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STATE OF WASHINGTON
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NO. 89343-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FLORENCE R. FRIAS,

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC., et al.,

Defendants.

DEFENDANTS' MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND U.S. BANK N.A.'S RESPONSE TO AMICUS BRIEF OF COALITION FOR CIVIL JUSTICE

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I. INTRODUCTION

The Coalition for Civil Justice ("CCJ") relies extensively on *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294 (2013), a case in which the brief's author serves as plaintiff's counsel. But the court in *Walker* misinterpreted Washington law and legislative history, as well as the facts before the court. This Court should reject the faulty logic and conclusions in *Walker*, and the spin CCJ puts on that case. Instead, the Court should reaffirm that the DTA establishes an injunctive remedy for borrowers seeking to challenge foreclosure on any "legal or equitable ground," RCW 61.24.130(1), but does not create a generalized presale damages remedy.

In addition, even a cursory review of the cases CCJ cites in support of their argument that "presale damages are well grounded in tort law" refutes that very theory. CCJ's cases generally stand for the opposite proposition, involve post sale claims, or required heightened elements (like malice), making their cases unlike the issues presented here.

II. ARGUMENT

A. This Court Should Not Follow *Walker*.

Although *Walker* does not bind this Court, because CCJ bases much of its amicus brief on that case, Defendants MERS and U.S. Bank offer a brief response.

1. *Walker* Reversed Dismissal of Claims under the DTA, CPA, and FDCPA.

Mr. Walker borrowed $280,000 from Credit Suisse Financial Corp. in 2007, evidenced by a Note and secured by a Deed of Trust. The Deed of Trust listed Credit Suisse as the Lender; MERS as beneficiary, solely as nominee for Credit Suisse and any subsequent Note holder; and Ticor Title as Trustee. 176 Wn. App. at 302-03. Walker defaulted on the Note, and on May 22, 2009, received a Notice of Default. *Id.* at 303. Also in May 2009, Select Portfolio Inc., purporting to act as beneficiary (Note holder), appointed Quality Loan Service as Trustee of Walker's Deed of Trust. *Id.* Because MERS was still listed in the Deed of Trust as the beneficiary in a nominee capacity for the Note holder, in July 2009, at Select's direction, MERS recorded an assignment of its interest (essentially an agency interest) to Select. *Id.* Quality, in turn, recorded a Notice of Trustee's Sale, reflecting that Select was the beneficiary and that MERS had assigned its nominee interest to Select. *Id.*

Walker never disputed his default or that he received proper notices. Still, he filed a Complaint under various legal theories against Quality, Select, and MERS, seeking to restrain the sale, recover damages, and quiet title. *Id.* Ignoring whether Select held the Note, Walker theorized that if MERS did not hold the Note, it was not a valid beneficiary and "all subsequent actions taken by any party in reliance on MERS' [sic] actions is [sic] also unlawful." *Id.* According to Walker, if Select relied on the MERS assignment to become beneficiary (i.e., Note holder), and MERS did not hold the Note, then Select could not appoint Quality as Trustee, and any subsequent foreclosure proceedings by Quality were wrongful. *Id.* The trial court granted Quality and Select's Motion for Judgment on the Pleadings. *Id.* (MERS was not a party to that motion.) Walker appealed.

The Court of Appeals reversed the trial court's order dismissing Walker's claims for violations of the DTA, CPA, and Fair Debt Collection Practices Act ("FDCPA"). The court concluded Walker pleaded facts that, if proved, were "sufficient to show that MERS lacked the authority to assign his deed of trust and note to Select and, as a consequence, that Select similarly lacked authority to appoint Quality successor trustee." *Id.* at 309. The court disagreed with most (not all) of the holdings in *Vawter v. Quality Loan Service Corp. of Washington*, 707 F. Supp. 2d 1115 (W.D. Wash. 2010), which held the DTA does not provide a presale damages remedy for DTA violations absent a sale. 176 Wn. App. at 312-13.

2. *Walker* Misreads *Bain* and *Vawter*.

Walker focuses much of its analysis on this Court's decision in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012), and on distinguishing the *Vawter* case from Judge Robart. Both *Bain* and *Vawter* support MERS and U.S. Bank on the certified questions in this case.

Walker's Misinterpretation of Bain. *Walker* misreads *Bain* in two ways:

First, *Walker* suggests that in *Bain*, this Court held that simply designating MERS as a nominee for a disclosed principal in the Deed of Trust could support liability in connection with a foreclosure initiation. *Walker*, 176 Wn. App. at 311-12 & n.58. That is not true.

In every Deed of Trust, MERS is listed as "beneficiary" solely as an agent for the original lender (and the "Lender" is identified in the Deed of Trust), and then for any subsequent MERS member that acquires the loan (i.e., the "Lender" and the "Lender's successors and assigns"). Dkt. 10-1, at 3. In *Bain*, this Court held that unless MERS was the Note holder, it could not take actions claiming to be the beneficiary (i.e., Note holder) in its own right, rather than as an agent for the actual Note holder. 175 Wn.2d at 110. The Court went out of its way, though, to explain that so long as MERS had a principal for whom it was acting, nothing prevented MERS from acting as an agent for a Note-holding principal: "MERS argues that lenders and their assigns are entitled to name it as their agent. That is likely true and nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the [DTA] itself, approves of the use of agents." *Id.* at 106.

But the driving factor in *Bain* was that it appeared on the limited record before the Court that MERS had no principal, due in part to an admittedly flawed assignment by MERS disavowing any principal and suggesting MERS was the Note holder, when it was not. *Id.* at 116-17 (assignment "purports to transfer its beneficial interest on behalf of its own successors and assigns, not on behalf of any principal").[1] The Court

[1] Unfortunately, in certifying *Bain* to this Court, Judge Coughenour's Order transmitted an incomplete and limited record (addressing exclusively legal, not factual, issues), and in the process omitted evidence in the record showing MERS was acting on behalf of a known Note holder (i.e., principal). Because the information showing that MERS did, in fact, have a principal was outside the appellate record, counsel for MERS was barred from referring to this evidence to the Washington Supreme Court. *State v. McFarland*, 127 Wn.2d 332, 335 (1995). The incomplete record resulted in the mistaken impression before the Court that MERS had no principal controlling MERS's actions and was acting as beneficiary not as an agent, but for itself. *See Bain*, 175 Wn.2d at 90 & n.2, 97 & n.12. The complete record clarified that even in *Bain*, MERS did have a principal for whom it

held that if MERS had a practice of generally representing it was the Note holder (rather than an agent) when it was not, that misrepresentation could meet the first three elements of a CPA claim.[2] On the limited record before it, this Court held that the flawed assignment—***not*** the Deed of Trust—created a question as to whether MERS was an agent for ***any*** principal at the time the foreclosure was initiated.

But contrary to the analysis in *Walker*, nothing from *Bain* suggests that MERS's designation as a Deed of Trust beneficiary ***solely*** as an agent for a ***disclosed*** principal is *per se* unfair or deceptive, or might support presale damages under the DTA. *See, e.g., Estribor v. Mtn. States Mortg.*, 2013 WL 6499535, *3 (W.D. Wash. 2013) ("The Deed of Trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive."). Indeed, the last sentence of *Bain* confirms that merely

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was acting. Indeed, upon remand, the trial court granted MERS summary judgment, observing that "[w]hile Deutsche Bank owned the note, it gave IndyMac the authority to modify and foreclose on the loan ***and use MERS as an agent***. That's what it looks like from the documents I see. And Deutsche Bank executed power of attorney to allow IndyMac to take any actions necessary to foreclose on the deed of trust." *Bain v. Metro. Mortg. Grp. Inc.*, Order Granting Summ. J., 2013 WL 6193887, at 5 (Wash. Super. Aug. 30, 2013). The complete record also showed that IndyMac appointed the trustee, not MERS, as this Court had assumed. *Bain v. Metro. Mortg. Grp. Inc.*, 2010 WL 891585, *1 (W.D. Wash. 2010) ("IndyMac ... appointed Regional Trustee Service as the successor trustee."); *compare Bain*, 175 Wn.2d at 89 ("MERS then appointed trustees who initiated foreclosure proceedings. The primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act if it does not hold the promissory notes secured by the deeds of trust.").

[2] MERS's standard assignment does not represent that it is acting for itself. And there is nothing unfair or deceptive about recording an assignment of an agency interest: "Contract rights are assignable unless forbidden by statute or otherwise violative of public policy." *Old Nat'l Bank v. Arneson*, 54 Wn. App. 717, 723 (1989). Indeed, this Court has recognized under similar circumstances that agency interests are freely assignable even where the agent is not the entity holding legal title to the underlying real property interest. *See Oriental Realty Co. v. Taylor*, 69 Wash. 115, 120 (1912).

designating MERS as a nominee in a Deed of Trust, without more, does not alone give rise to a CPA claim. *Id.* at 120 ("[T[he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury"). Thus, any suggestion in *Walker* or by Ms. Frias that MERS's designation as an agent for a principal supports a presale damages remedy finds no support in *Bain*. "*Bain* does not hold that the presence of MERS in a mortgage creates a presumptive CPA claim." *Mickelson v. Chase Home Fin., LLC*, 2012 WL 5377905, *2 (W.D. Wash. Oct. 31, 2012).[3]

Second, *Walker* cites *Bain* as holding that "the lending industry has institutionalized a series of deceptive practices," and that "MERS 'often issues assignments without verifying the underlying information.'" 176 Wn. App. at 311. But nothing in *Bain* suggests lenders have "institutionalized" deceptive practices. Indeed, the Court in *Bain* recognized MERS ***could*** act as an agent for a Note holder. 175 Wn.2d at 106-07, 112. Likewise, the footnote in *Bain* on which *Walker* relies for the assertion that MERS "often" executes assignments without verifying information relies on a law review article written by a foreclosure-defense firm in from Florida (which permits only judicial foreclosure). The author of that article makes his living suing MERS, and based his conclusions solely on his personal experience in that state. *Id.* at 118 n.18 (citing Dustin A. Zacks, 29 Quinnipiac L. Rev. 551, 580 (2011)) ("the author has

[3] Indeed for more than 100 years, Washington law has permitted lenders to use nominees or agents in this context. *See, e.g.*, *Carr v. Cohn*, 44 Wash. 586, 588 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36 (1923) (agent could prosecute foreclosure); *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same).

found that, quite often" in his cases, MERS signing officers deposed were unfamiliar with facts surrounding loan transfers).

Based on the unsupported opinion of a foreclosure defense lawyer, *Walker* leaps to a presumption of impropriety surrounding any Deed of Trust that designates MERS as an agent: "[T]he lending industry and MERS have already spawned the feared litigation with their institutionalized practices. Holding the lending industry liable for damages caused by its DTA violations should produce greater compliance." *Walker*, 176 Wn. App. at 313.

But nowhere does *Walker* identify evidence or even disclose the existence of any possible DTA violations that MERS and its members have "institutionalized," let alone identify how MERS's designation as an agent for a principal causes any borrower harm. "MERS's role [is] plainly laid out in the deeds of trust." *Bain*, 175 Wn.2d at 105 (citation omitted). And in any event, this Court has recognized both that MERS creates benefits for Washington borrowers, and that policy judgments about how to achieve "greater" compliance industry-wide are best left to the legislature. *Bain*, 175 Wn.2d at 109 ("There are certainly significant benefits to the MERS approach."); *id.* at 96 ("MERS has helped overcome ... a drawback of the traditional mortgage financing model: lack of liquidity" by allowing "more money to come into the mortgage market."); *id.* at 109 ("The legislature, not the Supreme Court, is in the best position to assess policy considerations."). The Court should disregard *Walker*'s misreading of *Bain*, and reject the idea that MERS's designation as a nominee for Note holders supports a generalized presale damages remedy under the DTA or CPA.

Walker's Misinterpretation of Vawter. *Walker* also misreads *Vawter*. In *Walker*, the court suggested *Vawter* stands for the proposition that a borrower injured by a lender's conduct lacks any presale remedy. 176 Wn. App. at 312-13. But the court in *Vawter* expressly left open the possibility that a borrower might be able to state a presale cause of action that would permit a damages remedy based on lender conduct during the foreclosure process. *Vawter*, 707 F. Supp. 2d at 1130 n.14. *Vawter* simply held that the remedies contained in the DTA ***for DTA violations*** are exclusive, not that borrowers lack remedies for other abuses during the foreclosure process.

Nothing in *Vawter* changes the fact borrowers can invoke the DTA's presale injunction remedy to challenge conduct during the foreclosure process. RCW 61.24.130; RCW 61.24.040(1)(f)(IX). That remedy does precisely what CCJ argues borrowers desire: it stops the foreclosure from proceeding, so borrowers have time to cure the default. And that adequate, preexisting remedy explains why the legislature has not given borrowers a generalized presale damages remedy in the DTA.

Nor does *Vawter* change the fact that borrowers can also assert other, independent causes of action based on conduct during foreclosure, which may permit a presale damages remedy. Those include, for instance, damage claims for defective workmanship on a swimming pool where payment for the pool work was secured by a Deed of Trust, *Cox v. Helenius*, 103 Wn.2d 383, 385-86 (1985); usury, s*ee Bingham v. Lechner*, 111 Wn. App. 118, 122 (2002); breach of contract, *see Hardcastle v. Greenwood Sav. & Loan Ass'n*, 9 Wn. App. 884, 889 (1973); the Consumer Protection Act if unfair or deceptive acts (rather than DTA procedural violations) cause injury, *see Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 86, 118-19 (2012); and the Distressed Property Conveyances Act, *see Jametsky v. Olsen*, No. 88215-1, Slip Op. at 8 (Wash. Feb. 6, 2014). Under both the DTA's presale injunction remedy provisions and Washington common and statutory law, borrowers have many available causes of action to remedy misconduct during the foreclosure process.

3. The Court in *Walker* Impermissibly Hypothesized Essential Facts to Support a Damages Remedy.

The Court of Appeals in *Walker* "hypothesized" several facts that *Walker* never pleaded, and it accepted as true legal conclusions lacking any support in the Complaint. Even under Washington's any-set-of-facts standard, the court's hypothesizing was improper. These holdings bear on the second certified question: even assuming a generalized presale damages claim exists, what principles govern any DTA or CPA claim in the foreclosure context? In short, even assuming a claim exists, and even under the DTA's strict construction, a nonjudicial foreclosure does not reduce basic pleading standards.

Specifically, the plaintiff in *Walker* did not (and could not) plead Select did not hold the Note, without authority to foreclose. Instead, Walker pleaded Select could not foreclose based on a MERS assignment, since ***MERS*** did not hold the Note. But Select never suggested its right to foreclose was tied to a MERS assignment, rather than to its possession of the Note. *See Florez v. OneWest Bank, FSB*, 2012 WL 1118179, *1 (W.D. Wash. 2012) (granting motion to dismiss with prejudice; distinguishing *Bain* because lender's right to foreclose was based on Note, not assignment).

The plaintiff in *Walker* bore the burden of alleging facts consistent with the theory that the foreclosing party did not hold the Note, and that lack of possession caused plaintiff injury. He did not do so. The court chose to hypothesize those facts for Walker. But if a plaintiff cannot allege essential facts subject to Rule 11, courts should not do so for him. Nothing about nonjudicial foreclosure lowers pleading standards necessary to recover under (under any theory).

Walker alleged facts suggesting MERS's assignment failed to make Select the Note holder. But Walker alleged no facts suggesting Select was not the Note holder by virtue of possessing a properly indorsed Note (the more common means of transfer).[4] Instead, to conclude that foreclosure initiation ***might*** have been wrongful and warrant damages, the

[4] The court at one point claimed "Walker alleges Select did not hold the Note" when Select appointed the Trustee. *Walker*, 176 Wn. App. at 309, ¶ 20. But nothing in Walker's Complaint actually alleges Select did not hold the Note; instead, he questions whether the Note holder was also the Note owner.

court "hypothesize[d] that MERS never had authority to appoint a beneficiary," and that "Select did not hold Walker's Note at the time it appointed Quality." 176 Wn. App. at 313. This is a bridge too far. If any borrower could claim injury for the time it takes to "investigate" a MERS assignment on the internet, and then use that assignment as a basis for claiming foreclosure is wrongful, then every borrower facing foreclosure could state a DTA and CPA claim in every case (because MERS's membership rules require it to assign out its agency interest to the Note holder before any foreclosure). Nothing in the DTA or CPA supports automatic liability, and the principles governing any claim under the DTA or CPA should not reduce essential pleading requirements under Civil Rules 8 and 11.

By *sua sponte* "hypothesizing" Select was ***not*** the Note holder, the court effectively discharged Walker of his obligation—as the plaintiff—to plead facts sufficient to show Select lacked the right to foreclose. A California Appellate Court rejected a similar approach under a similar pleading standard:

> Plaintiff's cause of action ultimately seeks to demonstrate that the nonjudicial foreclosure sale was invalid because HSBC lacked authority to foreclose, never having received a proper assignment of the debt. In order to allege such a claim, it was not enough for plaintiff to allege that MERS's purported assignment of the note in the assignment of deed of trust was ineffective. Instead, ***plaintiff was required to allege that HSBC did not receive a valid assignment of the debt in any manner.*** Plaintiff rests her argument on the documents in the public record, but assignments of debt, as opposed to assignments of the security interest incident to the debt, are commonly not recorded. The lender could readily have assigned the promissory note to HSBC in an

> unrecorded document that was not disclosed to plaintiff. ***To state a claim, plaintiff was required to allege not only that the purported MERS assignment was invalid, but also that HSBC did not receive an assignment of the debt in any other manner. There is no such allegation.***

Fontenot v. Wells Fargo, N.A., 198 Cal. App. 4th 256, 272 (2011) (emphasis added). So, too, in *Walker*. Because Walker could not or would not plead, subject to Rule 11, that the foreclosing entity did not hold the Note, the court should not have undertaken that burden for him under the guise of "hypothetical facts," and should not have ***presumed*** a DTA violation. *See id.* at 270 (foreclosure process presumed valid; burden is on plaintiff to plead facts showing otherwise).

Indeed, *Walker*'s holding contradicts the very 2009 DTA amendments on which the court relied. In those amendments, the legislature added a requirement that the foreclosing party prove to the Trustee—***not*** the borrower—that it is the Note holder. RCW 61.24.030(7)(a). *Walker* turns that legislative change on its head by assuming that unless the beneficiary has proved to the ***borrower*** that it holds the Note, the Court should assume it does not. Respectfully, this approach disregards ***any*** pleading standard, state or federal. *See, e.g.*, *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 715 (2008) (hypothetical facts must be "consistent" with those actually alleged).

In determining the principles of any DTA or CPA claim under the second certified question, this Court should not follow *Walker*'s diminution of basic pleading requirements and should not presume improper foreclosure under the guise of hypothetical facts.

4. The *Walker* Court Ignored the DTA's Presale Injunction Remedy and Misinterpreted Legislative History.

The court in *Walker* declared that "the DTA includes 'no specific remedies for the violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring.'" 176 Wn. App. at 307. But the DTA explicitly allows a borrower to "restrain" a sale "on any grounds whatsoever." RCW 61.24.040(1)(f)(IX); *see also* RCW 61.24.130(1) (borrower may "restrain" a sale on "any legal or equitable ground"). This broad presale injunction remedy directly fulfills one of the primary goals of the Act: giving interested parties an opportunity to prevent wrongful foreclosure.

The DTA also creates other remedies. Borrowers have long had the right to enjoin a sale by disputing the amount of fees listed on a Notice of Trustee's Sale, and if successful, to recover their attorneys' fees. *See* RCW 61.24.090(2). Likewise, since 1998 the DTA has allowed a *per se* CPA claim against any person seeking to chill bidding at a Trustee's Sale. *See* RCW 61.24.135(1). And in 2011, the legislature amended the DTA to make it a *per se* CPA violation if a lender fails to contact the borrower or mediate in good faith under the FFA. RCW 61.24.135(2).

The legislature thus clearly knows how to create presale remedies. But despite major amendments in four out of the last six years, it has ***never*** established a generalized presale damages remedy for violations of the DTA. The legislature has not done so even though, until *Walker*, courts in Washington consistently refused claims in which plaintiffs sought generalized presale damages for alleged DTA violations. The court in *Walker*, however, justified implying this new remedy by referring to the 2009 DTA Amendments to RCW 61.24.127. The court concluded those amendments "reflect[ed] the legislature's understanding of existing law" that a damages claim under the DTA exists presale. 176 Wn. App. at 307. Notably, in *Walker* the court acknowledged that the legislative history of the DTA amendments shows the legislature intended RCW 61.24.127 to address the holding in *Brown v. Household Realty Corp.*, 146 Wn. App. 157 (2008). *Walker*, 176 Wn. App. at 307 n.18. But the plaintiff in *Brown* sought ***only*** post-sale relief—precisely the relief the legislature provided in RCW 61.24.127. The stated purpose of the DTA amendment to RCW 61.24.127 negates any inference that the legislature intended to create or recognize a generalized presale damages remedy for DTA violations in RCW 61.24.127.[5]

More fundamentally, every existing remedy in the DTA has defined elements and statutes of limitations. Because the legislature did not create a generalized presale damages remedy, the legislature also did not define the elements or limitations period of that nonexistent remedy. In contrast, a post-sale claim is subject to either its own limitations period or two years, whichever is shorter. RCW 61.24.127(2)(a). The only limitations period for a Trustee's failure to "materially" comply with the

[5] In any event, RCW 61.24.127 could not even apply to the plaintiff in *Walker*, since that provision went into effect on July 26, 2009, five days ***after*** the last action taken toward foreclosure in *Walker*. *See* RCW 61.24.127 (effective date July 26, 2009); *Walker*, 176 Wn. App. at 306 (notice of trustee's sale recorded July 21, 2009).

DTA is two years from the sale (since this claim does not exist outside the DTA). *Id.* If there is a presale material violation, a defendant loses the two-year period in RCW 61.24.127, potentially subjecting a defendant to no limitations period. This approach—allowing a borrower to obtain a generalized presale damages remedy without any limitations period on the underlying claim—results in an absurd statutory interpretation.

5. The Court's Decision in *Walker* Creates Bad Policy.

To the extent the Court considers the policy issues raised in *Walker*—and U.S. Bank and MERS believe policy issues are best left to the legislature—*Walker*'s approach undermines the remedial balance the legislature struck in the DTA. This Court has recognized that "the legislature, not th[e] court, is in the best position to assess policy considerations" with respect to the DTA. *Bain*, 175 Wn.2d at 109. By hypothesizing facts to permit the litigation to proceed, the court in *Walker* disrupted the statutory process for initiating and objecting to nonjudicial foreclosures. This, in turn, will incentivize borrowers who have admittedly defaulted and cannot cure, ***and*** cannot meet the heightened preliminary injunction standards, to pursue litigation to forestall the inevitable—with the prospect of some monetary recovery in the bargain.

In addition, an increase in presale foreclosure litigation will negatively impact the non-defaulting public. Delays in foreclosure have caused the Federal Housing Finance Agency to consider measures that would effectively raise interest rates on the loans it acquires by between

15 and 30 basis points in certain states, depending on the delay in that state. The Federal Housing Finance Agency ("FHFA") observed:

> Foreclosure takes longer than average in some states as a result of regulatory or judicial actions. Further, in some states the investor cannot market a property for a period after foreclosure is complete. There is also variation among the states in the per-day carrying costs that investors incur during the periods when a defaulted loan is non-performing and, in some states, when a foreclosed property cannot be marketed. Those variations in time periods and per-day carrying costs interact to contribute to state-level differences in the average total carrying cost to investors of addressing a loan default. * * * ***[B]orrowers in states with lower default- related carrying costs are effectively subsidizing borrowers in states with higher costs.***

State Level Guarantee Fee Pricing, 77 Fed. Reg. 58991, 58991 (Sept. 25, 2012) (emphasis added).

In other words, the interest rates lenders will offer new borrowers who have never defaulted will increase to recoup the costs associated with foreclosure delays. "The [FHFA] approach recognizes that each state establishes legal requirements governing foreclosure processing that it judges to be appropriate for its residents. It also recognizes that unusual costs associated with practices outside of the norm in the rest of the country should be borne by the citizens of that particular state." *Id.* The net effect of delaying foreclosure through, for example, promoting litigation and damages claims will be that future borrowers "obtaining a 30-year, fixed-rate mortgage of $200,000 could see an increase of approximately $3.50 to $7.00 in his or her monthly mortgage payment." *Id.*

This Court has recognized that the nonjudicial foreclosure process should remain efficient and inexpensive. A generalized presale damages remedy for DTA violations would, as a practical matter, delay foreclosures without enjoining them (creating uncertainty for borrowers that a foreclosure will occur), increase litigation (by permitting borrowers to avoid having to satisfy the preliminary injunction standard), and raise lending and litigation costs for lenders and borrowers alike. This result would "contravene the Act's purpose and policy ... by making the process more lengthy (e.g., no finality), inefficient (e.g., more procedures), and expensive (e.g., litigation)." *Udall v. T.D. Escrow Servs., Inc.*, 132 Wn. App. 290, 302 (2006), *rev'd on other grounds* 159 Wn.2d 903 (2007) (rejecting breach of contract claim based on alleged DTA violation).

B. A Generalized Presale Damages Remedy for Wrongful Foreclosure Initiation Is Not Well Grounded in Tort Law.

CCJ spends eight of its eleven argument pages citing cases for the proposition that "presale damages are well grounded in tort law." CCJ Br. at 10-18. But none of the cited cases stands for that proposition. The cases can be grouped and distinguished as follows:

Post-Sale Claims. CCJ cites several cases involving post-sale claim, but such claims are irrelevant here, as Washington law already recognizes certain post-sale claims, for which plaintiffs may seek damages. *See Dobson v. MERS, Inc.*, 259 S.W.3d 19, 20 (Mo. Ct. App. 2008) (post-sale claim; reversing damages award because foreclosure not wrongful); *Fields v. Millsap & Singer, P.C.*, 295 S.W.3d 567, 569, 571 (Mo. Ct. App. 2009) (post-sale claim; rejecting claim because borrower admitted default and so could not prevail on wrongful foreclosure claim);[6] *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 290 (1983) (post-sale claim in commercial loan case); *McCarter v. Bankers Trust Co.*, 247 Ga. App. 129, 132-33 (2000) (post-sale claim for wrongful foreclosure rejected; emotional distress claim rejected for lack of required intent); *Curl v. First Fed. Sav. & Loan Ass'n of Gainesville*, 243 Ga. 842 (1979) (post-sale); *Teeuwissen v. JPMorgan Chase Bank, N.A.*, 894 F. Supp. 2d 903 (S.D. Miss. 2012) (post-sale; noting claim requires malice or bad faith).

Cases Not Involving a Wrongful Foreclosure Claim. CCJ likewise cites several cases that have nothing to do with foreclosure at all. *See Malone v. Belcher*, 216 Mass. 209, 2010-12 (1913) (abuse of process and malicious prosecution claims); *Goss v. Needham Co-op. Bank*, 312 Mass. 309, 309-10 (1942) (libel claim based on newspaper advertisement); *Matthews v. Homecoming Fin. Network*, 2005 WL 2387688, *7 (N.D. Ill 2005) (wrongful eviction action); *Stafford v. Puro*, 63 F.3d 1436, 1444-45 (7th Cir. 1995) (wrongful termination); *Peeler v. Kingston Mines*, 862 F.2d 135, 137-38 (7th Cir. 1988) (retaliatory discharge).

Emotional Distress Claims Are Not Recoverable. CCJ states that "[i]n a long line of federal cases, foreclosure or the prospect of foreclosure

[6] The *Dobson* and *Fields* holdings in Missouri are not surprising, as the Missouri Supreme Court, facing an identical scenario, refused to imply a new damages remedy for wrongful foreclosure initiation, holding that doing so was the job of the legislature. *Reese v. First Mo. Bank & Trust Co.*, 736 S.W.2d 371, 373 (Mo. 1987) (noting legislature allowed only injunctive relief presale; refusing to infer implied damages action for presale wrongful foreclosure initiation).

is almost per se an emotional harm." CCJ Br. at 13. This statement is misleading. Not only do these cases not form anything resembling a line, but also not one of them holds initiation of foreclosure creates recoverable harm, let alone under Washington law. For instance, in *Parks v. Wells Fargo Home Mortgage, Inc.*, 398 F.3d 937, 940-41 (7th Cir. 2005), the court held the plaintiff could not recover for emotional harm in an action under Illinois law for a lender's breach of contract and breach of fiduciary duty. And while in *Johnstone v. Bank of America N.A.*, 173 F. Supp. 2d 809, 814-15 (N.D. Ill. 2001), the court held emotional damages might be viable under the federal Real Estate Settlement Procedures Act, assuming causation, other courts and commentators have disagreed. *See Steele v. Quantum Serv. Corp.*, 2013 WL 3196544, *8 (N.D. Tex. 2013) (disagreeing and refusing to allow emotional distress damages under RESPA); *see also* 7 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.22 (5th ed. 2010) ("[C]ourts have been reluctant to extend tort liability into an area where damage claims may seem speculative and subject to exaggeration and abuse.").

Otherwise Factually Distinguishable. CCJ also cites several cases that are otherwise distinguishable. For example, in *Morse v. Mutual Federal Savings & Loan Ass'n of Whitman*, 536 F. Supp. 1271 (D. Mass. 1982), the court did allow recovery where the defendant engaged in willful misconduct, including adding a separate business debt to the mortgage loan, refusing to accept payments on the loan, freezing plaintiff's bank account causing business losses, threatening criminal proceedings, and interfering with plaintiff's refinancing efforts. *Id.* at 1275-81. Respectfully, this case (not since followed by any other court) so depends on its many egregious facts that it offers no persuasive authority for a generalized presale damages remedy under Washington's DTA.

Finally, CCJ cites several claims under the federal Fair Debt Collection Practices Act ("FDCPA"), which is, of course, a separate claim with separate elements; indeed, because nonjudicial foreclosure seeks property, rather than money, it is not even recognized as debt collection under the FDCPA. *Dietz v. Quality Loan Serv. Corp. of Wash.*, 2014 WL 29672, *4 (W.D. Wash. 2014) ("Claims based on foreclosure activities are not cognizable under the FDCPA.") (citations omitted).

III. CONCLUSION

Defendants MERS and U.S. Bank ask the Court to conclude that amici have presented no justifiable reason to imply a generalized presale damages remedy in the Deed of Trust Act, or to broaden the application of the Consumer Protection Act in cases involving nonjudicial foreclosures.

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