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STATE OF WASHINGTON  
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BY RONALD R. CARPENTER

Supreme Court No. \_\_\_\_\_  
(Court of Appeals No. 58927-0)

**FILED**  
MAR 22 2007  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

CLERK

BEAL BANK, SSB, a Texas State Savings Bank,

Appellant,

v.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof; WASHINGTON MUTUAL BANK; U.S. BANK NATIONAL ASSOCIATION #1000; and ONE ELEVEN HOMEOWNERS ASSOCIATION,  
Respondents.

AMICUS CURIAE MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER TO SUPREME COURT BY THE WASHINGTON BANKERS ASSOCIATION, THE WASHINGTON MORTGAGE LENDERS ASSOCIATION, THE WASHINGTON FINANCIAL LEAGUE, THE WASHINGTON CREDIT UNION LEAGUE, AND THE WASHINGTON INDEPENDENT COMMUNITY BANKERS ASSOCIATION

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ORIGINAL

## I. INTRODUCTION

The Washington Bankers Association, the Washington Mortgage Lenders Association, the Washington Financial League, the Washington Credit Union League, and the Washington Independent Community Bankers Association (collectively, the “Financial Industry *Amici*”) respectfully file this memorandum in support of Appellant Beal Bank’s Motion for Transfer to Supreme Court.

Following the ruling on the Motion to Transfer and the determination of the appropriate forum for consideration of this appeal, the Financial Industry *Amici* intend to move for leave to file a brief as *amici curiae* in support of the position of Appellant Beal Bank on certain underlying legal issues in the case.

## II. IDENTITY OF *AMICI*

### A. Washington Bankers Association.

The Washington Bankers Association (“WBA”), founded in 1889 and incorporated in 1970, is an independent, nonprofit organization representing more than 80 member commercial banks operating in every county of the state. Member banks range in size from large multi-state financial institutions to smaller, family-owned and community-based banks. Through advocacy, comprehensive programming, and information

exchange, the WBA educates the public and advances the business of banking in Washington State.

**B. Washington Mortgage Lenders Association.**

The Washington Mortgage Lenders Association (“WMLA”) has represented residential and income property mortgage lenders in Washington State since 1959. The WMLA focuses on government relations, consumer affairs, mortgage originator ethics, and the continuing improvement of information distribution channels to its members. Regular membership in the organization is open to firms engaged in mortgage lending, and associate membership is open to those firms providing services to the real estate finance industry. Regular members include independent mortgage bankers, commercial banks, savings banks, savings and loan associations, credit unions, and financial institution affiliated mortgage companies.

**C. The Washington Financial League.**

The Washington Financial League (“WFL”), founded in 1909, is a trade association representing community banks of all charter types and sizes with offices in the State of Washington. In providing a wide range of trade association services for its member institutions and their officers, directors and employees, the WFL’s mission is to promote and protect the interests of its members doing business in the State of Washington and to

inspire cooperation and encourage sound business methods among its members.

**D. Washington Credit Union League.**

The Washington Credit Union League ("WCUL"), founded in 1934, is a non-profit trade association for Washington's credit union community. Credit unions – consumer-owned, not-for-profit cooperative financial institutions – are formed to enable the consumer-owners to pool their savings, lend to one another, and own the organization where they save, borrow, and secure related financial services. The WCUL is supported and funded through annual dues paid by 135 credit unions across the state.

**E. Washington Independent Community Bankers Association.**

The Washington Independent Community Bankers Association ("WICBA"), founded in 1989 and counting 63 institutions among its ranks, is a trade association committed to promoting and publicizing the advantage of community banking and focusing on issues, products and services that benefit Washington State community banks and their consumers. As the only trade association exclusively representing independent community banks, the WICBA focuses on banking issues from the perspective of community bankers and provides a platform on

issues and services not currently provided by other financial institution associations.

### III. INTEREST OF THE FINANCIAL INDUSTRY *AMICI*

The Financial Industry *Amici* have an interest in the principal legal issue presented in this case – namely, the proper interpretation and application of the Washington Deed of Trust statute, RCW 61.24.100, and the effect of nonjudicial foreclosures on junior lien holders. The trial court’s decision, if affirmed, will have a profound impact on lending practices in the State of Washington – both by in-state and out of state lenders. The Financial Industry *Amici* have an interest in having this matter resolved directly by the Washington State Supreme Court, and in assuring that the Court is adequately informed about the effect this decision will have on the financial industry and its borrowing customers.

### IV. ARGUMENT

This case presents fundamental and urgent issues of broad public import that require prompt and ultimate determination by the Supreme Court. RAP 4.2(a)(4). Relying on this Court’s opinion in *Washington Mutual v. United States*, 115 Wn.2d 52, 793 P.2d 969 (1990), the trial court held that a non-judicial foreclosure sale pursuant to a first deed of trust wipes away not only the *security* held by junior lienors, but also the

underlying *debt* owed to those junior lienors. This was clearly error, as appellant Beal Bank has argued, and these Financial Industry *Amici* will further demonstrate in an amicus brief they will seek leave to file at a later date.

For now, the *Amici* will simply point out some of the ways in which the *Washington Mutual* case is legally and factually distinguishable from the case at bar.

*First*, in *Washington Mutual*, the junior lien holder (Washington Mutual) had purchased the property at a non-judicial foreclosure sale. The Court considered only the extent to which Washington Mutual was entitled to a “deficiency judgment,” the answer to which determined the redemption price to be paid by the IRS under the federal redemption statutes. Here, Beal Bank did not purchase the property at a non-judicial foreclosure sale and did not sue for a “deficiency,” but rather simply sought to enforce its rights under separate (albeit now unsecured) promissory notes. Yet the trial court, relying on the *Washington Mutual* case, granted the borrowers’ motion for summary judgment and ruled *as a matter of law* that Beal Bank, which was neither a foreclosing lien holder nor the purchaser at the foreclosure sale, nevertheless no longer had a right to sue on those separate debt instruments to recover the debt. This was mistaken. As Justice Guy explained in his concurrence in *Washington*

*Mutual*: “However, where a junior deed of trust holder does not foreclose, the junior deed of trust holder is not precluded from suing under the note.” *Washington Mutual*, 115 Wn.2d at 60. And more significantly, the entire Court, in a later Clarifying Opinion, held: “We do not herein address the matter of a junior deed of trust holder’s continued right to sue the debtor on the promissory note because it is not before us.” 800 P.2d 1124.

*Second*, *Washington Mutual* did not involve a co-debtor (such as respondent Cashman here) whose property was not subject to the foreclosure. Even read in its broadest terms, *Washington Mutual* provides no basis to extinguish the debt of a co-borrower who had no interest in the collateral foreclosed upon.

*Third*, in *Washington Mutual*, the Court’s pronouncements concerning the rights of junior lien holders came in the context of a question certified by a federal appeals court attempting to apply federal regulations relating to IRS redemption of real property following a nonjudicial foreclosure sale. Because both litigants contended that *Washington Mutual* was entitled to a “deficiency judgment,” neither had occasion to brief or argue fully what became the eventual holding of *Washington Mutual*. This case, in contrast, involves directly the issue of whether a junior lien holder (Beal Bank) may sue the borrower on separate promissory notes following a non-judicial foreclosure by a senior lien

holder, and will afford the Court an opportunity to reconsider the issue with full briefing and argument.

*Amici* know of no published decision in Washington that has extended *Washington Mutual* to extinguish a junior lien holder's right to sue on the underlying promissory note as a consequence of a non-judicial foreclosure by a senior lien holder. Yet that is precisely what the trial court did in ruling, as a matter of law, that Beal Bank's rights to sue on its separate promissory notes are now forever extinguished.

If affirmed, the trial court's decision would have sweeping effects on existing loan obligations as well as the prospects for future lending and borrowing in this state. With respect to existing debt, junior lien holders need to know whether their existing loans can be wiped away by a non-judicial foreclosure by a senior lien holder of all or even a portion of its collateral. Tens of millions of dollars of existing debt is at peril if the trial court's erroneous ruling is upheld. Further, allowing the actions of a senior lien holder to extinguish the existing contractual rights of third parties violates the U.S. Constitution guarantee against impairment of contracts. *United States Constitution*, Art. 1, Section X. Addressing this important constitutional question provides an additional basis for direct review by this Court. RAP 4.2(a)(2).

Further, if the trial court's ruling is affirmed, it will have profound effects on future lending in this state. Lenders need to know whether new loans secured by junior deeds of trust on real property can be extinguished by a non-judicial foreclosure by a senior lien holder. If that is in fact determined to be the law, Washington lenders naturally will be reluctant to make such loans, which will have a negative effect on the lending climate in the State of Washington. And lending, of course, is a two way street: every loan, by definition, has both a lender and a borrower. If lenders reduce or stop secondary lending secured by real property, borrowers will correspondingly be deprived of the ability to borrow against the equity in their real property. The field of home equity financing and other secondary lending will substantially dry up – to the detriment of lenders, borrowers, and the entire housing and commercial real estate industry. In addition, to the extent that such secured lending is replaced with unsecured lending, customers will generally be required to pay higher borrowing costs associated with unsecured lending and lose the availability of the federal income tax deduction of interest paid on borrowing secured by their residence.

Because this Court's decision in *Washington Mutual* stands at the center of this case, this Court should take direct review and clarify its earlier decision. Absent direct review, the risk exists that the Court of

Appeals will erroneously affirm the trial court's decision – through a published opinion with precedential force – and thus throw the fate of existing debt and future lending practices into turmoil before this Court has the opportunity to decide this critical issue. A Court of Appeals decision could have immediate and far-reaching implications beyond the parties to this case. Given the manifest and immediate state-wide implications of this case, this Court should accept review.

#### V. CONCLUSION

For the foregoing reasons, the Court should grant Appellant Beal Bank's Motion to Transfer.

DATED this 15th day of March, 2005.

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**DECLARATION OF SERVICE**

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Jennifer Sima states:

BY RONALD R. CARPENTER

I am a resident of the State of Washington, I am over the age of 18  
CLERK  
years, I am not a party to this action, and am competent to be a witness  
herein.

On this 15th day of March, 2007, I caused to be filed with the  
Washington State Supreme Court, the document to which this declaration  
is attached (the original and one copy). I also served copies of said  
document on the following parties as indicated below:

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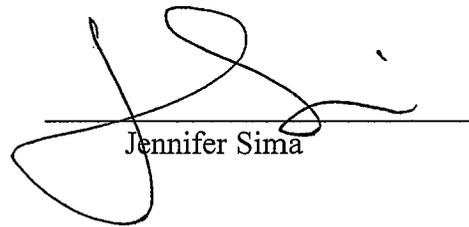
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