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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

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.

No. 87105-I

RESPONSE TO AMICUS  
MEMORANDUM OF  
WASHINGTON STATE  
ATTORNEY GENERAL

**FILED**  
MAY 18 2012

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

**I. Identity of Responding Parties & Relief Requested**

Respondents Quality Loan Service Corporation of  
Washington and Quality Loan Service Loan Corporation  
(collectively, "Quality") ask this Court to deny discretionary review.  
In order to avoid repetition, Quality respectfully suggests that the  
Court read this response (to the first of three amici) first.

RESPONSE TO AMICUS OF  
WASHINGTON STATE ATTORNEY GENERAL 1

ORIGINAL

## II. Facts Relevant to Motion

Amicus Attorney General (AAG) supports review in this case, albeit on an issue that is not in the case. The AAG fails to acknowledge that this Court already rejected direct review. See Order dated December 1, 2010. It also misunderstands the facts.

Specifically, the AAG asserts that appellate court's Unpublished Opinion "examined" Quality's "practice of deferring solely to the lender when deciding whether to postpone a foreclosure, despite the legal duties it owed to both parties." AAG at 3. The AAG provides no citation for this assertion, and indeed provides no statement of facts at all. *Id.* Quality had no such "practice." It is true that as Trustee, Quality also owed a duty to the Trust Deed Beneficiary (here, WaMu) and that WaMu reserved the right to approve requests for postponements. But there is no evidence that Quality "deferred" to anyone – that is rather Respondent PSG's mischaracterization of the Trustee's legally-mandated respect for its Beneficiary's instructions.

Simply put, no competent Trustee would fail to respect its Beneficiary's instructions not to postpone a sale without first seeking the Beneficiary's permission. Quality had never had any

problem obtaining WaMu's permission in the past. But PSG failed to inform Quality that WaMu was non-responsive, so Quality did not know a problem existed.

Partially as a result of this negligence, the jury found PSG 50% at fault for Ms. Halstein's damages. Though PSG has not appealed from this verdict, and so concedes its own negligence, the AAG fails to take note of it. The AAG also ignores additional factors contributing to the jury's verdict against PSG, including (a) PSG failed to bring a motion to stay the foreclosure sale; (b) PSG never provided Quality with a copy of the signed REPSA; and (c) PSG even failed to attend the foreclosure sale on behalf of Ms. Halstein, depriving Quality of the last clear chance to save her equity. The AAG's implication that the Court of Appeals' unpublished opinion enforcing the jury's verdict against PSG is somehow unfair is baseless.

### III. Argument

#### A. The AAG's concern about "unfairness" does not prevent it from being unfair to the Court of Appeals, mischaracterizing its holding and attacking an issue that PSG never raised below.

The AAG first mischaracterizes the Unpublished Opinion's holding. The AAG claims that the appellate court "held that the jury did not properly find this practice unfair because there was no authority for the proposition that the practice violated another statute." AAG at 3. The AAG gives no citation – because none exists. The appellate court's precise holdings on this issue are as follows (Unpub. Op. at 18):

1. "Whether a particular act or practice is 'unfair or deceptive' is a question of law" (citation omitted);
2. This can be proved by showing **either** (a) that the alleged act was a *per se* unfair trade practice; **or** (b) that an act or practice having the capacity to deceive a substantial portion of the public occurred in the conduct of any trade or commerce (citing ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 719 P.2d 531 (1986));
3. The Deed of Trust Act contains a CPA provision, RCW 61.24.135, which does not forbid anything PSG complained about here;
4. PSG's arguments about acting impartially or breaching a fiduciary duty (a claim that the trial court plainly

dismissed) are conclusory and unsupported by citations to any authority at all;

5. PSG raised no argument that Quality's alleged actions **either** (a) *per se* violated the CPA, **or** (b) had a "capacity to deceive a substantial portion of the public"; so
6. PSG failed to establish a CPA violation, and the Court "will not consider an inadequately briefed argument" (citing many cases).

The AAG's attempt to indict the appellate court for a holding it never made should fail. PSG just failed to prove its claims.

The AAG continues in this vein, quoting the Unpublished Opinion completely out of context (AAG 4):

The Court then states that [PSG] "cites no authority for the proposition that acting impartially or breaching a fiduciary duty constitutes a *per se* unfair or deceptive act or practice" and therefore Plaintiff offered no grounds for the jury finding a violation of the CPA. [Incorrect citation omitted.] By this analysis, if the act or practice is not a *per se* violation, it cannot be unfair.

It is the AAG that is unfair – to the Court of Appeals. In its very next sentence the appellate court says, "Nor does it make any argument as to why Quality's acts had a 'capacity to deceive a substantial portion of the public,'" and then concludes, "[w]e will not consider an inadequately briefed argument." Unpub. Op. at 18. The Unpublished Opinion renders no holding similar to the one that the

AAG challenges. Rather, it holds that PSG failed to prove that Quality's alleged acts either (a) were unfair *per se*, or (b) had the capacity to deceive a substantial portion of the public. Under this Court's long-standing precedents like ***Hangman Ridge***, those are necessary prerequisites for proving a CPA claim, as even PSG admitted in the Court of Appeals. See BR 29 n.21.

The AAG next engages in the helpful exercise of establishing that the Unpublished Opinion ***is consistent with*** a long line of existing state and federal precedent. AAG at 4-5 & n.8 (citing ***Henery v. Robinson***, 67 Wn. App. 277, 834 P.2d 1091 (1992); ***Minnick v. Clearwire US, LLC***, 683 F. Supp. 2d 1179 (W.D. Wash. 2010); ***Alvarado v. Microsoft Corp.***, No. C09-189, 2010 WL 715455, \*3 (W.D. Wash. 2010); ***May v. Honeywell Intern., Inc.***, 331 Fed.Appdx. 526, 2009 WL 2488936 (9<sup>th</sup> Cir. 2009); ***Smale v. Cellco Partnership***, 547 F. Supp. 2d 1181 (W.D. Wash. 2008)). The AAG further notes that these cases – like the Unpublished Decision – follow this Court's seminal decision in ***Hangman Ridge***. Following this Court's precedent and making rulings consistent with other courts' rulings are not grounds for review in this Court.

The AAG's real concern appears to be that "unfairness," as in "unfair or deceptive," should be a "stand-alone prohibition" under the CPA. AAG at 5-8. It cites the cases cited above, which simply do not address the issue, yet claims they are all wrong. *Id.* Those cases cannot be "wrong" on the AAG's issue because they did not address it, where it apparently was never raised or argued by the appellant in those cases.

The same is true here. Although the AAG earlier claims that PSG argued that Quality's acts were solely "unfair," it again gives no citation for this assertion, and again, there is none. AAG at 3. The Unpublished Opinion never addressed this issue because PSG never raised it. *See* BR at 29-36. This Court generally will not address issues raised for the first time here. *See, e.g., Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 819 (Wa. 2009); (citing *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993) (citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984)); *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962)). This Court should decline to reach this unpreserved issue.

In any event, the AAG is wrong for three reasons. First, the Unpublished Opinion does not say that the only way an act can be "unfair" is if a statute says it is unfair. AAG at 4. Rather, it correctly says that PSG raised only vague and conclusory assertions and arguments. Unpub. Op. at 18. As noted, PSG never raised the argument that the AAG is making, so the Unpublished Opinion does not address it. *Id.*

Second, it is not rational to argue that the CPA applies simply because someone does something "unfair." By its terms, the CPA protects the public from harmful acts, not from some vague and generalized "unfairness" that harms no one. Where, as here, the plaintiff fails to prove (a) that the alleged "unfair" act had the capacity to deceive a substantial portion of the public, and (b) that the alleged "unfair" act actually caused someone harm, the CPA claim must fail. As the appellate court expressly held, PSG failed to even argue that the alleged act had the capacity to deceive a substantial portion of the public. Unpub. Op. at 18. And the appellate court "agree[d] with Quality that Halstien received the full statutory notice period required for notice and that her legal rights were unaffected." *Id.* at 19.

Third and finally, the AAG cites several Washington cases – including a quite recent case – analyzing “unfair” acts independently from “deceptive” acts, so its claim that Washington courts do not recognize unfairness as an independent issue is plainly incorrect. See AAG at 7-9 (citing *State v. Kaiser*, 161 Wn. App. 705, 254 P.3d 850 (2011); *Blake v. Fed. Way Cycle Cntr.*, 40 Wn. App. 302, 698 P.2d 578 (1985); *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 659 P.2d 537 (1983)). Nothing in the Unpublished Opinion suggests that if PSG had raised and argued this issue, the appellate court would not have addressed it – but the claim would have failed for the same reasons: there is no evidence either of capacity to harm a substantial portion of the public, or of causation of harm. This case does not present the AAG’s sole issue. The Court should deny discretionary review.

**B. An Unpublished Opinion that does not address an issue never raised is not of interest to anyone.**

Finally, the AAG argues that an Unpublished Opinion that does not address the issue that the AAG raises is of substantial public interest. While it is obvious that PSG is attempting to create the impression of public interest in this Unpublished Decision by

asking a few amici to appear, this non-precedential decision does not affect Washington law. This Court should not accept review to address an Unpublished Opinion that does not even address the AAG's concern.

**IV. Conclusion**

For the reasons stated above, this Court should deny review.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of May, 2012.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed a copy of the foregoing  
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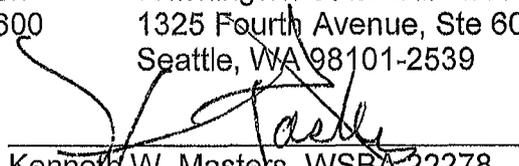
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**To:** Cheryl Fox  
**Subject:** RE: 87105-1 Klem v. Washington Mutual Bank - Response to Amicus Memorandum of Washington State Attorney General

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Attached for filing, please find: RESPONSE TO AMICUS MEMORANDUM OF WASHINGTON STATE ATTORNEY GENERAL

Case: *Klem v. Washington Mutual Bank*

Case Number: 87105-1

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Thank you!

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