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## II. APPELLANT'S ARGUMENT IN REPLY TO THE RESPONDENTS' STATEMENT OF THE CASE, ARGUMENT, CONCLUSION AND CITED RULES, STATUTES AND CASELAW

The Respondents fail to recognize that OLLA has a legal right to raise lack of subject matter jurisdiction if only for the first time on appeal, OLLA properly initiated his prior commenced action in Los Angeles Superior Court of the State of California, the only proper venue for such legal contest, given its exclusive subject matter jurisdiction over the question of the legality of the three subject consumer credit installment loans being that all three such loans were California loan transactions, each and all of which, contain explicit choice of law of the state of California on their page two.”<sup>4</sup>

The Respondents' Brief fails to acknowledge that Appellant OLLA had a perfectly legal right to challenge the legal validity of the subject October 16, 2008 Real Estate Purchase and Sale Agreement as was signed by the parties on October 17, 2008, and therefore by extension its two associated deeds in lieu of foreclosure. If the agreement could be held to be invalid, the clauses of mutual release of claims as contained therein would similarly legally fail.

Such California court possesses exclusive subject matter jurisdiction over any and all agreements purporting to settle all three of such subject consumer credit installment loan transactions, and the complaint as filed there on or about December 31, 2008 constituted a single-property action among whose variously

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<sup>1</sup> Reference: Appellant's Brief page 27, In re Saltis.

<sup>2</sup> Plaintiff's EXHBLST #7.

<sup>3</sup> Plaintiff's EXHBLST #18.

<sup>4</sup> Plaintiff's EXHBLST #179.

enumerated causes of action was that to quiet title of the Respondents in its subject Malibu, California real property.

That prior-commenced California lawsuit against the Respondents was properly brought before the only court of law possessing exclusive jurisdiction not only over the subject property of a quiet title action and its parties pursuant to California Code of Civil Procedure §760.040 which states that:

- "(a) The superior court has jurisdiction over actions under this chapter.
- (b) The court has complete jurisdiction over the parties to the action and property described in the complaint and is deemed to have obtained possession and control of the property for the purposes of the action with complete jurisdiction to render the judgment provided for in this chapter.
- (c) Nothing in this chapter limits any authority the court may have to grant such equitable relief as may be proper under the circumstances of the case."

OLLA filed his subsequently filed (instant) action against Respondents in Kitsap County Superior Court on June 25, 2009, primarily to seek that equity there impress a constructive trust upon the subject Indianola, Washington real property, not only pending the outcome of the prior commenced California action for rescission of all its challenged subject agreements between the parties, also for relief from Respondents' improper and unlawful actions alleged to have been committed by them within the state of Washington in the manner in which they sought to and did successfully acquire a deed in lieu of foreclosure as to instant action's subject Indianola, Washington real property. However, Respondents were granted their Motion for Expedited Fact Finding Hearing on August 21, 2009<sup>5</sup> and as a result the action as brought by OLLA in the trial court was

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<sup>5</sup> Clerk's Papers Sub #11 at page 2, lines 18 through 20 and SUB #17.

effectively transformed into something over which the trial did not possess legal authority to proceed to conduct a fact finding determination of, which was namely, the enforceability of the subject October 16, 2008-dated Real Estate Purchase and Sale Agreement, simultaneously refusing to make determination of fact and application of Washington law as to the issues within its jurisdiction which were the Respondents' alleged unlawful actions as done in the state of Washington which were alleged to have been in violation of Washington statutory law.

"The standard for evaluating the exercise of judicial discretion is whether it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary."<sup>6</sup> The applicable standard on review on appeal where the trial court sits without a jury is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.

**A. THE TRIAL COURT WHOLLY LACKED SUBJECT MATTER JURISDICTION OVER EACH AND ALL OF THE THREE SUBJECT CALIFORNIA CONSUMER CREDIT LOAN TRANSACTIONS**

On September 27, 2007 OLLA executed the first of three consumer credit installment loan notes in favor of the Respondents and their eponymous pension plan. It was executed by OLLA in city of his principal residence at the time, Malibu, California, and it was the understanding of the parties that the sale of such Malibu, California house was to provide the funds to pay off the subject Washington real property, in whole or in part. The September 18, 2007

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<sup>6</sup> Washington Federation of State Employees, Council 28, AFL-CIO v. State 99 Wn. 2d 878, 655 P. 2d 1337, 13343 (1983).

Agreement to Hold Funds, for which consideration was paid by OLLA in the non-refundable amount of \$17,000.00 (Seventeen Thousand Dollars), contemplated such as well as the prospect that following the sale of such Malibu real property that the Washington real property would likely be refinanced. The Respondents also executed such loan within the state of California.

It is only that loan, the first of the three subject loan transactions, which involved a deed of trust placed upon real property situated in the state of Washington. Even so, such deed of trust as to the subject Washington real property secured the Respondents' purchase price of such real property which was to be paid off from the expected proceeds from the sale of OLLA'S Malibu real property. As such, it was the Malibu real property that was the true collateral for extension of the first on the three subject consumer credit installment loans, which first loan was in effect a bridge loan. Because of this and, given the fact that this first installment loan as made to OLLA on September 27, 2007 contained an explicit choice of law of the state of California conspicuously on page 2 (such term shared in common with both of the two subsequent subject installment loans) of such note. Respondents cite choice of law as OLLA'S only asserted grounds for asserting trial court's lack of subject matter jurisdiction in outright avoidance of the foregoing.

Application of such choice of law of the state of California is not contrary under the circumstances, and in spite of the Respondents' Brief reasoning<sup>7</sup> that

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<sup>7</sup> Reference Respondents' Brief page 14.

OLLA never made his argument to the trial court. Apart from the fact that the trial court specifically told OLLA to present his evidence, that such evidence as entered would be reviewed and that the court would apply the appropriate law.<sup>8</sup> The issue of legality of the loans was recognized by the trial court as an affirmative defense to OLLA'S signing the subject Real Estate Purchase and Sale Agreement. The trial court made inquiry into the loans, examining them for fraud and hearing testimony and cross-examination as to unlawful failures to timely disclose. Moreover, refusal to apply choice of law of California under circumstances where that choice of law was a contractually bargained for right of loan contracts that pre-existed the subject agreement purportedly in settlement thereof would result in manifest injustice of the kind at which Civil Rule 9 (k) (4) is directed. The choice of law was embedded as terms of contract that the subject agreement purported to be in settlement of.<sup>9</sup> The Respondents' contention that OLLA had to plead foreign law at the outset, as is otherwise required by Civil Rule 9 (k) (1) is ultimately incorrect in any case because the trial court lacked subject matter jurisdiction.

Respondents then apply circular logic in concluding that the Washington Court should not be "stripped of their subject matter jurisdiction simply because they are required to apply the laws of other jurisdictions" and that "this principle is so axiomatic that no further elaboration is necessary".<sup>10</sup>

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<sup>8</sup> Reference RP page 396 at lines 4 through 7.

<sup>9</sup> Reference Plaintiff's EXLST No. 84 at page 1.

<sup>10</sup> Reference: Respondents' Brief, page 14.

Respondents fail to grasp that the state of Washington wholly lacks subject matter jurisdiction over each and all of the loan transactions irrespective of the existence of the choice of law terms. Moreover the chosen state of California had substantially greater relationship to the parties and/or the first subject loan transaction. In actuality, the second and third subject consumer loan transactions bore no legal connection to the state of Washington given that they were completely secured by California real property in the form of the Malibu house in the deeds of trust securing such.<sup>11</sup> The security for which each of the three subject loans was to be paid off existed exclusively within the state of California.

The trial court lacked subject matter jurisdiction over either any or all of the three subject consumer credit installment loans. Respondents refuse to accept that neither OLLA nor they can enjoy the privilege of adjudicating any issues concerning Respondents' lender liability as otherwise provided for to regulate the practice of lending in Washington State, not only due to the fact that private investor lender exemption is not expired until year 2009. The Washington State Department of Financial Institutions made a determination on June 4, 2010<sup>12</sup> that the first subject loan (the bridge loan) fell outside the scope of the Mortgage Brokers Practices Act (MBPA, RCW Chapter 19.146 ET SEQ.) because such loan transaction falls outside of WAC 208-660-005 (8) in keeping with WAC 208-660-005 (7) properly thus deferring the transaction to California transaction status in

<sup>11</sup> Plaintiff's EXLST Nos. 11 & 178.

<sup>12</sup> See Appellant's Supplemental ~~(Third)~~ **SECOND** Statement of Additional Authorities, as filed October 24, 2010.

effect as a matter of the discretionary powers vested in it by the Washington State Legislature pursuant to RCW §19.146.223, because it recognized that the true collateral for such loan was the Malibu, California real property.

B. THE TRIAL COURT WHOLLY LACKED SUBJECT MATTER  
JURISDICTION OVER THE SUBJECT OCTOBER 16, 2008-DATED  
REAL ESTATE PURCHASE AND SALE AGREEMENT

The facts must be sufficiently listed with particularity to be clear:

- i) The collateral for the first installment loan (Bridge Loan) offered by OLLA was his then principal residence in the state of California, his Malibu real property, its sale to be the source for the payoff of the first installment loan in part or in full, as contemplated in the Agreement to Hold Funds<sup>13</sup>
- ii) the subject settlement agreement purported to be in settlement of three California loan transactions;
- iii) the second two of the three subject loan transactions bore no legal connection to the state of Washington;
- iv) each and all of the three subject loans were secured by California real property, the second and third solely so and the first so as to be paid off by OLLA'S principal residence at the time of signing;
- v) the first loan was signed and executed completely by the parties within the state of California;

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<sup>13</sup> Reference: Plaintiff's EXLST Nos. 1 and 6.

vi) the second and third subject loans, though signed by OLLA in the state of Washington, were signed by OLLA before OLLA became a permanent resident-domiciliary of the state of Washington;

vii) the second and third loans could have been signed in any state and still be within the exclusive subject matter jurisdiction of the state of California;

viii) the subject settlement agreement as well as the three subject loan transactions were generated in and signed by Respondents in the state of California and sent to OLLA to sign;

ix) the overwhelming majority of the performance of the subject settlement agreement more than substantially took place in the state of California, where the loans and the debt for the three California loan transactions were excused upon OLLA'S signing the subject settlement agreement and the deed in lieu of foreclosure as to the Malibu real property was given on October 17, 2008 and October 18, 2008 respectively, with Respondents wiring and/or drafting funds from their bank in the state of California or a California title company; even the subsequent transfer of the subject Indianola, Washington real property on November 18, 2008 by deed in lieu of foreclosure and the cash payment in return therefore whose source were Respondents' California funds was absolutely conditioned on the prior initial transfer of the Malibu, California real property by deed in lieu of foreclosure as had been accomplished successfully beforehand.

- x) The Malibu real property transfer constituted the bulk of the security in Respondents' view.<sup>14</sup>
- xi) the subject settlement agreement was signed by OLLA in the state of Washington, but it could have been signed by OLLA in any place or state without such place of signing legitimately exercising jurisdiction thereon because it was in settlement of three California loan transactions;
- xii) filing of OLLA'S second commenced action against Respondents in the Washington trial court for causes of action which were not within the subject matter jurisdiction of the California court of the prior commenced action did not empower the Washington trial court to exercise subject matter jurisdiction over the subject agreement purporting to settle the three subject California loan transactions and the respective obligations of the parties to those transactions; OLLA'S attendance and defenses offered at the subject Fact Finding Hearing, did not waive his right to raise the issue of lack of subject matter jurisdiction over an agreement purporting to be in settlement of three out of state loan transactions. Subject matter jurisdiction can be raised at any even if for the first time following trial on appeal.<sup>15</sup> The state of Washington does not possess concurrent jurisdiction over such loans or subject settlement agreement.

Xiii) Performance requirement removal of OLLA'S personal property from inside

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<sup>14</sup> Reference Plaintiff's EXLST No. 182, at the September 26, 2008 email is not privileged pursuant to Cal. Evidence Code § 956, since the email recipient lawyer service's were being used to commit fraud, and pursuant to Washington Rule of Privileged Communications 1.6 (b) (3)

<sup>15</sup> Appellant's Brief, page 27 citing In re: Saltis, 94 Wash. 2d 889, 893, 621 P. 2d 716 (1980) and RAP 2.5 (a) (1).

the Malibu, California real property, including OLLA'S California registered automobile. OLLA maintained two automobiles registered in California until at all relevant times, not knowing whether he would permanently establish domicile in the state of Washington.

While the Respondents have admitted, and record shows<sup>16</sup> that a Washington lawyer was used to draft the subject agreement settling the three California loan transactions and that the subject settlement agreement identifies itself as a "Purchase and Sale Agreement"<sup>17</sup> purporting to sell two properties in two different states and that because OLLA signed the subject agreement in the state of Washington that somehow the trial court had possessed subject matter jurisdiction. It is very obvious that the misleading title of Real Estate Purchase and Sale Agreement, of an agreement which the Respondents have strenuously argued to be a settlement agreement, casts an aimless anchor for exercise of the trial court's subject matter jurisdiction. The Malibu, California property was the collateral for repayment of the subject first loan. Title to the Malibu, California real property was the main object behind the Respondents' demands and the settlement agreement they presented to OLLA, and all three loans were California loan transactions.

Pursuant to the subject October 16, 2008-dated Real Estate Purchase and Sale Agreement, OLLA gave two deeds which had secured the three subject consumer credit loans each and all of which contained choice of law of the state

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<sup>16</sup> Plaintiff's EXLST No. 182.

<sup>17</sup> Plaintiff's EXLST No. 84.

of California settling the obligations of parties with respect to the three subject loan transactions, the second two of which were not even legally connected to the state of Washington, the first two of which OLLA had signed before he was even a full-time resident of the state of Washington, and all three of which were signed before OLLA had fully established domicile in the state of Washington, having submitted all personal 2007 tax returns in May of 2008 to the IRS and the California Franchise tax board. Yet Respondents immediately assume that the subject settlement agreement settled loans that had sufficient contacts with the state of Washington to conclude that the subject agreement purportedly settling such loans should also be deemed within the subject matter jurisdiction of the state of Washington. It cannot be said that the trial court could exercise subject matter jurisdiction over any of the subject transactions and settlement agreement when OLLA had not lived in Washington one full year before the Respondents both sought to conclude the loan relationship in the manner that they did by inducing OLLA to sign a deed in lieu of foreclosure to the Malibu house property and the subject agreement.

Respondents' focus on paragraph 9 of the subject settlement agreement in release of claims overlooks the fact that the validity of the subject agreement was the bifurcated issue before the trial court. The Respondents' contentions imply that the subject settlement agreement lacks similar choice of law terms and that the loan notes' terms of choice of law of California is the lynchpin of OLLA'S assertions of lack of trial court subject matter jurisdiction.

It is readily apparent that Respondents' Brief completely sidesteps the issue they refuse to even address which is that OLLA'S assertions of trial court's lack of subject matter jurisdiction over the loan transactions and the subject is not centered on the choice of law terms in each and all of the three subject loans. Respondents contend that wherever OLLA breached his agreement there should be subject matter jurisdiction over the subject agreement's legal validity, and that OLLA'S action in the trial court of Washington signified breach of the settlement agreement. If legal challenge of the validity of the subject agreement was breached, such agreement was breached in California long before by suing the Respondents there on December 31, 2008. It certainly cannot be said that the Washington courts possessed concurrent jurisdiction with the state of California. If it had been the Respondents who sought to initiate an action for any kind of breach of the obligations under the subject agreement, they could have only brought such action in the state of California. Given the conclusion of the Washington Department of Financial Institutions,<sup>18</sup> regarding the first loan transaction, in accordance with WAC 208-660-005 (8) in keeping with WAC 208-660-005 (7), as previously discussed, clearly reflecting its wise discretion to defer, Respondents' objections to any assertion of lack of subject matter jurisdiction is entirely without merit.

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<sup>18</sup> Reference: Appellant's September 23, 2010 Supplemental State of Additional Authorities Exhibit Nos. 1 and 3 which are an offprint of WAC 208-660-005 (Purpose, scope and coverage of RCW Chapter 19.146, Mortgage Brokers Practices Act (MBPA)) and a true and correct copy of such department's June 4, 2010 letter of determination regarding departmental complaint #35391) that the subject first loan transaction (bridge loan) falls outside the scope of the MBPA (RCW chapter 19.146 ET SEQ.

The Respondents' Brief's characterization of the trial court's purpose as one simply concerned with the enforceability of the parties' subject settlement agreement is a purposefully misleading attempt to circumvent the trial court's lack of subject matter jurisdiction over each and all of the three subject loan transactions but also its lack of jurisdiction over subject agreement purporting to be in settlement thereof. The Respondents fail to grasp that the subject agreement is within the exclusive subject matter jurisdiction of the state of California and its legal validity could not have been adjudicated by the trial court.

Respondents brand OLLA'S assertion of absolute lack of subject matter jurisdiction as "outlandish legal theories", without even directly addressing them in full. Lack of jurisdiction over subject matter renders the superior court powerless to pass on the merits of OLLA'S claims and defenses.<sup>19</sup>

Respondents' illogic is plainly consistent with the counterclaims they have filed seeking 1.2 million dollars damages against OLLA for slander of title in the state of Washington for OLLA'S having filed a Lis Pendens against the Malibu, California real property concerning his prior commenced California litigation.

Moreover, the terms of the promissory notes themselves as alleged to have been fraudulent in nature and in violation of various federal statutes were most certainly not irrelevant. California Civil Code §1668 provides:

"All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another or in violation of law, whether willful or negligent, are against the policy of the law."

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<sup>19</sup> Reference Appellant's Brief, page 26.

Respondents induced OLLA into signing the subject agreement by representing to him that the loans were all done properly and that OLLA had no statutory grounds to contest them or rescind them and inescapably faced their filing of a notice of default immediately upon his failure to sign the subject agreement that they had drafted and whose terms were in no way negotiable.

Finally, Respondents act as if OLLA had no right to object to lack of subject matter jurisdiction if even for the first time on appeal, given that OLLA filed his action in the Washington trial court. Again, this base statement is intended to mischaracterize the purposes behind such legal action to supplement the prior commence California action. OLLA brought suit in the trial court seeking a constructive trust and redress for actions which took place in the state of Washington. The trial court allowed Respondents' counsel to transform the action into something which OLLA did not intend, where OLLA had signed the first loan in the state of California, collateralized the first loan of funds to purchase the subject real property with his then principal residence located in the state of California, signed the second and third subject loans which were not even secured by real property in the state of Washington while not yet an established domiciliary of the state of Washington and yet remained a domiciliary of the state of California, simply because OLLA had signed the subject agreement in the state of Washington and because OLLA filed causes of action in the trial court which the prior-commenced action in California had no subject matter jurisdiction over.

As stated in Appellant's Brief litigants may not waive subject matter jurisdiction<sup>20</sup> and subject matter jurisdiction can be raised if only for the first time on appeal.<sup>21</sup>

The Respondents do not realize that had the trial court found in OLLA'S favor, the right to appeal such hypothetical judgment and order for lack of subject matter jurisdiction over the subject settlement agreement as well as the three subject loans and associated deeds of trust would have been available to them under those circumstances. "The Washington superior courts are courts of general jurisdiction. They have authority to hear cases in equity and at law for which jurisdiction has not been exclusively vested in another court."<sup>22</sup>

Jurisdiction in the Superior Court is presumed unless affirmatively shown absent. The state of California satisfies such other court of exclusive subject matter jurisdiction even if just for the fact that OLLA'S prior commenced action in California involved in part a quiet title action as to that action's subject Malibu real property with regard to its challenge of the legal validity of each and all of the three subject installment loans as well as the subject Real Estate Purchase and Sale Agreement.

The subject settlement agreement cannot be elevated to invoke jurisdiction accorded probate and trust matters per RCW 11.96A.040 which gives jurisdiction over an incapacitated person's property if that person dies in Washington state and situs at his last gasp. The key is to understand that the trial court's fact finding hearing, essentially a bifurcation of issues for trial, created a controversy which

<sup>20</sup> Reference: Appellant's Brief, page 27.

<sup>21</sup> Reference: Appellant's Brief, page 27.

<sup>22</sup> Wash. Const. Art. IV., § 6, RCW 2.08.010, Moore v. Perrot, 2 Wash. 1, 25, p. 906 (1891).

transformed key procedural elements into jurisdictional requirements and the trial court thus overreached. Yet Civil Rule 8 (f) requires that all pleadings shall be construed as to do substantial justice. Respondents' Brief bemoans the fact that OLLA brought his case to the Washington state courts and that, as a result of his doing so, OLLA should not be permitted to argue lack of subject matter jurisdiction, but Respondents' request is entirely without merit because litigants may not waive their right to assert a lack of subject matter jurisdiction.”

"Jurisdiction exists because of a constitutional or statutory provision. A party cannot confer jurisdiction; all that a party can do is to invoke it.....subject matter jurisdiction typically refers to the authority of a court to provide relief as granted by the Constitution or the Legislature." ”

The unnoticed choice of law terms in the loan notes the trial court confessedly reviewed” so unnoticed by the trial court go to the heart of OLLA'S affirmative defenses to signing, which include illegal loan disclosures by Respondents and the statutory remedies available to OLLA as well as material facts which the Respondents did not properly disclose to him as a borrower while inducing him into signing the subject agreement. Yet the trial court's true lack of subject matter jurisdiction springs from the fact that the three subject consumer credit installment loans were each and all California loan transactions for the reasons above, and any agreement purporting to be in settlement thereof must

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<sup>23</sup> Appellant's Over-Length Brief at page 27, citing *Deaconess Hosp. v. Washington State Highway, Comm'n*, 66 Wash. 2d 378, 409, 403 P. 2d 54 (1965).

<sup>24</sup> *Dougherty v. Dep't of Labor & Indust.*, 150 Wn. 2d 310, 315, 76 P. 3d 1183 (2003).

<sup>25</sup> Oral Decision delivered on December 11, 2009, pages 3 through 5.

necessarily not only be in accord with the laws of the state of California, but can only be challenged by a state court of law of the state of California.

By adjudicating the enforceability of the subject settlement agreement at the promptings of Respondents' August 21, 2009 Motion for such expedited Fact-Finding hearing, the trial court overreached its judicial bounds to hear matters over which it was powerless to make any full and fair determination of fact.

C. OLLA HAD A LEGAL RIGHT TO CHALLENGE THE LEGAL VALIDITY OF SUBJECT OCTOBER 16,2008-DATED REAL ESTATE PURCHASE AND SALE AGREEMENT, MUTUAL CLAUSES IN RELEASE OF LIABILITY INCLUSIVE, ONLY WITHIN THE STATE OF CALIFORNIA COURTS

Because OLLA has a legal right to challenge the validity of the subject settlement agreement, the terms of mutual release of claims contained therein can similarly be challenged and may be held to be void if the agreement were so held irrespective of such.

The California courts have been clear in holding that any waiver of an important statutory right must be knowing and intelligent.<sup>26</sup> Moreover, the release as contained in the subject Real Estate Purchase and Sale Agreement did not acknowledge the statutory right of borrower OLLA to rescind under either the TILA or Regulation Z<sup>27</sup> and should not be held to bar later exercise of that right.

Even within the state of Washington courts, a waiver is an intentional relinquishment of a known right.<sup>28</sup> OLLA'S actions were not inconsistent with

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<sup>26</sup> Cathay Bank v. Lee, 14 Cal. App. 4<sup>th</sup> 1533, 18 Cal. Rptr. 2d 420 (1993); accord: In Re Acosta 182 B.R. 561, 566-567 (N.D. Calif. 1994).

<sup>27</sup> 12 C.F.R. §226 ET SEQ.

<sup>28</sup> Wagner v. Wagner, 95 Wn. 2d 94, 102, 621 P.2d 1279 (1980).

any other intent than to waive a known right. California Civil Code §1542 requires that a party seeking a waiver of liability must place a term of explicit waiver of such §1542 as to statutory rights unbeknownst to the party waiving the right and for whom the statutory right is of benefit or protection. A release obtained by fraud in execution is void, and a release obtained by fraud in inducement is voidable, in both California and Washington.<sup>29</sup> Respondents waived their protection by having drafted and furnished the subject settlement agreement to OLLA, albeit through third parties.<sup>30</sup>

#### D. RESPONDENTS MISREPRESENTED THEIR POWERS TO FORECLOSE ON BOTH OF OLLA'S TWO REAL PROPERTIES

The record supports that the Respondents misrepresented their powers to foreclose on both of OLLA'S two real properties, and that they could foreclose on OLLA'S Malibu real property after foreclosing on the subject Washington real property. Further, Respondents created misapprehension that they could successfully foreclose upon OLLA'S Malibu real property either before or in addition to foreclosure upon the subject Indianola, Washington real property.

Both the September 13, 2007 Agreement to Hold Funds and the September 18, 2007 Agreement to Hold Funds, as signed by both parties,<sup>31</sup> for which OLLA paid non-refundable consideration for, each contemplated that any sale of the Malibu real property would likely be followed by a refinance of the subject Indianola, Washington real property.

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<sup>29</sup> Petersen v. Bibioff, 63 Wn. App. 710, 828 P.2d 1113 (1992).

<sup>30</sup> Pappas v. Holloway, 114 Wn. 2d 198, 203-4, 787 P. 2d 30 (1990).

<sup>31</sup> Reference: Plaintiff's EXLST Nos. 1 and 6.

**E. THE TRIAL COURT DID NOT POSSESS CERTAIN FACTS UPON WHICH TO SUFFICIENTLY BASE CERTAIN OF ITS CONCLUSIONS OF LAW**

There is nothing in the record which indicates that Joseph Privitera and or Robert Freedman were authorized by OLLA to act as a negotiator. Secondly, Respondents and the trial court based their finding of bad faith solely on the OLLA'S September 20, 2008 email to Virginia Vassallo stating that OLLA intended to sue Respondents and a statement under testimony from OLLA'S own witness Virginia Vassallo, who at OLLA'S prompting for the reason as to why she thought OLLA signed the subject agreement, stated his purpose was to sue Respondents because she had told him to sue Respondents, whom she felt were not legitimate lenders. Had either the trial court or Respondents assiduously fact found they would connect the dates relating to OLLA'S September 20, 2008 email to Virginia Vassallo in question<sup>32</sup> as was sent by OLLA in reference to Respondents' recently tricking him into not renting out his Malibu real property to pay debt service to them as well as the first mortgage on the Malibu real property. Respondents and OLLA had not yet had a breakdown of any kind nor had Respondents at this time ever had their contact with Privitera to make their demand, which breakdown and demand occurred days later.

**F. RESPONDENTS MISREPRESENTED THEIR ABILITY TO FILE A NOTICE OF DEFAULT WITHIN A DAY IN VIOLATION OF RCW 61.24.031 AS AN INDUCEMENT FOR OLLA TO SIGN THE SUBJECT SETTLEMENT AGREEMENT**

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<sup>32</sup> Reference: Plaintiff's EXLST No. 40.

RCW §61.24.031 requires that a lender seeking to foreclose on real property within the state of Washington, secured by a deed of trust, must establish initial contact to discuss ways to avoid foreclosure, write a certified letter to borrower furnishing names of parties or entities in the borrower's area for assistance in avoiding foreclosure. Respondents were not entitled to file any notice of default "waiting on their desk to be filed the next day" as threatened and as supported by the testimony of Joseph Privitera and Robert Freedman. In any case, the notice of default process was not initiated and the notice of default was threatened as an inducement in further derogation of OLLA'S rights as a borrower.

**G. RESPONDENTS MISREPRESENTED THEIR ABILITY TO FILE A NOTICE OF DEFAULT WITHIN A DAY AND IN VIOLATION OF CALIFORNIA CIVIL CODE §2923.5**

Respondents concealed the fact that they necessarily could not file any notice of default within a day in order to induce OLLA into signing the subject settlement agreement which is in violation of California Civil Code §2923.5, essentially an analogue to RCW 61.24.031. California Civil Code §2923.5, which became effective on September 6, 2008 bars any entity seeking to potentially foreclose on real property in connection with loans made from January 1, 2003 through December 31, 2007, inclusive (and thus as to OLLA'S Malibu, California real property which was the true collateral in regard to the first installment (September 26, 2007 bridge loan) and the second (November 7, 2007) installment loan as made to OLLA by Respondents.

H. NO INDEPENDENT THIRD PARTY APPRAISAL OF EITHER REAL PROPERTY WAS CONDUCTED TO SUBSTANTIATE THE CLAIMS AND RECITALS OF THE SUBJECT OCTOBER 16, 2008-DATED REAL ESTATE PURCHASE AND SALE AGREEMENT AT THE TIME IT WAS DEMANDED THAT OLLA SIGN IT

No independent third party appraisal of either of OLLA'S two real properties was conducted by the Respondents at the time they had drafted and presented to OLLA through third party Robert Freedman with the demand that OLLA had about ten days to have such reviewed and signed, in order to have substantiated their claims as to the valuations (combined) of OLLA'S two real properties being less than the value of the loans against such. The trial court permitted Respondents at trial to conduct retroactive appraisals by paid expert witnesses imputing valuations for self-serving defense at trial. Settlement agreements for deeds in lieu of foreclosure have to be based on valuations at the time in justification for the need for deeds in lieu of foreclosure.

The listed valuations provided to OLLA two days before trial<sup>33</sup> shows that the combined values of the two real properties at Five Million Dollars when the loans outstanding combined were Four Million Seven Hundred Thousand Dollars.

I. THE TRIAL COURT ERRED IN REJECTING THE NEWLY DISCOVERED MATERIAL EVIDENCE IN THE FORM OF THE WASHINGTON MUTUAL BANK MORTGAGE NOTE

The trial court erred in rejecting the newly discovered material evidence in the form of the Washington Mutual Bank first mortgage note and First Deed of

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<sup>33</sup> Plaintiff's EXLST No. 201.

Trust which OLLA attached to his Memorandum in Opposition to Presentation of Orders as filed on January 13, 2010.<sup>34</sup>

The trial court did not abide by Evidence Rule 103, §(a) (2), which requires in pertinent part:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantive right or the party is affected, and.....

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of its evidence was made known to the court by offer or was apparent from the context within which questions were asked....."

The issue of a Due on sale clause in Washington Mutual's first mortgage loan note, was raised in pleadings of OLLA<sup>35</sup>. OLLA'S Complaint also stated that Respondents requested to borrow his Washington Mutual first mortgage papers which were never returned to OLLA.<sup>36</sup>

The intention of the subject agreement being avoidance of foreclosure, OLLA would not have signed the subject settlement agreement had the truth of the terms within such newly discovered evidence contained a bar on borrower OLLA'S alienation of any equitable interest therein without meeting the conditions that were not in fact met. Respondents concealed this contractual preclusion from OLLA for over one year prior to OLLA'S signing the subject settlement agreement. Such newly discovered evidence further buttressed OLLA'S contention that the subject agreement fails for bearing the taint of fraud

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<sup>34</sup> Reference: Exhibit No. 1 in support of Plaintiff OLLA'S Memorandum in Opposition to Presentation of Orders, as filed on January 13, 2010 for presentation of orders on January 15, 2010.

<sup>35</sup> Reference: OLLA'S Complaint, page 53 in paragraph 52.

<sup>36</sup> Reference: OLLA'S Complaint at page 17, paragraph 2.

and that the matters brought before the trial court and over which it did in fact hold jurisdiction, as to the deed in lieu of foreclosure as to the Washington real property, were the fruit of the poisoned tree.

**J. THE SETTLEMENT AGREEMENT IS UNENFORCEABLE BECAUSE IT WAS NOT FULLY NEGOTIATED BY THE BORROWER AS A PARTY TO MUTUALLY AGREED-TO TERMS AND WAS THEREFORE INVOLUNTARY**

Respondents' proffered subject settlement agreement could not be negotiated in any material way, and it was offered essentially as a take it or leave it proposition, with the enunciated alternative of their "next-day" filing of notice(s) of default and admonitions that OLLA would wind up with nothing following foreclosure.

**K. THE TRIAL COURT DID POSSESS THE LIMITED SUBJECT MATTER JURISDICTION TO MAKE A DETERMINATION OF FACT CONCERNING RESPONDENTS' ACTIONS IN THE STATE OF WASHINGTON DIRECTED AT INDUCING OLLA INTO SIGNING OVER THE SUBJECT WASHINGTON REAL PROPERTY BY DEED IN LIEU OF FORECLOSURE AND THE VIOLATIONS ATTENDANT TO SUCH ALLEGEDLY UNLAWFUL ACTIONS**

OLLA filed his action at the trial court for relief from harms attendant to the manner in which Respondents sought to procure or induce OLLA to hand over the deed to the subject Washington real property, but OLLA also sought for the trial court at equity to impress upon such subject real property a constructive trust pending the outcome of his prior commenced action in California as brought there to legally challenge all of the agreements of the parties.

**L. OLLA IS ENTITLED TO COMPENSATORY DAMAGES AND FOR DAMAGES ASSOCIATED WITH RESPONDENTS FRADULENT ACTS WITHIN THE STATE OF WASHINGTON:**

OLLA is entitled to compensatory damages for the sale of the subject Washington real property, given the fact that a deed in lieu of foreclosure thereto was fraudulently obtained, through actual concealment of material fact the truth of which had OLLA known would have made OLLA avoid the subject agreement purporting to settle the three California loan transactions, and in violation of RCW §61.24.031 by misrepresentation of their ability to file a notice of default as to the subject Washington real property. OLLA has incurred actual damages based on the fraudulent acts of the Respondent within Washington, the illegitimate sale of the subject Washington real property and the sale of the Malibu California real property illegitimately achieved as a result of the delays in the Los Angeles Superior Court case attendant to the trial courts erroneous judgment and order.

## VI. CONCLUSION

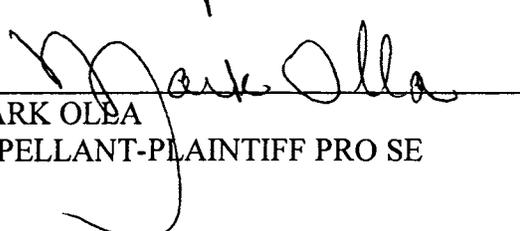
For the foregoing reasons, the trial court lacked subject matter jurisdiction over the subject October 16, 2008 Real Estate Purchase and Sale Agreement and was without requisite power to enforce it against OLLA in favor of the Respondents. Respondents acted in complete disregard of OLLA'S rights as a borrower in their willful failure to comply with the requirements of either RCW §61.24.031 or California Civil Code §2923.5.

The interests of Respondents in evading both application of California choice of law and submitting the subject loans and settlement agreement to the subject matter jurisdiction of California for legal scrutiny thereof, should not be

permitted to eclipse the jurisdictional interests of the state of California in protecting its citizens from fraudulent lending practices in transactions squarely within its regulatory oversight.

Therefore the judgment and orders entered by the trial court on January 15, 2010 dismissing OLLA'S claims with prejudice as well as expunging the Lis Pendens meritoriously recorded by OLLA against the subject Indianola, Washington real property, as based on its oral decision delivered on December 11, 2008 and its findings of fact and conclusions of law memorialized by Respondent Respondents' counsel Isaac Anderson, should be reversed in favor of Appellant-Plaintiff OLLA. Further, now that the subject Indianola, Washington real property has been transferred by the Respondents, presumably to a third party bona fide purchaser, shortly after trial court dismissed OLLA'S claims with prejudice and ordered expungement of the lis pendens rather than properly have impressed a constructive trust thereon at equity pending determination by the Los Angeles Superior Court of the State of California of the matter of the legal validity of the subject October 16, 2008 Real Estate Purchase and Sale Agreement, OLLA has sustained irreversible illegitimate harm to his property and has been deprived of any possible recovery of its possession.

RESPECTFULLY SUBMITTED this 20th day of October, 2010,

  
\_\_\_\_\_  
MARK OLLA  
APPELLANT-PLAINTIFF PRO SE

FILED  
COURT OF APPEALS  
DIVISION II

10 OCT 21 PM 3:46

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

**DECLARATION OF SERVICE**

I, Mark Olla, an individual, state as follows:

I am a citizen of the United States of America and a resident of the State of Oregon, I am over the age of 21 years, and I am the Appellant Pro Se in the above-captioned appeal.

On this 21<sup>st</sup> day of October 2010, I caused copies of the foregoing APPELLANT MARK OLLA'S REPLY BRIEF, SECOND SUPPLEMENTAL STATEMENT OF ADDITIONAL AUTHORITIES AND NOTICE OF CHANGE OF APPELLANT'S CONTACT TELEPHONE NUMBER to be served on the following parties as indicated below:

**Court of Appeals: Division II**  
**State of Washington**  
950 Broadway, Suite 300  
Tacoma, WA 98402

**FILING IN PERSON AT  
SAME LOCATION**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Port Orchard, Washington this 21 day of October, 2010.

[Signature]  
Mark Olla

original

FILED  
COURT OF APPEALS  
DIVISION II

10 OCT 21 PM 3:45

STATE OF WASHINGTON  
BY E  
DEPUTY

**DECLARATION OF SERVICE**

I, Mark Olla, an individual, state as follows:

I am a citizen of the United States of America and a resident of the State of Oregon, I am over the age of 21 years, and I am the Appellant Pro Se in the above-captioned appeal.

On this 21<sup>st</sup> day of October 2010, I caused copies of the foregoing APPELLANT MARK OLLA'S REPLY BRIEF, SECOND SUPPLEMENTAL STATEMENT OF ADDITIONAL AUTHORITIES AND NOTICE OF CHANGE OF APPELLANT'S CONTACT TELEPHONE NUMBER, to be served on the following parties, by as mailed Rita Petty 10/21/10 as indicated below:

**Attorney for Defendants/Respondents**       **Overnight UPS Delivery**  
Law Office of Isaac A. Anderson  
19717 Front Street  
Poulsbo, WA 98370  
Phone: 360-779-4292

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Port Orchard, Washington this 21 day of October 2010.

Mark Olla  
MARK OLLA, Appellant Pro Se

**DECLARATION OF SERVICE**

I, Rita Petteys, state as follows:

I am a citizen of Washington State, I am over the age of 21 years, and I am not a party to this action.

On this 21 day of October 2010, I caused copies of the foregoing APPELLANT MARK OLLA'S REPLY BRIEF, SECOND SUPPLEMENTAL STATEMENT OF ADDITIONAL AUTHORITIES AND NOTICE OF CHANGE OF APPELLANT'S CONTACT TELEPHONE NUMBER, to be served on the following parties as indicated below:

**Attorney for Defendants/Respondents**  
Law Office of Isaac A. Anderson  
19717 Front Street  
Poulsbo, WA 98370  
Phone: (360)-779-4292

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STATE OF WASHINGTON  
BY M  
DEPUTY

(X) By placing them in the mail via UPS overnight delivery to such party, such cost(s) of mailing/shipment as paid for by Mark Olla.

My business address is: 1805 SE Lund Ave  
Port Orchard, WA 98366

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Port Orchard, Washington on this 21 day of October, 2010.

Rita Petteys

Print name: Rita Petteys