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THE SUPREME COURT OF THE

STATE OF WASHINGTON

SANDRA SHELLY JACKSON, an individual,

Petitioner,

v.

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

Respondents,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Jackson's argument section is organized as follows: Part 1 addresses the nature of superior courts' subject matter jurisdiction; Part 2 addresses how RCW 61.24.030(7)(a) and (b) should be construed; Part 3 addresses why Jackson's complaint should not have been dismissed pursuant to CR 12(b)(6).

II. *ASSIGNMENT OF ERRORS:*

1. The trial court erred in failing to consider the nature of its authority, *i.e.* subject matter jurisdiction, if any, under the DTA.

ISSUES RELATED TO ASSIGNMENT OF ERROR 1:

1.) What role, if any, did the framers of the Washington Constitution assign to the judicial department, as opposed to the legislature, with regard to disputes at law involving the title and possession of real estate?

2.) Is the specifically enumerated jurisdiction set forth in Const. art. IV, § 6 exclusive?

ASSIGNMENT OF ERROR 2:

If the Superior Court did not err in failing to determine the nature of its subject matter jurisdiction, then the Superior Court erred in failing to construe the meaning of the DTA provisions, particularly RCW 61.24.030(7)(a) & (b).

ISSUES RELATED TO ASSIGNMENT OF ERROR 2:

1.) Does the first sentence of RCW 61.24.030(7)(a) direct a "trustee" to make a judicial inquiry?

2.) If so, must this judicial inquiry be performed by the trustee pursuant to "fundamental rules of ... jurisprudence"?

3.) Should the first sentence of RCW 61.24.030(7)(a) be construed so to require that the word "beneficiary" and "owner" be interpreted as having separate and distinct meaning?

4.) In order for RCW 61.24.030(7)(a) to be constitutional must Jackson have notice and an opportunity to participate in the trustee's judicial inquiry?

5.) Having created a judicial inquiry in the first sentence of RCW 61.24.030(7)(a) can the legislature mandate that inquiry be resolved based on a self-serving declaration that does not comply with the Civil Rules of Evidence or any semblance thereof?

ASSIGNMENT OF ERROR 3:

The trial Court erred in dismissing Jackson's complaint under CR 12(b)(6).

ISSUES RELATED TO ASSIGNMENT OF ERROR 3:

1.) Did the amended complaint set forth facts which could result in liability for defendants where it alleged McCarthy & Holthus (M&H)

and Quality Loan Service Corp. (QLSC), working together as a biased trustee in violation of a trustee's duty of good faith, failed to comply with RCW 61.24.030(7)(a)?

2.) Did the amended complaint set forth facts which could result in liability for the defendants where it alleged the deed of trust had been split from the note?

3.) Did M&H's alleged corporate veil defense preclude any possible liability of M&H to Jackson sufficient to grant at CR 12(b)(6) motion?

4.) Can the superior court take judicial notice of matters outside the pleadings pursuant to CR 12(b)(6) for purposes of resolving the claims on the merits?

5.) Did Jackson waive all of her briefed arguments by orally arguing the nature of the superior court's subject matter jurisdiction?

III. STATEMENT OF THE CASE

The Complaint.

On April 4, 2013 Appellant Sandra Shelly Jackson (Jackson) filed a Complaint in King County Superior Court (Trial Court) naming as defendants: Quality Loan Service Corporation of Washington (QLSC), McCarthy Holthus, LLP (M&H), Mortgage Electronic Registration Systems (MERS), U.S. Bank, National Association *as trustee for WAMU*

Mortgage Pass Through Certificates for WMALT 2006-AR4 Trust (hereafter US Bank), and the investors in WMALT 2006-AR4 Trust c/o JP Morgan Bank N.A. (hereafter J.P. Morgan Chase). CP 1-68. An Amended Complaint (CP 82-108) was filed on April 30, 2013 naming the same parties and alleging with more specificity the relationship between M&H and QLSC. *Compare e.g.* CP 4:1-9 and 85:1-15 for the limited differences in the complaints.

The amended complaint asserted the Superior Court had original jurisdiction to determine all facts and legal issues in "cases at law involving the title and possession of real estate". *See* Const. art. IV § 6. *See e.g.* CP 83, ¶1.4. *See also* para. CP 90 ¶ 3.14.

The complaint alleged the trustee (QLSC and M&H acting together) were misusing the DTA in order to take Jackson's home for the benefit of the purported beneficiary defendants by utilizing the MERS foreclosure system. CP 82-108, ¶ 2.3; 3.5; 5.1-5.13. In this regard, Jackson alleged that QLSC was operationally related to M&H, a law firm which owed a fiduciary duty to the purported beneficiary defendants in violation of RCW 61.24.010(3)&(4). CP 93, paragraph 5.2. Further, Jackson's complaint alleged that none of the purported "beneficiary defendants" (MERS or U.S. Bank or J.P. Morgan Chase) was a "beneficiary" within the meaning of RCW 61.24.005(2). CP 93, ¶ 5.3.

In support of her claims that the trustee had not met its burden under RCW 61.24.030(7)(a) to have proof that "beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" the complaint alleged or attached exhibits, documenting: the applicable deed of trust, CP 38-52 including Paragraph 20. CP 50; CP 88, ¶¶ 3.6 and 3.7. Paragraph 20 purports to allow the transfer of partial interests in her promissory note as well as the deed of trust. CP 50; CP 88, ¶¶ 3.6 and 3.7. Jackson also alleged in the complaint that the deed of trust purported to make MERS the beneficiary. CP 39 Definitions (E); CP 40 Transfer of Rights in Property; CP 88, ¶ 3.5. MERS was a different entity than the one which claimed to be foreclosing.

Jackson also attached an unauthenticated and unendorsed document evidencing the obligations secured by the deed of trust. CP 29-34. This document is dated March 17, 2006. It defines "note holder" as follows:

> "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

Finally, Jackson's complaint alleged or attached documents which showed 1.) an undated allonge purporting to convey the "NOTE DATED MARCH 17, 2006" from Cameron Financial Group, Inc. DBA 1st Choice

Mortgage to Countrywide Bank N.A.(CP 36); 2.) an undated Notice of Default alleging non-payment from January 1, 2011 to November 30, 2012 which identifies US Bank as beneficiary (CP 55-58); 3.) a Notice of Trustee's Sale recorded December 21, 2012 which states the Deed of Trust dated 3/17/2006 was assigned by MERS as nominee for Cameron Financial Group, Inc. DBA 1st Choice Mortgage to U.S. Bank, National Association, as Trustee and Successor in Interest to Bank of America, National Association as Trustee and as successor by merger to LaSalle Bank, National Association as Trustee for Washington Mutual Mortgage Pass-Through Certificates Series WMALT 2006-AR4 Trust. CP 60-63.

The Defendants' Motions to Dismiss.

On April 26, 2013 M&H moved for dismissal claiming that QLSC was the trustee and a separate corporation. CP 77-81. M&H argued that because Jackson's complaint had not alleged the corporate veil between M&H and QLSC should be pierced, their claims must be dismissed. CP 79:27-80:27. Jackson responded that by commingling activities and personnel to perform nonjudicial foreclosures under the DTA, both entities are performing requisite duties of the trustee. CP 116-124. Jackson also argued that under the Rules of Professional Conduct M&H and QLSC were not separate entities when performing activities within the judicial sphere of government. *See* Transcript of May 17, 2013 Oral Argument

(5/17/13 Transcript), pp. 5-6. *See also* CP 129-132. The superior court below accepted additional briefing on this issue, which can be found in the record at CP 129-132; 133-136. On June 14, 2013 the Trial Court granted M&H's CR 12(b)(6) motion to dismiss with prejudice. CP 167.

On June 11, 2013 and June 19, 2013 the remaining defendants filed motions to dismiss. CP 137-149; 168-174. Oral argument was heard on July 19, 2013. Counsel for MERS, US Bank, and JP Morgan Bank N.A. acknowledged his clients had notice of the claims Jackson was making against them. Transcript of July 19, 2013 Oral Argument (7/19/13 Transcript) 6:9-9:18. Counsel asked the Court to take judicial notice of the documents attached to plaintiff's complaint as proof contradicting the complaint's allegations. *Id.*, p. 13:18-14:5; 29:23-32:1. Similarly, counsel for QLSC (an attorney from M&H) indicated that QLSC had notice of Jackson's claims, but argued that QLSC complied with the DTA because it relied upon "public records." *Id.*, p. 15:10-24.

Jackson's counsel objected to the use of judicial notice in this manner; insisting Jackson was entitled to "expect the allegations of her complaint to be taken as true." *Id.*, p. 17:12-14. *See also* CP 180:20-184:12.

During oral argument Jackson, through her attorney, offered a hypothetical that indicated QLSC's "in-house counsel" was an employee

of M&H. 7/19/13 Transcript, p. 17:15-24:11. Further, the trial court was provided an email from QLSC's in house counsel to borrower's counsel, which advised in its disclaimer section:

> " ... If you have a question about a specific factual situation, you should contact an attorney directly. Should you desire to obtain a full opinion, we would be happy to submit your inquiry to McCarthy Holthus, LLP for handling."

Id., 17:18-23.

On August 8, 2013 the Trial Court issued an order that dismissed all defendants with prejudice. CP 215-16. Jackson timely filed a notice of this appeal on August 9, 2013. CP 218-227. Jackson thereafter filed a statement requesting direct review by the Supreme Court pursuant to RAP 4.2. That request is currently pending.

Clarification of Hypothetical on Appeal.

By way of conceptual backdrop for the legal determinations to be resolved in this appeal, Jackson proffers the following clarified hypothetical:

> M&H and QLSC work together as a vertically integrated foreclosure enterprise (Enterprise). Such an enterprise is characterized by a law firm which represents lenders at the same time it construes the meaning of the DTA for its affiliated trustee services company. The enterprise's construction of the DTA benefits its clients, in this case the purported beneficiary specifically, and the lending industry generally.

In other words, in performing judicial inquiries QLSC relies on M&H's construction of the DTA in favor of the purported beneficiary, to the detriment of the home owner. Thus, QLSC fails to apply a neutral construction of the law to the facts before the trustee.

IV. ARGUMENT

A. The Superior Court has original exclusive jurisdiction of all cases at law involving the title and possession of real estate and of unlawful and forcible detainer.

1. Standard of review.

Subject matter jurisdiction is reviewed de novo. *Crosby v. Spokane County,* 137 Wash.2d 296, 301, 971 P.2d 32 (1999). Constitutional issues are also reviewed de novo. *State v Jorgenson*, 2013 Wash. LEXIS 936 (Wash. Nov. 21, 2013).

2. The framers of Washington's Constitution intended to constitutionally restrict the legislature's power to enact laws.

The United States Constitution became effective in 1789[1], and contains only seven articles. *U.S. Const.* art. I-VII. These were enacted for purposes of separating the federal government's power into three branches, *Id.*, Art. 1- 3, and creating a federalist system of State and Federal governments in which each sovereign would have incentive to correct the abuses of the other. *Id.*, Art. 4 and 6. *See* The Federalist No. 28, at 179-80 (A. Hamilton) (J. Cooke ed. 1961).

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[1] Paul Rodgers (2011). *United States Constitutional Law: An Introduction*. McFarland. p. 109

Washington's Constitution, on the other hand was enacted in 1889, contains 27 articles, and constitutionally resolves contemporary problems and public policy matters that the federal government (and most state governments) left for future resolution by the legislative branch of government. Snure, Brian, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution,* 67 Wash. Law Rev. 669, 675 & 677 (1992).

Const. art. II, § 1 originally bestowed legislative authority on the House of Representatives and senate. But section 28 prohibited the legislature from enacting certain types of laws, including the following:

> The legislature is prohibited from enacting any private or special laws in the following cases:
> [* * *]
> 4. For authorizing the sale or mortgage of real or personal property of minors, or others under disability.
> [* * *]
> 6. For granting corporate powers or privileges.
> [* * *]
> 9. From giving effect to invalid deeds, wills or other instruments.
> [* * *]
> 11. Declaring any person of age or authorizing any minor to sell, lease, or encumber his or her property.
> 12. Legalizing, except as against the state, the unauthorized or invalid act of any officer.
> [* * *]
> 17. For limitation of civil or criminal actions.

Subsections 4, 9, and 11 above substantiate drafter's concerns about real property interests. Subsection 6 reiterates the drafter's substantial concern against enacting special legislation granting "corporations" powers or privileges. *See* infra. Subsection 12 prohibits the legislature from legalizing the unauthorized or invalid act of any officer. Subsection 17 prohibits the legislature from enacting limitations on civil actions.

As is discussed further herein, Jackson contends the DTA violates several of these provisions by creating a trustee to exercise exclusive judicial power reserved to the superior court. *See* infra.

Despite the limitations placed on the legislature to protect individual liberty and property, the problems which gave birth to such restrictions continued. Indeed, it quickly became clear that Washington's legislature was not being as responsive to the will of the people as the drafters intended:

> "It had been found impossible, for example, to get the legislature to enact a statute creating a railroad commission...Although popular demand became so strong for it that a railroad commission law was enacted in 1905, it cannot be said that the political conditions about Olympia had been improved. Legislative arrangements continued to be made between legislators and lobbyists over private bars in downtown hotel rooms and United States senators were chosen in similar fashion."

Johnson, Claudius O., *The Adoption of the Initiative and Referendum in Washington*, 35.4 *The Pacific Northwest Quarterly* 291, 294-295 (1944).

In 1899 Oregon's legislature amended its constitution to provide for direct legislation by the people. The people of Washington quickly seized on the idea as a potential solution. *Id.* An organized effort lead by the Washington State Grange and supported in the legislature by Senator L. C. Craw and Representative T. C. Miles, both framers of the Washington Constitution, resulted in introduction of a direct legislative amendment to the constitution. *Id.* The amendment was reintroduced each session until it passed. *Id.* at 296.

Other steps to secure power in the people were more quickly achieved; the direct primary was enacted in 1907. *Id.* By 1910 the Grange joined by the Washington Federation of Labor and others, began a public education campaign successful enough that by July C. C. Gose, president of the Washington Bar and an opponent of direct legislation, was quoted as saying "Throughout our state today many people are crying out for the initiative and referendum in legislation..." *Id.* at 297-9. The amendment was introduced as House Bill 153 in 1911 and passed both houses while resisting several amendments that would have impaired its function. *Id.* at 300.

The direct legislation Amendment to the Constitution suggests that legislative corruption by corporate interests and the wealthy was not immediately eradicated but remained (and some would argue remains) a problem, for which there has been (and is) no simple solution.

3. The Constitution restricts the legislature's promotion of corporate interests when doing so is to the detriment of individual freedoms and property rights.

Recently, this Court acknowledged corrupt legislative entanglement with corporations gave rise to provisions in the Constitution seeking to prevent similar legislative abuses in the future. *See Anderson v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006). As this Court noted in *Anderson*, the legislative branch was not the only branch of government which was not held in particularly high esteem by citizens of the Washington territory.

> "[L]egislative abuses were rampant--the territorial legislature reportedly passed few laws in 1862-63 but enacted numerous pieces of special legislation; governors were criticized for abusing patronage power; there was criticism of the judiciary due to "absentee judges, political manipulations, and the lack of local control over appointments"; and the "presence of powerful corporations in Washington was often at the root of the governmental corruption." Snure, supra, 67 Wash. L. Rev. at 671.

Id., at 16.

It is interesting to note that the United States Constitution, which created the separation of powers in the federal government, was followed

by the ratification of ten amendments, known as the "Bill of Rights" on December 15, 1791[2]. The first article of Washington's Constitution is entitled "The Declaration of Rights" and addresses individual liberties. Significantly, this Article precedes those establishing Washington's three branches of government. One commentator has suggested the framers intended that the people themselves be the fourth branch of government. Snure, supra, 67 Wash. L. Rev. at 683-685.

A purpose of the Federal Bill of Rights was protection of the States and their citizens from abuses of power by the Federal Government. *See* U.S. Const. Amendment 1 ("Congress shall pass no law..."); Amendment 6 (Protecting rights in judicial proceedings); Amendment 10 (reserving authority to the States). There is no evidence the drafters' of the Federal Constitution perceived any threat to individual liberty and private property arising from corporations.

Until the Industrial Revolution, general incorporation statutes did not exist and corporations were rare. Dodd, Edwin M. *American Business Corporations Until 1860, With Special Reference to Massachusetts* at 14-15 Harvard Univ. Press (1954). During those times, corporate form was acquired by petitioning one of the thirteen state legislatures for a special corporate charter which often restricted the corporation, *inter alia*, to

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[2] *The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 103-6, 103rd Cong., 1st Sess.*. U.S. Government Printing Office. 1996. p. 25 n.2.

specific activities, sources of revenue and a particular, often public, purpose.[3] Hurst, James W. *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* at 7-15; 133-135 The Lawbook Exchange, Ltd., (2010). *See also* Millon, David. *Theories of the Corporation*, 1990.2 *Duke Law Journal* 201, 207-209 (1990); Hamill, Susan P. *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 *Am. UL Rev.* 81, 84-86 (1999).

On the other hand, in 1889 the framers of the Washington Constitution believed it necessary to afford individuals protection from both the State and non-municipal corporations. Our Constitution reflects the concern that individual liberty and private property should be protected from both the government and private corporations; especially where legislative power seeks to promote the special interests of corporations and the wealthy. *See* e.g. Const. art. I, §12 (Special Privileges and Immunities Prohibited); Const. art. II, § 28 (Prohibiting certain categories of legislation); Const. art. XII (Regulating non-municipal corporations). In *Grant County* this Court observed:

> The Washington [Special Privileges and Immunities] provision differs from that of the Oregon provision only in that the Washington provision added a reference to corporations, which our

[3] An example of such a charter can be found in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (Wheat.) 518, 539-545, 4 L. Ed. 629 (1819).

> framers perceived as manipulating the lawmaking process. *Thompson*, 69 TEMP. L. REV. at 1253. Washington's addition of the reference to corporations demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth, ***which they feared more than they feared oppression by the majority***. Brian Snure, *Comment, A Frequent Recurrence to Fundamental Principles: Individuals Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669, 671-72 (1992); *Thompson*, 69 TEMP. L. REV. at 1253 (alteration of Oregon model "reflected the contemporary populist suspicion of the political influence accompanying large concentrations of wealth"). Our framers' concern with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81, 21 L. Ed. 394 (1872). (Emphasis Supplied)

Grant County Fire Prot. Dist. No. 5 v City of Moses Lake, 150 Wn. 2d 791, 808, 83 P.3d 419 (2004).

The Washington drafters sought to protect individuals from abuses by corporations which could impact their liberties and private property in several provisions of the Declaration of Rights, *see e.g.* Const. art. I, §§ 12, supra; 16 (eminent domain not to be used to benefit corporations), 24 (prohibiting individuals or corporations from organizing, maintaining or employing an armed body of men.). The drafters included a specific constitutional provision, Article 12, to regulate corporations and require the legislature to enact laws regulating corporations.

Former Justice Robert Utter discusses the historical context in which Article XII and the other provisions of the Constitution were adopted.

> ... Many of the candidates for delegate to the Constitutional Convention ran on populist platforms, and those who were elected managed to include a number of populist provisions in the constitution.
>
> Among the tenets of populist philosophy were a strong distrust of corruptible legislatures and the corporations that were believed to corrupt them, and a corresponding preference for more direct forms of democracy. The populists wished to protect personal, political, and economic rights from both the government and corporations, and they strove to place strict limitations on the powers of both. ...

Robert J. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 519 (1984)

The term "corporation" is defined broadly "to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partnerships." Const. art. XII § 5. **Banks**[4], Common Carriers[5], e.g. Railroads[6], and Telephone and

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[4] *See* Const. art. XII, §§ 11 and 12. The original text of Section 11 provided in pertinent part:

> [4]Each stockholder of any banking or insurance corporation or joint stock association, shall be individually and personally liable equally and ratably and not one for another, for all contracts, debts and engagements of such corporation or association while they remain such stockholders to the extent of the amount of their stock at the par value thereof, in addition to the amount invested in such shares.

[5] *See* Const. art XII, §§ 13-21.

[6] Although the term Common Carrier includes "railroads", the term "railroad" is used specifically throughout the provisions cited in Note 6.

Telegraph[7] companies **are specifically identified in Article XII as being of concern to the drafters**. The last section of Article XII prohibits any private monopolies or trusts **and instructs**: "[t]he legislature **shall pass laws for the enforcement of this section** by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises." Const. art. XII, § 22. (Emphasis Supplied)

4. The drafters selected the judicial department to enforce the provisions of the Constitution.

Former Justice Utter provides insight regarding contemporary events which likely influenced the drafters' view of the Executive and Judicial Departments.

> Portions of Washington Territory suffered two periods of martial law, one during an Indian uprising and one prompted by anti-Chinese riots some thirty years later. The Governor made the first declaration of martial law in 1856 solely to suspend the right of habeas corpus for a handful of suspected Indian sympathizers illegally held by the military. No military justification for martial law existed, since the Indians had already been defeated in the affected counties before the decree went into effect. The imposition of martial law resulted in some egregious violations of individual rights, as well as several violent confrontations between judicial and executive authorities. The Territory's Chief Justice sent a posse to the Executive Office to arrest the Governor (they were ejected by a group of loyal soldiers and

[7] Const. art. XII, § 19 declares telephone and telegraph companies "to be common carriers and subject to legislative control". Railroads are required to "allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies".

clerks), and the Governor retaliated by arresting the Chief Justice and holding him at a local fort for approximately two weeks. Thereafter, judges who dared to hold court were forced to assemble scores of bailiffs to protect them against the Governor's troops.

The second declaration of martial law occurred just three years before the 1889 Constitutional Convention. The official purpose of the declaration was to restore order and to protect the rights of whole communities of Chinese laborers who were being forcibly expelled from Washington by lawless bands headed, in the largest such incident, by Seattle's police chief. It should be noted, however, that at least one of the men who urged the Governor to declare martial law hoped merely to suspend the right of the civil authorities to arrest and try five soldiers accused of gunning down several members of an anti-Chinese mob. Whatever the cause of martial law, Seattle residents experienced approximately two weeks of military control of civil government, characterized by curfews, military passes, court-martials, and ***military edicts banishing citizens from their homes***[8].

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[8] There appears little doubt that being "banished" from their homes had an effect on the drafters. Thereafter, instead of adopting a provision similar to the Fourth Amendment, which dealt primarily with search warrants, our drafters authored Const. art. I, § 7 which states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The framers of Washington's Constitution, having the benefit of 113 years of interpretation of the United States Constitution and their own history, sought to ensure citizen's rights to be secure in one's home would be forever inviolate in this state, unabridged by acts of the legislature except under ***authority of law***. *See e.g.* Johnson, Charles W., and Beetham, Scott P. , *The Origin of Article I, Section 7 of the Washington State Constitution,* 31 Seattle UL Rev. 431, 443 (2007)("[T]he portion of article I, section 7 prohibiting the invasion of one's home without authority of law was likely meant to emphasize the "sanctity of a man's home," and the prohibition against any physical intrusion into the home and its surrounding areas as opposed to merely search or seizure."); Schuman, Craig E., *Washington's Article 1, Section 7 : A Historical Perspective* at 10 (1985)(On file at Washington State Law Library)("The Constitutional Convention, for the most part, wanted to make sure that the legislature would not be able to interfere with any of the protections that the delegates felt were inherent in a constitution."). It is difficult to conclude that the framers expected the phrase "authority of law" would allow the legislature to enact laws like the DTA, which allows for nonjudicial foreclosures. **The term "authority of law," which is only used once in the Constitution, is different than the term "as prescribed by law" which is used on over 50 occasions by the drafters).**
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Robert J. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. at 516-517 (citations omitted) (emphasis provided).

These events frame the obvious; namely, that the historical backdrop for devising a government of separated powers was different in the late 1700s (because no such government existed) than in the late 1800's. Just prior to the dawn of the twentieth century the people of Washington, other territories, and States had over a century of experience living under such a system. They observed how the system worked. And when given the chance, our forefathers strove to improve the workings of the separation of powers in the Washington Constitution they drafted based on their experience.

Justice Utter opines: "The decade preceding statehood ... gave the people and delegates an outlook on government that may well have been unique in the history of state constitution making." *Id.*, at 518. This helps to explain the delegates' choice of a legislative Constitution, *i.e.* a Constitution in which policy choices and types of laws normally reserved to a legislature were made by the Constitution's drafters for purposes of preventing longstanding legislative corruption in the future and to prevent the legislature's enactment of laws inconsistent with individuals' rights to

liberty and private property[9]. Indeed, in our Constitution the drafters go so far as to instruct the legislature to enact laws and to achieve policy goals. *See e.g.* Art. XII, § 22. *See also McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012)("[A]rticle IX, section 1 imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of all children." *Id.*, at 514).

Seventy-five delegates authored the Washington Constitution. Twenty three of them were lawyers. Charles K. Wiggins, *The Twenty-*

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[9] One commentator notes:

> [9]The striking thing about the Washington state constitution is the extent to which it reflects a strong affirmation of the rights of the individual, particularly property rights. Both the historical context in which the Washington Constitution was adopted and the structure of the Washington Constitution itself presuppose an individual's inherent right to acquire, use and transfer private property. The importance of private property as a fence to liberty was a key component of the American constitutional and common law traditions that extended from the time of the American Revolution through the year that the State of Washington was admitted to the Union as the 42nd state in 1889. Through the Enabling Act that authorized the Washington Territory to obtain statehood, Congress recognized that the Washington Constitution would inherit that property rights tradition by requiring that the Washington Constitution must be consistent with the principles of the Declaration of Independence and the United States Constitution. The strong individual rights emphasis of the Washington Constitution—which includes property rights—is implicit in the placement of a Declaration of Rights in article I of the document. Article I, § 1 provides that —[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.
>
> [9]One could argue, then, that the Washington Constitution does not *grant* rights to individuals; rather, it *recognizes* them, because its history and structure presuppose that rights—including the right to acquire, use and transfer private property—belong to individuals by nature. The Washington Constitution thus acknowledges these rights and the duty of government to safeguard those rights."

[9]Bindas, Michael, et al., *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 Gonz. L. Rev. 1 (2010)(citations omitted)(emphasis original).
9

Three Lawyer-Delegates to the Constitutional Convention, WASH. ST. B. NEWS, Nov. 1989, at 9-14. The twenty three lawyers were among the most influential delegates, Id., and constituted the largest occupational group within the convention. Utter, 7 U.Puget Sound at p. 520. Although there were concerns about the Constitution being too "legislative," it likely would have been expected by these lawyers that these directives would be made binding upon the legislature by the judicial department. Although "judicial review" was not as commonplace as it is today, it certainly had been an established principle of law that the judicial department was the ultimate arbiter of the meaning of the Constitution since *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 166; 177-79, 2 L. Ed. 60 (1803).

5. The delegates utilized their crafting of the jurisdictional provisions of Article IV for Courts of Record as another way of protecting individual's liberty and private property rights.

The original text of Const. art. IV, § 6 stated:

> The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand, or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases

> and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization, and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices and other inferior courts in their respective counties as may be prescribed by law. They shall be always open except on non-judicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and non-judicial days.

Our Constitution is unique with regard to its identification of specifically enumerated categories of cases over which the superior court has jurisdiction. While New York, Oregon, California and Indiana's Constitutions are believed to have been influential in the drafting of Washington's Constitution none of them contain similar enumerations of original jurisdiction.[10] Nor do constitutions from the western states admitted at or near the time of Washington, except for the Arizona Constitution, which was enacted in 1910.

[10] California's language is most similar: "The District Courts shall have original jurisdiction, in law and equity, in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts, their jurisdiction shall be unlimited." Cal. Const. art. VI, § 6 (1849).

Const. art. IV, § 6 was influenced by the same concerns that pervade the rest of Washington's Constitution.[11] Considerable time and analysis was given to crafting Articles III and IV of Washington's Constitution.[12]

Two years after the Constitution was adopted this Court held that the grants of enumerated original jurisdiction involved subjects that were within the exclusive jurisdiction of the superior court to resolve:

> The language of the constitution is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created. Thus, justices of the peace may be given exclusive original jurisdiction in cases where the demand or value of property in controversy is not $100, in cases of misdemeanor, and of other special cases and proceedings not otherwise provided for or specially enumerated as within the jurisdiction of the superior courts. ***It is the enumeration of the particular matters which are***

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[11] Of note, Washington was under martial law in 1856 and 1886.The 1856 incident led to a standoff between Governor Stevens and the judiciary resulting in the arrest and imprisonment of Chief Justice Edward Landers. The members of the Bar, with the apparent support of the people, declared Governor Stevens actions "illegal oppressive and insolent." *The Troubles in Washington Territory: The Military Against the Courts: Judge Landers Account of the Difficulty*, New York Times, August 7, 1856; avalible at http://query.nytimes.com/mem/archive-free/pdf?res=F10B17F93F5C1A7493C5A91783D85F428584F9. *See* Airey, Wilfred J. *A History of the Constitution and Government of Washington Territory*, Diss. University of Washington at 192; 346 (1945); avalible at http://lib.law.washington.edu/waconst/sources/airey.pdf.

[12] "Between July 16 and July 25, 1889, the Committee of the Whole spent a significant amount of time formulating the articles establishing the judicial and executive branches." Johnson, Charles W., and Scott P. Beetham.*The Origin of Article I, Section 7 of the Washington State Constitution* 31 Seattle U L Rev.431, 435 (2007).

> ***within the original jurisdiction of the superior courts, which we interpret to mean that those matters pertain to them exclusively.*** The language is not the clearest that could have been used; but, unless it is so interpreted, there can be no possible force in the restriction placed upon the legislature in its power to confer jurisdiction upon justices of the peace; for, if the minor courts can have concurrent jurisdiction with the superior courts up to $ 300, there is not a syllable in the constitution to prevent them from having it to any amount. This is certainly not to be conceded.

Moore v. Perrot, 2 Wash. 1, 4-5, 25 P. 906 (1891)(emphasis added).

Significantly, the author of the decision, Justice Stiles, and two of the Justices joining in the opinion, Justices Hoyt and Dunbar, were influential delegates who participated in writing Washington's Constitution. Wiggins, WASH. ST. B. NEWS, Nov. 1989, at p. 9-10.

This holding was reiterated by Justice J. M. Johnson in *State v Posey*, which, without mentioning *Moore*, virtually reiterates the holding of our founding fathers.

> In adopting Washington Constitution article IV, section 6, the people of this state granted the superior courts original jurisdiction "in all criminal cases amounting to felony" and in several other enumerated types of cases and proceedings. ***In these enumerated categories where the constitution specifically grants jurisdiction to the superior courts, the legislature cannot restrict the jurisdiction of the superior courts.*** *See Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 418, 63 P.2d 397 (1936). (Emphasis Supplied).

State v. Posey, 174 Wn.2d 131, 135-36, 272 P.3d 840 (2012).

Given the above holdings in 1891 and 2012 interpreting the language of Const. Art IV, § 6; the text of Constitutional provisions protecting citizens against special legislative enactments dealing with private property rights, including deeds, mortgages, and instruments; and the historical mischief the Constitution was designed to address; the issue squarely before this Court in this appeal is: Whether the legislature could enact a statute creating a nonjudicial process for taking title and possession of real estate which limits the nature of the superior court's original jurisdiction in derogation of Const. art. IV, § 6?

6. The Superior Court has no authority to enforce statutes, like the DTA, which trench upon its original and exclusive subject matter jurisdiction.

Of course, this Court should do its best to construe a statute so that it is constitutional. *See e.g. ZDI Gaming, Inc. v. Wash. State Gaming Comm'n*, 173 Wn. 2d 608, 616, 268 P. 3d. 929 (2012); *Haynes v. Seattle School District No. 1*, 111 Wn.2d 250, 253-4, 758 P.2d 7 (1988). However, the issue before the Court here is not like *ZDI* and *Haynes*. Here, the DTA carves out cases within the enumerated original jurisdiction of the superior court in order to create a nether world of nonjudicial foreclosures. Worse still, the legislature purports to limit civil actions against banks and other lenders. *See e.g.* RCW 61.24.127, *See* infra.

Under these circumstances *Household Finance,* supra, is the precedent more on point. Therein, this Court held:

> We are constrained to hold that the portion of Rem. Supp. 1941, § 8371-23, which purports to vest in the superior court for Thurston county the right to reverse on a trial de novo a decision of the supervisor with reference to the granting of such a license and, in effect, to substitute its judgment for that of the supervisor as to whether or not a license should issue, is unconstitutional as an attempt to vest a nonjudicial power in a constitutionally created court. ***We must reject this expansion of the court's power as firmly as we would resist a reduction of its rightful authority.***

(Emphasis Supplied) *Household Fin. Corp. v State*, 40 Wn. 2d. 451, 456-7, 244 P.2d 260 (1952).

Although the intent and workings of the separations of power doctrines under the U.S. Constitution and the Washington Constitution are obviously not the same given the evils each Constitution sought to address, the principle of law set forth in *Household Finance* is identical under both doctrines. *See Sprint Communs., Inc. v Jacobs*, 2013 LEXIS 9019 (U.S. Dec. 10, 2013)(Federal courts, it was early and famously said, have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *citing Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821).

The DTA is intended to give lenders a nonjudicial way to resolve disputes relating to the "possession and title of real estate" between DTA beneficiaries[13], borrowers[14], and grantors[15]. On its face, the very purpose of the DTA is to avoid our framers' intent that cases at law involving the title and possession of real estate be heard judicially by the superior court pursuant to its original, exclusive, and most authoritative jurisdiction.

On its face the DTA does not provide any appellate judicial review by the superior court of the Trustee's resolution of "judicial inquiries"[16]. *See infra, See Cox v Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985)([T]he deed of trust foreclosure process is conducted without review or confirmation by a court.... *Id.*, at 388.). Instead, the DTA purports to limit any judicial relief that borrowers can obtain judicially from civil actions regarding the possession and title of real estate. *Id.*, at 387 (If the grantor chooses not to cure, the grantor may take one or more of the following

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[13] RCW 61.24.005(2) states: "'Beneficiary' means 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."

[14] RCW 61.24.005(3) states: "'Borrower' means a person or a general partner in a partnership, including a joint venture, that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations, or the person's successors if they are liable for those obligations under a written agreement with the beneficiary."

[15] RCW 61.24.005(7) states: "'Grantor' means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations."

[16] For purposes of this brief the term "judicial inquiry" shall refer to Justice Oliver Wendell Holmes description thereof in *Prentis v.Atlantic Coast Lines*, 211 US 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908). *See infra.*

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actions. The grantor may contest the default ... RCW 61.24.149(2); restrain the sale, RCW 61.24.130; or contest the sale, RCW 61.24.040(2); *Id.* More recently the legislature enacted RCW 61.24.127, which on its face, purports to limit and eliminate civil causes of action in violation of Art. II, § 28(17) (prohibiting the legislature from limiting private causes of action) and carve out for a "trustee" parts of the superior court's exclusive original jurisdiction over an enumerated category of cases.

To the extent the legislature enacts statutes, like the DTA, which purport to remove or frustrate the superior court's constitutionally enumerated original jurisdiction regarding "all cases at law involving the title and possession of real estate," such statutes are void. The superior court has no authority to recognize an invalid restraint by the legislature upon its "duty and province" to declare what the law is under the Constitution with regard to cases at law which fall within its original jurisdiction. *See State v. Posey*, 174 Wn.2d 131, 135-141, 272 P.3d 840 (2012); *Household Fin. Corp. v State*, 40 Wn. 2d. 451, 456-457, 244 P.2d 260 (1952); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 418, 63 P.2d 397 (1936); *Moore v. Perrot*, 2 Wash. 1, 4-5, 25 P. 906 (1891).

No part of the DTA is subject to being saved as the intention by the legislature was to take what is reserved by the Constitution to the Judicial Department and give it to a private trustee and make what was intended to

be a judicial matter a nonjudicial one. *State v. Abrams*, 163 Wn.2d 277, 178 P.3d 1021 (2008)("The basic test for severability of constitutional and unconstitutional provisions of legislation is: ... whether the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature. *Id.* at 285-6)).

B. If the DTA can be construed so as to be Constitutional, what construction should the superior court have given to RCW 61.24.030(7)(a) & (b)?

1. Standard of Review.

The standard of review with regard to the construction of a statute is de novo. *See Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011); *State v. Roggenkamp,* 153 Wash.2d 614, 621, 106 P.3d 196 (2005).

2. Statutes, i.e. RCW 61.24.030(7)(a) and (b), must be construed so as be constitutional.

In footnote 11 of *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) the majority called into question the constitutionality of the DTA. *Klem*, 176 Wn.2d at 790. Dissenters and a concurring Justice claimed this comment was not merited. *Klem*, 176 Wn.2d at 806-7. In

Klem no party directly attacked the constitutionality of the DTA. Nonetheless, the majority observed and followed the rule that statutes should be construed to be constitutional, where possible to do so. *See ZDI Gaming, supra.* The *Klem* court stated:

> In a nonjudicial foreclosure, **the trustee undertakes the role of the judge** as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox*, 103 Wn.2d at 389. **While the legislature has established a mechanism for nonjudicial sales, neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure. An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.**

Klem, 176 Wn.2d at 790. (Emphasis Supplied).

The *Klem* Court's observation that the trustee acts as a "judge" is significant, but not extraordinary, where an inferior court and/or administrative agency exercises judicial or quasi-judicial authority. Indeed, it is a frequently recurring principle of Washington law that those who perform judicial inquiries, i.e. the application of existing law to existing fact, *see* note 16, supra, and *infra.* at p. 35, are required to

afford those persons which come before such tribunals the fundamental process required in the judicial sphere of government.

> The joint board is created by the statute with power to determine the rights of both employers and employees. In so doing, it acts judicially, or at least quasi-judicially. The employer has a right to appear before the department to be heard, and is given a statutory right of appeal. It is doubtless true that the joint board is not required to follow the exact procedure provided for the courts, but it must be equally true that it cannot wholly disregard those fundamental rules of procedure which all systems of jurisprudence, based upon the common law of England, recognize as requisite to due process. Among these none is more firmly established than the rule that one cannot lawfully be deprived of his property without notice and hearing.

See Mud Bay Logging Co. v Dep't of Labor & Indus., 189 Wash. 285, 291, 64 P. 2. 1054 (1937).

3. Other rules of statutory construction applicable to RCW 61.24.030(7)(a) & (b).

As previously noted, a statute should be interpreted so as to be consistent with the Constitution. *Klem*, 176 Wn. 2d at 790. Another rule of statutory construction requires giving "effect to every word, clause and sentence" of the DTA, *Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985). The DTA is to be strictly construed in favor of the borrower. *Klem*, supra, at 789; *Schroeder*, supra. at 105-5; *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012). Additionally, the DTA

should be construed consistently with its objectives; which are: first, the nonjudicial foreclosure process should remain efficient and inexpensive; second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and third, the process should promote the stability of land titles. *Bain,* supra, at 94.

4. The structure and purpose of RCW 61.24.030(7)(a) & (b).

RCW 61.24.030(7)(a) and (b) provide:

> It shall be a requisite to a trustee 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.

The first sentence of RCW 61.24.030(7)(a) imposes a "judicial inquiry" upon the trustee in order to effectuate a state sanctioned power of sale. This brief utilizes the same definition of judicial inquiry as was first proposed by Judge Oliver Wendell Holmes in P*rentis v. Atlantic Coast Lines*. Justice Holmes stated:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed to exist. That is its purposes and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter."

211 US 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908).

This Court has approved of Justice Holmes definition many times. A few examples include: *State v. McCuistion*, 174 Wash. 2d 369, 275 P.3d 1092 (2012); *Lummi Indian Nation v. State*, 170 Wash. 2d 247, 241 P.3d 1220 (2010); *Tacoma v. O'Brien*, 85 Wash. 2d 266, 272, 534 P.2d 114 (1975); *Ledgering v. State*, 63 Wash. 2d 94, 104, 385 P.2d 522 (1963).

5. The judicial inquiry required by the first sentence of RCW 61.24.030 (7)(a).

A "judicial inquiry" involves two steps: 1) interpreting the law as it exists; and 2) applying the law to existing facts. The first sentence of RCW 61.24.030(7)(a) requires a "judicial inquiry" to determine what , if any, proof exists "the beneficiary is the owner of any promissory note secured by the deed of trust". It is axiomatic, and this Court should take judicial notice of the fact, that virtually all trustees argue that 7(a) does not mean what the legislature wrote or what this Court construed in *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 285 P.3d 34 (2012); namely, that "the trustee shall have ***proof*** that the ***beneficiary is the owner*** of any

promissory note or other obligation secured by the deed of trust" and shall provide the homeowner with "the name and address of the ***owner*** of any promissory notes or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(l)." 175 Wn.2d at 93-4.

As will be recalled, Jackson hypothesized in her statement of the case that law firm and affiliated trustees, like M&H and QLSC (the enterprise), construe RCW 61.24.030(7)(a) in a manner that is not consistent with its plain language, but in the best interests of the enterprise's clients. A number of federal court decisions reflect this. *See e.g. Rouse v. Wells Fargo, N.A.*, 2013 U.S. Dist. LEXIS 144013, at (W.D. Wash. October 2, 2013)("Moreover, [federal] courts have uniformly rejected claims that only the 'owner' of the note may enforce it."); *Zalac v CTX Mortgage Grp.,* Case No. C12-01474 MJP, 2013 WL 1990728 at * 3 (W.D. Wash. May 13, 2013)(granting motion to dismiss where "Defendant [] asserts that it is the true *holde*r of the note, even if Fannie Mae is the owner of the note.") (emph. in original); *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1107-08 (W.D. Wash. 2011) (granting motion to dismiss in functionally identical circumstances where lender sold loan to Fannie Mae but then proceeded to foreclose in its own name - "Thus, even if Fannie Mae has an interest in Plaintiffs' loan, Defendant] has the

authority to enforce it."). *See Grant v. First Horizon Home Loans*, 2012 Wash. App. LEXIS 1246 (Wash. Ct. App. May 29, 2012)(***unpublished***[17]).

But these holdings and trustees' arguments are at odds with the first sentence of RCW 61.24.030(7)(a), which requires, as this Court observed in *Bain*, that the trustee have "proof" that the "beneficiary ***is the owne***r of the note secured by the deed of trust" before initiating any nonjudicial foreclosure proceedings whatsoever. (Emphasis Supplied) Notwithstanding federal court decisions suggesting otherwise, the legislative history of RCW 61.24.030(7)(a) shows the Washington legislature drew a clear distinction between "the beneficiary and owner" of the promissory note secured by the deed of trust and the "actual holder" of the note. *See* App. F of Motion to Take Judicial Notice of Legislative History ("Legislative History"), ESB 5810, p 12-13 (adopted Apr. 9, 2009). In fact, the original version of the bill contained none of what is now RCW 61.24.030(7)(a). *See* App. C to Legislative History, SB 5810 (as originally proposed on Feb. 3, 2009). The next version of the bill contained language that is almost identical to the language now contained in RCW 61.24.030(7)(a), with the notable difference that where the word "owner" is used in the present statutory provision. *See* App. F, at 12-13.

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[17] This unpublished Court of Appeals decision is not being cited a "authority" for any legal proposition. *See* CR 14.1. It is cited only to indicate the legal position of QLSC regarding the duties of a trustee under RCW 61.24.030(7) & (b).

The previous version used the words "actual holder." *See* App. D to Legislative History, Striker Amend. to SB 5810, p. 11 (adopted March 12, 2009). Under that earlier version, before the notice of trustee 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 original of any promissory note secured by the deed of trust . . ." *Id.* In the final version of the bill, that language was stricken and replaced by the current language of RCW 61.24.030(7)(a) requiring that the Trustee have proof that the beneficiary is the "owner" of the promissory note. *See* App. F, at 12-13.

In the accompanying Senate Bill Report ("SB Rep."), the Senate Committee on Financial Institutions, Housing & Insurance summarized the public testimony that supported the amended language and stated, in part: "Few homeowners know who has the authority to negotiate with them due to loan repackaging. The entity owning the loan should have to present the paper to prove they have authority to foreclose." *See* App. E to Legislative History, SB Rep. 5810, p. 3 (Apr. 9, 2009)(emphasis added). The final bill as enacted and codified contains identical language. *See* RCW 61.24.030(7). This sequential drafting history is powerful additional

evidence that the Trustees' construction of RCW 61.24.030 (7)(a) (and the federal court's adoption thereof) is wrong.

This Court should construe the statute in the same manner as it did in *Bain*. 175 Wn.2d at 93-4.

5. The second sentence of RCW 61.24.030(7)(a) purports to legislatively thwart the "judicial inquiry" required of the trustee.

The second sentence of RCW 61.24.030 (7)(a) states:

> 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.

Creating a "judicial inquiry" which can be resolved by a self-serving declaration, which under the Civil Rules of Evidence would be inadmissible, is an invitation to the judicial branch to become complicit in a system that provides no opportunity for borrowers to present evidence that the entity attempting to foreclose does not have the right to do so. *See infra*. This Court should not accept the legislature's interference with the judicial department's authority to exclusively exercise judicial power. *See* Const. art. IV, § 1. (The judicial power of the state shall be vested in a Supreme Court, Superior Courts, Justices of the Peace, and such inferior courts as the legislature may provide.) Such an intrusion would be almost exclusively for the benefit of wealthy corporations in violation of the

Washington Constitution. "Any legislative attempt to mandate legal conclusions ... violate[s] the separation of powers." *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 654, 771 P.2d 711 (1989)(quoting *Tacoma v. O'Brien*, 85 Wn.2d at 271).

The legislature can make legislative findings; it cannot determine adjudicative facts or instruct the outcome of a judicial inquiry.

"It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). As *Klem* observes, at minimum, our constitution and equity require the judicial inquiry mandated by the first sentence of RCW 61.24.030 (7)(a) be determined by a neutral trustee acting in the role of a substitute judge. Obviously, a decision-maker operating within the judicial department must apply the Civil Rules of Evidence (or some semblance thereof) to the proof produced by the *adverse parties* in order to make an adjudicative decision. *Id.* Such rules of evidence or some equivalent thereof must trump any attempt by the legislature to statutorily control the outcome of a judicial inquiry. As Justice Susan Owens explained for a majority of this Court: "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be

harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. *Putnam v Wenatchee Valley Med. Ctr.*, PS, 166 Wn. 2d 974, 980, 216 P. 3d 374 (2009). An irrebuttable presumption in favor of lenders stemming from a judicially inadmissible, self-serving declaration, which a borrower is given ***no*** opportunity to rebut before his property is taken, cannot be harmonized with the Rules of Evidence, the Civil Rules, or the Constitution. *See e.g.* CR 56.

This Court should not allow the legislature to distort the nature of a judicial inquiry by making it meaningless.

C.) The superior court improperly dismissed Jackson's complaint.

1. Standard of Review.

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. *Kinney v. Cook*, 159 Wn. 2d 837, 842, 154 P.3d 206 (2007).

2. Jackson's complaint adequately stated a cause of action against all defendants by alleging QLSC and M&H acted on behalf of purported beneficiary defendants as a biased trustee.

Courts should dismiss a claim under CR 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). Under this rule, a

plaintiff's allegations are presumed to be true. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985). Moreover, a court may consider hypothetical facts not part of the formal record. *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978). In *Halvorsen*, this Court stated with regard to hypothetical facts:

> ... [A]ny hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff's claim. As this court has previously stated, there is no reason why the "'hypothetical' situation should not be that which the complaining party contends actually exists." *Brown v. MacPherson's, Inc.*, supra at 298 n.2. In *Brown*, this court also sanctioned the presentation of "hypothetical" facts which were not part of the formal record; such facts are allowed to form the "conceptual backdrop for the legal determination." *Brown v. MacPherson's, Inc.*, supra at 298 n.2. Because the legal standard is whether any state of facts supporting a valid claim can be conceived, there can be no prejudice or unfairness to a defendant if a court considers specific allegations of the plaintiff to aid in the evaluation of the legal sufficiency of plaintiff's claim. Thus, we find nothing improper in appellant's additional allegations of fact made initially upon this appeal.

Halverson, 89 Wn. 2d at 674-5.

A complaint should survive a CR 12(b)(6) motion if any set of facts ***could*** exist that would justify recovery. *Lawson, at 448; Bowman*, at 183. As a practical matter, a complaint is likely to be dismissed under CR 12(b)(6) "only in the unusual case in which plaintiff includes

allegations that show on the face of the complaint that there is some insuperable bar to relief." *Orwick*, 103 Wn.2d at 254. **"When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion.**" *Bravo v Dolson Cos.*, 125 Wn. 2d 745, 754, 888 P. 2d 147 (1995)(quoting *Haberman v WPPSS.* 109 Wn. 2d 107, 120, 744 P. 2d 254 (1987)) (emphasis added).

Jackson alleged that QLSC and M&H worked together as a biased trustee in performing fact finding and applying RCW 61.24.030(7)(a) to those facts. (7)(a) states the trustee "shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust". Significantly, **under the statute the burden of proof was on the trustee to have "proof"; not on Jackson to show there was no proof**. The trustee offered no proof of compliance (or attempt to comply) with RCW 61.24.030(7)(a).

Defendants admitted during the second oral argument that each had notice of Jackson's claim, but asked the Court to resolve the case on the merits by taking judicial notice of documents. This was inappropriate, because Jackson's complaint should have been accepted as true under CR 12(b)(6). Even if the superior court had followed CR 12(b)(6), *see* infra., and properly converted the motion to one for summary judgment under

CR 56, QLSC and M&H never provided "proof" that any person or entity was a "beneficiary and owner of the promissory note" as is required by RCW 61.24.030 (7)(a). Even if QLSC and M&H had submitted a "beneficiary declaration" pursuant to the second sentence of (7)(a), the enterprise would not be entitled to rely on that declaration pursuant to a motion to dismiss under CR 12(b)(6) because of Jackson's assertion the trustee had violated its duty of good faith under RCW 61.24.010(4) must be taken as true. *See* RCW 61.24.030(7)(b), which states: "Unless the trustee has violated his or her duty [of good faith] 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."

This Court in *Klem* stated that claims against biased trustees and purported beneficiaries are viable.

> ***An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim***. n11 (Emphasis Supplied)

Klem, 176 Wn.2d at 790. Thus, the superior court erred in granting defendants' CR 12(b)(6) motion to dismiss.

3. Jackson's complaint adequately alleged the deed of trust had been separated from the document or instrument it secured.

Jackson clearly alleged in her complaint that the deed of trust had been split from the obligations evidenced by the note and therefore could not be the subject of nonjudicial proceedings. Complaint, (CP 91), ¶ 4.2.3. The superior court failed to address this theory of liability. This was error.

This Court indicated in *Bain* that under the MERS system a deed of trust could be split from the obligations. ("Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly could happen, given the record before us, we have no evidence that it did." *Id.*, 175 Wn. 2d at 112) *See also Bain,* 175 Wn. 2d. at 97-8 and note 7.

The evidence set forth in the complaint showed Jackson had been told the note had been transferred many times; several of which transfers purportedly occurred by merger. But no evidence was provided to her or the superior court that the note and deed of trust had been transferred together, nor was proof provided that either or both were transferred pursuant to each merger identified. Indeed, no "evidence" about the mergers, which were crucial to establishing a chain of title of the document or instrument evidencing the obligations, was provided to the trial court at all.

Under these circumstances, Jackson's complaint should not have been dismissed pursuant to CR 12(b)(6).

4. Jackson's complaint adequately set forth causes of action against M&H.

Jackson alleged QLSC and M&H commingled employees and activities to perform requisite duties required by a trustee. CP 82-83, Compl. 1.1; CP 85, Compl. 2.3; CP 93, Compl. 5.2; CP 94-95, Compl. 6.4. M&H moved to dismiss on grounds that QLSC was the trustee and a separate corporation. CP 125-7. But the complaint defined the "trustee" defendants as both QLSC and M&H, two separate entities acting together as a single trustee entity. CP 85, Compl. 2.3. The Complaint alleged the trustee defendants were attempting to conduct a private sale in violation of the DTA, CP 93, Compl. 5.4; violated duties owed Jackson under the DTA and her constitutional rights, CP 94, Compl. 5.5; and violated the duty of good faith they owed Jackson. CP. 92, Compl. 4.2.5. These and other allegations made clear to M&H and the Court that M&H was being sued for its own actions, which in concert with those of its affiliate, QLSC, resulted in a biased trustee, which brought nonjudicial foreclosure proceedings against Jackson in violation of RCW 61.24.010(3) and (4) based on M&H's erroneous interpretation of RCW 61.24.030 (7)(a).

Jackson also alleged in her complaint that QLSC was a law related services company under the control of M&H pursuant to RPC 5.7. CP 93, Complaint 5.2. Jackson urged that the Rules of Professional Conduct apply to attorneys and law related services companies acting as a trustee. CP 129-132. *See also Cox*, 103 Wn. 2d at 390.

Even assuming that Jackson was simply suing M&H for only QLSC's actions, her case should not have been dismissed pursuant to CR 12(b)(6). Washington recognizes the "alter ego" doctrine providing that where one entity "so dominates and controls a corporation that such corporation is [the entity's] alter ego, a court is justified in piercing the veil of corporate entity and holding that the corporation and private person are one and the same." *Standard Fire Ins. Co. v. Blakeslee*, 54 Wn. App. 1, 5, 771 P.2d 1172 (1989)

5. The Superior Court erred in deciding a CR 12(b)(6) motion on the merits by taking judicial notice of documents to resolve issues of fact.

CR 12(b)(6) states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion :...
> (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, ***if matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment***

> ***and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.***

(Emphasis Supplied)

Federal courts use the same rule, but have changed its "notice pleading" tradition to the more judge-centric "plausibility standard"[18]. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This Court declined to adopt the federal standard in *McCurry v Chevy Chase, FSB, 169* Wn. 2d 96, 100 233 P. 2d 861 (2010). This Court recently declined an invitation adopt the federal plausibility standard again in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013). In both *McCurry* and *Washburn* this Court indicated a preference for changing Civil Rules through rule-making; not as part of a judicial decision. *McCurry*, 169 Wn. 2d 102-3; *Washburn*, 178 Wn.2d at 750-2.

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[18] This "plausible to the judge who decides the motion" standard clearly favors defendants in these kinds of cases. *See* Cecil, Joe, et al. Motions to Dismiss for Failure to State a Claim after Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules (2011). The Report compared dismissal rates under FRCP 12(b) (6) motions to dismiss pre- and post- Iqbal/Twombly pleading standards in order to determine its impact. While dismissal rates were somewhat higher generally, one class of cases - those involving financial instruments - showed that in 2010 federal courts applying the Iqbal/Twombly dismissed 91.9% of fi nancial instrument claims for "failure to state a claim." Id., Table 4, FJC Report at p. 14. at 14, Table 4. Notably, the statistics excluded pro se plaintiffs which would have undoubtedly moved the number higher. Id at vii.

Before *McCurry* was decided by this Court, Division One of the Court of Appeals published *Rodriquez v Loudeye Corp.*, 144 Wn. App. 709, 189 P.3d 168 (2008). It held: "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Loudeye*, 144 Wn. App. at 726. Footnote 45 following this statement in the Court of Appeals decision notes: "While no Washington case explicitly permits this, courts in the Ninth Circuit have allowed the trial court to consider such information. ...". *Id.*

Division Two declined to follow *Loudeye* in *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 673, 288 P.3d 48 (Div. 2, 2012) rev. den., 176 Wn.2d 1022, 297 P.3d 707 (2013). A panel of that Court stated:

> The Washington Supreme Court has consistently held that we treat a CR 12(b)(6) motion to dismiss for failure to state a claim as a motion for summary judgment when matters outside the pleadings are presented to, and not excluded by, the superior court. *Sea-Pac Co. v. United Food & Commercial Workers Local Union* 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985).
>
> On a CR 12(b)(6) motion, no matter outside the pleadings ***may be considered, and the court in ruling on it must proceed without examining depositions and affidavits*** which could show precisely what, if anything, the plaintiffs could possibly present to entitle them to the relief they seek. Ordinarily, whenever a complaint is facially adequate and the possibility of obtaining relief depends on the factual showing the

> plaintiff can make, a dismissal motion should be treated as a motion for summary judgment, if only to keep the court from having to act completely in the dark as to the actual nature of the plaintiff's cause of action. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975) (emphasis added) (citation omitted).

Brummett, 171 Wn. 2d at 673-4.

Brummett reaches the correct result. The clear language of CR 12(b)(6) should be followed. Otherwise, depending upon the local rules, plaintiffs could find themselves having to respond to a CR 12(b)(6) motion, which considers matters outside the pleadings, pursuant to a five day motion. Additionally plaintiffs may be denied their constitutional rights to discovery. *See Doe v. Puget Sound Blood Bank*, 117 Wn.2d 772. 783, 819 P.2d 370 (1991). This is particularly inappropriate in foreclosure cases, given the abundance of robo-signed documents in the public records. *Klem*, 176 Wn. 2d at 192 ("This is often a part of the practice known as "robo-signing." Specifically, in this case, it appears that at least from 2004-2007, Quality notaries regularly falsified the date on which documents were signed."). *See also Bain*, 175 Wn. 2d. at 118 note 8.[19]

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[19] *See also Interagency Review of Foreclosure Policies and Practices*, Office of the Comptroller of the Currency et.al (2011)("Individuals who signed foreclosure affidavits often did not personally check the documents for accuracy or possess the level of knowledge of the information that they attested to in those affidavits. In addition, some foreclosure documents indicated they were executed under oath, when no oath was administered. Examiners also found that the majority of the servicers had improper notary practices which failed to conform to state legal requirements." *Id.* at 4.); Alan M. White, *Losing The Paper Mortgage Assignments, Note Transfers and Consumer Protection,* 24 Loy. Consumer L. Rev. 468, 470; 495-496; note 4 (2012); Testimony of

The superior court should have considered the motion to dismiss as a motion for summary judgment because defense counsel indicated they wanted to use the judicially noticed documents to decide merits issues. *Cf. Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787 (9th Cir. 2011)("[S]o long as the plaintiff alleges facts to support a theory that is not facially implausible, the court's skepticism is best reserved for later stages of the proceedings when the plaintiff case can be rejected on evidentiary grounds." *Id.*, at 791)

6. The trial court erred in waiving Jackson's argument because her counsel concentrated his argument on the Court's subject matter jurisdiction.

The trial court may have concluded Jackson waived all of her briefed arguments, apparently because Jackson's counsel concentrated his oral argument on the Court's lack of subject matter jurisdiction pursuant to Const. art IV, § 6 and the proper construction of RCW 61.24.030(7)(a). 7/19/13 Transcript, p.32: 8-17. Waiver occurs in many contexts. Waiver is generally defined as the "voluntary and intentional relinquishment of a known right." *See e.g. State v. Sublett*, 176 Wn.2d 58, 108-12, 292 P.3d 715 (2012); *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009).

Adam J. Levitin, *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Hous. and Comty. Opportunity of the H. Fin. Servs. Comm.*, 111th Cong. 2d Sess. (2010)("One GMAC employee, Jeffrey Stephan, stated in a deposition that he signed perhaps 10,000 affidavits in a month, or approximately 1 a minute for a 40-hour work week." *Id.* at 13).

Here, there is no indication that counsel intended to unequivocally waive Jackson's other theories as to why the motion to dismiss pursuant to CR 12(b)(6) should not be granted.

V. CONCLUSION

This Court should hold "cases involving the title and possession of real estate" are within the original, exclusive jurisdiction of the superior court, which cannot be abridged by statute. If the DTA can be construed constitutionally within this grant of original, exclusive jurisdiction then this Court should construe the meaning of RCW 61.24.030(7) pursuant to the applicable rules of statutory construction and apply that statute as construed by this Court to the issues raised in this appeal. This Court should reverse the superior court's order granting defendants' motions to dismiss because the allegations that 1) M&H and QLSC worked together as a biased trustee; 2.) on behalf of other defendants, none of which had been proved to be a beneficiary within the meaning of RCW 61.24.005(2); 3.) by initiating a wrongful foreclosure where the security instrument had been split from the note; and 4.) there was no compliance with (7)(a); was sufficient to state a cause of action sufficient to withstand a CR 12(b)(6) motion to dismiss.

RESPECTFULLY SUBMITTED this 20th day of December 2013,

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_____
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APPENDIX

UNITED STATES CONSTITUTION,

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION,

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION,

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

WASHINGTON CONSTITUTION

ARTICLE I, § 3

No person shall be deprived of life, liberty, or property, without the due process of law.

ARTICLE I, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

WASHINGTON CONSTITUTION

ARTICLE I, § 12

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WASHINGTON CONSTITUTION

ARTICLE I, § 16

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

WASHINGTON CONSTITUTION

ARTICLE I, § 1

The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.

Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either

measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: Provided, That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: Provided, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections, or parts of any act, law, or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to

the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall

take effect and become the law if it is approved by a majority of the votes cast thereon: Provided, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election. [AMENDMENT 72, 1981 Substitute Senate Joint Resolution No. 133, p 1796. Approved November 3, 1981.]

WASHINGTON CONSTITUTION

ARTICLE II, § 28

The legislature is prohibited from enacting any private or special laws in the following cases:

1. For changing the names of persons, or constituting one person the heir at law of another.

2. For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the

construction of which lands shall have been or may be granted by congress.

3. For authorizing persons to keep ferries wholly within this state.

4. For authorizing the sale or mortgage of real or personal property of minors, or others under disability.

5. For assessment or collection of taxes, or for extending the time for collection thereof.

6. For granting corporate powers or privileges.

7. For authorizing the apportionment of any part of the school fund.

8. For incorporating any town or village or to amend the charter thereof.

9. From giving effect to invalid deeds, wills or other instruments.

10. Releasing or extinguishing in whole or in part, the indebtedness, liability or other obligation, of any person, or corporation to this state, or to any municipal corporation therein.

11. Declaring any person of age or authorizing any minor to sell, lease, or encumber his or her property.

12. Legalizing, except as against the state, the unauthorized or invalid act of any officer.

13. Regulating the rates of interest on money.

14. Remitting fines, penalties or forfeitures.

15. Providing for the management of common schools.

16. Authorizing the adoption of children.

17. For limitation of civil or criminal actions.

18. Changing county lines, locating or changing county seats, provided, this shall not be construed to apply to the creation of new counties. Corporations for municipal purposes shall not be created by special laws: Art. 11 Section 10.

WASHINGTON CONSTITUTION

ARTICLE IV, § 6

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [AMENDMENT 87, 1993 House Joint Resolution No. 4201, p 3063. Approved November 2, 1993.]

WASHINGTON CONSTITUTION

ARTICLE XII, § 5

The term corporations, as used in this article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons.

WASHINGTON CONSTITUTION

ARTICLE XII, § 11

No corporation, association, or individual shall issue or put in circulation

as money anything but the lawful money of the United States. Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

The legislature may provide that stockholders of banking corporations organized under the laws of this state which shall provide and furnish, either through membership in the Federal Deposit Insurance Corporation, or through membership in any other instrumentality of the government of the United States, insurance or security for the payment of the debts and obligations of such banking corporation equivalent to that required by the laws of the United States to be furnished and provided by national banking associations, shall be relieved from liability for the debts and obligations of such banking corporation to the same extent that stockholders of national banking associations are relieved from liability for the debts and obligations of such national banking associations under the laws of the United States. [AMENDMENT 16, 1939 Senate Joint Resolution No. 8, p 1024. Approved November, 1940.]

WASHINGTON CONSTITUTION

ARTICLE XII, § 12

Any president, director, manager, cashier, or other officer of any banking institution, who shall receive or assent to the reception of deposits, after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be individually responsible for such deposits so received.

WASHINGTON CONSTITUTION

ARTICLE XII, § 13

All railroad, canal and other transportation companies are declared to be common carriers and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same be now constructed or may hereafter be constructed, to intersect, cross or connect with any other railroad, and when such railroads are of the same or similar gauge they shall at all crossings and at all points, where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage and cars without delay or discrimination.

WASHINGTON CONSTITUTION

ARTICLE XII, § 15

No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Excursion and commutation tickets may be issued at special rates.

WASHINGTON CONSTITUTION

ARTICLE XII, § 16

No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line.

WASHINGTON CONSTITUTION

ARTICLE XII, § 17

The rolling stock and other movable property belonging to any railroad company or corporation in this state, shall be considered personal property, and shall be liable to taxation and to execution and sale in the same manner as the personal property of individuals and such property shall not be exempted from execution and sale.

WASHINGTON CONSTITUTION

ARTICLE XII, § 18

The legislature may pass laws establishing reasonable rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law. [AMENDMENT 66, 1977 House Joint Resolution No. 55, p 1713. Approved November 8, 1977.]

WASHINGTON CONSTITUTION

ARTICLE XII, § 19

Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company

any facilities, privileges or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.

WASHINGTON CONSTITUTION

ARTICLE XII, § 20

No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the legislature, or to any person holding any public office within this state. The legislature shall pass laws to carry this provision into effect.

WASHINGTON CONSTITUTION

ARTICLE XII, § 21

Railroad companies now or hereafter organized or doing business in this state, shall allow all express companies organized or doing business in this state, transportation over all lines of railroad owned or operated by such railroad companies upon equal terms with any other express company, and no railroad corporation organized or doing business in this state shall allow any express corporation or company any facilities, privileges or rates for transportation of men or materials or property carried by them or for doing the business of such express companies not allowed to all express companies.

WASHINGTON CONSTITUTION

ARTICLE XII, § 22

Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any

other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises.

REVISED CODE OF WASHINGTON

61.24.005(2)

"Beneficiary" means 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.

REVISED CODE OF WASHINGTON

61.24.005(3)

"Borrower" means a person or a general partner in a partnership, including a joint venture, that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations, or the person's successors if they are liable for those obligations under a written agreement with the beneficiary.

REVISED CODE OF WASHINGTON

61.24.005(7)

"Grantor" means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.

REVISED CODE OF WASHINGTON

61.24.010(3)

The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.

REVISED CODE OF WASHINGTON

61.24.010(4)

The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

REVISED CODE OF WASHINGTON

61.24.030(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.

REVISED CODE OF WASHINGTON

61.24.030(7)(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.

COURT RULES

12(b)(6)

To dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

COURT RULE

56

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

OFFICE RECEPTIONIST, CLERK

From: Karrie Marschall <karrie@stafnetrumbull.com>
Sent: Friday, December 20, 2013 2:51 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: fredburnside@dwt.com; zanabugaighis@DWT.com; jmcintosh@mccarthyholthus.com; rmcdonald@mccarthyholthus.com
Subject: Jackson v. Quality Loan Service Corp, et. al. Supreme Court # 89183-47
Attachments: 12.20.2013- Jackson- Appendix for Opening Brief.pdf; 12.20.2013- Jackson Opening Brief Final.pdf

Please find attached for filing a copy of Plaintiff Appellant Jackson's Petition for a Review and Appendix in Jackson v. Quality Loan Service Corp, et. al. Supreme Court # 89183-47.

I received permission from Denise to file more than the allotted page limit for email filings.

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Sincerely,

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