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

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FLORENCE R. FRIAS,

***Plaintiff*,**

v.

ASSET FORECLOSURE SERVICES, INC., et al.,

***Defendants*.**

BRIEF OF AMICUS CURIAE WASHINGTON BANKERS ASSOCIATION

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I. Identity and Interest of Amicus

The Washington Bankers Association ("WBA"), founded in 1889 and incorporated in 1970, is an independent, nonprofit organization representing more than 80 member commercial banks operating in every county of this State. The WBA has separately filed a motion for leave to file this brief, which provides additional information on the WBA's identity, its interest in this case, its familiarity with the issues, and why additional argument will assist the Court in deciding the certified questions. The WBA incorporates that motion here.

II. Introduction

"It is essential," Plaintiff says, "that this Court make clear that banks, loan servicers, foreclosing trustees and others who choose to utilize the provisions of the DTA and enjoy the benefits of Washington's nonjudicial foreclosure procedure will face the liability *intended by the legislature* when they violate its provisions and cause injury to borrowers . . . ." Plaintiff's Reply Brief ("Reply") at 1 (emphasis added). The WBA couldn't agree more. This Court should enforce the explicit remedial scheme the Washington legislature intended to create, and did create, with the DTA—no more and no less. That legislation does not provide for a generalized damages remedy for a trustee's violation of the DTA in the absence of a sale. It is for the legislature, not this Court, to decide whether the costs and delays that would, without question, result from allowing such a remedy can somehow be justified as furthering the Act's purposes. The WBA maintains they cannot.

III. Statement of the Case

The WBA supports the Statement of the Case as framed by Defendants Mortgage Electronic Registration Systems, Inc. and U.S. Bank N.A. in their Answering Brief on Certified Questions ("U.S. Bank Br.").

IV. Argument

A. Washington's Deed of Trust Act does not provide for a generalized damages remedy in the absence of a sale.

In contrast to the legislature's *explicit* provision (1) for a cause of action to enjoin a trustee's sale "on any proper ground," RCW 61.24.030(8)(j), 61.24.040(1)(f)(IX), 61.24.130(1); (2) for certain *postsale* damages remedies, RCW 61.24.127; (3) to challenge reinstatement fees, RCW 61.24.090(2); (4) for damages for a trustee's refusal to re-convey a deed of trust after satisfaction, RCW 61.24.020 & 61.16.030; and (5) for a cause of action for a *per se* violation of the Consumer Protection Act ("CPA") premised on certain enumerated DTA violations, RCW 61.24.135, *nowhere* in the text of the DTA has the legislature provided for a generalized damages remedy for a trustee's violation of the DTA in the absence of a completed trustee's sale. In other words, the starting point for statutory interpretation—the text—militates against recognizing such a remedy. *See Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007).

Relying on *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 307, 310–11, 308 P.3d 716 (2013), Plaintiff argues to the contrary that RCW 61.24.127 is "an explicit recognition and expression of intent" that a damages remedy "exist[s] ***prior to*** a trustee's sale" (Reply at 2). Not so. RCW 61.24.127 (the "Non-Waiver Provision") provides in 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 . . . [f]ailure of the trustee to materially comply with the provisions of this chapter . . . .

RCW 61.24.127(1)(c). According to Plaintiff and *Walker*, this provision must be read to imply that a claim for damages for a trustee's DTA violation exists, and can be asserted, prior to the trustee's sale, because if it did not, there would be nothing for the borrower to "waive" when she fails, before the sale, to move to enjoin it—and therefore nothing for the legislature to protect from waiver under the Non-Waiver Provision.

This "strained and unsupported implication from the language of this statute," *Frias v. Asset Foreclosure Servs., Inc.*, No. C13-760 MJP, --- F. Supp. 2d ----, 2013 WL 3868856, at *4 (W.D. Wash. July 26, 2013), relies on the fictional assumption that a borrower can waive only a presently exercisable right—so if the legislature was concerned about waiver, it must have had in mind a right to sue presale. But in fact the legislature plainly had in mind the potential waiver of rights that would mature only after a sale. Thus, a borrower's failure to enjoin the sale *waives* the right to pursue an "action[] to vacate the sale," *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 796, 295 P.3d 1179 (2013), even though the right to "vacate the sale" by definition is inchoate and unmatured until the sale occurs. The DTA's "Waiver Provision" reinforces this conclusion:

> Anyone having any objection to the [trustee's] 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. *Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.*

RCW 61.24.040(1)(f)(IX) (emphasis added). A cause of action to invalidate a trustee's sale obviously does not exist before the sale; rather, like a postsale damages remedy, the right to invalidate a sale is inchoate and unmatured until the sale occurs. Yet the Waiver Provision provides that a borrower may be deemed to have waived such an action by failing to bring a presale injunction action.

When one reads the Non-Waiver Provision along with the Waiver Provision (as one must, since the Court should read the DTA as an integrated whole), the Non-Waiver Provision on its face exists to protect against an implied waiver of the legal counterpart to the expressly waived equitable right, *i.e.*, the right to recover damages after the sale, which (like the waived right to invalidate a sale) matures only after the sale occurs.

The Non-Waiver Provision simply does not speak to a presale damages remedy. To the contrary, the legislature enacted this provision to overrule in part the holding of *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008), that "a failure to seek presale remedies under the Act bars a borrower's" "*postsale* claim for damages . . . ." 146 Wn. App. at 166–67 (emphasis added); *see generally* U.S. Bank Br. at 33–36 (explaining legislative history of 2009 amendment adding RCW 61.24.127 as the "*Brown* fix"). Indeed, *Brown* and the cases on which it relied all involved *postsale* claims—either for damages (in the case of *Brown*) or to set aside or otherwise "object[] to the trustee's sale" after the fact. *Plein v. Lackey*, 149 Wn.2d 214, 229, 67 P.3d 1061 (2003); *see, e.g.*, *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971) (defense to postsale unlawful detainer action deemed waived by failure to bring presale injunction action); *Hallas v. Ameriquest Mortg. Co.*, 406 F. Supp. 2d 1176, 1180–81 (D. Or. 2005) (Washington's waiver doctrine applies to bar postsale challenges to both the foreclosure process and the underlying obligation); *In re Marriage of Kaseburg*, 126 Wn. App. 546, 559–60, 108 P.3d 1278 (2005) (debtor barred from "collaterally attack[ing] the foreclosure proceedings" by contesting underlying debt where she "chose not to contest [it]" presale).

Further textual evidence of the legislature's intent for the Non-Waiver Provision to protect only a postsale damages remedy comes from the repeated references in its text to "the foreclosure sale." The limitations period runs from "the date of *the foreclosure sale*"; the borrower's claim for damages may not affect "the validity or finality of *the foreclosure sale*"; the borrower may not record a lis pendens "related to the real property *foreclosed upon*"; the claim may not operate to encumber "the property that *was subject to the foreclosure sale*." RCW 61.24.127(2)(a), (c)–(e) (emphases added). All of these subsections take for granted that there was, in fact, a foreclosure sale, and the borrower is now seeking damages. Indeed, the penultimate subsection provides, "This section applies *only to foreclosures* of owner-occupied residential real property." RCW 61.24.127(3) (emphasis added). If the legislature intended for this provision to recognize a damages remedy in the *absence* of a foreclosure, it would have worded it differently.

The purpose and effect of RCW 61.24.127(1)(c) is to ensure that, even if a borrower waives "any proper grounds for invalidating the Trustee's sale," RCW 61.24.040(1)(f)(IX), she can still bring a wrongful foreclosure action *after the sale* seeking compensation for injury proximately caused by the sale. *See, e.g.*, *Guay v. Bhd. Bldg. Ass'n*, 87 N.H. 216, 177 A. 409, 411 (N.H. 1935) ("action at law to recover damages" is postsale equivalent of "bill in equity . . . [to] have . . . the trustee's sale set aside") (quotation marks omitted); *see* Grant S. Nelson & Dale A. Whitman, 1 Real Estate Finance Law § 7.22 (5th ed. 2010) ("The ability to bring a suit to set aside a foreclosure sale and to redeem can be cut off by certain events. When this occurs, the mortgagor or junior lienor will be left with a damages action for wrongful foreclosure against the foreclosing mortgagee or trustee."). Courts generally agree that the remedy for such wrongful foreclosure is the value of the borrower's equity in the property at the time of the foreclosure sale—the difference between the market value and the aggregate amount of the liens thereon. Nelson & Whitman, *supra*; Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323, 337 (Apr. 1984). This measure of damages makes sense: After all, the borrower's equity is what she *actually loses* if the trustee wrongfully forecloses upon her property. It is these damages the legislature intended to preserve in enacting RCW 61.24.127(1)(c).

B. The Court should not imply a generalized presale damages remedy for a trustee's DTA violation.

The legislature did not explicitly create a generalized presale damages remedy for a trustee's DTA violation. The question is thus whether this Court should imply one. It should not. The legislature did not intend to create such a remedy, and implying one is inconsistent with the underlying purposes of the DTA. *See Bennett v. Hardy*, 113 Wn.2d 912, 920–21, 784 P.2d 1258 (1990). Creating such a damages remedy would upset the balance the legislature struck and impose unjustified costs and delays on borrowers, courts, lenders, trustees, and the public.

1. The legislature acquiesced in an interpretation of the DTA as providing no generalized presale damages remedy.

Where, as here, the legislature has demonstrated its acquiescence in a statute's interpretation, the Court should defer to that interpretation and decline to imply a remedy inconsistent with it. *See Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999). Washington courts have held since 2007 that "the DTA does not authorize a cause of action for damages for the wrongful institution of nonjudicial foreclosure proceedings where no trustee's sale occurs." *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010) (citing, *inter alia*, *Krienke v. Chase Home Fin., LLC*, 140 Wn. App. 1032, 2007 WL 2713737, at *5 (Sept. 18, 2007) (unpublished opinion)); *see Frias v. Asset Foreclosure Servs., Inc.*, No. C13-760 MJP, 2013 WL 6440205, at *1 (W.D. Wash. Sept. 25, 2013) (collecting cases); U.S. Bank Br. at 29 n.12 (collecting cases). In the face of this steady stream of consistent interpretations of the DTA, the legislature did not act to add a presale damages remedy. The legislature's inaction is particularly notable in light of the speed with which it acted to cast off *Brown*: *Brown* was issued in mid-2008, and by 2009, the legislature had passed the Non-Waiver Provision rejecting *Brown*'s waiver holding. The legislature could have taken that very opportunity (or any other since then) to *also* disavow *Krienke* and its progeny if it truly believed those cases had misinterpreted the Act. But it did not. Its acquiescence could hardly be clearer. *Soproni*, 137 Wn.2d at 327 n.3.

Indeed, this legislative history calls into even greater doubt Plaintiff's and *Walker*'s interpretation of the Non-Waiver Provision as evincing the legislature's intent to "preserve[] a cause of action existing . . . before a foreclosure sale . . . for damages . . . ." *Walker*, 176 Wn. App. at 307. If—as this Court instructs—"the Legislature is presumed to [have] be[en] aware of [the] judicial interpretations of its enactments" in *Krienke* and its progeny when it enacted the Non-Waiver Provision, *Soproni*, 137 Wn.2d at 327 n.3, and if, as Plaintiff and the *Walker* court would have this Court believe, the legislature intended with the Non-Waiver Provision to codify the precise *opposite* of the holding of *Krienke* and its progeny, it would have said so.

2. Implying a generalized presale damages remedy would upset the balance struck by the legislature.

This Court has expressly acknowledged that the DTA "is not a rights-or-privileges-creating statute." *Schroeder v. Excelsior Mgmt. Grp.*, *LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013). Instead, it is an elaborate system of checks and balances crafted by the legislature to achieve the three purposes of the Act—(1) to keep the nonjudicial foreclosure process "efficient and inexpensive"; (2) to "provide an adequate opportunity for interested parties to prevent wrongful foreclosure"; and (3) to "promote the stability of land titles." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012) (quotation marks omitted). Introducing a new presale damages remedy under the Act would further *none* of these purposes (not even the second, as there is no need for a damages remedy to prevent wrongful initiation of foreclosure where the existing remedy of an injunction provides that opportunity), would *disserve* the purpose of keeping the nonjudicial foreclosure process efficient and inexpensive, and would thus disrupt the careful balance the legislature intended with the express provisions it *has* enacted. *See Reese v. First Mo. Bank & Trust Co. of Creve Coeur*, 736 S.W.2d 371, 373 (Mo. 1987) ("[A]uthorizing a cause of action for wrongful attempted foreclosure would effectively nullify the purposes for having the expeditious non-judicial foreclosure of deeds of trusts. If further provision for delaying foreclosure of security instruments is to be made, . . . the legislature should make the decision.").

3. Implying a generalized presale damages remedy would impose unjustified costs and delays.

There is a reason the legislature has not amended the DTA to create a damages remedy for a trustee's noncompliance with the DTA in the absence of a sale. Allowing such a remedy would severely compromise the efficiency of the foreclosure process in this State and impose substantial costs on *every* participant in the system. The immediate effect would be to "spawn litigation under the DTA for damages," *Vawter*, 707 F. Supp. 2d at 1124, resulting in substantial additional litigation costs to trustees that would be passed on to lenders.

Increased costs to lenders would translate into increased costs for borrowers. Lower costs to lenders translate into lower borrowing costs for homeowners. Conversely, when the costs to lenders rise, so do the costs of borrowing. Perhaps the most dramatic example of this phenomenon is the reduction in borrowing costs and expansion in borrowers' access to loans resulting from mortgage securitization.

The United States' robust secondary mortgage market has its roots in the federal government's response to the Great Depression. Jo Anne Bradner, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 Emory L.J. 971, 975 (1987). Starting in the 1930s, the federal government began a campaign to reduce the costs of investing in mortgages and to free trapped capital for borrowers. With the passage of the National Housing Act of 1934, Congress created the Federal Housing Administration ("FHA"). *Id.* at 975 & n.16. The FHA in turn chartered the Federal National Mortgage Association ("FNMA") and authorized FNMA to deal in mortgages insured by the federal government and, in 1968, to issue securities backed by pools of mortgages. *Id.* at 975–77 & n.26. In 1970, to further expand the secondary mortgage market, Congress authorized FNMA to invest outside of government-backed loans and established the Federal Home Loan Mortgage Corporation to compete with FNMA in that market. *Id.* at 978.

Shortly thereafter, mortgage-backed securities took off. The impetus was the Government National Mortgage Association ("GNMA")—a government agency spun off from FNMA in 1968. *Id.* at 977–78. GNMA began working with originators to assemble pools of mortgages backed by GNMA. *Id.* at 978 n.33. The originators would issue securities backed by those mortgages and deliver the securities to pooling entities for issuance and sale. *Id.* Crucially, the responsibility for servicing the underlying mortgages was left with the original servicers. *Id.* "No longer faced with the high cost of servicing loans which previously accompanied the foray into the mortgage market, private investors at first tentatively, then with increasing bravado, began packaging and issuing securities backed by mortgage loan pools." *Id.* at 979. Mortgage-backed securities also eliminated the costs previously associated with investing in mortgages of (1) holding an illiquid investment that could only be sold at a discount and (2) concentrating investment risk in one loan. *Id.* at 973, 982, 986–87, 989. The result: "Securitization has been a boon to virtually every participant in the capital markets, including . . . borrowers seeking to lower their cost of funds . . . ." Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 Tex. L. Rev. 1369, 1371 (May 1991).

In 1993, FNMA, GNMA, and several other mortgage industry participants conceived of what would ultimately become the Mortgage Electronic Registration System ("MERS"). Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 810 (1995). These entities sought to reduce the costs of investing in mortgages even further by cutting the estimated $260 million spent in 1993 on the administrative activities associated with transferring mortgage rights. *Id.* at 812. The MERS system eliminates many of those costs. *Id.* at 812–13. As the *Bain* court recognized, "MERS has facilitated securitization of mortgages bringing more money into the home mortgage market"—and lowering borrower costs. 175 Wn.2d at 96; *see id.* at 109 ("[t]here are certainly significant benefits to the MERS approach"); *Thompson v. Bank of N.Y. Mellon*, No. 3:12–cv–00066–MO, 2012 WL 1253203, at *5 (D. Or. April 12, 2012) (MERS "logically advances creditor convenience, improves efficiency, and lowers the cost of lending, which benefits lenders and borrowers alike").

The government-backed securitization movement in this country is thus a prime example of the financial benefits borrowers enjoy when lenders' costs are reduced. The converse is just as true—lenders pass increased costs on to borrowers in the form of higher borrowing rates. Creating a presale damages remedy recoverable from trustees would be no exception to this rule—the additional litigation costs spawned by the creation of such a claim would impact every new borrower seeking to obtain a loan.

Increased costs associated with the nonjudicial foreclosure process would shift beneficiaries towards the judicial foreclosure process. Creating a new presale damages remedy would also make the nonjudicial foreclosure process less attractive to lenders, causing them to shift, at least on the margin, to the court-supervised alternative. This is precisely the result the DTA was intended to avoid. *See Ostrander*, 6 Wn. App. at 31 ("The act was designed by the legislature to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender.").

The delays associated with the judicial foreclosure process are astonishing. For example, one study estimated that between February and September of 2012, the average time between the date of last payment on a delinquent mortgage and the sale of the property was *twice* as long in judicial versus nonjudicial foreclosure states—44 months versus 22. Larry Cordell, et al., *The Cost of Delay* 2, 12, 21 tbl. 3 (Research Dep't, Fed. Reserve Bank of Phila., Working Paper No. 13-15, Apr. 24, 2013).[1] These delays impose real costs. In addition to the obvious costs to the courts and, in turn, taxpayers, the servicer must pay taxes on the property while the borrower does not; the lender must continue to make insurance payments; and, most significantly, "[e]ach day the home is occupied by a borrower not making his mortgage payments, that borrower is likely not taking care of the home, and it is likely the home will be sold for less at

[1] *Available at* http://www.phil.frb.org/research-and-data/publications/working-papers/2013/wp13-15.pdf.

liquidation." *Id.* at 13. Indeed, a recent study in Boston showed that foreclosure delays of a year or longer led to crime, deferred maintenance, abandoned homes, and depressed property prices. *Id.* at 14; *see also* Kristopher Gerardi, et al., *Foreclosure Externalities: Some New Evidence* (Fed. Reserve Bank of Atlanta, Working Paper No. 2012-11, Aug. 2012)[2] (finding that "policies that slow the transition from delinquency to foreclosure likely exacerbate the negative effect of mortgage distress on house prices"); Bradner, *supra*, at 997 (citing "increased risk of vandalism, fire loss, depreciation, damage, and waste to the property from lengthy delays in mortgagee possession and foreclosure"). The Federal Housing Finance Agency ("FHFA") has attached a price tag to these costs: In 2012, it proposed charging an upfront guarantee fee of between 0.15–0.30 percent on mortgages originated in the five states with the longest average foreclosure delays—equivalent to a monthly surcharge of approximately $3.50 to $7.00 on a 30-year, fixed-rate mortgage of $200,000. State Level Guarantee Fee Pricing, 77 Fed. Reg. 58991, 58991–92 (Sept. 25, 2012).[3] Thus, the costs of increased foreclosure delays are likely passed on to new borrowers.

Lenders conduct the same risk calculations as the FHFA when deciding the rate at which to issue a new loan. If they expect to have to turn more often to the judicial foreclosure process—to avoid the passed-through litigation costs resulting from defaulting borrowers' presale

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[2] *Available at* http://www.frbatlanta.org/pubs/wp/12_11.cfm.
[3] This proposal is still under consideration.

damages lawsuits against trustees—they will pass the expected costs of this lengthier process on to *new* borrowers who have never defaulted. These new borrowers will in effect be subsidizing the recoupment of costs associated with foreclosure delays resulting from allowing *defaulting* borrowers to bring actions seeking presale damages.

A presale damages remedy will not increase loan modification rates. Though it acknowledged that this issue was not before it, the *Bain* court expressed concern that securitization of mortgages may be the cause of low loan modification rates. *See Bain*, 175 Wn.2d at 97–98. The data prove otherwise. One recent study concluded that the explanation for the lack of widespread mortgage renegotiation is not securitization but rather information asymmetries between borrowers and lenders. Manuel Adelino, et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures and Securitization*, 60 J. Monetary Econ. 835 (2013). That is, it is virtually impossible for lenders to tell (1) which defaulting borrowers truly cannot afford their current mortgage payment but *could* afford a smaller mortgage with a higher net present value to the lender than recovery from foreclosure, (2) which defaulting borrowers truly *can* afford their current mortgage or are capable of self-cure without a modification, and (3) which defaulting borrowers will default again even if given a modification. The lender must therefore make an assessment of the relative prevalence of these three categories of borrowers when deciding whether to modify a loan. If the assessed prevalence of the latter two categories is high enough, foreclosure will be the profit-maximizing course of action, even though to the "naïve observer [modification appears to be] a 'win-win' deal for the borrower and lender." *Id.* at 836–37, 846; *see* Plaintiff's Opening Brief ("Opening Br.") at 20 (incorrectly hypothesizing that U.S. Bank's unwillingness to modify Plaintiff's loan, where the net present value of doing so purportedly exceeded the returns from foreclosure, was not "a rational business decision [to] minimiz[e] losses"). For example, as self-cure rates fell from almost 70 percent in 2006 to 25 percent in 2009, modification rates rose. Adelino, *supra*, at 837. When self-cure rates started to rise again in mid-2009, modification rates started to fall. *Id.* at 850. And recent data show that between 40 and 60 percent of borrowers who receive modifications re-default within six months. *Id.* at 852. In other words, lenders began to modify fewer loans in 2009 in response to alarmingly high re-default rates and a rise in self-cure rates, not because their borrowers' mortgages had been securitized.

Indeed, another recent study found that securitized mortgages are actually *more* likely to be modified and *less* likely to be foreclosed on than non-securitized mortgages. *See* Manuel Adelino, et al., *Identifying the Effect of Securitization on Foreclosure and Modification Rates Using Early-Payment Defaults*, J. Real Estate Fin. & Econ. (forthcoming) (Fed. Reserve Bank of Atlanta, Working Paper No. 2010-8, Apr. 1, 2013).[4] There is thus no need for any sort of presale damages remedy to induce lenders to modify more (or punish them for modifying fewer) loans on the rationale that securitization produces an artificial barrier to modification.

[4] *Available at* http://ssrn.com/abstract=1600904.

A presale damages remedy is not necessary to "hold the lending industry liable" for foreclosure documentation practices. *Walker* cited to *Bain* for the proposition that "the lending industry has institutionalized a series of deceptive practices," that "MERS 'often issues assignments without verifying the underlying information,'" and that implying a presale damages remedy is somehow necessary to "[h]old[] the lending industry liable for damages caused by [such] DTA violations . . . ." 176 Wn. App. at 311 (citing and quoting *Bain*, 175 Wn.2d at 117–18 & n.18) (indications of alteration omitted); *see* Reply at 13 (same). But, for the proposition that MERS "often" executes assignments without verifying information, the *Bain* court cited to a law review article written by a plaintiff's foreclosure-defense lawyer from Florida (where nonjudicial foreclosure does not exist), based on his own personal experience in suing lenders and MERS (not, as the article suggests, Congressional testimony from MERS). *See Bain*, 175 Wn.2d at 118 n.18 (citing Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 Quinnipiac L. Rev. 551, 570–71 (2011)). Moreover, the *Bain* court made clear that the cause of the recent foreclosure crisis and resulting litigation was "not before [it]." *Id.* at 97. And in any event, an interagency review of foreclosure documentation practices found that the borrowers whose properties were foreclosed upon were "seriously delinquent on their loans"; that "servicers possessed original notes and mortgages and, therefore, had sufficient documentation available to demonstrate authority to foreclose"; that, with limited exceptions, "notes appeared to be properly endorsed and mortgages and deeds of trust appeared properly assigned"; and that "the appropriate party brought the foreclosure action." Fed. Reserve Sys., Office of the Comptroller of the Currency & Office of Thrift Supervision, Interagency Review of Foreclosure Policies and Practices 3–4, 7–9 (2011).[5] In other words, the reviewing agencies found no evidence that these servicers' foreclosure documentation practices caused systematic harm. There is thus no justification for authorizing borrowers to collect "damages" for such practices (or for the *Walker* court to presume that securitization causes harm).

Indeed, the only concrete "harm" Plaintiff and the *Walker* court come anywhere close to articulating is the cost incurred by the borrower in determining whether or not a DTA violation occurred. *See* Opening Br. at 42–43; Reply at 15; *Walker*, 176 Wn. App. at 320. But "[i]f [an] investigative expense would have been incurred regardless of whether a violation existed, causation [of damages] cannot be established." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64, 204 P.3d 885 (2009). For example, if the debt noticed in a collection notice is valid, the "expenses associated with determining whether the collection agency was registered under state law do[] not constitute injury because they would have been [in]curred even if the collection agency was registered." *Id.*; *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162

[5] *Available at* http://www.federalreserve.gov/boarddocs/rptcongress/interagency_review_foreclosures_20110413.pdf.

Wn.2d 59, 81, 83, 170 P.3d 10 (2007) ("we reject [plaintiff's] argument that causation may be established merely by a showing that money was lost"; "there must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury").

Even assuming borrowers' investigative costs qualify as "damages," what Plaintiff is essentially asking for is a damages remedy to compensate borrowers merely for the trouble of determining whether or not there was a violation—*not for injuries caused by the violation itself.* In light of the substantial negative externalities such a remedy would impose, and the purposes of the Act such a remedy would disserve, the Court should decline Plaintiff's request.

C. If the Court recognizes a presale damages remedy, it should impose the CPA's injury and damages requirements.

If this Court were to recognize a presale damages remedy for a trustee's noncompliance with the DTA, it should require the plaintiff to show that the trustee's violation of the DTA injured her and caused concrete, non-speculative damage to her business or property. *See* U.S. Bank Br. at 42–49. As with a CPA claim, the plaintiff "must establish that, but for the defendant's [violation], the plaintiff would not have suffered an injury." *Indoor Billboard*, 162 Wn.2d at 83. As to damages, it would not be appropriate to hold that a presale claim for damages under the DTA "sound[s] in tort" and therefore includes "recovery for non-economic injury such as emotional distress." Reply at 23. The DTA's "requisites to a trustee's sale . . . are *not, properly speaking, rights held by* *the debtor*; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Schroeder*, 177 Wn.2d at 106–07 (quotation marks and indications of alteration omitted; emphasis added). In other words, in contrast to the tort context, not every violation of the DTA deprives a borrower of a right for which she is entitled to recover damages. In any event, under Plaintiff's "tort" theory, a borrower proving a DTA violation that constitutes a *per se* CPA violation could *not* collect emotional distress damages (such damages are not recoverable under the CPA, *see Panag*, 166 Wn.2d at 57), yet a borrower proving a "plain vanilla" DTA violation *could*. That cannot be right. If a presale damages remedy is implied, plaintiffs should be limited to damages for injury to their business or property. *See* RCW 19.86.090.

V. Conclusion

For the foregoing reasons, this Court should hold that a plaintiff may not seek damages for a trustee's violation of the DTA in the absence of a sale. In the alternative, the Court should hold that a plaintiff bringing such a claim for presale damages must show that the trustee's violation of the DTA proximately caused concrete damage to her business or property.

DATED: January 28, 2014

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By *s/ Kathleen M. O'Sullivan*
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CERTIFICATE OF SERVICE

I, Jennifer Rosales, a legal secretary at Perkins Coie LLP, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be mailed (via first class mail, postage prepaid), to the following counsel of record in this case:

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DATED at Seattle, Washington, this 28th day of January, 2014.

s/ Jennifer Rosales

Jennifer Rosales

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From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, January 28, 2014 9:49 AM
To: 'Simonsen, Catherine S. (Perkins Coie)'
Subject: RE: Motion and Amicus Brief for Filing in Case No. 89343-8

Rec'd 1-28-14

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

From: Simonsen, Catherine S. (Perkins Coie) [mailto:CSimonsen@perkinscoie.com]
Sent: Tuesday, January 28, 2014 9:45 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Motion and Amicus Brief for Filing in Case No. 89343-8

Hello,

Attached for filing please find the Washington Bankers Association's motion for leave to file its amicus curiae brief, and its amicus curiae brief, in the following case:

Case name: *Frias v. Asset Foreclosure Services, Inc., et al.*
Case number: 89343-8

Person filing the documents:
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Thank you,
Catherine Simonsen

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