

Jackson also argues that a "judicial inquiry" occurs because the DTA allows a trustee to rely on a sworn statement from the beneficiary. The requirement that a trustee have a sworn statement from a beneficiary does not involve any sort of adjudicatory process. Instead, the trustee is merely charged with meeting certain statutory prerequisites to a sale.

3. The DTA Involves a Voluntary Process That Promotes Enforcement of Contractual Remedies While Preserving Access to the Court.

Jackson's argument that the state constitution grants exclusive jurisdiction to the courts for all real property concerns is based on a misreading of the text of W.A. Const. art. VI, § 6, and W.A. Const. art. II, § 1. That section provides that "Superior Court shall have original jurisdiction in all cases at law which [sic] involve a title or possession of real property. ..." W.A. Const. art. IV, § 6. A nonjudicial foreclosure is not a case at law but instead a statutory mechanism for the enforcement of

a voluntary agreement between parties. And the DTA specifically preserves the Superior Court's constitutional grant of jurisdiction by providing the borrower with the right to file an action in Superior Court to restrain a trustee's sale, RCW 61.24.130(2), and the right to contest a notice of default by initiating a court action. RCW 61.24.040(2). After a sale has occurred, a borrower has access to the courts to seek damages associated with the foreclosure and to potentially unwind a sale. *See,* RCW 61.24.127; *Albice v. Premier Mortg. Serv. of Wash.*, 174 Wa.2d 560, 276 P.3d 277 (2012), voiding sale and court action. Jackson's very lawsuit evidences the exercise of the right she denies exists.

Respondents further incorporate the arguments and authorities set forth in Co-Respondents' Answer.

D. Jackson's Claim Under the DTA that the Trustee Acted in Bad Faith Fails Pursuant to Recent Decisions of this Court.

Jackson argues that the Court of Appeals misread the allegations of her Amended Complaint and that her claims alleging trustee bias/bad faith under the DTA should have survived CR 12(b)(6). Jackson fails to recognize that her DTA claims are controlled by *Frias v. Asset Foreclosure Services Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014), and *Lyons v. U.S. Bank National Association*, 181 Wa.2d 775, 336 P.3d 1142 (2014), both of which definitively held that no cause of action exists under the DTA where, as here, no foreclosure sale has occurred. The Court of Appeals correctly held that because there had been no foreclosure, Jackson

had no claims under the DTA, *Jackson*, 347 P.3d at 493, and Jackson does not challenge that ruling in her Petition. *See*, Petition at 1-2. Jackson cannot use the DTA as the platform for her claims alleging bad faith and trustee bias against Quality and McCarthy, because she concedes she has no right of action under the DTA.

The issues Jackson raises under the DTA were properly decided and do not merit further review.

E. Jackson's CPA Claims Were Abandoned at the Trial Court and Waived on Appeal.

In an attempt to breath new life into her claim alleging a violation of the Consumer Protection Act, RCW 19.86 ("CPA"), Jackson suggests that the Court of Appeals' "misreading of her Complaint is creating confusion in Superior Court cases" involving the DTA. This argument is a diversionary tactic designed to sidestep the fact that Jackson failed to preserve any cause of action on appeal under which she could raise her bad faith claims. The Court of Appeals properly ruled that Jackson's claims for CPA violations, as well as her claims for breach of contract, negligence and quiet title in her opening brief, would not be considered because she failed to identify and support any claim of error in her opening brief. *Jackson*, 347 P.3d at 491. An appellate court will not consider a claim or error that a party fails to support with legal argument in her opening brief. *Mellon v. Reg.'l Trustee Servc. Corp.*, 182 Wn. App. 476, 486, 334 P.3d 1120 (2014). Jackson does not disputer the Court of Appeals' finding that her "failure to assign error to and argue against the

[trial] Court's decision...waived any argument as to these claims." *Jackson*, 347 P.3d at 491. The Court of Appeals' ruling was correct.

F. There Is No Controversy About the Use of Public Records and Documents Relied on in the Complaint and Thus No Need to Review This Issue.

The Court of Appeals correctly affirmed the Superior Court's determination that consideration of public records and documents expressly referenced in Jackson's Amended Complaint did not require that the CR 12(b)(6) motions be converted to CR 56 motions. *Jackson*, 347 P.3d at 491. As set forth in the Answer of Co-Respondents, the Court of Appeal's decision was based on a correct reading of existing cases which are not in conflict. In addition Jackson once again attempts to raise an issue on appeal (hearsay) which she did not raise in either the Superior Court or the Court of Appeals, and she has thus waived this issue. Respondents hereby incorporate the arguments and authorities cited by Co-Respondents.

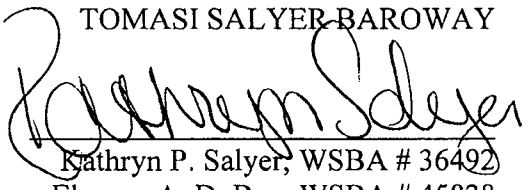
VI. Conclusion

This Court should decline to accept discretionary review of the issues raised by Petitioner. Her brief not only fails to show that the Court of Appeals erred but it also falls far short of showing that 1) the Court of Appeals' decision conflicts with another decision either of this Court or of another Court of Appeals; 2) involves an issue of substantial public interest that should be determined by this Court; 3) or presents a significant question of constitutional law. Moreover, Jackson's claims,

including her claim challenging the constitutionality of the DTA, are barred by her own substantive and procedural failures.

Respectfully submitted this 8th day of July, 2015.

TOMASI SALYER BAROWAY



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CERTIFICATE OF SERVICE

I certify that on July 8, 2015, I served a copy of the foregoing document, described as **RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND MCCARTHY & HOLTHUS, LLP'S ANSWER TO PETITIONER'S PETITION FOR REVIEW** on the following persons by U.S. First Class Mail and email:

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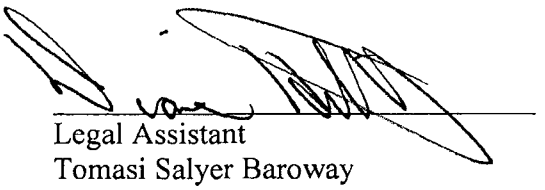
I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct, and that this Declaration was executed in Portland, Oregon.

Dated: July 8, 2015



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Dear Clerk:

In the Supreme Court Case No. 89183-4 (72016-4) *Jackson v. Quality Loan Service Corp. of WA, et al*, attached for filing on behalf of Kathryn P. Salyer, WSBA #36492, (503-894-9900), ksalyer@tsbnwlaw.com, is **RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND MCCARTHY & HOLTHUS, LLP'S ANSWER TO PETITIONER'S PETITION FOR REVIEW.**

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