

NO. ~~66252-0~~ 66252-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DIANNE KLEM, as administrator of the estate of Dorothy Halstien,

Respondent,

vs.

WASHINGTON MUTUAL BANK, a Washington corporation, and

Defendant,

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a  
Washington corporation, and QUALITY LOAN SERVICE  
CORPORATION, a California Corporation

Appellants.

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**REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS**

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## INTRODUCTION

There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. ... Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

Joseph Heller, Catch-22

Quality was caught in a Catch-22. It had a "fiduciary duty" to both Klem and the beneficiary. The beneficiary specifically instructed it not to postpone a sale without its permission. Klem claimed that following this instruction violated a fiduciary duty to her. Whew.

Fortunately, the trial court dismissed all of Klem's fiduciary duty claims because Klem failed to bring an action to restrain the sale. Unfortunately, the trial judge changed her mind, and the jury found Quality liable for following its duties to the beneficiary. The trial court was right the first time.

The Legislature has now eliminated the Catch-22, requiring only good faith of the trustee. Quality precisely followed the provisions of the Act. It neither breached fiduciary duties nor acted in bad faith. But in any event, Klem waived her claims.

This Court should reverse and dismiss.

## REPLY RE STATEMENT OF THE CASE

**A. Klem's "eight sets of undisputed facts" were either fatal to her claims, or disputed in all relevant particulars.**

Klem begins by claiming that there are eight undisputed "sets of facts." BR 2-3. This is false. All of the undisputed facts were either fatal to her claims, or hotly disputed at trial. Klem's entire Statement of the Case falls badly short of RAP 10.3(a)(5) ("A fair statement . . . without argument").

In Klem's first "set of facts," she tacitly concedes that Quality (of Washington) and Quality of California (QLSC) are "sister" corporations. *Id.* Yet Klem then claims that they may simply be lumped together as "Quality." *Id.* Distinct corporate entities may not be treated so cavalierly under Washington law. See BA 44. This is fatal to her claims against QLSC. *Id.*

Klem's second set of undisputed facts was disputed at trial. BR 3. What is undisputed is that Klem never provided Quality with a copy of the signed REPSA, so Quality had no idea whether to postpone the sale. See, e.g., BA 11-14; RP 382. Nor did PSG, Inc.'s Greenfield copy Quality on any of his communications with the bank, so Quality had no idea that the bank was giving him the "runaround." *Id.*

Finally on her second set, Klem falsely claims that it was undisputed that Quality sent a “messenger” to conduct the sale. BR 3 (citing RP 263). On the cited page, Quality’s COO, David Owen, states that Quality retained Priority Posting and Publishing Company (PPPC) to conduct the sale. RP 263. He denies any knowledge that PPPC used a “legal messenger.” *Id.* PPPC is a company with offices in California and Washington that assists in conducting foreclosure procedures, not a “messenger.” RP 171.

Klem’s third set of facts is a legal argument. BR 3-4. She claims that the jury instructions were undisputed. *Id.* It is true that Quality did not object to Court’s Instruction No. 5, but Quality argued that the law described in this instruction is inapplicable here in its summary judgment motion and on reconsideration; in its motion *in limine*; in its motion for directed verdict; and in its motion for new trial. See BA 15, 17-19. The issue whether this instruction should be given at all (*i.e.*, whether Klem’s case should even go to the jury) was plainly before the trial court.

Klem’s fourth set was hotly disputed at trial. BR 4. Klem claims that PSG, Inc. asked Quality to postpone the sale, but her first cite (RP 126-31) is largely irrelevant to this assertion. *Id.* At RP 131, Klem did say that “Quality had told us on two occasions

that they unequivocally could not assist in that area,” but Klem never purported to have spoken with Quality, and no other testimony supports her hearsay assertion. The only PSG, Inc. employee who ever claimed to have talked to Quality, Greenfield, admitted under oath that he did not ask Quality to postpone the sale during his first of two calls, putting the lie to Klem’s testimony that Quality refused to do so “on two occasions.” RP 311-12.

Klem’s second cite is to Greenfield’s wholly discredited testimony at RP 303-06. This is where he claimed to have called Ott – a blatant lie – and in “a minute, tops,” told him an implausible amount of information. RP 303-06. Ott denied Greenfield’s assertions, and Greenfield repeatedly admitted that he had lied under oath. See BA 11-12. The jury rejected Greenfield’s false testimony by declining to find that Quality committed a negligent misrepresentation. CP 1445. Nothing supports Klem’s claims.

The rest of Klem’s fourth set is an argumentative mischaracterization of the record regarding Deed-of-Trust-beneficiary WAMU’s contractual instructions to Quality not to postpone a sale without its permission. *Compare* BR 4 with BA 10, RP 215-16; Ex 12, p. 735 (“Your office is not authorized to postpone a sale without authorization” from WAMU or its agents).

There is nothing “confidential” about this contractual provision, though it is proprietary to WAMU, so they required confidentiality when disclosing it. Ex 12; CP 343. Klem claims that Quality “failed” to produce this document, but the cited record fails to demonstrate that Klem properly asked Quality for this document. BR 4. Quality admits that it had a fiduciary duty under existing law to obtain approval from the beneficiary before postponing the sale. There is nothing wrong with a trustee following its appointing beneficiary's instructions, even if those instructions say not to postpone without authorization.

Klem's fifth set asserts – without the benefit of any citations to the record – that Quality “follows a policy of treating all foreclosures [*sic*] the same regardless of whether a homeowner has any equity.” BR 4-5 (no cite in original). Quality follows no such “policy.” See, e.g., RP 379-81 (listing many circumstances where Quality would postpone a sale, including bankruptcy; junior leinholder's request; and loss mitigation (where a borrower is trying to obtain a forbearance plan, repayment plan, loan modification)); RP 381-82 (Quality has stopped foreclosures on the courthouse steps, including receiving a signed PSA from the borrower).

Owen did admit, however, that Quality is required to follow precisely the same statutory foreclosure procedures regardless of whether there is equity in the home, which is simply the law. RP 215. Thus, all that Klem's quotes at BR 5 establish is that Quality is not in a position to "care" whether equity is foreclosed because they have a duty to all parties to properly conduct the foreclosure proceedings. *Id.* Klem successfully jerked the heartstrings of the jurors, repeatedly implying that Quality was callous not to "care," but that is not Quality's duty.

Klem's sixth set begins accurately enough: Ms. Halstein's home was admittedly worth \$235,000 at the time of the foreclosure sale. BR 5. But Klem's assertion that this is "greatly in excess of the bid" is just an argument. *Id.* It is not a good argument, however, because our courts have repeatedly stated that a sale price (like the one in this case) at roughly 35% of the market price is not "grossly inadequate." *See, e.g.,* BA 37.

Klem's seventh set is irrelevant and inaccurate argument. BR 6. Quality candidly admitted that it predated some notices, including Ms. Halstein's, in its opening brief. *See* BA 19, 41-42. But doing this harmed no one. *Id.*

Klem's final set just misstates the record. *Compare* BR 6 with CP 1443-47 (Special Verdict Form, BA App. A). Her footnote 3 (noting that Quality "technically prevailed" on her negligence claim) is remarkably nigglesome: the jury found PSG, Inc.'s negligence equal to Quality's. CP 1444. More importantly, she omits that the jury utterly rejected her negligent misrepresentation claim, giving the lie to Greenfield's entire testimony. CP 1445.

**B. Klem's unsupported arguments about the summary judgment are inaccurate and misplaced.**

Klem's next "fact" section is pure argument. BR 6-8. It has no place in a Statement of Facts. RAP 10.3(a)(5). It goes on at length stating purported rationales for the trial court's rulings, and making factual assertions, all wholly unsupported by a single cite to the record. BR 7-8. The Court should disregard all of Klem's unsupported assertions.

Particularly troubling is her footnote 4. Klem claims that a pending REPSA somehow "rendered moot the need for a foreclosure sale." BR 8 n.4. This baseless and misplaced argument has no support in the law, the facts, or common sense. Had PSG, Inc. bothered to show up for the sale with the signed REPSA, however, this lawsuit might have been rendered moot.

Klem's final argument in this section is that she did not learn about "some of Quality's wrongdoing . . . until deposing Quality's employees." BR 8. The only alleged "wrongdoing" Klem notes is the predated notaries, which (as discussed above, below, and in the opening brief) harmed no one. There is no other "wrongdoing": Quality fully complied with its duties under the Act, and Klem's claims regarding breaches of those duties were (or should have been) dismissed. But in any event, Klem's delay in discovering the existing predated notaries cannot avoid the Act's requirements. She simply failed to restrain the sale.

**C. Klem's misplaced arguments about joining QLSC do not justify the trial court's ruling under Washington law (as discussed below – in the *Argument*).**

Quality next argues that QLSC was properly joined. BR 8-10. Once again, this argument is obviously in the wrong place, and will be addressed *infra*, in the appropriate section. Suffice it to say here that the eight argumentative "facts" bulleted at BR 9-10 fail to establish corporate disregard as a matter of Washington law.

**D. Klem's reconstruction of the "facts" concerning the alleged service on QLSC is misleading in many salient particulars, but is much ado about nothing.**

Klem next reconstructs the "facts" concerning its faulty attempts to serve QLSC – in a highly misleading fashion. BR 10-

12. It is difficult to understand why she goes to such lengths, however, where QLSC has not raised her failure to serve it as an issue on appeal. See BA 3-4, 43-45. Nonetheless, it is worth a moment to set the record straight.

Klem first contends that she achieved proper service because *Quality's* counsel initially agreed to accept service for QLSC, which she soon retracted upon learning she was not authorized by that client to do so. BR 10. Klem even claims that she "delivered copies of the summons and complaint to opposing counsel," citing CP 1821-22 (which were added to the record after the opening brief was filed). Yet those pages nowhere state that Klem's counsel sent copies of the summons and complaint to Quality's counsel. Rather, Klem's counsel swore that he simply terminated his efforts to serve QLSC (CP 1821-22):

As a result of Ms. Gilbert's March 10<sup>th</sup> email that was sent at 8:08 a.m., the Plaintiff immediately terminated its efforts to serve process on [QLSC]. It was not until April 8, 2009 that Plaintiff resumed its efforts to serve process on [QLSC].

Klem then convolutedly admits that she did not personally serve QLSC's Registered Agent on her second and third attempts. BR 11. Her confusing assertions were disputed. See, e.g., CP 639-40. But again, this is a non-issue.

**E. Klem's "harm" arguments are misplaced, unsupported, misleading, and potentially harmful.**

Klem argues that Quality harmed Ms. Halstein. BR 12 (§ E). This misplaced argument lacks a single citation. The Court should disregard it.

Klem then argues that "Washington residents are harmed" because Quality predated some documents. BR 12-14 (§ F). Again, this argumentative section is misplaced and inaccurate. Again, the Court should disregard it.

But assuming the Court will consider this improper argument, it is frankly quite revealing, both for what Klem doesn't say, and for what she says. What Klem never claims is that Ms. Halstein received a single minute short of her statutorily mandated notice period. She does not say this because she cannot. Since Ms. Halstien received her full statutory notice period, she was not deprived of anything to which she was legally entitled.

What Klem says, and is plainly asking this Court to say, is that because Quality's main offices are located in California, it should not be permitted to simply meet the statutory notice periods, but should be disadvantaged *vis a vis* Washington-based companies, and its beneficiaries should receive slower processing

of their foreclosures. Such a ruling would plainly violate the Dormant Commerce Clause, U.S. Const. Art. I, Sec. 8, cl. 3.

The Court might well ask, "why would Ms. Klem seek such a ruling?" She likely would not, but she is represented by the Northwest Justice Project, which as the Court well knows, handles many, many of these cases. NJP no doubt would like to see foreclosures slowed down. But that would mean placing additional strictures on the Deed of Trust Act that simply do not appear there. It would also mean unduly burdening interstate commerce.

Klem rhetorically asks (in her harshly-worded footnote 9) why Quality predated documents. BR 13 n.9. That is a mystery, even to Quality's COO. RP 199. It may be that some on Quality's staff thought they could not simply properly notarize the signatures earlier, and then send the documents off to be transmitted, recorded and posted at the appropriate time. Quality reprimanded those who predated documents. *Id.* It should never have happened. But in fact, it never harmed anyone. Ms. Halstien and the few others Klem identified whose documents were predated received the full statutory notice period, so their legal rights were unaffected. No one is entitled to more than the statutory notice periods. No one was harmed.

**F. Klem's seven "examples" are false or irrelevant.**

Klem next argues that the facts support the jury's verdict, albeit in a purported statement of facts. BR 15-19. She asserts "seven examples" why the jury believed her story. *Id.* Each is either false or irrelevant.

Her first "example" is that a Superior Court "scrutinized and approved" her behavior. BR 15. But the jury found Klem negligent. CP 1444. Obviously they did not defer to the Guardianship court.

Her second "example" is based on a misrepresentation of the record. She implies that Quality's witnesses told different stories. BR 15. But COO Owen did not "blame" his employees; rather, he denied having personal knowledge of the practice. RP 194-202. And Ott did not blame "management," but rather explained that two specific people who trained him told him to engage in this practice. RP 351-54. Unlike Greenfield's denial of responsibility for his own obvious negligence, the jury was not left with the impression that Quality's witnesses blamed one another.

Klem's third "example" is simply disingenuous. BR 15-16. Quality did not try "to make it look as if its phone records contradict" Greenfield's testimony – they absolutely do. *See, e.g.*, RP 310-318 (Greenfield repeatedly admits the phone records contradict his

testimony). Klem's assertion about Owen is unsupported by her citation, and would be irrelevant in any event. BR 16.

Klem's fourth "example" is again a legal argument, this time suggesting that a jury may decide to disregard the corporate form based on factors never recognized by any Washington court. BR 16. Again, this argument will be addressed below.

Klem's fifth "example" for the jury verdict again misrepresents the testimony at trial. BR 16-17. As explained above, Klem's claim that PSG, Inc. "twice" asked Quality to postpone the sale is unsupported hearsay (she never called Quality) directly contradicted by Greenfield's admission that he did not ask Quality to postpone the sale during his first call. RP 311-12. The single other call lasted "a minute, tops." RP 303-06. This explains why the jury found PSG, Inc. negligent, but it does nothing to support Klem's claims against Quality.

Klem's sixth "example" attempts to rehabilitate Greenfield. BR 16-17. But as explained above, he repeatedly admitted that he had lied under oath in prior declarations. See BA 11-12. The jury then rejected Greenfield's false testimony by rejecting Klem's negligent misrepresentation claim. CP 1445. Greenfield's testimony was totally discredited.

Klem's seventh "example" is again a legal argument, this time about the key issue, Klem's waiver of all defenses by failing to bring an action. BR 18-19. Klem's claim that she was "shocked" about the sale is again evidence of her negligence. BR 18. With Greenfield making dozens of unsuccessful attempts to convince WAMU to stop the sale, it is simply willful blindness to suggest that PSG, Inc. was surprised it went forward. This again proves Klem's negligence.

Klem also reiterates the many excuses she proffered to the jury for not filing an action. BR 18-19. Quality is not responsible for any of the problems Klem faced, such as time constraints or lack of money, so none of them matters to the legal issue whether Klem waived her claims. Had PSG, Inc. acted in a more timely manner, instead of taking months and months to evict the abusive daughter and list the home, the time constraints would not have mattered.

But the basic problem here is that the waiver issue is not a jury question, but a question of law for the court. The jury was not even asked to determine whether Klem waived her claims because the trial court had already decided that issue as a matter of law. Klem's suggestion that her excuses for PSG, Inc.'s negligence are relevant here is inaccurate and misleading.

## ARGUMENT IN REPLY

- A. **Klem fails to address – much less distinguish – the armloads of precedent contrary to her position, and her sole asserted “unwaived” claim defies common sense.**

Quality's lead argument was that a great deal of legal authority supports its position (and the trial court's original ruling) that Klem waived her claims by failing to restrain the sale. BA 26-34.<sup>1</sup> At various places in her brief, Klem attempts to offhandedly dismiss this authority on the theory that in those cases, the party failing to restrain the sale knew about the alleged problems prior to the sale, whereas here, Klem did not know and could not have known about her claims because they happened “at” the sale. See, e.g., BR 25-29 & n.20. As she was at trial, Klem is extremely vague about what claims she could not have known about. Plainly,

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<sup>1</sup> Citing *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003); *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *Moon v. GMAC Mortgage Corp.*, 2009 U.S. Dist. LEXIS 91933, at \*33 (2009); *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008), *rev. denied*, 165 Wn.2d 1023 (2009); *Universal Life Church Of Snohomish County v. GMAC Mortgage Corp.*, 2007 U.S. Dist. LEXIS 29333, at \*11 (W.D. Wa. 2007); *Hallas v. Ameriquest Mortgage Co.*, 406 F. Supp. 2d 1176, 1181 (D. Or. 2005) (interpreting Washington's Act), *aff'd*, 280 Fed. Appx. 667 (9<sup>th</sup> Cir. 2008); *In re Marriage of Kaseburg*, 126 Wn. App. 546, 108 P.3d 1278 (2005); *Country Express Stores, Inc. v. Sims*, 87 Wn. App. 741, 750-751, 943 P.2d 374 (1997); *Steward v. Good*, 51 Wn. App. 509, 515-17, 754 P.2d 150, *rev. denied*, 111 Wn.2d 1004 (1988); *Koegel v. Prudential Mut. Savings Bank*, 51 Wn. App. 108, 114, 752 P.2d 385, *rev. denied*, 111 Wn.2d 1004 (1988)

she knew or should have known about the alleged predating and Quality's assertion that it must have the beneficiary's permission to postpone a sale. But she does not discuss those matters in relation to the waiver argument. BR 25-29.

The single issue she does mention cannot support her claim: the fact that the trustee accepted a bid \$1 higher than the bank's bid, where the bid was 35% of market value. BR 25-26, 28. It is well established that a mere low price is not a sufficient ground to challenge a foreclosure sale. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 914-15, 154 P.3d 882 (2007); accord *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 157 Wn. App. 912, 932-33, 239 P.3d 1148 (2010); RESTATEMENT (THIRD) OF PROPERTY, *Mortgages* § 8.3 *cm. b* (less than 20% of market value may justify a challenge). Foreclosure-sale bidders properly expect low sale prices. See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538-39, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) ("property that *must* be sold within those [foreclosure-sale] strictures is simply *worth less*"). And it is, of course, quite common for a successful bidder to go just \$1 above a prior bid.

No legal authority has ever held that accepting such a common bid constitutes negligence, much less a breach of fiduciary

duty. Klem cites nothing. On the contrary, the Act requires that “the trustee or its authorized agent **shall sell the property** at public auction **to the highest bidder.**” RCW 61.24.040(4) (emphases added). Many, many foreclosure sales would be open to challenge if simply following the Act’s requirements were a proper basis for a damages claim. The Court should reject this obviously incorrect theory of liability.

Moreover, Klem’s argument proves too much. Klem does not argue that other actions by Quality (such as predating notices or telling Greenfield that the beneficiary must approve any postponement) were unknown to PSG, Inc. prior to the sale. BR 23-29. They obviously were or should have been known, so by Klem’s own reasoning, and under well settled law, these claims were waived. Yet the trial court allowed Klem to argue these supposed “wrongs” to the jury. This badly prejudiced Quality by misstating the law and misleading the jury. This Court should reverse and dismiss.

Division Two’s very recent decision in *Albice*, while not addressing the waiver issue presented here, nonetheless illustrates the types of behavior that may invalidate a foreclosure sale, in stark contrast to Klem’s claims. There, the property owners borrowed

\$115,500 under a deed of trust. **Albice**, 157 Wn. App. at 918. They fell delinquent and were served with notices of foreclosure and of trustee's sale, but they entered into a forbearance agreement with the lender. *Id.* The trustee continued the sale six times as the owners made (sometimes late) payments to cure their default. *Id.* at n.2. The owners tendered their final payment late (albeit more than 11 days before the foreclosure sale was held) but the lender refused the payment, declared a default, and went forward with the foreclosure sale. *Id.* at 918-19. The successful purchaser paid \$130,000, which was between 13 and 18 percent of the property's fair market value. *Id.* at 919, 931 n.12.

The owners sued the trustee and the purchasers to set aside the sale. **Albice**, 157 Wn. App. at 919. The trial court concluded that the purchasers were bona fide purchasers for value and that the trustee's violations of RCW 61.24.040(6) – continuing the sale for more than 120 days and then holding it on the 161<sup>st</sup> day (rather than re-noticing a new sale) – was moot: bona-fide-purchaser status renders a deed's recitals of compliance with the statute conclusive evidence that the sale was properly conducted. *Id.*

Division Two reversed. It held that the "conclusional recitals in the deed of trust . . . do not meet the statutory requirement of

'facts showing' compliance with chapter 61.24 RCW," so they do not prevent setting aside the sale. *Id.* at 922-25. It held that holding the sale after 120 days violated the statute and voided the sale. *Id.* at 926-28. It also held that the purchasers were on inquiry notice because (1) they were very experienced foreclosure-sale bidders; (2) they were told by the owners that they did not want to sell their property; (3) they were aware that the sale was continued far beyond the 120-day statutory limit; (4) they were surprised when the property came up for sale; and (5) they were aware that the sale price was far below what they were prepared to pay for the property. ***Albice***, 157 Wn. App. at 930-31.

Reasonable inquiry would have revealed that the owners had attempted to cure their default more than 11 days before the sale, as permitted by RCW 61.24.090(1). *Id.* at 932. The purchasers were therefore bound by the owners' uncontroverted evidence that the sale violated the Act and was void. *Id.*

In *dicta*, Division Two went on to say that while an inadequate price is insufficient to set aside a sale, this combined with "unfair procedures" that "unfairly harmed or prejudiced the borrower" can be enough. *Id.* at 933 (citing ***Udall***, 159 Wn.2d at 914-15; ***Steward***, 51 Wn. App. at 515). In ***Albice***, the illegal

postponements beyond 120 days, together with starting the actual bidding process almost 2 hours late, “likely chilled the bidding process by reducing the number of potential bidders.” *Id.* “More importantly, circumstances surrounding the default” and the owners’ attempts to cure it, including the trustee’s failure to reschedule the sale in light of the owners’ attempts to cure, were sufficient equitable grounds to set aside the sale. *Id.* at 933-35.

While *Albice* is inapposite and its *dicta* is not controlling here, it does illustrate the sort of facts that are required to sustain a challenge to a foreclosure sale. Those sellers showed a litany of failures by the trustee that directly prejudiced the borrower, not just a low sale price, which is plainly insufficient to sustain a claim. Klem did not come close to proffering this level of evidence.

The gist of Klem’s attempt to distinguish all of the relevant case law cited in the opening brief (and particularly *Brown*) is her claim that the well established statutory-waiver doctrine “does not preclude a party from pursuing claims in a timely filed post-sale action when the claims flow from how the trustee conducted the sale.” BR 27 (citing *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 130 [sic] 157 P.3d 415 (2007), *rev. denied*, 162 Wn.2d 1022 (2008); *Moon, supra*). Again, the trustee conducted this sale properly,

giving Ms. Halstein all required statutory notices in a timely fashion, complying with the beneficiary's demand for approval before a postponement, and accepting the highest bid at the duly-noticed foreclosure sale. Klem failed to establish that there was anything legally wrong with "how the trustee conducted the sale." *Id.*

More importantly, **CHD** and **Moon** do not stand for the proposition Klem asserts. In **CHD**, Division Three held that the appellant "waived its right to raise the statute of limitations defense" by failing to "employ the presale remedies under RCW 61.24.130." 138 Wn. App. at 134. In **Moon**, Judge Zilly granted summary judgment, rejecting a claim precisely like Klem's (that the trustee refusal to postpone a sale without the beneficiary's agreement was a misrepresentation or breached the trustee's duties). **Moon**, 2009 U.S. Dist. LEXIS 91933, at \*33-34 (2009). **CHD** and **Moon**, like so many other cases, are both directly contrary to Klem's arguments.

Klem also attempts to distinguish **Brown** on the grounds that the "trustee in **Brown** had nothing to do with the terms of the obligations secured by the deed of trust..." BR 27-28. This is a distinction without a difference. The holding in **Brown** is that a failure to restrain the sale "waives the right to postsale remedies." 146 Wn. App. at 163 (citing **Plein**, 149 Wn.2d at 227-29 (citing

*Country Express*, 87 Wn. App. at 749-51)). Indeed, specifically addressing claims like Klem's solely for money damages, *Brown* agrees with the holdings in *Kaseburg*, *Hallas* and *Universal*, "that a failure to seek presale remedies under the Act bars a borrower's claim arising out of any underlying obligation secured by the foreclosed deed of trust." *Brown*, 146 Wn. App. at 167-69 (discussing and following *Kaseburg*, 126 Wn. App. 546; *Hallas*, 406 F. Supp. 2d 1176; and *Universal*, 2007 U.S. Dist. Lexis 29333). Moreover, as explained in the opening brief, *Hallas*, *Universal* and *Steward* each hold that claims against trustees – including breach of fiduciary duty, negligence, and CPA claims arising out of the underlying obligation or the foreclosure process – are barred where, as here, the borrower failed to restrain the trustee's sale. See BA 31, 36. Klem fails to confront these cases, and does not even cite *Universal*.

Finally on this point, Klem disingenuously insinuates that *Cox* and *Plein* are to the contrary. BR 28-29. *Plein* itself acknowledges "that waiver of **any postsale contest** occurs where a party (1) received notice of the right to enjoin the sale [as did Klem], (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale [*ditto*], and (3) failed to bring an action

to obtain a court order enjoining the sale [*ditto*].” *Universal*, at \*9 (quoting *Plein*, 149 Wn.2d at 228 (citing *Country Express*, 87 Wn. App. at 749-51; *Steward*, 51 Wn. App. at 515-17; *Koegle*, 51 Wn. App. at 114)). As fully explained in the opening brief, *Cox* turns on the unfortunate – and inapposite – facts that the trustee was also the beneficiary’s attorney and misled the grantor. BA 28-30. *Dicta* from an inapposite case do not overcome years of decisions rejecting Klem’s theories.<sup>2</sup>

This Court should hold that the trial court was originally correct when it dismissed Klem’s waived claims. It should hold that it was incorrect to reconsider that ruling, and to deny motions for summary judgment, dismissal, and for judgment as a matter of law. Klem waived all postsale remedies by failing to restrain the sale.

**B. Klem fails to address Quality’s second point – that the trial court erred in repeatedly contradicting its own ruling that trustee-duty claims were waived – an independently sufficient ground to reverse and dismiss.**

Quality’s next point was that the trial court erred in repeatedly contradicting its own correct ruling that “[b]y failing to

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<sup>2</sup> Klem also asserts that the Act does not bar “damage claims.” BR 23-24. All of the authority cited above and in the opening brief holds that RCW 61.24.040(1)(f)’s waiver provision does exactly that. Accepting Klem’s argument would require overruling a great deal of authority.

enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee.” CP 270; see BA 38. Klem fails to address this argument. Since this is an independently sufficient ground on which to reverse and dismiss, the Court should do so.

The gist of Quality’s second argument is that while the trial court left the trustee-duty claim dismissed, it reinstated claims for negligence, breach of the deed of trust, and CPA violations, each of which was based on an alleged breach of trustee duties. BA 36-37. If the trustee-duty claims were dismissed, they were dismissed. As in *Universal, supra*, all claims (including CPA claims) were waived. This Court should reverse and dismiss.

**C. Klem still fails to prove her claims.**

Quality next argued that, assuming *arguendo* her claims were not waived, Klem failed to prove her negligence, contract, and CPA claims. BA 38-43. On negligence, she established no duty, breach, proximate cause or damages. BA 38-40. Klem appears to tacitly concede this point by failing to address it. Again, this is an independently sufficient basis on which to reverse.

Instead of addressing Quality’s negligence argument, Klem points out two typos (Counsel apologies for both his dyslexia and his failure to catch these typos) and accuses Quality of “confusion,”

yet sows a bit of confusion of her own. BR 38. Klem appears to claim that in “February 2008” (when this foreclosure sale occurred) a statute “which became effective June 12, 2008” somehow applies. *Id.* Perhaps this is just a typo.

In any event, Quality correctly cited and attached the version of RCW 61.24.040(6) that was in effect in February 2008, which is the 2007 version of the statute. See BA 39 & Appendix. The version that became effective in June 2008 (and is still in effect today) contains the language quoted at BA 39, expressly stating that the trustee has no obligation to continue a sale. *Id.* But there is no substantive difference between the two statutes: under both versions, the trustee “may” – but has no duty to – postpone a sale. Notwithstanding Klem’s assertion that the 2007 version **permitted** Quality to “do the right thing,” she fails to establish any legal duty to postpone the sale under the facts of this case. BR 38.

On her contract claim, Klem failed to show breach or damages. BA 40-41. Klem’s response literally cites to no case authority. BR 34-36. She argues that she showed a breach by “proving” that “(i) Quality’s deference to WaMu was contrary to its obligation to be impartial; (ii) Quality made no effort to avoid sacrificing Ms. Halstein’s equity; and (iii) Quality falsely dated the

notice of sale in order to speed up the foreclosure process.” BR 36. None of these three assertions is true.

On her first assertion, Klem fails to respond to Quality’s point that a trustee’s duty also runs to the beneficiary of the Deed of Trust, not solely to the grantor. Simply following the beneficiary’s instructions not to postpone a sale without authorization is not a breach of any duty owed to the grantor. It certainly does not breach what Klem calls a “duty” to be impartial, as the beneficiary has every right to demand that a trustee not postpone a sale without permission. Doing so would breach a duty to the beneficiary. Klem’s Catch-22 finds no support in the contract or in the law.

On her second point, Klem fails to establish that Quality had a duty or that it “sacrificed” her home. BR 36. Although she does not cite it, she presumably means to rely on the *Cox dicta* that the trustee must take reasonable steps to avoid sacrificing the debtor’s property. *Cox*, 103 Wn.2d at 389. But as noted above and in the opening brief, *Cox* and its *dicta* do not apply here because (1) Quality was not the beneficiary’s attorney acting in a conflict of interest situation; (2) Quality did nothing to mislead the grantor; and (3) Quality did not “sacrifice” Ms. Halstein’s property, where it sold for 35% of its market value. See, e.g., BA 29-30, 34.

Klem's third assertion ("Quality falsely dated the notice of sale in order to speed up the foreclosure process") is misleading. BR 36. Quality did not "speed up the foreclosure process," but gave Ms. Halstien her full statutory 190 days. See RCW 61.24.040(8). Quality thus met its obligations under the Deed of Trust to conduct the sale in accordance with the Act. Klem thus fails to establish that Quality breached the contract.

Nor did she establish resulting damages. BA 40. Klem's apparent assertion that the mere existence of a loss "proves" this element of a contract claim is obviously wrong. BR 36. Ms. Halstien lost her equity because (a) she could not repay the bank due to her dementia; and (b) Klem failed to restrain the sale. Quality's proper conduct of the sale did not cause this loss.

Klem expends extra pages on her CPA claim, presumably because it allows a fee award. BR 29-34, 49. While she rehearses arguments about all five elements, Quality argued only that she failed to prove an unfair or deceptive act or practice (element one) that caused injury to Ms. Halstein (element five). BA 41-43. On element one, she again raises Quality's decision to respect its beneficiary's instructions not to postpone without authorization, again relying exclusively on the inapposite *dicta* in **Cox**. BR 29-30.

For all the reasons stated above and in the opening brief, **Cox** is inapplicable. In any event, it nowhere states that respecting the beneficiary's wishes is an unfair practice.

Indeed, in the longest of her 34 footnotes, Klem concedes that "Quality was required to act as a fiduciary towards Ms. Halstien **and** WaMu." BR 30, n. 22 (emphasis added). Klem further admits that the Legislature has thought better of this unworkable Catch-22, rejecting any fiduciary duties, and requiring only good faith. *Id.* (citing the current version of RCW 61.24.010(3) & (4)). Quality should not be punished for complying with its fiduciary duties to the beneficiary. Nothing it did breached a legally cognizable duty to Ms. Halstein. Klem fails to prove an unfair act or practice.

Klem again relies on the inapplicable **Cox dicta** about not "sacrificing" property to claim an unfair practice. BR 31. But if simply selling the property for less than its fair market value is an unfair practice, then our courts are going to be seeing a lot more challenges to foreclosure sales. As discussed above and in the opening brief, since a selling price at 35% of the market value is not "grossly inadequate" as a matter of law, **Cox** does not apply here. Quality committed no unfair practice.

Klem's third and final claimed "unfair practice" is the predated notices. Here Klem becomes downright dishonest: she unfairly implies that quality failed to wait "the full 30 days from the posting of the notice of default, as required by RCW 61.24.030(8), before transmitting the 90 day notice of sale." BR 31. As Klem is well aware – because the trial court sustained Quality's objection on precisely this ground (RP 386-87) – RCW 61.24.040(1)(b) requires that notices of sale be "transmitted by . . . mail . . . to the following persons or their legal representatives," including the borrower. The Act does not in any way forbid Quality from sending a notice from California to Washington so that it can be timely transmitted to the borrower immediately after the full 30 days has run. Quality complied with the Act.

Again, the predating should never have happened. No doubt the jury was angered by it. But Ms. Halstein received her full statutory notice period. Klem's argument would make it impossible for Quality to perform timely foreclosures in Washington, punishing the beneficiaries it serves here. Quality could not do less than take all proper and necessary steps to ensure that it met its duties to the beneficiary, while respecting Ms. Halstein's statutory rights. Quality did nothing less. This Court should reverse and dismiss.

**D. The trial court erred in joining QLSC, and Quality was not an “agent” of its sister corporation.**

Quality’s final argument was that the trial court erred in joining QLSC (of California) and that no evidence supports the jury’s “agency” finding. BA 43-45. As noted above, Quality does not raise the service issue, so Klem’s arguments on that issue are misdirected. *Compare id. with* BR 39-41. Klem simply fails to address most of Quality’s actual arguments. *Id.*

But in her 28<sup>th</sup> footnote, Klem argues that shared management staff creates “an agency relationship . . . because the two parties have consented that ‘one shall act under the control of the other.’” BR 41 n.28 (citing *Rho Co. v. Dept. of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989)). This is a legal argument in search of some facts. No one testified to this supposed “consent” that Klem would create from whole cloth.

Quality’s argument is that no evidence supports the “agency” finding because Quality does not act on behalf of QLSC in handling foreclosures in Washington. Klem’s failure to cite any such evidence – while honest – is also a concession of error. This Court should not *sua sponte* disregard the corporate form. BA 44. QLSC should be dismissed from this action.

## RESPONSE TO CROSS-APPEAL

### A. Standard of Review.

Klem appears to concede that review of the trial court's decision to deny an injunction is for an abuse of discretion. See BR 46-47. This is correct:

A suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case. **Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life**, 106 Wn.2d 261, 264, 721 P.2d 946 (1986); **Rupert v. Gunter**, 31 Wn. App. [27,] 30[, 640 P.2d 36 (1982)].

Appellate courts must give great weight to the trial court's decision, interfering only if it is based on untenable grounds, is manifestly unreasonable or is arbitrary. **Federal Way**, 106 Wn.2d at 264; **Rupert**, 31 Wn. App. at 30.

**Steury v. Johnson**, 90 Wn. App. 401, 405, 957 P.2d 772 (1998) (paragraphing added).<sup>3</sup> "Great weight is given to the trial court's exercise of that discretion." **Nelson**, 64 Wn. App. at 189 (citing **Brown v. Voss**, 105 Wn.2d 366, 373, 715 P.2d 514 (1986)).

Despite this very well established standard of review for equitable decisions, Klem nonetheless seems to suggest at one point some aspects of this equitable decision are reviewed *de novo*.

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<sup>3</sup> Accord **Nelson v. Nat'l Fund Raising Consultants, Inc.**, 64 Wn. App. 184, 188, 823 P.2d 1165 (1992) (citing **Blair v. WSU**, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987) (citing **State ex rel. Carroll v. Junker**, 79 Wn.2d 12, 26, 482 P.2d 775 (1971))), *aff'd on other grounds*, 120 Wn.2d 382, 842 P.2d 473 (1992).

BR 48 (citing *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999)). Neither of these cases reviews an order denying a permanent injunction, or even equitable relief. No case law supports Klem's desire to sunder the trial court's equitable decision. The standard of review remains abuse of discretion.

**B. Klem ignores the legal requirements for an injunction.**

Klem simply ignores the legal requirements for a permanent injunction. BR 41-49. Injunctions are rarely granted:

An injunction is distinctly an equitable remedy and is "frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case."

*Kucera v. DOT*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (quoting 42 AM. JUR. 2D *Injunctions* § 2, at 728 (1969) (footnotes omitted)). Injunctive relief may be granted only if there is no plain, complete, speedy, and adequate remedy at law. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982) (citing *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976)).

Permanent injunctions are the subject of a statute (RCW 7.40.020)<sup>4</sup> and of a Court Rule (CR 65(d)). A petition seeking an injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either are resulting in or will result in actual and substantial injury to the plaintiff. *Nelson*, 64 Wn. App. at 189 (citing *Washington Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983)); *Malyon v. Pierce County*, 131 Wn.2d 779, 813, 935 P.2d 1272 (1997) (citing *Tyler*, 96 Wn.2d at 792). In deciding whether to grant a permanent injunction, the trial court also "must make a comparative appraisal of all the factors in the case, including the following:"

The character of the interest to be protected, the relative adequacy to the plaintiff of injunction and of other available remedies such as damages; plaintiff's delay in bringing suit, plaintiff's misconduct, if any; the relative hardship likely to

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4 "When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court . . . ."

result to defendant if the injunction is granted and to plaintiff if it is denied; the interest of third parties and of the public, and the practicability of framing and enforcing the order or judgment.

*Nelson*, 64 Wn. App. at 190 (citing *Seattle v. Nazarenius*, 60 Wn.2d 657, 669, 374 P.2d 1014 (1962) (quoting *Pacific Gas & Elec. Co. v. Minnette*, 115 Cal. App. 2d 698, 709, 252 P.2d 642 (1953))). Permanent injunctions must be narrowly tailored to prevent a specific harm. *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986); CR 65(d).

“[S]ince injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity[,] including balancing the relative interests of the parties and, if appropriate, the interests of the public.” *Tyler*, 96 Wn.2d at 792; accord *Butler v. Craft Eng Constr. Co.*, 67 Wn. App. 684, 693, 843 P.2d 1071 (1992). A failure to establish any criterion means that the injunction must be denied. *Kucera*, 140 Wn.2d at 210.

Klem fails to even address, much less meet, these mandatory requirements. BR 41-49. Nor does she address most of the trial court's many stated reasons for denying the injunction. Compare *id.* with CP 1585-88 (attached as Reply Appendix). As discussed below, the trial court did not abuse its broad discretion.

**C. The Court should summarily reject Klem's unsupported cross appeal.**

Though it is not evident from her briefing, Klem actually proposed a long and complex two-part injunction. See Reply Appendix ("RA") at CP 1586. The trial court rejected her proposal for numerous reasons. RA at CP 1586-88. These rulings were correct under the copious law cited above.

Klem's failure to address any of this should doom her cross-appeal. See, e.g., RAP 10.3(a)(6) (requiring parties to provide "argument in support of the issues presented for review, together with citations to legal authority"); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments unsupported by authority rejected). RAP 10.3(a)(6) and related rules are designed "to enable the court **and opposing counsel** . . . efficiently and expeditiously to review the relevant legal authority." ***Hurlbert v. Gordon***, 64 Wn. App. 386, 400, 824 P.2d 1238 (emphasis added), *review denied*, 119 Wn.2d 1015 (1992).

Implicit in RAP 10.3(a)(6) is the requirement that citations to legal authority must relate to the issues presented for review and support the propositions for which they are cited. ***Litho Color, Inc. v. Pacific Employers Ins. Co.***, 98 Wn. App. 286, 305, 991 P.2d

638 (1999); see also **Schmidt v. Cornerstone Investments, Inc.**, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990) (“plaintiffs do cite authority . . . [but] they fail to cite legal authority supporting their specific” argument). Courts will not, of course, attempt to construct arguments on a party’s behalf. **In re Marriage of Croley**, 91 Wn.2d 288, 294, 588 P.2d 738 (1978); **State v. Wheaton**, 121 Wn.2d 347, 365, 850 P.2d 507 (1993). Thus, our courts simply refuse to consider conclusory propositions unsupported by sufficient legal authority. See, e.g., **State v. Young**, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978); **South Hill Sewer Dist. v. Pierce County**, 22 Wn. App. 738, 748, 591 P.2d 877 (1979), overruled on other grounds in **City of Everett v. Snohomish County**, 112 Wn.2d 433, 772 P.2d 992 (1989).

Klem’s briefing fails RAP 10.3(a)(6). It fails to address most of the trial court’s actual rulings. It fails to cite nearly all of the relevant legal authority. Since Klem has not yet addressed the relevant requirements, she should not be permitted to do so in reply. See **Cowiche Canyon**, 118 Wn.2d at 809 (refusing to consider arguments first raised in reply). This Court should reject Klem’s cross appeal.

**D. The trial court did not abuse its broad discretion.**

Assuming *arguendo* that the Court will address the cross appeal, the trial court did not abuse its broad discretion. Klem's various technical process complaints about how the trial court reached its decision fail to address the heart of the trial court's equitable ruling: Klem asked for the impossible.

The trial court first noted that there is little law on granting injunctions under the CPA. RA at CP 1586. Based on Klem's briefing, this appears self-evidently correct. See BR 41-49 (citing only *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973) and the statute itself, RCW 19.86.090, as relevant to this issue). Yet Klem criticizes the trial court, asserting that "substantial authority" exists on this point, but citing only the same two authorities. BR 43-44. Since the trial court cited *Hockley*, RA at CP 1586, and was plainly aware of the statute, they hardly contradict the trial court's point. Klem's process argument fails.

The trial court found the first paragraph of Klem's proposed injunction (which is far longer and more complex than the bowdlerized "proposal" she sets forth at BR 45) "overly broad and unenforceable." RA at CP 1586. The vague phrase "adequate assurances" is undefined and unlimited. *Id.* Particularly in the

context of the current statutory duty of “good faith” – another vague and undefined phrase – neither Quality nor the court would have any way to know what constitutes compliance or non-compliance. *Id.* As Quality argued below, an injunction painted with so broad a brush violates not only the voluminous law cited above, but also the Due Process Clause of the Fourteenth Amendment. CP 1505 (citing *State v. Reader’s Digest Assn.*, 81 Wn.2d 259, 274, 501 P.2d 290 (1972); *Ralph Williams’*, 82 Wn.2d at 279). The trial court was within its broad discretion to reject the first paragraph.

On her second paragraph, the trial court gave two pages of explanation as to why it was unnecessary, overbroad, unenforceable, and dangerously litigation-fomenting. RA at CP 1587-88. Klem does not address any of this. First, there is no evidence that Quality continued to predate documents after its management discovered and forbade the practice in 2007. *Id.* at 1587. Second, the jury rejected Klem’s contention that Quality ever made a negligent misrepresentation. *Id.* Third, the *Cox dicta* is so vague that “this proposal would subject [Quality], the lender, third party lienholders, and the entire process established by the Deed of

Trust Act, to uncertainty any time a borrower asked to postpone a foreclosure sale for any reason.” *Id.* Whew.<sup>5</sup>

There is no indication that this trial judge abused her broad discretion to deny a permanent injunction in this case. The Judge specifically rejected Klem’s argument that Quality had to tell her it would “follow the law” some time after the verdict, stating (after hearing all of the testimony) that the “court assumes [Quality] will follow the law.” RA at CP 1588. Klem’s cross appeal fails.

**E. Klem is not entitled to attorney fees.**

Klem requests a fee award under the CPA. BR 49. She should not prevail on that claim (or any other), so fees should be denied. Assuming *arguendo* she prevails on the CPA, fees should be limited solely to work on that issue, which comprises approximately 10% of her opening brief (5/50 = 10%).

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<sup>5</sup> With all due respect to the trial court, this is precisely why the *Cox dicta* is too vague to enforce against Quality in this case, as discussed above.

**CONCLUSION**

For the reasons stated above, this Court should reverse and dismiss. It also should reject the cross appeal.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of November  
2010.

WIGGINS & MASTERS, P.L.L.C.



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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANTS/CROSS RESPONDENTS** postage prepaid, via U.S. mail on the 8<sup>th</sup> day of November, 2010, to the following counsel of record at the following addresses:

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\_\_\_\_\_  
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Attorney for Appellants/Cross Respondents

1  
2  
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4  
5  
6  
7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
8 **IN AND FOR THE COUNTY OF KING**  
9

11 DIANNE KLEM, as administrator of the  
12 estate of Dorothy Halstien,

13 Plaintiff,

14 v.

15 WASHINGTON MUTUAL BANK, a  
16 Washington corporation; QUALITY  
17 LOAN SERVICE CORPORATION OF  
18 WASHINGTON, a Washington  
19 corporation; and QUALITY LOAN  
20 SERVICE CORPORATION, a California  
21 Corporation

22 Defendants.

No. 08-2-13989-1 SEA

ORDER DENYING PLAINTIFF'S  
MOTION FOR INJUNCTION

**ORIGINAL**

22 THIS MATTER came on for hearing upon Plaintiff's motion for an injunction pursuant  
23 to the Consumer Protection Act following trial. The court has reviewed and considered  
24 plaintiff's Motion for Injunction, Defendant's Response, Plaintiff's Reply, Plaintiff's Response  
25 to Issues Raised by the Court on February 5, 2010, the testimony presented by all witnesses at  
26 trial, all of the exhibits admitted into evidence at trial; the arguments made at trial by counsel  
27 for Plaintiffs and Defendants, and the verdict of the jury which found that the defendants  
28 violated the Consumer Protection Act.  
29

1 Plaintiff has asked the court to enjoin the defendants, Quality Loan Service Corporation  
2 of Washington ("QLS") and Quality Loan Service, generally as follows:

- 3 1. From conducting business in Washington as a successor trustee, conducting  
4 foreclosure sales, taking any action to evict a person from a property that was  
5 subject to a Deed of Trust foreclosure in which QLS acted as trustee, and recording  
6 trustee's deeds, until a hearing before this court determines that QLS has satisfied  
7 the judgment in this case, and has "provided the Court and counsel for the Plaintiff  
8 with adequate assurances that Quality Loan Service corporation of Washington will  
9 at all times in the future satisfy all duties it owes to borrowers in connection with  
10 conducting and continuing deed of trust foreclosures;" or, in the alternative;  
11 2. Will not cause any document related to deed of trust foreclosures to be falsely dated  
12 or falsely notarized; and, in an action in which QLS is trustee for deeds of trust in  
13 Washington, will (a) treat both the borrower and lender in good faith, (b) take  
14 reasonable and appropriate steps to avoid sacrifice of the homeowner's property, (c)  
15 refuse to follow instructions from a lender requiring QLS to obtain lender approval  
16 before postponing a foreclosure sale.

16 The court denies plaintiff's motion for an injunction for the following reasons. There is  
17 little case law on injunctions pursuant to the Consumer Protection Act, and the statute specifies  
18 no substantive requirements. It was intended to permit the courts to enjoin future violations of  
19 the Consumer Protection Act that affect the public interest. Hockley v. Hargitt, 82 Wn.2d 337  
20 (1973). Permanent injunctions, however, must be narrowly tailored to prevent specific harm.  
21 Kitsap County v. Kev, Inc. 106 Wn.2d 135 (1986), CR 65(d).

22 The proposed injunction in plaintiff's first alternative is overly broad and  
23 unenforceable. Plaintiff has not defined, and there is no way this court can establish, what  
24 would constitute "adequate assurances" that QLS, acting as trustee under the Deed of Trust  
25 Act, is satisfying its duties to borrower. This is particularly true where the only duty set forth  
26 in the current statute (revised in 2009), is one of "good faith" to the borrower, beneficiary, and  
27 grantor. "Good faith" is not defined in the statute. There is no longer a fiduciary duty as  
28 existed at the time the incidents in this case occurred, and when Cox v. Helenius, 103 Wn.2d  
29 383 (1985) was decided. There is arguably some duty to the borrower under Udall v. Escrow  
Services, Inc., 159 Wn.2d 903 (2007), which says "The Act must be construed in favor of

1 borrowers because of the relative ease with which lenders can forfeit borrowers' interest and  
2 the lack of judicial oversight in conducting nonjudicial foreclosure sales."

3 The courts have defined "good faith" relative to other statutes. *See* RCW 48.01.030  
4 and Tank v. State Farm Fire and Cas.Co, 105 Wn.2d 381 (1986) regarding insurance;  
5 Washington's Uniform Commercial Code, RCW 62A.1-201(19), which defines good faith as  
6 honesty in fact in the conduct or transaction; and case law which establishes an implied duty of  
7 good faith and fair dealing in every contract. However, none of these definitions has been  
8 applied in the context of the Deed of Trust Act.

9 The court rejects plaintiff's proposed second alternative because:

10 1) There is no indication that QLS is currently falsely dating or notarizing documents.  
11 There was testimony at trial that this was done in the past. However, David Owen, chief  
12 operating officer of both corporations, testified that the policy was changed when discovered,  
13 and no testimony or evidence established that the practice is ongoing, or has occurred since  
14 2007. Furthermore the jury did not find QLS liable for negligent misrepresentation.

15 2) Subsections (a) and (b) are also overbroad and unenforceable for the reasons  
16 described above. This court cannot dictate what "reasonable and appropriate steps" would  
17 avoid sacrifice of the homeowner's property. While Cox v. Helenius says that the trustee  
18 "must take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his  
19 interest," it does not define what that means. Cox also holds that the trustee of a deed of trust  
20 is not obligated to obtain the best possible price for the trust property. Without definitions of  
21 "reasonable and appropriate" and what constitutes "sacrifice of the homeowner's property,"  
22 this proposal would subject QLS, the lender, third party lienholders, and the entire process  
23 established by the Deed of Trust Act, to uncertainty any time a borrower asked to postpone a  
24 foreclosure sale for any reason. In addition, the court could be asked to intervene any time a  
25 borrower requested a postponement that was rejected.

26 Subsection (c), while more narrowly tailored and directly related to the jury's verdict, is  
27 still overbroad and unenforceable. The jury found that QLS breached its contract under the  
28 Deed of Trust. The only evidence and law as to the breach of contract claim was that QLS  
29 violated Washington law by not fulfilling its duties to the borrower, as required by its Deed of  
Trust with Mrs. Klem. QLS had a contract with the lender, Washington Mutual, in the form of  
an "attorney expectation document." (Exhibit 12 at trial) That document states that "your

1 office is not authorized to postpone a foreclosure without the consent” of Washington Mutual  
2 or Fidelity. The jury was instructed as follows as to the status of Washington law in effect at  
3 the time of these events: “The trustee is a fiduciary for both the borrower and the lender, it  
4 must act impartially between them, and it is bound by its office to present the sale under every  
5 possible advantage to the borrower as well as the lender.” Court’s Instruction No. 5.

6 The law has changed, and no fiduciary duty now exists. However, a contract with a  
7 lender that prohibits QLS from exercising its discretion to postpone a sale, even when it  
8 believes a situation so warrants, could be a violation of the “good faith” to the borrower  
9 requirement of the Deed of Trust Act. This court cannot review every contract QLS has for  
10 compliance with the Deed of Trust Act (which has been amended at least twice in the last few  
11 years), nor can the court review every request for a postponement of foreclosure sale to  
12 determine whether QLS has properly exercised its discretion and duty of good faith.

13 The court assumes QLS will follow the law. The court also assumes that, after this  
14 case, QLS understands its obligations under the law, and that it will in the future fulfill its duty  
15 of good faith to borrowers, lest it face endless litigation.

16 For all of these reasons, the court denies plaintiff’s motion for an injunction.

17 IT IS SO ORDERED this 5 day of March 2010.

18   
19 \_\_\_\_\_  
20 JUDGE BARBARA A. MACK

## **RCW 61.24.010 (2010)**

### **Trustee, qualifications — Successor trustee.**

(1) The trustee of a deed of trust under this chapter shall be:

(a) Any domestic corporation incorporated under Title 23B, 30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; or

(b) Any title insurance company authorized to insure title to real property under the laws of this state, or any title insurance agent licensed under chapter 48.17 RCW; or

(c) Any attorney who is an active member of the Washington state bar association at the time the attorney is named trustee; or

(d) Any professional corporation incorporated under chapter 18.100 RCW, any professional limited liability company formed under chapter 25.15 RCW, any general partnership, including limited liability partnerships, formed under chapter 25.04 RCW, all of whose shareholders, members, or partners, respectively, are either licensed attorneys or entities, provided all of the owners of those entities are licensed attorneys, or any domestic corporation wholly owned by any of the entities under this subsection (1)(d); or

(e) Any agency or instrumentality of the United States government; or

(f) Any national bank, savings bank, or savings and loan association chartered under the laws of the United States.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

(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.

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

[2009 c 292 § 7; 2008 c 153 § 1; 1998 c 295 § 2; 1991 c 72 § 58; 1987 c 352 § 1; 1981 c 161 § 1; 1975 1st ex.s. c 129 § 1; 1965 c 74 § 1.]

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**To:** Shelly Winsby  
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REPLY BRIEF OF APPELLANTS/ CROSS RESPONDENTS

Case: KLEM v. QUALITY LOAN SERVICE  
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Thank you.

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