April 2014 Newsletter

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NCLC explains RESPA's new loss mitigation rules, Part I.

Case summaries including: *Preciado*, *Manis*, *Bergman*, *Rouse*, *Harris*, *Rowland*, *Rijhwani*, and cases covering the significant movement on the preemption front.

New RESPA Loss Mitigation Procedures[1]

Important RESPA regulations concerning loss mitigation procedures went into effect on January 10. The new rules specify procedures a servicer must follow if a mortgage loan borrower requests loss mitigation assistance.

New Rules Specify Procedures and Not the Substance of Offered Loss Mitigation Assistance

In drafting the loss mitigation requirements in Regulation X § 1024.41, the CFPB drew a distinction between "substantive" and "procedural" regulation of servicers' loss mitigation activities.[2] The regulation expressly states that nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with a specific loss mitigation option.[3] The CFPB leaves to the servicer the discretion to approve or

[1] This article is the first in a two-part series authored by John Rao, with assistance from Geoff Walsh, for the National Consumer Law Center's *eReports* service. Part II will appear in the HBOR Collaborative's May 2014 newsletter. Printed here with permission of the author and NCLC. *Copyright 2014 National Consumer Law Center, Inc. All rights reserved.*
[2] *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,816/-/18 (Feb. 14, 2013).
[3] Reg. X, 12 C.F.R. § 1024.41(a) (effective Jan. 10, 2014).

disapprove an option.[4] Instead, the CFPB has mandated a procedural framework within which the evaluation of loss mitigation options must take place.[5]

Borrowers have a private right of action to seek remedies for violations of the procedural requirements in § 1024.41, such as the failure to give required notices, failure to evaluate applications in accordance with required time frames, and the failure to refrain from foreclosure during certain periods of the review process.[6] However, borrowers do not have a private right of action under the CFPB's rules to enforce the terms of an agreement between a servicer and an owner or assignee of a mortgage concerning the evaluation of borrowers for loss mitigation options.[7]

If the servicer fails to comply with the substantive standards of an applicable loss mitigation program, the CFPB regulatory scheme does not preclude borrowers from enforcing substantive rights under other state or federal laws.[8] It may also be possible for borrowers to use the error correction procedures under § 1024.35 to address a servicer's failure to correctly evaluate a borrower for a loss mitigation option.[9]

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[4] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(1)-1 (effective Jan. 10, 2014; "The conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer.").

[5] 12 C.F.R. § 1024.41(a). *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,818 (Feb. 14, 2013) ("The Bureau believes that this framework provides an appropriate mortgage servicing standard; servicers must implement the loss mitigation programs established by owners or assignees of mortgage loans and borrowers are entitled to receive certain protections regarding the process (but not the substance) of those evaluations.").

[6] The CFPB relied on its authority under sections 6(j)(3), 6(k)(1)(C), 6(k)(1)(E), and 19(a) of RESPA to establish the loss mitigation procedures in § 1024.41. The CFPB also relied upon the general rulemaking authority under § 1022(b) of the Dodd-Frank Act to carry out the consumer protection purposes of RESPA. *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013).

[7] *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,818 (Feb. 14, 2013).

[8] Reg. X, 12 C.F.R. § 1024.41(a) (effective Jan. 10, 2014; "Nothing in § 1024.41 should be construed to ... eliminate any such right that may exist pursuant to applicable law."). *See also* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013). The CFPB's analysis specifically notes the consistency between appeal remedies under CFPB rules and remedies available under the California Homeowner Bill of Rights. *Id*. at 10,835.

[9] *See* NCLC *eReports*, Dec. 2013, No. 4; NCLC *Foreclosures*, § 9.2.2.2.2.3 (4th ed. and 2013 Supp.).

Any Loss Mitigation "Application" Triggers Homeowner Rights

Certain specific obligations, discussed below, are imposed upon the servicer the moment the borrower acts in a manner that can reasonably be construed as the submission of an "application." Section 1024.41 imposes overlapping duties on a servicer once it receives a borrower's application for loss mitigation review.

The term "application" is to be construed "expansively."[10] An application must be distinguished from a "complete" application. A complete application triggers additional requirements on the servicer, but any application, even if incomplete, triggers certain requirements.

The CFPB's commentary emphasizes that an application need not be in any particular form and includes any "prequalification" for a loss mitigation option.[11] The application may be verbal.[12]

The borrower's actions need only meet two broad criteria in order to be construed as an "application" under the rules. First, the borrower must express an interest in seeking any form of foreclosure avoidance. Second, the borrower must provide at least some information that a servicer would normally use in determining whether a borrower qualified for a loss mitigation option.[13]

It should not be difficult to find these two elements present in many communications between a borrower and servicer personnel. For example, the existence of a "hardship" related to a default is a requirement for virtually all loss mitigation options under servicing

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[10] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(1)-2 (effective Jan. 10, 2014). *See also* Section-by-Section Analysis, § 1024.41(b), 78 Fed. Reg. 10,825 (Feb. 14, 2013) ("Because a servicer must exercise reasonable diligence in making a loss mitigation application complete, the Bureau believes appropriate communication with a borrower that expresses an interest in a loss mitigation option is to clarify the borrower's intention regarding the submission and to obtain information from the borrower to make a loss mitigation application complete.").

[11] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(1)-2 (effective Jan. 10, 2014) ("For example, if a borrower requests that a servicer determine if the borrower is "prequalified" for a loss mitigation program by evaluating the borrower against preliminary criteria to determine eligibility for a loss mitigation option, the request constitutes a loss mitigation application.").

[12] *See also* Section-by-Section Analysis, § 1024.41(b), 78 Fed. Reg. 10,825 (Feb. 14, 2013).

[13] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(1)-3 (effective Jan. 10, 2014). This commentary makes clear that *both* prongs of this standard must be satisfied before a communication must be deemed an "application."

guidelines in general use. The borrower who mentions a loss of income or an increased expenditure in the course of a phone conversation with a servicer's representative and expresses an interest in avoiding foreclosure has made an "application" under the CFPB rule.

The regulation does not prohibit a servicer from offering loss mitigation options to a borrower who has *not* submitted a loss mitigation application.[14] In addition, a servicer is permitted to offer a loss mitigation option to a borrower who has submitted an incomplete loss mitigation application where the offer is not based on any evaluation of information submitted by the borrower in connection with the application.[15]

As an example, the CFPB's Official Bureau Interpretation provides that if a servicer has a program that offers trial loan modifications to all borrowers who become 150 days delinquent without an application or consideration of any information provided by a borrower in a loss mitigation application, the servicer's offer under the program does not violate the duty to evaluate the borrower for all loss mitigation options, and a servicer is not required to comply with §1024.41 with respect to the program.[16] The offer of the loss mitigation option in that situation is treated as not being based on an evaluation of a loss mitigation application.

A "Complete" Loss Mitigation Application

The most significant protections under the rule are afforded to the borrower upon submission of a complete application. A "complete loss mitigation application" is defined as "an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower."[17] An application is complete when the borrower provides all the required information even though additional information may be required that is not in the

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[14] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(2)(i)-1 (effective Jan. 10, 2014).
[15] *Id.*
[16] *Id.*
[17] Reg. X, 12 C.F.R. § 1024.41(b)(1) (effective Jan. 10, 2014).

control of the borrower.[18] For example, if the servicer requires a credit report and the borrower authorizes release of the report or has requested the report, the application is complete even though the credit reporting agency has not yet provided the report.

Considered in isolation, this definition appears to leave much to the servicer's discretion. However, substantial non-RESPA sources define the parameters of the loss mitigation application process that applies to a particular loan. Most servicers are required to adhere to application guidelines set by owners of loans, investors, or government insurers.[19] For example, the FHFA servicing alignment guidelines mandate use of a simple and concise loss mitigation application form that must be accepted and reviewed by all servicers for GSE-related loans.[20] A servicer should not be able to assert that a set of documents fully complying with FHFA guidelines defining a complete application for a GSE loan was somehow "incomplete."

Servicer's Duties upon Receipt of an "Incomplete" Application

Borrowers seeking loss mitigation often have to deal with multiple requests by servicers for information and documents (including documents previously submitted) over extended periods of time without ever getting confirmation that their applications are complete. The CFPB attempted to address this problem by adopting § 1024.41(b)(2), which imposes distinct obligations upon a servicer to respond to an application, whether or not it is complete.[21] These

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[18] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(1)-5 (effective Jan. 10, 2014).

[19] In response to RESPA's loss mitigation rule, the Dept. of Treasury issued Supplemental Directive 13-09 (Oct. 18, 2013), which provides: "This Supplemental Directive introduces the concept of a "Loss Mitigation Application" which consists of (i) the "Initial Package" described in Section 2.2.2 of Chapter II of the Handbook and, (ii) to the extent a servicer is required under the CFPB Regulations to consider a borrower for HAMP contemporaneously with all other loss mitigation options available to the borrower, those other documents and information the servicer requires in order to evaluate the borrower for such options. However, servicers are reminded that the first loss mitigation option considered by servicers for each borrower shall continue to be HAMP, in accordance with existing guidance."

[20] *See* NCLC *Foreclosures*, § 2.10 (4th ed. and 2013 Supp.).

[21] Reg. X, 12 C.F.R. § 1024.41(b)(2) (effective Jan. 10, 2014).

obligations extend over the post-default period up to forty-five days before a scheduled foreclosure sale date.[22]

When initially made aware of a communication that can reasonably be deemed to be an application for loss mitigation, the servicer must promptly conduct a review to determine whether the communication represents a complete or an incomplete application.[23] If the servicer determines that the application is complete, it must send the borrower a notice acknowledging that the application is complete within five business days of receipt of the application.[24]

If the servicer deems the application to be "incomplete" for any reason, the regulation requires two actions by the servicer. First, the servicer must act affirmatively to complete the application. The servicer must exercise "reasonable diligence" to obtain any documents and information it claims to require to complete the application.[25] Second, the regulation mandates that the servicer provide a written notice to the borrower describing the documents and information needed to complete the application.[26] This notice must include a "reasonable date" by which the borrower should submit the missing documents and information.[27] The servicer must send the notice within five business days of receipt of an application it deems incomplete.[28]

Reasonable Deadline for Completing an Incomplete Application

In setting a "reasonable date" for completing the application, the CFPB Official Bureau Interpretation states that the deadline should preserve the "maximum borrower rights," except when the selection of a particular deadline would be "impracticable" for the borrower to comply.[29] The CFPB suggests that generally, it would be impracticable

[22] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i) (effective Jan. 10, 2014).
[23] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(A) (effective Jan. 10, 2014).
[24] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).
[25] Reg. X, 12 C.F.R. § 1024.41(b)(1) (effective Jan. 10, 2014).
[26] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).
[27] Reg. X, 12 C.F.R. § 1024.41(b)(2)(ii) (effective Jan. 10, 2014).
[28] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).
[29] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(2)(ii)-1 (effective Jan. 10, 2014).

for a borrower to obtain and submit documents in less than seven days. The CFPB Interpretation also states that a servicer should consider the following "milestones" in setting a reasonable date:

- the date when any documents or information previously submitted by the borrower will be considered stale;
- the date that is the 120th day of the borrower's delinquency;
- the date that is 90 days before a foreclosure sale;
- the date that is 38 days before a foreclosure sale.[30]

As discussed below, several of these "milestones" are based on the timeline for the availability of appeal rights and dual tracking protections for borrowers under the rule. For example, if a servicer sets a deadline to complete the application that is 89 days before a sale, generally this would not be a reasonable date if setting a deadline 90 days or more before the sale would be practicable. This is because the borrower would lose the right to appeal a loan modification denial if the application is completed less than 90 days before a scheduled foreclosure sale, as discussed in part II of this article. If the date of a foreclosure is not known, the servicer may use a reasonable estimate of the date when the foreclosure may be scheduled.[31]

The setting of a reasonable date to complete the application under this provision is not intended to create an absolute deadline that would preclude evaluation of the application if the borrower fails to complete the application by that date. The CFPB has noted that § 1024.41(b)(2)(ii) requires servicers to inform borrowers of the reasonable date by which the "borrower *should* make the loss mitigation complete, as opposed to the date by which the borrower *must* make the loss mitigation application complete."[32]

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30 *Id.*
31 *Id.*
32 *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 60395 (Oct. 1, 2013) (emphasis in original).

What Happens If the Servicer Decides Later That a Complete Application Is Incomplete?

If the borrower submits all the missing documents and information as stated in the five-day notice of application status, or no additional information is requested in the notice because the servicer considers the application to be complete, the application is considered "facially complete."[33] If a servicer later discovers that it incorrectly concluded that the application was complete, that more information is needed, or that corrections are required to be made to previously submitted documents, the servicer must promptly request the missing information or corrected documents. However, the servicer must treat the application as complete for purposes of the dual tracking protections in §§ 1024.41(f)(2) and 1024.41(g) until the borrower is given a reasonable opportunity to complete the application.[34]

If the borrower completes the application within this period, the application is considered complete as of the date it was facially complete for the timelines contained in the following provisions: § 1024.41(d)(procedures for denial of loan modification options); § 1024.41(e)(procedures dealing with borrower response to a loss mitigation offer); § 1024.41(f)(2)(dual track protections for application received before a foreclosure referral); § 1024.41(g)(dual track protections for application received more than 37 days before a foreclosure sale); and § 1024.41(h)(appeal procedures). The application is considered complete as of the date it is actually completed for purposes of § 1024.41(c)(procedures for evaluation of loss mitigation applications).

Servicer's Duty to Respond to a "Complete" Application

Significantly greater rights accrue to a borrower whose submission constitutes a "complete" loss mitigation application. If the servicer receives an application it deems complete, it must acknowledge the application as "complete" by sending the borrower written notice

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[33] Reg. X, 12 C.F.R. § 1024.41(c)(2)(ii) (effective Jan. 10, 2014).
[34] *Id.*

within the five-day period.[35] The CFPB considered and rejected the option to have the requirement for the five-day notice of application status applied only to incomplete applications.[36]

In addition to acknowledging the application in writing as "complete," the servicer's immediate responsibility upon receipt of a complete loss mitigation application is to evaluate it. Section 1024.41(c)(1)(i) sets a strict time frame for this evaluation provided that the complete application is received by the servicer more than thirty-seven days before a foreclosure sale.[37] The evaluation of the borrower for all loss mitigation options must be completed within thirty days of receipt of a complete application.[38] By this deadline the servicer is also required under § 1024.41(c)(1)(ii) to provide the borrower with a written notice stating the servicer's determination of which loss mitigation options, if any, are being offered to the borrower.[39]

As discussed more fully below, if the servicer is denying the borrower for any trial or permanent loan modification option, the notice must state specific reasons for the denial of each modification option.[40] The decision not to offer a particular loan modification option available to the borrower, even if a different loan modification option or other form of loss mitigation is offered, constitutes the denial of that loan modification option.[41] If applicable, the evaluation notice must also inform the borrower of the amount of time the borrower has to accept or reject a loss mitigation offer and to exercise appeal rights for the denial of a loan modification, which are discussed in Part II of this article.[42]

Although the § 1024.41(c)(1)(ii) evaluation notice requirement refers to the loss mitigation options being offered to the borrower, this

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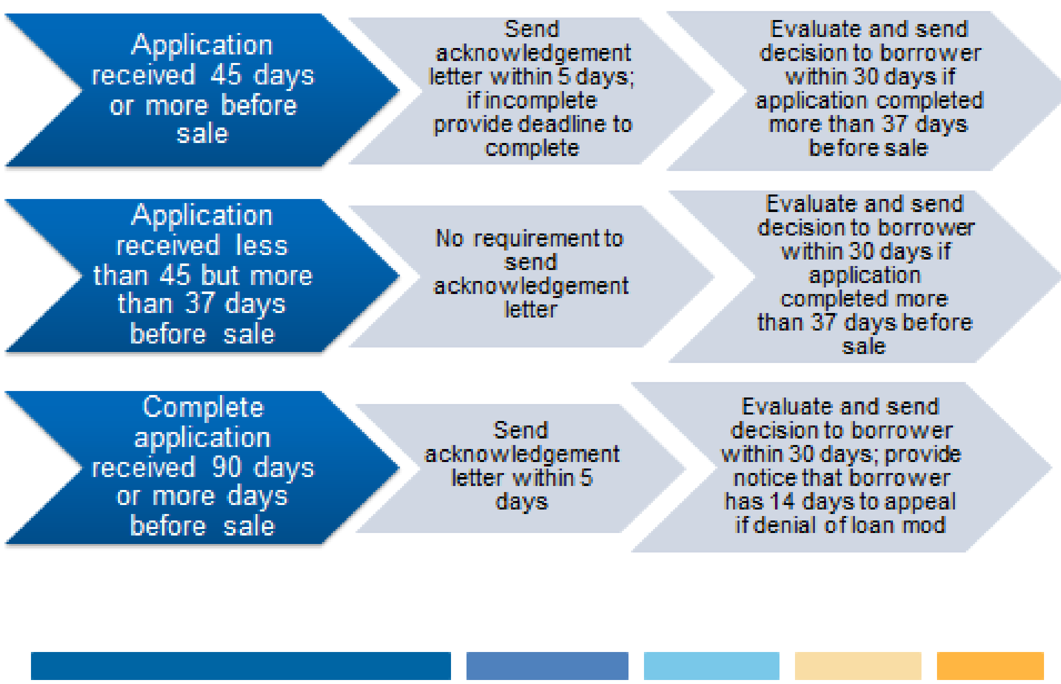
[35] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).
[36] *See also* Section-by-Section Analysis, § 1024.41(b), 78 Fed. Reg. 10,823-26 (Feb. 14, 2013).
[37] Reg. X, 12 C.F.R. § 1024.41(c)(1)(i) (effective Jan. 10, 2014).
[38] Reg. X, 12 C.F.R. § 1024.41(c)(1)(i) (effective Jan. 10, 2014).
[39] Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii) (effective Jan. 10, 2014).
[40] Reg. X, 12 C.F.R. § 1024.41(d) (effective Jan. 10, 2014).
[41] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-3 (effective Jan. 10, 2014).
[42] Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii) (effective Jan. 10, 2014).

provision should be construed to require the servicer to provide the borrower with a written notice of its decision not to offer any loss mitigation options to the borrower. In fact, another provision in § 1024.41 that deals with dual tracking refers to a notice under § 1024.41(c)(1)(ii) as stating that the borrower is not eligible for any loss mitigation options.[43] However, there is no specific requirement to provide a detailed written notice specifying the reasons for the denial of loss mitigation options other than loan modification options.

This chart helps to illustrate the timelines for servicer treatment of applications under the loss mitigation rule:



Other Law May Require Evaluation of Applications Submitted Within 37 Days of Foreclosure

The RESPA duty to evaluate the borrower for all loss mitigation options applies if the borrower submits a complete loss mitigation application more than thirty-seven days before a foreclosure sale.

[43] *See* Reg. X, 12 C.F.R. § 1024.41(f)(2)(i) (effective Jan. 10, 2014).

However, a servicer may be obligated under non-RESPA applicable law to evaluate a borrower's application submitted *less* than thirty-seven days before a foreclosure sale. Consistent with the general RESPA preemption rule that more consumer protective laws are not preempted,[44] the CFPB explicitly stated in promulgating the RESPA loss mitigation rule that "servicers should comply with the most restrictive requirements to which they are subject."[45]

As an example, the CFPB noted that the National Mortgage Settlement and GSE requirements impose obligations on servicers to conduct an expedited loss mitigation evaluation for applications received thirty-seven days or less before a foreclosure sale.[46] The CFPB stated that "[n]othing in § 1024.41 prohibits or impedes a servicer from complying with these requirements and servicers may be required to comply with requirements that are more prescriptive than the regulations implemented by the Bureau."[47]

Actions That Can be Taken Based on an Incomplete Application

The CFPB loss mitigation regulation emphasizes that a servicer shall not evade the duty to evaluate the borrower for all loss mitigation options by offering the borrower an option based on an incomplete application. [48] However, the regulation contains two limited exemptions to this anti-evasion provision.

Exemption Where Application Remains Incomplete.

The first exemption provides that a servicer may in its discretion evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option if the servicer exercises reasonable diligence in obtaining the needed information and the application remains

[44] *See* NCLC *Foreclosures*, § 9.4 (4th ed. and 2013 Supp.).
[45] *See also* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013).
[46] The HAMP program guidelines also allow an application to be submitted up to seven business days before a sale and would cause a foreclosure sale to be suspended. *See* NCLC *Foreclosures*, § 2.8.2.12 (4th ed. and 2013 Supp.).
[47] *Id.*
[48] Reg. X, 12 C.F.R. § 1024.41(c)(2) (effective Jan. 10, 2014).

incomplete for a significant period of time under the circumstances without any progress by the borrower to complete the application.[49] A servicer may consider the timing of the foreclosure process in determining whether an application is incomplete for a significant period of time.[50]

For example, the CFPB's Official Bureau Interpretation states that "if a borrower is less than 50 days before a foreclosure sale, an application remaining incomplete for 15 days may be a more significant period of time under the circumstances than if the borrower is still less than 120 days delinquent on a mortgage loan obligation."[51] If the servicer offers a loss mitigation option in this situation, the evaluation of the incomplete application is not subject to § 1024.41 and does not count as a single complete loss mitigation application for purposes of the duplicative request rule discussed in Part II of this article.[52]

Exemption for Short-Term Forbearance Programs in § 1024.41(c)(2)(iii).

A servicer can offer a borrower a short-term payment forbearance program based on an incomplete loss mitigation application.[53] The CFPB's Official Bureau Interpretation notes that a borrower's incomplete loss mitigation application in this situation is still subject to the other obligations in § 1024.41, including the obligation to review the application to determine if it is complete, to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application, and to provide the borrower with the five-day notice of application status.[54] In addition, an offer of a payment forbearance option cannot preclude the borrower from receiving an

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[49] Reg. X, 12 C.F.R. § 1024.41(c)(2)(ii) (effective Jan. 10, 2014).
[50] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(2)(ii)-1 (effective Jan. 10, 2014).
[51] *Id*.
[52] Reg. X, 12 C.F.R. § 1024.41(c)(2)(ii) (effective Jan. 10, 2014).
[53] Reg. X, 12 C.F.R. § 1024.41(c)(2)(iii) (effective Jan. 10, 2014).
[54] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(2)(iii)-2 (effective Jan. 10, 2014).

evaluation for all available options and access to review rights if the borrower later submits a complete application.[55]

Any notification from the servicer that offers the borrower a short-term payment forbearance should state that the borrower has the option of completing the application to receive a full evaluation.[56] If a servicer provides such notification, and the borrower complies with the payment forbearance and does not request further assistance, the CFPB's Official Bureau Interpretation states that the servicer may stop requesting documents from the borrower and suspend its reasonable diligence efforts under § 1024.41(b)(1) until near the end of the payment forbearance period.[57] The Interpretation also instructs that before the end of the forbearance period, the servicer should contact the borrower to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation.

The CFPB describes a payment forbearance program as a loss mitigation option that "allows a borrower to forgo making certain payments or portions of payments for a period of time," and a short-term payment forbearance as a program that "allows the forbearance of payments due over periods of no more than six months."[58] The six-month period refers to the amount of payments being deferred (no more than six months of payments) rather than the duration of any repayment agreement that is part of the forbearance plan.[59] For example, if the borrower is permitted to defer payment of six monthly payments of $1,000 per month, the forbearance program would be considered short-term even if the servicer allows the borrower to pay the $6,000 in missed payments over an 18 month period.

The rule does not preclude a servicer from offering multiple, successive short-term payment forbearance programs.[60] However, to

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[55] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(2)(iii)-3 (effective Jan. 10, 2014).
[56] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(b)(1)- 3(iii) (effective Jan. 10, 2014).
[57] *Id.*
[58] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(2)(iii)-1 (effective Jan. 10, 2014).
[59] *Id.* ("Such a program would be short-term regardless of the amount of time a servicer allows the borrower to make up the missing payments.").
[60] *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 60400 (Oct. 1, 2013).

address the concern that a borrower might face an immediate foreclosure at the end of the forbearance plan and would therefore lose the benefit of the 120-day pre-foreclosure waiting period provided under § 1024.41(f)(discussed in Part II of this article), § 1024.41(c)(2)(iii) provides that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing under the terms of a payment forbearance program offered pursuant to the rule.[61]

In creating this exemption to the anti-evasion provision, the CFPB made clear that a short-term payment forbearance is nevertheless a form of loss mitigation.[62] Thus, if the borrower wishes only to obtain a short-term payment forbearance and does not want to be considered for other loss mitigation options, it may be advisable for the borrower to not complete the loss mitigation application. If the borrower is offered a short-term payment forbearance in response to a complete loss mitigation application, any additional loss mitigation applications submitted by the borrower to that servicer, even if submitted years later, will not be subject to the procedures under § 1024.41, based on the duplicative request provision discussed in Part II of this article (forthcoming in the HBOR Collaborative's May 2014 newsletter).

Written Notice of Denial of Loan Modification Options

The regulation provides enhanced notification requirements if a loan modification is being denied. The servicer has an obligation after evaluating a loss mitigation application to give the borrower written notice of its decision to deny any trial or permanent loan modification available to the borrower.[63] The information required to be provided in this denial notification must be included in the evaluation notice sent to the borrower under § 1024.41(c)(1)(ii) that describes the loss mitigation options being offered to the borrower. Consistent with the

[61] Reg. X, 12 C.F.R. § 1024.41(c)(2)(iii) (effective Jan. 10, 2014).
[62] *See* Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 60401 (Oct. 1, 2013).
[63] Reg. X, 12 C.F.R. § 1024.41(d) (effective Jan. 10, 2014).

requirement to evaluate the borrower for all available loss mitigation options, a servicer's determination not to offer a borrower a loan modification available to the borrower is a denial of that loan modification option for purposes of this notice requirement, notwithstanding that the servicer offers the borrower a different loan modification option or other loss mitigation option.[64]

Disclosure of Reasons for Denial of Loan Modification Options

The rule requires that within thirty days of receipt of a complete loss mitigation application, the servicer must give the borrower notice in writing of the servicer's decision on the borrower's eligibility for all trial and permanent loan modification options available to the borrower.[65] This written denial portion of the § 1024.41(c)(1)(ii) evaluation notice must state the specific reasons for the servicer's denial of any modification option, and if applicable, that the borrower was not evaluated on other criteria.[66] The CFPB's Official Bureau Interpretation makes clear that a servicer is required to disclose the actual reason or reasons for the denial.[67] If a servicer's systems establish a hierarchy of eligibility criteria (often referred to as a "waterfall"), and the borrower is denied based on the first criterion and there is no further evaluation based on additional criteria, a servicer complies with the rule by providing only the reason or reasons for which the borrower was actually evaluated and rejected, as well as notification that the borrower was not evaluated on other criteria.[68] In this situation, a servicer is not required to determine or disclose whether a borrower would have been denied based on the additional criteria if such criteria were not actually considered.

For example, if a borrower must satisfy qualifications A, B and C to be approved for a loan modification, and the servicer's system determines that the borrower has failed qualification A, the servicer

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[64] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-3 (effective Jan. 10, 2014).

[65] Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii) and (d) (effective Jan. 10, 2014).

[66] *Id.*

[67] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-4 (effective Jan. 10, 2014).

[68] *Id.*

may end the evaluation for that loss mitigation option and is required to disclose the reason for denial based only on qualification A. The servicer need not disclose all potential reasons for denial such as qualifications B and C if they were not actually evaluated.

If a reason for denial was a requirement set by an owner or assignee of the loan, the notice must identify the owner or assignee and the specific requirement that was the basis for the denial.[69] A mere statement that a loan modification option is denied based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient.[70] However, less detail is required if the owner or assignee has an evaluation criteria that sets an order for ranking the evaluation of loan modification options and a borrower has qualified for a particular loan modification option in the ranking established by this waterfall. In this situation, it is sufficient for the servicer to inform the borrower that the investor's requirements include the use of a waterfall and that the borrower is being denied for any other loan modification options ranked below the option offered to the borrower.[71]

If the servicer denies any loan modification option because of a net present value calculation,[72] the notice must state this reason and include the inputs used for the calculation.[73] This requirement should assist advocates who are reviewing a servicer's denial of a modification for a mortgage not subject to program guidelines with a similar requirement, such as those not covered by HAMP or the National Mortgage Settlement.

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[69] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-1 (effective Jan. 10, 2014).
[70] *Id*.
[71] *Id*.
[72] *See* NCLC *Foreclosures*, § 2.8.2.3 (4th ed. and 2013 Supp.) (discussing generally the net present value test).
[73] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-2 (effective Jan. 10, 2014).

Notice of Appeal Rights

The denial notice must also describe the borrower's right to appeal the denial, the deadline to make an appeal, and any requirements for making an appeal.[74] As described in Part II of this article (forthcoming in the May newsletter), borrowers may generally exercise appeal rights so long as the complete application was submitted at least ninety days before a scheduled foreclosure sale.[75]

Rights Where Notice of Denial Not Compliant

Examine a denial notice carefully for both timing and accuracy. To be valid, the notice of denial must specifically state all grounds considered for denial for each available loan modification option applicable to the borrower. Non-RESPA guidelines determine what loan modification options are available to the borrower or for a particular loan. These may be guidelines under FHFA servicing standards, under the National Mortgage Settlement, under government-insured (FHA, VA, RHS) programs, or under pooling and servicing agreements.

Failure to comply with the written notice of denial requirement is by itself a violation of Regulation X and can give rise to a private legal claim. More significantly, the notice may serve as a window into the servicer's loss mitigation review process, or lack of one. A defective denial notice may establish that an appropriate loss mitigation review never took place. Referral to foreclosure or the conduct of a sale without complying with requirements for evaluating a complete application violates the Regulation X's dual tracking prohibitions described in Part II of this article.[76] If costs and fees were incurred or, more significantly, if the borrower lost a home while the servicer ignored available alternatives to foreclosure, the borrower can hold the servicer accountable through recourse to the remedies allowed under RESPA.[77]

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[74] Reg. X, 12 C.F.R. § 1024.41(d)(2) (effective Jan. 10, 2014).
[75] Reg. X, 12 C.F.R. § 1024.41(h)(1) (effective Jan. 10, 2014).
[76] *See also* NCLC *Foreclosures*, § 9.2.8.7 (4th ed. and 2013 Supp.) (discussing the dual tracking provisions).
[77] *See* NCLC *Foreclosures*, § 9.2.10 (4th ed. and 2013 Supp.)

Summaries of Recent Cases

Published State Cases

CCP 1161a: Tenants, Former Homeowners Defend Eviction by Alleging Improper Notice & Failure to Prove Duly Perfected Title

Bank of N.Y. Mellon v. Preciado, __ Cal. App. 4th Supp. __, 2013 WL 8116695 (Aug. 19, 2013):[78] To be effective, unlawful detainer (UD) notices to quit must be properly served: 1) by personal service; 2) or if personal service failed, by leaving the notice with a person of "suitable age and discretion" at the residence or business of the tenant (or former borrower) and then mailing a copy; 3) or if the first two methods failed, by posting a notice at the residence and mailing a copy. CCP § 1162. Here, the process server's affidavit stated that "after due and diligent effort," he executed "post and mail" service. The UD court accepted this statement as evidence of compliance with CCP 1162, but the appellate division reversed. The statute indicates that "post and mail" is the *last* available method of service, not the first. Since the affidavit does not specifically assert that personal service was *ever* attempted, the trial court erred in assuming that service was proper. Further, defendants' appeal based on defective service was not barred because they failed to assert it as an affirmative defense. Proper service is an "essential [UD] element" and tenants' and former homeowners' "general denial" of each statement in the complaint put service at issue.

Post-foreclosure UD plaintiffs must also demonstrate duly perfected title and compliance with CC 2924 foreclosure procedures. CCP § 1161a. "Duly" perfected title encompasses all aspects of purchasing the property, not just recorded title. The UD court relied on the trustee's deed upon sale, showing plaintiffs purchased the property at the foreclosure sale. The court ignored contradicting testimony alleging

[78] This summary originally appeared in our September 2013 Newsletter. It is reprinted here because this important case was ordered published March 19, 2014.

that the property was sold to the loan's servicer, not plaintiff. Further, "to prove compliance with section 2924, the plaintiff must necessarily prove the sale was conducted by the trustee." Here, the trustee's deed upon sale identifies one trustee, but the DOT identifies another. The UD court erred in accepting the recorded trustee's deed upon sale as conclusive evidence of compliance with CC 2924, and the appellate division reversed.

Unpublished & Trial Court Decisions[79]

Court Distinguishes *West* on Fraud Claim, *Aceves* on Promissory Estoppel Claim

Fairbanks v. Bank of Am., N.A., 2014 WL 954264 (Cal. Ct. App. Mar. 12, 2014): To assert a fraud cause of action, a borrower must show, *inter alia*, 1) a false representation; 2) on which borrower justifiably relied; and 3) damages. Borrower must plead the fraud claim with specificity. In the foreclosure context (involving mostly corporate defendants) specificity as come to include: "the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." In both *West v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 780 (2013), and in this case, borrowers alleged servicer had fraudulently misrepresented that a permanent modification would follow completion of a trial period plan (TPP). In *West*, borrower submitted the TPP agreement with her complaint, as well as a letter from servicer denying her a modification but promising to conduct a re-evaluation if she contested the denial. She specified the dates of two phone conversations where she requested the re-evaluation to a supervisor in the loan modification department, and where a servicer representative on a conference call assured her no foreclosure sale would occur during the re-evaluation. Here, by contrast, a single phone call provided the basis for borrowers'

[79] 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.

fraud claim. Borrowers did not specify the date of the call, the position of the servicer-representative they spoke with, or any particular aspects of the call. They only alleged an oral TPP and failed to describe its terms and conditions. Borrowers were also unable to plead justifiable reliance. In *West*, the servicer assured borrower that it would not foreclose as it re-evaluated her for a permanent modification. The Court of Appeal deemed West's reliance on this assurance and her choice to forgo legal action justifiable. Here, borrowers elected to apply for a HAMP modification *before* the alleged fraud occurred, so any costs associated with applying were not incurred in reliance on the alleged misrepresentation. Additionally, this court found borrowers' decision to invest thousands of dollars in property improvements unreasonable and unjustifiable reliance on one phone conversation. Finally, and most importantly for this court, these borrowers could not allege damages because they, unlike the borrower in *West*, had not lost their home. The Court of Appeal affirmed the granting of servicer's demurrer to borrowers' fraud claim.

Promissory estoppel (PE) claims require borrowers to allege a clear and unambiguous promise, reasonable and foreseeable reliance on that promise, and injury caused by their reliance. Here too, the Court of Appeal relied on a case where a borrower brought similar, but critically different, allegations to show why these borrowers' claim failed. In *Aceves v. US Bank, N.A.*, 192 Cal. App. 4th 218 (2011), borrower alleged her servicer promised to negotiate a modification in good faith, but instead foreclosed on the property. Here, by contrast, borrowers alleged servicer promised to permanently modify their loan. Unlike a promise to negotiate in good faith, this type of promise is unclear and ambiguous because borrowers did not plead the essential terms of any proposed modification, who made the promise, or when. Additionally, the requirement that borrowers complete a TPP renders any potential promise conditional, enhancing its ambiguousness. On the detrimental reliance piece, the servicer in *Aceves* was aware borrower chose not to convert her chapter 7 to a chapter 13 bankruptcy in reliance on servicer's promise to negotiate for a modification, so borrower's reliance was not just foreseeable—it was acknowledged. Here, borrowers' decision to invest in property improvements based on a conditional and unclear promise, *and when borrowers were in default*, was not foreseeable or reasonable. Finally, these borrowers could not allege loss of their home as an injury. Servicer's demurrer to their PE claim was also affirmed.

Tenants in Possession Have Standing to Bring Rent Skimming Claim

Ferguson v. Tr. Holding Serv. Co., 2014 WL 810852 (Cal. Ct. App. Mar. 3, 2014): "Rent skimming" refers to a landlord's practice of "using revenue received from [rent payments] at any time during the first year period after acquiring [the] property without first applying the [rent payments] . . . to the . . . mortgage." CC § 890(a)(1). Various parties can bring rent skimming actions, including tenants who paid the misapplied rent. Specifically, tenants can bring a rent skimming action against their old landlord "for the recovery of actual damages, including any security [deposit] . . . , and moving expenses if the property is sold at a foreclosure sale and the tenant was required to move." CC § 891(d). Here, tenants remained in possession after foreclosure, only moving once evicted by the new property owner. Tenants brought their rent skimming suit, then, while still in possession of the property. The court had to determine whether a tenant "needs to vacate the property in order to bring a claim for rent skimming." Looking at the statute syntax, the court decided that continued possession, while possibly prohibiting a recovery for non-existent moving expenses, was irrelevant to the recovery of tenants' security deposit. "Nothing in the [statute's] plain language . . . suggests that it was intended to apply only to tenants forced to move or forced to move prematurely." And though tenants did not bring this is as a separate claim, the court found a comparison to CC 1950.5 instructive. To recover a security deposit from a pre-foreclosure landlord under that statute, a tenant may still possess the property. Having found these tenants to have the requisite standing (and the trial court to have incorrectly prohibited a cross-examination of a witness), the

Court of Appeal reversed the trial court's dismissal of tenants' rent skimming claim and remanded for a limited new trial.

Valid Post-Judgment Claim of Right to Possession

Manis v. Superior Court, No.1-13-AP-001491 (Cal. App. Div. Super. Ct. Santa Clara Cnty. Apr. 26, 2013): Before a sheriff's lockout, but after judgment has been entered in a post-foreclosure UD action, an unnamed tenant can still enter the case by filing a post-judgment claim of right to possession with the sheriff. If the tenant is found to be an "invitee, licensee, guest, or trespasser," the court must deny the tenant's claim of right to possession. CCP § 1174.3(d). Here, the tenant produced a written lease agreement that extended past the foreclosure date. Accordingly, the court found him to be a tenant, not an invitee, licensee, guest or trespasser. Further, the court found his claim of right to possession valid because, as a tenant with a fixed-term lease in a foreclosed home, he was entitled to retain possession throughout his lease term under CCP 1161b. The UD plaintiff argued tenant did not have a valid claim because the trial court had found tenant's purported landlord to have a "null" grant deed, rendering tenant's lease invalid. The Appellate Division was unconvinced, finding no indication that the UD court had found the grant deed void. Further, the court stated, the legitimacy of the grant deed can be litigated in the UD court once the tenant joins the case as a defendant. The court granted tenant's petition for a writ of mandate and reversed the UD court's denial of his claim of right to possession.

Preliminary Injunction Issued Despite Sale Postponement; Bond

Leonard v. JP Morgan Chase Bank, N.A., No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014): To win a preliminary injunction in California state court, a borrower must show a likelihood of prevailing on the merits and that they will be more harmed if the injunction does *not* issue, than the servicer would be if the injunction *did* issue. Here, the potential harm borrowers face by losing their home far outweighs servicer's potential harm in having the PI issue. The court also determined that borrowers were at least "reasonably likely" to prevail on the merits of their dual tracking, negligence per se, and UCL claims. That servicer is currently in the process of rescinding the NTS did not convince the court that the PI was unnecessary. The sale was only stopped in the first place because of a TRO and servicer did not cite any caselaw to support their contention that a PI is unnecessary when there is no sale pending. Borrowers also offered evidence that the sale *is* still pending, having been merely postponed. Accordingly, the court determined dual tracking could still occur and granted the PI, setting a one-time bond of $4,000.

Dual Tracking, Application Acknowledgment, and SPOC Claims; Fraud and Negligent Misrepresentation Claims Based on Request for Back Taxes

Carlson v. Bank of Am., N.A., No. 34-2013-00146669-CU-OR-GDS (Cal. Super. Ct. Mar. 25, 2014): Both large and small servicers are prevented from dual tracking: initiating or proceeding with foreclosure while a borrower's complete, first lien loan modification application is pending. California Civil Code 2924.18 prohibits small servicers (defined as conducting fewer than 175 foreclosures in the past fiscal year) from engaging in this practice, while CC 2923.6 regulates large servicers. Here, borrowers brought a CC 2924.18 dual tracking claim against Bank of America, a large servicer. The court acknowledged borrowers' misapplication of HBOR's dual tracking statutes, but still overruled BoA's demurrer: "there is no authority cited for the proposition that [borrowers'] failure to specifically allege that [BoA] is [a small servicer] renders their cause of action deficient for pleading purposes." Nor did the court find borrowers' failure to specifically allege that an NOD had been recorded fatal to their dual tracking claim. The complaint included a statement from a BoA representative that foreclosure "would continue," and asserted that borrowers had received a copy of the NOD. From the pleadings, the court "inferred that a NOD has been recorded" and that foreclosure was in progress.

HBOR also requires servicers to acknowledge a borrower's modification application within five business days of receipt, to describe the loan modification process, and to request any missing documents. CC § 2924.10. Borrowers alleged they submitted a complete application but never received a description of the loan modification process. The court found this sufficient to state a CC 2924.10 claim, despite servicer's insistence that it eventually notified borrowers their application was complete. While a servicer cannot be held liable for a CC 2924.10 violation that it remedies before recording an NTS (CC § 2924.12(c)), there was no clear remedy here; the mere acknowledgment of a complete application does not fulfill the requirements of CC 2924.10. Servicer's failure to provide a description of the loan modification process constitutes a CC 2924.10 violation, even if servicer acknowledged receipt of a complete application.

HBOR also requires servicers to provide borrowers with a "single point of contact," or SPOC, during the loan modification process. SPOCs may be an individual or a "team" of people, and must communicate with the borrower in a "timely" fashion about the status of borrower's loss mitigation application(s). Here, borrowers pled they were assigned a SPOC but were never able to reach her to ascertain the status of their application. Instead, two non-SPOC representatives each gave borrowers conflicting information over the status of foreclosure. These allegations adequately plead a SPOC violation and the court noted that borrowers' damage "*is* the fact that they were not provided the requisite [SPOC] as required by the statute" (emphasis added).

Fraud claims must be plead with specificity. Against a corporate defendant, fraud claims must include: the corporate representatives' identity, their authority to speak, what was communicated, and when the communication occurred. These borrowers identified the name and title of the servicer representative, alleged she had the authority to speak on servicer's behalf, identified the month and year of the phone conversation, and identified the exact amount the representative insisted was owed by borrowers in back property taxes. At the pleading stage, these allegations sufficiently stated borrower's fraud claim.

Negligent misrepresentation claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. An exception applies, however, if a lender's activities extend beyond this relationship. This court agreed with the dominant line of reasoning that a servicer's election to "offer, consider, or approve" of a loan modification falls within the ambit of a traditional lender-borrower relationship. It acknowledged, however, that within the confines of a modification application "relationship," a duty exists "not to make material representations of fact . . . regarding the stat[us] of a loan modification application or the status of foreclosure." Here, borrowers alleged that servicer misrepresented they owed back property taxes and that foreclosure would follow their non-payment of those taxes. The court found that these allegations, if true, violated servicer's duty *not* to make material misrepresentations of fact. The negligent misrepresentation claim also survived the demurrer.

Attorney's Fees Awarded in Breach of TPP Case

Bergman v. JP Morgan Chase Bank, N.A., No. RIC 10014015 (Cal. Super. Ct. Riverside Cnty. Jan. 22, 2014): Borrower brought six causes of action based on borrower's full TPP performance, servicer's denial of a permanent modification, servicer's promise to abstain from foreclosure as it re-evaluated borrower for a modification, and servicer's refusal to allow borrower to cure his default because a loan modification application was pending. A twelve-person jury found servicer had breached the implied covenant of good faith and fair dealing and had made at least one intentional misrepresentation regarding borrower's application, foreclosure status, and/or curing attempts. The jury awarded $250,000 in damages. Weeks after trial, the judge awarded borrower's attorney fees and costs at a rate of $300/hour for over 600 hours, totaling over $188,000.00 (reduced from the requested $462,000). Four months later, that same attorney moved to amend the judgment to "include additional attorney's fees incurred after trial and up to and including the rendition of judgment," or, in other words, for the period between the conclusion of the trial and the judge's entry of judgment. The court granted the motion, providing borrower's attorney with an additional $16,000.00 in accordance with CC 1717 (providing guidelines for the award of attorney's fees based on contract disputes).

Federal Cases

Diversity Jurisdiction: National Banks are Only Citizens of the State Where Their "Main Office" is Located

Rouse v. Wachovia Mortg., FSB, __ F.3d __, 2014 WL 1243869 (9th Cir. Mar. 27, 2014): In evaluating diversity jurisdiction in cases involving national banks, courts turn to 12 U.S.C. § 1348: "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located." In this case, the Ninth Circuit decided what "located" means. As some other district courts have recently been finding,[80] this district court found Wells Fargo, a national bank, to be a citizen both of the state where its articles of association located the bank's "main office" (South Dakota), and where the bank's "principal place of business" is located (California). Wells Fargo's California citizenship destroyed diversity citizenship with the California plaintiffs and the case was remanded to state court. In a 2-1 decision, the Ninth Circuit disagreed and reversed. The panel looked to the Supreme Court's reasoning in *Wachovia Bank v. Schmidt,* 546 U.S. 303 (2006), which decided a similar issue: is a national bank a citizen of *every* state of operation, or only where its "main office" is located? The Supreme Court decided the latter was true. The panel also considered the leading Ninth Circuit case that came to a similar conclusion but phrased it in a critically different way: *American Surety Co. v. Bank of Cal.,* 133 F.2d 160 (9th Cir. 1943). There, the Court held that a national bank is not a citizen of *every* state where it maintains operations (as in *Schmidt*), but is only a citizen where it locates its

[80] *See*, *e.g.*, Vargas v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2013 WL 6235575 (N.D. Cal. Dec. 2, 2013) (summarized in our January 2014 Newsletter).

"principal place of business." The Supreme Court did not consider *American Surety* in deciding *Schmidt*, so there is no clear ruling on whether a national bank can have dual citizenship, where it maintains its main office *and* where its principal place of business is located. To resolve this question, the Ninth Circuit followed the historical trajectory of "jurisdictional parity" between national and state banks. The operative law, 12 U.S.C. § 1348, was created a decade *before* Congress acknowledged that state banks could be dual citizens. The Court reasoned, then, that Congress could not have possibly intended for national banks to have dual citizenship in the same way that state banks do because that idea did not exist yet. Therefore, under the operative statute, § 1348, national banks are only citizens of the state with their main office – because that was the only definition of bank "citizenship" available at the time of the statute's creation. The dissenting Justice pointed out that *Schmidt* did *not* decide the question at hand here and that *Schmidt's* holding does not preclude a finding that a national bank can enjoy dual citizenship.

Article III Standing: Injury Occurred When Loan was Purchased

Galope v. Deutsche Bank Nat'l Tr. Co., __ F. App'x __, 2014 WL 1244279 (9th Cir. Mar. 27, 2014): To have standing under Article III of the U.S. Constitution, a litigant must allege injury in fact. Standing has been held to exist, for example, "when a plaintiff purchases a product she would not otherwise purchased but for the alleged misconduct of the defendant." Here, borrower alleged she would not have entered into a loan agreement with defendants had she known defendants were "manipulating the LIBOR [London Interbank Offered Rate] rate." This is a cognizable injury in fact and adequately alleges Article III standing to bring her antitrust, breach of covenant of good faith and fair dealing, fraud, UCL, and False Advertising Law claims. In a 2-1 decision, the Ninth Circuit reversed the district court's grant of summary judgment to defendants. The dissent argued that borrower had suffered no injury because her mortgage payments were never affected by the LIBOR rating. The majority, however, found that the injury occurred when she entered into a loan agreement she otherwise would not have, rather than during the life of the loan.

Debtor Lacks Standing to Challenge Authority to Foreclose

***In re* Davies**, __ F. App'x __, 2014 WL 1152800 (9th Cir. Mar. 24, 2014): If borrower/debtor can bring a quiet title claim (this court "assumes" they can, but refused to "decide" the issue) to stop a foreclosure, they must have a specific factual basis for doing so. Here, debtor could not allege specific facts to challenge the authority to foreclose held by the original beneficiary's assignee. The assignee produced a valid, recorded assignment and "the fact that [MERS] executed the assignment does not impair its validity." Possible inconsistencies in the note (missing initials on a page, for example) do not change a debtor's default or debt. And finally, a debtor cannot challenge a pooling and servicing agreement. Over Judge Carr's dissent, the majority opinion acknowledged "that California courts have divided over this [last] issue. But the weight of authority holds that debtors . . . who are not parties to the pooling and servicing agreements—cannot challenge them. . . . We believe the California Supreme Court, if confronted with this issue, would so hold." The Ninth Circuit therefore affirmed the BAP's affirmation of the bankruptcy court's grant of creditor's motion for judgment on the pleadings.

Negligence: Following *Lueras*, Distinguishing *Jolley*

Benson v. Ocwen Loan Servicing, LLC, __ F. App'x __, 2014 WL 962022 (9th Cir. Mar. 13, 2014): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Here, the Ninth Circuit adopted the finding in *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49 (2013), that neither the lender nor servicer owes a duty of care to the borrower. Without analysis or comment, the court distinguished *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872 (2013), by citing the conclusion in *Lueras*: "The duty of care imposed on construction lenders [as in *Jolley*], does not apply in the residential loan context." The panel affirmed the lower court's dismissal of borrower's negligence claim.

Chapter 11: Debtors Cannot Modify Debt Secured by Real Property that is both Residential and Commercial

***In re* Wages**, __ B.R. __, 2014 WL 1133924 (B.A.P. 9th Cir. Mar. 7, 2014): Debtors can modify certain aspects of their debt in a Chapter 11 (corporate) bankruptcy. The bankruptcy court can only confirm a debtor's plan if it complies with the bankruptcy code, including 11 U.S.C. § 1123(b)(5): a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." Here, debtors sought to modify the mortgage on their principal residence, real property which also served a commercial purpose—debtors used a home office and stored their commercial trucks on the property when the trucks were not used. The bankruptcy court denied confirmation of the plan and the BAP affirmed that denial. The court found the statute "plain and unambiguous" and adopted a bright-line rule: the "anti-modification" statute applies to debt secured by real property that serves as debtor's principal residence, regardless of any additional use. In other words, "either a property is a debtor's principal residence or it is not." Because the property at issue here is the debtor's principal residence, the debtor cannot modify the loan secured by that property—even if the property is also used to generate income.

Dual Tracking: Trustees are Liable, Borrowers Must Plead Owner-Occupied Element

Banuelos v. Nationstar, 2014 WL 1246843 (N.D. Cal. Mar. 25, 2014): HBOR's dual tracking statute prevents servicers, mortgagees, *trustees*, loan beneficiaries, or their authorized agents, from proceeding with a foreclosure while a borrower's first lien loan modification application is pending. The enforcement statute, CC 2924.12, lists these same parties, who, in a post-foreclosure action, "shall be liable to a borrower for actual economic damages . . . resulting from [dual tracking] violation[s].” The modification application triggering dual tracking protections must pertain to the loan securing borrower’s “owner-occupied,” principal residence. Here, though the court agreed that borrower’s trustee can be held liable for a dual tracking violation, despite its professed “limited role in the foreclosure process,” it dismissed borrower’s claim because she did not plead the subject property was owner-occupied or address the issue in her opposition.

A National Bank May Invoke HOLA, Preempting HBOR but not Common Law; Offered (Not Negotiated) Modification May Create Duty of Care

Sun v. Wells Fargo, 2014 WL 1245299 (N.D. Cal. Mar. 25, 2014):[81] State laws regulating or affecting the “processing, origination, servicing, sale or purchase of . . . mortgages” are preempted by the Home Owner’s Loan Act (HOLA), as applied to federal savings associations. Without independent analysis, this court accepted the reasoning of the majority of California federal courts that Wells Fargo, a national bank, can invoke HOLA preemption to defend its conduct *as a national bank* because the loan in question originated with a federal savings association. The court then found borrower’s HBOR claims (pre-NOD outreach, dual tracking, SPOC) preempted because these laws relate to the processing and servicing of mortgages. Insofar as borrower’s UCL claim was based on their HBOR causes of action, that claim is also preempted. Borrower’s fraud, promissory estoppel, negligence, and negligent misrepresentation claims were not preempted. These common laws only impose a “general duty not to misrepresent material facts when doing business with borrowers.” Here, borrower claims servicer misrepresented it would not foreclose while it reviewed her modification application. Her common law claims, then, are not preempted.

[81] This case and *Meyer v. Wells Fargo Bank, N.A.*, 2013 WL 6407516 (N.D. Cal. Dec. 6, 2013), summarized in our January 2014 Newsletter, have nearly identical holdings. Both involved the same plaintiff *and* defense attorneys, and were each decided by Judge William Alsup.

To state a claim for negligence (and here, negligent misrepresentation and constructive fraud), a borrower must show that her servicer owed her a duty of care. This court allowed that "when [a servicer] *offers* borrowers a loan modification and a [TPP]," it "actively participates . . . beyond the domain of the usual money lender," and this may give rise to a duty of care (emphasis added). Here, however, there was never a TPP or permanent modification. "Merely *engaging* in the loan modification process is a traditional money lending activity" and does not give rise to a duty. Borrower's negligence related claims were dismissed.

California's Nonjudicial Foreclosure Statutes (including HBOR) are Not Preempted by HOLA

Stowers v. Wells Fargo, 2014 WL 1245070 (N.D. Cal. Mar. 25, 2014): State laws regulating or affecting the "processing, origination, servicing, sale or purchase of . . . mortgages" are preempted by the Home Owner's Loan Act (HOLA), as applied to federal savings associations. Without comment, this court applied a HOLA preemption analysis to claims against Wells Fargo, a national bank. It found, however, that borrower's claims, which related to the nonjudicial foreclosure of borrower's home, were *not* preempted. The court cited an increasingly common (but still minority) logic among district courts: "A lender cannot on the one hand rely on California law as the foundation for its right to conduct a non-judicial foreclosure, and then on the other hand ignore restrictions and procedural requirements that are part of the process under California law." Servicers, in other words, cannot have it both ways: foreclosure laws available *pre*-sale are not magically preempted *post*-sale, just in time for servicer's defense. Here, borrower's dual tracking claim (pled as a UCL claim) and pre-NOD outreach claims were not preempted, but were dismissed for insufficient pleading.

Judicial Estoppel: Failure to Disclose Potential Wrongful Foreclosure Claim in Chapter 13 Bankruptcy Prevents Subsequent Case

Swendsen v. Ocwen Loan Servicing, LLC, 2014 WL 1155794 (E.D. Cal. Mar. 21, 2014): Broadly, judicial estoppel prevents "a party from . . . taking one position, and then seeking a[n] advantage by taking an incompatible position." In the bankruptcy context, a debtor cannot take advantage of the bankruptcy process by later "asserting a cause of action not . . . mentioned in [his] schedules or disclosure statements." Debtors must notify the bankruptcy court of all their assets and liabilities; potential causes of action are considered "assets" in this regard. In a Chapter 13 bankruptcy, a debtor's duty to list assets and liabilities continues throughout the bankruptcy process, right up until conversion, confirmation, or dismissal. Further, a debtor must list any *possible* causes of action, even without knowing its full factual or legal bases. If: 1) a debtor has taken "clearly inconsistent" positions; 2) the bankruptcy court accepted debtor's earlier position; and 3) because of the two positions, debtor receives an unfair advantage or the defendants in the second case will suffer "unfair detriment," then the debtor should be judicially estopped from proceeding with the second case. Here, all three elements were met. First, the facts giving rise to debtor's wrongful foreclosure claim (mismanaged modification negotiations) transpired before and during his two Chapter 13 bankruptcies. Just weeks after his second bankruptcy was dismissed, debtor filed the instant action. This timing sequence showed that debtor had enough information to foresee at least a *potential* claim against creditor-servicer. He therefore took "clearly inconsistent" positions by first failing to disclose this potential claim on his bankruptcy schedules, and then by quickly filing the claim after his bankruptcy was dismissed. Second, the bankruptcy court "accepted" debtor's position by enforcing the automatic stay. The ultimate dismissal of debtor's bankruptcy was irrelevant. Finally, that automatic stay benefited debtor and constitutes and "unfair advantage" he would enjoy, were his affirmative case allowed to continue. Allowing debtors to pursue (and possibly collect on) previously undisclosed claims would open the entire bankruptcy system to abuse. With all three elements met, the court dismissed debtor's complaint.

RESPA: Kickbacks and Fee Splitting Claims

Henson v. Fidelity Nat'l Fin. Inc., 2014 WL 1246222 (C.D. Cal. Mar. 21, 2014): The Real Estate Settlement and Procedures Act (RESPA) prohibits parties in real estate transactions from receiving or giving "kickbacks," payment in exchange for a business referral. To bring a claim, borrowers must allege: 1) that the kickback involved "any service provided in connection with a real estate settlement" (including "document preparation" and "delivery"); and 2) that the referral was for "'business incident to or part of a settlement service' in exchange for 'any fee, kickback, or thing of value.'" Here, borrowers accused the escrow company that had facilitated their mortgage closing of maintaining an arrangement between its subsidiaries and several delivery companies (like UPS, FedEx, OnTrac) to overcharge for the delivery of closing documents. The escrow company internally instructed its subsidiaries to only use certain delivery companies for courier services (the referral). The delivery companies would then pay the escrow company a "marketing fee" (the kickback). The court agreed that the courier services constituted "settlement services" under RESPA's plain language. Second, borrowers' allegations that the escrow company required its subsidiaries to use particular delivery companies, through a "master agreement" and "internal compliance memoranda," adequately demonstrated a "referral." The court denied the escrow company's motion to dismiss on the grounds borrowers failed to state a claim.

RESPA also contains a "splitting" prohibition: "no person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." The "split" refers to fee or charge divided between two or more parties. There is no time requirement for the split: it need not occur directly after the closing. More importantly, if any actual services are performed for the fee, *no matter how miniscule in relation to the fee*, there is no splitting violation. Here, borrowers adequately pled that a split had occurred, even if it occurred long after the actual fees in this case were charged to borrower's closing accounts. The "split" was the "marketing fee" paid by the delivery companies to the escrow company, determined by the amount of business referred through the escrow company's subsidiaries, to the delivery companies. However, borrowers acknowledged in their complaint that escrow company *did* perform a service—it "promoted" the delivery companies and their services to its subsidiaries (through the internal compliance memos). Borrowers' kickback allegations, which required the showing of a referral, foreclosed this "splitting" claim. The court granted the escrow company's MTD for failure to state a claim.

Class Action on Force-Placed Flood Insurance

Ellsworth v. US Bank, N.A., __ F. Supp. 2d __, 2014 WL 1218833 (N.D. Cal. Mar. 21, 2014): Many DOTs and mortgage agreements include clauses allowing servicers to "force-place" insurance (purchase hazard insurance on borrower's property and charge the borrower) if the borrower refuses to purchase that insurance, or allows a policy to lapse. This purported class accuses servicer of engaging in a scheme with an insurance company, whereby servicer would force-place flood insurance on borrowers' properties, backdate that insurance to cover time periods where no loss had been incurred (constituting "worthless" insurance), and receive kickbacks (compensation) from the insurance company for its increased business. The purported class brought breach of contract claims, breach of the implied covenant of good faith and fair dealing claims, unjust enrichment, and UCL claims involving both California and New Mexico properties. The court denied servicer's motion to dismiss.

Debtors Modify Chapter 13 Plan after Loan Modification

***In re* Pasley**, __ B.R. __, 2014 WL 1199558 (Bankr. E.D. Cal. Mar. 21, 2014): Chapter 13 debtors may request to modify their plan at any point between plan confirmation and completion. Modification requests must be made "in good faith," preventing debtors from "attempting to unfairly manipulate the . . . Code." This good faith determination is left to the bankruptcy court. Here, debtors were initially approved for a 60-month plan calling for payments on their mortgage and car—both secured claims. Unsecured creditors—holding a junior mortgage and credit card debt—were not due any payments under the original plan. Two years after plan confirmation, the bankruptcy court approved debtor's loan modification which decreased debtor's "debt service burden" on their mortgage, freeing up resources to go towards their car payment. Debtors therefore proposed a modified plan, shortening it to 44 months and decreasing their monthly payments. The Trustee objected because the unsecured creditors would still receive nothing under the modified plan. Instead, the Trustee argued, the 60-month term should remain, and the unsecured creditors should start receiving debtor's disposable income after the car is paid-off, for the remainder of the term. The court analyzed debtor's proposed modified plan just as it had their original plan. As "below-median income" debtors, they would normally receive a 36-month plan, but the court found this modified 44-month plan appropriate and their previous 60-month plan (which was also an exception to the 36-month rule) now *in*appropriate. Further, the court found, debtors had requested the plan modification "in good faith." There was no evidence that debtors were "attempting to manipulate the . . . Code." The court overruled the Trustee's objection to the modified plan and granted debtor's motion to confirm.

Survey of Valid TPP-Related Claims

Harris v. Bank of Am., N.A., 2014 WL 1116356 (C.D. Cal. Mar. 17, 2014): Contract claims require the existence of a contract, including offer and acceptance. Contracts involving the sale of real property must conform to the statute of frauds: they must be in writing and “signed by the party to be charged.” Here, borrowers received what appears to be a TPP “notice” – a letter from their servicer congratulating them on their TPP and instructing borrowers to “accept” the TPP “offer” by electronically signing the documents and emailing them to servicer, which these borrowers did. Further, the TPP stated that if borrowers made the three TPP payments, they “*will* receive a permanent modification” (emphasis added). Borrowers made three timely payments but never received a permanent modification. Instead, servicer foreclosed and sold the home. The court determined that under the plain terms of the TPP itself, the TPP notice was an offer and by electronically signing and returning the offer, as instructed, *borrowers “accepted” the offer*. That acceptance transformed the TPP into a contract. Relying on *Corvello*, the court then found that servicer was contractually obligated to offer borrowers a permanent modification once borrowers complied with the terms of the TPP. In this case, the TPP only required three timely payments. Borrowers' payments triggered servicer's obligation to offer a permanent modification. Also under *Corvello*, servicer's failure to return a fully executed copy of the TPP does not render the TPP invalid or its obligation to offer a permanent modification void. Lastly, borrower's failure to attach a permanent modification document to their pleadings was deemed irrelevant. Borrowers *did* attach the TPP notice and servicer correspondence “indicating that it understood that there was a TPP agreement.” Because the TPP notice constituted “a writing” from the party to be bound (the servicer), the court rejected servicer's statute of frauds defense.

To have standing to set aside a completed foreclosure sale, borrowers must “tender” (offer and be able to pay) the amount due on their loan. There are several exceptions to this rule, however, including where borrowers allege the “underlying debt is void.” Here, as in *Chavez*, the court invoked this exception. In each case, borrowers alleged that servicer had “lacked a contractual basis to exercise the power of sale” because borrowers were compliant with their modified loan agreement. In other words, there was no “underlying debt” to foreclose upon. Servicer's motion to dismiss for failure to tender was denied.

Normally, borrowers may not plead promissory estoppel and breach of contract claims based on the same set of factual allegations. If a contract exists, in other words, it forecloses borrower's option of bringing a PE claim—which is available in the *absence* of a contract. An exception exists, however, allowing borrowers to plead PE and contract claims "in the alternative" if the servicer denies that a contract existed. Here, servicer moved to dismiss borrower's breach of contract claim, so the court found this exception applicable and allowed borrower's PE claim to continue. On that claim, the court determined that borrower's TPP payments and their "refraining from alternative measures to save their home" constituted detrimental reliance. The court denied servicer's MTD borrower's PE claim.

The California Rosenthal Act prohibits unfair and deceptive debt collection practices. To be held liable, a servicer must be considered a "debt collector:" "any person who, in the ordinary course of business, regularly, on behalf or himself or herself or others, engages in debt collection." Borrowers accused servicer of unfairly attempting to collect payments that were not due and by "misrepresenting" their debt, basically refusing to acknowledge the modification. Citing *Corvello*, this court found servicer to be a "debt collector" engaged in collection efforts "because 'a TPP [i]s more than an information al circulation.'" The court denied the MTD borrower's Rosenthal claim.

California's Consumer Credit Reporting Agencies Act (CCRAA) prevents parties from "furnish[ing] information on a specific transaction or experience to any consumer credit reporting agency if the [party] knows or should know the information is incomplete or inaccurate." Here, borrowers alleged servicer "willfully" reported borrowers' "default" to credit agencies, knowing that it gave those agencies an inaccurate and incomplete picture of borrower's modified mortgage status. The "missing" payments borrowers questioned covered the time period after they had complied with their TPP—not the period before the TPP (when borrowers *did* miss payments). Borrowers CCRAA claim also survived the MTD.

The federal Fair Credit Reporting Act (FCRA) requires that, upon notice from a credit reporting agency (CRA), "furnishers" of credit information "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" To do so, furnishers must reasonably investigate borrower's dispute. After servicer started reporting that borrowers had defaulted on their mortgage, borrowers promptly disputed the report to all three CRAs. Borrowers alleged that any "investigation" purportedly done by their servicer was improper. In their pleadings, borrowers accused servicer of systemic FCRA violations, alleging it maintained a policy of merely verifying that the disputed credit report pertained to the same subject as the information in servicer's internal records—not whether or not those records were accurate. Borrowers also accused servicer of lacking any internal investigation procedures or instructions for employees "conducting" investigations. Using these systemic accusations, the court inferred that the investigation into borrowers' particular dispute was unreasonable. Their FCRA claim also survived.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. This court acknowledged that the main Court of Appeal case to establish a duty of care arising from loan modification negotiations, *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872 (2013), involved a construction loan. It then quoted *Jolley*: "We note that we deal with a construction loan, not a residential home loan where, *save for possible loan servicing issues*, the relationship ends when the loan is funded. By contrast, in a construction loan the relationship between lender and borrower is ongoing." Because this case involved "ongoing loan servicing issues," as did the dispute in *Jolley*, this court found *Jolley* applicable, not distinguishable. Rather than explicitly finding a duty of care, however, the court simply denied servicer's MTD because servicer had based it "sole[ly on] . . . the application of the general rule—without more."

Dual Tracking: Borrowers Must Please Subject Property is Their Principal Residence

Kouretas v. Nationstar Mortg. Holdings, Inc., 2014 WL 1028410 (E.D. Cal. Mar. 14, 2014): [82] Dual tracking claims require borrowers to plead that the subject property is "owner-occupied," defined as "the principal residence of the borrower." CC § 2924.15(a). Here, borrower made no allegations or provided any evidence that the property was his principal residence. The court therefore granted servicer's motion to dismiss.

Pleading PE and Contract Claims in the Alternative; Duty of Care Exists; Economic Loss Doctrine

Rowland v. JP Morgan Chase Bank, N.A., 2014 WL 992005 (N.D. Cal. Mar. 12, 2014): Normally, borrowers may not plead promissory estoppel and breach of contract claims based on the same set of factual allegations. If a contract exists, in other words, it forecloses borrower's option of bringing a PE claim—which is available in the *absence* of a contract. An exception exists, however, allowing borrowers to plead PE and contract claims "in the alternative where there may be a dispute about the terms or validity of the alleged contract." Here, servicer only moved to dismiss borrower's PE claim, not their contract claim. But because servicer could still mount a defense to the contract claim, including denying the existence of the contract, the court allowed borrower to continue with her PE claim in the alternative and denied servicer's motion to dismiss.

Negligence claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. 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

[82] This case was originally summarized, at the preliminary injunction stage, in our February 2014 Newsletter as *Kouretas v. Nationstar Mortg.*, 2013 WL 6839099 (E.D. Cal. Dec. 26, 2013) (denying a preliminary injunction on borrower's dual tracking claim).

(1958), to analyze whether an activity extends beyond this relationship. Here, as it did in *Rijhwani* (below), the court applied the *Biakanja* factors to borrower's allegations and determined that servicer had overstepped its role as a traditional bank. The court cited the following assertions as critical to establishing a duty of care: 1) servicer's permanent modification offer was intended to affect borrowers because it would have significantly decreased their monthly mortgage payments. Further, "[servicer] did not just mishandle a loan modification application. Instead, it mishandled an *approved* loan modification agreement that [servicer] representatives repeatedly stated was 'complete' and 'in place'" (emphasis added). 2) The harm servicer could (and did) cause by mishandling a permanent modification was both foreseeable and certain—borrowers sent several letters detailing the emotional toll this experience was having on them, so servicer was definitely on-notice of the harm it was causing. 3) The connection between servicer's actions (or inaction) and the harm suffered is "direct and immediate." 4) Servicer's conduct is "subject . . . to moral blame." 5) Public policy, evidenced by recent legislation, "supports the existence of a duty" where servicer agreed to modify a loan, admitted its many errors in "finalizing" that modification, and then transferred its servicing rights to another servicer. The court found servicer owed borrower a duty of care and denied servicer's motion to dismiss his negligence claim.

The "economic loss doctrine" allows borrowers to recover only actual economic damages for contract-related claims. The doctrine does *not* apply "in cases where a 'special relationship' . . . or 'legal duty' . . . [exists]" between the parties to the contract. This court equated the test to determine if a special relationship exists with the six-factor test to analyze whether servicer owed borrower a duty of care (described above). Servicer argued the economic loss doctrine prevents borrower from claiming emotional distress damages on her negligence claim because any injury resulted from a breach of contract. The court found the exception to the economic loss doctrine applies here; servicer owed borrowers a duty of care under the *Biakanja* factors and, accordingly, a special relationship existed that renders the doctrine inapplicable.

TPP: Breach of Good Faith & Fair Dealing

Curley v. Wells Fargo & Co., 2014 WL 988618 (N.D. Cal. Mar. 10, 2014). The implied covenant of good faith and fair dealing is read into every contract and prevents one party from depriving the other of the benefits imparted by the contract. To state a claim, borrowers must show: 1) a contract (including the elements of contract formation: offer, acceptance, consideration); 2) borrower's performance, or excused nonperformance; 3) servicer's breach; and 4) damages caused by servicer's breach. Here, the court found the existence of the contract at issue, a HAMP Trial Period Plan (TPP), an issue of material fact inappropriate for disposition at summary judgment. It is, at best, unclear whether borrower accepted servicer's TPP offer by submitting a three-year old tax return. The TPP required "a copy of the *most recent* filed federal tax return," which borrower insists *was* the three-year old copy. The court also pointed to servicer's own records indicating the TPP was "approved," and deposition testimony of a servicer representative attesting to TPP formation. Second, the court found borrower's professed financial hardship and inability to make mortgage payments (stated in his TPP application) a disputed issue of material fact, requiring an interpretation of "cut[ing] back on [borrower's] social life." Finally, the court found causation unsettled because the parties disagreed about who caused the foreclosure. Servicer argued borrower's default resulted in foreclosure; borrower argued servicer's acceleration of the loan –breaching the TPP agreement—caused the foreclosure. The court denied servicer's motion for summary judgment.

HBOR Provides for Post-Sale Recovery of Actual Economic Damages *Caused by* Material HBOR Violations

Heflebower v. JP Morgan Chase Bank, NA., 2014 WL 897352 (E.D. Cal. Mar. 6, 2014): Pre-sale, HBOR provides borrowers a private right of action to enjoin a servicer from foreclosing. Post-sale,[83] borrowers may recover actual economic damages "resulting from"

[83] It is unclear from the pleadings whether the sale has occurred. According to the docket, a preliminary injunction remains in place, preventing the foreclosure sale. Borrower, though, seeks to recover *post*-sale damages and the court writes its opinion as if the sale has already occurred.

material violations of specific HBOR provisions, including the pre-NOD outreach requirement. CC § 2924.12(b). Along with an NOD, a foreclosing servicer must record a declaration of compliance attesting to their fulfillment of the pre-NOD outreach requirements. Here, borrower claimed three material violations of HBOR: dual tracking, no pre-NOD outreach, and recording documents without ensuring they are "accurate and complete and supported by competent and reliable evidence" (CC § 2924.17). In a convoluted pleading, borrower based these three specific HBOR claims on a broad pre-NOD outreach claim. Specifically, borrower alleged, servicer falsely filed its NOD declaration, evidenced by the incorrect chain of title described in the document, and because both the declaration and the NOD were "robo-signed." Not only are these allegations too general and factually deficient, but they are "not germane to [servicer's] duty" to engage in pre-NOD outreach. An incorrect chain of title listed on the NOD declaration and robo-signing allegations were also irrelevant to borrower's other two HBOR claims. Additionally, borrower failed to show how servicer's robo-signing and/or incorrect statement of the chain of title caused him actual economic harm. The court granted servicer's motion to dismiss.

A National Bank May Invoke HOLA, which Does Not Preempt CC 2923.5, But May Preempt Common Law Claims

Ambers v. Wells Fargo Bank, N.A., 2014 WL 883752 (N.D. Cal. Mar. 3, 2014): State laws regulating or affecting the "processing, origination, servicing, sale or purchase of . . . mortgages" are preempted by the Home Owner's Loan Act (HOLA), as applied to federal savings associations. Without independent analysis, this court accepted the reasoning of the majority of California federal courts that Wells Fargo, a national bank, can invoke HOLA preemption to defend its conduct *as a national bank* because the loan in question originated with a federal savings association. The court found, however, that borrower's CC 2923.5 claim was not preempted. That statute merely requires servicers to reach out to borrowers before recording an NOD, and has only an "incidental" effect on the processing or servicing of mortgages. It also "furthers a vital state interest." In analyzing borrower's remaining state law claims, the court noted a distinction between fraud and misrepresentation claims based on "inadequate disclosures of fees, interest rates, or other loan terms," and fraud and misrepresentation claims based on a bank's "general duty" not to "misrepresent material facts." The former would be preempted under HOLA because those claims relate to the processing and servicing of mortgages; the latter claims are not preempted because do not touch on lending regulations. The court determined that applying this analysis directly to borrower's ill-pled claims, however, would be premature. The court dismissed borrower's CC 2923.5 claim as untimely and without a remedy (no remedy for the pre-HBOR version of CC 2923.5 in post-foreclosure cases) and her other claims based on SOL and lack of specificity issues.

National Banks Cannot Invoke HOLA Preemption to Defend Their Own Conduct; Compliance with NMS is an Affirmative Defense to HBOR; Promissory Estoppel Claim Based on Failure to Forward Application to Correct Department; Duty of Care Exists

Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016 (N.D. Cal. Mar. 3, 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 based foreclosure 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 admitted it had allowed Wells Fargo to invoke HOLA preemption in the past, largely because borrowers had "either failed to argue otherwise or conceded the issue, the upshot being that the courts never had to grapple with it; instead, the courts simply concluded, without much analysis, that HOLA preemption applied." The court then acknowledged the growing concern over this issue, and the increasing number of courts starting to examine Wells Fargo's "reasoning" for using HOLA. Finally, this court was persuaded by the application of HOLA preemption "only to *conduct occurring before the loan changed hands* from the federal savings association or bank to the entity not governed by HOLA." Here, borrowers' claims pertained to Wells Fargo's own conduct occurring *after* Wachovia merged into Wells Fargo. The court determined that Wells Fargo could not then invoke HOLA preemption to defend its own conduct as a national bank.

As long as the National Mortgage Settlement (NMS) is effective, a signatory who is NMS-compliant with respect to the individual borrower is not liable for various HBOR violations, including dual tracking. CC § 2924.12(g). If, for example, a borrower submitted a complete modification application within the 15 days preceding a scheduled foreclosure sale, the NMS servicer would *not* be liable for HBOR dual tracking (if they went ahead with the sale while the application was pending) because the 15 day requirement is dual tracking cut-off period provided by the NMS. In this case, borrowers brought dual tracking and SPOC claims against their servicer, a NMS signatory. Servicer argued borrower's claims should be dismissed because it is "in compliance with the NMS's terms [and] insulated from liability for alleged HBOR violations." The court found this safe harbor argument an affirmative defense proper for the summary judgment stage of litigation, not in a MTD. Further, servicer will bear the burden of proof to show they complied with the NMS as it pertained to this borrower. NMS *non*-compliance is not an element borrowers need to allege as part of their HBOR pleading.

Promissory estoppel (PE) claims must include, *inter alia*, 1) a clear and unambiguous promise, 2) made with the expectation of reasonable reliance and, in fact, detrimentally relied upon by the borrower. Here, borrowers alleged three distinct promises: that their SPOC would forward their modification application to servicer's review department; that borrowers would qualify for a modification; and that a foreclosure sale would not occur during the evaluation process. The first and third promises are sufficiently clear. The promise to modify, however, is not, because borrowers did not plead the specific terms of any promised modification. Borrowers also successfully alleged detrimental reliance, pointing to their repeated submission of requested documents, choice not to pursue bankruptcy, hire an attorney, or attempt to refinance, and most importantly, their failure to appear at the foreclosure sale (which they did not know was happening) and place a "competitive bid" on their home. The court dismissed servicer's statute of frauds claim as inapplicable to PE claims. The borrower's PE claim survived on two of the alleged promises: to review their application and to not foreclose during that process.

Negligence claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. 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. Here, the court determined that servicer, through borrower's SPOC representative, had overstepped its role as a traditional lender, fulfilling at least five of the six-factors. The court cited the following allegations as critical to its conclusion: 1) the SPOC's communications with borrowers were "unquestionably intended to affect [them]," as his assurances affected the foreclosure of their home; 2) it was foreseeable and certain that his failure to forward their application to the correct department would result in harm to borrowers. Importantly, the loss of even an *opportunity* to save their home (even if not a "guarantee" that a modification would issue or be successful) constituted harm in this case. 3) There is a "close connection" between the SPOC's failure to forward their application and borrowers' harm (again, losing the *opportunity* to modify their loan was their harm); and 4) HBOR and recently enacted federal law (assumedly the CFPB servicing rules) demonstrate an existing public policy bent towards preventing this type of harm. The court felt it too early to attach "moral blame" to servicer's actions at this stage, but nevertheless found the existence of a duty of care and overruled servicer's MTD borrowers' negligence claim.

CC 1717: Servicer Attorney's Fees Unavailable if Borrower Voluntarily Dismisses COAs "on a Contract"

Caldwell v. Wells Fargo Bank, NA., 2014 WL 789083 (N.D. Cal. Feb. 26, 2014):[84] CC 1717 allows for attorney's fees in actions "on a contract." In this limited, attorney's fees context, California courts interpret "on a contract" liberally to include any action "involving a contract." To recover attorney's fees under this statute, the moving party must show: 1) the operative contract specifically allows attorney's fees; 2) it has prevailed in the action; and 3) its request is reasonable. Importantly, there is no "prevailing party" if the borrower voluntarily dismisses their case. Here, borrower brought wrongful foreclosure claims based on dual tracking, pre-NOD outreach, and a breach of a class action agreement, as well as UCL and RESPA claims. This court followed California precedent and found these claims to be "on a contract," rejecting servicer's argument that the action included "non-contract" claims. Determining CC 1717 to be the operative statute, the court then analyzed whether servicer met the three elements. Though the operative agreements—the note and the DOT—provide for attorney's fees, servicer failed to show it had prevailed in the action. Because borrower voluntarily dismissed her case (after the court denied her ex parte TRO request), there was no prevailing party in this action. The court dismissed servicer's motion for attorney's fees.

National Banks Cannot Invoke HOLA Preemption

Roque v. Wells Fargo Bank, N.A., 2014 WL 904191 (C.D. Cal. Feb. 3, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing

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[84] An earlier stage of this case was originally summarized in our August 2013 Newsletter as *Caldwell v. Wells Fargo Bank, N.A.*, 2013 WL 3789808 (N.D. Cal. July 16, 2013) (denying borrower's ex parte TRO based on dual tracking and pre-NOD outreach claims).

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 based foreclosure claims 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 originated with a federal savings bank, but pointed to the lack of controlling authority from the Ninth Circuit. The court then adopted a fairly black and white approach to the question: because the "plain language" of HOLA and the OTS regulations only apply to federal savings associations, a national bank cannot use HOLA preemption protection as a defense. Further, the OTS regulations never refer to "the genesis of the loan." The fact that a loan began with a federal savings association, then, is irrelevant to answering the question: can a national bank invoke HOLA preemption? The answer is simply, no. Having found Wells Fargo unable to use HOLA preemption as a defense, the court evaluated borrower's claims on their merits.

TRO: Servicer Rejection of Monthly Payments

Brinker v. JP Morgan Chase, 2013 WL 7798675 (N.D. Cal. May 17, 2013): To win a temporary restraining order in a California 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 breach of contract and breach of the covenant of good faith and fair dealing claims against his servicer for refusing to accept borrower's monthly mortgage payments, reporting a "default" to credit reporting agencies, and attempting to foreclose.

Borrower has shown a likelihood of prevailing on the merits of his contract related claims. The court found it "significant" that borrower had set aside the alleged amount of "default" in a trust account, asserting his ability to pay the full amount if servicer would just accept it. The court also found the impending sale constitutes irreparable harm, and that the balance of equities favored borrower—he would lose his home without the TRO, and servicer would just experience a delay in foreclosure with the TRO. The public interest is served by not allowing servicers to simply reject valid payment and institute foreclosure proceedings against borrowers. Borrower's ex parte TRO request was granted.

FCRA: Relationship between Force-Placed Insurance & Note

Haghighi v. JP Morgan Chase Bank, 2013 WL 7869341 (C.D. Cal. Apr. 9, 2013): The Fair Credit Reporting Act (FCRA) requires furnishers of credit information, including servicers, to report complete and accurate information to credit reporting agencies. Here, borrowers' DOT allowed their servicer to force-place homeowner's insurance, should the borrower allow that insurance to lapse. When a lapse occurred, servicer force-placed insurance and created an escrow account, charging borrowers for each month of insurance coverage. When borrowers failed to pay the escrow, servicer unilaterally added the escrow amount to the note itself, increasing borrowers' monthly mortgage payments. Borrowers continued to make their original, pre-escrow payments. Servicer failed to credit their account with *any* amount and reported zero payments to credit agencies. The court looked to the note language to determine if this reporting was accurate and complete, as servicer contended. The note stated that any amounts "disbursed by lender" would become "additional debt," but did not specify whether that additional debt was separate from, or part of, the existing debt secured by the note. Servicer clearly treated the force-placed insurance debt as part of the original note but provided no support for this interpretation. The court found two disputed issues of material fact: whether the note provided for the "rolling" of force-placed insurance charges into the note itself and, even if that were true, whether servicer's reporting of zero payments was complete and accurate, given that borrowers paid "virtually the entire amount" of their monthly mortgage payment, despite not paying the additional insurance charge. The court denied summary judgment to servicer.

Negligence: Duty of Care Exists to Accurately Credit Borrower's Account

Hampton v. US Bank, N.A., 2013 WL 8115424 (C.D. Cal. May 7, 2013): Negligence claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. 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. Here, during loan modification negotiations, servicer had instructed borrower to pay $20,000 to "cure [her] default." After borrower made the payment, servicer failed to credit her account, (exacerbating her default), denied her a modification, and foreclosed. Applying the *Biakanja* factors, the court found servicer's request for the payment was intended to affect borrower because it was made "in furtherance of [borrower's modification] application." It was also foreseeable that borrower would "be directly harmed" by servicer's failure to credit her account with an amount so significant. Even without evaluating all six factors, the court determined that servicer had overstepped its role as a traditional bank by "inaccurately represent[ing] to [borrower] that her payment . . . would cure her default and, *impliedly, increase her chances of receiving a loan modification*" (emphasis added). The court denied servicer's MTD borrower's negligence claim, but dismissed it (without comment) "insofar as it seeks actual damages."

Reporting Borrower Who was Compliant with Forbearance Agreement as "Delinquent" may Violate FCRA & CCRAA

Jamil-Panah v. OneWest Bank, 2012 WL 10466468 (N.D. Cal. Apr. 24, 2012): California's Consumer Credit Reporting Agencies Act (CCRAA) prevents parties from "furnish[ing] information on a specific transaction or experience to any consumer credit reporting agency if the [party] knows or should know the information is incomplete or inaccurate." Here, borrower and servicer entered into a HAMP forbearance, reducing borrower's monthly payment for six months. Borrower timely made all payments but servicer reported him delinquent to credit reporting agencies. In one section, the forbearance agreement stated: "This agreement is not an agreement to waive any reporting of delinquent loan payments." Borrower, though, pointed to the term "delinquent." Payments may have been *reduced* by the forbearance, but he never made a *late* payment, so servicer's reporting of a delinquency was inaccurate. There was also a dispute over the related term "current;" whether borrower's timely, but reduced, payments required servicer to report his account "current." Ambiguous contract language cannot be settled at the pleading stage, so the court denied servicer's MTD on borrower's CCRAA claim.

The federal Fair Credit Reporting Act (FCRA) requires that, upon notice from a credit reporting agency (CRA), "furnishers" of credit information "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" To do so, furnishers must reasonably investigate borrower's dispute. After servicer started reporting borrower "delinquent" on his mortgage payments, borrower promptly disputed the report to a CRA. Servicer, borrower alleged, reported that the account was "accurate" to the CRA, without conducting a reasonable investigation. Specifically, borrower pled servicer had not reviewed "all relevant information" and that the investigation was inappropriate. At the pleading stage, these allegations are sufficient to assert servicer's failure to conduct a reasonable investigation. Contrary to servicer's assertion, there are no "specific facts" required to plead an unreasonable investigation. Borrower's FRCA claim also survived the MTD.

Preliminary Injunction Issued on (Former) CC 2923.5 Violation; Bond Set at Fair Market Rent

De Vico v. US Bank, 2012 WL 10702854 (C.D. Cal. Oct. 29, 2012): To win a preliminary injunction in a California federal court, a borrower must show: 1) at least serious questions going to the merits of his claim; 2) imminent and irreparable harm if the PI does not issue; 3) that the balance of harms tips in their favor; and 4) the PI is in the public interest. Here, borrower sought a preliminary injunction on a former CC 2923.5 claim (which closely resembled the current HBOR version, CC 2923.55). Pre-HBOR, as now, servicers could not record an NOD without first contacting (or diligently attempting to contact) the borrower to discuss their financial circumstances and possible loss mitigation options. As with so many pre-NOD outreach claims, this case was a "he said, she said" dispute, the borrower claiming servicer never attempted to contact him, and servicer pointing to its declaration recorded with the NOD, attesting to either actual or attempted contact. This court cited the exact same arguments in *Tamburri v. Suntrust Mortg., Inc.*, 2011 WL 2654093 (N.D. Cal. July 6, 2011) and ruled as that court did: the borrower has shown at least "serious questions" on the merits of his pre-NOD outreach claim. Servicer's NOD declaration merely tracks the language of CC 2923.5 and servicer offered only a "hearsay report" from the signer of the declaration. Further, the loss of borrower's home –in two days if the PI did not issue—was both imminent and would be irreparable. It would be so irreparable, in fact, that borrower's potential harm far exceeds servicer's potential harm, should the PI be eventually lifted. The very nature of a pre-NOD outreach claims suggests that any foreclosure postponement would be temporary—the servicer need only correct its error to proceed with foreclosure. Lastly, "the public is benefited by ensuring that banks honor their statutory obligations." The court issued a preliminary injunction on borrower's pre-NOD outreach claim.

The Federal Rules of Civil Procedure require a "security" if a PI issues, "to pay the costs and damages sustained by [the servicer] found to have been wrongfully enjoined." Here, the court considered borrower's failure to pay his mortgage for nearly two years, and his “representation” that he could tender the full amount due on his mortgage if necessary, in setting the bond at the fair market rental for the property: $3,000/month.

Recent Regulatory Updates

Freddie Mac Bulletin 2014-4, (Mar. 28, 2014)

Modifications

The new servicer guidance and requirements announced in Bulletin 2013-27 (regarding the processing of Standard and Streamlined Modification programs for mortgages with mark-to-market loan-to-value (MTMLTV) ratios less than 80%) has been amended. Servicers have until July 1, 2014 to implement the new guidance (see postponement announcement below, Bulletin 2014-13).

Servicers must provide eligible borrowers (whose loans have MTMLTV ratios less than 80%) three amortization options: 480-months, 360-months, or 240-months. But not every borrower gets all three options. Their choices are dictated by their estimated modified principal and interest (P&I) payment. Freddie Mac did not include a handy table like Fannie Mae did (see below), but the rules are the same. As with Fannie Mae, borrowers with Freddie Mac loans cannot change their amortization period once they have made their first TPP payment. Nor can borrowers request a different period outside of the choices outlined in their TPP offer.

Fannie Mae Servicing Announcement SVC-2014-05, (Mar. 28, 2014)

Standard & Streamlined Modification Updates

In December 2013 (Announcement SVC-2013-28), Fannie Mae announced its intention to expand its standard and streamlined modification programs to more borrowers: as of April 1, 2014, the programs would apply to mortgage loans with a pre-modification mark-to-market loan-to-value (MTMLTV) ratio of less than 80%. Fannie Mae postponed that effective date (see March 12th announcement, below) and revamped the new guidance.

Servicers must implement these new changes by July 1, 2014.

A flow chart (see announcement) identifies what steps a servicer must go through to calculate the TPP terms for loans with a MTMLTV ratio less than 80%. If a loan meets these new requirements, servicers do not have to submit their proposed TPP to Fannie Mae for approval, as they did previously. If a loan does *not* meet these requirements, then the servicer must submit it to Fannie Mae for review and possible approval.

Evaluation Notice, Solicitation Letter, and TPP

Once a loan has been determined "eligible" for a standard or streamlined modification, servicer must follow Fannie Mae's new guidance in crafting their "Evaluation Notice" and "Solicitation Letter" to borrowers, offering them a TPP. The guidance sets forth different TPP offers corresponding to different amortization periods. The main take-away is: if a borrower is eligible for a TPP plan "with more than one amortization term [480-month, 360 month, or 240-month terms], the borrower may choose an amortization term," according to the guidance. Once they select an amortization period, however, they are locked into that period once the servicer receives their first TPP payment. "Evaluation Notices" sent to eligible borrowers must now contain certain information regarding this amortization process (outlined in a table in the announcement). If borrower defaults (60 or more days delinquent) in the first year of their modification, they cannot be approved for another modification.

Fannie Mae Servicing Notice: Late or Inaccurate Mortgage Loan Reporting, (Mar. 28, 2014)

The penalties servicers face (internal penalties and fees, to be paid from servicer to Fannie Mae), if they make inaccurate or late loan reports, have been revised. Fannie Mae has to correct servicing errors and these penalties are meant to compensate Fannie Mae.

Freddie Mac Single-Family/Servicer Guide Bulletin 2014-13, **Servicing Policy Updates: Alternatives to Foreclosure** (Mar. 17, 2014)

Standard & Streamlined Modifications

The new servicer guidance and requirements announced in Bulletin 2013-27 (regarding the processing of Standard and Streamlined Modification programs for mortgages with mark-to-market loan-to-value ratios less than 80%) is being amended. The amended guidance, and a new deadline for implementation (the previous deadline was 4/1/14), will be announced soon (see Announcement 2014-4, above).

Adverse Action Notices

If a servicer is required to notify a borrower of the reasons for a loss mitigation denial (under ECOA or FCRA, for example), and *Freddie Mac*, not servicer, actually evaluated borrower's application and denied a loss mitigation option, Freddie Mac will provide servicer with the reasons for the denial. Servicer will then communicate those reasons to borrower, through any required notice procedures. This procedure will be effective June 1, 2014.

Property Valuations

The property valuation requirements for Freddie Mac's HAMP, standard, and streamlined modification programs will soon be clarified and expanded upon in a new, user-friendly chart.

Bulletin 2013-20 announced the discontinuance of the "AVM (Automated Valuation Model) report" (used for calculating property value for Freddie Mac HAMP, standard, and streamlined modification evaluations). Due to widespread servicer opposition, the AVM report will not be discontinued.

Income documentation

Borrowers must submit proof of income when they apply for loss mitigation programs, as part of their "Borrower Response Package." Employed borrowers must submit "paystub(s) reflecting the most recent 30 days or four weeks of earnings." Depending upon the frequency of borrower's paycheck, more than one paystub may be required.

Fannie Mae Servicing Notice, Effective Date Change for Standard and Streamlined Modification Updates (Mar. 12, 2014)

In December 2013 (Announcement SVC-2013-28), Fannie Mae announced its intention to expand its standard and streamlined modification programs to more borrowers: as of April 1, 2014, the programs would apply to mortgage loans with a pre-modification mark-to-market loan-to-value (MTMLTV) ratio of less than 80%. Fannie Mae postponed that effective date and will revamp the new guidance, particularly on the "mortgage loan amortization term options that may be offered to [borrowers]" (see Servicing Announcement SVC 2014-05, above). If a servicer *already* implemented the changes announced in December, however, then eligible loans (with MTMLTVs ratios of less than 80%) will continue to be eligible for standard or streamlined modifications (servicers cannot undo changes they already implemented).

Supplemental Directive 14-01: HAMP Handbook version 4.4, (Mar. 3, 2014)

HAMP Handbook version 4.4 includes and incorporates revisions to Version 4.3, mostly involving administrative clarifications. There are several notable substantive changes, however:

Outreach & Borrower Intake Project

Servicers participating in HAMP can also "subscribe" to the Hope LoanPort (HLP), which is part of the Making Home Affordable Outreach and Borrower Intake Project. As part of this Project, borrowers work with participating housing counseling agencies. The agency submits an "Initial Package" to HLP on behalf of the borrower applying for a HAMP loss mitigation program. Handbook 4.4 brings the Project into alignment with the CFPB mortgage servicing rules.

For example, if a servicer enters a "rejection code" into HLP on a particular application, that does "not constitute a denial of a borrower for [HAMP] consideration." It only declares the borrower ineligible for funding under *the Project*, not HAMP as a whole. Servicers participating in the Project must also follow the new CFPB rules in terms of requesting more documentation for incomplete Initial Packages submitted through HLN. Finally, they must review applications in accordance with the CFPB's loss mitigation rules (now outlined in the HAMP Handbook, § 4.6).

Suspension of a Referral to Foreclosure: Expanded to non-Mod Programs

Under the new CFPB mortgage servicing rules, servicers may not refer a borrower to foreclosure until the borrower is at least 121 days delinquent. If a delinquent borrower submits an *incomplete* "Loss Mitigation Application" under HAMP, that 120-day "freeze" may be slightly extended: servicer cannot refer that borrower to foreclosure until *the later of*: 1) that 120-day "freeze," or 2) "at least 30 calendar days have passed since the date the servicer sent the borrower an Incomplete Information Notice" and the borrower's application remained incomplete when referred to foreclosure. Handbook 4.4 now expands this policy to applications for HAMP's Unemployment Program and Foreclosure Alternatives Programs.

Borrowers in Bankruptcy

Previously, HAMP required servicers to offer financial counseling to borrowers with TPP or permanent modification agreements. Servicers had to make a "reasonable effort" to contact these borrowers for this purpose. Version 4.4 now clarifies that servicers are not required to solicit these borrowers if borrowers are in active Chapter 7 or Chapter 13 bankruptcies. These borrowers *must* be offered financial counseling, however, if they, their attorney, or the bankruptcy trustee specifically requests it. There are also several changes to the particular types of communications required for borrowers receiving a Chapter 7 discharge.

FILED

APR 26 2013

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY ________ DEPUTY

M. Rosales

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

APPELLATE DIVISION

NICK MANIS, Petitioner, v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA, Respondent. BAY VALLEY PROFESSIONAL CENTER, LLC, Real Party in Interest.	Case No. 1-13-AP-001491 Trial Ct. No. 1-12-CV-234869 **ORDER GRANTING PETITION FOR WRIT OF MANDATE**

On October 24, 2012, Bay Valley Professional Center ("Bay Valley") filed its unlawful detainer action against defendant Romell Millan ("Defendant"). A bench trial was held on January 17, 2013. Following the unlawful detainer trial, the court (Hon. Woodhouse) entered judgment in favor of Bay Valley. A writ of execution was issued the following day. On March 14, 2013, petitioner Nick Manis ("Petitioner") presented his claim of right to possession and notice of hearing to the sheriff. After a noticed hearing, the court denied Petitioner's claim on March 27, 2013.

On April 2, 2013, Petitioner filed the instant writ petition and request for stay. On April 3, the Presiding Judge of the Appellate Division entered an order staying the eviction until April 30, 2013. Having considered the petition and all supporting papers, as well as the opposition filed by Bay Valley, the Court now rules as follows:

Code of Civil Procedure section 1174.3 sets out a formal procedure for making a claim of right to possession. (*Cardenas v. Noren* (1991) 235 Cal.App.3d 1344, 1349.) The sole issue at the hearing is whether there is a valid claim of possession by the claimant. (Code Civ. Proc., § 1174.3, subd. (d).) The claimant has the burden of proving the right of possession. (*Huerstal v. Muir* (1884) 64 Cal.450, 452-453, cited with approval in *Arrieta v. Mahon* (1982) 31 Cal.3d 381.) If the court finds that the claimant is an invitee, licensee, guest, or trespasser, it must determine the claim to be *invalid*. (Code Civ. Proc., § 1174.3, subd. (d).) On the other hand, if the court determines the claim of right to possession is *valid*, it shall "deem the unlawful detainer Summons and Complaint to be amended on their faces to include the claimant as defendant...." (Code Civ. Proc., § 1174.3, subd. (e)(2).) The complaint would then be served and defendant given an opportunity to respond. (*Ibid.*)

As an initial matter, both parties assert conflicting positions as to the applicability of the federal Protecting Tenants at Foreclosure Act of 2009 (12 U.S.C. § 5220) to Petitioner's lease. However, these arguments are irrelevant to determining whether Petitioner has a valid claim of right to possession. (See Code Civ. Proc., § 1174.3, subd. (d).) Such issues can be litigated in the unlawful detainer action against Petitioner.

As indicated above, if the court finds that the claimant is an invitee, licensee, guest, or trespasser, it must determine the claim to be invalid. (Code Civ. Proc., § 1174.3, subd. (d).) Here, Petitioner's status does not fall into any of those categories. Rather, Petitioner's claim of right to possession is based on a written rental agreement he has with Pepita Millan dba Summit Home for Independent Living. The lease was entered into on June 20, 2012, and expires on June 20, 2013. (See Petition, Exh. B [Admission Agreement].) At the hearing, Petitioner testified that he has lived at the property since June of 2012 and pays $900 per month. (See Reporter's Transcript ("RT"), pp. 14:13-16:19.) Pepita Millan became an owner of the Subject

Property on March 24, 2011, when by grant deed, Defendant conveyed the property to himself, Romulo Millan, and Pepita Millan, as joint tenants. (See Petition, Exh. C.) Bay Valley purchased the property at a trustee's sale in July 2012. On that date, the rental agreement between Petitioner and Pepita Millan was in effect.

As a tenant in a foreclosed residential property, Petitioner has a valid claim of right to possession. Under Code of Civil Procedure section 1161b, tenants or subtenants holding possession of a rental housing unit under a fixed-term residential lease entered into *before* transfer of title at a foreclosure sale have the right to possession until the end of the lease term, and all rights and obligations under the lease survive foreclosure. (Code Civ. Proc., § 1161b, subd. (b).) The tenancy may be terminated, however, on 90 days' written notice to quit under certain circumstances. (Code Civ. Proc., § 1161b, subd. (b).)[1] The purchaser or successor in interest bears the burden of proof in establishing that a fixed-term residential lease is not entitled to protection.[2] (Code Civ. Proc., § 1161b, subd. (c).)

In Bay Valley's opposition, Bay Valley argues that Petitioner's claim is invalid because the grant deed granting Pepita Millan joint ownership of the Subject Property was found to be a nullity during trial of the underlying action. (See Bay Valley's Opposition to Petition for Writ, pp. 3:22-4:3, 5:14-6:9.) Bay Valley reasons that since Pepita Millan was not an owner, she had no right to lease the property to Petitioner. Contrary to Bay Valley's argument, however, there is no evidence that the trial court previously declared the grant deed to be void. While Bay Valley cites *Hohn v. Riverside County Flood Control & Water Conservation Dist.* (1964) 228 Cal.App.2d 605 for the proposition that one cannot elude the security interest of a deed of trust by a gratuitous transfer of title to a third party, it is well-settled that a trustor can transfer encumbered property. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438.) Under such circumstances, the grantee of the property simply receives the title subject to all existing deeds.

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[1] The 2012 amendment to section 1161b substituted 90 days' written notice for 60 days' written notice. (See Stats. 2012 ch. 562 § 3 (Assem. Bill 2610), effective January 1, 2013.)

[2] In situations where section 1161b does not apply, the tenant in a foreclosed property is entitled to 30 days' notice if he rents under a fixed-term lease. (Code Civ. Proc., § 1161a, subd. (c).)

(*Id.*) Nevertheless, Bay Valley's claims can be litigated in the unlawful detainer action once Petitioner is added as a defendant.

Bay Valley previously argued that a tenant's claim of right to possession is invalid unless he proves that his right is independent of the named unlawful detainer defendant. (See Bay Valley's Opposition to Claim to Right of Possession.) However, this argument ignores the express provisions of Code of Civil Procedure section 1161b. As explained in the California Judges Benchguide, Landlord-Tenant Litigation: Unlawful Detainer (CJER 2013 rev.) section 31.95, a tenant or subtenant in a residential property that was sold at a foreclosure sale may file a postjudgment claim of right to possession. Here, Petitioner is a necessary party defendant in the unlawful detainer action because he was a tenant in possession when title was transferred to Bay Valley. (See Code Civ. Proc., § 1164.)

Lastly, Bay Valley complains that Petitioner's actions are mere delay tactics. However, the delay caused by Petitioner's claim is the sole result of Bay Valley's failure to name Petitioner in its unlawful detainer complaint. (See *Arrieta v. Mahon*, *supra*, 31 Cal.3d at p. 393.) Furthermore, despite the summary nature of unlawful detainer proceedings, evictions must still comply with due process principles.

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For all of the foregoing reasons, the petition for writ of mandate is GRANTED, the order denying Petitioner's claim is REVERSED, and the trial court is instructed to enter a new order granting Petitioner's claim. While the temporary stay issued on April 3, 2012, is dissolved, the levying officer may not enforce the writ of possession against Petitioner in light of this Order.

Date: 4/26/13

Honorable Griffin M.J. Bonini
Acting Presiding Judge of the Appellate Division

Date: 4-26-13

Honorable Deborah A. Ryan
Judge, Appellate Division

Date: 4/26/13

Honorable Julia Alloggiamento
Judge, Appellate Division

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

MINUTE ORDER

DATE: 03/27/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: K. Pratchen
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Carrillo

CASE NO: **34-2014-00159785-CU-OR-GDS** CASE INIT.DATE: 03/06/2014
CASE TITLE: **Leonard vs. JPMorgan Chase Bank NA**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Preliminary Injunction

APPEARANCES
Ted A Greene, counsel, present for Plaintiff(s).
Jennifer M Porter, counsel, present for Defendant(s) telephonically.

Nature of Proceeding: Motion for Preliminary Injunction

TENTATIVE RULING

The Preliminary Injunction is GRANTED.

On March 7, 2013, counsel for the plaintiff Perry Leonard appeared on an ex parte application and request for TRO and Order to Show Cause to prevent the foreclosure sale of his home. The TRO and Order to Show Cause re Preliminary Injunction were granted.

Plaintiff's Complaint alleges four causes of action: the 1st for violation of California Civil Code, sec. 2923.6, et seq.; the 2nd for Violation of California Civil Code, sec. 2924.11, et seq.; the 3rd for negligence per se; and, the 4th for Violation of California Business and Professions Code Section 17200, et seq.

Plaintiff has alleged that he and his wife have lived in their home since 1995. After their daughter fell ill, and was being cared for by her mother, they fell behind in their mortgage payments. They applied for a loan modification from JP Morgan Chase, and while that application was pending, but still in underwriting, they received a Notice of Trustee's Sale scheduling their home to be sold on March 10, 2014.

Plaintiffs have alleged that they are the victims of "dual tracking" by JPMorgan, in violation of the Homeowner Bill of Rights ("HOBR") Civil Code, sec. 2923.6.

Plaintiffs request injunctive relief, pursuant to Civil Code § 2924.12(2) which provides: "Any injunction shall remain in place and any trustee's sale shall be enjoined until the court determines that the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent has corrected and remedied the violation or violations giving rise to the action for injunctive relief. An enjoined entity may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied."

In deciding whether to issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance of the injunction. The greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678. A preliminary injunction may not be granted, regardless of the balance of interim harm, unless it is reasonably probable that the moving party will prevail on the merits. *San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal. App. 3d 438, 442.

Here, the relative interim harm to the defendants from the issuance of a preliminary injunction until JP Morgan Chase and National Default Servicing Corporation is far less than the harm which plaintiffs would incur should their home of almost 20 years be sold in violation of the HOBR.

Although JPMorgan opposes the PI on the grounds that there is currently no pending sale, and the Notice of Trustee's Sale is in the process of being rescinded; the sale was stopped by the issuance of the TRO by the Court and the defendants have submitted no evidence at all in support of their opposition.

In reply, plaintiffs provide admissible evidence that the sale was not "cancelled" by Chase, but merely postponed to May 12, 2014. (Greene Dec., Exh. A) The threat posed by double-tracking is still extant here.

On the record before it, the Court finds that the plaintiffs are reasonably likely to prevail on any of the causes of action in their complaint. Plaintiffs have alleged negligence per se and unfair business practices based upon JP Morgan Chase's violation of the HOBR's prohibition against dual tracking. Plaintiffs have alleged entitlement to damages as well as injunctive relief for violation of those statutory schemes.

The Preliminary Injunction is granted.

Plaintiffs shall submit an undertaking in the amount of $4,000. CCP, sec. 529.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.

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: 03/25/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown, K. Pratchen
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2013-00146669-CU-OR-GDS** CASE INIT.DATE: 06/12/2013
CASE TITLE: **Carlson vs. Bank of America NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,10772895
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Bank of America NA
CAUSAL DOCUMENT/DATE FILED: Demurrer to 1st Amended Complaint, 12/30/2013

APPEARANCES

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Bank of America, N.A.'s ("BANA") demurrer to Plaintiffs Lisa and Kevin Carlson's First Amended Complaint is ruled upon as follows.

The Court considered Plaintiffs' opposition served one day late, though the Court must note that it fails to meaningfully address many of the points raised in BANA's demurrer.

Defendant's request for judicial notice is granted.

In this foreclosure action, Plaintiffs allege causes of action for violations of the Home Owners' Bill of Rights ("HBOR") and causes of action for fraud and negligent misrepresentation.

<u>First, Second, and Third Causes of Action (HBOR causes of action)</u>

BANA's demurrer to these causes of action on the basis that they are premature because there are no current foreclosure proceedings is overruled. BANA argues that the HOBR was enacted to ensure that as part of the nonjudicial foreclosure process, borrowers are considered for foreclosure alternatives and that the process only commences once a notice of default has been recorded. It reasons that since Plaintiffs failed to allege the a NOD was recorded or attach a copy to the FAC that these HBOR causes of action are premature.

The Court disagrees. Liberally construing the FAC, as it must on a demurrer [Code Civ. Proc., § 452], the Court finds that Plaintiffs, while they may not have specifically alleged that a NOD was recorded on a specific date, have alleged facts showing that the foreclosure process has commenced. Indeed, the FAC is replete with such facts. Plaintiffs allege, for example, that BANA representatives advised them that "the foreclosure process would continue." (FAC ¶ 11.) They allege that they received a Notice of Default. (FAC ¶ 13.) They allege that their "home is currently in foreclosure." (FAC ¶¶ 41, 49.) Plaintiffs have alleged facts from which it can easily be inferred that a NOD has been recorded, despite an express allegation that it was recorded, and that the foreclosure process has commenced such that their HBOR causes of action are not premature. The demurrer to the first, second and third causes of action on this basis is overruled.

First Cause of Action (Violation of Civil Code § 2923.7)

The demurrer is overruled despite the fact that Plaintiffs failed to address BANA'a arguments as to this cause of action. Civil Code § 2923.7 requires that a servicer establish a single point of contact in the foreclosure prevention alternative process. A single point of contact is defined as "an individual or team of personnel each of whom has the ability and authority to perform the responsibilities" required by Section 2923.7. (Civ. Code § 2923.7(e).)

Plaintiffs' allegation that BANA "advised" them that "April Walker" was their single point of contact is not an admission that BANA complied with Section 2923.7 as BANA argues. Indeed, Plaintiff alleged that they tried to contact Ms. Walker on numerous occasions to confirm that the foreclosure would be paused during the loan modification application process but were unable to do so. (FAC ¶¶ 11, 13) Plaintiffs were instead transferred to different individuals, specifically, Jonathan Weiss and Carlos Lopez, each of whom provided Plaintiffs differing information regarding the status of the foreclosure process (inconsistently, Weiss indicated that Plaintiffs could ignore the Notice of Default they received while Lopez indicated that the foreclosure would proceed). Plaintiffs alleged that they requested a single point of contact but instead "were given several different contact people with differing information in violation of California Civil Code, Section 2923.7." (FAC ¶ 19.) Liberally construing the allegations as it must, the Court finds that Plaintiffs sufficiently alleged that they were not given a single individual or even a team with the ability/authority to perform the responsibilities" required by Section 2923.7. While BANA argues Plaintiffs failed to allege how they were damaged, the damage is the fact that they were not provided the requisite single point of contact as required by the statute. The demurrer to this cause of action is therefore overruled.

Second Cause of Action (Violation of Civil Code § 2924.18)

The demurrer to this cause of action is overruled, again despite Plaintiffs' failure to address BANA's arguments directed to this cause of action. Civil Code § 2924.18(a)(1) prohibits a "mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent" from recording a NOD where a borrower has submitted a completed loan modification application. Here, Plaintiffs alleged that they received a NOD while the loan modification process was pending and that BANA proceeded with foreclosure in violation of Section 2924.18. (FAC ¶ 25.)

As already discussed above, the Court has rejected BANA'a argument that Plaintiffs failed to allege facts demonstrating that an NOD has been recorded and that foreclosure proceedings have been commenced. Further, the Court recognizes BANA's point that this section only applies to a "depository institution chartered under state or federal law...that, during its immediately preceding annual reporting period...foreclosed on 175 or fewer residential real properties, containing no more than four dwelling units that are located in California." (Civ. Code § 2924.18(b).) However, there is no authority cited for the proposition that Plaintiffs failure to specifically allege that BANA is such an institution renders their cause of action deficient for pleading purposes. The demurrer is overruled.

Third Cause of Action (Violation of Civil Code § 2924.10)

The demurrer is overruled again despite Plaintiffs' failure to specifically address the arguments directed to this cause of action. Section 2924.10 requires a servicer to provide written acknowledgement of receipt of documentation within five business days of receipt of the loan modification application and in that acknowledgment must describe the loan modification process, include any applicable deadlines, expiration dates, and describe any deficiency in the application.

Plaintiffs allege that they provided BANA with a complete loan modification application but did not receive any "correspondence describing the loan modification process." (FAC ¶ 29.) This is sufficiently pleaded as Section 2924.10 required BANA to describe the process in its written acknowledgment of Plaintiffs' completed application. The Court is aware that a servicer is not liable for a violation of Section 2924.10 if it remedies any violation prior to recordation of trustee's deed upon sale. (Civil Code § 2924.12(c).) However, BANA is incorrect that the allegations show the violation was remedied. Indeed, BANA's argument that it informed Plaintiffs it had received all documents after initially sending a denial letter for "missing documents" does not demonstrate that it remedied the alleged violation at issue here, specifically, BANA's alleged failure to describe the loan modification process as required by Section 2924.10(a)(1). These allegations sufficiently allege conduct by BANA which violated Section 2924.10.

Further, BANA's argument that Plaintiffs are not entitled to injunctive relief hinges upon its already rejected contention that Plaintiffs failed to allege foreclosure proceeding have commenced.

The demurrer is overruled.

<u>Fourth Cause of Action (Fraud)</u>

The demurrer is overruled. The Court first rejects the argument that the cause of action, as pled, is barred by the statute of limitations. BANA's argument in this regard relies upon its attempt to re-write the FAC to argue that the fraud cause of action is based upon conduct that occurred in September 2009 when BANA purchased the subject loan from Taylor Bean Whitaker. Not so, despite the fact that Plaintiffs' opposition almost entirely fails to address this point, instead arguing that the cause of action did not accrue until they could no longer afford the increased mortgage payments caused by BANA's representation that they owed back taxes and insurance. Indeed, the fourth cause of action is based on the allegation that in "October 2010, Defendant BANA mortgage loan representative, Lorna Humphreys, with authority to speak on BANA's behalf, represented to Plaintiffs that they owed back property taxes and insurance amount [sic] to $10,583." (FAC ¶ 36.) Plaintiffs allege that the representations were false as they were not behind on their taxes and insurance. (Id. ¶ 37.) The complaint was filed on June 12, 2013, less than three years after the alleged misrepresentation by Humphreys and thus within CCP § 338(d). Thus the demurrer on the basis that the fraud cause of action is barred by the statute of limitations is overruled.

Further, the Court finds that the fraud cause of action is pled with the requisite specificity. When fraud is alleged against a corporate defendant, the plaintiff must specifically allege their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (*Tarmann v. State Farm Mutual Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) BANA simply argues that Plaintiffs failed to sufficiently allege facts showing the authority for Lorna Humprheys to speak on its behalf. The Court disagrees, in that Plaintiffs allege that she was BANA's "mortgage loan representative, with authority to speak on BANA's behalf..." (FAC ¶ 36.) These allegations are sufficient for pleading purposes as Ms. Humprheys title, "mortgage loan representative" supports the allegation that she had authority to speak on BAN's behalf regarding Plaintiffs' mortgage with BANA.

The Court also rejects BANA's argument that the cause of action is deficient because it is premised on Taylor Bean Whitaker's failure to properly account for tax payments and it is not liable for such conduct. Again, however, BANA is attempting to re-write the FAC. The fraud causes of action are premised on BANA's conduct, specifically, its alleged affirmative representation that Plaintiffs' owed $10,583 in back taxes and that BANA knew this was false because it had, or should have had, the documents from Taylor Bean Whitaker showing that they did not owe such money. Thus Plaintiffs adequately pled BANA's knowledge or the representation's falsity. They do not, however, seek to hold BANA liable for any conduct of Taylor Bean Whitaker.

The Court further rejects the argument that Plaintiffs failed to allege justifiable reliance. Plaintiffs alleged that they reasonably relied on Ms. Humphreys' representation that they owed back taxes and insurance and that BANA would foreclose if such sums were not paid. They alleged that they were thus required to increase their monthly mortgage payments "by nearly $1,000 toward paying $10,583 in alleged delinquent property taxes." (FAC ¶ 41.) This is sufficient.

Finally, the Court rejects the argument that Plaintiffs failed to adequately allege damages. Indeed, they alleged that they had to increase their monthly mortgage payments by nearly $1,000 and that the increase resulted in them not being able to keep up with their mortgage payments and as a result their home is in foreclosure. (FAC ¶ 41.) The fact that Plaintiffs also alleged that BANA offered to "break up the $10,583 for sixty months" does not render Plaintiffs' damages allegations insufficient.

The demurrer to the Fourth Cause of action is overruled.

<u>Fifth Cause of Action (Negligent Misrepresentation)</u>

The demurrer is overruled. The demurrer on the basis that the cause of action is barred by the statute of limitations and that the cause of action is not sufficiently specific is identical to the demurrer directed to the fourth cause of action and is overruled for the same reasons.

The demurrer on the basis that BANA owed no duty to Plaintiffs is overruled, despite Plaintiffs' failure to address this argument. BANA cites to the general rule that a financial institution generally owes no duty of care to a borrower where the institution's involvement does not exceed the scope of a conventional lender of money. (*Nymark v. Heart Federal Sav. & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1096.) However, this rule does not prevent Plaintiffs from alleging a negligent misrepresentation cause of action based on representations made in the context of a loan modification situation. Indeed, it is true that "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. A lender's obligation to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67.) Even when the lender is acting as a conventional lender, the no-duty rule is only a general rule. (*Osei v. Countrywide Home Loans* (E.D.Cal. 2010) 692 F.Supp.2d 1240, 1249.) *Nymark* does not support the sweeping conclusion that a lender never owes a duty of care to a borrower. A duty may be alleged based on the loan modification relationship and representations made to the borrower. Clearly, a lender has a duty not to make material misrepresentations of fact, for example, regarding the statute of a loan modification application or the status of a foreclosure. (*Lueras, supra, at pp.* 68-69 [granting leave to amend a negligence cause of action against a financial institution as it "is foreseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification, and the connection between the misrepresentation and the injury suffered could be very close"].) Here, the allegations that BANA's representative misrepresented that Plaintiffs owed back taxes and insurance and that they would be subject to foreclosure if they did not pay such amounts fits within that scenario. The demurrer on the basis that Plaintiffs failed to allege facts showing BANA owed a duty is overruled.

BANA's demurrer is overruled. No later than April 4, 2014, BANA shall file and serve its answer to the FAC.

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

JUL 03 2013

E. Usher

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

JEFFREY BERGMAN

Plaintiff,

v.

J.P. MORGAN CHASE BANK, N.A.; CAL-WESTERN RECONVEYANCE CORP.; MARK MRAZ, an Individual; and DOES 1 through 20,

Defendants.

CASE NO.: RIC10014015

SPECIAL VERDICT FORMS

DATE: **June 21, 2013**
TIME: **8:30 a.m.**
DEPT: **"6"**

TRIAL: June 21, 2013

ACTION FILED: July 15, 2010

Plaintiff Jeffrey Bergman and defendant JPMorgan Chase Bank, N.A. ("JPMorgan" or "Defendant") respectfully submits the following special verdict forms.

SPECIAL VERDICT – FRAUD (CACI 1902)

We answer the questions submitted to us as follows:

1. Did JPMorgan Chase Bank, N.A. make a promise to provide Jeffrey Bergman with a loan modification if he made the 3 trial payments and provided all financial information requested?

______ Yes __X__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did JPMorgan Chase Bank, N.A. have an intention to perform when the promise was made?

______ Yes ______ No

If your answer to either option for question 2 is yes, then answer question 3. If you answered no to both options, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did JPMorgan Chase Bank, N.A. intend for Jeffrey Bergman to rely on the promise of a loan modification if he made the 3 trial payments and provided all financial information requested?

______ Yes ______ No

If your answer to either option for question 3 is yes, then answer question 4. If you answered no to both options, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did Jeffrey Bergman reasonably rely on the promise by JPMorgan Chase Bank to provide him a loan modification?

______ Yes ______ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did JPMorgan Chase Bank, N.A. provide Jeffrey Bergman with the loan modification after Jeffrey Bergman performed all things that the agreement required him to do?

______ Yes ______ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was Jeffrey Bergman's reliance on JPMorgan Chase Bank, N.A.'s promise a substantial factor in causing his harm?

______ Yes ______ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are Jeffrey Bergman's damages?

TOTAL $______

[redacted]

[redacted]

[redacted]

7/1/13

BREACH OF ORAL AGREEMENT

We answer the questions submitted to us as follows:

1. Did Jeffrey Bergman and JPMorgan Chase Bank, N.A. enter into a binding oral contract?

X Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Jeffrey Bergman do all, or substantially all, of the significant things that the oral contract required him to do?

X Yes ____ No

or

Was Jeffrey Bergman excused from having to do all, or substantially all, of the significant things that the oral contract required him to do?

X Yes ____ No

If your answer to either option for question 2 is yes, then answer question 3. If you answered no to both options, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did all the conditions that were required for JPMorgan Chase Bank, N.A.'s performance occur or were they excused?

X Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did JPMorgan Chase Bank, N.A. fail to do something that the oral contract required it to do?

____ Yes _X_ No

or

Did JPMorgan Chase Bank, N.A. do something that the contract prohibited it from doing?

____ Yes ____ No]

If your answer to either option for question 4 is yes, then answer question 5. If you answered no to both options, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was Jeffrey Bergman harmed by that failure?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are Jeffrey Bergman's damages?

TOTAL $ ________

7/1/13

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BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

We answer the questions submitted to us as follows:

1. Did Jeffrey Bergman and JPMorgan Chase Bank, N.A. enter into a binding oral contract?

X Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Jeffrey Bergman do all, or substantially all, of the significant things that the oral contract required him to do?

X Yes ____ No

or

Was Jeffrey Bergman excused from having to do all, or substantially all, of the significant things that the oral contract required him to do?

X Yes ____ No

If your answer to either option for question 2 is yes, then answer question 3. If you answered no to both options, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did all the conditions that were required for JPMorgan Chase Bank, N.A.'s performance occur or were they excused?

X Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did JPMorgan Chase Bank, N.A. unfairly interfere with Jeffrey Bergman's right to receive benefits of the contract?

X Yes ____ No

If your answer to [redacted]] question 4 is yes, then answer question 5. If you answered no [redacted]], stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was Jeffrey Bergman harmed by the conduct of JPMorgan Chase Bank, N.A.?

X Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are Jeffrey Bergman's damages?

125,000

TOTAL $ ~~[illegible]~~

7/2/13

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

We answer the questions submitted to us as follows:

1. Was JPMorgan Chase Bank, N.A.'s conduct outrageous?

____ Yes X No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did JPMorgan Chase Bank, N.A. intend to cause Jeffrey Bergman emotional distress?

or

Did JPMorgan Chase Bank, N.A. act with reckless disregard of the probability that Jeffrey Bergman would suffer emotional distress, knowing that Jeffrey Bergman was present when the conduct occurred?

____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did Jeffrey Bergman suffer severe emotional distress?

____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date

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SANTA ANA

this form.

4. Was JPMorgan Chase Bank, N.A.'s conduct a substantial factor in causing Jeffrey Bergman's severe emotional distress?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are Jeffrey Bergman's damages?

TOTAL $________

7/2/13

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INTENTIONAL MISREPRESENTATON

We answer the questions submitted to us as follows:

1. Did JPMorgan Chase Bank, N.A. make a false representation of an important fact to Jeffrey Bergman?

X Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did JPMorgan Chase Bank, N.A. know that the representation was false, or did it make the representation recklessly and without regard for its truth?

X Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did JPMorgan Chase Bank, N.A. intend that Jeffrey Bergman rely on the representation?

X Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did Jeffrey Bergman reasonably rely on the representation?

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X Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was Jeffrey Bergman's reliance on JPMorgan Chase Bank, N.A.'s representation a substantial factor in causing harm to Jeffrey Bergman?

X Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are Jeffery Bergman's damages?

TOTAL $ 125,000

7/3/13

NEGLIGENT MISREPRESENTATION

We answer the questions submitted to us as follows:

1. Did JPMorgan Chase Bank, N.A. make a false representation of an important fact to Jeffrey Bergman?

X Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did JPMorgan Chase Bank, N.A. honestly believe that the representation was true when it made it?

X Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did JPMorgan Chase Bank, N.A. have reasonable grounds for believing the representation was true when it made it?

X Yes ____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did JPMorgan Chase Bank, N.A. intend that Jeffrey Bergman rely on the representation?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did Jeffrey Bergman reasonably rely on the representation?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was Jeffrey Bergman's reliance on JPMorgan Chase Bank, N.A.'s representation a substantial factor in causing harm to Jeffrey Bergman?

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are Jeffrey Bergman's damages?

TOTAL $________

7/3/13

UNLAWFUL FORECLOSURE

We answer the questions submitted to us as follows:

1. Did JPMorgan Chase Bank, N.A. violate any law or regulation governing foreclosure?

____ Yes _X_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. At the time of the foreclosure sale, was the market value of the subject property in excess of the liens/loans against the subject property? If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. If the value of the subject property at the time of the foreclosure sale was in excess of the liens/loans against the subject property, this is the damage for unlawful foreclosure. What is the amount that represents the value of the subject property at the time of the foreclosure sale in excess of the liens/loans against the subject property?

TOTAL $________

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PUNITIVE DAMAGES (CACI VF 3904)

1. Did an agent or employee of JPMorgan Chase Bank, N.A. engage in the conduct with malice, oppression, or fraud against Plaintiff?

____ Yes _X_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, [redacted]. stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did one or more officers, directors, or managing agents of JPMorgan Chase Bank, N.A. authorize this conduct?

____ Yes ____ No

A PROFESSIONAL CORPORATION SANTA ANA

Signed: ____________________

Presiding Juror

Dated: 7/3/13

After all verdict forms have been signed, notify the clerk/bailiff/court attendant that you are ready to present your verdict in the courtroom.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

OCT 02 2013

E. Usher

AA

OCT 02 2013 R

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE, CENTRAL JUSTICE CENTER

JEFFREY A. BERGMAN Plaintiff, vs. J.P. MORGAN CHASE BANK, N.A.; CAL-WESTERN RECONVEYANCE CORP.; MARK MRAZ, an Individual; and DOES 1 through 20, Defendants.	Case Number: RIC 10014015 JUDGMENT ON JURY VERDICT CASE FILED: JUL 15, 2010 TRIAL DATE: JUN 21, 2013

This action came on regularly for trial on June 21, 2013, in Department 6 of the Superior Court, the Honorable Ronald Taylor presiding, Plaintiff Jeffrey Bergman appearing by attorney Gregory Burke, Burke Molina, and Defendant J.P. Morgan Chase Bank, N.A., appearing by attorneys Christopher Yoo and John Sorich of AlvaradoSmith.

A jury of 12 persons was regularly impaneled and sworn. Witness were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court its verdict as follows:

Intentional Misrepresentation

"We answer the questions submitted to us as follows:

1. Did JP Morgan Chase Bank, N.A. make a false representation of an important fact to Jeffrey Bergman?

BM
BURKE + MOLINA
3419 Via Lido Ste 368
Newport Beach, CA 92663
(888) 679-6767

2. Did JP Morgan Chase Bank, N.A. know that the representation was false, or did it make the representation recklessly and without regard for its truth? YES.

3. Did JP Morgan Chase Bank, N.A. intend that Jeffrey Bergman rely on the representation? **YES**

4. Did Jeffrey Bergman reasonably rely on the representation? **YES.**

5. Was Jeffrey Bergman's reliance on JP Morgan Chase Bank, N.A.'s representation a substantial factor in causing harm to Jeffrey Bergman? **YES.**

6. What are Jeffrey Bergman's damages? **$125,000.**

Breach of the Implied Covenant of Good Faith and Fair Dealing

"We answer the questions submitted to us as follows:

1. Did Jeffrey Bergman and JP Morgan Chase Bank, N.A. enter into a valid oral contract? **YES.**

2. Did Jeffrey Bergman do all, or substantially all, of the significant things that the contract required him to do or that he was excused from having to do those things? **YES.**

3. Did all conditions required for JP Morgan Chase Bank, N.A's performance had occurred [or] were excused? **YES.**

4. Did JP Morgan Chase Bank, N.A unfairly interfere with Jeffrey Bergman's right to receive the benefits of the contract? **YES.**

5. Was Jeffrey Bergman harmed by JP Morgan Chase Bank, N.A'S conduct? **YES.**

6. What are Jeffrey Bergman's damages? **$125,000.**

It appearing by reason of said verdict that Plaintiff Jeffrey Bergman is entitled to judgment against Defendant JP Morgan Chase Bank, N.A.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Jeffrey Bergman shall recover from Defendant JP Morgan Chase Bank, N.A the sum of $250,000 ~~with interest at the rate of ten percent (10%) per annum from the date of the entry~~

BM
BURKE • MOLINA
5419 Via Lido Ste 360
Newport Beach, CA 92663
(888) 679-6767

~~of this judgment until paid~~, together with costs and dispursements in the amount of $____—____.

DATED: 10/2/13

Ronald Taylor
JUDGE OF THE SUPERIOR COURT

BM
BURKE • MOLINA
3419 Via Lido Ste 369
Newport Beach, CA 92663
(888) 679-6767

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of eighteen (18) and am not a party to the within action.

I served the foregoing document described as:

JUDGMENT ON JURY VERDICT

on all interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope as follows:

S. CHRISTOPHER YOO, ESQ.
ADORNO YOSS ALVARAD & SMITH
1 MACARTHUR PLACE, STE. 200
SANTA ANA, CA 92707

X **(BY MAIL)** as follows: I caused such envelope(s) fully prepaid to be placed in the United States Mail in Orange County, California, on the date executed below. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

X **(BY PERSONAL DELIVERY).**

X **(BY FACSIMILE).**

X **(STATE)** I declare under penalty of perjury that the above is true and correct.

Executed on August 7, 2013, Newport Beach, California.

Gregory Burke

BURKE • MOLINA
3419 Via Lido Ste 360
Newport Beach, CA 92663
(888) 679-8767

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

JAN 22 2014

L. Howell

REB

JAN 24 2014

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE, CENTRAL JUSTICE CENTER

JEFFREY A. BERGMAN Plaintiff, vs. J.P. MORGAN CHASE BANK, N.A.; CAL-WESTERN RECONVEYANCE CORP.; MARK MRAZ, an Individual; and DOES 1 through 20, Defendants.	Case Number: RIC 10014015 [~~PROPOSED~~] ORDER GRANTING PLAINTIFF'S MOTION TO AMEND THE JUDGMENT TO INCLUDE THE ADDITIONAL ATTORNEY'S FEES INCURRED AFTER TRIAL AND UP TO AND INCLUDING THE RENDITION OF JUDGMENT. Hearing Date: January 6, 2014 Department: 6 Hon. Ronald Taylor, Judge CASE FILED: JUL 15, 2010

PLEASE TAKE NOTICE, that on January 6, 2014, in Department 6 of the Riverside Superior Court, the Honorable Ronald Taylor, Judge presiding, after having considered Plaintiff's Motion to Amend the Judgment to include additional attorney's fees incurred after trial and up to and including the rendition of judgment, and Defendant's opposition thereto, the Court rules as follows:

PLAINTIFF'S MOTION IS GRANTED. THE JUDGMENT IS AMENDED TO INCLUDE ADDITIONAL ATTORNEY'S FEES IN THE AMOUNT OF $16,470.00

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Newport Beach, CA 92663
(949) 357-0377

INCURRED AFTER TRIAL AND UP TO AND INCLUDING JUDGMENT PURSUANT TO CALIFORNIA CIVIL CODE SECTION 1717.

IT IS SO ORDERED.

Dated: Jan. 17, 2014

By: Ronald Taylor
JUDGE OF THE SUPERIOR COURT

BURKE • MOLINA
3419 Via Lido Ste 360
Newport Beach, CA 92663
(949) 357-0577

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of eighteen (18) and am not a party to the within action,

On January 7, 2014 I served the foregoing documents described as:

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION TO AMEND THE JUDGMENT TO INCLUDE THE ADDITIONAL ATTORNEY'S FEES INCURRED AFTER TRIAL AND UP TO AND INCLUDING THE RENDITION OF JUDGMENT.

on all interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope as follows:

S. CHRISTOPHER YOO, ESQ.
ALVARADOSMITH
1 MACARTHUR PLACE, STE. 200
SANTA ANA, CA 92707

____ **(PERSONAL DELIVERY)**

_X_ **(BY MAIL)** as follows: I caused such envelope(s) fully prepaid to be placed in the United States Mail in Orange County, California, on the date executed below. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

_X_ **(STATE)** I declare under penalty of perjury that the above is true and correct.

Executed on January 14, 2014, Newport Beach, California.

GREGORY BURKE

BURKE • MOLINA
3419 Via Lido Ste 360
Newport Beach, CA 92663
(949) 357-0377