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Supreme Court No. 89343-8

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

FLORENCE FRIAS,  
Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC.; LSI TITLE AGENCY, INC.,  
U.S. BANK, N.A.; MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.; and DOE DEFENDANTS 1 through 20,  
Defendants.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
JAN 28 5 11 PM '14  
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**AMICUS CURIAE BRIEF OF THE NORTHWEST JUSTICE  
PROJECT, NORTHWEST CONSUMER LAW CENTER, AND  
COLUMBIA LEGAL SERVICES AS COUNSEL FOR  
WASHINGTON HOMEOWNERS**

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 ORIGINAL

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## I. INTEREST OF *AMICI*

The Northwest Justice Project (NJP), Northwest Consumer Law Center (NWCLC) and Columbia Legal Services (CLS) combat violations of the Deed of Trust Act (DTA) every day. As National Mortgage Settlement grant recipients, we are charged with helping low and moderate income Washington homeowners save their homes whenever foreclosure can be avoided. We are uniquely poised to assess DTA compliance and to intervene when trustees, financial institutions, and others take shortcuts that harm homeowners. In 2013, we responded to over 2,000 homeowners facing foreclosure. We and our clients have a great interest in ensuring that our state's foreclosure laws are fair, follow established tort principles, and reflect sound public policy, consistent with *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 304-13, 308 P.3d 716 (2013). We ask the Court to uphold *Walker* for all of the reasons set forth by Plaintiff, which are strongly supported by public policy considerations, tort law principles, and the overarching goals of the DTA, as discussed below.

## II. ARGUMENT

### A. **The Foreclosure Crisis in Washington Is Not Over and the Questions in this Case Are of Utmost Importance.**

The foreclosure crisis in Washington is not over. Though there has been a modest housing rebound, it masks the fact that a large number of Washington homeowners still face loss of their homes in the years to

come. Last year, nearly 35,000 Washington homeowners were in some stage of non-judicial foreclosure.<sup>1</sup> Despite a steady decline in the number of recorded notices of trustee's sale (NTS) since September 2013, the latest figures indicate that 6.7% of Washington mortgage loans are not current.<sup>2</sup> Indeed, despite a notable decrease in national foreclosure filings from 2012 to 2013, the foreclosure rate in Washington *increased* during the same period by 13%.<sup>3</sup>

Analysts emphasize that mortgage default is the result of local economic conditions.<sup>4</sup> Unfortunately, Washington can expect several more years of economic volatility. According to the Federal Reserve, economic growth for the 12th District<sup>5</sup> was "modest" during the last

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<sup>1</sup> *Foreclosure Activity for Washington, January*, RealtyTrac (Dec. 2013), <http://www.realtytrac.com/statsandtrends/foreclosuretrends/wa> (last visited Jan. 24, 2014).

<sup>2</sup> *Mortgage Market Performance Observations Data*, Black Knight Financial Services, (Nov. 2013), <http://www.lpsvcs.com/LPSCorporateInformation/CommunicationCenter/DataReports/MortgageMonitor/201311MortgageMonitor/MortgageMonitorNovember2013.pdf>.

<sup>3</sup> *1.4 Million U.S. Properties with Foreclosure Filings in 2013 Down 26 Percent to Lowest Annual Total Since 2007*, RealtyTrac (Jan. 13, 2014), <http://www.realtytrac.com/Content/foreclosure-market-report/2013-year-end-us-foreclosure-report-7963>.

<sup>4</sup> *Delinquency and Foreclosure Rates Continue to Plummet*, Mortgage Bankers Association National Delinquency Survey (Nov. 7, 2013), <http://www.mbaa.org/NewsandMedia/PressCenter/86173.htm>.

<sup>5</sup> The Federal Reserve's 12th District also includes Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon and Utah.

reporting period.<sup>6</sup> The extent to which homeowners can weather illness, divorce, or job loss depends on their home equity. While there is no evidence that homeowners default on their loans solely because of negative equity, when economic hardships mount, negative equity drastically reduces a homeowner's foreclosure-avoidance options. In a state where unemployment rates are as high as 11.3% (Grays Harbor County)<sup>7</sup> and negative equity rates reach 32% (Pierce County),<sup>8</sup> there is cause for continued concern.

Homeowners in foreclosure depend on the DTA's protections to ensure fair treatment by the trustees that conduct sales and the financial institutions and other entities that own and manage the loans, but recent changes in the mortgage market will make the evaluation and enforcement of DTA compliance especially challenging. For example, many loan servicers, the only line of communication between borrowers and note owners, are drastically reducing foreclosure staff.<sup>9</sup>

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<sup>6</sup> *Summary of Commentary on Current Economic Conditions by Federal Reserve District*, Federal Reserve (Dec. 4, 2013), available at [http://www.federalreserve.gov/monetarypolicy/beigebook/files/Beigebook\\_20131204.pdf](http://www.federalreserve.gov/monetarypolicy/beigebook/files/Beigebook_20131204.pdf).

<sup>7</sup> *Map of County Unemployment Rates*, Wash. Employment Security Dep't, <https://fortress.wa.gov/esd/employmentdata/reports-publications/economic-reports/monthly-employment-report/map-of-county-unemployment-rates> (last visited Jan. 24, 2014).

<sup>8</sup> *The U.S. Housing Crisis: Where are home loans underwater?* <http://www.zillow.com/visuals/negative-equity/#4/39.98/-106.92> (last visited Jan. 27, 2014).

<sup>9</sup> See *supra* note 4.

Several major financial institutions recently sold large volumes of mortgage servicing rights to hedge funds and non-banks, new players and servicers who are unfamiliar with state foreclosure laws.<sup>10</sup> Mortgage industry compliance with the Washington DTA was already problematic when servicers were well-staffed with locally experienced personnel.<sup>11</sup> The new servicer environment creates a heightened danger of unresponsiveness and noncompliance by trustees, loan servicers and beneficiaries, and makes the certified questions in this case all the more timely and important.

**B. Foreclosure Is a *Process*, Not an *Event*, and in that Process Homeowners May Suffer Many Types of Injuries and Damages as a Result of DTA Violations and Other Tortious Conduct Even in the Absence of a Sale.**

A wrongful non-judicial foreclosure is not an *event* that occurs at the moment of the trustee's sale, but a *process* that occurs over months, beginning with notices and potentially concluding nearly a year later with a sale. A homeowner may suffer many types of injuries and damages as a result of DTA violations over that period, even in the absence of a sale.

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<sup>10</sup> *GSO Drawn to Mortgage Servicing as Banks Retreating*, Bloomberg News (Sept. 17, 2013), <http://www.bloomberg.com/news/2013-09-17/gso-drawn-to-mortgage-servicing-as-banks-retreating.html>.

<sup>11</sup> See, e.g., *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Bain v. Metro. Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

**1. Many Ways in Which the Non-Judicial Foreclosure Process May Be Begun But Not Completed.**

There are many ways in which a non-judicial foreclosure may be begun without resulting in a trustee's sale. Such scenarios include foreclosure proceedings that are terminated by reinstatement, modification, deed in lieu of foreclosure (DIL), sale (including "short" sales) of the property, and successful mediation under the Foreclosure Fairness Act (FFA), RCW 61.24.163, which may include those and other alternative outcomes, or judicial foreclosure. In each scenario, the homeowner can be injured and can suffer damages as a result of DTA violations.

When faced with potential liability, the beneficiary may decide to cancel an unlawfully-initiated non-judicial foreclosure and pursue judicial foreclosure and deficiency instead. But DTA violations that cause higher arrears and fees will carry over into the subsequent judicial foreclosure, whether in the form of a larger deficiency or in a greater tax liability for a waived deficiency. In short, foreclosures may end in many ways other than a trustee's sale, and unlawful or unauthorized DTA violations can cause direct and indirect harm and damages to homeowners.

**2. Many Types of DTA Violations that Cause Injuries and Damages Even When No Sale Occurs.**

*Violations Creating Delays.* Delays from DTA violations that injure homeowners include untimely response during the FFA mediation

process and refusal to timely grant the homeowner a requested Meet and Confer session. Delays in the process caused by DTA violations result in additional arrears and/or fees, and prolonged emotional distress and other physical harm.<sup>12</sup>

*Violations Shortening the Process.* When a beneficiary's DTA violation involves shortcutting the process, added fees and other effects associated with processing the notices accrue sooner than necessary. Shortcutting the process may also cause the homeowner to miss deadlines to respond, with potentially disastrous results.

*Violations from Trustee's Lack of Authority.* If the appointment of the foreclosure trustee is untimely, or the entity appointing the trustee is not authorized to do so, or the trustee is not otherwise authorized to proceed with foreclosure under the DTA, the sale would be void if completed.<sup>13</sup>

*Violations that Mislead the Homeowner or Cause a Misdirected or Thwarted Response.* The promissory note owner, for example, may be misidentified in several key locations: notice of default, notice of pre-foreclosure options, and notice of sale. If an improper party is identified

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<sup>12</sup> See *infra* at 8 & nn. 15-16.

<sup>13</sup> See *Schroeder*, 177 Wn.2d at 682-83 & 687; see also *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) ("Without statutory authority, any action taken [under the DTA] is invalid"); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636, 642-49 (2013) (same).

as the one to negotiate a modification, the homeowner may waste precious time negotiating with the wrong party. The notice of default or notice of sale may also contain incorrect amounts that lead the homeowner to believe she cannot reinstate the default, when indeed she could.

*Violations Wrongly Placing Homeowner in Foreclosure or Wrongly Proceeding with the Process.* Less commonly, a non-judicial foreclosure may be commenced improperly when the homeowner is not, in fact, in default. For example, a loan servicer may misapply a payment and then, rather than working with the homeowner to resolve the situation, initiate the non-judicial foreclosure process. Another example of improperly proceeding would be if the foreclosure moved ahead in the face of a bankruptcy stay.<sup>14</sup>

### **3. Types of Injuries and Damages from Wrongful Foreclosure in the Absence of a Sale.**

Homeowners suffer a wide variety of monetary and non-monetary injuries as a result of wrongful foreclosures, depending on the types of violation(s) committed.

*Emotional Distress and Physical harm.* A harm common to all DTA violations is the emotional distress caused by the prospect of losing

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<sup>14</sup> For a further cataloging of the types of violations of non-judicial foreclosure laws and resulting injuries that occur without a trustee's sale, see Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562, 564-70 (2012).

one's home. Granted, often the events leading to the default are also distressing, like the loss of a spouse, loss of employment, or overwhelming medical expenses. However, DTA violations that result in the *unnecessary* prospect of losing one's home through a foreclosure and/or extend the time in foreclosure substantially exacerbate the emotional distress and create actionable injury and damages.<sup>15</sup> A recent report finds that foreclosure has an adverse effect on health that is unrelated to unemployment or existing health conditions.<sup>16</sup>

*Arrears.* When DTA violations cause needless delay before resolution, the homeowner's arrears continue to accrue, augmented with late fees and higher default interest. These additional sums may preclude a modification or reinstatement. Because the servicer may refuse to accept payments short of the entire cure amount, a homeowner cannot make payments in the interim to minimize the arrears. Unnecessary arrears increase the loan balance, the amount needed to reinstate or redeem, and the amount capitalized for a standard loan modification.

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<sup>15</sup> See Transcript of Digitally-Recorded Ruling by Hon. Karen A. Overstreet in *Keahey v. Jared, et al.*, Bankr. W.D. Wash., No. 05-1153, dated Feb. 2, 2006, Dkt. 67, attached to Plaintiff Frias' Reply at 28-34 (awarding emotional distress damages for a wrongful foreclosure that did not result in a trustee's sale); see also *Sherwood v. Bellevue Dodge*, 35 Wn. App. 741, 749, 669 P.2d 1258 (1983) (affirming tort damages for emotional distress awarded for wrongful repossession of vehicle along with CPA damages); *Theis v. Fed. Ftn. Co.*, 4 Wn. App. 146, 150, 480 P.2d 244 (1971) (affirming emotional distress damages for wrongful attempted foreclosure of chattel mortgage).

<sup>16</sup> Janet Currie & Erdal Tekin, *Is There a Link Between Foreclosure and Health?* Nat'l Bureau of Econ. Research (revised Nov. 2013), <http://www.nber.org/papers/w17310>.

Moreover, unnecessary arrearages have negative implications for non-retention options such as sale, short sale, deed in lieu (DIL), or even judicial foreclosure. A homeowner with equity may wish to sell, but a wrongful foreclosure can cause trustee's sale stigma, unnecessarily high arrearages, and additional fees, any of which reduces the cash back to the homeowner. If there is no equity, the homeowner may wish to short sell the home, or execute a DIL. The greater the accrued arrearages and fees, the greater the deficiency—and the greater the chance that the servicer will not approve the sale. Further, a higher deficiency equates to greater potential liability after the short sale or DIL, or a greater federal tax liability for forgiven debt if the deficiency is waived.

*Impacts to Credit Score.* A closely related issue is injury to credit score and associated damages. Where the servicer refuses to accept payments—even if the homeowner could tender them—the homeowner's credit history suffers additional blows. Thus, if the ultimate resolution of the default is delayed by DTA violations, not only does the homeowner have additional negative credit score impact, but it also takes longer before she can begin to make regular payments and rebuild her score with a positive remittance history.<sup>17</sup>

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<sup>17</sup> See *Bloor v. Fritz*, 143 Wn. App. 718, 744, 180 P.3d 805 (2008) (affirming \$10,000 damages for injury to credit ratings caused by tortious conduct); see also Kenneth P. Brevoort, *Foreclosure's Wake: Credit Experiences of Individuals Following*

*Additional Fees.* The non-judicial foreclosure process also involves a series of fees for posting, publication, mailing, and processing of notices, and ancillary fees for title searches, inspections, and other foreclosure costs, all of which are added to the loan balance. DTA violations that wrongfully initiate or extend the period of foreclosure thus needlessly increase the loan balance and are a further source of monetary harm.<sup>18</sup>

*Sale Stigma.* Once the NTS is recorded, the property's foreclosure status becomes public knowledge and the property value decreases. If DTA violations result in the NTS being issued needlessly or erroneously, the homeowner is harmed by the lowered value and decreased desirability of the home. This is especially injurious if the homeowner is attempting to sell the home, whether as a "short" sale or to capture equity. The recorded NTS also alerts scammers who target economically vulnerable homeowners.

*Restriction of Rights.* Certain DTA violations mislead or misdirect homeowners such that they miss deadlines to respond and/or request meetings or mediation. Also, a misidentified beneficiary on a

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*Foreclosure, Finance and Economics Discussion Series No. 2010-59*, Federal Reserve Board (2010), at <http://www.federalreserve.gov/pubs/feds/2010/201059/201059pap.pdf>.

<sup>18</sup> See Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 820 (2011) (discussing profitable fees which "encourage servicers to draw out the time to resolution for a loan in default," because the longer a foreclosure is pending, the more fees the servicer may assess).

notice may improperly trigger an exemption from Foreclosure Fairness Act (FFA) mediation under RCW 61.24.163, depriving a homeowner of this valuable negotiation tool.<sup>19</sup>

*Loss of Time and Incidental Costs.* Time away from work or business, travel costs (mileage, gas, parking, etc.), multiple fax fees, and time lost while making phone calls and waiting on hold are all examples of the incidental monetary and value-of-time injuries that can result from most types of DTA violations.

*Attorney Fees and Costs of Investigation.* The average homeowner is not familiar with all the DTA's provisions and may only suspect that something is wrong. Costs of investigation and consultation with an attorney can be expensive. An attorney and investigative time may be required to determine, for example, the real party in interest if the owner of the loan is misidentified at any juncture.

*Court Costs and Other Fees and Expenses.* If a foreclosure proceeded in the face of a bankruptcy stay, the homeowner would be forced to file a motion in bankruptcy court to stop it. Time off work,

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<sup>19</sup> See also *Klem*, 176 Wn.2d at 792-95 (trustee falsely notarized and predated notices "to expedite the date of sale"); *Cox v. Helenius*, 103 Wn.2d 383, 384-85, 693 P.2d 683 (1985) (trustee, who was also beneficiary's attorney, misled homeowner by proceeding with sale despite knowledge that homeowners believed their prior action had halted the sale); see also John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 CATHOLIC UNIV. L. REV. \_\_\_\_ (2014) (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191738###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191738###).

attorney fees, filing fees, and travel-related costs would accrue.

**4. Case Examples Illustrating Pre-Sale Injuries Caused by Wrongful Foreclosures Absent a Sale.**

Examples of *pre-sale* foreclosure violations causing injury and considerable damages to homeowners abound. In *Provost v. Kandi*,<sup>20</sup> for example, the plaintiff filed a complaint in King County Superior Court for damages resulting from pre-sale misconduct in a non-judicial foreclosure, including a claim for wrongful attempted foreclosure. The case involved a self-proclaimed loan shark who sought to foreclose on the home of a woman who borrowed money to stave off a foreclosure from another hard money lender. The new loan was payable in 60 days and at 75% interest. Mr. Kandi initiated a foreclosure under the DTA using his own attorney as trustee, sidestepped the foreclosure procedures by shortening the notice period, not recording various documents, and scheduling the sale well before the time allowed, and only was halted when the lawsuit was initiated.<sup>21</sup> The court found that the loan was usurious and extortionate, and so awarded a usury penalty of \$240,000 (set off against the debt),

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<sup>20</sup> *Provost v. Kandi*, King County Superior Court No. 09-2-25191-6. These public court records are available online at <http://www.kingcounty.gov/courts/Clerk/Records/> and are capable of accurate and ready determination, and should be judicially noticed under ER 201(b)(2).

<sup>21</sup> *Id.*, First Amended Complaint, filed May 26, 2010, ¶¶ 2.1-2.15 & 10.1 (Dkt. 43).

punitive damages of \$100,000 under the Distressed Property Act,<sup>22</sup> plus attorney fees and costs. Because the damages exceeded the deed of trust debt, title was quieted in favor of the plaintiff, thus nullifying the deed of trust.<sup>23</sup>

Similarly, in *Maas v. Ross*,<sup>24</sup> former attorney Norman Maas instituted a collusive foreclosure in King County Superior Court against his former clients, the Rosses, and other junior lien holders. The action was a judicial foreclosure, but the foreclosing party could just as easily have used the non-judicial procedure. Lien holder Richard Hope challenged the validity of the foreclosure, contending that when he advanced money to Ross, he had satisfied the debt to Maas. Because of the lapse of time, little evidence of the payment could be produced. Nevertheless, the trial court found that Hope had indeed paid off the lien and that the foreclosure was collusive. The Rosses conceded they were getting a substantial bonus from Maas to allow them to purchase another house in return for not protesting the foreclosure. The trial court found that Maas had fabricated the claim in order to get the property free and

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<sup>22</sup> *Id.*, Judgment and Findings for Damages and Quieting Title, filed June 4, 2010 (Dkts. 46 & 47); *see also* The Distressed Property Act, RCW 61.34.

<sup>23</sup> *Id.*

<sup>24</sup> *Maas v. Ross*, King County Superior Court, No. 96-2-10058-7-SEA.

clear for himself and had destroyed records that would prove otherwise.<sup>25</sup> Hope received a substantial judgment for damages and attorney fees. This Court *disbarred* Mr. Maas for his foreclosure misconduct on January 3, 2002.<sup>26</sup>

Although most wrongful foreclosures are less extreme, there is almost invariably real anguish and emotional distress from the prospect of losing one's home, along with the costs of investigating and responding to the wrongful foreclosure and attorney fees required to obtain legal counsel as the DTA requires that homeowners be advised to do.<sup>27</sup>

A Georgia court sums up the logic behind the rule that cancellation of a wrongful foreclosure sale should not bar a homeowner from pursuing a claim of damages for humiliation and emotional distress:

It strains credulity to insist that the recovery of appellant's wrongfully foreclosed residence has made her whole, and we find no bar in law or in logic to a recovery of damages for her humiliation and emotional distress should evidence at trial establish the truth of the allegation in her pleadings that the foreclosure was instituted intentionally and without basis. Accordingly, we do not agree that because the foreclosure sale had been cancelled, appellant could not pursue her separate claim for damages.

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<sup>25</sup> *Id.*, Findings of Fact and Conclusions of Law, filed November 17, 1997 (Dkt. 90).

<sup>26</sup> <https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=188>.

<sup>27</sup> See RCW 61.24.040(2) (requiring that trustees advise homeowners in the Notice of Trustee's Sale to consult with an attorney to "help save your home").

*Clark v. West*, 395 S.E.2d 884, 885 (Ga. App. 1990) (emphasis added).<sup>28</sup>

Judge Karen Overstreet, former Chief Bankruptcy Judge in the Western District of Washington, recognized this same logic and rejected the proposition that a foreclosure must be completed to give rise to a damages remedy. As she observed, “a plaintiff who actually stops the foreclosure should not be in a *worse* position than someone who doesn’t stop the foreclosure,” and has “at least as many rights if not more than someone who fails to stop the foreclosure.”<sup>29</sup>

**C. Established Tort Law Policies and the Objectives of the DTA Support a Damages Claim for Pre-Sale Injuries Caused by DTA Violations in the Absence of a Sale.**

As shown above, the *process* of a wrongful foreclosure causes injury and damages that are very similar to, if not the same as, the injury and damages caused by the *event* of a completed wrongful foreclosure. These include emotional distress, damages to credit score, loss of value, and the costs and attorney fees to investigate the wrongful foreclosure.<sup>30</sup>

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<sup>28</sup> See also *Morse v. Mut. Fed. Sav. & Loan Ass’n*, 536 F. Supp. 1271, 1279-80 (D. Mass. 1982) (finding that wrongful acts in violation of non-judicial foreclosure law could be expected to humiliate and distress homeowners and allowing recovery for mental suffering based on unlawful attempted foreclosure).

<sup>29</sup> *Barrus v. ReconTrust Co., N.A.*, No. 11-01578 KAO (Bankr. W.D. Wash., Mar. 3, 2011) (transcript of summary judgment hearing and decision) at 88 (ruling that California trustee was barred from prosecuting Washington foreclosure, and that homeowner did not lose damages claim for pre-sale DTA violations when sale was halted for “abuses in the foreclosure process,” rejecting *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115 (W.D. Wash. 2010)).

<sup>30</sup> See RCW 4.84.030 (costs); RCW 61.24.090(2) (fees and costs incurred challenging reasonableness of fees demanded in foreclosure); RCW 61.24.130(1)(b) (fees and costs

The only difference is the *quantum* of damages caused by the DTA violations, which may include the ultimate loss of equity after a sale. Thus, it makes no sense to bar a homeowner from asserting a damages claim for injuries caused by DTA violations unless or until a sale occurs.<sup>31</sup> In addition to the many compelling arguments set forth by Plaintiff Frias, this conclusion is further supported by established tort law policy and the overall objectives of the DTA.

**1. Policy of Compensating Homeowners Injured by DTA Violations.**

A primary goal of our tort system is to compensate an injured party “to make him whole again as nearly as that may be done by an award of money.” *DeNike v. Mowery*, 69 Wn.2d 357, 358, 418 P.2d 1010 (1966) (citation omitted). It follows that homeowners should be fully and fairly compensated for their pre-sale injuries caused by DTA violations and other tortious conduct, including for injuries such as emotional distress that are not compensable under the Consumer Protection Act, RCW 19.86. This should be true with or without a completed trustee’s sale.

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incurred “by any party” as a result of a restraining order or injunction); *see also Rorvig v. Douglas*, 123 Wn.2d 854, 861-63, 873 P.2d 492 (1994) (despite general rule that attorney fees are not recoverable absent contract, statute or ground of equity, attorney fees may be recovered in “certain circumstances” involving real estate such as actions for “malicious prosecution, wrongful attachment and slander of title” where defendant’s “conduct forces the plaintiff to litigate”).

<sup>31</sup> As one court observed, “[i]f the foreclosure is indeed wrongful, it seems artificial and counter to the rules of equity to require Plaintiffs to wait for the inevitable to take place—the sale of their property—before bringing suit.” *Nguyen v. JP Morgan Chase Bank N.A.*, 2013 WL 2146606, \*4 (N.D. Cal. May 15, 2013).

Compensating homeowners for their injuries caused by DTA violations in the absence of a sale is also necessary so that the remedies for violations of Washington’s judicial foreclosure law, chattel mortgage foreclosure law, and non-judicial foreclosure law are all symmetrical. In judicial foreclosures under RCW 61.12 and judicial foreclosures of chattel mortgage, there is a formal court process where the property owner can challenge the foreclosure process and seek damages, including emotional distress damages, for unlawful foreclosures that are begun but not completed.<sup>32</sup> The same should be true for non-judicial foreclosures. *See also* RCW 61.24.020 (“Except as provided in this chapter [the DTA], a deed of trust is subject to all laws relating to mortgages on real property”).

## **2. Policy of Deterring DTA Violations and Motivating Better Compliance.**

Another policy goal of Washington tort law is to deter bad behavior and motivate good behavior.<sup>33</sup> In the non-judicial foreclosure context, holding the mortgage industry liable in damages for injuries caused by their violations of the DTA—even absent a sale—promotes this policy by creating incentives for trustees, servicers and beneficiaries to comply with

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<sup>32</sup> *See Maas v. Ross*, discussed *supra* at 13-14 (judicial foreclosure); *Theis*, 4 Wn. App. at 150 (chattel mortgage).

<sup>33</sup> *See Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419, 150 P.3d 545 (2007) (discussing “deterrent effect of tort law”); *Christen v. Lee*, 113 Wn.2d 479, 513, 780 P.2d 1307 (1989) (Utter, J., concurring in part and dissenting in part) (discussing tort policy of “imposing liability to provide incentive to avoid the loss altogether”).

the DTA, and disincentives for them not to. Limiting a homeowner's wrongful foreclosure claim to cases where there has been a completed sale would subvert this policy by substantially reducing the incentives for strict compliance with the DTA, and would make no sense. As this Court said in *Albice*, "[b]ecause the Act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply." *Albice*, 174 Wn.2d at 567. A reasonable damages remedy will motivate strict compliance.

### **3. Policy Supporting Mitigation of Damages and Strong Preference for Presale Remedies.**

A third objective of our tort system is to encourage injured parties to mitigate their damages. *See, e.g., Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004) (discussing "doctrine of avoidable consequences, or mitigation of damages"). In the context of non-judicial foreclosures, this principle is closely tied to the courts' strong preference that homeowners seek *presale remedies*. This preference is expressed in numerous court decisions,<sup>34</sup> and in the language of the statute itself, which

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<sup>34</sup> *See Plein v. Lackey*, 149 Wn.2d 214, 227-28 & n.5, 67 P.3d 1061 (2003) (discussing concern that if DTA violations are not raised pre-sale and sales are invalidated after the fact, "title insurers will not insure, secured lenders will not lend on, and buyers will not purchase real property with title tracing to a trustee's deed"); *see also Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971) ("To allow one to delay asserting a defense [until after the sale] would be to defeat the spirit and intent of the trust deed act.").

authorizes homeowners to file a pre-sale action to restrain a sale “on *any* proper legal or equitable ground.” RCW 61.24.130(1) (emphasis added). A rule that prevented homeowners from recovering damages for pre-sale injuries, and required them to wait until a completed sale, would undermine these salutary goals as well.

#### **4. Promoting the Objectives of the Deed of Trust Act.**

The position supported by *amici* promotes the three overarching goals of the DTA, which are (1) to create an efficient and inexpensive process, (2) to promote stability of land titles, and (3) to prevent wrongful foreclosures. *See Albice*, 174 Wn.2d at 567.

The goal of increasing efficiency and reducing expense is served because, as the *Walker* court explained, “[h]olding the lending industry liable for damages caused by its DTA violations should produce greater compliance and a reduction in future litigation,” thus “reduc[ing] the long-term system-wide expenses of nonjudicial foreclosures under the DTA.” *Walker*, 176 Wn. App. at 311-12 (citing *Bain*, 175 Wn.2d at 117-18 & n.18).

The goal of promoting stable land titles is served because allowing homeowners to sue for damages for injuries caused by DTA violations in the absence of a sale will encourage compliance by trustees, servicers and beneficiaries, and “[e]ncouraging statutory compliance encourages . . .

procedurally sound sales . . . thereby promoting stable land titles overall.”

*Albice*, 174 Wn.2d at 572.

Finally, the goal of preventing wrongful foreclosures is plainly served by recognizing a damages claim for pre-sale injuries, because it will encourage strict compliance with the DTA and prevent wrongful foreclosures from occurring in the first place. *Albice*, 174 Wn.2d at 572.

### III. CONCLUSION

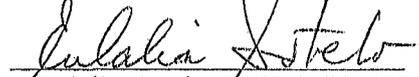
*Amici* respectfully request that the Court answer the first certified question by holding that a homeowner may assert a claim for damages for a wrongful foreclosure done in violation of the DTA or other established standards of conduct, whether or not there has been a completed sale.

DATED this 28th day of January, 2014.

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**DECLARATION OF SERVICE**

I, Annabell Joya, a legal assistant at Columbia Legal Services, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon the following counsel of record:

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## OFFICE RECEPTIONIST, CLERK

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**To:** Annabell Joya  
**Subject:** RE: Frias v. Asset Foreclosure Services, Inc. et al., Case No. 89343-8

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Annabell Joya [mailto:Annabell.Joya@ColumbiaLegal.org]  
**Sent:** Tuesday, January 28, 2014 3:54 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Frias v. Asset Foreclosure Services, Inc. et al., Case No. 89343-8

Dear Clerk,

Attached are the following documents for filing with the Court:

- Motion of The Northwest Justice Project, Northwest Consumer Law Center, and Columbia Legal Services as Counsel for Washington Homeowners for Leave to File *Amicus Curiae* Brief; and
- *Amicus Curiae* Brief of The Northwest Justice Project, Northwest Consumer Law Center, and Columbia Legal Services as Counsel for Washington Homeowners.

These have been served today upon all counsel of record by first-class mail, postage prepaid.

The case name, case number, and name, phone number, bar number and email address of the attorney filing these documents are, respectively:

Frias v. Asset Foreclosure Services, Inc. et al., Case No. 89343-8, filed by Matthew Geyman, WSBA #17544, (206) 287-9661, [matt.geyman@columbialegal.org](mailto:matt.geyman@columbialegal.org). Thank you.

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