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SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA SHELLEY JACKSON, an individual,

Petitioner

v.

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

Respondents.

CORRECTED

CONSOLIDATED REPLY TO MERS AND QUALITY LOAN

(Reply Brief)

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I. The nature of the case before the trial court.

The gravamen of Jackson's complaint is that MERS' boilerplate documents and securitization business model were intended to, and did in this case, separate the note from the deed of trust in such a way that there was no beneficiary within the meaning of RCW 61.24.005(2).[1] Accordingly, Jackson contends no entity can utilize CH. 61.24 RCW, the Deeds of Trust Act ("DTA"), to non-judicially foreclose on her property.[2]

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[1] This Court in *Bain* raised the possibility that the MERS system might be incompatible with the DTA:

> Under the MERS system, questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult. The MERS system may be inconsistent with our second objective when interpreting the deed of trust act: that "the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure."

Bain, 175 Wn.2d at 97-8.

[2] As this Court will recall, MERS argued in *Bain v. Metro. Mortg. Grp., Inc.* 175 Wn.2d 83, 95-7, 285 P.3d 34 (2012) that under the MERS system MERS was the holder of the deed of trust.

> MERS also argues that it meets the statutory definition [of beneficiary] itself. It notes, correctly, that the legislature did not limit "beneficiary" to the holder of the promissory note: instead, it is "the holder of the *instrument or document* evidencing the obligations secured by the deed of trust." RCW 61.24.005(2) It suggests that "'instrument'" and "'document'" are broad terms and that "in the context of a residential loan, undoubtedly the Legislature was referring to all of the loan documents that make up the loan transaction — *i.e.*, the note, the deed of trust, and any other rider that sets forth the rights and obligations of the parties under the loan," and that "'obligation'" must be read to include any financial obligation under any document signed in relation to the loan, including "attorneys' fees and costs incurred in the event of default." Resp. Br. of MERS at 21-22. ... In these particular cases, MERS contends that it is a proper beneficiary because, in its view, it is "indisputably the 'holder' of the Deed of Trust."

Bain, 175 Wn.2d at 101.

Some authority at the time supported MERS' gamble to name itself as a fourth party to this state's longstanding three party deed of trust system, *see e,g,* Restatement (Third) of Property: Mortgages § 5.4 (b) ("Except as otherwise required by the Uniform

See Am. Compl. (CP 82-107). Jackson is not arguing here that she: a) cannot be sued on the note, b) may not be subject to an equitable lien or judicial foreclosure.

This suit involves her claims against MERS and its affiliated companies based on misuse of the DTA to initiate nonjudicial foreclosure proceedings against her home.

The simple factual issues this case presents are whether any of the MERS affiliated entities can prove: 1.) it holds the instrument or document evidencing the obligations 2.) the instrument or document is secured by the deed of trust; and 3.) it does not hold the obligations secured by the deed of trust for some other purpose. *See* RCW 61.24.005(2); RCW 61.24.010(2).

Additionally, with regard to the Trustee defendants, QLSW and M&H (hereafter referred to as "QLSW"), this case requires determining both the meaning of RCW 61.24.010(2), (3), (4), and .030(7)(a), and whether the trustee could comply with these provisions in the absence of a beneficiary.

MERS and QLSW state as "fact," and in argument, that a beneficiary under RCW 61.24.005(2) is simply the equivalent of a UCC

Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.").

holder of the original note.[3] QLSW and M&H Answering Brief ("QA") at 13-14. Jackson disagrees. *See supra* and *infra*. But even if this is so, Jackson should win this appeal because the evidence before the superior court did not establish that any of the purported beneficiaries was a holder of the note. This is because the original lender never endorsed the note and the allonge which, even if it was attached to the note, is unsigned. *See* Complaint, Ex. 1 & 2, CP 28-36; MERS Request for Judicial Notice, Ex. A, CP 154-160.

Even though this Court can resolve this case by simply holding that defendants lose because they have not shown the existence of a UCC holder, this Court should go further. This Court should reiterate that a beneficiary must be 1.) the holder of document or instrument evidencing all the obligations 2.) secured by the deed of trust 3.) excluding those persons holding such obligation for a different purpose. In *Bain v. Metro.*

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[3] Unfortunately, the record substantiates MERS was able to convince the superior court that mere possession of Jackson's unendorsed note with an unexecuted Countrywide allonge attached thereto was a sufficient basis for the trustee to initiate nonjudicial foreclosure proceedings regarding borrower's home on behalf of a securitized trust, which proved no ownership interest in the note.

> THE COURT: Who holds the paper?
>
> MR. PARK: Your Honor, U.S. Bank as the trustee for the trust holds the note at this point.

RP 7/19/13 Transcript 7:3-5; *see* also CP 224 (Am. Order indicating Court considered MERS' request for judicial notice of documents for purposes of proving ownership of the note).

Mortg. Grp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012), this Court specifically rejected the "beneficiary is just a UCC holder" argument.

There, this Court refused MERS' request to follow the Fourth Circuit's analysis in *Horvath v. Bank of N.Y.*, 641 F.3d 617, 620 (4th Cir. 2011). *Bain*, 175 Wn.2d at 105-6. *Horvath* determined that a MERS securitization trust, which was a holder of the note under the UCC, was the equivalent of a DTA beneficiary under Virginia law. *Id.* This Court explained the *Horvath* situation: "Horvath sued the holder of the note and MERS, ... [claiming] various financial entities had by 'splitting ... the pieces of' his mortgage ... caused 'the Deeds of Trust [to] split from the Notes and [become] unenforceable.'" *Id.*, at 105-6. This Court criticized *Horvath*'s holding that being a holder of partial interests in a note pursuant to section 20 of MERS boilerplate deed of trust equated to being a beneficiary under Virginia's laws governing non-judicial foreclosure. This Court's problem with *Horvath* was its failure to provide any statutory analysis. "There is no discussion anywhere in *Horvath* of any statutory definition of 'beneficiary.'" *Id.*, at 106.

This Court's criticism of *Horvath* for not taking into account the Virginia statute governing non-judicial foreclosure was similar to its reasoning for rejecting the Ninth Circuit's decision in *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011). "Nowhere

in *Cervantes* does the Ninth Circuit suggest that the parties could contract around the statutory terms." *Bain*, 175 at 105. *Bain* and its progeny, *Schroeder v. Excelsior Mgmt. Grp*, 177 Wn.2d 94, 297 P.3d 677 (2013) and *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), make clear that the terms of the DTA (as they must be constitutionally construed), and where appropriate the principles of equity, determine whether a lender can make use of Washington's statutory non-judicial foreclosure system, not a boilerplate deed of trust.

Jackson asserts it is up to a jury, or the superior court sitting in equity because she prayed for equitable relief, to determine whether any of the non-trustee defendants meet the criteria set forth in RCW 61.24.005(2) for being a DTA beneficiary. If the provisions of MERS' deed of trust are not compatible with the DTA's definition of "beneficiary" that is not Jackson's fault; the fault lies with "whoever drafted the [MERS boilerplate] forms used in these cases." *Bain*, 175 Wn.2d at 108-9.

One might wonder, in the absence of even an arguable "beneficiary" within the meaning of RCW 61.24.005(2), how MERS and its allied corporate defendants were able to find a neutral judicial substitute to initiate non-judicial foreclosure proceedings against Jackson. *See* RCW 61.24.010(2), (3), (4), and 61.24.030(7)(a). The allegations in Jackson's complaint that QLSW and M&H work together as a paid

"biased" trustee for their MERS allied clients suggest an answer with regard to how this non-judicial foreclosure without an obvious beneficiary came to pass. The trustee's initiation of these non-judicial foreclosure proceedings against Jackson in obvious violation of RCW 61.24.030(7) likely stemmed from the incentives QLSW and M&H were provided by those who wanted to take Jackson's property under the guise of the DTA. *See Klem*, 176 at 789 ("As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude.").

II. The superior court's subject matter jurisdiction is original and exclusive; not appellate.

Jackson asserted in her complaint:

> 2.13. Superior courts have exclusive original jurisdiction in all cases at law which involve the title and possession of real property." Further, courts have inherent action to prevent arbitrary and capricious action and to enforce the Washington Constitution.

CP 5, ¶ 2.13.

MERS argues, "[t]he entire point of a non-judicial foreclosure is that it is not judicial in nature..." MERS Appellees' Answering Brief ("MA") at 1. Two sentences later MERS argues "[i]n any event the DTA expressly reserves superior court jurisdiction to resolve any disputes over

the foreclosure process (as does Plaintiff's Deed of Trust)." *Id. See also* MA at 13-16. In other words, MERS concedes the legislature contemplated there may be disputes related to non-judicial foreclosures under the DTA which the superior courts would have to resolve. One question which this appeal poses is what is the nature of the superior courts' subject matter jurisdiction, if any,[4] to resolve disputes (both causes of action and defenses) arising out of any aspect of the non-judicial foreclosure of deeds of trust pursuant to the DTA?

The issue is important to Jackson because if the superior courts' jurisdiction to resolve such disputes stems from its enumerated original jurisdiction under Wash. Const. art. IV, § 6, homeowners must be afforded those basic procedural protections, i.e. access to the civil rules of procedure and evidence, which are available to those who seek justice from the judicial branch of government. *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 977-779, 216 P.3d 374 (2009) (citing *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

[4] The jurisdictional options would appear to be that disputes arising out of or relating to enforcement of deeds of trust and/or provisions regarding the DTA arise pursuant to the superior courts' enumerated original jurisdiction or pursuant to superior courts appellate "jurisdiction as prescribed by law" or with regard to the trustee, acting as a statutory officer, pursuant to the court's inherent jurisdiction.

If, on the other hand, the DTA bestows appellate jurisdiction then the superior courts must follow all statutory procedural requirements of the DTA as they are conditions precedent to the exercise of jurisdiction. *See e.g. ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 173 Wn.2d 608, 616-19, 268 P.3d 929 (2012) (Johnson, J. M. dissenting); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998).[5]

MERS and QLSW argue that Jackson's disputes with them do not involve equitable issues or "a case at law," but instead "non-judicial" questions relating to a consensual agreement. MA at 17; QA at 7. They assert the legislature has defined the superior court's subject matter jurisdiction with regard to the DTA and any matters possibly related thereto so as to include only certain rights, including the right to "restrain the sale on any proper legal or equitable ground" pursuant to RCW 61.24.130. MA at 16-17; QA at 7.

While it is true that there is a provision allowing borrowers to "restrain the sale on any proper and legal ground," the access to the

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[5] However, even when the legislature appropriately prescribes appellate jurisdiction, the legislature must comply with the declared rights set forth in Article I of Washington's Constitution with regard to the appeal procedures it prescribes by law, including, but not limited to Art. I, § 3. *Ledgering v. State*, 63 Wn.2d 94, 385 P.2d 522 (1963); *Mud Bay Logging Co. v. Department of Labor & Industries*, 189 Wash. 285, 64 P.2d 1054 (1937).

superior court the legislature has provided comes at a constitutionally unacceptable price if it is intended to limit the superior court's enumerated original jurisdiction. *See Putman*, 166 Wn.2d 974. RCW 61.24.130 requires Jackson to pay into the Court registry the entire amount the creditor claims is due before the legislature allows access to the superior court. If the debtor cannot afford to pay the money owed, which servicers are incentivized to inflate by design,[6] the statute deems her claims to her home will be forever waived. *Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013). This is an absurd result where, as here, Jackson is arguing there is no beneficiary under the DTA because, among other things, the language of MERS boilerplate agreements has resulted in a situation in which the superior court may have to invoke its equitable jurisdiction to determine who is owed what. *See Bain*, 175 Wn. 2d at 111.[7]

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[6] *See generally* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev 755 (2011)

[7] Equity has always been an appropriate jurisdiction for resolving these types of property disputes, both nationally and in Washington State.

> It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests.

In Re Sawyer, 124 U.S. 200, 213-4, 8 S. Ct. 482, 31 L. Ed. 402 (1888). Washington courts have resorted to equity to determine how disputes regarding the title and possession of land should be resolved where the original mortgagors, who like MERS, appeared to be a legitimate business entity, sold interests in mortgages without ever providing a trail documenting any chain of ownership. In those cases, this Court applied the equitable doctrines of "comparative innocence" and "unclean hands" to resolve those issues created by an apparently upstanding business entity simply "gaming" Washington's real estate laws in effect at the time. *See e.g. Von Normann v. Woodson*,

This Court has recently suggested that its subject matter jurisdiction jurisprudence was not as precise as it would have liked with regard to the superior courts' enumerated original jurisdiction during much of the time the DTA has been in place. *See State v. Posey*, 174 Wn.2d 131, 136-40, 272 P.3d 840 (2012) citing *State v. Werner*, 129 Wn.2d 485, 918 P.2d 916 (1996) for the proposition (which is true under federal law) that: "[t]here are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment." *See also Little v. Little*, 96 Wn.2d 183, 634 P.2d 498 (1981), citing 1 A. Freeman, *Judgments* § 226 (5th ed. rev. 1925).

Unlike lower *federal courts* which have only such particular jurisdiction as Congress confers,[8] Washington superior courts have constitutionally enumerated, exclusive original jurisdiction with regard to certain categories of cases. This enumerated jurisdiction is anchored to Wash. Const. Art. IV, § 6 and is not granted to superior courts by

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182 Wash. 271, 46 P.2d 1050 (1935); *Dunn v. Neu*, 179 Wash. 351, 37 P.2d 883 (1934); *Bloxom v. Deitchler*, 175 Wash. 431, 27 P.2d 720 (1933); *Beckman v. Ward*, 174 Wash. 326, 24 P.2d 1091 (1933); *Ross v. Johnson*, 171 Wash. 658, 19 P.2d 101 (1933); *Dietl v. Lowman & Pelly Inv. Co.*, 169 Wash. 227, 13 P.2d 462 (1932); *Palm v. Brydges*, 169 Wash. 28, 13 P.2d 57 (1932); *Liska v. Beckmann*, 168 Wash. 489, 12 P.2d 599 (1932); *Nicklisch v. Flynn*, 168 Wash. 310, 11 P.2d 1066 (1932); *Koppler v. Bugge*, 168 Wash. 182, 11 P.2d 236 (1932); *Pfeiffer v. Heyes*, 166 Wash. 125, 6 P.2d 612 (1932); *Kiley v. Bugge*, 165 Wash. 677, 5 P.2d 1038 (1931).

[8] *See* U.S. Constitution, Art. III, § 1

legislative grace.[9] *See* Pet'r Br. 29; *see also In Re: Marriage of Buecking*, 179 Wn.2d 438, 316 P.3d 999 (2013) (decided after Pet'r Br. was filed).

Buecking explains that while the legislature cannot restrict the superior courts' enumerated original jurisdiction it can "prescribe prerequisites to a court's exercise of constitutionally derived jurisdiction." 179 Wn.2d at 448. *Buecking* holds: "[t]hus, legislation with the purpose or effect of divesting a constitutional court of its powers is void, while on the other hand the legislature may prescribe reasonable regulations that do not divest the court of its jurisdiction." *Id.*

Because the undisputed purpose of the DTA was to deprive superior courts of their traditional jurisdiction in equity and "at law" over foreclosures of real estate,[10] the DTA should be considered by the judicial

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[9] Washington's founding fathers firmly rejected the notion the legislature should have authority to prescribe the superior court's jurisdiction. Wiggins, Charles K., *George Turner and the Judiciary Article. Part II: The Constitutional Convention of 1889 Creates a Judiciary for Washington*, 43 Washington State Bar News 17, 18 (October 1989). By tying the superior court's enumerated original jurisdiction directly to the authority of the Constitution the delegates sought to prevent legislative infringement upon the superior court's ability to protect declared rights.

> Among the meritorious provisions of our constitution which had any degree of novelty at all, I pronounce the judicial system first. Not many of the states have constitutional courts, and still fewer of them have undertaken to define the jurisdiction of their courts by the higher law.

Stiles, Theodore L., *The Constitution of the State and its Effects on Public Interests*, 4 Wash. Historical Q. 281, 283 (Oct.1913). The restrictions on legislative power pursuant to Art. II, § 28 generally parallel the Constitution's grant of exclusive enumerated original jurisdiction to decide disputes arising in these areas of constitutional concern. Knapp, Lebbeus J., *The Origin of the Constitution of the State of Washington*, 4 Wash. Historical Q. 227, 232, 239, 245-246 (Oct. 1913).

[10] Appellees do not dispute that the purpose of the DTA was to divest superior courts of their traditional jurisdiction with regard to the title and possession of real property.

department as unconstitutional and void. In this respect, the enactment of a statute ***with a stated intent*** to usurp enumerated exclusive jurisdiction from the superior court cannot be followed without disregarding the separation of powers inherent in Washington's Constitution. The problem is that where the legislative intent is to write an unconstitutional statute, this Court has no power to construe the statute so as to make it constitutional under the canon of construction that a law shall be deemed to have been intended to be constitutional.

This Court encountered a very similar problem in *Household Fin. Corp. v State*, 40 Wn.2d 451, 456-7, 244 P.2d 260 (1952). That case involved the enactment of a statute which very clearly intended to bestow administrative power on the superior court to issue licenses under the Washington Small Loan Act. In dismay, this Court noted: "[w]e cannot in good conscience indulge a presumption that the legislature intended a standard of review which it had deliberately discarded" so as to interpret

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Indeed, the courts of appeal routinely note that this is the purpose for the statute; i.e. to deprive borrowers of the protections afforded by judicial foreclosures in exchange for a compromise between lender and borrowers, which has continually changed for the benefit of the lending industry. *Wash. Fed. Sav. & Loan Ass'n v. McNaughton*, Slip. Op. No. 68178-8-1, 2014 Wash. App. LEXIS 1266 (Div. 1, May 19, 2014); Wash. *Fed. v. Gentry*, 179 Wn. App. 470, 319 P.3d 823 (Div. 1, 2014). If foreclosures were traditionally within the superior court's jurisdiction, is a statutory attempt to divest such jurisdiction void?

Appellees devote no time to this argument. But this Court should address the argument given that 1.) the DTA was enacted during a time period in which this Court was less vigilant about the superior court's subject matter jurisdiction; and 2.) this Court's recognition in *Klem* that non-judicial foreclosures were unlawful at the time Washington's Constitution was enacted.

the statute to be constitutional. *Id.* at 458.

Here, it is also impossible to conclude that the legislature's intent in enacting the DTA was anything other than to usurp the superior courts' exclusive enumerated original jurisdiction over foreclosures in order to give a slice of this authority to a statutory officer, called a trustee. Indeed, it is well known that a primary purpose of the statute was to allow lenders to foreclose on debtors without those costly due process procedures which must be afforded borrowers pursuant to judicial foreclosures.

It is, of course, this Court's decision as to whether it should countenance such an objective under the recently announced *Buecking* standard, which allows the legislature to prescribe "reasonable regulations" with regard to cases within the superior courts' enumerated jurisdiction. Presumably, however, an intention to deprive the superior court of its exclusive, enumerated jurisdiction cannot amount to a "reasonable regulation" of foreclosures as its purpose is not to regulate, but to usurp the superior court's jurisdiction over a class of case our framers chose to exempt from legislative meddling. *See* note 7, *supra.*

Kennebec v. Bank of the West, 88 Wn.2d 718, 725, 565 P.2d 812 (1977) states: "The [non-judicial foreclosure] remedy may never have been utilized [while Washington has been a State], but it was available as early as Washington's territorial days." 88 Wn.2d at 724. *Klem* flatly

contradicts this: "Until the 1965 deed of trust act, there was no provision in Washington law for a nonjudicial foreclosure. *See* Laws of 1965, ch. 74." *Klem*, 176 Wn. 2d at 771. *Klem*, not *Kennebec*, is historically accurate.

The territorial legislature of 1869 (Session Laws, 1869, p. 130, § 498) enacted a statute which stated: "[a] mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law,..." This was later codified as RCW 7.28.230(l). *Norfor v. Busby*, 19 Wash. 450, 452, 53 P. 715 (1898). Thus, the "common law of England" allowing non-judicial foreclosures had been legislatively repealed well before 1889 when the Constitution was ratified.

Washington's Constitution adopted the laws of the Washington Territory, not repugnant to the new constitution. Wash. Const. art. XXVII, § 2. Thus, the prohibition against non- judicial foreclosures enacted in 1869 would have taken effect because it was consistent with the language and purposes of the Wash. Const. art. II § 28 and IV § 6. As explained in Jackson's opening brief, the purpose of these provisions was to vest exclusive, enumerated original jurisdiction to hear cases all cases in equity and at law "which involve the title or possession of real property" in the superior courts. Pet'r Br. at 11.

The assertions by QLSW that trustees are not engaged in a "judicial inquiry," but only ministerial activities on behalf of the state, has little relevance with regard to the superior court's jurisdiction over their conduct if their conduct falls within a category of case within the superior court's enumerated exclusive jurisdiction. The legislature cannot simply identify an activity performed by state officials as being "non- judicial" and restrain the superior court's authority with regard to them. *See* Art. II, § 28 (9) & (12). The superior court has inherent jurisdiction over all state officials and agencies to correct arbitrary or capricious conduct or conduct which is contrary to law. *See Pierce County Sheriff v. Civil Service Com.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Thus, to the extent Jackson can show the trustees, as state officers, are violating her fundamental rights in an arbitrary or capricious manner or through blatant disregard of the law (such as violations of RCW 61.24.010(2), (3), (4), and .030 (7)) defendants' acts fall within the inherent jurisdiction of the superior court. *Pierce County Sheriff*, 98 Wn.2d at 695.

III. Due Process applies to proceedings pursuant to RCW 61.24.030(7).

For purposes of this argument, it is assumed this Court has construed the DTA, as a whole, to be constitutional. Thus, the argument now before the Court is whether this Court should construe RCW

61.24.030(7)(a) to require the borrower notice and an opportunity to be heard during the statutory "proof" process required to occur before a notice of trustee sale can be "recorded, transmitted, or served."

QLSW suggests "[t]he legislature wanted to ensure that nonjudicial foreclosures were being carried out by entities that have the power to do so, but without imposing overly burdensome evidentiary requirements on trustees in order to keep the process efficient and inexpensive." QA at 14-15. Here, the process envisioned by the legislature as conceived by QLSW must have been very minimal as the evidence before the superior court establishes **the note had not been indorsed.** *See* Complaint, Ex. 1 & 2, CP 28-36; MERS Request for Judicial Notice, Ex. A, CP 154-160.

MERS and QLSW cite *Kennebec* as authority that the DTA does not violate the due process clauses of the federal and state Constitutions.[11] *But see Klem*, 176 Wn.2d at 771, 790, n. 11, where a majority of this Court noted *Kennebec* was not dispositive with regard to whether the DTA in its present form complies with Art. I, § 3. *Kennebec* holds only the pre-1975 version of the DTA does not violate the Fourteenth Amendment of the United States Constitution. 88 Wn.2d at 725-26. The DTA has changed greatly since then. This Court should reject *Kennebec* as

[11] Due process under Wash. Const. art. I, § 3 begins with the protections afforded by the federal constitution and includes within its scope the liberty and property interests sought to be protected by the Washington Constitution.

controlling with regard to its interpretation of RCW 61.24.030(7) because that provision was not enacted until 2009.

Further, .030(7), along with other newer provisions of the DTA, like RCW 61.24.127 and .130, evidences a legislative intent to change the nature of the DTA from one facilitating the enforcement of consensual agreements to a statute establishing the minimum requisites for the procedure necessary to perform non-judicial foreclosures in Washington. To the extent, the second interpretation is correct, i.e. that the DTA sets forth procedures under state law for the taking of the title and possession of real property, due process must apply regardless as to whether such procedures are characterized as ministerial, judicial, or quasi-judicial. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (Private action pursuant to creditor rights statute constituted state action for purposes of due process.)

RCW 61.24.030, as amended over time, imposes "limits on the trustee's power to foreclose without judicial supervision." *Schroeder*, 177 Wn.2d at 107. RCW 61.24.030(7) requires the trustee have proof that the beneficiary is the owner of any promissory note or obligation secured by the deed of trust" and provides a mechanism the trustee can utilize in obtaining such "proof." The provisions of RCW 61.24.010 set forth the qualifications of those statutory officers, i.e. trustees, and directions with

regard to their exercise of state power. In *Klem* this Court described trustees as acting in the capacity of an impartial judicial substitute presiding over nonjudicial foreclosures, Klem, 176 Wn.2d at 790, and suggested that trustees were state officers acting under color of state law. *Id.* at note 11.

In this case, had Jackson been afforded notice and an opportunity to be heard during the initiation stage of the non-judicial foreclosure process she could have pointed out that there were "no proper endorsements" on the note indicating "the entity initiating the foreclosure sale [had] the authority to enforce the note." *See* QA at 13. Indeed, this case illustrates in stark realities why due process must apply at this stage during the statutory non-judicial foreclosure process as it exists today.

Under *Frizzell* the borrower's only meaningful opportunity for questioning the proof that the trustee claims establishes the "beneficiary is the owner of any promissory note or obligation secured by the deed of trust" before having to incur dire economic consequences is during the process established by RCW 61.24.030(7). Once the charlatan[12]

[12] The term "charlatan" is defined as "a person who falsely pretends to know or be something in order to deceive people." *Charlatan - Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/charlatan (last visited April 14, 2014); *see also Black's Law Dictionary*, 266 (9th Ed. 2009) (defining "charlatan" as "a person who pretends to have more knowledge or skill than he or she actually has; a quack or faker).

"beneficiary" and the incentivized trustees decided to initiate a non-judicial foreclosure Jackson had no chance to assert her home is not actually security for the debt or to challenge the amount of the debt unless she can afford to pay the debt claimed to be owed into the Court registry. Forcing borrowers to pay an entire debt that a creditor simply claims is owed upon penalty of loss of any interest in their home violates both federal and state due process. *See e.g. Lugar*, 457 U.S. 922 at 937-41; *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973); *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). This problem can be avoided and the purposes of the statute facilitated if this Court reads RCW 61.24.030(7) to include notice of, and an opportunity to be heard regarding, the "proof" the trustee is relying upon to initiate the non-judicial foreclosure. *See Ledgering v. State*, 63 Wn.2d 94, 385 P.2d 522 (1963).

IV. The complaint alleged, and there was evidence to support, QLSW and M&H acted together as a biased trustee in violation of RCW 61.24.010(3) & (4).

Jackson alleged that QLSW and M&H acted as a single trustee so as to allow their clients, entities not meeting the definition of "beneficiary" in RCW 61.24.005(2), to non-judicially foreclose on her home under the guise of the DTA. *See supra*. In addition to these allegations, materials which were judicially noticed at the request of the MERS affiliated

defendants, included an unendorsed note which could not have served as a basis for a trustee accepting an appointment under RCW 61.24.010(2), *see Walker v. Quality Loan Servs. Corp. of Wash.*, 176 Wn. App. 294, 308 P.3d 716 (Div. 1, 2013); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (Div. 1, 2013); *Rucker v. NovaStar Mortg. Inc.*, 177 Wn. App. 1, 311 P.3d 31 (Div. 1, 2013), or having complied with RCW 61.24.030(7).

Defendants admit they have notice of the claims against them; they just don't like them. That is understandable. But it was not a legitimate basis to dismiss the claims Jackson leveled against M&H, a law firm, and QLSW, a legal services entity, which Jackson claimed worked together as a trustee to steal her home under the guise of the DTA for MERS allied companies pursuant to MERS' system.

V. Reply to Appellees other arguments.

The Complaint does not request the superior court declare the DTA unconstitutional. CP 25-26; 197. As Jackson has not sought a declaratory judgment that the DTA is unconstitutional, there is no requirement that the attorney general be involved in this case. *City of Sumner v. Walsh*, 148 Wn.2d 490, 496-97, 61 P.3d 1111 (2003).

MERS claims the superior court did not grant its request for judicial notice. MA 10. The superior court's orders indicate otherwise. CP

221-222 and 224-225.

MERS and QLSW claim Jackson has abandoned theories. MA at 7, QA at 2. Jackson does not intend to abandon any of the theories pled below which rely for their viability on the resolution of the assignment of errors and issues set forth in Jackson's opening brief. Pet'r Br. at 1-5. Neither appellee offers applicable authority for the proposition that a litigant waives merits arguments by insisting that the court declare the nature of its subject matter jurisdiction.

MERS argues that "if [Jackson] is correct every real property transaction- buying or leasing a home, etc. - would have to go through the courts." MA at 1. MERS' "flood gate" hysteria has no anchor. This Court has traditionally played a role regarding the preparation of real property instruments and other contracts written in Washington via its duty to police the practice of law. *See* authorities cited at CP 130:18-131:26; *see also Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 302, 45 P.3d 1068 (2002).

MERS' argument that this Court's determination of the nature of the superior courts' subject matter jurisdiction to decide DTA related disputes will gut Washington's Uniform Arbitration Act (RCW Ch. 7.04A), Mandatory Arbitration of Civil Actions (RCW Ch.7.06), and Uniform Mediation Act (RCW Ch. 7.07) is not well reasoned. *See* MA at 1 & 19. The provisions of Washington's Constitution are mandatory.

Wash. Const. art. I, § 29. If cases arise where these statutes intrude on areas of enumerated original jurisdiction of the superior court, and do not fall within those reasonable regulations the legislature may prescribe, then this Court at such time should determine whether such statutes can and should be construed so as to be constitutional. *Buecking*, 179 Wn.2d at 449.

MERS defendants argue they are not liable for trustee violations. MA at 23. That remains to be seen. The law in this area is evolving and it is not appropriate to resolve unsettled questions of law via a motion to dismiss. *See* Pet'r Br. 42; *See* also *Klem*, 176 Wn. 2d at 790. Jackson's complaint alleged "[a]ll of the defendants worked together to diminish plaintiffs right to an impartial judicial substitute."[13] Jackson reiterated and argued this claim during oral argument. Transcript 23:2-24:9.

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[13] Unlike MERS, *see* MA at 13, Jackson is aware recently departed Justice Tom Chambers wrote the majority opinion in *Klem*; and that neither Justice Wiggins nor Justice McCloud participated in that decision. Ordinarily, counsel would not point out such an obvious mistake, but feels compelled to do so here because MERS' misstatements of the facts, *see* MA at 2-6 (The Misstatement of Facts), and Jackson's arguments, *see supra*, are such as to call into question whether MERS is a worthy participant in our adversarial system of justice which requires candor to the Court with regard to the accuracy of factual and legal representations. Another example of MERS' glibness can be found in MA. n.1, where it suggests that this Court believes MERS serves a "useful" role as a contractual beneficiary, when this Court actually held that labelling MERS as a beneficiary in a deed of trust was presumptively deceptive. *Bain*, 175 Wn. 2d at 117. Part of the problem may be MERS' inability to accept that its system has actually been rejected by this Court. *See e.g.* Burnside, Fred B. *The Bain of our Existence: Lessons Learned and Opportunities Missed in the Washington Supreme Court's Examination of MERS*, 66 Ark. L. Rev. 229 (2013).

MERS and QLSW argue the hypothetical was not subject to CR 11. Jackson's counsel disagrees. But to the extent there is any doubt, the undersigned certifies the hypotheticals comply with CR 11.

MERS argues Jackson waived all her claims during oral argument. Resp. 6, 12 and 26. The superior court's July 25 and August 8, 2013 orders state the court considered the pleadings, judicially noticed materials, and a hypothetical to resolve the motion to dismiss on the merits. CP 222; CP 225. Jackson's counsel argued (1) the nature of the superior court's subject matter jurisdiction;[14] (2) the defendants' failure to comply with the DTA,[15] including, but not limited to RCW 61.24.010(4)[16] and 61.24.030(7);[17] and (3) whether the DTA was constitutional pursuant to Wash. Const. Art I, § 3.[18]

VI. Conclusion

This Court should determine the nature of the superior courts' jurisdiction, if any, to hear disputes, causes of action, and/or defenses arising out of, and related to, the DTA. This Court should also reverse the superior court's orders granting all defendants' motions to dismiss.

RESPECTFULLY SUBMITTED this 28th Day of May 2014,

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[14] RP 7/19/13 Transcript 24:12-25:25.
[15] RP 7/19/13 Transcript 27:6-28:1
[16] RP 7/19/13 Transcript 17:6-24:11
[17] RP 7/19/13 Transcript 28:2-29:8.
[18] RP 7/19/13 Transcript 26:1-27:5.

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CERTIFICATE OF SERVICE

I, Shaina Dunn, declare under the penalty of perjury that I served a copy of the Consolidated Reply To MERS And Quality Loan Respondents attorneys by depositing a true and correct copy of that document with the U.S. Postal Service and electronically to the following individuals:

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DATED this 28th Day of May, 2014 in Arlington, Washington.

s/ Shaina Dunn
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Cc: Mr Joshua Trumbull; Brian Fisher; Mr Scott Stafne; Matthew Link; Emily Harris
Subject: RE: Supreme Court No. 89183-4 Jackson v. QLSC of WA et al.

Rec'd 5-28-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Cc: Mr Joshua Trumbull; Brian Fisher; Mr Scott Stafne; Matthew Link; Emily Harris
Subject: Supreme Court No. 89183-4 Jackson v. QLSC of WA et al.

Dear Clerk of the Supreme Court:

On behalf of Sandra Jackson in case 89183-4, Jackson v. QLSC of WA et al, Scott Stafne, WSBA #6964 of Stafne Trumbull, LLC 239 N. Olympic Ave, Arlington, WA 98223 would like to file the attached corrected version of Jacksons's Reply to MERS in the above captioned case. The reply that was filed yesterday contained several typographical errors; please replace the reply filed yesterday with the attached reply.

Please contact us at 360.403.8700 or scott@stafnetrumbull.com if you have any questions. Thank you.

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