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IN THE SUPREME COURT
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CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

IN

FLORENCE FRIAS,

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC., *et al.*,

Defendants.

OPPOSING BRIEF OF DEFENDANT LSI TITLE AGENCY, INC.

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INTRODUCTION

This case is before the Court on certification of two questions from the U.S. District Court for the Western District of Washington (Pechman, C.J.), case number C13-760MJP. Earlier this year, Judge Pechman dismissed Plaintiff Florence Frias's ("Frias") tort and statutory claims under the Consumer Protection Act ("CPA") and Deeds of Trust Act ("DTA") for failure to state a claim upon which relief can be granted. The District Court's dismissal order remains in place pending the Court's answers to the certified questions.

One aspect of the case involves an issue of law that has recently divided state and federal courts in Washington. That issue is whether the Legislature, by enacting RCW 61.24.127, created a pre-sale claim and accompanying damages remedy against a nonjudicial foreclosure trustee in cases where no trustee's sale occurs and the borrower is not prejudiced by the trustee's conduct. The answer to this purely legal question is "no", the Legislature has not provided such a claim or remedy. The plain language of the DTA confirms that a borrowers' sole pre-sale remedy is to enjoin the trustee's sale.

For the most part, the remedies available under the DTA are designed to maintain the status quo while the trial court determines the merits of any dispute between the borrower, lender and/or trustee. If the

borrower believes the foreclosure proceedings have not been conducted in a manner consistent with the DTA or are otherwise improper, she may move to enjoin the sale on “any legal or equitable ground.” If the sale is enjoined, however, the borrower must continue making payments on the secured obligation, but the payments are made to the clerk of the court instead of the beneficiary. This procedure enables an appropriate degree of judicial oversight in an otherwise purely nonjudicial proceeding, and allows parties to litigate or settle their disputes prior to a sale occurring. This is consistent with one of the three primary goals of the DTA: to give interested parties an adequate opportunity to prevent wrongful foreclosure.

For example, if the borrower and lender dispute the terms of the underlying payment obligation, and therefore disagree on the payment required to cure a loan default, that dispute may be litigated or settled while the sale is enjoined. The Legislature has not, however, created an additional damages claim or remedy under the DTA for a trustee’s allegedly improper initiation or prosecution of nonjudicial foreclosure proceedings where no sale occurs.

Moreover, pursuant to the 2009 enactment of RCW 61.24.127, the borrower’s failure to seek an injunction prior to sale will not result in a waiver of claims the borrower might otherwise have. This statute confirms that the borrower will eventually get her day in court even if a

sale occurs, but it neither *creates* a new cause of action arising prior to sale nor a pre-sale damages remedy.

RCW 61.24.127, discussed in more detail below, is central to this case and others like it. Frias surmises that, even though her property has not been sold and two prior sales were voluntarily cancelled despite her lack of payment, she must in fact have a “claim for damages” against the trustee (and its co-defendants) because the Legislature enacted a statute confirming that her claim would not have been waived had there been a sale. In other words, Frias argues that the non-waiver language of RCW 61.24.127 implicitly establishes the basis for a pre-sale claim and damages remedy under the DTA. Frias is mistaken. The plain purpose of RCW 61.24.127(1) is to confirm the borrower’s right to assert post-sale claims, subject to the limitations in RCW 61.24.127(2).

In addition to misconstruing the DTA, Frias fails to recognize that, for her CPA and tort claims, she was required to plead facts sufficient to show all of the essential elements of those claims, particularly injury and damages. The District Court’s order dismissing LSI Title Agency, Inc. (“LSI”) was a straightforward application of well established Washington law correctly identifying the elements Frias must plead to support her claims for violation of the CPA, fraud/intentional misrepresentation and declaratory judgment.

Notwithstanding the dismissal, the District Court has requested guidance on the principles governing CPA claims within the context of nonjudicial foreclosure proceedings. The Court is aware that the CPA is the subject of a well-developed body of law in Washington spanning several decades. The ordinary CPA analysis applies to this case and all other cases involving CPA claims. A CPA claim, whether it incidentally arises in the context of nonjudicial foreclosure proceedings or not, is governed by the traditional elements established by the Washington Legislature as further articulated in *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) and the cases following *Hangman Ridge*. The District Court operated within this precise framework and properly recognized the principles governing a CPA claim.

ISSUES PRESENTED

The District Court certified two questions to be answered by this Court:

1. Under Washington law, may a plaintiff state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee's sale of real property?

2. If a plaintiff may state a claim for damages prior to a trustee sale of real property, what principles govern his or her claim under the Consumer Protection Act and the Deed of Trust Act?

STATEMENT OF THE CASE

A. Facts

In September 2008, Frias borrowed approximately \$213,303 under a mortgage loan with U.S. Bank, N.A. (“U.S. Bank”). In connection with the loan, she signed a promissory note (“Note”) in favor of U.S. Bank and a deed of trust (“Deed of Trust”) naming U.S. Bank as “Lender” and Mortgage Electronic Registration Systems, Inc. (“MERS”), acting solely as nominee for Lender, as “Beneficiary.” Dkt. No. 2, Ex. A, ¶ 2.1; *see also* Dkt. No. 10-1 at 1-16 (deed of trust). The Deed of Trust encumbers Frias’s residence in Marysville, Washington (the “Property”) with a lien as security for, among other things, Frias’s repayment obligations under the Note.

Frias admits that she defaulted under the Note. She also admits that the default was *not* proximately caused by any defendants’ conduct. She “fell behind” on her mortgage payments in August 2009 “as a result of her physical disability and lack of savings.” Dkt. No. 2, Ex. A, ¶ 2.2.

After Frias’s default, on May 14, 2010, MERS, acting as nominee for U.S. Bank, appointed LSI as successor trustee under the Deed of Trust.

Dkt. No. 10-1 at 17.¹ *See Bain v. Metropolitan Mortg. Grp.*, 175 Wn.2d 83, 106, 285 P.3d 34 (2012) (although MERS could not act as a beneficiary in its own right, “nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note”).

LSI issued a notice of trustee’s sale dated May 17, 2010 (the “First Sale Notice”). Dkt. No. 10-1 at 19-22. The First Sale Notice was recorded in Snohomish County on May 19, 2010. According to the First Sale Notice, the principal sum of Frias’s default under the Note at that time was \$14,522.85. *Id.* at 20. Frias has not disputed the accuracy of this figure, which is exclusive of any incidental fees and costs associated with the foreclosure. The First Sale Notice set a trustee’s sale for August 20, 2010. *Id.* at 19. However, that sale was later discontinued and did not occur. *See id.* at 24.

LSI issued a second notice of trustee’s sale dated May 19, 2011 (the “Second Sale Notice”). *Id.* at 26-29. The Second Sale Notice was recorded in Snohomish County on May 20, 2011. According to the Second Sale Notice, the principal sum of Frias’s default under the Note at that time was \$33,886.65. *Id.* at 27. Frias has not disputed the accuracy of this figure, which is exclusive of any incidental fees and costs associated

¹ The original trustee identified in the Deed of Trust is not involved in this case.

with the foreclosure. The Second Sale Notice set a trustee's sale for August 26, 2011. *Id.* at 26. That sale was also discontinued and did not occur. *See id.* at 30.

LSI resigned as trustee under the Deed of Trust on May 8, 2013.² *Id.* at 32-33. Presently, there is no foreclosure sale pending and LSI has no authority under the Deed of Trust. Frias concedes that no foreclosure sale has occurred, that none is pending, that she continues to live at the Property and that she has not made mortgage payments in approximately four years. *See* Dkt. No. 2, Ex. A, ¶ 2.17. Further, Frias does not claim to have made any attempt to tender the undisputed principal default to U.S. Bank, LSI or any other person.

B. Procedural History

1. Claims alleged in the complaint and removal to federal court

Frias filed this suit in Snohomish County Superior Court on March 13, 2013 against U.S. Bank, Asset Foreclosure Services, Inc.

² While Frias asserts in her statement of facts that LSI's resignation "appears to be a blatant attempt by LSI to relieve itself from liability to [her]," such an assertion is argumentative, unsupported by the record, and illogical. The District Court did not rely on this resignation in dismissing any of Frias's four claims, and only briefly recognized that LSI had raised the issue that it was no longer serving as the foreclosing trustee. Dkt. No. 34 at 4:14-15. Besides this bare allegation, Frias does not explain how LSI could avoid damages claims for past actions by way of a subsequent resignation as successor trustee.

(“Asset Foreclosure”), LSI, MERS, and unknown defendants “Does 1-20.” Dkt. No. 2, Ex. A (summons); *id.* ¶¶ 1.3 - 1.7. LSI removed the case to the U.S. District Court for the Western District of Washington. *See* Dkt. No. 2 at 1. Frias asserts four causes of action against LSI, all of which have been dismissed by the District Court.

First, Frias requested a preliminary injunction under the DTA, which permits the court to enjoin a trustee’s sale “on any proper legal or equitable ground”. Dkt. No. 2, Ex. A, ¶ 3.3 (citing RCW 61.24.130(1)). Although no trustee’s sale was pending when she filed suit, Frias alleged that the Superior Court should enjoin any future foreclosure sale because she was “misled and deceived” by all defendants, and because there were defects with the previous foreclosure proceedings. *See id.* ¶ 3.4. Although her complaint includes a prayer for injunctive relief, Frias stated that injunctive relief would be sought “[b]y way of the filing of a separate motion” if another sale is attempted. *Id.* ¶ 3.2. To date, Frias has not filed such a motion because no sale is pending.

Second, Frias alleged that all defendants violated the CPA. *Id.* ¶¶ 3.7 - 3.12. As to LSI, Frias alleged that LSI misrepresented the legal basis for initiating the prior foreclosure proceedings, did not meet the statutory requirements to serve as a foreclosure trustee in Washington and inflated various costs associated with the discontinued foreclosure

proceedings. *Id.* Importantly, Frias failed to allege any injury to her business or property proximately caused by LSI's alleged conduct. *See id.*

Third, Frias alleged "breach of the duties under the deed of trust act" against LSI and Asset Foreclosure.³ *Id.* ¶¶ 3.13 - 3.17, 5.1. The purported breaches of duties include failing to act in good faith towards Frias and failing to materially comply with the provisions of the DTA. Frias further alleged that LSI was never properly appointed as trustee under the Deed of Trust and therefore could not legally initiate the previous foreclosure proceedings, and that LSI violated the DTA by issuing notices with "incorrect information and demand for improper payments." *Id.* ¶¶ 3.16 - 3.17. Frias did not, however, allege that she suffered any damages proximately caused by the alleged breaches of duties.

Fourth, Frias alleged "intentional and/or negligent misrepresentation" against all defendants. *Id.* ¶¶ 3.18 - 3.21. Frias alleged that all defendants misrepresented their "various relationships" to her mortgage loan, as well as "the legal requirements for a loan modification under FHA's rules and the ability to foreclose on [her] home." *Id.* ¶¶ 3.19

³ Defendant Asset Foreclosure Services, Inc. executed both the First Sale Notice and the Second Sale Notice in its capacity as agent for LSI, a relationship that was fully disclosed in those documents. Dkt. No. 10-1 at 21, 28.

- 3.21. Frias did not allege that she suffered any damages proximately caused by the alleged misrepresentations.

2. LSI's motion to dismiss

On May 9, 2013, LSI moved to dismiss Frias' complaint under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 10. LSI argued that Frias failed to state a claim upon which relief could be granted because: (i) as to her first cause of action (injunctive relief), there was no trustee's sale to enjoin (*id.* at 5:3-18); (ii) as to her second cause of action (violation of the CPA), she failed to allege, and in fact had not suffered, injury to her business or property because she still owned the Property and never paid any of the purportedly inflated foreclosure fees and costs (*id.* at 5:19 - 8:9); (iii) as to her third cause of action (violation of the DTA), there was in fact a valid basis for initiating nonjudicial foreclosure proceedings against the Property (Frias's admitted default under the Note) and no cause of action with a damages remedy exists in Washington for wrongful initiation of foreclosure proceedings under *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010) (*id.* at 8:10 - 9:16); and (iv) as to her fourth cause of action (intentional and/or negligent misrepresentation), she failed satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b) and further failed to allege the essential elements of reliance and damages (*id.* at 9:17 - 12:4).

Frias's response to LSI's motion to dismiss included a lengthy discussion of some of the requirements of trustees and beneficiaries under the DTA and the CPA. However, Frias failed to describe any injury proximately caused by LSI's actions. Dkt. No. 14 at 4-10.⁴

3. The District Court's dismissal

The District Court largely agreed with LSI's arguments and granted its motion to dismiss on July 26, 2013. Dkt. No. 34. The District Court first held that Frias was not entitled to a preliminary injunction, because with no pending sale, "a request for preliminary injunction is unripe and will not be considered because doing so would result in an impermissible advisory opinion." *Id.* at 8:23 - 9:2 (citation omitted).

Second, with respect to Frias's CPA claim, the court properly identified the elements from *Hangman Ridge* that Frias was required to plead. *See id.* at 9:20-24 (citing *Hangman Ridge*, 105 Wn.2d at 780). The court summarized its holding by stating, "Where Plaintiff's property was not actually sold and Plaintiff did not pay any foreclosure fees, there is no

⁴ Alluding to damages under the CPA, Frias argued in her opposition that "[s]pecific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees." Dkt. No. 14 at 11:22-25 (citing *Mason v. Mortg. Am.*, 114 Wn.2d 842, 792 P.2d 142 (1990)). This citation is misleading in the context provided by Frias, as *Mason* recognized that a *legally cognizable injury* was an essential element of a CPA claim. 114 Wn.2d at 854. Frias alleged no legally cognizable injury—monetarily or otherwise.

CPA claim.” *Id.* at 9:19-20. The District Court further elaborated that Frias’s CPA claim failed “[w]ithout a demonstration of harm.” *Id.* at 10:2-6.

Third, the District Court dismissed Frias’s claim under the DTA. *Id.* at 10:9 - 11:3. The court applied the rule from *Vawter* and *Zalac v. CTX Mortg. Corp.*, No. C12-1474MJP, 2013 U.S. Dist. Lexis 20269, at *5 (W.D. Wash. Feb. 14, 2013) to bar claims seeking damages under the DTA where a foreclosure sale was initiated, but not completed. *Id.*

Finally, the District Court dismissed Frias’s intentional misrepresentation⁵ and negligent misrepresentation claims because Frias had not paid any fees to LSI, which was fatal to the reliance and damages elements of her fraud and negligent misrepresentation claims. *See id.* at 10:4 - 13:9; *see also id.* at 13:3-4 (Frias failed to “show pecuniary loss caused . . . by [her] justifiable reliance”) (citing *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (quotation marks omitted)).

⁵ Although Frias attempted to disclaim the fraud allegation in her complaint in order to circumvent the heightened pleading standard, Dkt. No. 34 at 11:7-9 (citing Dkt. No. 14 at 3), the District Court properly concluded that “[a] claim of intentional misrepresentation is a claim in fraud.” *Id.* at 11:19-20 (citing *W. Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002)).

In sum, while the District Court applied the holding in *Vawter* in dismissing Frias's DTA claim, it did not simply dismiss the case on the basis that no trustee's sale occurred. It thoroughly addressed the essential elements of Frias's various claims and held that some elements of each claim were insufficiently alleged. It follows, therefore, that the complaint failed to state a claim upon which relief can be granted and the case was properly dismissed.

4. Motion to reconsider and certification

On August 9, 2013, Frias moved for reconsideration of the District Court's dismissal. Dkt. No. 36. Relying upon the recent case of *Walker v. Quality Loan Service Corp.*, discussed further below, Frias argued that her pre-sale DTA claim seeking damages was actionable under *Walker* and the District Court should follow the Washington Court of Appeals in predicting the likely holding of this Court. *See id.* Frias also argued that *Walker* recognized injuries similar to hers under the CPA. *See id.* at 3-8.

In response to this motion and the *Walker* decision, the District Court abstained from ruling on the motion for reconsideration and instead certified questions to this Court. Dkt. No. 48. The District Court recognized that the success of Frias's motion for reconsideration "turns on whether Washington recognizes a claim for damages under the Deed of Trust Act ('DTA') in the absence of a completed trustees' sale of the real

property.” *Id.* at 2:8-10. The District Court cited numerous cases from the U.S. District Courts of Washington holding that no such claim exists, and stated that *Walker* had rejected some of those cases. *Id.* at 2-3. The District Court recognized that *Walker* was not necessarily binding on it, and concluded:

Because the Washington Supreme Court has not answered the question of whether a trustee’s sale is a predicate for a claim against a trustee under the DTA and that issue has generated conflicting decisions, this matter should be presented to the Washington Supreme Court.

Id. at 3:7-9.

ARGUMENT

A. Standard of review

Certified questions from federal court are questions of law that the Court reviews de novo. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011) (citing *Bradburn v. N. Cent. Reg’l Library Dist.*, 168 Wn.2d 789, 799, 231 P.3d 166 (2010)). “[W]hether to answer a certified question pursuant to chapter 2.60 RCW is within the discretion of the court.” *Bain*, 175 Wn.2d at 91 (citing *Broad v. Mannesmann Anlagenbau, A. G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (citing in turn *Hoffman v. Regence Blue Shield*, 140 Wn.2d 121, 128, 991 P.2d 77 (2000))).

B. Summary of Argument

The District Court's first certified question asks whether "a plaintiff [may] state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee's sale of real property." Dkt. No. 48 at 3:12-15. The answer to this question is "no." The Legislature has created a specific remedy under the DTA of injunctive relief, conditioned on the borrower performing its continuing obligation to pay any amounts due on the secured obligation. The Legislature has not created a separate pre-sale claim against the trustee, with an accompanying damages remedy, for failure to adhere to the procedural requirements of the DTA where no sale occurs.

The District Court's second certified question asks:

If a plaintiff may state a claim for damages prior to a trustee sale of real property, what principles govern his or her claim under the Consumer Protection Act and the Deed of Trust Act?

Dkt. No. 48 at 3:16-18.

LSI respectfully submits that the question conflates the "principles" governing two very different acts (the DTA and the CPA) and, problematically, contains the ambiguous phrase "claim for damages" without specifying the particular hypothetical claim. In other words, there is no such thing as "claim for damages", there are only claims that, if

proven, might lead to the recovery of damages. The question also fails to recognize that damages are merely an *element* of most actionable claims and that recovery of damages might be a *remedy* depending on the nature of the underlying claim.

At any rate, whether an actionable claim may be stated under a statute, contract or the common law prior to a trustee's sale depends on the particular elements of that claim. CPA claims are governed by the principles set forth in the statutory scheme of RCW 19.86 and the case law interpreting and applying those statutes.⁶

This Court should recognize that the "principles" governing a plaintiff's claim under the CPA are the same well-established principles set forth in the CPA and the interpretive case law, including *Hangman Ridge*. Like any CPA claim, a borrower who brings a CPA claim prior to a completed trustee's sale must show an unfair or deceptive act, occurring in trade or commerce, affecting the public interest, that proximately causes injury to the plaintiff's business or property. Even if such a claim arises in the context of nonjudicial foreclosure proceedings, a borrower must

⁶ CPA claims brought in the context of nonjudicial foreclosure proceedings may also be limited by certain provisions of the DTA that are not at issue here. RCW 61.24.127, for example, limits the time for which a borrower may bring a CPA claim to two years after the completion of a foreclosure sale, rather than four years after the claim accrues. *Compare* RCW 61.24.127 *with* RCW 19.86.120.

separately satisfy the elements of a CPA on its own terms, and not by merely alleging violations of the wholly separate DTA.

C. In response to Question Number 1, no pre-sale “claim for damages” against the trustee exists under the DTA

The first certified question, whether a party may state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee’s sale of real property, is one of first impression in this Court. While numerous federal judges within the Western and Eastern Districts of Washington have held that no such claim (and no damages remedy) exists, *see* Dkt. No. 48 at 2:10-21 (collecting cases), a Washington Court of Appeals case recently disagreed with the seminal federal case on the subject and held that “a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred.” *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013), as modified (Aug. 26, 2013), *disagreeing with Vawter*, 707 F. Supp. 2d at 1122-240. This Court, however, has not spoken on whether a damages claim or remedy exists under the DTA when no sale occurs. *Walker’s* dubious reasoning and a more thorough analysis of RCW 61.24.127 are discussed below.

1. The DTA provides borrowers with specified pre-sale remedies which do not include a general claim for damages

“[T]he DTA[] establish[es] a comprehensive scheme for the nonjudicial foreclosure process, including specific remedies for grantors and borrowers facing the potential loss of their homes.” *Vawter*, 707 F. Supp. 2d at 1123. The Legislature had three goals in passing the DTA: (1) to create an “efficient and inexpensive” nonjudicial foreclosure process; (2) to give interested parties “an adequate opportunity . . . to prevent wrongful foreclosure”; and (3) to “promote the stability of land titles.” *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

In interpreting the DTA, the Court should first consider the text of the statute. *See Udall v. T.D. Escrow Servs., Inc.*, 159 Wn. 2d 903, 909, 154 P.3d 882 (2007) (goal of statutory interpretation is to “determine the legislature’s intent,” which may be determined by the unambiguous text of the statute) (quotation marks omitted) (citation omitted). The Court is “required, when possible, to give effect to every word, clause and sentence of a statute.” *Cox*, 103 Wn.2d at 387-88 (citing *Int’l Paper Co. v. Dep’t of Revenue*, 92 Wn.2d 277, 281, 595 P.2d 1310 (1979) (citing in turn 2A C. Sands, *Statutory Construction* § 46.06, at 63 (4th ed. 1973))). Separate provisions of the same chapter are construed consistently. *See Udall*, 159

Wn.2d at 910 (rejecting reading of single provision of DTA that was “not plausible when . . . read in conjunction with the rest of the Act”).

No provision of the DTA creates a pre-sale damages remedy against the trustee. Instead, the DTA provides other remedies for purported violations of the DTA when the claim is brought prior to sale. As this Court has recognized, the borrower’s remedies are to (i) contest the default, (ii) restrain the sale; or (iii) contest the sale. *Cox*, 103 Wn.2d at 387. The borrower may also challenge the fees and costs described in the trustee’s foreclosure notices and, if successful, may obtain a judgment for fees and costs incurred in that proceeding. RCW 61.24.090(2) (discussed below).

First, a borrower may contest the default prior to the sale. RCW 61.24.030(8)(j) (requiring that the notice of default contain “[a] statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground”). As noted above, this provision informs the borrower of the right to seek judicial relief in an otherwise nonjudicial proceeding. Second, a borrower may restrain a trustee’s sale on “any proper legal or equitable ground.” RCW 61.24.130(1); *see also* RCW 61.24.040(1)(f), part IX (notice of trustee’s sale required to state, “Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be

heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130”). Third, a borrower may challenge the sale itself. *See Cox*, 103 Wn.2d 383 at 385 (setting aside completed foreclosure sale because trustee had proceeded despite colorable challenge to the existence of any default and trustee’s breach of duty to grantors); *see also Udall*, 159 Wn.2d at 911 (noting examples of procedural irregularities that may void the sale, including bankruptcy filing by borrower and pending suit regarding obligation on deed of trust, but not mere insufficient price).

Vawter, 707 F. Supp. 2d at 1123-24, the leading U.S. District Court case on this issue, recognized the absence of any legal authority supporting a borrower’s claim to recover damages under the DTA where no sale occurs. *Vawter* concluded that the plaintiffs in that case had “identified [no] statutory provision of the DTA that permits a cause of action for wrongful institution of foreclosure proceedings,” and no case law to that effect. *Id.* at 1123. Frias cannot and does not dispute this premise of *Vawter*, but argues that RCW 61.24.127 and *Walker* have undermined its reasoning. *See* Opening Br. at 45-47.

2. Walker misapplied RCW 61.24.127 based on an incorrect and incomplete reading.

A court is “required, when possible, to give effect to every word, clause and sentence of a statute”. *See Cox*, 103 Wn.2d at 387-88 (citations omitted). *Walker* is premised on an incomplete and incorrect reading of RCW 61.24.127 that should not persuade this Court. RCW 61.24.127(1) states:

- (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:
 - (a) Common law fraud or misrepresentation;
 - (b) A violation of Title 19 RCW;
 - (c) Failure of the trustee to materially comply with the provisions of this chapter; or
 - (d) A violation of RCW 61.24.026.

RCW 61.24.127(1) (codifying Laws of 2009, c. 292, § 6 (effective July 26, 2009)). Contrary to *Walker*'s characterization of this statute as affirmatively creating pre-sale claims, it merely confirms the borrower's right to assert post-sale claims subject to the limitations in subsection (2) .

The *Walker* court ignored portions of the statute that clearly indicate a limited non-waiver purpose of RCW 61.24.127, rather than Legislative intent to create entirely new claims and remedies by

implication. RCW 61.24.127, read in its entirety including subsection (2), confirms that the statute contemplates a sale having actually occurred.

For example, a borrower does not “fail” to “bring a civil action to enjoin a foreclosure sale” under the DTA unless and until the sale has actually occurred. *See* RCW 61.24.127(1). A borrower also cannot “waive” claims by failing to bring a civil action to restrain the sale until the sale has actually occurred. *See id.*

Even more telling, subsection (2) of RCW 61.24.127, which was not addressed at all by the *Walker* court, places certain limitations on the claims described in subsection (1), each of which clearly contemplates the claims described in subsection (1) being asserted *after* the sale. RCW 61.24.127(2) states:

- (2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:
 - (a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;
 - (b) The claim may not seek any remedy at law or in equity other than monetary damages;
 - (c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;
 - (d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document

purporting to create a similar effect, related to the real property foreclosed upon;

- (e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and
- (f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.

Each of these limitations, when read in proper context, clearly contemplates a sale having occurred. Subparagraph (a) sets a limitations period for bringing the claims of “two years from the date of the foreclosure sale” unless the applicable statute of limitations requires a shorter period (clearly referring to the “applicable statute of limitations” as that applicable to the substantive claim asserted under another legal theory and not RCW 61.24.127 itself). Subparagraph (b) requires that any claim be only for monetary damages (i.e., the borrower may not seek equitable relief, such as rescission of the sale). Subparagraph (c) requires that the claims “not affect . . . the validity or finality of the foreclosure sale” and subparagraph (d) prohibits the borrower from encumbering the property

sold with a lis pendens (i.e., the borrower's claims shall not assert a dispute over title and the borrower may not slander the purchaser's title by filing an invalid lis pendens). Subparagraph (e) prohibits the borrower's claims from encumbering or otherwise clouding title to the property (i.e., the borrower may not seek to quiet title or request that the court impose a constructive trust over the property sold, each of which would require granting relief against the foreclosure sale purchaser who might be a bona fide purchaser). Finally, Subparagraph (f) limits claims to actual damages, except to the extent additional damages are recoverable under the CPA (i.e., the borrower may not seek hypothetical consequential damages for lost appreciation of the property value after sale). Each of these limitations can only be read as applying in the context of the claims described in (1) being asserted *after* completion of a trustee's sale.

Moreover, *Walker* incorrectly stated that "in response to a decision of this court, in 2009 the legislature explicitly recognized a cause of action for damages for failure to comply with the DTA." 308 P.3d at 721 (citing *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008)). There is no such "explicit" recognition in the DTA. The *Walker* opinion suggests that RCW 61.24.127 was enacted in response to a holding that a borrower has no pre-sale cause of action under the DTA for failure to comply with the DTA, but *Brown* did not involve that issue at

all. *Brown* involved only the issue of waiver resulting from the borrower's failure to seek a pre-sale injunction. In *Brown*, the Court of Appeals stated:

This case presents the question of whether a borrower/grantor waives any claims against a lender/beneficiary arising out of an obligation secured by a deed of trust by failing to request a preliminary injunction or restraining order enjoining a nonjudicial foreclosure sale at least five days before the sale date.

146 Wn. App. at 160. The Court of Appeals held that, where a foreclosure sale occurred and the borrower failed to move to restrain the sale, the borrower waived his tort claims. *Id.* The borrower in *Brown* did not even assert a DTA claim. *See id.* at 160.⁷

The *Brown* court found that courts “have concluded that a failure to seek presale remedies under the Act bars a borrower’s claim arising out of any underlying obligation secured by the foreclosed deed of trust.” *Id.* at 167. In response, the Legislature enacted RCW 61.24.127 to avoid that potentially harsh result. It did not, as suggested by the *Walker* opinion, enact RCW 61.24.127 in order to create a new pre-sale cause of action and damages remedy under the DTA.

⁷ The claims pursued by the Browns after sale were “fraud, breach of the covenant of good faith and fair dealing, violation of the Washington Consumer Protection Act, violation of the federal Truth in Lending Act, and breach of fiduciary duty and quasi-fiduciary duty.” 146 Wn. App. at 160.

The House Judiciary Committee, Office of Program Research, bill analysis for Engrossed Senate Bill (ESB) 5810 refers to *Brown* only insofar as the Court of Appeals “held that a party waives the right to post-foreclosure sale remedies where the party failed to bring an action to enjoin the sale.”⁸ Similarly, a Senate report on the testimony on the new law recognized that “[t]he *Brown* court case fix is important.”⁹ Reading *Brown*, the case that necessitated the “fix” in the first place, makes apparent that the statute’s purpose was to preserve claims accruing after sale, not to recognize new pre-sale claims.

Walker was incorrect in other material assumptions. The *Walker* court opined Mr. Walker “correctly observe[d]” that “the DTA includes no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring.” 308 P.3d at 721. But this premise is incorrect in two ways. First, as noted above the DTA does contain “specific remedies” for the violation of the

⁸ The committee analysis “was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.” Ex. A. That said, this Court may still consider materials such as bill reports. See *Cosmopolitan Eng’g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 305-06, 149 P.3d 666 (2006).

⁹ The Senate report contains a similar disclaimer to the previous footnote. Ex. B.

statute in certain instances: the borrower may seek an injunction to prevent the sale from moving forward, as expressly permitted by RCW 61.24.130(1). Second, an injunction is the *ultimate* remedy “to prevent the wrongful foreclosure from occurring.” *Id.* That is the precise purpose of an injunction. A DTA claim seeking to recover damages before a sale occurs, on the other hand, would have at most an incidental effect on the sale occurring. *See Vawter*, 707 F. Supp. 2d at 1124 (recognizing that while “an action for damages might often have the incidental effect of stopping a trustee’s sale, . . . it is not the statutory method established by the Washington legislature to restrain a sale”).

The *Walker* court’s portrayal of a damages remedy being necessary to “prevent the wrongful foreclosure from occurring” turns the Legislature’s choice of remedies on its head, by ignoring the specific remedy already provided by the Legislature to prevent a sale (injunction) and substituting a separate remedy (damages) which in fact, if pursued, would not necessarily prevent the sale from occurring. *See Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003) (quoting *Cox*, 103 Wn.2d at 388) (“[A]n action contesting the default, filed after notice of

sale and foreclosure has been received, does not have the effect of restraining the sale.”).¹⁰

D. In response to Question Number 2, while a CPA claim may hypothetically be available before a sale occurs, no DTA claim is cognizable. CPA claims are governed by the principles of *Hangman Ridge* and other Washington decisions

The District Court’s second certified question asks:

If a plaintiff may state a claim for damages prior to a trustee sale of real property, what principles govern his or her claim under the Consumer Protection Act and the Deed of Trust Act?

Dkt. No. 48 at 3:16-18. LSI respectfully submits that different responses to this claim are required with respect to the DTA and the CPA.

1. CPA claims are governed by the principles set forth in RCW 19.86, *Hangman Ridge* and other decisions of Washington courts

Any CPA claim, including one arising from nonjudicial foreclosure proceedings, is governed by RCW 19.86. A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and

¹⁰ The *Walker* court’s citation to *Klem v. Washington Mutual Bank* as evidence to “support[] [its] conclusion that the specific remedies provided in the DTA are not exclusive,” is similarly misguided. See 308 P.3d at 721-22 (citing *Klem*, 176 Wn.2d 771,785-86, 295 P.3d 1179 (2013)). *Klem* involved a claim brought under the CPA, not the DTA. The CPA, as discussed below, itself creates a damages remedy for an act that meets its elements, and is entirely distinct from a DTA claim. *Klem* is not instructive on the issue of whether RCW 61.24.127 recognizes a damages remedy in a pre-sale DTA claim.

(4) causes injury (5) to plaintiff's business or property. *Hangman Ridge*, 105 Wn.2d at 780. Any plaintiff asserting a claim under the CPA, including one arising in the context of nonjudicial foreclosure proceedings, must prove all of these elements. See Dkt. No. 34 at 10:1-2 (citing *Besel v. Viking Ins. Co. of Wisc.*, 105 Wn. App. 463, 483, 21 P.3d 293 (2001)).

Whether an act or practice is unfair or deceptive, the first element, is a question of law¹¹ that may be established in one of two ways. First, the Legislature may expressly incorporate a certain practice to create a *per se* violation of the CPA. *Klem*, 176 Wn.2d at 786. Certain aspects of the DTA, none of which are at issue in this case insofar as LSI is concerned, have been declared *per se* violations of the CPA. See, e.g., RCW 61.24.135(1) (*per se* CPA violation to chill or engage in collusive bidding at trustee's sale); RCW 61.24.135(2) (citing RCW 61.24.163) (*per se* violation for beneficiary's failing to comply with the duty of good faith in foreclosure mediation); RCW 61.24.135(2) (citing RCW 61.24.031) (*per se* violation for beneficiary's failing to exercise due diligence in attempting to meet with the borrower prior to issuing a notice of default).

¹¹ See *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006) (citing *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997)).

Alternately, in the absence of a *per se* CPA claim, a court may determine whether a practice is deceptive or unfair. *See Klem*, 176 Wn.2d at 786. “Implicit in whether an act is ‘deceptive’ is ‘the understanding that the actor *misrepresented* something of material importance.’” *Brummett v. Washington’s Lottery*, 171 Wn. App. 664, 288 P.3d 48, 54 (2012) (emphasis in original), *review denied*, 176 Wn.2d 1022, 297 P.3d 707 (2013) (quoting *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 166, 159 P.3d 10 (2007), *aff’d*, *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009)). Courts have recognized some serious, prejudicial CPA violations occurring in parallel with a nonjudicial foreclosure proceeding. This Court, for example, has identified the fraudulent pre-dating of notarized documents by a trustee, and a refusal of a trustee to continue a sale while the borrower’s guardian attempted to sell the property, as unfair or deceptive acts. *See Klem*, 176 Wn.2d at 792-795. But not *every* failure to materially comply with the DTA is necessarily a fraudulent or deceptive act giving rise to a CPA claim.

The second element requires that the act occur in trade or commerce. *Hangman Ridge*, 105 Wn.2d at 786. This is statutorily defined to “include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2). The District Court did not reach the second element,

resolving Frias's CPA claim on other grounds, and had no occasion to consider that a foreclosure trustee such as LSI is not engaged in the sale of assets or services to borrowers like Frias.

The third element, whether an unfair or deceptive practice affects the public interest, is now statutorily defined by RCW 19.86.093:

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3) (a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.¹²

Frias raised no argument that any claims against LSI were *per se* violations of the CPA, *see* RCW 19.86.093(1), and the DTA does not “contain[] a specific legislative declaration of public interest impact.” *See* RCW 19.86.093(2). As discussed in greater detail below, the District Court did not consider the public interest element due to Frias's failure to meet other elements of her claim. *See* Dkt. No. 34 at 9:8 - 10:7.

The fourth element requires an injury to business or property. *Hangman Ridge*, 105 Wn. 2d at 792. The injury itself “need not be great,

¹² This provision applies to any claim accruing after the effective date of July 26, 2009.

but it must be established.” *Id.* The injury must be an injury to “business or property,” which excludes personal injury damages such as emotional distress damages. *See Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989) (injury arising from broken ankle is not recoverable under the CPA); *Ambach v. French*, 167 Wn.2d 167, 172-73, 216 P.3d 405 (2009) (personal injury damages are not recoverable under the CPA); *Panag*, 166 Wn.2d at 57 (injury due to mental distress, embarrassment, and inconvenience are not recoverable under the CPA). Attorneys’ fees for bringing a suit, and defending against a collection action, are also not cognizable under the CPA. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) (disagreeing with trial court on whether those aspects of plaintiff’s claim constituted injury, but concluding that a separate loss of business was an injury to the plaintiff’s business).

Finally, the defendant’s unfair or deceptive act must proximately cause the plaintiff’s injury to business or property. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (trial court properly required jury to find proximate cause).

In the context of a claim arising from nonjudicial foreclosure proceedings, LSI submits that the elements of injury and causation could

only be satisfied if either (i) the borrower's property was sold by the trustee, (ii) the borrower in fact paid the disputed fees or charges described in the trustee's notices, or (iii) the borrower otherwise suffered some form of loss or injury to her business or property caused by the trustee.

2. The Court should decline to address the elements of a pre-sale "DTA claim for damages" because none exists, but at a minimum such a claim would require prejudice to the borrower

The district court's second certified question also asks what principles govern a DTA claim, but the question requests an answer only if this Court answers the first question in the affirmative. Because the Court should hold that no pre-sale claim for damages exists under the DTA, and that the only pre-sale remedy available under the DTA is an injunction, it should decline to answer this question insofar as it relates to the DTA.

If the Court, however, does address the governing principles for establishing pre-sale cause of action for damages under the DTA, it should confirm the well-established requirement that the borrower must suffer some prejudice as a result of the violation.

A series of cases involving *post-sale* challenges confirms the prejudice requirement for relief under the DTA. *See, e.g., Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113, 752 P.2d 385 (1988)

(although notice of trustee's sale was sent without 30 days' notice of default, timing error "was nonprejudicial and the debtor could have invoked judicial protection prior to the sale but failed to do so"; refusing to set aside sale on procedural grounds); *Walker*, 308 P.3d. at 724 (recognizing prejudice is required in order to recover damages for DTA claims brought prior to completed trustee's sale); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988) (noting that although "exact letter of the law has not been followed," where trustee mailed notice of default before his appointment was made and recorded, and trustee served (but did not record) notice of sale in requisite time, borrower could not show prejudice and was not entitled to set aside sale); *see also Albice v. Premier Mortgage Services of Wash., Inc.*, 174 Wn. 2d 560, 581 n.4, 276 P.3d 1277 (2012) (Stephens, J., concurring) (noting requirement of prejudice).

Even if RCW 61.24.127(1) did create pre-sale claims or remedies against the trustee—which it did not—the statute itself recognizes a prejudice requirement. Specifically, any claim against the trustee premised on RCW 61.24.127(1)(c) must involve the failure to "materially comply with the provisions of" the DTA. *See* RCW 61.24.127(1)(c). "Material" means that the procedural failure prejudiced the borrower, or "significantly affect[ed] some right of the forfeited party." *Galladora v.*

Richter, 52 Wn. App. 778, 783, 764 P.2d 647 (1988) (quotation marks omitted) (citation omitted). It stands to reason that, in recognizing certain post-sale remedies for a trustee's failure to materially comply with the provisions of the DTA, the Legislature would incorporate the same prejudice standard already adopted by Washington courts. *See Koegel*, 51 Wn. App. at 112; *Steward*, 51 Wn. App. at 515.

Prejudice, in this context, could presumably include an inability to determine the proper entity with whom to obtain a loan modification, *see Vawter*, 707 F. Supp. 2d at 1119 n.5 (noting that plaintiff's allegation that she could not ascertain proper entity stood in tension with her allegation that she had been unsuccessful in obtaining loan modification from Chase), or perhaps the remission of payment to a wrong source, causing a default. *McCrorey v. Fed. Nat. Mortgage Ass'n*, No. C12-1630RSL, 2013 WL 681208, at *4 (W.D. Wash. Feb. 25, 2013) (noting that although misidentification of a party as beneficiary "may give rise to compensable damages (if, for example, the borrower's attempts to negotiate a modification fail because he is bargaining with the wrong entity or the borrower incurs costs while trying to locate the actual holder of the original promissory note), the misidentification itself does not cause the type of injuries alleged in the complaint"). In any ordinary meaning,

however, prejudice can only include acts that induce some type of detrimental reliance or harm to the plaintiff.

3. The district court correctly dismissed Frias's claims under Federal Rule of Civil Procedure 12(b)(6).

While the merits of the district court's order are not before the Court and exceed the scope of the certified questions, Frias has asserted that "there was no basis at all for the dismissal of [her] claims by the [D]istrict [C]ourt." Opening Br. at 35. To the contrary, the District Court correctly dismissed Frias's claim under Federal Rule of Civil Procedure 12(b)(6), and LSI corrects some of the factual and legal misstatements in Frias's briefs to ensure that this Court reviews the certified questions within the proper context.

a. The District Court properly dismissed Frias's CPA claim under the precise principles that she suggests this Court adopt.

Frias urges this Court to recognize that CPA claims in this context are subject to "the same well-established principles that Washington courts apply to other . . . CPA claims." Opening Br. at 7. The District Court applied this framework and properly concluded that she failed to state a claim under *Hangman Ridge*.

LSI argued in its motion to dismiss that Frias did not allege injury to her business or property because she "has not paid any of the fees, charges or costs described in her Complaint. She has not lost her home to

foreclosure, and she has suffered no injury to her business or property. In sum, she has no damages or injury.” Dkt. No. 10 at 8:4-6. In response, rather than address the substance of LSI’s argument, Frias argued at length as to the *liability* aspects of her CPA claim, *see* Dkt. No. 14 at 1-10, and *public interest* aspects of that claim, without ever addressing facts to show a legally cognizable *injury to business or property* proximately caused by LSI’s conduct. *See id.* at 11:22-24 (stating only that “[s]pecific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees.”). In short, she provided no reason for the District Court to hold that she had pleaded facts sufficient to show all elements of a CPA claim, and the District Court properly held that she had not pled a plausible claim under that statute.

Frias now attempts to re-litigate the injury element before this Court, but still does not substantiate a legally cognizable injury to business or property. With respect to LSI, Frias states that she had to “obtain assistance and undertake efforts to deal with the attempted foreclosures,” public records were created showing the foreclosure initiations, she has suffered stress “related to whether she will be able to retain her property,” and she speculates there are foreclosure fees for which she “will be responsible for...so long as she remains responsible for the balance owed on the loan.” Opening Br. at 43.

None of these “injuries” are sufficient under the CPA. Frias does not allege that she paid for any assistance or suffered injury to her business or property in investigating the foreclosures. The mere inconvenience and frustration she alleges is not a recognized CPA injury. *See Panag*, 166 Wn.2d at 57 (“inconvenience” not an injury under CPA). Defending against a collection action is not an injury under the CPA. *See Sign-O-Lite Signs, Inc.*, 64 Wn. App. at 564. Frias’s allegations of distress are also plainly not actionable under the CPA. *Ambach*, 167 Wn.2d at 172-73 (personal injury damages); *Panag*, 166 Wn.2d at 57 (emotional distress). Moreover, Frias concedes in her complaint that she never actually paid the purportedly excessive trustee’s fees, and she only speculates that she might have to pay them if she keeps her property, an assertion too speculative to support a claim of injury.¹³

Frias raised nothing more than conclusory arguments as to injury in her response, and failed to show that any purportedly deceptive or

¹³ Frias cites language from *Walker* that states: “Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.” Opening Br. at 43 (citing *Walker*, 308 P.3d at 727-28 (citing *Panag*, 166 Wn.2d at [62])). With respect to attorney fees, the internal citation to *Panag* actually held that attorney’s fees to investigate the underlying obligation, not the fees from bringing a CPA claim, might constitute an injury to business or property. *See Panag*, 166 Wn.2d at 62. Whatever the merits of *Walker*’s citation, Frias pled none of these types of injuries in her complaint. *See* Dkt. No. 2, Ex. A, at ¶ 2.17 (alleging only stress and other emotional injury).

unfair acts of LSI, as opposed to her undisputed mortgage default, caused her injuries. *See generally* Dkt. No. 14.

b. The District Court properly ruled that Frias has no claim under the DTA, but even if she did, Frias failed to show prejudice.

While the District Court did not reach the issue of prejudice, having dismissed Frias's DTA claim on other grounds, Frias would be unable to show that any procedural error committed by LSI actually caused her prejudice, as would be necessary to state a "claim for damages" against LSI under the DTA.

Frias, who owns her home and has undisputedly not made mortgage payments since 2009, has not suffered the prejudice of a sale. A "sale" under the DTA occurs by physical delivery of a trustee's deed. The sale is "final" if the deed is recorded within fifteen days after the trustee's acceptance of a bid. RCW 61.24.050(1). Frias does not allege that any of these events occurred, because they did not.

Moreover, Frias has not alleged any other prejudice resulting from LSI's actions. She has not, for example, alleged that she was unable to identify the proper trustee or contact LSI in order to dispute fees or obtain information about the pending foreclosure sales, or that LSI's purported failure to maintain a street address in Washington caused her to be prejudiced. *See Buddle-Vlasyuk v. Bank of New York Mellon*, No. 11-CV-

5561 RBL, 2012 WL 254096, at *4 (W.D. Wash. Jan. 27, 2012) (rejecting claim against trustee for lack of prejudice where trustee's alleged failure to maintain a street address resulted in no harm). She does not allege that she took any action in response to any document related to foreclosure proceedings.

Finally, with respect to the fees described in the First Sale Notice and the Second Sale Notice, despite alleging that LSI charged excessive fees Frias never paid or contested the fees. She could have contested the fees and costs under RCW 61.24.090(2), but instead decided to file this lawsuit. By doing so, Frias ignored a remedy available to her under the DTA, choosing instead to assert a litany of claims the facts and law do not support.

CONCLUSION

In response to the first certified question, the Court should answer that the DTA, and specifically RCW 61.24.127, does not create a cause of action and damages remedy against the trustee in the absence of a completed foreclosure sale, and the borrower's sole pre-sale remedy against the trustee is to enjoin the trustee from conducting the sale.

In response to the second certified question, the Court should answer in three parts: (i) as stated in response to the first question, there is no pre-sale cause of action or damages remedy under the DTA against the

trustee, so there are no principles governing such a claim, (ii) to the extent that the trustee's conduct, including any material failure to comply with the provisions of the DTA, is actionable in a post-sale claim preserved by RCW 61.24.127, the claim is only actionable if the borrower is prejudiced by the trustee's conduct, and (iii) a CPA claim arising in the context of nonjudicial foreclosure proceedings is governed by the ordinary principles governing CPA claims in Washington as established by RCW 19.86, *Hangman Ridge* and other cases which require the plaintiff to allege and prove all essential elements of the claim.

DATED this 13th day of December, 2013.

Respectfully submitted,

K&L GATES LLP

By:

David J. Lenci, WSBA # 7688

Brian L. Lewis, WSBA # 33560

Lauren E. Sancken, WSBA # 43470

Attorneys for Defendant LSI Title Agency,
Inc.

APPENDIX

Exhibit A

Judiciary Committee

HB 1942

Title: An act relating to foreclosures on deeds of trust.

Brief Description: Concerning foreclosures on deeds of trust.

Sponsors: Representatives Orwall, Rodne, Kirby, Hasegawa, Pedersen, Jacks, Morrell, Van De Wege, Appleton, Lias, Moeller, Darneille, Sells, Ormsby, Miloscia, Upthegrove, Carlyle, Dickerson, Conway, Kenney, Simpson, Goodman, Kagi and Santos; by request of Governor Gregoire.

Brief Summary of Bill

- Requires a mortgagee or beneficiary, before filing a notice of default, to contact the borrower and assess the borrower's financial situation and explore alternatives to foreclosure.
- Provides that a tenant of residential property that was sold in foreclosure shall have 60 days written notice before the tenant may be removed from the property.
- Provides that the borrower's failure to bring a court action to enjoin a foreclosure does not waive certain claims the borrower may have, such as claims based on fraud or breach of a trustee's duty.
- Specifies duties owed by the trustee to the borrower.

Hearing Date: 2/11/09

Staff: Trudes Tango (786-7384)

Background:

Unlike mortgages, which require judicial foreclosure, deeds of trust may be non-judicially foreclosed if the grantor defaults on the loan obligation. The Deeds of Trust Act establish procedures for foreclosure.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A foreclosure under a deed of trust cannot occur until at least 190 days from the date of default on the loan. Within that time, the trustee or beneficiary must comply with specific notice provisions. The beneficiary or trustee must send a notice of default to the borrower at least 30 days before the trustee records a notice of trustee's sale. The trustee must record, mail, and serve the notice of trustee's sale at least 90 days before the sale.

At any time prior to the 11th day before the trustee's sale, the borrower may cure the default by paying the back payments, plus the trustee's costs and fees. This will discontinue the sale. However, within 11 days of the sale, if the borrower offers to cure, the beneficiary can reject the cure and demand full payment of the loan. The trustee's sale is automatically stayed if the borrower files for bankruptcy. In addition, the trustee has discretion to delay the sale for up to 120 days.

Anyone having an interest in the real property, including the borrower, may restrain the sale on any proper ground. Among the proper grounds for enjoining a sale are: no default on the loan; defective notice of sale; a workout or settlement has been agreed to; and, defenses to the debt, such as truth in lending violations or misrepresentations of the seller.

The action to enjoin can be filed anytime before the scheduled trustee sale. However, a person seeking to enjoin the trustee sale must give five days notice of the action to the trustee and the beneficiary. In *Brown v. Household Realty Corp.* (2008), the court of appeals held that a party waives the right to post-foreclosure sale remedies where the party received notice of the right to enjoin the sale, the party had actual or constructive knowledge of a defense to foreclosure prior to the sale, and the party failed to bring an action to enjoin the sale. The court stated that applying the waiver doctrine to claims arising out of underlying obligations further the three goals of the Deeds of Trust Act: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

The trustee has strict obligations imposed by statute and case law. The trustee must act impartially between the borrower, grantor, and beneficiary. The Washington Supreme Court has held that because the deed of trust foreclosure process is generally conducted without review or confrontation by a court, the fiduciary duty imposed upon the trustee is high.

The purchaser at a trustee's sale has the right to possession of the property on the 20th day following the sale.

Summary of Bill:

Contact Requirements Before Notice of Default

In addition to the existing timeframes under the deeds of trust statutes, a mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default until 30 days after contacting, or attempting in due diligence to contact, the borrower. A mortgagee, beneficiary, or agent must contact the borrower either in person or by telephone to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure.

During the initial contact, the borrower must be advised that he or she has the right to request a subsequent meeting, which if requested, must be scheduled within 14 days. Any meeting may be by telephone. The borrower must be provided the toll-free number of a housing counseling agency certified by the U.S. Department of Housing and Urban Development. The borrower may designate a housing counseling agency, attorney, or other advisor to discuss options with the mortgagee, beneficiary, or agent. Any deed of trust modification or workout plan offered at the meeting must be approved by the borrower.

If the mortgagee, beneficiary, or agent fails to contact the borrower after due diligence, it may file a notice of default. What constitutes due diligence is specified in statute, and includes, for example, attempts to contact the borrower by letter, by telephone at least three times at different times and days, sending certified mail, providing a toll-free number with access to a live representative, and posting information on a website.

Contacting the borrower and waiting 30 days before filing the notice of default is not necessary in the following cases: (1) if the borrower has surrendered the property; (2) the borrower has contracted with an entity or person whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid paying their mortgage; or (3) the borrower has filed for bankruptcy.

The contact requirements apply to deeds of trust made from January 1, 2003, to December 31, 2007, that are secured by owner-occupied residential real property. The contact requirements expire January 1, 2013.

Duty of Trustee

The trustee must: (1) act in the borrower's best interest and in the utmost good faith toward the borrower, must disclose any and all interests to the borrower, and must not accept or provide any undisclosed compensation or remuneration that benefits the trustee on an expenditure made for the borrower; (2) carry out all lawful instructions provided by the borrower; (3) disclose to the borrower all material facts of which the trustee has knowledge that might reasonably affect the borrower's rights, interests, or ability to receive intended benefits from the loan; (4) use reasonable care in performing duties; and (5) provide an accounting to the borrower.

Waiver of Claims

The following claims are not waived by the borrower's failure to bring a lawsuit to enjoin a trustee sale: (1) common law fraud and misrepresentation; (2) unlawful or deceptive acts in the making or brokering of a residential mortgage loan; (3) damages against the lender that may be grounds for contractual rescission, if asserted in a timely manner before the foreclosure sale; and (4) breach of certain duties by the trustee or lender. The claims may be asserted in an unlawful detainer action and must be asserted or brought within one year from the date of the sale.

Tenants in Foreclosed Houses

A tenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days written notice before the owner may evict the tenant. When posting a notice of sale on residential real property in which there might be a tenant, a trustee must also post a notice

telling the resident that: (1) 20 days after the date of the notice, the property may be sold at foreclosure; and (2) if the person is a tenant, the new property owner may either enter into a new lease or provide the tenant with a 60-day eviction notice. This section expires January 1, 2013.

Duty of Servicers

The Legislature declares that any duty that servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a deed of trust pool and not to any particular party. A servicer acts in the best interest of all parties if it agrees to a deed of trust modification or workout plan when the deed of trust is in payment default (or payment default is foreseeable) and the anticipated recovery under a modification or workout plan is more than the anticipated recovery from a foreclosure. The mortgagee, beneficiary, or agent must offer the borrower a modification or workout plan if consistent with its contractual or other authority.

Enjoining a Sale

Upon good cause shown to the court, a foreclosure sale of an owner-occupied residence may be enjoined if the lender has not been responsive to a borrower's documented, reasonable, and material requests.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Exhibit B

SENATE BILL REPORT

SB 5810

As of February 23, 2009

Title: An act relating to foreclosures on deeds of trust.

Brief Description: Concerning foreclosures on deeds of trust.

Sponsors: Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

Brief History:

Committee Activity: Financial Institutions, Housing & Insurance: 2/18/09, 2/24/09.

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, HOUSING & INSURANCE

Staff: Diane Smith (786-7410)

Background: A deed of trust is a type of security interest in real property. A deed of trust is essentially a three-party mortgage. The borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary).

The major difference between a deed of trust and a mortgage is that the deed of trust may be nonjudicially foreclosed, whereas a mortgage may only be foreclosed judicially. If the grantor defaults on the loan obligation, the trustee may foreclose on the real property as long as certain procedural and notice requirements are met.

The trustee of a deed of trust may be a domestic corporation, a title insurance company, an attorney, a professional corporation whose shareholders are licensed attorneys, an agency of the United States government, or a bank or savings and loan association. A trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee.

In order for a deed of trust to be nonjudicially foreclosed, the following requirements must be met: (1) the deed contains a power of sale and provides that the real property is not used principally for agricultural purposes; (2) a default has occurred which makes the power of sale operative; (3) the deed has been recorded; (4) a notice of default is sent at least 30 days before a notice of sale is recorded; and (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

To initiate foreclosure procedures the trustee must (1) file a notice of trustee's sale 90 days before the sale; (2) send notice of the sale to the grantor, beneficiary, and any other person with a recorded interest in the land; (3) post the notice on the property or personally serve any occupants; and (4) publish the notice of sale in a newspaper at specified dates.

The sale may not take place less than 190 days from the date of default. Any person other than the trustee may bid at the sale. After sale of the property there is no right of redemption and no right to a deficiency judgment.

The proceeds of the foreclosure sale are distributed first to the expenses of sale and the obligation secured by the deed of trust, and the surplus is deposited with the clerk of the court. Any interests or liens on the real property that are eliminated by the sale attached to the surplus proceeds.

Notice of trustee's sale must be given to occupants of property consisting of a single-family residence, condominium, cooperative, and dwelling with less than five units; the notice must identify personal property that may be sold and any other action that is pending to foreclose on another security; the notice must specify the potential effects of foreclosure on the occupants of the property; and there are two eight-day time periods during which the trustee must publish the notice of sale in a legal newspaper.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): For deeds of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property, a 30-day extension is made to the current timeline for foreclosure. Thirty days must pass before the notice of default can be filed. The 30 days are measured from the time the lender contacts the borrower, or satisfies due diligence requirements to contact the borrower, to work out a way to avoid foreclosure.

Obligations of the lender to the borrower are to advise the borrower of his or her right to request a subsequent meeting; to schedule that meeting to occur within 14 days; and to give the borrower a toll-free telephone number for contacting a HUD-certified counselor.

The counselor or other advisor may participate in the workout negotiations on the borrower's behalf and provide third-party verification that the lender used due diligence in its attempts to contact the borrower.

The notice of default must include a declaration from the lender that it contacted the borrower or used due diligence in attempting to do so, and if the borrower has not surrendered the property, a declaration from a third party confirming that due diligence was used. Actions by the lender to contact the borrower and the times at which these actions are to be taken are specified in detail.

Under certain circumstances the 30-day delay in filing the notice of default and the due diligence requirements need not be met.

If a servicer has a duty to maximize net present value under its current contractual agreements, this duty can extend to all parties in the pool if the servicer agrees to implement a modification or workout plan. The plan must be made when the payments are in default or when default is reasonably foreseeable and when the recovery under the deed of trust workout plan is greater than the anticipated recovery through foreclosure on a net present value basis. The creditor must offer the borrower a modification of the deed of trust or a workout plan if the modification or plan is consistent with its contractual or other authority.

Tenants in non-owner-occupied one- to four-unit residences must be notified of the impending foreclosure sale, the potential consequences to them, and their option to contact a lawyer, legal aid, or a housing counselor about their rights. Tenants living in foreclosed property must be given 60 days written notice before they are removed from the property by an unlawful detainer action.

The trustee must act in utmost good faith and in the borrower's and lender's best interest. Various acts are required of the trustee in the discharge of this duty. This requirement has no expiration date.

Certain claims are not waived by the borrower's failure to bring a lawsuit to enjoin a foreclosure sale of an owner-occupied one- to four-unit residence, but these claims must be asserted within one year of the foreclosure sale.

Existing law is conformed to the specific requirements of this bill.

Other than as mentioned above, this bill expires January 1, 2013.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: The numbers of foreclosures are increasing and are expected to continue to increase for some period. This bill will complement very well the Obama plan that came out today. Our Senate provided a wonderful package of counseling for homeowners last year. The landscape continues to change. We continue to work with the banks and the bar association. While the legal language is complicated, we need to make sure it protects both the financial institutions and the consumers. This bill is part of the Governor's stimulus package. A lot of work has been done to prevent foreclosures in the future. This bill helps people who are struggling now. Loan modifications are just not happening. This bill will not be enough. Lenders are not acting correctly. The third party trained mediation could be the solution to this crisis in a lot of ways. We need a loan modification plan with teeth. The Brown court case fix is important. If done right, this could be the single most important piece of consumer protection legislation we see in our careers. There were more January foreclosures than sales in King County. Few homeowners know

who has the authority to negotiate with them due to loan repackaging. The entity owning the loan should have to present the paper to prove they have authority to foreclose.

CON: It is important to maintain the trustee's impartiality by not adding duties that undermine that neutrality. The unconstitutionality arises from casting too large a net.

OTHER: We are concerned that we get this legislation right for consumers and for the health of our financial institutions. We need to amend the bill so that nonjudicial foreclosure works for both parties. This bill is important in preventing foreclosures. When people get depressed, they get difficult to reach. Some language in the bill is not applicable to our Deed of Trust Act and some is unconstitutional. It is important to strike the balance between judicial and nonjudicial foreclosure. Trustees do not want to be caught in the middle of terms that are not well defined.

Persons Testifying: PRO: Kari Burrell, Governor's Policy Office; Melissa Huelsman, private consumer attorney; Bruce Neas, Columbia Legal Service; Nick Federici, Washington Low Income Housing Alliance; Georgene T. Monday, ACORN; Michelle Thomas, Tenants Union of Washington.

CON: Stu Halsan, Washington Land Title; Aleana Harris, Real Property Realtors, Trust Section of the Washington State Bar Association.

OTHER: Denny Eliason, Washington Bankers Association; Joe Sakay, Washington Mortgage Lenders Association.

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Subject: Florence Frias v. Asset Foreclosure Services, Inc., et al., No. 89343-8 - Opposing Brief of Defendant LSI Title Agency, Inc.
Attachments: Opposing Brief of Defendant LSI Title Agency Inc.pdf

Case Name: *Florence Frias v. Asset Foreclosure Services, Inc., et al.*
Case Number: 89343-8
Filer: Brian L. Lewis
WSBA: 33560
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Direct: (206) 370-7966
Attorney for Defendant LSI Title Agency, Inc.

Dear Clerk:

Attached for filing is the Opposing Brief of Defendant LSI Title Agency, Inc. in the above-referenced case.

Please let us know if you have any difficulties opening the attachment.

Sincerely,
Pete Talevich

K&L GATES

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