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No. 71724-3
COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MARISA BAVAND,

Appellant/Plaintiff,

v.

CHASE HOME FINANCE LLC, et al.,

Respondents/Defendants.

RESPONDENTS CHASE HOME FINANCE LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWERING BRIEF

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I. INTRODUCTION

Plaintiff Marisa Bavand stopped making payments on her mortgage in September 2010, and thereafter filed this lawsuit in order to delay the rightful foreclosure that followed. At all times relevant, Respondent Chase Home Finance LLC (and its successor JPMorgan Chase Bank, N.A.) possessed the note with a blank indorsement and, thus, was the proper beneficiary under the deed of trust and entitled to enforce its terms as provided by the Uniform Commercial Code and chapter 61.24 RCW, and as interpreted in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn. 83, 104 (2012) and this Court's decision in *Trujillo v. Northwest Trustee Servs, Inc.*, __ Wn. App. __, 326 P.3d 768, No. 70592-0-I (Div. I, June 2, 2014). Ms. Bavand's claims to the contrary were entirely unsupported.

II. STATEMENT OF CASE

On or about March 18, 2004, Plaintiff Marisa Bavand entered into the Loan agreement with Capital Mortgage Corporation, a Washington Corporation ("Capital Mortgage"). CP 1558-1561. Ms. Bavand borrowed $160,000 from Capital Mortgage, and executed a Deed of Trust in favor of Capital Mortgage, encumbering the real property commonly known as 628 168th Pl. SW, Lynnwood, WA 98037 ("Deed of Trust"). CP 1563-1580. The Deed of Trust was recorded under Snohomish County Recording No. 200403310204. *Id.* The Deed of Trust lists Capital Mortgage as the

"Lender," Joan H. Anderson EVP on behalf of Flagstar Bank FSB as "trustee," and Mortgage Electronic Registration Systems, Inc. ("MERS") as a separate corporation that is acting solely as nominee for the lender and lender's successors and assigns as "beneficiary." *Id.*

The original Note was specially indorsed by Capital Mortgage to Flagstar Bank FSB (Flagstar"), then indorsed in blank by Flagstar Bank. Chase Home Finance LLC began servicing the loan on or about October 1, 2004, upon transfer of the loan from Flagstar. CP 1554. Chase received physical possession of the note on November 24, 2004, and retained possession at its facility located at Chase Custodial Services, 780 Delta Dr., Monroe, LA 71203 at all times relevant to the claims made in the Complaint. *Id.*

Federal National Mortgage Association ("Fannie Mae") became the owner of the Loan on or about April 8, 2004, was the owner when servicing of the loan was transferred to Chase in October 2004, and is the current owner. CP 1554. Chase services the loan pursuant to Fannie Mae's Servicing Guide published at https://www.fanniemae.com/content/guide/svc061011.pdf as referenced at CP 1554. Chase initiated the foreclosure pursuant to the Servicing Guide and was authorized to initiate foreclosure and execute foreclosure

documents in Chase's own name. *See Servicing Guide*, Part VIII, Chapter 1, Section 101.

Ms. Bavand failed to make her monthly payments on September 1, 2010, and accordingly due to the default Chase initiated nonjudicial foreclosure proceedings. CP 1554. On February 1, 2011, MERS executed an Assignment of Deed of Trust transferring its interest in the Deed of Trust to Chase Home Finance LLC at Chase's request. The Assignment of Deed of Trust was recorded under Snohomish County Recording No. 201102020358. CP 1582. Also at Chase's direction, an Appointment of Successor Trustee was executed on February 1, 2011, by Ken Patner, Vice President of Northwest Trustee Services, Inc., attorney in fact for Chase Home Finance LLC under a power of attorney recorded under Snohomish County Recording No. 200902090295. CP 1584. The Limited Power of Attorney grants NWTS authority to execute appointments of successor trustees on Chase's behalf. The Appointment of Successor Trustee appointed Northwest Trustee Services, Inc. ("NWTS") as trustee under the Deed of Trust and was recorded under Snohomish County Recording No. 201102020359. CP 1586-1588.

NWTS issued a Notice of Default dated February 1, 2011, which was sent to Ms. Bavand, stating that the arrears, including past due payments, costs and fees to that date were $7,549.72. *Id.* at Exhibit F.

The Notice of Default was signed by Chase Home Finance LLC through its authorized agent NWTS. Chase Home Finance LLC was identified as the party to whom the debt was owed, as the holder of the Note, and as the beneficiary under the Deed of Trust. CP 1590-1592.

On May 1, 2011, Chase Home Finance LLC merged with JPMorgan Chase Bank, National Association, under the name "JPMorgan Chase Bank, National Association." CP 1594-1597.

On January 26, 2012, JPMorgan Chase, N.A., as successor by merger to Chase Home Finance LLC, executed a Beneficiary Declaration, attesting it was the holder of the Note. CP 1599. At the time the Beneficiary Declaration was executed, the original Note, indorsed in blank, was in the physical possession of JPMorgan Chase Bank, N.A. at Chase Custodial Services, 780 Delta Dr., Monroe, LA 71203. CP 1555-1556.

On or about May 2, 2012, at Chase's direction, NWTS issued a Notice of Trustee's Sale, which was recorded under Snohomish County Recording No. 201205100345. CP 1600-1603. The trustee's sale was set for August 10, 2012.

After Ms. Bavand filed the above referenced suit on August 20, 2012, Chase agreed to postpone the trustee's sale. CP 1556. The sale date has since lapsed and there is no pending trustee's sale scheduled. *Id.*

In January of 2014, Chase, MERS, and Fannie Mae filed a joint motion for summary judgment, with supporting declarations, to dismiss all of Ms. Bavand's claims against them. CP 1532 - 1623.

On March 26, 2014, the trial court granted Chase, MERS, and Fannie Mae's motion for summary judgment. CP 52 - 56. The trial court also entered an Order striking the Declaration of Tim Stephenson on that same day. CP 57 - 59.

On April 3, 2014, Ms. Bavand filed her Notice of Appeal, seeking review of the trial court's orders of March 26, 2014. CP 41 - 51.

III. ARGUMENT

A. Applicable Standard of Review

The Court of Appeals reviews an order for summary judgment *de novo*, engaging in the same inquiry as the trial court. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law." Civil Rule (CR) 56(c). A material fact is one on which the outcome of the litigation depends. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008). A defendant can move for summary judgment in either of two

ways: (1) set out its version of the facts and allege that there is no genuine issue based on those facts; or (2) point out to the court that the nonmoving party lacks sufficient evidence to support its case. *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001).

Once a moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth specific facts rebutting the moving party's contention and disclosing that a genuine issue of material fact exists. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008). If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial," then summary judgment should be granted. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1982).

Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact to preclude summary judgment. *Grimm v. Univ. of Puget Sound,* 110 Wn.2d 355, 360, 753 P.2d 517 (1988). The party seeking to avoid summary judgment must affirmatively present the admissible factual evidence upon which he relies; he cannot rely upon the bare allegations of his pleadings. *Meyer v. University of Washington*, 105 Wn.2d 847, 852 (1986).

B. Summary Judgment Properly Granted

1. Claims for Wrongful Foreclosure, Violation of the Deeds of Trust Act, and for Declaratory Relief Fail.

Ms. Bavand's claims for wrongful foreclosure and alleged violations of the Deeds of Trust Act fail because no foreclosure has occurred and thus no such claims exist under Washington law as explicitly addressed in a September 18, 2014, decision by the Washington Supreme Court. *See Frias v. Asset Foreclosure Servcs. Inc.*, __ Wn.2d __ (September 18, 2014) ("We hold that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed.") Copy provided as Attachment A hereto. Ms. Bavand's claims also fail under the Uniform Commercial Code, chapter 61.24 RCW, and Washington case law because at all times relevant to this action Chase was the holder of the Note and thus the beneficiary of the Deed of Trust.

a. Chase is the "Holder" of the Note and Entitled to Enforce the Note and Deed of Trust and Appoint Northwest Trustee Services, Inc. as Trustee.

For more than 50 years Washington's negotiable instrument enforcement law has been the Uniform Commercial Code's ("UCC") Article 3. Under that law, a promissory note is a negotiable instrument. RCW 62A.3-104(a), (b), and (e). A note may be enforced by, "the holder

of the instrument...." RCW 62A.3-101. In turn, "holder" is defined as the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(b)(21)(A). In other words, the holder possesses a note payable or indorsed to itself or in blank. If a note is made payable to an identified person, the note may be negotiated to another who thereby becomes its holder by transferring possession of the note and by indorsement of the note by its holder. RCW 62A.3-201.

The UCC's Permanent Editorial Board recently reaffirmed application of these laws to notes secured by deeds of trust. *See* CP 1535 - 1551 ("PEB Report"). Seeking to "identify[] and explain[] several key rules in the UCC that govern the ... enforcement of notes secured by a mortgage [or Deed of Trust] on real property," the Board stated:

> The first way that a person may qualify as the person entitled to enforce a note is to be its "holder." This familiar concept, ... requires that the person be in possession of the note and either (1) the note is payable to that person or (ii) the note is payable to bearer. Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement so that, for example, a note payable to the order of a named payee that is indorsed in blank by that payee becomes payable to bearer.

PEB Report, p. 5 (fns. omitted). The UCC's indorsement provisions are also Washington law. RCW 62A.3-204(a), RCW 62A.3-205(b).

The Washington State Supreme Court recognized the above UCC provisions defining "holder" and "person entitled to enforce" in nonjudicial foreclosure cases in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn. 83, 104 (2012). Since 1998, the Deed of Trust Act has defined "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." LAWS OF 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2). In *Bain*, the court held that to enforce a deed of trust, "a beneficiary must either actually possess the promissory note or be the payee." *Bain,* 175 Wn.2d at 104.

The law in Washington regarding negotiable instruments is the UCC codified at chapter 62A RCW. RCW 62A.9A-203(g) states: "Lien securing right to payment. The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien." This section is identical to UCC Section 9-203(g), including the supporting comments: "Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security

interest or other lien on personal or real property also transfers the security interest or lien. *See* RESTATEMENT (3D), PROPERTY (MORTGAGES) § 5.4(a) (1997)." In other words, the security follows the debt.

Again, the Washington State Supreme Court in *Bain* held: "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *Bain,* 175 Wn.2d at 104. It is the holder of the promissory note who qualifies as the beneficiary and who is entitled to enforce the security interest. *Id.* at 98-99.

The Note at issue in this case was last indorsed in blank and was in Chase's possession from November 2004 to the time Ms. Bavand filed her Complaint. CP 1554, 1558-1561. Thus, under RCW 62A.1-201(b)(21)(A) and the Washington State Supreme Court's decision in *Bain*, Chase, as the holder of the Note was the beneficiary entitled to enforce the Deed of Trust. At Chase's request, NWTS initiated foreclosure proceeding and was appointed as Successor Trustee. Furthermore, NWTS issued the Notice of Default and Notice of Trustee's sale at the request of Chase. Thus, Chase, as the holder of the Note and beneficiary of the Deed of Trust, directed the initiation of the foreclosure proceedings. There was no violation of the Deed of Trust Act and there is no basis for Ms. Bavand's requested declaratory relief.

b. Ownership of the Note is Not a Requirement to Enforce the Deed of Trust.

To foreclose under Washington law, the foreclosing entity need not own the Note. *Trujillo v. Northwest Trustee Servs, Inc.*, __ Wn. App. __, 326 P.3d 768, No. 70592-0-I (Div. I, June 2, 2014); RCW 62A.3-101; *Bain, supra*, 175 Wn.2d at 104; PEB Report, p. 8. Although Fannie Mae has owned Ms. Bavand's loan since April 2004, Chase Home Finance LLC and JPMorgan Chase Bank, N.A., as successor by merger, have remained the loan servicer and in possession of the original Note indorsed in blank since the loan was transferred from Flagstar.

As discussed above, a "beneficiary" under the Deeds of Trust Act is defined as the "holder" of the Note. Imputing an "ownership" requirement to the definition of "beneficiary" under RCW 61.24.005(2) is inconsistent with the Deeds of Trust Act and the UCC and at odds with the intent of the Washington State Legislature. Washington courts have long held that for a "holder" to enforce an instrument, "[i]t is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969).

Recognizing *John Davis & Co., supra*, this court recently rejected the same claim as is being asserted in this case. See *Trujillo,* 326 P.3d 768.

As in this case, the borrower in *Trujillo* argued that RCW 61.24.030(7)(a) requires that a beneficiary be both the holder and the owner of the note. The court squarely rejected this argument. First, inclusion of use of different words, "owner" and "holder," in the same statute by the legislature indicated that it did not intend them to have the same meaning. Second, citing to *John Davis & Co, supra,* discussed above, the court confirmed that Washington common law makes clear that the holder has authority to enforce a note and that the question of ownership of a note is irrelevant to enforcement. Third, the court relied upon RCW 62A.3-301 to reach its conclusion that a holder may enforce a note. In sum, the court held that a beneficiary declaration under RCW 61.24.030(7)(a) is sufficient if the declaration provides proof that the party is the holder of the note.

The United States District Court for the Western District of Washington also reached the same conclusion in *Corales v. Flagstar Bank, FSB,* 22 F.Supp.2d 1102, 1107 (W.D. Wash. 2011). In determining that Flagstar as the "holder" of the note at issue was entitled to enforce the deed of trust, the court stated:

> Plaintiffs allege that Flagstar "transferred" their loan into a mortgaged-backed security fund related to Fannie Mae. However, even assuming that Plaintiffs' allegations are true, they have not established that Flagstar presently lacks authority to enforce the Deed of Trust at issue or that Flagstar lacks authority to initiate foreclosure proceedings.

> It is undisputed that Flagstar is in possession of the original Note at issue, endorsed in blank. Flagstar therefore is the holder of the Note with the right to enforce it and the corresponding Deed of Trust. ... [E]ven if a lender sells a loan to Fannie Mae, the lender's possession of the Note endorsed in blank means that it may foreclose in its own name. Thus, even if Fannie Mae has an interest in Plaintiffs' loan, Flagstar has the authority to enforce it. Thus, the court grants Flagstar's and MERS's motion with regard to this issue.

Corales, 22 F.Supp.2d at 1107 (citations omitted). This holding follows the Washington State Supreme Court's holding in *Bain* and this Court's decision in *Trujillo.*

If, contrary to Washington statute and case law, evidence of Chase's status as a "holder" is insufficient to establish its authority to foreclose the Deed of Trust, Chase's servicing agreement authorizes Chase to act on Fannie Mae's behalf in directing institution of foreclosure proceedings and executing foreclosure documents. CP 1554.

Chase is both the Note holder and authorized servicer for Fannie Mae, the Note owner. Chase is entitled to institute foreclosure proceedings in its own name against the Property, and therefore this Court should affirm the trial court's grant of Defendants' summary judgment motion.

c. MERS Involvement Does Not Support Any Claims.

Ms. Bavand asserts in her Complaint that no Defendant holds her Note, MERS is not a proper beneficiary, and therefore no one may foreclose. However, the *Bain* court stated it "tended to agree" that a DTA violation – such as denominating MERS as beneficiary – "should not result in a void deed of trust." *Bain*, 175 Wn.2d at 113. Similarly, MERS's involvement here does not support any of Ms. Bavand's claims. MERS was identified as the Deed of Trust's beneficiary but in a nominee capacity for the lender, Capital Mortgage Corporation and its successors and assigns, a practice held to not be actionable. *Bain*, 175 Wn.2d at 113. MERS executed an Assignment of Deed of Trust in February 2011, but Defendants do not rely on that assignment, and no claim may be premised on it. *See Lynott v. Mtg. Elec. Reg. Sys., Inc.*, 2012 WL 5995053, at *2 (W.D. Wash. Nov. 30, 2012) (dismissing with prejudice plaintiff's claims based on MERS's assignment because, "possession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact"). MERS took no action in connection with the foreclosure. Chase's right to foreclose is based upon its possession of the Note, indorsed in blank, not MERS's assignment. As the United States District Court for the Western District of Washington recognized:

> [T]he situation at issue here is unlike the situation in *Bain v. Metro. Mortg. Group Inc.* In *Bain*, the alleged authority to foreclose was based solely on MERS's assignment of the deed of trust, rather than on possession of the Note. Here, however, the undisputed facts establish that OneWest had authority to foreclose, independent of MERS, since OneWest held Plaintiffs' Note at the time of foreclosure.

Florez v. OneWest Bank, FSB, 2012 WL 1118179, *1 (W.D. Wash. April 3, 2012).

Further, Ms. Bavand ignores the fact that Chase as the note holder and a member of the MERS® System is the principal of MERS the nominee (agent), and MERS executed documents at Chase's request. MERS executed the assignment at the direction of Chase and MERS merely assigned its record agency interest in the deed of trust to Chase, the beneficiary. Ms. Bavand's assertions that Defendants conspired to defraud of her Property are simply unsupported allegations.

Nothing in *Bain* supports Ms. Bavand's claims in this case, because the foreclosing entity did not rely on MERS or any MERS assignment or appointment to foreclose, but instead had possession of the Note. Because Chase was entitled to enforce the Note and Deed of Trust, MERS's limited involvement gives rise to no claims, summary judgment as to MERS should be affirmed.

2. Ms. Bavand's Consumer Protection Act Claim was Properly Dismissed Because she Failed to Establish Causation, Reliance, and Damages.

Ms. Bavand must prove five elements to succeed on her Consumer Protection Act, RCW 19.86, et seq. ("CPA") claim: (1) an unfair or deceptive act or practice: (2) which occurred in trade or commerce; (3) with public interest impact; (4) caused injury to plaintiff's business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Failure to satisfy even one element is fatal to a CPA claim. Id. at 793. To establish a per se violation, a plaintiff must show "that a statute has been violated which contains a specific legislative declaration of public interest impact." *Id.* at 791.

Ms. Bavand's claims fail because Chase was in physical possession of the Note, indorsed in blank, and qualified as a "holder" for the purposes of the UCC and chapter 61.24 RCW. Thus, identification of Chase on the Notice of Default and the Notice of Trustee's Sale as the beneficiary was correct and does not constitute a "deceptive act" on the part of Chase or Fannie Mae under the CPA. Accordingly, Ms. Bavand's claim that identifying Chase as the "holder" on the Notice of Default and Notice of Trustee's Sale was deceptive fails. Her argument that Fannie Mae, not Chase, was the holder or that it managed a "yet unidentified

securitized trust" was supported by no evidence, and the trial court did not err in granting summary judgment.

Furthermore, Ms. Bavand has not established any deceptive act of MERS caused her harm. Proof of causation is an essential CPA element. *Schnall v. AT&T Wireless Svcs., Inc.*, 168 Wn.2d 125, 144, 225 P.3d 929 (2010). The causal link is but-for – a plaintiff must establish that the "injury complained of ... would not have happened" if not for defendant's acts. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007) (emphasis added). "Depending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation ...." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 59, n. 15, 204 P.3d 885 (2009).

The *Bain* court held, "the mere fact MERS is listed on the deed of trust as beneficiary is not itself an actionable injury under the CPA." *Bain*, 175 Wn.2d at 120 (emphasis added). The Court recognized that, "if there have been misrepresentations, fraud, or irregularities in the [foreclosure] proceedings, and if the homeowner borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA." 175 Wn.2d at 51 (emphasis added). Although many "[p]laintiffs seem to attempt to place themselves into the hypothetical circumstances theorized in *Bain*," *Douglass v. Bank*

of Am. Corp., 2013 WL 2245092, *8 (E.D. Wash. May 21, 2013), no published cases report any as having succeeded.

In *Singh v. Federal Nat'l Mortg. Ass'n*, No. C13-1125RAJ, 2014 WL 504820 (W.D. Wash. Feb. 7, 2014), the court found that borrowers pleaded facts sufficient to establish that the trustee violated its duty of good faith. There it was alleged that the trustee acted with the beneficiary and servicer to collectively mislead the borrowers about the status of the foreclosure while borrowers attempted to negotiate a loan modification. However, in determining whether, even given the violation of the duty of good faith, the complaint should nonetheless be dismissed under Fed. R. Civ. P. 12(b)(6), the court found it should be, given the lack of causation. The court held that had the defendants complied with their duties, the plaintiffs did not allege that they would have done anything differently. *Id.* at *6. The court emphasized that the borrowers did not allege that they could have met their financial obligations to enjoin the sale. *Id.* The court found that for those reasons, their complaint did not plausibly allege that the damages flowing from foreclosure were attributable to the defendants' misconduct. *Id.* The court chided the defendants' actions in that case, but held that if a homeowner cannot pay her mortgage, she will ultimately lose her home. *Id.*

The Ninth Circuit Court of Appeals recently issued a similar decision relating to causation, and the failure thereof. In *In re: MERS*,

borrowers asserted a tort of wrongful foreclosure in violation of Arizona, California, and Nevada laws, arguing that the MERS system impermissibly "splits" ownership of the note from the ownership of deed of trust, thereby making the promissory note unsecured and unenforceable in any foreclosure proceedings. *In re Mortg. Elec. Reg. Sys., Inc.*, 754 F.3d 772 (9th Cir. June 12, 2014). The court determined that it need not address the argument about splitting the note because the wrongful foreclosure claims alleged failed for another reason: none of the appellants alleged lack of default, tender to cure the default, or an excuse from tendering. While California and Nevada law had such an existing requirement, Arizona did not. The court notably held: "But even if we were to assume that the tort of wrongful foreclosure exists in Arizona, one of its elements *would very likely be* lack of default or tender to cure the default, as is required under California and Nevada law, or an excuse from the tender requirement, as recognized by California." *Id.*at 784 (Emphasis supplied.) Ultimately, foreclosure is caused the failure to make payments, and unless the borrower can show that she is ready and able to make payments, even a technically flawed foreclosure process does not result in damages.

Here, at all times relevant, Ms. Bavand was aware with whom to communicate concerning her loan and the foreclosure process. She knew to make her mortgage payments to Chase, as she made payments to Chase

from the time of the service transfer in 2004 to the time of default in 2010. The Notice of Default identified Chase Home Finance LLC as the servicer of the loan and party to whom the debt and provided its address and phone number. Additionally, the Notice of Default provided Ms. Bavand with a phone number at NWTS for her to call regarding amounts owed.

Ms. Bavand did not change her actions in reliance on any foreclosure-related information she received. Assignments and appointments executed by MERS and others on her various loans never caused her to pay her mortgage to an entity other than the current servicer, as she made no payments at all. She was aware if servicing was transferred she would receive correspondence informing her of the new entity entitled to collect her loan payments. No actions by Chase, MERS, or Fannie Mae caused Ms. Bavand to stop paying her mortgage.

Identification of Chase as the "holder" on the Notice of Default and Notice of Trustee's Sale was true and accurate because Chase was the holder. Ms. Bavand's claims to the contrary are directly contrary to the UCC's definition of "holder" as codified in RCW 62A.1-201(b)(21)(A). If a note, as the one at issue here, is indorsed in blank, the party in possession of the note is the "holder." In February 2011 when NWTS was appointed as trustee under the Deed of Trust under the direction of Chase and when the Notice of Default was issued by NWTS at Chase's direction,

the Note was indorsed in blank by Flagstar and held in Chase's physical possession at 780 Delta Dr., Monroe, LA 71203. CP 1554.

Ms. Bavand also argues that MERS acted deceptively when it was named as beneficiary under the Deed of Trust. However, no injuries were caused by any characterization of MERS as beneficiary under the Deed of Trust. Ms. Bavand was not misled as to the identity of the holder of the Note as a result of MERS's designation or that such ignorance of the actual holder led to the initiation of foreclosure proceedings.

Ms. Bavand suffered no damage from any alleged "deception." In order to succeed on her claim, Ms. Bavand must establish injuries that would not have occurred but for the conduct of Chase, MERS, and/or Fannie Mae. Foreclosure proceedings were initiated because Ms. Bavand stopped to making loan payments in September 2010. Ms. Bavand was not confused as to whom payment was owed. She did not make payments to MERS or Fannie Mae. Chase, as the holder of the Note, had authority to appoint NWTS as Successor Trustee to initiate foreclosure proceeding. Once Ms. Bavand filed the instant suit, the trustee's sale was continued and the sale date eventually lapsed. Accordingly, Ms. Bavand cannot prove the elements of reliance, causation, and damages to prevail on her CPA claim. Ms. Bavand suffered no injury by Defendants'

communications and accordingly her claims for CPA violations fail. *Bain*, 175 Wn.2d at 120.

3. "Little RICO" Claim Properly Dismissed

Ms. Bavand asserts that Defendants violated Washington's Criminal Profiteering Act, RCW 9A.82, et seq. ("Little RICO"). Little RICO was enacted to combat organized crime. *Winchester v. Stein*, 135 Wn.2d 835, 849, 959 P.2d 1077 (1998). The statute requires injury and damages to a person, business, or property by an act of criminal profiteering; that is, commission of specific enumerated felonies for financial gain as part of a pattern including three or more acts within a five year period that are similar or interrelated to the same enterprise. RCW 9A.82.010(4) and (12); RCW 9A.82.100.

Little RICO liability is limited to the specific listed statutory felonies, including murder, robbery, kidnapping, theft, arson, and collection of an unlawful debt. RCW 9A.82.010(4). When a plaintiff fails to sufficiently plead even one act of criminal profiteering, let alone three, and lodges only threadbare recitals, her Little RICO claim must be dismissed. *Kauhi v. Countrywide Home Loans Inc.*, 2009 WL 3169150, *7 (W.D.Wash. Sept. 29, 2009).

Here, Ms. Bavand cannot establish that Chase, MERS, or Fannie Mae violated RCW 9A.82. Assuming her Little RICO claim is based on the felony of collection of an unlawful debt, the statute defines as:

> (21) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in the state in full or in part because the debt was incurred or contracted:
>
> (a) In violation of any one of the following:
>
> (i) Chapter 67.16 RCW relating to horse racing;
>
> (ii) Chapter 9.46 RCW relating to gambling;
>
> (b) In a gambling activity in violation of federal law; or
>
> (c) In connection with the business of lending money or a thing of value at a rate that is at least twice the permitted rate under the applicable state or federal law relating to usury.

RCW 9A.82.010(21).

Chase and Fannie Mae's only involvement with Ms. Bavand is related to the servicing, ownership, and foreclosure notices of her mortgage. MERS' only involvement with Bavand relates to its designation in her Deed of Trust as beneficiary in a nominee capacity and with its assignment of the Deed of Trust, a contract Bavand is not a party to and never relied on. None of those activities involve gambling, horse racing, or lending money at a usurious rate, nor does Ms. Bavand allege that they did. Further, Ms.

Bavand does not allege the prerequisites of profiteering, continuity, and multiple acts to support her claim, which is fatal.

"Because sending a notice of a trustee sale, even if they (sic) were defective under the DTA's requirements, are not listed as one of the specific enumerated felonies (sic) constitute indictable criminal acts under Washington law, [defendants] cannot be liable under RCW 9A.82." *Robertson v. GMAC Mtg. LLC*, 2013 WL 1898216, *4 (W.D.Wash. May 6, 2013). Similarly, when a borrower fails to specifically allege any act qualifying as criminal profiteering by entities who serviced her loan, held her note, or were otherwise involved in her mortgage, her Little RICO claim must be dismissed with prejudice. *Zalac v. CTX Mortgage Corp.*, 2013 WL 1990728, *4 (W.D. Wash. May 13, 2013).

As the courts did in *Robertson* and *Zalac*, the trial court properly dismissed Ms. Bavand's Little RICO claim against the moving Defendants, and this Court should affirm.

C. Declarations of Karie Mullen and Lisa Mahony Properly Considered

Ms. Bavand's opening brief complains about the declarations of Lisa Mahony (of Flagstar) and Karie Mullen (of Chase) because they are purportedly inconsistent with each other with regard to the exact dates in 2004 that Fannie Mae purchased the Note from Flagstar, and Chase

became the servicer and note holder. The records attached to Ms. Mahony's declaration, however, are consistent with Ms. Mullen's testimony as to when Fannie Mae became the owner and when Chase became the Servicer and thereafter holder. Regardless, the exact dates of service transfer and transfer of possession of the Note in 2004 are irrelevant.

Ms. Mullen's testimony establishes that Chase's records are made at or near the time of the occurrence set forth in the records, by an employee or representative with personal knowledge of the acts or vents recorded, kept and maintained by Chase in the regular course of its business, and are relied upon by Chase in the ordinary course of its business. CP 1552-1556. This establishes that Chase has maintained possession of the Note from November 2004 to date, including at the time that the beneficiary declaration was signed on January 26, 2012. *Id.*

Ms. Mullen, an Assistant Secretary with JPMorgan Chase, N.A. successor by merger to Chase Home Finance LLC, was a qualified witness to authenticate the business records of Chase. Her testimony and the records attached to her declaration were admissible as evidence in support of Defendants' Motion for Summary Judgment.

RCW 5.45.020 provides that business records may be authenticated by a record custodian or other qualified witness. Ms.

Mullen testified that she was familiar with the manner in which Chase maintained its records, including computer records, that it is Chase's routine practice to make records at or near the time of the occurrence recorded, that the records are maintained in the regular course of business, and that she reviewed the record in setting forth the matters contained in the declaration. CP 1552-1556. Such an attestation is sufficient to qualify Ms. Mullen as a witness under Washington law. *See American Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675, 292 P.3d 128 (2012) ("Lavarta is an American Express employee who had persona knowledge of how American Express's records were kept. His declaration indicated that the account statements were kept in the ordinary course of American Express's business and the transactions within them were recorded at the time of occurrence. These documents were properly admitted.); RCW 5.45.020.

Ms. Bavand's citation to *State v. Smith*, 16 Wn. App. 425, 558 P.2d 265 (1976) and *State v. Kane*, 23 Wn. App. 107, 594 P.2d 1357 (1979), are inapposite as the documents attached to Ms. Mullen's declaration are not computer printouts, but are copies of actual documents, including the original Note. Rather, here, just as in *Kane*, the court allowed a representative of a "well-established national banking institution, maintaining multiple branches within the state" to testify about

the contents of its computerized business records (subject to the normal business records exception requirement provided under RCW 5.45.020 met as described above), because "it is reasonable for a court to assume that the 'electronic-computer' equipment [of such an institution] is reliable." *Kane*, 23 Wn. App. at 112.

The trial court properly considered the declaration testimony of Karie Mullen and Lisa Mahony.

D. "Expert" Declaration of Non-Expert Tim Stephenson Properly Excluded

In support of her Consolidated Response to Defendants' Motions for Summary Judgment, Ms. Bavand submitted the Declaration of Tim Stephenson as a purported expert witness. CP 1368-1386. This declaration failed to establish Mr. Stephenson as an expert, consisted almost entirely of inadmissible statements including legal conclusions, and otherwise failed to provide the trier of fact with any useful information. Mr. Stephenson's declaration was properly excluded by the trial court. CP 57-59.

Expert testimony is admissible when (1) the witness qualifies as an expert, (2) the opinion is based on an explanatory theory generally recognized in the scientific community, and (3) if it will be helpful to the trier of fact." ER 702; *In re Per. Restraint of Morris*, 176 Wn.2d 157, 168-

69, 288 P.3d 1140 (2012). An expert must rely on facts and data, not mere speculation. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994). An expert may not testify to legal conclusions. *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002). Additionally, expert "testimony cannot be used to provide legal meaning or interpret [a contract] as written." *McHugh v. United Service Auto. Ass'n*, 164 F.3d 451 (9th Cir. 1999). Furthermore, issues regarding witness credibility and the weight of evidence are determined by the finder of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

The entirety of the testimony of Tim Stephenson (other than his recitations of agreements to which neither he nor Ms. Bavand is a party), contained improper legal conclusions and contract interpretation. CP 1368-1386. For example, Mr. Stephenson attempts to inform the trial court about which party may serve as a beneficiary under the applicable Washington statute, which party is the "owner" or "holder" of the subject note, and the legal sufficiency of the Beneficiary Declaration. *Id.* These statements are legal conclusions. The Washington Attorney General and the Federal Trade Commission have both warned of the dangers of these "Forensic Audits," and courts have rejected this type of evidence. *See, e.g., Fidel v. Deutsche Bank Nat'l Trust Co.*, No. C10-2094, 2011 WL

2436134 (W.D. Wash. June 14, 2011). Furthermore, Mr. Stephenson's conclusions are nothing more than conjecture based on his interpretation of a trust agreement and a custodial agreement and the duties of the respective parties to those agreements. These documents are not pertinent to the nonjudicial foreclosure initiated in this case where Chase, the foreclosing party, in compliance with the Washington Supreme Court's mandate in *Bain supra*, had possession of the Note indorsed in blank at the time the foreclosure was initiated and all relevant times thereafter. Even if these documents were relevant—which they are not-- such opinions of law and contract interpretations are not admissible as expert testimony.

Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 103 882 P.2d 703 (1994). In *Queen City Farms*, the Washington State Supreme Court found that the trial court abused its discretion in allowing expert testimony of a witness in a case involving coverage issues under comprehensive general liability policies for losses resulting from contamination of groundwater. The proffered witness gave opinion testimony of the underwriting practices of Lloyd's syndicates regarding waste disposal sites and operations. However, the Washington State Supreme Court found that the witness lacked foundation to qualify as an

expert because while the witness "may have been an expert as to certain policies of Lloyd's underwriters, and an expert as to the underwriting practices of his own syndicate, he was not qualified to testify as to the Lloyd's policies at issue and whether misrepresentations by QCF [an insurer] were material." *Id.* at 104. The witness "had no knowledge whatever of the underwriting practices of the syndicates which insured QCF, and could not state a generally accepted standard of practice for all of the Lloyd's syndicates." *Id.* The court also notes that his testimony was mere conjecture and speculation because it "lacked foundational facts to support his conclusion that the actual underwriters would have reached a different decision about issuing the insurance had they known of the waste ponds." *Id.*

Like the proffered testimony in Queen City Farms, the declaration testimony of Tim Stephenson offers nothing more than conjecture and speculation from an unqualified witness. CP 1368-1386. A review of Mr. Stephenson's Curriculum Vitae (CV) (submitted only after the Defendants' motion to strike), makes apparent that while Mr. Stephenson has experience originating loans and the vaguely denoted "mortgage industry," his CV lacks any indication that he has experience in servicing loans for Fannie Mae, custodial arrangements with Fannie Mae, foreclosing loans in which Fannie Mae is the owner, or foreclosure

requirements in Washington State. CP 116-119. Rather, the only foreclosure experience listed on the CV is for one year, from 1990-1991, in the state of California. CP 118. A year of experience, over 23 years ago in California, related to "foreclosure proceedings" fails to qualify Mr. Stephenson to testify as an expert regarding whether a party has authority to foreclose a deed of trust under Washington law.

Furthermore, Mr. Stephenson provides no specialized knowledge regarding Fannie Mae's standard of practice with its servicers—he has merely read a Trust Agreement found on the internet and provides his thoughts from a "mortgage lender's perspective"—nor does he have any specialized knowledge regarding Fannie Mae's relationship with Chase. Mr. Stephenson provides no background facts to support his opinion regarding Fannie Mae's standard of practice and the relationship between Fannie Mae and Chase. Similar to the rejected proffered expert in *Queen City Farms*, generalized knowledge regarding the "mortgage industry" without additional, targeted facts regarding the agreement or practices actually at issue in this case, Mr. Stephenson's opinion is not sufficient to rise above the level of mere speculation and conjecture because it lacks foundation.

Finally, Mr. Stephenson's testimony provides no information which "will assist the trier of fact to understand the evidence" under ER

702. Rather, it is the court that is in the position to review the documents before it and make a determination whether the requirements of Washington's Deed of Trust Act and the Uniform Commercial Code as codified in Title 62A RCW are met. Mr. Stephenson purports to illuminate on the term "holder" within the mortgage lending industry, but for the purposes of this matter whether Chase is the "holder" of the Note is determined by RCW 62A.1-201(b)(21)(A). Additionally, whether Chase is the "beneficiary" under the Deed of Trust" is determined under chapter 61.24 RCW. Any testimony regarding Mr. Stephenson's understanding of these terms is irrelevant. These are legal determinations to be made by this Court. Nothing supports the admissibility of this declaration, and it was properly stricken.

E. CR 56(f) Request was Properly Denied

The Court of Appeals reviews a trial court's refusal to grant a continuance pursuant to CR 56(f) for abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007). Here, absolutely no basis for finding such an abuse of discretion exists. In fact, Ms. Bavand's materials show just the opposite.

Just as she did at the trial court level, Ms. Bavand's opening brief fails to address any of the requirements for obtaining CR 56(f) relief, and instead cursorily states that "to the extent that there remained discovery

that needed to be done," she should have been given additional time to conduct discovery. Ms. Bavand ignores the requirement that in order to obtain CR 56(f) relief when responding to a motion for summary judgment, she was required to "provide an affidavit stating what evidence [she] seeks and how it [would] raise an issue of material fact to preclude summary judgment." *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009); *citing Qwest Corp.*, 161 Wn.2d at 369.

Ms. Bavand also failed to provide any legitimate basis for her delay in seeking additional discovery, whatever that might have been. Failure to exercise diligence in obtaining discovery is also grounds for denying a CR 56(f) motion, even it a proper affidavit is provided. *Durand*, 151 Wn. App. at 828. Under the circumstances the trial court properly denied Ms. Bavand's request for CR 56(f) relief, or at the very least, the trial court did not abuse its discretion. The trial court's decision not to grant a continuance should be affirmed.

F. Chase is Entitled to Its Attorneys' Fees

Chase is entitled to an award of its fees and costs pursuant to the terms of the Note and Deed of Trust and as provided under RAP 18.1.

Paragraph 7(E) of the Note provides as follows:

> **(E) Payment of Note Holder's Costs and Expenses**
> If the Note Holder has required me to pay Immediately in full as described above [Notice of Default], the Note

> Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by Applicable Law. Those expenses include, for example, reasonable attorneys' fees.

CP at 1560.

Paragraph 26 of the Deed of Trust provides that the Lender is entitled to recover its reasonable attorneys' fees and costs in "any action or proceeding to construe or enforce any term" of the Deed of Trust, including without limitation, attorneys' fees incurred on appeal. *See* CP at 1573 (¶26).

Accordingly, Chase requests that the Court affirm the trial court's dismissal of Ms. Bavands' Complaint, and award Chase its reasonable attorneys' fees and costs incurred on appeal as provided by the Note, Deed of Trust, and RAP 18.1.

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IV. CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court affirm the trial court's grant of summary judgment to all Defendants, affirm the trial court's striking of the declaration of Tim Stephenson, and award Chase its reasonable fees and costs on appeal.

Respectfully submitted this 19th day of September, 2014.

BISHOP, MARSHALL & WEIBEL, P.S.

By _____

Adam G. Hughes, WSBA #34438
Attorneys for Respondents Chase, FNMA, and MERS

CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 19th day of September, 2014, I caused the foregoing document, **RESPONDENTS CHASE HOME FINANCE LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWERING BRIEF**, to be delivered to the following parties in the manner indicated below:

Richard Llewelyn Jones KOVAC & JONES, PLLC 1750 112th Ave NE, Ste D-151 Bellevue, WA 98004-2976 *Attorneys for Appellant/ Plaintiff*	[X]By First Class Mail [ ] By ABC Legal Messenger [ ] By Email [ ] By Facsimile
Joshua S. Schaer RCO Legal, P.S. 13555 SE 36th St, Ste 300 Bellevue, WA 98006-1489 *Attorneys for Respondent/Defendant Northwest Trustee Services, Inc.*	[X] By First Class Mail [ ] By ABC Legal Messenger [ ] By Email [ ] By Facsimile

Fred B. Burnside Davis Wright Tremaine LLP 1201 Third Ave, Ste 2200 Seattle, WA 98101-3045 *Attorneys for Respondent/* *Defendant Flagstar Bank FSB*	[ ] By First Class Mail [X] By ABC Legal Messenger [ ] By Email [ ] By Facsimile

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 19th day of September, 2014, at Seattle, Washington.

Kay Spading

Kay Spading

ATTACHMENT A

To: RESPONDENTS CHASE HOME FINANCE LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWERING BRIEF,

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE SEP 18 2014
Madsen, C.J.
CHIEF JUSTICE

This opinion was filed for record
at 8:00 Am on Sept. 18, 2014
Ronald R. Carpenter
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN	
FLORENCE R. FRIAS, Plaintiff, v. ASSET FORECLOSURE SERVICES, INC.; LSI TITLE AGENCY, INC.; U.S. BANK, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and DOE DEFENDANTS 1-20, Defendants.	No. 89343-8 EN BANC Filed: SEP 18 2014

FAIRHURST, J.—We have been asked by the United States District Court for the Western District of Washington to determine whether state law recognizes a cause of action for monetary damages where a plaintiff alleges violations of the deeds of trust act (DTA), chapter 61.24 RCW, but no foreclosure sale has been

completed. We are also asked to articulate the principles that would apply to such a claim under the DTA and the Consumer Protection Act (CPA), chapter 19.86 RCW.

We hold that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed. The answer to the first certified question is no—at least not pursuant to the DTA itself. We further hold that under appropriate factual circumstances, DTA violations may be actionable under the CPA, even where no foreclosure sale has been completed. The answer to the second certified question is that the same principles that govern CPA claims generally apply to CPA claims based on alleged DTA violations.

I. FACTUAL AND PROCEDURAL HISTORY

In September 2008, plaintiff Florence R. Frias entered a promissory note secured by a deed of trust encumbering real property in Marysville, Washington. Defendant U.S. Bank National Association was identified on the note and deed of trust as the lender, and defendant Mortgage Electronic Registration Systems Inc. was identified as the beneficiary on the deed of trust. Frias eventually defaulted on her payments and attempted to contact representatives from U.S. Bank to obtain a loan modification. While Frias was waiting for a response from U.S. Bank, she received a notice of default followed by a notice of trustee's sale. Frias continued

working towards a loan modification, and the trustee's foreclosure sale was voluntarily discontinued.

Frias received another notice of trustee's sale in May 2011, which relied on the prior notice of default. The notice of trustee's sale included an itemization of the fees Frias needed to pay to stop the sale, including an auctioneer fee, a bankruptcy check fee, an assignment recording fee, and a fee for the anticipated cost of recording a trustee's deed following the trustee's sale, all of which Frias alleges are, at best, unreasonable in amount and, at worst, simply illegal.

Approximately 90 days later, in July 2011, Frias received a loan modification offer from U.S. Bank. Frias alleges the modification offer was unworkable because it required her to devote more than half of her gross income to her monthly mortgage payments. The May 2011 notice of trustee's sale did not indicate the sale would be delayed to accommodate Frias' efforts at loan modification, and the sale was not discontinued or postponed after U.S. Bank made its July 2011 modification offer.

In August 2011, Frias contacted a housing counselor in an attempt to participate in mediation pursuant to the Washington foreclosure fairness act. LAWS OF 2011, ch. 58. Frias' case was referred to the appropriate agency and a mediator was appointed. At the scheduled mediation session, Frias appeared, but no one appeared on behalf of the beneficiary. The mediation was rescheduled and U.S. Bank's attorney confirmed the foreclosure sale would be stayed pending mediation.

At the second scheduled mediation session, Frias learned the sale had gone forward as originally scheduled—after the first scheduled mediation session but before the second. U.S. Bank was the successful bidder, but the sale was not completed because the deed to the property was not issued. A third mediation session was scheduled to give U.S. Bank time to reverse the wrongful foreclosure sale and produce the required documentation. At that third session, U.S. Bank still did not have all its required documentation and refused to consider modifying Frias' loan. The mediator determined U.S. Bank had not participated in mediation in good faith.

Frias claims she is now uncertain of her status—she still has title to her home but has not entered a loan modification agreement and has not made any payments on her promissory note since mediation, though she would like to. Frias alleges this uncertainty has caused her emotional distress accompanied by physical symptoms.

Frias filed a summons and complaint in Snohomish County Superior Court. She named a cause of action against all defendants under the CPA, alleging that U.S. Bank refused to mediate in good faith in violation of the DTA, that various defendants made numerous misrepresentations to her, that defendants Asset Foreclosure Services Inc. and LSI Title Agency Inc. do not have legal authority to act as foreclosing trustees in Washington, and that the defendants falsely inflated the costs of the improper foreclosure sale for their own profit. Frias also named a cause of action for violations of the DTA against Asset Foreclosure and LSI as purported

trustees. Frias alleges these defendants violated their duties of good faith by initiating the foreclosure sale when they did not have legal authority to act as trustees and when they made demands for unreasonable payments not permitted by the DTA.

The matter was removed to the United States District Court for the Western District of Washington, and all defendants successfully moved for dismissal under Fed. R. Civ. P. 12(b)(6). As to the CPA claim, the federal court held Frias failed to allege any compensable injury because her property had not been sold and she had not paid any foreclosure fees. As to the DTA claim, the federal court held Frias could not state a cause of action under the DTA because no foreclosure sale had occurred. These holdings are consistent with prior western district decisions. *E.g., Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1123-24, 1129-30 (2010).

Frias moved for reconsideration. While her motion was pending, Division One of the Court of Appeals held in a published opinion that Washington law recognizes a cause of action for monetary damages under both the DTA and CPA for alleged DTA violations, even if no foreclosure sale has been completed. *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 313, 320, 308 P.3d 716 (2013). In light of *Walker*, the federal court refrained from ruling on Frias' motion for reconsideration and instead certified two questions to this court.

II. CERTIFIED QUESTIONS PRESENTED

> 1. Under Washington law, may a plaintiff state a claim for damages relating to breach of duties under the [DTA] and/or failure to adhere to the statutory requirements of the [DTA] 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's sale of real property, what principles govern his or her claim under the [CPA] and the [DTA]?

Order Certifying Questions to the Wash. Supreme Ct. at 3.

III. STANDARD OF REVIEW

Certified questions are matters of law we review de novo. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). We consider the questions presented in light of the record certified by the federal court. *Id.* Because the federal court certified these questions in connection with a motion for dismissal for failure to state a claim on which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6), all facts alleged in the complaint are accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

IV. ANALYSIS

In light of the submissions made in this case, we must first specify the scope and nature of our analysis. We then analyze whether the DTA implies a cause of action for damages premised on DTA violations absent a completed foreclosure sale, and we conclude it does not. Finally, we hold that the ordinary principles governing CPA claims generally apply to CPA claims premised on alleged DTA violations.

A. Our analysis is one of statutory construction, and we decline to consider submissions that make factual assertions and public policy arguments

As a preliminary matter, we must address submissions by some parties and amici that make factual assertions and policy arguments. In matters of statutory construction, we are tasked with discerning what the law is, not what it should be. We are in no position to analyze the large-scale impacts of accepting or rejecting Frias' position. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 109, 285 P.3d 34 (2012) ("The legislature, not this court, is in the best position to assess policy considerations."). And because this case is before us on certified questions from the federal court, our decision will be made on the certified record. RCW 2.60.010(4)-(5); RAP 16.16(d); *cf. Bain*, 175 Wn.2d at 114 (declining to answer a certified question because "resolution of the question before us depends on what actually occurred with the loans before us, and that evidence is not in the record").

We therefore decline all explicit and implicit requests that we take judicial notice of irrelevant submissions, including all of the following: materials and decisions from unrelated cases brought in federal bankruptcy courts or state superior courts; cases interpreting unrelated federal statutes; studies about the impacts of DTA-based actions on costs and on the availability of loan modifications; studies showing Washington's continued economic volatility, linking foreclosure rates to physical health problems, noting the financial disparity between borrowers and lenders, and pointing to the presence of hedge funds and out-of-state lenders in the

loan servicing market; and news articles about unrelated instances of lender misconduct and other homeowners' negative experiences with nonjudicial foreclosure.

B. The DTA does not create a cause of action for violations of its terms in the absence of a completed foreclosure sale

A statute can create a cause of action either expressly or by implication. *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702-03, 222 P.3d 785 (2009). At oral argument, Frias conceded that no provision of the DTA expressly creates a cause of action for monetary damages premised on a trustee's material DTA violations in the absence of a completed foreclosure sale. Wash. Supreme Court oral argument, *Frias v. Asset Foreclosure Servs., Inc.*, No. 89343-8 (Feb. 27, 2014), at 3 min., 20 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. Frias' concession is well taken, and we consider only whether such a cause of action is implied.

As in all questions of statutory construction, our goal is to discern and give effect to legislative intent. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1976). To do so, we consider the following: "[F]irst, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Bennett v. Hardy*, 113

Wn.2d 912, 920-21, 784 P.2d 1258 (1990) (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1353 (9th Cir. 1987)).

Frias is within the class for whose benefit RCW 61.24.127 was enacted. We can find no explicit legislative intent that addresses the issue presented, but implicit legislative intent supports denying a remedy. Implying the cause of action Frias seeks to assert would be neutral as to most underlying purposes of the legislation and detrimental to one. Therefore, we hold the DTA does not imply a cause of action for monetary damages premised on DTA violations absent a completed foreclosure sale.

1. Frias is a member of the class for whose especial benefit RCW 61.24.127 was enacted

The plain language of RCW 61.24.127, which is our primary focus, leaves no doubt that it was enacted to benefit borrowers or grantors subjected to nonjudicial foreclosure of owner-occupied real estate by preserving their right to bring damages claims that might have been deemed waived before the statute was enacted. *E.g., Brown v. Household Realty Corp.*, 146 Wn. App. 157, 169, 189 P.3d 233 (2008). Frias is certainly a borrower who has been subjected to nonjudicial foreclosure proceedings of her owner-occupied real property and so is within the class for whose especial benefit the statute was enacted.

2. There is no legislative history that explicitly supports creating or denying a remedy, but there is implicit support for denying it

Next, we look to explicit and implicit legislative intent. RCW 61.24.127(1) provides, in relevant part, "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: . . . (c) Failure of the trustee to materially comply with the provisions of this chapter." Without question, this provision explicitly recognizes an independent cause of action for damages premised on a trustee's material DTA violations. However, it does not state when such a cause of action accrues, so that is the question we must answer. *Cf. Ducote*, 167 Wn.2d at 703 (noting RCW 26.44.050 does create a cause of action for negligent investigation of suspected child abuse but analyzing the class of individuals with standing to bring such a claim as a separate inquiry).

We cannot find any explicit indicators that the legislature intended to either allow or deny the cause of action Frias seeks to assert. Indicators of implicit legislative intent, however, show that the legislature did not intend to imply a cause of action for money damages under the DTA absent a completed foreclosure sale.

a) There is no explicit legislative intent on the issue presented

Something is "explicit" when it is "characterized by full clear expression : being without vagueness or ambiguity : leaving nothing implied : UNEQUIVOCAL." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 801 (2002). Frias contends

there is explicit evidence of legislative intent supporting her position because "the only logical reading" of RCW 61.24.127 is to presume that damages claims under the DTA must exist prior to a foreclosure sale. Pl. Frias' Opening Br. on Questions Certified to the Supreme Ct. by the U.S. Dist. Ct. at 50 (citing *Walker*, 176 Wn. App. at 310-11); *accord Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 496, 309 P.3d 636 (2013). This reading is logically mandated, Frias argues, because that statute states a claim for damages under the DTA is not waived where the borrower does not seek to enjoin the foreclosure sale, and, in order to be waived, the claim must exist in the first place. Frias' interpretation, though reasonable, is not logically mandated and does not provide the explicit legislative intent she attributes to it.

Frias conflates the right to bring a cause of action with the time at which a particular claim accrues. One cannot waive a right that does not exist, but one can waive the right to bring a claim for damages before the claim accrues. A classic example is the contractual preinjury release—party A agrees not to bring a cause of action for damages arising from the contract even if party B is negligent. Because at the time the contract is signed, it is unknown whether B ever will be negligent, A's claim for damages has not yet accrued. However, a contractual preinjury release will be upheld as a valid waiver of A's right to bring a claim for B's negligence, should it ever occur, so long as the provision does not violate public policy. *See Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996).

We can find no statute or legislative history that explicitly—that is, without vagueness, ambiguity, or implication—addresses whether one can bring an action for damages under the DTA absent a completed foreclosure sale. There is simply no explicit legislative intent either way.

b) Implicit legislative intent counsels against accepting Frias' position

Because there is no explicit statement of legislative intent regarding whether a claim for damages under the DTA is actionable absent a completed foreclosure sale, we must look for sources that might imply the answer. Frias contends that this issue was not raised in the process of enacting RCW 61.24.127 because it was already decided; that is, the legislature assumed it was already settled that a claim for damages under the DTA absent a completed foreclosure sale is actionable. The defendants contend that the legislature simply never considered whether to allow such a claim or not, and so has not implicitly recognized it—at least not yet. Available sources support the defendants' position.

It is undisputed that the legislature's primary purpose in enacting RCW 61.24.127 was to supersede the Court of Appeals' holding in *Brown*, 146 Wn. App. 157. See Hr'g on S.B. 5810 Before the S. Fin. Insts., Hous. & Ins. Comm. 61st Leg., Reg. Sess. (Feb. 18, 2009), at 58 min., 33 sec.; 1 hr., 12 min., 14 sec.; Hr'g on S.S.B. 5810 Before the S. Fin. Insts., Hous. & Ins. Comm. 61st Leg., Reg. Sess. (Feb. 24, 2009), at 36 min., 55 sec.; Hr'g on E.S.B. 5810 Before the H. Judiciary Comm. 61st

Leg., Reg. Sess. (Mar. 23, 2009), at 45 min., 7 sec.[1] *Brown* held that a cause of action for damages under the DTA is waived when the borrower does not seek to enjoin the foreclosure sale before it happens. The damages claim at issue in *Brown* was not brought until well after a completed foreclosure sale, and the question of whether to allow a damages claim under the DTA absent a completed foreclosure sale was not raised in connection with the enactment of RCW 61.24.127 in any source we can locate.

Other than her argument that RCW 61.24.127 necessarily presumes a cause of action for damages under the DTA absent a completed foreclosure sale, Frias does not point to, and we cannot locate, any provision or legislative history implicitly supporting her position. As discussed above, we do not find that argument persuasive. We also cannot simply resort to our general rule of construing the DTA in favor of borrowers to resolve the question. The purpose of that rule is to protect the borrowers' interests in his or her own real property, but construing the DTA as Frias advocates here would not protect her real property interests—it would provide monetary compensation in the *absence* of damage to Frias' real property interests. *Cf. Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007) (rejecting borrower's argument that his interpretation should prevail because the act complained of "does not injure the borrower's interests").

[1]Recordings of all committee hearings cited herein are available at http://www.tvw.org.

On the other hand, the defendants' position finds support in RCW 61.24.127(2), which sets restrictions on the nonwaived claims enumerated in RCW 61.24.127(1). The way the legislature phrased these restrictions strongly implies that a cause of action under the DTA for a trustee's material statutory violations is not available until after a completed foreclosure sale:

> 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;
>
> . . . .
>
> (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.

RCW 61.24.127(2). Notably, all of these limitations refer to "the" foreclosure sale. The use of a definite article "the"—as opposed to an indefinite article "a"—is indicative of the legislature's intent to specify or particularize the word that follows. *City of Olympia v. Drebick*, 156 Wn.2d 289, 297-98, 126 P.3d 802 (2006) (citing *Cowiche Growers, Inc. v. Bates*, 10 Wn.2d 585, 618, 117 P.2d 624 (1941) (Simpson, J., dissenting)). Plainly, the specific foreclosure sale referred to in RCW

61.24.127(2) is the foreclosure sale the borrower or grantor did not bring a civil action to enjoin. While foreclosure generally is a process rather than an event, "the foreclosure sale" is a single, specific event, and the limitations in RCW 61.24.127(2) all speak of that foreclosure sale in the past tense, clearly contemplating it has already happened.[2]

From the limited evidence available, we find there is no legislative intent that implicitly supports recognizing the DTA cause of action Frias seeks to assert; all the evidence implies that the legislature has not yet considered whether to allow a cause of action for damages under the DTA absent a completed foreclosure sale. Because the legislature has never considered the issue, it would be strange to hold the legislature has already implicitly decided it—we are not in a position to impute to the legislature the intent we think it will have if it does consider the issue. Further, the limitations in RCW 61.24.127(2) provide implicit support for the defendants' position—under the current statutory framework, there is no independent cause of action under the DTA for DTA violations absent a completed foreclosure sale.

[2]While a foreclosure sale did occur in this case, it was voided, as allowed by RCW 61.24.050(2). Once something is declared void, it never happened at all for legal purposes. BLACK'S LAW DICTIONARY 1709 (9th ed. 2009) (defining "void" as "[o]f no legal effect; null").

3. Implying the remedy Frias seeks would not promote the purposes behind RCW 61.24.127 and the DTA

Finally, we consider the purposes behind RCW 61.24.127 specifically and the DTA generally to determine whether implying a cause of action for a trustee's material DTA violations absent a completed foreclosure sale is consistent with those purposes. Deciding the issue in Frias' favor would be inconsistent with one of the purposes of the DTA and neutral to the other relevant purposes.

As discussed above, the purpose behind RCW 61.24.127 was to supersede *Brown*. *Brown* dealt with a damages action brought after a completed foreclosure sale, and so implying a damages action absent a completed foreclosure sale neither furthers nor hinders the legislature's specific purpose in passing RCW 61.24.127.

The purposes of the DTA generally are well established: "'First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.'" *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)). Clearly, if a borrower's claim for damages accrues as soon as the trustee engages in material noncompliance with the DTA (or as soon as the borrower reasonably should know of the facts tending to show such noncompliance), nonjudicial foreclosure will be rendered less efficient and more expensive.

The accrual of a damages claim prior to a completed foreclosure sale is neutral as to the purpose of giving interested parties adequate opportunities to prevent wrongful foreclosure. Wrongful foreclosure is *prevented* when a borrower obtains a restraining order or injunction based on material DTA violations, while wrongful foreclosure is *compensated* when a borrower recovers damages for material DTA violations. There is no indication that stability of land titles will be either promoted or impeded by accepting Frias' interpretation of RCW 61.24.127 because a cause of action for damages under RCW 61.24.127 cannot serve to affect title to the real property at issue. RCW 61.24.127(2).

Thus, implying a presale damages action under RCW 61.24.127 would be inconsistent with the DTA's purpose of efficient and inexpensive foreclosure, and is neutral as to the other purposes relevant to our consideration.

We therefore hold that, while Frias is a member of the class for whose especial benefit RCW 61.24.127 was passed, available sources of legislative intent indicate the legislature has never actually considered whether to create a cause of action for monetary damages under the DTA absent a completed foreclosure sale. What the legislature would do upon considering the issue is beyond our judicial ken. Imputing to the legislature an intent to create this cause of action would be at odds with RCW 61.24.127(2) and would not serve the purposes underlying RCW 61.24.127 or the DTA generally. Under the existing statutory framework, we hold there is no

actionable, independent cause of action for monetary damages under the DTA based on DTA violations absent a completed foreclosure sale.

C. Even in the absence of a completed foreclosure sale, violations of the DTA may be actionable under the CPA under ordinary CPA principles

Frias' CPA claim must be analyzed under the same principles that apply to any CPA claim. Even where there is no completed foreclosure sale and no allegation the plaintiff has paid any foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.

1. RCW 61.24.127 does not modify the elements of a cause of action under the CPA or the time at which such an action accrues

Unlike a DTA-based cause of action for damages, the CPA is a preexisting statutory cause of action, with established elements. RCW 61.24.127 plainly intends to preserve, rather than modify, the availability of a CPA claim where a borrower does not seek to enjoin a foreclosure sale before it happens. *See* RCW 61.24.127(2)(f) (preserving statutory CPA remedies, notwithstanding limitations on damages for other nonwaived claims under RCW 61.24.127). Further, because CPA actions, unlike DTA actions for a trustee's material violations, are governed by their own body of statutes and case law, the limitations in RCW 61.24.127(2) are not at odds with a CPA cause of action absent a completed foreclosure sale, as they are in the case of a DTA cause of action for damages.

2. Frias arguably pleaded injuries that could be compensable under the CPA

Compensable injuries under the CPA are limited to "injury to [the] plaintiff in his or her business or property." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Without question, where a plaintiff actually loses title to her house in a foreclosure sale or actually remits foreclosure fees, that plaintiff has suffered injury to his or her property. However, those injuries are not necessary to state a CPA claim—other business or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context. We believe Frias did allege some injuries that may be compensable under the CPA.

The CPA's requirement that injury be to business or property excludes personal injury, "mental distress, embarrassment, and inconvenience." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009). The financial consequences of such personal injuries are also excluded. *Ambach v. French*, 167 Wn.2d 167, 178, 216 P.3d 405 (2009). Otherwise, however, the business and property injuries compensable under the CPA are relatively expansive.

Because the CPA addresses "injuries" rather than "damages," quantifiable monetary loss is not required. *Panag*, 166 Wn.2d at 58. A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. *Id.* at 55-56 & n.13. Where a business demands

payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. *Id.* at 62 ("Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not." (citations omitted)). The injury element can be met even where the injury alleged is both minimal and temporary. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

Here, Frias alleges she was denied the chance to obtain a reasonable loan modification because U.S. Bank refused to participate in mediation in good faith. Where a more favorable loan modification would have been granted but for bad faith in mediation, the borrower may have suffered an injury to property within the meaning of the CPA. *Cf. Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 795, 295 P.3d 1179 (2013) (holding a CPA injury was pleaded where a falsely backdated notarization allowed a foreclosure sale to happen earlier than it could have otherwise, cutting short the borrower's chance to close sale on the real property with a private purchaser for a higher price).

Frias further alleges numerous illegal fees have been added to her debt. Even though she has not paid those fees, expenses incurred in investigating their legality may be compensable, and she may be entitled to equitable relief in the form of those

fees being stricken, if they have not already been. *Panag*, 166 Wn.2d at 62-63. Frias also alleges that she appeared for a scheduled mediation session and no one appeared on behalf of U.S. Bank and that when Frias appeared for the rescheduled mediation session, U.S Bank was not prepared. The expenses Frias incurred in the extra mediation sessions allegedly necessitated by U.S. Bank's failure to prepare and mediate in good faith could be an injury compensable under the CPA. *Id.* at 64.

Although Frias' alleged emotional distress and associated physical symptoms are not compensable under the CPA, she did plead other injuries to her property that could be compensable under the CPA. Loss of title or payment of illegal fees are sufficient, but not necessary, to plead an injury compensable under the CPA based on alleged DTA violations.

3. CPA claims alleging DTA violations are governed by the same principles as other CPA claims

As noted above, nothing about the DTA indicates a CPA claim should be subject to a different analysis where the CPA claim is premised on alleged DTA violations as opposed to any other alleged wrongful acts. In response to the second certified question, we hold that the analysis of the elements of a CPA action premised on alleged DTA violations is the same as the analysis of the elements of a CPA claim premised on any other allegedly unfair or deceptive practice with a public interest impact occurring in trade or commerce that has allegedly proximately caused injury

to a plaintiff's business or property. *See, e.g.*, ch. 19.86 RCW; *Klem*, 176 Wn.2d at 782-97; *Panag*, 166 Wn.2d at 37-65; *Hangman Ridge*, 105 Wn.2d at 783-93.

V. CONCLUSION

We hold the answer to the first question certified by the federal court is no: Washington does not recognize an independent cause of action under the DTA seeking monetary damages for alleged DTA violations absent a completed foreclosure sale.

We hold the answer to the second question is that under appropriate circumstances DTA violations may be actionable under the CPA regardless of whether a foreclosure sale has been completed. Such claims are governed by the ordinary principles applicable to all CPA claims.

Fairhurst, J.

WE CONCUR:†

Madsen, C.J.

Owens, J.

Stephens, J.

Gordon McCloud, J.

† Judge C.C. Bridgewater participated as a justice pro tempore at the argument of this appeal but died prior to the filing of the opinion.

No. 89343-8

WIGGINS, J. (dissenting in part/concurring in part)—The United States District Court for the Western District of Washington certified two questions for our review. While I agree with the majority's answer to the second question, I disagree with the majority's answer to the first. The first certified question is 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." Order Certifying Questions to the Wash. Supreme Ct. at 3. The majority's answer is no; the answer should be the careful, lawyerly response: it depends. It depends on who the defendant is (e.g., a borrower, grantor, trustee, or guarantor) and which statutory duty the defendant breached. The majority categorically precludes claims for damages absent a completed trustee's sale under the deeds of trust act (DTA), chapter 61.24 RCW, without a discussion of the various duties created in the statute. *See* majority at 2. I would focus on the trustee's duty of good faith to the borrower, beneficiary, and grantor, which is the violation Florence Frias asserts. I conclude that a borrower, like

Frias, may sue a trustee for breach of this duty, even in the absence of a completed trustee's sale.

ANALYSIS

The legislature may implicitly or explicitly create a cause of action. *See Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702-03, 222 P.3d 785 (2009). Whether a statute creates a cause of action is a matter of statutory construction. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). As in most matters of statutory construction, our ultimate goal is to determine the intent of the legislature. *See id.* at 15-16. If the legislature does not expressly create a cause of action, our court utilizes a three-part test to determine the legislature's intent. *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). We determine whether the plaintiff is "within the class for whose 'especial' benefit the statute was enacted"; whether "legislative intent, explicitly or implicitly, supports creating or denying a remedy"; and "whether implying a remedy is consistent with the underlying purpose of the legislation." *Id.*

Using this test, I conclude that the legislature implicitly created a cause of action against a trustee for breach of its duty of good faith that is not dependent on a completed trustee's sale.

Part 1: Frias is a member of the class protected by the statute

The first part of the test is satisfied because Frias is "within the class for whose 'especial' benefit the statute was enacted . . . ." *Bennett*, 113 Wn.2d at 920. RCW

61.24.010(4) states, "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." The clear legislative intent is to protect borrowers, beneficiaries, and grantors from actions taken in bad faith by trustees. Frias is a borrower under the act, whose interest the legislature sought to protect.

Part 2: Legislative intent supports creating a claim

Legislative intent explicitly and implicitly supports creating a cause of action against the trustee (even prior to a completed trustee's sale). *Bennett*, 113 Wn.2d at 920. The explicit support is found in RCW 61.24.127. The statute states that a borrower or grantor does not waive a claim for damages due to a trustee failing to "materially comply with the provisions of this chapter" by failing to enjoin a foreclosure sale. RCW 61.24.127(1)(c). This recognition of a claim against the trustee supports the creation of a cause of action for breach of a trustee's duty of good faith. The legislature placed no explicit limitation on when a borrower or grantor may bring suit.

The majority reaches a different conclusion. Majority at 10. It agrees that RCW 61.24.127 recognizes a cause of action against a trustee but concludes the claim is available only after a trustee's sale. *See id.* It relies on RCW 61.24.127(2), which subjects the nonwaived claims to certain limitations. The limitations include, for example, the claim must be brought within two years of the "foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier," and the claim cannot affect the validity of the foreclosure sale or cloud the title. RCW 61.24.127(2)(a), (c), (e). The majority relies on the fact that all of the limitations rely

on a past foreclosure sale to support its conclusion that the legislature intended a claim for damages only after a foreclosure sale.

I disagree with the majority's reasoning. Of course the limitations contemplate a completed trustee's sale—the legislature was specifically discussing the effects of failing to enjoin a sale on other claims that borrowers and grantors may bring. There is no indication that the legislature intended for this language to limit the availability of a claim for damages against a trustee for failing to materially comply with the DTA.[1]

There is also implicit support for allowing a claim before a trustee's sale is complete. We assume that the legislature is aware of the doctrine of implied cause of action, which is that the legislature "would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights." *Bennett*, 113 Wn.2d at 919-21. RCW 61.24.010 creates a duty and a corresponding right. "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.010(4). Here, the legislature did not explicitly provide a mechanism for protecting borrowers, beneficiaries, or grantors from a trustee who acts in bad faith.[2] Therefore, we may assume that the legislature intended

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[1] Interestingly, the majority abandons its reasoning when discussing the Consumer Protection Act (CPA), chapter 19.86 RCW. RCW 61.24.127(1) treats violations of Title 19 RCW the same as a claim against a trustee for failing to materially comply with the DTA, and subsection (2) provides applicable limitations. The majority concludes that despite subsection (2)'s limitations, a CPA claim may be commenced absent a completed trustee's sale. Majority at 18.

[2] RCW 61.24.130 is not the mechanism. It allows borrowers, grantors, guarantors, or other people interested in a lien to enjoin a trustee sale "on any proper legal or equitable ground." RCW 61.24.130(1). However, it requires the applicant to pay the clerk of the court "the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not

that there would be a judicial mechanism to enforce the statutory right. I have no reason to conclude that it intended this remedy only after a trustee's sale.

Part 3: Implying a remedy is consistent with the purpose of the statute

Implying a remedy is consistent with RCW 61.24.010(4)—which imposes a duty on the trustee to act in good faith toward borrowers, beneficiaries, and grantors—and is consistent with the purposes of the DTA. This implied remedy encourages trustees to act in good faith and allows early intervention for a breach of the duty.

A cause of action is also consistent with the overall objectives of the DTA. The objectives are that "'[t]he nonjudicial foreclosure process should remain efficient and inexpensive[;] . . . the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure[; and] the process should promote the stability of land titles.'" *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)).

The majority opines that allowing a claim for damages to accrue as soon as a trustee violates the DTA would be inconsistent with the first objective articulated by *Schroeder* because the nonjudicial foreclosure will be rendered less efficient and more expensive than judicial foreclosure. Majority at 16-17. The majority opinion provides no reasoning for this conclusion, and I disagree. Allowing damage claims to accrue before a trustee sale should incentivize the trustee to conform to the requirements of

being foreclosed." *Id.* It does not appear that the legislature intended this to be the sole remedy for misdeeds by a trustee. The legislature did not make the trustee's duty contingent on the ability of borrowers to pay their arrears.

the law from the beginning of the foreclosure process. When nonjudicial foreclosures are pursued and completed lawfully, the process will ultimately be more efficient.

The remedy also supports the second purpose, which is to "'provide an adequate opportunity for interested parties to prevent wrongful foreclosure.'" *Schroeder*, 177 Wn.2d at 104 (quoting *Cox*, 103 Wn.2d at 387). Under RCW 6, a borrower, grantor, or guarantor may restrain a trustee's sale only if it pays the clerk of the court sums that would be due on the obligation if there was no foreclosure. If a borrower has insufficient resources to pay the sums due, the borrower will be unable to stop a wrongful trustee's sale. Allowing the cause of action before the sale encourages trustees to adhere to the required procedures.

All three parts of the implied cause of action test are satisfied. A cause of action against a trustee for violation of its duty of good faith should be available even in the absence of a completed trustee's sale. I disagree with the majority's answer to the first certified question.

I dissent in part and concur in part.