June 2014 Newsletter

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Announcements—

The HBOR Collaborative is conducting a free training at PLI in San Francisco, **June 16**. The training will also be webcast. Please see the information at the end of the newsletter for details or sign-up at our website's training calendar!

New RESPA Early Intervention Requirements for Borrowers in Default[1]

The 2013 RESPA Servicing Rule amendments to CFPB Regulation X, effective January 10, 2014, include provisions dealing with foreclosure avoidance and loss mitigation. The early intervention requirements found in Regulation X § 1024.39 focus on the period soon after a borrower becomes delinquent. The regulation requires a servicer to attempt to establish contact with the borrower at this early stage in order inform the borrower about available options to avoid foreclosure--a live contact within thirty-six days and a written notice within forty-five days of delinquency.

Another Regulation X provision, § 1024.40, requires the servicer to maintain a continuity of contact with the borrower if the borrower requests loss mitigation assistance, and § 1024.41 establishes procedures for handling loss mitigation applications. This article focuses on the early intervention requirements. The HBOR Collaborative's February 2014 Newsletter covered the continuity of

[1] This article is authored by John Rao for the National Consumer Law Center's *eReports* service. Printed here with permission of the author and NCLC.

This project was made possible by a grant from the Office of the Attorney General of California, from the National Mortgage Fraud Settlement, to assist California consumers.

contact rules, and our April and May 2014 Newsletters covered the new loss mitigation requirements. All issues are available on the HBOR Collaborative website, calhbor.org.

Live Contact with Borrower

A servicer is required to make good faith efforts to establish "live contact" with a delinquent borrower not later than the thirty-sixth day of the borrower's delinquency.[2] The purpose of the live contact requirement is to provide servicers an opportunity to discuss with a borrower the circumstances of a borrower's delinquency.[3] Live contact includes telephoning or conducting an in-person meeting with the borrower, but not leaving a recorded phone message. Good faith efforts to establish live contact consist of "reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer."[4]

Promptly after establishing live contact, the servicer is to inform the borrower, or the borrower's authorized agent, about the availability of loss mitigation options, if appropriate.[5] If the borrower makes a payment in full before the end of the thirty-six day period, the servicer need not establish live contact with the borrower.[6]

A servicer is given discretion to determine whether informing the borrower about the availability of loss mitigation options is appropriate under the circumstances.[7] If the servicer determines it is appropriate and establishes live contact with the borrower, it must promptly provide information about the availability of applicable loss mitigation

[2] 12 C.F.R. § 1024.39(a) (effective Jan. 10, 2014).
[3] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-2 (effective Jan. 10, 2014).
[4] *Id.*
[5] *Id.*
[6] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a) - 1.iv (effective Jan. 10, 2014).
[7] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-3.i (effective Jan. 10, 2014).

options.[8] The information can be provided orally, in writing, or through an electronic communication. A servicer need not notify a borrower about any particular loss mitigation options – it may simply state that loss mitigation options may be available.

The CFPB's Official Bureau Interpretation to Regulation X defines "delinquency" as beginning "on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee."[9] For example, if a borrower's monthly payment for January is due on January 1 and the payment is not fully paid during the 36-day period after January 1, the servicer must make good faith efforts to establish live contact not later than February 6 (which is 36 days after January 1). A borrower who is performing as agreed under a loss mitigation option intended to cure a default is not delinquent for purposes of § 1024.39.[10]

Pre-Foreclosure Written Notice Regarding Loss Mitigation

Section 1024.39(b) mandates that servicers give borrowers who are in default a specific form of notice informing them how to contact servicer staff for loss mitigation reviews.[11] The regulation designates this as an "early intervention" notice, and its purpose is to encourage communication between the borrower and the servicer as soon as possible after a default has occurred.

The servicer must give this written notice no later than the forty-fifth day of the borrower's delinquency.[12] The same definition for delinquency as used for the live contact requirement applies here.[13] Servicers are not required to give this notice to a borrower more than

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[8] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-3.ii (effective Jan. 10, 2014).
[9] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-1 and 39(b)-1 (effective Jan. 10, 2014).
[10] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-1.ii (effective Jan. 10, 2014).
[11] 12 C.F.R. § 1024.39(b) (effective Jan. 10, 2014).
[12] 12 C.F.R. § 1024.39(b)(1) (effective Jan. 10, 2014).
[13] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(a)-1 (effective Jan. 10, 2014).

once during any 180-day period.[14] The written notice must be provided even if the servicer provided information about loss mitigation and foreclosure previously during a live contact with the borrower under § 1024.39(a).[15]

The notice must include the following information:

- a statement encouraging the borrower to contact the servicer;[16]
- the telephone number to access the servicer's loss mitigation personnel assigned to the borrower under the continuity of contact rule (§ 1024.40(a)), and the servicer's mailing address;[17]
- if applicable, a statement providing a brief description of examples of loss mitigation options that may be available from the servicer;[18]
- either application instructions or information on how the borrower may obtain more information about the application process;[19] and
- the website address the borrower may use to access either the CFPB's list or HUD's list of homeownership counselors or organizations, and the HUD toll-free phone number.[20]

The rule does not require that the notice list extensive details about loss mitigation options. The "if applicable" limitation with regard to available loss mitigation options would apply in the unlikely instance where a servicer was prohibited from offering any type of loss mitigation. In the overwhelming majority of cases, the servicer will be able to, and therefore must, describe some examples of loss mitigation options available for the borrower.

[14] *Id.*
[15] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(1)-4 (effective Jan. 10, 2014).
[16] 12 C.F.R. § 1024.39(b)(2)(i)(effective Jan. 10, 2014)
[17] 12 C.F.R. § 1024.39(b)(2)(ii) (effective Jan. 10, 2014).
[18] 12 C.F.R. § 1024.39(b)(2)(iii) (effective Jan. 10, 2014).
[19] 12 C.F.R. § 1024.39(b)(2)(iv) (effective Jan. 10, 2014). The servicer can provide detailed application instructions or can simply include a general statement such as, "contact us for instructions on how to apply." *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)(iv)-1 (effective Jan. 10, 2014).
[20] 12 C.F.R. § 1024.39(b)(2)(v) (effective Jan. 10, 2014).

The Official Bureau Interpretation to Regulation X indicates that the rule does not mandate that the servicer list a specific number of loss mitigation options.[21] The explanation of options may be a generic list of options that the servicer offers to borrowers.[22] An example of an option "may be described in one or more sentences."[23] However, the notice must contain some accurate content that meets this requirement, otherwise the notice is ineffective.

Additional information that the servicer determines would be helpful can be included in the notice.[24] A servicer may provide the written notice by combining it with other notices in a single mailing, but only if each of the statements required by § 1024.39(b)(2) meets the clear and conspicuous standard in § 1024.32(a)(1).[25]

The CFPB has made available to servicers model clauses MS-4(A), MS-4(B), and MS-4(C) that may be used to comply with the requirements of § 1024.39(a).[26] But the servicer may use any format for the written notice, including any size and type of print, number of pages, size and quality of paper, provided again that each of the required statements in the notice satisfies the clear and conspicuous standard in § 1024.32(a)(1).[27] Servicers can supplement the notice with a loss mitigation application form.[28]

Once the type of loan is identified, the borrower's advocate should be able to determine whether the description of available loss mitigation options is accurate. The failure to provide accurate information to a borrower regarding loss mitigation options and

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[21] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)(iii)-1 (effective Jan. 10, 2014) ("Section 1024.39(b)(iii) does not require that a specific number of examples be disclosed, but borrowers are likely to benefit from examples of options that would permit them to retain ownership of their home and examples of options that may require borrowers to end their ownership to avoid foreclosure.").
[22] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)(iii)-2 (effective Jan. 10, 2014).
[23] *Id.*
[24] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)-1 (effective Jan. 10, 2014).
[25] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)-3 (effective Jan. 10, 2014).
[26] *See* Appendix MS-4 to Subpart C of Regulation X, reprinted in Appx. C.3, *infra*.
[27] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)-2 (effective Jan. 10, 2014).
[28] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(b)(2)(iv)-1 (effective Jan. 10, 2014).

foreclosure, as required by the early intervention notice under § 1024.39, is expressly covered by the error resolution procedures.[29] In addition, violations of the early intervention requirements are actionable under the RESPA's remedy provision.[30]

Scope of the Rule

The early intervention requirements, as well as the continuity of contact and loss mitigation requirements, apply only to a mortgage loan that is secured by a property that is the debtor's principal residence.[31] In addition, these requirements do not apply to: 1) a servicer that qualifies as a small servicer;[32] 2) a servicer with respect to a reverse mortgage transaction;[33] and 3) a servicer with respect to a mortgage loan for which the servicer is a "qualified lender."[34]

Borrowers in Bankruptcy

Extensive comments were submitted by mortgage industry representatives during the rulemaking process seeking bankruptcy exemptions to the loss mitigation requirements, including the early intervention requirement. The CFPB initially declined requests to create blanket exemptions, noting that a borrower could have filed for bankruptcy but still be eligible for loss mitigation assistance.[35] Instead, the CFPB added a provision to the early intervention rule and

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[29] 12 C.F.R. § 1024.35(b)(7). *See* NCLC *Foreclosures*, § 9.2.2.2.2 (4th ed. and 2013 Supp.).
[30] 12 U.S.C.§ 2605(f); NCLC *Foreclosures*, § 9.2.10 (4th ed. and 2013 Supp.).
[31] Reg. X, 12 C.F.R. § 1024.30(c)(2) (effective Jan. 10, 2014).
[32] Reg. X, 12 C.F.R. § 1024.30(b)(1). A small servicer, as defined by Regulation Z section 1026.41(e)(4), is a servicer that "services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee." Reg. Z, 12 C.F.R. § 1026.41(e)(4)(ii)(A) (effective Jan. 10, 2014). The small servicer definition also includes "Housing Finance Agencies, as defined in 24 C.F.R. § 266.5," without regard to the number of mortgage loans serviced by such agencies. Reg. Z, 12 C.F.R. § 1026.41(e)(4)(ii)(B) (effective Jan. 10, 2014).
[33] Reg. X, 12 C.F.R. § 1024.30(b)(2) (effective Jan. 10, 2014). A reverse mortgage transaction is defined at 12 C.F.R. § 1026.33(a).
[34] Reg. X, 12 C.F.R. § 1024.30(b)(3) (effective Jan. 10, 2014). A "qualified lender" is defined at 12 C.F.R.§ 617.7000, which covers mortgage loans made under the Farm Credit System.
[35] *See* Section-by-Section Analysis, § 1024.39(b), 78 Fed. Reg. 10,807 (Feb. 14, 2013).

commentary intended to demonstrate that compliance with both RESPA and the Bankruptcy Code is feasible. However, after the final rule was published and without using the advance notice and comment procedure, the CFPB issued an "Interim Final Rule" that granted a bankruptcy exemption that applies to the early intervention requirements.[36] Fortunately, bankruptcy exemptions were not adopted for the continuity of contact and loss mitigation requirements.

Section 1024.39(d)(1) provides that a servicer is exempt from the early intervention requirements for a mortgage loan while the borrower is a debtor in a bankruptcy case.[37] The Official Bureau Interpretation for this section provides that the exemption applies for any portion of the mortgage debt that is discharged in bankruptcy.[38] This fails to recognize that many consumers file chapter 7 for non-mortgage related reasons, continue to maintain payments after receiving a discharge, and do not reaffirm discharged mortgage debts because of the discharge injunction exception provided in § 524(j) of the Bankruptcy Code. In addition, all of the government sponsored loan modification programs require that a borrower who has received a chapter 7 discharge and not reaffirmed the mortgage debt must still be considered for loss mitigation options. Thus, the CFPB's Interpretation is inconsistent with the policies of these loss mitigation programs and the Bankruptcy Code, and hopefully will be reconsidered by the CFPB.

In addition, the Official Bureau Interpretation provides that if there are joint obligors on a mortgage, the exemption applies if any of the borrowers is in bankruptcy. An example is given of a husband and wife who jointly own a home, stating that "if the husband files for bankruptcy, the servicer is exempt from complying with § 1024.39 as to both the husband and the wife."[39] If the husband in this example filed a chapter 7 bankruptcy case, the automatic stay in his case does not apply to his spouse or any other joint obligors as there is no co-obligor stay in chapter 7. The Interpretation would appear to prevent the wife

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[36] *See* 78 Fed. Reg. 62,993 (Oct. 23, 2013).

[37] 12 C.F.R. § 1024.39(d)(1) (effective Jan. 10, 2014).

[38] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(d)(1) - 2(ii) (effective Jan. 10, 2014).

[39] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(d)(1) - 3 (effective Jan. 10, 2014).

in the example provided by the Bureau from receiving information about loss mitigation options even if the husband filed a chapter 7 case years after the couple were separated or divorced and the husband's participation is not required to complete the loss mitigation application.

Borrowers Who Have Sent an FDCPA Cease Communication Letter

Another exemption from the early intervention requirements was added to Regulation X by the Interim Final Rule for a servicer subject to the FDCPA with respect to a mortgage loan for which the borrower has sent a cease communication notice to the servicer pursuant to the Fair Debt Collection Practices Act, 15 U.S.C.§ 1692c(c).[40]

[40] 12 C.F.R. § 1024.39(d)(2) (effective Jan. 10, 2014).

Summaries of Recent Cases

Published State Cases

Fraud and UCL Claims Based on "Speculative Appraisal" Fail

Graham v. Bank of Am., __ Cal. App. 4th __, 2014 WL 2149725 (May 23, 2014): Fraud claims require borrowers to show: 1) defendant's misrepresentation; 2) defendant's awareness of the false nature of the misrepresentation; 3) defendant's intent to induce borrower's reliance; 4) borrower's reliance; and 5) damages. A fraudulent concealment claim requires the same elements, but focuses on defendant's omission or suppression of a material fact, rather than a misstatement. Importantly, opinions—"particularly involving matters of value"– cannot form the bases for fraudulent misrepresentation or concealment claims. Here, borrower brought fraud-based claims based on defendants' alleged misrepresentation of borrower's property value, or "speculative appraisal." Not only was the home overvalued, borrower alleged, but defendants also fraudulently assured borrower that the value would increase over time and that borrower would be able to sell for a profit, or refinance before the adjusted interest rate set in. Borrower's claims were anchored in a theory of "industry-wide fraud." The Court of Appeal affirmed the trial court's sustaining of defendants' demurrer, mostly because an appraisal is an opinion, and therefore not actionable under borrower's theories. There were no facts (or factual omissions), in other words, on which borrower could have relied.

The "unfair" prong of a UCL claim requires, according to this court, conduct that is "tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law." (This is a notably narrower definition than what many other California courts use as a guide for analyzing "unfair" conduct: conduct that is misleading, against legislatively stated public policy, or "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"). Here, borrower repeated his general allegations that defendants participated in an industry-wide conspiracy to artificially inflate property values and "defraud" borrowers that ultimately collapsed the housing market. Additionally, defendants appraised homes at speculative values and "lured" borrowers into imprudent, adjustable rate mortgages. These general allegations did not comply with the Court of Appeal's definition of unfair conduct, so the court affirmed the sustaining of defendants' demurrer.

A "fraudulent" prong UCL claims requires borrowers to show defendants' conduct was likely to deceive the public. This court added two more requirements: 1) defendant had a duty to disclose necessary information; and 2) borrower actually relied on defendants' omission or misstatement. Here, borrower's claim rested in the appraisal and in defendants' failure to disclose its "speculative nature." Because appraisals are actually made for the benefit and protection of the lender, however, and not the potential borrower, defendants had no duty to disclose anything about the appraisal. The court affirmed the sustaining of the demurrer to borrower's fraudulent prong UCL claim.

Rejection of *Glaski*

Yvanova v. New Century Mortg. Corp., __ Cal. App. 4th __, 2014 WL 1654680 (Apr. 25, 2014): In general, California borrowers do not have standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower cited *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on PSA violations and New York trust law. Borrower alleged that the assignment to the trust and the substitution of trustee were both backdated, in violation of trust rules, and therefore void. The Court of Appeal affirmed the trial court's grant of defendants' demurrer, explicitly rejecting *Glaski*. Without really analyzing *Glaski*, the court chose to follow *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497 (2013), a pre-*Glaski* case that denied borrower standing to challenge the PSA. Following *Jenkins*, this court reasoned that botched assignments or substitutions are not the borrower's problem: they do not affect the borrower's obligation to pay their mortgage. If any entity is harmed and deserves a chance to challenge a PSA, it would be the “true” owner of the loan, who *should have* had the right to foreclose, but was deprived of it by the improper assignment. The publication of this case is important for California foreclosure law. There is now a clear conflict among the California Courts of Appeal over *Glaski*.

Unpublished & Trial Court Decisions[41]

Attorney’s Fee Awarded after Preliminary Injunction under HBOR

Ingargiola v. Indymac Mortg. Servs., No. CV1303617 (Cal. Super. Ct. Marin Cnty., May 21, 2014): Except as specifically provided by statute, statutory attorney’s fees are awardable only at the end of a case. Here, the borrower moved for fees under CC 2924.12(i) after obtaining a preliminary injunction. After finding the statutory language ambiguous as to whether it permitted interim fee awards, the court still granted the fee award because the court agreed with borrower’s argument that statutory scheme contemplates interim fee awards because in most instances HBOR cases will never go to trial because the servicer will cure the violation before a trial or the notice of trustee sale will have expired on its own terms.

Duress as a defense to subsequent modification; Good faith and fair dealing

Pichardo v. GMAC Mortg., No. 30-2012-00581642-CU-CL-CJC (Cal. Super. Ct. Orange Cnty. May 12, 2014): To assert a breach of contract claim, borrowers must plead, among other elements, the existence of a contract and damages. Duress, a contract defense, "can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract." A borrower's "reasonable alternative" is a question of fact. Here, borrower alleged the existence of a loan modification and servicer alleged that a subsequent

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[41] Cases without Westlaw citations can found at the end of the newsletter. Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.

modification superseded the first. However, the borrower alleged that he was in the hospital when GMAC insisted that he sign the subsequent modification, which omitted a loan forgiveness term from the previous modification borrower agreed to, or be faced with foreclosure. On the issue of damages, the court construed the claim as declaratory relief as to whether the forgiven loan amount is owed. Because the borrower adequately alleged a defense of duress to the second loan modification agreement, the court overruled servicer's demurrer.

Every contract contains an implied covenant of good faith and fair dealing in the "performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Here, borrower asserted that servicer was required to service the loan under the terms of the previous modification and breached the duty of good faith and fair dealing by servicing the loan under the subsequent modification which required borrower to pay additional principal. The court overruled servicer's demurrer.

Preliminary Injunction Granted on Dual Tracking Claim; Bond Option for Monthly Installments

Monterrosa v. PNC Bank, No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014): To receive a preliminary injunction in California state court, a borrower must show a likelihood of prevailing on the merits and that the borrower will suffer more harm if the injunction does not issue, than the servicer would if the injunction did issue. Here, the court found borrower likely to demonstrate that the servicer was dual tracking because it scheduled a foreclosure sale before providing a written denial. Further, the court found borrowers' potential loss of their home to constitute irreparable harm outweighed servicer's potential loss. The court granted the PI.

The court rejected borrower's request that no bond be posted due to their financial inability to do so. Specifically, the court stated that absent evidence of borrowers' financial income and indigency, servicer was entitled to be compensated in case the preliminary injunction was wrongly issued. The court ultimately required borrower to either post a bond in a single lump sum payment or in monthly installments based on the fair market rental value of the property.

Preliminary injunction granted on Dual Tracking claim; Trustee as borrower under CC 2923.6; Bond set at minimal amount

Zanze v. California Capital Loans Inc., No. 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014): To receive a preliminary injunction in California state court, a borrower must show a likelihood of prevailing on the merits and that they will suffer more harm if the injunction does not issue, than the servicer would if the injunction did issue. Here, the court determined that there was some likelihood that borrowers will prevail on their dual tracking claims. Also, the potential harm the borrower face by losing their home outweighs servicer's potential harm in having the PI issue. Servicer made three arguments as to why borrower's dual tracking claims were meritless. First, servicer argued that CC 2923.6 does not apply to trusts. The court stated, however, that the note indicated that borrower, through his capacity as trustee, was a borrower under CC 2923.6. Second, servicer argued borrower's loan was not a personal loan and not for an owner-occupied property. The court disagreed stating that there is evidence that the property is owner occupied and that borrower was pressured to sign loan documents which misrepresented the nature of the loan. Finally, servicer asserted that borrower was not a party to the note or DOT. Again, not persuaded by servicer's arguments, the court determined that borrower was a party in his capacity as trustee. Accordingly, the court granted the PI.

The court significantly lowered the required bond. In its tentative ruling, the court determined that the appropriate measure is the rent servicer could get if it removed borrower and rented the property plus defense fees and costs for a total of $24,000. After oral argument, however, the court opted to lower the bond to $500 because the court had previously found the borrower indigent.

Federal Cases

No Judicially Estoppel when Claim Arose Post-Petition; Bank Owed Duty of Care to Borrower for Negligent Servicing

Mahoney v. Bank of Am., N.A., 2014 WL 2197068 (S.D. Cal. May 27, 2014): All the assets of the debtor, including legal claims at the time of the petition, belong to the bankruptcy estate. Thus, if the debtor fails to schedule an asset such as a cause of action, the cause of action continues to belong to the bankruptcy estate and does not revert to the debtor after discharge. Here, the debtor's negligent loan administration claim arose after the bankruptcy petition was filed because the defendant failed to identify any damages, an element of the negligence claim, incurred before the bankruptcy discharge. Therefore, the court rejected the servicer's argument that the debtor lacks standing to prosecute the claim. Similarly, the debtor was not judicially estopped from asserting the negligence claim.

Turning to the merits of the negligence claim, the court found that the servicer owed a duty of care to the borrower and that the economic loss rule did not bar recovery. Even though a lender generally does not owe a duty of care to a borrower when the lender does not exceed its conventional role as a mere lender of money, the facts in the complaint showed that the servicer was not being sued for its role as a conventional money lender. Accordingly, the court agreed the borrower that the complaint adequately alleged that the servicer owes a duty of care under these circumstances.

The economic loss rule bars tort claims for purely economic loss after contractual breaches, unless the plaintiff can demonstrate harm above and beyond a broken contractual promise. Here, the complaint alleged that the borrower suffered "severe emotional distress, worry and anxiety." Thus, the court allowed the borrower's negligent loan administration claim to proceed.

TPP: Leave to Amend to Add Fraud and Contract Based Claims after Summary Judgment; Delayed Discovery Doctrine

Curley v. Wells Fargo & Co., 2014 WL 2187037 (N.D. Cal. May 23, 2014):[42] "[L]eave to amend [to add causes of action] must be granted except where no set of facts could state a claim." Here, after surviving summary judgment on his good faith and fair dealing claim, borrower moved for leave to add several other fraud and contract based claims against both the loan's servicer and investor. The court analyzed whether each additional claim could meet the relevant pleading standards, as alleged against each defendant.

Borrowers have a viable promissory fraud claim if servicer "fraudulently induce[d] the [borrower] to enter into a contract." Borrower's basic allegation is that servicer misrepresented that a TPP would result in a permanent loan modification (servicer instead breached the TPP by accelerating the loan and foreclosing). Borrower previously lost summary judgment on his fraud claim because he failed to show how his reliance—the TPP payments—resulted in damages (*i.e.*, foreclosure). Instead, servicer successfully argued, borrower's default resulted in foreclosure. Now, borrower alleges he made TPP payments in reliance on servicer's promise to permanently modify and, in so doing, passed up other opportunities including bankruptcy, obtaining private financing, or selling his home. The court found these allegations sufficient to allege detrimental reliance that caused borrower's damages, and granted borrower leave to amend to state a promissory fraud claim against servicer.

Constructive fraud—an "act or omission . . . involving a breach of legal or equitable duty . . . which results in damage to another even though the conduct is not otherwise fraudulent"—only occurs in the context of a "fiduciary or confidential relationship." This relationship does not generally exist within the context of traditional borrower-lender activities. An exception applies, however, if a bank's activities extend

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[42] This case was originally summarized, at the summary judgment stage, in our April Newsletter as *Curley v. Wells Fargo & Co.*, 2014 WL 988618 (N.D. Cal. Mar. 10, 2014) (finding whether borrower complied with his TPP document production requirement a question of material fact inappropriate for resolution at summary judgment).

beyond this relationship. Without expressly agreeing with other courts in its district, this court acknowledged that in offering a TPP, a bank *may* have "stepped outside the scope of a traditional money-lender relationship." And, since borrower claims servicer offered a TPP, the court granted leave to add a claim for constructive fraud.

Interference with contract and interference with prospective economic advantage claims cannot be brought against the other party to the contract or economic relationship. Instead, a borrower must show, *inter alia*, a valid contract (or economic relationship) between themselves and a third party, not the defendant. Here, the TPP was a contract (and evidence of an economic relationship with the probability of future financial benefit to the borrower) between servicer and borrower, so the court dismissed the tortuous interference claims against servicer. The loan's *investor* though, could be seen as an interested third party to the TPP. On the contractual interference claim, investor argued that its economic interest in the TPP extinguished its tort liability. The court disagreed: a non-party with a financial interest in the contract is not [subject to contractual liability]," so it would only be fair to subject that party to tort liability. The court granted leave to add the interference claims against investor.

Those interference claims, however, must be brought within two years of the wrongful interference. Under California's delayed discovery doctrine, a borrower may toll the SOL until he discovered the interference, if he could not have reasonably discovered it earlier. Here, borrower alleged he could not have discovered investor's interference—or the roll that investor played in the modification process—until a witness gave deposition testimony. The court allowed borrower to amend his complaint to assert the delayed discovery doctrine in conjunction with his newly added tortuous interference claims.

Breach of TPP: Borrowers Attach Permanent Mod Offer to Complaint; Fraud Claim Survives Based on Servicer Inducement to Become Delinquent

Newsom v. Bank of Am., N.A., 2014 WL 2180278 (C.D. Cal. May 22, 2014): To plead a breach of contract claim, borrowers must allege a contract, their performance, defendant's breach, and damages. Here, borrowers alleged servicer breached their TPP agreement by failing to provide them with a permanent modification after borrowers successfully complied with all TPP requirements. Foreclosure eventually began, even when borrowers continued to make modified payments while awaiting their permanent modification. Under California law, this would seem to state a valid breach of contract claim. Borrowers, though (seemingly mistakenly), attached servicer's offer to permanently modify to their complaint. According to servicer, borrowers had rejected this offer, considering the terms unacceptable. Borrowers "pled themselves out" of their breach of contract claim by attaching the permanent modification offer. The court dismissed their claim with prejudice.

Fraud claims require borrowers to show: 1) servicer's misrepresentation; 2) servicer's awareness of the false nature of the misrepresentation; 3) servicer's intent to induce borrower's reliance; 4) borrower's reliance; and 5) damages. Here, borrowers alleged two bases for their fraud claim. First, servicer misrepresented that borrower would receive a permanent loan modification once the TPP was completed. Because servicer actually *did* offer a permanent modification, though, this claim was dismissed. Second, borrowers alleged servicer misrepresented that borrowers would "suffer neither a negative credit report nor foreclosure as a result of engaging in the modification process." Servicer not only encouraged borrowers to become delinquent to qualify for a modification, but servicer refused to accept full mortgage payments during the modification process. Servicer ultimately started the foreclosure process and, when it did offer a modification, added interest that had accrued over an extended TPP period. Borrowers also alleged detrimental reliance: borrowers were current on their mortgage when they began the modification process and "misled into defaulting." But for servicer's misrepresentation, borrowers would not be in their current position. The court allowed borrower's fraud claim to survive the MTD.

Section 1983 Liability for Private Actor Acting in Concert with Police; Violation of FHA Loss Mitigation Requirements may be Grounds to Set Aside Sale

Urenia v. Public Storage, 2014 WL 2154109 (C.D. Cal. May 22, 2014):

In a § 1983 claim, a plaintiff must allege two elements: (1) a violation of a federal right (2) by a person acting under color of state law. While a private actor generally does not act under color of state law, in certain situations a private individual or entity can be held liable under § 1983 if it engages in "joint action" with public actors. In this case, the plaintiffs contended that the bank, which had foreclosed on the home and removed the belongings inside it, and the public storage company, which took possession of the belongings, acted in concert with police officers such that the bank and storage company could be deemed to have acted under color of state law. The police officers, who had been called by the bank and directed to change the locks, allegedly went to the property, forced out the former homeowner, changed the locks, and erected a chicken-wire fence. The officers also allegedly refused to allow the plaintiffs to obtain their belongings and threatened arrest if the plaintiffs returned, and the plaintiffs were allowed only one hour to pack their belongings because Occupy Fights Foreclosures ("OFF") was holding a candlelight vigil at the property that evening. The court found that the plaintiffs did not plead sufficient facts to make out a First Amendment claim, since the only allegation pertaining to that claim was an isolated statement that the defendants would arrive every time the plaintiffs tried to associate with OFF and then demand identification of all individuals who were there. That allegation, the court decided, did not establish any connection between the purported acts of the police officers, namely the "defendants" who would presumably arrive at the property demanding identification, and any acts by the bank and storage company. There was no allegation that the officers actually went to the property to demand identification of OFF members at the direction of or in coordination with the private defendants. However, the court found that the plaintiffs did establish a plausible Fourth Amendment claim against the bank. The court noted that when police officers do more than merely “stand by” but, instead, affirmatively participate in assisting private actors in effectuating an eviction or repossession of property, the private actors may be said to be acting under color of law. Here, the plaintiffs demonstrated that the officers did more than “stand by” when the bank locked them out of the property, evicted them, and took possession of their belongings.

The defendants also moved to dismiss the borrower’s wrongful foreclosure claim and cited *Pfeifer v. Countrywide* to contend a violation of HUD’s loss mitigation rules do not constitute grounds to set aside a completed foreclosure sale. In *Pfeifer*, the California Court of Appeal held that a violation of HUD loss mitigation requirements for FHA loans may be a ground to enjoin a foreclosure sale. However, the court here held that the proposition cited by the defendants did not capture the holding of *Pfeifer* and declined to dismiss the claim on this ground. However, the court dismissed the wrongful foreclosure claim for the plaintiff to more specifically allege more particularly the course of events that made the foreclosure wrongful and the specific FHA loss mitigation provisions that were violated.

RESPA Statutory Damages; Verification Notice as Evidence of Debt Collector Status; No Tender Rule before Foreclosure

Schneider v. Bank of Am., N.A., 2014 WL 2118327 (E.D. Cal. May 21, 2014):

Real Estate Settlement Procedures Act (“RESPA”). Under RESPA, a loan servicer that receives a qualified written request (“QWR”) from the borrower must acknowledge the letter within 5 days, and must substantively respond to any qualified written request within 30 days. The court rejected the defendants’ assertions that, “save for one letter,” the plaintiff did not allege the dates on which he sent his alleged QWRs, since “RESPA does not require that a loan servicer fail to respond to a slew of QWRs before it will be found to have violated the law. It states that if one is sent, the loan servicer must respond to that one.” Also, the court noted that the plaintiff specifically identified three communications as QWRs, along with their transmission dates and addressees. In addition, the court rejected the defendants' contention that the plaintiff had failed to plead facts establishing actual damages. The plaintiff's complaint stated that damages included "a detriment to [his] ability to sell or refinance his home," and specifically alleged three clearly identified instances where he sent a QWR to the loan servicer and got no timely response. The complaint alleged a "pattern or practice of noncompliance" sufficient to state a claim for statutory damages under RESPA.

Fair Debt Collection Practices Act ("FDCPA"). Because creditors are not debt collectors under the FDCPA, the plaintiff's claim was dismissed as to Bank of America. Because servicers are covered under the Act only if the debt was in default at the time it was obtained, the claim was also dismissed as to BAC Home Loans, the servicer, which obtained the mortgage before any alleged arrearage occurred. However, Quality Loan Service Corp. ("QLS"), the trustee, was found to be a debt collector. The court noted that the allegations that QLS was a debt collector as defined by that Act, that it was not exempt from coverage, that it was "trying to collect a debt," and that some of the communications with QLS took place over the telephone, an instrument of interstate commerce, were enough to allege that QLS was a debt collector. The court additionally noted that the complaint attached a communication from QLS stating in bold letters:

> "THIS NOTICE IS SENT FOR THE PURPOSE OF COLLECTING A DEBT. THIS FIRM IS ATTEMPTING TO COLLECT A DEBT ON BEHALF OF THE HOLDER AND OWNER OF THE NOTE. ANY INFORMATION OBTAINED BY OR PROVIDED TO THIS FIRM OR THE CREDITOR WILL BE USED FOR THAT PURPOSE."

While not conclusive as to debt collector status, this statement was "certainly sufficient to put the burden on QLS to establish why it is not a debt collector." As to QLS' argument that the complaint failed to allege that it engaged in any "unfair practices," the court pointed to the allegation that QLS falsely denied that it could give plaintiff information about the debt, and also, that only the *lender* could postpone the sale, yet when the plaintiff called the lender that same day, the lender's employee told him that he had to get the information from QLS and that "only the *trustee* [QLS] could postpone the sale." These allegations, said the court, plainly pointed to an unfair credit collection practice.

<u>*Rosenthal Act*</u>. Bank of America could not avoid liability by asserting an exemption as a lender or servicer. In making this argument, the Bank incorrectly relied on the federal FDCPA, citing no provision or case law of the Rosenthal Act where this asserted exemption could be found. Indeed, the court noted that the Rosenthal Act provision defining "debt collector" is broader than that of the FDCPA and includes persons collecting their own debts, whereas such persons are expressly exempted under the federal Act. The court also found that the allegations were sufficiently specific to go forward where the claim alleged that Bank of America had falsely referred to QLS as "the attorneys," conduct that is expressly made unlawful by the Rosenthal Act's provision prohibiting a debt collector from making a false representation that a person is an attorney or counselor at law.

<u>*Breach of Contract.*</u> First, the defendants argued that the plaintiff had not alleged his own performance but had in fact alleged his non-performance by failing to obtain or produce proof of insurance. However, where the plaintiff alleged that Bank of America waived this provision of the Deed of Trust by acquiescing in the plaintiff's conduct, the court found that while the plaintiff did not allege complete performance, he nevertheless alleged an excuse for non-performance or waiver of performance. Second, the defendants argued that there was no breach. However, where the plaintiff alleged that a written modification to the Deed of Trust contained an agreement that Bank of America would never create an escrow account against his mortgage, the Bank did just that, so the court declined to dismiss the claim. Stating that even though the plaintiff's allegation "brushed right up" against the plausibility pleading standards, and that it was hard to believe that a lender would ever agree to such a thing, the court found

that the plaintiff's allegations were "merely improbable, rather than implausible," and therefore withstood dismissal.

Conversion. Conversion is the wrongful exercise of dominion over the property of another. In order to make out a claim, the plaintiff must show: (1) ownership or right to possession of the property at the time of the conversion; (2) a defendant's conversion by wrongful act or disposition of property rights; and (3) damages. There need not be a manual taking of property; there need only be an assumption of control or ownership, or a showing that the defendant applied the property for his own use. A cause of action for conversion of money can be stated only when a defendant interferes with a plaintiff's possessory interest in a specific, identifiable sum. Here, the plaintiff alleged that the surplus escrow funds were supposed to be returned to him, but were instead kept by the defendants. The court rejected the defendants' argument that the plaintiff's right to payment was a "mere contractual one." The plaintiff did not just assert that the defendants owed him money under the contract; rather, he asserted that he entrusted specific sums of money to the defendants to be used for a specific purpose, but that they instead took the money entrusted to them and used it to pay fees the plaintiff did not owe and then refused to return it, or even any surplus after the fees were paid. These allegations stated a claim for conversion.

Wrongful Foreclosure. According to the "tender rule," a homeowner who sues for wrongful foreclosure must show that they he is ready, willing and able to pay the full amount due on the loan. In support of his wrongful foreclosure claim, the plaintiff alleged that he had made full and timely tender of all amounts owed. The court found two problems with Bank of America's argument that the plaintiff had not alleged "tender." First, according to his complaint the plaintiff had alleged "tender." Second, there exists a recognized exemption to the tender rule where the foreclosure sale has not yet occurred.

TRO granted on Dual Tracking after "Complete Application" Submitted

Cooksey v. Select Portfolio Servs., Inc., 2014 WL 2120026 (E.D. Cal. May 21, 2014): To receive a temporary restraining order in federal court, a borrower must show: 1) a likelihood of success on the merits of his claim (or at least serious questions going to the merits); 2) imminent and irreparable harm if the TRO does not issue; 3) that the balance of harms tips in their favor; and 4) the TRO is in the public interest. Here, borrower brought dual tracking claims against servicer for continuing with a trustee sale after borrower submitted, and servicer confirmed receipt of, a complete application. Borrower has shown a likelihood of prevailing on the merits. Even though the borrower submitted a number of previous loan modification applications, the court found that the borrower was still entitled to dual tracking protections under CC 2923.6(g) because it was "unlikely" that servicer evaluated or "afforded a fair opportunity to evaluate" borrower's application. The court also found the impending sale constitutes irreparable harm. Additionally, the balance of equities favored borrower – without the TRO borrower would lose his home. The public interest also favors borrower by "ensuring judicial oversight of the procedural guarantees" of non-judicial foreclosures. Borrower's TRO request was granted.

SOL Issues; Pleading Damages for Negligent & Intentional Misrepresentation

Ferguson v. JP Morgan Chase Bank, N.A., 2014 WL 2118527 (E.D. Cal. May 21, 2014): "The nature of the right sued upon, not the form of action or the relief demanded, determines the applicability of the statute of limitations." Here, borrowers brought promissory estoppel and negligent misrepresentation claims based on servicer's failure to permanently modify their loan after they successfully completed a TPP. The court reasoned that these claims were, basically, fraud-based claims: servicer fraudulently represented that it would permanently modify borrower's loan and instead, ultimately denied them a modification. Because the statute of limitations for fraud is three years, the court set the SOL for borrowers' PE and negligent misrepresentation claims at three years. The negligent misrepresentation claim, it should be noted, was a closer call. There, courts generally give a two-year SOL if the claim acts more like a negligence claim (if servicer breached a duty of care), and a three-year SOL if the claim more closely mirrors a deceit or fraud claim. Because these borrowers pled their negligent misrepresentation claim based on the same facts as their intentional misrepresentation claim (fraud), the court applied the three-year fraud SOL.

Both negligent and intentional misrepresentation claims require borrowers to show that servicer's misrepresentations led to borrower's damages. Here, borrowers adequately pled that nexus requirement. Specifically, borrowers informed servicer at the beginning of loan modification negotiations that they wanted to sell their property because they had substantial equity. Servicer advised borrowers not to sell, that a modification would be forthcoming and would be a better scenario. Borrowers relied on this representation in choosing not to sell when they had more equity (they eventually sold with much less equity) and in participating in lengthy modification negotiations and a TPP. The court therefore denied servicer's MTD borrowers' misrepresentation claims.

CRA Duty to Reinvestigate under the Fair Credit Reporting Act

Darrin v. Bank of Am., N.A., 2014 WL 1922819 (E.D. Cal. May 14, 2014):

The federal Fair Credit Reporting Act ("FCRA") requires that whenever a consumer reporting agency prepares a consumer report, it must follow "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." In this case, the plaintiff, who had sought and received a HAMP loan modification, contended that her case presented a "simple accounting question," since the bank had apparently reported her earlier mortgage payments to the credit reporting agencies as being late even though she had made such payments according to the bank's direction. The court analyzed the plaintiff's allegations by looking to whether the credit reporting agencies ("CRAs") relied on information received from a source that it reasonably believed to be reputable. Here, the court found that the plaintiff presented no evidence demonstrating that the CRAs would have reason to believe that the bank was not a reputable source, and moreover, the information that the bank reported was not attributable to the CRAs' procedures. Rather, this information was attributable to the bank, which provided this information to the CRAs. Given that reporting information that may be inaccurate does not violate § 1681e(b) if such information is received "via accuracy-assuring procedures," and because there were no allegations in the record that the CRAs' procedures were unreasonable, the plaintiff's § 1681e(b) claim was unsuccessful.

Under the FCRA (§ 1681i) a CRA must reasonably reinvestigate an item in a consumer's credit file once the consumer directly notifies the agency of a possible inaccuracy. Here the plaintiff's consumer report contained inaccurate information about completed mortgage payments, which she disputed to the CRAs, and after the CRAs failed to correct the information, she disputed a second time. In a prior order, the court found that because the CRAs reinvestigated the claim within a month and contacted the bank, and the bank confirmed to the CRAs that the information they provided about the plaintiff was accurate, the plaintiff failed to make out a claim that the CRAs "failed to respond" or "failed to reinvestigate." On motion for reconsideration, the plaintiff argued that the court's analysis was incorrect, as liability can arise under § 1681i if there was no investigation at all, if the investigation was not completed in 30 days, or if the manner of the investigation was not sufficient. The plaintiff contended that because the CRAs not only relied solely on information provided by the bank in their reinvestigation process, but also failed to send any of her documentation and failed to describe her disputes to the bank "accurately or completely," the CRAs violated their FCRA obligations. While acknowledging that the plaintiff was correct that liability can attach for failure to respond in a reasonable manner, the court nevertheless stated that her complaint did not sufficiently establish a claim and that the court reasonably found that all three CRAs had performed a reinvestigation. However, the court also found that the plaintiff raised a concern that the CRAs relied exclusively on an ACDV system in reinvestigating the plaintiff's dispute. The court noted that such reliance is "problematic," since many courts have found that where a CRA is affirmatively on notice that information received from a creditor may be suspect, it is unreasonable as a matter of law for the agency to verify that information through the ACDV process without engaging in additional investigation. The court therefore granted in part the plaintiff's motion for reconsideration as to the plaintiff's § 1681i claims and granted her leave to amend.

A National Bank Cannot Invoke HOLA Preemption to Defend its Own Conduct; HBOR's NMS "Safe Harbor" Provision is an Affirmative Defense; Establishing a Duty of Care

Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829 (N.D. Cal. May 13, 2014):[43] The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Normally, national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Here, borrower brought state law claims (HBOR dual tracking and negligence) against her servicer, a national bank. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. This court acknowledged that many district courts allow Wells Fargo to invoke HOLA preemption if the subject loan

[43] Judge Maria-Elena James issued this opinion, as well as the *Faulks* and *Peterson* decisions (both below) on the same day. All three cases have essentially the same preemption holding: a national bank cannot invoke HOLA preemption to defend *its own conduct*.

originated with a federal savings bank, but pointed to the lack of controlling authority from the Ninth Circuit. The court then opted to follow a growing minority view that only allows a national bank to invoke HOLA preemption to defend the conduct of the federal savings association. Any conduct occurring *after* the loan passed to the national bank would be subject to an NBA preemption analysis. Here, the conduct at issue revolved around loan modification negotiations that occurred well after borrower's loan was transferred to Wells Fargo. The court therefore rejected Wells Fargo's HOLA preemption argument. Having found Wells Fargo unable to use HOLA preemption as a defense, the court evaluated borrower's claims on their merits.

Signatories to the National Mortgage Settlement (NMS) are immune from HBOR liability, but only if the servicer was compliant with the NMS *as it pertains to the borrower bringing the HBOR claim*. CC 2924.12(g). Here, servicer attempted to argue borrower's dual tracking claim should be dismissed because borrower had not alleged, in her complaint, that servicer was non-compliant with the NMS. The court quickly dismissed this reasoning, agreeing with another Northern District court that found this "an affirmative defense to be raised on summary judgment," and for which servicer bears the burden of proof.

Dual tracking prevents a servicer from recording an NOD or conducting a foreclosure sale while a borrower's modification application is pending. Further, if a servicer denies borrower's application, the servicer may not move forward with foreclosure until the borrower's appeal period has passed, or until the servicer gives borrower a written denial of borrower's appeal. Through a series of convoluted communications with her servicer, this borrower had both a pending appeal (on application 1) *and* a pending modification application (application 2) when servicer recorded an NOD (during borrower's appeal, a servicer representative encouraged her to re-apply, which she did). Not only did borrower never receive a written denial of her appeal on application 1, but she never received a reason for the ultimate denial of application 2, or notice of appeal rights on *that* application. The court determined these allegations adequately stated a dual tracking claim and denied servicer's motion to dismiss.

Negligence claims require a borrower to demonstrate that servicer owed her a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care. An exception applies, however, if a bank's activities extend beyond this relationship. Some courts use the six-factor test from *Biakanja v. Irving*, 49 Cal. 2d 647 (1958) to analyze whether an activity extends beyond this relationship. This court acknowledged that many California state and federal courts find loan modification negotiations to be a normal part of the bank-borrower relationship. Others have decided that "a financial institution has exceeded its role as a money lender once it accepts an application for a loan modification." This court applied the *Biakanja* test and found five of the six factors fulfilled. Specifically: (1) servicer's acceptance of the modification application was intended to effect borrower, because it would have lowered *her* mortgage payments; (2) it was foreseeable that servicer's "mishandling" of the application would result in a failed modification attempt – and even the possibility of modifying was important; (3) borrower's lost opportunity was a substantially certain injury; (4) servicer's actions directly led to the lost opportunity to modify; and (5) state and federal legislatures have recently identified the foreclosure crises as a cause for public concern (the court did not address the final factor: moral blameworthiness). In agreeing to process borrower's application, then, servicer went beyond the role of a traditional money-lender and established a duty of care. Borrower's negligence claim survived the pleading stage.

A National Bank Cannot Invoke HOLA Preemption to Defend its Own Conduct; Promissory Estoppel; Requisite Specificity for Fraud Claims; Establishing a Duty of Care

Faulks v. Wells Fargo & Co., 2014 WL 1922185 (N.D. Cal. May 13, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Normally, national banks are regulated by the National

Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Here, borrower brought state common law claims against his servicer, a national bank. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. This court acknowledged that many district courts allow Wells Fargo to invoke HOLA preemption if the subject loan originated with a federal savings bank, but pointed to the lack of controlling authority from the Ninth Circuit. The court then opted to follow a growing minority view that only allows a national bank to invoke HOLA preemption to defend the conduct of a federal savings association. Any conduct occurring *after* the loan passed to the national bank would be subject to an NBA preemption analysis. Here, the conduct at issue revolved around loan modification negotiations that occurred well after borrower's loan was transferred to Wells Fargo. The court therefore rejected Wells Fargo's HOLA preemption argument. Having found Wells Fargo unable to use HOLA preemption as a defense, the court evaluated borrower's claims on their merits.

Promissory estoppel claims require: 1) a clear and unambiguous promise; 2) borrower's reasonable and foreseeable reliance on that promise; 3) damages incurred from the reliance. Here, the court found servicer's promise not to foreclose while it considered borrower's loan modification application to be clear and unambiguous. After making this promise, servicer wrote to borrower that his application had been denied or was considered withdrawn. After receiving this information, a servicer representative told borrower that "he would help get the loan modification request reinstated" and later, that servicer was still "actively considering [borrower's] loan modification." Taken together, these assertions were also clear and unambiguous promises. The court also accepted borrower's assertion that, in reliance on servicer's representations, he chose not to seek "other alternatives" to foreclosure, like selling the house himself, as sufficient detrimental reliance. The foreclosure itself was sufficient to allege damages. Borrower's promissory estoppel claim survived servicer's MTD.

Fraud claims have a heightened pleading standard that requires borrowers to allege "the who, what, when, where, and how" of the alleged fraudulent conduct. Borrower has met that burden: 1) he identified the servicer representative by name (who promised to reinstate borrower's modification application); 2) the promises not to foreclose were made over the course of a couple of years; 3) promises were made "by letter, email, and over the phone;" 4) and finally, the specific representations made and how they turned out to be false (servicer foreclosed while modification was pending). Servicer's motion to dismiss borrower's fraud claim was denied.

In addition to the established elements for negligent misrepresentation claims, this court required borrower to show that servicer owed him a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care. An exception applies, however, if a lender's activities extend beyond this relationship. Some courts use the six-factor test from *Biakanja v. Irving*, 49 Cal. 2d 647 (1958) to analyze whether an activity extends beyond this relationship. This court acknowledged that many California state and federal courts find loan modification negotiations to be a normal part of the bank-borrower relationship. Others have decided that "a financial institution has exceeded its role as a money lender once it accepts an application for a loan modification." This court applied the *Biakanja* test and found five of the six factors fulfilled. Specifically: (1) servicer's acceptance of the modification application was intended to effect borrower, because it would have lowered *his* mortgage payments; (2) it was foreseeable that servicer's "mishandling" of the application would result in a failed modification attempt – and even the possibility of modifying was important; (3) borrower's lost opportunity was a substantially certain injury; (4) servicer's actions directly led to the lost opportunity to modify; and (5) state and federal legislatures have recently identified the foreclosure crises as a cause for public concern (the court did not address the final factor: moral blameworthiness). In agreeing to process borrower's application, then, servicer went beyond the role of a traditional money-lender and established a duty of care. Borrower's negligence claim survived the pleading stage.

A National Bank Cannot Invoke HOLA Preemption to Defend its Own Conduct; Promissory Estoppel

Peterson v. Wells Fargo Bank, N.A., 2014 WL 1911895 (N.D. Cal. May 13, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Normally, national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Here, borrowers brought state common law claims against their servicer, a national bank. Borrowers' loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. This court acknowledged that many district courts allow Wells Fargo to invoke HOLA preemption if the subject loan originated with a federal savings bank, but pointed to the lack of controlling authority from the Ninth Circuit. The court then opted to follow a growing minority view that only allows a national bank to invoke HOLA preemption to defend the conduct of the federal savings association. Any conduct occurring *after* the loan passed to the national bank would be subject to an NBA preemption analysis. Here, the conduct at issue revolved around loan modification negotiations that occurred well after borrowers' loan was transferred to Wells Fargo. The court therefore rejected Wells Fargo's HOLA preemption argument. Having found Wells Fargo unable to use HOLA preemption as a defense, the court evaluated borrower's claims on their merits.

Promissory estoppel claims require: 1) a clear and unambiguous promise; 2) borrower's reasonable and foreseeable reliance on that promise; 3) damages incurred from the reliance. Here, servicer offered borrowers a loan modification wherein their interest rate would increase yearly for eight years. Borrowers alleged servicer promised a *second* modification one year after this first one. This second modification would result in lower payments and would not include the yearly interest rate increase. In reliance on servicer's promise, borrowers agreed to the first modification. Servicer never modified borrowers' loan a second time. The court found servicer's promise to modify a second time to be clear and unambiguous. Borrowers also demonstrated reasonable and foreseeable reliance by "refraining from obtaining other alternatives to remedy their situation." Finally, they showed adequate injury because they used their resources to improve the house and incurred expenses from the ongoing foreclosure. Property improvements were also sufficient to grant borrower standing to bring their UCL claim based on promissory estoppel. Both claims survived the MTD.

Attorney fees as sanction for multiplicity of filing

Lindberg v. Wells Fargo Bank, N.A., 2014 WL 1779470 (N.D. Cal. May 5, 2014): A court may award attorney's fees as a sanction against an attorney who multiplies the proceedings "unreasonably and vexatiously." Here, borrower's attorney filed a first amended complaint and unsuccessfully moved for preliminary injunction based on the complaint. Subsequently, after failing to submit a second amended complaint, borrower's attorney appealed to the Ninth circuit despite the fact that the district court's decision was not a final, appealable order. While the appeal was ongoing, the attorney also filed an "ex parte application to stop the foreclosure," which the court denied because it was duplicative of the already denied preliminary injunction motion. The court agreed with servicer that two of borrower's attorney's filings led to multiplication of the proceedings and/or constituted bad faith. First, as to the ex parte application to delay foreclosure the court found it was "simply re-filed . . . in a different guise" as borrower's attorney had already filed for a preliminary injunction using the same arguments. Second, by failing to respond to the court's order to file a second amendment complaint, borrower's attorney acted "unreasonably, vexatiously, and in bad faith" and consequently led servicer to file a motion to dismiss for failure to comply with a court order. As a result, the court awarded fees to servicer for the conduct of borrower's attorney.

Recent Regulatory Updates

Fannie Mae Servicing Guide Announcement SVC-2014-08 (May 21, 2014)

Calculating the Repurchase Price

With this Announcement, Fannie Mae clarifies its policy for calculating the repurchase price when a mortgage loan (other than a reverse mortgage) originally purchased at a premium or discounted purchase price has undergone negative amortization. The purchase discount and the purchase premium will be limited to the amount of the original purchase discount or premium. The purchase price used to calculate the repurchase amount is expressed as a percentage of par. If a discount was paid when Fannie Mae purchased the loan, this percentage will be less than 100%. Conversely, the percentage will be greater than 100% if a premium was paid when Fannie Mae purchased the loan.

Release of Security

This Announcement updates the documents used to evaluate a request for a full or partial release of a property securing a loan. Fannie Mae will review the request and follow up with the servicer. The servicer is no longer required to contact the Servicing Consultant, Portfolio Manager, or Fannie Mae National Servicing Organization's Servicing Solutions Center for these approvals.

Servicer Oversight and Business Continuity Requirements

The Announcement states that servicers are responsible for oversight of all outsourcing and third-party vendors. Servicers must have policies and procedures in place to ensure that all outsourcing firms and third-party vendors are fully compliant with the Servicing Guide requirements, and must perform annual quality control tests. Additionally, the servicer must implement and maintain business continuity plans ensuring the ability to regain critical business operations if the subservicers, third-party originators, outsourcing firms, and/or third party vendors fail to maintain business continuity, or suffer complete business failure or dissolution. These written plans must be comprehensive, accessible to critical staff, and tested and updated on an annual basis.

Stay of Foreclosure and other Legal Proceedings for Servicemembers

The extended stay of foreclosure and other legal proceedings that is set to expire at the end of 2014 will continue indefinitely for eligible servicemembers. Servicers must stay any foreclosure proceedings already in process or postpone the initiation of foreclosures against an eligible servicemember. Servicers are no longer permitted to obtain the servicemember's written consent and/or petition the court to continue or start foreclosure proceedings.

Fannie Mae Servicing Guide Announcement SVC-2014-07 (May 16, 2014)

Borrower Solicitation Letters, Acknowledgement of Borrower Response Package, and Incomplete Information Notice

This Announcement provides that for a borrower who submits a complete Borrower Response Package (BRP) or incomplete documentation 37 days or fewer prior to a foreclosure sale, the servicer (1) must explain its plans for evaluating the borrower for a workout option and suspending the foreclosure sale in the BRP acknowledgement notice, if applicable, and (2) is encouraged to work with a borrower who submits incomplete documentation to obtain a complete BRP, but is not required to send an Incomplete Information Notice.

Substantially Complete Borrower Response Package

With this Announcement, Fannie Mae is eliminating all Servicing Guide requirements related to a substantially complete BRP. Servicers need no longer postpone foreclosure due to the receipt of a substantially complete BRP.

Payment Adjustment of Initial Workout Option Offer After Appeal Decision

Where additional amounts have accrued and/or the due dates of the initial workout offer have changed because the borrower was awaiting the outcome of an appeal decision, the servicer must adjust the payment amount of the initial offer, use the same adjustment approach on all Fannie Mae loans, and reissue the initial offer to reflect any adjusted dates or amounts.

Referral to Foreclosure and Delay in Legal Action

Servicers are no longer required to refer a mortgage loan secured by a principal residence to foreclosure within five business days after the 121st day of delinquency. The Announcement reminds servicers that they are expected to complete routine foreclosure proceedings within the maximum number of days set forth in the Foreclosure Time Frames and Compensatory Fee Allowable Delays exhibit on the Fannie Mae website, and that they are not to refer a mortgage loan secured by a principal residence to foreclosure prior to the 121st day of delinquency. Further, when a borrower has been offered a workout option based on the evaluation of a complete BRP, the servicer must not refer a mortgage loan to foreclosure or complete the first legal action, or proceed with the motion for judgment or order of sale until the borrower's time period for submitting the initial payment to accept the offer has expired without the servicer receiving the payment.

Freddie Mac Bulletin 2014-9 (May 15, 2014)

Foreclosure Referral on a Primary Residence (effective July 1, 2014)

The Bulletin updates sections 63.2, 64.5 and 66.9.1(a) to remove the requirement that a foreclosure referral on a primary residence must be made no later than five business days after the 121st day of delinquency (*i.e.*, 151 days from due date of last paid installment (DDLPI).

Foreclosure Sale Bidding

The Bulletin updates section 66.43 to provide that where state law gives the borrower a post-foreclosure sale right of redemption and the borrower can redeem the property for the successful foreclosure sale price, the servicer must start its bid at an amount equal to the lesser of (1) 100% of the credit bid obtained from the service loans application; (2) total indebtedness, which includes the unpaid principal balance, accrued interest, escrow advances and expenses; or (3) such other amount required by applicable state law (*e.g.*, amount of the judgment).

Expense Reimbursement (effective Aug. 15, 2014; servicers may begin using May 19)

The Bulletin adds six new income codes to the reimbursement system to provide servicers specific codes for certain income paid to Freddie Mac: 815075 (Suspense Payments); 815077 (Payments after DDLPI); 815078 (Homeowners Association (HOA) Refunds); 815079 (Utility Refunds); 815081 (Attorney Refunds); and 815064 (Supplemental Windstorm Coverage).

Form 105, Multipurpose Loan Servicing Transmittal

Applicable Guide sections have been updated to remove the requirement for servicers to submit Form 105 to report disaster information pertaining to distressed properties, risk of ownership issues, changes to the mortgaged premises, notification of non-compliance with Texas Equity section 50(a)(6) mortgages, bankruptcy cramdowns, and post-eviction requests to approve storage of an occupant's personal belongings. In addition to the removal of options from Part C (Reason for Transmittal) that relate to the above matters, the form has been updated to: (1) add a selection in Part C to document information on long-term repayment plans; (b) add fields to capture the date the form is submitted and the servicer’s e-mail address as well as functionality to calculate total indebtedness and pending unpaid expenses.

Subsequent Transfers of Servicing

The bulletin revises the Guide to extend the submission time frame for a request for approval of servicing transfer from 30 to 45 days prior to the proposed servicing transfer date. The bulletin states that the additional 15 days are needed to provide the servicer with enough time following Freddie Mac's approval to notify borrowers of transfers in accordance with Freddie Mac and RESPA requirements.

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Chair:
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Attorney for Plaintiffs
ROSARIO and JENNA INGARGIOLA

FILED

MAY 21 2014

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: T. Fraguero, Deputy

BY FAX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

ROSARIO INGARGIOLA and JENNA INGARGIOLA Plaintiffs, v. INDYMAC MORTGAGE SERVICES, a Division of ONEWEST BANK, FSB; OCWEN LOAN SERVICING, LLC, MERIDIAN FORECLOSURE SERVICES, and Does 1 through 20, inclusive, Defendants.	**Case No: CV1303617** **[~~PROPOSED~~] ORDER GRANTING PLAINTIFFS' MOTION FOR INTERIM ATTORNEY'S FEES AND COSTS AGAINST DEFENDANTS INDYMAC MORTGAGE SERVICES, FSB AND ONEWEST BANK, FSB** Complaint Filed: November 18, 2013

I. RULING

Plaintiffs' Motion for interim attorney's fees and costs is granted, in part, in the amount of $15,758.33 limited to attorney fees incurred in obtaining preliminary injunctive relief calculated as follows: $1,508.33 for drafting the initial Complaint including the cause of action for violation of Civil Code §2923.6 (reduced by two-thirds for claims unrelated to the TRO and preliminary injunction), $6,350 for the successful TRO and Preliminary Injunction pursuant to Civil Code §2924.12, and $7,900 for this motion for attorney fees. Plaintiffs also seek $979.50 in costs. However, those costs are not itemized sufficiently to allow the court to make an award of costs relating to the preliminary injunctive relief.

This Court recognizes that, generally, statutory fees are awardable only at the end of the case. No matter how meritorious the claim, courts ordinarily cannot make interim fee awards. (Wegner, Fairbank & Epstein, California Practice Guide: Civil Trials and Evidence (TRG 2013) §17:152.5, citing *Bell v. Farmers Ins. Exch.* (2001) 87 Cal.App.4th 805, 831.)

Plaintiffs now seek to recover all of their attorney's fees incurred in this action to date pursuant to Civil Code §2924.12(i) which provides:

> A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.

Code of Civil Procedure §1021 provides: "Except as attorney's fees are *specifically provided for by statute*, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; . . ." (Italics added.) Thus, the propriety of an interim award of attorney fees in this case depends on whether it is "specifically provided for" by Civil Code 2924.12(i).

The axioms of statutory construction require us first to look at the words used by the

Legislature. If the language is unambiguous, our task is finished. (*Construction Industry Force Account Council v. Amador Water Agency* (1999) 71 Cal.App.4th 810, 815.) "We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent, '[t]he court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.'[Citations.]" (*Bell, supra*, 87 Cal.App.4th at 831.) If the language is ambiguous, we then examine the context of the statute, striving to harmonize the provision internally and with related statutes, and we may also consult extrinsic indicia of intent as contained in the legislative history of the statute. (*Construction Industry Force Account Council, supra*, 71 Cal.App.4th at 815.)

This Court finds the reference to "injunctive relief" in Civil Code §2923.12(i) ambiguous as to whether it was meant to include preliminary injunctive relief. Viewing §2923.12(i) in the context of the Homeowner Bill of Rights, the Court finds plaintiffs' proffered construction more persuasive. The purpose of the new statutory provisions prohibiting dual tracking is to suspend foreclosure proceedings while lenders deal with borrowers in default to try to effectuate a workable loan modification. (See *Jolley v. Chase Home Finance*, LLC (2013) 213 Cal.App.4th 872, 904-905.) If a lender engages in dual tracking and the borrower brings an action for injunctive relief alleging a violation of Civil Code §2923.6, in most cases the primary and immediate purpose of the lawsuit will be to obtain a TRO or preliminary injunction because the foreclosure process is swift and ongoing and time is of the essence. If a borrower waits until trial to seek a permanent injunction, the need for an injunction will likely no longer exist because the foreclosure will have concluded; or as in this case, the statutory violation may become moot because the Notice of Trustee Sale will have expired by its own terms, but not after the borrower is made to suffer months of dealing with the dual tracks of foreclosure and modification. It would defeat the purpose of the statute to require borrowers to carry the financial burden of obtaining the primary relief sought by the action, a preliminary injunction, the need for which would likely be moot by the time of trial.

As a result of the foregoing, the Plaintiffs' Motion for Attorney's Fees and Costs is GRANTED IN PART. Plaintiffs are awarded attorney's fees in the amount of $15,785.33 against Defendants INDYMAC MORTGAGE SERVICES, FSB and ONEWEST BANK, FSB.

Dated: MAY 21 2014

MARK A. TALAMANTES

Honorable Mark. A. Talamantes
Judge of the Superior Court Marin County

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 05/12/2014 TIME: 01:30:00 PM DEPT: C23

JUDICIAL OFFICER PRESIDING: Frederick P. Aguirre
CLERK: Joanne M Schwartz
REPORTER/ERM: Patrick Richard Brezna CSR# 5288
BAILIFF/COURT ATTENDANT: Maria Concepcion

CASE NO: **30-2012-00581642-CU-CL-CJC** CASE INIT.DATE: 07/06/2012
CASE TITLE: **Pichardo vs. GMAC Mortgage**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other Collections

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EVENT ID/DOCUMENT ID: 71907715
EVENT TYPE: Demurrer to Amended Complaint
MOVING PARTY: Ocwen Loan Servicing
CAUSAL DOCUMENT/DATE FILED: Demurrer to Amended Complaint, 02/28/2014

EVENT ID/DOCUMENT ID: 71914210
EVENT TYPE: CMC: Bankruptcy Removal

APPEARANCES
Thomas W. Gillen, counsel, present for Plaintiff(s).
Yaron Shaham, from Severson & Werson, present for Defendant(s) telephonically.

Tentative Ruling posted on the Internet .

The court (1) **grants** Defendant Ocwen Loan Servicing's request for judicial notice; (2) **sustains** the demurrer **with 20 days leave to amend** as to the third cause of action; (3) **sustains without leave to amend** as to the fourth cause of action; and (4) **overrules** as to all other causes of action.
Defendant's request to take judicial notice of the deed of trust to the subject property (Ex. A) is **granted**. As no opposition was filed, Plaintiff does not challenge the authenticity of this document or otherwise object. Judicial notice is appropriate as to the existence of the document, its contents, and the clear legal effects thereof; but not the truth of any statements therein. (Evid. Code, §§ 452, subds. (c), (h), 453; *Fontenot v. Wells Fargo Bank, N.A*. (2011) 198 Cal.App.4th 256, 264-265.)
Demurrer to the first cause of action for breach of contract is overruled.
Although Defendant Ocwen may not have received a full copy of the 08/10/09 loan modification agreement, the court-filed copy of the FAC appears to contain the full agreement. (See FAC, Ex. A.) In any event, a written contract may be pleaded either word for word or generally "according to its legal intendment and effect." (See *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198–199.) Here, Plaintiff pled the latter, alleging that the 08/10/08 agreement modified the loan by reducing the monthly payments and forgiving $120,000.
To the extent Defendant Ocwen is arguing that the 11/10/09 loan modification supersedes the 08/10/09 agreement, it appears that Plaintiff is asserting he signed the 11/10/09 version under duress. The doctrine "can apply when one party has done a wrongful act which is sufficiently coercive to cause a

reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract." (*CrossTalk Prods., Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644.) Duress may consist of threats to property interests, and wrongful acts include the assertion of a claim known to be false and a bad faith threat to breach a contract. (*Id.* at 645.) Whether Plaintiff had a reasonable alternative "is a factual one, rarely if ever susceptible to determination on demurrer." (*Id.* at 644) Here, Plaintiff alleges he was in the hospital when GMAC insisted he sign another "original" loan modification agreement or be faced with foreclosure, and the agreement submitted to him turned out to be a revised agreement that eliminated the $120,000 loan forgiveness. (FAC, ¶¶ 11-12.)
Finally, Plaintiff alleges damages from Defendants' demand of $120,000 that was allegedly forgiven on the loan. To the extent Defendant Ocwen argues that there are no damages because Plaintiff has not paid the additional $120,000, the court **construes** this claim as one for declaratory relief as to whether an additional $120,000 is owed on the loan. (See *Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38–39 [if the essential facts of some valid cause of action are alleged, the complaint is good against a general demurrer].)
Demurrer to the second cause of action for breach of covenant of good faith and fair dealing is overruled.
"It has long been recognized, of course, that every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.) A loan servicer has an implied duty to service the loan under the terms of the operative loan agreement. (See *Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1014-1015 [liability may attach for loan servicer's failure to modify loan documents pursuant to modification agreement].)
Here, Plaintiff essentially alleges Defendant Ocwen was obligated to service the loan under the terms of the 08/10/09 loan modification agreement and breached the duty of good faith and fair dealing by servicing the loan under the 11/10/09 modification agreement, which demands $120,000 more in principal from Plaintiff. (FAC, ¶¶ 18-19.)
Demurrer to the third cause of action for negligence is sustained with 20 days' leave to amend.
Defendant Ocwen correctly points out that "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 206 [internal quotations omitted].) Thus, there is no generalized duty imposed on Defendant Ocwen to properly administer the loan modification program.

Demurrer to fourth cause of action for unjust enrichment is sustained without leave to amend.
Unjust enrichment is a remedy, not a cause of action. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.) Accordingly, it fails as a matter of law to state a cause of action.

Demurrer to fifth cause of action for violation of Bus. & Prof. Code, § 17200 is overruled.
As set forth above, Plaintiff has alleged duress in the execution of the 11/10/09 agreement. Such conduct and the subsequent efforts to collect on a loan amount wherein a substantial portion has allegedly been forgiven may constitute unfair and fraudulent activity.
Moving Party is ordered to give notice.

The Court having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court confirms the tentative ruling as follows:

The Court orders Demurrer sustains the demurrer with 20 days leave to amend as to the third cause of action; sustains without leave to amend as to the fourth cause of action; and overrules as to all other causes of action.

Plaintiff is granted leave to amend Complaint within 20 days.

Moving party/Defendant is ordered to prepare the Notice of Ruling and give notice.

Bankruptcy remains pending as to Defendant GMAC.

CMC: Bankruptcy Removal continued to 07/21/2014 at 08:30 AM in this department.

Court orders Plaintiff to give notice.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 05/08/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: Steven Rodda
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: T. Elder

CASE NO: **34-2014-00162063-CU-OR-GDS** CASE INIT.DATE: 04/15/2014
CASE TITLE: **Monterrosa vs. PNC Bank a Division of PNC Bank National Association**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Preliminary Injunction

APPEARANCES
W Christopher Sims, counsel, present for Plaintiff(s).
Peter J Van Zandt, counsel, present for Defendant(s) telephonically.

Nature of Proceeding: Motion for Preliminary Injunction

TENTATIVE RULING

Plaintiffs' Application for Preliminary Injunction is granted on the same terms and conditions as the TRO.

Plaintiff is ordered to post a bond in the amount of $20,000, or alternatively to make monthly payments of $2,135.54 directly to defendant pending the trial of this action.

On April 17, 2014 the court issued a TRO/OSC enjoining the pending foreclosure of plaintiffs' residence at 2153 Kavine Way, Folsom, CA.

Plaintiffs contend that defendants breached a HAMP loan modification contract and acted in contravention of Civil Code section 2923.6 and 2923.55. Plaintiffs contend that after they completed the trial plan payments of $2,135.54 they were denied a permanent loan modification and were forced to complete a new trial plan with higher payments and to accept a permanent loan modification with higher payments. Plaintiffs allege defendant violated Civil Code section 2923.6 when it failed to provide a written denial and recorded a notice of trustee sale while the loan application was pending. Plaintiffs also contend defendant violated Civil Code 2923.55 when it filed a notice of default without exploring other options to avoid disclosure. (Declarations of Michael Monterrosa, Cheranne Nobis)

In opposition, defendant PNC Mortgage contends that plaintiffs cannot establish irreparable harm, and that if the court issues an injunction, it should require plaintiff to post a bond. PNC offers no evidence in opposition to refute plaintiffs' evidence that it violated the foreclosure statutes, but rather relies on a case with distinguishable facts in which the court denied the injunction, finding that plaintiff was making a transparent attempt to buy time to delay the foreclosure. See *Alcatraz v Wachovia Mort. FSB* (E.D. 2009) 592 F. Supp.2nd 1296, 1301. However, in this case plaintiffs have provided evidence, not disputed by defendant, that defendant was "dual tracking" by proceeding with a notice of foreclosure sale while also engaging in the loan modification process.

In deciding whether to enter a preliminary injunction, the Court must evaluate two interrelated factors: (1) the likelihood that the applicant will prevail on the merits at trial, and (2) the interim harm that the applicant will likely suffer if preliminary relief is not granted, as compared to the likely harm that the opposing party will suffer if the preliminary injunction issues. (See, e.g., *Langford v. Superior Court (Gates)* (1987) 43 Cal.3d 21, 28.) One of these two factors may be accorded greater weight than the other depending on the applicant's showing. (See *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 447.)

In this case, plaintiffs would suffer irreparable harm if they were to lose their residence before the merits of their claims were adjudicated. Any harm to the defendant in granting the injunction is far outweighed by the damage to plaintiffs if the injunction were to be denied. However, the Court is not persuaded that no bond should be required pending the trial of the action. Plaintiffs Complaint alleges they should have been given a permanent loan modification of $2,135.54 per month. By prevailing in the action, plaintiffs would presumably obtain a monthly payment in this amount.

California Code of Civil Procedure Section 529(a) provides: "On granting an injunction, the court or judge **must** require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount tp be specified, the party may sustain by reason of the injunction...[emphasis added]." (CCP §529(a).) The purpose of the bond is to compensate the defendant for all reasonably foreseeable damages that may be proximately caused by issuance of the injunction. *Top Cat Productions, Inc. v. Michael's Los Feliz* (2002) 102 Cal.App.4th 474, 478; *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 14.) The trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum. (See *Abba Rubber Co.,* supra, at 14.)

Plaintiffs' declarations requesting that no bond be required are conclusionary. Both plaintiffs state "I request that the Court not order a substantial bond as it will create a hardship for me and my spouse to pay for said bond or obtain a bond from a surety as we do not have the financial ability to do so." (Declarations of plaintiffs, paragraph 40) Absent evidence of plaintiff's income and their indigency, defendants are entitled to be compensated pending trial for the fair market rental value of the residence and attorneys fees. Moreover, if plaintiffs are unable to pay at least the amount of the trial modification, they will be unable to prevail in this action. Therefore, the Court is ordering that plaintiffs post a bond in the amount of $20,000, or alternatively make payments to defendant in the amount of $2,135.54 per month pending the trial of the action. If plaintiffs fail to make timely payments under the alternative, the defendant may make a motion to dissolve the preliminary injunction.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312. The Court will sign the formal order upon proof of payment of the undertaking or in the alternative, the first payment of $2,135.54 to defendant. If the monthly payment option is chosen the parties are ordered to meet and confer to agree upon the time and other terms of making the monthly payments.

If the parties are unable to agree on the time and other terms, the prevailing party shall make an appointment on the court's ex parte calendar and the court will set the time and other terms of the monthly payments.

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 05/01/2014 TIME: 01:29:00 PM DEPT: 54

JUDICIAL OFFICER PRESIDING: Raymond Cadei
CLERK: D. Ahee
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2014-00157940-CU-CR-GDS** CASE INIT.DATE: 02/10/2014
CASE TITLE: **Zanze vs. California Capital Loans Inc**
CASE CATEGORY: Civil - Unlimited

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Application for Preliminary Injunction)

TENTATIVE RULING

The tentative ruling of 03/21/14 granting Plaintiff Randall Zanze's ("Zanze") motion for preliminary injunction is AFFIRMED, and Zanze's request for a waiver of the bond requirement at CCP § 529 is DENIED. The order of 03/21/14 follows the discussion immediately below.

Zanze has produced evidence that he is appearing *in forma pauperis* in this case. He has also produced that he is unable to work and receives social security benefits. Moreover, he has produced that his sister, who lives in the second home that secures the loan herein, relies on public benefits as well. Based on this evidence, Zanze argues that he is entitled to a discretionary waiver of the bond requirement pursuant to CCP § 995.240. That section authorizes the court to dispose with a bond where the principal is indigent and unable to obtain sufficient sureties. (See *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1122 [waiver based on indigence is available with all statutory bond requirements].) In deciding whether to grant a discretionary waiver, the court must consider all relevant factors, including potential harm to the beneficiary of the bond. (CCP § 995.240.)
Notwithstanding Zanze's evidence, the court is not persuaded that Zanze has insufficient assets at his disposal to obtain the $24,000 bond at issue. As Defendant California Capitol Loans ("CCL") observes, Zanze and his sister each live in a single family residence, and both residences secure a $1.498 million note. Zanze concedes that this property has appreciated recently, and he produced evidence in an earlier proceeding that his and his sister's residences could be used to produce a substantial cash payment. (See CCL's Further Opp. at 2:11-19; Reply Supp. Memo. at 1:24-2:1.) In addition, Zanze has not disclosed the total value of trust assets at his disposal. As a consequence, the court affirms its initial determination that Zanze must post a $24,000 bond before the court will enter the preliminary injunction.
CCL's request for judicial notice is UNOPPOSED and GRANTED.
<u>No later than May 7, 2014</u>, Zanze is directed (1) to submit a revised formal order setting the bond at $24,000, and (2) post the bond. The court will not sign the order until the bond is posted. The TRO will remain in effect until the court signs the order but will automatically dissolve no later than May 12, 2014.
The affirmed tentative ruling of 03/21/14 reads:
The OSC is DISCHARGED, and the motion for preliminary injunction is GRANTED as follows:

<u>Factual/Procedural Background</u>

This is a nonjudicial foreclosure case. Plaintiff Randall Zanze ("Zanze"), as trustee of the William N. Zanze and Joyce A. Zanze Revocable Trust Dated July 30, 1999, is the borrower and trustor. Leo J.

Speckert, trustee of defendant herein California Capitol Loans, Inc. ("CCL"), is the payee under the Note and beneficiary under the Deed of Trust ("DOT"). The DOT confers upon CCL's trustee a security interest in two properties. Zanze resides in one property, and his sister resides in the other. (See Reply Zanze Decl.; Reply Moriarty Decl.)

Although Zanze does not allege that he is current on his mortgage payments, he does allege that CCL has engaged in unlawful dual tracking by negotiating a loan modification while simultaneously proceeding with the nonjudicial foreclosure process. (See CC § 2923.6(c).) Zanze's complaint contains causes of action for Violation of the California Homeowner's Bill of Right [Dual Tracking], Financial Elder Abuse [Cal. W&I Code § 15610.30], and Unfair Business Practices [Fraud and Usury under B&P Code § 17200].

On February 11, 2014, this court granted Zanze's ex parte application for a temporary order enjoining the then-scheduled trustee's sales of his and his sister's residences. The court issued an OSC and set the matter on today's date for hearing on a motion for preliminary injunction.

Discussion

In deciding whether to enter a preliminary injunction, the court must evaluate two interrelated factors: (1) the likelihood that the applicant will prevail on the merits at trial, and (2) the interim harm that the applicant will likely suffer if preliminary relief is not granted, as compared to the likely harm that the opposing party will suffer if the preliminary injunction issues. (See, e.g., *Langford v. Superior Court (Gates)* (1987) 43 Cal.3d 21, 28.) One of these two factors may be accorded greater weight than the other depending on the applicant's showing. (See *Commons Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 447.)

The comparative interim harms tip in favor of Zanze. There is colorable evidence that Zanze and his sister (both senior citizens) occupy the subject properties as their primary residences. (Compare Zanze Decl., ¶ 5, Reply Zanze Decl. and Moriarty Decl., ¶ 2 with Robinson Decl., ¶ 3(d)-(e) and Speckert Decl., ¶¶ 3(d)-(e), 4(a)-(b), 5.) Thus, if the court were to deny the motion, Zanze and his sister likely would lose their homes. (Given Zanze's assertions that he was pressured to do so, evidence that Zanze signed loan documents indicating that the properties would not serve as his or his family's residences does not alter the court's conclusion at this juncture.) Although the interim harm to CCL in being prevented from obtaining and disposing of its security pending trial presents appreciable harm, it is less than the potential harm to Zanze.

Next, the court concludes that there is at least some likelihood that Zanze will prevail on his dual tracking claim. CC § 2923.6(c) generally prohibits mortgagees, beneficiaries and mortgage servicers, among others, from proceeding with a trustee's sale where the borrower has applied for a loan modification and the mortgage servicer has made a written determination that the borrower is ineligible. Zanze has produced evidence that he applied (through his real estate broker, Moriarty) for a modification and that no written denial followed. Notably, CCL has not produced any evidence contradicting this evidence.

Instead, CCL argues that Zanze's dual tracking claim is meritless because that statute does not apply to trusts. In other words, CCL posits the trust as the borrower, rather than Zanze. The Note, however, indicates that Zanze is the borrower, though in his capacity as trustee. Absent an authority holding that a trustee cannot benefit from CC § 2923.6, the court rejects the argument.

CCL also argues that Zanze's dual tracking claim lacks merit because the loan was not a personal loan and was not made for an owner-occupied property. As noted above, however, there is evidence that the properties are owner occupied. In addition, there is evidence that Zanze was pressured to sign loan documents misrepresenting the true nature of the loan. Although the court cannot say whether this evidence will enable Zanze to prevail at trial, it is sufficient to support his current motion for a preliminary injunction.

Finally, CCL argues that Zanze lacks standing to pursue his dual tracking claim because he is not a party to the Note or DOT. As previously indicated, evidence before the court indicates that he is a party, albeit in his capacity as trustee. Given this, and given CCL's failure to cite any legal authority for its no-standing argument, the court is not persuaded.

In sum, the court concludes that the equities tip in favor of an order preserving the status quo pending disposition of Zanze's legal claims. Because the court bases its conclusion on Zanze's dual tracking claim, it does not reach the parties' further dispute about the merits of his usury claim.

On the issue of bond, CCL proposes an amount equal to one year's interest on the Note plus estimated defense fees and costs.

For his part, Zanze requests a one-dollar bond. He argues that a *de minimis* bond is warranted given his current convalescence and the fact that the properties are appreciating in value. Zanze further asserts that there is no industry to provide a large bond, and the "public benefit issues" at stake support a minimal bond.

A bond or undertaking is required for the purpose of protecting the opposing party should it be finally determined, after trial on the merits, that a restriction on one party's freedom of activity was improperly imposed or lifted and resulted in monetary damages.

(*Markley v. Superior Court* (1992) 5 Cal.App.4th 738, 747.) Thus, the appropriate measure for a bond is the amount of damages, including defense costs, CCL is likely to suffer by losing its right to dispose of the security while the litigation proceeds. However, CCL's proposal to measure damages against interest payments on the Note is inapt. CCL does not appear likely to obtain such payments regardless of whether the trustee's sale is enjoined. Rather, an appropriate measure is the rent CCL could obtain if it could remove Zanze and his sister from the properties.

Neither party has presented evidence of the rental value of the two properties. Five-hundred dollars per month, however, is a conservative estimate of a single family home's rental value in this community. Accordingly, the court will order a bond consisting of (1) $12,000 in lost rents (both properties rented at $500/mo. for 12 mos.) plus $12,000 in defense fees and costs, for a total of **$24,000**.

CCL's objections to evidence are OVERRULED. Even if the court were to sustain the objections, however, it would not alter its decision to grant the motion.

CCL's request for judicial notice of recorded land documents is GRANTED. In taking judicial notice of these documents, the court accepts the fact of their existence, not the truth of their contents. (*Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

The court notes that Zanze has filed documents containing unredacted social security numbers as well as an unredacted checking account number. Zanze is advised that court records are generally available for public viewing. If Zanze wishes to remove unredacted, private information from public view, then he must file an application or motion to seal pursuant to CRC 2.550-2.551.

COURT RULING

The matter was argued and submitted. The Court grants plaintiff's request for an additional week to post a bond. Bond is to be posted within two weeks. The Court directs counsel to call Department 59 within a week and request an early Settlement Conference. The matter was taken under submission.

SUBMITTED MATTER RULING

The Court took the matter under submission to consider further the appropriate amount of the injunction bond to be posted by Plaintiff. Based on the holding in Baltayan v. Estate of Maro Getemyan, 90 CA 4th 1427 (2001) and the Court's prior order by Judge Vasquez finding Plaintiff indigent, the Court hereby modifies its tentative ruling and the amount of the required bond is reduced from $24,000 to $500. The Tentative Ruling is otherwise AFFIRMED.