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~~No. 89183-4~~

(King County Superior Court No. 13-2-15865-5)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA SHELLEY JACKSON, a single woman,

Petitioner/Plaintiff,

v.

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

Respondents/Defendants.

RESPONDENTS U.S. BANK, N.A., JPMORGAN CHASE BANK, N.A., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S ANSWERING BRIEF

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I. INTRODUCTION

Petitioner Shelley Jackson asks this Court to reverse the trial court's Order dismissing her Complaint—which challenges Defendants' right to initiate foreclosure on her property—because she contends the Washington Deed of Trust Act ("DTA"), RCW 61.24 et seq. is unconstitutional, making any nonjudicial foreclosure efforts wrongful. She argues the DTA somehow usurps the Superior Court's original jurisdiction by delegating to the trustee of a Deed of Trust the power to decide matters involving title or possession of real property. Plaintiff argues that trustees act as judges when they proceed with a consensual and contractual nonjudicial foreclosure.

Even if she had proven she notified the Washington Attorney General of her constitutional challenge to a Washington statute —a prerequisite that bars her constitutional challenge—her arguments make no sense. The entire point of a ***nonjudicial*** foreclosure is that it is ***not judicial*** in nature and is not an adjudication of anything. If Plaintiff's argument were correct, every real property transaction—buying or leasing a home, etc.—would have to go through the courts. Taken her argument to its logical conclusion would require invalidating as unconstitutional any alternative dispute resolution method (arbitration, mediation, etc.) involving real property. This is absurd.

In any event, the DTA expressly preserves superior court jurisdiction to resolve any disputes over the foreclosure process (as does Plaintiff's Deed of Trust). Indeed, that Plaintiff filed her Complaint in the

superior court below demonstrates the DTA does not usurp superior court jurisdiction (a fact she concedes in her Complaint).

Plaintiff's other grounds for appeal ignore the DTA's plain language and this Court's prior opinions. This Court should conclude the trial court properly applied the Washington State Constitution, established case law, and the DTA in dismissing Plaintiff's Complaint, and should affirm the trial court in all respects.

II. STATEMENT OF THE CASE

A. Factual Background

Plaintiff's Note. Plaintiff signed an Adjustable Rate Note, dated March 17, 2006, to obtain a $715,000 loan from Cameron Financial Group, Inc., DBA 1st Choice Mortgage to refinance her home loan. Clerk's Papers ("CP") 87-88, ¶ 3.2; CP 29-34; CP 155-60. The Note explained Cameron Financial could transfer the Note and the right to receive payments. CP 29, ¶ 1.

Plaintiff's Deed of Trust. Plaintiff also signed a Deed of Trust, dated March 17, 2006, creating a lien on her Seattle home to secure her obligations under the Note. CP 88, ¶ 3.5; CP 38-53. The Deed of Trust similarly explains that Cameron Financial could sell Plaintiff's property without prior notice to her, and that unless she was told otherwise, the loan servicing obligations (collection of payments and general servicing duties) would remain with the entity disclosed to her as loan servicer (not any new Note holder). CP 50, ¶ 20. The Deed of Trust also explains that upon default, Plaintiff agreed the Trustee of the Deed of Trust could sell her

property to recoup the loan proceeds. CP 51.

The Deed of Trust identified Cameron as "Lender." CP 39, ¶(C). That designation meant Cameron Financial (as Note holder) was beneficiary of the Deed of Trust as a matter of law, until it transferred the Note to a new party. RCW 61.24.005(2). Plaintiff and Cameron Financial also agreed, however, to label MERS as "beneficiary" under the Deed of Trust, but ***solely*** as a nominee (agent) for Cameron Financial and any successor or assign of Cameron Financial. CP 39, 40. Thus, in the Deed of Trust MERS was listed as an agent for a disclosed principal (Cameron Financial), and the parties agreed that MERS would continue to act as an agent for any successor Note holder until that Note holder were to terminate MERS's agency interest.[1] The Deed of Trust also listed Fidelity National Title as "Trustee." CP 39.

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[1] The term "beneficiary" under the Deed of Trust is a contractual label (not a legal conclusion), useful for designating MERS as an agent for the Note holder (i.e., the beneficiary as a matter of law), to ensure MERS will get notice of any competing claims recorded against the property; this allows MERS (as agent) to relay that information to its principal (the Note holder), whomever that may eventually be. This Court in *Bain* recognized that MERS's role is "plainly laid out in the deeds of trust," that there is "no reason to doubt that lenders and their assigns control MERS," and that MERS "certainly" provides "significant benefits," by creating "efficiency," and overcoming "a drawback of the traditional mortgage financing model: lack of liquidity." *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 86, 105, 107, 109 (2012) (citation omitted). Thus, MERS's beneficiary designation is a matter of routine agency and contractual convenience, not an attempt to contract around Washington law. Indeed, the Deed of Trust discloses Cameron Financial as the Note holder (and thus beneficiary as a matter of Washington law), and the Deed of Trust explains that to the extent any term in the Deed of Trust conflicts with applicable law, that law controls. CP 39, ¶ (C), 49 ¶ 16. Nothing in the Deed of Trust suggests MERS is claiming that it is Note holder (i.e., beneficiary as a matter of Washington law). *See Bain*, 175 Wn.2d at 106 (recognizing DTA "approves the use of agents" and it is "likely true" that "lenders and their assigns are entitled to name MERS as its agent"). It also worth noting that on remand, on a complete record, MERS obtained summary judgment because the Deed of Trust was not split, MERS did have a principal for whom it acted, and MERS caused no injury. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, 2013 WL 6193887, *5 (Wash. Super. 2013). *See also Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248-49 (2008) (court may consider trial court orders).

Plaintiff's Loan Was Sold to a Securitized Trust. Plaintiff concedes her loan was sold to a securitized trust known as the "WaMu Mortgage Pass Through Certificate for WMALT 2006-AR4" but questions whether the Trust or the Trust's investors are the "note holders." CP 85-86 ¶ 2.6. Plaintiff does not dispute that U.S. Bank (Bank as Trustee for WMALT 2006-A4 Trust) possesses her Note (that is the only way the investors for that Trust could be "note holders," as she alleges).[2]

Plaintiff Defaulted on Her Loan in January 2011. Beginning in January 2011—i.e., more than three years ago—Plaintiff defaulted on her loan payments. *See* CP 56, ¶ 2 (excerpts of notice of default).

MERS Terminates its Nominee Role. On September 20, 2012, MERS—acting as nominee for U.S. Bank as Trustee for WMALT 2006-A4 Trust (i.e., the successor and assign of Plaintiff's loan)—assigned its nominee interest in the Deed of Trust back to its principal, U.S. Bank as Trustee, thereby terminating MERS's agency interest. CP 162. No foreclosure sale was scheduled or pending at the time MERS's role ended.

Plaintiff Received Her Notice of Default. In November 2012, Plaintiff was mailed (and received) a Notice of Default. *See* CP 56; CP 61, § VI. That Notice of Default disclosed her loan had been sold to U.S. Bank as Trustee for the WMALT 2006-AR4 Trust (which owned her loan), Chase was her loan servicer, her arrears were approximately $127,000, and a foreclosure sale might be scheduled if she did not cure her

[2] Plaintiff's Complaint attached as Exhibit 2 an unauthenticated and unsigned allonge that she obtained from some unspecified source. CP 6, ¶ 3.3, CP 36, 88. But because the allonge is unsigned, it is a nullity. *See* RCW 62A.2-204.

default, but she "ha[d] recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground." CP 55-57.

U.S. Bank Appointed a New Trustee Under the Deed of Trust. On November 13, 2012, U.S. Bank (as Note holder) recorded an Appointment of Successor Trustee in King County, appointing Quality Loan Service Corp. as new trustee under the Deed of Trust. CP 164-66.

Quality Loan Service Scheduled a Foreclosure Sale. Because Plaintiff did not cure her default Quality Loan Service recorded a Notice of Trustee's Sale, scheduling the sale for April 26, 2013. CP 89, ¶ 3.12; CP 60-63. The Notice of Trustee's Sale referenced the Notice of Default, identified the original parties to the Deed of Trust—to allow the recorder's office to link to the Deed of Trust—and identified U.S. Bank as successor in interest to Plaintiff's loan. CP 60-61. The foreclosure sale did not occur, and the property has not been sold. (And under RCW 61.23.040(6) any foreclosure sale must start over, since the maximum 120-day-extension period has elapsed from the original sale date of April 26, 2013.)

B. Procedural Background

Plaintiff Filed Her Complaint. Plaintiff filed her Complaint on April 8, 2013, eighteen days before the scheduled foreclosure sale. Plaintiff alleged claims against U.S. Bank, JPMorgan Chase Bank, N.A., MERS, Quality, and McCarthy & Holthus, LLP ("M&H") as legal counsel for Quality. *See* CP 1-63. On April 30, 2013, Plaintiff filed an Amended Complaint against the same entities for breach of contract, DTA violations, constitutional violations, CPA violations, negligence, and quiet

title. *See* CP 82-108. Plaintiff does not dispute her default, does not dispute that US Bank was disclosed to her as the owner of her loan in her Notice of Default, does not claim any other entity has ever tried to foreclose on her, and does not claim she can reinstate her loan but is afraid of paying the wrong entity. The gravamen of Plaintiff's Complaint is ***not*** that she does not know ***who*** to pay, but that she wants to find some way to avoid the consequences of defaulting on her loan.

The Trial Court Granted Defendants' Motions to Dismiss. In three separate orders, dated June 14, July 25, and July 30, 2013, the trial court dismissed with prejudice all claims against M&H; U.S. Bank, Chase, and MERS; and Quality, respectively. CP 167, 211-12, 214. On August 8, 2013, the court issued an order clarifying its dismissal against U.S. Bank, Chase, and MERS, explaining it had considered Plaintiff's hypothetical arguments in dismissing those claims. CP 215-17.

Plaintiff Seeks Direct Review to the Supreme Court. On August 9, 2013 Plaintiff sought direct review to this Court, which Defendants opposed. This Court has yet to rule on the motion for direct review. Plaintiff filed her Opening Brief on December 20, 2013.

III. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly conclude the DTA does not violate the Washington State Constitution?

2. Did the trial court properly interpret the DTA in dismissing Plaintiff's DTA claims?

3. Did Plaintiff waive her non-constitutional law claims?

IV. ARGUMENT

The only issues before this Court on review are Plaintiff's challenges to the DTA under Article 4 Section 6 of the Washington Constitution and alleged DTA violations.

Plaintiff's Complaint alleged several additional theories of liability that she does not pursue on appeal; Plaintiff has thereby waived any challenge to the dismissal of those claims. *Ang v. Martin*, 154 Wn.2d 477, 486-87 (2005); RAP 10.3(a). Specifically, Plaintiff's opening brief does not challenge the dismissal of her breach of contract, CPA, unconscionability, negligence, or quiet title claims as to Chase, U.S. Bank, or MERS. Likewise, in her Opening Brief, Plaintiff abandons her claims of constitutional law theories based on due-process, separation of powers, taking without just compensation, and denial of right to a jury trial, and so has waived them on appeal. *Id.*

A. Standards and Scope of Review.

Plaintiff's Constitutional Challenge: Courts review the constitutionality of a statute de novo. *State v. Abrams*, 163 Wn.2d 277, 282 (2008). But Courts presume a statute is constitutional; the burden rests on the challenging party to prove the statute's unconstitutionality beyond a reasonable doubt. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 335 (2000). A party meets the standard "if argument and research show that there is no reasonable doubt that the statute violates the constitution." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205 (2000).

Motion to Dismiss Standard: This Court reviews a motion to dismiss de novo. *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 201 (1998). A court properly grants a motion to dismiss under 12(b)(6) when "no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994). The purpose of CR 12(b)(6) is to "weed[] out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry v. Chevy Chase Bank, FSB,* 169 Wn.2d 96, 102 (2010). While all well-pleaded facts "are presumed true ... the court is not required to accept the complaint's legal conclusions." *Rodriquez*, 144 Wn. App. at 717-18. "[W]here it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Id.* at 759. To withstand dismissal, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, ... or ***contain allegations*** from which an inference ***fairly may be drawn*** that evidence on these material points will be introduced at trial." *Berge v. Gorton*, 88 Wn.2d 756, 763 (1977) (emphasis added).

Hypothetical Facts. Plaintiff's Opening Brief argues the Court must consider any possible hypothetical facts that might state a claim. OB at 41. Plaintiff is mistaken. The Court may "consider hypothetical facts ***proffered*** by the plaintiff" to determine whether they are "legally sufficient to support plaintiff's claim." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214-15 (2005). But courts may consider only hypothetical

facts ***consistent*** with the allegations of the complaint and ***actually proffered*** by the plaintiff. *Id.* at 215; *McCurry*, 169 Wn.2d at 116 (Johnson, J., dissenting) (plaintiffs cannot defeat CR 12(b)(6) motion "by suggesting hypothetical facts that bear no logical relation to the claims raised in their complaint."); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750 (1995) ("a court may consider hypothetical situation ***asserted by*** the complaining party") (emphasis added). Otherwise the courts would usurp the parties' role and provide an improper "advisory ruling." *West v. Thurston Cnty.*, 169 Wn. App. 862, 867 n.3 (2012).

By arguing the trial court erred in refusing to blindly accept legal theories based on unpleaded and inconsistent facts, Plaintiff wants the benefits of Washington's liberal pleading standard without the consequences of CR 11. The Court should not rewrite Plaintiff's Complaint to hypothesize facts that Plaintiff—mindful of her CR 11 obligations—chose not to assert. If Plaintiff wants to prevail she "must allege and prove, without violating CR 11," facts showing Defendants' conduct meets every element of each claim. *Havsy v. Flynn*, 88 Wn. App. 514, 520 (1997) (affirming dismissal). If the rule were otherwise, a plaintiff could simply allege "the defendant wrongfully foreclosed," without more, and withstand dismissal by demanding the Court hypothesize any facts she was unwilling to plead under CR 11. Even under Washington's "any set of facts" standard, this Court need not "swallow the plaintiff's invective hook, line, and sinker; bald assertions,

unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996) (using "any set of facts" standard); *see also SEC v. Seaboard Corp.*, 677 F.2d 1315, 1316 (9th Cir. 1982) (same; allegation defendant "fraudulently induced" plaintiff to enter transaction was mere a conclusion and need not be accepted as true without allegations as to how plaintiff was induced).

Scope of Review. Plaintiff's brief argues that the trial court erred to the extent it considered the documents attached to and referenced in her Complaint, as well as documents subject to judicial notice, without converting the motion to dismiss into one for summary judgment. OB 47-50. Although Plaintiff does not contest that courts may consider facts contained in documents attached to a complaint (such as Plaintiff's Note) on a motion to dismiss, Plaintiff argues the trial court should not have considered the Corporate Assignment of Deed of Trust (CP 162) and Appointment of Successor Trustee (CP 164-166).[3] But the trial court granted Respondents' motion to dismiss without rendering a decision on the motion for judicial notice. As a result, this Court lacks jurisdiction to consider this issue on appeal. RAP 5.1(a).

Even if that were otherwise, courts may take judicial notice of matters of public record without converting a CR 12(b)(6) motion into one

[3] And to the extent the Complaint's allegations contradict the documents referenced in and attached to the Complaint, the documents control, and the Court may rely on those documents. *See Guardianship of Robinson*, 9 Wn.2d 525, 536 (1941) ("certainly the court, in passing upon the demurrer and motion, had the right to, and did, take judicial notice of its own records, and was not bound to accept as true allegations in the petition or the amended petition contrary to such records.").

for summary judgment. A court may do so if the information is "not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726 (2008) (quoting ER 201(b)). Because Plaintiff did not and does not reasonably question the accuracy of the King County Recorder's Office, the trial court could not have erred had it expressly granted the request for judicial notice without converting the motion into one for summary judgment.

B. The Court Should Reject Plaintiff's Constitutional Challenge to the DTA.

1. This Court lacks jurisdiction to consider Plaintiff's constitutional challenge.

As a threshold matter, the Court lacks jurisdiction to consider Plaintiff's constitutional challenge because she did not allege service (or file a proof of service with the Court) of her constitutional arguments on the Attorney General. "A plaintiff who seeks to have a statute declared unconstitutional must provide the attorney general with notice of the action." RCW 7.24.110; *see also Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 160 (2006). "[S]ervice upon the attorney general is mandatory; it is a prerequisite to the court's jurisdiction." *Camp Fin.*, 133 Wn. App. at 160 (citing *Kendall v. Douglas, Grant, Lincoln & Okanogan Cntys. Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 11-12 (1991)). Neither Plaintiff's Complaint nor the record below reflects service on the Attorney General. *See* CP 1-26; 82-108. "The trial court did not, then, have jurisdiction to address the issue." *Camp Fin.*, 133 Wn. App. at 162.

The Court may affirm the trial court's order dismissing Plaintiff's Complaint on this basis because Plaintiff's legal theories turn on her constitutional arguments and she waived her other claims in oral argument before the trial court. *State v. Carter*, 74 Wn. App. 320, 324 n. 2 (1994) (court may affirm on any basis supported by the record). RP (7/19/13) 27:20-22 ("We're not coming before you under the Deed of Trust Act. We're coming before you directly under the Constitution. We're saying the statute is unconstitutional."); 32:7-9 (Court: "His response seemed to waive all DTA claims, violations, and only want the Court to consider constitutional violations."). This notice and pleading requirement is nontrivial. Absent proof of notice to the Attorney General, Plaintiff can litigate the issue, await the result, and if unfavorable, argue the decision is not binding because the court lacked jurisdiction to resolve the issue.

2. The Deed of Trust Act Does Not Violate Article 4 Section 6 of the Washington State Constitution.

If the Court decides to consider the merits of Plaintiff's constitutional arguments, however, it should conclude the trial court correctly refused to declare the DTA unconstitutional. Plaintiff bases her primary thesis on the mistaken theory that a nonjudicial foreclosure is somehow "judicial" in nature, and that as a result, the DTA usurps jurisdiction from the Superior Courts over cases involving title or possession of real property. But the nonjudicial foreclosure process is (as the name suggests) not judicial at all, and the DTA expressly preserves the

superior court's jurisdiction to resolve disputes stemming from nonjudicial foreclosures (as it did here).

a. Nonjudicial Foreclosure is Not Judicial.

Plaintiff's argument hinges on her theory that the nonjudicial foreclosure process involves a "judicial inquiry," i.e., an inquiry she believes the constitution reserves to the Courts. For support, Plaintiff cites *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771 (2013), claiming that case establishes a Trustee under a Deed of Trust "acts as a judge" and engages in "judicial inquiries." OB 30-31. Plaintiff misreads *Klem* and misunderstands the DTA.

In *Klem*, the Court was addressing the duties of a Trustee and drew an ***analogy*** between judicial and nonjudicial foreclosures, but it did not somehow convert a nonjudicial process into a judicial one, via dicta. *Klem*, 176 Wn.2d at 789-90. Justice Wiggins observed that in judicial Deed of Trust foreclosures, an "impartial judge," rather than a Trustee, ultimately completes the sale by Court Order. Because a nonjudicial foreclosure does not involve a judge, the Trustee should likewise "act as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected." *Id.* The point was ***not*** that the DTA makes Trustees into judges, but rather that Trustees should act impartially, just as a judge would. Plaintiff "reads far too much into the [judicial] analogy," as both the DTA and the cases interpreting it show Trustees do not adjudicate anything. *Sedima v. Imrex Co.*, 473 U.S. 479, 511 (1985) (warning against reading too much into analogies).

Indeed, in rejecting a similar challenge to the one Plaintiff raises here, this Court expressly recognized that "[a] nonjudicial trustee sale is ***not made pursuant to a judgment***," but instead is entirely voluntary, and thus there is no state action by the Courts or otherwise. *Felton v. Citizens Fed. S&L of Seattle*, 101 Wn.2d 416, 423 (1984) (emphasis added); *Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 725 (1977). Nothing in *Klem* converts a nonjudicial process into a judicial one.

Plaintiff next argues the legislature's decision to allow a Trustee to rely on a sworn statement from the beneficiary that the beneficiary has the right to foreclose involves some sort of "judicial inquiry." OB 31, 33 (citing RCW 61.24.030(7)(a)-(b)). She contends that RCW 61.24.030(7) deprives her of some right because it "provides no opportunity for borrowers to present evidence that the entity attempting to foreclose does not have the right to do so." OB 38.

But Plaintiff cites nothing supporting these propositions. As this Court recognized in *Schroeder v. Excelsior Mgmt. Grp. Inc.*, 177 Wn.2d 94 (2013), that RCW 61.24.030 "is not a rights-or-privileges-creating statute," but "[i]nstead, it sets up a list of "requisite[s] to a trustee's sale." *Id.* at 106-07. Indeed, the Court specifically examined all the requirements under RCW 61.24.030 and held they were "not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Id.* at 107. This requirement is no more judicial than requiring that the lender identify the

Deed of Trust or issue a Notice of Default. The Trustee is not adjudicating anything; it is merely ensuring compliance with the list of statutory prerequisites to a sale. Countless statutes contain notarization, certification, or other similar requirements as a condition of taking further action; Plaintiff's argument would mean that hundreds of statutes are unconstitutional.[4] She cites not one case supporting her theory and this Court should reject her argument here.

And certainly nothing under the DTA prevents Plaintiff from having the "opportunity to present evidence that the entity attempting to foreclose does not have the right to do so," as she suggests. If Plaintiff had some reason to believe that the entity foreclosing was not entitled to do so, she could either: (a) provide that information to the Trustee and demand that the Trustee stop the sale; or (b) file a Court action to restrain the sale. *See Klem*, 176 Wn.2d at 789-92 (trustee must even-handed and impartial as to both lender and borrower in determining whether to proceed to sale); RCW 61.24.010(4) (Trustee has duty of good faith to all

[4] *See, e.g.*, RCW 11.42.010 (a declaration and oath in affidavit form or under penalty of perjury is required for identification of a nonprobate notice agent to creditors); RCW 16.52.220 (written certifications must be signed under penalty of perjury for the transfer of certain mammals to research institutions); RCW 18.104.093 (application for a water well construction operator's training license requires a statement by a licensed operator signed under penalty of perjury verifying the applicant has the required field experience and assuming liability for all of the applicant's well construction activities); RCW 19.225.040 (athlete agent disclosure form must be signed under penalty of perjury); RCW 25.05.025 (partnership statement filed with the office of secretary of state must be signed under penalty of perjury); RCW 29A.08.510 (county auditor or Secretary of State may rely on a registered voter's signed statement "subject to the penalties of perjury" that another registered voter is deceased in canceling the deceased voter's registration from the official state voter registration list).

sides); RCW 61.24.130 (borrower may restrain sale on any legal or equitable ground).

Here, Plaintiff chose the latter option. But notably, nowhere in her Complaint (or argument below) does she offer even a hypothetical fact suggesting "the entity attempting to foreclose [U.S. Bank] does not have the right to do so." OB 48. Plaintiff did not base her Complaint on the theory that Note holder (U.S. Bank) does not have the right to foreclose, but on the "misguided hope[]" that she can find some excuse to delay foreclosure for as long as possible. *Barton v. JPMorgan Chase Bank, N.A.*, 20013 WL 5574429, *1 (W.D. Wash. 2013) ("unfounded curiosity or misguided hopes" over note's location do not bear on the DTA's procedural requirements and cannot form the basis for DTA liability). If Plaintiff could plead facts, subject to Rule 11, that U.S. Bank did not hold the Note and thus lacked the right to foreclose, she would do so. But tellingly, she refuses to make that allegation—indeed, she concedes U.S. Bank as Trustee for WMALT 2006-AR4 Trust holds the Note. CP 86 ¶ 2.6. Because Plaintiff "can prove no set of facts, consistent with [her] complaint, which would entitle [her] to relief," *Haberman v. Wash. Public Power Supply Sys.*, 109 Wn.2d 107, 120 (1987), the trial court properly dismissed her Complaint.

b. The DTA Does Not Divest the Court of Jurisdiction.

The majority of Ms. Jackson's brief urges this Court to declare the Washington legislature cannot legislate in the area of title and possession

of real estate. OB at 9-30. Ms. Jackson bases her argument on the Constitution's alleged "exclusive" grant of jurisdiction to the courts for all real property concerns. *See* OB at 1, 10. Under Article 4, Section 6 of the Constitution, the "Superior Court shall have original jurisdiction ***in all cases at law*** which [sic] involve ***the title or possession of real property*** ...." Wash. State Const., Art. 4, § 6 (emphasis added).

The majority of Plaintiff's brief urges this Court to find that the Washington legislature has no ability to legislate regarding the title and possession of real estate. OB at 9-30. Plaintiff bases her argument on Const. art. IV, § 6, and Const. art. II, § 1's alleged "exclusive" grant of jurisdiction to the courts for all real property concerns. *See* OB at 1, 10. The Washington constitution provision Plaintiff cites provides that the "Superior Court shall have original jurisdiction ***in all cases at law*** which [sic] involve ***the title or possession of real property*** ...." Wash. State Constitution, Art. 4, § 6. But a nonjudicial foreclosure is not "a case at law," it is the enforcement of an entirely voluntary agreement between parties. The DTA "is entirely noncoercive" and voluntary. *Kennebec,* 88 Wn.2d at 725. Thirty years ago this Court emphasized the voluntary nature of nonjudicial foreclosure in rejecting the idea that it involves a forced sale:

> The phrase "forced sale" does not apply where the owner consents directly to the sale, or does so indirectly by consenting to, or doing those acts or things that necessarily or usually eventuate in a sale, as, ***for instance, a sale under a power contained in a mortgage or a decree of foreclosure. When the owner of property consents to a sale under the execution or other legal process, the sale is not forced, but it is as voluntary***, within the full import of

> the term, as it is when he directly effects the sale and executes the conveyance.

Felton, 101 Wn.2d at 421-22 (emphasis in original, citations omitted).

Until, for instance, a party challenges the foreclosure, there is no "case at law" to bring to Superior Court. Indeed, the DTA specifically ***preserves*** the Superior Court's constitutional grant of jurisdiction: "Nothing contained in this chapter shall prejudice the right of the borrower" to file an action in Superior Court "to restrain, on any proper legal or equitable ground, a trustee's sale." RCW 61.24.130(2).[5] This is precisely the access to Superior Court that Plaintiff denies exists. Yet this lawsuit is the very exercise of that right.[6] The DTA also provides that if a lender fails to acknowledge satisfaction of the mortgage by reconveyance 60 days from the date of the borrower's request, the lender is liable for damages and attorneys' fees in a court action. RCW 61.16.030; RCW 61.24.110. And even after the sale has occurred, Plaintiff has access to the Courts to seek damages associated with the foreclosure (and in some cases

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[5] *See also* RCW 61.24.030(8)(j) ("the borrower ... has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground"); RCW 61.24.040(2) ("You may contest this default ***by initiating court action*** in the Superior Court of the county in which the sale is to be held") (emphasis added); RCW 61.24.090(2) ("Any person entitled to cause a discontinuance of the sale proceedings shall have the right .... to ***request any court***, excluding a small claims court, for disputes within the jurisdictional limits of that court, to determine the reasonableness of any fees demanded or paid as a condition to reinstatement") (emphasis added); RCW 61.24.130(1) ("Nothing contained in this chapter shall ***prejudice the right of the borrower ... to restrain, on any proper legal or equitable ground, a trustee's sale***" in superior court) (emphasis added).

[6] Likewise, Plaintiff's Deed of Trust expressly preserves her right to access the Courts to resolve any disputes over the propriety of foreclosure, requiring that any default notice explain Plaintiff has "the right to bring a Court action to assert the non-existence of a default or any other defense of [Plaintiff] to acceleration and sale." CP 50, ¶ 22.

may unwind the sale). *See* RCW 61.24.127; *Albice v. Premier Mortg. Serv. of Wash.*, 174 Wn.2d 560, 568 (2012) (voiding sale via court action).

The DTA clearly embraces the use of the courts should there actually be "case at law" (or even in equity) disputing the propriety of foreclosure.[7] As such, Plaintiff's argument the DTA somehow usurps the superior court's jurisdiction contradicts the words of the statute and Washington case law. The fact the Superior Court has original jurisdiction to resolve disputes over title and possession of real property issues also does not mean the legislature cannot enact laws that regulate real property title transactions. If the rule were otherwise, Washington's Uniform Arbitration Act and Uniform Mediation Act would also be unconstitutional because they too authorize, and provide a means for enforcing, private agreements outside superior courts (avoiding the courts' original jurisdiction), through alternative dispute resolution. *See* RCW 7.04A et seq., RCW 7.07 et seq. Plaintiff's position is untenable.

Plaintiff, however, claims this Court held in *Moore v. Perrot*, 2 Wash. 1 (1891), that superior courts have "exclusive" jurisdiction over real property. OB at 24 (citing *Moore*, 2 Wash. at 4-5). As an initial matter, *Moore* actually holds the opposite: "The language of the constitution is ***not*** that the courts shall have exclusive jurisdiction."

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[7] The DTA does not purport to resolve any disputes as to "possession" of property, as it makes clear that any effort to enforce any possessory right must be done through the courts under RCW 59.12 *et seq.* *See* RCW 61.24.040(9) ("After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW.").

Moore, 2 Wash. at 4 (emphasis added). Regardless, *Moore* does not apply. In *Moore*, the Court addressed whether a justice of the peace had ***jurisdiction*** to enter an order for $300 in money or property. *Moore*, 2 Wash. at 2. The Court analyzed the constitution's jurisdictional grant and held the justice of the peace lacked jurisdiction because "minor courts can[not] have concurrent jurisdiction with the superior courts." *Id.* at 5. The Court explained "[i]t is the enumeration of the particular matters which are within the original jurisdiction of the superior courts, which we interpret to mean that those matters pertain to them exclusively." *Id.* at 4-5. Thus, the exclusivity referred to in Article 4, section 6 exists between courts, not government branches. The *Moore* Court did ***not*** address the legislature's ability to create law on matters touching the superior court's original jurisdiction.

Plaintiff also mischaracterizes *State v. Posey*, 174 Wn.2d 131, 135-36 (2012). *See* OB at 25. In *Posey*, this Court held the legislature could not divest the superior court of criminal jurisdiction over juveniles, and that "juvenile courts are properly understood, jurisdictionally, as a separate division of the superior courts." 174 Wn.2d at 139-40. The Court explained: "In these enumerated categories where the constitution specifically grants jurisdiction to the superior courts, the legislature cannot ***restrict*** the jurisdiction of the superior courts." *Posey*, 174 Wn.2d at 135 (citing *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 418 (1936)). Thus, *Posey* involved legislation regarding ***jurisdiction*** over

cases at law. The DTA involves neither. Unlike in *Posey*, the legislature has not divested (or even attempted to divest) the Superior Court of jurisdiction over disputes involving nonjudicial foreclosures. *See, e.g.*, RCW 61.24.040(1)(f)(IX); RCW 61.24.130. *Posey* does not support declaring the DTA unconstitutional.

In short, the DTA does not limit the superior court's original jurisdiction. Instead, the DTA creates a statutory mechanism that allows lenders to enforce their contractual rights under Deeds of Trust efficiently and inexpensively, while protecting borrowers' ability to prevent improper foreclosures through court access.

C. The Trial Court Properly Dismissed Plaintiff's Remaining DTA Theories.

1. Plaintiff Has Abandoned Several DTA Theories.

Plaintiff's arguments in opposition to U.S. Bank, MERS, and Chase's Motion to Dismiss as to her DTA claims were: (a) the Deed of Trust is unenforceable; (b) a foreclosure sale is not a prerequisite to a DTA claim; and (c) the Trustee was required to disclose to her the identity of the Note holder. CP 189-94. On appeal, Plaintiff raises only the first argument (which Defendants address below), abandoning the latter two arguments. As a result, Plaintiff has waived any argument as to those theories.

2. The Court Should Reject Plaintiff's New DTA Theories.

Plaintiff's Opening Brief and her Request for Judicial Notice attempt to raise new issues on appeal. This Court "will not review an issue, theory, argument, or claim of error not presented at the trial court level." *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207 (2001). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37 (1983). Failure to do so precludes raising the error on appeal. *Id.* at 37. The Court therefore should not entertain Plaintiff's newly raised theories.

Even if the Court were to consider them, each lacks merit.

Plaintiff's New Owner/Holder Theory Lacks Merit. For the first time on appeal, Plaintiff argues the "structure and purpose" of RCW 61.24.030(7)(a) means that foreclosing beneficiary must be both the Note owner and Note holder. *See* OB at 33-38. Plaintiff never alleges that U.S. Bank is not both the Note holder and Note owner, and the evidence before the Court shows that it was. Plaintiff argued below that under the DTA, the lender must deliver a Notice of Default that identifies the Note owner. CP 193. The Notice of Default attached to the Complaint lists U.S. Bank as owner in its capacity as Trustee of a securitized trust. *See* CP 55. Plaintiff wisely abandons this lack-of-disclosure theory on appeal. (Plaintiff also concedes U.S. Bank as Trustee of the Trust is the Note

holder—though she confuses whether the securitized Trust or its investors is Note holder. CP 85-86 ¶ 2.6.)

Defendants Are Not Liable for Trustee Violations. Plaintiff also argues for the first time on appeal that U.S. Bank (as beneficiary) may somehow be liable under the DTA for the Trustee's alleged breach of the duty of good faith. OB 42-43. But in any event, Plaintiff offers no factual allegation for this claim. Instead, Plaintiff asks the Court to accept as true his ***legal conclusion*** that the Trustee violated its duty of good faith by accepting the beneficiary declaration required by RCW 61.24.030(7))(a), and then leap from that premise to the conclusion that the remaining defendants can be liable based on her misreading of *Klem.* OB at 43.

But the Court is not required to accept legal conclusions as true. *Rodriguez*, 144 Wn. App. at 717-18. And as shown above, a Trustee does not breach its duty of good faith by adhering to the DTA's statutory requirements through receipt and reliance on a beneficiary declaration. *See* RCW 61.24.030(7)(a)-(b). In fact, RCW 61.24.030(7)(b), the "trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection." The allegations in this case bear no likeness to those in *Klem*. There, evidence existed showing the Trustee had a written agreement with the lender to violate the Trustee's statutory duty of good faith to both sides by only listening to the lender, and the agreement prevented the borrower from paying off the loan before the sale, causing prejudice. *Klem*, 176 Wn.2d at 777-80. Plaintiff alleges no

such facts here. Instead, she asks the Court to infer liability for alleged Trustee misconduct as a matter of course. Not only does this approach lack support in the case law, but it also contradicts the DTA, which allows liability against the Trustee (but not the lender) for material defects in the foreclosure process. RCW 61.24.127(1)(c).

3. The Trial Court Properly Dismissed Plaintiff's "Split the Note" Theory.

Plaintiff alleges the trial court erroneously dismissed her "split the note" claim by "failing to address this theory of liability." OB at 44. But the parties briefed the issue in the trial court, so Plaintiff has no basis for concluding the trial court failed to consider this theory. *See* CP 140, 189.

Regardless, Plaintiff's theory fails as a matter of law. She claims the Note may have been separated from the Deed of Trust because it was transferred to U.S. Bank as Trustee of a securitized trust—and because U.S. Bank succeeded Bank of America as Trustee of the Trust, and because Bank of America was successor by merger to LaSalle Bank—without evidence the Note and Deed of Trust were "transferred together." OB 44; CP 55, 60.[8] Plaintiff cites *Bain* for the proposition that it is possible to separate a Note and Deed of Trust. *Id.* (citing *Bain*, 175 Wn.2d at 112). But Plaintiff ignores the rest of *Bain*, where the Court acknowledged that nothing in the record suggested the Note was separated

[8] The fact the Notice of Default and Notice of Trustee's Sale both disclose the transfer of Plaintiff's Note also supports the dismissal of Plaintiff's contract-based claim that she was never given notice of the sale of her loan. Leaving aside the fact the Deed of Trust expressly disavows any obligation to provide notice when the loan is sold, CP 50 ¶ 20, these documents show the loan transfers *were* disclosed to Plaintiff. This, presumably, is why Plaintiff abandons this theory on appeal.

from the Deed of Trust. *Id.* "It is conceivable that on rare occasions a mortgagee will wish to disassociate the [Note] obligation and the [Deed of Trust], but that result should follow ***only upon evidence that the parties to the transfer so agreed.***" Restatement (Third) of Property (Mortgages) § 5.4 cmt. a (1997) (emphasis added). Plaintiff does not (and cannot consistent with Rule 11) allege U.S. Bank agreed to separate the Note from the Deed of Trust. Moreover, the Court in *Bain* rejected Plaintiff's theory here, and held that the Deed of Trust follows the Note as a matter of law, without need for further evidence: "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *Bain*, 175 Wn.2d at 104.[9] Thus, whoever holds the Note has the right to foreclose under the Deed of Trust as beneficiary, regardless how many transfers occur (or how the transfer occurs). *See* RCW 61.24.005(2) (beneficiary is Note holder). Here, Plaintiff concedes U.S. Bank as Trustee is Note holder. CP 85-86 ¶ 2.6. Plaintiff's "split-note" theory thus fails as a matter of law, rather than as a matter of factual pleading, because under Washington law, the Deed of Trust presumptively follows the Note.

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[9] "Transfer of the obligation ... should carry the mortgage along with it. This is indeed the universal result in American law...Washington decisions, though old, support this proposition." 18 Wash. Practice § 18.20 (2d ed. 2010); *Fidelity & Deposit v. Ticor*, 88 Wn. App. 64, 69 (1997); *Price v. N. Bond & Mortg.*, 161 Wash. 690, 695 (1931)("the note is considered the obligation, and the mortgage ... passes with it"); *Nance v. Woods*, 79 Wash.188 (1914)("mortgage follows the note"); *Spencer v. Alki Point Transp.*, 53 Wash. 77, 90 (1909)("assignment of the notes ipso facto passes the security"); *Bartlett Estate Co. v. Fairhaven Land*, 49 Wash. 58, 63 (1908) (mortgage "passes to the assignee by an assignment of the debt").

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

Toward the end of oral argument on Defendants' Motion to Dismiss, Ms. Jackson's counsel made the tactical decision to waive all claims except Plaintiff's constitutional law theory: "We're not coming before you under the Deed of Trust Act. We're coming before you directly under the Constitution. We're saying the statute is unconstitutional." RP (7/19/13) 27:20-22. The trial court remarked that "[Ms. Jackson's] response seemed to waive all DTA claim[s], violations, and only want[s] the Court to consider constitutional violations," and that "concessions get made all the time." *Id.* at. 32:1-15. Plaintiff's counsel had an opportunity to correct the Court on the matter, but instead bolstered his concession by asking the Court to certify solely the constitutional law question to the Supreme Court. *Id.* at 35:4-36:3.

It is not entirely clear whether the Court accepted Plaintiff's waiver—the court's Order Granting Respondents' Motion to Dismiss does not reflect any waiver ruling. CP 211-13, 215-17; *see also* RP (34:25-35:3) ("I will go back, reread the amended complaint carefully in light of the arguments made to the Court. You should have my decision by the end of business next week. ... I am going to take my time with it and look carefully."). To the extent Plaintiff now wishes to withdraw her tactical decision, the Court should reject that effort and refuse to consider any issue other than the constitutional law issue (which the Court should reject for the reasons stated above).

V. CONCLUSION

Respondents U.S. Bank, Chase, and MERS respectfully ask this Court to affirm the trial court's dismissal of Plaintiff's Complaint in its entirety.

RESPECTFULLY SUBMITTED this 6th day of March, 2014.

Davis Wright Tremaine LLP
Attorneys for U.S. Bank, N.A.,
JPMorgan Chase Bank, N.A., and
MERS, Inc.

By _____
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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

Scott E Stafne	(X)	By U. S. Mail
Joshua B. Trumbull	( )	By Federal Express
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Dated at Seattle, Washington this 6th day of March, 2013.

Fred B. Burnside

OFFICE RECEPTIONIST, CLERK

From: Bass, Lisa <LisaBass@dwt.com>
Sent: Thursday, March 06, 2014 2:09 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Burnside, Fred; Bugaighis, Zana; Dacuag, Evelyn
Subject: Jackson v. Quality Loan Service Corp. of Washington, et al., Washington State Supreme Court No. 89183-4 -- Respondents' Answering Brief
Attachments: FINAL Jackson v. JPMC Answering Brief.pdf

Re: Jackson v. Quality Loan Service Corp. of Washington, et al.
Washington State Supreme Court No. 89183-4
Respondents' Answering Brief

Dear Clerk,

Please find attached for filing with the Court in .PDF format, *Respondents U.S. Bank, N.A., JPMorgan Chase Bank, N.A., and Mortgage Electronic Registration Systems, Inc.'s Answering Brief.* This brief is being submitted by:

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Thank you for your assistance.

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