IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA, ex rel. Brook Jackson, Plaintiff, v. VENTAVIA RESEARCH GROUP, LLC; PFIZER, INC.; ICON, PLC, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 1:21-CV-00008 JUDGE MICHAEL J. TRUNCALE

ORDER

The Court has received the Government's Notice of Election to Decline Intervention. [Dkt. 13]. The Government (also referred to as "United States") having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the Court rules as follows:

It is ORDERED as follows:

1. the complaint be unsealed and served upon the Defendants by the Relator;

2. all other contents of the Court's file in this action remain under seal and not be made public or served upon the Defendants, except for this Order and the Government's Notice of Election to Decline Intervention, which the Relator will serve upon the Defendants only after service of the Complaint;

3. the seal be lifted as to all other matters occurring in this matter after the date of this Order;

4. the Parties shall serve all pleadings and motions filed in this action, including supporting memoranda, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). The United States may order any deposition transcripts and is entitled to intervene in this action, for good cause, at any time;

5. all Parties shall serve all notices of appeal upon the United States;

6. all orders of this Court shall be sent to the United States; and that

7. should the Relator or the Defendants propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting its approval.

SIGNED this 10th day of February, 2022.

Michael J. Truncale
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA *ex rel.* Brook Jackson,	§	RELATOR BROOK JACKSON'S ORIGINAL COMPLAINT FOR VIOLATIONS OF THE FEDERAL FALSE CLAIMS ACT
Plaintiff,	§	
v.	§	**FILED UNDER SEAL** PURSUANT TO 31 U.S.C. § 3730(b)(2)
	§	CASE NO. _____
VENTAVIA RESEARCH GROUP, LLC; PFIZER INC.; ICON PLC,	§	DO NOT PUT ON PACER
Defendants.	§	DO NOT PLACE IN PRESS BOX
	§	JURY TRIAL DEMANDED

RELATOR BROOK JACKSON'S ORIGINAL COMPLAINT

TABLE OF CONTENTS

1. Plaintiff/Relator Brook Jackson ("Jackson" or "Relator") brings this action pursuant to the False Claims Act, 31 U.S.C. §§ 3729–3732, and seeks to recover all damages, penalties, and other remedies established by the False Claims Act on behalf of the United States of America and on her own behalf. Relator would respectfully show the following:

I. INTRODUCTION TO CASE

2. Developing a safe and effective vaccine against the novel Coronavirus ("COVID-19") was a matter of urgency. But that urgency does not excuse cutting corners in clinical trials, wasting taxpayer dollars, violating federal regulations, and possibly endangering Americans' health. Defendants Pfizer Inc., Icon PLC, and Ventavia Research Group, LLC (collectively, "Defendants") conducted a clinical trial to test one of the COVID-19 vaccine candidates. In the race to secure billions in federal funding and become the first to market, Defendants deliberately withheld crucial information from the United States that calls the safety and efficacy of their vaccine into question. Namely, Defendants concealed violations of both their clinical trial protocol and federal regulations, including falsification of clinical trial documents. Due to Defendants' scheme, millions of Americans have received a misbranded vaccination which is potentially not as effective as represented. The vaccine's U.S. Food and Drug Administration ("FDA") authorization resulted from a deeply flawed clinical trial that violated FDA regulations. Defendants have profited from the COVID-19 pandemic at the expense of the United States and its citizens by abusing the scientific process.

3. BioNTech SE ("BioNTech") and Defendant Pfizer Inc. ("Pfizer") co-developed a messenger RNA vaccine against COVID-19. After a reportedly successful Phase 1 clinical trial, Pfizer entered into a contract with the United States Department of Defense ("DoD"), under which DoD would purchase 100 million doses of the vaccine for $1.95 billion following FDA approval

or Emergency Use Authorization ("EUA"). Pfizer and BioNTech became co-sponsors of Phase 2 and 3 clinical trials for their vaccine, aiming for FDA approval or EUA status.

4. Pfizer delegated management of the clinical trial to subcontractor Defendant Icon PLC ("Icon"), an Irish clinical research organization. Icon was tasked with oversight of over 160 test sites worldwide, ensuring trial protocol compliance, and ensuring reporting of required information. This includes oversight of Serious Adverse Event ("SAE") reporting, which is required by the trial protocol and federal regulations. Pfizer remained responsible for managing and quality checking all data for the entire clinical trial, per the trial's protocol.

5. Defendant Ventavia Research Group, LLC ("Ventavia") was contracted by Pfizer to provide three Phase 3 test sites for the vaccine trial in Houston, Fort Worth, and Keller, Texas. Ventavia ultimately enrolled about 1,500 clinical trial patients. Ventavia employed Relator Jackson as a Regional Director. She was tasked with overseeing site management, patient enrollment, quality assurance completion, event reporting, corrective action plan creation, communication with management, and staff training completion at the Keller and Fort Worth sites.

6. Pfizer, aiming for the title of "first successful COVID-19 vaccine," pushed Ventavia to enroll as many patients as possible in the vaccine trial as quickly as possible. Ventavia was compensated by Pfizer mainly on a per-patient basis—up to a weekly limit—and rushed to enroll as many clinical trial participants as possible per week. Ventavia's race to maximize payment and over-booking of patients resulted in sloppy and fraudulent documentation practices, poor clinical trial protocol compliance, and little oversight. Pfizer and Icon turned a blind eye to Ventavia's misconduct, despite numerous warning signs.

7. Ventavia's trial protocol and regulatory violations were so widespread, in fact, that Relator observed them on a near-daily basis during her brief employment period. For example, Relator observed:

- fabrication and falsification of blood draw information, vital signs, signatures and other essential clinical trial data;
- enrollment and injection of ineligible clinical trial participants, including Ventavia employees' family members;
- failure to timely remove ineligible patients' data from the trial;
- failure to maintain temperature control for the vaccine at issue;
- failure to monitor patients after injection as required by the trial protocol;
- principal investigator oversight failures;
- use of unqualified and untrained personnel as vaccinators and laboratory personnel;
- failure to maintain the "blind" as required, which is essential to the credibility and validity of the observer-blinded clinical trial;
- ethical violations, such as failure to secure informed consent and giving patients unapproved compensation;
- improper injection of the vaccine (*i.e.*, by over-diluting vaccine concentrate or using the wrong needle size);
- failure to ensure that trial site staff were properly trained as required by good clinical practices;
- safety and confidentiality issues, including HIPAA violations; and
- other violations of the clinical trial protocol, FDA regulations, and Federal Acquisition Regulations and their DoD supplements.

8. Ventavia failed to report the majority of its clinical trial protocol and regulatory violations to Pfizer or the external Institutional Review Board. Issues were improperly documented or hidden away in "notes to the file," and not corrected.

9. Icon and Pfizer communicated with each trial site to monitor compliance, but failed to follow up on missing information, ignored "red flags" of trial protocol violations and false data, and failed to exclude ineligible participants from the trial data. In Pfizer's rush to be the "first," it failed to address violations that compromised its entire clinical trial, including those raised by Relator. This resulted in Pfizer withholding material information from the United States, and submitting false data and records in its clinical trial results.

10. Relator reported many of the violations she observed to Ventavia management, who allowed the majority of violations to continue unabated. Defendant Ventavia harassed Relator and terminated her in retaliation for her reports of and efforts to stop fraud against the United States DoD. Relator also reported her concerns to Pfizer after termination, yet Pfizer elected to press on, expanding its trial to include even more participants.

11. Although Relator's experience with test sites is limited to Texas, Pfizer and Icon's oversight failures and fraudulent misconduct vis-a-vis Ventavia bring the entire Pfizer-BioNTech clinical trial into question. It is likely that similar fraud occurred at clinical trial sites managed by other subcontractors of Pfizer.

12. The FDA issued EUA for the Pfizer-BioNTech vaccine on December 11, 2020. The EUA is based in part on Defendants' falsified clinical trial results and concealment of key information. As a result, DoD has now purchased misbranded vaccines from Defendant Pfizer, relying on Defendants' fraudulent misrepresentations that the vaccine trial was properly conducted. Had DoD known of Defendants' clinical trial protocol violations, fraudulent conduct, and regulatory violations, it would not have purchased the vaccines.

13. Defendants' fraudulent scheme caused DoD to pay billions that it would not have paid had it known that the safety and efficacy of the vaccine at issue was not properly proven. At worst, the vaccine could be far less effective than represented, and DoD has purchased something that will not protect the public from COVID-19 as effectively as claimed. At best, the vaccine is effective, but Defendants have profited from the COVID-19 pandemic by lying to the United States, violating federal regulations, and failing to uphold the integrity of the scientific process.

II. JURISDICTION AND VENUE

14. Jurisdiction and venue are proper in the Eastern District of Texas pursuant to 31 U.S.C. § 3732(a) because Relator's claims seek remedies on behalf of the United States for multiple violations of 31 U.S.C. §§ 3729–3732 in Texas by Defendants that damaged the United States government.

15. Defendants Pfizer, Inc. and Ventavia do business in Texas and are registered with the Texas Secretary of State.

16. Defendant Icon PLC conducts continuous and systematic business in Texas. It maintains corporate offices in San Antonio and Sugar Land, Texas, and employs hundreds of Texans statewide, including in this District. Icon PLC also oversees and manages clinical trial sites in Texas and in this District.

17. Defendants are therefore subject to general and specific personal jurisdiction pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. § 1367.

III. GOVERNMENT PLAINTIFF

18. The Government Plaintiff in this lawsuit is the United States of America.

IV. INTRODUCTION TO RELATOR BROOK JACKSON

A. Relator's Background

19. Relator Brook Jackson ("Relator" or "Jackson") has worked in the clinical trials field for over eighteen years. She is a Clinical Research Auditor and Certified Clinical Research Professional. Before working for Defendant Ventavia Research Group, LLC ("Ventavia"), Jackson served as the Director of Operations for a multi-state clinical trial company. Second only to the CEO, she oversaw legal and regulatory compliance, adherence to good clinical practices, submission of required documentation, and business development across the company.

20. Because Relator's prior position required a great deal of travel, she decided to leave that company and begin working for Ventavia. Relator began her employment with Ventavia on September 8, 2020 as a Regional Director.

21. As Regional Director, Relator oversaw site managers, patient recruitment success, training completion, quality assurance completion, enforcement of communication paths, and growth plans at her assigned test sites. Relator's job duties also included daily and weekly communication with the site operations managers of her assigned test sites and Ventavia's leadership team. Relator was responsible for the duties above at two of Ventavia's three test sites for the clinical trial at issue, located in Fort Worth and Keller, Texas.

22. Relator's direct supervisor during her employment with Ventavia was Director of Operations Marnie Fisher ("Fisher"). Her other superiors were Ventavia's Executive Directors Olivia Ray ("Ray") and Kristie Raney ("Raney") and the Chief Operating Officer, Mercedes Livingston ("Livingston").

23. Beginning on September 8, 2020, Relator reported on a near-daily basis to Fisher and Livingston that patient safety and the integrity of the Pfizer-BioNTech vaccine trial was at risk, via telephone, conversation, and e-mail. Relator discussed virtually all of the clinical trial protocol and FDA regulatory violations she witnessed with Livingston, Ray, Raney, and Fisher, including, but not limited to: (1) enrollment and injection of ineligible trial participants; (2) falsification of data, poor recordkeeping, and the deficiency of Ventavia's documentation "quality control"; (3) deficiencies in and failure to obtain informed consent from trial participants; (4) adverse event capture and reporting; (5) failure to preserve blinding; (6) vaccine dilution errors; (7) failure to list all staff on delegation logs; (8) principal investigator oversight; (9) reporting temperature excursions; (10) patient safety issues, such as not keeping epinephrine dose

information in patient charts; (11) failure to secure and record staff training required by clinical research standards; (12) use of unqualified staff as vaccinators; (13) use of biohazard bags for needle disposal; and (14) failure to properly monitor patients post-injection.

24. In general, every time that Relator raised concerns about safety or Ventavia's clinical trial protocol compliance with Fisher, she was told to e-mail Fisher about the issue or make a list of affected patients. Many of the identified issues were systemic, and Relator did not always have access to information required to make the lists Fisher requested. Relator did as Fisher requested to the extent that she was able, but the identified problems were never addressed.

25. Relator also reported some clinical trial protocol violations to the Fort Worth Principal Investigator, Dr. Mark Koch. In particular, Relator discussed Ventavia's practice of "quality checking" patient source documents long after the fact and issues of missing documentation. Dr. Koch acknowledged that Ventavia needed to "clean up" the problems before starting any new clinical trials.

26. Ventavia was required to scan or enter all data from clinical trial participants' source documents into the "Complion" Clinical Trial Management System database, so that it could be passed on to Icon and Pfizer. Ventavia "quality checked" all source documents before scanning or uploading them. In Ventavia's scramble to enroll as many participants as possible, quality checking and uploading fell behind schedule. Relator observed that the "back log" of documents to be quality checked often lacked key information, such as patient or doctor signatures and blood draw times. Relator also observed that Ventavia's quality checking process was performed by unqualified personnel not listed on delegation logs, and often involved falsification of missing data. Relator reported her concerns to Ventavia management, who was more concerned with "catching up" on quality checking than actually solving the problem.

27. On September 16, 2020, Relator examined some of the biohazard disposal bags at Ventavia's Fort Worth site. Relator discovered that used needles had been disposed of in the bags. Biohazard bags are not puncture-proof, so this presented a serious risk to employees' safety. That same night, Relator photographed ongoing HIPAA violations. Relator also documented that product cartons and patient randomization numbers from the BioNTech-Pfizer vaccine trial had been left in public view in a preparation area, potentially unblinding all Ventavia staff at the site and some patients as well. Relator shared her photographs from September 16 with Livingston and Fisher via text message or e-mail.

28. On September 17, 2020, in her daily phone call with Ray, Raney, Fisher, Livingston, and Houston Regional Director Lovica "Kandy" Downs ("Downs"), Relator brought up virtually all of the protocol and regulatory violations she had witnessed to date, as well as Ventavia's HIPAA violations. Relator explained that the FDA would likely issue warning letters against Ventavia if it visited or audited the trial sites. She recommended that Ventavia immediately stop enrollment in the Pfizer-BioNTech clinical trial.

29. Ventavia shortly thereafter decided to pause enrollment in order to catch up on "quality checking" source documents. Ventavia was not up-front with Pfizer and Icon about the reasons for the enrollment pause (sloppy documentation that violated the clinical trial protocol). Ventavia elected to schedule patients for several weeks later rather than truly and completely pause enrollment. *See* Ex. 1, Text Messages with Ray and Others, at 6, 9–10. Raney directed employees not to cancel any patients already "on their way" to test sites because "that might piss them off and they can call the news, etc[.]" Ex. 1, at 11.

30. During the enrollment pause, Ventavia's "quality checking" not only failed to correct documentation violations but also involved falsification of missing or inconsistent data.

Relator even personally observed employees falsifying source document data (*i.e.*, by changing blood pressure readings). In short, Ventavia's "quality checking" failed to prevent or stop fraud on the United States DoD.

31. On September 23, 2020, Relator e-mailed Ray, Fisher, Raney, Downs, Livingston, and Director of Quality Control William Jones ("Jones") to report ongoing serious issues with Ventavia's "quality checking." *See* Ex. 2, E-mail Chain with Ray and Others (Sept. 23, 2020). Relator noted, for example, that multiple patients had not received their second dose of the vaccine in the required window of nineteen to twenty-three days, and that Ventavia had not truthfully recorded the delay. *Id.* Due to the seriousness of these violations, Relator stated, "I might be in a little bit of shock." Ex. 2, at 1.

32. On the evening of September 24, 2020, Relator met with Fisher and Jones. *See* Ex. 3, Transcript of September 24, 2020 Meeting Recording. The meeting was arranged to discuss Relator's photographic documentation of safety issues, HIPAA violations, and unblinding from September 16. The meeting quickly escalated into harassment. Fisher questioned repeatedly why Relator took the photographs and falsely accused Relator of removing patient source documents from another Ventavia location. Jones stated that Ventavia had not "even finished quantifying the number of errors" because "it's something new every day." Ex. 3, at 12. He acknowledged that the problems were "not just in one site" either, and stated "we're gonna get some kind of letter of information at least, when the FDA gets here. Know it." *Id.*

33. Relator specifically referenced FDA regulatory violations in her September 24 conversation with Fisher and Jones. She told Fisher and Jones that if they did not see what she saw when quality checking patients' source documents, then they needed to "get on Google" and search for FDA warning letters. Ex. 3, at 14. Relator also reported to Fisher and Jones that Raney

and Ray had acknowledged that Ventavia did not have the staff or patient room capacity to handle the number of clinical trial participants being seen every day.

34. On the following morning, Relator called the FDA's hotline to report the clinical trial protocol violations and patient safety concerns she witnessed. Relator was terminated from her position at Ventavia that same day—September 25, 2020—under the pretext that she was "not a good fit." Relator had never been formally disciplined or reported for any failure regarding her job performance.

35. After Relator was terminated, she called Ventavia's contact at Pfizer and gave a general overview of her concerns about unblinding, principal investigator oversight, and patient safety in the Pfizer-BioNTech vaccine trial. She also informed Pfizer that she had contacted the FDA.

36. Almost immediately after Relator was terminated (the next business day), Ventavia lifted the enrollment "pause" and resumed the push to enroll as many clinical trial participants per week as possible. Given the amount of quality checking left to be performed when Relator was terminated, Relator estimates that Ventavia had neither completed quality checking nor remedied its ongoing violations by the time it resumed enrollment.

37. Ventavia retaliated against Relator in response to her reports of, and efforts to stop, fraud against the United States DoD resulting from the Pfizer-BioNTech COVID-19 vaccine trial.

B. Original Source and Disclosures

38. There are no bars to recovery under 31 U.S.C. § 3730(e), and, or in the alternative, Relator is an original source as defined therein. Relator has direct and independent knowledge of the information on which she bases her allegations. To the extent that any allegations or transactions herein have been publicly disclosed, Relator has independent knowledge that

materially adds to any publicly disclosed allegations or transactions and has provided this information to the United States and DoD prior to filing a complaint by serving a voluntary pre-filing disclosure statement.

39. Relator will submit an original disclosure statement, as well as substantially all material evidence and information, to the Attorney General of the United States, Department of Justice, and United States Attorney for the Eastern District of Texas contemporaneously with the service of this Original Complaint.

V. DEFENDANTS

A. Pfizer Inc.

40. Pfizer Inc. ("Pfizer") is a Delaware corporation headquartered at 235 East 42nd Street, New York, New York 10017-5703. It maintains an office in this District at 1301 Solana Boulevard, Westlake, Texas 76262. Pfizer, together with BioNTech, developed the vaccine at issue and co-sponsors the clinical trial at issue.

41. Pfizer is publicly-traded on the New York Stock Exchange under the ticker symbol "PFE."

42. The United States Department of Defense has contracted with Pfizer to purchase 200 million doses of the vaccine at issue after FDA approval, for a total cost of $3.9 billion.

43. Pfizer is currently subject to a Corporate Integrity Agreement with the Office of the Inspector General of the U.S. Department of Health and Human Services, dated May 23, 2018.[1]

44. Pfizer may be served through its registered agent, CT Corporation System, at 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

[1] *Available at* https://oig.hhs.gov/fraud/cia/agreements/Pfizer_Inc_05232018.pdf

B. Icon PLC

45. Icon PLC ("Icon") is an Irish company headquartered in Dublin. Icon conducts extensive business in the United States and Texas, including at its offices in Sugar Land and San Antonio, Texas. Icon has hundreds of employees in Texas, including in this District, and oversees and manages clinical trials statewide.

46. Icon is publicly-traded on the NASDAQ stock exchange under the ticker symbol "ICLR."

47. Defendant Pfizer subcontracted Icon to manage the clinical trial at issue. Icon oversaw more than 160 test sites worldwide, and was tasked with ensuring clinical trial protocol compliance and required information reporting.

48. Icon may be served at South County Business Park, Leopardstown, Dublin 18, Ireland.

C. Ventavia Research Group, LLC

49. Ventavia Research Group, LLC ("Ventavia") is a Texas limited liability company headquartered at 1307 Eighth Avenue, Suite 202, Fort Worth, Texas 76104. Ventavia operates ten test sites in Texas, some of which are located in this District. Three of Ventavia's test sites—in Keller, Fort Worth, and Houston—participated in the vaccine trial at issue.

50. Ventavia secured its contract to operate three test sites for the Pfizer-BioNTech vaccine trial through its contracting agent Platinum Research Network, LLC, and was paid directly by Defendant Pfizer for that work. Pfizer compensated Ventavia mainly on a per-patient basis, with additional amounts paid per Serious Adverse Event reported and for activities like training.

51. Ventavia recorded all key participant and clinical trial information in "source documents" made available to Pfizer and Icon after entry or upload.

52. Ventavia may be served through its registered agent, Registered Agents Solutions Inc., at 1701 Directors Boulevard, Suite 300, Austin, Texas 78744.

VI. RESPONDEAT SUPERIOR AND VICARIOUS LIABILITY

53. Any and all acts alleged herein to have been committed by Defendants were committed by officers, directors, employees, representatives, or agents, who at all times acted on behalf of Defendants and within the course and scope of their employment, or by corporate predecessors to whom successive liability applies.

VII. STATUTORY AND FACTUAL BACKGROUND

A. COVID-19 Vaccine Development

54. On May 15, 2020, the White House announced Operation Warp Speed ("OWS"), a partnership between the United States Department of Health and Human Services ("HHS") and the United States Department of Defense ("DoD").

55. OWS aimed to begin delivery of 300 million doses of FDA-authorized COVID-19 vaccines by January of 2021. HHS, Fact Sheet: Explaining Operation Warp Speed (Nov. 30, 2020).[2] OWS coordinates with and expands existing HHS programs, including the National Institutes of Health's Accelerating COVID-19 Therapeutic Interventions and Vaccines ("ACTIV") partnership. *Id.*

56. OWS's main initiative has been contracting with pharmaceutical companies to fund clinical trials of or purchase promising COVID-19 vaccine candidates. Purchases only occur after those vaccine candidates secure approval or Emergency Use Authorization from the United States Food and Drug Administration ("FDA"). The vaccine at issue is part of one such contract, explained further *infra*.

[2] https://www.hhs.gov/coronavirus/explaining-operation-warp-speed/index.html.

B. FDA Clinical Trial Regulations

57. The FDA promulgates regulations applicable to all clinical trials of new drugs like the vaccine at issue. *See* 21 C.F.R. §§ 312.1 *et seq.* These regulations apply with equal force to COVID-19 vaccine trials, despite their accelerated nature and the pandemic emergency. *See* 42 U.S.C. § 247d-6d(c)(5)(C)(i).

58. Clinical trial sponsors like Pfizer must submit an Investigational New Drug Application ("IND") before commencing the trial. *See* 21 C.F.R. § 312.23(a). An example IND (Form FDA-1571) is attached hereto as Exhibit 4. In the IND, the sponsor commits to conduct the trial "in accordance with all [] applicable regulatory requirements." 21 C.F.R. § 312.23(a)(v); Ex. 4, Form FDA-1571, at 2. The IND form warns clinical trial sponsors that making a "willfully false statement is a criminal offense." Ex. 4, at 2.

59. Clinical trial sponsors must utilize an Institutional Review Board ("IRB") for initial and continuing review and approval of the clinical trial. *See* 21 C.F.R. § 312.23(a)(iv). The sponsor must report "all changes in the research activity" to the IRB, along with "all unanticipated problems involving risk to human subjects or others." 21 C.F.R. § 312.66. The sponsor must assure that it "will not make **any changes to research without IRB approval**, except where necessary to eliminate apparent immediate hazards to human subjects." *Id.* (emphasis added).

60. The sponsor must promptly investigate "all safety information it receives" and follow up on any adverse reactions. 21 C.F.R. § 312.32(d)(1). The sponsor must also review all safety and effectiveness information reported by contract investigators (*i.e.*, clinical trial sites). The sponsor must notify the FDA of potential serious risks and adverse reactions. *See* 21 C.F.R. § 312.32(c).

61. If a study sponsor utilizes contract investigators for its clinical trial (like how Pfizer contracted with Icon and Ventavia here), it must ensure that the investigator is qualified, provide the investigator with the information needed to properly conduct a clinical trial, ensure proper monitoring of the trial, ensure that the trial complies with the IND and clinical trial protocol, and ensure "that FDA and all participating investigators are promptly informed of significant new adverse effects or risks" with respect to the drug under investigation. 21 C.F.R. § 312.50.

62. The sponsor must obtain a signed Form FDA-1572 from each contract investigator. 21 C.F.R. § 312.53(c). In Form FDA-1572, each investigator certifies, in relevant part, that it:

> (a) Will conduct the study(ies) in accordance with the relevant, current protocol(s) and will only make changes in a protocol after notifying the sponsor, except when necessary to protect the safety, the rights, or welfare of subjects;
> (b) Will comply with all requirements regarding the obligations of clinical investigators and all other pertinent requirements in [21 C.F.R. part 312];
> (c) Will personally conduct or supervise the described investigation(s);
> (d) Will inform any potential subjects that the drugs are being used for investigational purposes and will ensure that the requirements relating to obtaining informed consent (21 CFR part 50) and institutional review board review and approval (21 CFR part 56) are met;
> (e) Will report to the sponsor adverse experiences that occur in the course of the investigation(s) in accordance with § 312.64; . . . [and]
> (g) Will ensure that all associates, colleagues, and employees assisting in the conduct of the study(ies) are informed about their obligations in meeting the above commitments.

21 C.F.R. § 312.53(c)(vi); *see also* Ex. 5, Form FDA-1572. Each contract investigator also commits in Form FDA-1572 to promptly report to the IRB "all changes in the research activity and all unanticipated problems involving risks to human subjects or others[.]" 21 C.F.R. § 312.53(c)(vii). The contract investigators further commit to not making any research changes without IRB approval "except where necessary to eliminate apparent immediate hazards to the human subjects." *Id.* The Form warns contract investigators that a "willfully false statement is a criminal offense." Ex. 5, at 2.

63. The sponsor must monitor its contract investigators' progress and compliance with the clinical trial protocol, IND, and all applicable regulations. *See* 21 C.F.R. §§ 312.50, 312.56. "A sponsor who discovers that an investigator is not complying" with those requirements "shall promptly either secure compliance or discontinue shipments of the investigational new drug to the investigator and end the investigator's participation in the [clinical trial]." 21 C.F.R. § 312.56(b). Contract investigators are bound by the same regulations as the sponsor, to the same degree, with regard to any obligation the sponsor delegates to them. *See* 21 C.F.R. § 312.52.

64. Thus, in the clinical trial at issue, all Defendants are bound by FDA regulations and "subject to the same regulatory action . . . for failure to comply[.]" 21 C.F.R. § 312.52(b). Failure to comply with FDA regulations or submission of false information to the trial sponsor or FDA can disqualify a company from conducting future clinical trials. *See* 21 C.F.R. § 312.70(b).

65. Contract investigators are obligated to "furnish all reports to the sponsor." 21 C.F.R. § 312.64(a). The sponsor "is responsible for collecting and evaluating the results obtained." *Id.*

66. Contract investigators must maintain adequate records of drug dispensation, "including dates, quantity, and use by subjects." 21 C.F.R. § 312.62(a). They must also keep "adequate and accurate case histories" for all study participants which "record all observations and other data pertinent to the investigation[.]" 21 C.F.R. § 312.62(b).

67. Informed consent must be obtained and documented for every participant in the clinical trial. *See* 21 C.F.R. §§ 50.27(a), 312.60, 312.62(b). The investigator must document "that informed consent was obtained **prior to** participation in the study." 21 C.F.R. § 312.62(b) (emphasis added).

68. The clinical trial drug (here, the vaccine at issue) shall only be given to subjects under an investigator or sub-investigator's personal supervision. *See* 21 C.F.R. § 312.61. It shall not be given to any person not authorized to receive it. *Id.*

69. Contract investigators must immediately report any Serious Adverse Event ("SAE") to the sponsor, "whether or not considered drug related, . . . and must include an assessment of whether there is a reasonable possibility that the drug caused the event." 21 C.F.R. § 312.64(b). Nonserious adverse events must also be reported to the sponsor. *Id.*

70. SAEs have the potential to pause clinical trials if sufficiently serious. *See* 21 C.F.R. § 312.44. In fact, two of Pfizer's competitors in the COVID-19 vaccine race—Astra Zeneca and Johnson & Johnson—had to pause their own clinical trials when participants developed unexplained illnesses.

C. The BioNTech-Pfizer COVID-19 Vaccine

1. Background and Development of BNT162b2

71. BNT162b2, the vaccine at issue, is a biologic vaccine co-developed by BioNTech and Defendant Pfizer which is based on a platform of nucleoside-modified messenger RNA ("mRNA").

72. Most conventional vaccines are based on weakened strains of the virus at issue. Those vaccines essentially "teach" the body how to fight the weakened virus, resulting in production of antigens to combat future infection.

73. BNT162b2, in contrast, is based on mRNA—molecules of genetic material—from the novel Coronavirus. The vaccine causes the body's cells to produce viral proteins, and the body then produces an immune response. In this way, the body is "taught" how to fight the virus's proteins, rather than a weakened version of the virus itself. One purported advantage of mRNA

vaccines is that there is no risk of infection because they do not contain the actual virus—just parts of its genetic material.

74. One drawback of mRNA vaccines like BNT162b2—and one reason that they are not widespread—is that they must be stored at more controlled temperatures than conventional vaccines. BNT162b2 specifically must be stored in medical-grade freezers at –112°F to –76°F. It may also be shipped and stored short-term in a specialized cooler with dry ice (solid carbon dioxide) for up to ten days unopened.

75. Because BNT162b2 is stored at such low temperatures, it must be thawed before use. The placebo used in the BNT162b2 clinical trial does not require such thaw time. In order to preserve patient blinding in the BNT162b2 clinical trial, waiting times for both the vaccine and placebo are standardized at thirty minutes or more, and the syringe is covered by an opaque label during injection. *See* Ex. 6, BNT162b2 Product Manual, at 34, 48–49.

2. Clinical Trial Overview

76. Clinical trials of new drugs are divided into three phases under FDA regulations. *See* 21 C.F.R. § 312.21. Phase 1 trials typically evaluate the "metabolism and pharmacologic actions of the drug in humans, the side effects associated with increasing doses, and, if possible, . . . gain early evidence on effectiveness." 21 C.F.R. § 312.21(a)(1).

> Phase 2 includes the controlled clinical studies conducted to evaluate the effectiveness of the drug for a particular indication or indications in patients with the disease or condition under study and to determine the common short-term side effects and risks associated with the drug. Phase 2 studies are typically well controlled, closely monitored, and conducted in a relatively small number of patients, usually involving no more than several hundred subjects.

21 C.F.R. § 312.21(b). Next, Phase 3 trials are "performed after preliminary evidence suggesting effectiveness of the drug has been obtained, and are intended to gather the additional information about effectiveness and safety that is needed to evaluate the overall benefit-risk relationship of the

drug and to provide an adequate basis for physician labeling." 21 C.F.R. § 312.21(c). Phase 3 trials "usually include from several hundred to several thousand subjects." *Id.*

77. Phase 1 of the trial at issue concluded in the summer of 2020. It involved 195 United States participants aged eighteen to fifty-five. Several different doses were tested, and the most successful, called "BNT162b2," was advanced to Phase 2 and 3 testing. *See* Edward E. Walsh et al., *Safety & Immunogenicity of 2 RNA-Based COVID-19 Vaccine Candidates*, New England Journal of Medicine (Oct. 14, 2020).[3]

78. In Phase 2 and 3 of the trial, the vaccine at issue was administered as an intramuscular injection. The clinical trial protocol requires that it be administered in two doses separated by nineteen to twenty-three days. Ex. 7, Clinical Trial Protocol, at 88; Ex. 6, BNT162b2 Product Manual, at 45.

79. Pfizer expanded the trial to HIV-positive individuals, those with Hepatitis B and C, and sixteen- and seventeen-year-olds in September of 2020, adding 14,000 new participants worldwide. Pfizer again expanded the trial to young teenagers (aged twelve to fifteen) on October 12, 2020, adding approximately 4,400 more participants.

80. A total of 43,998 participants were enrolled in Phase 3 of the trial at issue, per Pfizer's reporting on clinicaltrials.gov.[4] Approximately 1,500 of those were enrolled at Defendant Ventavia's facilities. Defendant Ventavia recruited study participants via advertising, contacting local business and organizations, and features in local news media. Patients were paid for participation in the study.

[3] https://www.nejm.org/doi/10.1056/NEJMoa2027906?url_ver=Z39.88-2003&rfr_id=ori:rid:crossref.org&rfr_dat=cr_pub%20%200pubmed.
[4] https://clinicaltrials.gov/ct2/show/study/NCT04368728.

81. Pfizer and BioNTech announced the completion of Phase 3 on November 18, 2020. Ex. 8, Pfizer Press Release, at 2. Pfizer applied for EUA for BNT162b2 on November 20, 2020. The FDA granted EUA on December 11, 2020.[5]

3. Clinical Trial Protocol

82. Pfizer has publicized its clinical trial protocol on the Internet, and it is attached hereto as Exhibit 7. The protocol portions most relevant to this matter are summarized below.

a. Inclusion and Exclusion Criteria

83. The trial at issue is randomized, placebo-controlled, and observer-blinded. *See* Ex. 7, Clinical Trial Protocol, at 1. By the end of Phase 3, the trial included healthy individuals, aged twelve to eighty-five, at risk of acquiring COVID-19, who are capable of informed consent and willing and able to comply with scheduled visits, vaccination plan, laboratory tests, and study procedures. *See* Ex. 7, at 40–41. Individuals with certain pre-existing conditions or history are excluded, including pregnant and breastfeeding women and people with a history of severe vaccine reactions. *See* Ex. 7, at 41–43.

84. The study also excludes "[i]nvestigator site staff or Pfizer/BioNTech employees directly involved in the conduct of the study, site staff otherwise supervised by the investigator, and their respective family members." Ex. 7, at 43.

85. Participants who have already begun the study must be withdrawn if they deviate from the protocol, lose their eligibility, or take certain medications. *See* Ex. 7, at 50–53. Participants who become pregnant after receiving the first dose of the vaccine, for example, must withdraw from the study. *See* Ex. 7, at 65.

[5] Press Release, FDA, FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine (Dec. 11, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19.

86. All participants' eligibility screening evaluations must be reviewed "to confirm that potential participants meet all eligibility criteria." Ex. 7, at 55. Ventavia was required to "maintain a screening log to record details of all participants screened and to confirm eligibility or record reasons for screening failure, as applicable." *Id.*

87. Each participant's full date of birth must be collected in order to facilitate evaluation of immune response and safety by age. Ex. 7, at 54.

b. Blinding

88. The study is observer-blinded. Ex. 7, at 1. The physical appearance of the vaccine and placebo differ, so blinding the person administering the vaccine is not possible. *See* Ex. 7, at 36. The patient receiving the vaccine, study coordinator, and other site staff are blinded. *See* Ex. 7, at 36, 48–49.

89. At the test site level, the only people who should be unblinded are those administering the injection. *See* Ex. 7, at 36, 48–49. Nobody involved in "evaluation of any study participants" should be unblinded. Ex. 7, at 49.

c. Temperature Control

90. The investigator must confirm that all vaccine doses received have been transported and stored under "appropriate temperature conditions[,]" and that "any discrepancies are reported and resolved before use of the study intervention." Ex. 7, at 47.

91. The vaccines must be stored in "a secure, environmentally controlled, and monitored" area in accordance with the product manual, as described further *infra*. *Id.* Daily maximum and minimum temperatures must be recorded for all storage locations and those records must be made available upon request. *See id.*

92. Any deviations from recommended temperature, called "temperature excursions," must be reported to Pfizer upon discovery, "along with any actions taken." Ex. 7, at 47. The vaccines subject to the excursion must be quarantined from others and not used unless Pfizer subsequently provides permission. *See id.*

d. Informed Consent

93. As with all clinical drug trials, the participant must provide informed consent. The protocol for the trial at issue requires obtaining signed and dated informed consent documentation prior to performing *any* study-specific procedures, including administration of the vaccine. *See* Ex. 7, at 54, 117.

e. Administration

94. Before administration of the vaccine, study participants receive a clinical assessment "to establish a baseline." Ex. 7, at 58. The participant's medical history and observations from any physical examination must be documented and submitted to Pfizer. *See id.*

95. Women of childbearing potential must undergo a pregnancy test before receiving the vaccine or placebo. *See* Ex. 7, at 23, 65,

96. Only participants enrolled in the study may receive the vaccine, and only authorized site staff may administer it. Ex. 7, at 47.

97. Study participants must receive the vaccine "under medical supervision." Ex. 7, at 50. The date and time of injection must be recorded. *Id.*

98. Participants must receive their second injection nineteen to twenty-three days after the first. *See* Ex. 7, at 23, 88.

f. Safety and Monitoring

99. All adverse events in the first thirty minutes after injection must be documented in an Adverse Event Case Report Form. *See* Ex. 7, at 58, 86, 89.

100. Participants use an electronic diary ("e-diary") application to record any adverse events and use of any antipyretic (fever-reducing) medication. *See* Ex. 7, at 58–59. E-diary data is periodically transmitted directly to Pfizer and Icon. *See* Ex. 7, at 59.

101. After participants report any ongoing local reactions, systemic events, or use of antipyretic medication, the investigator must obtain and document end dates for those events. *See* Ex. 7, at 59–60.

102. Serious adverse events ("SAEs") must be reported to Pfizer within twenty-four hours. Ex. 7, at 66. Under no circumstances should they be reported later. *Id.* Any update to SAE information must be reported to Pfizer within twenty-four hours of it becoming available. *Id.* Any non-serious adverse events must be reported and documented on Case Report Forms submitted to Pfizer. *See id.* Site investigators are responsible for pursuing and obtaining "adequate information both to determine the outcome and to assess whether the event" is serious "or caused the participant to discontinue the study intervention." Ex. 7, at 65.

103. Follow-up on adverse events must continue until the event resolves or stabilizes at a level acceptable to the investigator and concurred with by Pfizer. *Id.* Follow-up information must include enough detail to allow for complete medical assessment and independent determination of possible causality. Ex. 7, at 67.

104. If any participant is confirmed to have been injected while pregnant or breastfeeding, Pfizer must be notified within twenty-four hours. *See* Ex. 7, at 67–68. The same

applies to pregnancy in partners of clinical trial participants. *Id.* The investigator must conduct follow-up on the pregnancy and its outcome and keep Pfizer updated. *See* Ex. 7, at 68–69.

g. Legal and Regulatory Compliance

105. The protocol emphasizes that investigators must notify Pfizer of SAEs "so that legal obligations and ethical responsibilities towards the safety of participants and the safety of [the vaccine] under clinical investigation are met." Ex. 7, at 67. The protocol notes that Pfizer "has a legal responsibility to notify" the government about the safety of the vaccine under investigation, and "will comply with country-specific regulatory requirements relating to safety reporting to the appropriate regulatory authority . . . and investigators." *Id.*

106. The protocol also states that the study will be conducted in accordance with all applicable laws and regulations, including privacy laws. Ex. 7, at 116.

107. Ventavia is responsible for oversight of the study at their sites and adherence to FDA regulations found in Title 21 of the Code of Federal Regulations. *See id.*

h. Adherence to Protocol

108. Adherence to the trial protocol "is essential and required for study conduct." Ex. 7, at 54. "Protocol waivers or exemptions are not allowed." *Id.* Thus, as noted previously, participants who deviate from the protocol must be excluded.

109. The protocol also requires that the clinical trial adhere to "ICH GCP"—Good Clinical Practices established by the International Council for Harmonization. *See* Ex. 7, at 116, 138–39.

110. Any failure to provide a test or procedure required by the protocol must be documented, alongside any corrective or preventive actions taken by the administrator, and Pfizer's safety team must be informed. *See* Ex. 7, at 55.

111. Site investigators must inform Pfizer immediately if they know of any new information which might influence the evaluation of the benefits and risks of the vaccine at issue. Ex. 7, at 116. They must also immediately inform Pfizer of any serious breaches of the study protocol or ICH GCP. *Id.*

112. Pfizer may close a study site early for any reason, including when the site investigator fails to comply with the study protocol. *See* Ex. 7, at 121.

i. Accuracy of Data

113. Site investigators must maintain accurate source documentation supporting all information entered into electronic Case Report Forms submitted to Pfizer. *See* Ex. 7, at 119–21. If source documents differ from any information in the Case Report Form, the discrepancy must be explained. Ex. 7, at 120.

114. Site investigators must verify that data entries are accurate and correct by signing the Case Report Forms transmitted to Pfizer. Ex. 7, at 119.

115. Pfizer or Icon is responsible for data management of the study, "including quality checking of the data." Ex. 7, at 120.

4. BNT162b2 Product Manual

116. The product manual for BNT162b2—attached hereto as Exhibit 6—provides specifics as to how the vaccine and placebo should be stored and administered. These specifics supersede storage conditions set out in the clinical trial protocol, and provide additional guidance for temperature excursions and use. *See* Ex. 7, Clinical Trial Protocol, at 47–48, 52, 80, 86, 88. Thus, noncompliance with the product manual is equivalent to noncompliance with BNT162b2's clinical trial protocol.

a. Additional Blinding Precautions

117. The patient, study coordinator, and other test site staff are blinded, as previously noted. The vaccinator is not. "Blinded personnel should not have access to the container IDs" for the vaccine. Ex. 6, Product Manual, at 23. "Only the site staff who will be dispensing, preparing, and administering the [vaccine] are unblinded and can have this access." *Id.*

118. Occluding labels are applied to the syringe barrel in order to mask its contents and preserve blinding. *See* Ex. 6, at 49–50. Patients are also instructed to look away during injection. *See* Ex. 6, at 50.

119. Each prepared BNT162b2 syringe expires six hours after preparation. Ex. 6, at 49. To preserve the blind, both the vaccine and placebo are given the same expiration date and time. *Id.*

120. Sites must have a process in place for maintaining the study blind, including ensuring that vials, dilution material, and dosing syringes "are shielded from the view of BLINDED study staff and the participant during dose preparation, dispensing, transportation, administration, and disposal." Ex. 6, at 49. The site should "ensure that the study blind was maintained and that the [BNT162b2] cartons, preparation records, syringes, and disposal of used supplies were carefully handled prior to and after administration." *Id.* The site must document for each participant whether the blind was maintained. *See* Ex. 6, at 50.

121. Pfizer must be notified of any potential unblinding, and further enrollment and injection must stop immediately:

> if the study drug is not stored, handled, or administered according to the protocol and/or relevant site documentation to adequately maintain the blind. The site must provide details of the incident or any protocol deviations and[] assist in resolving the issue and/or determining corrective actions to take.

> If the blind is broken or potentially broken, unblinded staff must contact [Pfizer] immediately. Do not administer or dispense the study drug to any participant and do not randomize a new participant until the Sponsor provides further instructions.

Ex. 6, at 43.

b. Temperature Excursions

122. BNT162b2 must be protected from light and stored at -112°F to -76°F in its original packaging prior to use in dose preparation. *See* Ex. 6, at 36, 40.

123. BNT162b2 is shipped in a specialized container with dry ice (solid carbon dioxide). Ex. 6, at 36. The shipping containers used in the clinical trial included a monitoring device that triggered an alarm if the acceptable temperature range for the product was exceeded. *See* Ex. 6, at 36, 38.

124. If any deviation in temperature for BNT162b2 shipments outside of the accepted range occurs, the product must be segregated and the excursion must be reported to Pfizer. *See id.*; Ex. 7, Clinical Trial Protocol, at 47. Pfizer then notifies the site if the product is acceptable for use despite the excursion. *See* Ex. 6, at 38.

125. The same process must be followed if there is any lapse in temperature monitoring or even when the site is not sure if there has been a temperature excursion. *See* Ex. 6, at 40.

c. Dose Preparation

126. BNT162b2 is shipped as a frozen concentrate, which is thawed for approximately 30 minutes and diluted with sodium chloride (saline) solution before injection. Ex. 6, at 47. "Only clinical site personnel who are appropriately trained on the procedures" in the product manual may prepare and administer BNT162b2. Ex. 6, at 46.

127. The doses must be allowed to reach room temperature before administration. Ex. 6, at 48. Preparation time is standardized at thirty minutes or more in order to avoid unblinding,

since the placebo has no thaw time. *See* Ex. 6, at 47–49, 53, 56, 60, 72, 76; Ex. 9, E-mail Chain with Downs and Others (Sept. 18, 2020), at 2.

d. Injection

128. Participants are injected using a 1" or 1.5" needle, depending on their body weight. Ex. 6, at 51. A 5/8" needle may also be used for participants weighing less than 130 pounds if the skin is stretched tightly. *Id.* The 1" needle size is appropriate for all participants except males over 260 pounds and females over 200 pounds, for whom a 1.5" needle is required. *See id.*

129. Only "an appropriately qualified and experienced member of the study staff" may prepare and administer the vaccine or placebo. Ex. 6, at 44, 72, 75, 78. The product manual specifies that this must be a "nurse, physician's assistant, nurse practitioner, pharmacy assistant/technician, or pharmacist[,] as allowed by local, state, and institutional guidance." *Id.*

130. The vaccine is injected into the deltoid muscle of the participant's non-dominant arm. Ex. 6, at 44.

131. Any error in dispensing the vaccine that may cause or lead to patient harm while in the site's control must be reported to Pfizer and Icon immediately. Ex. 6, at 62.

e. Monitoring

132. "Blinded site staff must observe" clinical trial participants after injection "for at least 30 minutes" to monitor "for any acute reactions." Ex. 6, at 44; *see also* Ex. 6, at 61. Reactions must be recorded in source documents, on an adverse event reporting form, and also as an SAE if necessary. Ex. 6, at 44.

D. Contract at Issue

1. Background

133. On July 21 2020, the United States DoD entered into the contract at issue with Defendant Pfizer, through Advanced Technology International ("ATI"). *See* Ex. 10, Pfizer-DoD Contract, at 1.

134. DoD likely used ATI as its intermediary in order to simplify the contracting process and avoid possible delay resulting from typical procurement processes. Despite the use of an intermediary, the United States has clearly stated that the contract is between itself and Pfizer. *See* Ex. 10, Pfizer-DoD Contract, at 1, 2; Press Release, HHS, U.S. Government Engages Pfizer to Produce Millions of Doses of COVID-19 Vaccine (July 22, 2020).[6]

135. Under the contract, DoD purchased 100 million doses of the vaccine at issue, with the option to purchase up to 500 million more doses later. *See* Ex. 10, at 11–12, 17. DoD contracted to pay Pfizer $1.95 billion for the vaccines ($19.50 per dose) after FDA approval or Emergency Use Authorization ("EUA"). *See* Ex. 10, at 1, 17.

136. The clinical trial at issue, which was privately-funded, aimed to secure FDA approval or EUA of the vaccine by the end of 2020, resulting in DoD's purchase of the vaccine and payment to Pfizer under the contract. *See* Ex. 10, at 5, 6.

137. Pfizer delegated some management of the clinical trial at issue to Defendants Icon and Ventavia, as previously explained.

138. Under the contract, Pfizer sends monthly invoices to DoD at $19.50 per dose for each delivery of vaccines, which are paid within thirty days. *See* Ex. 10, at 17.

[6] https://www.hhs.gov/about/news/2020/07/22/us-government-engages-pfizer-produce-millions-doses-covid-19-vaccine.html.

139. In late December of 2020, DoD exercised a contractual option to purchase 100 million more doses of the vaccine for $1.95 billion. Thus, the contract's total value is now $3.9 billion.

2. FAR Compliance

140. In performing under the contract at issue, Pfizer must comply with Federal Acquisition Regulations ("FAR"), including but not limited to the provisions discussed below. *See* 42 C.F.R. §§ 3.1004(a), 52-203.13; Ex. 4, Form FDA-1571, at 2; Ex. 7, Clinical Trial Protocol, at 116.

141. FAR 52.203-13 contains the Contractor Code of Business Ethics and Conduct. In relevant part, that regulation requires Pfizer to maintain a code of ethics and conduct, exercise due diligence to prevent criminal conduct, and disclose any credible evidence that a subcontractor (including Icon and Ventavia) has committed a False Claims Act violation. 48 C.F.R. § 52.203-13(b). This regulation also requires Pfizer to maintain an "internal control system" with procedures in place to detect fraud and improper conduct "in connection with Government contracts." 48 C.F.R. § 52-203.13(c)(2). Pfizer must include the Contractor Code of Business Ethics and Conduct in any subcontract with a performance period over 120 days. 48 C.F.R. § 52-203(13)(d)(1).

142. FAR 42.202(e)(2) requires Pfizer to manage all of its subcontracts. *See* 48 C.F.R. § 42-202(e)(2). Pfizer was therefore required to monitor Ventavia and Icon's performance and ensure that they complied with the clinical trial protocol. *Id.*

3. FAR Certification

143. Federal Acquisition Regulation 52.232-32 requires Pfizer to certify the following, in relevant part, in any request for payment under the contract:

> I certify to the best of my knowledge and belief that-
> (1) This request for performance-based payment is true and correct; this request (and attachments) has been prepared from the books and records of the Contractor, in accordance with the contract and the instructions of the Contracting Officer[.]

48 C.F.R. § 52.232-32(m).

VIII. DEFENDANTS' FRAUD ON THE GOVERNMENT

144. Defendants' conduct in the clinical trial at issue violates its own stated protocols, FDA regulations, and FAR, as described further below. Defendants fraudulently misrepresented their regulatory and protocol compliance to the United States and submitted false data in support of the clinical trial at issue.

A. Violation of Clinical Trial Protocol

145. Relator observed noncompliance with virtually every aforementioned provision of the clinical trial protocol at issue, as explained further below.

146. Every violation of the clinical trial protocol is a violation of the False Claims Act. Defendants represented to the United States in FDA forms 1571 and 1572 that they would abide by the protocol. *See* Ex. 4, Form FDA-1571; Ex. 5, Form FDA-1572. Defendants' regulatory noncompliance rendered Pfizer's later claims for payment fraudulent.

147. Additionally, the clinical trial protocol is a false record material to Pfizer's claims for payment. Pfizer submitted the protocol to the United States alongside its IND. Defendants' protocol noncompliance rendered the protocol false, and DoD would not have paid for the vaccines if it had known of Defendants' widespread noncompliance with the submitted protocol.

1. Inclusion and Exclusion Criteria

148. Ventavia enrolled and injected ineligible clinical trial participants.

149. Pregnant individuals are ineligible, and the trial protocol contains multiple layers of safeguards to prevent administration of the vaccine or placebo to them. *See* Ex. 7, Clinical Trial

Protocol, at 42, 44, 52, 65, 73, 86, 88, 132–35. Women of childbearing potential ("WOCBPs") and their partners must provide information about and use certain methods of contraception. *See* Ex. 7, at 44, 73, 86, 88, 132–35. WOCBPs also undergo a pregnancy test at every vaccination appointment during the trial, as previously noted.

150. Due to Ventavia's carelessness and rush to enroll and inject as many patients as possible, however, pregnant women appear to have been enrolled in the clinical trial and injected with the vaccine or placebo. *See* Ex. 12, E-mail Chain with Raney (Sept. 17, 2020), at 3, 5–6 (describing injection of pregnant patient after a positive pregnancy test). Ventavia did not report all clinical trial participants' pregnancies to Pfizer and Icon as required. *See* Ex. 7, at 67–68, 128 (required reporting protocol).

151. Women who have undergone a tubal ligation may still become pregnant. The clinical trial protocol does not list tubal ligation as an accepted contraception method. *See* Ex. 7, at 134. As a result, Ventavia was required to ensure that these women provided other contraception information and that pregnancy tests were administered before injection with BNT162b2 or placebo. Ventavia instead treated these women as non-WOCBPs, violating the clinical trial protocol. *See* Ex. 11, Ventavia's Quality Control Findings, at 3 (Subject 1018, seen at Keller site, had tubal ligation, but pregnancy test was not given). Ventavia's violations in this regard would be obvious from the source documents. Pfizer and Icon ignored these red flags and kept the ineligible participants' data in the clinical trial.

152. Ventavia's recklessness also resulted in other ineligible participants being enrolled and injected. The errors were not timely "caught" or corrected, due to Ventavia's recklessness and long-delayed "quality control" of source documents.

153. For example, Subject 11281302 was enrolled and injected before routine laboratory work and a nasal swab COVID-19 test. The subject also did not give informed consent until after injection. If this subject was COVID-19 positive, that would have rendered him or her ineligible. Furthermore, the failure to obtain informed consent is itself a protocol, regulatory, and ethical violation. When "quality checking" this subject's documents, furthermore, Ventavia edited a question about why injection preceded informed consent, transforming it into a comment that the informed consent time was incorrect:

VENTAVIA RESEARCH GROUP

Quality Assurance Checklist – Source Documents

Protocol: C4591001 Subject #: 11281302 Subject Initials: S.B

Visit	Page #	Finding	QCd by: (Init/Date)	Responsible Staff	Corrected by: (Init/Date)
*		Random pg in chart	GR		
V1	3	Initial/Date note	GR	TS	
		for Exc. #22			
V1	12	Pt vxs held for	GR	AS	
		over 2 hours after			
		dose?			
V1	9	Labs/Nasal collected	GR	TS	
		after pt dosed?			
V1	9	Labs/nasal weren't	GR	NM	
		collected until after dose			
		but checked off prior			
		to dosing			
~~V1~~	~~10~~	~~Why dose time prior~~	~~GR~~		
		~~to ICF?~~			
V1	1	ICF time recorded incorrectly	GR	TS	

Ventavia subsequently would have "corrected" this patient's records to hide the informed consent and ineligibility violations, creating false source documents.

154. Relator also observed that Ventavia employees and their family members were enrolled in the clinical trial, in direct breach of the protocol, creating a serious conflict of interest.

2. Blinding

155. The clinical trial at issue is observer-blinded. At each study site, only those administering the vaccine and placebo are unblinded. *See* Ex. 7, at 47–49. Thus, the only unblinded people at Ventavia's study sites should have been those vaccinating patients: Kandy Downs, Nadia Martinez, Jailyn Reyes, and Cordy Henslin. However, Ventavia's recklessness in product and document handling led to more people becoming unblinded—including Relator, Fisher, and Fort Worth Site Operations Manager Jennifer "Jen" Vasilio. More people were likely unblinded as well, since the conduct described below had the potential to unblind patients and anyone working at Ventavia's Fort Worth and Keller locations.

156. On September 16, 2020 Relator photographed BNT162b2 vaccine boxes left out in the open at Ventavia's Fort Worth location, and later sent her photos to management. These boxes were marked as such and bore numbers that allow determination of whether a patient received a placebo or the Pfizer-BioNTech vaccine. This type of unblinding incident had occurred before at least once. *See* Ex. 13, Unblinding E-mail Chain (Sept. 22, 2020), at 1 (describing a similar incident witnessed one month prior by Downs). Neither unblinding was ever reported to Pfizer. Instead, Fisher directed Relator and others to discipline the responsible employees. *Id.*

157. On or around September 14, 2020, Ventavia discovered that randomization confirmation pages had improperly been placed in every patient's chart. These pages unblind the reader by revealing whether or not the patient received a placebo, and had been in place since the

beginning of Ventavia's involvement in the Pfizer-BioNTech trial. Approximately 1,200 patients' charts were affected, compromising the integrity of the trial. Ventavia subsequently removed or "lined through" (crossed out) this information, but it had been visible and accessible to all employees and patients for over two months. Ventavia did not report this issue to Pfizer or Icon, instead placing Notes to File ("NTFs") in patients' charts, dated September 17, 2020 and stating:

> This Note to File serves as notification that confirmation printouts of research participant drug assignments will not be placed within participant charts for study C4591001. Inclusion of the drug assignment confirmation will disclose drug dosage information contraindicated for study blinding. It is for this purpose that the confirmation of drug assignment is located in Complion within the unblinded binder. This note to file addresses IMPALA drug assignment confirmation requested in study source document versions 1 through 5.
> An update [to] the source document removing this requirement has been created in follow-up to this Note to File.

Ex. 14, NTF on Randomization, at 1. The NTFs are not viewable by Pfizer or Icon until the end of the clinical trial. The NTF on randomization, furthermore, does not show that patients and staff could have been unblinded; it simply states that randomization documents should not be in patients' charts. *See id.* However, Pfizer was alerted to the issue via a "red flag" e-mail chain from September 14–18, 2020, sent to Dr. Arturo Alfaro of Pfizer. Downs asked Alfaro to confirm that randomization forms should not be given to blinded staff, and Alfaro concurred. *See* Ex. 15, E-mail Chain with Downs and Alfaro, at 1–2. Pfizer should have realized that Downs' inquiry could indicate that the unblinding had already occurred. To Relator's knowledge, Pfizer never followed up on the issue or removed affected patients' data from the clinical trial, resulting in fraud on the United States DoD.

158. Ventavia's unblinded vaccinators also carelessly forwarded and shared communications marked "UNBLINDING"—intended only for unblinded staff—to staff who should have been blinded. For example, on September 15, 2020, Recruitment Specialist Cordy

Henslin forwarded such an e-mail to Relator. Ex. 16, E-mail Chain with Henslin, at 1. The e-mail was originally sent by Icon to Henslin, and contained subject numbers, placebo dosing information, and other data that unblinded Relator. *See* Ex. 16, at 1–4.

159. During her employment, Relator observed that the Pfizer-BioNTech vaccine containers were stored in a manner that could unblind Ventavia staff and patients. Specifically, the vaccines for all vaccine trials at Ventavia were stored together, and the vaccines for this trial were labeled with each patient's subject identification number after randomization. The vaccines are often left outside of cabinets while thawing, exposing that unblinding information to all in the vicinity. The vaccine preparation area is accessible by any staff member and even visible by patients—especially when patients were placed in hallways for "observation" after injection. To provide an illustration, if an employee was blinded for the trial at issue, but unblinded on another trial, she would be able to see patients' IDs and drug assignment for the trial at issue every time she went to the vaccine preparation area—becoming unblinded.

160. When Relator joined Ventavia, she was given lists of action items that predated her employment. Based on that documentation, inadvertent unblinding was also an issue at Ventavia's Keller location.

161. The above conduct constituted reportable violations of the clinical trial protocol which compromised the integrity of the entire study and should have been reported to Pfizer and Icon, per the protocol. *See* Ex. 7, at 54–55, 116. However, when Relator reported unblinding concerns to Ventavia management, for example, she was instructed to "write up" Fort Worth's vaccinators for discipline. Management appeared more concerned with punishing employees than investigating the extent of the unblinding. Unblinding incidents were never reported to Pfizer during Relator's employment, and were documented only in NTFs.

3. Temperature Control

162. Ventavia, in violation of temperature control requirements in the clinical trial protocol and product manual, did not report all temperature excursions to Pfizer, and did not always properly segregate vaccines affected by excursions.

163. For example, around September 11, 2020, a freezer at Ventavia's Keller location was unplugged and moved, resulting in a temperature excursion. The excursion was reported to Pfizer late, in violation of the protocol's requirement that excursions be reported as soon as discovered. The Fort Worth site also had unreported temperature excursions.

4. Informed Consent

164. Ventavia performed screening and injected clinical trial patients prior to obtaining informed consent, in direct violation of the clinical trial protocol. *See* Ex. 7, at 54, 117.

165. For example, on July 30, 2020, Ventavia recorded identical informed consent and vital sign collection times for Subject 1001 at Keller—an impossibility. Ex. 11, Ventavia's Quality Control Findings, at 1 ("[informed consent form] time same as [vital signs] Rest"). Relator observed that this often was due to vital signs being taken during or before the informed consent process. She also observed that the issue was often corrected during "quality control" by falsifying the time of vital signs to several minutes after informed consent. This is likely what was done to "correct" Subject 11281001's source documents. Similar issues were observed for the following clinical trial participants, and were likely corrected via falsification:

Subject Number	Site	Visit Type	Date of Visit	Reflected in
1004	Keller	Eligibility Screening	July 30, 2020	Ex. 11, at 1
1007	Keller	Eligibility Screening	July 30, 2020	Ex. 11, at 2
1010	Keller	Unspecified	July 30, 2020	Ex. 11, at 2
1011	Keller	Unspecified	July 30, 2020	Ex. 11, at 2
1013	Keller	Unspecified	July 30, 2020	Ex. 11, at 2
1083	Keller	Unspecified	Aug. 11, 2020	Ex. 11, at 5
1087	Keller	Unspecified	Aug. 11, 2020	Ex. 11, at 5

Subject Number	Site	Visit Type	Date of Visit	Reflected in
1088	Keller	Unspecified	Aug. 12, 2020	Ex. 11, at 5
1090	Keller	Unspecified	Aug. 12, 2020	Ex. 11, at 5
11281007	Fort Worth	First Injection	July 31, 2020	Ex. 11, at 12
11281010	Fort Worth	First Injection	July 31, 2020	Ex. 11, at 13
11281011	Fort Worth	First Injection	July 31, 2020	Ex. 11, at 13
11281012	Fort Worth	First Injection	July 31, 2020	Ex. 11, at 14

166. This issue was also observed as a recurring problem by Fisher on September 21, 2020. *See* Ex. 17, Fisher's List of Deficiencies, at 2–3 (describing ongoing informed consent timing errors and need for correction).

167. To give another example, on August 5, 2020, Subject 11281035's progress notes were written prior to execution of informed consent. *See* Ex. 11, Ventavia's Quality Control Findings, at 3.

168. A Ventavia-internal quality assurance checklist circulated by Livingston on September 22, 2020 documenting common documentation errors at Ventavia noted that the incorrect version of the informed consent form was often used, informed consent forms sometimes had "obvious mismatch[es]" in signatures (indicating possible forgery of patient signatures), and other problems. Ex. 18, Common Quality Assurance Findings Checklist, at 1.

169. Ventavia likely falsified informed consent times in order to hide these protocol deviations from Pfizer and Icon. However, Pfizer and Icon had access to the original source documents in many cases, imparting constructive knowledge of informed consent time discrepancies. *See* Ex. 19, E-mail Chain with Icon (Sept. 21, 2020), at 1, 3, 4–5 (noting informed consent date errors). Pfizer also received e-mails from Ventavia indicating past informed consent protocol violations. *See* Ex. 20, Informed Consent E-mail Chain with Alfaro and Others (Sept. 24, 2020). Had Pfizer reviewed data as required, it would have noticed this issue and removed these patients' data from the clinical trial, but it did not.

170. Ventavia never reported its informed consent violations to the IRB overseeing the clinical trial.

5. Dose Preparation

171. Ventavia routinely rushed preparation of BNT162b2 frozen concentrate, in violation of the clinical trial protocol and resulting in potential unblinding of clinical trial participants. Livingston directed employees to hold the frozen concentrate in their hand to thaw it faster than the mandated thirty minutes. *See* Ex. 6, Product Manual, at 47, 53, 56, 72, 76; Ex. 9, E-mail Chain with Downs and Others, at 1–2, 4; Ex. 21, Daily Status Updates E-mail Chain, at 51–53. Ventavia did this to maximize the number of patients injected per day and their per-patient payments from Pfizer.

172. Ventavia was also using an outdated product manual that set a thaw time of twenty, rather than thirty minutes. *See* Ex. 9, at 4. Pfizer notified Ventavia of this in August of 2020, and was placed on notice that Ventavia was likely deviating from thaw time protocols. *See id.* The issue persisted, however. On September 21, 2020, Fisher listed injection wait times of less than thirty minutes as a consistent issue, finally suggesting protocol deviation reporting and resolution with an NTF. *See* Ex. 17, Fisher's List of Deficiencies, at 2. However, to Relator's knowledge, Pfizer never removed the affected patients' data from the clinical trial.

6. Administration

173. Ventavia, in violation of the clinical trial protocol, used improperly-trained vaccinators. Cordelia "Cordy" Henslin ("Henslin"), a medical assistant, was qualified to vaccinate, but was trained over the telephone instead of in-person. And, that training did not occur until after Henslin had already started giving BNT162b2 to patients in the Pfizer-BioNTech trial.

174. Issues with Henslin were discussed via e-mail. Ray noted on August 28 that she was uncomfortable with Henslin being "the only unblinded vaccinator for this trial" at her site, and asked for a more experienced person to give training. Ex. 21, Daily Status Updates E-mail Chain, at 29. Raney replied: "I actually feel like this was brought up a few weeks ago…that [Henslin] had no training and has very little oversight [because] she is the unblinded." Ex. 21, at 28. Raney expressed concern that "something bad is going to happen with" Henslin unless she was trained. Ex. 21, at 29. On August 31, 2020, Downs acknowledged via e-mail that Henslin had finally been trained but over the telephone, and only later "rechecked when onsite." Ex. 21, at 27.

175. Additionally, other vaccinators were unqualified to administer BNT162b2. Nadia Martinez, an office assistant at the Fort Worth site, who had no medical certifications or background, acted as an unblinded vaccinator in the Pfizer-BioNTech trial. *See* Ex. 22, E-mail Chain with Fisher, Raney, and Others (Sept. 9, 2020), at 2. Ventavia was seeing so many patients that the qualified vaccinator at that site, Jailyn Reyes, was unable to perform all vaccinations. *See id.*; Ex. 23, E-mail Chain with Livingston, Vasilio, and Others, at 2 ("Nadia is now doing all the vaccines for the COVID trial, to eliminate this from Jailyn's plate, occasionally if Nadia is behind or not in office, then Jailyn will jump in to vaccinate").

176. Many clinical trial participants were given their second injection outside of the protocol-mandated nineteen to twenty-three day window. Relator and others reported this to Ventavia staff multiple times. *See, e.g.*, Ex. 1, Text Messages with Ray and Others (Sept. 17, 2020), at 1 (noting injection "OOW", meaning out of window); Ex. 2, E-mail Chain with Ray and Others (Sept. 23, 2020), at 1 (noting "visits that are out of window"); Ex. 18, Common Quality Assurance Findings Checklist, at 1. Ventavia never reported this violation to Pfizer or Icon, but it

would have been obvious from the source documents. However, Pfizer and Icon, to Relator's knowledge, never removed these patients from the clinical trial data.

177. Multiple clinical trial participants were injected with the wrong needle size for their body weight and sex, in violation of the clinical trial protocol. For example, on August 7, 2020, Subject 11281072 was injected with the wrong size needle at Ventavia's Fort Worth site. *See* Ex. 11, Ventavia's Quality Control Findings, at 24. The same issue recurred for Subjects 11281054, 11281050, 11281047, 11281040, 11281039 at the Fort Worth site. *See* Ex. 11, at 21–24. Ventavia also did not record needle size for multiple participants, meaning that more patients could also have been injected with the wrong needle size. *See* Ex. 11, at 17, 19, 20, 24. If this issue was not concealed via needle size falsification by Ventavia, then Pfizer and Icon had constructive notice of it via the source documents, and violated regulations by not removing these patients from the clinical trial data.

178. Ventavia also improperly diluted the concentrated BNT162b2 vaccine and did not document that failure. At least four times, Ventavia employees used too much sodium chloride solution for dilution (1.7 mL versus 1.2 mL). Defendant Icon noticed the issue and informed Ventavia. Ventavia falsely told Icon that the discrepancy was due to a transcription error. See Ex. 16, E-mail Chain with Henslin (Sept. 15, 2020), at 2.

7. Safety and Patient Monitoring

179. In violation of the clinical trial protocol, clinical trial participants were not monitored under medical supervision for thirty minutes after injection. *See* Ex. 6, Product Manual, at 44, 61; Ex. 7, Clinical Trial Protocol, at 50. Ventavia's Fort Worth site, for example, had only five examination rooms. To see as many patients as possible per day, patients were instructed to wait in a hallway for thirty minutes after injection. A Ventavia receptionist or non-medically-

qualified employee periodically "checked on" the patients and asked if they were "OK." This does not rise to the level of thirty minutes of "medical supervision" required by the protocol. Ex. 7, Clinical Trial Protocol, at 50; *see also* Ex. 6, at 44. Furthermore, the period of supervision was frequently less than thirty minutes. *See* Ex. 1, Text Messages with Ray and Others (Sept. 17, 2020), at 1.

180. Ventavia's lack of patient monitoring was reported to management by Relator and by multiple employees, and acknowledged as a recurring issue. *See, e.g.*, Ex. 1, Text Messages with Ray and Others (Sept. 17, 2020), at 1; Ex. 24, Mercedes Livingston's List of Common Errors (Sept. 22, 2020), at 2. Pfizer was put on notice of Ventavia's patient monitoring violations by Relator in an anonymous post-termination telephone call to Dr. Arturo Alfaro.

181. In a September 22, 2020 list of common errors in documentation and protocol compliance, Director of Operations Mercedes Livingston acknowledged that "Patients['] location during 30 minute waiting period" after injection was an issue, and that she would train employees accordingly. Ex. 24, at 2. Livingston instructed employees as follows:

- Be in the waiting area where **the receptionist** can see the patients
- If in the hallway, a staff member needs to be in the hallway with a work station
- Patients need to be brought back into a room for 30-minute post observation period.

Ex. 24, at 2 (emphasis added). Relator observed that Ventavia's monitoring practices did not change despite Livingston's stated plan, and that non-medical personnel were still performing "observation."

182. Ventavia management perceived its patient monitoring practices as sufficient and questioned whether patient safety was really at risk. As Jones and Fisher told Relator at a September 24, 2020 meeting:

> BROOK JACKSON: **Okay, if we're gonna talk about just the safety, the safety of the patient component, they know that they don't have the rooms to manage the number of patients** [for] their recruitment goals that they're putting for these sites.
>
> MARNIE [FISHER]: That's –
>
> WILLIAM JONES: So what would be your recommendation? As the expert?
>
> BROOK JACKSON: As the expert – you just –
>
> MARNIE [FISHER]: Hold that thought. And, **what are you seeing that has led to that's a safety issue –** . . . That you've seen, that's gonna be a [FDA] warning letter? That's what I mean. That detail. So we can target –
>
> BROOK JACKSON: **But nobody would ever know if we were putting patients in the hallway and they weren't being monitored.** But –
>
> MARNIE: **But they are, they are being checked on.** See that's what I mean, like, they are.
>
> BROOK JACKSON: **Marnie, no, they're not.**
>
> MARNIE: **They are! Because I see them out there. When I'm coming and going, I'm seeing people out there all the time.** They are but, now, do we have it documented? That's where I would say, "Okay…" That's what I mean by go find – okay, that's a concern. Are we documenting it? Is it clear? So we can speak to that.

Ex. 3, Transcript of September 24, 2020 Meeting Recording, at 27–28 (emphasis added).

183. Ventavia also failed to report all adverse events and Serious Adverse Events ("SAEs") to Pfizer and Icon in the clinical trial at issue.

184. On September 17, for example, Raney e-mailed Relator, Ray, Downs, Fisher, and Livingston about issues with not reporting SAEs to Pfizer and Icon. *See* Ex. 12, E-mail Chain with Raney, at 1–2. Ventavia was actually paid by Pfizer per SAE reported, making the failure all the more puzzling. *See* Ex. 12, at 1.

185. In a September 21, 2020 e-mail to Livingston, Downs, Relator, and Jones documenting ongoing issues, Fisher noted that adverse events "are not being reported correctly **or**

at all[.]" Ex. 17, Fisher's List of Deficiencies, at 1 (emphasis added). Fisher claimed that the problem was due to conflicting information from Pfizer, but emphasized that Ventavia "should follow the protocol as to how we read it and record any [adverse events] ASAP[.]" Ex. 17, at 1.

186. Pfizer and Icon had constructive notice of this issue because they had access to clinical trial participants' "electronic diary" entries, which recorded any symptoms experienced after vaccination. Pfizer and Icon could have seen that Ventavia was not reporting all of these diary entries as adverse events, as they were required to.

8. Accuracy and Completeness of Data

187. Ventavia maintained careless and sloppy documentation practices during the Pfizer-BioNTech trial, violating the clinical trial protocol's requirement that sites maintain accurate source documents supporting all information submitted to Pfizer, and verify the accuracy of all data entry. *See* Ex. 7, Clinical Trial Protocol, at 119–21. Ventavia even falsified some patient data to cover protocol violations or missing data. Pfizer and Icon, despite obvious warning signs of documentation failures in the source documents and its communications with Ventavia, turned a blind eye to the fraud and, to Relator's knowledge, did not remove affected patients' data from the clinical trial. By doing so, Pfizer and Icon violated their responsibility to quality check all study data. *See* Ex. 7, Clinical Trial Protocol, at 120.

188. Ventavia's over-enrollment of patients and rush to see as many as possible per week took its toll on documentation. Data was often missing, and as previously mentioned, ineligible patients were sometimes enrolled and injected. *See, e.g.*, Ex. 2, E-mail Chain with Ray and Others (Sept. 23, 2020), at 1 (reporting "missing charts" to Ventavia management).

189. Ventavia's most egregious data and documentation failure relates to blood samples. Patients' blood is used to establish a baseline prior to injection with the vaccine or placebo. Any

failure in timely processing or recording data from the first sample affects the baseline, which could hide subsequent changes (and possible side effects) of the vaccine that could be slow to develop. For example, white blood cell counts are a key metric and a defective baseline would affect future readings. Furthermore, blood is used to measure immune response, in other words, whether the vaccine actually works against COVID-19. Any errors in blood draw data or processing go to the heart of the clinical trial—effectiveness of BNT162b2.

190. An example blood draw log from Ventavia's Fort Worth location is attached hereto as Exhibit 25. The document shows egregious data falsification and blood processing failures that call into question the validity of all Ventavia patients' data for the clinical trial. The document reveals:

- The time that plasma samples were frozen was altered to hide delayed freezing. *See* Ex. 25, Blood Draw Data, at 1. Freeze times are completely missing for some subjects. *See* Ex. 25, at 5, 10, 18.

- The time of centrifuge insertion was altered to disguise noncompliance with required clotting times (at least thirty minutes), required centrifuge times (at least fifteen minutes), or processing delays. *See* Ex. 25, at 4, 7, 18.

- One patient's blood did not clot, but a clot time was recorded anyway. *See* Ex. 25, at 4.

- No clot time or centrifuge insertion time was recorded for some patients. *See* Ex. 25, at 7, 8, 18.

- Blood draw times are missing for some patients. *See* Ex. 25, at 15, 18, 19, 20.

- A clot time of 309 minutes is listed for Subject 11281013 at a post-injection monitoring visit (visit 3). Ex. 25, at 1. Per Relator, the responsible employee left the lab and the blood sample sat unattended, resulting in a very long clot time being recorded. The patient should have been brought back to Ventavia for a re-draw, but that was never done.

- Clot times of exactly thirty minutes are recorded for "strings" of over twenty patients in a row—a strong indicator of falsified data. *See* Ex. 25, at 13–18, 24–28.

191. The above violations are so obvious from the source documents that Pfizer and Icon had constructive notice of Ventavia's fraud. Icon also directly questioned missing blood collection and processing times on September 21, 2020 in an e-mail to Fisher, Downs, Relator, and others. *See* Ex. 19, E-mail Chain with Icon, at 1. Yet, to Relator's knowledge, Pfizer and Icon never removed affected patients from the clinical trial data.

192. Ventavia "quality checked" patients' source documents after seeing each patient, to make sure information was consistent with protocol, was not omitted, and matched up with electronically-entered information. However, due to Ventavia's push to maximize enrollment and consequent revenue, "quality control" quickly fell behind its scheduled twenty-four hour window.

193. Ventavia eventually brought in employees' friends and family members on weekends to help "catch up" on quality control. These temporary employees were not listed on delegation logs. Furthermore, some of the temporary employees were also clinical trial participants—a serious conflict of interest.

194. Relator observed that quality control personnel were not fixing deficiencies in documentation. She personally observed employees change data during "quality checking." For example, in late September of 2020, she observed employee Thea Sonnier ("Sonnier") change blood pressure readings in source documents, apparently fabricating new numbers. Sonnier was one of the lead employees for "quality checking" and her practices would have been followed by other employees at Ventavia.

195. Ventavia management was well aware of serious documentation issues—including falsification of data—as far back as August 13, 2020. On that day, Fisher sent a company-wide e-mail emphasizing the importance of filling out source documents "real-time." Ex. 26, Source Documentation E-mail Chain, at 1. Fisher noted that if data was completed after-the-fact:

> the time has passed so data or assessments have been forgotten, source may already have been scanned in, signatures were missed[,] and now the investigator is not available to sign. **This results in deviations, queries, and overall will jeopardize the integrity of the data** and ultimately our reputation and future access to studies and thus revenue coming in.

Ex. 26, at 2 (emphasis added). Nevertheless, falsification of data and incomplete documentation persisted at Ventavia, and was never completely remedied. One month later, Fisher forwarded her August 13 e-mail to Downs and Relator, noting that sites were still falling behind on documentation. *See* Ex. 26, at 1.

196. Ventavia also failed to document improper dilution of the frozen BNT162b2 vaccine concentrate. Defendant Icon noticed the issue and informed Ventavia. Ventavia falsely told Icon that the discrepancy was due to a transcription error. See Ex. 16, E-mail Chain with Henslin (Sept. 15, 2020), at 2.

197. For months, Ventavia sites did not properly track when clinical trial participants developed symptoms of COVID-19. Ventavia created a symptom log in August, but no sites used it until Downs circulated the log on September 24, 2020. *See* Ex. 27, Symptom Log E-mail Chain and Attachment (Sept. 24, 2020), at 1. The issue was documented in an NTF but Pfizer and Icon were not notified. Nevertheless, Pfizer had constructive knowledge of this failure via the NTF, and should have excluded affected patients from its trial data.

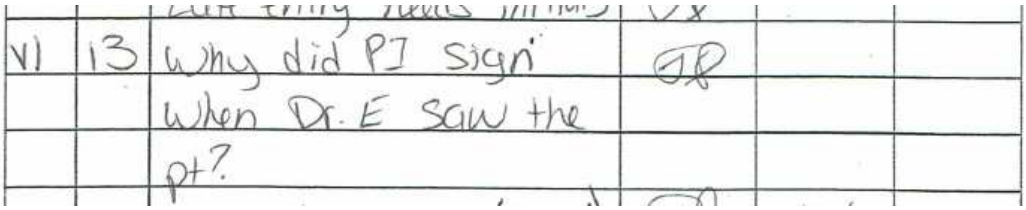
9. Adherence to Protocol

198. Defendants were required to adhere to Pfizer's clinical trial protocol, but did not. In addition to the protocol violations listed *supra*, Defendants also violated the clinical trial protocol in the following ways.

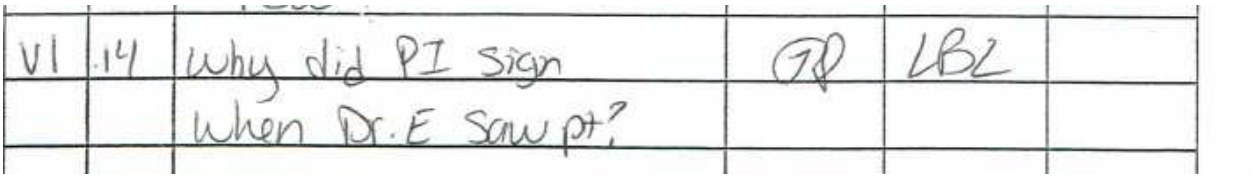
199. Ventavia did not consistently use up-to-date versions of the clinical trial protocol or BNT162b2 product manual as they were required to. *See* Ex. 9, E-mail Chain with Downs and Others, at 4; Ex. 17, Marnie Fisher's List of Deficiencies (Sept. 21, 2020), at 1.

200. Clinical trial participants were, per the protocol, to be examined/enrolled one at a time. Ventavia, however, cancelled single patients' appointments in favor of married couples or groups of friends who sought to participate in the trial. *See* Ex. 28, List of Action Items, at 14. In Ventavia's view, groups could be scheduled and seen at the same time, maximizing the number of patients (and Ventavia's payments) per day. However, seeing groups could potentially unblind patients, could violate privacy laws, and violated the clinical trial's 1:1 randomization protocol. This practice would be apparent to Pfizer and Icon from overlapping times in the source documents. Pfizer and Icon thus ignored obvious red flags of noncompliance.

201. Ventavia also did not maintain adequate principal investigator oversight. Dr. Mark Koch, the principal investigator at Ventavia's Fort Worth location, signed records for patients he did not personally or adequately examine. Sub-investigator physicians or other medical staff examined patients instead, and Dr. Koch "signed off" on the records. This issue was noted, for example, during a "quality check" of Subject 11281278's first injection visit at Ventavia's Fort Worth site, but never reported to Pfizer or Icon:



The document signed by Dr. Koch constitutes a false record because he did not actually examine the patient. The same issue affected Subject 11281378's first injection visit as well:



202. To provide another example, no principal investigator signed records of Subject 1031's screening visit on August 5, 2020. *See* Ex. 11, Ventavia's Quality Control Findings, at 3. Per Relator, this indicates that there was no principal investigator oversight for that subject's visit.

203. This issue occurred because Ventavia was seeing too many clinical trial participants per day. Principal investigator and sub-investigator physicians had their own medical practices to oversee and could not stay at Ventavia test sites all day. Some investigator physicians even went back and forth from their own offices to Ventavia multiple times per day.

204. The Houston site's principal investigator, Dr. Van Tran, wanted to close his medical practice during certain times, effectively setting aside scheduled "blocks" to examine clinical trial participants at Ventavia. On August 15, 2020, Raney told Downs, Ray, Fisher, Livingston, and another employee that Dr. Tran's plan was not acceptable because the Houston site would not be able to "hit" its cap of forty patients per week, maximizing its payments from Pfizer. *See* Ex. 21, Daily Status Updates E-mail Chain, at 55–56. Raney wrote:

> I understand that [Dr.] Tran had a different plan due to his patients and practice, but we can't allow that kind of stuff to impact a high-enrolling study. I know you brought this up on our call last week, but I didn't fully grasp the impact. In the future, if you need to detour off of my recruitment guidance, I need you to seek approval first before you agree or put anything into action. You brought the detour up really quickly on our call and it was already in place when you told me about it, so it was a little too late for me to say no (though I now realize I should have). The direction was to see the 40 patients within the first 2.5 days...so that when Pfizer did increase their [weekly] cap, we'd be the first ones approved for additional drug[s] (and I did clearly explain my strategy and the rationale behind it when I gave my direction). And now, Pfizer is planning to increase their drug and [Houston] didn't hit their 40 in the first week. Honestly, that's unacceptable. I need you to figure out how 9 patients will be randomized on Monday.

Ex. 21, at 56. Raney's directive exemplifies the focus on quick enrollment over protocol compliance, and could have resulted in inadequate oversight by Dr. Tran at the Houston site.

205. Ventavia also did not report many clinical trial protocol deviations to Pfizer and Icon. The issues, as previously noted, were often buried in "notes to the file" if they were reported at all. Fisher acknowledged this as an ongoing issue on September 21, 2020, noting that she was "not sure" if deviation reports were "getting completed or not[.]" Ex. 17, Fisher's List of Deficiencies, at 3.

10. Privacy Law Compliance

206. Defendant Ventavia's Fort Worth location mishandled clinical trial participants' protected health information, in violation of the Health Insurance Portability and Accountability Act ("HIPAA") and clinical trial protocol.

207. For example, on September 16, 2020, Relator observed that a wall calendar posted near a reception area visible to all staff and patients contained patients' names, phone numbers, and health information (as a method of reminding staff to follow up with patients). Both medical and non-medical staff could see this information. That same day, Relator also observed that patient files had been left out unattended in an area where they were visible to non-medical staff.

208. On September 21, Fisher documented common findings during document "quality checking" and noted that Ventavia's test sites were inconsistent in safeguarding patients' protected health information, describing, for example, "patient folders out on counters in the clinic and face[] up with names visible[.]" Ex. 17, Fisher's List of Deficiencies (Sept. 21, 2020), at 1.

209. Ventavia employees at all three test sites regularly utilized the smartphone and computer application "Slack" for communication, including patients' names and identification numbers. Slack is not secure or HIPAA-compliant.

210. Ventavia's HIPAA violations are a violation of the clinical trial protocol, which requires compliance with all "applicable privacy laws." Ex. 7, at 116.

B. Violation of FDA Regulations

211. Defendants' clinical trial also violated FDA regulations, as explained further below. As noted previously, Icon and Ventavia are bound by FDA regulations to the same extent and degree as Pfizer. *See* 21 C.F.R. §§ 312.50, 312.52, 312.56; Ex. 7, at 116.

212. Defendants violated FDA regulations regarding IRB oversight and reporting when they failed to report additional clinical trial participant compensation, failure to follow clinical trial protocols, and informed consent violations to the clinical trial's IRB. *See* 21 C.F.R. §§ 312.66, 312.53(c).

213. Defendants violated FDA regulations when they failed to investigate and report all adverse event information received in the clinical trial at issue, and failed to notify the FDA of all potential serious risks and adverse reactions. *See* 21 C.F.R. §§ 312.32, 312.50. Defendants Ventavia and Icon violated 21 C.F.R. § 312.64(b) when they failed to immediately report all adverse events to Pfizer.

214. Defendant Pfizer violated 21 C.F.R. § 312.50 and 21 C.F.R. § 312.56 when it failed to properly oversee Defendants Ventavia and Icon and failed to ensure that they complied with the clinical trial protocol.

215. Defendants Pfizer and Icon also violated FDA regulations when they learned of Defendant Ventavia's regulatory and protocol violations and elected not to "promptly . . . secure compliance" or "discontinue shipments of [BNT162b2] and end [Ventavia's] participation" in the clinical trial. 21 C.F.R. § 312.56(b).

216. Ventavia and Icon violated 21 C.F.R. § 312.64 by failing to furnish all required reports to Pfizer, including but not limited to reports of adverse events, temperature excursions, and clinical trial protocol deviations.

217. Defendant Ventavia violated 21 C.F.R. § 312.62 by failing to maintain adequate and accurate records of BNT162b2 dispensation and clinical trial participants' case histories.

218. Defendants violated FDA regulations by failing to obtain and document informed consent for every patient prior to clinical trial participation. *See* 21 C.F.R. §§ 50.27(a), 312.60, 312.62(b).

219. Defendant Ventavia violated FDA regulations by giving BNT162b2 to subjects not under the personal supervision of the principal investigators or sub-investigators at its clinical trial sites. *See* 21 C.F.R. § 312.61.

220. Defendant Ventavia violated 21 C.F.R. § 312.61 by administering BNT162b2 to ineligible clinical trial participants and to Ventavia employees and their family members.

221. Defendants' violations of FDA regulations constitute a violation of the clinical trial protocol as well. *See* Ex. 7, Clinical Trial Protocol, at 116 (requiring compliance with all applicable laws and regulations).

222. Defendants violations of FDA regulations rendered their certifications and representations of compliance in Pfizer's claims for payment, the clinical trial protocol, Form FDA-1571, and Form FDA-1572 false.

C. Violation of FAR

223. As previously noted, Defendant Pfizer is required to comply with FAR. Defendant Pfizer did not maintain due diligence to detect and did not disclose Defendants' violations of the

False Claims Act to DoD. Defendant Pfizer has, as a result, breached its contract with DoD and violated federal regulations. *See* 48 C.F.R. § 52.023-13.

224. Additionally, Pfizer did not monitor its subcontractors, Icon and Ventavia, as it was required to do by FAR 42-202(e)(2). *See* 48 C.F.R. § 42-202(e)(2).

D. Ongoing Monitoring Concerns

225. Enrollment in the trial at issue has closed (except for twelve- to fifteen-year-olds) and only required ongoing patient monitoring is still taking place. The fraud alleged herein also affects this ongoing monitoring. Due to Defendants' aforementioned fraudulent practices, data from ongoing monitoring (including possible new adverse events) may be falsified or concealed, preventing material information about BNT162b2 from reaching the United States.

E. Safety and Ethical Issues

226. Relator observed fundamental safety risks to study participants and Ventavia employees, over and above those which violate the clinical trial protocol. She also observed breaches of ethical standards required in clinical trials.

227. On September 16, Relator observed used needles placed in biohazard bags instead of sharps containers. The bags are not puncture-proof, so Ventavia employees were directly put at risk of injury or infection during bag handling and disposal.

228. Ventavia internally requires every patient's chart to contain dosage ranges for epinephrine based weight, age, and other factors. Epinephrine is used to counter anaphylaxis if a patient has an allergic reaction to a vaccine. Relator observed and reported to Ventavia management that the protocol was not being followed. The deficiency could lead staff to incorrectly guess the correct epinephrine dosage in an emergency, putting patients' safety and lives

at risk. Relator reported this issue to Ventavia supervisors verbally and via e-mail, including on September 23 and 24, 2020. The issue was not remedied, to Relator's knowledge.

229. To adhere to industry-standard "Good Clinical Practices," Ventavia trial site employees were required to undergo training in biologics handling, occupational safety and health, and other areas. Relator strove to ensure that all employees underwent and reported their training, but was terminated before this task was complete. To Relator's knowledge, Ventavia never provided all employees with all required training.

230. Ventavia and other trial sites for the Pfizer-BioNTech trial must get IRB approval for all compensation paid to clinical trial participants. Ventavia, however, routinely gave participants gift cards as a "customer service" initiative, to apologize for long patient wait times. For example, on August 17, 2020, Ray directed Fisher and Downs as follows:

> Let your [Site Operations Managers] know that sometimes we need to use kindness to deal with difficult patients (purchase lunch, a coffee, small gift card, apologize, etc.) Make it right when they are in the office, **don't wait until they leave upset and go write reviews or report us to the IRB, FDA.** Customer service is everything.

Ex. 28, List of Action Items, at 13 (emphasis added). Providing gift cards to clinical trial participants constitutes additional patient compensation not approved by the IRB and is a breach of ethical obligations.

231. Ventavia did not report any of the above misconduct to the IRB or Pfizer.

IX. RETALIATION AGAINST RELATOR

232. Defendant Ventavia Research Group, LLC ("Ventavia") retaliated against Relator in response to her reports of, and efforts to stop, Defendants' fraud against the United States DoD.

233. Relator began her employment with Ventavia on September 8, 2020 as a Regional Director.

234. As Regional Director, Relator oversaw site managers, patient recruitment success, training completion, quality assurance completion, enforcement of communication paths, and growth plans at her assigned test sites. These duties included ensuring that Serious Adverse Event ("SAE") reports were timely submitted, and that her assigned sites created corrective action plans to address protocol deviations. Relator's job duties also included daily and weekly communication with the site operations managers of her assigned test sites and Ventavia's leadership team.

235. Relator was responsible for the duties above at two of Ventavia's three test sites for the clinical trial at issue, located in Fort Worth and Keller, Texas. The third site involved, in Houston, was overseen by another Regional Director and managed by Lovica "Kandy" Downs. The Fort Worth site was managed by Jennifer Vasilio and the Keller site was managed by Katie Benitez.

236. The principal investigators for the three sites at issue are medical doctors: Mark Koch, M.D. ("Dr. Koch") in Fort Worth, Gregory Fuller, M.D. in Keller, and Van Tran, M.D. in Houston. The doctors are not employees of Ventavia; they serve as principal investigators in addition to practicing medicine elsewhere. Ventavia and the principal investigators were paid by Pfizer for supervision of the study on a per-patient basis, with additional funds paid per SAE reported and for activities such as training.

237. Relator's direct supervisor during her employment with Ventavia was Director of Operations Marnie Fisher ("Fisher"). Her other superiors were Ventavia's Executive Directors Olivia Ray ("Ray") and Kristie Raney ("Raney") and the Chief Operating Officer, Mercedes Livingston ("Livingston").

A. Relator begins her efforts to stop fraud on the United States Department of Defense.

238. Beginning on September 8, 2020, Relator reported on a near-daily basis to Fisher and Livingston that patient safety and the integrity of the Pfizer-BioNTech vaccine trial was at risk, via telephone, conversation, and e-mail. Relator discussed virtually all of the clinical trial protocol and FDA regulatory violations she witnessed with Livingston, Raney, and Fisher, including, but not limited to: (1) enrollment and injection of ineligible trial participants; (2) falsification of data, poor recordkeeping, and the deficiency of Ventavia's documentation "quality control"; (3) deficiencies in and failure to obtain informed consent from trial participants; (4) adverse event and SAE capture and reporting; (5) failure to preserve blinding; (6) vaccine dilution errors; (7) failure to list all staff on delegation logs; (8) principal investigator oversight; (9) reporting temperature excursions; (10) patient safety issues, such as not keeping epinephrine dose information in patient charts; (11) failure to secure and record staff training required by clinical research standards; (12) use of unqualified staff as vaccinators; (13) use of biohazard bags for needle disposal; and (14) failure to properly monitor patients post-injection.

239. In general, every time that Relator raised concerns about safety or Ventavia's clinical trial protocol compliance with Fisher, she was told to e-mail Fisher about the issue or make a list of affected patients. Many of the identified issues were systemic, and Relator did not have access to information required to make the lists Fisher requested. Relator did as Fisher requested to the extent that she was able, but the identified problems were never addressed. *See* Ex. 3, Transcript of Sept. 24 Meeting (discussing, in part, Relator's prior reports of protocol violations).

240. Relator also reported some clinical trial protocol violations to the Fort Worth Principal Investigator, Dr. Koch. In particular, Relator discussed Ventavia's practice of "quality checking" patient source documents after the fact and issues of missing documentation. Dr. Koch

acknowledged that Ventavia needed to "clean up" the problems before starting any new clinical trials.

241. Ventavia was required to scan or enter all data from clinical trial participants' source documents into its Clinical Trial Management System Database, so that it could be passed on to Icon and Pfizer. Ventavia "quality checked" all source documents before scanning or uploading them. In Ventavia's scramble to enroll as many participants as possible per week and maximize revenue, quality checking and uploading fell behind schedule. Relator observed that the "back log" of documents to be quality checked often lacked key information, such as patient or doctor signatures and blood draw times. Relator also observed that Ventavia's quality checking process was performed by unqualified personnel not listed on delegation logs, and often involved falsification of missing data. Relator reported her concerns to Ventavia management, who seemed more concerned with "catching up" on quality checking than preventing fraud.

242. On September 15, 2020, Relator reported to Fisher that some patient charts had never been sent to Pfizer, were needed "urgently," and had not been quality checked. *See* Ex. 29, Text Messages with Fisher, at 1.

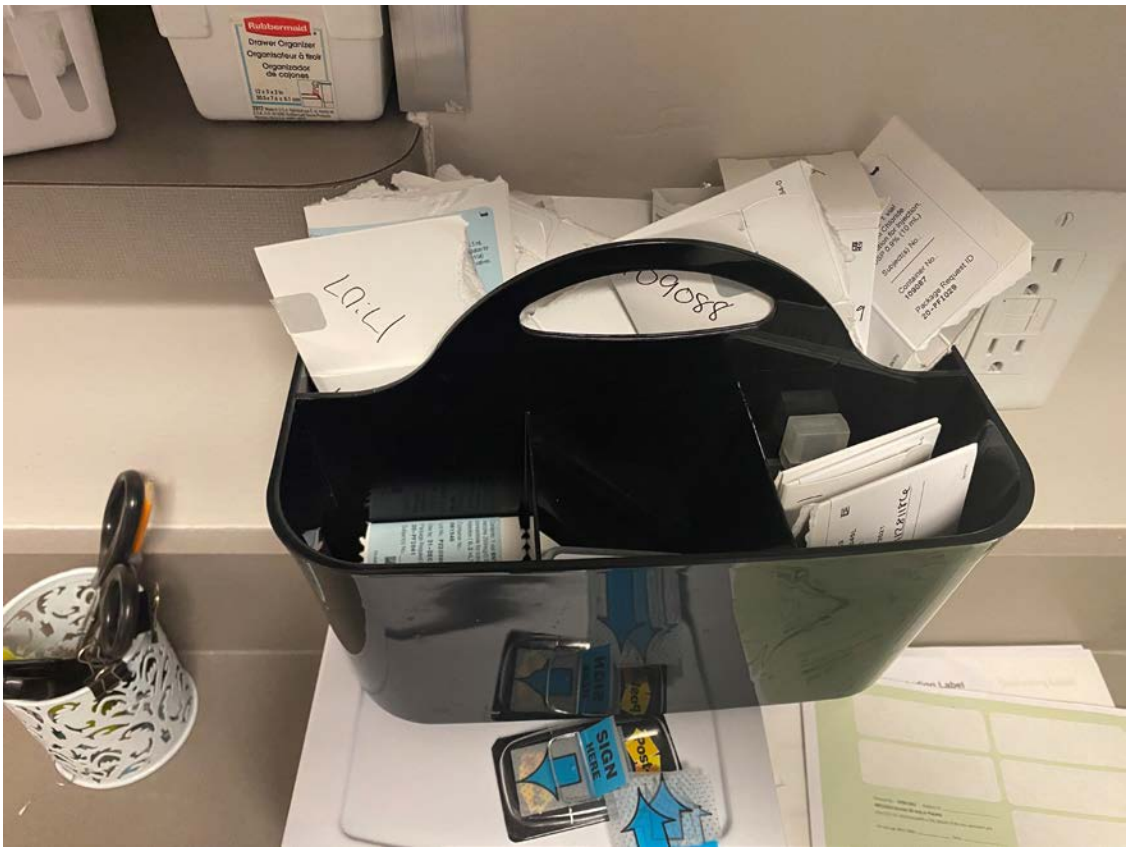
243. Relator called Ventavia's contact at Pfizer for the trial at issue, Dr. Arturo Alfaro ("Dr. Alfaro") on September 14 and 16 to discuss protocol violations, but was unable to reach him.

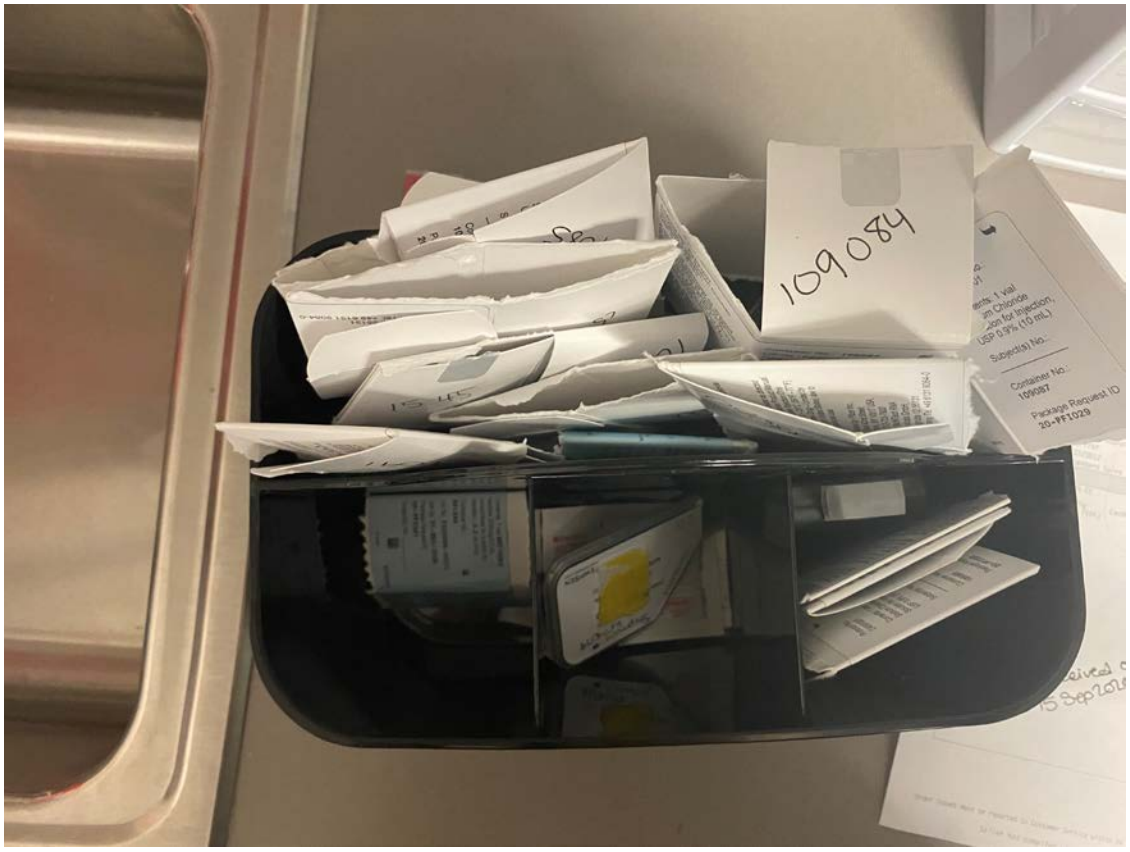
B. Relator photographs violations.

244. On September 16, 2020, Relator examined some of the biohazard disposal bags at Ventavia's Fort Worth site. She had been asked to monitor this issue because Ventavia was charged by weight for disposal of the bags, and non-biohazard items were sometimes improperly placed there. Relator discovered that used needles had been disposed of in the bags:

See also Ex. 3, Transcript of September 24 Meeting Recording, at 1–2. Biohazard bags are not puncture-proof, so this presented a serious risk to employees' safety.

245. That same night, Relator photographed ongoing HIPAA violations. Ventavia kept a calendar of patients to follow up with in public view in a reception area. The calendar contained patients' names and information. Similarly, patient records were left out in public view. Relator also documented that product cartons and patient randomization numbers from the BioNTech-Pfizer vaccine trial had been left in public view in a preparation area, potentially unblinding all Ventavia staff at the site and some patients as well:


Rubbermaid
Drawer Organizer
Organisateur à tiroir
Organizador de cajones
09088
SIGN HERE


109084
Container No.:
109087
Package Request ID
20-PF1029

246. Relator shared her photographs from September 16 with Livingston and Fisher via text message or e-mail. The following day, she reported an identical biohazard bag issue at the Keller site to the same people.

C. Relator recommends pausing clinical trial enrollment.

247. On September 17, 2020, Relator spoke to Downs and Ventavia's Quality Control Director William Jones ("Jones") via telephone. Relator asked both for their opinion about what would happen if the FDA audited Ventavia. Both Downs and Jones responded the same way—afraid that Ventavia would receive warning letters or be asked to discontinue trial enrollment.

248. Later that day, in her daily phone call with Ray, Raney, Fisher, Downs, and Livingston, Relator brought up virtually all of the protocol and regulatory violations she had witnessed to date, as well as Ventavia's HIPAA violations. Relator explained that the FDA would likely issue warning letters against Ventavia if it visited or audited the trial sites. She recommended that Ventavia immediately stop enrollment in the Pfizer-BioNTech clinical trial.

249. Ray directed Relator and others to conduct FDA trainings, in preparation for a possible future site visit or audit by the FDA. *See* Ex. 28, List of Action Items, at 1; Ex. 1, Text Messages with Ray and Others (Sept. 17, 2020), at 1. Ventavia also decided to pause enrollment in order to catch up on "quality checking" source documents. *Id.*

250. Later on September 17, Relator responded to a group text message including Ray, Downs, Raney, Livingston, and Fisher. *See* Ex. 1, at 2. First, Relator passed on the concerns of Fort Worth Site Operations Manager Jennifer Vasilio regarding documentation and patient observation protocol violations, patients being injected outside of the nineteen to twenty-three day "window," and HIPAA violations. Ex. 1, at 1. Second, Relator expressed her concerns about Ventavia's "quality checking" (QC):

> I would like us to create a solid monitoring plan . . .
>
> I don't think it is as simple as pulling a chart and looking for missing check boxes or missing initial in a header/footer which I have been seeing a lot of when I have QC'd the QC'er.
>
> We need to be able to reconcile time of [vaccine] prep and admin[istration], for example. This cannot be done by everyone who is QC'ing to ensure we do maintain the blind. This is one reason I think we need to carefully consider what we are looking at especially if we are approaching this from the perspective of an FDA auditor, which I 100% think we should be. . . .
>
> I would have liked the opportunity to discuss this with [the principal investigators, Drs. Fuller and Koch] individually and I still would.

Ex. 1, Text Messages with Ray and Others (Sept. 17, 2020), at 2. The "reconcil[ing]" Relator discussed showed that vaccine preparation and administration times were not compliant with the clinical trial protocol. *Id.*

251. Ventavia was not up-front with Pfizer and Icon about the reasons for the enrollment pause (sloppy documentation that violated the clinical trial protocol). In a text message conversation on September 17, Raney instructed Ventavia employees how to respond to any questions from Pfizer about the pause. She told them to "make it like it's no big deal" and that the pause resulted from Ventavia was "being responsible by considering we have a certain bandwidth and these visits on top [of] each other has hit our bandwidth." Ex. 1, at 10. Raney also directed employees to falsely tell patients that Ventavia was not enrolling because "we met our company capacity[.]" Ex. 1, at 6. Ventavia was also not up-front with its Houston principal investigator, Dr. Van Tran, regarding the reason for the pause. Downs was directed to convey to Dr. Tran that the pause was due to Ventavia being "at capacity" and not wanting "to overd[o] it." Ex. 1, at 9.

252. Ventavia ultimately elected to schedule patients for several weeks later rather than truly and completely pause enrollment. *See* Ex. 1, at 6, 9–10. Raney directed employees not to cancel any patients already "on their way" to test sites because "that might piss them off and they

can call the news, etc[.]" Ex. 1, at 11. Livingston responded, "if [patients] were scheduled far enough out[,] cancel[,] but if they are there then see them." *Id.* Downs responded that she would not cancel patients in Houston. *See id.*

253. During the enrollment pause, Ventavia's "quality checking" not only failed to correct documentation violations but also involved falsification of missing or inconsistent data. Ventavia hired employees' friends and family members on a temporary basis to perform quality checking who were not adequately trained. Relator even personally observed employees falsifying source document data (*i.e.*, by changing blood pressure readings). Relator also noticed that information was often completely obscured when changed, rather than "lining through" (which preserves legibility of the original text). In short, Ventavia's "quality checking" failed to prevent or stop fraud on the United States DoD.

254. On September 23, 2020, Relator e-mailed Ray, Fisher, Raney, Downs, Jones, and Livingston to report ongoing serious issues with Ventavia's "quality checking." *See* Ex. 2, E-mail Chain with Ray and Others (Sept. 23, 2020). Relator noted, among other issues:

- There were 100 outstanding queries from Icon about missing or inconsistent data which were up to twenty-eight days old. *See* Ex. 2, at 1.

- Scheduling errors resulted in multiple patients receiving their second injection outside of the required nineteen to twenty-three day window. Ventavia was not truthfully recording the vaccine delay for these patients, and due to the oversight, Pfizer and Icon could not discover that these patients were vaccinated outside of the permissible window. *Id.*

- Quality checking caused large delays. Relator found a twenty-one-day-old patient chart that had not been entered into the Electronic Data Capture system to send to Icon and Pfizer. That information should have been entered within twenty-four hours. *Id.*

- Some patient charts and laboratory specimens were missing. *Id.*

Due to the seriousness of these violations, Relator noted that she "might be in a little bit of shock." Ex. 2, at 1.

255. On September 23, 2020, Relator e-mailed Livingston to report that Ventavia's emergency response protocol for allergic reactions was not being followed. Ventavia internally required every patient's chart to contain appropriate dosage ranges (based on age, weight, etc.) for epinephrine in the event of anaphylaxis. The patients' charts did not contain this information. No action was taken to correct this during Relator's employment.

D. Ventavia management falsely accuses Relator of violating patient confidentiality.

256. On the evening of September 24, 2020, Relator met with Fisher and Jones. *See* Ex. 3, Transcript of September 24, 2020 Meeting Recording. The meeting was arranged to discuss Relator's photographic documentation of safety issues, HIPAA violations, and unblinding from September 16. The meeting quickly escalated into harassment. Fisher questioned repeatedly why Relator took the photographs and falsely accused Relator of removing patient source documents from another Ventavia location. *Id.*

257. Fisher reiterated her instructions to provide specific patient names which, as noted previously, was not always possible. *See* Ex. 3, at 4, 18, 20, 22. Fisher and Jones gave contradictory instructions, telling Relator to fix violations once identified but also noting that Ventavia cannot correct all violations, and has to pick and choose what to address. *See, e.g.*, Ex. 3, at 12, 15, 27. Jones stated that Ventavia had not "even finished quantifying the number of errors" because "it's something new every day." Ex. 3, at 12. He acknowledged that the problems were "not just in one site" either, and stated "we're gonna get some kind of letter of information at least, when the FDA gets here. Know it." *Id.*

258. When Relator discussed her unblinding documentation, Fisher appeared more concerned with punishing the employees responsible for the unblinding incident than preventing the issue in the future. *See* Ex. 3, at 2, 3; *see also* Ex. 13, Unblinding E-mail Chain (Sept. 22, 2020), at 1 (instructing employees to discipline those responsible for unblinding incident).

259. Relator specifically referenced FDA regulatory violations in her conversation with Fisher and Jones. *See* Ex. 3, Transcript of September 24, 2020 Meeting Recording, at 14. She told Fisher and Jones that if they did not see what she saw when quality checking patients' source documents, then they needed to "get on Google" and search for FDA warning letters. Ex. 3, at 14.

260. Relator reported hearing Raney and Ray acknowledge via telephone that Ventavia did not have the staff or patient room capacity to handle the number of clinical trial participants being seen every day. Ex. 3, at 15. Relator questioned whether Raney and Ray truly prioritized patient safety. *See id.* Fisher questioned whether placing patients in the hallway for "monitoring" after injection was actually a safety risk. *Id.*

261. Relator also discussed with Jones and Fisher that Downs had previously reported many of the same violations and safety risks that Relator had. *See* Ex. 3, at 21, 23–24. Fisher claimed that Ventavia addressed Downs' concerns, but clearly the same issues had recurred, or else Relator would not have spotted them. *See* Ex. 3, at 24.

E. Ventavia terminates Relator the next day.

262. On the following morning, Relator called the FDA's hotline to report the clinical trial protocol violations and patient safety concerns she witnessed.

263. Relator was terminated from her position at Ventavia that same day—September 25, 2020. Relator was never formally disciplined or reported for any failure regarding her job performance until the day that she was terminated.

264. Relator was harassed and terminated by Defendant Ventavia as a direct consequence of her reports of and efforts to stop fraud against the United States DoD.

265. After Relator was terminated, she called Dr. Alfaro at Pfizer and gave a general overview of her concerns about unblinding, principal investigator oversight, and patient safety in the Pfizer-BioNTech vaccine trial. She also informed Dr. Alfaro that she had contacted the FDA. Relator did not identify herself or discuss any specific trial sites, concerned that doing so might adversely affect a future retaliation action.

266. Not long after her termination, the FDA contacted Relator and spoke to her for several hours regarding the violations she witnessed at Ventavia.

267. Almost immediately after Relator was terminated (the next business day), Ventavia lifted the enrollment "pause" and resumed the push to enroll as many clinical trial participants per week as possible. Given the amount of "quality control" left to be performed when Relator was terminated, Relator estimates that Ventavia had neither completed quality checking nor remedied its ongoing violations by the time it resumed enrollment.

268. Relator's termination is but one example of a pattern and practice of retaliatory terminations by Defendant Ventavia. Ventavia's prior Fort Worth Site Operations Manager Michelle Gaines was terminated in August of 2020 for reporting and trying to stop protocol noncompliance and regulatory violations in other clinical trials.

X. ACTIONABLE CONDUCT BY DEFENDANTS

A. False Claims Act

1. Applicable Law

269. This is an action to recover damages and civil penalties on behalf of the United States and Relator Jackson arising from the false and/or fraudulent statements, claims, and acts that Defendants made in violation of the False Claims Act, 31 U.S.C. §§ 3729–3732.

270. For conduct occurring on or after May 20, 2009, the FCA provides, in relevant part, that any person who:

> (A) knowingly presents, or causes to be presented, a false and/or fraudulent claim for payment or approval; [or]
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false and/or fraudulent claim[,]

31 U.S.C. § 3729(a)(1), is liable to the United States for a civil penalty of not less than $11,665 and not more than the applicable regulatory maximum for each such claim, plus three times the amount of damages sustained by the Government because of the false and/or fraudulent claim. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5.

271. The FCA defines "claim" as:

> (A) mean[ing] any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--
>
> (i) is presented to an officer, employee, or agent of the United States; or
>
> (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--
>
> (I) provides or has provided any portion of the money or property requested or demanded; or

> (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. . . .

31 U.S.C. §3729(b)(2).

272. The FCA allows any person having knowledge of a false and/or fraudulent claim against the Government to bring an action in federal district court for himself and for the United States, and to share in any recovery, as authorized by 31 U.S.C. § 3730.

273. Based on these provisions, Relator Jackson seeks damages and civil penalties arising from Defendants' violations of the False Claims Act.

2. Defendants' Violations of the False Claims Act

a. Presentation of False Claims (31 U.S.C. § 3729(a)(1)(A))

274. From 2020 to the present, Defendants knowingly presented, or caused the presentment of, false and/or fraudulent claims for payment or approval to the United States. Pfizer's claims for payment to DoD were rendered false and/or fraudulent by express and implied false certifications.

275. First, when Defendant Pfizer submitted its clinical trial protocol to the United States in connection with its contract, it represented that the clinical trial would comply with all applicable laws and regulations. Defendants violated FAR and multiple FDA regulations when conducting the clinical trial, rendering this certification false.

276. Second, Defendant Pfizer's IND for the vaccine and clinical trial at issue warned that making a "willfully false statement is a criminal offense." Ex. 4, Form FDA-1571, at 2. Defendants rendered Pfizer's acknowledgement of this warning false by submitting false data to the FDA.

277. Third, Defendants Ventavia and Icon certified in Form FDA-1572, submitted to Pfizer and the United States, that they would: (1) conduct the trial in accordance with the protocol and FDA regulations; (2) obey informed consent and IRB reporting requirements; (3) report adverse events; (4) ensure that all "associates, colleagues, and employees assisting in" the trial were "informed about their obligations"; and (5) make no changes to the trial without IRB approval. B, Form FDA-1572; 21 C.F.R. § 312.53(c)(vi). Ventavia and Icon acknowledged when submitting Form FDA-1572 that making willfully false statements is a crime. *See* Ex. 5, at 2. This acknowledgement and certification was rendered false by Ventavia and Icon's violations of the clinical trial protocol, FDA regulations, and fraudulent conduct described *supra*.

278. Fourth, Defendant Pfizer certified in its claims for payment that they were true and correct, prepared from Pfizer's books and records, and in accordance with the Pfizer-DoD contract. *See* 48 C.F.R. § 52.232-32(m). This certification was rendered false by Defendants' submission of false data and violation of FDA regulations and FAR, and by the other fraudulent conduct described *supra*.

279. Defendants' fraudulent schemes transform these certifications into false certifications, rendering Defendant Pfizer's claims for payment to DoD false and/or fraudulent.

280. By creating and carrying out their fraudulent schemes, Defendants knowingly and repeatedly violated Section 3729(a)(1)(A) of the False Claims Act.

281. Defendants' knowing submission, or causation of submission, of false and/or fraudulent claims had the potential to influence the government's payment decision and was material to the government's decision to pay the claims.

282. Defendants' violations of the applicable statutes and regulations, and misrepresentations regarding their compliance, were material, because they went to the very

essence of the bargain for which the United States DoD contracted. Had the United States DoD known of Defendants' fraudulent non-compliance, which resulted in the submission of ineligible false and/or fraudulent claims for reimbursement, it would not have paid the claims.

283. Defendants' presentment, or causation of presentment, of false and/or fraudulent claims to the United States DoD was a foreseeable factor in DoD's loss and a consequence of Defendants' schemes. By virtue of Defendants' actions, the United States DoD has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false and/or fraudulent claim.

b. Making or Using False Records or Statements to Cause Claims to be Paid (31 U.S.C. § 3729(a)(1)(B))

284. From 2020 to the present, Defendants knowingly made, used, or caused to be made or used, false records or statements that were material to false and/or fraudulent claims paid or approved by the United States DoD. These false records or statements include the clinical trial protocol Pfizer submitted to the United States and the falsified source documents and data behind Defendants' trial results and EUA application.

285. By creating and carrying out their fraudulent schemes, Defendants knowingly and repeatedly violated Section 3729(a)(1)(B) of the False Claims Act.

286. Defendants' false records were material to Pfizer's claims for payment for the vaccine at issue. The United States DoD would not have paid Pfizer if it knew that the clinical trial protocol was not complied with by Defendants, because the protocol violations call the integrity and validity of both the entire clinical trial and Pfizer's EUA into question.

287. Defendants' false records also went to the very essence of the bargain the United States contracted for. DoD contracted to purchase vaccines found effective by a valid clinical trial conducted according to the protocol submitted by Pfizer. The integrity of the entire clinical trial

was compromised by the trial protocol violations, false source documents, and the false data that resulted, which calls the vaccine's EUA into question. Had the United States DoD known of Defendants' false records, it would not have paid Pfizer.

288. Defendants' use, or causation of use, of material false records was a foreseeable factor in the United States DoD's loss and a consequence of Defendants' schemes. By virtue of Defendants' actions, the United States DoD has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false and/or fraudulent claim.

c. Retaliation (31 U.S.C. § 3730(h))

289. Section 3730(h) of Title 31 of the United States Code defines whistleblower protection under the False Claims Act as follows:

> (1) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under [the False Claims Act] or other efforts to stop 1 or more violations of [the False Claims Act].
> (2) Relief . . . shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

31 U.S.C. § 3730(h).

290. As discussed *supra*, in violation of 31 U.S.C. § 3730, Defendant Ventavia retaliated against Relator as a result of Relator's efforts to stop Defendants from committing False Claims Act violations. Defendant Ventavia punished Relator for her lawful and statutorily protected activity with harassment and termination.

291. Relator has suffered both economic loss and emotional harm as a result of Defendant Ventavia's retaliatory actions.

XI. CAUSES OF ACTION

A. Count I – Presentation of False and/or Fraudulent Claims (31 U.S.C. § 3730(a)(1)(A))

292. Relator realleges and hereby incorporates by reference each and every allegation contained in all paragraphs of this Complaint.

293. Since December of 2020, Defendants have knowingly presented or caused the presentment of false and/or fraudulent claims to the United States for payment or approval. Defendant Pfizer's claims for payment to DoD were rendered false or fraudulent by Defendants' implied and express false certifications of legal and regulatory compliance, accuracy of data, and clinical trial protocol compliance.

294. By creating and carrying out their fraudulent scheme, Defendants knowingly and repeatedly violated the False Claims Act. *See* 31 U.S.C. § 3729(a)(1)(A).

295. Defendants' knowing submission, or causation of submission, of false and/or fraudulent claims had the potential to influence the United States' payment decision and was material to the United States' decision to pay the claims.

296. The United States paid the false and/or fraudulent claims.

297. Defendants' presentment or causation of presentment of false and/or fraudulent claims was a foreseeable factor in the United States' loss and a consequence of Defendants' fraudulent scheme. By virtue of Defendants' actions, the United States has suffered damages and is entitled to recover treble damages plus a civil monetary penalty for each false and/or fraudulent claim.

B. Count II – Making or Using False Records or Statements Material to False and/or Fraudulent Claims (31 U.S.C. § 3730(a)(1)(B))

298. Relator realleges and hereby incorporates by reference each and every allegation contained in all paragraphs of this Complaint.

299. From 2020 to the present, Defendants knowingly made, used, or caused to be made or used, false records or statements that were material to false and/or fraudulent claims paid or approved by the United States. These false records or statements include the clinical trial protocol that Defendant Pfizer submitted to the United States and the falsified source documents and data behind Defendants' clinical trial results and Emergency Use Authorization application.

300. By creating and carrying out their fraudulent scheme, Defendants knowingly and repeatedly violated 31 U.S.C. § 3729(a)(1)(B).

301. Defendants' false records or statements, or causation thereof, had the potential to influence the United States' payment decision and were material to the United States' decision to pay the claims.

302. Defendants' false records or statements, or causation thereof, were material because they went to the very essence of the bargain for which the United States contracted. Had the United States known of Defendants' fraudulent misrepresentations regarding the clinical trial at issue, which resulted in the submission of ineligible false/fraudulent claims for reimbursement, then the United States would not have paid those claims.

303. The United States paid the false and/or fraudulent claims.

304. Defendants' false records or statements, or causation thereof, was a foreseeable factor in the United States' loss and a consequence of Defendants' scheme. By virtue of Defendants' actions, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false and/or fraudulent claim.

PRAYER FOR RELIEF

305. WHEREFORE, Relator prays that this Court enter judgment against Defendants and award the following:

(1) Damages in the amount of three (3) times the actual damages suffered by the United States as a result of Defendants' conduct;

(2) Civil penalties against Defendants up to the maximum allowed by law for each violation of 31 U.S.C. § 3729;

(3) The maximum award Relator may recover pursuant to 31 U.S.C. § 3730(d);

(4) All costs and expenses of this litigation, including attorneys' fees and costs of court; and

(5) All other relief on behalf of Relator or United States that the Court deems just and proper.

C. Count III – Retaliation (31 U.S.C. § 3730(h))

306. Relator realleges and hereby incorporates by reference each and every allegation contained in all paragraphs of this Complaint.

307. In violation of 31 U.S.C. § 3730(h), Defendant Ventavia Research Group, LLC ("Ventavia") retaliated against Relator Jackson as a result of her efforts to stop Defendants from committing violations of the False Claims Act.

308. Ventavia punished Relator for her lawful and statutorily protected activity with harassment and termination.

309. Relator has suffered economic loss and emotional harm as a result of her termination by Ventavia.

PRAYER FOR RELIEF

310. WHEREFORE, Relator prays that this Court enter judgment against Defendant Ventavia Research Group, LLC for the following:

(1) Reinstatement with the same seniority status;

(2) Two times the amount of Relator's back pay;

(3) Interest on Relator's back pay;

(4) Compensation for special damages sustained by Relator as a result of Defendants' actions, including but not limited to compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, loss to reputation, and other pecuniary and nonpecuniary losses;

(5) Punitive damages;

(6) Litigation costs and attorneys' fees;

(7) Prejudgment interest at the highest rate allowed by law; and

(8) Any other relief that the Court deems just and proper to make Relator whole.

XII. INDEX OF EXHIBITS

311. The exhibits referenced herein consist of the following:

Exhibit Number	Description	Bates Range
1	Text Messages with Ray and Others (Sept. 17, 2020)	JSN0001-JSN0011
2	E-mail Chain with Ray and Others (Sept. 23, 2020)	JSN0012-JSN0014
3	Transcript of September 24, 2020 Meeting	JSN0015-JSN0046
4	Form FDA-1571	JSN0047-JSN0049
5	Form FDA-1572	JSN0050-JSN0051
6	BNT162b2 Product Manual	JSN0052-JSN0135
7	Clinical Trial Protocol	JSN0136-JSN0281
8	Pfizer Press Release (Nov. 18, 2020)	JSN0282-JSN0287
9	E-mail Chain with Downs and Others (Sept. 18, 2020)	JSN0288-JSN0292
10	Pfizer-DoD Contract	JSN0293-JSN0327
11	Ventavia's Quality Control Findings	JSN0328-JSN0351
12	E-mail Chain with Raney (Sept. 17, 2020)	JSN0352-JSN0357
13	Unblinding E-mail Chain (Sept. 22, 2020)	JSN0358-JSN0359
14	Note to File on Randomization (Sept. 17, 2020)	JSN0360
15	E-mail Chain with Downs and Alfaro	JSN0361-JSN0364
16	E-mail Chain with Henslin (Sept. 15, 2020)	JSN0365-JSN0369
17	Marnie Fisher's List of Deficiencies (Sept. 21, 2020)	JSN0370-JSN0373
18	Common Quality Assurance Findings Checklist (Sept. 22, 2020)	JSN0374-JSN0377
19	E-mail Chain with Icon (Sept. 21, 2020)	JSN0378-JSN0385
20	Informed Consent E-mail Chain with Alfaro and Others (Sept. 24, 2020)	JSN0386-JSN0391
21	Daily Status Updates E-mail Chain	JSN0392-JSN0457
22	E-mail Chain with Fisher, Raney, and Others (Sept. 9, 2020)	JSN0458-JSN0460
23	E-mail Chain with Livingston, Vasilio, and Others (Sept. 22, 2020)	JSN0461-JSN0464

Exhibit Number	Description	Bates Range
24	Mercedes Livingston's List of Common Errors (Sept. 22, 2020)	JSN0465-JSN0467
25	Blood Draw Data	JSN0468-JSN0495
26	Source Documentation E-mail Chain (Sept. 10, 2020)	JSN0496-JSN0497
27	Symptom Log E-mail Chain and Attachment (Sept. 24, 2020)	JSN0498-JSN0503
28	List of Action Items	JSN0504-JSN0521
29	Text Messages with Fisher (Sept. 14-15, 2020)	JSN0522

XIII. DEMAND FOR JURY TRIAL

312. Pursuant to Federal Rule of Civil Procedure 38, Relator demands a trial by jury.

Respectfully submitted,

BERG & ANDROPHY

/s/ Joel M. Androphy

Joel M. Androphy
TX State Bar No. 01254700
Rebecca L. Gibson
TX State Bar No. 24092418
3704 Travis Street
Houston, TX 77002
Tel. (713) 529-5622
Fax (713) 529-3785
jandrophy@bafirm.com
rgibson@bafirm.com

Greg M. Dykeman
TX State Bar No. 06325100
STRONG PIPKIN BISSELL & LEDYARD LLP
595 Orleans, Suite 1400
Beaumont, TX 77701-3255
Tel. (409) 981-1000
Fax (409) 981-1010
gdykeman@strongpipkin.com

COUNSEL FOR RELATOR BROOK JACKSON

OF COUNSEL:

Steve Kardell
Kardell Law Group

4514 Cole Avenue
Suite 600
Dallas, TX 75205
Tel. (214) 616-4654
Fax (469) 729-9926
skardell@kardelllawgroup.com

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, a true and correct copy of the foregoing was delivered to the following recipients via certified mail, return receipt requested.

Civil Division U.S. Department of Justice 175 North Street NE, 9th Floor Washington, DC 20002 *CC to:* Civilfrauds.quitams@usdoj.gov	Michael Lockhart U.S. Attorney's Office, Eastern District of Texas 350 Magnolia Avenue, Suite 150 Beaumont, Texas 77701-2237
Jeffrey Rosen Acting United States Attorney General Department of Justice 950 Pennsylvania Avenue NW Washington, DC 20530	

/s/ Joel M. Androphy
Joel M. Androphy

CASE NO. 100619-5

IN THE SUPREME COURT OF WASHINGTON

On Appeal from the Court of Appeals Division I 80968-7

CHRISTOPHER AND ANGELA LARSON,

Plaintiff-Appellant,

v.

SNOHOMISH COUNTY *et al.*,

Defendant-Respondent.

PETITION FOR DISCRETIONARY REVIEW

Scott E. Stafne, WSBA# 6964
STAFNE LAW *Advocacy & Consulting*
239 North Olympic Avenue
Arlington, Washington, 98223
Tel: 360-403-8700
Scott@stafnelaw.com
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Federal Statutes

State Statutes

Constitutional Provisions

Rules

Other

I. IDENTITY OF PETITIONERS

Christopher and Angela Larson were the Torrens Land Title Applicants in the superior court and are Petitioner/Appellants in *Christopher Larson v New Century Mortgage*, Appeal No. 81874-1-I. The Larsons were the Plaintiffs below and Petitioner/Appellants in the linked Appeal *Christopher Larson v. Snohomish County*, Appeal No. 80968-7-I, challenging Snohomish County, and its officials' noncompliance with Chapter 65.12 RCW–Registration of Land Titles (Torrens Act).

Because the two above referenced appeals were linked by the Court of Appeals and cannot be meaningfully reviewed separately, the Larsons have filed the same Petition for Review – word for word – in both cases. This has resulted in a situation where the word count of each Petition exceeds 5,000 words, but is less than that if it is considered that the same Petition for Review addresses both cases.

The Larsons intend to file an alternative motion to consolidate review of the above-referenced appeals or alternatively to allow them to exceed the word count with regard to each of the Petitions for Review they have filed.

II. COURT OF APPEALS DECISIONS

The Larsons request review of parts of the Court of Appeals' above referenced decisions dealing with judicial neutrality.

The Larsons timely moved for Reconsideration of these linked decisions, which was denied on January 5, 2022. A copy of the linked decisions being appealed is in the Appendix at pages App. 1–45. A copy of the Order denying Larsons' Motion for Reconsideration is in the Appendix at pages App. 46–7. A copy of this Court's Order granting the Larsons an Extension of Time in which to file this Petition for Review until February 14, 2022, is in the Appendix at pages App. 48–52.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the rule of necessity applies to Washington State superior court judicial officers and judges in this case?
2. Whether Washington judges must apply the partiality claims *asserted by the parties* against judicial officers and judges when determining whether there has been a legitimate exercise of judicial power under Wash. Const. art. IV in accordance with that Due Process of law mandated by the Fourteenth Amendment and the statutory requirements of RCW 2.28.030(1)?
3. Whether Washington State superior court judges must inform themselves about those facts which could be a legitimate basis for their recusal under Wash. Const. art. IV, the Fourteenth Amendment, and RCW 2.28.030?

4. Whether Washington State superior court judges must apply an objective standard to those facts found to exist with regard to challenges to judicial partiality based on Wash. Const. art. IV, the Fourteenth Amendment, and RCW 2.28.030?

IV. STATEMENT OF THE CASE

Re: Christopher Larson v. Snohomish County, Appeal No. 80968-7-I

Threatened with a nonjudicial foreclosure by Deutsche Bank as trustee of a 2007 Morgan Stanley Trust seeking to enforce a New Century (then a bankrupt entity) loan the Larsons alleged was (1) never funded or (2) appropriately assigned by MERS to Deutsche Bank,[1] the Larsons filed a Torrens Title

[1] The Larsons' factual basis for their assertion that their loan had not been funded by New Century was based on an agreed order between their lender, New Century, and Washington's Department of Financial Institutions, which stipulated that New Century loans closed loans during this time frame which were never not funded by New Century. CP 4003–04 (Complaint) ; CP 1194, ¶¶4–5 (SJ Response); CP2534-2540 (Evidence). *See also* App. 63-64, 87-96. The Larsons' factual contentions that MERS had no authority to assign their Deed of Trust to Deutsche Bank after New Century's bankruptcy was set forth in their opposition to the summary judgment motion at CP 1195–1199, ¶¶10–27. The Larsons' legal theory in this regard was based on decisions from other state and federal courts holding that under these exact same circumstances MERS relationship with New Century was terminated in 2008, citing *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 199 Cal. Rptr. 3d 66, 365 P.3d 845 (2016); *Dilibero v. Mortg. Elec. Registration Sys.*, 108 A.3d 1013 (R.I. 2015); and *Ross v. Deutsche Bank Nat'l Tr. Co.*, 933 F. Supp. 2d 225, 228-29 (D. Mass. 2013). *See* CP 1196, ¶15. *See also* cases cited in Larsons Opening Brief in Torrens Appeal at pp. 10–12. The Larsons also presented into evidence Debtor New Century's "Notice of Rejection of Executory Contract," CP 343–346 and 2541–2547, and the

Application pursuant to Ch. 65.12 RCW with the Snohomish County Superior Court on June 5, 2018. App. 315–337. When Snohomish County failed to act on their title registration application, *see* Clerk's Papers (CP) 248–51, the Larsons sued the County and several of its officials—including its superior court's judges and court clerk—for noncompliance with their ministerial duties under that law. CP 3985–4056.

When the Larsons began preparation of their Complaint against Snohomish County they suspected that many—if not all—counties in Washington State were not in full compliance with the Torrens Act. *See* App. 258-260. Therefore, the Larsons included a prayer for relief in their Complaint filed with the Skagit County Superior Court in hopes of obtaining a neutral judge. This Prayer for relief requested

> recusal of all superior court judges in any county which has failed to comply with the provisions of the Torrens Act and/or whom are in a similar position to these Snohomish County judicial defendants with regards to the issues being raised in this litigation; i.e., superior court judges whose acts and omissions have prevented landowners within their respective county from availing themselves of the protections afforded persons with interests in land

---

bankruptcy court's Order authorizing and approving the procedures for rejection of MERS' executory contract. CP 1344–1349, 1844–1849, 2548–2551.

> by the public and transparent land registration system established by the Torrens Act.

CP 4030–31, ¶H.

When the Larsons confirmed that Skagit County, like Snohomish County did not have an operating land registration system—and the Skagit County Judges were not complying with the Torrens statute in the same way as the Snohomish County Judges, *see* CP 3701–3755 (Anderson declaration with exhibits including email correspondence between Anderson and Skagit County Court Clerk, at 3479) the Larsons filed an affidavit of prejudice which asserted that disqualification of Skagit County Judges was also required by RCW 2.28.030. CP 3615–18.

Although one Skagit County Superior Court Judge (Judge Stiles, at CP3479) recused himself on this basis, the second Skagit County Superior Court Judge (Judge Svaren) to whom the case was then referred, refused to do so. CP 3584. Shortly thereafter Judge Svaren dismissed all the Snohomish County Defendants (including the judges) and transferred the case to the Snohomish County Superior Court, claiming the Snohomish County Superior Court had mandatory venue. CP. 18–25; 3570–3573; 3581–3583.[2]

[2] Although the Larsons's do not seek review of this venue decision here, they would note that RCW 4.28.030(4) specifically provides for transfer of venue in situations where the prerequisites of RCW 2.28.030(1) involving judicial partiality are not met. These particular venue provisions, which are grounded in the need for judicial neutrality, have their roots in

After the Appeal of this case against the Snohomish County Defendants was docketed, counsel for the Larsons observed that there were irregularities with the Superior Court Clerk's filings. *See* App. 175-263 (Filings re: Larsons' motion to require Snohomish County Clerk to comply with RAP 9.6.) And when the Court of Appeals did not grant the relief requested, the Larsons moved the Court of Appeals to modify the Commissioners ruling. The filings relating to Larsons' Motion to Modify are set forth in the record at App. 112-174.

These pleadings are mentioned here because they document problems the Larsons had with regard to creating a record in both the superior court and the Court of Appeals which accurately reflected their court filings.

After the *Snohomish County* case was transferred by Judge Svaren to the Snohomish County Court, Defendants Deutsche Bank (as trustee for the 2007 Morgan Stanley trust which claimed to own Larsons' Deed of Trust) and MERS, the entity which purportedly assigned the Deed of Trust to Deutsche Bank, moved for summary judgment. CP 537–51. Before that dispositive motion could be heard, the Presiding Judge of the Snohomish County Superior Court issued an Order disqualifying all judicial officers in that court (judges and commissioners) from

---

Washington's territorial laws, *see* 1854 laws, §§ 98–9, 1869 laws, §§ 52 (2) and (3); 1877 laws, § 52; and 1881 laws, § 51.

adjudicating this case. CP 575–78. As part of the same Order the Presiding Judge appointed Skagit County Superior Court Judge Svaren (the same judge as had been adjudicating this case in the Skagit County Court) to act as a Snohomish County judge pro tempore for purposes of adjudicating the *Snohomish County* case.

Following Judge Svaren's appointment as a pro tempore judge to adjudicate the Larsons *Snohomish County Case* the Larsons again sought Judge Svaren's disqualification as a judge through a series of related motions, i.e., such as Larsons' Motion to Amend their Complaint, CP 274-2753; Motion to Disqualify CP 2745-2753, and Larsons various responses to Defendants' summary motions. *See e.g.,* 1191-1192, 1210-1214, 1221-1231.

The Larsons asserted two different grounds for Judge Svaren's recusal after he started acting as a pro tempore judge for Snohomish County. First, the Larsons argued Judge Svaren, as a pro tempore judge of Snohomish County should be recused on the basis of the res judicata effect of the Snohomish County Presiding Judge's recusal of all Snohomish County judicial officers because the Skagit County Superior Court Judges had not complied with the Torrens Act provisions in precisely the same way as Snohomish County, resulting in neither Snohomish or Skagit County having an operating Torrens Title system. Thus, to the extent that Judge Svaren would be adjudicating the culpability of the Snohomish County Judges not complying with the Torrens

Act in such a way as to have initiated an operating Torrens system he would also be adjudicating his own and fellow officers' culpability for Skagit County also not having any registration system its landowners could use.

Secondly, the Larsons challenged that changes in Washington law occurring in or around 2006-07 were designed to pool the retirement funds of all Washington's public officials (including judges) into profit based investment funds managed by the Washington State Investment Board (WSIB), an agency of the Executive Branch, *see* Ch. 43.33 RCW, and its adviser State Street Bank, an entity which was accused of and admitted to selling low value subprime mortgages and mortgage-backed securities to investors by falsifying their value so that it could make a profit. The Larsons request this Court take judicial notice of SEC's February 11, 2012, Cease and Desist Order to establish this fact. This Order is accessible on the SEC's government website.[3]

The Larsons also presented evidence to the Superior Court Judges which demonstrated WSIB had invested billions of dollars in mortgages and mortgage-backed securities the value of which the Larsons claimed could be manipulated by judicial decision-making anticipated to occur as a result of those subprime mortgage practices that State Street Bank, WSIB's partner, and

[3] https://www.sec.gov/litigation/admin/2010/33-9107.pdf Last accessed February 13, 2022.

Morgan Stanley, one of WSIB's advisers (and the creator of the New Century Trust fund in this case) were engaging in. *See* CP 1001-1171.

The Larsons argued that prior to 2006 judges' retirement benefits appeared to be invested in several different funds, systems, and accounts. *See e.g.,* Ch. 2.10 RCW: "Judicial retirement system"; Ch. 2.12. RCW: "Retirement of judges—Retirement System"; 2.14: "Retirement of Judges Supplemental retirement."

Judges' retirement benefits under Ch. 2.10 RCW were designed to be paid to judges through a separate judicial retirement system which preserved judges' neutrality—and the appearance of judges' neutrality—by guaranteeing the solvency of judges' retirement benefits. *See* RCW 2.10.090(3) ("The state shall…guarantee the solvency of said [judge's retirement] fund…") *See also Horowitz v. State Dep't of Ret. Sys.*, 96 Wn.2d 468, 471-72, 635 P.2d 1078, 1080 (1981). *See also* 2.12.060.

At some point judges were given the opportunity, or required to, leave their own retirement programs established exclusively for judges to join Washington's public employees' retirement system. *See e.g.,* 2.12.100; 2.14.115. In fact, the political branches incentivized Washington judges to move into plans where judges' contributions and investment were pooled with most other government workers, including employees of the

Legislature and Executive branches, by compensating judges to do so. *See e.g.,* RCW 41.40.124.

The Larsons claimed that the changes by the legislature in pooling the retirement accounts of judges with those of other government workers under the auspices of an Executive Branch agency, teamed up with State Street Bank (a bad actor in the sub-prime mortgage crisis) and Morgan Stanley (an entity apparently having an interest in this case) created circumstances about which judges must discover those facts applicable to their situation, which are necessary to be determined in order to conclude whether a judge has or would reasonably appear to have a disqualifying interest in adjudicating the case.

After Judge Svaren granted the private Defendants' Motion for Summary Judgment, Judge Svaren turned to the Larsons' recusal challenges. This time, Judge Svaren, acting as a Snohomish County Judge Pro Tempore, didn't ignore the Larsons' arguments, but he also didn't address their substance, i.e., (1) that he, Judge Svaren, had failed to comply with RCW 65.12 in the same way as had the Snohomish County Judges and was therefore acting as a judge over his own conduct as well as the conduct of other Skagit County and Snohomish County Judges' conduct and (2) did not consider whether the economic interest he and other judges were given by law in mortgage and mortgage-

backed securities investments constituted a pecuniary interest which created bias or created an appearance of bias.

> THE COURT: . . . Bottom line, motions for summary judgment are granted.
>
> * * *
>
> I haven't addressed in my oral comments the request that was brought to have me disqualify myself. That request is denied. I don't have a dog in this fight.

App. 174, lines 3–11. *See also* CP 9, 32, & 45. (Written orders stating Judge Svaren's subjective opinion that he is able to decide this case impartially.)

The Larsons contend that most reasonable people—and most judges—would agree Judge Svaren did have a dog in these fights because he and the other Skagit County Judges and officials had violated the Torrens Act and as a result landowners could not register their land in Skagit County in exactly the same way as land could not be registered in Snohomish County when the Larsons attempted to do so. *See* CP 3985–4056. Perhaps, Judge Svaren did have not an interest in Washington's pooled retirement accounts, but we will never know because he provided no information about whether he had any judicial retirement account or not. But certainly, this is information which Judge Svaren and other likely should have been aware of. It is the Larsons' position that the burden should not be placed on litigants to sniff out judges' personal affairs. Judges should be aware of

their personal affairs and be willing to investigate them further if they issues affect the public's perception of judicial neutrality.

After this Appeal was docketed Larsons learned the Snohomish County Court Clerk had failed to include in the summary judgment record the Declaration of Joseph Vincent, legal counsel for Washington's Department of Financial Institutions. Vincent testified in support of the premise that New Century never funded some closed loans in Washington, like the Larsons claimed happened with their loan. *See* App. 87-111 (Motion for Reconsideration)

V. STATEMENT OF THE CASE

Re: Christopher Larson v. Snohomish County, Appeal No. 81874-1[4]

Notwithstanding that Larsons' land title registration (Torrens) application was filed first, those proceedings were not concluded in the Snohomish County Superior Court until after the Larsons *Snohomish County* case filed in Skagit County had been decided because there was no Snohomish County process in effect to handle these title registration proceedings. *See* App. 43, where the Court of Appeals states: "And by the time Judge Okrent dismissed the Larsons Torrens Act petition, the County had rectified the issues the Larsons had raised in their Snohomish County lawsuit."

[4] The Larsons will refer to the clerk's paper in the Torrens Act proceedings as TACP followed by the numbers of the relevant Clerk's pages.

Without waiting for the newly appointed Title Examiner to present his report on the Larson's title fraud claims against MERS and Deutsche Bank, *see* RCW 65.12.110, Judge Okrent (a Snohomish County judge who had been recused by the Presiding Judge of that Court from adjudicating the issue of whether he and his fellow judges violated their duties under the Torrens Act to create a working registration system) sent an email to the attorneys for Larsons and Deutsche Bank requiring them to set forth any grounds for his recusal within three days. *See* Torrens Act Clerk's Papers (TACP 18). The Larsons responded by filing a pleading denominated as "Specific Grounds for Recusal of Snohomish County Superior Court Judge Okrent under Controlling Federal Due Process Precedent and RCW 2.28.030(1)." *See* 17-25.

This filing asserted

> Facts justifying disqualification of Judge Okrent with regard to this matter for these interests include those previously set forth in the pleadings and these additional ones:
>
> 1.) The Larsons originally filed this registration proceeding with the Snohomish County Superior Court on June 8, 2018, to have the chain of title to their real property in Washington's land records examined so that they could register their homestead. When this Court took no action for a prolonged period of time and the Larsons were unable to provoke any attempt by court personnel to comply with the law, the Larsons

filed suit on November 15, 2018, against all the judges on this superior court in the Skagit County Superior Court because they wanted this county's superior court judges, including Judge Okrent, to comply with their ministerial duties under Washington's Registration of Land Title (Torrens) Act, Ch. 65.12 RCW, which was necessary to create an operating Torrens system in Snohomish County.

2.) In their Complaint against Snohomish County Judges the Larsons requested that their case be adjudicated by a judge from a county superior court that had an operating Torrens system or by an agreed upon lawyer who had no interest in this issue as to whether the Torrens Act should be repealed.

3.) Skagit County Superior Court Judge Svaren, who refused to disqualify himself notwithstanding Skagit County judges were in the same position as Snohomish County Judges with regard to their noncompliance with the Torrens Act, dismissed the judges of this Court from this case without prejudice. Thereafter the Larsons filed an Amended Complaint again naming all Snohomish County Judges and additional Snohomish County officials as Defendants.

4.) The Larsons then moved all Snohomish County Judges named in the Amended Complaint to recuse themselves. The Presiding Judge granted that motion and disqualified all judicial officers.

5.) The Larsons contend they are entitled to a preclusive and/or estoppel effect here because reversing this Court's Presiding Judge's decision now will allow Judge Okrent to adjudicate the appropriateness of Snohomish County's conduct in not complying with his and other judges duties under Ch. 65.12 RCW at a time when this is still a live issue before the Court of

> Appeals where all Snohomish County Superior Court Judges are still named parties in the presently ongoing Appeal of that case, which involves precisely the same Torrens Act issue that is being raised here.
>
> 6.) Additionally, the Larsons contend that Judge Okrent, and all Snohomish County judicial officers, are interested in the public perception of the Snohomish County Clerk, who is a Defendant in this case. Because the Snohomish County Clerk is accused of several irregularities that suggest the quality of record-keeping by the Snohomish County Court may vary depending on the Clerk's interests in the case the average person as a judge of this issue would be tempted to adjudicate the facts and law in such a way as to favor the interests of the clerk and her court in order to make the judge, the court, and the clerk look good, or at least not bad.
>
> 7.) As the Larsons' point out in their Opposition to Deutsche Bank's Motion to dismiss these proceedings, there are also separation of powers issues at play. These are indicated by efforts to repeal the Torrens Act by County and state officials based on misrepresentations of fact and law; the creation of pecuniary incentives for all government employees to invest in mortgage-backed securities; and the natural tendency to want to prove they, as judges, have done nothing wrong in refusing to comply with the law in such a way as to deprive citizens of those opportunities their forefathers intended they have.

TACP 20–23.

Significantly, Deutsche Bank's response, TACP 32-35, did not address any of the Larsons' Due Process arguments or any of

the Supreme Court objective Due Process precedents advanced by the Larsons as requiring disqualification.

Although Deutsche Bank argued that RCW 2.28.030(1) did not apply to this case because Judge Okrent was not a named Defendant in the Larsons' Torrens Act case, it failed to address the "interest" in the case prong of RCW 2.28.030(1). TCAP 33. Deutsche Bank also erroneously claimed that the Presiding Judge's Order Disqualifying Judge Okrent from adjudicating the *Snohomish County* case was not applicable because Judge Okrent was a named Defendant in that case. TCAP 34 But this was not true because Judge Svaren had already dismissed the Snohomish County Defendants (including judges) before they recused themselves.

Deutsche Bank and MERS mocked the Larsons' request for an unbiased judge to adjudicate the Larsons' title claims because they claimed there were no unbiased judges in Washington with regards to such matters. TCAP 34.

Apparently in a hurry to allow Deutsche Bank to take the Larsons' home, Judge Okrent signed a proposed order prepared by Deutsche Bank's attorneys which denied recusal but did not say why: "It is hereby ORDERED ADJUDGED and DECREED that: the Larsons' Motion that the Honorable Richard Okrent, Snohomish County Superior Court Judge, recuse

and remove himself from the above matter is hereby DENIED." TACP 14.

The Larsons object to that judicial arrogance which insists that judicial officers can adjudicate legal and factual issues without any explanation as to why. *See* Alexander Hamilton, Federalist Papers No. 78 (The judiciary, . . . may truly be said to have neither FORCE nor WILL, but merely judgment;) And judgment should not be interpreted to mean such silence as is unreviewable and therefore not open to challenge.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED OF THE ISSUES IDENTIFIED & SHOULD BE GRANTED IN BOTH CASES

A. This Court should accept review of the ruling that the rule of necessity applies to superior court judges in Washington in light of art. IV, § 7

The Court of Appeals first excuses any partiality that Judge Svaren, or Judge Okrent have or appear to have under Wash. Const. art. IV, the Fourteenth Amendment and RCW 2.28.030 by invoking the "rule of necessity." App. 42. The Panel states this rule is "a well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" citing *United States v. Will*, 449 U.S. 200, 213 (1980).

But Washington's founders intentionally created a constitution that provides an alternative forum, i.e., pro tempore

judges who are members of the bar, to exercise judicial power when elected and appointed judicial officers are prohibited by law from doing so. In this regard, Wash. Const. art. IV, § 7 states:

> . . . A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court and sworn to try the case.[5]

Washington's history indicates this language was designed to address and solve the problem of biased judicial officers acting as judges in Washington's courts by ensuring that pro tempore judges, who are members of the bar, can be appointed in situations like this one to obtain unbiased judges to resolve these types of cases. Theodore Stiles, a delegate to Washington's Constitutional Convention in 1889 and one of its first Supreme Court judges, wrote in 1911 that Washington's judiciary article, i.e., Wash. Const. art. IV, was "[a]mong the meritorious provisions of our constitution which had any degree of novelty at all, …. Not many of the states have constitutional courts, ***and still fewer of them have undertaken to define the jurisdiction of their***

[5] Notwithstanding Wash. Const. Art. IV, § 7 was amended in 1987 by Amendment 80 and in 2001 by Amendment 94, this sentence providing for members of the bar as alternative judges when elected or appointed judicial officers are not available has remained part of this constitutional provision. This Court has indicated this sentence means what it says. *State ex rel. New Wash. Oyster Co. v. Meakim*, 34 Wn.2d 131, 135-36, 208 P.2d 628, 631 (1949).

courts by the higher law."[6] (emphasis added)

This Court should review the Court of Appeals decision that the rule of necessity applies in this case because this involves a significant question of law regarding the meaning of Wash. Const. art. IV, § 7 and also involves an issue of substantial public interest that should be determined by this Court. Furthermore, as the rule of necessity is being interpreted by the Court of Appeals in these decisions the Court of Appeals' interpretation conflicts with this Court's interpretation of the rule in *Kennett v. Levine*, 50 Wn.2d 212, 219-20, 310 P.2d 244, 249 (1957) explaining that "[i]t is established by the great weight of authority that where a public officer, . . . is given exclusive jurisdiction to conduct a hearing . . . , and no alternate or substitute is provided, disqualification will not be permitted to destroy the only tribunal with power in the premises." *Id.* at 219-20.

B. Judicial power must be exercised by neutral adjudicators in accordance with Due Process.

Wash. Const. art. IV, § 1 provides: "The judicial power of the state shall be vested in a supreme court, superior courts,

---

[6] The history of our constitutional convention demonstrates delegates' disillusionment with the federal judicial system as our founders soundly defeated a proposal to give the political branches authority to establish Washington court's jurisdiction as is so in the federal system. *See* Wiggins, Charles K., *George Turner and the Judiciary Article. Part II The Constitutional Convention of 1889 Creates a Judiciary for Washington*, 43 Washington State Bar News 17, 18 (Oct. 1989).

justices of the peace, and such inferior courts as the legislature may provide."[7] The term *judicial power* was borrowed directly from Article III of the United States Constitution, wherein that phrase is used to describe that separate and distinct type of governmental power used to adjudicate disputes between litigants within courts' jurisdictions.

It is Larsons' contention here that those founders who wrote and ratified Washington's Constitution[8] understood that *judicial power* can only be exercised by courts acting through judges who are—and appear to be—neutral as between the parties. *See e.g.*, Scott Douglas Gerber, A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787 (Oxford Univ. Press 2011); Fabian Gelinas, The Dual Rationale of Judicial Independence 1, 9–10 (2011) (discussing ancient roots of the concept of adjudicatory justice, which trace back to Egypt's First Intermediate Period and also appear in Babylonian inscriptions about this same period of time.) *See also* Clifford S. Fishman, Old

---

[7] Years later, in 1968, the term *judicial power* was used when the People of Washington amended their Constitution to add Washington's Court of Appeals as a court capable of exercising *judicial power*. Wash. Const. art IV, § 30(1).

[8] Twenty-three of the seventy-five delegates to Washington's Constitutional Convention were lawyers. Wiggins, Charles K., *The Twenty-Three Lawyer Delegates to the Constitutional Convention*, 43 Washington State Bar News 9, (Nov. 1989).

Testament Justice, 51 Cath. U. L. Rev. 405 (2002)(Explaining the ancient basis for modern day law and procedure). *See also* The Law of Moses, which directed the appointment of judges who "shall judge the people fairly." "Do not pervert justice or show partiality. Do not accept a bribe, for the bribe blinds the eyes of the wise and twists the words of the righteous." Deuteronomy 16:18–19 (New Int.Vers). *See also Proverbs* 15:27 (Rev. Std. Vers). ("He who is greedy for unjust gain makes trouble for his household, but he who hates bribes will live.")

Indeed, the enactment of RCW 2.28.030 in 1891, just two years after Washington's Constitution was ratified, indicates Washington's founders appreciated the collective wisdom of history at that time and intended judicial power could only be exercised by neutral judges. This statute states in pertinent part: "A judicial officer is a person authorized to act as a judge in a court of justice. ***Such officer shall not act as such in a court of which he or she is a member*** ...: (1) ***In an action, suit, or proceeding*** to which he or she is a party, or ***in which he or she is directly interested***; . . ."

It is the Larsons' position that this is an appropriate statutory restriction, i.e., reasonable regulation, on Washington courts and judges' exercise of *judicial power*. *Cf. In re Marriage of Buecking,* 179 Wn.2d 438, 448, 316 P.3d 999 (2013) *citing James v. Kitsap County,* 154 Wn.2d 574, 579-89, 115 P.3d 286 (2005) *and*

Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 418, 63 P.2d 397 (1936).

Additionally, and separately from the Larsons' assertion that judicial neutrality—and its appearance—are a requisite for the valid exercise of judicial power under Wash. Const. art. IV, they also assert that this same requirement is part of that Due Process which States must provide those who appear in their courts under the Fourteenth Amendment. *See e.g., Rippo v. Baker*, 137 S. Ct. 905 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *Bracy v. Gramley*, 520 U.S. 899 (1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Ward v. Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

The classic principle of neutrality associated both with the exercise of judicial power and Due Process of law throughout the world is "no one shall be his own judge or decide his own case." This principle, which is consistent with the ancient authorities previously discussed as well as RCW 2.28.030 and the Fourteenth Amendment, was codified as part of Roman law at least as early as 376 AD. *See e.g.*, Justinian Codex 3.5.1, imperial decree of year 376 AD.

This predicate for the exercise of *judicial power*—i.e., judicial neutrality as between the parties—was a part of European legal principles well before the founding of the United States. In England, for example, ***the principle that a judge at common law was not competent to adjudicate a matter in which he had a direct financial interest was recognized as early as 1563***, *see* Sir Nicholas Bacon's Case (1563) 2 Dyer 220b., and was well established before the lack of neutral judges in the King's courts of North America became a rallying cry for revolution in this Nation's Declaration of Independence. *See e.g.*, Dr. Bonham's Case, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610); *Earl of Derby's Case*, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K.B. 1614); and *Day v. Savage*, Hobart (3d ed. i67i) 85 (K. B. 1614).

By the time this country established its nationhood, the necessity for independent neutral judges was well understood and accepted by those who wrote and ratified our national Constitution. *See e.g.*, Madison, James, Federalist Paper No. 10 (1787) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.") *See also* Hamilton, Alexander, Federalist Paper No. 80 (1788) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.")

The common law ***prohibition*** against financially interested judges exercising judicial power was enacted into law by the political branches of the federal government in 1792. This statute required recusal in any case in which "it shall appear that the judge of such court is, any ways, concerned in interest." Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79 (quoted in Peter Bowie, *Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With The Administration of Justice: Foreword: The Last 100 Years: An Era of Expanding Appearances*, 48 S. Tex. L. Rev. 911, 913 (2007). This same statute enacted in 1792 required disclosure of the disqualifying facts "to be entered on the minutes of the court."

Judge Bowie in the above referenced article describes how over time the public's concern with judicial conduct resulted in the creation of *rules of conduct* for judges. In 1922, for example, Chief Justice Taft chaired the American Bar Association Committee that drafted the Canons of Judicial Ethics, which provided that a judge should avoid even the appearance of impropriety. *Bowie*, *supra*, at 917-18. Avoiding the appearance of impropriety was carried into the 1972 ABA Code of Judicial Conduct, and eventually into 28 U.S.C. § 455(a), requiring that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id*. at 930-31.

This same standard requiring recusal of a judge in any proceeding "in which his impartiality might be reasonably questioned" has been adopted and applied by many states, including Washington. The Court of Appeals acknowledges this in the text of their decision at App. 41, when it states: "Due process, appearance of fairness and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned."

C. This Court should accept review of Issue Two pursuant to RAP 13.4(b)(1), (3), and (4).

Notwithstanding the Larsons' judicial neutrality challenges were premised on the Fourteenth Amendment and RCW 2.28.030 the Court of Appeals decided them based on Washington's Code of Judicial Conduct, explaining:

> CJC Canon 3(D)[9] lays out the rules for when judges should disqualify themselves in a proceeding, for

[9] As can be seen from the Court of Appeals' decision reproduced at page 42 of the Appendix, the Panel appears to be citing to CJC Canon 3(D). But published copies of the decision substitute in place of the Panel's reference to "CJC Canon 3(D)" a reference to "CJC 2.11(A)." *See e.g., Larson v. Snohomish Cty.*, 499 P.3d 957, 982-83 (Wash. Ct. App. 2021). (Published electronically by Lexis-Nexis). The Larsons take offense to the Panel's unauthorized and undisclosed amendment of their decision in light of the fact the Panel denied the Larsons' formal motion to reconsider similar mistakes, such as the Panel's failure to acknowledge that proof in the record documenting New Century's bankruptcy. See App. 60, 64-72. In any event, the Larsons would note they believe the Panel is actually referring to CJC 2.11(A) rather than Canon 3(D), but assert this does not matter because the legal theories for recusal the Larsons have continually asserted are premised

> example, when the judge has a personal bias or prejudice concerning a party, when the judge previously served as a lawyer or witness in a controversy, or when the judge's family member is or is likely to be a witness in the case. None of these situations occurred here.

App. 42.

The Larsons assert that while the standards applicable to Due Process, RCW 2.28.030, and the CJC may be similar, the Larsons are entitled to have Washington judges apply the legal standards they asserted, which included judges' pecuniary interests in the outcome of the case created by state law[10] as part of the Due Process and statutory standard they asserted, applied to the facts of this litigation. *Greenlaw v. United States*, 554 U.S. 237 (2008) ("In our adversary system … we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 244). *See also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

---

on the Fourteenth Amendment and RCW 2.28.030, not the CJC or Washington's Appearance of Fairness doctrine.

[10] As interpreted by the Court of Appeals CJC does not reach the situation the Larsons assert has occurred here, where laws have been enacted which give judicial officers interest in assets which compromise judicial neutrality -- or the appearance of thereof. *See e.g., Tumey v. Ohio*, 273 U.S. 510, 515 (1927). ("[I]t certainly violates the Fourteenth Amendment… to subject . . . property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *See also Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019) cert. denied 140 S. Ct. 1120 (2020).

Determining whether litigants in Washington can assert distinct judicial neutrality claims, such as those the Larsons are asserting under Wash. Const. art. IV, the Fourteenth Amendment, and RCW 2.28.030 in this case, without having them co-opted by judges deciding them pursuant to Washington's CJC's apparently different standards, involves significant questions of law under both the Constitution of Washington and the United States. RAP 13.4(b)(3). It also involves an issue of substantial public interest which should be determined by this Court pursuant to RAP 13.4(b)(4). Considering whether Washington judges can simply co-opt the Larsons' neutrality arguments based on national law by simply applying a different standard to the facts they present also arguably conflicts with *Tumey*, *supra*, at 523 and *In re Murchison*, *supra*., at 136 and arguably provides a basis for review under RAP 13.4(b)(1).

D. This Court should accept review of Issues Three and Four pursuant to RAP 13.4(b)(1), (2) and (3).

The Panel states the CJC was not violated because:

> The Larsons allegation that judges have a personal interest in retirement funds invested in mortgage-backed securities and therefore have some interest in allowing lenders to foreclose is pure speculation. The Larsons have alleged no facts indicating that either judge has control over the state retirement plans or that their decisions regarding the Torrens Act will have any impact whatsoever on the value of securities in which the retirement plans are invested. Without

> these facts, there is nothing to support the Larsons' argument.

App. 43

But it is the Court of Appeals' judges, not Larsons, who appear to have their facts wrong. The Larsons set forth facts and arguments with regard to the judicial neutrality issues they advanced in so many pleadings it is difficult to believe the Panel could have overlooked them. Those pleadings submitted directly to the Court of Appeals in this regard include without limitation: App. 82-84 (Motion to Reconsider); 132-138; 140-144; 186-189; - p. 4 of 9.6.

Those pleadings submitted to the superior courts in this regard which referenced facts and evidence included without limitation: Stafne's Declaration in support of Larson's Motion to Amend, CP 2611–2743 (also included in record as CP 2769–2911[11]). *See also* 65–67; 85, 114–15, 264–277; 583-585, 2745-50. *See also* in Torrens Act proceedings, TACP 9-13, 17-25, 49–75, 77–79, 86–95, 122-138, 212–242, 265–396, 411–609, 620–648 (Vincent Declaration), 650–680, 722–763, 767–780, 791–906, 1030–1032.

[11] *See*, CP 31 (Amended Order granting summary judgment identifying Stafne's declaration in support of the Larsons' Motion to Amend their Complaint as being one of the few submitted by Larson that Judge Svaren considered.)

The Larsons produced evidence (some of it coming directly from Skagit County) which demonstrated that Skagit County Judges (which included Judge Svaren) had not complied with their responsibilities under Chapter 65.12 RCW in exactly the same way Snohomish County Judges had ignored their duties. *See* CP 3468–522, and specifically the correspondence from Skagit County to Anderson at CP 3479 (Skagit County Clerk stating: "I spoke with the Skagit County Auditor, Jeanne Youngquist about this matter. The Torrens Act was used in this County in the 1800's and early 1900's to register lands. The Auditor's office does not have any records on site regarding the Land Registration Docket. . . . Currently the process entitles the ***recording*** of a Deed for lands."[12] (Emphasis Supplied). *See also* email at 3522.

Certainly, the Court of Appeals judges (as well as all of this State's superior court judges) knew or should have known that Washington's political branches changed judges' retirement benefits from being guaranteed by the State (i.e. benefits which were paid to judges regardless of the consequences of their judicial decision-making) to being paid from the pooled retirement investments of all government workers being managed by WSIB, an

[12] The Auditor's claim that the Torrens Act was used in the 1800s is obviously not correct because the Torrens Act was not enacted into law until 1907. On the other hand, the Auditor's statement that Skagit County only allows the recording of deeds substantiates Skagit County's noncompliance with the Torrens Act.

Executive Branch agency in 2006, and if that didn't work, then directly from the taxpayers. *See* RCW 2.12.060.

And the Larsons did present evidence that WSIB, the entity that was managing Washington judges' retirement funds, was partnered up with State Street Corporation, an entity WSIB identified as its agent and counterparty for securities lending transactions. CP 1033. The Larsons also submitted evidence demonstrating that while State Street was helping WSIB manage judges' retirement accounts the Securities and Exchange Commission issued a Cease and Desist Order against it in 2010 which charged that in 2007 State Street was misleading some investors about the value of the mortgage-backed securities it was selling them. CP 272–75.

The Larsons complained that WSIB's maintenance of a relationship with State Street after 2010 was "not consistent with administering a trust fund for judges who were . . . tasked with adjudicating the legal consequences of these same type of bank frauds." CP 274.[13] Further , the Larsons alleged this forced alliance between government workers, judges, money lenders and debt buyers imposed by state law created federal Due Process

[13] Additionally, it should be noted that Morgan Stanley, the purported creator of the trust claiming ownership of Larsons' loan in this litigation, is identified as one of WSIB's "private equity partners.," see CP 1004. *See also* CP 1171 indicating WSIB invests in a Morgan Stanley investment pool.

problems, citing *Cain v. White*, 937 F.3d 336 (5th Cir. 2019) and *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019).

Although the Court of Appeals judges claim otherwise, it is patently obvious that the law applicable to mortgage-backed securities and MERS' private registration alternative to Washington's Torrens title public registration system was not settled in 2006 at the time these changes were made lumping judges' interests in these type of investments with those of other government workers. *See e.g., Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

Reasonable people, who are not economically interested in these retirement funds, understand that if judges had decided against the enforceability of these types of subprime mortgages and mortgage-backed securities through foreclosures after 2007 the value of judges' and other government workers' retirement accounts would have declined appreciably. And this is the type of pecuniary interest which must be evaluated to determine whether the Fourteenth Amendment, Wash. Const. art IV, and RCW 2.28.030 require recusal.

Additional evidence of partiality by these judicial officers/judges and the Snohomish County and Skagit County courts in the record includes:

a) Both Snohomish and Skagit County officials (including all of their superior court judges and specifically including Judges

Svaren and Okrent) failed to perform those statutory duties required of them to set up title registration systems in their counties. And the Court of Appeals outright admits this in its decisions: "And by the time Judge Okrent dismissed the Larsons' Torrens Act petition, the county had rectified the procedural issues the Larsons had raised in their Skagit County lawsuit." App. 43.

b) The record before the Court of Appeals contains evidence of partiality by the Snohomish County Court Clerk. As is stated above the retirement funds of the Clerk and her staff (who are government workers) are also invested in mortgages and mortgage-backed securities, the value of which has been mostly determined by judicial decision-making occurring after 2007.

c) The most serious misconduct brought directly to the Court of Appeals attention was the Clerk's apparent manipulation of the court record, including the failure to file a declaration offered by a Washington State official in opposition to private Defendants' Motion for Summary Judgment. *See supra.* Other misconduct included making false statements in the Clerk's certification of records from the Skagit County Court to the Snohomish County Court. *See e.g.,* App. 114-5, 166-171.

d) Still more evidence of misconduct by Judge Svaren, the Snohomish County Clerk, Deutsche Bank, and MERS is that following the Larsons' Motion to Reconsider the Summary Judgment Order for not identifying the evidence the Court relied upon, *compare* CP 4–9 *with* 29–32, Judge Svaren signed an Order prepared by Deutsche Bank and MERS which failed to reference virtually any of the evidence the Larsons filed with the Snohomish County Superior Court Clerk in the *Snohomish County Case* in opposition to the summary judgment. *See e.g.,* McDermott declaration at CP 989–1171, which included exhibits documenting WSIB's investments relating to public workers' (including judges'), retirement accounts had invested in mortgages and mortgage-backed securities,[14] which was not considered by Judge Svaren. CP 31. *See also* Stafne Declaration in Opposition to Summary Judgment which Judge Svaren indicates at CP 39 was not considered, notwithstanding the Order prepared by Deutsche Bank and MERS and signed by Judge Svaren provides no basis for excluding this declaration, which included 11 exhibits, including Exhibit 2, public and historical documents, which the Clerk failed to include as part of the record.

[14] It appears that part of McDermott's declaration, CP 1500-1671, was misfiled by the Clerk as a part of Stafne's declaration in opposition to the motions for summary judgment.

CP 1443–1444, ¶ 3; Exhibit 3, various iterations of Washington's Deeds of Trust Act, Chapter 61.24 RCW, those parts of this exhibit which clerk filed appear at 2001–2239; Exhibit 4 depositions of Michael Maynes, at CP 1417–1429, 1917–29, the Honorable Judge Monty J. Cobb, at CP 2457–94; Richard Beresford, at 2510-33; and the three depositions of Jeffrey Stenman, at CP 2242–67, 2272–368, and 2373–448; Exhibit 5, New Century Consent decree at CP 2534–2540; Exhibit 6, New Century Bankruptcy documents at CP 2541–2551; and etc., i.e. Exhibits 7–11, at CP 2552–2596.[15]

The Larsons assert that this type of misconduct by the Court through its judge and staff, which prevented the Larsons from presenting their case based on a record capable of appellate review because of misconduct, is not consistent with the legitimate exercise of judicial power under Wash. Const art. IV or Due Process under the Fourteenth Amendment or the mandates of RCW 2.28.030.

This Court should review the Court of Appeals decision that Larsons must do more than they have done in order to challenge neutrality because the Panel's ruling appears to put the

[15] It is the Larsons' position that Judge Svaren's uncritical acceptance of the order prepared by MERS and Deutsche Bank which intentionally misstated the evidence in the record -- under the circumstances of this case -- constitutes further evidence of judicial partiality or the appearance thereof.

burden on litigants to actually establish disqualification, rather than on judges to determine they are qualified under the Due Process Clause and RCW 2.28.030. *See* cases cited at 22, *supra. See also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)(a violation of 28 U.S.C § 455 is established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality). *Cf. Lake v. State Health Plan for Teachers & State Emps.*, 376 N.C. 661, 662, 852 S.E.2d 888 (2021)(North Carolina Supreme Court justices interpret that state's Code of Judicial Conduct to so as to require each to determine whether justice's relatives have an interest in PERS retirement plan before that case is before them.)

This Court should also review the Court of Appeals decision because it excuses Judge Svaren's application of a subjective standard—"I don't have a dog in this fight"—and relieves him (*and future Washington judges*) from applying the objective inquiry Due Process requires. *See* authorities, cited *supra.,* at 22.

Actual bias—"I don't have a dog in this fight"—is not the test for judicial disqualification. *Caperton*, *supra.*, at 883–84. Rather "under a realistic appraisal of psychological tendencies and human weakness," the legal standard which must be applied requires determining whether the judicial bias alleged "poses such a risk of actual bias or prejudgment that the practice must be

forbidden if the guarantee of Due Process is to be adequately implemented." *Id.*

Judge's Okrent's failure to provide any basis for refusing to recuse himself is similarly problematic unless this Court intends to give Washington's superior court judges a pass on this issue which the judges of other states do not have.

This Court should grant review to determine whether the objective standard long required by Due Process has been met here given the alignment of government workers as a result of Washington State laws which give them a common pecuniary interest against borrowers. And in this regard this Court should observe that even the Court of Appeals indicates it believes "[t]he test for determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts," citing *State v. Gentry*, 183 Wn.2d 749, 762, 356 P.3d 714 (2015). App. 41.

What is most startling about this case is the breadth of issues—many of them constitutional—which the superior court judges and Court of Appeals Panel decided on the basis of a summary judgment record which the superior court clerk and judges stripped of its essence. Why did these judges want to position these issues in a way that couldn't be won?

Our governments, both at the national and Washington State level, were carefully designed to ensure openness and

public disclosure. This is because "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in The Writings of James Madison 103 (1910). This Court should consider whether this goal is thwarted if judges are allowed to decide partiality issues based only on their subjective conclusion that they can be fair.

Review of these partiality issues are appropriate under RAP 13.4(b)(1)-(3) and this Court should grant review.

VII. Conclusion

Review should be granted.

I hereby certify this Petition contains 8574 words, and is not in compliance with RAP 18.17. *See* Motion to Consolidate, or Alternatively to Extend Permissible Word Count.

DATED this 14th day of February 2022.

Respectfully submitted,

by: *s/ Scott E. Stafne*

Scott E. Stafne , WSBA No. 6964
Stafne Law *Advocacy & Consulting*
239 North Olympic Avenue
Arlington, Washington 98223
Tel: 360.403.8700
scott@stafnelaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, February 14, 2022, I filed the *Petition for Discretionary Review* by using the Appellate Court's electronic filing system which will provide service to the interested parties of record.

Dated February 14, 2022, at Mount Vernon, WA.

By: s/*LeeAnn Halpin*
LeeAnn Halpin, Paralegal

TABLE OF APPENDICES		
Date	Title of Filing	Page No.
Dec 06, 2021	Published Opinion	pp. 1–45
Jan 05, 2022	Order Denying Motion for Reconsideration	pp. 45–47
Feb 07, 2022	Order Granting Motion for Extension of Time Case No. 100620-9	pp. 48–49
Feb 07, 2022	Order Granting Motion for Extension of Time Case No. 100619-5	pp. 50–52
Dec 12, 2021	Motion for Reconsideration	pp. 53–85
	Appendix re Motion-Declaration of Vincent w. exhibits	pp. 87–111
Jul 13, 2020	Appellants' Reply re Motion to Modify	pp. 112–20
Jun 29, 2020	Response re Amended Motion to Modify	pp. 121–23
Jun 22, 2020	Amended Motion to Modify	pp. 124–44
	Attachment 1 re Amended Motion	pp. 145–47
	Attachment 2 re Amended Motion	pp. 148–50
Jun 22, 2020	Stafne Declaration in Support of Amended Motion to Modify	pp. 151–64

	Appendix re Amended Motion-Clerk's Letter	pp. 166–67
	Appendix re Amended Motion-Case Summary	pp. 166–71
	Appendix re Amended Motion-Clerk's Letter re Order of Dismissal	p. 172
Apr 10, 2020	Verbatim Report of Proceedings	pp. 173–74
Apr 06, 2020	Reply to Motion re Clerk to Comply with RAP 9.6	pp. 174–84
Apr 06, 2020	Stafne's Declaration in Support of Reply	pp. 185–89
	Exhibit re Stafne's Declaration -Order of Assignment	p. 190
Mar 03, 2020	Halpin's Declaration in Support of Reply	pp. 191–97
	Exhibit re Halpin's Declaration- Clerk's Letter	pp. 191–204
	Exhibit re Halpin's Declaration in Support of Reply- Clerk's Letter	p. 205
Apr 03, 2020	Response re to Motion re Clerk to Comply	pp. 206–09
Mar 13, 2020	Motion re Clerk to Comply with RAP 9.6	pp. 210–23

Mar 13, 2020	Stafne Declaration in Support of Motion re Clerk to Comply with RAP 9.6	pp. 224–52
	Exhibit re Stafne Declaration -Ruling Denying Motion to Strike	pp. 254–61
	Exhibit re Stafne Declaration- Recusal	pp. 262–63

FILED
12/6/2021
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CHRISTOPHER LARSON and ANGELA LARSON,

Appellants,

v.

SNOHOMISH COUNTY, a Washington State Municipal Corporation; CAROLYN WEIKEL, individually and as the SNOHOMISH COUNTY AUDITOR and Registrar; SONJA KRASKI, individually and as the SNOHOMISH COUNTY CLERK; JANE DOE, individually and as SNOHOMISH COUNTY EXAMINER OF TITLES and LEGAL ADVISOR TO THE REGISTRAR; SNOHOMISH COUNTY SUPERIOR COURT JUDGES GEORGE F. APPEL, GEORGE N. BOWDEN, MARYBETH DINGLEDY, JANICE E. ELLIS, ELLEN J. FAIR, ANITA L. FARRIS, MILLIE M. JUDGE, LINDA C. KRESE, DAVID A. KURTZ, JENNIFER R. LANGBEHN, CINDY A. LARSEN, ERIC Z. LUCAS, RICHARD T. OKRENT, BRUCE J. WEISS, and JOSEPH P. WILSON; THE STATE OF WASHINGTON; WASHINGTON STATE GOVERNOR JAY INSLEE in his official capacity; WASHINGTON STATE ATTORNEY GENERAL ROBERT FERGUSON in his official capacity as WASHINGTON ATTORNEY GENERAL; JOHN DOES, Successors in interest and assigns to

No. 80968-7-I

DIVISION ONE

PUBLISHED OPINION

NEW CENTURY MORTGAGE COMPANY and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY; DEUTSCHE BANK NATIONAL TRUST COMPANY as trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE2 Mortgage Pass Through Certificates, Series 2007; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE2; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; SELECT PORTFOLIO SERVICING, INC., a Utah corporation; and MORTGAGE ELECTRONIC RECORDING SYSTEM, INC., a Delaware Corporation,

Respondents.

CHRISTOPHER LARSON and ANGELA LARSON,

Appellants,

v.

NEW CENTURY MORTGAGE; JANE DOE; ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN OR INTEREST INTO, OR UPON THE REAL PROPERTY DESCRIBED HEREIN,

Respondents.

No. 81874-1-I

ANDRUS, A.C.J. — Christopher and Angela Larson appeal adverse rulings in two separate lawsuits related to the nonjudicial foreclosure of their home. They challenge the dismissal of a Torrens Act[1] application they filed in Snohomish County Superior Court[2] and the dismissal of a lawsuit they filed in Skagit County

[1] Ch. 65.12 RCW.

[2] The Snohomish County Torrens Act application was filed as Snohomish County Superior Court No. 18-2-04994-31. We will refer to this lawsuit hereinafter as the "Torrens Act proceeding."

Superior Court against the State of Washington, Snohomish County, its superior court judges, the successor lender, foreclosure trustee, and loan servicer.[3]

In both proceedings, the Larsons sought a judicial determination that the 2006 deed of trust they granted to their initial lender, New Century Mortgage Company, was invalid. In the Skagit County lawsuit, the Larsons sought declaratory relief against the Public Defendants,[4] seeking to compel them to comply with the Torrens Act. They also sought monetary damages and injunctive relief against the successor lender, the trustee, and loan servicer[5] for alleged violations of the Deed of Trust Act (DTA)[6] and the Consumer Protection Act (CPA).[7]

Although the Larsons sought injunctive relief, they never actually moved to enjoin the nonjudicial foreclosure sale. The trustee proceeded with the sale after which the trial court dismissed the Larsons' claims against the Public Defendants under CR 12(b)(6) and transferred venue for the remaining claims against the Private Defendants to Snohomish County Superior Court. The court subsequently dismissed all remaining claims on summary judgment. The court also dismissed the Larsons' Torrens Act application because they were no longer title owners of the property.

---

[3] The Skagit County lawsuit was filed under Skagit County Superior Court No. 18-2-01234-29. The court transferred venue of the lawsuit to Snohomish County Superior Court in January 2019, and it proceeded under Snohomish County Superior Court No. 19-2-01383-31.

[4] We refer hereafter to the State of Washington, Governor Inslee, and Attorney General Ferguson collectively as "the State Defendants." We refer to Snohomish County, its auditor, its examiner of titles, and the Snohomish County superior court judges as "the County Defendants." We refer to the State Defendants and the County Defendants collectively as "the Public Defendants."

[5] We refer hereafter to Deutsche Bank Trust Company, as trustee for Morgan Stanley ABS Capital I, Inc. Trust 2007-HE2, Quality Loan Service Corporation of Washington, Select Portfolio Servicing, Inc. and Mortgage Electronic Recording System (MERS) collectively as "the Private Defendants."

[6] Ch. 61.24 RCW.

[7] Ch. 19.86 RCW.

On appeal, the Larsons raise a number of statutory and constitutional arguments, none of which have merit. We therefore affirm the dismissal of both lawsuits.

FACTUAL BACKGROUND

In October 2006, Christopher Larson[8] purchased a house in Snohomish County and borrowed $218,000 from New Century Mortgage Corp. (New Century) to do so. Christopher signed the promissory note in which he agreed to make monthly loan payments beginning December 1, 2006. Christopher and his wife, Angela, executed a deed of trust securing the loan. The deed of trust identified Christopher as the borrower, New Century as the lender, First American Title as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary. The sellers, Tyson and Alisia Bushnell, executed a statutory warranty deed, conveying the property to Christopher, on October 9, 2006.

The Larsons allege that New Century declared bankruptcy in April 2007 and declined to accept their mortgage payment in August 2007. Angela testified that she contacted New Century and was informed that the lender no longer "had [their] mortgage" and could not tell her to whom they should pay their mortgage payment. In October 2007, the Larsons received a notice of default on behalf of Countrywide Home Loans through its servicer, Recontrust. The Larsons, believing their home was in foreclosure, moved to Idaho, where they lived for eight years.

The Larsons do not dispute that they made no regular mortgage payments after July 2007. In 2009, they received another notice of default from BAC Home

[8] We refer to Christopher and Angela Larson by their first names for ease of reference. We mean no disrespect in doing so.

Loans and in 2010, they received both a notice of default and a notice of trustee sale from Recontrust on behalf of Bank of America. The Larsons did not respond to any of these notices and made no loan payments in response to them.

In July 2010, MERS assigned its interest in the Larson deed of trust to Deutsche Bank, the note holder at the time. That same month, Recontrust issued a notice of trustee sale, identifying Deutsche Bank as the assignee under the deed of trust, but it apparently did not proceed with the sale.

In August 2012, the Larsons received a letter from Select Portfolio Servicing, Inc. (SPS), identifying itself as the new loan servicer. In May 2014, SPS referred the account to a new trustee, Northwest Trustee Services, Inc., to commence foreclosure. At that point, the Larsons retained counsel who began corresponding with Northwest Trustee Services and SPS, challenging the validity of the debt and the right of any lender to conduct a nonjudicial foreclosure sale. The Larsons made no payments on the note until May 2017, when they made one partial mortgage payment.

On December 22, 2017, North Cascade Trustee Services, Inc., the successor trustee, issued a notice of default on behalf of the note holder, Deutsche Bank. North Cascade recorded a notice of trustee's sale in February 2018 and set a sale date of June 29, 2018.

On May 17, 2018, SPS appointed Quality Loan Service Corporation of Washington (QLS) as successor trustee under the deed of trust.

On June 5, 2018, the Larsons filed an "Application for 'Torrens' Registration of Title to Land" in Snohomish County Superior Court. In this application, the Larsons alleged that "[t]here a[re] no known valid liens or encumbrances on the

listed property," and sought a court order declaring that they held sole title to their land. The Larsons attached to their application a copy of a Ticor Title Company commitment for title insurance, with an effective date of June 9, 2017. This commitment, by its terms, was no longer in effect, as it had expired six months after its effective date. The commitment also identified as an encumbrance, and excluded from any title insurance coverage, the recorded Deutsche Bank deed of trust.

The next day, on June 6, 2018, QLS executed a notice of discontinuance of the trustee sale scheduled for June 28, 2018, and issued a new notice of trustee's sale, rescheduling the foreclosure sale for October 12, 2018. The notice was recorded on June 8, 2018. There is no evidence in the record that Deutsche Bank, QLS, or SPS was aware of the Larsons' Torrens Act application before issuing this notice of trustee sale. At some point, QLS continued the foreclosure sale to November 16, 2018.

The Larsons did not move to enjoin the foreclosure sale. Nor did they file a motion in the Torrens Act proceeding to obtain any relief under that statute. Instead, on October 18, 2018, they initiated a lawsuit in Skagit County Superior Court against the Public and Private Defendants, alleging several causes of action. The Larsons sought declaratory and injunctive relief against the Public Defendants, seeking an order compelling the County Defendants to create a Torrens Act system, compelling the superior court judges to comply with their duties under the Torrens Act, compelling the State Attorney General to "provide guidance to the court" on how to comply with the Torrens Act, and compelling the Governor to fulfill his duty to "see that the laws are faithfully executed."

The Larsons alleged that they wanted to register their interest in the land under the Torrens Act, but if they could not do so, they alternatively sought to quiet title, alleging that the original promissory note had been forged, that the original loan had never been funded, that Deutsche Bank had no interest in the property under the deed of trust, and that foreclosure was barred by the statute of limitations.

They also sought damages and injunctive relief against Deutsche Bank, MERS, SPS, and QLS under the CPA. They claimed that these Private Defendants violated the CPA by attempting to collect a "loan which was never funded," "[i]ntentionally splitting the note from the Security Instrument and transferring each separately," falsifying or forging a note, charging fees not owed, and violating the DTA by attempting to foreclose on a void note and deed of trust after the expiration of the statute of limitations. They further alleged that the DTA was unconstitutional on its face and as applied to them.[9] Finally, they alleged numerous but unspecified "equitable claims" to preclude Deutsche Bank from foreclosing on their home.

When the Larsons did not obtain a court order precluding Deutsche Bank and QLS from conducting the scheduled nonjudicial foreclosure sale, QLS sold the Larsons' property to Deutsche Bank on November 16, 2018, and recorded the trustee deed of sale on November 21, 2018.

[9] The Larsons also alleged claims under the Washington Collection Agency Act, Ch. 19.16 RCW, the Consumer Loan Act, Ch. 31.04 RCW, and 42 U.S.C. §1983. The Larsons do not challenge the dismissal of these claims.

On November 30, 2018, the Public Defendants moved to dismiss the Larsons' claims against them, arguing that the Larsons' Torrens Act application was deficient due to their failure to file an abstract of title as required by RCW 65.12.085, and, in the alternative, moved to transfer venue to Snohomish County Superior Court under RCW 4.12.010(1) and RCW 4.12.020(2).

QLS moved to dismiss the claims asserted against it, arguing the DTA is constitutional, the Larsons waived any claims by failing to seek an injunction of the sale before it occurred, Deutsche Bank was the holder of the Larson promissory note and entitled to foreclose, the foreclosure sale complied with the DTA, and the statute of limitations did not bar foreclosure. QLS also joined in the Public Defendants' motions. Deutsche Bank, SPS and MERS joined the motions filed by the Public Defendants and QLS.

At a December 2018 hearing on these motions, the Larsons asked Skagit County Superior Court Judge Svaren to recuse himself, a request the court denied. The court granted the Public Defendants' motions and dismissed all claims against them without prejudice. The court separately granted the Private Defendants' motion to dismiss with prejudice the Larsons' quiet title claim, concluding that the Larsons' failure to enjoin the trustee sale under RCW 61.24.127(2) barred that claim. The court denied the motion to dismiss the CPA claim, the claim for declaratory relief as to the constitutionality of the DTA, and the Larsons' claim for "equitable causes of action." The court concluded venue in Snohomish County was mandatory under RCW 4.12.020(1) and transferred all remaining claims to Snohomish County Superior Court.

In July and August 2019, the Private Defendants moved for summary judgment dismissal of all remaining claims. While the parties were briefing these summary judgment motions, the Larsons moved to amend their complaint to add new causes of action against the Private Defendants and to add as defendants the Washington State Treasurer, the Washington State Investment Board, the Snohomish County Treasurer, Snohomish County Prosecuting Attorney, and Snohomish County Sheriff. They simultaneously moved to disqualify all Snohomish County judicial officers on the grounds that they were named as defendants to the action. The presiding judge of Snohomish County Superior Court granted the motion to disqualify the named judges and assigned the case to Judge Svaren, sitting in the capacity of a visiting judge for Snohomish County Superior Court.

Judge Svaren heard oral argument on the Larsons' motion to amend their complaint on October 23, 2019. The court denied the motion in part, concluding that the proposed amended complaint realleged a claim for quiet title, a claim the court had already dismissed with prejudice, and realleged violations of the Torrens Act, claims the court had dismissed for lack of compliance with that statute. The Larsons reminded the court that it had dismissed the Torrens Act claims without prejudice. The court responded "It does not make any difference to the court, because as I said, the basis of that ruling remains the same. There was no abstract filed. [The] Torrens Act was not properly invoked and therefore there's no judiciable controversy."[10]

[10] The court granted the motion to the extent the Larsons sought to assert their "undefined equitable claims," and the CPA claim. It also ruled that the Larsons could proceed with their constitutional

Despite this ruling, on October 24, 2019, without notice to any of the other parties, the Larsons appeared in the Ex Parte Department of the Snohomish County Superior Court and presented a motion to a commissioner for an order referring their Torrens Act application to the county examiner of titles. They attached to this motion the same expired Ticor Title Company commitment for title insurance as they had previously attached to their June 2018 application, and represented to the commissioner that this document was an "abstract of title," despite the fact that Judge Svaren had ruled that the document did not constitute an abstract of title under the Torrens Act. The commissioner signed an order referring the Larsons' application to the county examiner of titles.[11]

On November 11, 2019, the court granted the Private Defendants' summary judgment motions.

On May 29, 2020, Deutsche Bank, now the sole owner of the property, filed a motion to dismiss the Larsons' Torrens Act application and the case was assigned to Judge Okrent at Snohomish County Superior Court. The Larsons moved for Judge Okrent to recuse himself, but the court denied the motion. At an August 19, 2020, hearing, the court dismissed the Larsons' Torrens Act case, concluding that they were no longer owners of the property and had no right to seek a title registration under the Torrens Act.

The Larsons now appeal rulings from both cases.

---

challenge to the DTA. It asked the Larsons to submit a new proposed amended complaint that complied with the court's ruling as to the claims it would allow and those it would not. We have been unable to locate any revised amended complaint in the record before us.

[11] The County Defendants moved to vacate this ruling based on the Larsons' misrepresentations to the commissioner, but subsequently withdrew that motion when Deutsche Bank moved to dismiss the application.

ANALYSIS

1. The Deeds of Trust Act and the Torrens Act

At the heart of this case is a question of the relationship between two statutes, the well-known Deeds of Trust Act (DTA), chapter 61.24 RCW, and the lesser-known and rarely used Torrens Act, chapter 65.12 RCW. The Larsons contend that they had the statutory right to initiate a Torrens Act proceeding to register title to their land and to clear any cloud to that title, including obtaining a judicial determination as to the validity of the Deutsche Bank deed of trust. They argue that simply filing the Torrens Act proceeding had the legal effect of staying any nonjudicial foreclosure sale—even in the absence of a court order enjoining the sale—and that the Public Defendants denied them the right to this proceeding by not having a functioning Torrens Act system. They further argue that Deutsche Bank and the trustee violated the DTA by proceeding with the nonjudicial foreclosure sale once the Larsons filed their Torrens Act petition.

To analyze their claims, we need to understand the difference between the DTA and the Torrens Act. Most homeowners have a basic understanding of a mortgage. "A mortgage [is] a mechanism to secure an obligation to repay a debt," and has existed since "at least the 14th century." Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 92, 285 P.3d 34 (2012). Most mortgages today are secured by a deed of trust on the property. Id. Under the DTA, a deed of trust creates a three-party transaction in which the borrower conveys their property to a trustee who holds in trust for the lender, who is the beneficiary of this transaction. Id.

Under the DTA, if the deed of trust explicitly provides the trustee with the power of sale on a default of the underlying loan, the trustee may foreclose the

deed of trust and sell the property without judicial supervision, i.e., through a nonjudicial foreclosure sale. Id. at 93 (citing RCW 61.24.020, RCW 61.12.090, and RCW 7.28.230(1)). Because the power to sell is "a significant power," the DTA sets out specific procedures a trustee must follow before it may legally conduct such a sale. Id.

In interpreting the DTA, our Supreme Court has advised courts to keep in mind the statute's three basic objectives: the nonjudicial foreclosure process should remain efficient and inexpensive, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure, and the process should promote the stability of land titles. Id. at 94; accord Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 848, 347 P.3d 487 (2015).

While the DTA governs the use of deeds of trust to secure home loans and the process by which lenders may enforce their rights against borrowers who default on those loans, the Torrens Act has nothing to do with the securitization of residential mortgages or the enforcement of rights under deeds of trust. The Torrens Act is instead one of two recognized methods of establishing who holds legal title to a piece of real estate.

Under RCW 65.04.020(1), each county auditor must have a system of recording transfers of real property. The auditor, acting as the "register of deeds," maintains actual books containing copies of all instruments affecting title to parcels of land within the county. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 14.6 (2d ed. 2004). An auditor must record documents if certain requisites are met. Id. The auditor maintains a general index of all recorded documents. Id. (citing RCW 65.04.050).

This recording system does not determine the validity of any deed or encumbrance; it instead merely provides notice, and establishes priority of, recorded legal interests in the land. Id. at § 14.5; see also Dickson v. Kates, 132 Wn. App. 724, 737, 133 P.3d 498 (2006) ("our recording statutes are intended to provide constructive notice to land possessors who have restrictions burdening their land"). Recording a deed or other conveyance document with a county auditor is not required by law, but is, instead, permissive. Id. (citing RCW 65.08.070). Once an encumbrance is recorded, a subsequent purchaser is deemed to have constructive notice of it, but anyone searching the county land index has a right to rely on it and is not bound to search for records outside the recorded chain of title. Dickson, 132 Wn. App. at 737.

Because recording a deed or some other encumbrance does not establish its legal validity, chain-of-title issues can arise. 18 STOEBUCK & WEAVER, supra § 14.11. Such problems arise rarely in Washington because of the prevalence of title insurance companies, who conduct title searches to identify instruments that create a cloud on one's title. Id.

The Torrens Act, unlike the recording statutes, establishes a system for adjudicating the validity of one's title and any encumbrances on land through a process called "registration." Id. at § 14.13; RCW 65.12.005. Adopted by the Washington legislature in 1907, the Torrens Act allows a landowner to apply to have their title registered by filing a petition for registration with the superior court for the county in which the land is situated. RCW 65.12.005; RCW 65.12.040. The court must then "inquire into the condition of the title to and any interest in the land and any lien or encumbrance thereon," and enter a judicial decree declaring the

validity of title and any liens or encumbrances on the land, declaring the priority of any such encumbrances, and removing any clouds on the title. RCW 65.12.040.

The process starts with the filing of an application and "an abstract of title" in superior court and recording the application with the county auditor. RCW 65.12.005 (recording with auditor required); RCW 65.12.040 (filing application with superior court required); RCW 65.12.085 (filing abstract of title required); 18 STOEBUCK & WEAVER, supra §14.14. The clerk must certify a copy of the application and file it with the auditor, at which time the application has "the force and effect of a lis pendens." RCW 65.12.100.

When the abstract of title is on file, the superior court "shall enter an order referring the application to an examiner of titles." RCW 65.12.110. The title examiner examines the abstract of title, searches records, "investigate[s] all the facts brought to his or her notice," and then issues a report containing his or her opinion on the title. If the opinion is adverse to the applicant, they may withdraw the application or proceed with further judicial proceedings. Id. Summonses are issued to any person found by the examiner as being in possession of the property or having a lien, encumbrance, or any other right, title or interest in the land. RCW 65.12.120, RCW 65.12.130.

Once summonses have issued and those served have appeared and answered, the superior court may decide the case or may refer the matter to the title examiner to take evidence and report their findings to the court. RCW 65.12.160. RCW 65.12.165. If the court determines the applicant holds title to the land, it may issue a decree of confirmation and registration. RCW 65.12.175. This decree becomes binding and conclusive as against all other parties to the action.

Id. And the person receiving the certificate of title holds that title "free from all [e]ncumbrances except only such estates, mortgages, liens, charges and interests" noted in the last certificate of title in the registrar's office. RCW 65.12.195.

The Torrens Act has been "little used" since its adoption, the primary reason being

> the trouble and expense of converting from recorded to registered title. Since all land was under record title when the Torrens system was adopted and since the certificate of registration is, with a few exceptions, conclusive as to the state of title, it is necessary to have a kind of quiet title action in court to establish the title and other interests that will appear on the original [title] certificate.

18 STOEBUCK & WEAVER, supra, § 14.13 at 161.

2. Larsons' Torrens Act Claims Against Public Defendants

The Larsons first contend the trial court erred in dismissing their declaratory judgment action against the Public Defendants because it lacked subject matter jurisdiction over the adequacy of their Torrens Act application. The Larsons also contend their Torrens Act application was not defective because the Ticor Title Insurance document they submitted to the court was the equivalent of an abstract of title as that term is used in RCW 65.12.085.

We review de novo a dismissal under CR 12(b)(6). Leishman v. Ogden Murphy Wallace, PLLC, 196 Wn.2d 898, 903, 479 P.3d 688 (2021). A dismissal at this stage of the proceedings will be affirmed if it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would entitle him or her to relief. Id. at 903-04.

The Larsons' subject matter argument lacks merit. A superior court has subject matter jurisdiction "where it has authority to adjudicate the type of controversy involved in the action." Boudreaux v. Weyerhaeuser Co., 10 Wn. App. 2d 289, 295, 448 P.3d 121 (2019) (quoting In re Marriage of McDermott, 175 Wn. App. 467, 480-81, 307 P.3d 717 (2013)). The Washington Constitution provides that "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." CONST. art. IV, § 6.

The Larsons do not argue that any of their claims against the Public Defendants have been vested in the exclusive jurisdiction of another forum. Instead, they argue that Skagit County Superior Court lacked jurisdiction under the "prior exclusive jurisdiction doctrine," which, they assert, stands for the proposition "that two courts do not have the jurisdiction to adjudicate the same case at the same time." The Larsons argue that under the doctrine, Skagit County Superior Court's 2018 ruling that their Torrens Act application was defective conflicts with the Snohomish Superior Court's 2019 order accepting the application and referring it to the county examiner of titles.

No Washington court has ever held that the prior exclusive jurisdiction doctrine applies in this state. The Larsons' position is puzzling because they themselves invoked the Skagit County Superior Court's jurisdiction by filing this lawsuit in that court and seeking relief for Snohomish County's alleged inaction with regards to their Torrens Act application. The Larsons sought a court order requiring the Snohomish County Superior Court to process their Torrens Act application; the County Defendants argued they had no duty to do so because the

Larsons failed to file a valid application under the statute. Because the defense to the Larsons' claims against the County Defendants was the invalidity of their application and the Larsons invoked the subject matter jurisdiction of the superior court, the Skagit County Superior Court had the authority to render a ruling on whether the Larsons complied with RCW 65.12.085.

The Larsons also argue that Skagit County Superior Court lacked jurisdiction under the "priority of action rule." This argument fails for similar reasons. "The rule provides generally that the first court to obtain jurisdiction over a case possesses exclusive jurisdiction to the exclusion of other coordinate courts." Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990). "[T]he rule should not be automatically applied each time two similar cases are pending in different counties. For instance . . . there must be identity of subject matter, relief, and parties between the actions before the priority rule should be applied." Id.

The Larsons chose to sue the Public Defendants in Skagit County Superior Court. They cite no authority for the proposition that, because they filed a Torrens Act application in Snohomish County Superior Court, this act divested Skagit County Superior Court of the jurisdiction to rule on a case properly before it under the elective venue statute, RCW 36.01.050(1). These are two different cases. The issue the Larsons presented before Skagit County Superior Court was whether they were entitled to an injunction requiring Snohomish County to take action under the Torrens Act. Any issues with Skagit County Superior Court's jurisdiction were rendered moot when the Skagit County Superior Court transferred venue to Snohomish County Superior Court, the court the Larsons now claim should have

ruled on the adequacy of their Torrens Act application in the first instance. We reject the Larsons' subject matter jurisdiction argument.

As to the merits of the dismissal, the Larsons' claims against the Public Defendants rested on the allegation that Snohomish County failed to follow the mandatory procedures laid out in the Torrens Act with regard to their land title application. The Larsons alleged that they filed their application in court on June 5, 2018, that the clerk did not file the application in the "land registration docket," and that the superior court did not refer the application to a county title examiner as required under the statute. The trial court dismissed this claim without prejudice, concluding that the Larsons' application did not trigger the County's duties under the Act because the application did not include the required abstract of title. We affirm this ruling.

The Larsons argued below that their application was not defective because there is a question of fact as to whether their title insurance commitment constitutes an "abstract of title" under the Torrens Act. But the meaning of RCW 65.12.085 is a question of law, not a question of fact, and we review the trial court's interpretation de novo. Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

RCW 65.12.085 requires the filing of "an abstract of title such as is now commonly used." Commentators have stated, "[n]ow that abstracts of title are no longer 'commonly used' in Washington, it is unclear whether an old-fashioned abstract must be produced, if anyone can be found to make up one, or whether a preliminary commitment for title insurance . . . will suffice." 18 STOEBUCK &

WEAVER, supra, § 14.14 at 163. We conclude a preliminary commitment for title insurance does not suffice under the Torrens Act.

First, although the Torrens Act does not define "abstract of title," our legislature has passed statutes distinguishing between an abstract of title, a title policy, a preliminary title report, and a commitment for title insurance. Barstad v. Stewart Title Guar. Co., Inc., 145 Wn.2d 528, 537, 39 P.3d 984 (2002). In the chapter regulating title insurers, chapter 48.29 RCW, the legislature defined an abstract of title as follows:

> [A] written representation, provided under contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of this representation, listing all recorded conveyances, instruments, or documents that, under the laws of the state of Washington, impart constructive notice with respect to the chain of title to the real property described. An abstract of title is not a title policy as defined in this subsection.

RW 48.29.010(3)(a). A title insurance commitment serves a very different purpose:

> "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.

RCW 48.29.010(3)(f). Requiring a Torrens Act applicant to file and record an abstract of title serves the purpose for which this requirement is intended: it provides the title examiner a report as to the condition of the title to real property.

Allowing the applicant to file a title insurance commitment would not serve this purpose because a commitment makes no representations as to chain of title.

Second, even if a title insurance policy could serve the same purpose as an abstract of title, the Larsons' Ticor Title commitment expired a year before they filed it. An expired title insurance commitment clearly cannot meet the purpose of an abstract of title under RCW 65.12.085. The trial court correctly concluded that the County Defendants had no duty to process the Larsons' Torrens Act application in the absence of the statutorily mandated abstract of title.

The Larsons now argue that they should have had the opportunity to amend their Torrens Act application and file the requisite abstract of title. But they had this opportunity; the trial court's dismissal was without prejudice. The Larsons could have remedied the defect in their Torrens Act application by obtaining, filing, and recording a current abstract of title and, if the County then failed to act, could have renewed its claim for injunctive relief. And the Larsons also had time to move to enjoin the nonjudicial foreclosure sale to give them time to remedy the defect. At the time they sought Torrens Act relief in June 2018, the foreclosure sale was four months away and then continued another month. They inexplicably chose not to take advantage of these options. Dismissal without prejudice was appropriate.

As to the claims against the State Defendants, the trial court correctly concluded that they have neither the duty nor the authority to force the County or its superior court judges to take the action the Larsons demanded and such an order would constitute a violation of the doctrine of separation of powers.

The Constitution provides that "[t]he attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be

prescribed by law." CONST. ART. III, § 21. The legislature has delineated the Attorney General's "other duties" in various statutes,[12] but none establish the mandatory duty the Larsons seek to enforce here. The Constitution also provides that the Governor "shall see that the laws are faithfully executed." CONST. art. III, § 5.

The Larsons argue that the Attorney General's position as "the chief law enforcement officer for Washington State" and the Governor's duty to "see that the laws are faithfully executed" imposes a duty to compel the county to develop a Torrens Act system. But neither the Attorney General nor the Governor have any duty or enforcement authority under the Torrens Act. See RCW 65.12.

The Larsons essentially seek a writ of mandamus against the State Defendants. A writ of mandamus "is an extraordinary remedy that we grant only if the mandatory act sought to be compelled is not discretionary." Goldmark v. McKenna, 172 Wn.2d 568, 576, 259 P.3d 1095 (2011). "Mandamus, therefore, is an appropriate remedy only where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." Colvin v. Inslee, 195 Wn.2d 879, 893, 467 P.3d 953 (2020) (citations omitted). To order a mandamus to compel discretionary duties of a public official would be to "usurp the authority of the coordinate branches of government." Walker v. Munro, 124 Wn.2d 402, 410, 879 P.2d 920 (1994). Because the Larsons have not identified any mandatory duty on behalf of the Governor or Attorney General, the trial court properly dismissed the Larsons'

[12] See ch. RCW 43.10.

claims against the State Defendants.

We affirm the trial court's order dismissing claims relating to the Torrens Act against the Public Defendants under CR 12(b)(6).

3. Dismissal of Quiet Title Claim against Private Defendants

The Larsons next contend the trial court erred in dismissing their quiet title claim against the Private Defendants. They raise two main arguments. First, the Larsons argue that their June 2018 Torrens Act application precluded any nonjudicial foreclosure sale and their failure to move to enjoin the sale did not constitute a waiver of their quiet title claim. Second, they contend that RCW 64.24.127, the DTA waiver statute, is unconstitutional. We reject both arguments.

a. A Torrens Act application does not automatically stop a nonjudicial foreclosure sale

The trial court dismissed the Larsons' quiet title claim in December 2018 because they failed to obtain an order restraining the November 2018 foreclosure sale. The trial court held that under RCW 61.24.127, the Larsons waived their quiet title claim by failing to do so. We agree.

RCW 61.24.130 provides that a borrower may seek a court order to restrain a nonjudicial foreclosure sale "on any proper legal or equitable ground." The procedure laid out in RCW 61.24.130 is "the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure." Cox v. Helenius, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). A borrower with notice of an impending nonjudicial foreclosure sale who does not obtain an order restraining that sale waives any claim to the validity of the sale. Plein v. Lackey, 149 Wn.2d 214, 225-26, 67 P.3d 1061 (2003).

RCW 61.24.127(2)(b), (d) and (e) provide that failing to enjoin a sale does not waive claims for monetary damages for certain common law and statutory claims, but "[a] borrower . . . who files such a claim is prohibited from recording a lis pendens" and "[t]he claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale." The Larsons did not obtain a court order enjoining the sale and, as a result, their quiet title action violated this provision of the DTA.

The Larsons maintain that their Torrens Act application, by itself, had the effect of preventing a nonjudicial foreclosure sale under the DTA. RCW 65.12.210, the Larsons' only authority for this proposition, provides:

> Any person who shall take by conveyance, attachment, judgment, lien or otherwise any right, title or interest in the land, subsequent to the filing of a copy of the application for registration in the office of the county auditor, shall at once appear and answer as a party defendant in the proceeding for registration, and the right, title or interest of such person shall be subject to the order or decree of the court.

(Emphasis added). This statute says nothing about whether a Torrens Act application automatically stops a nonjudicial foreclosure sale under the DTA. It merely states that if a person receives title to property after a Torrens Act application is filed, then that person must become a party defendant in the Torrens Act proceeding. RCW 65.12.210 does not support the Larsons' argument.

Nor is their argument supported by existing case law. In Cox v. Helenius, the Washington Supreme Court held that simply filing a lawsuit challenging the underlying debt, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale. 103 Wn.2d at 388. In Plein v. Lackey, it held that simply filing an action for a permanent injunction also does not forestall

a trustee's sale that occurs before that lawsuit is resolved. 149 Wn.2d at 227. Any homeowner seeking to enjoin a sale must file a motion and obtain a court order doing so.

By enacting RCW 61.24.127, the legislature made it clear that a borrower cannot bring a claim that affects title to property if they do not first obtain a court order enjoining the nonjudicial foreclosure sale. There is nothing to suggest that the legislature intended to exempt a quiet title action initiated under the Torrens Act from the scope of this waiver provision. We therefore reject the Larsons' contention that the mere filing of a Torrens Act application under Chapter 65.12 RCW somehow automatically precluded Deutsche Bank and QLS from conducting the nonjudicial foreclosure.

The undisputed evidence supports the trial court's conclusion that the Larsons waived their quiet title claim. The Larsons had notice of the nonjudicial foreclosure and did not obtain a court order enjoining the sale, either in the Torrens Act proceeding, which was then pending in Snohomish County Superior Court, or in any other proceeding. The trial court did not err in dismissing the quiet title claims against the Private Defendants.

b. RCW 64.24.127, the DTA waiver statute, is constitutional

The Larsons next maintain that RCW 61.24.127 cannot constitutionally extinguish their right to pursue a quiet title action. They contend the provision violates the privileges and immunities provision of article I, section 12 of the state constitution. They argue that the statute denies them the right to pursue a common law cause of action against lenders and foreclosure trustees and unconstitutionally confers a special privilege on these entities. We reject this argument.

Washington courts employ a two-part test to decide if legislation violates article I, section 12, asking first if the challenged law grants a "privilege" or "immunity" for purposes of the state constitution, and, if yes, asking if there is a reasonable ground for granting the privilege or immunity. Schroeder v. Weighall, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014) (citations omitted). "Not every benefit constitutes a 'privilege' or 'immunity' for purposes of the independent article I, section 12 analysis. Rather, the benefits triggering that analysis are only those implicating 'fundamental rights . . . of . . . state . . . citizenship.'" Id. at 573 (quoting State v. Vance, 29 Wash. 435, 458, 70 P. 34 (1902)).[13] In Schroeder, the Supreme Court recognized that "where a cause of action derives from the common law, the ability to pursue it is a privilege of state citizenship triggering article I, section 12's reasonable ground analysis. A law limiting the pursuit of common law claims against certain defendants therefore grants those defendants an article I, section 12 immunity." Id. at 573 (quotations omitted).

RCW 61.24.127 does limit the Larsons' ability to bring a quiet title action after a foreclosure sale, thereby implicating article I, section 12. But RCW 61.24.127 does not bar all quiet title actions; it merely affects the timing of when such claims may be brought—parties must do so in advance of a nonjudicial foreclosure sale. The question is whether the legislature had a reasonable ground

[13] The Larsons also argue that Washington courts have recently "eliminated" installment contract statutes of limitations and that this case law violates article 1, section 12. No Washington court has "eliminated" the statute of limitations for installment contracts, as the Larsons suggest. Our Supreme Court held as early as 1945 that "when recovery is sought on an obligation payable by installments the statute of limitations runs against each installment from the time it becomes due." Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945). Our cases merely enforce this black letter contract law. See Merceri v. Bank of New York Mellon, 4 Wn. App. 2d 755, 434 P.3d 84 (2018) (a trustee sale is timely if note has not been accelerated and action is brought within six years of any missed monthly installment payment). This case law does not implicate the privileges and immunities provision of the state constitution.

for limiting quiet title remedies in this manner.

The Larsons rely on two Supreme Court cases holding that statutes limiting the ability of minors to bring medical malpractice claims are unconstitutional under article I, section 12. See Schroeder, 179 Wn.2d at 566; DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998). In both of those cases, the court concluded that the challenged statutes did not further the legislature's stated objectives of reducing medical malpractice insurance premiums and barring stale claims. Schroeder, 179 Wn.2d at 574-77; DeYoung, 136 Wn.2d at 148.

Unlike Schroeder and DeYoung, however, the timing restriction of RCW 61.24.127 advances the three basic objectives of the DTA by keeping the foreclosure process efficient and inexpensive, retaining the opportunity for a homeowner to prevent a wrongful foreclosure, and promoting the stability of land titles. Bain, 175 Wn.2d at 94. The Larsons do not explain how the ability to bring a quiet title action after a sale has concluded instead of an injunction action to prevent the foreclosure sale from occurring, provides any more protection of their property rights. RCW 61.24.127 is therefore supported by reasonable grounds and does not violate the privileges and immunities clause.[14]

[14] The Larsons make a similar argument with respect to the limitations placed on their ability to prosecute claims under the CPA. But they fail to demonstrate that the limitation on a statutory cause of action falls within the scope of article 1, section 12. Generally, rights left to the discretion of the legislature have not been considered fundamental. Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc., 196 Wn.2d 506, 475 P.3d 164 (2020). In Martinez-Cuevas, the Supreme Court held that the statutory right to exempt dairy workers from overtime pay constituted an impermissible privilege or immunity granted to agricultural employers. Id. at 519. But the court's analysis was premised on a constitutional guarantee to workers that "the legislature shall pass necessary laws for the protection of persons working in . . . employments dangerous to life or deleterious to health." Id. (quoting CONST. art. II, § 35). It concluded that "[t]he right to statutory protection for health and safety pursuant to article II, section 35" is a fundamental personal right entitled to protection by the government. Id. at 522. The Larsons have not demonstrated that they have any similar constitutional right, personal to them, affected by RCW 61.24.127. Thus, to the extent the DTA limits their statutory right to recovery under the CPA, it does not implicate article I, section 12.

4. CPA Claims & Constitutional Challenges to the DTA as Against Private Defendants

The Larsons appear also to challenge the summary judgment dismissal of their CPA claims and their constitutional challenges to the DTA. Because the Larsons failed to raise a genuine issue of material fact under the CPA and their challenges to the DTA fail as a matter of law, we affirm dismissal of these claims.

We review a summary judgment order de novo and perform the same inquiry as the trial court. Borton & Sons, Inc. v. Burbank Props., LLC, 196 Wn.2d 199, 205, 471 P.3d 871 (2020). A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." CR 56(c). We view all facts and reasonable inferences in light most favorable to the non-moving party. Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

a. CPA Claims[15]

The Larsons contended below that the Private Defendants violated the CPA by conducting a nonjudicial foreclosure sale in violation of the DTA. They argue on appeal that the trial court erred in dismissing their CPA claim because the October 2006 promissory note was not authentic, the MERS's assignment of the deed of trust to Deutsche Bank was invalid, New Century never funded the

[15] The Larsons have not assigned error to the dismissal of CPA claims against SPS and QLS. Generally, a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required by RAP 10.3, precludes appellate consideration of an alleged error. Matter of WWS, 14 Wn. App. 2d 342, 350 n.4, 469 P.3d 1190 (2020). In their reply brief, the Larsons contend that QLS violated RCW 65.12.210 by selling the home in a nonjudicial foreclosure without participating in the Larsons' Torrens Act proceeding. They failed to raise this argument below and we will not address any argument raised for the first time in a reply brief. See Ainsworth v. Progressive Cas. Ins. Co., 180 Wn. App. 52, 78 n.20, 322 P.3d 6 (2014).

Larsons' loan, and New Century breached its contractual obligations to the Larsons by refusing to accept their August 2007 mortgage payment. We reject many of these arguments as frivolous and others as simply not supported by any evidence in this record.

To prevail on a private CPA claim, a plaintiff must establish (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury to the plaintiff; and (5) a causal link between the unfair or deceptive act and the injury suffered. Trujillo v. Nw. Tr. Servs., Inc., 183 Wn.2d 820, 834-35, 355 P.3d 1100 (2015). The failure to establish any of the five elements is fatal to a CPA claim. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Violations of the DTA may be actionable under the CPA. Frias v. Asset Foreclosure Srvs., Inc., 181 Wn.2d 412, 430, 334 P.3d 529 (2014).

As to the authenticity of the Larson promissory note, the Larsons contend that Christopher's signature on the note was "misappropriated." Christopher never testified that his signature on the note was forged. Deutsche Bank produced the original promissory note at the summary judgment hearing and demonstrated that the note bears Christopher's signature. In addition, the trial court had copies of the deed of trust bearing both Christopher's and Angela's notarized signatures. When they executed these documents, Christopher also executed a "Name Affidavit," in which he certified that he was the person named in the documents and that his signature was his true and correct signature. This document was also notarized on October 9, 2006, by the same notary public who notarized the deed

of trust. There is no evidence in this record that Christopher's signature on the promissory note was a forgery.

The Larsons argue that under RCW 62A.3-308(a), by denying the validity of the note, they shifted the burden of proving validity to Deutsche Bank.[16] To the extent this statute applies, Deutsche Bank met its burden of proving the validity of the note. The Larsons failed to present any conflicting evidence.

They also cite Stahly v. Emonds, 184 Wash. 207, 210, 50 P.2d 908 (1935), for the proposition that whether a signature has been forged is a question of fact and thus inappropriate for summary judgment. Stahly, however, is distinguishable. The plaintiffs in that case testified "unequivocally" at trial that the signatures on the documents were not theirs. Id. at 210. We have no such testimony here. There is thus no genuine issue of material fact regarding the authenticity of the note.

The Larsons next argue that there is a genuine issue of material fact as to whether New Century and MERS split the deed of trust and promissory note when they named MERS as beneficiary under the deed of trust. They argue that MERS was not an eligible beneficiary of the deed of trust (because it never held the promissory note), and its assignment of the deed of trust to Deutsche Bank had no legal effect unless MERS was New Century's agent and had the authority to assign New Century's rights to Deutsche Bank. If MERS was not acting as New Century's agent at the time of the assignment, the Larsons argue, then Deutsche Bank had no right to conduct a nonjudicial foreclosure under the DTA.

[16] RCW 62A.3-308(a) provides: "In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity."

The Larsons rely on Bain for this argument. In Bain, our Supreme Court held that MERS is an ineligible beneficiary under the DTA if it never held the promissory note. 175 Wn.2d at 110. But it cast doubt on the theory that involving MERS automatically constituted a "split" rendering a deed of trust unenforceable. The court stated "While that certainly could happen, given the record before us, we have no evidence that it did. If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened." Id. at 112. The Bain court also raised a possible second legal option: the creation of an equitable mortgage in favor of the noteholder. Id. at 112-13 (citing the RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 5.4 reporters' note at 386 (1997)).[17]

In Walker v. Quality Loan Service Corp., 176 Wn. App. 294, 308 P.3d 716 (2013), this court rejected a similar "split the note" theory. In that case, the borrower argued that MERS was never a legitimate beneficiary under RCW 61.24.005 because it did not hold the promissory note and "the interest in the Deed of Trust has been effectively segregated from the interest in the Note," rendering the deed of trust invalid. 176 Wn. App. 294 at 321. This court held that the defect in identifying MERS as the beneficiary did not void the deed of trust and the real beneficiary was the lender or its successors whose interests were secured by the deed of trust. Id. at 323.

[17] Under the Restatement (Third) of Property (Mortgages) §5.4 cmt. b (Am. Law Inst. 1997):

> A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage. The objective of this rule . . . is to keep the obligation and the mortgage in the same hands unless the parties wish to separate them.

The Walker court held that the note holder and the beneficiary of a deed of trust securing that note are legally one and the same and the note cannot be "split" from the deed of trust:

> In Bain, the Supreme Court declined to decide the legal effect of MERS acting as an unlawful beneficiary under the DTA. However, the court stated its inclination to agree with MERS's assertion that any violation of the DTA "'should not result in a void deed of trust, both legally and from a public policy standpoint.'" The court also noted, "[I]f in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender's successors." While dicta, these statements identify critical problems with Walker's argument.

Id. at 322. The court concluded that any defect in the deed of trust through the designation of MERS as beneficiary did not invalidate the deed of trust. Id. Similarly, in Winters v. Quality Loan Service Corp. of Washington, Inc., 11 Wn. App. 2d 628, 644-45, 454 P.3d 896 (2019), this court held that the holder of a promissory note has the authority to enforce the deed of trust because "the deed of trust follows the note by operation of law."[18] We take this opportunity to clearly hold that the designation of MERS as a beneficiary of a deed of trust, even though ineligible to hold that position under the DTA, does not split the promissory note from the deed of trust or invalidate the deed of trust.

It is undisputed that Deutsche Bank holds the Larsons' note and was entitled to enforce the deed of trust. Because Deutsche Bank was not barred from foreclosing on the Larsons' home simply because MERS was listed as the original beneficiary under the deed of trust in 2006, it is immaterial whether MERS was

[18] The Ninth Circuit has also held that the split the note theory has no sound basis in law or logic. Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1044 (9th Cir. 2011).

acting as New Century's agent or acting on its own behalf when it assigned the deed of trust to Deutsche Bank.

The Larsons next argue that there is a genuine issue of material fact as to whether New Century ever funded the Larsons' loan. We reject this argument because there is absolutely no evidence to support it.[19]

Deutsche Bank provided the trial court with copies of the 2006 closing documents related to New Century's funding of the Larsons' loan. The undisputed evidence shows that New Century funded this loan on October 6, 2006. It authorized the closing escrow company, First American Title, to disburse the funds that same day. First American confirmed it had disbursed the loan proceeds from New Century. The Larsons themselves admit that they closed their loan on October 11, 2006 and used the funds to purchase the property. The record also contains the statutory warranty deed by which the former owners conveyed the property to the Larsons. The Larsons cannot point to a single piece of evidence supporting their allegation that New Century was unable to fully fund their loan.

Finally, the Larsons argue that there is a genuine issue of material fact as to whether New Century breached its contract by refusing to accept their August 2007 mortgage payment. Although somewhat unclear, it appears the Larsons contend that if New Century breached an agreement with them before they defaulted, the Larsons were then released from the obligation to make further payments on the note. But the Larsons cite no legal authority for this proposition

[19] The Larsons contend that in 2007, New Century failed to fund a number of loans made to Washington consumers. But even if New Century had insufficient funds to fund loans in 2007, this fact would not prove that it failed to fully fund the Larsons' loan in October 2006.

and it is illogical.

First, the Larsons do not explain how New Century's refusal to accept a payment in August 2007 constituted a material "breach" of any provision of the promissory note. The note contains the Larsons' promise to repay the loan through monthly installment payments on the first day of each month. There is no evidence that New Century declared the Larsons to be in default when they were not in arrears. In fact, according to Angela, New Century informed her in August 2007 that the note had been assigned to someone else. So the only evidence in this record is that New Century no longer held the note when the Larsons claim it refused their payment.

Second, Christopher explicitly acknowledged in the note itself that "the Lender may transfer this Note." New Century indorsed the Larson promissory note in blank. Under the Uniform Commercial Code (UCC), RCW 62A.3-205(b), a note becomes payable to whomever holds the note when it is indorsed in blank. Blair v. Nw. Tr. Srvs, Inc., 193 Wn. App. 18, 32, 372 P.3d 127 (2016). Deutsche Bank presented undisputed testimony that it is the holder of the Larson promissory note and had the legal right to Larsons' installment payments.

Finally, Deutsche Bank did not seek to collect payments prior to March 2012. The final notice of default, dated December 22, 2017, stated that the Larsons' delinquent monthly payments began March 2012. The Larsons do not deny that they failed to make regular payments after that date, or that servicers for Deutsche Bank paid the property's real estate taxes and homeowner's insurance, resulting in over $50,000 in escrow advances on their loan. The Larsons fail to

explain how New Century's alleged breach of contract in 2007 is attributable to Deutsche Bank or any of the other Private Defendants.

The Larsons have failed to establish a genuine issue of material fact on any of their CPA claims against the Private Defendants related to the foreclosure of their home under the DTA. The trial court thus properly dismissed these claims on summary judgment.

b. Constitutional Challenges to the DTA

The Larsons alleged several constitutional challenges to the DTA in the complaint, and the trial court dismissed these arguments on summary judgment. On appeal, their constitutional arguments can be distilled into four claims: (1) the DTA's permissive allowance of nonjudicial foreclosures violates the due process guarantee of a fair hearing, (2) the 2018 amendments to the DTA impaired the contractual relationship between the Larsons and their lender, (3) the DTA treads upon the constitutional original jurisdiction of superior courts, and (4) the DTA's shortened statute of limitations for CPA claims is unconstitutional because it grants unequal privileges and immunities to lenders.[20] We disagree with each of these arguments and affirm their dismissal.

The Larsons first argue that the DTA is unconstitutional because it gives corporate trustees the authority to remove property from mortgagors without due process of law under article I, section 3 of the state constitution. This claim fails for lack of state action.

A violation of the state due process clause requires state action, whether in

[20] We rejected the Larsons' constitutional challenge to the limitation of actions contained in RCW 61.24.127 in section 3(b) of this opinion and will therefore not address the issue again here.

civil or criminal context. State v. McCullough, 56 Wn. App. 655, 784 P.2d 566, review denied, 114 Wn.2d 1025 (1990). Our Supreme Court has held that the legislature's passage of the DTA constituted "passive involvement" in private conduct, neither commanding nor forbidding nonjudicial foreclosure, and thus did not constitute state action, as required to support a due process claim. Kennebec, Inc. v. Bank of the West, 88 Wn.2d 718, 722-23, 565 P.2d 812 (1977).

The Larsons distinguish their case from Kennebec on the basis that they "challenge the conduct of the State, . . . the conduct of Snohomish County . . . in intentionally not complying with their duties under [the Torrens Act], the conduct of Judge Svaren, . . . and the Sheriff's threatened eviction of them from their home." But the Larsons' argument blurs their claims against the Public Defendants and their distinct constitutional arguments, arising out of their contract with private parties. They do not allege that the Public Defendants deprived them of due process, but that the DTA and associated mortgage agreements lack adequate procedural protections. State enforcement of a contract between two private parties is not state action. State v. Noah, 103 Wn. App. 29, 50, 9 P.3d 858 (2000).

To the extent the Larsons challenge the actions of the Snohomish County Sheriff in threatening eviction, their claim is similarly unavailing. The mere acquiescence in the actions of a private contracting party is not sufficient to hold the government responsible for those actions under the due process clause of the Fourteenth Amendment to the United States Constitution. Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) (Medicaid recipients failed to establish state action in nursing home decision to discharge or transfer to lower levels of care). The Larsons failed to allege state action to support their due

process claim.

Even if we were to conclude that nonjudicial foreclosure proceedings under the DTA do constitute state action, the Larsons still have failed to establish a deprivation of due process. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). The level of procedural protection required varies based on circumstance. Id. at 334. Throughout the foreclosure process, the Larsons had open access to the courts and the ability to seek an order enjoining the foreclosure. They chose not to avail themselves of this procedural protection. The Larsons cannot now complain of a lack of procedural protections they expressly declined to use.

Next, the Larsons argue that the Private Defendants could not foreclose in 2018 unless they had the legal authority to do so under the laws in effect at the time the Larsons obtained their loan in 2006. They contend that the state legislature amended RCW 61.24.030(7)(a) in 2018 to permit a note holder who is not the "owner" of the deed of trust to foreclose, but this amendment cannot apply retroactively to the Larsons' deed of trust without impairing the Larsons' contract rights.[21]

[21] RCW 61.24.030(7)(a) requires a trustee, before recording a notice of trustee's sale, to receive proof that the beneficiary under the deed of trust is the holder of the promissory note secured by the deed of trust. A declaration from the beneficiary, made under penalty of perjury, stating that the beneficiary is the holder of the note "shall be sufficient proof as required under this subsection."

Article I, section 23 of the Washington Constitution prohibits the legislature from passing a law "impairing the obligations of contracts." Wash. Educ. Ass'n v. Dep't Ret. Svcs., 181 Wn.2d 233, 242, 332 P.3d 439 (2014). But the prohibition against the impairment of contracts is not absolute and cannot be read with "literal exactness." Wash. Fed. of State Emps v. State, 127 Wn.2d 544, 560, 901 P.2d 1028 (1995). When the legislature impairs contract rights between private parties, courts defer to legislative judgment to determine if it was reasonably necessary. Hous. Auth. of Sunnyside, Wash. v. Sunnyside Valley Irr. Dist., 51 Wn. App. 387, 393, 753 P.2d 1005, 1009 (1988), rev'd on other grounds sub nom. Hous. Auth. of Sunnyside v. Sunnyside Valley Irr. Dist., 112 Wn. 2d 262, 772 P.2d 473 (1989). In determining whether a law violates the contracts clause, a court will determine if state law has operated to substantially impair a contractual relationship, measured by the degree of destruction of the contractual expectation. Id. (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)). If so, the state must have a significant and legitimate public purpose for the regulation such as the remedying of a broad and general social or economic problem. Id.

The Larsons fail to explain how the passage of RCW 61.24.030(7)(a) substantially impaired their contractual relationship with their lender. It appears that their argument is premised on the erroneous assumption that New Century and MERS "split" the note from the deed of trust, a legal argument we have rejected. And we do not understand how permitting a note holder, such as Deutsche Bank, to enforce the deed of trust significantly modified any contract rights the Larsons had when they obtained their home loan in 2006.

We also reject the Larsons' assertion that nonjudicial foreclosure sales violate article IV, section 6 of the state constitution by infringing upon the original jurisdiction on the superior courts. Article IV, section 6 provides that "[t]he superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property." In Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 347 P.3d 487 (2015), the plaintiff made the same argument that the Larsons do here: that the DTA is unconstitutional for giving nongovernmental actors the authority to determine the result of contractual cases at law which involve the title and possession of real property, when the exclusive jurisdiction over such matters is bestowed by article IV, section 6 with the superior courts. The Jackson court disagreed, reasoning

> a nonjudicial foreclosure is not made pursuant to a judgment but rather is one conducted under a power contained in a mortgage or a decree of foreclosure. As such, it is made through an agreement between the grantor and the beneficiary of the deed of trust. The DTA does not divest the superior court of jurisdiction. Indeed, the superior court's constitutional grant of jurisdiction is preserved in specific portions of the DTA. Until a party challenges the foreclosure, there is no judicial involvement. It is at that point that the superior's court's jurisdiction is invoked.

Jackson, 186 Wn. App. at 847-48.

The Larsons argue that Jackson is not controlling because its constitutional analysis was mere dicta and conflicts with other precedents holding that the legislature may not enact legislation intended to frustrate the jurisdiction of the superior courts. The Larsons correctly note that the Jackson court rejected the borrowers' constitutional challenge based on their failure to notify the state attorney general of their challenge, as required by RCW 7.24.110. 186 Wn. App. at 846.

Its discussion about the legislature's authority to enact the DTA is thus dicta. But Jackson's constitutional analysis is well-reasoned and we adopt it here.

A superior court has subject matter jurisdiction "where it has authority to adjudicate the type of controversy involved in the action." Boudreaux, 10 Wn. App. 2d at 295(quoting In re McDermott, 175 Wn. App. 467 at 480-81). As the Jackson court explained, a nonjudicial foreclosure is conducted under a specific contractual agreement made between the borrower and the beneficiary of the deed of trust. 186 Wn. App. at 847. The DTA preserves the superior court's jurisdiction by giving a borrower the right to file an action in superior court to restrain the sale, RCW 61.24.130(1), granting the borrower the power to initiate court action, RCW 61.24.040(2), and granting the borrower the right to request a court to decide the reasonableness of fees a lender demands before reinstating the mortgage. RCW 61.24.090(2). We conclude that the legislature had the authority to enact the DTA and its enactment does not encroach on the jurisdiction of the superior court. Summary judgment as to this claim was appropriate.

5. Order Dismissing Torrens Act Proceeding

In August 2020, the Snohomish County Superior Court dismissed the Larsons' Torrens Act application on the basis that, after the nonjudicial foreclosure sale, they were no longer the owners of the property and lacked any interest in the land to be registered. We affirm this conclusion.

The Torrens Act provides that "[t]he owner of any estate or interest in land, whether legal or equitable, except unpatented land, may apply as hereinafter provided to have the title of said land registered." RCW 65.12.005. Homeowners who have lost their home in a foreclosure sale are no longer owners of the property

and lack standing to prosecute a title registration action. Matter of Warren, 10 Wn. App. 2d 596, 599, 448 P.3d 820 (2019). Once the Larsons lost title in the property in the November 2018 foreclosure sale, they had no statutory right to pursue title registration. The trial court properly dismissed their Torrens Act application.

6. Denial of Motion to Amend

The Larsons next argue that the trial court erred in denying their motion to amend their complaint to reallege claims against the Public Defendants and to add additional State office holders or entities. They contend they had no other way to obtain a ruling that Snohomish County and its officials were intentionally not complying with the Torrens Act. We disagree—the Larsons could have remedied the defect in their Torrens Act petition by filing and recording the abstract of title, as the superior court ruled when dismissing the claims.

We review the denial of a motion to amend a complaint under a manifest abuse of discretion standard. McDonald v. State Farm Fire and Cas. Co., 119 Wn.2d 724, 737, 837 P.2d 1000 (1992). Leave to amend "shall be freely given when justice so requires." CR 15(a). However, a trial court may consider whether the new claim is futile. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997).

The trial court did not abuse its discretion in concluding that the Larsons' proposed amendment would be futile. At oral argument, the trial court recognized, and the Larsons do not dispute, that the proposed amended complaint contained "the same basic claims, based upon the same basic facts." The only apparent difference was the addition of a claim for damages against both Public and Private Defendants for violations of the Torrens Act. The gravamen of the Larsons'

argument was, once again, that the trial court lacked subject matter jurisdiction to decide whether their application was defective. Under these circumstances, the trial court did not abuse its discretion in denying the motion to amend.

7. Recusal

The Larsons next argue that both Judge Svaren and Judge Okrent had an interest in the outcome of their respective cases and thus erred by failing to recuse themselves. We disagree.

This court reviews a trial judge's recusal decision for abuse of discretion. State v. Gentry, 183 Wn.2d 749, 761, 356 P.3d 714 (2015). A judicial officer "shall not act as such in a court of which he or she is a member in any . . . action, suit, or proceeding to which he or she is a party, or in which he or she is directly interested." RCW 2.28.030. "Due process, appearance of fairness and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned." State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006).

> A mere suspicion of partiality may be enough to warrant recusal because the effect on the public's confidence in our judicial system can be debilitating. The test for determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts.

Gentry, 183 Wn.2d at 762 (citations omitted).

The Larsons argue that Judge Svaren, and every other Skagit County Superior Court judge, should have been precluded from hearing their case because "judges and other public servants have been unconstitutionally incentivized to approve foreclosures outside of equity" due to the fact that judges'

state retirement funds are invested in mortgage-backed securities. They further argue that Judge Okrent and the Snohomish County judges cannot be considered impartial because (1) their retirement accounts are invested in mortgage backed securities, and (2) they have historically failed to comply with their duties under the Torrens Act. The Larsons offer documents from the Washington State Investment Board to support its allegation. These arguments are unconvincing for several reasons.

First, the Larsons appear to argue that there is no judge in either county who could adjudicate their cases. If true, the rule of necessity defeats their argument. The rule of necessity is "a well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" U.S. v. Will, 449 U.S. 200, 213, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980) (quoting F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929)). The rule "provides for the effective administration of justice while preventing litigants from using the rules of recusal to destroy what may be the only tribunal with power to hear a dispute." Glick v. Edwards, 803 F.3d 505, 509 (9th Cir. 2015). Because the Larsons sought the disqualification of every judge in both counties where they elected to bring their cases, the recusal of Judge Svaren and Judge Okrent was not required.

Second, the Larsons failed to establish any personal connection between Judge Svaren or Judge Okrent and their cases. CJC Canon 3(D) lays out the rules for when judges should disqualify themselves in a proceeding, for example, when the judge has a personal bias or prejudice concerning a party, when the judge

previously served as a lawyer or witness in a controversy, or when the judge's family member is or is likely to be a witness in the case. None of these situations occurred here.

The Larsons' allegation that judges have a personal interest in retirement funds invested in mortgage-backed securities and therefore have some interest in allowing lenders to foreclose is pure speculation. The Larsons have alleged no facts indicating that either judge has control over the state retirement plans or that their decisions regarding the Torrens Act will have any impact whatsoever on the value of securities in which the retirement plans are invested. Without these facts, there is nothing to support the Larsons' argument.

Their allegation that Judge Svaren could not rule impartially on a case in which a party alleges that judges in Snohomish County were violating the Torrens Act is similarly unsupported in this record. And by the time Judge Okrent dismissed the Larsons' Torrens Act petition, the County had rectified the procedural issues the Larsons had raised in their Skagit County lawsuit.[22] The only issue before Judge Okrent was whether the Larsons could continue to pursue title registration after they lost their home in a foreclosure sale. No reasonable person could conclude that either Judge Svaren or Judge Okrent acted in any way other than impartially in handling these cases.

8. Transfer of Venue

The Larsons finally argue that trial court erred in transferring venue to Snohomish County Superior Court. The Larsons argue that RCW 4.12.030

[22] According to the Larsons, Snohomish County appointed an examiner of titles in 2019.

requires that venue should have remained with Skagit County Superior Court. We disagree.

Venue is governed primarily by statute. Ralph v. Weyerhaeuser Co., 187 Wn.2d 326, 338, 386 P.3d 721 (2016). While as a general rule the initial choice of venue lies with the plaintiff, the plaintiff must choose a venue that is statutorily authorized. Id. If a plaintiff files in an improper venue and the defendant does not waive the objection, the defendant has the right to have the matter transferred to a proper venue. RCW 4.12.030(1). Changing venue under such circumstances is not discretionary and is reviewed as a matter of law. Ralph, 187 Wn.2d at 338.

Actions relating to the title of real property must be brought in the county in which the real estate is situated. RCW 4.12.010(1). The Larsons' complaint against the Private Defendants was an action relating to the title of real property because they alleged these defendants had no valid encumbrance on their property and thus no legal right to conduct a foreclosure sale under various legal theories. Their lawsuit was an action relating to title of real property. The trial court correctly concluded a change of venue was legally required under this statute.

The Larsons, however, argue that they were entitled to remain in Skagit County Superior Court under RCW 4.12.030(2). Under RCW 4.12.030(2), a court has the discretion to change venue when, among other reasons, "there is a reason to believe that an impartial trial cannot be had therein." We review a venue decision under this section for abuse of discretion. Unger v. Cauchon, 118 Wn. App. 165, 170, 73 P.3d 1005 (2003). The Larsons argue that an impartial trial could not be held in Snohomish County because all of the Snohomish County Superior Court judges had recused themselves from the case. But this issue was

resolved by appointing Judge Svaren to sit as a visiting judge in Snohomish County Superior Court. None of the recused judges ruled on the Larsons' cases. The trial court's refusal to set venue in Skagit County Superior Court under RCW 4.12.030(2) was not an abuse of discretion.

9. Attorney Fees

Deutsche Bank requests attorney fees on appeal under RAP 18.1, relying on paragraph 26 of the deed of trust. This provision provides:

> Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceeding or on appeal.

A lender can recover attorney fees on appeal when the deed of trust allows them to do so. Edmundson v. Bank of Am., 194 Wn. App. 920, 933, 378 P.3d 272 (2016). The Larsons' complaint sought to invalidate the deed of trust; Deutsche Bank had to participate in the lawsuit to enforce its terms. For this reason, the proceeding involved the construction and enforcement of the deed of trust, entitling Deutsch Bank to an award of attorney fees on appeal. We therefore award attorney fees to Deutsche Bank conditioned on its compliance with RAP 18.1(d).

Affirmed.

Andrus, A.C.J.

WE CONCUR:

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CHRISTOPHER LARSON and ANGELA LARSON,

Appellants,

v.

SNOHOMISH COUNTY, a Washington State Municipal Corporation; CAROLYN WEIKEL, individually and as the SNOHOMISH COUNTY AUDITOR and Registrar; SONJA KRASKI, individually and as the SNOHOMISH COUNTY CLERK; JANE DOE, individually and as SNOHOMISH COUNTY EXAMINER OF TITLES and LEGAL ADVISOR TO THE REGISTRAR; SNOHOMISH COUNTY SUPERIOR COURT JUDGES GEORGE F. APPEL, GEORGE N. BOWDEN, MARYBETH DINGLEDY, JANICE E. ELLIS, ELLEN J. FAIR, ANITA L. FARRIS, MILLIE M. JUDGE, LINDA C. KRESE, DAVID A. KURTZ, JENNIFER R. LANGBEHN, CINDY A. LARSEN, ERIC Z. LUCAS, RICHARD T. OKRENT, BRUCE J. WEISS, and JOSEPH P. WILSON; THE STATE OF WASHINGTON; WASHINGTON STATE GOVERNOR JAY INSLEE in his official capacity; WASHINGTON STATE ATTORNEY GENERAL ROBERT FERGUSON in his official capacity as WASHINGTON ATTORNEY GENERAL; JOHN DOES, Successors in interest and assigns to NEW CENTURY MORTGAGE COMPANY and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.;

No. 80968-7-I

ORDER DENYING MOTION FOR RECONSIDERATION

DEUTSCHE BANK NATIONAL TRUST COMPANY; DEUTSCHE BANK NATIONAL TRUST COMPANY as trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE2 Mortgage Pass Through Certificates, Series 2007; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE2; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; SELECT PORTFOLIO SERVICING, INC., a Utah corporation; and MORTGAGE ELECTRONIC RECORDING SYSTEM, INC., a Delaware Corporation, Respondents.	
CHRISTOPHER LARSON and ANGELA LARSON, Appellants, v. NEW CENTURY MORTGAGE; JANE DOE; ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN OR INTEREST INTO, OR UPON THE REAL PROPERTY DESCRIBED HEREIN, Respondents.	No. 81874-1-I

The appellants, Christopher and Angela Larson, have filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Andrus, A.C.J.

THE SUPREME COURT
STATE OF WASHINGTON

ERIN L. LENNON
SUPREME COURT CLERK

SARAH R. PENDLETON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

February 7, 2022

LETTER SENT BY E-MAIL ONLY

Scott Erik Stafne
Stafne Law Advocacy & Consulting
239 North Olympic Avenue
Arlington, WA 98223-1336

Robert William McDonald
Quality Loan Service Corp of Washington
108 1st Avenue South, Suite 202
Seattle, WA 98104-2538

Geoffrey Alan Enns
Lyndsey Marie Downs
Snohomish County Prosecutor's Office
Civil Division
3000 Rockefeller Avenue # MS504
Everett, WA 98201-4046

Hon. Lea Ennis, Clerk
Division I, Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101

Robert A. Bailey
Lagerlof, LLP
701 Pike Street, Suite 1560
Seattle, WA 98101-3915

Re: Supreme Court No. 100620-9 – Christopher E. Larson, et ano. v. New Century Mortgage, et al.
Court of Appeals No. 81874-1-I

Clerk and Counsel:

On February 4, 2022, this Court received and filed the Petitioner's "MOTION TO EXTEND TIME". The matter has been assigned the above referenced Supreme Court case number. The Supreme Court Deputy Clerk entered the following ruling regarding the motion on February 7, 2022:

> **In light of the extraordinary circumstances related to Covid-19 described in the Petitioners' motion for a 10-day extension of time to file a petition for review, the motion for extension of time is granted. The petition for review should be served and filed by February 14, 2022.**

To proceed with this case, the Petitioner should serve and file in this Court a petition for review pursuant to RAP 13.4, by February 14, 2022. Failure to serve and file the petition for review may result in the dismissal of this matter.

The parties should note that *Christopher E. Larson, et ano. V. Snohomish County, et al*. No. 100619-5 and *Christopher E. Larson, et ano. v. New Century Mortgage, et al.* No. 100620-9 are not consolidated at this time. Therefore, in the future, motions and filings should be made in each case separately.

It is also noted that the $200 filing fee has not been received. If the filing fee and petition for review are not received by February 14, 2022, it is likely that this matter will be dismissed. RAP 18.9(b).

The parties are advised that upon receipt of the petition for review and filing fee, a due date will be established for the filing of any answer to the petition for review. The petition for review will be set for consideration by a Department of the Court without oral argument on a yet to be determined date.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. This office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

THE SUPREME COURT
STATE OF WASHINGTON

ERIN L. LENNON
SUPREME COURT CLERK

SARAH R. PENDLETON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

February 7, 2022

LETTER SENT BY E-MAIL ONLY

Scott Erik Stafne
Stafne Law Advocacy & Consulting
239 North Olympic Avenue
Arlington, WA 98223-1336

Amy Edwards
Stoel Rives LLP
760 Southwest 9th Avenue, Suite 3000
Portland, OR 97205-2584

Geoffrey Alan Enns
George Bradley Marsh
Lyndsey Marie Downs
Snohomish County Prosecutor's Office
Civil Division
3000 Rockefeller Avenue
Everett, WA 98201-4046

Joseph Ward McIntosh
McCarthy & Holthus, LLP
108 1st Avenue South, Suite 300
Seattle, WA 98104-2104

Rene David Tomisser
R. July Simpson
Office of the Attorney General
7141 Cleanwater Drive Southwest
Tumwater, WA 98501-6503

Robert A. Bailey
Lagerlof, LLP
701 Pike Street, Suite 1560
Seattle, WA 98101-3915

Robert William McDonald
Quality Loan Service Corp of Washington
108 1st Avenue South, Suite 202
Seattle, WA 98104-2538

Hon. Lea Ennis, Clerk
Division I, Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101

Re: Supreme Court No. 100619-5 – Christopher E. Larson, et ano. v. Snohomish County, et al.
Court of Appeals No. 80968-7-I

Clerk and Counsel:

On February 4, 2022, this Court received and filed the Petitioner's "MOTION TO EXTEND TIME". The matter has been assigned the above referenced Supreme Court case number. The Supreme Court Deputy Clerk entered the following ruling regarding the motion on February 7, 2022:

In light of the extraordinary circumstances related to Covid-19 described in the Petitioners' motion for a 10-day extension of time to file a petition for review, the motion for extension of time is granted. The petition for review should be served and filed by February 14, 2022.

To proceed with this case, the Petitioner should serve and file in this Court a petition for review pursuant to RAP 13.4, by February 14, 2022. Failure to serve and file the petition for review may result in the dismissal of this matter.

The parties should note that *Christopher E. Larson, et ano. V. Snohomish County, et al.* No. 100619-5 and *Christopher E. Larson, et ano. v. New Century Mortgage, et al.* No. 100620-9 are not consolidated at this time. Therefore, in the future, motions and filings should be made in each case separately.

It is also noted that the $200 filing fee has not been received. If the filing fee and petition for review are not received by February 14, 2022, it is likely that this matter will be dismissed. RAP 18.9(b).

The parties are advised that upon receipt of the petition for review and filing fee, a due date will be established for the filing of any answer to the petition for review. The petition for review will be set for consideration by a Department of the Court without oral argument on a yet to be determined date.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. This office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

No. 80968-7 & 81874-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

On Appeal from Snohomish County Case Nos .
19-2-01383-31 and 19-2-01383-31

CHRISTOPHER and ANGELA LARSON,

Plaintiff-Appellant,

v.

SNOHOMISH COUNTY *et al.*,

Defendants-Respondents.

MOTION FOR RECONSIDERATION

Scott E. Stafne, WSBA No. 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360.403.8700
scott@stafnelaw.com
Attorney for Petitioners-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Supreme Court Opinions

U.S. Constitution

Federal Court Opinions

State Constitution

State Statutes

Restatement of the Law

Other

I. Designation of Persons Filing this Motion

Christopher Larson and Angela Larson were the applicants in the Torrens Act registration proceedings filed with the Snohomish County Superior Court on June 5, 2018. The Larsons are the appellants in the Appeal related to application proceedings, which is docketed here as Appeal No. 81874-1.

The Torrens Application Appeal (Torrens Appeal) referenced above is linked with the Larson's Appeal of their case against the Public and Private Defendants in *Larsons v. Snohomish County*, Appeal No. 80968-7-1. This second case against Snohomish County, its Superior Court judges, and others was originally brought in the Skagit County Superior Court to require public official Defendants to comply with their duties to establish a working land registration system in Snohomish County. This second case also sought to recover damages against several Private Defendants, who were alleged to have misappropriated the Larsons' loan from the Larson's original lender's (i.e., New Century's) bankruptcy proceedings.

The Larsons were the Plaintiffs in this second court action that was eventually transferred to Snohomish County, so that the Snohomish County Superior Court could adjudicate it. The Larsons are the Appellants in that Appeal, i.e., Appeal No. 81874-1, which was decided by the superior court first and provided the

basis for the Snohomish County Superior Court's resolution of the Torrens application proceedings.

Respectfully, the Larsons move for the relief set forth in Section II with regard to the Snohomish County case and Appeal. Accordingly, all references to Clerk's Papers (CP) are to those in the Snohomish County Appeal, No. 81874-1.

II. Relief Requested

Christopher and Angela Larson request this Panel reconsider its decision:

1) by changing the word "alleged" to "testified" in this Panel's assertion at page 4 of its decision that "[t]he Larsons allege that New Century declared bankruptcy in April 2007 ….";
2) by acknowledging that CR 56's absence of material fact standard applies to more than just the Larsons' CPA causes of action;
3) by changing the Panel's finding/conclusions that there are no material factual issues which preclude granting summary judgment to the Defendants and instead holding that material questions of fact exist which preclude granting summary judgment, including without limitation questions of material fact with regard to who presently owns Larsons' loan and each of its component agreements;

4) to address the presentations of the parties regarding those judicial neutrality arguments advanced by the Larsons relating to Judge Svaren, and Defendant Snohomish County Clerk who, as a Defendant, appears to have manipulated those court records she allowed to be filed with the Snohomish County Superior Court arguably for purposes of achieving a judicial result in favor of judicial employees.

III. Reference to Pertinent Parts of the Record

This Motion for Reconsideration is based mostly on that evidentiary material filed with the Court in support of the July 23, 2019, and August 13, 2019, Motions for Summary Judgment, which did not get decided until much later because all the judicial officers in Snohomish County recused themselves from adjudicating the matter.

The first Motion for Summary Judgment was brought on July 23, 2019, by several Private Defendants, namely Deutsche Bank as Trustee (hereafter "Deutsche Bank") for the Morgan Stanley HE 7 Trust (hereafter "Morgan Stanley Trust"), Select Portfolio Servicing, Inc. (hereafter "SPS") that Trust's servicer and Mortgage Electronic Recording System, Inc. (hereafter "MERS") the entity agreed the Larsons' agreed would be the legal owner of the Deed of Trust). Private Defendant Quality Loan Service Corporation of Washington (hereafter Quality) also

filed its own Motion for Summary Judgment and joined in the other Private Defendants motion . CP 537-551.

The factual material that was offered as evidence in support of Private Defendants' Motions for Summary Judgment pursuant to CR 56 included only the Declarations of Daniel Maynes (CP 3134–40), attorney Jeffrey Courser (CP 3101–33); and attorney Robert McDonald (CP 456-536)

The Larsons submitted far more evidentiary materials opposing those Motions for Summary Judgment, including without limitation: The Declarations of Angela Larson, CP 1270–1416 and 126–136, Declaration of Micah J. Anderson, CP 807–98, Declaration Scott Stafne, CP 1440–51, The Declaration of Donovan McDermott, CP 989-1171,The deposition of Daniel Maynes impeaching the declaration of Daniel Maynes, CP 1417-1429; Three depositions of Jeff Stenmen, the CEO of Quality; The deposition of the Honorable Monty Cobb, Superior Court Judge of Mason County, and the deposition of Richard Beresford, who was at that time the Title Examiner for King and Pierce Counties in Washington State.

Additionally, the Larsons submitted the Declaration of Joseph M. Vincent, the Director of Regulatory and Legal Affairs at the Washington Department of Financial Institutions, who testified with regard to the meaning of the Agreed Order to Cease and Desist entered into between his agency and the Larsons' lender.

Unfortunately, the Larsons did not become aware that Mr. Vincent's declaration had not been filed by the Defendant Snohomish County Clerk in the Snohomish County Superior Court file until counsel for the Larsons and his staff began preparation of their Clerk's Papers for purposes of the Snohomish County Appeal. These problems led to motions supported by evidentiary submissions requesting relief from this Court which challenged the integrity of the judicial process below.

The Larsons also rely on those motions requesting relief from this Court with regard to the irregularities in the record below, and the evidence offered in support of such motions, as well their adversaries' responses to such motions and evidence, and the Larsons' replies as further evidence supporting this Motion for Reconsideration. The Motions and evidence before this Court which the Larsons request this Court consider when ruling on this Motion to Reconsider includes: Motion to Require Clerical personnel to comply with RAP 9.6 filed on March 13, 2020, in Appeal 80968-7; Declarations of Scott Stafne and LeeAnn Halpin in Support of Motion to Require Clerical Personnel to Comply with RAP 9.6 also filed on March 13, 2020 in Appeal 80968-7; Snohomish County's Response to Larsons' Motion Requiring Defendant/Appellee Clerk to Comply with RAP 9.6 filed on April 3, 2020, in Appeal 80968-7; Declaration of Scott E. Stafne in Support of Appellants' Motion to File Reply Brief to

(1) Answering Brief of Deutsche Bank, SPS, MERS, Snohomish County, its Officials and Judges, and Quality Loan; and (2) Answering Brief of Washington State Defendants, Governor Jay Inslee, and Attorney General Bob Ferguson filed on December 20, 2020, in linked Appeal 80968-7.

IV. Statement of the Grounds for Relief Sought and Supporting Argument

A. The Evidence before the Court was disputed and does not support the grant of a summary judgment

1) Larsons submitted evidence that New Century went into bankruptcy.

The purpose of summary judgment "is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*" *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080, 1085 (2015) (quoting *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)).

The Larsons submitted evidence of New Century's bankruptcy which included Angela Larson's testimony to this effect (CP 1274) as well as argument containing numerous court decisions discussing this bankruptcy in the context of other homeowners' claims MERS had no authority to assign New Century

loans after the revocation of its agency relationship with New Century by the bankruptcy court. *See* CP 4001–08 (Larsons' Complaint, ¶¶ 3.43–3.64); CP 1193–1199 (Larsons' Opposition to Summary Judgment). *Cf.* OB in Snohomish County Appeal, 10–13; OB in Torrens Appeal at 23

It is the Larsons' position that no reasonably, neutral judge, i.e., trial or appellate, could take the position that there are not material questions of fact with regard to whether the bankruptcy occurred and MERS had the agency authority in 2010 to assign the Deed of Trust to Deutsche Bank as Trustee for the 2007 Morgan Stanley Trust after it had allegedly been sold to a different 2006 Trust. And in this regard the Larsons would note that the Private Defendants had the burden of proof on this issue in order to prove their relationship to the loan.

Accordingly, the Larsons respectfully request this Panel clarify that New Century's bankruptcy is shown by *evidence* so that this fact can be considered pursuant to the material fact standard applicable to summary judgments with regard to the specific legal theories advanced by the Larsons, including specifically without limitation (1) the issue as to whether the Larsons' loan was funded and, if so, by whom?; and (b) whether MERS had the legal authority to transfer anything related to Larsons' loan to Deutsche Bank after its agency relationship with New Century was terminated? See also *infra*.

2) The Panel's decision erroneously implies the absence of material fact standard applies only to the CPA claims

At pages 27–34 of its decision this Court implies that Rule 56's absence of material fact standard applies only to their CPA claims because it nowhere else applies that standard to the other legal issues raised by the parties, particularly the Larsons. App. 27–34. This is important because the judicial branch of government is obligated to exercise judicial power between litigants in such a manner as to apply those legal principles advocated by the parties to those facts found to be true through appropriate fact-finding procedures. *See e.g., Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908)("A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. *That is its purpose and end.*" *Id.* at 226). (Emphasis Supplied).

This purpose cannot be achieved unless judges make clear that the facts they have found to exist, i.e., about which there are no material disputes, apply to all those legal theories which the adversarial parties present for adjudication. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)

3) The disputed facts of this case require a trial

CR 56 (c) provides summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Unfortunately, this Panel makes various factual claims in its decision but does not provide any reference to those parts of the record, i.e., *the* Clerk Papers, containing that evidence which supports its factual findings. *See e.g.,* App. 27–8.

The only evidence in the record below specifically relied upon by the Private Defendants to support the summary judgment granted by Judge Svaren in the Snohomish case and on Appeal are, as stated previously, the Declarations of Jeffrey Courser, 3101–33, and Daniel Maynes, CP 3134–3229. The Larsons, on the other hand, submitted a massive amount of evidence which this Court's decision indicates the Panel did not consider because this evidence appears to have been ignored.

This Panel's factual findings seem to be based solely on the declaration of Daniel Maynes, which appears at CP 3134–40. In his declaration Maynes claims he is an "officer" for SPS, the servicer for Deutsche Bank, the Trustee of the Morgan Stanley Trust. CP 3134, ¶ 1. But Maynes testified at his deposition that he really is just a "problem resolution supervisor" who functions as a "document control officer" for about an hour a day when he signs declarations prepared by SPS' attorneys for use as evidence in prosecuting foreclosure related cases, like this one. *See e.g.*, CP

1419:6:1–10:6; 1421:16:7–17:16; 1425:30:1–33:4. The Larsons assert that Maynes' testimony that he is an officer for SPS is misleading because the dictionary definition of "officer" means: "one who holds an office of trust, authority, or command // the *officers* of the bank; //chief executive *officer*" *See* Merriam Webster Online Dictionary.[1] A reasonable juror could well question the rest of Maynes testimony after learning that he (and the SPS attorneys who wrote his declaration) are stretching the truth by claiming in his declaration that he is an officer within the generally accepted meaning of that word.

At his deposition Maynes testified that the only documents he reviews for purposes of signing such declarations are those documents SPS' attorneys provide to him as support for those conclusions the attorneys wrote and ask Maynes to sign. CP 1426:34:19–1427:38.8. *Cf.* 1423:23:8–24:20 (Maynes doesn't compare business records attorney provides with his declaration to actual records.)

Significantly, Maynes also testified at his deposition that he was not aware of any rules or procedures that he must follow when signing such documents, but seemed pretty sure SPS had some. SPS. CP 1419:8.9–25 .

[1] Last Accessed December 26, 2021, at https://www.merriam-webster.com/dictionary/officer

Why did the judges of this Court not acknowledge—or at least consider—whether this deposition impeaches Mayne's testimony for purposes of creating an issue of fact precluding summary judgment? Certainly, applicable law suggests they should have. *See e.g., Balise v. Underwood*, 62 Wn.2d 195, 200 (1963); *Laguna v. Dep't of Transp.*, 146 Wn. App. 260 (2008)(an issue of credibility is present if the party opposing the summary judgment comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue. *Id.* at 266-267); *Cf. PNC Bank, Nat'l Ass'n v. Cozza*, No. 80966-1-I, 2021 Wash. App. LEXIS 547, at *12 (2021)(Refusing to hold credibility of declarant creates an issue of fact regarding foreclosure where credibility does not call into question holdership of the original note.) But as is shown here and below the credibility of Maynes testimony is directly applicable to this important issue because he admits—contrary to his declaration—that he actually does not know whether the original Note was sent to Stoel Rives, SPS's attorneys.

4) Questions of fact exist with regard to who purchased Larsons' Note and Deed of Trust from New Century

The Larsons provided evidence from New Century's bankruptcy proceedings that their loan was not sold to the 2007 Morgan Stanley Trust. *See* Larson Declaration, CP 1270-1416, ¶¶ 8–22 (CP 1272–1277), and Exhibits 6 & 7 (CP 1342–1349).

Exhibit 6 indicates the Larson loan was a HUD Loan, i.e., MIN #100488910099127945, which was sold to a November 2006 pool in which JP Morgan Chase acted as Trustee. *See also* CP 3117, response number 1.

Exhibit seven is a copy of the original Order of the United States District Bankruptcy Court for the District of Delaware titled: "Order Pursuant to Sections 356 and 554 of the Bankruptcy Code (A) Authorizing and approving the rejection of certain unexpired leases of nonresidential property and (B) Authorizing and approving procedures for the rejection of executory contracts and unexpired leases of person and nonresidential real property."

Maynes testified that he had no evidence to dispute the factual assertion that Larsons loan was sold to Chase as Trustee for a 2006 Trust. CP 1420:11:22–12:4. And Maynes also testified that he did not know whether under the circumstances of Chase originally obtaining the Larsons' mortgage loan this transaction could have been rescinded. CP 1421:15:22–16:1.

This evidence creates a material question of fact because it is inconsistent with Deutsche Bank's story that the 2007 Morgan Stanley Trust purchased the loan from New Century before New Century's bankruptcy and now still holds the Larsons' promissory Note and Deed of Trust agreements as a result of that transaction. Thus, there is at the outset an issue of material fact

regarding whether the 2007 Morgan Stanley Trust or the 2006 Trust with Chase Bank as its Trustee purchased the Larsons' October 2006 loan (i.e., Note and Deed of Trust agreements) from New Century before its bankruptcy.

5) New Century's 2007 Bankruptcy creates both material issues of fact and law

No party has ever disputed that New Century filed for bankruptcy in April 2007. It is less clear, however, whether the Larsons' loan was sold before then. And, if so, to whom? *See supra*.

If the loan remained in the bankruptcy estate, a question of law is presented as to whether MERS could have assigned its interest in that loan in 2010 to Deutsche Bank as Trustee for the 2007 Morgan Stanley Trust after its agency relationship was terminated by the bankruptcy court. *See e.g., Dilibero v. Mortg. Elec. Registration Sys.,* 108 A.3d 1013 (R.I. 2015)(specifically holding MERS could not foreclose after its agency relationship with New Century lending entities was terminated in bankruptcy. *Id.* at 1017). *See also* CP 4001–08 (Larsons' Complaint, ¶¶ 3.43–3.64); and Opposition to Summary Judgment, CP 1193–1199 (Larsons' Opposition to Summary Judgment) citing to this and other cases for this legal proposition.

This Court appears to have attempted to avoid deciding which of the above three factual issues occurred in this case, i.e.,

whether the loan was purchased by either the 2006 or 2007 Trust or went into the bankruptcy estate by holding this doesn't matter because the deed of trust always follows the note.

But, of course, that assertion doesn't help these specific Private Defendants if the Larsons loan, i.e., the Note and mortgage, was purchased by the 2006 Trust because then that Trust, not 2007 Morgan Stanley Trust, would have purchased both agreements and presumably hold the actual Note. If, on the other hand, New Century still held the loan when it went into bankruptcy there is a legal issue under federal law (which has not been addressed by either the superior court or this Panel) as to whether MERS could have assigned the loan to Deutsche Bank as Trustee for the 2007 Morgan Stanley Trust.

Thus, among other things, it is the Larsons position that Deutsche Bank has not demonstrated that it has standing to foreclose on the Note for the 2007 Morgan Stanley Trust because there is a factual dispute with regard to whether the 2006 Trust or the 2007 Morgan Stanley Trust is the actual owner/holder of the loan. Furthermore, the Larsons assert there is also a factual issue as to whether the Larsons' loan was still owned by New Century when it went into bankruptcy. If so, then there are both legal and disputed factual issues regarding MERS authority to have assigned the Larsons loan to the Morgan Stanley Trust in 2010.

6) There is a question of fact with regard to whether Private Defendants hold the original, authentic Note

When asked about his declaration testimony that "[t]he original Note is currently held in the custody of Stoel Rives, counsel for SPS and the Trust, . . . ," CP 3135, ¶ 8, Maynes admitted that he had never seen the original Note and had no personal knowledge as to whether the Note that was sent to Stoel Rives was the authentic original Note. CP 1420:11:2–12:4; 1423:25:22–1425:30:1. Further, when asked what business record suggested to him that the original, authentic Note had been sent to Stoel Rives, Maynes testified under oath that he did not know. CP 1422:21:8–19. 1423:25:22–1425:30:1. 1421:15:22–16:6. Thus, there appears to be no evidentiary basis in the record for this Panel's finding that it is undisputed that Private Defendants, or any one of them, are the holders of the original promissory Note. *See also* CP 3120–3121, responses to interrogatories 4 & 5.

Maynes' admissions during his deposition about his lack of knowledge (based on *either* personal knowledge or the business records he reviewed) as to whether Private Defendants actually hold the original authentic Note is significant in light of that other evidence which poses as a fact question whether the Larsons' loan was sold to a different Trust or whether it became a part of New Century's bankruptcy estate.

If the loan became a part of New Century's bankruptcy estate, then there are both questions of law and fact as to whether MERS was precluded by federal bankruptcy law from acting as New Century' agent in assigning the Larsons' Note and Mortgage to Deutsche Bank as Trustee for the Morgan Stanley Trust. *See e.g., Dilibero v. Mortg. Elec. Registration Sys.,* 108 A.3d 1013 (R.I. 2015). Indeed, it is the Larsons' position that because MERS' agency with New Century was terminated by the federal bankruptcy court, this Court has no authority under the Supremacy Clause of Article 6 of the United States Constitution to reinstate that agency relationship so as to allow MERS to assign the loan as New Century' agent in 2010, when there is evidence that the Larsons' loan was already then owned by the 2006 Trust.

Furthermore, the Larsons assert and will argue as a basis for discretionary review that this Court's abrogation of the holding in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 111–113 (2012) that MERS must be an agent for the lender to act as the DTA beneficiary under Washington's Deed of Trust Act, Ch. 64.12 RCW, *Bain,* at 175 Wn. 2d 106–197, would require a factual finding that MERS and New Century did not intend to split the Note from the mortgage. *See e.g.,* Restat 3d of Property: Mortgages, § 5.4 (a), (b), (c) and Comment E to the Restatement. But certainly, there are material factual questions about whether such

intent existed with regard to the Larsons' 2006 loan agreements and others like them executed before *Bain* was decided.

Indeed, MERS argued in *Bain* that MERS and Lenders intent in the deed of trust language the Larsons agreed to was to split the Note and Mortgage so as to be able to intentionally separate the agreements. *See* OB, Torrens Appeal, 22–23. *See* Bain 175 Wn. 2d at 83 ("As MERS itself acknowledges, its system changes "a traditional three party deed of trust [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and assigns. MERS Resp. Br. at 20" (cleaned up) *See also Bain*, 175 Wn. 2d. at 99 ("MERS argues that under a more expansive view of the act, it meets the statutory definition of 'beneficiary.' . . . . It contends that the parties were legally entitled to contract as they see fit, and that the 'the parties contractually agreed that the beneficiary under the Deed of Trust was MERS and it is in that context that the Court should apply the statute.")

And the agreement the Larsons signed clearly states MERS, not the lender, holds legal title to the Deed of Trust, *see* CP 3151, thereby indicating an intent to split ownership of the Note and Mortgage. *See also Robinson v. Am. Home Mortg. Servicing, Inc. (In re Mortg. Elec. Registration Sys.),* 754 F.3d 772, (9th Cir. 2014) (Ninth Circuit Panel concluded a split in the note and mortgage likely occurred when MERS was designated as a

beneficiary in the Deed of Trust. *Id.* at 786. *See also Edelstein v. Bank of N.Y. Mellon,* 128 Nev. 505, 286 P.3d 249 (2012), which held that "[d]esignating MERS as the beneficiary does . . . effectively 'split' the note and the deed of trust at inception because . . . an entity separate from the original note holder . . . is listed as the beneficiary (MERS) . . . ." *Id.* at 259.

This Panels' attempt to provide MERS and its successors with an equitable trust remedy under these circumstances based on summary judgment standards suffers from the same type of judicial overreach because the law is that this Court must find that "the intent of the parties to create an equitable mortgage as a lien on real property is unequivocal." *See e.g., Redemptorist Fathers of the Wash. v. Purdy*, 174 Wash. 358, 361 (1933); *Beaulaurier v. Buchanan*, 16 Wn. App. 887, 888-89 (1977); *Cf. Dunbabin v. Brandenfels*, 18 Wn. App. 9, 12-13 (1977).

This Court cannot make such a finding here because there is no evidence in the record to show that the Larsons' intended to allow anyone MERS assigned its intentionally separated mortgage to the right to foreclose upon their home in violation of the law which existed in Washington at the time they took out their loan in 2006. In fact, the mortgage they signed states just the opposite; namely that its terms should be interpreted pursuant to applicable law. *See* CP 3150, Deed of Trust, ¶ J definition of "Applicable Law." *See also* CP 3166, Adjustable-Rate Rider, ¶ 11.

7) There are other questions of fact with regard to whether the Note in Private Defendants' possession is an authentic wet ink original

Other legitimate factual questions as to the Note's authenticity are provided by the Larsons responses to interrogatories 4 & 5 at CP 3121–25. Additionally, the Larsons elected to require Deutsche Bank to prove the authenticity of the Note and the signatures thereon pursuant to RCW 62 A. 3-308(a). *See Citibank, NA v. Peterson*, No. 53747-8-II, 2021 Wash. App. LEXIS 516, at *8–11(2021) for an example as to how Division Two recently applied this statutory provision in a similar case.

Although this Court states there is no evidence that the Note was not signed on October 9, 2006, this is not true. Most, in fact virtually all, documents related to this mortgage recite that the Note and Mortgage were both executed on October 6, 2006. *See e.g.,* Note, CP 3142; Deed of Trust, CP 3237; Adjustable-Rate Rider (which amends the terms of the Deed of Trust), CP 3253; Prepayment Rider Adjustable-Rate Loan, CP 3256, Notice of Default, CP 3261; Appointment of Successor Trustee, CP 3270; Notice of Trustee Sale, CP 3273; Trustee's Deed Upon Sale, 3277, and Notice of Trustee Sale, CP 3284.

In order to arrive at the conclusion it does, i.e., that the Note was executed on October 9, 2006, rather than October 6, 2006, this Panel has to assume facts that are not in evidence so as

to create a basis for invoking a presumption as to when the documents were signed without ever explaining why this is appropriate.

Other courts that have found themselves with inappropriate summary judgment records in cases like this one have decided the trial court should start over. *Cf. Deutsche Bank Nat'l Tr. Co. v. Moss*, 99 A.3d 226 (Del. 2014)(Delaware Supreme Court vacates summary judgment based on confusing record and trial court's failure to address the legal issues asserted by Deutsche Bank in case involving this same 2007 Morgan Stanley Trust.) Perhaps the same course of action should be taken here.

8) Private Defendants have not proved for purposes of summary judgment that the loan was funded.

Private Defendants propounded interrogatories to the Larsons which required: "[i]dentify the facts supporting your assertion . . . that the loan was never funded." CP 3120. The Larsons responded by referencing facts alleged in their Complaint and other interrogatory responses. The Larsons then stated:

> Evidence shows New Century did not have the money to pay loans during applicable time periods. MERS practice at this time was not to fund mortgages. Further, the practice at that time was to treat the note and deed of trust as separate instruments each having its own value and to transfer them separately because the note and deed of trust were split. . . .

Id. at Response to No. 6.

Not content to rely on these assertions for opposing summary judgment, the Larsons submitted the Declaration of Joseph M. Vincent, the Director of Regulatory and Legal Affairs, i.e., Legal Counsel, for the Washington State Department of Financial Institutions (DFI) to further document these assertions. After laying an appropriate legal foundation, Vincent produced a copy of the March 2007 Cease and Desist Order New Century signed with the DFI. App. 47 ¶ 3 and Order, at App.49–55.

As can be seen the Order attached as an exhibit to Vincent's declaration New Century stipulated that it had closed unfunded loans in Washington State.

> Specifically, New Century agreed:
>
> 5. New Century . . . does not have sufficient warehouse lines of credit to fund loans that Respondent closed or intended to close with Washington Consumers.
>
> 6. The stock of New Century . . . has dropped considerably and all trading of the stock has been suspended by the New York Stock Exchange by the New York Stock Exchange.
>
> 7. Respondents presently have closed and unfunded loans outstanding for Washington Consumers.
>
> 8. Respondents are in such financial condition that they cannot continue in business in Washington

> without there being a substantial likelihood that Washington consumers will be injured.

Although Vincent's declaration was submitted as evidence to the Clerk of the Snohomish Superior Court (who was a named Defendant in Snohomish County case and is also a named appellee in this Appeal) she or members of her staff did not file that pleading as part of the superior court's record. The Larsons did not find out about this until their legal counsel began preparation of the Clerk's Papers to this Court in the Snohomish County Appeal.

After reviewing the record more closely the Larsons' counsel also identified several other filing problems, indicating the Clerk may have handled the Larsons' opposition filings to the Summary Judgment in an inappropriate and irregular manner. As was discussed previously those irregularities were documented in this Court by the motions and other material filed in this Court which is referenced in Section III for consideration as evidence pursuant to this Motion for Reconsideration.

The Larsons would also ask this Court to take judicial notice pursuant to ER 902 that other government websites during this same period of time also document New Century did not have money to fund many of its loans, including those occurring during the last three-quarters of 2006. *See e.g. In the Matter of the California Corporations Commissioner v. New Century Mortgage*

Corp., File Nos.: 603-9136 et al.[2] (March 16, 2011); Massachusetts Commissioner of Banks, Findings of Fact and Temporary Order to Desist, Docket No. 2007-011[3] (March 13, 2011); New Jersey Depart of Banking & Insurance Issues Cease and Desist Order (March 14, 2007). Moreover, these enforcement orders note that several of New Century's lenders, including Deutsche Bank were asking for their money back from loans they had previously funded for New Century. This is corroborated by news articles during this same time period. *See e.g.*, MarketWatch "Deutsche Bank increases pressure on New Century; Bank wants subprime lender to repurchase $900 million of loans more quickly." (March 19, 2007)[4]

9) There is a question of fact with regard to whether New Century breached their agreements with the Larsons by refusing to accept their mortgage payments.

Angela Larson testified that she and her husband attempted to make payments to New Century pursuant to their

---

[2] Last accessed on December 27, 2021, at https://dfpi.ca.gov/wp-content/uploads/sites/337/2013/04/newcentury_dr.pdf

[3] Last accessed on December 27, 2021, at: https://www.mass.gov/temporary-order-to-cease-and-desist/new-century-mortgage-corporation

[4] This article was last accessed on December 27, 2020, at https://www.marketwatch.com/story/deutsche-bank-increases-pressure-on-new-century

Note and Mortgage agreements, but that their payments were not accepted. CP 1272, ¶ 8. Both the Note, *see* CP 3144–3145 at ¶¶ 4–7, and the mortgage, *see* CP 3152–54 at ¶¶ 1–4, obligated New Century to accept these payments. In their opposition to Private Defendants' Motion for Summary Judgment the Larsons asserted they moved out of their home for seven years because they were not allowed to make payments. CP 1194. The only reason they moved back after waiting seven years to be foreclosed upon is they remained liable to their government, neighborhood, and creditors for the maintenance of their home. CP 1197. It is difficult to understand why judges cannot see this as a problem for the Larsons given that their debt increased exponentially with regard to each payment they were not allowed to pay.

But in any event the Larsons' allegations in this regard are undisputed and it should be up to a trier of facts to decide their merit.

B. This Panel should reconsider its judicial neutrality analysis

This Court misstates the Larsons' judicial neutrality arguments to the Skagit Court Superior Court judges as being based on Washington employee's retirement system, when in fact it was based on the fact that both Snohomish County and Skagit County judges had purposely chosen not to implement a Torrens registration system for their respective counties. *See* CP 3468–

3477; Anderson declaration, ¶¶22–29. The Larsons respectfully request this Panel correct this error.

The Larsons believe this Panel has similarly glossed over their Federal Separation of Powers and Fourteenth Amendment Due Process arguments. In their briefing to this Panel and the judges below in these now linked cases the Larsons urged *Cain v. White*, 937 F.3d 446 (5th Cir. 2019) and *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019) as authority for the proposition that a state's political branches cannot enact laws which compromise or appear to compromise state judges' impartiality. *See e.g.,* OB Snohomish County Appeal, 43–46; OB Torrens Appeal, 38–40. The Larsons request this Court address these arguments on reconsideration.

And they would like to point out to this Court that the conduct by the Clerk in this case supports their claims that the integrity of the entire judicial department—judicial officers and judicial employees alike—appears to have been compromised here. For, if parties, like the Larsons are precluded from making a record of the evidence they present to Washington courts, then many people will lose hope that justice is achievable here.

The Larsons would also appreciate this Court addressing their claim that Judge Svaren's continuing refusal to recuse himself, first, without explanation, and then because he subjectively believed "I don't have a dog in that fight," does not comply with

Supreme Court precedent requiring judges apply an objective analysis to this issue. The operative inquiry the judge must make being: whether, "considering all the circumstances alleged," *Rippo*, 580 U. S. Baker, 197 L. Ed. 2d 167 at 168, "the average judge in [the same] position is likely to be neutral, or whether there is an unconstitutional potential for bias," *Williams* v. *Pennsylvania*, 195 L. Ed. 2d 132 at 134 (2016)

This Court of Appeals appears to excuse Judge Svaren not applying an objective analysis to the recusal request against him based on its conclusion the "rule of necessity" applies in this case. The Larsons position is that at a minimum a judicial officer being challenged for a conflict should be required to apply an objective test to the conflict alleged so that such conflict is identified for the parties and any reviewing courts.

The Larsons also respectfully request this Panel reconsider whether the "rule of Necessity" applies in Washington State. *See* App. 53. Both Article IV, section 7 of our Constitution, and RCW 2.56.030 provide for better and more superior relief, which is the appointment of a pro tem judge who has no conflict.

V. Conclusion

The Larsons humbly and respectfully ask this Court reconsider its application of the absence of fact component of CR 56 and those aspects of its judicial neutrality rulings as are set forth herein.

Certificate of Compliance

I certify the foregoing Motion for Reconsideration was produced by using word processing software and includes 5,840 words, which is in compliance with RAP 18.17(8).

Respectfully submitted by:

s/ *Scott E. Stafne*
Scott E. Stafne, WSBA No. 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360.403.8700
scott@stafnelaw.com
Attorney for Petitioners-Appellants

Certificate of Service

I hereby certify that on this day, December 27, 2021, I filed the Appellants' Motion for Reconsideration, with this Court's electronic case filing system which served the document to the parties of record.

Dated on this 27th day of December 2021, in Mount Vernon, Washington.

By: /s/ *LeeAnn Halpin*
LeeAnn Halpin, Paralegal

TABLE OF APPENDICES

STATE OF WASHINGTON
SKAGIT COUNTY SUPERIOR COURT

CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman Plaintiffs, v. SNOHOMISH COUNTY, *et al.*, Defendants.	NO. 18-2-01234-29 DECLARATION OF JOSEPH M. VINCENT

I, JOSEPH M. VINCENT, am over the age of eighteen years old. I make the following declaration based on my personal knowledge and I am competent to testify to the facts set forth herein.

1. I am the Director of Regulatory and Legal Affairs at the Washington State Department of Financial Institutions. I have been in this position since March 3, 2003. Originally, my official title was "Legal Counsel," and I was addressed as "General Counsel." However, my position and duties have always been the same as my present title of Director of Regulatory and Legal Affairs.

2. In my role as the Director of Regulatory and Legal Affairs, I serve as a member of the Department's Executive Team and part of my responsibilities include providing counsel, policy, coordination and oversight, and review and recommendation related to overall administrative enforcement and procedure as to the Division of Banks and Division of Credit Unions; reviewing and drafting of and making of recommendations in relation to the Agency

Director (in the Director's capacity as Presiding Officer) issuing uncontested final default orders, orders on petition for reconsideration of final orders, and final orders on petition for review of Initial Orders from the Office of Administrative Hearings; certifying administrative records on judicial appeal; drafting and reviewing general administrative policies and procedures; and acting as liaison to the Attorney General's Office.

3. In March 2007, DFI entered into an Agreed Order to Cease and Desist with New Century Mortgage Corp., New Century Mortgage Ventures, LLC, New Century Credit Corp., and Home 123 Corp. (collectively, "New Century"). A copy of the Agreed Order is available on DFI's website and a true and correct copy is attached as Exhibit 1.

4. The records retention period for the files relating to the investigation and enforcement action against New Century is six (6) years. After six years, the files can be destroyed. Administrative orders are typically made available on DFI's website and transferred to the Washington State Archives for appraisal and selective retention. A true and correct copy of DFI's records retention schedule, as available from the Washington State Archives website, https://www.sos.wa.gov/archives/recordsmanagement/state-agencies-records-retention-schedules.aspx, is attached as Exhibit 2.

5. The records retention period for the New Century investigation and enforcement files expired in 2013. A copy of the Agreed Order is available on DFI's website; however, the files were destroyed in 2016, pursuant to the records retention schedule.

6. The enforcement action against New Century occurred in 2007. There is no one at DFI with independent knowledge of the underlying facts of the investigation or enforcement action, and because the files were destroyed in 2016, research would not reveal any facts outside of those stated in the Agreed Order.

7. The stipulated facts in the Agreed Order are labeled as such because the parties likely agreed that the facts, as stated, are true. While I do not have any independent knowledge of the stipulated facts, I believe they are likely accurate, as it would be DFI's general course to

include in an Agreed Order facts designated as "stipulated facts" when it believes those facts to be true and the other party agrees to include them.

8. Because of my role and the contingent prospect of any enforcement matter from the Division of Consumer Services (including the matter resulting in an Agreed Order identified in paragraph 3 above) coming up on petition for review to the Agency Director, I had no direct involvement in or ex parte communication in relation to the prosecution of any enforcement matters by the Division of Consumer Services, including, without limitation, the matter resulting in the Agreed Order identified in paragraph 3 above.

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

Signed at Tumwater, Washington, this 20th day of August 2019.

Joseph M. Vincent
Director of Regulatory and Legal Affairs
Department of Financial Institutions

EXHIBIT 1

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
CONSUMER SERVICES DIVISION

IN THE MATTER OF DETERMINING Whether there has been a violation of the Consumer Loan Act of Washington by:	C-07-068-07-TD01
New Century Mortgage Corp., New Century Mortgage Ventures, LLC, New Century Credit Corp., and Home 123 Corp.,	AGREED ORDER TO CEASE AND DESIST
Respondents	

COMES NOW the Director of the Washington State Department of Financial Institutions (Director), by and through his designee Deborah Bortner, Division Director, Division of Consumer Services (designee), and New Century Mortgage Corp., New Century Mortgage Ventures, LLC, New Century Credit Corp., and Home 123 Corp., (Respondents) by and through their undersigned representative(s), and agree to entry of this Agreed Order to Cease and Desist pursuant to chapter 31.04 RCW, the Consumer Loan Act (Act), and RCW 34.05.060 of the Administrative Procedure Act, based on the following:

AGREEMENT AND ORDER

A. **Jurisdiction.** It is AGREED that the Department has jurisdiction over the subject matter of the activities discussed herein.

B. **Authority.** It is AGREED that the Department has authority pursuant to RCW 31.04.093(5) to issue an order directing Respondents to:

1. Cease and desist from conducting business in a manner that is injurious to the public,
2. Take such affirmative action as is necessary to comply with the Act, and
3. Make restitution to any borrower or other person who is damaged as a result of a violation of the Act.

C. **Statements of Fact.** It is AGREED that this Order is based on the following stipulated facts:

1. New Century Mortgage Corp. is a subsidiary of New Century Financial Corporation and is located at 18400 Von Kaman Ave., Ste. 1000, Irvine, CA 92612. It is licensed in Washington as a consumer loan company under license no. 17969.

2. New Century Mortgage Ventures, LLC, is a subsidiary of New Century Financial Corporation and is located at 210 Commerce, Ste. 100, Irvine, CA 92612. It is licensed in Washington as a consumer loan company under license no. 27629.

3. New Century Credit Corp. is a subsidiary of New Century Financial Corporation and is located at 18400 Von Kaman Ave., Ste. 1000, Irvine, CA 92612. It is licensed in Washington as a consumer loan company under license no. 18429.

4. Home 123 Corp. is a subsidiary of New Century Financial Corporation and is located in Irvine, CA. It was formerly licensed in Washington as a consumer loan company under license no. 23732.

5. New Century Financial Corporation does not have sufficient warehouse lines of credit to fund loans that Respondent's closed or intended to close with Washington Consumers.

6. The stock of New Century Financial Corporation has dropped considerably and all trading of the stock has been suspended by the New York Stock Exchange.

7. Respondents presently have closed and unfunded loans outstanding for Washington Consumers.

8. Respondents are in such financial condition that they cannot continue in business in Washington without there being a substantial likelihood that Washington Consumers will be injured.

C. **Consent to Be Bound By Order.** It is AGREED that the parties shall be bound by the following terms and conditions of this Order:

1. Respondents shall immediately cease and desist accepting, from either consumers, mortgage brokers, or other consumer lenders, any applications for residential first or secondary mortgage loans or home

equity lines of credit secured by Washington real property or from Washington consumers. For the purposes of this Order, "Washington Consumers" shall include Washington residents and persons that have submitted applications for loans which are, or are intended to be, secured by Washington real property.

2. Respondents shall immediately cease and desist from advertising its wholesale and retail businesses in Washington or to Washington Consumers.

3. Respondents shall make all reasonable efforts to obtain funding for, or place with another lender, loans to Washington Consumers that have closed but not yet been funded.

4. Respondents shall immediately notify all Washington mortgage applicants or the mortgage applicant's broker of the status of any applications or loans with Respondents and the likelihood of funding.

5. Respondents shall either (a) obtain funding for and close or (b) place with other lenders, applications from Washington Consumers to whom loan commitments have been issued. Respondents shall transfer to any new lender all fees paid by consumers whose loans will be placed with other lenders.

6. For loan applications from Washington Consumers for which no commitment has been issued, Respondents shall either (a) obtain funding for the loans, or (b) place the loan applications with other lenders, or (c) deny the loan applications for cause. Respondents shall return all fees paid by consumers whose loans are denied. Respondents shall transfer to any new lender all fees paid by consumers whose loans will be placed with other lenders.

7. Respondents shall seek out other lenders with whom they can place Washington Consumer loans or applications to the benefit of the Washington Consumer.

8. Respondents shall provide to the Department a daily list of all loans to Washington Consumers that have closed but not funded or loan applications from Washington Consumers that have not closed. This list shall be updated as stated above until all Washington Consumers have either had their loans funded or all issues regarding Washington loan applications have been resolved.

a. This list shall include, but is not limited to:

i. The names of all Washington Consumers that have closed but not funded loans from Respondents or who have submitted an application to Respondents that has not yet closed;

ii. The address and telephone numbers of the consumers listed in (i);

iii. The loan number;

iv. The amount of all prepaid loan fees submitted;

v. The amount of each loan;

vi. The current application status;

vii. The rate lock status;

viii. The actual closing dates;

ix. Whether the loan was a purchase or refinance;

x. The identification of the applicable lender with whom each loan will be placed and contact information for that lender.

b. Any changes in the list shall be explained in writing.

c. The list shall be sent to James R. Brusselback, Program Manager and Enforcement Chief, Consumer Services Division, at jbrusselback@dfi.wa.gov, by 5:00 PM PST on each business day.

9. Respondents shall provide to the Department on a weekly basis a liquidity schedule that lists the anticipated Washington loans to be closed and the anticipated funding available.

10. Respondents shall, as soon as possible, place any fees previously collected from Washington Consumers relative to any first or secondary mortgage loan applications in a separate escrow account maintained at a federally insured depository institution.

11. Respondents shall release any liens filed on any Washington real property or filed on property owned by any Washington Consumer as a result of a residential mortgage loan closing with

Respondents but not being funded. In the event that the loan subsequently funds, Respondents may file a lien against the property at that time.

12. In the event that interest on a Washington residential mortgage loan closed or originated by Respondents starts on any day other than the day of funding, or if there is any change of terms from the signed loan document, Respondents must notify the Department immediately at the contact information provided in subsection 8c.

13 Respondents shall use every best effort to resolve their current inability to fund loans.

D. **Authorized Business.** It is AGREED that nothing in this Order shall prevent Respondents from selling or assigning residential mortgage loans to another entity, servicing closed mortgage loans, or engaging in other lawful activity not prohibited herein.

E. **Compliance with the Law.** It is AGREED that Respondent shall comply with the laws pertaining to consumer lending, including but not limited to the Consumer Loan Act (chapter 31.04 RCW) and the rules adopted thereunder (chapter 208-620 WAC).

F. **Non-Compliance with Order.** It is AGREED that Respondent understands that failure to abide by the terms and conditions of this Order may result in further legal action by the Department. In the event of such legal action, Respondent may be responsible to reimburse the Department for the cost incurred in pursuing such action, including but not limited to, attorney fees.

G. **Voluntarily Entered.** It is AGREED that the undersigned Respondent has voluntarily entered into this Consent Order, which shall be effective when signed by the Director or the Director's designee.

H. **Entire Agreement.** It is AGREED that this Order contains the whole agreement between the parties. There are no other terms, obligations, covenants, representations, statements, conditions, or otherwise, of any kind whatsoever concerning this Order. This Order may be amended in writing by mutual agreement by the Department and Respondents.

H. **Completely Read, Understood, and Agreed.** It is AGREED that Respondents have read this Order in its entirety and fully understands and agrees to all of the same.

I. **Authority to Sign.** Respondents AGREE that the undersigned representative for each Respondent has the authority to bind said Respondent to the terms of this Order.

RESPONDENTS:

New Century Mortgage Corp.
By: Stergios Theologides, Secretary

Authorized Representative — DATE 3/16/07

New Century Mortgage Ventures, LLC
By: Stergios Theologides, Secretary

Authorized Representative — DATE 3/16/07

New Century Credit Corp.
By: Stergios Theologides, Secretary

Authorized Representative — DATE 3/16/07

Home 123 Corp.
By: Stergios Theologides, Secretary

Authorized Representative — DATE 3/16/07

DO NOT WRITE BELOW THIS LINE

IS ORDER ENTERED THIS 16 DAY OF March, 2007.

DEBORAH BORTNER
Division Director
Division of Consumer Services

EXHIBIT 2

This schedule applies to: Department of Financial Institutions

Scope of records retention schedule
This records retention schedule authorizes the destruction/transfer of the public records of the Department of Financial Institutions relating to the unique functions of regulating and examinations of state chartered financial services and to protect consumers from financial fraud. The schedule is to be used in conjunction with the *State Government General Records Retention Schedule (SGGRRS)*, which authorizes the destruction/transfer of public records common to all state agencies.

Disposition of public records
Public records covered by records series within this records retention schedule (regardless of format) must be retained for the minimum retention period as specified in this schedule. Washington State Archives strongly recommends the disposition of public records at the end of their minimum retention period for the efficient and effective management of state resources.

Public records designation as "Archival (Permanent Retention)" must not be destroyed. Records designated as "Archival (Appraisal Required)" must be appraised by the Washington State Archives before disposition. Public records must not be destroyed if they are subject to ongoing or reasonably anticipated litigation. Such public records must be managed in accordance with the agency's policies and procedures for legal holds. Public records must not be destroyed if they are subject to an existing public records request in accordance with chapter 42.56 RCW. Such public records must be managed in accordance with the agency's policies and procedures for public records requests.

Revocation of previously issued records retention schedules
All previously issued records retention schedules to the Department of Financial Institutions are revoked. The Department of Financial Institutions must ensure that the retention and disposition of public records is in accordance with current, approved records retention schedules.

Authority
This records retention schedule was approved by the State Records Committee in accordance with RCW 40.14.050 on December 5, 2012.

Signature on File	*Signature on File*	-	*Signature on File*
For the State Auditor: Cindy Evans	**For the Attorney General: Kathryn McLeod**	**For the Office of Financial Management: Cherie Berthon**	**The State Archivist: Jerry Handfield**

REVISION HISTORY

Version	Date of Approval	Extent of Revision
1.0	December 5, 2012	Consolidation and revision of all existing disposition authorities.

For assistance and advice in applying this records retention schedule, please contact the Department of Financial Institutions' Records Officer or Washington State Archives at:

recordsmanagement@sos.wa.gov

TABLE OF CONTENTS

1. AGENCY MANAGEMENT

This section covers records relating to the overarching management of agency business and its general administration which are not covered by the *State Government General Records Retention Schedule.*

See State Government General Records Retention Schedule for additional records relating to agency management.

1.1 LEGISLATIVE FILES

The activity of agency rulemaking and legislative activities.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68358 Rev. 0	***Rulemaking Files*** Documents agency rulemaking (WAC) as described in RCW 34.05.370 (the Washington Administrative Procedures Act). Includes but is not limited to: • The text of proposed rules with documents of agency internal review and comments; • Mailroom distribution records; • Rulemaking hearing sign-in sheets (including names and addresses of persons attending the hearing or giving testimony); • Summary of public rule hearing; written comments received regarding the proposed rule (regardless of when received), as well as any DFI response; • Original rulemaking orders and documents showing adoption date and record of filing with the Code Reviser (as well as assignment of WSR number).	**Retain** for 6 years after effective date of rule or date rulemaking was cancelled or expired *then* **Transfer** to Washington State Archives for appraisal and selective retention.	**ARCHIVAL** **(Appraisal Required)** NON-ESSENTIAL OPR

2. ENFORCEMENT

This section covers records relating to enforcement actions and investigations against regulated or unregulated financial entities.

2.1 ENFORCEMENT

The activity of enforcing the regulatory and statutory requirements of financial institutions chartered in the state.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68359 Rev. 0	***Administrative Orders*** Orders issued by the Director of Financial Institutions or a Division Director against a financial entity pursuant to an enforcement action.	**Retain** for 6 years after receipt *then* **Transfer** to Washington State Archives for appraisal and selective retention.	**ARCHIVAL** **(Appraisal Required)** NON-ESSENTIAL OPR
12-12-68360 Rev. 0	***Complaints*** Records relating to consumer or other complaints filed with Department of Financial Institutions, including those referred by other state agencies or agencies in other states. Includes, but is not limited to: • Correspondence, including complaint intake forms; • Notes and memoranda; • Compiled evidence; • Resolution documents not rising to the level of an administrative order; • Case-specific information sharing agreements between the Department and other agencies, state or federal. *Note: Complaint files are held separate from investigations files, secondary copies of complaints leading to investigations become part of the investigation file.*	**Retain** for 6 years after case closed *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

2.2 INVESTIGATIONS

The activity of investigating financial institutions chartered in the state.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68361 Rev. 0	***Investigations – Non-Securities*** Records of investigations conducted against non-securities entities. Includes, but is not limited to: • Correspondence, notes, and memoranda used as part of investigation; • Compilation of evidence; • Statements of Charges not attached to Administrative Orders. Excludes records covered by Administrative Orders (DAN 12-12-68359). *Note: Investigation files are held separate from original complaint files, secondary copies of complaints leading to investigations become part of the investigation files.*	**Retain** for 6 years after case closed *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR
12-12-68362 Rev. 0	***Investigations – Securities*** Records of investigations against securities entities conducted by the Division of Securities. Includes, but is not limited to: • Correspondence, notes, and memoranda used as part of investigation; • Compilation of evidence; • Statements of Charges not attached to Administrative Orders; • Case-specific information sharing agreements between the Department and other agencies, state or federal. Excludes records covered by Administrative Orders (DAN 12-12-68359). *Note: Investigation files are held separate from original complaint files, secondary copies of complaints leading to investigations become part of the investigation files.*	**Retain** for 15 years after case closed *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

3. EXAMINATIONS

This section covers records relating to the examinations of regulated financial entities.

3.1 EXAMINATIONS

The activity relating to the examinations and compliance of regulated financial entities. Also includes entities potentially subject to regulation.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68363 Rev. 0	***Examinations*** Documents created, received, or maintained that relate to examinations of any regulated entity or entity potentially subject to regulation. This includes all Reports of Examination (ROEs), as well as all documentation received or created necessary to support an ROE and is the evidence of the business practices and evidence of violations of deficient business practices. This includes, but is not limited to examinations of: • Consumer Loan Companies; • Mortgage Brokers; • Banks and Mutual Savings Banks; • Money Services Businesses; • Trust Companies; • Credit Unions and Credit Union Subsidiaries; • Check cashers and sellers, and small loan lenders; • Escrow agents and broker-dealers; • Investment advisors; This also includes, but is not limited to: • Entity- or individual-specific information sharing agreements between the Department and other agencies, state or federal; • Supervisory agreements and directives.	**Retain** for 6 years after created or received *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

3.1 EXAMINATIONS

The activity relating to the examinations and compliance of regulated financial entities. Also includes entities potentially subject to regulation.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68364 Rev. 0	***Examinations – Transitory/Temporary Documents*** Non-essential documents and copies of records for information gathering purposes and do not contain evidence of violations of deficient business practices, and are not specifically referenced in the Report of Examination (ROE). Excludes records covered by Examinations (DAN 12-12-68363).	**Retain until no longer needed for agency business after final report of examination is completed** *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OFM

4. LICENSING, CHARTERING, AND REGISTRATION

This section covers records relating to the licensing, chartering, and registration of financial institutions and individuals such as banks, credit unions, mortgage brokers, payday lenders and securities issuers and salespeople.

4.1 LICENSING, CHARTERING AND REGISTRATION

The activity relating to the applications, licensing, chartering and registration of financial institutions and entities doing business in the state.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68365 Rev. 0	***Criminal History Reports*** Documents created, received, or maintained regarding the criminal history or background checks of applicants, employees of existing regulated entities, and any other persons requiring licensure through the Department of Financial Institutions.	**Retain** until a licensing, chartering, or registration decision is made *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

4.1 LICENSING, CHARTERING AND REGISTRATION

The activity relating to the applications, licensing, chartering and registration of financial institutions and entities doing business in the state.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68366 Rev. 0	***Regulated Entity or Offering Files*** Records relating to specific regulated entities (firms or individuals) or offerings. Includes, but is not limited to: • Granted, denied, abandoned, rejected, surrendered, revoked, suspended, expired, or withdrawn applications for licenses, charters, or registered offerings, as well as all documents related to such applications; • Licensing files for consumer loan companies, mortgage brokers, loan originators, check cashers and sellers and payday lenders, money services businesses, escrow agents, escrow officers, broker-dealers, securities salespersons, investment advisor representatives, and investment advisors; • Registration files for the offering of securities, business opportunities, or franchises; • Chartering files for banks, savings banks, trust companies, and credit unions; • Records of major events in the life of a depositary financial institution; • Articles of incorporation, bylaws, and bonds for depositary financial institutions; • Credit union rosters; • Bond files for licensed, registered, or chartered institutions not otherwise maintained as part of a licensing, registration, or chartering file; • Notification filings for investment companies.	**Retain** for 6 years after license, charter, or registration ends, application is denied, or an application for additional authority is granted *then* **Destroy.**	NON-ARCHIVAL **ESSENTIAL** OPR

4.1 LICENSING, CHARTERING AND REGISTRATION

The activity relating to the applications, licensing, chartering and registration of financial institutions and entities doing business in the state.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68367 Rev. 0	***Reports by Regulated Entities*** Reports, forms, worksheets, and documents submitted as required or as voluntarily submitted by regulated and unregulated entities. Includes, but is not limited to: • Periodic reports of regulated activities; • Annual assessment forms, worksheets, and reports; • Shareholder meeting reports; • Surveys of non-regulated entities conducted by Department of Financial Institutions.	**Retain** for 6 years after receipt *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

4.1 LICENSING, CHARTERING AND REGISTRATION

The activity relating to the applications, licensing, chartering and registration of financial institutions and entities doing business in the state.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
12-12-68368 Rev. 0	***Testing and Continuing Education*** Documents created, received, or maintained regarding testing by individuals seeking professional licenses and records of compliance with continuing education requirements. Testing may be administered by the Department of Financial Institutions or by a vendor. Includes, but it not limited to licensure for: • Mortgage brokers, loan originators; • Check cashers and sellers and payday lenders; • Escrow agents, escrow officers, broker-dealers, securities salespersons; • Investment advisor representatives, and investment advisors. Includes, but is not limited to: • Completed test documents; • Continuing education sign-in sheets; • Materials generated and used during creation and revision of tests. *Note: Documentation of final license requirements and certifications are held in the applicants licensing files.*	**Retain** for 6 years after receipt *then* **Destroy.**	NON-ARCHIVAL NON-ESSENTIAL OPR

GLOSSARY

Appraisal

The process of determining the value and disposition of records based on their current administrative, legal, and fiscal use; their evidential and informational or research value; and their relationship to other records.

Archival (Appraisal Required)

Public records which may possess enduring legal and/or historic value and must be appraised by the Washington State Archives on an individual basis.

Public records will be evaluated, sampled, and weeded according to archival principles by archivists from Washington State Archives (WSA). Records not selected for retention by WSA may be disposed of after appraisal.

Archival (Permanent Retention)

Public records which possess enduring legal and/or historic value and must not be destroyed. State government agencies must transfer these records to Washington State Archives (WSA) at the end of the minimum retention period.

WSA will not sample, weed, or otherwise dispose of records fitting the records series description designated as "Archival (Permanent Retention)" other than the removal of duplicates.

Disposition

Actions taken with records when they are no longer required to be retained by the agency.

Possible disposition actions include transfer to Washington State Archives and destruction.

Disposition Authority Number (DAN)

Control numbers systematically assigned to records series or records retention schedules when they are approved by the State Records Committee.

Essential Records

Public records that state government agencies must have in order to maintain or resume business continuity following a disaster. While the retention requirements for essential records may range from very short-term to archival, these records are necessary for an agency to resume its core functions following a disaster.

Security backups of these public records should be created and may be deposited with Washington State Archives in accordance with Chapter 40.10 RCW.

Non-Archival

Public records which do not possess sufficient historic value to be designated as "Archival". Agencies must retain these records for the minimum retention period specified by the appropriate, current records retention schedule.

Agencies should destroy these records after their minimum retention period expires, provided that the records are not required for litigation, public records requests, or other purposes required by law.

Non-Essential Records

Public records which are not required in order for an agency to resume its core functions following a disaster, as described in Chapter 40.10 RCW.

OFM (Office Files and Memoranda)

Public records which have been designated as "Office Files and Memoranda" for the purposes of RCW 40.14.010.

RCW 40.14.010 – Definition and classification of public records.

(2) "Office files and memoranda include such records as correspondence, exhibits, drawings, maps, completed forms, or documents not above defined and classified as official public records; duplicate copies of official public records filed with any agency of the state of Washington; documents and reports made for the internal administration of the office to which they pertain but not required by law to be filed or kept with such agency; and other documents or records as determined by the records committee to be office files and memoranda."

OPR (Official Public Records)

Public records which have been designated as "Official Public Records" for the purposes of RCW 40.14.010.

RCW 40.14.010 – Definition and classification of public records.

(1) "Official public records shall include all original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use, and disposition of all public property and public income from all sources whatsoever; all agreements and contracts to which the state of Washington or any agency thereof may be a party; all fidelity, surety, and performance bonds; all claims filed against the state of Washington or any agency thereof; all records or

No. 80968-7

On Appeal from Snohomish County No.19-2-01383-31

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER and ANGELA LARSON,

***Plaintiff-Appellant*,**

v.

SNOHOMISH COUNTY *et al.*,

Defendant-Respondents.

APPELLANTS' REPLY TO SNOHOMISH COUNTY AND WASHINGTON STATE DEFENDANTS' RESPONSE TO MOTION TO MODIFY

Scott E. Stafne, WSBA No. 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Plaintiff-Appellant

I. Introduction

On June 19, 2020, Appellants Larsons filed their Motion to Modify the Commissioner's ruling requiring the designation of Clerk's Papers (CP) and Opening Brief (OB) to be filed on June 19, 2020, while their attorney was required to be sheltered at home. Because of technical problems, the Larsons did not get their motion filed with this Court's electronic filing system until 5:03 p.m. that day. The Larsons were later notified by this Court that because their filing was late it would not be considered as being filed until Monday, June 22, 2020 at 9:00 a.m.

On Monday June 22, 2020, at approximately 11:30 a.m. the Larsons filed an amended motion that included as part of that filing (a) the rulings the Larsons requested be modified; (b) the declaration of the Larson's attorney; and (c) the Skagit County court filing, *i.e.* CPs, designated as Index entry one by the Snohomish County Clerk, a Defendant/Appellant in this Appeal.

On June 24, 2020, Richard D. Johnson, this Court's "Court Administrator/Clerk" issued a letter order stating:

> On June 22, 2020, an amended motion to modify was filed in the above-referenced case. Any response to the motion is due by July 6, 2020. Any reply to the response is due 10 days after the response is filed. After the time period for the reply has passed, the motion will be submitted to a panel of this court for determination without oral argument. RAP 17.5(b). The parties will be notified when a decision on the motion has been entered.

On June 29, 2020, the Snohomish County Defendants/Respondents (including the Snohomish County Superior Court Judges and Court Clerk) responded to the Larsons' motion. The judges and Clerk did not dispute any of the facts set forth in Larson's motion to modify with regard to the CPs not being appropriately certified. Indeed, the Snohomish County Defendants did not oppose the motion; they only requested this Court set September 1 2020, as the "date certain on which their brief will be due. . . ." Response, p. 1.

Snohomish County Defendants asserted in favor of this date that Larson's attorney, who is 71 and suffers from several secondary conditions was already "allowed back to work" by Governor Inslee's phased reopening plan.

On July 2, 2020, the Washington State Defendants (Governor Inslee and Attorney General Robert Ferguson) joined in this response. They also did not dispute any of the factual allegations in the Larsons' motion.

The private Defendant/Respondents chose not to respond to the Larsons' motion for a modification. The Larsons' now Reply; asking for appropriate relief.

II. Argument

A. The Larsons have established judicial irregularity by the County Clerks, one of which is a party to this Appeal

No party disputes the certification by Melissa Brown— "county Clerk and ex-officio clerk of the superior court of the state of Washington in and for Skagit County" App. p. 2—is false and does not accurately certify

those pleadings she actually sent to the Snohomish County Superior Court on February 14, 2020.

What is troubling about the Skagit County Superior Court Clerk's false statement is the fact that it is false, but also that the Skagit County Superior Court apparently did not have all the pleadings that had been filed in the Clerk's record. Thus, any person would wonder why these seventeen pleadings that were previously filed with the court were missing when the record was transferred. *See* Beaton's handwritten note App. 1 And most fact finders would also wonder why when the Snohomish County Clerk became aware of this certification problem, she did not take steps to have the certification corrected by the Skagit County Clerk.

The Larsons are not accusing the Clerks of Skagit County and Snohomish County of anything improper at this point—other than their false certification—which they request be explained and accurately certified before proceeding with this Appeal.

B. This Court should order the Snohomish County Clerk to pay for the costs of having to designate all pleadings filed in the Skagit County Clerk as one index

Thus far Defendant/Respondent Snohomish County Clerk has failed to request payment for the CPs designated by Larsons under protest of the Commissioner's first order. *See* RAP 9.7. After the Larsons are provided by Defendant Snohomish County Court Clerk with the cost bill for such CP, the Larsons have two weeks to pay them. *Id.*

Designating all the court records filed with the Clerk of the Skagit County Clerk as a single docket entry was obviously necessary because the

first seventeen docket entries were missing when that Court record was certified to have been filed. The only way the filing of this court record could have been handled on the day it was filed by the Defendant/Respondent Clerk was as a single docket entry so that the record could be manipulated later to include the additional pleadings that were lost from the Skagit County court file when it was transferred.

There is no reason that Larsons should have to pay the extra costs for the Clerks' mishandling of the record and improper certification of the record below.

C. This Court should not order the Larsons' attorney, an individual vulnerable to the Covid-19 virus, to file an Opening Brief until he is able to do so.

Snohomish County Superior Court Judges and Clerk, as well as Defendants/Respondents Washington Governor and Attorney General argue that the COVID-19 Pandemic is less serious now in Snohomish County than in phase 1.

> The Larsons ask the Court to extend the time for filing their brief until sometime after the point when vulnerable persons, including their counsel, are "allowed back to work." Mot. at 1. But such persons are already allowed to work. Governor Inslee's Proclamation 20-25.4, of which this Court may take judicial notice, states that the "Stay Home, Stay Healthy" exceptions in the Safe Start Washington Phased Reopening County-by-County Plan are in effect as each county enters the different phases. Snohomish County (where opposing counsel works and resides) is in Phase 2, which permits professional services and office-based businesses, such as legal services, to operate.

> In spite of the COVID-19 Pandemic, Counsel has demonstrated his ability to effectively communicate with the Court. The motion before the Court includes a 20-page motion, declaration, and numerous attachments. Clearly, counsel has found ways to work from his office and coordinate with his paralegal that do not put him at risk of COVID-19 exposure.

Response by Snohomish Superior Court Judges, Clerk, and other Respondents, p. 1.

This argument misstates the evidence. The attorney and paralegal put themselves at risk to respond to the Commissioner's inappropriately timed order when they would have preferred not to. This amended motion asks this Court to modify the Commissioner's rulings in such a way as to provide justice for the Larsons, *i.e.* to allow their elderly, disabled attorney a fair chance without hurting himself to prepare a competent Opening Brief.

The Government Defendants in this Appeal do not dispute that Larson's 71-year-old attorney (who suffers from diabetes, heart disease, and immune deficiencies, *see* Stafne declaration, ¶¶ 23–34 and Exhibit 3 thereto) is a vulnerable person under these proclamations; instead, they argue he is entitled to work even if working might hurt him.

The Larsons claim this is not true. Under the *Safe Start Washington Phased Reopening County-by-County Plan*[1] issued by the Office of the Governor on July 7, 2020, High-Risk populations are "strongly encouraged, but not required, to stay home . . . ", *Id.* p. 8 & 10, unless "they are sick" or

[1] This proclamation is accessible at:
https://www.governor.wa.gov/sites/default/files/SafeStartPhasedReopening.pdf

are put in a position that may exacerbate their underlying medical conditions. *Id.* at p. 5. *See also* Proclamation 20-46.1 (High-Risk Employees —Workers' Rights); WAC 296-800-12005 *Cf.* June 24 *Order of the Secretary of Health 20-03*[2] (mandating the wearing of face masks statewide because "the worldwide COVID-19 Pandemic and its progression in Washington State continue to constitute an emergency threatening the safety of the public Health . . .". *Id.*, p. 1.)

Proclamation 20-46.1 is clear that employers and unions cannot put vulnerable workers, like the Larsons' attorney, in situations that might harm them. This proclamation states in pertinent part:

> WHEREAS, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued amendatory Proclamations 20-06 through 20-53 and 20-55 through 20-57, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and WHEREAS, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, has broadly spread throughout the state of Washington, significantly increasing the threat of serious associated health risks statewide; and
>
> * * *
>
> WHEREAS, *the threat of severe illness and death from COVID-19 to Washington State's public and private sector workers who are in*

[2] This Order of the Secretary of Health, 20-03, mandating the wearing of Face Coverings by people Statewide, is accessible at: https://www.governor.wa.gov/sites/default/files/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.pdf

> *these higher-risk groups is recognized, and action must be taken to protect them from working conditions that require them to be placed in situations where they may be exposed to infection by the virus that causes the COVID-19 disease;* and
> WHEREAS, during this critical period of virus spread throughout our state, public and private sector workers in these high-risk groups must have access to accommodations to prevent greater risk of contracting COVID-19, and these decisions cannot be left solely to the employer; and
>
> * * *
>
> NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, . . .
>
> * * *
>
> . . . continue to prohibit all public and private employers in Washington State from taking any action that is inconsistent with practices related to high-risk employees, as described in Emergency Proclamation 20-46. This prohibition shall remain in effect until 11:59 PM on August 1, 2020, unless extended beyond that date.
>
> FURTHERMORE, based on the above situation and under the provisions of RCW 43.06.220(1)(h), to help preserve and maintain life, health, property or the public peace and to support implementation of the above prohibited activities by employers, I also hereby continue to prohibit all public and private employers in Washington State and labor unions representing employees in Washington State from applying or enforcing any employment contract provisions that contradict or otherwise interfere with the above prohibitions and the intent of this Proclamation as described herein until 11:59 PM on August 1, 2020, unless extended beyond that date.

It is the Larsons position that this Court should take into account the vulnerability of their attorney's condition and the status of the Pandemic before ordering him to file an Opening Brief, before he is capable of doing

so. Alternatively, the Larsons request that their Opening Brief be required to be filed 60 days after the Clerk's Papers become available.

III. Conclusion

The Larsons' motion to modify should be granted so as to award the following relief: (1) require Defendant Snohomish County Clerk and Skagit County Clerk to properly certify the record and explain why it was not accurately certified in the first instance; (2) require Defendant Snohomish County Clerk to pay the cost of reproducing Index one as part of the CP's; and (3) take into account the vulnerable status of their attorney to the Pandemic—as well as the Pandemic itself—before requiring him to file an Opening Brief in this case.

DATED this 12th day of July 2020, at Arlington, WA.

By: /s / Scott E. Stafne

Scott E. Stafne, WSBA No. 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Plaintiff-Appellant

NO. 80968-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman,

Appellants,

v.

SNOHOMISH COUNTY *et al.*,

Respondents.

SNOHOMISH COUNTY'S RESPONSE TO APPELLANTS' AMENDED MOTION TO MODIFY THE COMMISSIONER'S RULING REQUIRING THE DESIGNATION OF CLERK'S PAPERS AND OPENING BRIEF TO BE FILED ON JUNE 19, 2020, WHILE LARSONS' ATTORNEY MUST BE SHELTERED AT HOME BECAUSE OF THE PANDEMIC

ADAM CORNELL
Prosecuting Attorney

LYNDSEY DOWNS, WSBA #37453
GEOFFREY A. ENNS, WSBA #40682
Deputy Prosecuting Attorneys
Attorneys for Snohomish County
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-6330

ARGUMENT

Respondent Snohomish County does not oppose the Larsons' motion to extend their deadline for filing their opening brief. But the County asks the Court to set a date certain on which their brief will be due, rather than the unspecified deadline proposed by the Appellants.

The Larsons ask the Court to extend the time for filing their brief until sometime after the point when vulnerable persons, including their counsel, are "allowed back to work." Mot. at 1. But such persons are already allowed to work. Governor Inslee's Proclamation 20-25.4, of which this Court make take judicial notice, states that the "Stay Home, Stay Healthy" exceptions in the *Safe Start Washington* Phased Reopening County-by-County Plan are in effect as each county enters the different phases. Snohomish County (where opposing counsel works and resides) is in Phase 2, which permits professional services and office-based businesses, such as legal services, to operate.

In spite of the COVID-19 pandemic, Counsel has demonstrated his ability to effectively communicate with the Court. The motion before the Court includes a 20-page motion, declaration, and numerous attachments. Clearly, counsel has found ways to work from his office and coordinate with his paralegal that do not put him at risk of COVID-19 exposure.

The County asks for a filing date of September 1, 2020, for the Larsons' brief so that this case is not delayed any more than it already has been.

Respectfully submitted on June 29, 2020.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: _____
LYNDSEY DOWNS, WSBA #37453
GEOFFREY A. ENNS, WSBA #40682
Deputy Prosecuting Attorneys
Attorney for Respondent Snohomish County

No. 80968-7

On Appeal from Snohomish County No. 19-2-01383-31

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER and ANGELA LARSON,

***Plaintiffs-Appellants*,**

v.

SNOHOMISH COUNTY *et al.*,

Defendants-Respondents.

APPELLANTS' AMENDED MOTION TO MODIFY THE COMMISSIONER'S RULING REQUIRING THE DESIGNATION OF CLERK'S PAPERS AND OPENING BRIEF TO BE FILED ON JUNE 19, 2020, WHILE LARSONS' ATTORNEY MUST BE SHELTERED AT HOME BECAUSE OF THE PANDEMIC

Scott E. Stafne, WSBA# 6964
Stafne Law *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Plaintiff-Appellant

1. IDENTITY OF MOVING PARTY:

Christopher and Angela Larson, the Plaintiffs below and Appellants here, ask for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT:

Modify the rulings of the Commissioner filed on April 30, 2020, and June 10, 2020, attached hereto as Attachment 1 and 2 respectively, requiring Larsons file their Designation of Clerk's Papers pursuant to RAP 9.6 and their Opening Brief no later than June 19, 2020, so as to require the Clerk's Papers, for which the designation was filed on June 12, 2020, be received by Larsons' attorney no later than August 1, 2020, and the Opening Brief to be filed by September 1, 2020, if vulnerable persons are allowed back to work on or before August 1, 2020. Alternatively, to modify the rulings to provide access to justice based on the circumstances herein including that judicial bias which would prevent a neutral adjudication of this case.

3. FACTS RELEVANT TO MOTION:

A. Facts Relating to Registration of Land Title (Torrens) Act

Washington law provides the option of registering interests in land instead of simply recording them. *Compare* Ch. 65.12 RCW and Ch. 65.08 RCW. The primary difference between "registering" and "recording" of

such interests is that those interests which are registered must be investigated and certified by county officials known as the Registrar of Titles and the Examiner of Titles before they are certificated in each county's public registration, *i.e.* Torrens system. Under Washington's "recording" system anyone claiming an interest in land can simply record, *i.e.* file a claim of land ownership or incumbrance, without having to provide any proof of the authentication or accuracy of the recording until years—sometimes decades—after a document has been recorded. Washington's early citizens were concerned this potential for fraud and forgery in *recorded* land records would result in the creation of secret liens and hidden equities that registration of land titles would prevent. *See e.g. In re in re Schnarrs*, 10 Wn. App. 2d 596, 601-02, 448 P.3d 820, 823 (2019).

The public land registration statute, *i.e.* Chapter 65.12 RCW, requires each county in Washington to create and operate a certificate of land title registration, *i.e.* Torrens, system. Each county registration system must allow persons with interests in land or their encumbrances to register their land title interests with the County immediately after county officers verify the authenticity of such interests by way of an investigation into the truth of such records. *See infra.*

In *Finley v. Finley*, 43 Wn.2d 755, 762, 264 P.2d 246, 251 (1953) the

Washington Supreme Court stated "[a]n extensive list of defects of title which the Torrens Act eliminates, which the recording acts do not eliminate, can be found in [R.G. Patton,] 19 Minnesota L. Rev. 519, 534 [1935].)(This article was last accessed by this author on June 16, 2020, at: https://scholarship.law.umn.edu/mlr/2106). Patton's list includes elimination of those risks which are otherwise inherent in recording systems, *i.e.* the secret liens, hidden equities and use of fraudulent documents, which do not require investigation of each title interest or incumbrance at the time of recording. As Patton explains:

> [Land registration systems] . . . secure immunity from risk of loss, or impairment of title from the dangers incident to a title based upon the recording system, such as: forged deeds (deed void); deeds recorded which have never been "delivered" (deed void); deed executed pursuant to a forged or undelivered power of attorney or executed after revocation of the power by death or insanity of the maker (deed void); a deed voidable because of infancy of the grantor; deed void (in some cases) because of mental incompetency of grantor; record void because of forgery of certificate of acknowledgment; will produced for probate after conveyance by heirs at law; deed from one other than the owner but having the same name as the owner (a species of forgery); deed by grantor supposed to be single but in fact married, or from a married grantor joined by a person who is not the grantor's spouse; void divorce decree; claimants not barred by a legal proceeding upon which a title is based; will partially revoked by birth of a posthumous child; overruling of decisions upon the principle of which the validity of a title depends; a

> trusteeship of which the illegality has not been discovered; deed signed "by mark" when grantor was not conscious; lack of title in a "record owner" by reason of matters which need not be made a matter of record or which do not depend upon the record (e.g., adverse possession); conflicting government patents, of which one only appears in the county records; etc.

19 Minnesota L. Rev. at 534.

In order to take advantage of Chapter 65.12 RCW the Larsons filed a land title application with the clerk of the Superior Court for Snohomish County on June 5, 2018. After their application was filed the Larsons expected it would be promptly acted upon by the Registrar of Land Titles and the Superior Court of Snohomish County, including that Court's judicially appointed Examiner of Titles. *See* RCW 65.12.050[1]; 65.12.090[2];

---

[1] This statute provides in pertinent part:

> The judges of the superior court in and for the state of Washington for the counties for which they were elected or appointed shall appoint a competent attorney in each county to be examiner of titles and legal adviser of the registrar. . . . Every examiner of titles shall, before entering upon the duties of his or her office, take and subscribe an oath of office to faithfully and impartially perform the duties of his or her office, and shall also give a bond in such amount and with such sureties as shall be approved by the judge of the said superior court, payable in like manner and with like conditions as required of the registrar. A copy of the bond shall be entered upon the records of said court and the original shall be filed with the registrar.

[2] This statute provides in pertinent part:

> The judges of the superior court in and for the state of Washington for the counties for which they were elected or appointed shall appoint a competent attorney in each county to be examiner of titles and legal adviser of the registrar. . . . Every examiner of titles shall, before entering upon the duties of his or her office, take and subscribe an oath of office to faithfully and impartially perform the duties of his or her office, and shall also give a bond in such amount and with such sureties as shall be

65.12.110[3].

When the Snohomish County Superior Court and Snohomish County Registrar/Auditor refused to take any action with regard to their title registration application the Larsons sued Snohomish County including several of its officials as well as all of its superior court judges—along with Washington's Governor and Attorney General, and those private Defendants that were threatening to foreclose on their home—for among other things, failing to comply with the Torrens Act. A copy of the Larsons' complaint against these Defendants is included as part of the 735+ pages of Docket Entry 1 of the Clerk's Papers, which is attached as ***Exhibit 1*** to the Appendix in support of this motion.

Request for Relief H to that complaint stated:

> WHEREFORE, Plaintiffs pray for such relief as is just and fair under the circumstances of this case, including without

---

> approved by the judge of the said superior court, payable in like manner and with like conditions as required of the registrar. A copy of the bond shall be entered upon the records of said court and the original shall be filed with the registrar.

[3] This statute provides in pertinent part:

> Immediately after the filing of the abstract of title, the court shall enter an order referring the application to an examiner of titles, who shall proceed to examine into the title and into the truth of the matters set forth in the application, and particularly whether the land is occupied, the nature of the occupation, if occupied, and by what right, and, also as to all judgments against the applicant or those through whom he or she claims title, which may be a lien upon the lands described in the application; he or she shall search the records and investigate all the facts brought to his or her notice, and file in the case a report thereon, including a certificate of his or her opinion upon the title. . . .

limitation:

* * *

H. All other relief which is fair and equitable under the long history of this case ***including … recusal of all superior court judges in any county which has failed to comply with the provisions of the Torrens Act and/or whom are in a similar position to these Snohomish County judicial defendants with regard to the issues being raised in this litigation***; *i.e.* superior court judges' acts and omissions have prevented landowners within their respective county from availing themselves of the protections afforded person with interest in land by the public and transparent land registration system established by the Torrens Act.

App., Ex. 1. p. 46, Request for Relief H. (Emphasis in original)

After the complaint was filed several Defendants, including the Snohomish County Defendants, moved to dismiss the case. Snohomish County officials and judges also moved to transfer venue of the case to Snohomish County. The Larsons moved to disqualify Skagit County judicial officers because they had the same interests as the Snohomish County Superior Court judges, *i.e.* because they were also refusing to comply with the Torrens Act thereby depriving Skagit County landowners from the protection against secret liens, hidden equities, and fraudulent documents afforded by that the Registration of Land Title (Torrens) Act in the same manner as were Snohomish County judges[4].

[4] A copy of the evidence supporting the motion to disqualify is set forth at App., Ex. 1. Declaration of Micah Anderson, pp. 147–162.

The Skagit County Superior Court, through Judge Svaren, denied *without explanation* the Larsons motion to disqualify him. He then granted Snohomish County Defendants', including the judges', motion to dismiss the Snohomish County Defendants *without prejudice* (leaving them open to being sued again). *See* App. Ex. 1, pp. 19–23. Judge Svaren also granted in part and denied in part private Defendant Quality Loan's motion to dismiss. Judge Svaren then transferred the venue of the case to the Snohomish County Superior Court, where the judges and the court clerk who had just been dismissed without prejudice were likely to become defendants again.

At some point after Judge Svaren's decisions referenced above, the material in the clerk's file was mechanically transferred by the Skagit County Clerk to the Snohomish County Clerk and assigned a new Snohomish County Superior Court docket number. Apparently, as a part of this process the Skagit County Clerk sent everything that Court had accumulated to the Snohomish County Clerk as a single docket entry consisting of numerous pleadings and other materials. Or the Snohomish County Clerk determined to file all these materials as a single docket entry. Whatever happened this was highly irregular because it resulted in the manipulation of the court case file in such a way that it could not be

properly certified. *See* Stafne declaration.

The clerks' treatment of all material as being filed in both the constituted egregiously irregular judicial conduct. *See* Stafne declaration.

On March 13, 2020, the Larsons filed a Motion with this Court "to require the [superior courts'] clerical personnel to comply with RAP 9.16." This motion and the other pleadings related to the motion were supported by declarations, all of which are incorporated herein.

On February 29, 2020, the Governor of Washington issued his first Stay Home Stay Healthy order related to the COVID-19 coronavirus Pandemic. *See* Stafne declaration.

B. Facts related to public employees, including judicial officials, bias against the Registration of Land Titles (Torrens) Act

In their complaint the Larsons allege (and in their pleadings Larsons offer evidence) that county Auditors throughout Washington state have been attempting to have Washington's Registration of Land Titles (Torrens) Act repealed at the same time these and other County officials were purposely refusing to comply with that law. *See* Complaint, App. Ex., *e.g.* 1, 3.2–3.24. *See also* App. pp. 75–95.

Among the evidence the Larsons presented of public and judicial officer bias against the Torrens Act were lobbying materials from the

Washington State Association of County Auditors (WSACA), which urged repeal of that statute at the same time these officials were refusing to comply with the statute. The Auditors (ex officio Registrars of Title) misrepresented to Washington's legislature:

> Torrens (Registered Land) is a system of land registration defined under 65.12 and supported by 105 subchapters (65.12.005 through 65.12.900). It is a complex, labor intensive system of land registration that must be kept separate from our standard recording systems. It requires counties maintain an employee as the Registrar of Title[5]. The registrar must maintain and verify appropriate chain of title, the role modernly performed by title companies[6].
>
> Auditors support the proposed bill that would abolish Torrens and instead record land title using modern methods of recording and preserving documents.

App. Ex. 1, pp. 711–735.

It was the Larsons' position that this, and other evidence in the record below,[7] documented that judges throughout Washington were

---

[5] This is untrue. The Auditor is ex officio the Registrar of the County's registration system. *See* RCW 65.12.050 ("The county auditors of the several counties of this state shall be registrars of titles in their respective counties; . . .") The Larsons assert the fact that county auditors are lying to the legislature in this obvious regard suggests they are sufficiently biased against the law so as to distort its provisions.

[6] The Larsons' dispute that Title Companies play the same chain of title roles as would public officials charged with maintaining accurate title documents. It is the Larsons' position that such private insurers actually benefit, as do public employees in Washington, when property encumbered with secret liens and hidden equities are allowed to be transferred in ways which benefit them through courts. *See infra*.

[7] Such evidence included among it the declaration of Micah Anderson, which proved that Skagit County Superior Court judicial officers and Clerk were in the same position

purposely refusing to comply with their duties under the Torrens Act so as to allow money lenders and debt buyers to use Washington's land recording system to manipulate chain of title evidence to foreclose and sell off peoples' real property for their economic advantage when the judges had no legal right to do so.

After their case was transferred to the Snohomish County Superior Court following Skagit Judge Svaren's order the Larsons filed a proposed Amended and Supplemental Complaint which further refined their claims against Washington State officials and Snohomish County officials and its superior court judges. The Larsons proposed Amended and Supplemental Complaint alleged Defendants Washington State Treasurer and the Washington State Investment Board (SIB) were managing public employee retirement funds for public employees, including judicial officers, in a way that promoted the interests of the wealthy and enforcement of the Washington's Deeds of Trust Act, Chapter 61.24 RCW, against the interests of property owners generally and their rights to utilize the Torrens Act to do so. App., Ex. 2, Proposed Amended and Supplemental Complaint, at paragraphs 1.13–120; 3.19–320; 4.45.

---

with regard to their non-compliance with the Torrens Act as were Snohomish County judicial officers and Clerk. *See* App., Ex. 1, pp. 147–162.

In 2007 the political branches of Washington's government eliminated judicial officers' retirement accounts and required that all public officials have the same retirement accounts. *See* Washington State Department of Retirement Systems Comprehensive Annual Financial Report Funds of the State of Washington for the Year Ended June 30, 2018[8], p. 86, 144–5. These funds invested heavily at that time (as they do now) in mortgage backed securities. *See* Washington State Investment Board Thirty-Seventh Annual Report 2018, pp. 27–29, 36–37, 39, 42[9].

Indeed, the State Investment Board 2018 report indicates that the Investment Board allocates approximately twenty percent of its retirement fund investments as Fixed Income Assets. *Id.* at 45–46. Mortgage Backed Securities are targeted to comprise five to forty-five percent of the Fixed Fund Asset Class. This suggests these instruments, which total in excess of billions dollars of public employees' retirement assets are only slightly more risky than U.S. Treasury bonds; notwithstanding, this certainly would not be the case if Washington courts

[8] This report can be accessed at the following government website: https://www.drs.wa.gov/administration/annual-report/cafr/CAFR-2018.pdf
The Larsons request this Court take judicial notice of the evidence referenced in all the government reports cited herein.

[9] Accessible at http://sib.wa.gov/financial/pdfs/annual/ar18.pdf.

still granted foreclosures as Wash. Const. art. IV, § 6 requires, *i.e.* pursuant to superior courts equitable jurisdiction.

While their motion to amend the complaint was pending (it would have reinstated among other things the Larsons claims against judicial officers) the Larsons moved to have all the judicial officials of the Snohomish County Superior Court disqualified. That motion, regarding both judges and commissioners, was granted by the Presiding Judge who then promptly appointed Judge Svaren as a pro tem judge of the Snohomish County Superior Court. The Larsons again requested Judge Svaren to disqualify himself based on his interest in the outcome of the case; *i.e.* he and his Court also refused to comply with their duties under the Torrens Act thereby depriving Skagit County property owners of the benefits of protection against land record fraud.

In denying the motion to disqualify, Judge Svaren refused to acknowledge that he had any interest in the case ("I don't have a dog in that fight) when this was categorically not true.

The Larsons assert here for the purposes of this motion (as well as all aspects of the underlying case and this Appeal generally) that the decision of the political branches to align judicial officers retirement funds with those of public employees generally was and remains constitutionally

problematic because the investment standards for public employees generally are based on the reasonably prudent investment standard, *i.e.* maximizing profit, *see* RCW 43.33A.140, while the standard for accumulating pension funds for judicial retirement funds must only involve investments that would not tempt the average person acting as a judicial officer to be anything less than a neutral adjudicator in cases that come before her[10].

To be clear it is the Larson position in this motion, and with regard to this Appeal, generally that judicial officers should not have investments in mortgage-backed securities because this incentivizes rulings which result in foreclosures based on any alleged default, without regard to the equities of the forfeiture—such as whether the entities or persons seeking foreclosure have any right to the monies under the original deed of trust security interest and Washington law.

Accordingly, it is the Larsons' contention here that the political

[10] The Larsons contend this legal standard applicable to judicial officers is fact, not argument. *See e.g. Rippo v. Baker*, 137 S. Ct. 905 (2017). *See also Williams v. Pennsylvania*, 136 S. Ct 1899 (2016)("[N]o man [or woman] can be a judge in his own case and no man [or woman] is permitted to try cases where he [or she] has an interest in the outcome" citing *In re Murchison*, 349 U.S., 136, 75 S. Ct. 623 (1955) *Id.* at 136 S. Ct. at 1905-6.) *See also Cain v. White*, No. 18-30955, 2019 U.S. App. LEXIS 25437 (5th Cir. Aug. 23, 2019); *Caliste v. Cantrell*, No. 18-30954, 2019 U.S. App. LEXIS 26288 (5th Cir. Aug. 29, 2019).

branches of Washington's government could not constitutionally undercut the separation of powers principles which require neutrality of the judicial department by enacting statutes which tempt judges to share in the plunder being seized by banks in alliance with government employees. *See infra*.

ARGUMENT

The Commissioner is a judicial officer under of RCW 2.28.030 (1)

As previously indicated RCW 2.28.030(1) states: "A judicial officer is a person authorized to act as a judge in a court of justice." The Commissioner who has ordered Stafne to submit Larson's Opening Appeal Brief during this Pandemic while Stafne is supposed to be sheltering at home is clearly acting as a judicial officer of this Court when she renders procedural decisions for it.

When it comes to Pandemics it is the political branches of state governments that have the authority to require people like Stafne to shelter at home–and not work–in order to protect local communities. In *South Bay United Pentecostal Church v. Gavin Newsom*, 590 U.S. __, 2020 U.S. LEXIS 3041 (May 29, 2020) the issue before the Supreme Court was whether the Church could obtain an injunction against enforcement of an executive order restricting the size of the Church's worship services. A

majority of the Supreme Court denied the injunction, stating that emergency regulations with regard to the COVID-19 coronavirus Pandemic should not normally be created by the judicial branch of government. "[Emergency regulations] should not be subject to second-guessing by an 'unelected federal judiciary'" which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *citing Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985). *See also Jacobson v. Massachusetts,* 197 U. S. 11, 24–25 (1905); *In re Abbott,* 954 F.3d 772, 778 (5th Cir. 2020); *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020); *Robinson v. AG*, 957 F.3d 1171 (11th Cir. 2020).

In Washington the power of government to protect the people has been delegated to the Governor. *See e.g.* RCW 38.08; 38.53; and 43.06. No judicial officer has the authority to remove Stafne from the protections afforded by law to peoples having similar disabilities. *See e.g.* U.S. Const. Fourteenth Amendment; Wash. Const. art. 1, §§ 3 and 12. *See also Tennessee v. Lane,* 541 U.S. 509, 124 S. Ct. 1978 (2004).

When the judicial officer issued the orders directing the Larsons to (a) designate the clerk's papers or contact the superior court with regard to them; and (b) to designated the clerk's papers and file the Opening

Brief by June 19, 2020, Stafne was precluded by the Governor from working. The Commissioner did not have the authority to rescind the Governor's Order.

If judges do not have the authority acting under the constitutional structure of our governments to require Stafne to work at a time when the Governor has proclaimed that it is unsafe for him and his community for him to work, then a magistrate also does not have any such authority either.

Why are officers of the court going to such extremes, *i.e.* putting the community in danger, to prevent this case from being decided carefully upon its merits?

The Separation of Power and America's Adversarial System of Justice

Recently a panel of this Court refused to consider whether it and the court below were biased within the meaning of due process precedents based on the structuring of the judiciary's retirement funds in such a way that judicial officers substantially benefit from their decisions allowing securities investors, like themselves, to benefit from foreclosing on securitized mortgages. Here's how the panel of judges answered this straightforward question.

C. Judicial Disqualification

> The Petersons argue that the "likely explanation" for the trial court's ruling against them is that "Washington's judges . . . have been financially incentivized to side with entities, like US Bank, in foreclosing on people's real property regardless of what the equities are because public employees benefit economically." Thus, they argue the trial court failed to determine whether it could provide a fair and neutral forum under the meaning of the Due Process Clause of the United States Constitution's Fourteenth Amendment. US Bank argues the Petersons cannot bring this claim for the first time on appeal and disagree with the argument on its merits. We decline to hear this issue for the first time on appeal.
>
> We may refuse to review any claim of error not raised in the trial court. RAP 2.5. Washington courts have applied the doctrine of waiver to similar claims, such as those of bias and under the appearance of fairness doctrine. *See In re Marriage of Wallace*, 111 Wn. App. 697, 705 n.1, 45 P.3d 1131 (2002) (reviewing various cases in which Washington courts have declined to hear claims of bias and appearance of fairness for the first time on appeal). The Petersons could have, but did not, file a notice of disqualification with the trial court under RCW 4.12.050. They argue they could not possibly have raised their arguments about unconstitutional conduct by the trial court until that conduct occurred. But the Petersons' argument against Washington judges overseeing foreclosure proceedings apparently applies to any Washington trial judge acting in foreclosure proceedings at any time, so the trial court could have heard the argument. The Petersons did not raise this issue below and we decline to hear it here.

U.S. Bank Nat'l Ass'n v. Peterson, No. 80125-2-I, 2020 Wn. App. LEXIS 1692, at *9-10 (Ct. App. June 15, 2020)

The problem with that panel's ruling is that the Petersons also challenged the neutrality of the Panel based on its deciding cases against Washington's property owners that benefitted the Panel judges own

economic interests. Thus, the neutrality of both the judges on the panel—as well as the trial judge below—was being challenged.

The panel had no right to evade Petersons' challenge to the Panel's unconstitutional bias by erroneously claiming the Petersons had only challenged the bias of the trial judge. *Cf. Williams v. Pennsylvania*, 136 S. Ct 1899 (2016)[11]. And neither does the judicial officer on this Court of Appeals who seeks to protect the judicial department from having to provide the parties with a full and fair adjudication of this case have the right to protect this Court from having to fairly decide the separation of powers and justice issues being raised here by not giving the Larsons an adequate opportunity to brief those important neutrality issues.

The separation of governmental powers inherent in both the United States Constitution and the Washington State Constitution can only exist when the people who run the government respect the need for such separation. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). Such respect does not exist when the people who operate the all three branches of the government unite against the governed to create

[11] In *Williams* an appellate court judge was alleged to be unconstitutionally biased against a party after the lower court lost jurisdiction. The United States Supreme Court sustained Williams' due process neutrality challenge raised against the appellate judge.

incentives for government employees to take the peoples' properties.

Our Founders recognized that an unholy alliance among those who operate the government creates the very basis for such tyranny as is antithetical to the reasons this country was originally formed.

> For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[12] . . . [A]s liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; . . .
>
> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . .

Hamilton, Alexander, Federalist Papers: No. 78 "The Judiciary Department"[13]

Recently the great people of this once great nation have been roused by their government's atrocities against them to peacefully demonstrate in support of their government allowing them to breathe the air of life and liberty their organic law promises. The Peoples' demonstrations clearly indicate that the judicial departments of democratic republics, like ours, should heed the actual language of our Constitutions rather than their own court made precedents that too often elevate immunities for a totalitarian

---

[12] Citing to "[t]he celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." "Spirit of Laws." vol. i., page 186.

[13] Last accessed on June 19, 2020 at: https://avalon.law.yale.edu/18th_century/fed78.asp#1T

regime over the Natural Law our Founders and Framers intended we should enjoy.

For the People will not—and should not—accept a government that seeks to protect its own workers' best interests at the expense of the people who are being governed to promote the best interests of an Oligarchy.

CONCLUSION

This Court should modify the Commissioner's ruling so as to allow the Larson's attorney, who is a vulnerable person, from having to prepare an Opening Brief based on an inadequate record during a Pandemic in which he has been instructed by the Governor of Washington to shelter at home.

Dated this 22nd day of June 2020,

Respectfully submitted,

By: */s/ Scott E. Stafne*
Scott E. Stafne, WSBA# 6964
Stafne Law Advocacy *& Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Plaintiff-App

Attachment 1

Larson et al. v. Snohomish County et al.

Case No. 80968-7

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

April 30, 2020

Lyndsey Marie Downs
Civil Div Snohomish County Prosecutor's
3000 Rockefeller Ave # MS504
Everett, WA 98201-4046
ldowns@snoco.org

George Bradley Marsh
Civil Div Snohomish County Prosecutor's
3000 Rockefeller Ave
Everett, WA 98201-4046
gmarsh@snoco.org

Scott Erik Stafne
Stafne Law Advocacy & Consulting
239 N Olympic Ave
Arlington, WA 98223-1336
scott@stafnelaw.com

Geoffrey Alan Enns
Snohomish County Prosecutor's Office
3000 Rockefeller Ave
Everett, WA 98201-4046
Geoffrey.Enns@co.snohomish.wa.us

KC Lynne Hovda
Attorney at Law
600 University St Ste 3600
Seattle, WA 98101-4109
kc.hovda@stoel.com

Donald Jeffrey Courser
Stoel Rives LLP
760 SW 9th Ave Ste 3000
Portland, OR 97205-2587
jeffrey.courser@stoel.com

Alicia O Young
WA State Attorney General's Office
PO Box 40100
Olympia, WA 98504-0100
alicia.young@atg.wa.gov

Rene David Tomisser
Office of the Attorney General
7141 Cleanwater Dr SW
Tumwater, WA 98501-6503
rene.tomisser@atg.wa.gov

Robert A. Bailey
AFRCT LLP
301 N Lake Ave Ste 1100
Pasadena, CA 91101-4158
rbailey@afrct.com

R July Simpson
Washington Atty General
7141 Cleanwater Dr SW
Tumwater, WA 98501-6503
july.simpson@atg.wa.gov

Joseph Ward McIntosh
McCarthy & Holthus, LLP
108 1st Ave S Ste 300
Seattle, WA 98104-2104
jmcintosh@mccarthyholthus.com

Delian Petrov Deltchev
Anglin Flewelling Rasmussen Campbell &
701 Pike St Ste 1560
Seattle, WA 98101-3915
ddeltchev@afrct.com

Robert William McDonald
Quality Loan Service Corp of Washington
108 1st Ave S Ste 202
Seattle, WA 98104-2538
rmcdonald@qualityloan.com

CASE #: 80968-7-I
Christopher E. Larson, et ano., Appellants v. Snohomish County, et al., Respondents

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on April 29, 2020, regarding Appellant's Motion to Require Clerical Personnel to Comply w/ RAP 9.6:

The appellants have filed a motion to require the Snohomish County Superior Court Clerk's Office to comply with their view of RAP 9.6 by allowing them to designate portions of a single docket entry and/or reducing the costs the clerk may charge for preparing the clerk's papers. The motion is denied for the reasons below.

A party seeking appellate review has the burden to provide an adequate appellate record by filing a designation of clerk's papers in the trial court. In re Detention of Halgren, 156 Wn.2d 795, 804, 132 P.3d 714 (2006). When an appellant fails to meet this burden, the challenged trial court decision will stand. Id. It is appellants' burden to designate the clerk's papers necessary to review. RAP 9.7 allows the trial court clerk to charge up to 50 cents per page. To the extent appellants are unable to pay for the preparation of the clerk's papers because of indigency, they may seek expenditure of public funds under RAP 15.

As to appellants' claim that they should be allowed to designate only part of certain entries in the Snohomish County Superior Court docket, RAP 6.2(b)(2) refers to entries in the superior court docket as "pleadings" and RAP 9.6(c)(1) provides that "[f]ull copies" of each "pleading" must be included "unless the trial court determines otherwise." It appears undisputed that all the pleadings filed in the Skagit County Superior Court before the transfer of the case to Snohomish County are included in a single docket entry - and therefore a single "pleading" - in the Snohomish County case. Therefore, RAP 9.6(c)(1) requires the clerk to provide a full copy of that docket entry if designated, regardless of then number of pages, "unless the trial court orders otherwise."

Here, appellants have not filed a designation of clerk's papers. Their motion is therefore premature. And, RAP 9.6(c)(1) makes clear that the trial court is in the best position to determine whether they should be allowed to seek less than a full copy of any particular docket entry. The motion is denied without prejudice to appellants' ability to seek relief in the trial court.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAM

Attachment 2

Larson et al. v. Snohomish County et al.

Case No. 80968-7

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

June 10, 2020

Lyndsey Marie Downs
Civil Div Snohomish County Prosecutor's
3000 Rockefeller Ave # MS504
Everett, WA 98201-4046
ldowns@snoco.org

George Bradley Marsh
Civil Div Snohomish County Prosecutor's
3000 Rockefeller Ave
Everett, WA 98201-4046
gmarsh@snoco.org

Scott Erik Stafne
Stafne Law Advocacy & Consulting
239 N Olympic Ave
Arlington, WA 98223-1336
scott@stafnelaw.com

Geoffrey Alan Enns
Snohomish County Prosecutor's Office
3000 Rockefeller Ave
Everett, WA 98201-4046
Geoffrey.Enns@co.snohomish.wa.us

KC Lynne Hovda
Attorney at Law
600 University St Ste 3600
Seattle, WA 98101-4109
kc.hovda@stoel.com

Donald Jeffrey Courser
Stoel Rives LLP
760 SW 9th Ave Ste 3000
Portland, OR 97205-2587
jeffrey.courser@stoel.com

Alicia O Young
WA State Attorney General's Office
PO Box 40100
Olympia, WA 98504-0100
alicia.young@atg.wa.gov

Rene David Tomisser
Office of the Attorney General
7141 Cleanwater Dr SW
Tumwater, WA 98501-6503
rene.tomisser@atg.wa.gov

Robert A. Bailey
AFRCT LLP
301 N Lake Ave Ste 1100
Pasadena, CA 91101-4158
rbailey@afrct.com

R July Simpson
Washington Atty General
7141 Cleanwater Dr SW
Tumwater, WA 98501-6503
july.simpson@atg.wa.gov

Joseph Ward McIntosh
McCarthy & Holthus, LLP
108 1st Ave S Ste 300
Seattle, WA 98104-2104
jmcintosh@mccarthyholthus.com

Delian Petrov Deltchev
Anglin Flewelling Rasmussen Campbell &
701 Pike St Ste 1560
Seattle, WA 98101-3915
ddeltchev@afrct.com

Robert William McDonald
Quality Loan Service Corp of Washington
108 1st Ave S Ste 202
Seattle, WA 98104-2538
rmcdonald@qualityloan.com

CASE #: 80968-7-I
Christopher E. Larson, et ano., Appellants v. Snohomish County, et al., Respondents

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on June 10, 2020, regarding Appellant's failure to file the designation of clerk's papers and opening brief:

The designation of clerk's papers has been overdue since February 12, 2020. The Appellants' brief has been overdue since May 26, 2020. Appellants should file the designation of clerk's papers and opening brief, or proper motions for extension of time, by June 19, 2020. Failure to do so may result in sanctions and/or dismissal of this appeal.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAM

No. 80968-7

On Appeal from Snohomish County No.19-2-01383-31

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER and ANGELA LARSON,

***Plaintiffs-Appellants*,**

v.

SNOHOMISH COUNTY *et al.*,

Defendants-Respondents.

SCOTT E. STAFNE'S DECLARATION IN SUPPORT OF AMENDED MOTION TO MODIFY THE COMMISSIONER'S RULING

Scott E. Stafne, WSBA# 6964
Stafne Law *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Plaintiff-Appellant

1. My name is Scott E. Stafne. I am the attorney for the Larsons in this Appeal. I am over the age of majority and competent to make this declaration. I make this declaration as their attorney and/or based on such personal knowledge as is set forth herein.

2. A Commissioner, *i.e.* judicial officer within the meaning of RCW 2.28.030(1), of this Court has ordered me to (a) designate the Clerk's Papers and Exhibits for this Appeal pursuant to RAP 9.6 by June 19, 2020; and (b) to also file the Larsons' Opening Brief by June 19, 2020, notwithstanding serious irregularities with the lower court's record.

3. The case below was originally filed in the Skagit County Superior Court against, among others, some Snohomish County officials and *all the Snohomish County Superior Court Judges*—as well as the Governor and Attorney General of Washington—pursuant to RCW 36.01.050. Judge Svaren of the Skagit County Superior Court originally dismissed the Snohomish County officials and judges from the case without prejudice and then transferred the case to the Snohomish County Superior Court for adjudication.

4. After Judge Svaren ordered transfer of the case to the Snohomish County Superior Court the Clerk for Skagit County apparently attempted to transfer all the materials that court had accumulated

regarding the case to Snohomish County. Those accumulated documents appear to have been filed by the Snohomish County Clerk as a single docket entry, *i.e.* Docket Entry 1. Docket Entry 1 is 735 pages long. Docket Entry 1 is attached as ***Exhibit 1 to Appendix 1*** in support of this Motion. *See* App., *Exhibit 1*, pp. 1–735.

5. I have been practicing law since 1974. Based on my experience practicing law since 1974 it is my judgment that Docket No. 1 is quite irregular for the reasons alluded to in the Larsons' previously filed "Motion to Require Clerical Personnel to Comply with RAP 9.6" and the declarations of LeeAnn Halpin and myself in support of such motion and reply, which are hereby incorporated herein.

6. Other reasons Docket Entry 1 is highly irregular for a single docket entry in a court of record are apparent from Docket Entry 1 itself.

7. The first two pages of Docket Entry 1, *i.e.* App., Ex. 1, pp. 1–2, appear to be a letter about and certification of the record being exchanged between the two County Clerks' offices. Page 1 is the letter sent by the Skagit County Clerk on February 12, 2019, to the Snohomish County Clerk (which was apparently received—or at least filed on February 14, 2019). On the side of letter, however, is handwriting which states: "T/C Clerk – we didn't receive sub 1-17 > received sub 1-17 on 2/22."

8. Page 2 of ***Exhibit 1*** of the Appendix certifies on February 14, 2020, to the Snohomish County Superior Court as follows:

> CERTIFICATION:
>
> I, MELISSA BROWN, COUNTY CLERK AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SKAGIT COUNTY, DO HEREBY CERTIFY THAT THE FOREGOING ARE AND CONSTITUTE THE ORIGINAL RECORD IN THE ABOVE NUMBERED CASE AS THE SAME WERE ORIGINALLY FILED AND NOW APPEAR OF RECORD IN SAID CASE IN MY OFFICE. . . .

9. Thus, although the certification of the record received by the Snohomish County Clerk states that it "is a full, true and correct copy of the original" as of February 12, 2019, the handwritten notes on page 1 indicate this is not true. This writing documents that all the materials certified to have been sent by the Skagit County Clerk to the Snohomish County Clerk either were not sent or did not show up on the other (Snohomish County Clerk) end until February 22, 2019.

10. The first 17 filings that were not included were important ones. They included, among others, the Larsons' complaint and those pleadings related to Snohomish County's motions to dismiss and for transfer of venue. One must wonder if these records were not in the Skagit County Court file where the parties filed them, where were they? Who took them and WHY?

11. Pages 3–6 of Appendix, Exhibit 1 includes the Skagit County Court's docket, *i.e.* an itemization of the 35 individual pleadings in the Skagit County Superior Court record. But the materials in Appendix Exhibit 1 do not track these records. Instead Exhibit 1 appears to be a mishmash of materials many of which I am not sure were ever filed with the Skagit County Superior Court.

12. As a long-time attorney, it is my experience that blatantly inaccurate judicial record-keeping is not common, but highly irregular. Usually, pleadings that have been filed with the court are not removed from the court docket as they have been in this case.

13. I believe based on my experience with this and other Torrens Act cases that the reasons for the irregularities here include (a) the Snohomish County Clerk being a Defendant in this case; (b) the fact that both Snohomish and Skagit counties, including their officials and judges,

are refusing to comply with the Torrens Act in c) such a way as to benefit themselves and other government workers both professionally and economically.

14. One of the several experiences that lead me to believe that Washington's judicial officers are sensitive to complaints they are not complying with the Torrens Act is that in one of those cases involving original proceedings against judges, a clerical official accepted service of process on behalf of the Chief Justice of the Washington Supreme Court. Then she turned around a few days later and asserted she was a judicial official and dismissed the action against the Chief Justice, claiming the Chief Justice had not been served when she accepted service on her behalf.

15. To reiterate in over 45 years of legal practice I have never seen a Clerk's office do anything like this before. My understanding of the reason for court records being stored and organized by docket entries is so that the parties and the appellate courts' judicial officers and other personnel have ready access to an organized case file in order to neutrally adjudicate the merits. If clerks manipulate court filings, they can arbitrarily deny citizens access to justice.

16. I had personally practiced law in the Skagit County Superior Court before I filed this case on behalf of the Larsons. One of the cases I litigated in that superior court and then on appeal was *Stafne v. Snohomish Cty.*, 156 Wn. App. 667, 234 P.3d 225 (2010) aff'd on other grounds *Stafne v. Snohomish Cty.*, 174 Wn.2d 24, 271 P.3d 868 (2012).

17. My former law firm, Stafne Trumbull, also practiced law in that superior court in cases I am familiar with before this case which is the subject of this Appeal began. *See e.g. Ewing v. Glogowski*, 198 Wn. App. 515, 394 P.3d 418 (2017).

18. There was never any indication in those cases that the judicial record in the trial court had been tampered with.

19. I first began to appreciate the contours of this problem when my paralegal began to prepare a draft designation of Clerk's Papers. *See e.g.* my declarations in support of the Larsons' motion to have the clerical staff comply with RAP 9.6. As I explained in those declarations, I was terribly busy at the time, so based on my experience I decided to file a motion to require the superior court clerical personnel create an adequate record. I was not aware at that time that there was evidence the clerks had manipulated the record.

20. On April 30, 2020,—during the middle of the COVID-19 Pandemic, this Court through its Commissioner denied the Larsons any relief with regard to the creation of an adequate record. The Commissioner's Order was issued when I was sheltering at home and unable to practice law.

21. The Commissioner issued a final Order with regard to this matter directing me to designate the Clerk's Papers and file the Larsons' Opening Appeal Brief on June 19, 2020, on June 10, 2020, when the office I worked for was temporarily closed. I immediately began attempting to comply with this judicial officer's order by having my paralegal LeeAnn Halpin file a designation of Clerk's Papers from her home which included everything I might possibly need.

22. I then began to look at the record the two elected County Clerks and their staffs had created in this case. I did so with somewhat of a jaundiced eye because the Snohomish County Clerk was also a named Defendant in the lawsuit for which this abysmal record had been created.

23. I am a 71-year-old man. I suffer from several serious underlying conditions which make the likelihood of my contracting the COVID-19 virus probable if I do not avoid people. This includes avoiding my

paralegal LeeAnn Halpin. As a result, the law office where I work is presently temporarily closed, so she and I are on unemployment. I had informed the unemployment compensation department before the Commissioner created this mess that I did not anticipate being able to return to work until August 1, 2020.

24. I have previously moved several courts, including this Court, to extend briefing schedules or allow me to withdraw from cases because of my inability to provide my clients with competent counsel during this Pandemic.

25. Exhibit 3 of the Appendix is a copy of the motion and declaration I filed in *Jay J. John et al. v. Quality Loan Service Corp. of WA et al.,* U.S. District Court for the Eastern District of Washington Cause No. 4:20-CV-05008. My declaration relating to that motion also includes as an exhibit the motion and declaration I filed with this Court in *PNC NA, its successor in interest and/or assigns v. Cozza*, Division One Washington Court of Appeals No. 809661-1. Both motions and the declarations represent accurate facts and circumstances which continue to exist as to me, and both set forth facts establishing I am required and entitle to shelter at home and not work until it is safe for me to return to work

and I have access to a workplace that will allow me to competently practice law.

26. My declaration in the John's filing also includes as exhibits copies of several of the Governors' "Stay at Home – Stay Healthy" Proclamations which specifically apply to me as a person particularly susceptible to the virus. Like my testimony in that declaration, I also incorporate herein those Proclamations herein, and request this Court judicially notice and apply them.

27. I want to bring to this Court's attention an additional fact that was not available to me when the pleadings contained in Appendix 3 were filed, which is that I have been tested for the COVID-19 antibodies and have none; thus, indicating I remain susceptible to the disease. I would also note that current news reports indicate that the virus remains problematic for people like me in Washington and throughout much of the United States.

28. I include here for the Court's reference the government website internet addresses for several of the applicable Proclamations and Executive Orders which apply here:

A. Proclamation 20-05 issued on February 29, 2020, by Washington's Governor establishing a State of Emergency in Washington as a result of the COVID-19 Coronavirus pandemic[1]

B. Proclamation 20-25.1[2].

C. Proclamation 20-25.2[3].

D. Proclamation 20-25.3[4].

E. Proclamation 20-25.4[5].

F. Proclamation 20-25.46.1[6]. establishing protections for High Risk workers.

29. I cannot effectively work from home because I live in the foothills of the Cascade Mountains and internet access at home is so slow that I cannot prepare documents for most of the day.

---

[1] https://www.governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf

[2] https://www.governor.wa.gov/sites/default/files/proclamations/20-25.1%20-%20COVID-19%20-%20Stay%20Hom e%2C%20Stay%20Healthy%20Extension%20%28tmp%29%29.pdf

[3] https://www.governor.wa.gov/sites/default/files/proclamations/20-25.2%20Coronovirus%20Stay%20Home%20Amend%20%28tmp%29%20%28with%20links%29.pdf

[4] https://www.governor.wa.gov/sites/default/files/20-25.3%20-%20COVID-19%20Stay%20Home%20Stay%20He althy%20-%20Reopening%20%28tmp%29.pdf

[5] https://www.governor.wa.gov/sites/default/files/proclamations/20-25.4%20-%20COVID-19%20Safe%20Start.pdf

[6] https://www.governor.wa.gov/sites/default/files/proclamations/20-46.1%20-%20COVID-19%20High%20Risk%20Ext%20%28tmp%29.pdf

30. It is also next to impossible for me to practice law without the support of my paralegal LeeAnn Halpin as she communicates with court personnel, edits, and proofreads my pleadings, puts them in the appropriate format for each court, and then files the pleadings. LeeAnn's husband works at the Boeing facility in Everett where he is regularly exposed to people who do not follow social distancing guidelines which increases her risk of contracting COVID-19.

31. Accordingly, I am asking this Court to modify the Commissioner's June 10, 2020, ruling directing that I designate Clerk's Papers from the court below and file the Larsons' Opening Brief in this Appeal on or before June 19, 2020, which was last Friday. With regard to this request, I would ask this Court to judicially notice that I have 30 days, or until July 9, 2020, to request this ruling be modified. *See* RAP 17.7.

32. Also, I would ask this Court to take judicial notice of the fact that it is necessary for Clerk's Papers to be created before they can be cited in an Opening Brief. The Clerk's papers were filed with the Snohomish County Superior Court via fax and June 12, 2020. To the best of my knowledge the Clerk's Papers have not been transmitted to Division One, and these Papers are not accessible by me. Given I must have the page numbers that are assigned by the Snohomish County Clerk to cite

the case below in the Appellants' Opening Brief, the Commissioner's ruling appears to be one which is intended to use the COVID-19 Pandemic as an easy way to get rid of the judicial department's obligation to decide the merits of this case and dispense justice.

33. LeeAnn and I came to the office on June 19, 2020, to prepare and file this Motion to Modify the Clerk's Ruling and related documents even though the office is closed. We attempted to file it several minutes before 5:00 p.m., but were unable to get it filed. We did finally get a version of this motion filed, at 5:03 p.m. However, that version has some mistakes and this Court's filing system indicates that it was not filed with this Court until Monday, June 22, 2020. Accordingly, the Larsons are filing this amended version of the Motion, supported by my declaration and the Appendix supporting this motion on Monday, June 22, 2020, so it will also show that it is being recorded on Monday June 22, 2020. It is being filed as a single document as one of this Court's Case Managers has directed us to do. As is explained in paragraph 31 above it is the Larsons' position that this motion and supporting materials have been timely filed pursuant to RAP 17.7. ("[T]he motion to modify the ruling must be served on all persons

entitled to notice of the original motion and filed in the appellate court not later than 30 days after the ruling is filed."

34. I believe and allege the conditions that cause me to be a vulnerable person within the meaning of the Governor's COVID-19 Proclamations, *i.e.* age, poorly controlled diabetes, various heart conditions, HIV, etc., are also disabilities within the meaning of Washington and federal disabilities law that entitle me to constitutional protections based on the Fourteenth Amendment. *See e.g. Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004).

I declare under the penalty of perjury that the foregoing is true and correct to the best of my information and belief.

DATED this 22nd day of June 2020, in Arlington, WA.

/s / Scott E. Stafne
Scott E. Stafne, Declarant

EXHIBIT NO.	APPENDIX	PAGE NUMBERS
EXHIBIT 1	Skagit County Superior Court Record Docket 1	APP 0001–0735
EXHIBIT 2	Stafne's Declaration in Support of Larsons' Motion for Leave to File Supplemental and Amended Complaint	APP 0736–0868
EXHIBIT 3	Motion to Withdraw as the Attorney for Plaintiffs	APP 0869–1004

19-2-01383-31
RCDCHV 1
Record on Change of Venue
4950137

MELISSA BEATON
SKAGIT COUNTY CLERK

KRIS DESMARAIS
CHIEF DEPUTY CLERK

~ OFFICE OF THE ~
SKAGIT COUNTY CLERK

205 W KINCAID, ROOM 103
MOUNT VERNON, WA 98273
PHONE (360) 416-1800

DATE: February 12, 2019

SNOHOMISH COUNTY CLERKS OFFICE
3000 ROCKEFELLER AVE
EVERETT, WA 98201

19 2 01383 31

FILED
2019 FEB 14 AM 10:03
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH

RE: 18-2-01234-29
CHRISTOPHER E LARSON et al vs JANE DOE et al
ORDER CHANGING VENUE TO SNOHOMISH COUNTY

Dear Clerk:

An Order Granting Change of Venue to SNOHOMISH COUNTY was signed on January 24, 2019. Enclosed please find a certified copy of the record on Change of Venue and the attorney's check#604152876 in the amount of $240 for your filing fee.

Please conform and stamp the new cause number on the enclosed copy of this letter and return it in the self-addressed stamped envelope provided, thank you.

Respectfully,
MELISSA BEATON, COUNTY CLERK

Elizabeth Murphy, Lead Civil Deputy Clerk
MELISSA BEATON, SKAGIT COUNTY CLERK

Enclosures:
Record on Change of Venue
Ck #

T/C Clerk - we don't have sub 1-17 Transcript sub 1-17 on 9/20

19 2 01383 31

MELISSA BEATON
SKAGIT COUNTY CLERK

KRIS DESMARAIS
CHIEF DEPUTY CLERK

~ OFFICE OF THE ~
SKAGIT COUNTY CLERK

205 W KINCAID, ROOM 103
MOUNT VERNON, WA 98273
PHONE (360) 416-1800

CC: TO FILE
TO ATTORNEY

18-2-01234-29

FILED
2019 FEB 14 AM 10:03
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

CERTIFICATION:

I, MELISSA BEATON, COUNTY CLERK AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SKAGIT COUNTY, DO CERTIFY THAT THE FOREGOING ARE AND CONSTITUTE THE ORIGINAL RECORD IN THE ABOVE NUMBERED CASE AS THE SAME WERE ORIGINALLY FILED AND NOW APPEAR OF RECORD IN SAID CASE IN MY OFFICE.

I FURTHER CERTIFY THAT THE ORDER TRANSFERRING VENUE IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF AS IT APPEARS ON FILE AND OF RECORD IN MY OFFICE.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF THE SUPERIOR COURT OF SKAGIT COUNTY ON THIS THE 12TH DAY OF FEBRUARY, 2019.

MELISSA BEATON, COUNTY CLERK
BY _____
ELIZABETH MURPHY, DEPUTY

SEAL OF THE SUPERIOR COURT STATE OF WASHINGTON OF SKAGIT COUNTY

SKAGIT

CASE SUMMARY 19 2 01383 31

CASE NO. 18-2-01234-29

CHRISTOPHER E LARSON et al
vs
JANE DOE et al

§ Location: **Skagit**
§ Filed on: **10/18/2018**
§ JIS/SCOMIS Case Number: **18-2-01234-4**
§
§

CASE INFORMATION

Case Type: **MSC2 Miscellaneous - Civil**

Case Status: **10/18/2018 Active**

Case Flags: **Affidavit of Prejudice**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	18-2-01234-29
Court	Skagit
Date Assigned	10/18/2018

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**LARSON, ANGELA**	**Stafne, Scott Erik** *Retained* 360-403-8700(W)
	et al	
Defendant	**APPEL, GEORGE F**	**DI VITTORIO, SARA J** *Retained* 425-388-6343(W)
	et al	

DATE	EVENTS & ORDERS OF THE COURT	INDEX
10/18/2018	Complaint	*Index # 1*
10/24/2018	Notice of Appearance Party: Attorney McDonald, Robert William; Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 2*
10/24/2018	Affidavit Declaration Certificate Confirmation of Service	*Index # 3*
11/05/2018	Notice of Appearance Party: Assistant Attorney General YOUNG, ALICIA O; Assistant Attorney General SIMPSON, R JULY; Defendant WASHINGTON, STATE OF; Defendant INSLEE, WA/ST GOVERNOR, JAY; Defendant FERGUSON, WA/ST ATTY GENERAL, ROBERT	*Index # 4*
11/14/2018	Notice of Appearance Party: Attorney Courser, Donald Jeffrey; Defendant DEUTSCHE BANK NATIONAL TRUST CO	*Index # 5*
11/15/2018	Notice of Appearance Party: Deputy Prosecuting Attorney DI VITTORIO, SARA J; Deputy Prosecuting Attorney DOWNS, LYNDSEY MARIE; Deputy Prosecuting Attorney ENNS, GEOFFREY ALAN	*Index # 6*

Printed on 02/12/2019 at 3:58 PM

11/30/2018	Motion to Dismiss Party: Assistant Attorney General SIMPSON, R JULY	*Index # 7*
11/30/2018	Note for Motion Docket *SIMPSON: MT TO DISMISS*	*Index # 8*
12/03/2018	Motion to Dismiss *& CHANGE OF VENUE* Party: Defendant SNOHOMISH, COUNTY OF	*Index # 9*
12/03/2018	Note for Motion Docket *ENNS: DISMSS & CHG VENUE*	*Index # 10*
12/06/2018	Motion to Dismiss *FOR JUDICIAL NOTICE & MTN TO DISMISS NOTICE OF JOINDER* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 11*
12/06/2018	Note for Motion Docket *MCDONALD: TRST'S JOINDER OF MTN & MTN FOR DISMISSAL*	*Index # 12*
12/06/2018	Affidavit Declaration Certificate Confirmation of Service	*Index # 13*
12/14/2018	Motion *EMERGENCY MTN FOR EXTENSION OF TIME* Party: Attorney Stafne, Scott Erik; Plaintiff LARSON, CHRISTOPHER E; Plaintiff LARSON, ANGELA	*Index # 14*
12/14/2018	Response *TO STATE/WA MTN TO DISMISS & QUALITYS JOINDER & SNOH CO MTN TO DISMISS* Party: Attorney Stafne, Scott Erik; Plaintiff LARSON, CHRISTOPHER E; Plaintiff LARSON, ANGELA	*Index # 15*
12/14/2018	Response *LARSONS RESPONSE TO SNOH CO DFTS MTN TO TRANSFER VENUE* Party: Attorney Stafne, Scott Erik; Plaintiff LARSON, CHRISTOPHER E; Plaintiff LARSON, ANGELA	*Index # 16*
12/14/2018	Declaration Affidavit *OF A LARSON*	*Index # 17*
12/14/2018	Declaration Affidavit *OF CHRIS LARSON*	*Index # 18*
12/14/2018	Declaration Affidavit *OF MICHAH ANDERSON*	*Index # 19*
12/14/2018	Declaration Affidavit *IN SUPPT OF OPPOS TO MTNS TO DISM & TRANSFER VENUE & IN SUPPT OF MTN FOR CONTINUANCE* Party: Attorney Stafne, Scott Erik	*Index # 20*
12/17/2018	Notice of Association of Counsel	*Index # 21*

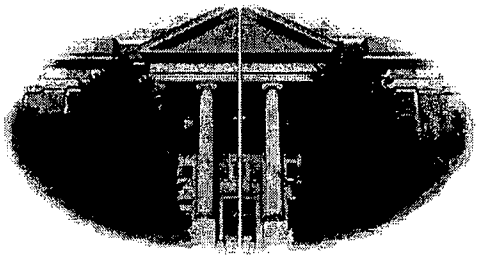
12/17/2018	Motion *FOR JOINDER OF TRUST,SPS, & MERS IN MTN TO DISMISS* Party: Attorney Courser, Donald Jeffrey	*Index # 22*
12/18/2018	Affidavit of Prejudice Party: Attorney Stafne, Scott Erik	*Index # 23*
12/18/2018	Declaration Affidavit Party: Plaintiff LARSON, ANGELA	*Index # 24*
12/18/2018	Affidavit Declaration Certificate Confirmation of Service	*Index # 25*
12/18/2018	Reply *SNO CO. DEFTS MTN TO DISMISS & TRANSFER VENUE*	*Index # 26*
12/18/2018	Declaration Affidavit *IN SUPP'T OF OF QUALITY'S MTN FOR JUDICIAL NOTICE* Party: Attorney McDonald, Robert William; Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 27*
12/18/2018	Reply *NOTICE OF JOINDER & SUPPLEMENTAL ER 201 REQUEST* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 28*
12/18/2018	Reply *IN SUPP'T OF MTN TO DISMISS* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 29*
12/18/2018	Response *TO PLAINTIFF MTN FOR EXTENTION* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 30*
12/20/2018	*CANCELED* **Summary Judgment** (9:30 AM) (Judicial Officer: Svaren, David A) *SIMPSON: MT TO DISM CR 12(B)(6)* *Duplicate Hearing*	
12/20/2018	*CANCELED* **Summary Judgment** (9:30 AM) (Judicial Officer: Svaren, David A) *ENNS: DISMISS & CHANGE VENUE* *Duplicate Hearing*	
12/20/2018	**Summary Judgment** (9:30 AM) (Judicial Officer: Svaren, David A) *MCDONAD: TRST'S JOINDER OF MTN & MTN FOR DISMISSAL* *ENNS: DISMISS & CHANGE VENUE* *SIMPSON: MT TO DISM CR 12(B)(6)* Resource: Court Admin Default, Default Events: 11/30/2018 Note for Motion Docket 12/03/2018 Note for Motion Docket 12/06/2018 Note for Motion Docket	
12/20/2018	Motion Hearing (Judicial Officer: Svaren, David A) *3/9:30 (not recorded) - 11:14 (not recorded), 11:20 - 11:55*	*Index # 31*
12/20/2018	Order of Dismissal Without Prejudice (Judicial Officer: Svaren, David A) *ONLY REGARDING SNO CO. & STATE DEFT'S*	*Index # 32*

CASE SUMMARY

CASE NO. 18-2-01234-29

01/04/2019	Notice of Association of Counsel Party: Attorney Courser, Donald Jeffrey; Attorney Marshall, Ann T.; Attorney DELTCHEV, DELIAN PETROV; Defendant DEUTSCHE BANK NATIONAL TRUST CO	*Index # 33*
01/24/2019	Order for Change of Venue (Judicial Officer: Needy, David R) *& PATIAL ORDER OF DISMISSAL* *(FEES NOT PAID)*	*Index # 34*
01/29/2019	Letter *RE CHANGE OF VENUE FEE*	*Index # 35*

DATE	FINANCIAL INFORMATION	
	Plaintiff LARSON, CHRISTOPHER E	
	Total Charges	270.00
	Total Payments and Credits	270.00
	Balance Due as of 2/12/2019	**0.00**



MELISSA BEATON
SKAGIT COUNTY CLERK

KRIS DESMARAIS
CHIEF DEPUTY CLERK

~ OFFICE OF THE ~
SKAGIT COUNTY CLERK

205 W KINCAID, ROOM 103
MOUNT VERNON, WA 98273
PHONE (360) 416-1800

18-2-01234-29

01/29/2019

ROBERT MCDONALD
ATTORNEY AT LAW
108 1ST AVE S., STE 202
SEATTLE, WA 98104-2538

JEFF COURSER
ATTORNEY AT LAW
600 UNIVERSITY STREET, SUITE 3600
SEATTLE, WA 98101

SCOTT STAFNE
ATTORNEY AT LAW
239 N. OLYMPIC AVE.
ARLINGTON, WA 98223

SARA DI VITTORIO
ATTORNEY AT LAW
3000 ROCKEFELLER AVE #MS504
EVERETT, WA 98201-4046

Re: **CHRISTOPHER LARSON & ANGELA LARSON VS SNOHOMISH COUNTY, ET AL.,**
CASE# 18-2-01234-29

Counsel,

Please be advised that an order on **Partial Order of Dismissal and Order on Change of Venue** was signed on 01/24/2019 by Judge Dave Needy in the above referenced case.

Actual transfer of the file on Change of Venue cannot proceed until we receive from your office:

1. A check made out to Skagit County Superior Court for $20.00, Change of Venue Fee;
2. A check made out to Snohomish County Superior Court for $240.00 for their filing fee.

Upon receipt of the above fees, the Change of Venue will be prepared promptly and transmitted to Snohomish County. Thank you for your consideration.

Sincerely,

JESSICA CARTER
Deputy Clerk
Skagit County Superior Court

DUPLICATE ORIGINAL

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION I

80968-7-I

CHRISTOPHER and ANGELA LARSON,)

Appellant,) Snohomish County Cause

vs.) No. 19-2-01383-31

SNOHOMISH COUNTY, et al.,)

Respondents.)

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE

DAVID A. SVAREN

NOVEMBER 7, 2019

TRANSCRIBED FROM RECORDING BY:

CHERYL J. HAMMER, RPR, CCR 2512

that were before the court at this time inasmuch as the court has already made a determination with respect to the quiet title action. Bottom line, motions for summary judgment are granted.

MALE VOICE: Thank you, Your Honor.

FEMALE VOICE: Your Honor, we have a proposed order.

THE COURT: I haven't addressed in my oral comments the request that was brought to have me disqualify myself. That request is denied. I don't have a dog in this fight.

And to the extent I'm being asked to continue the hearing based upon what is occurring in a separate action, I am going to be denying that request as well. This is a timely summary judgment hearing based upon documents that were filed this last summer.

At this time, I am signing the proposed order presented by the trust, SPS, and MERS' motion for summary judgment.

Mr. McDonald, does QLS have a proposed order?

MR. McDONALD: I do, Your Honor.

THE COURT: And the court has signed the order of dismissal submitted by Quality Loan Service of Washington. That will conclude the

No. 80968-7

On appeal from Snohomish County No.19-2-01383-31

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER and ANGELA LARSON,

Plaintiff-Appellant,

v.

SNOHOMISH COUNTY *et al.*,

Defendant-Respondent.

APPELLANTS' REPLY TO SNOHOMISH COUNTY AND ITS OFFICIALS RESPONSE TO LARSONS' MOTION REQUIRING DEFENDANT/APPELLEE CLERK TO COMPLY WITH RAP 9.6

Scott E. Stafne, WSBA# 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Defendant-Appellant.

I. Introduction to Reply

The Snohomish County Prosecutor on behalf of Snohomish County and presumably the other Snohomish County defendant officials, *i.e.* the Snohomish County Auditor, Snohomish County Clerk, Snohomish County Examiner of Titles and Legal Advisor to the Registrar, and the Snohomish County Superior Court Judges, argues in the "Introduction and Relief Requested" section of its Response to the Larsons' "Motion to Require its Clerical Personnel to Comply with RAP 9.6" that this Court should deny the motion as moot. *See* Snohomish County's Response to Motion to Require Clerical Personnel to Comply with RAP 9.6 (SC Response) p. 1.

In the "Argument" section of these parties' Response, the Prosecutor appears to argue that the Defendant County Clerk's procedures, as outlined in the Larsons' motion, comply with RAP 9.6. In this regard, Snohomish County's Response states:

> While counsel for the County was not privy to

> the conversations between members of Mr. Stafne's office and personnel in the Clerk's office, the County does not doubt that Appellants were likely told that the typical process is that parties can only designate an entire entry in the docket rather than individual pages thereof, in compliance with RAP 9.6.

SC Response, p. 1

The Larsons were not told by the Snohomish County Clerk's office that this was the typical procedure. They were told this was the procedure they must comply with. *See* Declaration of LeeAnn Halpin in support of Motion.

II. Reply Argument

A. This Motion is Not Moot.

An issue is moot if the matter is "purely academic." *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983) (quoting *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968)). "However, an issue is not moot if a court can provide any effective relief." *Turner*, 98 Wn.2d at 733 (citing *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981)).

"'The central question of all mootness problems is whether changes in the circumstances that prevailed at the

beginning of litigation have forestalled any occasion for meaningful relief.'" *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006) (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.3, at 261 (2d ed. 1984)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)).

Obviously this case, as a whole, is not moot. The question with regard to this motion is whether these government Defendants can force the Larsons to go to their Snohomish government adversaries to request they perform their jobs as judicial officials, or can simply come to this Court and obtain an order compelling these judicial clerks to follow the mandates of RAP 9.6.

This is an important question in this Appeal because

these same government Defendants who have control of the Snohomish County courts are being sued for purposely violating the Torrens Act in a way that is designed to economically benefit each of them[1]. This, the Larsons argue, makes these officials and the County they represent an inappropriate forum in which to adjudicate the meaning of this court rule.

In this Appeal, Snohomish County and its Clerk (a defendant in the underlying action) argue that they should not be required by this Court to follow RAP 9.6 because counsel for the Larsons should have simply asked their attorney, the Snohomish Prosecutor, to simply relax the rule in this case.

> Having been made aware of Appellant's predicament through their motion, counsel for the County discussed available options with the Clerk's office. The Clerk's office informed the

[1] After this case was transferred from the Skagit County Superior Court to the Snohomish County Superior Court the Larsons moved to disqualify all of Snohomish County superior court judges from adjudicating their case based on federal Due Process and RCW 2.28.030(1). *See* Stafne declaration in support of this Reply. Shortly thereafter all of Snohomish County's superior court judges and commissioners recused themselves from adjudicating this case. The Clerk, however, did not recuse herself notwithstanding she was charged with the same disqualifying conduct as were Snohomish County judges and commissioners. *Id.*

> undersigned counsel that Appellants could select the particular pages they desired from the Skagit County Superior Court file, file those pages under a cover letter in the Snohomish County Superior Court docket (indicating they are excerpts from the docket entry containing the entire Skagit County court file), and then designate the docket number containing the excerpts as their designation of the clerk's papers. The County is confident this process will serve the needs of both the Court and Appellants. ***If it does not, Appellants simply need to contact counsel for the County to work out a different compromise.***

SC Response, pp. 1–2 (Emphasis Supplied)

As can be seen from the above quoted Response Snohomish County and its officials are reserving for themselves, rather than allowing this Court to determine, how RAP 9.6 (a state Rule of Appellate Procedure) should be interpreted in this Court. Under the Separation of Powers principles incorporated into Washington's Constitution local officials in the Executive Branch of County government do not have authority to judicially interpret the meaning of court rules. This is because it is up to the judges of our Courts, not county clerks, to ultimately interpret Washington Court rules. *See e.g. Waples v. Yi*, 169 Wn.2d 152, 155, 234 P.3d 187

(2010); *Putnam v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 977-78, 216 P.3d 374 (2009).

Because this Court can provide the Larsons with the relief they requested in their motion, *i.e.* that the Court order Snohomish County and the Snohomish County Clerk to comply with the language of RAP 9.6 as it is written, the Larsons' Motion is not moot.

B. Even if the Motion is Moot, it is in the Public Interest that it be Adjudicated.

If an issue presented is of continuing and substantial public importance, an appellate Court should review an otherwise moot issue. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). To determine whether the contested issue is of substantial and continuing public importance, courts should consider whether "(1) the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Id.* at 892 (quoting *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994)).

Division II recently applied these principles in *In re Dependency of T.P.*, No. 52928-9-II, 2020 Wash. App. LEXIS 437 (Ct. App. Feb. 25, 2020) (**unpublished**). There the issue before the Court of Appeals was the whether the juvenile court violated RCW 13.34.065(1)(a) by continuing the shelter care hearing for 22 days after the child had been taken into custody and, if so, whether that violation of this statute was moot for purposes of the child's father obtaining relief from the Court of Appeals. A panel of Division II held:

> [T]his case may be reviewed under the public interest exception because (1) this issue [removal of a child from his or her parents' care] is a matter of public interest, (2) guidance to lower courts is desirable, and (3) this issue is likely to recur but continually escape our review.

Id. at *9.

The same is true here. The issue as to whether counties and their elected court clerks and staff must follow the court rules as they are written or can interpret them as they please is a matter of public importance. Guidance by this Court to the lower superior courts and subordinate counties (and county officials) is desirable. And as the Snohomish County's

Response request indicates this issue has previously long evaded review, and will likely do so in the future, if the County and its clerk can simply moot the issue by offering to make the issue go away.

C. The Interpretation of the Meaning of RAP 9.6 Remains a Live Issue.

Snohomish County and its Defendant Clerk, other Defendant officials, and Defendant judges appear to be arguing that RAP 9.6 allows deputy clerks to determine the meaning of RAP 9.6 because they say at the end of their response that this interpretation allows the prosecuting attorney to work out a compromise with regard to these Defendants' interest in this case. The Larsons' strongly disagree. The attorney for the Snohomish County Clerk—no more than the attorney for any adversary—does not have the right to make judicial decisions in this Appeal because his client is acting as a judge interpreting an applicable court rule. *See e.g. Williams v. Pennsylvania,* 136 S. Ct. 1899 (2016) (. . ."[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the

outcome." *Id.* at 1905–06 quoting *In re Murchison*, 349 U.S. 133, 137, 75 S. Ct. 623, (1955).)

The Larsons are entitled to have RAP 9.6 interpreted according to its language by constitutional judges who have no stake in the outcome of this case. Snohomish County, its officials, and judges have not offered any argument as to why the Larsons' interpretation of RAP 9.6 is not correct; most likely because the Larsons' interpretation of this Rule is correct.

III. Conclusion

This Court should interpret the meaning of RAP 9.6. After doing so this Court should order defendant Snohomish County and defendant Snohomish County Clerk to comply with RAP 9.6 as it is written; not as these defendants want it to have been written.

Dated this 6th day of April 2020, at Arlington, Washington.

Respectfully submitted by,

/s / Scott E. Stafne

Scott E. Stafne, WSBA# 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue

No. 80968-7

On appeal from Snohomish County No.19-2-01383-31

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER and ANGELA LARSON,

Plaintiff-Appellant,

v.

SNOHOMISH COUNTY *et al.*,

Defendant-Respondent.

STAFNE'S DECLARATION IN SUPPORT OF APPELLANTS' REPLY TO SNOHOMISH COUNTY AND ITS OFFICIALS RESPONSE TO LARSONS' MOTION REQUIRING DEFENDANT/APPELLEE CLERK TO COMPLY WITH RAP 9.6

Scott E. Stafne, WSBA# 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Defendant-Appellant.

1. My name is Scott E. Stafne. I am the attorney for the Larsons in this matter. I am over the age of majority and competent to make this declaration. I make this declaration both as the Larsons' attorney and/or on the basis of personal knowledge which appears more fully herein.

2. I have attached hereto as Exhibit 1 a copy of the original complaint without exhibits the Larsons filed against Snohomish County, its officials, and judges in the Skagit County Superior Court pursuant to RCW 36.01.050. *See* Exhibit 1, ¶¶ 2.2. In that complaint[1] the Larsons prayed for different types of relief:

> Including without limitation ***recusal of all superior court judges in any county which has failed to comply with the provisions of the Torrens Act and/or whom are in a similar position to these Snohomish County judicial defendants with regards to the issues being raised in this litigation;*** i.e. superior court judges acts and omissions have prevented landowners within their respective county from availing themselves of the protections afforded persons with interests in land by the public and transparent land registration system established

[1] The Larsons also filed a proposed amended complaint which a Skagit Superior Court judge denied acting as a pro tem judge for the Snohomish County Superior Court. This denial of the Larsons' motion to file this amended complaint remains a potential issue in this Appeal.

by the Torrens Act.

Exhibit 1, at pp. 46–7, ¶ M.

3. The Larsons filed a motion to amend their original complaint after the case was transferred back to Snohomish County by the Skagit County Superior Court Judge based on Snohomish County and its officials and judges' contested motion to transfer venue. A copy of the amended complaint and exhibits is attached as Exhibit 2 hereto, where it appears as Attachment 1 to my declaration..

4. This proposed amended complaint requests the Snohomish County Superior Court judges recuse themselves based on Fourteenth Amendment Due Process grounds, Washington State's Due Process grounds, and RCW 2.28.030(1). *See e.g.* Exhibit 2, Proposed Plainitffs' Supplemental and Amended Complaint, ¶ 2.3. The proposed complaint also seeks damages from Snohomish County Defendants for the acts and omissions of Snohomish County officials, including the Snohomish County Clerk, for violating the Torrens Act. *See e.g.* Exhibit 2, Proposed Plainitffs' Supplemental and Amended Complaint, ¶¶ 1.6; 2.3;

3.34–3.40; 4.4–48; 5.3-5.6; 8.1–8.5.

6. As the Court can see the proposed complaint alleges at ¶ 4.45 that:

> 4.45 On information and belief the pension funds of Snohomish County officials and judges are heavily invested (more than one billion dollars ($1,000,000,000.00)) in mortgage backed securities. Thus, when peoples' homes are taken from them pursuant to securitized obligations public officials and judges benefit. If, on the other hand, the foreclosures are not allowed to be completed against people like the Larsons the financial interest of these same Snohomish County officials and judges are diminished. This creates a pecuniary conflict of interest between the government, its officials, and a large number of people.

7. In the Larsons' opposition to the private Defendants' motion for summary judgment the Larsons further clarified this argument at pages 20–22 by setting forth facts tending to establish that Snohomish County officials and judges benefit economically from superior courts routinely allowing foreclosures to proceed. A copy of this opposition is attached as Exhibit 3.

8. I have attached as Exhibit 4 a copy of the recusal order of the judges and commissioners in Snohomish County. It is the Larsons position that if clerks are going to be interpreting laws they should not be allowed to do so in cases and appeals where they are named parties.

I declare under the penalty of perjury for the laws of Washington that the foregoing is true and correct to the best of my information and belief.

Dated this 6th day of April 2020, at Arlington, Washington.

By: */s / Scott E. Stafne*

Scott E. Stafne, WSBA# 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360-403-8700
scott@stafnelaw.com
Attorney for Defendant-Appellant.

19-2-01383-31
ORP 66
Order of Preassignment
5624952

FILED

2019 SEP 25 AM 10:55

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

Larson et al **Plaintiff**	**19-2-01383-31**
vs	**ORDER OF ASSIGNMENT**
Snohomish County et al	
Defendant.	

ALL Snohomish County Judges and Commissioners, having recused themselves from hearing the above-referenced matter, and Skagit County Judge David A. Svaren has agreed to handle motions and trial in the above-referenced matter, now, therefore,

IT IS HEREBY ORDERED that the above-entitled matter is hereby assigned to Skagit County for trial and all pre-trial motions.

DATED this 23rd day of September, 2019.

BRUCE I. WEISS
Presiding Judge

No. 80968-7

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman

Appellant,

v.

SNOHOMISH COUNTY et al.,

Respondent.

DECLARATION OF LEEANN HALPIN IN SUPPORT OF MOTION TO REQUIRE CLERICAL PERSONNEL TO COMPLY WITH RAP 9.6

Snohomish County Superior Court No. 19-2-01383-31

Scott E. Stafne, WSBA # 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360.403.8700
Scott@Stafnelaw.com
Attorney for Appellants

1. My name is LeeAnn Halpin. I am the paralegal for the Appellant/Plaintiff Larsons in this Appeal and the case below.
2. I am competent to make this declaration and do so on the basis of that personal knowledge which is reflected herein.
3. I decided to begin work on the Larsons' Clerks Papers in late January of this year because I knew the process may be more complicated due to the change of venue.
4. I had previous knowledge the record sent from the Skagit County Clerk to the Snohomish County Clerk was transferred as one volume because I had viewed the record on the Snohomish County Odyssey portal following the change of venue.

5. On or about January 31, 2020, I went directly to the Skagit County Clerk's office to speak with the clerk and to review the information on the Skagit County Odyssey portal related to the Larsons case.

6. I had previously noted a handwritten comment on the left-hand side of the cover letter written by Melissa Beaton, who is a Skagit County Clerk, to the Clerk of Snohomish County related to the Order Changing Venue that I did not understand. The comment indicates "T/C Clerk – we didn't [not discernible] sub 1-17 > on [not discernible] sub 1-17 2/22." A certified copy of the record on Change of Venue is attached hereto as ***Exhibit 1***.

7. Following the cover letter for the record is a case summary that includes the date of each filing, the Events & Orders of the Court, and the Index

number assigned to the record. The index number is synonymous with the subnumber. *See Exhibit 1*.

8. The index numbers on the Case Summary for Case No. 18-2-01234-29 range from 1–35 and are dated 10/18/2018 through 1/29/2019.

9. I was aware the numbers shown above the bar code stamp on each document filed in Snohomish County also started with subnumber (index) one which would result in duplicate subnumbers for the record at Skagit and Snohomish County. *See* upper left corner of *Exhibit 1* Skagit County record on change of venue is stamped "RCDCHV 1".

10. Knowing I could not identify duplicate numbers following the change of venue I decided to discuss the matter with the clerk. The clerk indicated that

I could not use the numbers listed in the case summary and that I would need to follow the directions provided by the Snohomish County Clerk related to subnumbers.

11. I called the Snohomish County Clerk's office the following Monday, February 3, 2020, to determine how I should identify individual filings. The first person I spoke with could not assist me and transferred my call to someone who worked in the Appeals department.

12. This employee was also not able to assist me, but advised me that she would locate an Appeals Manager who would return a call to me on the same day.

13. I received a call back on the same day from the Snohomish County Clerk's office. I explained that the record from Skagit County had been sent to

Snohomish County and that I was not able to identify specific subnumbers related to each filing before the change of venue because the record on change of venue was one volume and the Skagit County record had duplicate index numbers.

14. The Appeals Manager explained that I would need to designate the record from the change of venue as one Index. She also stated "we won't pull out individual filings for you."

15. I explained to Mr. Stafne that I would not be able to designate individual filings from the record in Skagit County.

16. I drafted most of the Designation of Clerk's Papers on February 9, 2020, and my coworker completed the process on February 11, 2020, based on the information I had received from Snohomish County Clerk's office. A copy of the

Designation was provided to Mr. Stafne on the same day and is attached hereto as ***Exhibit 3***.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing testimony is true and correct to the best of my information and belief.

Dated this 13th day of March, 2020, at Mount Vernon, Washington.

By: s/*LeeAnn Halpin*
LeeAnn Halpin, Declarant

Exhibit 1

Larson v. Snohomish County et al.
Case No. 80968-7

19-2-01383-31
RCDCHV 1
Record on Change of Venue
4950137

MELISSA BEATON
SKAGIT COUNTY CLERK

KRIS DESMARAIS
CHIEF DEPUTY CLERK

~ OFFICE OF THE ~
SKAGIT COUNTY CLERK

205 W KINCAID, ROOM 103
MOUNT VERNON, WA 98273
PHONE (360) 416-1800

DATE: February 12, 2019

SNOHOMISH COUNTY CLERKS OFFICE
3000 ROCKEFELLER AVE
EVERETT, WA 98201

19 2 01383 31

FILED
2019 FEB 14 AM 10:03
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH

RE: 18-2-01234-29
CHRISTOPHER E LARSON et al vs JANE DOE et al
ORDER CHANGING VENUE TO SNOHOMISH COUNTY

Dear Clerk:

An Order Granting Change of Venue to SNOHOMISH COUNTY was signed on January 24, 2019. Enclosed please find a certified copy of the record on Change of Venue and the attorney's check#604152876 in the amount of $240 for your filing fee.

Please conform and stamp the new cause number on the enclosed copy of this letter and return it in the self-addressed stamped envelope provided, thank you.

Respectfully,
MELISSA BEATON, COUNTY CLERK

Elizabeth Murphy, Lead Civil Deputy Clerk
MELISSA BEATON, SKAGIT COUNTY CLERK

Enclosures:
Record on Change of Venue
Ck #

T/C Clerk - we don't have sub 1-17 Transcript sub 1-17 on file

19 2 01383 31

MELISSA BEATON
SKAGIT COUNTY CLERK

KRIS DESMARAIS
CHIEF DEPUTY CLERK

~ OFFICE OF THE ~
SKAGIT COUNTY CLERK

205 W KINCAID, ROOM 103
MOUNT VERNON, WA 98273
PHONE (360) 416-1800

CC: TO FILE
TO ATTORNEY

18-2-01234-29

FILED
2019 FEB 14 AM 10:03
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

CERTIFICATION:

I, MELISSA BEATON, COUNTY CLERK AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SKAGIT COUNTY, DO CERTIFY THAT THE FOREGOING ARE AND CONSTITUTE THE ORIGINAL RECORD IN THE ABOVE NUMBERED CASE AS THE SAME WERE ORIGINALLY FILED AND NOW APPEAR OF RECORD IN SAID CASE IN MY OFFICE.

I FURTHER CERTIFY THAT THE ORDER TRANSFERRING VENUE IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF AS IT APPEARS ON FILE AND OF RECORD IN MY OFFICE.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF THE SUPERIOR COURT OF SKAGIT COUNTY ON THIS THE 12TH DAY OF FEBRUARY, 2019.

MELISSA BEATON, COUNTY CLERK
BY _____
ELIZABETH MURPHY, DEPUTY

SEAL OF THE SUPERIOR COURT STATE OF WASHINGTON OF SKAGIT COUNTY

SKAGIT

CASE SUMMARY

CASE NO. 18-2-01234-29

19 2 01383 31

CHRISTOPHER E LARSON et al
vs
JANE DOE et al

§
§
§
§
§
§

Location: **Skagit**
Filed on: **10/18/2018**
JIS/SCOMIS Case Number: **18-2-01234-4**

CASE INFORMATION

Case Type: **MSC2 Miscellaneous - Civil**

Case Status: **10/18/2018 Active**

Case Flags: **Affidavit of Prejudice**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	18-2-01234-29
Court	Skagit
Date Assigned	10/18/2018

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**LARSON, ANGELA**	**Stafne, Scott Erik** *Retained* 360-403-8700(W)
	et al	
Defendant	**APPEL, GEORGE F**	**DI VITTORIO, SARA J** *Retained* 425-388-6343(W)
	et al	

DATE	EVENTS & ORDERS OF THE COURT	INDEX
10/18/2018	Complaint	*Index # 1*
10/24/2018	Notice of Appearance Party: Attorney McDonald, Robert William; Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 2*
10/24/2018	Affidavit Declaration Certificate Confirmation of Service	*Index # 3*
11/05/2018	Notice of Appearance Party: Assistant Attorney General YOUNG, ALICIA O; Assistant Attorney General SIMPSON, R JULY; Defendant WASHINGTON, STATE OF; Defendant INSLEE, WA/ST GOVERNOR, JAY; Defendant FERGUSON, WA/ST ATTY GENERAL, ROBERT	*Index # 4*
11/14/2018	Notice of Appearance Party: Attorney Courser, Donald Jeffrey; Defendant DEUTSCHE BANK NATIONAL TRUST CO	*Index # 5*
11/15/2018	Notice of Appearance Party: Deputy Prosecuting Attorney DI VITTORIO, SARA J; Deputy Prosecuting Attorney DOWNS, LYNDSEY MARIE; Deputy Prosecuting Attorney ENNS, GEOFFREY ALAN	*Index # 6*

11/30/2018	Motion to Dismiss Party: Assistant Attorney General SIMPSON, R JULY	*Index # 7*
11/30/2018	Note for Motion Docket *SIMPSON: MT TO DISMISS*	*Index # 8*
12/03/2018	Motion to Dismiss *& CHANGE OF VENUE* Party: Defendant SNOHOMISH, COUNTY OF	*Index # 9*
12/03/2018	Note for Motion Docket *ENNS: DISMSS & CHG VENUE*	*Index # 10*
12/06/2018	Motion to Dismiss *FOR JUDICIAL NOTICE & MTN TO DISMISS NOTICE OF JOINDER* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 11*
12/06/2018	Note for Motion Docket *MCDONALD: TRST'S JOINDER OF MTN & MTN FOR DISMISSAL*	*Index # 12*
12/06/2018	Affidavit Declaration Certificate Confirmation of Service	*Index # 13*
12/14/2018	Motion *EMERGENCY MTN FOR EXTENSION OF TIME* Party: Attorney Stafne, Scott Erik; Plaintiff LARSON, CHRISTOPHER E; Plaintiff LARSON, ANGELA	*Index # 14*
12/14/2018	Response *TO STATE/WA MTN TO DISMISS & QUALITYS JOINDER & SNOH CO MTN TO DISMISS* Party: Attorney Stafne, Scott Erik; Plaintiff LARSON, CHRISTOPHER E; Plaintiff LARSON, ANGELA	*Index # 15*
12/14/2018	Response *LARSONS RESPONSE TO SNOH CO DFTS MTN TO TRANSFER VENUE* Party: Attorney Stafne, Scott Erik; Plaintiff LARSON, CHRISTOPHER E; Plaintiff LARSON, ANGELA	*Index # 16*
12/14/2018	Declaration Affidavit *OF A LARSON*	*Index # 17*
12/14/2018	Declaration Affidavit *OF CHRIS LARSON*	*Index # 18*
12/14/2018	Declaration Affidavit *OF MICHAH ANDERSON*	*Index # 19*
12/14/2018	Declaration Affidavit *IN SUPPT OF OPPOS TO MTNS TO DISM & TRANSFER VENUE & IN SUPPT OF MTN FOR CONTINUANCE* Party: Attorney Stafne, Scott Erik	*Index # 20*
12/17/2018	Notice of Association of Counsel	*Index # 21*

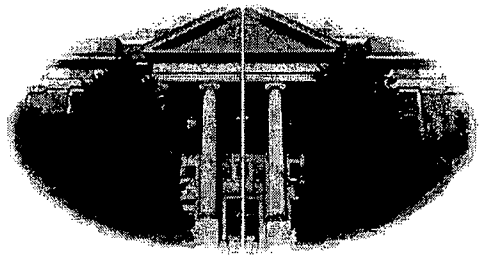
12/17/2018	Motion *FOR JOINDER OF TRUST,SPS, & MERS IN MTN TO DISMISS* Party: Attorney Courser, Donald Jeffrey	*Index # 22*
12/18/2018	Affidavit of Prejudice Party: Attorney Stafne, Scott Erik	*Index # 23*
12/18/2018	Declaration Affidavit Party: Plaintiff LARSON, ANGELA	*Index # 24*
12/18/2018	Affidavit Declaration Certificate Confirmation of Service	*Index # 25*
12/18/2018	Reply *SNO CO. DEFTS MTN TO DISMISS & TRANSFER VENUE*	*Index # 26*
12/18/2018	Declaration Affidavit *IN SUPP'T OF OF QUALITY'S MTN FOR JUDICIAL NOTICE* Party: Attorney McDonald, Robert William; Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 27*
12/18/2018	Reply *NOTICE OF JOINDER & SUPPLEMENTAL ER 201 REQUEST* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 28*
12/18/2018	Reply *IN SUPP'T OF MTN TO DISMISS* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 29*
12/18/2018	Response *TO PLAINTIFF MTN FOR EXTENTION* Party: Defendant QUALITY LOAN SERVICE CORP OF WA	*Index # 30*
12/20/2018	*CANCELED* **Summary Judgment** (9:30 AM) (Judicial Officer: Svaren, David A) *SIMPSON: MT TO DISM CR 12(B)(6)* *Duplicate Hearing*	
12/20/2018	*CANCELED* **Summary Judgment** (9:30 AM) (Judicial Officer: Svaren, David A) *ENNS: DISMISS & CHANGE VENUE* *Duplicate Hearing*	
12/20/2018	**Summary Judgment** (9:30 AM) (Judicial Officer: Svaren, David A) *MCDONAD: TRST'S JOINDER OF MTN & MTN FOR DISMISSAL* *ENNS: DISMISS & CHANGE VENUE* *SIMPSON: MT TO DISM CR 12(B)(6)* Resource: Court Admin Default, Default Events: 11/30/2018 Note for Motion Docket 12/03/2018 Note for Motion Docket 12/06/2018 Note for Motion Docket	
12/20/2018	Motion Hearing (Judicial Officer: Svaren, David A) *3/9:30 (not recorded) - 11:14 (not recorded), 11:20 - 11:55*	*Index # 31*
12/20/2018	Order of Dismissal Without Prejudice (Judicial Officer: Svaren, David A) *ONLY REGARDING SNO CO. & STATE DEFT'S*	*Index # 32*

CASE SUMMARY

CASE NO. 18-2-01234-29

01/04/2019	Notice of Association of Counsel Party: Attorney Courser, Donald Jeffrey; Attorney Marshall, Ann T.; Attorney DELTCHEV, DELIAN PETROV; Defendant DEUTSCHE BANK NATIONAL TRUST CO	*Index # 33*
01/24/2019	Order for Change of Venue (Judicial Officer: Needy, David R) *& PATIAL ORDER OF DISMISSAL* *(FEES NOT PAID)*	*Index # 34*
01/29/2019	Letter *RE CHANGE OF VENUE FEE*	*Index # 35*

DATE	FINANCIAL INFORMATION	
	Plaintiff LARSON, CHRISTOPHER E	
	Total Charges	270.00
	Total Payments and Credits	270.00
	Balance Due as of 2/12/2019	**0.00**



MELISSA BEATON
SKAGIT COUNTY CLERK

KRIS DESMARAIS
CHIEF DEPUTY CLERK

~ OFFICE OF THE ~
SKAGIT COUNTY CLERK

205 W KINCAID, ROOM 103
MOUNT VERNON, WA 98273
PHONE (360) 416-1800

18-2-01234-29

01/29/2019

ROBERT MCDONALD
ATTORNEY AT LAW
108 1ST AVE S., STE 202
SEATTLE, WA 98104-2538

JEFF COURSER
ATTORNEY AT LAW
600 UNIVERSITY STREET, SUITE 3600
SEATTLE, WA 98101

SCOTT STAFNE
ATTORNEY AT LAW
239 N. OLYMPIC AVE.
ARLINGTON, WA 98223

SARA DI VITTORIO
ATTORNEY AT LAW
3000 ROCKEFELLER AVE #MS504
EVERETT, WA 98201-4046

Re: **CHRISTOPHER LARSON & ANGELA LARSON VS SNOHOMISH COUNTY, ET AL.,**
CASE# 18-2-01234-29

Counsel,

Please be advised that an order on **Partial Order of Dismissal and Order on Change of Venue** was signed on 01/24/2019 by Judge Dave Needy in the above referenced case.

Actual transfer of the file on Change of Venue cannot proceed until we receive from your office:

1. A check made out to Skagit County Superior Court for $20.00, Change of Venue Fee;
2. A check made out to Snohomish County Superior Court for $240.00 for their filing fee.

Upon receipt of the above fees, the Change of Venue will be prepared promptly and transmitted to Snohomish County. Thank you for your consideration.

Sincerely,

JESSICA CARTER
Deputy Clerk
Skagit County Superior Court

DUPLICATE ORIGINAL

NO. 80968-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman,

Appellants,

v.

SNOHOMISH COUNTY *et al.*,

Respondents.

SNOHOMISH COUNTY'S RESPONSE TO MOTION TO REQUIRE CLERICAL PERSONNEL TO COMPLY WITH RAP 9.6

ADAM CORNELL
Prosecuting Attorney

LYNDSEY DOWNS, WSBA #37453
GEOFFREY A. ENNS, WSBA #40682
Deputy Prosecuting Attorneys
Attorneys for Snohomish County
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-6330

INTRODUCTION AND RELIEF REQUESTED

Respondent Snohomish County asks the Court to deny as moot Appellants' Motion to Require Clerical Personnel to Comply with RAP 9.6 because Appellants have the option to designate only those clerk's papers they deem relevant to their claim. Appellants would have learned this had they simply contacted counsel for the County to discuss the issue rather than seeking relief from the Court without attempting to meet-and-confer to explore ways to resolve the dispute.

ARGUMENT

Appellants are correct that the court file from Skagit County Superior Court was transferred to Snohomish County and entered as a single docket number in the record. *See* Decl. of Scott E. Stafne in Supp. of Mot. to Require Clerical Personnel to Comply with RAP 9.6 ("Stafne Decl.") ¶ 4. While counsel for the County was not privy to the conversations between members of Mr. Stafne's office and personnel in the Clerk's office, the County does not doubt that Appellants were likely told that the typical process is that parties can only designate an entire entry in the docket rather than individual pages thereof, in compliance with RAP 9.6.

Having been made aware of Appellant's predicament through their motion, counsel for the County discussed available options with the Clerk's office. The Clerk's office informed the undersigned counsel that Appellants

could select the particular pages they desired from the Skagit County Superior Court file, file those pages under a cover letter in the Snohomish County Superior Court docket (indicating they are excerpts from the docket entry containing the entire Skagit County court file), and then designate the docket number containing the excerpts as their designation of the clerk's papers. The County is confident this process will serve the needs of both the Court and Appellants. If it does not, Appellants simply need to contact counsel for the County to work out a different compromise.

CONCLUSION

Counsel for Appellants and counsel for the County have worked cooperatively throughout this litigation, and the County is committed to continuing that approach throughout this appeal. Given the workaround available to Appellants, the Court may deny as moot Appellants' motion to compel different action by the Clerk.

///

///

///

///

///

///

Respectfully submitted on April 3, 2020.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: 

LYNDSEY DOWNS, WSBA #37453
GEOFFREY A. ENNS, WSBA #40682
Deputy Prosecuting Attorneys
Attorney for Respondent Snohomish County

No. 80968-7

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman

Appellant,

v.

SNOHOMISH COUNTY et al.,

Respondent.

MOTION TO REQUIRE CLERICAL PERSONNEL TO COMPLY WITH RAP 9.6

Snohomish County Superior Court No. 19-2-01383-31

Scott E. Stafne, WSBA # 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360.403.8700
Scott@Stafnelaw.com
Attorney for Appellants

IDENTITY OF MOVING PARTY

Appellants are CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman, hereafter referred to as the "Larsons" herein. The Larsons were the Plaintiffs in the trial court and are the Appellants in this Court of Appeals.

RELIEF REQUESTED

The Larsons respectfully request this Court to allow them to designate those specific Clerk's Papers which they want reviewed from the Skagit County Superior Court which transferred the case below to Snohomish County Superior Court.

If this Court determines the Larsons are not allowed to designate those specific clerk's papers they want to rely upon from the Skagit County

Superior Court, the Larsons respectfully request this Court issue an order mitigating the economic costs and effects of the clerical staff's instruction that numerous clerk's papers must be filed as if they were a single index.

ISSUES

1) Should the Larsons be allowed to designate those specific clerk's papers that form the basis of their Appeal pursuant to RAP 9.6?
   (Short Answer: YES)
2) If the Larsons are not allowed to designate only those clerk's papers they want to rely upon from the Skagit County Superior Court should this Court issue an order mitigating the economic and other costs this will impose on the Larsons?
   (Short Answer: YES)

FACTS RELEVANT TO MOTION

Larson v. Snohomish County, et. al, Skagit County Case No. 18-2-01234-29, was filed against Snohomish County, several of its officials including all its superior court judges, and other private defendants in the Skagit County Superior Court on October 18, 2018, pursuant to RCW 36.01.050. This complaint was filed after the Larsons had filed their registration of land title (Torrens) application on June 5, 2018, with the Snohomish County Superior Court. The Torrens application proceeding was docketed as Snohomish County Case No. 18-2-04994-31.

On December 3, 2018, Snohomish Deputy County Prosecutor Geoffrey Enns moved to change venue of Skagit County Case No. 18-2-01234-29 to the Superior Court of Snohomish County. Skagit

County Superior Court Judge David Svaren granted this motion and the case was transferred to the Snohomish County Superior Court as Case No. 19-2-01383-31. Thereafter the public and private defendants moved for a summary judgment and the Larsons' moved to amend their complaint to, among other things, (1) name additional Washington State and Snohomish County defendants and (2) allege additional causes of action pursuant to Ch. 65.12 RCW.

Faced with these motions the entire Snohomish County superior court bench, both judges and commissioners, recused themselves from adjudicating the case. Then Snohomish County Superior Court, through its presiding judge, appointed Skagit County Superior Court Judge David Svaren (the same judge who transferred the

case to the Superior Court of Snohomish County) to adjudicate the same case as a pro tempore Snohomish Superior Court Judge.

Judge Svaren, now acting as a pro tempore judge of Snohomish County Superior Court, granted defendants' motion for summary judgment on November 14, 2019. Judge Svaren had granted the Larsons' motion to amend their complaint in part on October 23, 2019.

The Larsons filed their Notice of Appeal on January 13, 2020. All arrangements for the preparation of transcripts by court reporters were promptly completed. But the designation of clerk's papers stalled. Indeed, the designation of clerk's papers is not yet complete and is presently overdue.

The reason the clerk's papers have not been designated is because the Snohomish County

Superior Court, through its clerical personnel, have advised Larsons' counsel that they will not allow them to designate the pleadings, filings, and declarations in the Skagit County Superior Court as anything but a single clerk's paper—when in fact they constitute many clerk's papers—clerk's papers that the rules require should be designated individually.

ARGUMENT

I. RAP 9.6 requires the designation of single pleadings and orders

RAP 9.6 provides:

> (a) Generally. ***The party seeking review should***, within 30 days after the notice of appeal is filed or discretionary review is granted, ***serve on all other parties and file with the trial court clerk a designation of those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court.*** A copy of the designation shall also be filed with the appellate court clerk. . . . ***Each party is encouraged to designate only clerk's papers and exhibits***

needed to review the issues presented to the appellate court.

(b) Designation and Contents.

(1) The clerk's papers shall include, at a minimum:
(A) the notice of appeal or the notice for discretionary review;

* * *

(C) the summons and complaint or case initiating petition in a civil case;
(D) any written order or ruling not attached to the notice of appeal, of which a party seeks review;
(E) the final pretrial order, or the final complaint and answer or other pleadings setting out the issues to be tried if the final pretrial order does not set out those issues;
(F) any written opinion, findings of fact, or conclusions of law;

* * *

(2) ***Each designation*** or supplement ***shall specify the full title of the pleading, the date filed, and, in counties where subnumbers are used, the clerk's subnumber.***

Approximately two or more weeks before the designation of the clerk's papers was due LeeAnn

Halpin, the paralegal for the Larsons' attorney, began preparing to help Mr. Stafne designate the clerk's papers. *See* Halpin declaration. She learned that the Snohomish County Superior Court clerical staff took the position that the Larsons' could not designate any of those individual pleadings and orders that had been originally filed in this case in the Skagit County Superior Court. Ms. Halpin was told the Larsons could only file the pleadings and orders filed in the Skagit County Superior Court as a single group of pleadings approximately 10 days before the designation was due.

When Ms. Halpin informed the Larsons' attorney of this, the attorney told Ms. Halpin that this was unacceptable. Unfortunately, the attorney was ill at this time and his schedule was full. *See* declaration of Scott E. Stafne.

The attorney knew from his previous appellate experience that what would happen next was this Court would likely send him a sanctions notification; *i.e.* a notice threatening to sanction the Larsons if the designation was not made before a certain date. Given his illness and other obligations the attorney decided to forego filing the designation when due so that he could carefully contemplate what to do. Ultimately he decided to file these alternative motions. *Id.*

II. If this Court orders the Larsons must designate numerous pleadings as a single clerk's paper it should order the expense of doing so be borne by the Court of the public.

As previously demonstrated RAP 9.6 provides that a designation or supplementation of clerk's papers must be of single documents, *i.e.* pleadings, declarations, court orders, etc. Other RAPs indicate

that this Court should not require the Larsons to bear the cost of this Court requiring the Larsons to violate RAP 9.16.

RAP 9.7 provides in pertinent part:

> (a) Clerk's Papers. ***The clerk of the trial court shall make copies at cost, not to exceed 50 cents a page, of those portions of the clerk's papers designated by the parties and prepare them for transmission to the appellate court.*** The clerk shall assemble the copies and number each page of the clerk's papers in chronological order of filing, and bind in volumes of no more than 200 pages, or, as authorized by the appellate court, assemble and transmit the numbered clerk's papers to the appellate court in electronic format. The clerk shall prepare a cover sheet for the papers with the title "Clerk's Papers" and prepare an alphabetical index to the papers. The clerk shall promptly send a copy of the index to each party. ***The reproduction costs must be paid to the trial court clerk within 14 days of receipt of the index.*** Failure to do so may result in sanctions under rule 18.9. Within 14 days of receiving payment, the clerk shall forward the clerk's papers to the appellate court.

RAP 9.8 provides in pertinent part:

> (a) Duty of Trial Court Clerk. Except as provided in section (b), ***the clerk of the trial court shall send the clerk's papers and exhibits to the appellate court when the clerk receives payment for the preparation of the documents.*** The clerk shall endorse on the face of the record the date upon which the clerk's papers are transmitted to the appellate court.
>
> (b) ***Cumbersome Exhibits***. ***The clerk of the trial court shall transmit to the appellate court exhibits which are difficult or unusually expensive to transmit only if the appellate court directs or if a party makes arrangements with the clerk to transmit the exhibits at the expense of the party requesting the transfer of the exhibits.*** No weapons, controlled substances, hazardous items, or currency shall be forwarded unless directed by the appellate court.

The pleadings and exhibits filed in the Skagit County Superior Court "clerk's paper" totals 735 pages, costing 50 cents per page for each copy[1]. The Larsons cannot afford this unnecessary cost that

[1] The Larsons' attorney testifies in his declaration that it is his custom to order a copy of the clerk paper documents the Superior Court files with the Court of Appeal to ensure that he has an accurate copy of the Clerk's Papers this Court is considering. *See* Stafne declaration.

court clerical staff have imposed upon them in violation of RAP 9.6.

RAP 9.8 allows this Court to make orders to allow for its consideration of difficult or expensive exhibits. The same procedure should be used here if this Court decides that the Larsons are not allowed to designate specific clerk's papers filed with the Skagit County Superior Court.

Such Order should, among other things, mitigate the cost necessary to prepare the oversized Skagit County Superior Court clerks paper for both this Court and a copy of that Clerk's paper for the Larsons.

CONCLUSION

This Court should order the clerks and clerical personnel of the Snohomish County Superior Court to comply with RAP 9.6.

Alternatively, this Court should issue an Order mitigating the economic impact on the Larsons of not being able to file clerk's papers in the manner prescribed by RAP 9.6.

Dated this 13th day of March 2020, at Arlington, Washington.

Respectfully submitted,

By: s/*Scott E. Stafne*
Scott E. Stafne, WSBA # 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360.403.8700
Scott@Stafnelaw.com
Attorney for Petitioner

No. 80968-7

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

CHRISTOPHER E. LARSON, a married man as his separate estate, and ANGELA LARSON, a married woman

Appellant,

v.

SNOHOMISH COUNTY et al.,

Respondent.

DECLARATION OF SCOTT E. STAFNE IN SUPPORT OF MOTION TO REQUIRE CLERICAL PERSONNEL TO COMPLY WITH RAP 9.6

Snohomish County Superior Court No. 19-2-01383-31

Scott E. Stafne, WSBA # 6964
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Avenue
Arlington, WA 98223
360.403.8700
Scott@Stafnelaw.com
Attorney for Appellants

1. My name is Scott E. Stafne. I am the attorney for the Appellant/Plaintiff Larsons in this Appeal.
2. I am competent to make this declaration and do so on the basis of that personal knowledge which is reflected herein or on the basis of my status as the Larsons' attorney.
3. I affirm that the facts set forth on pages four through seven of this declaration are true and correct based on my personal knowledge and as the Larsons' attorney in the underlying action.
4. My office began preparing to timely file the "clerk's papers" and "statements of arrangement" within the time parameters of the RAPs. In this regard, my paralegal LeeAnn Halpin obtained a copy of the Snohomish County Superior Court docket and noticed that no individual subnumbers were specified with regard to the

Skagit County Superior Court docket. Instead, the entire record before that Skagit County Superior Court prior to the case transferring to the Snohomish County Superior Court is identified as a single docket number.

5. It is my understanding Ms. Halpin investigated this lack of of subnumbers by contacting clerical personnel at the Skagit County Superior Court and the Snohomish County Superior Court. *See* Declaration of LeeAnn Halpin filed simultaneously with this declaration (Halpin Declaration).

6. Ms. Halpin told me these clerical personnel had told her that our office could not designate specific individual clerk's paper pleadings filed with the Skagit County Superior Court before the case was transferred to Snohomish County Superior Court. Further, Ms. Halpin told me these

instructions by clerical personnel of these superior courts were confirmed to her by an Appeals Manager who works at Snohomish County Superior Court. *See* Halpin Declaration.

7. When Ms. Halpin informed me that the clerks would not allow us to designate any specific subnumbers to prepare the "clerk papers" related to the case records that were filed in the Skagit County Superior Court, I told her that she must be mistaken and we argued to some extent about what I must do.

8. At the time I was very busy. I was writing several appellate briefs—one in the Ninth Circuit and one in the Washington Supreme Court—both of which I considered raised important legal issues on par with many of the issues raised in this Appeal.

9. I believe the designation of clerk's papers generally and in this Appeal particularly involves very important legal skills which should be exercised by attorneys pursuant to RAP 9.6. In this appeal one of the reasons for this is the case below raises very important statutory and constitutional issues with regard to the relationship between Washington's Registration of Land Titles (Torrens) Act, Chapter 65.12 RCW (Torrens Act) enacted in 1907 and Washington's Deed of Trust Act, Chapter 61.24 RCW (DTA) enacted in 1965, and recently amended on an almost yearly basis to allow peoples' homes to be taken from them without the necessity for judicial supervision or the possibility of equitable relief.

10. I am familiar with many of Washington's recent cases involving the interrelationships between the

Torrens Act and Washington's DTA because I have been counsel in several of those litigations, including those cases, appeals, and original writ actions described below.

11. Recent cases considering the application of the Torrens Act *vis à vis* the DTA began with a *pro se* mandamus action filed directly in the Washington Supreme Court against all of Thurston County's superior court judges. In that original writ action, *Schnarrs v. Murphy, et al*, Washington Supreme Court No. 95545-O, the Petitioner Warren Frank Schnarrs, who is now deceased, maintained the Thurston County Superior Court judges' failure to comply with their ministerial duties under the Torrens Act caused Thurston County to not have a working Torrens System. Schnarrs maintained and alleged that these acts and omissions

exposed him and his wife to a nonjudicial foreclosure based on secret liens, hidden equities, and fraudulent *recorded*, as opposed to truthful *registered*, filings.

12. Mr. Schnarrs asked me to represent him in this original action after his writ was filed and I agreed to do so.

13. During oral argument before the Commissioner I argued that few, if any, Washington judges had complied with their ministerial duties under the Torrens Act.

14. With regard to this contention, the Supreme Court's Commissioner wrote in his Ruling dismissing this original action:

> Mr. Schnarrs expresses a belief (unsupported by any evidence) that only one county in Washington utilizes the Torrens Act system. The act has apparently fallen into disuse as a result of the practicality and efficiency of

modem title recording systems, including the use of title companies. Of particular note, the attorney who was later appointed to be Thurston County's examiner of titles asserted at a superior court hearing in cause number 17-2-0306-34 that he was not aware of anyone registering title under the Torrens Act in at least 40 years. In light of the apparent long-term dormancy of the Torrens Act, Mr. Schnarrs has not shown that this issue as it relates to him is a continuing matter of substantial public interest or that it will recur with such frequency that a decision by this court on the moot mandamus claim is necessary.

Furthermore, with respect to the Torrens Act issue as it relates to foreclosure proceedings affecting his interests, Mr. Schnarrs has a potentially adequate remedy by way of the appeal currently pending in the Court of Appeals. *Wash. State Council of County & City Emps.*, 151 Wn.2d at 167. In this connection, Mr. Schnarrs does not show that his interests will not be protected absent issuance of a writ. *City of Kirkland*, 82 Wn. App. at 827.

Ruling Terminating Review, which is attached hereto ***Exhibit 1***.

15. Before Schnarrs' mandamus action was ultimately dismissed he and his wife asked me to represent them with regard to the appeal the Commissioner refers to above. In that appeal, which was decided after the Commissioner's decision, Division Two of the Washington State Court of Appeals held that Schnarrs could not file a Registration of Land Title application under Chapter 65.15 RCW because their home had been sold pursuant to the DTA before they filed their land title registration application. *See In re Schnarrs*, 10 Wn. App. 2d 596, 448 P.3d 820 (2019).

16. The next Chapter 65.12 RCW case, *Singleton v. West Valley Enterprises*, Mason County Cause No.

18-2-358-23, was filed against Thurston County, several of its officials including all of its superior court judges, and several private defendants in the Mason County Superior Court on June 8, 2018, pursuant to the venue established by RCW 36.01.050.

17. Several of the private and public defendants in that action are represented by the same attorneys who have appeared on behalf of Defendants in this Appeal. I represented the Singletons. No one objected that the venue for the Singleton case was not appropriately brought in the Mason County Superior Court against Thurston County and its officials, including its superior court judges.

18. Unfortunately, all of the Mason County Judges recused themselves based on the Singleton's complaint. One of these judges, the Honorable

Judge Monty Cobb, who had was appointed to the bench by Governor Jay Inslee in 2018, stated in his recusal:

> The undersigned Judge is hereby recused from the hearing the above matter.
>
> REASON FOR RECUSAL: Judge's prior employment involved legislative work on behalf of several named [County defendants] and also included legislative advocacy involving a central issue identified in the complaint. [i.e. lobbying for repeal of Torrens Act]
>
> Dated this 18th day of July 2018,
>
> Monty D. Cobb
> Superior Court
> Judge

A copy of this recusal is attached hereto as ***Exhibit 2***.

19. After all the Mason County Superior Court judges and another judge in the Pierce County Superior Court (Judge Spier) recused themselves, the Chief Justice of the Washington Supreme

Court Mary Fairhurst without notice to the Singletons appointed Kitsap County Superior Court Judge Jeanette Dalton to adjudicate the case *to its conclusion* without regard to whether she was qualified to do so under the Due Process Clauses of the Washington Constitution, the Fourteenth Amendment to the U.S. Constitution, and RCW 2.28.030(1).

20. After the Chief Justice issued this order Heather Singleton filed an original prohibition action against the Chief Justice and Judge Dalton in the Washington Supreme Court. Chief Justice Fairhurst recused herself from consideration of this original action and shortly thereafter a panel of the Washington Supreme Court denied review. The Singletons then filed a petition for certiorari with the United States Supreme Court, based on

federal due process. That petition was declined. As of yet no final appealable decision has been issued in the *Singleton* case by pro tem Mason County Superior Court Judge Dalton.

21. This case, the *Larson v. Snohomish County*, et. al. case, which is currently on Appeal in this court, was the next Torrens Act case to be brought. Its history is briefly and accurately described at pages four through seven in the motion that this declaration supports.

22. Thereafter, another case potentially raising similar issues in Benton County was removed to federal court. A motion to remand on several grounds, including abstention, is currently pending in the United States District Court for the Eastern District of Washington.

23. This Appeal involves the same recusal issues as are involved in all those Torrens Act cases where superior court judges are sued personally for not complying with those ministerial duties which are necessary for a county government to create a working Torrens system for the protection of landowners. Judicial disqualification based on refusal to comply with the provisions of the Torrens Act is one of several issues which I am contemplating raising on appeal because Skagit County Superior Court Judge Svaren has also failed to comply with the Torrens Act in the same way as have the Snohomish County Superior Court judges, but has refused to disqualify himself for violating the Torrens Act.

24. This recusal issue relates directly to the venue decision made by Judge Svaren transferring this

case from Skagit County to a court where he knew, or should have known, that all judicial officers who had been sued personally would be required to recuse themselves, as happened here promptly after the case was transferred.

25. Given the importance of this issue the Larsons should not be prejudiced by clerks deciding to ignore RAP 6.9 for their own benefit. If these clerks were not capable of accommodating this transfer in such a way as to preserve the Larsons appeal rights, then justice did not support Judge Svaren's transfer of this case to the Snohomish County Superior Court.

26. There are many other important issues that the Larsons raised below and which can be asserted on Appeal. The problem for me, as the attorney for the Larsons, is deciding which ones to raise.

27. For example, the Larsons argued that given the vast judicially created homelessness in Washington State had become a magnet for disease which exposed its victims to injury and death. The Larsons argued that they and others faced with the sheriff evicting them into the streets through state action should be afforded full due process before their homes are taken from them by a private trustee, who is not a judicial officer.

28. In this regard, the Larsons' proposed amended complaint alleges:

> 3.17 Another major difference between registration of a land interest under a public land titles system as mandated by Ch. 65.12. RCW and recording such interests under Washington's general recording system pursuant to Ch. 65.08 RCW[1], is that "chain of title" mistakes

[1] Last accessed August 8, 2019, at https://app.leg.wa.gov/RCW/default.aspx?cite=61.24

made by the Registrar of Titles or the Examiner of Titles as the result of false assignments can result in damages being awarded against Snohomish County's treasurer in favor of any injured party. *See e.g.* RCW 65.12.680, 65.12.690, and 65.12.700.

3.18 Washington's Deed of Trust Act was enacted by the legislature in 1965 and is presently codified at Ch. 61.24 RCW[2]. The Deed of Trust Act (DTA) was enacted by the Washington legislature to benefit wealthy corporations at the expense of the people. The DTA does not provide sufficient judicial oversight of the trustee and the nonjudicial foreclosure process to comply with Wash. Const. art. IV, § 6. Sufficient judicial involvement in the nonjudicial process to comply with Wash. Const. art. IV, § 6 requires the same or similar involvement by the judiciary over officials who are acting on behalf of the State as is afforded by the Torrens Act.

3.19 In *Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 565 P.2d 812 (1977), borrowers challenged the nonjudicial sale of real property d by the lender/beneficiary violated the Federal Due Process Clause of the Fourteenth

[2] Last accessed August 8, 2019, at https://app.leg.wa.gov/RCW/default.aspx?cite=61.24

Amendment. The trial court rejected that claim without considering whether the DTA violated Wash. Const. art. IV, § 6. On appeal, the Washington Supreme Court affirmed, stating that no state official was involved in the matter other than in the most ministerial manner. The court held that the foreclosure actions taken pursuant to Washington's Deed of Trust Act, Chapter 61.24 RCW (DTA) constituted only passive state involvement which did not violate the Due Process Clause of the Fourteenth Amendment. ***Kennebec should be reconsidered. The decisions of DTA trustees today are the basis for the exercise of arbitrary governmental power which can and often does cause death, reduced life expectancy, disease, injury, and loss of liberty as well as property based on false documents and fraud. This is not consistent with justice or the norms of a civilized society. Furthermore, since the Great Recession the political branches have used legislation as a way of materially changing the terms of the deed of trust agreements to such a extent that it amounts to significant "state action." Moreover, Washington's governments, and public employees are now betting against the people and communities of Washington by investing in asset***

backed securities which are based on the investors' rights to foreclose on people's homes regardless of whether they actually own the loan and deed of trust as an investor. See RCW 61.24.005 (2) enacted in 1998.

* * *

3.27 In 2006, before the effects of the great recession were being felt by the people of Washington State and this nation, it was well known that:

> Homelessness dramatically elevates one's risk of illness, injury and death.
>
> For every age group, homeless persons are three times more likely to die than the general population. Middle-aged homeless men and young homeless women are at particularly increased risk.
>
> The average age of death of homeless persons is about 50 years, the age at which Americans commonly died in 1900. Today, non-homeless Americans can expect to live to age 78.
>
> Homeless persons die from illnesses that can be treated or prevented. Crowded,

poorly-ventilated living conditions, found in many shelters, promote the spread of communicable diseases. Research shows that risk of death on the streets is only moderately affected by substance abuse or mental illness, which must also be understood as health problems. Physical health conditions such as heart problems or cancer are more likely to lead to an early death for homeless persons. The difficulty getting rest, maintaining medications, eating well, staying clean and staying warm prolong and exacerbate illnesses, sometimes to the point where they are life threatening.

Homeless persons die on the streets from exposure to the cold. In the coldest areas, homeless persons with a history of frostbite, immersion foot, or hypothermia have an eightfold risk of dying when compared to matched non-homeless controls.

Homeless persons die on the streets from unprovoked violence, also known as hate crimes. For the years 1999 through 2005, the National

> Coalition for the Homeless has documented 472 acts of violence against homeless people by housed people, including 169 murders of homeless people and 303 incidents of non-lethal violence in 165 cities from 42 states and Puerto Rico.
>
> Poor access to quality health care reduces the possibility of recovery from illnesses and injuries. Nationally, 71% of Health Care for the Homeless clients are uninsured, as were 46.6 million other Americans in 2005.

National Health Care for the Homeless Council, "Homeless Persons' Memorial Day, 2006: *THE HARD, COLD FACTS ABOUT THE DEATHS OF HOMELESS PEOPLE"* (2006)[3]. *See also* NHS.UK, "*Homeless Die 30 Years Younger than Average*" (December 21, 2011)[4].

3.28 Attached hereto as ***Exhibit 1*** is a list of studies and articles that establish the

[3] Last accessed on August 6, 2019, at https://www.google.com/search?q=Homeless+Persons%E2%80%99+Memorial+Day,+2006:+THE+HARD,+COLD+FACTS+ABOUT+THE+DEATHS+OF+HOMELESS+PEOPLE&tbm=isch&source=univ&sa=X&ved=2ahUKEwj8kJyvoI3kAhVSLX0KHSfYD8cQ7Al6BAgGECQ&biw=1920&bih=888#imgrc=eks9v45eEw7bpM:

[4] Last accessed on August 6, 2019, at https://www.nhs.uk/news/lifestyle-and-exercise/homeless-die-30-years-younger-than-average/

health effects of homelessness. The Larsons request this Court judicially notice that homelessness can cause death, dramatically decreased life expectancy, loss of health, exposure to injury, loss of liberties, and property which occurs without due process of law in the case of nonjudical foreclosures in Washington.

* * *

3.36 On information and belief modern methods of recording and preserving documents do not adequately protect Snohomish County landowners from the recording of secret liens, hidden equities, and fraudulent documents. Furthermore, the title companies WSACA wants to take the place of the Snohomish County Registrars of Titles and Examiner of Titles are biased in favor of promoting secret liens, hidden equities, and use of fraudulent documents to create chains of title after the fact and without regard to whether they are accurate. In fact, private title companies profit when government Defendants do not comply with the Torrens Act.

3.37 Snohomish County, its officials and judges who are referenced as Defendants herein, purposely refused to comply with their statutory duties under the Torrens Act in order to support the MERS registry because it benefited them and their own pecuniary interests.

> 3.38 Alternatively, Snohomish County, its officials and judges were negligent in refusing to comply with their duties under the Registration of Land Titles (Torrens) Act.
>
> 3.39 In either event, Snohomish County and its officials and judges have robbed Snohomish County residents, and owners of interests in land, of the benefits of the public registration system established by Washington's founders via statute to prevent against injustices being visited upon the people because of forged documents, secret liens, and hidden equities concealed in recorded documents.
>
> 3.40 Defendants Governor Inslee and Attorney General Ferguson have acquiesced in Snohomish County's subversion of the people's statutory right to register their interests in land pursuant to the terms of Ch. 65.12 by allowing it to enforce the DTA and Recording Acts and not implement the Torrens Act. This was not a policy choice these executives were allowed to make because the DTA is unconstitutional for the reasons stated herein.

(Emphasis Supplied)

29. The Larson's proposed amended complaint alleged the DTA violated the following

constitutional provisions: Wash. Const. art. IV, § 6, *see* Amended Complaint ¶¶ 6.5–6.16; U.S. Const. Art. I, § 10 and Wash. Const. art. I, § 23, *see* ¶¶ 6.16–23; Wash. Const. art. I § 12, *see* Amended Complaint 6.24–6.27.

30. Within months after the amended complaint was filed the COVID-19 coronavirus struck Washington which now prevents my staff from coming to the office because I am in the high risk group for this serious illness.

31. When my paralegal first told me that clerks were dictating that I had to designate clerk's papers in a manner contrary to the rules I refused to do so, and let the soft deadline pass because I had other significant cases I had to deal with at that time. I knew when I did so that if this Court

followed its normal procedure I would be threatened with sanctions unless I filed the Larsons' clerk's papers by a certain date in the future. Because I needed time to think about what I should do, I decided that the best interest of my clients required I contemplate what course of conduct I should take regarding the unusual circumstances in which clerks had determined that they need not follow RAP 9.6.

32. In the Larsons proposed amended complaint they also allege that government workers, including judges and court clerical personnel, benefit financially from allowing money lenders and debt buyers to foreclose on debtors' homes. In this regard, the proposed amended complaint states:

1.14 Defendant Washington State Treasurer Duane Davidson is a member of Washington's Executive Department. Wa. Const. art. III, § 1. The Washington Constitution provides "The treasurer shall perform such duties as shall be prescribed by law." Wash. Const. art. III, § 19.

1.15 Chapter 43.08 RCW establishes several of the legal duties the Treasurer is required to perform. Chapter 2.12 RCW establishes a judicial retirement system for Defendant and other Washington State judges. The Washington's Treasurer is the ex-officio treasure of the "judge's retirement fund." *See* RCW 2.12.050.

1.16 On April 29, 2019, Governor Inslee signed House Bill No. 1284 creating the capacity for the state treasurer's office to provide separately managed investment portfolios to eligible governmental entities. Such governmental entities include any county, city, town, municipal corporation, quasi-municipal corporation, public corporation, political subdivision, or special purpose taxing district in the state. Washington's Treasurer invests heavily in mortgage backed securities and assets.

1.17 ***The State Treasurer sits on the Washington State Investment Board (SIB), which manages investments of seventeen retirement plans for public***

sector workers, including teachers and other school workers, law enforcement, firefighters, and judges. Washington's SIB also oversees eighteen more public investment funds for programs in industrial insurance, higher education, and developmental disabilities.

1.18 Defendant Washington SIB is a "public fiduciary". Like the Washington State Treasurer's Office Washington's SIB is heavily invested in mortgage backed securities like the one involved in this case.

1.19 The Larsons allege these [mortgage backed] ***investments incentivize Washinton's public employees to support measures which insure the viability of such investments, such as enacting amendments to the DTA, and ensuring that litigation is resolved in favor of their interests in mortgages being enforced even if the note has been split from its security instrument and/or the actual owner of the note cannot be identified.***

1.20 The Larsons request Defendants Treasurer and Washington's SIB be enjoined from investing in funds which include mortgage backed securities containing Washington deeds of trust because Washington's DTA is

unconstitutional and such investments are legally and morally repugnant because they benefit wealthy corporations, government entities, and public employees by redistributing wealth away from the people.

* * *

PRAYER FOR RELIEF

WHEREFORE, Christopher Larson, Angela Larson, their marital community, and two minor children as Plaintiffs pray for such relief as is just and fair and equitable under the circumstances of this case, including without limitation:

* * *

C. Injunctive relief against Washington Governor Inslee, Washington Attorney General Ferguson, Washington Treasurer Duane Davidson, the Washington SIB, and Snohomish County official and judicial defendants comply with the provisions of the Registration of Land Title (Torrens) Act and to stop facilitating enforcement of the Deed of Trust Act to the extent it is unconstitutional simply because it benefits the Washington government and its officials;

* * *

31. I have observed on several occasions Washington court clerical personnel making decisions, like the one involved here, that I believed should have been made by judges. I believe the duty I owe to the courts and my clients requires me to object and I therefore do.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing testimony is true and correct to the best of my information and belief.

Dated this 13th day of March, 2020, at Arlington, Washington.

By: s/*Scott E. Stafne*
Scott E. Stafne, Declarant

Exhibit 1

Larson v. Snohomish County et al.
Case No. 80968-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WARREN FRANK SCHNARRS, Petitioner, v. CAROL ANN MURPHY, ANN HIRSCH, JAMES DIXON, ERIK PRICE, CHRISTINE SCHALLER, MARY SUE WILSON, JOHN C. SKINDER, and CHRISTOPHER LANESE, individuals who have been elected and/or appointed to, and now hold the office of Judge collectively and independently for the Superior Court for the State of Washington at the County of Thurston, Respondents.	No. 95545-0 RULING DENYING MOTION TO STRIKE AND DISMISSING ORIGINAL ACTION

Warren Frank Schnarrs, initially acting pro se, filed an original action in this court under article IV, section 4 of the Washington Constitution, seeking a writ of mandamus compelling the individual superior court judges of Thurston County to (1) approve a county auditor's bond, (2) appoint an attorney to be examiner of titles, and (3) designate a superior court judge to serve as a special inquiry judge. Mr. Scharrs, through counsel, also moves to strike the judges' "opposition"—effectively disqualify the judges' counsel and strike their briefing—because they are represented by a

Thurston County deputy prosecutor. For reasons stated below, the motion to strike is denied and the original action is dismissed.

Mr. Schnarrs,[1] acting pro se, filed three actions in Thurston County Superior Court relating to foreclosure proceedings on Mr. Schnarrs's real property: cause numbers 17-2-02356-34, 17-2-0306-34, and 17-2-06118-34. Mr. Schnarrs sought, among other things, to have title to the subject property registered under the Torrens Act, chapter 65.12 RCW, a seldom used statute originally enacted in 1907. The superior court dismissed number 17-2-02356-34 with prejudice and denied Mr. Schnarrs's motion to appoint a title examiner under the Torrens Act. Mr. Schnarrs's appeal of those orders is now pending in Division Two of the Court of Appeals. No. 51392-7. The other two superior court actions do not appear to be active at this time.

Meanwhile, Mr. Schnarrs, again acting pro se, filed the instant petition for a writ of mandamus, seeking to compel the superior court judges to (1) approve a sufficient county auditor bond pursuant to RCW 65.12.055, (2) appoint an attorney to serve as the county's examiner of titles and set compensation for said examiner, and (3) designate by majority vote of the superior court judges one of their members to be available to serve as a special inquiry judge pursuant to RCW 10.27.050.

A Thurston County senior deputy prosecutor appeared on behalf of the judges and filed an answer opposing Mr. Schnarrs's petition. The judges later submitted a pleading with attached exhibits consisting of copies of court orders indicating that the Thurston County Superior Court had recently approved a bond for the county auditor, appointed an attorney to act as title examiner, and accepted that attorney's oath of office.

Mr. Schnarrs, through newly retained counsel, moved to "STRIKE RESPONDENT'S OPPOSITION," arguing that superior court judges may be represented only by an assistant attorney general. The matter proceeded to a

[1] In his pro se pleadings, Mr. Schnarrs refers to himself as "warren frank: Schnarrs."

teleconference hearing at which the parties argued the motion to strike and the original action.[2] During oral argument, counsel for Mr. Schnarrs clarified that the motion to strike was intended to disqualify the prosecutor's office from representing the judges and to strike their pleadings.

With regard to disqualification of counsel, Mr. Schnarrs contends that article IV, section 4 of the Washington Constitution provides that only an assistant attorney general may represent a superior court judge. That section of the constitution concerns solely jurisdiction in this court; there is nothing within its text relating to legal representation of superior court judges in mandamus actions. Furthermore, the judges are correct that in light of the dual county/state status of superior court judges, it is not unusual for a prosecuting attorney to represent a superior court judge served with a petition for writ of mandamus. *See, e.g.*, *Tacoma News v. Cayce*, 172 Wn.2d 58, 256 P.3d 1179 (2011); *Wash. State Council of County & City Emps. v. Hahn*, 151 Wn.2d 163, 86 P.3d 774 (2004). Mr. Schnarrs is correct that RCW 43.10.010 authorizes the attorney general to represent all state officers, but the statute is not self-executing to the extent it does not explicitly preclude superior court judges from electing to rely on representation by the county prosecutor, particularly when the matter is of local concern.

Mr. Schnarrs relies on *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011), to argue that only the attorney general may represent the judges in this matter; but *Goldmark* is not controlling under these facts. In that case, the attorney general represented the state commissioner of public lands in a superior court action but refused to represent the commissioner on appeal of the adverse judgment entered by the trial

[2] In the meantime, Mr. Schnarrs moved for a disability accommodation in the form of being represented at oral argument by an individual who is not a licensed attorney. This court denied the motion. As indicated, a licensed attorney later appeared for Mr. Schnarrs and argued on his behalf at the hearing.

court. This court held that in light of a statute expressly requiring that the commissioner of public lands be represented by the attorney general in litigation, the attorney general had a mandatory duty, actionable in mandamus, to represent the commissioner in appealing an adverse judgment. *See id.* at 576-82; *see also* RCW 43.12.075. *Goldmark* is inapplicable in these circumstances, where the judges elected to rely on their county's prosecutor.

Mr. Schnarrs further asserts a conflict of interest exists between the judges and the prosecutor. Mr. Schnarrs's vague and unsupported assertions of corruption is unpersuasive. I perceive no actual or potential conflict in this matter. Mr. Schnarrs's motion to disqualify the Thurston County Prosecutor from representing the judges in this matter is therefore denied.[3]

As for striking the pleadings, even if the prosecutor is disqualified from this case, I do not perceive anything improper in the briefing already submitted. The judges' briefing does not assert any arguments not properly before the court, nor does it include inadmissible evidence. Furthermore, the briefing puts forth the same arguments the attorney general would likely make if an assistant attorney general represented the judges. Accordingly, the motion to strike the briefing is denied.

Turning to Mr. Schnarrs's original action, this court has original jurisdiction in mandamus as to all state officers. CONST. art. IV, § 4. It has the power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the exercise of its appellate and revisory jurisdiction. *Id.* With respect to this action, I must initially determine whether to retain the petition for a decision on the

[3] The day before oral argument, Mr. Schnarrs filed in this court, in support of his motion to strike, two declarations and attached papers concerning Thurston County Superior Court ex parte Commissioner Rebekah Zinn, a part-time judicial officer who also works as the court's staff attorney. The point of these declarations is obscure and do nothing to aid Mr. Schnarrs's motion to strike.

merits in this court, transfer it to a superior court for further proceedings, or dismiss it. RAP 16.2(d).

This court may issue a writ of mandamus to compel a state officer to perform a nondiscretionary act that the law clearly requires as part of the official's duties. *Cmty. Care Coal. of Wash. v. Reed*, 165 Wn.2d 606, 614, 200 P.3d 701 (2009). A mandatory duty exists when a constitutional provision or statute directs a state officer to take some course of action. *Brown v. Owen*, 165 Wn.2d 706, 724, 206 P.3d 310 (2009). The mandate must define the duty with such particularity as to leave nothing to the exercise of discretion or judgment. *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011). Furthermore, mandamus is available only where there exists no plain, speedy, or adequate remedy at law. *Wash. State Council of County & City Emps.*, 151 Wn.2d at 167. A remedy is not inadequate merely because it causes delay, expense, or annoyance; instead, there must be something in the nature of the action that makes it apparent that the litigant's rights will not be protected without the issuance of a writ. *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996).

Finally, an individual is entitled to mandamus only if he or she is beneficially interested in compelling the performance of a state officer's duty beyond the interest that is shared in common with other citizens. *See Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003) (an individual has standing to bring an action for mandamus and is considered to be beneficially interested if he has an interest in the action beyond that shared in common with other citizens); RCW 7.16.170 (requiring writ application by "party beneficially interested").

With respect to Mr. Schnarrs's claims concerning compliance with the Torrens Act, the judges have shown that their court recently entered orders cured the claimed shortcomings. In particular, the court (1) entered an order approving a bond of the Thurston County auditor pursuant to RCW 65.12.055, (2) entered an order appointing

a certain attorney to be examiner of titles and setting a bond amount and compensation standard pursuant to RCW 65.12.090, and (3) accepted for filing an oath of the appointed examiner of titles pursuant to the Torrens Act, chapter 65.12 RCW. These filings render Mr. Schnarrs's original action moot as to these issues. *See In re Marriage of Horner,* 151 Wn.2d 884, 891, 93 P.3d 124 (2004) (a case is moot if a court can no longer provide effective relief).

At oral argument, Mr. Schnarrs asserted that the case is not moot because he had already lost his house in the foreclosure action. If anything, this line of argument reinforces the mootness of this original action: Mr. Schnarr is apparently relying on the Torrens issue as a means to collaterally challenge the foreclosure action. But he fails to show how challenging Thurston County's handling of the Torrens Act by way of a mandamus action is going to solve that problem.

Again at oral argument, Mr. Schnarrs urged that if the Torrens Act issues are moot, this court should review them as a matter of continuing and substantial public interest. A moot case will be reviewed if its issue is a matter of continuing and substantial public interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 749-50, 174 P.3d 60 (2007). Since the increasing use of this exception threatens to swallow the basic rule of not issuing decisions in moot cases, actual application of these essential factors is necessary to ensure that an actual benefit to the public interest in reviewing the moot case outweighs the harm from an essentially advisory opinion. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 759 P.2d 1206 (1988).

Mr. Schnarrs expresses a belief (unsupported by any evidence) that only one county in Washington utilizes the Torrens Act system. The act has apparently fallen into disuse as a result of the practicality and efficiency of modern title recording

systems, including the use of title companies. Of particular note, the attorney who was later appointed to be Thurston County's examiner of titles asserted at a superior court hearing in cause number 17-2-0306-34 that he was not aware of anyone registering title under the Torrens Act in at least 40 years. In light of the apparent long-term dormancy of the Torrens Act, Mr. Schnarrs has not shown that this issue as it relates to him is a continuing matter of substantial public interest or that it will recur with such frequency that a decision by this court on the moot mandamus claim is necessary.[4]

Furthermore, with respect to the Torrens Act issue as it relates to foreclosure proceedings affecting his interests, Mr. Schnarrs has a potentially adequate remedy by way of the appeal currently pending in the Court of Appeals. *Wash. State Council of County & City Emps.*, 151 Wn.2d at 167. In this connection, Mr. Schnarrs does not show that his interests will not be protected absent issuance of a writ. *City of Kirkland*, 82 Wn. App. at 827.

Moving on to the designation of a special inquiry judge under RCW 10.27.050, the statute does not plainly indicate that a judge be designated at any particular time prior to identification of the need for such a judicial officer. Mr. Schnarrs has not shown that such a need has arisen. Furthermore, choice of the judge to serve in such a role necessarily involves the exercise of judicial discretion. *Freeman*, 171 Wn.2d at 323 (statute must not allow exercise of discretion or judgment). In the absence of a clear mandatory duty to appoint a special inquiry judge at this time, an action in mandamus will not lie.

Furthermore, Mr. Schnarrs fails to show that he has a current beneficial interest in appointment of a special inquiry judge. *See Retired Pub. Emps. Council of*

[4] In his motion to strike, Mr. Schnarrs urges this court to take judicial notice of attempted actions to repeal the Torrens Act and the political motivations for doing so. I decline to do so. ER 201(b).

Washington, 148 Wn.2d at 616. Mr. Schnarrs's bald and unsupported assertions of corruption surrounding the Torrens Act are insufficient to establish such an interest.

The original action is dismissed.

Michael E Johnston
COMMISSIONER

June 4, 2018

Exhibit 2

Larson v. Snohomish County et al.
Case No. 80968-7

(1)

SUPERIOR COURT OF WASHINGTON FOR MASON COUNTY

HEATHER SINGLETON and PEARL SINGLETON, Plaintiff, vs WEST VALLEY ENTERPRISES Inc Et al. Defendant.	No. 18-2-358-23 RECUSAL **[REC]**

The undersigned Judge is hereby recused from hearing the above matter.

REASON FOR RECUSAL: Judge's prior employment involved legislative work on behalf of several named defendants and also included legislative advocacy involving a central issue identified in the complaint.

13

DATED this 18th day of July 2018.

Monty D. Cobb,
Superior Court Judge

STAFNE LAW ADVOCACY & CONSULTING

February 14, 2022 - 3:41 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,619-5
Appellate Court Case Title:	Christopher E. Larson, et ano. v. Snohomish County, et al.
Superior Court Case Number:	19-2-01383-2

The following documents have been uploaded:

- 1006195_Motion_20220214153026SC023549_1778.pdf
  This File Contains:
  Motion 1 - Consolidation
  The Original File Name was 2022.02.14. Supreme Court Motion to Consolidate.pdf
- 1006195_Other_20220214153026SC023549_1955.pdf
  This File Contains:
  Other - Petition for Discretionary Review
  The Original File Name was 100619-5 Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Christine.Truong@atg.wa.gov
- Geoffrey.Enns@co.snohomish.wa.us
- Jacob.Giem@atg.wa.gov
- amy.edwards@stoel.com
- comcec@atg.wa.gov
- cryden@snoco.org
- gmarsh@snoco.org
- jeni.inirio@stoel.com
- jmcintosh@mccarthyholthus.com
- july.simpson@atg.wa.gov
- kblevins@lagerlof.com
- ldowns@snoco.org
- leeann@stafnelaw.com
- nicole.magill@snoco.org
- pam@stafnelaw.com
- rbailey@lagerlof.com
- rene.tomisser@atg.wa.gov
- rmcdonald@qualityloan.com
- rockymcdonald@gmail.com
- rrysemus@snoco.org

Comments:

Sender Name: Scott Stafne - Email: Scott@StafneLaw.com
Address:
239 N OLYMPIC AVE
ARLINGTON, WA, 98223-1336
Phone: 360-403-8700

Note: The Filing Id is 20220214153026SC023549