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~~No. 89183-4~~

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA SHELLEY JACKSON, an individual

Petitioner;

v.

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

Respondents.

RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND McCARTHY & HOLTHUS, LLP'S ANSWERING BRIEF

Kathryn P. Salyer, WSBA # 36492
Eleanor A. DuBay, WSBA # 45828
Tomasi Salyer Baroway
121 SW Morrison St., Suite 1850
Portland, OR 97204
P: (503) 894-9900
F: (971) 544-7236
ksayler@tsbnwlaw.com
edubay@tsbnwlaw.com

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INTRODUCTION

By way of this appeal, Plaintiff Sandra Jackson challenges the constitutionality of the Washington Deed of Trust Act, RCW 61.24 *et. seq.* ("DTA"), and the propriety of certain actions taken in connection with the initiation of nonjudicial foreclosure proceedings against her home. Her Complaint, which was dismissed by the trial court, alleged claims against Quality Loan Service Corporation of Washington ("QLSW"), the foreclosure trustee, McCarthy & Holthus LLP ("M&H"), QLSW's attorneys, and against the beneficiary and loan servicer of her home loan, U.S. Bank, N.A., JPMorgan Chase Bank, N.A., and MERS ("co-Defendants").

None of Plaintiff's constitutional arguments hold muster. First, she failed to notify the Washington Attorney General of her constitutional challenge to the DTA (which in and of itself bars her challenge) and her argument that the DTA usurps the Superior Court's original jurisdiction is just shy of absurd. Plaintiff's other arguments on appeal were waived at the trial court, and are meritless in any event, owing to her disregard of the plain language of the DTA and its legislative history as well as long established case law. Finally, Plaintiff's Opening Brief addresses only her constitutional and DTA claims, thereby waiving any further review of the other claims in her Complaint. This Court should affirm the trial court in all respects.

COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

QSLW and M&H adopt and incorporate herein by this reference the Counterstatement of Issues set forth at page 6 of co-Defendants' Answering Brief.

STATEMENT OF THE CASE

QSLW and M&H adopt and incorporate herein by this reference the Statement of the Case set forth at pages 2-6 of co-Defendants' Answering Brief.

ARGUMENT

The only issues properly before the Court are Plaintiff's constitutional arguments relating to the original jurisdiction of the Superior Court and certain of her DTA arguments. The DTA creates a statutory mechanism that allows lenders to enforce their contractual rights efficiently and inexpensively and protects borrowers by providing a statutory remedy to prevent improper foreclosures. It does not limit the Superior Court's original jurisdiction. Moreover, Plaintiff's claims under the DTA fail as a matter of law. Specifically, Plaintiff's DTA theories rest on a strained and impermissible reading of the DTA and on legal theories which simply do not apply to the facts presented. No sale has occurred (nor can one occur), and thus Plaintiff has not been damaged, facts which alone are fatal to her claims.

While Plaintiff's Complaint alleged several additional theories of liability (e.g., negligence, consumer protection act violations and quiet title), she does not pursue those theories on appeal. Indeed, she expressly

waived all claims other than her constitutional claim in the trial court. Moreover, her Opening Brief abandons many of her constitutional arguments (e.g., due process, separation of powers, taking and denial of right to jury trial) by failing to raise these issues.

The trial court's order should be affirmed in all respects.

I. Standard of Review

A. The Constitutionality of Statutes.

Issues of statutory constitutionality are reviewed de novo. *HomeStreet, Inc. v. Dept. of Revenue,* 166 Wn.2d 444, 451 (2009). "[A] statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt." *Island County v. State,* 135 Wn.2d 141, 146-147 (1998) (citations omitted). This burden is a heavy one. *Amalgamated Transit Union Local, 587 v. State,* 142 Wn.2d 183, 205 (2000). Only where "argument and research show that there is no reasonable doubt that the statute violates the constitution" may this court deem a statute to be unconstitutional. *Id.* (citation omitted).

B. Motion to Dismiss.

This Court reviews de novo an order granting a motion to dismiss under CR 12(b)(6). The Court presumes the well-pled facts in the complaint are true, but the Court is not required to accept as true any legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wn.2d 107, 120 (1987); *State ex. rel. Pirak v. Schoettler,* 45 Wn.2d 367, 370

(1954). "[W]here it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton,* 88 Wn.2d 756, 759 (1977).

This Court is not required to consider Plaintiff's hypothetical facts unless those facts are consistent with the allegations of the Complaint and actually proffered by the Plaintiff. *Gorman v. Garlock,* 155 Wn.2d 198, 215 (2005). The proffered hypothetical must be "legally sufficient to support plaintiff's claim." *Id.* The hypothetical must meet the requirements of CR 11 if it is to be considered on the same footing as an allegation in a pleading. *See Biggs v. Vail,* 124 Wn.2d 193, 201 (1994) If the rule were otherwise, Plaintiff could defeat dismissal by demanding the court hypothesize any fact she was unable to plead under CR 11.

C. Scope of Review.

This Court only considers decisions made by the lower court. RAP 5.1(a). Plaintiff asks this Court to rule on the propriety of judicial notice (OB 47-50), but the trial court granted Defendants' motions to dismiss without rendering a decision on the motion for judicial notice. (CP 214, 220). As there is no lower court decision based on the motion for judicial notice, there is no basis on which this Court may consider Plaintiff's arguments on that issue. Thus, this Court should disregard Plaintiff's request for a ruling on the motion for judicial notice.

II. The Court Should Reject Plaintiff's Constitutional Arguments

A. This Court Lacks Jurisdiction to Consider Plaintiff's Constitutional Challenge.

This Court lacks jurisdiction to consider Plaintiff's constitutional challenge to RCW 61.24.030(7)(a) and (b). While Plaintiff seeks a declaration that the DTA is unconstitutional, she failed to serve the Washington Attorney General as required by RCW 7.24.110.[1] Plaintiff does not allege in her Complaint or in her Amended Complaint that she served the Attorney General. *See* CP 1-26; 82-108.

Service of the Complaint on the Washington Attorney General is jurisdictional. Failure to serve "the Attorney General 'with a copy of the proceeding' .... clearly deprives [Plaintiff] of relief under the Uniform Declaratory Judgments Act, RCW 7.24." *Kendall v. Douglas, Grant, Lincoln, and Okanogan Counties Public Hosp. Dist. No. 6,* 118 Wn.2d 1, 11 (1991). This means that the trial court did not have jurisdiction to address Plaintiff's claim that the DTA is unconstitutional. *Camp Fin., LLC v. Brazington,* 133 Wn. App. 156, 162 (2006).

This Court has "a duty to affirm [the trial court's dismissal] on any ground supported by the record, even if it is not the ground relied on by the trial court." *State v. Carter,* 74 Wn. App. 320, 324 n.2 (1994) (citation omitted). Although the trial court dismissed Plaintiff's constitutional arguments on other grounds, the fact that Plaintiff failed to serve the

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[1] RCW 7.24.110 provides, in part: "... if the statute ... is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard."

Attorney General provides sufficient grounds for affirming the dismissal of her argument that the DTA is unconstitutional. Moreover, as service on the Washington Attorney General is a jurisdictional requirement, Plaintiff could obviate compliance with an unfavorable decision by later raising this same jurisdictional defect herself. Because Plaintiff failed to comply with RCW 7.24.110, this Court should decline to consider Plaintiff's claims regarding the constitutionality of the DTA.

B. The Deed of Trust Act is Not Unconstitutional.

If the Court decides to consider the merits of Plaintiff's constitutional arguments, it should conclude that the trial court correctly refused to declare the DTA unconstitutional. QLSW and M&H join in and adopt the arguments made in the Answering Brief of Co-Defendants regarding Plaintiff's constitutional challenge to the DTA, setting forth below only brief arguments on this issue.

1) The Nonjudicial Foreclosure Process Does not Involve Judicial Inquiry.

Plaintiff's arguments that the DTA deprives the Superior Court of original jurisdiction hinge on the position that the nonjudicial foreclosure process involves some sort of judicial inquiry made by the trustee. In this regard, Plaintiff suggests that trustees decide and adjudicate issues, when in fact, the process the DTA creates is more ministerial in nature. Indeed, the trustee's role is to impartially "ensure that the rights of both the beneficiary and the debtor are protected." *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 790 (2013). In this regard, Plaintiff misreads *Klem*, which did

not convert nonjudicial foreclosures into judicial foreclosures. Indeed, should either party feel the need for adjudication of disputes, both have recourse to the courts. *See* RCW 61.24.130 (borrower may restrain sale on any legal or equitable ground). In point of fact, Plaintiff is before this court because she availed herself of the statutory access to the court provided by the DTA. However, once Plaintiff got to court, where her claims could be adjudicated, she failed to plead facts or offer hypotheticals to suggest that the entity foreclosing did not have the right to do so, and in fact concedes that issue. (CP 86 ¶ 2.6.) For these reasons, as more fully discussed by co-Defendants in their Answering Brief, the Court should find that the trial court properly dismissed Plaintiff's Complaint.

2) The DTA Does Not Divest the Superior Court of Jurisdiction.

Plaintiff's argument about what the Washington Legislature may and may not do (OB 9-30) misses the mark because a nonjudicial foreclosure is not a case at law but rather is the enforcement of a voluntary agreement between parties. *Kennebec, Inc. v. Bank of the West,* 88 Wn.2d 718, 725 (1977). There is no judicial involvement unless and until a party challenges the foreclosure, at which point the DTA preserves the Superior Court's jurisdiction over the dispute. RCW 61.24.130(2), 61.24.030(8)(j). Plaintiff's argument that the DTA usurps the Superior Court of jurisdiction runs counter to the words of the statute at issue and of case law interpreting it.

For these reasons, as discussed at length by co-Defendants in their Answering Brief, the Court should find that the DTA does not deprive the Superior Court of jurisdiction over matters involving real property, and instead creates a valid substitute for the judicial foreclosure process.

III. The Trial Court Properly Rejected Plaintiff's Other DTA Theories against QSLW and M&H

A. Plaintiff's DTA Claims are Moot and Should Be Dismissed.

RAP 18.9(c) allows an appellate court to dismiss a case if it has become moot. Dismissal is appropriate because the "court can no longer provide effective relief," where, as here, the nonjudicial foreclosure sale has "timed-out" pursuant to RCW 61.24.040(6). *Spokane Research & Defense Fund v. City of Spokane,* 155 Wn.2d 89, 99 (2005). Because Plaintiff is no longer in danger of losing her home in a nonjudicial foreclosure sale, her claim has become moot. *See Rose v. Reconstruct Co., N.A.,* 2013 U.S. Dist. LEXIS 56041, *7 (E.D. Wash. 2013) ("Plaintiff's request for injunctive relief related to this attempted foreclosure has been rendered moot."); *Olander v. ReconsTrust Corp.,* 2012 U.S. Dist. LEXIS 28019 (W.D. Wash. 2012); *Frias v. Asset Foreclosure Servs., Inc.,* 957 F. Supp. 2d 1264, 1270 (W.D. Wash. 2013) (rejecting argument that future sale might occur as basis for injunctive relief) *question certified by* 2013 U.S. Dist. LEXIS 147444 (W.D. Wash. 2013). "Where there is no pending or imminent action to restrain, a request for preliminary injunction is unripe and will not be considered because doing so would result in an impermissible advisory opinion."

Frias, 957 F. Supp.2d at 1270. Plaintiff's claims before this court seek an advisory opinion as to the construction of the DTA. Plaintiff is not entitled to enjoin a sale that is no longer pending. Because Plaintiff's DTA claim is moot, the Court should not further consider the sufficiency of Plaintiff's factual allegations.

B. Plaintiff's Claims Were Properly Dismissed Because She Cannot Allege Recoverable Damages Where a Sale Has Not Occurred.

Plaintiff's claim for damages under the DTA rests on precarious footing. Plaintiff's Complaint alleges that Defendants were "*attempting* to conduct and are conducting a private sale of plaintiff Jackson's home..." (CP 5, ¶2.9; 86, ¶2.9. Emphasis added). Plaintiff cannot base her DTA claim on speculative damages arising from a foreclosure sale that has not occurred, or on one that may occur in the future. It has long been held that a borrower has no claim for damages under the DTA where no sale occurred. *E.g., Vawter v. Quality Loan Service Corp. of Wash.,* 707 F. Supp. 2d 1115 (W. D. Wash. 2010). "The mere danger of future harm, unaccompanied by present damage, will not support liability." *Haslund v. Seattle,* 86 Wn.2d 607, 619 (1976). ("[A]n essential element of a cause of action based upon negligence or 'wrongful acts' ... is actual loss or damages."). *See also Udall v. T.D. Escrow Servs., Inc.,* 159 Wn.2d 903, 916 (2007). Plaintiff's home has not been sold and she cannot prove damages under the DTA.

After the trial court dismissed Plaintiff's Amended Complaint, the Washington Court of Appeals decided *Walker v. Quality Loan Serv. Corp, of Wash.,* 176 Wn. App. 294 (2013), finding, for the first time, a basis for pre-sale damages in wrongful foreclosure proceedings. *Walker* completely ignored the statutory remedy already provided by the Legislature (injunction to prevent the sale) and substituted a separate remedy (damages) which the Legislature did not provide, and which, if pursued, would not necessarily prevent the sale from occurring. The Western District of Washington recently questioned the *Walker* decision in *Frias*, and certified this question to this Court:

> "Under Washington law, may a plaintiff state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee's sale of real property?"

Id., at *2. This Court should overrule *Walker* and find that no presale claim for damages exists under the DTA. Assuming the *Walker* decision is overruled by *Frias*, Plaintiff's claim will fail for failure to prove damages.

C. Plaintiff's DTA Claims are Based on a Faulty Interpretation of RCW 61.24.030(7).

The central allegation of Plaintiff's DTA claim, and a major focus of her Opening Brief, is her argument that QLSW violated RCW 61.24.030(7)(a) by "failing to have sufficient proof identifying the

beneficiary and note owner *prior* to instigating this private sale." (CP 94)

RCW 61.24.030(7) provides, in relevant part:

> (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. *A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.*
>
> (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW 61.24.030(7) (emphasis added).

Notably, Plaintiff *does not* allege or contend that QLSW did not obtain a declaration from the beneficiary nor does she allege facts that would tend to show that QLSW failed to act impartially with respect to the interests of the lender and the debtor. Moreover, Plaintiff does not allege that she ever advised QLSW that she disputed the note-holder's identity or presented contrary evidence to QLSW before filing her Complaint. Rather, Plaintiff contends that the statutory declaration should not be sufficient and that, to satisfy its duty, a trustee must do more than obtain the declaration, even under circumstances where, as here, there has been no challenge to the declaration or other aspects of the nonjudicial foreclosure proceeding. (OB 43; CP 94.) Plaintiff's argument that QLSW is a "biased trustee" is a faulty legal conclusion addressed in Section C1 below.

Indeed, Plaintiff urges this Court to rewrite RCW 61.24.030(7) to place burdens on the trustee that were expressly rejected by the Legislature. Plaintiff urges this Court to ignore significant provisions of the statute and instead require the trustee to engage in a "judicial inquiry" into the ownership of the promissory note without reliance on any declarations or other evidence provided by the beneficiary. (OB 33-34.) In Plaintiff's world, a trustee would be required to seek out and evaluate evidence of every aspect of a homeowner's loan, from origination through the foreclosure referral and then make an "adjudicative decision" based on "proof that complies with the Civil Rules of Evidence" before proceeding nonjudicially. (OB 33-40.) That is not, however, what the Legislature prescribed.

The rules of statutory construction are clear: the Court should not interpret the statute in such a way as to render any portion of it "superfluous, void, or insignificant." *HomeStreet,* 166 Wn.2d at 452. Instead, "[w]henever possible, a statute must be interpreted so as to give all of its language meaning." *Sacred Heart v. Dept. of Revenue*, 88 Wn. App. 632, 639 (1997). "Where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself." *Bellevue Fire Fighters Local 1604, et al v. City of Bellevue*, 100 Wn.2d 748, 750 (1984). The Court "is required to assume the Legislature meant exactly what it said and apply the statute as written." *Duke v. Boyd*, 133 Wn.2d 80, 87 (1997). This Court cannot use the guise

of statutory construction to rewrite the DTA to require proof beyond the declaration the statute presently requires.

Plaintiff's construction of the statute is not consistent with the Legislature's intent. The Legislature previously considered and rejected requirements similar to these that Plaintiff now seeks to judicially insert into the DTA. The 2009 amendment that added subsection (7)(a) to RCW 61.24.030 began as Senate Bill ("SB") 5810. As originally proposed, SB 5810 did not require the trustee to have proof that the beneficiary held the promissory note. SB 5810, 61st Legislature, 2009 Regular Session (Feb. 3, 2009).[2] The State Senate revised SB 5810 to include the requirement that the trustee obtain "proof that the beneficiary is the actual holder" of the promissory note or has "possession of the original" promissory note "with the proper endorsements so that the entity initiating the foreclosure sale has the authority to enforce the terms of the promissory note." First Engrossed SB 5810, §7(7)(k)(i), 61st Legislature, 2009 Regular Session (Mar. 12, 2009)[3]. This amendment would have required that "[p]roof that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust must be made by way of an affidavit made by a person with personal knowledge of the physical location of the promissory note or other obligation." *Id.*,

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[2] Available at http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5810.pdf.

[3] Available at http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5810.E.pdf.

§7(7)(k)(ii). The State House of Representatives subsequently amended the proof requirement regarding the beneficiary's authority to foreclosure, replacing the Senate's language with the language that is now in the statute. Engrossed Senate Bill 5810, 61st Legislature, 2009 Regular Session, passed House Apr. 9, 2009, passed Senate Apr. 20, 2009.[4] At the final committee meeting of the House Judiciary Committee, Legislative staff counsel explained that the trustee "has to have proof from the beneficiary that the beneficiary is actually the holder of the promissory note securing the deed of trust, and that proof can be by declaration of the beneficiary."[5] Under this House amendment, the proof of the beneficiary's ownership of the promissory note may be in the form of the beneficiary's declaration. The fact that the Legislature considered alternate language for this section of DTA, but did not enact it, is significant. It is not the Court's role "to substitute [its] judgment for that of the Legislature." *Hardee v. Dept. of Social and Health Services,* 172 Wn.2d 1, 19 (2011) (citations omitted).

The Legislature's intent is clear from the legislative history and the final language of the statute. The 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

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[4] Available at http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/5810.PL.pdf.

[5] Available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030190. The quoted statement is at 12:19-12:47.

requirements on trustees in order to keep the process efficient and inexpensive. *See Cox v. Helenius*, 103 Wn.2d 383, 387 (1985).

While Plaintiff contends that "a borrower is given no opportunity to rebut" the declaration of ownership provided by the beneficiary to the trustee, (OB 40), in fact the borrower has every opportunity to inform the trustee that he or she disputes the identification of the beneficiary in the foreclosure notices and to present any contrary information.[6] It is then that the trustee must determine whether the foreclosure should proceed. *See Klem*, 176 Wn.2d at 791. If the trustee proceeds, a borrower may file an action to enjoin the foreclosure. *See* RCW 61.24.130. The borrower is not left unprotected under this statutory framework. Plaintiff cannot state a cause of action against QSLW for doing precisely what the DTA requires. Plaintiff's Complaint was properly dismissed.

D. Plaintiff's Other DTA Allegations against QLSW are Insufficient

1) The DTA Does Not Prohibit QLSW From Being Owned by a Law Firm.

Plaintiff's DTA claim concludes that QLSW is a "biased trustee" because it is allegedly owned by M&H, a law firm. (OB, 42). Once this Court disregards, as it must, Plaintiff's erroneous legal conclusions, *Pirak,* 45 Wn.2d at 370, it is clear that the factual allegations of the Complaint do

[6] RCW 61.24.030(8)(1) requires the Notice of Default to disclose the name and address of the owner of the promissory note. Additionally, the Real Estate Settlement Procedures Act, and many residential deeds of trust must, allow the borrower to request information relating to the ownership of the promissory note.

not support Plaintiff's claim. The DTA does not prohibit law firm ownership or operation of a corporate trustee. In fact, the DTA specifically permits an attorney, a professional corporation, or a limited liability company composed entirely of attorneys, to act as trustee. RCW 61.24.010(1)(c)-(d). The Legislature implicitly recognized that the fiduciary duty an attorney owes to his or her clients will differ from the good faith duty the attorney-as-trustee owes to the debtor and the lender.

Indeed, the Legislature provided specific duties of a trustee, separate and apart from the duties a lawyer might otherwise owe to his or her client. Pursuant to RCW 61.24.010(3), "[t]he 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." In addition, the trustee (whether or not also a lawyer) owes a duty of good faith to the borrower. RCW 61.24.010(4). QLSW's duties are created by statute, and there is nothing in the statute, its legislative history, or case law, to suggest that the trustee's duties are expanded by the professions of its owners. The allegations concerning the ownership of QLSW are an erroneous legal conclusion and they do not support Plaintiff's DTA claim.

2) The Rules of Professional Conduct Do Not Apply to QLSW.

Plaintiff's DTA claim also rests on the legal conclusion that M&H's alleged ownership of QLSW imposes the ethical responsibilities of attorneys on QLSW, and that these ethical responsibilities may conflict

with QLSW's statutory duties under the DTA. (OB 6, 46.) Not so. The RPC does not apply to QLSW, a nonlawyer, but even if it did, the RPC was "never intended as a basis for civil liability." *Hizey v. Carpenter*, 119 Wn.2d 251, 261 (1992).

RPC 5.7 expressly addresses the situation where, as alleged here, a lawyer or law firm owns a distinct entity through which law-related services are provided, which is separate from the legal services the lawyer provides to his or her clients. RPC 5.7(a)(2). Comment 4 to RPC 5.7 applies here and provides:

> Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that *the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply*. (emphasis added)

Thus, contrary to Plaintiff's arguments, a law firm's ethical duty to its clients does not extend to the services provided by a separate entity such as QLSW. While the law firm, M&H, admittedly owes ethical duties to its clients, (*see* RPC 5.7(a)), QLSW owes no duties beyond those imposed by the DTA. Therefore, even if Plaintiff's allegations concerning the law firm's ownership of QLSW were true, that ownership does not impose any heightened duties on QLSW. The RPC does not provide a basis on which Plaintiff may prevail against QLSW in this case.

3) Plaintiff's Factual Allegations concerning the Operative Documents are Insufficient to State a Claim and are Contradicted by the Exhibits to Her Complaint.

Plaintiff also argued that QLSW violated the DTA by failing to include the identity of the note holder in the foreclosure notices. (CP 94.) But the Notice of Default and Notice of Trustee's Sale, attached to her Complaint as Exhibits 4 and 5, contain the required disclosures. (CP 55, 60.) Both documents identify the note owner as U.S. Bank National Association, as Trustee for Washington Mutual Pass-Through Certificates Series WMALT 2006-AR4. The Notice of Default identifies the note owner as:

> "U.S. Bank, National Association as trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust" (CP 55),

whereas the Notice of Trustee's Sale identifies the beneficiary as:

> "U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for Washington Mutual Mortgage Pass-Through Certificates Series WMALT 2006-AR4" (CP 60).

Finally, the Amended Complaint alleges that the Deed of Trust did not include a statement that the property was not being used for agricultural purposes in violation of RCW 61.24.030(2) (*see* CP 94-95). However, a copy of the Deed of Trust which Plaintiff attached to her Complaint clearly contained such a statement. (CP 52.)

Plaintiff's Amended Complaint, like her Opening Brief, is rife with conclusory statements that are inconsistent with the exhibits attached to

her Complaint. Under the civil rules, these exhibits are part of the pleading. CR 10(c). The actual facts proffered by Plaintiff in the pleadings are contradictory and fail to demonstrate any violation of the DTA. The Court should affirm dismissal of the DTA claim against QLSW.

E. The Trial Court Correctly Dismissed Plaintiff's Claims against M&H.

Plaintiff alleges that the law firm M&H has taken or is attempting to take actions to foreclose on her property, but, as noted above, the exhibits to her Complaint reflect that the nonjudicial foreclosure was being conducted by QLSW. Plaintiff also attempted to impose liability on M&H by arguing that the corporate veil should be pierced, an argument which is equally specious. As there are no facts which could exist to justify recovery by Plaintiff against M&H, this Court should affirm the trial court's dismissal of Plaintiff's Complaint against M&H. *Bowman v. Two,* 104 Wn.2d 181, 183 (1985).

1) M&H is Not Foreclosing on the Deed of Trust.

The facts alleged in Plaintiff's Amended Complaint, and even her hypothetical to this Court, demonstrate that the nonjudicial foreclosure of her property is being advanced by QLSW as successor trustee of the Deed of Trust. Neither the alleged facts, nor the documents attached to the Amended Complaint, nor the documents in the public record, show that the law firm M&H has taken or is attempting to take any action to foreclose on the property. CR 10(c) ("A copy of any written instrument

which is an exhibit to a pleading is a part thereof for all purposes.") Nevertheless, Plaintiff contends that both QLSW and M&H have violated the DTA because the law firm "owns, operates or has substantial interest in the operations and workings of QLSW." (CP 85.) This Court should affirm the trial court's dismissal of Plaintiff's claims against M&H, as Plaintiff cannot plead any basis from which the Court could hold the law firm liable for the foreclosure activities of QLSW, a separate and distinct corporation. Nor can she identify any violation of the DTA that would impose liability on the law firm for the nonjudicial foreclosure.

2) Plaintiff Cannot Pierce the Corporate Veil to Hold M&H Liable for the Actions of the Trustee.

Plaintiff's Complaint also concludes that M&H is liable for the foreclosure activities of QLSW as its alleged subsidiary. This conclusion is premised on a faulty understanding of principles of corporate law and corporate disregard. "The purpose of a corporation is to limit liability." *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411 (1982). A corporation exists separate and distinct from the personality of its shareholders. The mere formation of separate corporate entities is not misconduct and does not provide any basis for holding the individual owners or shareholders liable for the corporation's activities. *Id.*

Moreover, "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation ... is not liable for the acts of its subsidiaries." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398 (2002) (citations omitted). Indeed, for a parent

corporation to be liable for the obligations of its subsidiary, the party seeking relief must show that there is an overt intention by the corporation to disregard the corporate entity in order to avoid a duty owed to the party seeking to invoke the doctrine. *Id.*, citing *Morgan v. Burks,* 93 Wn.2d 580, 587 (1980).

The alleged facts on which Plaintiff bases her claims against QLSW and M&H are that the two entities are "operationally related," commingle employees, (OB 4; 45, CP 85), and that M&H owns QLSW. Even assuming the truth of these "facts," the Complaint still fails to state a cause of action against M&H because these facts do not provide any basis to pierce the corporate veil to impute the actions of QLSW to M&H.

The Court may disregard the corporate distinction by "piercing the corporate veil," but only in exceptional circumstances to prevent injustice. *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 707-08 (1997). Washington recognizes two theories to justify piercing the corporate veil. *Grayson v. Nordic Construction Co., Inc.,* 92 Wn.2d 548, 552-553 (1979). The first is where the corporate entity has been disregarded; the second is where the corporate entity is nothing more than the alter ego of the principals. *Id.* The facts of this case do not support either basis for holding M&H liable for the alleged acts of QSLW.

a. <u>There Was No Disregard of the Corporate Identity</u>.

The test for piercing the corporate veil based on disregard of the corporate entity requires proof of two elements: (1) the corporate form is intentionally used to violate or evade a duty; and (2) disregarding the

corporate form is necessary and required to prevent unjustified loss to the injured party. *Meisel,* 97 Wn.2d at 410. Importantly, "commingling" of assets alone is not sufficient to meet the test, nor is the sharing of employees, officers, clients, physical addresses or business interests. *See Norhawk Inv., Inc. v. Subway Sandwich Shops*, 61 Wn. App. 395 (1991) (notwithstanding the commingling of assets, piercing the corporate veil was not appropriate because the corporate form was not being used to mislead and evade a duty to plaintiff); *Rogerson Hiller Corp. et al v. Port of Port Angeles*, 96 Wn. App. 918 (1999) (finding that sole shareholder of multiple corporations commingled finances, banking transaction, employee savings plans, and inventories, but that "commingling" alone was insufficient to pierce corporate veil).

Plaintiff's attempt to pierce QLSW's corporate veil and hold M&H liable for QLSW's alleged violations of the DTA is based exclusively on commingling of assets, employees and operations (OB6) and fails to satisfy the required elements under the corporate disregard theory. Plaintiff cannot satisfy the first element by demonstrating an abuse of the corporate form. The facts alleged by Plaintiff are that QLSW is advancing the nonjudicial foreclosure of the subject property, and that QLSW violated various provisions of the DTA by failing to obtain proof of the beneficiary's authority to foreclose. (CP 94.) Even if these facts were true, they would not demonstrate any misuse of the corporate form. The DTA expressly allows a Washington corporation to act as trustee. RCW 61.24.010(1)(a). QLSW's alleged failure to properly advance the

foreclosure does not constitute a misuse of the corporate form to evade creditors, and accordingly no basis has been shown to pierce the veil and hold QLSW's individual shareholders (allegedly including M&H) liable for violations of the DTA.

As to the second element, Plaintiff cannot prove that disregarding QLSW's corporate form to reach M&H is necessary or required to prevent her unjustified loss. To the contrary, under the DTA, Plaintiff's requests to enjoin the foreclosure and seek other relief would be appropriate against QLSW as trustee. *See* RCW 61.24.130. Enjoining M&H from foreclosing would be hollow relief, as M&H is not the successor trustee and is not taking any actions to foreclose. Moreover, there are no allegations that QLSW would be unable to pay any potential monetary judgment rendered against it. Hence, piercing the corporate veil to hold M&H liable for QLSW's foreclosure activities is neither necessary nor required to prevent Plaintiff from suffering an alleged loss.

b. QLSW is Not M&H's Alter Ego.

Plaintiff's allegations also do not satisfy the test for piercing the corporate veil based on the alter ego theory, which requires that there be "such unity of ownership and interest that the separateness of the corporation has ceased to exist." *Grayson*, 92 Wn.2d at 553 (citation omitted). However, a corporation's separate legal identity is not lost merely because all of its stock is held by one person or entity. *Id.* Plaintiff alleges that QSLW is owned by M&H, and, as such, that QSLW and the law firm are acting as a single entity. (OB 45) Proceeding under

this theory would only be appropriate if regarding "the two corporations" as separate would aid the consummation of a fraud or wrong upon others." *J.I. Case Credit Corp. v. Stark,* 64 Wn.2d 470, 475 (1964). Commingling of property and interests above is not enough. *Norhawk,* 61 Wn. App. at 401. Likewise, "[h]arm alone does not create corporate misconduct." *Id.* at 400. (citation omitted). Plaintiff's corporate disregard claim rests on faulty legal conclusions and she has not identified any basis on which to overturn the trial court's dismissal of this claim.

Therefore, this Court should affirm the dismissal of all claims against M&H.

IV. Dismissal of Plaintiff's Other Claims is Appropriate.

A. Plaintiff Does Not Assign Error to the Trial Court's Dismissal of Her Other Claims.

Plaintiff's Complaint and Amended Complaint asserted several causes of action in addition to her DTA claim, including claims for negligence, consumer protection violations, and quiet title. (CP 16-25, 97-106.) But her Opening Brief fails to address anything beyond the DTA claim. Because Plaintiff has not raised any assignments of error arising out of the dismissal of her other causes of action, she has waived any right to claim such errors. *See Ortblad v. State*, 85 Wn.2d 109, 111-112 (1975). In addition, Plaintiff's Opening Brief abandoned many of the

constitutional theories alleged in her Complaint, including due process, right to trial by jury, separation of powers, and taking.

This Court "will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority." *McKee v. American Home Products, Corp.,* 113 Wn.2d 701, 705 (1989); RAP 10.3(a). Where Plaintiff's brief contains no argument or citation to authority pertaining to the omitted issues, this Court will deny review of those arguments. *Ang v. Martin,* 154 Wn.2d 477, 486-487, (2005); RAP 10.3(a).

The Court should affirm the dismissal of all remaining causes of action in the Amended Complaint, and not consider theories not raised in Plaintiff's Opening Brief.[7]

B. Plaintiff Waived Her Non-Constitutional Law Claims During Oral Argument.

"A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Bowman v. Webster*, 44 Wn.2d 667, 669, (1954). At oral argument, Plaintiff's counsel expressly abandoned all claims other than the constitutional argument. He declared: "We're not coming before you under the Deed of Trust Act. We're coming before you

[7] Additionally, Plaintiff's CPA claims are barred by the statute of limitations, as briefed in the Motions to Dismiss (CP 145-146) and, thus, those claims are moot. RCW 19.86.120; *Spokane Research,* 155 Wn.2d at 99.

directly under the Constitution. We're saying the statute is unconstitutional." RP (7/19/13) 27:20-22. The trial judge noted: "[Ms. Jackson's] response seemed to waive all DTA claim[s], violations, and only want[s] the Court to consider constitutional violations." *Id.*, at 32:1-15. Plaintiff's counsel followed with a request to have the court certify solely the constitutional law question to the Supreme Court. *Id.*, at 35:4-36:3. Although the trial court's order granting Respondents' Motion to Dismiss does not include a waiver ruling, CP 211-13, 215-17, the words and conduct of Plaintiff's counsel support the finding that Plaintiff has waived all claims other than the constitutional claim. This Court should deem all of Plaintiff's arguments other than her constitutional argument to be waived, and the court should deny the constitutional argument for the reasons set forth above.

CONCLUSION

Plaintiff has waived all of her claims except her constitutional claim, and that claim cannot be considered because Plaintiff failed to serve the Attorney General. If the Court considers Plaintiff's constitutional argument, the Court should find the Deed of Trust Act to be constitutional.

The Court should not consider Plaintiff's non-constitutional claims, as those claims have been waived. If the Court does consider Plaintiff's non-constitutional claims, Plaintiff cannot prove that QSLW violated the Deed of Trust Act in advancing the nonjudicial foreclosure of her property. She also cannot prove any basis for liability against M&H, the

alleged "owner" of QLSW. For these reasons, the Court should affirm dismissal of all claims against Quality Loan Service Corporation of Washington and its attorneys, McCarthy & Holthus LLP.

Respectfully submitted this 20th day of March, 2014.

TOMASI SALYER BAROWAY

/s/ Kathryn P. Salyer

Kathryn P. Salyer, WSBA # 36492
Eleanor A. DuBay, WSBA # 45828
Tomasi Salyer Baroway
121 SW Morrison St., Suite 1850
Portland, OR 97204
P: (503) 894-9900
F: (971) 544-7236
ksalyer@tsbnwlaw.com
edubay@tsbnwlaw.com

CERTIFICATE OF SERVICE

I certify that on March 20, 2014, I served a copy of the foregoing document, described as RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND McCARTHY & HOLTHUS, LLP'S ANSWERING BRIEF on the following persons by electronic service and by U.S. First Class Mail:

Scott E. Stafne
Joshua B. Trumbull
Stafne Trumbull, LLC
239 North Olympic Avenue
Arlington, WA 98223

Fred B. Burnside
Zana Bugaighis
Davis Wright Tremaine LLP
1201 Third Ave., Ste. 2200
Seattle, Washington 98101-3045

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct, and that this Declaration was executed in Portland, Oregon.

Dated: March 20, 2014

/s/ Elisha Treacy
Elisha Treacy, Legal Assistant
Tomasi Salyer Baroway

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Subject: Supreme Court No. 89183-4; Jackson v. Quality Loan Service Corp. of WA, et al.

Dear Clerk:

In the Supreme Court Case No. 89183-4, *Jackson v. Quality Loan Service Corp. of WA, et al.*, attached for filing on behalf of Kathy Salyer, WA#36592, (503) 894-9900, ksalyer@tsbnwlaw.com, is **Respondents Quality Loan Service Corporation of Washington and Mccarthy & Holthus, LLP's Answering Brief.**

-Elisha Treacy