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Supreme Court No. 89343-8

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

FLORENCE R. FRIAS

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC.; LSI TITLE AGENCY,
INC.; U.S. BANK, N.A.; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.; and DOE DEFENDANTS 1 through 20,

Defendants.

**PLAINTIFF FLORENCE R. FRIAS' OPENING BRIEF ON
QUESTIONS CERTIFIED TO THE SUPREME COURT BY THE
UNITED STATES DISTRICT COURT**

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INTRODUCTION

The record in this case is replete with violations of the Deed of Trust Act, RCW 61.24 (“DTA”), as alleged in detail by Plaintiff in her Complaint. The issue on the certified questions before the Court is not whether Defendants committed those violations, but whether, based on those violations, (1) Plaintiff may state a claim for damages under the DTA and/or the Consumer Protection Act (“CPA”) relating to Defendants’ breach of their duties under the DTA and/or their failure to adhere to the requirements of the DTA, in the absence of a completed foreclosure sale, and (2) if so, what principles govern Plaintiff’s claims for damages under the DTA and CPA.

Under Washington law, and as a matter of public policy, the answer to the first question must be yes. Plaintiff may assert a damages claim for the injuries she suffered as a result of Defendants’ violations of their duties under the DTA and associated unfair or deceptive acts under the CPA. This is just as true in the absence of a completed foreclosure sale as it is after a sale, where such claims are indisputably recognized. Consistent with the language of the DTA and the CPA, the legislative history of RCW 61.24.127, and the public policy of this State, this Court should hold, just as the Court of Appeals did in *Walker v. Quality Loan Service Corp.*, ___ Wn. App. ___, 308 P.3d 716, 720-24 (2013), that a borrower may assert a damages claim for injuries caused by violations of the DTA and/or CPA such as the violations committed by Defendants in this case, even if no foreclosure sale occurred.

With regard to the second question, the principles that should govern Plaintiff's claims under the DTA and the CPA are the same well-established principles that Washington courts apply to other statutory torts and CPA claims. As the Court of Appeals stated in *Walker*, a claim for pre-foreclosure damages under the DTA is simply a "cause of action for damages . . . based upon a trustee's failure to comply with the DTA, causing damage to the borrower." *Walker*, 308 P.3d at 721.¹ Similarly, the elements of Plaintiff's CPA claim for injuries suffered as a result of Defendants' pre-foreclosure unfair or deceptive acts, which include their DTA violations, are the same principles that govern any other CPA claim under the standard *Hangman Ridge* factors. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013).

As described more fully below, Ms. Frias, the Plaintiff in these proceedings, has faced repeated attempts to conduct a trustee's sale of her home, all while she pursued relief under federal home loan modification programs and the Washington foreclosure mediation program. The Defendants have refused to comply with the requirements of the DTA, but rather, have collaborated to give the appearance that LSI and Asset Foreclosure, entities that cannot act as trustees in Washington, were free to

¹ Such liability may extend to a controlling beneficiary under agency principles. As the Court stated in *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 791 n.12, 295 P.3d 1179 (2013), "[w]here the beneficiary so controls the trustee as to make the trustee a mere agent of the beneficiary, then as principal, the beneficiary may be liable for the acts of its agent." *See also Walker*, 308 P.3d at 724 ("[W]e can plausibly hypothesize Select controlling Quality's actions violating the DTA").

pursue the foreclosure, and in fact, held an auction while Ms. Frias was in foreclosure mediation and violated other portions of the DTA. Ms. Frias has suffered injury and damages as a result of the Defendants' actions in initiating and pursuing a trustee's sale of her home, up to the point of calling it for auction. Accordingly, Ms. Frias respectfully urges the Court to consider the certified questions herein, which bear not only upon her own claims but those of other Washington homeowners facing improper attempts to foreclose upon their homes by purported foreclosing trustees who are not acting in conformity with the strict requirements of the DTA, and by purported "beneficiaries" such as Defendants U.S. Bank and MERS, who similarly violate the requirements of the DTA and engage in unfair and deceptive acts in relation to nonjudicial foreclosures.

**STATEMENT OF ISSUES PRESENTED BY THE CERTIFIED
QUESTIONS AND BRIEF ANSWERS THERETO**

Judge Pechman of the U.S. District Court, Western District of
Washington, has framed the certified questions as follows:

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?

Dkt. No. 48, 3. Judge Pechman also noted, *id.*, that this Court may reformulate the questions to the extent that it deems relevant, citing to *Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.*, 556 F.3d 920, 922

(9th Cir. 2009).

The recent foreclosure opinions of this Court and the intermediate appellate court decisions which have followed and relied on them make clear that under Washington law, a plaintiff may state a claim for damages relating to a breach of duties under the DTA and/or failure to adhere to the statutory requirements of the DTA even in the absence of a completed trustee's sale of the real property.² These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. As Division I emphasized in *Walker*, “No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.” *Walker*, 308 P.3d at 724.

Since Washington case law makes clear that a plaintiff may pursue these claims, we must look to the same cases to instruct us as to what principles guide the plaintiff’s claims under the DTA and the CPA. *Id.* Citing to *Klem*, the *Walker* court noted that it “supports our conclusion that the specific remedies provided in the DTA are not exclusive.” *Walker*, 308 P.3d at 721. With the exception of *Albice*, all of the recent

² See *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Rucker v. Novastar Mortg., Inc.*, ___ Wn.App. ___, ___ P.3d ___, *15-16 (Ct. App. Div. I No. 67770-5-1) (published by order of October 2, 2013); *Bavand v. OneWest Bank, FSB*, ___ P.3d ___, ___ Wn. App. ___, No. 68217-2-I, * (Wash. Ct. App. Div. I, Sept. 9, 2013); *Walker v. Quality Loan Service Corp.*, ___ Wn. App. ___, 308 P.3d 716, 720-24 (2013); *Frizzell v. Murray*, 170 Wn. App. 420, 283 P.3d 1139 (2012), *review granted*, 176 Wn.2d 1011 (2013).

Washington foreclosure cases have consistently held that breach of duties and failure to adhere to the DTA's statutory requirements also constitute violations of the CPA and subject defendants to liability thereunder.

STANDARD OF REVIEW FOR CERTIFIED QUESTIONS

Certified questions are questions of law that are reviewed *de novo*. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). This Court considers the certified questions not in the abstract but based on the certified record provided by the federal court. *Id.* (citing RCW 2.60.030(2)). In addressing the certified questions, the Court may consider related issues it determines are relevant and necessary to address the certified questions as framed, and it may in its discretion reformulate a question as appropriate.³

STATEMENT OF THE CASE

On or about September 29, 2008, Ms. Frias obtained a new mortgage loan with Defendant U.S. Bank. In connection with that mortgage loan, she signed a Promissory Note and a Deed of Trust which identified U.S. Bank as the "Lender." Defendant MERS was listed as the "beneficiary" on the Deed of Trust and as the "nominee" for "Lender" and its successors and assigns. The loan was an FHA insured loan and Ms.

³ See RCW 2.60.020; see also Order Certifying Questions to the Washington Supreme Court, Dkt. No. 48 at 3 ("This Court does not intend its framing of the questions to restrict the Washington State Supreme Court's consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified questions, it may in its discretion reformulate the questions.") (citing *Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.*, 556 F.3d 920, 922 (9th Cir. 2009)).

Frias was required to pay for mortgage insurance on the loan. In 2007, prior to obtaining the loan, Ms. Frias had had knee surgery and resulting physical therapy. Shortly after obtaining the mortgage loan, it became clear that she would need additional surgery and that she had to apply for disability. She was not approved for disability until March 2010. By then, she had depleted her savings in paying for her mortgage and other expenses. Dkt. No. 2 (Verification of State Court Records), 9-10 ¶¶ 2.1-2.2 (excerpt of Ms. Frias' Complaint).

Using her savings, Ms. Frias kept up with her mortgage payments until August 2009, when she could not sustain the payments any longer. At that time, she was making her mortgage payments to U.S. Bank. As soon as she began having financial difficulties, Ms. Frias contacted representatives of U.S. Bank in an attempt to obtain information about applying for a home loan modification to keep her home. Ms. Frias submitted paperwork and communicated with U.S. Bank for a significant period of time trying to obtain a loan modification. *Id.*, 10 ¶¶ 2.2-2.3.

While she was not getting any response on her applications for a loan modification, Ms. Frias received a Notice of Default document posted at her home on or about April 14, 2010. The Notice of Default listed the alleged amount of the arrears on the loan. When Ms. Frias could not cure the arrears, but had not received a response on her application for a loan modification, she received a Notice of Trustee's Sale ("NOTS") on or about May 17, 2010 indicating that her home was being foreclosed by MERS. The purported foreclosing trustee was LSI, even though it could

not act as a foreclosing trustee under the requirements of Washington law and it had never been appointed as the successor trustee by the “noteholder”. RCW 61.24.005(2). *Id.*, 10-11 ¶ 2.4.

Although Ms. Frias did not have the document at the time she filed her Complaint, LSI attached to its Motion a copy of the Appointment of Successor Trustee document which was recorded in the records of Snohomish County Washington on May 19, 2010. (Dkt. 10-1) The document was signed by Lisa Rogers, “Assistant Secretary” for MERS on May 14, 2010, and represented that MERS was appointing LSI as the successor trustee under Ms. Frias’ Deed of Trust. *Id.* This document makes clear that MERS purported to appoint a successor trustee when it did not have the legal authority under Washington law to make such appointment because it was not the “noteholder” or the loan owner. RCW 61.24.005(2); 61.24.030(7). Even if LSI could have acted as a foreclosing trustee under Washington law, MERS could not have authority to make such an appointment because it was never the “noteholder” or owner of Ms. Frias’ loan. *Id.* Further, the DTA makes clear that any appointment of successor trustee document is only valid, if it can be valid at all, upon recording. RCW 61.24.010(4). Here, the appointment document was recorded immediately prior to the recording of the NOTS, making it clear that the NOTS was not signed after the recording of the appointment document. Thus, by no means could LSI ever have become a successor trustee under Ms. Frias’ Deed of Trust.

Further, and independently, LSI also could not act as a foreclosing

trustee because although it was licensed as a title insurance agency in Washington, it did not have a street address in Washington with a physical presence at the office and a telephone phone at that location. RCW 61.24.010(1)(a) and 61.24.030(6). LSI listed an office address at 1111 Main Street #200, Vancouver, WA on Ms. Frias' foreclosure documents, but it had neither a physical presence there nor a telephone number, and the address was a sham. Dkt. No. 2, 7-8 ¶ 1.5. The DTA requires that a foreclosing trustee have a physical address in the State and a telephone number located at that address for use by those needing to obtain information about the pending foreclosure, but LSI's office does not meet these criteria. RCW 61.24.030(6). Further, Defendant LSI entered into a Consent Decree with the Washington Department of Insurance relating to its actions in connection with foreclosures in Washington in which it admitted that it did not maintain a physical presence in Washington, and it agreed not to act as a foreclosing trustee in the future and paid a monetary fine. Dkt. No. 17-4 (Consent Order). LSI was also sued by the State of Washington in January 2013 in connection with the same allegations. Request for Judicial Notice, Ex. A.

Although the NOTS listed LSI as the purported foreclosing trustee, Ms. Frias maintains that it was actually Asset Foreclosure, an entity that operates out of California, which was acting as the actual foreclosure trustee. Dkt. No. 2, 10-11 ¶ 2.4. LSI allowed itself to be listed as the foreclosing trustee on foreclosure documents relating to foreclosures in the State of Washington even though it cannot qualify as a trustee, while at all

times, Asset Foreclosure performed all functions of the foreclosing trustee. This is consistent with the Consent Decree LSI entered into with the Department of Insurance and the claims made by the Washington Attorney General. Asset Foreclosure is also an entity that cannot qualify to act as a foreclosing trustee under Washington law. It is a California corporation that is not registered in Washington and there is no record of it being registered with the Washington Department of Insurance as a title insurance company or title insurance agent. *See* Dkt. No. 17-2; Request for Judicial Notice, Ex. B. RCW 61.24.010(2). Just like Defendant LSI, Asset Foreclosure does not have a physical address in Washington and no telephone number connected to such an address. RCW 61.24.030(6).

Despite the fact that neither of these entities had any legal authority under Washington law to act as a foreclosing trustee, Defendants LSI and Asset Foreclosure, acting in concert, caused a NOTS document, which was returnable to Asset Foreclosure in Woodland Hills, California to be served upon Ms. Frias at her residence. The NOTS was signed by Norie Vergara, Sr., who clearly indicated she was employed by Asset Foreclosure in California on the document. Ms. Vergara indicated that she was signing on behalf of Asset Foreclosure as an “agent” for LSI. Dkt. No. 2, 10-11 ¶ 2.4. There are no provisions in the DTA for a foreclosing trustee to act through an “agent” when issuing the NOTS. In fact, the DTA has very specific provisions about who may act as a trustee, which the Defendants intentionally violated. RCW 61.24.010(1). (The only acts that the DTA by its terms allows to be performed by “agents” or

“authorized agents” are those under RCW 61.24.031(1) (power to issue a notice of default, to make contact with borrower on beneficiary’s behalf and to schedule and conduct meeting between beneficiary and borrower prior to notice of default issuance); 61.24.040(4) (power to call trustee’s auction); 61.24.050 (power to void trustee’s sale); 61.24.143 (power to notice residents of rental property of impending trustee’s sale); and 61.24.163(8)(a) (power to represent beneficiary at mediation)).

The NOTS was recorded in the records of Snohomish County, Washington on May 19, 2010 by Asset Foreclosure, further demonstrating its involvement in the foreclosure as the acting trustee and that the sale was being initiated in the name of MERS. This 2010 attempted foreclosure sale was discontinued by way of a recorded Discontinuance of Trustee’s Sale a year later on May 12, 2011. Because of her continued financial problems in 2010, Ms. Frias was required to file for Chapter 7 bankruptcy protection and she received a discharge. Presumably, this was the reason that the first attempted trustee’s sale was discontinued. Ms. Frias continued to try to get a loan modification during this period of time, but to no avail. Dkt. No. 2, 11 ¶¶ 2.5-2.6.

After two years of trying, Ms. Frias finally received a loan modification offer from U.S. Bank on or about July 1, 2011 which would have had her paying 52% of her gross income as a mortgage payment. Obviously, she could not afford such a payment, even after her bankruptcy discharge. In another letter, dated July 7, 2011, sent to Ms. Frias by U.S. Bank, it asserted that she was not eligible to be considered for a HAMP

loan modification because she had filed for bankruptcy protection in 2010 and had received a discharge. She did not reaffirm the mortgage loan debt. However, the assertion that Ms. Frias was not eligible for a HAMP loan modification because of the bankruptcy was patently untrue. HAMP Guidelines make clear that a Chapter 7 bankruptcy does not preclude borrowers from participating in HAMP. Request for Judicial Notice, Ex. D. This false assertion demonstrates the lengths to which U.S. Bank was willing to go to deny Ms. Frias even the relief that was contemplated through the HAMP program. *Id.*, ¶ 2.6.

Meanwhile, on or about May 19, 2011, Ms. Frias had received another NOTS document posted on her door and she received numerous copies in the mail. This NOTS was also signed by Ms. Solano as an alleged “agent” for LSI by Asset Foreclosure on May 19, 2011. Over Ms. Solano’s signature was listed an address in Bellevue, Washington, but as indicated in the Consent Decree signed in October and November, 2011, LSI did not have a physical address in Washington. This document relied upon the previously issued Notice of Default and was again returnable after recording to Asset Foreclosure in California. This NOTS was recorded on May 20, 2011 in the records of Snohomish County, Washington. This time the NOTS indicated that U.S. Bank was the “beneficiary” who was initiating the foreclosure sale.

Seconds before the second NOTS was recorded in Snohomish County, an Assignment of Deed of Trust was recorded. This document was signed by Brenda Wettstain, an alleged “Assistant Secretary” of

MERS. The document was signed in Daviess County, Kentucky. In reality, Ms. Wettstain is an employee of U.S. Bank and by way of her signature on the Assignment, purported to “assign” MERS’ alleged interest in Ms. Frias’ Deed of Trust to U.S. Bank. Dkt. No. 2, 12 ¶ 2.7. Ms. Frias maintains that MERS did not have any interest in the Deed of Trust that could be assigned independent of the Promissory Note signed by Ms. Frias because under Washington law, the Deed of Trust follows the Note. *See Bain v. Metropolitan Mortg. Grp.*, 175 Wn.2d 83, 104 (2012) (“Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around. MERS is not a ‘holder’ under the plain language of the statute.”).

Included with the second NOTS document was a Notice of Foreclosure Sale document, as required by the DTA. RCW 61.24.040. This document included an itemization of the amounts being charged to Ms. Frias that would need to be paid in order to stop the foreclosure sale, and Ms. Frias explained these excessive and unreasonable charges in detail in her complaint. Dkt. No. 2, 12-13.

While Ms. Frias was being offered time to review the loan modification offer that was not feasible, the foreclosure sale date remained unchanged. This action, offering her a modification while simultaneously proceeding with a foreclosure, is called “dual tracking” and is an abusive practice that has been the subject of federal agency enforcement actions against major servicers of mortgage loans. *See Request for Judicial Notice, Ex. D.* It is inconsistent with HAMP and other federal plans and

policies designed to allow borrowers to try to save their homes, including those promulgated by HUD, the government agency that includes FHA, the entity that has guaranteed payment on Ms. Frias' home in the event that the owner of the loan incurs a loss. Dkt. No. 2, 10 ¶ 2.1.

Ms. Frias eventually contacted a housing counselor at Parkview Services to seek assistance. Through the staff at Parkview, she made a request to participate in foreclosure mediation under Washington's Foreclosure Fairness Act, RCW 61.24.163 *et seq.* ("FFA"). The referral to FFA mediation was made on August 1, 2011 and a mediator was appointed on August 5, 2011. As soon as the referral was received by the Washington Department of Commerce, the foreclosure sale that had been initiated against Ms. Frias' home should have been put "on hold", as the foreclosure could not proceed until after the mediation was complete. RCW 61.24.163(16). As of August 23, 2011, the staff at Parkview had confirmed that LSI and/or Asset Foreclosure was planning on proceeding with the foreclosure sale by speaking with Lilian Solano, an employee of Asset Foreclosure. Dkt. No. 2, 14 ¶ 2.10. The fact that information about the pending foreclosure sale came from Asset Foreclosure makes it clear just who was acting as the purported foreclosure trustee. More importantly, Asset Foreclosure and LSI apparently did proceed with the foreclosure sale while Ms. Frias was in the mediation process, in direct violation of the requirements of the FFA. RCW 61.24.163(16).

Because the foreclosure auction proceeded in violation of the requirements of the FFA, Asset Foreclosure and LSI were required to

“unwind” that foreclosure auction. The foreclosure auction was conducted on September 23, 2011 and the successful bidder was purportedly U.S. Bank. A Trustee’s Deed was never recorded in the records of Snohomish County, Washington, but information about the sale was provided during the mediation process. Dkt. No. 2, 14 ¶ 2.10. A Notice of Discontinuance of Trustee’s Sale was apparently recorded in the records of Snohomish County, Washington on October 31, 2011, signed by Asset Foreclosure acting as a supposed “agent” for LSI on October 28, 2011. (Dkt. 10-1).

At the first scheduled mediation session on September 12, 2011, no one showed up on behalf of the alleged “beneficiary,” which was identified as U.S. Bank. U.S. Bank did not attend the session, even after a call to its attorneys. The mediation session was continued as required under the FFA, the foreclosure auction occurred anyway in contravention of the statute’s requirements. Dkt. No. 2, 14-15 ¶ 2.11.

Ms. Frias attended the first and second mediation session with a Parkview representative. The second session took place on October 11, 2011, where she was advised for the first time that the foreclosure auction had occurred in violation of the requirements of the FFA. She was told that because a trustee’s deed was not issued, the “beneficiary” did not complete the foreclosure sale. In spite of this assertion, at the end of 2011, Ms. Frias received a 1099-A form from U.S. Bank that was also sent to the IRS indicating that on September 23, 2011 it had acquired her property and that the “Balance of Principal Outstanding” was \$211,131.13. Ms. Frias has never seen any indication that this false information given to the

IRS has been corrected by U.S. Bank. Also at the second mediation session, U.S. Bank did not provide the documents that it was required to produce under the FFA. Dkt. No. 2, 15 ¶¶ 2.12-2.15.

Because of the refusal by U.S. Bank to participate as required under the FFA, a third mediation session was scheduled. At the third session, U.S. Bank still had not provided all required documents. As required under the FFA, the mediator and Ms. Frias' housing counselor ran the required inputs for the NPV Test (Net Present Value), which indicates whether the loan owner will make more money by foreclosing or by modifying the loan. The mediator ran the required NPV and the results were a "PASS" for Ms. Frias, meaning that the owner of the loan would make more money by modifying the loan. Nevertheless, U.S. Bank refused to consider this information and refused to offer Ms. Frias an affordable loan modification. Presumably, U.S. Bank was not interested in modifying the loan because it intends to seek recovery on any loan losses from the FHA – thereby obtaining funds from U.S. citizens rather than making a rational business decision and minimizing losses. Ms. Frias also maintains that U.S. Bank has not complied with its requirements under the specific FHA Guidelines for modifying loans that the FHA has insured. Request for Judicial Notice, Ex. E.

As a result of the actions of U.S. Bank during the multiple mediation sessions and its refusal to consider the NPV analysis, the mediator made a finding that U.S. Bank failed to participate in the mediation in good faith, which is a *per se* violation of the Washington

CPA. Dkt. No. 2, 15-16 ¶¶ 2.15-2.16; RCW 61.24.135(2); RCW 19.86, *et seq.* Approximately two years later, on May 8, 2013, an officer of LSI located in California executed a Resignation of Trustee document that was recorded in the records of Snohomish County, Washington on the same day. This appears to be a blatant attempt by LSI to relieve itself from liability to Ms. Frias. (Dkt. 10-1)

Ms. Frias is now in limbo. It appears that she is still on title to her house but does not have a loan modification. Ms. Frias has been forced to take action in order to stop the wrongfully initiated foreclosures, she has credit damage from the two recorded NOTS documents and has suffered significant emotional distress. She has also suffered from anxiety and other physical symptoms because she is constantly worried about becoming homeless. Dkt. No. 2, 16 ¶ 2.16.

This case was originally filed in the Snohomish County Superior Court and was subsequently removed to federal court based upon diversity jurisdiction. Ms. Frias asserted claims for issuance of a temporary restraining order and preliminary injunction, violations of the CPA, breach of duties under the DTA, including the FFA and negligent and intentional misrepresentation Dkt. No. 2, 6-22. LSI moved to dismiss Ms. Frias' claims, contending that she had failed to state a claim, which was joined by Asset Foreclosure. Dkt. Nos. 10 and 11. Ms. Frias responded to those motions, but also moved to stay the proceedings so that certified questions might first be posed to and answered by this Court. Dkt. Nos. 22 and 23. Defendants U.S. Bank and MERS also joined the motion to dismiss only

as to the preliminary injunction cause of action, Dkt. No. 12, 2, and to “otherwise support the motion to dismiss.” Dkt. No. 34, 4 (Order on Motion to Dismiss).⁴ Judge Pechman denied Ms. Frias’ motions and entered an Order dismissing all of Ms. Frias’ claims as to LSI and Asset Foreclosure and her claim for preliminary injunction against U.S. Bank and MERS. *Id.* The other causes of action pled by Ms. Frias against U.S. Bank and MERS were not dismissed and none of those issues were briefed. *Id.*

ARGUMENT

Despite this Court’s repeated clarifications that the DTA must be construed to protect vulnerable homeowners, several federal trial court orders have recently held that Washington offers no DTA remedy to homeowners except where a trustee’s sale of real property is completed. These courts have reached this illogical conclusion based upon their own analysis of state law, and in reliance on one unpublished Washington Court of Appeals opinion. While no Washington authority directly addressed this issue prior to August of 2013, at least three published Washington Court of Appeals opinions have since recognized that homeowners may have claims under the DTA where non-judicial foreclosure is wrongfully instituted or pursued, *even if a sale is not completed*. In light of the conflict between these recent state appellate

⁴ It does not appear that the District Court relied upon the briefing supplied by Defendants U.S. Bank and MERS in any way, as it was not referenced in its Orders and it should be disregarded entirely by this Court.

opinions and the federal trial court opinions to the contrary, the present case, on the questions now certified, offers this Court an opportunity to provide a definitive answer to this important and recurring issue of law.

First, Ms. Frias submits that Washington’s non-judicial foreclosure statute itself recognizes claims for damages relating to violations of the Deed of Trust Act irrespective of whether or not a trustee’s sale is completed. No textual language in the DTA limits recovery to cases where a trustee’s sale occurs. Moreover, the DTA implicitly recognizes that claims exist in the absence of a trustee’s sale, as a plaintiff’s claims *may* be “waived” if a plaintiff fails to bring them prior to a sale. *See* RCW 61.24.127; *see also Albice v. Premier Mortg. Servs.*, 174 Wn.2d 560, 569, 270 P.3d 1277 (2012) (“Waiver, however, cannot apply to all circumstances or types of postsale challenges....”). The Court of Appeals, Division I, has thoughtfully considered the goals of the DTA in its recent cases, and has concluded that claims for damages may exist even in the absence of a sale. *See Walker*, 308 P.3d at 720-24 (holding that claim for damages exists in absence of trustee’s sale, and expressly rejecting reasoning in *Vawter*). Because *Walker* takes account of recent developments in state law, it, and not federal trial court opinions, provides the most helpful guide to the issues before the Court in the present case.

Second, Ms. Frias maintains that Washington’s CPA’s familiar “injury” standard allows recovery for violations of the non-judicial foreclosure process even where consumer injury takes a form other than a completed trustee’s sale of the plaintiff’s home. As this Court recently

recognized in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), foreclosing entities' violations of the DTA may form a proper basis for claims under the CPA. However, further guidance from this Court is needed due to the ongoing controversy as to whether a CPA claim relative to abuses of the foreclosure process may stand in the absence of a foreclosure sale.

A. Washington recognizes claims for damages relating to violations of the Deed of Trust Act in the absence of a completed trustee's sale of real property.

1. Washington courts have properly held that homeowners such as Ms. Frias may pursue claims for nonjudicial foreclosures initiated in violation of the requirements of the Deed of Trust Act.

Ms. Frias has pointed out specific facts which support her claims against LSI and Asset Foreclosure related to their inability to act as foreclosing trustees under Washington law, their attempts to nonjudicially foreclose on her home; the wrongful auction of her home and the injury and damage she has suffered as a result of the actions of these defendants. Although this Court's answers to the questions posed by the district court will be of general application and not exclusively focused on the facts of this case, it is important nevertheless to focus on the specific violations alleged here. In summary, the relevant facts are as follows:

A. Defendant LSI did not have a street address located in the State of Washington with a physical presence and a telephone number answerable at that address so that service of process may be effected and so persons who need information related to their foreclosure may obtain information. RCW 61.24.030(6).

B. Defendant Asset Foreclosure is not a Washington corporation which has one officer residing within the state, nor does it meet any of the other criteria for being a foreclosure trustee under Washington law. RCW 61.24.010(1)(a). It does not have a street address located in the State of Washington with a physical presence and a telephone number answerable at that address. RCW 61.24.030(6).

C. Despite the fact that neither Defendants LSI nor Asset Foreclosure could act as a foreclosing trustee under Washington law, they nevertheless wrongfully initiated two nonjudicial foreclosure sales of Ms. Frias' real property by signing or causing to be signed, and causing to be recorded in the records of Snohomish County, Washington, documents in support of those nonjudicial foreclosure attempts. And they caused an auction of her property to occur.

D. Defendants LSI and Asset Foreclosure demanded monies from Ms. Frias which were unearned and excessive, and were therefore unreasonable under the DTA. The charges for the wrongfully initiated foreclosures have been added to Ms. Frias' loan balance.

E. Ms. Frias suffered injury and damages related to those actions as articulated hereinabove.

F. Ms. Frias also alleged that the combined actions of all of the defendants has prevented her from getting a loan modification under the requirements of the FHA Guidelines because U.S. Bank is seeking to recover fully by making a claim for reimbursement to HUD rather than modifying her loan.

See generally Dkt. No. 2, 6-16 (Ms. Frias' Complaint); *see also* Statement of the Case, *supra*.

This Court in *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, 97, 285 P.3d 34 (2012), answered three questions: who may act as the "beneficiary" under the DTA; what is the effect of someone who is not a "note holder" initiating a foreclosure; and can a plaintiff pursue a claim for violation of the CPA, RCW 19.86, *et seq.*, if an entity falsely asserts it is a "beneficiary." *Bain*, at 85-86. (The *Bain* case involved a foreclosure that was initiated in 2008, before the 2009 amendments to the DTA, including RCW 61.24.010, 61.24.030(7), 61.24.031 and 61.24.127, among others.)

Ms. Frias maintains that the person or entity with the power to cause the initiation of a nonjudicial foreclosure under the DTA must be more than the mere “noteholder” because of the requirements added to the DTA in 2009, including RCW 61.24.030(7)(a) and 61.24.030(8)(l). The “noteholder” must also be the “owner” of the loan. *Id.*

Ms. Frias maintains that in order to answer comprehensively the two broad questions posed by the district court, this Court must also 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 and the ways in which participants in the process permitted under the DTA may violate the statute. There has been recent analysis of the *Walker*, *Bavand*, and *Rucker* decisions and argument in other litigation cases wherein other similarly situated defendants have argued that claims relating to wrongful initiation of a nonjudicial foreclosure sale may only be pursued against the foreclosing trustee, and that the “beneficiary” and/or loan owner or other person or entity who instructs a trustee to foreclose in violation of the requirements of the DTA are **not** liable for those actions. *See, e.g., Rouse v. Wells Fargo Bank, N.A.*, No. 3:13-cv-5706-RBL, Dkt. No. 25, 7 (W.D. Wash. Order Granting Motion to Dismiss, Oct. 2, 2013) (“RCW 61.24.127 preserves certain claims but not Rouse’s Deed of Trust Act claims [against parties other than the trustee] here.”), Request for Judicial Notice Ex. F. The existing case law supports the position that any person or entity involved in the wrongful initiation of a nonjudicial foreclosure in

Washington may be liable to the property owner under the DTA but asks this Court for clarification on this issue as well. Further, there is a need 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 the CPA. RCW 19.86, *et seq.*

Ms. Frias also asks that the Court state with specificity whether it adopts the express rejection of the principles underpinning the *Vawter* decision as Division I of the Court of Appeals has articulated in *Walker*. This is necessary because the federal courts and some state courts have gone to great lengths to repeatedly adopt the reasoning of an unpublished Court of Appeals decision, *Krienke v. Chase Home Fin., LLC*, 140 Wn. App. 1032 (Div. II 2007), by relying upon *Pfau v. Wash. Mutual, Inc.*, No. 08-cv-00142-JLQ, 2009 WL 484448 (E.D. Wash. Feb. 24, 2009) and *Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115 (2010). *See* Dkt. Nos. 23, 5 n.1 (collecting Western District of Washington cases reiterating rule of *Krienke* and *Vawter*); 34, 5 (Order on motion to dismiss). In order to prevent further injustice to Washington state homeowners who have suffered damages for wrongfully initiated foreclosures, this Court should provide comprehensive guidance to all of the Courts of Washington, federal and state, on these issues.

In the *Bain* decision, this Court made clear that the “beneficiary” definition contained in the DTA means what it says and that a “beneficiary” must be “the holder of the promissory note or other instrument evidencing the obligation” and that entity has “the power to

appoint a trustee to proceed with a nonjudicial foreclosure on real property.” *Id.*; RCW 61.24.005(2). This Court did not determine the effect of such a misrepresentation to a homeowner and left it to the trial court to decide that issue in both cases that were consolidated in *Bain*. This Court also made clear that a homeowner may pursue a claim for a violation of the CPA based violations of the DTA, “but it will turn on the specific facts of each case.” *Id.* In spite of this language in the *Bain* decision, the District Court in this case found *Bain* did not “recognize[e] claims for damages without acknowledging that a trustee’s sale need occur”, prior to rescinding its dismissal order to certify questions to this Court. Dkt. No. 34 (Order), 6:8-15. And on that basis, the District Court dismissed Ms. Bain’s claims for violations of the DTA and CPA, relying almost entirely upon *Vawter*. *Id.*, 10-11. Ms. Frias maintains that this Court in *Bain* would certainly have held that Ms. Bain’s claims were barred if it interpreted the law to preclude claims for violation of the DTA and the CPA when no foreclosure has occurred. *Id.*

In its briefing to the District Court, LSI blatantly ignored claims regarding the improprieties in connection with the initiation of the two foreclosures and assertions it could not lawfully act as a foreclosing trustee. *See* Dkt. No. 10. Instead, LSI made the legally unsupported argument that because Ms. Frias had defaulted on her loan, there was some basis for initiating a nonjudicial foreclosure so it could not be liable to her. *Id.*, 6:12-23. Essentially, LSI asserted that because Ms. Frias was in default on the loan, it and the other defendants were free to do whatever

they pleased to initiate two foreclosures and it was irrelevant whether or not their acts were in conformity with the requirements of the Washington Deed of Trust Act. *Id.* This assertion was not supported by citation to a single case that supported its position and ignored the four Washington Supreme Court decisions—*Schroeder, Klem, Bain, and Albice*—regarding nonjudicial foreclosures which had been issued prior to the submission of the briefing. (Since then, other Washington appellate decisions have been issued which support Ms. Frias’ position.) And in fact, such an assertion – that a borrower who has defaulted on a loan cannot assert any claims for violations of the requirements of the nonjudicial foreclosure process – defies logic and the plain language of the statute. The protections afforded to persons with an interest in the real property that is the subject of a nonjudicial foreclosure under the DTA only become relevant when a default has occurred. RCW 61.24.040(f); 61.24.130. Certainly there is nothing in any of the Washington appellate court decisions which supports such an assertion and there has long been language in those decisions making it clear that adherence to the requirements of the DTA is of paramount importance. The Court should expressly reject this argument.

As the Court observed in *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 760 P.2d 350 (1988), citing to 1 V. Towne, *Wash. Prac.* § 605 (2d ed. 1976), “[F]oreclosure proceedings must conform exactly to the statute.” *Id.* at 514. “Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon a trustee is exceedingly high.” *Cox*

v. *Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

Although the standard for foreclosing trustees has been clarified by the legislature since *Cox*, the importance of adherence to the requirements of the statute remains the same and has been reiterated repeatedly by this Court and other Washington appellate courts. *See Klem, supra* at 789 (this Court “has frequently emphasized that the deed of trust act ‘must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.’”) (citations omitted); *Walker*, at 6 (“No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA’s requirements.”); RCW 61.24.010(3) and (4). As Justice Dore noted in his eloquent dissent in *Queen City*,

Relatively unsophisticated borrowers used to be able to rely on the judiciary to prevent overreaching by lenders who make it their business to obtain every advantage from the foreclosure process. *See*, RCW 61.12. Since the judiciary is not involved in deed of trust foreclosures under the Act, only the words of the Act itself stand between the borrower and the lender eager to foreclose. Unless we strictly construe the Act, that protection will erode away to zero.

Queen City, supra, at 515. This language has been cited favorably by this Court, including its decisions in *Bain* and *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007).

Moreover, as this Court stated in *Schroeder*, RCW 61.24.030, entitled “Requisites to trustee’s sale”, is “not a rights-or-privileges

creating statute. Instead, it sets up a list of ‘requisites to a trustee’s sale.’” *Schroeder v. Excelsior Mgmt. Gr., LLC*, 177 Wash.2d 94, 106, 297 P.3d 677 (2013). “These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” *Id.* at 107. Although LSI, whose briefing is relied upon entirely by the other Defendants, made these assertions as forming the basis for dismissing Ms. Frias’ claims under the CPA, its arguments are properly addressed to claims made for violations of the duties under the DTA as well. Dkt. No. 10, 5-8..

Turning to the actual arguments advanced by Defendant LSI as to why, in its view, dismissal of the claims for breach of duties under the DTA was appropriate, LSI also ignored the foreclosure decisions recently rendered by this Court and actually prevailed on its motion until the *Walker* decision was published by Division I. LSI cited generally to the *Bain* decision, but without any analysis, and continued to assert that because Ms. Frias had defaulted on her loan and no foreclosure had occurred, she could not articulate any viable causes of action. The only other foreclosure case cited, without analysis was *Vawter*. Dkt. No. 10, 9.

2. Recent Washington case law correctly concludes that homeowners may recover for abuses of the Deed of Trust Act irrespective of whether or not a trustee’s sale is completed.

In stark contrast to the dearth of analysis and authority provided by Defendant LSI in its briefing, Ms. Frias outlined the applicable Washington case law which makes clear the viability of Ms. Frias’ claims,

beginning with *Bain*. Other recent decisions by this Court, such as *Schroeder*, and the language of the DTA, support her claims.

First, the DTA is clear regarding who may appoint a successor trustee and initiate a foreclosure under the DTA:

The trustee may resign at its own election or be replaced by the *beneficiary*. The trustee shall give prompt written notice of its resignation to the *beneficiary*. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the *beneficiary* to replace the trustee, the *beneficiary* shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

RCW 61.24.010(2) (emphasis added). Defendants LSI and Asset Foreclosure do not meet the requirements for who may act as a trustee.

The *Bain* case also involved analysis of Defendant MERS' involvement as the purported "beneficiary", just as is the case here. As Ms. Frias alleged, an employee of Asset Foreclosure signed the Appointment of Successor Trustee document as though she was an officer of MERS in order to give the false appearance that MERS was the entity foreclosing on Ms. Frias' property. That same false information about the entity foreclosing on her home was included on the first NOTS issued by LSI and/or Asset Foreclosure. Dkt. No. 2, 10-11 ¶ 2.4. Further, the false assertions in the Appointment document also included the inherent

assertion that LSI was really acting as the foreclosing trustee and that it had the legal authority to act as a foreclosing trustee under Washington law, when Asset Foreclosure knew that it was really acting as the trustee, even though it could not so act under Washington law. Ms. Frias also maintains that Asset Foreclosure's attempt to appoint itself as the trustee, using the disguise of LSI, was a violation of its duties under the DTA. RCW 61.24.010(4). Dkt. No. 2, 10-11; 18-21.

An employee of U.S. Bank signed an Assignment of Deed of Trust document purporting to transfer the interest in Ms. Frias' Deed of Trust from MERS to U.S. Bank, which was then recorded by LSI and/or Asset Foreclosure in support of the continued effort at foreclosure. Dkt. No. 2, 10-11 ¶ 2.4. The Assignment was then utilized to support the second NOTS that was recorded immediately thereafter in the records of Snohomish County, Washington. *Id.* at 11, ¶ 2.5. LSI and Asset Foreclosure knew that MERS did not have any interest in Ms. Frias' Deed of Trust and nevertheless were involved in causing the Assignment to be recorded in the records of Snohomish County, presumably upon direction from US Bank. Defendants LSI and Asset Foreclosure then proceeded to create and cause to be recorded a second NOTS identifying U.S. Bank as the foreclosing entity even though neither one had been or could be appointed as the foreclosing trustee under Washington law.

As this Court noted in *Bain*, the definition of "noteholder" has remained unchanged since the definitions were added to the DTA in 1998, and is consistent with certain portions of Article 3 of the UCC, as adopted

by Washington. *Bain*, 175 Wn.2d at 103-04. Article 3 holds that the person entitled to enforce the terms of a Promissory Note is the holder, a non-holder in possession, or transferee who obtains the right to enforce directly from the holder. RCW 62A.3-203. However, it is essential to note that the DTA does *not* use the additional Article 3 language regarding who may enforce. The DTA only refers to “the holder of the note or other obligation . . .” RCW 61.24.005(2). There is nothing in the DTA which would allow a nonholder, who might otherwise be able to enforce the terms of a promissory note through other means under Article 3, to enforce the terms of the note through the initiation of a nonjudicial foreclosure. *Id.* Rather, the legislature, in enacting the DTA, has specifically limited who may initiate a non-judicial foreclosure and until 2009, that was solely and exclusively the “note holder”. RCW 61.24.005(2). In 2009, the legislature amended the DTA to require that certain sensitive actions in the foreclosure process be undertaken by the “owner” of the Note. RCW 61.24.030(7)(a)-(b), 61.24.163(5)(c).

At this juncture, there is no evidence or even an unsupported assertion that the noteholder, whoever that may be, ever instructed anyone to appoint a new trustee or initiate a foreclosure sale. There is absolutely no evidence at all about the location of Ms. Frias’ Promissory Note when the two foreclosures were initiated but even more importantly as required after 2009, , there is no evidence that the loan “owner” has appointed a successor trustee and the “owner” has never caused a nonjudicial foreclosure done in compliance with the DTA to be initiated. Dkt. No. 2,

8 ¶ 1.6, 10 ¶ 2.4. Thus, there was no basis at all for the dismissal of Ms. Frias' claims by the district court.

The importance of the foreclosing trustee adhering to the requirements of the DTA is consistently laid out in strong language in this Court's recent decisions. In *Albice v. Premier Mortg. Services*, 174 Wn.2d 560, 270 P.3d 1277 (2012), this Court held:

Because the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. *Udall*, 159 Wn.2d at 911.

.....

Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required. *Udall*, 159 Wn.2d at 915-16.

Albice at 564 (emphasis added). Although *Albice* involved a wrongfully completed nonjudicial foreclosure sale, there were no caveats in the decision which limited the Court's analysis and holding to cases involving a completed foreclosure sale. Rather, *Albice* supports the conclusion that strict adherence to the DTA is an absolute necessity.

This Court further clarified in the importance of the trustee's duties to the strict requirements of the statute in *Klem*, 176 Wn.2d 771,

(discussing RCW 61.24.010(4)). The actions of Defendants LSI and Asset Foreclosure as described herein demonstrate clear violations of the duty of good faith owed by the purported trustee to Ms. Frias. RCW 61.24.010(4). In *Klem*, this Court reiterated the importance of adherence to the requirements of the DTA:

While the Legislature has established a mechanism for nonjudicial sales, neither due process nor *equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure*. An independent trustee owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.

Klem (citations omitted; emphasis added). The Court's conclusion in *Klem* also includes the following:

We hold that the right to enjoin a foreclosure sale is an equitable remedy and the failure to enjoin a sale does not operate to waive claims based on the foreclosure process where it would be inequitable to do so. *Where applicable, waiver only applies to actions to vacate the sale and not to damages actions*. We hold that it is an unfair or deceptive practice under the CPA for a trustee of a nonjudicial foreclosure to fail to exercise its authority to decide whether to delay a sale.

Klem 176 Wn.2d at 796-97 (emphasis added). Thus, a foreclosure that was initiated by someone without the legal authority to initiate or conduct the sale must result in a finding against those person(s).

In the recent Division I decision, *Walker*, the Court of Appeals

expressly rejected the reasoning in *Vawter*, holding that *Vawter* is not in conformity with Washington law. (This is similar to this Court’s express rejection of *Vawter* in *Bain* as being not “helpful” in interpreting the Deed of Trust Act’s definition of “beneficiary.” *Bain*, 185 Wn.2d at 109.)

In *Walker*, the Court considered precisely the same arguments advanced here by Defendants LSI and Asset Foreclosure and a trial court decision virtually identical to that in *Vawter*. Division I reached the conclusion that *Vawter* is not consistent with *Bain* and other recent foreclosure cases, and therefore rejects entirely all of the premises of the *Vawter* order. In doing so, the *Walker* court cited extensively to *Bain* and discussed how that decision provided more clarity as to what claims were available to homeowners whose homes had not yet been foreclosed, including claims for violations of the DTA and under the CPA.

First, the *Walker* Court discussed the facts pled by Walker which supported viable claims for violation of the requirements of the DTA, which are very similar to those pled by Ms. Frias. Ms. Frias actually pled her claims with more specificity than those outlined in the *Walker* decision, but nevertheless, the basis of the claims is much the same – the entity that initiated the one attempted foreclosure and the actual foreclosure auction that did occur did not have the legal authority to do so under the DTA. Further, there were allegations that the purported “beneficiary” signing the Appointment document did not have the legal authority to appoint a successor trustee and therefore the trustee did not have the power to act under the DTA. The Court of Appeals explained:

Because the assignment to Select was ineffective, Select's designation of Quality as successor trustee was also ineffective, meaning that Quality lacked authority to initiate nonjudicial foreclosure proceedings. *Although no foreclosure sale occurred, Walker labels this a "wrongful foreclosure" claim. We consider it more accurate to characterize this as a claim for damages arising from DTA violations. Select and Quality respond that Washington does not recognize a claim for "wrongful initiation of foreclosure when, as here, the foreclosure sale has been discontinued." We disagree.*

.....

Only a lawful beneficiary has the power to appoint a successor trustee, and only a lawfully appointed successor trustee has the authority to issue a notice of trustee's sale. Accordingly, when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale.

....

The Washington Supreme Court "has frequently emphasized that the deed of trust act 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.'" (citing *Klem*, 176 Wn.2d at 789).

....

The DTA permits a borrower or grantor, among others, "to restrain, on any proper legal or equitable ground, a trustee's sale." But, as Walker correctly observes, 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." However, in response to a decision of this court, in 2009 the legislature explicitly recognized a cause of action for damages for failure to comply with the DTA. It did so by amending the DTA to include RCW 61.24.127, which provides that a borrower or grantor does not waive certain claims for damages by failing to bring a civil action to enjoin a foreclosure sale. The claims not waived include the "[failure of the trustee to materially comply with the provisions of this chapter."

Nothing in the 2009 amendment requires that the violation resulted in the wrongful sale of the property. This provision preserves a cause of action existing at the time a sale could be restrained—in other words, a claim existing before a foreclosure sale. It reflects the legislature's understanding of existing law—that a cause of action for damages existed based upon a trustee's presale failure to comply with the DTA, causing damage to the borrower.

Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013), supports our conclusion that the specific remedies provided in the DTA are not exclusive. There, the court 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. The Klem court held that the legislature's list was not exclusive, observing, "Given that there is 'no limit to human inventiveness,' courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA."

....

In addition to these procedural violations [violations of the requirements of RCW 61.24.005(2), 61.24.010(2) and 61.24.040], Walker alleges that Quality breached its statutory duty of good faith to him imposed by the DTA. He contends, "If [Quality] intends to foreclose a property non-judicially it is obligated to have evidence that it is doing so on a legitimate and legal basis and not simply acting at the behest of a party that may or may not have the legal right to conduct such an action."

Walker, 308 P.3d at 720-22 (footnotes omitted; emphasis added).

The Court of Appeals then specifically rejected the reasoning in *Vawter*, pointing out that it was decided prior to *Bain* and that the *Walker* court did not find *Vawter*'s reasoning persuasive, holding:

The court in *Vawter* stated four reasons for its holding. First, it explained, "The Vawters have not identified any statutory

provision of the DTA that permits a cause of action for wrongful institution of foreclosure proceedings." The court did not address the effect of the 2009 amendments to RCW 61.24.127 because the savings clause did not apply in the case before it. But, construing RCW 61.24.127(1)(c) in a borrower's favor, this statute demonstrates that the legislature recognized a cause of action for damages for DTA violations. As previously noted, nothing in the statute requires that the violation resulted in the wrongful sale of the property.

Second, the court in *Vawter* explained that the legislature "established a comprehensive scheme for the nonjudicial foreclosure process" and that "to the extent the legislature intended to permit a cause of action for damages, it could have said so." But, the legislature has spoken and, with RCW 61.24.127(1)(c), recognized a cause of action for damages caused by violations of the DTA. Third, the court reasoned that allowing a presale cause of action for damages would "spawn litigation under the DTA for damages, thereby interfering with the efficient and inexpensive nature of the nonjudicial foreclosure process, while at the same time failing to address directly the propriety of foreclosure or advancing the opportunity of interested parties to prevent wrongful foreclosure." Bain observed that the lending industry has institutionalized a series of deceptive practices, that MERS has been involved with "an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide," and that MERS "often issue[s] assignments without verifying the underlying information." Thus, the lending industry and MERS have already spawned the feared litigation with their institutionalized practices. Holding the lending industry liable for damages caused by its DTA violations should produce greater compliance and a reduction in future litigation. Thus, the availability of a presale cause of action for damages could significantly reduce the long-term systemwide expenses of nonjudicial foreclosures under the DTA.

Finally, the court in *Vawter* stated that even if it were to recognize a presale cause of action for damages under the

DTA, "the court is not persuaded that it could be maintained without a showing of prejudice. "There, the plaintiffs could not show prejudice because they conceded that the trustee's sale was discontinued and that one of the defendants possessed the note. Additionally, the court determined that prematurely appointing a successor trustee, before authority to make such an appointment, was a "non-prejudicial timing mistake" because the trustee reappointed the successor after it was assigned a beneficial interest in the deed of trust. Further, pre-Bain, the court explained, "Even accepting the Vawters' factual allegation that MERS exists to maintain records regarding the ownership of mortgages, this does not mean that MERS cannot hold a beneficial interest under the Deed of Trust."

Here, Walker alleges that MERS never had a beneficial interest because it never held the note. Under Bain, it could never be a lawful beneficiary. Walker also alleges damages caused by Select's and Quality's unlawful actions taken in violation of the DTA. Walker's allegations strongly support recognizing a presale cause of action for damages under the DTA because he pleads facts showing he has suffered prejudice from Select's and Quality's unlawful conduct.

....

MERS never held the note and, based on Walker's amended complaint, we can hypothesize that MERS never had independent authority to appoint a beneficiary. We can further hypothesize that Select did not hold Walker's note at the time it appointed Quality. No Washington case law relieves from liability a party causing damage by purporting to act under the DTA without lawful authority to act or failing to comply with the DTA's requirements. Notably, the language of RCW 61.24.127(1)(c) refers only to "[failure of the trustee to materially comply with the provisions of this chapter." (Emphasis added.) We need not decide if this may prevent a borrower from suing a beneficiary under some circumstances. Our Supreme Court has recognized, in the context of a CPA claim, "Where the beneficiary so controls the trustee so as to make the trustee a mere agent of the beneficiary, then as principle [sic], the beneficiary may be liable for the acts of its agent." Here, we can plausibly

hypothesize Select controlling Quality's actions violating the DTA. ***Because the legislature recognized a presale cause of action for damages in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred.*** Additionally, where a beneficiary, lawful or otherwise, so controls the trustee so as to make the trustee a mere agent of the beneficiary, then, as principal, it may have vicarious liability.

Walker, 308 P.3d at 723-24 (footnotes omitted; emphasis added).

Regarding a potential claim for violation of the Consumer Protection Act related to the breach of duties under the DTA, the *Walker* Court held as follows:

The CPA does not define an "unfair or deceptive act or practice." Whether an alleged act is unfair or deceptive presents a question of law. A consumer may establish an unfair or deceptive act by showing "either that an act or practice 'has a capacity to deceive a substantial portion of the public,' or that 'the alleged act constitutes a per se unfair trade practice.'" "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact. To establish a per se violation, a plaintiff must show "that a statute has been violated which contains a specific legislative declaration of public interest impact."

Walker, 308 P.3d at 726-27.

Citing to this Court's decision in *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), the *Walker* court noted that Walker had valid claims even though the foreclosure was not completed because he had suffered harm,

In *Panag* . . . , our Supreme Court held, "[T]he injury requirement is met upon proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.

....

Because Walker pleads facts that, if proved, could satisfy all five elements, we conclude that the trial court erred by dismissing his CPA claim.

Walker, at 727-728 (citing *Panag*, 166 Wn.2d at 53).

Ms. Frias has alleged the same sort of "harm": she has been denied an FHA loan modification and has had to obtain assistance and undertake efforts to deal with the attempted foreclosures, the foreclosure auction that was wrongfully conducted and the other actions taken in violation of the requirements of the DTA. Further, there are multiple public records of attempted foreclosures which will affect her credit in the future and may well have already had a negative impact. No amount of "correction" will erase the two attempted foreclosures from the Snohomish County records and from future credit reports. She has experienced the stress of not knowing whether she will retain title to her property nor what information has really been reported to the IRS. She has stress related to whether she will be able to retain her property. A part of this open question for Ms. Frias is what dollar amounts have been added to her loan balance as a result of the actions of LSI and Asset Foreclosure. Ms. Frias will be responsible for those amounts so long as she remains responsible for the balance owed on the loan. She has

suffered a significant “injury” and damages under the CPA which is even greater than the harm articulated by Walker in his complaint.

The Washington Court of Appeals issued two published opinions on the same day, *Walker* and *Rucker*. *Rucker* continues, like *Walker*, to follow the reasoning outlined in this Court’s recent foreclosure cases. See *Rucker*, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 5537301 at *6 (“[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale;” “such actions by the improperly appointed trustee, we have explained, constitute ‘material violations of the DTA.’”) (citing *Walker*) (quotation marks omitted). Furthermore, the Court of Appeals reiterated its rejection of *Vawter* in the *Bavand* case decided shortly after *Walker* and *Rucker*. See *Bavand v. One West Bank, FSB, supra*, 309 P.3d at 647. In *Bavand*, Division I held that, “In *Walker* we explained why we reject the analysis and conclusion of [*Vawter*],” *i.e.*, because 1) *Bain* postdated *Vawter*; 2) RCW 61.24.127 was adopted after *Vawter*, recognizing causes of action in the absence of a trustee’s sale; 3) *Vawter*’s concern that granting homeowners claims in the absence of a trustee’s sale would result in a “rash” of litigation was misplaced since foreclosing entities themselves cause such litigation by failing to comply with the Deed of Trust Act; and 4) prejudice existed in light of the DTA violations and their effect on the plaintiff in *Walker*. *Id.* (It should be noted that the *Rucker* decision states that it refers to “former” versions of RCW 61.24.005(2) and 61.24.010(2), but these specific subsections have not been changed by

the Legislature.)

A slightly older appellate decision reiterates a long standing principle of Washington Deed of Trust Act law, and that is “[b]ecause the DTA dispenses with many protections commonly enjoyed by borrowers, ‘lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower’s favor.’” *Rucker*, at 12, citing to *Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005). The *Rucker* plaintiffs did not make a claim for damages, as Ms. Frias has done in this case, and for that reason the Court was required only to determine whether the completed foreclosure was invalid. Relying upon this Court’s decisions in *Albice* and *Schroeder*, the *Rucker* Court found that the sale must be invalid, noting that, “If the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority.” *Rucker*, at 16. Similarly, Ms. Frias has suffered injury and damages as a result of the actions of the Defendants herein and she is entitled to pursue her claims under now well-settled Washington state law, especially since she has taken steps to mitigate her damages by acting to obtain an answer. Division II reached a similar result in *Frizzell v. Murray*, 283 P.3d 1139 (Wash. App. Div. 2 2012), rejecting an overreaching waiver argument and holding that a foreclosure auction conducted by someone without the legal authority to do so was invalid and that the plaintiff could pursue her CA and DTA causes of action.

The only courts which have held in recent years that homeowners are barred from asserting claims for violations of the DTA in the absence of a completed foreclosure sale have been the federal district courts which relied on the *Vawter* analysis that has no support in published Washington Supreme Court and appellate opinions. In this case, Defendant LSI cited *Vawter* and a string of unpublished federal district court decisions following *Vawter* for the proposition that homeowners are barred from asserting claims for violations of the DTA in the absence of a completed foreclosure sale. *See* Dkt. No. 10, 8-9. In its Order certifying the questions, the district court cited many of those same unpublished district court decisions. *Id.* at 2. All of those decisions simply stated and followed the holding of *Vawter*, which, in turn, was based on the faulty reasoning in the unpublished decision (and unauthoritative under GR 14.1) decision of the Court of Appeals, Division II in *Krienke*. *See Vawter*, 707 F. Supp. 2d at 1123.

The specific passage of reasoning from *Krienke* that the *Vawter* court discussed and relied on was as follows:

[1] [T]here is no case law supporting a claim for wrongful damages for the initiation of an allegedly wrongful foreclosure sale. [2] Moreover, there is no statutory basis supporting a claim for damages for wrongful institution of foreclosure proceedings. [3] On the contrary, courts promote the [DTA's] objectives, declining to invalidate completed sales even where trustees have not complied with the statute's technical requirements.

Vawter, 707 F. Supp. 2d at 1123 (quoting *Krienke*, 2007 WL 2713737 at *5; numbered brackets added). None of these premises that were the

supposed foundation for the unpublished decision in *Krienke*, and were the supposed basis for the *Vawter* decision, holds true today.

As to the first point – case law supporting a claim for wrongful damages for initiation of an allegedly wrongful foreclosure sale -- *Walker* is a published Washington appellate decision that squarely supports a claim under both the DTA and the CPA. *Walker*, 308 P.3d at 720-24. With regard to the second – the statutory basis for a claim – RCW 61.24.127 was enacted in 2009, two years *after Krienke*, and provides solid evidence of the legislature’s understanding that a cause of action for damages exists and may be brought for pre-foreclosure violations of the DTA. *See Walker*, 308 P.3d at 723 (citing RCW 61.24.127). Finally, with regard to *Krienke* court’s third point asserting that Washington courts will decline to invalidate completed sales even where trustees have not complied with the requirements of the DTA, that proposition has been squarely rejected by this Court. *See, e.g., Schroeder v. Excelsior Management Group, LLC, supra*, at 106, (the DTA “is not a rights-or-privilege-creating statute,” but instead “sets up a list of ‘requisites to a trustee’s sale’” which may not be waived); *see also Bavand v. OneWest Bank, F.S.B., supra*, 642-45 (under the DTA, only a lawfully appointed trustee may conduct a nonjudicial foreclosure, and that a failure to comply with the requirements of RCW 61.24.010(2) will render subsequent foreclosure proceedings invalid).

Thus, in essence, *Vawter* and its progeny on which LSI relied are, as one court aptly stated in precisely this context, “a chain of support with

no anchor.” *Remington Arms Co. v. Liberty Mutual Ins. Co.*, 810 F. Supp. 1420, 1424 (D. Del. 1992). Here, just as in that case: “Like a parrot repeating words without any understanding of their meaning, each case in the chain cite[d] a standard whose origin or justification [was] never made apparent.” *Id.* In short, the Court of Appeals’ decision in *Walker* is fundamentally sound and should be followed, and there was and is no basis for *Vawter* and the district court orders that simply parroted *Vawter*.

Although this Court was considering a post-sale challenge in *Albice* which resulted in a much stronger remedy than payment of damages—the invalidation of a completed foreclosure sale years after its conclusion—it nevertheless found that by enforcing statutory compliance “encourages trustees to conduct procedurally sound sales.” *Albice*, 174 Wn.2d at 572. This Court explained that when trustees strictly comply with their legal obligations under the act, “interested parties will have no claim for postsale relief, thereby promoting stable land titles overall.” *Albice*, 174 Wn.2d at 572. Here, the Court should be seriously concerned with the complete and utter disregard for the requirements of the DTA evidenced by LSI and the other defendants who joined in its motion, and the willingness of the federal district courts to relieve them from liability without the support of any published Washington case law. LSI intentionally ignores the established fact relating to its business model that during, at least, the years 2010 through 2011, as outlined in the Consent Decree, LSI purported to act as a foreclosing trustee in Washington when it could not act in conformity with the statute. Dkt. No. 17-4. But the

evidence here makes it clear that LSI was engaged in its sham assertion that it was a foreclosing trustee in 2009, as seen in the Appointment of Successor Trustee executed by an employee of Asset Foreclosure acting as an officer of MERS, an entity without the legal authority to appoint a successor trustee, and then recorded by Asset Foreclosure. This means that as far back as at least 2009, LSI was falsely asserting it could act as a foreclosing trustee under Washington law, that it could be appointed as a trustee by someone other than the “beneficiary” and loan owner, and that the Appointment continued to have effect years later such that another foreclosure could be initiated in 2011. Dkt. No. 2, 7-8 ¶ 1.5. If this sort of express refusal to comply with the minimum requirements of the DTA is not actionable, then none of the DTA requirements have any meaning.

Ms. Frias maintains that this Court should clarify the application of its recent holdings in foreclosure sale cases and affirm the decisions rendered by Division I and II in *Walker*, *Rucker*, *Bavand*, and *Frizell*, making clear that nonjudicial foreclosures which are initiated in contravention of the requirements of the DTA subject those involved to claims for breach of the duties under the DTA and under the CPA. This Court must provide this guidance in order to make certain that Ms. Frias and others similarly situated may seek to recover for injury and damages, as well as attorneys’ fees and costs under the CPA. Ms. Frias also notes that the DTA contains provisions allowing for recovery of attorneys’ fees and costs, RCW 61.24.127(2)(f), that Washington’s attorney fee reciprocity statute allows for such recovery, RCW 4.84.330, and that

plaintiffs may seek the same recovery under the DTA.

3. A Cause of Action for Damages Based on Defendants' Pre-Foreclosure Violations of the DTA Is Consistent with Washington Case Law Governing Statutory Torts.

In *Walker*, as noted above, the court analyzed the savings clause in RCW 61.24.127(1), and, construing that language in the borrower's favor, held that the language on its face demonstrates the legislature's understanding that a cause of action for damages exists and may be brought for pre-foreclosure violations of the DTA. *Walker*, 308 P.3d at 723. As the *Walker* court indicated, the only logical reading of the legislature's provision stating that failure to bring an action to enjoin a foreclosure sale does *not* waive a claim for damages under RCW Title 19, including the CPA, or a claim for damages based on a trustee's material violations of the DTA, was that such a claim existed in the first place. *Id.*; see also *Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 422-23, 167 P.3d 1193 (2007) ("A grant of immunity from liability clearly implies that civil liability can exist in the first place.").

Recognizing the cause of action for damages based on Defendants' pre-foreclosure violations of the DTA is also consistent with Washington case law supporting the recognition of statutory torts where, as here, there are clear statutory duties and the persons intended to be protected under the statute are injured by a defendant's breach of those statutory duties. As this Court has stated, "It has long been recognized that a legislative

enactment may be the foundation of a right of action.” *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990) (citation omitted).

In *Bennett*, the Court outlined a three-part test for determining whether violations of duties imposed by a statute will support a separate cause of action:

[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett, 113 Wn.2d at 920-21 (citation omitted); *see also Jackowski v. Borchelt*, 174 Wn.2d 720, 735, 278 P.3d 1100 (2012) (“Chapter 18.86 RCW does not indicate the creation of a new statutory cause of action but it does state that the common law continues to apply where it is not limited or inconsistent . . . Therefore, common law tort causes of action remain the vehicle through which a party may recover for a breach of statutory duties set forth in chapter 18.86 RCW.”) (citing *Bennett*, 113 Wn.2d at 920-21).⁵

All three requirements are readily met because: (1) Plaintiff and others like her whose properties are subject to non-judicial foreclosures are within the class for whose benefit the DTA was enacted; (2) legislative intent, as expressed in RCW 61.24.127, supports creating a remedy; and

⁵ *See also* Restatement (Second) of Torts § 874A (1979) (“When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate . . . accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.”).

(3) implying a remedy is consistent with the underlying purpose of the DTA, which “requires [the] trustee to be evenhanded to both sides and to strictly follow the law.” *Klem*, 176 Wn.2d at 789 (citation omitted). Recognizing such a cause of action is also necessary to create financial incentives for trustees and controlling beneficiaries, such as Defendants in this case, to comply with the DTA. Thus, under the three-part *Bennett* analysis, as well, the Court should uphold *Walker* in recognizing a tort cause of action for damages based on Defendants’ pre-foreclosure violations of the DTA.

B. Washington affords relief to homeowners under the Consumer Protection Act and common law irrespective of whether or not a trustee’s sale occurs.

As this Court held in *Bain*, violations of the DTA can constitute violations of the CPA. It is not a *per se* violation, but if a plaintiff can prove the required five elements, it can support a CPA claim. Those elements are: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property; (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986). These Defendants have committed numerous unfair and deceptive acts and practices, as described in great detail above. Given the complete and utter disregard that the Defendants have shown for complying with the requirements of the DTA, it is very likely that Ms. Frias will be able to demonstrate to a trier of fact that this is part of a larger pattern and

practice and very likely to be repeated, thus allowing Plaintiff to prove a violation of the CPA. RCW 19.86, *et seq.*

Ms. Frias will be able to prove that the Defendants all have made numerous misrepresentations about who has the legal authority to act as a foreclosing trustee and the cost of the process, the ownership of the Promissory Note, the identity of the Note Holder and loan owner, and the alleged assignment of the interest in the Deed of Trust. This information impacts the determination as to who has the legal right to foreclose on the Property, as well as the legal authority to negotiate a loan modification. Ms. Frias maintains that these entities have repeatedly engaged in making such misrepresentations to other Washington homeowners and there is a substantial likelihood that they will do so in the future. This is demonstrated by their description of what occurred in this case as “business as usual” and by their attempts to avoid providing discovery in support of these claims by refusing to answer questions and provide responsive documents. They will prove that these acts constituted violations of the CPA and support an award of damages and attorneys’ fees. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990). Certainly, the Supreme Court has made clear in *Bain* that plaintiffs are able to bring

these claims for violations of the DTA.

The Supreme Court noted in *Klem* that claims for violations of the CPA, RCW 19.86, *et seq.* can be brought against defendants for acts that are “unfair *or* deceptive”, including in the context of a non-judicial foreclosure sale. *Klem* at 11. The Court went on to cite extensively and discuss its decision in *Panag*, 166 Wn.2d at 48, 204 P.3d 885 (2009), and it expressly clarified that a violation of the CPA may be brought because of a “*per se* violation of a statute, an act or practice that has the capacity to deceive the substantial portions of the public, or an unfair or deceptive practice not regulated by statute but in violation of public interest.” *Klem*, 176 Wn.2d at 787. The Court quoted from *Panag*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would have undertaken an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

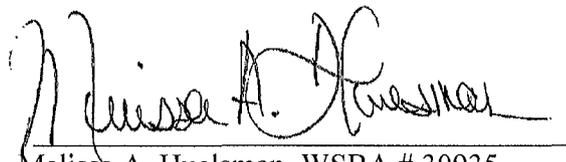
Id. (citing *Panag*, 166 Wn.2d at 48) (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). The *Klem* Court further noted that “an act or practice can be unfair without being deceptive” and that the statute clearly allows claims for “unfair acts *or* deceptive acts or practices.” *Klem*, 176 Wn.2d at 787. Defendants LSI and AFSI have chosen to completely ignore the requirements of the DTA and has

intentionally published in the public records false and deceptive information and for doing so, it is liable to Ms. Frias under the CPA.

CONCLUSION

For all the foregoing reasons, Ms. Frias respectfully urges the Court to conclude that borrowers, including Plaintiff in this case, may state claims for abuses of the home foreclosure process that violate the DTA irrespective of whether or not a trustee's sale of their property is first completed, and that it has already articulated principles to be applied to DTA and CPA claims in its previous decisions, as further elucidated in the recent published decisions by Division I of the Court of Appeals discussed above.

Respectfully submitted this 30th day of October, 2013.

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a horizontal line underneath it.

Melissa A. Huelsman, WSBA # 30935
Attorney for Plaintiff Ruth R. Frias

DECLARATION OF SERVICE

I, Melissa A. Huelsman, certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of the Plaintiff's Opening Brief, with Request for Judicial Notice and Exhibits, to be electronically mailed and served as follows upon counsel of record and filed with the Court:

<p>Mr. Andrew H. Salter Ms. Lisa Franklin Veris Law Group, PLLC 1809 Seventh Ave, Suite 1400 Seattle, WA 98101 Andy@verislawgroup.com lisafranklinlaw@gmail.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>	<p>Ms. Katrina Eve Glogowski Ms. Kimberly M. Hood Glogowski Law Firm, PLLC 506 – 2nd Avenue Seattle, WA 98104-2343 katrina@glogowskilawfirm.com Kimberly@glogowskilawfirm.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>
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Signed at Seattle, Washington, this 30th day of October, 2013.

LAW OFFICES OF MELISSA A.
HUELSMAN, P.S.

/s/ Melissa A. Huelsman
Melissa A. Huelsman

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, October 31, 2013 8:07 AM
To: 'Melissa Huelsman'
Cc: Pamela Hamilton; Walter Smith
Subject: RE: Frias v. Asset Foreclosure, et al.; Case No. 89343-8

Rec'd 10-31-13

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: Melissa Huelsman [mailto:mhuelsman@predatorylendinglaw.com]
Sent: Wednesday, October 30, 2013 10:21 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Pamela Hamilton; Walter Smith
Subject: Frias v. Asset Foreclosure, et al.; Case No. 89343-8

Dear Clerk of the Court,

Attached please find submitted for filing in the above referenced case, the following pleadings:

1. Plaintiff's Opening Brief on Questions Certified to the Supreme Court by the United States District Court
2. Request for Judicial Notice and attachments thereto

Proof of Service for both is attached to the Opening Brief.

Please let me know if there is anything else that the Court requires at this time.

Thank you, Melissa Huelsman

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