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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

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FLORENCE FRIAS,

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC., et al.,

Defendants.

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**DEFENDANTS' MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., AND U.S. BANK N.A.'S ANSWERING BRIEF ON  
CERTIFIED QUESTIONS**

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**Secondary Authorities**

*Charles W. Calomiris, et al., The Econ. of the Proposed Mortg. Servicer  
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## I. INTRODUCTION

The legislature passed the Deed of Trust Act (“DTA”), RCW 61.24 *et seq.*, in 1965 to establish an efficient, inexpensive, and fair foreclosure process. Those goals required balancing the sometimes conflicting interests of borrowers and lenders. To ensure a fair process, the legislature did give borrowers a *presale* remedy to enjoin foreclosure based on DTA violations. Over the years, the legislature added to the DTA other provisions for presale relief (for challenges to reinstatement fees or per se Consumer Protection Act violations), without limiting borrowers’ rights to seek whatever relief the law permits independent of the DTA. But because the legislature viewed the presale injunction remedy as providing adequate means to prevent wrongful foreclosure—a central goal of the Act—it never gave borrowers a generalized presale damages remedy.

The certified questions ask the Court to decide whether, despite this balanced remedial scheme, an *implied* damages remedy also exists under the DTA in the absence of a sale and, if so, what principles govern that remedy. Dkt. 48 at 3. Relying almost entirely on *Walker v. Quality Loan Service Corp. of Washington*, 308 P.3d 716 (Wn. App. 2013), Plaintiff urges the Court to follow *Walker* and find an implied presale damages remedy (and to reach the merits of her claims and several other issues not before this Court). Given the DTA’s existing remedies, legislative history, and purposes, the Court should decline to find an implied remedy. But if it does, it should make clear that plaintiffs may recover *only* for a trustee’s material DTA violation and actual damages.

(The Court should also decline to go beyond the questions certified.) The Court should reach these conclusions because:

*First*, the DTA's presale remedy provisions, interpreted in light of the Act's primary goals, confirm plaintiffs may bring presale claims for DTA violations only to obtain injunctive relief. RCW 61.24.030(8)(j), .040(1)(f)(IX) & (2), .130(1). The DTA's legislative history reflects a careful balancing of rights and remedies, which an implied presale damages remedy would upset, and confirms the DTA already contains the universe of presale remedies the legislature intended. The plain language and legislative history limit RCW 61.24.127 to borrowers' postsale claims and remedies, which a plaintiff preserves even if she fails to restrain a sale.

*Second*, because the DTA contains no generalized presale damages remedy, the Court need not address the second certified question. But if it does, it should hold that plaintiffs may recover only for a trustee's material DTA violation and actual damages. The Court should reject Plaintiff's attempt to convert a strictly construed statute into a strict-liability one. If the Court turns to the CPA to define the elements governing when a plaintiff may obtain damages in a presale claim for DTA violations, as Plaintiff advocates, the Court should adopt the well-recognized elements of an independent CPA claim (i.e., a claim not based on the DTA's requirements), including injury and causation.

*Third*, the Court should decline Plaintiff's invitation to go beyond the certified questions to address the merits or additional questions.

## II. CERTIFIED QUESTIONS

The district court, Dkt. 48 at 3, certified the following questions:

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

## III. STANDARD OF REVIEW

“Certified questions from federal court[s] are questions of law that [this Court] review[s] de novo.” *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493 (2011). When a federal court certifies a question, this Court does “not have jurisdiction to go beyond the specific question presented by the Certification Order.” *La.-Pac. Corp. v. Asarco Inc.*, 131 Wn.2d 587, 604 (1997); RCW 2.60.020. The Court should thus decline Plaintiff’s effort to expand review to encompass the district court’s ruling on the underlying motions to dismiss, *see* Dkt. 48—particularly because Plaintiff in federal court must meet the U.S. Supreme Court’s plausibility pleading standard under Federal Rule of Civil Procedure 12(b)(6), not this Court’s “any set of facts” pleading standard under Civil Rule 12(b)(6). Further, MERS and U.S. Bank have not litigated the merits of Plaintiff’s claims, which they will address when this case returns to federal court. MERS and U.S. Bank therefore focus on the issues this Court has jurisdiction to address. *See La.-Pac. Corp.*, 131 Wn.2d at 604.

#### IV. STATEMENT OF THE CASE

##### A. Factual Background.

***Plaintiff's Loan with U.S. Bank.*** In September 2008, Plaintiff obtained an FHA-insured loan from “U.S. Bank,” which her Deed of Trust identifies as the “Lender.” Dkt. 2, Ex. A ¶ 2.1; Dkt. 10-1 at 2. Plaintiff made payments to U.S. Bank, and she does not allege it sold her loan. Dkt. 2, Ex. A ¶¶ 2.1-2.2, 2.6-2.7. Her Deed of Trust identifies MERS as beneficiary, “acting solely as nominee for Lender and Lender’s successors and assigns,” *id.* ¶ 2.1; Dkt. 10-1 at 2, and explains that “[a]ny forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.” Dkt. 10-1 at 7 ¶ 11.

***Plaintiff's Default and Foreclosure Initiation.*** In August 2009, Plaintiff defaulted “as a result of her physical disabilities and lack of savings.” Dkt. 2, Ex. A ¶ 2.2; *see also* Dkt. 10-1 at 20. Plaintiff received a Notice of Default on April 14, 2010, and U.S. Bank began foreclosure. Dkt. 2, Ex. A ¶ 2.4. In May 2010, MERS—as agent for its fully disclosed principal, U.S. Bank, the note holder and beneficiary under RCW 61.24.005(2)—appointed “LSI Title Agency, Inc., c/o Asset Foreclosure Services, Inc.,” as successor trustee. Dkt. 2, Ex. A ¶ 2.4; Dkt. 10-1 at 17; *see also Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106-07 (2012) (MERS may act as agent for disclosed note holder).<sup>1</sup>

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<sup>1</sup> *See also Rucker v. Novastar Mortg., Inc.*, 311 P.3d 31, 38 (Wn. App. 2013) (noting agent of note holder may appoint trustee but finding no agency relationship based on language of specific agreement) (citing *Bain*, 175 Wn.2d at 106). Plaintiff concedes MERS was an agent of U.S. Bank. *See, e.g.*, Dkt. 2, Ex. A ¶ 1.8.

With Plaintiff nine months behind on payments, Asset Foreclosure, “as Agent for the Trustee,” issued and recorded on May 19, 2010, a Notice of Trustee’s Sale, setting an August 20 sale date. Dkt. 10-1 at 19-21; RCW 61.24.040(4) (trustee may use agents). No sale occurred, and the sale notice expired on December 19, 2010. RCW 61.24.040(6) (120-day maximum extension period). In May 2011, Asset Foreclosure, as LSI’s agent, issued and recorded a second Notice of Trustee’s Sale, setting a sale date of August 26, 2011. Dkt. 10-1 at 26-28; Dkt. 2, Ex. A ¶ 2.7. By then, Plaintiff had not made a payment in *nearly two years*. Dkt. 10-1 at 27. The Notice of Trustee’s Sale accurately stated “the beneficial interest in [Plaintiff’s Deed of Trust] is presently held by US BANK.” *Id.* at 26; Dkt. 2, Ex. A ¶ 2.7.<sup>2</sup> Plaintiff concedes she “is still on title to her house,” does not allege any trustee’s deed was recorded, *see* RCW 61.24.050(1), and concedes Asset Foreclosure, as LSI’s agent, recorded a second discontinuance notice on October 31, 2011. Dkt. 2, Ex. A ¶ 2.17; Dkt. 10-1 at 30. On May 8, 2013, LSI resigned as trustee. Dkt. 10-1 at 32.

***Plaintiff’s Loan Modification Efforts.*** Plaintiff alleges that “[a]s soon as she began having difficulties” in 2009, she contacted “U.S. Bank” for a loan modification. Dkt. 2, Ex. A ¶¶ 2.3-2.4. She admits that in 2009 and 2010, she was unemployed, making modification unlikely. *Id.* ¶¶ 2.1-2.2. She also admits that in 2010 she filed bankruptcy and received a discharge. *Id.* ¶ 2.6; Pl. Br. at 15.

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<sup>2</sup> MERS is also identified in the Notice of Trustee’s Sale because the Act prescribes the form of the Notice of Trustee’s Sale, such that the Trustee *must* list all of the originally identified parties to the Deed of Trust (including MERS). *See* RCW 61.24.040(1)(f)(I).

Even though U.S. Bank had no legal obligation to modify Plaintiff's loan, it *approved* her for a modification on July 1, 2011, under the FHA's standard modification program. Dkt. 2, Ex. A ¶¶ 2.2-2.4, 2.6. Plaintiff preferred a better offer, rejecting that offer as "unrealistic" and claiming the payment would be 52% of her income. *Id.*

Plaintiff also claims that on July 7, 2011, U.S. Bank declined her request "for a HAMP loan modification." Dkt. 2, Ex. A ¶ 2.6; *see also* Pl. Br. at 11, 15-21. But Plaintiff had an FHA loan, and the FHA-HAMP process is separate from the standard HAMP process, with "[d]ifferent regulations/guidelines govern[ing] each program." *Sutherland v. Wells Fargo Bank, N.A.*, 2013 WL 5817386, \*4 n.5 (E.D.N.C. 2013) (citing, *inter alia*, Mortgagee Letter 2009-23, 2009 WL 3348117 (July 30, 2009)). Under the 2011 FHA-HAMP regime, a borrower more than 12 months behind on payments could not qualify for loan modification. *See, e.g.*, Mortgagee Letter 2009-23, 2009 WL 3348117, at \*2. In August 2011, when Plaintiff requested mediation to pursue a modification, she had not made a payment in 23 months and therefore did not qualify under FHA-HAMP. Dkt. 2, Ex. A ¶ 2.10; Dkt. 10-1 at 27.

Despite disqualification under FHA-HAMP, and despite receiving a modification offer under the FHA's traditional modification program, around August 1, 2011, Plaintiff requested mediation to discuss modification (again) under the Washington Foreclosure Fairness Act ("FFA"). RCW 61.24.163; Dkt. 2, Ex. A ¶ 2.10. She alleges U.S. Bank

did not mediate in good faith because it refused to consider disputed Net Present Value (“NPV”) inputs she claims were relevant<sup>3</sup>—even though U.S. Bank participated in mediation, provided documents, and had *already* offered modification. Dkt. 2, Ex. A ¶¶ 2.10-2.16.<sup>4</sup> (U.S. Bank denies it had a duty to mediate at all under the FFA—a question for another day.)

### B. Plaintiff’s Claims.

Plaintiff asserts claims against *all* Defendants for Consumer Protection Act (“CPA”) violations and misrepresentation. *Id.* ¶¶ 3.1-3.12, 3.18-3.21. She also asserts a claim under the DTA based in part on alleged DTA violations by MERS and U.S. Bank. *Id.* ¶¶ 1.6-1.7, 2.4, 2.7, 3.16-3.17. She seeks injunctive relief, as well as damages from all Defendants. Plaintiff asks the Court to hold that MERS and U.S. Bank can be liable under RCW 61.24.127(1)(c), even though the statute allows only *postsale* claims against *trustees* for material DTA violations. Pl. Br. at 26-27.

Plaintiff’s brief is rife with new factual assertions—appearing nowhere in the record certified by the district court—about LSI’s alleged

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<sup>3</sup> Plaintiff alleges the mediator and housing counselor “ran” an NPV test, which U.S. Bank supposedly disregarded. Dkt. 2, Ex A ¶ 2.15. But NPV calculations include transaction and institution-specific criteria (property values, lender’s risk tolerance, risk of re-default, and discount rate), which Plaintiff, the mediator, and a housing counselor could not have known—making their NPV calculation meaningless. *See Calomiris, et al., The Econ. of the Proposed Mortg. Servicer Settlement (May 6, 2011), available at: <http://ssrn.com/abstract=1833729>, at 7-8.* Further, the high HAMP re-default rate (40-60%), among other factors, means even a positive NPV might not make economic sense for lenders, “ruining what a naïve observer might think of as a ‘win-win’ deal for the borrower and lender.” Adelino, Girardi, & Willen, *Why Don’t Lenders Renegotiate More Home Mortgages: Redefaults, Self-Cures, and Securitization*, 60 J. OF MONETARY ECON. 835, 846, 852 (2013).

<sup>4</sup> Plaintiff also accuses U.S. Bank of violating HAMP (which did not apply) by proceeding with foreclosure while discussing loan modification, i.e., “dual tracking.” Pl. Br. at 17-20. But FHA regulations *require* U.S. Bank to pursue foreclosure with “reasonable diligence.” 24 C.F.R. § 203.356(b). Likewise, the Deed of Trust expressly provides that U.S. Bank’s decision to temporarily forbear from foreclosure did not waive the right to immediately resume the process. Dkt. 10-1 at 7 ¶ 11.

Washington presence, HAMP Guidelines (which do not apply to FHA loans), U.S. Bank's compliance with FHA guidelines (which afford no private right of action), and credit injury stemming from her admitted default (which federal law preempts). *Id.* at 14, 16, 20, 43. Under RCW 2.60.030(2), this Court should consider none of these assertions.

### **C. Procedural Background**

On May 9, 2013, LSI filed a motion to dismiss, in which Asset Foreclosure joined, because no foreclosure sale occurred or was pending, and LSI was no longer the trustee. Dkts. 10-11. MERS and U.S. Bank joined in the motion to dismiss the preliminary injunction claim, stating they “agree with [LSI’s] positions and do not oppose LSI’s motion.” Dkt. 12 at 1:24-25; *see also* Dkt. 18.<sup>5</sup> Before the court ruled, Plaintiff filed a motion to stay and certify three questions to this Court. Dkts. 22 & 23 at 9. LSI, and MERS and U.S. Bank, opposed the motion. Dkts. 25-27. On July 26, 2013, the court granted Defendants’ motions to dismiss and denied Plaintiff’s motion. Dkt. 34. On August 9, 2013, four days after Division I decided *Walker v. Quality Loan Service Corp. of Washington*, 308 P.3d 716 (Wn. App. 2013), Plaintiff moved to alter or amend the district court’s Order. Dkt. 36. Plaintiff argued that, under *Walker*, she could state a presale damages claim for alleged DTA violations. *See id.* The district court instead certified two of Plaintiff’s questions. Dkt. 48.

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<sup>5</sup> The Court should not disregard MERS and U.S. Bank’s briefing in the district court, as Plaintiff requests. *See* Pl. Br. at 22 n.4. Whether the district court “relied” on that briefing in granting the motions to dismiss does not matter, as this proceeding does not involve an appeal from that order. Dkt. 48.

## V. ARGUMENT

### A. The DTA Defines and Limits Presale and Postsale Remedies for Alleged DTA Violations.

Relying on *Walker v.* Plaintiff asks this Court to hold the DTA allows a damages claim whenever a lender or trustee violates any DTA requirement, even if a foreclosure sale never occurs. Plaintiff's formulation of the issue confuses claims with remedies. Borrowers have *always* been able to bring a claim alleging a DTA violation before a sale. But nothing in the DTA provides a presale *damages* remedy—other than the legislatively declared per se CPA remedy found in RCW 61.24.135. And the DTA's history and purpose confirm the legislature intended to limit borrowers' presale *remedies* for DTA violations to injunctive relief. “[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979).<sup>6</sup>

The legislature's policy choices in the DTA allow borrowers to bring statutory or common-law claims independent of the DTA. Plaintiffs may seek whatever relief those claims permit, regardless whether a foreclosure sale has occurred. But borrowers may not make an end-run around the DTA's carefully delineated remedial scheme by seeking damages for an alleged DTA violation in the absence of a foreclosure sale.

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<sup>6</sup> See also *Logan v. U.S. Bank N.A.*, 722 F.3d 1163, 1172 (9th Cir. 2013) (no implied right of action under federal tenant foreclosure statute where Congress “included an express provision for private enforcement” under a related act) (quoting *TAMA*, 444 U.S. at 19).

**The DTA Limits Presale Remedies for DTA Violations to  
Injunctive Relief.**

The Court's analysis must start with the statute itself. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 105 (2013); *see also TAMA*, 444 U.S. at 16. The DTA establishes the procedures governing nonjudicial foreclosures and defines what remedies a borrower has for DTA violations, both presale and postsale. *See* RCW 61.24 et seq.; *Albice v. Premier Mortg. Servs. of Wash.*, 174 Wn.2d 560, 568 (2012); *Plein v. Lackey*, 149 Wn.2d 214, 226-27 (2003); *Cox v. Helenius*, 103 Wn.2d 383, 387 (1985).

Establishing the DTA's remedial scheme required careful balancing. To ensure an efficient, inexpensive, but fair process, the legislature therefore *declined* to create a damages remedy for every presale DTA violation. Instead, before a sale, the DTA affords *injunctive* relief and makes presale monetary remedies available only in limited and well-defined circumstances. And the DTA defines the postsale claims for which a borrower may seek damages if the borrower failed to invoke the DTA's presale injunction remedy. Given the care the legislature devoted to defining balanced remedies under the DTA, the Court should decline to imply damages remedies beyond what the legislature created.

**a. The DTA Balances the Interests of  
Lenders and Borrowers.**

The DTA grew out of the legislature's desire to facilitate lending by providing an efficient and inexpensive means for lenders to realize on their security. Because an 1869 Washington statute barred nonjudicial foreclosure, real estate lenders historically had to proceed through court to

realize on their real estate security. See *Kennebeck, Inc. v. Bank of the W.*, 88 Wn.2d 718, 724 (1977); John A. Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 94 (1966). By the 1960s, commentators recognized the judicial foreclosure process as “obsolete,” “cumbersome and expensive.” W.L. Shattuck, *Security Transactions: Real Property Mortgage Foreclosure—Redemption*, 36 Wash. L. Rev. 309, 310 (1961). Judicial foreclosures required a “time consuming judicial process and a judicial sale which did not vest title in the purchaser” until one year later, because the borrower could cure the default and “redeem” the property. Gose, *supra*, at 95; see also Shattuck, *supra*, at 310.

The judicial foreclosure system hurt borrowers and lenders alike. The one-year redemption period chilled bidding because of the risk borrowers might redeem the property, and because of the impact of redemption on property values. Shattuck, *supra*, at 310-11. The failure to maximize the return on foreclosed property reduced any potential surplus to the borrower—and increased the risk of a deficiency, for which the borrower might remain liable. *Id.* The delays, risks, and expenses associated with judicial foreclosure also reduced available financing, requiring borrowers to make down payments at levels unheard of today. See Ernest M. Murray, Comment, *Statutory Redemption: The Enemy of Home Financing*, 28 Wash. L. Rev. 39, 39, 41-42 (1953); Gose, *supra*, at 95. Thus, although the judicial foreclosure law “had as its goal a greater benefit to the debtor [it had] completely failed in its purpose.” Murray,

*supra*, at 46; *see also* Gose, *supra*, at 95 (judicial foreclosure “hindered” borrowers).

Against this backdrop, the legislature enacted the DTA in 1965 “to avoid time consuming and expensive judicial foreclosure proceedings and to save time and money for both borrower and lender.” ESSB 6191, Final Bill Rep. (June 11, 1998); *see also* *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 31 (1971); Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323, 323 (Apr. 1984). The legislature viewed the Act as essential to improving borrowers’ access to residential financing. Gose, *supra*, at 95 n.7; *Ostrander*, 6 Wn. App. at 31 (Act “applauded as meeting the need of modern real estate financing”). For these reasons, since 1965, “public policy [has] actually favor[ed] trustee’s foreclosures.” Wm. Stoeck & John Weaver, 18 Wash. Prac. § 20.2 (2d ed. 2013); *see also* Murray, *supra*, at 46 n.42 (DTA considered a “release[] from the shackles” of judicial foreclosure).

The legislature had three goals in passing the DTA: (1) to create an “efficient and inexpensive” nonjudicial foreclosure process; (2) to give interested parties “an adequate opportunity ... to prevent wrongful foreclosure”; and (3) to “promote the stability of land titles.” *Cox*, 103 Wn.2d at 387; *see Frizzell v. Murray*, --- P.3d ---, 2013 WL 6312124, \*4 (Wash. 2013) (citation omitted). The Court construes the DTA “to further [these] three basic objectives.” *Cox*, 103 Wn.2d at 387. To achieve these

goals, the legislature required compromises from borrowers and lenders. *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416 (1988).

***No Deficiencies.*** A lender who elected nonjudicial foreclosure gave up the right to a deficiency judgment. RCW 61.24.100. If the sale failed to satisfy the debt, the lender could no longer seek from the borrower the difference between the sale price and amount owed. The legislature viewed this sacrifice as the “price’ the lender must pay to elect to use the private sale provisions.” Gose, *supra*, at 96 & n.14.

***No Debt Acceleration.*** Before passage of the DTA, a lender could accelerate the loan balance upon default. *Knissell v. Brunet*, 60 Wash. 610, 613 (1910). A lender invoking nonjudicial foreclosure under the DTA waives that right. *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 375 (1979). Until 11 days before the sale, the borrower can cure defaults by reinstatement.

***Procedural Safeguards.*** Although borrowers no longer had the benefit of judicial oversight, the DTA provided “several safeguards to ensure that the nonjudicial foreclosure process is fair and free from surprise.” *Cox*, 103 Wn.2d at 387. These include provisions limiting the trustee’s authority and granting the right to challenge the default or sale in an action “to ***restrain*** a threatened sale by the trustee upon ***any*** proper ground.” Gose, *supra*, 100-01 (emphasis added); *Schroeder*, 177 Wn.2d at 106-07 (citing RCW 61.24.030); RCW 61.24.030(8)(j), .040(1)(f)(IX), .130(1). The legislature viewed this presale injunction remedy sufficient

to “adequately protect the borrower” without inhibiting the Act’s goals of creating an efficient and inexpensive process. Gose, *supra*, at 100-01.

**Purchaser Protection.** To protect land title stability, the legislature clarified that if the trustee’s deed recites satisfaction of the DTA’s requirements, the recitals are conclusive for bona fide purchasers—and presumptively valid for other purchasers. RCW 61.24.040(7). These presumptions limit postsale challenges and remove “disincentives to investment” inherent in judicial foreclosures. *Glidden v. Mun. Auth. of Tacoma*, 111 Wn.2d 341, 350 (1988) (en banc). The legislature maintained purchaser protection in 2009 DTA amendments, which allow a postsale damages remedy for certain claims, “suggest[ing] that money damages against the trustee are warranted in part *because* the grantor *cannot* recover property sold to a bona fide purchaser.” *Albice*, 174 Wn.2d at 580 n.2 (Stephens, J. concurring) (emphasis added).

In short, the DTA balances the legislature’s desire to create an efficient and inexpensive mechanism for lenders to realize on security, while protecting borrowers’ rights to prevent improper foreclosures.

**b. The DTA Provides a Broad Presale Injunction Remedy for DTA Violations.**

In interpreting a statute, the Court strives to “determine the legislature’s intent.” *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909 (2007). The DTA’s presale remedies provisions refer repeatedly to injunctive relief but, as Plaintiff concedes, do not mention a generalized presale damages remedy. The breadth of the presale injunction remedy—which permits restraint on *any* proper legal or equitable ground—reflects

the balanced remedial scheme the legislature designed and does not include a generalized presale damages remedy.

The DTA sets forth a detailed set of preconditions to nonjudicial foreclosure, including (most notably) a power of sale in a recorded deed of trust, a default, and proper notice of the default. *See Schroeder*, 177 Wn.2d at 106-07 (citing RCW 61.24.030). The notice of default must inform the borrower that failure to timely cure the default may result in a nonjudicial foreclosure sale “no less than” 120 days later. RCW 61.24.030(8)(g). The trustee must record a notice of trustee’s sale “[a]t least” 90 days before the sale date. RCW 61.24.040(1)(a) & (f). “Specific *statutory remedies exist* to make appropriate challenges” when a party fails to follow the DTA’s requirements. *Donovick*, 111 Wn.2d at 417 (emphasis added). Those remedies reflect the competing interests and policy decisions embodied in the DTA.

To protect the borrower’s right to avoid wrongful foreclosure, the legislature allowed a borrower to seek “recourse to the courts pursuant to RCW 61.24.130 to contest *the alleged default* on any proper ground.” RCW 61.24.030(8)(j) (emphasis added). The borrower has “the right ... *to restrain*, on any proper legal or equitable ground, a trustee’s sale.” RCW 61.24.130(1) (emphasis added). The sale notice must inform the borrower that she “may contest this default by initiating court action” and “[l]egal action ... may *prevent or restrain* the sale.” RCW 61.24.040(2) (emphasis added). The notice must also tell the borrower that “[i]n *such* action [to prevent or restrain the sale] [the borrower] may raise any

legitimate *defenses* ... to this default.” *Id.* (emphasis added). In other words, a borrower may seek to stay the sale by raising defenses, such as challenges to the debt, default, or deed of trust formation. *See Hoffmann, supra*, at 326 n.23 (borrower may seek presale injunction to raise substantive defenses); RCW 61.24.030(8)(j), .040(2), .130(1).

Even if the borrower concedes the debt and default, she may still test procedural compliance with the DTA and *contest the sale*, again under RCW 61.24.130(1). *See* RCW 61.24.040(1)(f)(IX). “Anyone having any objection *to the sale on any grounds whatsoever* will be afforded an opportunity to be heard as to those objections if they bring a lawsuit *to restrain* the sale pursuant to RCW 61.24.130.” *Id.* (emphasis added); *see also* RCW 61.24.130(1).<sup>7</sup> In an action to restrain the sale, the borrower may challenge procedural aspects of the foreclosure process, such as improper or untimely notice under the DTA. *Hoffmann, supra*, at 326 n.24; *Albice*, 174 Wn.2d at 579 (Stephens, J., concurring) (“an owner can seek to enjoin the sale even while acknowledging” debt). “Failure to bring such a lawsuit [to restrain a sale] may result in a waiver of any proper grounds for invalidating the Trustee’s sale.” RCW 61.24.040(1)(f)(IX).<sup>8</sup>

But designing a foreclosure system to avoid burdening borrowers and lenders with foreclosure litigation costs “necessitated a reduction in the level of protection afforded to borrowers.” *Donovick*, 111 Wn.2d at

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<sup>7</sup> The borrower may also file for bankruptcy (as Plaintiff did here), which effectively restrains the sale. RCW 61.24.130(4).

<sup>8</sup> To obtain a restraining order or injunction, the borrower must also give the trustee five days’ notice and make certain payments to the court. RCW 61.24.130(1)-(2); *see also Frizzell*, 2013 WL 6312124, at \*3.

420 (Dore, J., dissenting). Without limiting the threat of litigation by every borrower unhappy to face foreclosure (like Plaintiff), “it [would be] difficult to find qualified people willing to serve as trustees, frustrating one of the purposes of the deed of trust act—keeping the nonjudicial foreclosure process efficient and inexpensive.” *Meyers Way Dev. Ltd. P’ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 667 (1996). The legislature in 1965 designed the DTA to circumscribe available presale remedies: the DTA afforded no generalized *damages* remedy for DTA violations in the absence of a completed foreclosure sale. RCW 61.24.030(8)(j); RCW 61.24.040(1)(f)(IX) & (2); RCW 61.24.130(1). Instead, before a sale, the DTA contemplated only defenses to the sale (e.g., to establish a set off or lack of default), *not* affirmative claims. *See* RCW 61.24.040(2) (borrower may raise “legitimate defenses”); *Ostrander*, 6 Wn. App. at 31-32 (assertion deed of trust was obtained by fraud was defense, not affirmative claim); *Acme Fin. Co. v. Monohon*, 188 Wash. 392, 393 (1936) (defenses to debt may defeat action on debt but provide no affirmative relief). *See Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 575-76 & n.12 (1997) (distinguishing defensive claim from affirmative quiet-title claim).

**c. The DTA’s History Confirms the Act Limits Presale Remedies for DTA Violations to Injunctions.**

Since passing the DTA in 1965, the legislature has amended the statute to provide limited express monetary remedies—without ever creating a presale damages remedy for DTA violations generally:

- In 1985, the legislature clarified that, except as provided in the DTA, all mortgage laws apply to deeds of trust. RCW 61.24.020. This gave borrowers a right to damages against a trustee who refused to reconvey a deed of trust after satisfaction. *Schmerer v. Darcy*, 80 Wn. App. 499, 502-03 (1996) (citing RCW 61.16.030).

- In 1987, the legislature amended RCW 61.24.090(2) so a borrower may challenge, presale or postsale, the “reasonableness of any fees demanded or paid as a condition to reinstatement,” and may recover fees and costs. (Although Plaintiff here alleges unreasonable fees, *see* Dkt. 2, Ex. A ¶ 2.8, she chose not to invoke the express statutory remedy.) The amendment did *not* provide for damages. RCW 61.24.090(2).

- In 1998, the legislature gave borrowers a right to damages either presale or postsale for specific DTA violations—but required borrowers to proceed under the CPA, not the DTA. RCW 61.24.135.

- In 2009, the legislature amended the DTA to identify the postsale claims a borrower retains even if she fails to enjoin the sale. RCW 61.24.127(1).<sup>9</sup> The amendment confirmed a trustee’s “material” violation of the DTA during the sale process may support *postsale* damages. RCW 61.24.127(1)(c); Hoffmann, *supra*, 329 (borrower may seek damages postsale); *Frizzell*, 2013 WL 6312124, at \*5.

- In 2011, the legislature amended the DTA to include the FFA, requiring certain lenders in some circumstances to meet borrowers

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<sup>9</sup> Except where borrower shows the sale was void, postsale claims may not affect sale’s finality. RCW 61.24.127(2)(c)-(e). “Void sales are ineffective and do not pass title to the purchaser, while voidable sales are effective but may be set aside until the property is acquired by a bona fide purchaser.” Hoffmann, *supra*, at 326 n.22.

before a sale to address foreclosure alternatives. RCW 61.24.163. The legislature also created a corresponding remedy, making a failure to comply with the FFA a per se CPA violation. RCW 61.24.135(2).

The legislature's amendments carefully balance the rights and interests of lenders and borrowers, and show the legislature "has set forth in great detail how nonjudicial foreclosures may proceed." *Bain*, 175 Wn.2d at 108-09. This history also demonstrates that "when [the legislature] wished to provide a private damages remedy, it knew how to do so and did so expressly." *TAMA*, 444 U.S. at 20-21. *See also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (same; no implied damages remedy); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 685 (1987) ("[I]f the Legislature had wanted to mandate [a result], it would have used express language to that effect."). Consistent with the goal of keeping the foreclosure process efficient and inexpensive, the legislature has *not* created a general presale damages remedy for claims of DTA violations. "The legislature, not this court, is in the best position to assess policy considerations," *Bain*, 175 Wn.2d at 109, and to determine when to make damages available. The Court "must avoid stepping into the role of the Legislature by actively creating the public policy of Washington." *Sedlacek v. Hillis*, 145 Wn.2d 379, 390 (2001). *See also Rousso v. State*, 170 Wn.2d 70, 75 (2010) (court lacks authority to balance pros and cons of legislature's policy decisions).

Plaintiff identifies no language in the DTA providing a generalized presale damages remedy for every DTA violation. *See* Pl. Br. at 23. In effect, Plaintiff asks the Court to read language into the DTA to afford an undefined damages remedy the legislature elected *not* to include for presale DTA claims. *Id.* But “the court will not add language to an unambiguous statute even if the court believes the statute failed adequately to express that intent.” *Mahoney*, 107 Wn.2d at 684. *See also TAMA*, 444 U.S. at 19 (court will not read additional remedies into statute that already provides certain express remedies); *Logan*, 722 F.3d at 1172 (same); *State v. Schwab*, 103 Wn.2d 542, 548-53 (1985) (rejecting CPA claims based on Residential Landlord Tenant Act violations, where rights and remedies legislatively “spelled out in great detail”; “not every violation of a statute results in” a CPA claim).

**d. Applying the DTA’s Presale Remedy Provisions as Written Fulfills the Act’s Goals.**

Establishing an unlimited and undefined presale damages remedy for every DTA violation would undermine the policy balance the legislature struck in the DTA: (1) to create an “efficient and inexpensive” nonjudicial foreclosure process; (2) to give interested parties “an adequate opportunity ... to prevent wrongful foreclosure”; and (3) to “promote the stability of land titles.” *Cox*, 103 Wn.2d at 387.

*Implying Presale Damages Remedies Will Make the Process Less Efficient and More Expensive.* This Court has repeatedly stated it must construe the DTA so “the nonjudicial foreclosure process ... remain[s]

efficient and inexpensive.” *Cox*, 103 Wn.2d at 387; *see also Frizzell*, 2013 WL 6312124, at \*4; *Plein*, 149 Wn.2d at 225; *Bain*, 175 Wn.2d at 94; *Schroeder*, 177 Wn.2d at 104; *Albice*, 174 Wn.2d at 575 (Stephens, J., concurring). The DTA’s broad “presale injunction remedy” provisions “maintain the efficiency of the nonjudicial foreclosure process by permitting deed of trust foreclosures *without* a mandatory prior hearing.” Hoffmann, *supra*, at 331 (emphasis added).

The DTA’s presale injunction remedy allows efficient resolution of any challenge to the propriety of a sale. A borrower invoking that remedy first seeks a temporary restraining order and then requests a permanent injunction, which “constitutes the final resolution of the action.” *Plein*, 149 Wn.2d at 226-27 (quoting Hoffmann, *supra*, at 327). The Civil Rules envision a hearing on the permanent injunction within 14 days of the temporary injunction. CR 65(b) (TRO expires after 14 days). The presale injunction remedy thus proceeds expeditiously. It weeds out meritless claims by requiring borrowers to show a “clear legal or equitable right to relief,” “a well-grounded fear of invasion of that right,” and “actual and substantial injury as a result of the invasion,” as required to obtain an injunction. Hoffmann, *supra*, at 331.

The legislature built into the DTA a check on the broad injunction remedy, giving a defendant the ability to recover costs and fees when borrowers seek an injunction that lacks basis:

[T]he legislature was sufficiently concerned by the prospect of frivolous injunction requests that it allowed a court to “condition granting the restraining order or injunction upon

the giving of security by the applicant ... for the payments of such costs and damages, including attorneys' fees, as may be later found by the courts to have been incurred or suffered by any party by reason of the restraining order or injunction.”

*Myers v. MERS, Inc.*, 2012 WL 678148, \*2 (W.D. Wash. 2012) (citation omitted), *aff'd* --- Fed. Appx. ---, 2013 WL 4779758 (9th Cir. 2013). In these ways, the presale injunction remedy aims to reduce the volume of foreclosure litigation, ensure efficient resolution of DTA violation claims, and protect borrowers from unfair foreclosure.

A *damages* remedy for DTA violations associated with an abandoned or suspended sale, on the other hand, would increase litigation and undercut the balancing inherent in the DTA's express injunction remedy. A presale damages remedy would incentivize borrowers to file lawsuits to delay foreclosure, regardless whether the claims have merit, because borrowers would not need to meet CR 65's injunction standards (or the DTA's bond requirements) to maintain a damages action. This result would “contravene the Act's purpose and policy ... by making the process more lengthy (e.g., no finality), inefficient (e.g., more procedures), and expensive (e.g., litigation).” *Udall v. T.D. Escrow Servs., Inc.*, 132 Wn. App. 290, 302 (2006), *rev'd on other grounds* 159 Wn.2d 903 (2007) (rejecting breach of contract claim based on alleged DTA violation).

A presale damages remedy would also discourage lenders from proceeding to sale, even where they have the right to do so. Few lenders will forego the right to a deficiency, as the DTA requires, if they know they *also* face a presale claim for DTA violations for which a borrower

may obtain damages, increasing the total loss on the loan. This result as well “frustrate[s] the purpose of the Act because lenders understandably may not be willing to utilize a non-judicial foreclosure procedure in which the trustee’s sale bars any deficiency judgment but leaves the lender subject to potential liability.” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 169 (2008), *overruled on other grounds by* RCW 61.24.127.<sup>10</sup> *See also Reese v. First Mo. Bank & Trust Co.*, 736 S.W.2d 371, 373 (Mo. 1987) (noting legislature allowed only injunctive relief presale; refusing to infer implied action for presale wrongful foreclosure initiation).

The legislature designed the DTA “to *avoid* time-consuming judicial foreclosure proceedings and to save substantial time and money to *both* the buyer and the lender.” *Ostrander*, 6 Wn. App. at 31-32 (emphasis added). It intended the exclusive presale injunction remedy for DTA violations to achieve these goals by resolving the propriety of a sale promptly and efficiently, without leaving the deterrent of a pending damages action. *See id.*; *Albice*, 174 Wn.2d at 578 (presale injunction remedy enables courts to “ensure efficient resolution of defaulted loans”). And unlike the DTA’s injunction provision—which allows a lender to recover damages and fees if the injunction lacks basis—no comparable cross-check protects lenders from frivolous presale damages claims. *Myers*, 2012 WL 678148, at \*2. Further, expanding presale remedies

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<sup>10</sup> Indeed, the legislature acknowledged that even expanding only the *postsale* claims and remedies available would result in increased foreclosure litigation. H.B. 1942, Multiple Agency Fiscal Note Summary II.C – Expenditures, *available at* <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=aKATCQdcOv8&att=false>.

available for DTA violations will increase foreclosure delays, undermine the DTA's basic purpose, and risk an increase in borrowing costs.

***Borrowers Already Have Adequate Remedies to Prevent Wrongful Foreclosure.*** Refusing to create a presale damages remedy for every DTA violation leaves borrowers with protection against wrongful foreclosure. RCW 61.24.030, .040, and .130 grant borrowers the right to enjoin foreclosure, “provid[ing] an adequate remedy for interested parties to prevent wrongful foreclosure.” *Cox*, 103 Wn.2d at 387; *see also Frizzell*, 2013 WL 6312124, at \*4. The DTA affords courts broad leeway, allowing them to enjoin sales “on **any** proper ground,” “on **any grounds whatsoever**,” and “on **any** proper legal or equitable ground.” RCW 61.24.030(8)(j), .040(1)(f)(IX), .130(1) (emphasis added). Because of the breadth of the remedy, the legislature had no need to add a **damages** remedy where no sale occurs. Hoffmann, *supra*, at 327 (DTA “manifests a legislative preference for the presale injunction remedy by reserving ... the right to restrain the trustee’s sale on any proper ground”). Indeed, “[a]dequate remedies to prevent wrongful foreclosure exist in the presale remedies” for injunctive relief. *Plein*, 149 Wn.2d at 228. *See also Ostrander*, 6 Wn. App. at 32 (DTA affords “adequate remedy”).<sup>11</sup>

Further, borrowers have protections outside the judicial process. This Court has made clear that “common law and equity requires [the]

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<sup>11</sup> The court’s statement in *Walker* that “the DTA includes ‘no specific remedies for violation of the statute in the context of pre-sale actions meant to prevent the wrongful foreclosure from occurring,’” 308 P.3d at 721, disregards the DTA’s many presale injunction remedy provisions and this Court’s conclusion those provisions provide adequate remedies for borrowers, *Plein*, 149 Wn.2d at 228.

trustee to be evenhanded to both sides.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 789 (2013) (citing *Albice*, 174 Wn.2d at 568; *Cox*, 103 Wn.2d at 389)). Thus, even without an injunction, if a borrower identifies to the trustee an alleged material flaw in the foreclosure initiation, the trustee’s duty of good faith requires it to stop or postpone the nonjudicial foreclosure—or face potential damages liability after the sale. *Id.*

Plaintiff, however, argues “[n]o textual language in the DTA limits recovery to cases where a trustee’s sale occurs” and contends the Act “implicitly recognizes that claims exist in the absence of a trustee’s sale.” Pl. Br. at 23. But Plaintiff’s arguments conflate *remedies* with claims. *See id.* at 23, 29, 46. Although defaulting borrowers can assert presale *claims* for alleged DTA violations, the DTA expressly enumerates the *remedies* a borrower has for DTA violations, depending on whether the borrower obtains relief before or after a sale. A borrower claiming wrongful foreclosure has a *presale remedy* under the DTA of enjoining the sale in an action to contest the default or sale, and *postsale remedies* of damages or vacating void sales. *See* RCW 61.24.030(8)(j), .040(1)(f)(IX) & (2), .130(1), .127(2); Hoffmann, *supra*, at 326-29, 331-37 (presale remedy is injunction; postsale remedies are vacating void sales or damages). Further, interpreting the DTA as written still affords borrowers the ability to recover monetary relief for presale conduct, depending on the borrower’s circumstances. *Compare* Pl. Br. at 49. A borrower who can establish a lender imposed unreasonable fees “as a condition to

reinstatement” may recover those fees, as well as attorneys’ fees and costs, under the DTA. RCW 61.24.090(2). The DTA also gives borrowers a right to sue under the CPA for specified DTA violations. RCW 61.24.135.

In addition, a borrower who can establish a common law claim can recover damages, even if the claim parallels an incomplete foreclosure—as long as the borrower does not premise the claim solely on an alleged DTA violation. *Compare Myers*, 2012 WL 678148, at \*2 n.3 (plaintiff might recover presale damages on claims independent of DTA). In *Cox*, for example, this Court allowed a borrower whose property secured payments under a construction contract to bring a common law claim against a foreclosing contractor for defective workmanship and to recover damages. 103 Wn.2d at 385-86. The borrower’s claim did not arise under the DTA; instead, he asserted negligence. *Id. Hardcastle v. Greenwood S&L Ass’n*, 9 Wn. App. 884, 889 (1973) (may recover contract damages).

Similarly, borrowers may seek damages for separate statutory claims *not* premised on DTA violations. In *Bingham v. Lechner*, 111 Wn. App. 118, 122 (2002), the court allowed a borrower to seek statutory damages under Washington’s usury statute by challenging the underlying debt as usurious—a claim independent of the foreclosure process. And in *Bain* and *Klem*, this Court clarified a borrower may assert a presale CPA claim if she can show the unfair or deceptive conduct involved material misrepresentations and caused injury, i.e., the elements of a CPA claim, independent of the DTA violation. In *Klem*, for example, the Court held if

a trustee misrepresents a material fact to a borrower (falsely notarizing the notice of sale) and the misrepresentation injures a borrower’s business or property (there, by ensuring the sale occurred before the borrower’s agent could close on a real estate contract to sell the property), the borrower has stated a CPA claim—independent of the DTA. 176 Wn.2d at 794-95.

Similarly, in *Bain*, this Court concluded if a party misrepresents its beneficiary status in an assignment of the deed of trust (a document not required under the DTA) and that misrepresentation injures a borrower’s business or property, the conduct supported a CPA claim—independent of the DTA. *Bain*, 175 Wn.2d at 117. The DTA’s presale injunction remedy thus furthers the Act’s purpose of giving interested parties an opportunity “to *prevent* wrongful foreclosure,” *Cox*, 103 Wn.2d at 387, without impairing an efficient foreclosure process or a borrower’s ability to seek monetary relief under *other* common-law or statutory claims.

***Existing Remedies Promote Stability of Land Titles.*** The Court must construe the DTA’s presale remedy provisions so “the process ... promote[s] the stability of land titles.” *Cox*, 103 Wn.2d at 387; *see Frizzell*, 2013 WL 6312124, at \*4. “The legislative preference for the presale injunction remedy manifested in the [DTA] is consistent with the objective of preserving the stability of land titles.” *Hoffmann*, *supra*, at 335. By limiting borrowers to injunctive relief for presale claims for DTA violations, the DTA permits courts to prevent any wrongful sales, thereby decreasing the likelihood of postsale litigation.

Recognizing a presale damages claim would not make the nonjudicial foreclosure process more efficient or inexpensive. It would not prevent wrongful foreclosures, which the presale injunction remedy protects. It would not promote the stability of land titles. In short, it would serve none of the recognized purposes of the DTA.

**RCW 61.24.127 Addresses Postsale Remedies and Does Not Create New Presale Remedies.**

Unable to point to any DTA provision allowing a generalized damages remedy absent a sale, Plaintiff argues “the DTA implicitly recognizes” those claims in RCW 61.24.127. Pl. Br. at 23, 47. In so doing, Plaintiff adopts wholesale the court’s rationale in *Walker*. *Id.* at 38-43. Plaintiff and *Walker* reason that because the legislature in RCW 61.24.127 enumerated the *postsale* claims a borrower does not waive by failing to enjoin the sale and for which the borrower may obtain only damages, those claims “must have existed” before the sale as well. Pl. Br. at 50; *id.* at 39 (quoting *Walker*, 308 P.3d at 721). This argument misunderstands RCW 61.24.127’s plain language, ignores the legislative history, and misreads recent DTA opinions.

**e. Before *Walker*, Washington Courts Properly Limited Presale Remedies.**

Until *Walker*, Washington courts for 40 years recognized only injunctive relief for presale DTA violations, consistent with the DTA’s presale remedy provisions and the legislative balancing inherent in the DTA. The Court’s many DTA decisions do not so much as suggest the existence of a presale damages remedy for claims arising purely from DTA

violations. *See, e.g., Albice*, 174 Wn.2d at 578 (Stephens, J., concurring) (quoting *Plein*, 149 Wn.2d at 226) (emphasis added); *see also Cox*, 103 Wn.2d at 388 (same); *Donovick*, 111 Wn.2d at 417; *Udall*, 159 Wn.2d at 908 (leaving intact court of appeals' conclusion "the Act, not common law, governs statutory nonjudicial foreclosure sales").

Until its recent decision in *Walker*, the court of appeals also viewed the DTA's presale injunction remedy as exclusive, adequate, and fair for claims for DTA violations.<sup>12</sup> Plaintiff, however, argues this Court in *Bain* and *Schroeder* veered away from 40 years of precedent and held borrowers may seek a presale damages remedy under the DTA for procedural violations. *See* Pl. Br. at 31-32. In fact, the Court in *Bain* held only that a borrower may establish a separate CPA claim if she shows a material misrepresentation and injury caused by that representation. 175 Wn.2d at 118-19. And while the Court interpreted the DTA's definition of beneficiary, it did not conclude a borrower may obtain presale damages for

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<sup>12</sup> *See Ostrander*, 6 Wn. App. at 32 (borrower limited to "adequate" injunctive relief remedy in RCW 61.24.130); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137 (2007) ("The sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with RCW 61.24.130."); *Amresco Ind. Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537 (2005) ("To keep the process quick and inexpensive, yet protect all interested parties, the Act grants presale remedies for those wanting to enjoin or restrain a threatened sale."); *In re Marriage of Kaseburg*, 126 Wn. App. 546, 558 (2005) (same); *Olsen v. Pesarik*, 118 Wn. App. 688, 694 (2003) ("the timely action [to restrain or enjoin sale] was the only proper means by which [plaintiffs] could assert any defenses to the non-judicial foreclosure"); *Steward v. Good*, 51 Wn. App. 509, 516 (1988) (DTA "specifically sets forth safeguards to protect against wrongful foreclosure" through presale injunction remedy). In addition, the district court's order certifying questions identifies ten federal district judges who have interpreted the DTA as limiting a borrower's presale remedy for DTA violations to injunctive relief. Dkt. 48 at 2; *see also Pfau v. Wash. Mut. Inc.*, 2009 WL 484448, \*12 (E.D. Wash. 2009) (Quackenbush, J.) (same); *Henderson v. GMAC Mortg. Corp.*, 347 Fed. Appx. 299, 302 (9th Cir. 2009). At least three unpublished court of appeals decisions with six different judges have found no presale damages remedy.

an alleged violation of that DTA provision. *Id.* at 99-104.<sup>13</sup> In *Schroeder*, the only presale claims for which plaintiff sought damages arose under *other* statutes and involved wrongful conduct *other* than DTA violations. 177 Wn.2d at 102. *Schroeder* did not address DTA damages absent a sale.

Nothing in *Bain* or *Schroeder* justifies *Walker*. Instead, *Walker* sharply departs from decades of DTA jurisprudence.

**f. RCW 61.24.127 Addresses Postsale Claims and Remedies Only.**

*Walker* relied heavily on RCW 61.24.127(1), which states:

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

Any of these specific non-waived postsale claims “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.” RCW 61.24.127(2)(a) (emphasis added). In addition, a borrower invoking this postsale remedy provision “may not seek any remedy at law or in equity other than monetary damages.” RCW 61.24.127(2)(b); *see also* RCW 61.24.127(2)(f) (borrower “limited to actual damages” except as permitted under CPA). And any such postsale “claim may not affect in

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<sup>13</sup> In addition, and contrary to Plaintiff’s suggestion, *see* Pl. Br. at 32, the Court in *Bain* recognized an agent *can* represent a disclosed note holder under the DTA. 175 Wn.2d at 106-07. This holding comports with long-standing Washington law. *See Carr v. Cohn*, 44 Wash. 586, 588 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36 (1923) (agent could prosecute foreclosure). On a complete record on remand, the trial court confirmed MERS was acting as an agent for a principal and granted summary judgment in its favor. *Bain v. Metro. Mortg. Grp. Inc.*, 2013 WL 6193887, \*5 (Wash. Super. 2013).

any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.” RCW 61.24.127(c); *see* RCW 61.24.127(2)(d)-(e) (borrower may not record a lis pendens or encumber or cloud title).

Thus, in RCW 61.24.127, the legislature clarified which claims a borrower retains after a foreclosure sale, even if the borrower failed to seek or obtain an injunction to restrain the sale. The structure of RCW 61.24.127, by its terms, contemplates a sale: the legislature tied the limitations period on these non-waived postsale claims and remedies to “the date of the foreclosure sale,” and emphasized the remedy may not affect the sale’s finality. RCW 61.24.127(2)(a), (c). Nothing in the statute even hints at the existence of a damages remedy if no sale occurs.

Reading RCW 61.24.127 to apply only to postsale damages claims comports with the Act’s three primary policies. The legislature drafted the DTA to “provide an adequate opportunity for interested parties to *prevent* wrongful foreclosure,” and the presale injunction remedy provisions accomplish that objective. *Cox*, 103 Wn.2d at 387 (emphasis added). Further, nothing in .127 indicates how a court might measure damages absent a sale: “[C]ourts have been reluctant to extend tort liability into an area where damage claims may seem speculative and subject to exaggeration and abuse.” 7 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.22 (5th ed. 2010) (citations omitted).

By contrast, settled principles guide how courts compute postsale damages: damages for a substantive DTA violation are the borrower’s

equity less proceeds received from sale; damages for a procedural violation are the sale price had the defect not occurred less debt. *See Hoffmann, supra*, at 337. In addition, a borrower may obtain only damages in most postsale actions since, after the sale, the borrower “cannot recover property sold to a bona fide purchaser.” *Albice*, 174 Wn.2d at 580 n.2 (citing RCW 61.24.127(2)(c)); *see also Hoffmann, supra*, at 336 (same). Thus, before a sale, a borrower has an injunctive remedy; after a sale, the borrower may still be able to pursue some postsale damages remedies. RCW 61.24.127 does not recognize a damages remedy for presale claims for DTA violations.

It makes no difference that the statute uses the term “waiver.” “Waiver is an equitable principle that can apply to defeat someone’s legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failing to assert an otherwise available adequate remedy.” *Albice*, 174 Wn.2d at 569. In RCW 61.24.127, the legislature made clear that a borrower does not lose her right to seek *postsale* relief “by delaying in asserting or failing to assert” a presale claim for injunctive relief; but if a borrower seeks postsale relief, she may assert only specific postsale claims and may obtain only damages. RCW 61.24.127(1)-(2). This Court acknowledged as much in *Klem, Schroeder*, and *Frizzell*, recognizing waiver based on a borrower’s failure to enjoin the sale “only applies to actions to vacate the sale and not to damages actions.” *Klem*, 176 Wn.2d at 796-97 (construing RCW 61.24.127);

*Schroeder*, 177 Wn.2d at 114 (quoting *Klem*); *Frizzell*, 2013 WL 6312124, at \*5.

In reaching a contrary conclusion, the court in *Walker* overlooked that RCW 61.24.127 refers only to postsale claims and remedies, and misunderstood the meaning of “waiver.” *Walker*, 308 P.3d at 721-22. The Court should reject *Walker* and instead, interpret RCW 61.24.127 according to its plain meaning: a borrower’s failure to invoke the DTA’s presale injunction remedy does not result in the borrower waiving all *postsale* claims and remedies. *See* RCW 61.24.127(1)-(2). The statute has no bearing on the existence of remedies in the absence of a sale.

**g. Legislative History Shows RCW 61.24.127 Addresses Postsale Claims and Remedies.**

RCW 61.24.127’s legislative history confirms the legislature intended the statute to clarify that borrowers do not waive *postsale* claims and remedies by failing to invoke the DTA’s presale injunction provisions.

The legislature enacted RCW 61.24.127 in 2009 to overrule portions of *Brown v. Household Realty Corp.*, 146 Wn. App. 157 (2008). *See* H.B. 1942, Bill Analysis, at 2 (Feb. 11, 2009) (summarizing *Brown*); S.B. Rep. 5810 at 3 (Feb. 23, 2009); E.S.B. 5810, Bill Analysis, at 2 (Mar. 23, 2009); E.S.B. 5810, at 3 (Apr. 9, 2009).<sup>14</sup> In *Brown*, the court held borrowers who failed to seek to enjoin the sale waived their right to sue

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<sup>14</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House/1942%20HBA%20JUDI%2009.pdf>. In analyzing legislative history, the Court may consider bill reports, *see Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304-06 (2006), as well as “relevant and probative committee hearings and floor debates concerning” the enactment, *State v. Evans*, 177 Wn.2d 186, 199 (2013).

the lender after the sale for fraud, breach of the covenant of good faith and fair dealing and fiduciary duties, and violations of the CPA and the federal Truth in Lending Act. 146 Wn. App. at 166-67. (Plaintiffs in *Brown* did not bring claims for DTA violations.) The court of appeals concluded permitting borrowers to pursue damages in postsale actions would “frustrate the purposes of the Act” by discouraging nonjudicial foreclosure. *Id.* at 169. *Brown* contradicted this Court’s cases *permitting* a postsale damages remedy where the borrower could not have brought the claim in time to enjoin the sale. *See, e.g., Cox*, 103 Wn.2d at 388.

Seven months later, the legislature proposed the first iteration of RCW 61.24.127 to codify what had been the law before *Brown*, i.e., that borrowers can bring certain claims postsale, and can obtain damages for those claims. S.B. 5810, 61st Leg., 2009 Reg. Sess.; H.B. 1942, 61st Leg., 2009 Reg. Sess. After amendments, the bill passed.

Although the legislative history shows the legislature intended the bill to strengthen consumer rights in foreclosures generally, not one public statement or document reveals *any* legislative intent to create a damages remedy for DTA violations in advance (much less in the absence) of a sale. To the contrary, in the public hearings and bill reports, the legislature repeatedly manifested its intent that the bill’s non-waiver section overrule *Brown*—which involved only postsale claims and did not involve alleged DTA violations—and to clarify the scope of postsale claims and remedies. For instance, in public hearings, the Senate Judiciary Committee’s staff

counsel explained: (1) the bill's non-waiver section was intended to supersede "recent court cases" holding a party who failed to enjoin the sale "is deemed to have waived *any* right to *post-foreclosure sale remedies* if the party had knowledge of any of the defenses to the foreclosure prior to the sale";<sup>15</sup> and (2) the bill's non-waiver section "*deals with claims that survive a foreclosure sale.*"<sup>16</sup> Similarly, staff counsel for the Senate Financial Institutions, Housing and Insurance Committee stated: (1) the bill's non-waiver section "takes care of a situation that was created by an appellate court case called *Brown v. Household Realty Corporation*";<sup>17</sup> (2) emphasized the non-waiver section refers only to claims "brought ... *after the foreclosure*;"<sup>18</sup> and (3) called the bill's non-waiver section "*the Brown fix.*"<sup>19</sup>

The bill reports likewise emphasize the legislature viewed RCW 61.24.127 as addressing *Brown's* holding concerning waiver of postsale remedies. Several bill analyses and reports identified *Brown* as part of the bill's background. See H.B. 1942 Bill Analysis, at 2 (Feb. 11, 2009); E.S.B. 5810, Bill Analysis at 2 (Mar. 23, 2009); E.S.B. Rep. 5810 at 2 (Apr. 9, 2009). And several bill reports state in the summary of public testimony that "[t]he *Brown* court case fix is important." S.B. Rep. 5810, at 3 (Feb. 23, 2009); see also S.B. Rep. 5810 (As Reported by Senate

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<sup>15</sup> See [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2009020109](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009020109) at 59:35 (emphasis added).

<sup>16</sup> See [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2009030181](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181) at 44:55 (emphasis added).

<sup>17</sup> See [www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2009021219](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009021219) at 58:30.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> See [www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2009020202](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009020202) at 36:55.

Committee on Financial Institutions, Housing & Ins.) at 4 (Feb. 24, 2009) (same); S.B. Rep. 5810 (As Amended by House) at 3 (Apr. 9, 2009).

The legislature intended the non-waiver section of the bill to void *Brown's* holding that a borrower failing to enjoin a sale waives *postsale* fraud claims for damages. Nothing in the history suggests the legislature created a new presale damages remedy for DTA violations generally.

**h. Walker Misinterprets the DTA's Remedy Provisions and Recent Cases.**

*Walker*, on which Plaintiff solely relies, misinterpreted the DTA by not considering the language, history, and goals of the DTA's remedial scheme. *Compare Walker*, 308 P.3d at 721-24, with Part V.A.1-2, *supra*.

*Walker* also misreads recent case law. After defaulting, Walker filed a complaint to restrain the sale, quiet title, and obtain damages. *Id.* at 719. In his complaint, he alleged "MERS could not be a lawful deed of trust beneficiary" and so "all subsequent actions taken by any party in reliance on MERS' actions is [sic] also unlawful." *Id.* at 720. The court held Walker pleaded sufficient facts under CR 12(b)(6) "to show that MERS lacked the authority to assign his deed of trust and note to [the beneficiary] and, as a consequence, that [the beneficiary] similarly lacked authority to appoint [the] successor trustee." *Id.* at 722. The court also decided RCW 61.24.127(1)(c) "recognize[s] a presale cause of action for damages." *Id.* at 724. In so doing, the court found *Klem* "supports [its] conclusion that the specific remedies provided in the DTA are not exclusive," i.e., the DTA's presale injunction remedy is not the exclusive

remedy presale. *Id.* at 721. The court reasoned that in *Klem*, it “considered whether the violations of the DTA that the legislature identified in RCW 61.24.135 as unfair or deceptive acts for purposes of the CPA were the only DTA violations that were unfair for CPA purposes.” *Id.* According to *Walker*, *Klem*’s holding that a plaintiff could base a CPA claim on “an unfair or deceptive act or practice not regulated by statute but in violation of public interest” shows the DTA does not provide exclusive DTA remedies. *Id.* at 726-27 & n.59; *Klem*, 176 Wn.2d at 787.

But this Court in *Klem* addressed only *postsale* claims and had no occasion to consider whether a borrower may seek damages for presale DTA violations. *See Klem*, 176 Wn.2d at 779-80. *Klem* simply clarifies the ways in which a plaintiff may satisfy the unfair or deceptive act or practice prong of the CPA. *Id.* at 794-95. If a plaintiff can establish the elements of an independent CPA claim, the party can pursue that claim. *See id.* at 794-95. No one disputes that point.

Nor does *Bain* stand for the propositions for which *Walker* cites it. *Walker* suggests that in *Bain*, this Court held “deed of trust language identifying MERS as ‘acting solely as a nominee for Lender and Lender’s successors and assigns’ insufficient to establish MERS as the note holder’s agent.” 308 P.3d at 722-23. In fact, the Court in *Bain* acknowledged “Washington law, and the deed of trust act itself, approves of the use of agents” for disclosed principals. 175 Wn.2d at 106-07, 112. The Court’s concern in *Bain* stemmed from the fact that, on the limited record before it, the flawed assignment of the deed of trust—not the actual deed of

trust—did not indicate whether MERS had any principal, let alone a disclosed one, at the time of foreclosure initiation. *Id.* at 116-17; *see also id.* at 105 (“MERS’s role [is] plainly laid out in the deeds of trust.”) (citation omitted). But here, U.S. Bank has remained Plaintiff’s lender (and MERS’s fully disclosed principal) throughout. *See* Dkt. 2, Ex. A ¶¶ 1.6, 2.1-2.4, 2.7; Dkt. 10-1 at 1-2, 26.

Nor do the other recent court of appeals decisions Plaintiff cites compel interpreting the DTA’s presale and postsale remedy provisions, or their legislative history, as permitting a generalized damages remedy for all presale DTA violations. *See* Pl. Br. at 44 (citing *Rucker v. Novastar Mortg., Inc.*, 311 P.3d 31 (Wn. App. 2013); *Bavand v. One West Bank, FSB*, 176 Wn. App. 475 (2013)). *Rucker* did not involve presale claims, so the court did not consider the scope of presale remedies under the DTA. *See* 311 P.3d at 35. And *Frizzell* draws *Bavand* into doubt. In *Bavand*, the court held a plaintiff did not waive post-sale claims when he obtained a restraining order but failed to make the court-ordered and statutorily required payments. 309 P.3d at 644-47. Finding procedural irregularities, the court invalidated the sale. *Id.* at 649. In *Frizzell*, however, this Court held a borrower who obtains a restraining order but fails to make the payments necessary to maintain the restraining order—as in *Bavand*—waives her ability to pursue postsale actions to vacate the sale. *Frizzell*, 2013 WL 6312124, at \*6.<sup>20</sup>

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<sup>20</sup> In any event, like *Walker*, the court in *Bavand* misread *Bain* as holding MERS could never act as an agent for even a disclosed beneficiary, ignored that RCW 61.24.030(7)(a) requires the foreclosing party to prove only to the trustee (not the borrower) that it holds

### **The Court Should Not Imply a New Statutory Cause of Action.**

Ignoring the DTA's express remedies, Plaintiff asks the Court to imply a presale statutory tort for DTA violations, for which borrowers may obtain damages. Pl. Br. at 50-52 (citing *Bennett v. Hardy*, 113 Wn.2d 912, 919 (1990)). Under *Bennett*, this Court considers three factors in deciding whether to imply a statutory tort: (1) "whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted"; (2) "whether legislative intent, explicitly or implicitly, supports creating or denying a remedy"; and (3) "whether implying a remedy is consistent with the underlying purpose of the legislation." 113 Wn.2d 912, 920-21 (1990).

But "[n]o cause of action should be implied when the Legislature has provided an adequate remedy in the statute." *Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 445 (1997); *see also TAMA*, 444 U.S. at 19; *Logan*, 722 F.3d at 1172. The Court has concluded the legislature provided "[a]dequate remedies" for borrowers in the DTA's presale injunction remedy provisions. *Plein*, 149 Wn.2d at 228; *see also Donovick*, 111 Wn.2d at 417. And the DTA allows for presale monetary relief in specific situations. *See* RCW 61.24.090, .135. "In view of these express provisions for enforcing the duties imposed by [the DTA], it is highly improbable that '[the legislature] absentmindedly forgot to mention an intended'" damages remedy. *TAMA*, 444 U.S. at 20 (no implied damages remedy where statute expressly provided other remedies)

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the note, and failed to analyze RCW 61.24.127's plain language and legislative history. 309 P.3d at 643, 647-48.

(internal citation omitted); *see also Logan*, 722 F.3d at 1172 (no implied damages remedy where related statute expressly provided other remedies); *Crisman v. Pierce Cnty. Fire Protection Dist. No. 21*, 115 Wn. App. 16, 23-24 (2002) (no implied private cause of action for damages where statute expressly provided other remedies). Because the DTA provides an adequate presale injunction remedy for DTA violations and, in limited situations, presale monetary relief, the Court should decline Plaintiff's request to imply a new statutory damages remedy for presale claims for DTA violations.

Even if that were not so, the DTA explicitly and implicitly supports denying a presale damages remedy. Far from being silent on remedies, the DTA gives borrowers a broad presale injunction remedy and the right to seek presale monetary relief in certain situations. RCW 61.24.030(8)(j), .040(1)(f)(IX) & (2), .130(1); RCW 61.24.090, .135. And contrary to Plaintiff's assertion, Pl. Br. at 51, the DTA in RCW 61.24.127 preserves remedies for *postsale* claims only: borrowers can bring those claims only *after* the sale and can seek only damages, so as to protect the sale's finality. RCW 61.24.127(1)-(2); *see also Albice*, 174 Wn.2d at 580 n.2 (Stephens, J., concurring). Given this carefully structured remedial design, the Court should not imply a damages remedy for presale claims for DTA violations, unmoored to the policy decisions the legislature expressed in the DTA. *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 712 (2003) (no legislative intent to create private action where, among other

things, parties believing themselves aggrieved have other remedies); *McCandlish Elec. Co. v. Will Constr. Co.*, 107 Wn. App. 85, 97 (2001) (no implied private cause of action for damages where, among other things, “nothing in the wording of the statute support[ed]” creating that remedy).

Rather than respect the legislature’s judgment, Plaintiff appeals to the Court to legislate a generalized cause of action under the DTA for presale damages “to create financial incentives for trustees and controlling beneficiaries ... to comply with the DTA.” Pl. Br. at 52. But even without a damages remedy, “the very nature of a trustee’s role [already] leaves the trustee vulnerable to claims arising from the foreclosure process,” which in turn creates potential for litigation that is “expensive, time consuming, and emotionally draining,” contrary to the DTA’s goals. *Myers Way*, 80 Wn. App. at 667. In any event, Plaintiff’s “policy arguments should be addressed to the Legislature.” *Cazzanigi*, 132 Wn.2d at 446. This Court “will not imply a private cause of action when the drafters of a statute evidenced a contrary intent; public policy is to be declared by the Legislature, not the courts.” *Id.*

Nor would implying a new statutory tort permitting presale damages be “consistent with the underlying purpose of the legislation.” *Bennett*, 113 Wn.2d at 921. The DTA’s presale injunction remedy fulfills the Act’s primary objectives by ensuring nonjudicial foreclosures remain efficient and inexpensive, while still giving interested parties an adequate opportunity to *prevent* wrongful foreclosure. Allowing borrowers to seek

damages for all presale claims for DTA violations would contradict these goals by increasing nonjudicial foreclosure litigation (reducing efficiency and increasing cost), without enhancing borrowers' ability to *prevent* wrongful foreclosure. Because a presale claim for DTA violations "originates from the [DTA], it is necessarily limited to remedying the injuries [the DTA] was meant to address"—i.e., *preventing* wrongful foreclosure. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 598 (2003) (statutory cause of action "limited to remedying the injuries the statute was meant to address," not "broader" duties or injuries); *see also Adams v. King Cnty.*, 164 Wn.2d 640, 655-56 (2008) (refusing to imply cause of action where finding such a claim "would be inconsistent" with statute's purpose); *McCandlish Elec.*, 107 Wn. App. at 97 (same).<sup>21</sup>

**B. If the Court Implies a Presale Claim for DTA Violations, It Should Require Material Prejudice.**

The second certified question asks the Court to determine "what principles" would govern a presale claim for DTA violations under the DTA or CPA, assuming a borrower could seek damages for such a presale claim. Dkt. 48 at 3. Because a presale damages remedy for claims for

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<sup>21</sup> Plaintiff cites *Klem* for the proposition that "the underlying purpose of the DTA ... 'requires [the] trustee to be evenhanded to both sides and strictly follow the law.'" Pl. Br. at 52 (quoting *Klem*, 176 Wn.2d at 789). But that statement actually reads: "*common law and equity* requires that trustee to be evenhanded to both sides and to strictly follow the law." *Klem*, 176 Wn.2d at 789 (emphasis added). Thus, the Court was not interpreting the trustee's duties in light of the DTA's three primary objectives. Nor do Plaintiff's other cases compel a contrary conclusion. *See* Pl. Br. at 50 (citing *Walker*, 308 P.3d at 723 (failing to discuss *Bennett*'s implied statutory cause of action test); *Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 422-23 (2007) (implying remedy for child victims of sexual abuse flowed from statute's remedy for parent victims of negligent child abuse investigations and was consistent with statutory intent to impose civil consequences for failure to report on mandatory reporters)); *id.* at 51 (citing *Jackowski v. Borchelt*, 174 Wn.2d 720, 735 (2012) (noting court of appeals "did not indicate that it was creating a new cause of action and did not apply" *Bennett*, and affirming without applying *Bennett*)).

DTA violations does not exist—expressly or impliedly—the Court need not answer this question. In fact, the need for this question reflects the amorphous nature of the claim Plaintiff seeks to assert: because the legislature never created the remedy she now asks the Court to create, no standards exist to guide its resolution. But if the Court decides a borrower may obtain damages for a presale claim for DTA violations, it should hold that, at a minimum, as for postsale DTA claims, borrowers must show the trustee’s DTA violation caused material prejudice and actual damages.

***Plaintiffs Must Show Prejudice.*** Plaintiff asks the Court to “clarify some of the means by which DTA participants can violate the requirements of the Act and subject themselves to liability.” Pl. Br. at 27. Washington courts have already determined the principles of a postsale claim against a trustee for DTA violations. *See, e.g., Udall*, 159 Wn.2d at 911; *Albice*, 174 Wn.2d at 567-69. Specifically, a plaintiff alleging a DTA violation must show prejudice. *See Udall*, 159 Wn.2d at 915-16; *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112 (1988); *Albice v. Premier Mortg. Serv. of Wash.*, 157 Wn. App. 912, 933 (2010), *aff’d* 174 Wn.2d 560 (2012); *Amresco Ind. Funding*, 129 Wn. App. at 537; *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 510 n.17 (1988); *Steward*, 51 Wn. App. at 514.<sup>22</sup> The legislature codified this requirement in RCW 61.24.127(1)(c), which requires the plaintiff to show a “[f]ailure

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<sup>22</sup> *See also* Marjorie Dick Rombauer, 27 Wash. Prac.: Creditors’ Remedies—Debtors’ Relief § 3.41 (1998) (“[E]ven though the [Deed of Trust Act] has not been complied with strictly in the foreclosure process, the foreclosure may still be deemed to be effective and complete if a complaining party is not able to demonstrate prejudice from technical violations of the Act.”).

of the trustee to materially comply with” the DTA. “To be material, a statutory failure must significantly affect some right of the forfeited party.” *Galladora v. Richter*, 52 Wn. App. 778, 783 (1988) (interpreting statute modeled on DTA) (citations and internal quotation marks omitted). Courts have refused to set aside sales that “exhibit[] technical, formal error” absent a “showing that the borrower had been harmed or prejudiced.” *Udall*, 159 Wn.2d at 915 (citation omitted).<sup>23</sup>

The requirement that plaintiffs show a DTA violation caused material prejudice makes sense, as the DTA contains many provisions aimed not at protecting borrowers but, instead, at protecting *others*, such as junior lienholders and bona fide purchasers. *See, e.g.*, RCW 61.24.060 (rights of purchaser); RCW 61.24.080 (disposition of proceeds of sale). *Cf. Galladora*, 52 Wn. App. at 783 & n.4. Ultimately, whether a violation was material or caused prejudice will turn on the facts. *See Bain*, 175 Wn.2d at 111-14 (declining to answer certified question turning on facts). Aside from the absence of a sale and a trustee’s material DTA violation, neither the DTA nor the common law provide guidance as to remaining elements, limitations periods, or defenses—because the legislature chose not to create the remedy. *Reese*, 736 S.W.2d at 373 (refusing to infer wrongful foreclosure elements because task best suited to legislature).

Plaintiff argues every DTA violation is actionable because the

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<sup>23</sup> Indeed, in *Udall* this Court reversed a decision voiding a nonjudicial foreclosure based on a defective sale because the defect did “not injure the borrower’s interests,” since the “debt secured by the trustee’s deed is *per se* satisfied by the foreclosure sale due to the Act’s antideficiency provision.” *Id.* at 915-16 & n.8.

Court must strictly construe the DTA in the borrower's favor. *See* Pl. Br. at 30-31, 35-36. MERS and U.S. Bank agree the Court strictly construes the DTA in a borrower's favor. *Albice*, 174 Wn.2d at 567. But that principle does not make *every* DTA violation actionable (or a per se CPA violation). "While strict compliance is ideal, it is far from certain that failure to comply with every statutory mandate will prejudice the interest-holder." *Id.* at 581 n.4 (Stephens, J., concurring).

Plaintiff's repeated emphasis on strict construction of the DTA, at the expense of the materiality requirement, conflates strict statutory construction with strict liability. *See* Pl. Br. at 9, 30-31, 35-36, 49. Taken to the extreme, Plaintiff would have this Court conclude that any minor technical defect—such as minor typographical errors—establishes liability and requires compensation. But the DTA is not a strict liability statute:

The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an ambush from which an adversary can overwhelm him for an immaterial misstep. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed, and it is never employed otherwise.

*United Cork Cos. v. Volland*, 365 Ill. 564, 572 (1937) (foreclosure case) (cited in 3 Sutherland Statutory Construction § 61:3 (7th ed. 2013)).

***The Legislature Has Limited any Damages Remedy for DTA Violations to a Trustee's Material Violation of the DTA.*** Plaintiff asks the Court to "identify those persons and/or entities who may be held liable for the breach of duties under the DTA and/or claims under the CPA related to the wrongful initiation of a nonjudicial foreclosure sale." Pl. Br.

at 26. To the extent the second question asks the Court to decide only the elements of a presale DTA violation claim for which a plaintiff may obtain damages, this question exceeds the certified questions. In any event, the legislature answered this question in RCW 61.24.127(1)(c). By its terms, that statute limits a borrower's postsale claim for DTA violations to the "[f]ailure of the *trustee* to materially comply" with the Act. RCW 61.24.127(1)(c) (emphasis added). The statute's plain language reflects the legislature's policy choice to limit liability to the trustee, who conducts the sale, not the beneficiary (or loan servicer). If the Court implies a presale damages remedy under RCW 61.24.127(1)(c), it should limit the claim to a trustee's violations. *See State v. Gossage*, 165 Wn.2d 1, 7 (2008) (court must enforce statute as written).

Plaintiff relies on *Walker* to urge a contrary result. Pl. Br. at 26. Although *Walker* acknowledged RCW 61.24.127(1)(c) "refers only" to a trustee's material DTA violations, 176 Wn. App. at 313, the court decided it could ignore this language because in *Klem* this Court contemplated that under the *CPA*, an agency relationship between a beneficiary and trustee might permit a borrower to pursue a CPA claim against a beneficiary: "Here, we can plausibly hypothesize Select controlling Quality's actions violating the DTA." *Id.* (quoting *Klem*, 176 Wn.2d at 791 n.12). But there, the record showed the trustee deferred entirely to the beneficiary. Further, the Court in *Klem* did not interpret the DTA and did not hold the CPA amends the plain language of the DTA. The Court should reject

*Walker*'s effort to read RCW 61.24.127 as if it were not limited to the trustee's DTA violations.<sup>24</sup>

***Plaintiffs Must Show a Violation of the DTA.*** Likewise, the Court should limit any presale damages claim to a violation of the procedural requirements *of the DTA*. That a borrower can restrain a sale on any legal or equitable ground does not mean that *any* legal or equitable ground for restraint would also entitle the borrower to damages under the DTA. For example, borrowers often base DTA claims on speculation the beneficiary might not hold the note. But the legislature decided the beneficiary must prove its status as note holder to the *trustee*, not the borrower. RCW 61.24.030(7)(a). “[U]nfounded curiosity or misguided hopes” over the note’s location do not bear on the DTA’s procedural requirements, and claims such as these cannot form the basis for DTA liability. *Barton v. JPMorgan Chase Bank, N.A.*, 20013 WL 5574429, \*1 (W.D. Wash. 2013). Any DTA liability must be tied to an existing duty under the DTA.

***Plaintiffs Must Show Actual Damages.*** A plaintiff asserting a DTA violation claim must also show the alleged DTA violation caused her injury and actual damages. *See Udall*, 159 Wn.2d at 916. “[A]n essential element of a cause of action based upon negligence or ‘wrongful’ acts ... is actual loss or damages.” *Haslund v. Seattle*, 86 Wn.2d 607, 619 (1976). “The mere danger of future harm, unaccompanied by present damage, will

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<sup>24</sup> Nor do *Bavand* or *Rucker* support deviating from the words of RCW 61.24.127(1)(c). *See* Pl. Br. at 26 (citing *Bavand*, 176 Wn. App. at 649 (reversing without discussing .127’s limitation of DTA violation claims to a trustee’s material violation); *Rucker*, 311 P.3d at 39 (court did not address application of .127 to non-trustees because plaintiffs “[did] not seek damages based upon” the alleged DTA violation)).

not support” liability. *Id.* (quoting *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219 (1975)). Borrowers cannot satisfy this element based solely on speculation that a nonjudicial foreclosure sale might occur in the future, or that a technical error might occur during a future foreclosure proceeding, without any evidence of actual present damage.

Relying on *Walker*, however, Plaintiff appears to argue the Court should apply the CPA’s injury principles to claims for DTA violations. Pl. Br. at 52-53. The Court need not invoke CPA principles to determine the elements of a presale claim for DTA violations (a trustee’s material violation of the DTA that caused prejudice and actual damages). But if this Court accepts Plaintiff’s invitation, it should clarify that borrowers may not satisfy the CPA’s injury requirement by resorting to emotional distress or, as a general matter, attorney’s fees. Plaintiff acknowledges the CPA requires her to show “injury to [her] in [her] business or property.” *Id.* at 52. Plaintiff alleges “significant emotional distress ... anxiety, sleeplessness, headaches and other physical symptoms.” Dkt. 2, Ex. A ¶ 2.17. But “damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57 (2009).

Plaintiff also suggests (again based on *Walker*) that she can satisfy the CPA’s injury requirement because she paid a lawyer to bring this lawsuit or to participate in mediation under the FFA. *See* Pl. Br. at 42-43 (citing *Walker*, 308 P.3d at 722-28). In *Panag*, however, the Court clarified “consulting an attorney to institute a CPA claim” does not show

injury to business or property. 166 Wn.2d at 62.<sup>25</sup> And the voluntary costs of availing oneself of potential statutory rights—here, mediation under the FFA—cannot be injury. If it were, every borrower unhappy with the outcome of a mediation would have CPA injury. See *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622, \*2-3 (W.D. Wash. 2013) (CPA injury lacking where, among other things, plaintiffs “would have paid an attorney to attend the mediation session even if Wells Fargo *had* mediated in good faith” (emphasis in original)). “To hold otherwise would be to invite [debtors] in most, if not all, routine collection actions to allege CPA violations” in response. *Sign-O-Lite Signs v. DeLaurenti*, 64 Wn. App 553, 563-64 (1992). To the extent it concluded a plaintiff may establish CPA injury by paying a lawyer, *Walker* misread *Panag*.

**C. The Court Should Decline Plaintiffs’ Invitation to Go Beyond the Certified Questions.**

Plaintiff invites the Court to go beyond the certified questions to “clarify some of the means by which DTA participants can violate the requirements of the Act and subject themselves to liability under the DTA and CPA.” Pl. Br. at 27. But as Plaintiff admits, the Court has already held this type of question fact specific, particularly where, as here, the parties have not litigated the merits of Plaintiff’s remaining claims. See *id.* at 28 (quoting *Bain*, 175 Wn.2d at 89). Answering this question would exceed the scope of the certified questions. See *La.-Pac. Corp.*, 131 Wn.2d at 604; RCW 2.60.030. Plaintiff also asks the Court to rule that

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<sup>25</sup> Plaintiff relies on superseded case law in arguing otherwise. See Pl. Br. at 53 (citing *St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 659 (1983)).

only the “owner” of the loan may initiate nonjudicial foreclosure, not the “noteholder,” despite the plain language of RCW 61.24.005(2). Pl. Br. at 25-26. But as Plaintiff recognizes, the Court answered this question in *Bain* and should not address it again here. *Id.* at 27-28, 33-34.

## VI. CONCLUSION

For these reasons, the Court should answer the first question “no,” and hold a plaintiff may not seek damages in a claim for DTA violations absent a completed trustee’s sale. If the Court were to answer the first question “yes,” it should hold a plaintiff bringing such a claim must show the trustee’s DTA violations caused material prejudice and actual damages.

RESPECTFULLY SUBMITTED December 13, 2013.

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To the Clerk of the Court:

I am attaching for filing in the above-referenced case:

1. Defendants' Mortgage Electronic Registration Systems, Inc. and U.S. Bank N.A.'s Answering Brief on Certified Questions, and
2. Proof of Service

Thank you.

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