National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

March 2014 Newsletter

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Part II of NCLC's article on the new QWR process: Requests for Information

Case summaries including: *Mik*, *Robinson*, lots of FCRA & CCRAA and SPOC cases, and a detailed review of HUD's new FHA-HAMP FAQ

Announcements—

The HBOR Collaborative is hosting a webinar on representing former homeowners in post-foreclosure unlawful detainers on **March 25**. See sign-up information at the end of the newsletter.

We have also updated our post-foreclosure eviction practice guide for both tenant and homeowner advocates. The current version is available on our website.

New RESPA Rules Change Qualified Written Request Procedure: Requests for Information[1]

RESPA provides mortgage borrowers with the right to dispute servicer errors and to obtain account information by sending a "qualified written request." The Consumer Financial Protection Bureau (CFPB) has substantially revised the prior qualified written request procedure. New regulations that take effect on January 10, 2014 create two separate processes: one for resolving errors on a borrower's account (discussed in Part 1) and the other for requesting information about the account. The final 2013 RESPA Servicing Rule expands the scope of information requests by no longer limiting them to the "servicing of the loan." As under the current law, a borrower may recover actual damages, statutory damages, costs, and reasonable

[1] This article is the second in a two-part series authored by John Rao for the National Consumer Law Center's *eReports* service. Part I appeared in the HBOR Collaborative's January 2014 newsletter and focused on the new "Notices of Error." Printed here with permission of the author and NCLC.

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

attorney fees for violations of the new request for information and notice of error procedures.[2]

Requirements for a Request for Information

A servicer is required to respond to any written request for information from a borrower that "states the information the borrower is requesting with respect to the borrower's mortgage loan."[3] Unlike the earlier version of this regulation that applied to qualified written requests, the scope of an information request under Regulation X § 1024.36 is no longer tied solely to the concept of information that is "related to the servicing of the loan."[4] Rather, requests are effective if they seek any information concerning the borrower's mortgage loan, which would include, but would not be limited to, the servicing of the loan. Thus, the question as to whether the borrower has sent a valid information request no longer turns on the narrow definition of "servicing" found in RESPA.[5] Prior court decisions that had found certain requests to be ineffective because of this definition, as discussed below, are effectively abrogated by Regulation X § 1024.36.

To accommodate the new regime in which qualified written requests continue to coexist with requests for information, Regulation X provides that a qualified written request that requests information relating to the servicing of the mortgage loan is a request for information for purposes of § 1024.36, and a servicer must comply with all requirements applicable to a request for information with respect to such qualified written request.[6] However, a written inquiry can be a

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[2] 12 U.S.C. § 2605(f). *Foreclosures*, § 9.2.10 (4th ed. and 2013 Supp.).
[3] Reg. X, 12 C.F.R. § 1024.36(a) (effective Jan. 10, 2014). The request for information must also comply with the general requirements for borrower inquiries, such as by including the name of the borrower and information that enables the servicer to identify the borrower's mortgage loan account. *See Foreclosures*, § 9.2.2.2.1 (4th ed. and 2013 Supp.).
[4] Reg. X, 12 C.F.R. § 1024.21(e)(2)(i) (effective until Jan. 10, 2014).
[5] *See* Section-by-Section Analysis, § 1024.36(f)(1)(iv), 78 Fed. Reg. 10,761 (Feb. 14, 2013) ("the final rule . . . does not limit information requests to those related to servicing"). The term "servicing" is defined in RESPA § 2605(i)(3) to mean "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan."
[6] Reg. X, 12 C.F.R. § 1024.36(a) (effective Jan. 10, 2014).

request for information even if it is not a qualified written request, and so may seek information beyond that of a qualified written request. The one express limitation in Regulation X on requests for information is that they may not seek the payoff balance of a mortgage loan.[7] If the borrower sends such a request for a payoff balance statement, the servicer need not treat it as a request for information under Regulation X, but instead should treat it as a request under Regulation Z.[8] However, a borrower may use a notice of error under Regulation X to seek correction of an inaccurate statement of a mortgage payoff balance.[9] A more detailed discussion of requests for a payoff balance statement was provided in an earlier article in this series, NCLC *eReports*, Nov. 2013, No. 4.[10]

Request for Information about a Loan Modification Application

Several courts in cases decided before the 2013 RESPA Servicing Rule held that a request for information about a loan modification application was not related to the servicing of a loan and therefore could not be a valid qualified written request.[11] Such requests are now covered under Regulation X § 1024.36.

In discussing the borrowers' right to assert a notice of error for a servicer's failure to provide accurate information to a borrower with respect to available loss mitigation options, the CFPB stated that "it is critical for borrowers to have information regarding available loss mitigation options," and that this access should include "accurate information about the loss mitigation options available to the borrower, the requirements for receiving an evaluation for any such loss mitigation option, and the applicable timelines relating to both the

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[7] *Id.*
[8] Reg. X, 12 C.F.R. § 1026.36(c)(3) (effective Jan. 10, 2014).
[9] *See Foreclosures*, § 9.2.2.2.2 (4th ed. and 2013 Supp.).
[10] *See also Foreclosures*, § 9.6.5 (4th ed. and 2013 Supp.). The referenced article will be published in a later edition of the HBOR Collaborative newsletter.
[11] *See, e.g.*, Mitchell v. Reg'l Trust Serv. Corp., 2013 WL 556395 (N.D. Cal. Feb. 12, 2013); Van Egmond v. Wells Fargo Home Mortg., 2012 WL 1033281 (C.D. Cal. Mar. 21, 2012); Saucedo v. Bank of Am., 2011 WL 6014008, (D. Or. Dec. 1, 2011); *In re* Salvador, 456 B.R. 610, 623 (Bankr. M.D. Ga. 2011). *See also Foreclosures*, § 9.2.2.2.3.1 (4th ed. and 2013 Supp.).

evaluation of the borrower for the loss mitigation options and any potential foreclosure process."[12] The CFPB also noted that servicers are typically required to provide borrowers with information about loss mitigation options and foreclosure under the National Mortgage Settlement and servicer participation agreements with the Department of the Treasury, HUD, Fannie Mae and Freddie Mac, and that "providing such information to borrowers is a standard servicer duty."[13]

Request for Loan Servicing File

In response to the expanded scope of information requests as proposed by the CFPB, mortgage industry commenters raised the concern that a borrower could request the entire servicing file for the borrower's mortgage loan.[14] In promulgating the final 2013 RESPA Servicing Rule, the CFPB refused to adopt a per se rule that such requests would be invalid. Rather, the CFPB concluded that, if a borrower requests a servicing file, the servicer shall provide the borrower with a copy of the information contained in the file subject only to the limitations set forth in Regulation X § 1024.36(f) that deal with duplicative, overbroad, or unduly burdensome requests, which are discussed below.[15]

The CFPB provided additional explanation on this issue in discussing its refusal to adopt the National Mortgage Settlement's standards[16] in another section of Regulation X, § 1024.38, which deals with general servicing requirements.[17] Consumer organizations submitted comments suggesting that servicers who are initiating a foreclosure should be required to provide borrowers with documentation of their authority to foreclose, and that strict standards to ensure the accuracy and validity of foreclosure documentation

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[12] *See* Section-by-Section Analysis, § 1024.35(b)(7), 78 Fed. Reg. 10,742 (Feb. 14, 2013).
[13] *Id.*
[14] *See* Section-by-Section Analysis, § 1024.36(a), 78 Fed. Reg. 10,754 (Feb. 14, 2013).
[15] *Id. See also Foreclosures*, § 9.2.2.2.3.3 (4th ed. and 2013 Supp.).
[16] *See Foreclosures*, § 2.9 (4th ed. and 2013 Supp.).
[17] *See* Section-by-Section Analysis, § 1024.38(b)(1)(v), 78 Fed. Reg. 10,781 (Feb. 14, 2013).

should be adopted as included in the National Mortgage Settlement. The CFPB concluded that such requirements were unnecessary because the information request process set out in § 1024.36 provides borrowers in foreclosure with access to foreclosure-related documentation. The CFPB stated specifically that § 1024.36 "requires servicers to provide to borrowers upon their request information about their mortgage loan accounts, including their servicing files, which includes a complete payment history, a copy of their security instrument, collection notes, and other valuable information about their accounts."[18]

Consistent with this analysis of § 1024.36, the CFPB noted in the Official Staff Interpretation for the servicing file provision that § 1024.38(c)(2) does not provide the borrower with an "independent right" to access information contained in the servicing file.[19] In other words, a borrower's right to the servicing file information derives only under § 1024.36. Upon receipt of a borrower request for information asking for a servicing file, a servicer shall provide a copy of the information contained in the servicing file, subject only to the limitations set forth in § 1024.36.[20]

What constitutes the "servicing file" that the borrower may obtain through a request for information is addressed in the general servicing requirements of Regulation X, at § 1024.38.[21] Although the general servicing requirements found in § 1024.38 are not privately enforceable, they help to define the scope of a permissible request for information under § 1024.36 (which is enforceable by the borrower).

Section 1024.38(c)(2) provides that a servicer is required to maintain the following documents and data on each mortgage loan account it services in a manner that facilitates compiling such documents and data into a servicing file within five days:

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[18] *Id.*
[19] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 38(c)(2)-2 (effective Jan. 10, 2014).
[20] *Id.*
[21] *See Foreclosures*, § 9.4 (4th ed. and 2013 Supp.).

(1) a schedule of all transactions credited or debited to the mortgage loan account, including any escrow account and any suspense account;
(2) a copy of the security instrument that establishes the lien securing the mortgage loan;
(3) any notes created by servicer personnel reflecting communications with the borrower about the mortgage loan account;
(4) a report of the data fields relating to the borrower's mortgage loan account, to the extent applicable, created by the servicer's electronic servicing systems; and
(5) copies of any information or documents provided by the borrower to the servicer in accordance with the notices of error procedures under § 1024.35 or the loss mitigation procedures under § 1024.41.[22]

Thus, the servicing file appears to be a subset of the entire loan file for a borrower. Significantly, a servicing file includes a "schedule of all transactions credited or debited" to the account. Since this provision refers to "all" transactions and no time limitation is placed on the reporting period, a borrower may request a life-of-loan payment history.

While § 1024.38(c)(2) requires a servicer to produce the servicing file within five days, this timeline is established in the general servicing requirements for compliance reviews by the CFPB rather than for responses to borrower requests for information under § 1024.36. Thus, the customary timeline for compliance with requests for information as discussed below would apply to a request for the servicing file.

Requests for Loan Origination Documents

A number of court decisions under the former law had held that a qualified written request could not be used to obtain loan origination documents because such documents are not related to the servicing of

[22] Reg. X, 12 C.F.R. § 1024.38(c)(2) (effective Jan. 10, 2014).

the loan.[23] By expanding the scope of borrower inquiries to include information concerning the borrower's mortgage loan, Regulation X now permits a borrower to obtain loan origination documents by sending a request for information under § 1024.36. However, as discussed below, the servicer may claim that such documents are not available, or that the request is overbroad or unduly burdensome. A request for the entire loan origination file will likely generate such a response from the servicer. To avoid this response, the request should ask for the particular documents that may be needed, such as a copy of the loan note, mortgage or deed of trust, HUD-1 settlement statement, or TILA disclosure and rescission notice.

Exclusions from Compliance

Similar to the treatment of notices of error,[24] a servicer may reject certain information requests it deems to be duplicative or overbroad. Regulation X expands the list of exclusions from compliance for requests for information to include requests that are unduly burdensome, or that seek information that is irrelevant, confidential, proprietary, or privileged. However, a servicer's decision to ignore a borrower's request comes with certain risks. If the servicer makes an unreasonable determination that any of the listed exclusions apply, it would be liable to the borrower for its failure to comply with § 1024.36.[25]

If a servicer determines that it is not required to comply with a request for information because one of the exclusions applies, it must notify the borrower in writing within five business days after making its determination.[26] The notice must set forth the basis for the servicer's determination. The failure to provide such notice to the borrower should preclude a servicer from having a defense to liability

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[23] *E.g.*, Liebelt v. Quality Loan Serv. Corp., 2011 WL 741056 (N.D. Cal. Feb. 24, 2011); Aniel v. Litton Loan Servicing, L.P., 2011 WL 635258 (N.D. Cal. Feb. 11, 2011); Taggart v. Wells Fargo Home Mortg., Inc., 2010 WL 3769091 (E.D. Pa. Sept. 27, 2010).

[24] *See Foreclosures*, § 9.2.2.2.2.2 (4th ed. and 2013 Supp.).

[25] *See* Section-by-Section Analysis, § 1024.36(f)(1), 78 Fed. Reg. 10,759 (Feb. 14, 2013).

[26] Reg. X, 12 C.F.R. § 1024.36(f)(2) (effective Jan. 10, 2014).

for noncompliance in subsequent litigation based on an argument that the requirements were not applicable.

Duplicative Request for Information

A servicer is not required to comply with a request for information if the servicer reasonably determines that it is duplicative in that the information requested is substantially the same as information the borrower previously requested and for which the servicer has previously complied.[27] A borrower's request for a type of information that can change over time is not substantially the same as a previous information request for the same type of information if the subsequent request covers a different time period than the prior request.[28]

Request Asking for Confidential, Proprietary, or Privileged Information

Compliance with a request for information is not required if the servicer reasonably determines that the information requested is confidential, proprietary, or privileged.[29] The Official Bureau Interpretation to Regulation X provides the following examples of confidential, proprietary, or privileged information: (1) information regarding management or profitability of a servicer, including information provided to investors in the servicer; (2) compensation, bonuses, or personnel actions relating to servicer personnel, including personnel responsible for servicing a borrower's mortgage loan account; (3) records of examination reports, compliance audits, borrower complaints, and internal investigations or external investigations; or (4) information protected by the attorney-client privilege.[30]

The CFPB's initial proposed rule included a reference to "general corporation information of a servicer" as part of the confidential,

[27] 12 C.F.R. § 1026.36(f)(1)(i) (effective Jan. 10, 2014).
[28] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(f)(1)(i)-1 (effective Jan. 10, 2014).
[29] 12 C.F.R. § 1026.36(f)(1)(ii) (effective Jan. 10, 2014).
[30] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(f)(1)(ii)-1 (effective Jan. 10, 2014).

proprietary or privileged exclusion.[31] Industry commenters supported the CFPB's listing in the proposed Official Bureau Interpretation of a pooling and servicing agreement (PSA) between the servicer and the owner of the mortgage as an example of this general corporate information exclusion. Consumer organizations commented that PSAs are not typically confidential or proprietary, and are important as a subject for information requests because servicers rely on such agreements to make erroneous claims that they are not authorized to offer loan modifications or other loss mitigation options. In issuing the final rule, the CFPB removed the reference to general corporate information. The CFPB also agreed that PSAs are not typically kept confidential, and therefore deleted from the final Official Bureau Interpretation a PSA as an example of a confidential, proprietary or privileged request item.

Although the final rule does not have an explicit exclusion for a borrowers' request for a PSA, the CFPB noted that a servicer may not be required to comply with such a request if it reasonably determines that any of the exclusions set forth in § 1024.36(f) apply.[32] To avoid the possibility of these other exclusions being applicable, such as requests that are irrelevant, overbroad, or unduly burdensome, the borrower should consider avoiding a general request for the entire PSA.[33] Rather, the borrower's request might be limited to the portions of the PSA that are relevant to the borrowers' specific inquiry or dispute with the servicer. For example, if a servicer denies a loan modification request by claiming that a modification is prohibited by the terms of the PSA for a particular securitization transaction, a request for the relevant sections or provisions of the agreement that address any restrictions on the servicer in negotiating, offering, processing, or approving loss mitigation options should be treated as a valid request for information. As another example, if an attorney is attempting to

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[31] *See* Section-by-Section Analysis, § 1024.36(f)(1)(ii), 78 Fed. Reg. 10,759/-/60 (Feb. 14, 2013).
[32] *Id*.
[33] *See In re* Ginn, 465 B.R. 84 (Bankr. D.S.C. 2012) (in pre- Jan. 10, 2014, case, general request for copy of pooling and service agreement did not fall within the meaning of "servicing" for purposes of qualified written request); *In re* Griffin, 2010 WL 3928610 (Bankr. S.D.N.Y. Aug. 31, 2010) (same).

determine if a client's mortgage loan was included in the pool of loans covered by a particular PSA, a request for the exhibit to the PSA (*e.g.*, Exhibit A - Mortgage Loan Schedule) that lists the covered loans for the pool should be a valid request.

Request Asking for Irrelevant Information

No response is required by a servicer to a request that seeks irrelevant information.[34] In adopting this exclusion for information that it is not directly related to a borrower's mortgage loan account, the CFPB noted that it does not intend to impose an obligation on borrowers to "identify with specificity the precise document or data point the borrower is seeking."[35] Rather, the purpose of this exclusion is to ensure that servicers are not expending resources on irrelevant requests, so that they may focus on providing relevant information to borrowers.

The Official Bureau Interpretation to Regulation X provides the following examples of irrelevant information: (1) information that relates to the servicing of mortgage loans other than a borrower's mortgage loan, including information reported to the owner of a mortgage loan regarding individual or aggregate collections for mortgage loans owned by that entity; (2) the servicer's training program for servicing personnel; (3) the servicer's servicing program guide; or (4) investor instructions or requirements for servicers regarding criteria for negotiating or approving any program with a borrower, including any loss mitigation option.[36]

The fourth example of irrelevant information given in the Official Bureau Interpretation raises concerns by referring to "investor instructions or requirements for servicers regarding criteria for negotiating or approving any program with a borrower."[37] This appears to be inconsistent with the CFPB's general position that borrowers

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[34] 12 C.F.R. § 1026.36(f)(1)(iii) (effective Jan. 10, 2014).
[35] *See* Section-by-Section Analysis, § 1024.36(f)(1)(iii), 78 Fed. Reg. 10,760 (Feb. 14, 2013).
[36] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(f)(1)(iii)-1 (effective Jan. 10, 2014).
[37] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(f)(1)(iii)-1 (effective Jan. 10, 2014).

should have full access to information about loss mitigation options.[38] However, this example is apparently referring to general investor requirements and not those pertaining to an individual borrower's evaluation for loss mitigation options.

This is made clear by the treatment of denial notices for loan modifications under Regulation X's loss mitigation rule.[39] If the reason for denial of a loan modification option was a requirement set by an owner or assignee of the loan, the rule requires that the denial notice must identify the owner or assignee and the specific requirement that was the basis for the denial.[40]

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.[41] Thus, a borrower should be permitted to obtain this information through a request for information if it is not provided in the denial notice.

Overbroad or Unduly Burdensome Request for Information

A servicer may reject a request for information request it deems to be overbroad or unduly burdensome.[42] An information request is overbroad if a borrower requests that the servicer provide an "unreasonable volume of documents or information."[43] Regulation X elaborates on this point by stating that an information request is unduly burdensome if a diligent servicer could not respond to the request without either exceeding the maximum time limits under § 1024.36(d)(2) for responding to the request or incurring costs or dedicating resources that would be unreasonable in light of the circumstances.[44] If a servicer can reasonably identify a valid information request in a writing that is otherwise overbroad or unduly

[38] *See Foreclosures*, § 9.2.2.2.3.2 (4th ed. and 2013 Supp.).
[39] *See Foreclosures*, § 9.2.8.2.4 (4th ed. and 2013 Supp.).
[40] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)(1)-1 (effective Jan. 10, 2014).
[41] *Id.*
[42] 12 C.F.R. § 1026.36(f)(1)(iv) (effective Jan. 10, 2014).
[43] *Id.*
[44] *Id.*

burdensome, the servicer is required to comply with respect to the validly requested information.[45] The Official Bureau Interpretation to Regulation X provides the following examples of an overbroad or unduly burdensome request for information:

- Requests that seek documents regarding substantially all aspects of mortgage origination, mortgage servicing, mortgage sale or securitization, and foreclosure, including, for example, requests for all mortgage loan file documents, recorded mortgage instruments, servicing information and documents, and sale or securitization information and documents;

- Requests in a form that is not reasonably understandable or are included with voluminous tangential discussion or assertions of errors;

- Requests that purport to require servicers to provide information in specific formats, such as in a transcript, letter form in a columnar format, or spreadsheet, when such information is not ordinarily stored in such format; and

- Requests that are not reasonably likely to assist a borrower with the borrower's account, including, for example, a request for copies of the front and back of all physical payment instruments (such as checks, drafts, or wire transfer confirmations) that show payments made by the borrower to the servicer and payments made by a servicer to an owner or assignee of a mortgage loan.[46]

The exclusion for overbroad or unduly burdensome information requests appears intended by the CFPB as a response to servicer complaints about boilerplate qualified written requests available on the internet that have been used by *pro se* homeowners and some

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[45] *Id.*
[46] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 35(f)(1)(iv)-1 (effective Jan. 10, 2014).

attorneys in foreclosure litigation.[47] These forms often contain numbered paragraphs that resemble litigation discovery requests and have numerous assertions that may not be relevant to the homeowner's dispute. To avoid any potential servicer defense in litigation over violations of RESPA § 2605(e) and Regulation X § 1024.36, an attorney who drafts a request for information should ensure that it is concise and tailored to the facts of the particular case.

Compliance with Requests for Information

A servicer must acknowledge receipt of a request for information within five days (excluding holidays, Saturdays, and Sundays) after receiving the request.[48] Alternatively, the servicer need not provide this acknowledgment or otherwise satisfy the compliance requirements if it provides the borrower with the information requested, and notifies the borrower in writing of contact information (including a telephone number) for further assistance, within the five business day period.[49]

Within thirty days (excluding holidays, Saturdays, and Sundays) of receipt of a request for information from the borrower, the servicer must either:

- provide the borrower with the requested information and contact information, including a telephone number, for further assistance in writing; or

- conduct a reasonable search for the requested information and provide the borrower with a written notification that states that the servicer has determined that the requested information is not available to the servicer, states the basis for the servicer's

[47] *See* Section-by-Section Analysis, § 1024.36(f)(1)(iv), 78 Fed. Reg. 10,760 (Feb. 14, 2013) ("During the Small Business Review Panel outreach, small entity representatives expressed that typically qualified written requests received from borrowers were vague forms found online or forms used by advocates as a form of pre-litigation discovery. Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome.").
[48] Reg. X, 12 C.F.R. § 1024.36(c) (effective Jan. 10, 2014).
[49] Reg. X, 12 C.F.R. § 1024.36(e) (effective Jan. 10, 2014).

> determination, and contains contact information, including a telephone number, for further assistance.[50]

A shorter timeframe for response is set for a request for the identity of, and address or other relevant contact information for, the owner or assignee of a mortgage loan.[51] A servicer is required to respond to such a request within ten days (excluding holidays, Saturdays, and Sundays) of receipt.[52] Requests for the identity of a mortgage owner were previously discussed in another article is this series, NCLC *eReports*, Sept. 2013, No. 1.[53]

Extension of Response Period

A servicer may extend the time period for responding by an additional fifteen days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the thirty-day period, the servicer notifies the borrower in writing of the extension and the reasons for the extension.[54] Although the borrower notification must state the reasons for the extension, RESPA and Regulation X do not require that the servicer have a valid or justifiable reason for extending the time period. A servicer may not extend the ten-day time period for responding to requests for identity of the owner or assignee of a mortgage loan.[55]

Information Not Available

A servicer must conduct a reasonable investigation before concluding that information requested is not available. The Official Bureau Interpretation to Regulation X provides that information is not available if the information is (1) not in the servicer's control or possession, or (2) cannot be retrieved in the ordinary course of business through reasonable efforts.[56] The Official Bureau Interpretation

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[50] Reg. X, 12 C.F.R. § 1024.36(d) (effective Jan. 10, 2014).
[51] *See Foreclosures*, § 9.2.2.5.5 (4th ed. and 2013 Supp.).
[52] Reg. X, 12 C.F.R. § 1024.36(d)(2)(i)(A) (effective Jan. 10, 2014).
[53] This article appeared in the HBOR Collaborative's October 2013 newsletter.
[54] 12 U.S.C. § 2605(e)(4); Reg. X, 12 C.F.R. § 1024.36(d)(2)(ii) (effective Jan. 10, 2014).
[55] *Id.*
[56] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(d)-1 (effective Jan. 10, 2014).

provides the following examples to illustrate when information is or is not available:

- A borrower requests a copy of a telephonic communication with a servicer. Audio files with recordings or transcripts of borrower telephone calls are accessible to the servicer in the ordinary course of business, and the requested communication can be identified through reasonable business efforts. The information requested is available to the servicer.

- A borrower requests information stored on electronic back-up media. Information on electronic back-up media is not accessible by the servicer's personnel in the ordinary course of business without undertaking extraordinary efforts to identify and restore the information from the electronic back-up media. The information requested is not available to the servicer.

- A borrower requests information stored at an offsite document storage facility. The servicer has a right to access documents at the offsite document storage facility and servicer personnel can access those documents through reasonable efforts in the ordinary course of business. The information requested is available to the servicer assuming that the information can be found within the offsite documents with reasonable efforts.[57]

Ban on Charging Response Fees

As discussed in Part 1 of this article, the Dodd-Frank Act clarifies that a servicer shall not charge a fee for responding to a "valid qualified written request."[58] This provision is implemented by Regulation X § 1024.35(h) for notices of error and § 1024.36(g) for requests for information.[59] A servicer is prohibited from charging a fee, or requiring the borrower to make any payment owed on the account,

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[57] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(d)-2 (effective Jan. 10, 2014).
[58] Pub. L. No. 111-203, 124 Stat. 1376, tit. XIV, § 1463(a) (July 21, 2010).
[59] Reg. X, 12 C.F.R. § 1024.35(h) and § 1024.36(g) (effective Jan. 10, 2014).

as a condition of responding to a notice of error or request for information.

Summaries of Recent Cases

Unpublished & Trial Court Decisions[60]

Void vs. Voidable Deeds & Bona Fide Encumbrancers

Johnson v. Deutsche Bank Nat'l Tr. Co., 2014 WL 555178 (Cal. Ct. App. Feb. 13, 2014): Fraudulent transfers of property, where the grantor's signature was forged or the grantor was unaware of the nature of the transfer-document, are void. Void deeds "cannot be made the foundation of a good title, even by a bona fide encumbrancer." A void*able* deed, by contrast, is one where the grantor was aware of their actions, but was "induced to sign and deliver [the deed] by fraudulent misrepresentations or undue influence." A bona fide encumbrancer can retain title in the face of a voidable transfer, but not of a void transfer. This plaintiff brought quiet title and cancellation causes of action against Deutsche Bank, a purported bona fide encumbrancer. Plaintiff was allegedly scammed out of his property by real estate con-artists in a fraudulent refinance scheme. The con-artists then used the property to obtain loans which were eventually securitized in a mortgage pool with Deutsche Bank as trustee. Contrary to the trial court (which, relying on language in the "participation agreement," found the transfer legitimate and granted summary judgment to Deutsche Bank), the Court of Appeal found that plaintiff may have unknowingly transferred title, rendering the deed void. At the very least, the transfer may have been voidable. The con-artist's oral representations and the language in the "participation agreement" both assured plaintiff that he would retain ownership, and *only he* could use the property as collateral to obtain loans. Plaintiff's possible "knowledge" or awareness that he was transferring title is not dispositive because the very definition of a voidable transfer assumes the grantor's awareness. Having found evidence to support a voidable deed theory,

[60] 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.

the court then turned to evaluating whether Deutsche Bank was a bona fide encumbrancer.

A bona fide encumbrancer takes its property interest "without knowledge or notice of competing liens." Notice, actual or constructive, therefore defeats bona fide status. Here, as soon as plaintiff discovered that the arrangement was a con, he recorded a lis pendens against the property. The loan was purportedly securitized *after* the lis pendens was recorded. This timing, combined with a possible hole in the chain of title (a missing assignment), purports to show that Deutsche Bank may have had notice of plaintiff's claim to the property *before* it obtained a property interest. The trial court impermissibly accepted Deutsche Bank's bare assertion that it *was* a bona fide encumbrancer so the Court of Appeal reversed the trial court's grant of summary judgment.

Leave to Amend Borrower's Breach of Covenant of Good Faith & Fair Dealing and UCL Claims Granted in Light of *Wigod*, *West*, *Corvello*, *Bushell*

Nersesyan v. Bank of Am., N.A., 2014 WL 463538 (Cal. Ct. App. Feb. 5, 2014): Every contract contains an implied covenant of good faith and fair dealing, "meaning neither party will do anything that will injure the right of the other to receive the benefits under the contract." Here, borrower pled that her original loan contract required her to make monthly loan payments, and servicer had an "implicit obligation not to hinder or prevent" her from making those payments. Servicer *did* hinder her ability to make payments when it orally agreed to a Trial Period Plan (TPP), accepted TPP payments for two years, but never properly credited those payments as monthly mortgage payments. Servicer had never mailed borrower a final TPP "package," resulting in borrower missing her first payment. She made many subsequent payments, however, which servicer accepted, continually telling her to keep submitting documents so servicer could "reconsider" her for a modification after it had denied her. Servicer also promised not to foreclose as long as borrower kept making TPP payments. The

Court of Appeal found that with these facts, borrower should be allowed to amend her pleadings to state a claim for breach of the covenant of good faith and fair dealing in light of *Wigod*, *West*, *Bushell* and *Corvello*, all of which were decided after the trial court sustained servicer's demurrer without leave to amend. If borrower can plead that she "executed a TPP . . . made all her trial payments, and supplied the required documentation, she will have established a cause of action for breach of the covenant of good faith and fair dealing." The court reversed and remanded for further proceedings.

Similarly, the court decided borrower should be allowed to amend her UCL claim in light of *West*. That court found a viable UCL claim where borrower alleged servicer "engaged in a practice of making TPPs that did not comply with HAMP guidelines, made misrepresentations regarding a borrower's rights and foreclosure sales, and wrongfully conducted trustee's sales when the borrower was in compliance with a TPP." If borrower successfully alleges a good faith and fair dealing claim, she will have also pled a viable UCL claim.

TPP Is an Enforceable Contract to Offer a Permanent Mod; Contract Formation Analysis

Goodman v. Wells Fargo Bank, N.A., 2014 WL 334222 (Cal. Ct. App. Jan. 30, 2014): Borrowers alleging breach of contract claims must show: 1) existence of a contract and its terms; 2) performance or excuse; 3) breach; and 4) damages. Here, borrower entered into a Trial Period Plan (TPP) contract with his servicer and performed under that contract: he made required payments, continually provided servicer will all requested documents, and kept all of his information accurate. Servicer ultimately denied borrower a permanent modification, citing borrower's failure to provide requested documents. The foreclosure eventually occurred and borrower pled lost title, lost equity, costs incurred in participating in the TPP, lost refinancing or selling opportunities, a lowered credit score, and emotional distress as damages. Servicer cited *Nungaray v. Litton Loan Servicing*, 200 Cal. App. 4th 1499 (2011) to argue that the TPP was not a modification, and that no permanent modification formed unless borrowers met all "conditions," including receiving a fully executed copy of a permanent modification from the servicer. The trial court sustained servicer's demurrer relying on *Nungaray* and refusing to follow *Wigod* (holding TPPs *do* form enforceable contracts *to offer* permanent loan modifications) because it was an out-of-circuit, federal case. Since the trial court's ruling, California state and federal courts have accepted *Wigod* (in *West*, *Corvello*, *Bushell*). The Court of Appeal followed suit and reversed the trial court, holding that the TPP did form an enforceable contract to offer a modification and, because borrowers pled full performance (unlike the *Nungaray* plaintiffs, who did not submit all requested documents), their complaint must survive the pleading stage. Servicer's argument that borrowers never received a fully executed copy of a permanent modification, rendering the TPP "conditions" unfulfilled, was unavailing. Receiving a fully executed copy of the permanent modification would make that agreement *take effect*. The agreement *to provide* borrowers with a permanent modification offer, however, was only conditioned by borrower's compliance with the TPP.

The court also provided a breakdown of contract formation to address servicer's claims that the TPP lacked mutual assent, definite terms, and consideration—all requirements for a valid contract. Mutual assent "cannot exist unless the parties 'agree upon the same thing in the same sense,'" and is objectively determined by the parties' "outward . . . expressions" and contract language. Here, the TPP was offered by servicer, signed and returned by borrowers, and servicer then sent them an acknowledgement letter, congratulating them on their TPP. Just as in *Wigod*, this court found that a reasonable person would interpret these actions and the TPP language to find that the borrowers and servicer mutually agreed to perform under the TPP, and then to offer a permanent modification, respectively. Contracts also require terms sufficiently definite "so as to provide a basis for determining to what obligations the parties have agreed." The TPP contains specific language identifying the parties, the obligations and conditions, and the promises. A lack ot the *permanent modification* terms does not render the *TPP* terms indefinite. Because this was a HAMP TPP, any resulting permanent modification would have to comply with HAMP terms, so the terms were definite enough to form a contract. Finally, contracts require consideration: "any benefit conferred . . . as an inducement to the promisor, is a good consideration for a promisee." Performing a pre-existing legal obligation does not constitute consideration, though the addition of "some small . . . performance" to this legal obligation can constitute adequate consideration. Here, the TPP required borrowers to provide significant documentation, update that documentation when necessary, undergo credit counseling, and make payments that exceeded the original mortgage payment. This is sufficient consideration. This valid TPP contract forms the basis of borrower's viable breach of contract claim.

Eviction Stayed Pending Meritorious UD Appeal

Dang v. Superior Court, No. 30-2013-684596 (Cal. App. Div. Super. Ct. Jan. 31, 2014): A stay of judgment is appropriate: "[1:] when the court finds that the moving party will suffer extreme hardship in the absence of a stay and [2]: [when] the nonmoving party will not be irreparably injured by its issuance." Here, a former borrower sought a stay pending appeal of her unlawful detainer judgment after the trial court granted the bank's UD summary judgment motion. The Appellate Division found both stay-prongs satisfied: 1) if the former homeowner and her ill mother were evicted while her UD appeal was pending, they would suffer extreme hardship and "she would lose any benefit from a successful appeal." Second, as long as the former borrower pays "rent" ($2,500/month) to the foreclosing bank (the UD plaintiff), there is little risk that the bank will be harmed by the stay. And while not part of the above analysis, the fact that former borrower's appeal seemed meritorious contributed to the court's grant of her motion to stay. To evict a former homeowner, a UD plaintiff must show "duly perfected title." This requirement encapsulates not just "good record title," but that "all steps have been taken to make [title] perfect, *i.e.*, to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt." Title is retroactively deemed perfected by 8am on the date of the foreclosure sale if the trustee's deed upon sale is recorded within 15 day calendar days of the sale. CC § 2924h(c). Here, the trustee's deed was not recorded in 15 days, so title was not deemed perfect as of the date of sale. Because the plaintiff-bank filed the UD before recording the trustee's deed, it filed its complaint without holding duly perfected title. The court granted the former homeowner's motion for stay.

CC 2923.6: Meaning of "Conduct a Trustee's Sale" and "Complete Application;" Successful SPOC Pleading

Singh v. Wells Fargo Bank, N.A., No. 34-2013-00151461-CU-OR-GDS (Cal. Super Ct. Sacramento Cnty. Feb. 24, 2014): HBOR's dual tracking provisions prevent a servicer from "record[ing] a notice of default or notice of sale, or conduct[ing] a trustee's sale, while the [borrower's] complete first lien loan modification is pending." Here, an NOD and NTS had already been recorded before HBOR became effective, but borrower submitted his complete application after the law was in place. While the application was pending, servicer sent borrower notices that a foreclosure sale had been briefly postponed but that a sale would take place on a specified date. The court found that this notice constituted "conduct[ing] a sale," "or at least attempting to conduct a trustee's sale" for the purposes of HBOR's dual tracking statute because servicer clearly "intended to proceed with the foreclosure sale." This notice, combined with borrower's pleading that he submitted a complete loan modification, establish a valid CC 2923.6 dual tracking claim. A borrower need not allege that servicer acknowledged an application's completeness to state a dual tracking claim. The completeness of an application is a factual inquiry not appropriately determined on a demurrer.

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 have several responsibilities, including: facilitating the loan modification process and document collection, possessing current information on the borrower's loan and application, and having the authority to take action, like stopping a sale. Here, borrower alleged that he was "constantly shuttled between a veritable phone tree of [servicer] representatives [and] was never provided with a [SPOC] with knowledge about the status of his modification . . . or authority to act on that request." This pleading provides sufficient detail to state a valid CC 2923.7 SPOC claim. The court overruled servicer's demurrer.

Valid Dual Tracking Claim Based on "Complete Application" from 2012

Bolton v. Carrington Mortg. Servs. LLC, No. 34-2013-00144451-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Feb. 24, 2014): HBOR prevents servicers from moving forward with a foreclosure while a "complete first lien loan modification application" is pending. Though not retroactive, HBOR does regulate servicer activity that occurs after January 1, 2013. Here, borrower pled she submitted two complete loan modification applications in 2012, neither of which servicer responded to before recording an NTS in 2013. Servicer alleged it notified borrower in 2012 that her applications were "lost or not received," and that her dual tracking claim therefore fails because a complete application was not pending when the NTS was recorded. Because borrower alleged servicer's notification was false—that her applications *were* received and *not* lost—she adequately pled a dual tracking claim. The "completeness" of an application is a factual inquiry not appropriately determined on a demurrer. The demurrer to borrower's CC 2923.6 and UCL claims (the latter based on the former) was overruled.

Federal Cases

FHA-Required Flood Insurance

Feaz v. Wells Fargo Bank, N.A., __ F.3d __, 2014 WL 503149 (11th Cir. Feb. 10, 2014): All FHA-insured mortgage loan contracts require borrowers to maintain insurance on their homes “against any hazards for which [the] lender requires insurance,” and in whatever amount the lender specifies. The contracts further require borrowers to maintain flood insurance “to the extent required by [HUD].” Here, borrower obtained flood insurance that met the HUD-specified amount, but that fell short of the home’s replacement value. Her servicer instructed her to increase her flood insurance to the home’s replacement value. Borrower refused, so servicer force-placed flood insurance up to the higher amount. Borrower’s contract related claims were premised on the argument that a servicer cannot force-place flood insurance beyond an amount required by HUD. The Eleventh Circuit affirmed the district court’s ruling that FHA contracts unambiguously set a federally-required flood insurance *minimum*, not maximum. Servicers are therefore permitted to require *more* flood insurance than the amount established by federal law and may force-place that insurance when borrowers fail to comply. The decision to dismiss the complaint was affirmed.

PTFA: Preempts Less Protective State Law and Forms Basis for Affirmative, State-law Causes of Action

Mik v. Fed. Home Loan Mortg. Corp., __ F.3d __, 2014 WL 486214 (6th Cir. Feb. 7, 2014): The federal Protecting Tenants at Foreclosure Act (PTFA) requires purchasers of foreclosed property to allow existing, bona fide tenants the opportunity to maintain possession through their fixed-term leases. It also mandates that all bona fide tenants receive a 90-day notice to quit before being evicted. Further, “nothing under this section shall affect . . . any State or local law that provides longer time periods or other additional protections for tenants.” And because *less* protective state law would conflict with the purpose of the PTFA, “to ensure that tenants receive appropriate notice of foreclosure and are not abruptly displaced,” the PTFA preempts less protective state law. Here, the Sixth Circuit found that the PTFA preempted less protective Kentucky law in two ways. First, a fixed-term lease survives foreclosure under the PTFA, and the purchaser of the foreclosed property must allow bona fide tenants to occupy the property through the remainder of their lease. By contrast, existing leases are extinguished by foreclosure under Kentucky common law. Second, the PTFA's 90-day notice requirement preempts Kentucky law allowing a purchaser of foreclosed property to take immediate possession without providing any notice to existing tenants.

Having established that the PTFA preempts less protective Kentucky foreclosure law, the court then evaluated whether the PTFA, which does not include an express or implied private right of action, can nevertheless form the basis for state-law causes of action. Using *Wigod* for support, the court held that it can. The absence of a private right of action in a federal law does not automatically bar a state claim that incorporates elements of that federal law. Under Kentucky foreclosure law, a purchaser of foreclosed property may take possession without stepping foot in a courtroom. Without a judicial proceeding, an evicted tenant cannot invoke *any* defense, much less a PTFA defense. In this case, not allowing the tenants to assert PTFA violations as a basis for their wrongful eviction claim would render the PTFA meaningless. Accordingly, the court reversed the district court's dismissal of tenants' wrongful eviction tort claim, which was based on the defendant's refusal to honor tenants' bona fide lease, a PTFA violation.

"Foreclosure" in Servicemembers Civil Relief Act Includes Foreclosure Fees Incident to an NOD

Brewster v. Sun Trust Mortg., __ F.3d __, 2014 WL 486187 (9th Cir. Feb. 7, 2014): The Servicemembers Civil Relief Act (SCRA) invalidates "[a] sale, foreclosure, or seizure of property . . . if made during, or within one year after, the period of the servicemember's military service." Here, mortgage servicer recorded an NOD on borrower-servicemember's home while he was on active duty. The NOD listed foreclosure fees in the arrearage. Though servicer eventually rescinded the NOD, the foreclosure fees remained on borrower's account. Servicing rights were sold and borrower's new servicer then tried to collect those fees while borrower was on active duty. The court had to decide whether the SCRA's use of the term "foreclosure" included foreclosure fees tacked onto an NOD. Not only does the language elsewhere in the operative statute refer to "foreclosure *proceedings*," referencing a process greater than the actual foreclosure sale, but the language in the specific statutory section invalidates a "sale, foreclosure, *or* seizure of property" (emphasis added), "thereby suggesting that foreclosure must mean more than just a sale or seizure." Additional factors weighing in favor of including fees in "foreclosure" were: 1) the regulation of fees in California foreclosure law, and 2) the duty courts have to construe the SCRA broadly, in favor of servicemembers. The court determined that foreclosure related fees *are* captured by the term "foreclosure" in the SCRA, and that borrower's new servicer violated that Act by failing to remove those fees. The Ninth Circuit accordingly reversed the district court's dismissal of borrower's complaint.

Chapter 13 Bankruptcy: Petition-Date Used to Value Property & Amount of Senior Mortgage Debt

***In re* Gutierrez**, 503 B.R. 458 (Bankr. C.D. Cal. 2013): Bankruptcy plans "modify" the rights creditors would normally be able to exercise under non-bankruptcy law, regarding their liens. Claims on those liens are either "secured" (the value of the lien) or "unsecured" (the deficiency). Generally speaking, a chapter 13 debtor has two goals pertaining to junior liens on their principal residence: 1) an approved plan that will "treat the [creditor's] claim as unsecured for the purposes of distributions during the plan's term;" and 2) when plan's payments are complete, avoiding the lien. If the junior lien on the debtor's principal residence is entirely underwater—worth less than what the debtor owes—then a chapter 13 plan can "modify the rights of a junior lienholder," which would accomplish those two goals. The lien, in other words, would be "unsecured." A key inquiry, then, is when should the bankruptcy court value the home to determine if a junior lien is entirely underwater: the date of the bankruptcy petition, or a date more contemporaneous with the hearing deciding this issue, which could be many months (if not over a year) later? The Bankruptcy Code, and the case law interpreting it, does not provide a clear answer.

In this case, the debtor's home was subject to a first mortgage and multiple junior liens. As of the petition-date, the most junior lien was underwater and therefore unsecured. At the time of the hearing deciding this issue (almost a year later), the property value had increased significantly, bringing the lien out from underwater and transforming it from unsecured to secured. This court found that the petition-date is more appropriate than the hearing-date to determine both the value of the principal residence, and the amount of the senior liens, which factor into whether the junior lien in question was, in fact, underwater at the time of filing. This was the bankruptcy court's tentative ruling. Before the court could issue a final ruling, the debtor voluntarily converted to a chapter 7 bankruptcy case, where the lien-stripping remedy is not available.

Breach of Oral Contract; The Timing of a "Material Change in Financial Circumstances;" Pleading a "Complete Application"

Rockridge Tr. v. Wells Fargo Bank, N.A., 2014 WL 688124 (N.D. Cal. Feb. 19, 2014):[61] Contracts require mutual consent, definite terms, and consideration. Terms must be sufficiently definite "so as to provide a basis for determining to what obligations the parties have agreed." Terms regarding a loan contract should generally include the identity of the parties, the amount, and repayment terms. Consideration is "any benefit conferred . . . as an inducement to the promisor, is a good consideration for a promisee." Performing a pre-existing legal obligation does not constitute consideration, though the addition of "some small . . . performance" to this legal obligation can constitute adequate consideration. Here, borrowers alleged that a slew of communications with different servicer-representatives over the course of four years constituted several oral contracts, all of which servicer breached by foreclosing and by failing to offer a permanent loan

[61] This case decided the motion to dismiss borrowers' second amended complaint. The previous iteration of this case, deciding the MTD borrowers' first amended complaint, *Rockridge Tr. v. Wells Fargo Bank, N.A.*, __ F. Supp. 2d __, 2013 WL 5428722 (N.D. Cal. Sept. 25, 2013), appeared in the HBOR Collaborative's November 2013 newsletter.

modification. Dissecting each alleged contract separately, the court noted several key findings regarding borrower's oral contract claims. First, borrowers' agreement to submit monthly mortgage payments is not valid consideration, as they were already obligated to make payments under their loan agreement. The time and energy it took borrowers to prepare and submit financial information, however, is valid consideration because it was not required by their original loan agreement. On the servicer end of things, a promise *not* to foreclose in exchange for documents submitted "in furtherance of a loan modification," can be consideration. Second, a contract contemplating a HAMP TPP or permanent modification necessarily binds a servicer to HAMP guidelines, which dictate loan repayment terms. Even without specifying exact numbers and time periods, these contracts are sufficiently definite because they exist within HAMP parameters. Here, the modification(s) being negotiated were not HAMP modifications, so the absence of repayment terms proved fatal to contract formation. Third, a promise to postpone a foreclosure sale while a loan modification application is pending is a sufficiently definite contract "term." In the end, only one conversation between borrowers and a servicer-representative was deemed an oral contract. Borrowers adequately pled performance (submission of more documents); breach (foreclosure when servicer agreed not to foreclose); and damages (not seeking an injunction, attorney's fees, lost equity), and successfully pled a breach of oral contract claim.

Under HBOR, if a borrower was already evaluated for (and denied) a loan modification, either before HBOR took effect or after, that borrower ordinarily does not receive dual tracking protections. Dual tracking protections can only be reignited if the borrower can document and submit a "material change in financial circumstances" that occurred "*since the date of the borrower's previous application*" (emphasis added). Here, borrowers were denied a modification in 2012. Borrowers argue that their 2009-2012 bankruptcy constituted a material change in financial circumstances that was documented and submitted to their servicer in 2012. Bankruptcy may well constitute a material change in financial circumstances, but the timing also matters. Though the statute specifies that qualifying financial changes occur "since the date of the borrower's previous application," this court disagrees. "[R]ead[ing] the . . . statute as a whole, [the court] concludes that the material change needs to have occurred not only after the borrower's previous application, but also after January 1, 2013," when HBOR became effective. The court based this conclusion on what it considers an absurd result if the statute were read literally: "[A] borrower who had a loan modification application denied, but then experienced change circumstances—even if both the denial and the changed circumstances occurred ten years ago—could bring suit under this section." The court dismissed borrower's dual tracking claims.

HBOR prevents servicers from charging borrowers fees during the loan modification review process. CC § 2924.11(f). Submitting a complete first lien loan modification application is a requisite element of this provision. Here, borrowers failed to plead they submitted a complete application. In fact, they pled that, in compliance with servicer's requests, they submitted documents up until the foreclosure sale and even after the sale. They clearly had not submitted a complete application pre-sale, so any dual tracking claims fail, including the imposition of fees during a modification review period. This claim was dismissed.

(Former) CCP 580b Prevented Lawsuits, It Did Not Extinguish Liens;[62] FCRA Does Not Require Servicers to Notate Their Inability to Collect a Deficiency Judgment

Murphy v. Ocwen Loan Servicing, LLC, 2014 WL 651914 (E.D. Cal. Feb. 19, 2014): California has several "anti-deficiency" statutes which prevent creditors from seeking deficiency judgments in particular situations. CCP 580b, for instance, "bars a purchase money mortgagee, following foreclosure, from seeking a deficiency judgment

[62] CCP 580b was amended in 2013 by Senate Bill No. 426. The current version of the law (effective Jan. 1, 2014) specifies: "No deficiency *shall be owed or collected*, and no deficiency judgment shall lie, on a loan, refinance, or other credit transaction . . . that is used to refinance a purchase money loan . . ." (emphasis added to highlight the additional language).

for the balance owed on the mortgage." Basically, if a house sold at foreclosure for less than what the borrowers owed, this statute prevents borrowers' creditors from taking them to court to recover the balance of the loan. Additionally, a foreclosure on the first lien prevents a creditor holding a second lien from seeking a judgment against borrowers as well. These borrowers tried to use (the former) CCP 580b as a basis for an affirmative Fair Credit Reporting Act (FCRA) claim. They argued that not only did CCP 580b prevent a deficiency judgment, but that it "obliterate[d]" the second lien on their property. Since servicer foreclosed on its first lien, in other words, the anti-deficiency statute "wiped out" any remaining debt, including the second lien. In reporting unpaid debt *that did not exist* to credit reporting agencies, then, servicer violated the FCRA by reporting inaccurate information. The court did not accept borrowers' arguments. The statute only contemplated and prevented the seeking of a deficiency *judgment*. It said nothing about credit reporting or eliminating the debt entirely. The court dismissed borrower's FCRA claim based on non-compliance with (former) CCP 580b.

The FCRA requires that, upon notice from a credit reporting agency, "furnishers" of credit information (including servicers), "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" Borrowers here argue that their former servicer's reporting of debt, without also notating the servicer's inability to recover that debt in court, violates the FCRA because, though technically accurate, it is misleading. Nothing in the FCRA requires this type of notation, and nothing in the anti-deficiency statute even touches on this credit reporting issue. Courts have previously found a private right of action under the FRCA to require furnishers of credit information to notate that a debt has been *disputed*, but that is inapplicable to borrowers' situation since they do not dispute the technical accuracy of the debt. Borrowers FCRA claim was dismissed. (Note that the *Johnson v. Well Fargo* court (below) came to the opposite conclusion on this credit-reporting notation issue. It agreed with the *Murphy* court that former CCP 580b did not extinguish debt.)

Debt Collector, as Third-Party Contractor for HOA, May be Liable under FDCPA & UCL for Davis-Stirling Violations

Hanson v. Pro Solutions, 2014 WL 644469 (N.D. Cal. Feb. 19, 2014): California's Davis-Stirling Act "regulates a [home owner association's (HOA)] ability to collect debts owed by its members." Specifically, HOAs may not "impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied." Further, an HOA may only recover "reasonable costs incurred in collecting the delinquent assessment," and capped late fees and interest. In other words, an HOA cannot *profit* from debt-collection. California courts have interpreted the Act to mean: 1) while an HOA cannot profit from debt collection, third-party debt-collectors hired by an HOA are not so restricted; and 2) a debt-collector's fees, while legal, cannot "exceed the [HOA's] costs." Here, the HOA hired a third-party debt-collector to recover homeowner's delinquent assessments. The debt-collector provided "*No Cost* Non-Judicial Collections" (emphasis added), charging homeowners directly for any costs associated with collecting delinquent fees. In this particular debt-collection attempt, debt-collector charged homeowner "collection fees," "vesting costs," "management collection costs" and "other charges." These fees would have clearly violated the Davis-Stirling Act, had the HOA charged them. But the court had to decide whether a *debt-collector* participating in these activities violated the Act, forming the basis for homeowner's FDCPA and UCL claims (wrongful debt collection). And because the HOA incurred *no* costs here (thanks to the debt-collector's business model), the California precedent described above was not directly on-point (it assumed *some* costs incurred by the HOA). The court concluded that a third-party debt collector's rights cannot exceed those of the HOA that hired them because the debt-collector has no independent rights against the homeowner. The "right" to impose debt collection fees stems directly from the HOA's right to do so. "If California law . . . entitled [debt-collector] to impose the fees of its choosing against homeowners . . . [it] would wield unchecked power to extract a cascade of fees and costs from a HOA's delinquent members." The court dismissed homeowners FDCPA and UCL claims with leave to clarify the distinct aspects of debt-collector's activities that violated the FDCPA and UCL ("vis-à-vis the constraints imposed on the HOA by the Davis-Stirling Act").

PI on Dual Tracking: Servicer's Acknowledgment that it *May* Request Further Documentation Does Not Preclude the Finding of a "Complete Application;" No Cash Bond Necessary

McKinley v. Citimortgage, 2014 WL 651917 (E.D. Cal. Feb. 19, 2014): In the Ninth Circuit, a borrower seeking a preliminary injunction must show, inter alia, serious questions going to the merits of their claim: here, a dual tracking claim. Servicers are prevented from moving forward with foreclosure while a borrower's complete, first lien loan modification application is pending. This borrower submitted his application and timely submitted additional documents requested by his servicer. Just prior to servicer recording the NTS, borrowers received a letter from servicer informing them that their application had been "forwarded to a Home Owner Support Specialist for review." Their application then, was still pending when servicer recorded the NTS, in violation of HBOR's dual tracking prohibition. The court found borrowers to have shown not just serious questions, but a likelihood of prevailing on their dual tracking claim. That servicer's letter did not acknowledge the application as "complete" does not render the application incomplete. "[Servicer] cannot hide behind the document it drafted." In fact, the letter led the court to infer that the application *was* complete because it acknowledged that servicer had received the necessary documents to forward it to a specialist for review. The letter also stated that the specialist *may* request additional information. Contrary to servicer's argument, this "hypothetical request" does not render the application incomplete either. After denying servicer's motion to dismiss, the court granted borrower's preliminary injunction.

Federal courts must set discretionary bonds to protect the interests of any enjoined party. Here, in the foreclosure context, the court waived the bond entirely, finding the servicer "adequately protected by its security interest in [the] property," and because the parties' ongoing financial relationship will enable servicer to "recoup any costs" it incurs if the injunction is determined to have been wrongfully ordered.

Dual Tracking: "Submitting" and "Documenting" a Material Change in Financial Circumstances

Rosenfeld v. Nationstar Mortg., LLC, 2014 WL 457920 (C.D. Cal. Feb. 3, 2014):[63] A servicer is not obligated to consider a borrower's modification application if it considered a previous application, even one submitted pre-HBOR. If a borrower can show she "documented" and "submitted" a "material change in financial circumstances" to her servicer, however, dual tracking protections can reignite and protect the borrower while that subsequent application is pending. Here, borrower pled she wrote to her servicer that she had eliminated her credit card debt. The court accepted this letter as sufficient "documentation" and "submission" of a material change in financial circumstances that reignited dual tracking protections. Servicer violated those protections by recording an NTS *after* receiving a complete application but *before* making a decision on that application. The court accordingly denied servicer's motion to dismiss borrower's dual tracking claim.

Shuffling SPOCs Violates HBOR

Mann v. Bank of Am., N.A., 2014 WL 495617 (C.D. Cal. Feb. 3, 2014): "Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." CC § 2923.7. SPOCs may be a "team" of people, or an individual, and must facilitate

[63] This case follows a previous dismissal, with leave to amend, of borrower's dual tracking claim. *See* Rosenfeld v. Nationstar Mortg., LLC, 2013 WL 4479008 (C.D. Cal. Aug. 19, 2013) (summarized in the HBOR Collaborative's September 2013 newsletter). The first case was dismissed in large part because alleging a change in financial circumstances in a complaint does not fulfill the "document" and "submit" requirements of CC 2923.6(g).

the loan modification process and document collection, possess current information on the borrower's loan and application, and have the authority to take action. Importantly, the SPOC "shall remain assigned to the borrower's account until the mortgage servicer determines that all loss mitigation options offered by, or through, the mortgage servicer have been exhausted . . . ." Here, borrower was "shuffled from SPOC to SPOC," which he recounted in pleadings, noting conversations with different representatives on specific dates. As a result of this shuffle, borrower had to continually "re-inform" servicer representatives about his situation and constantly received contradicting information. These allegations adequately asserted a SPOC violation. Even if the multiple representatives borrower communicated with were a "team" of people, allowable under the statute, no member of this "team" was able to perform the required SPOC duties. Borrower's SPOC claim survived the MTD.

Conflicting Pre-NOD Contact Accounts Should be Resolved in Favor of Borrower at Pleading Stage; SPOC Assigned in 2011 Forms Basis for SPOC Claim under HBOR

Garcia v. Wells Fargo Bank, N.A., 2014 WL 458208 (N.D. Cal. Jan. 31, 2014): Servicers may not record an NOD until contacting the borrower (or diligently attempting contact) and waiting 30 days. Here, borrower brought a pre-NOD contact claim, asserting that servicer never contacted her before recording an NOD, and never instructed her that she could request a meeting, as required by the statute. Servicer recorded an NOD declaration attesting to its actual contact with borrower to discuss her financial situation. In this "he said, she said" situation, the court acknowledges, "there are not any 'facts' for [borrower] to allege other than the negative statement that [servicer] did not actually contact [her]." Taking borrower's allegation as true at this pleading stage, and noting that contact did occur one month *after* the NOD was recorded, the court denied servicer's motion to dismiss borrower's CC 2923.5 claim.

"Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall *promptly* establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact" (emphasis added). CC §2923.7. SPOCs must "adequately inform the borrower of the current status of the foreclosure prevention alternative." This borrower was assigned a SPOC in 2011—two years before HBOR went into effect. When borrower wanted to re-initiate the loan modification process in 2013 (the first ended with her reinstating her loan), she unsuccessfully attempted to contact the same SPOC. It took six months for servicer to assign her a new SPOC. Borrower alleged her original 2011 SPOC's unresponsiveness in 2013 violated HBOR. The court somewhat agreed, noting that the statute does not "define the frequency with which a SPOC must communicate with a borrower," but fearing that such an interpretation would lead to nominal appointments of SPOCs. Oddly, the court ignored the 2013 violations and cited the SPOC's "failure to follow up on [borrower's] loan modification request (made in October 2011 . . .)" as "sufficient to state a claim under [2923.7]." (The court did not specify whether it was referring to SPOC's failure to follow up *in 2011*, or ever – continuing into 2013.) In any case, borrower's SPOC claim also survived the motion to dismiss.

HOLA Does Not Preempt State Property, Foreclosure Law; Tender Not Required to Attack the Validity of Underlying Debt

Sarkar v. World Savings FSB, 2014 WL 457901 (N.D. Cal. Jan. 31, 2014): State laws regulating loan origination and processing are preempted under the Home Owner's Loan Act (HOLA). State contract, property, and tort laws, however, are not preempted "to the extent that they only incidentally affect the lending operations of Federal savings associations . . . ." Here, borrower brought lack of standing, quiet title, and declaratory relief causes of action based on an alleged improper assignment of his note to a securitized trust. The court found these types of claims "firmly ground in state property law," which only incidentally affect servicer's lending operations. And though borrower did not bring claims tied to specific, procedural foreclosure statutes, the court noted: "[N]othing in HOLA or its implementing regulations suggest that [it] preempts the enforcement of state foreclosure statutes." Borrower's fraud-based claims also escaped preemption because California's fraud laws only require servicers to be truthful; any effect on lending is incidental. While the court rejected servicer's preemption defense, it nevertheless dismissed borrower's complaint. California borrowers must have a "specific factual basis" to allege that the foreclosing entity did not have a beneficial interest in the property, as borrower does here. Without more specific pleading, borrower's claims fail.

California law requires borrowers bringing quiet title claims to tender the amount due on their loan. There are several exceptions to this rule, including when the borrower "attacks the validity of the underlying debt." Here, borrower alleged his loan originator wrongfully failed to verify borrower's income, agreeing to a loan it knew borrower could not afford. This fraud allegation is enough to excuse tender at the pleading stage (though, as described above, borrower's claims were dismissed for other reasons).

Implied Contract Repudiation Requires Putting Contract Performance "Out of [Repudiator's] Power"

Gilliland v. Chase Home Mortg., 2014 WL 325318 (E.D. Cal. Jan. 29, 2014): As part of a breach of contract claim, borrowers must allege servicer's breach. Anticipatory breach "occurs when one of the parties to a bilateral contract repudiates the contract," implicitly or explicitly. Implied repudiation "results from conduct where the promissor puts it out of *his* power to perform so as to make substantial performance of *his* promise impossible." Shortly after mailing her executed copy of a permanent modification agreement, borrower was allegedly contacted by servicer and told to stop making modified payments "because she would lose her money." The servicer representative further instructed borrower that her home would not go into foreclosure when she stopped making payments. Borrower relied on these representations and ceased payment; foreclosure followed. Borrower brought a breach of contract claim, alleging servicer committed anticipatory breach by repudiating the contract. This is not the "clear, positive, unequivocal refusal to perform" required by explicit repudiations, nor was it an implied repudiation: servicer did not "put performance out [its] power." The court dismissed borrower's contract claim.

Pleading Contract Performance despite Default

Mahoney v. Bank of Am., N.A., 2014 WL 314424 (S.D. Cal. Jan. 28, 2014): To allege breach of contract, borrowers must plead, inter alia, their performance (or excused nonperformance). These borrowers alleged servicer breached the original DOT and note. In its defense, servicer accused borrowers of nonperformance because they had defaulted on their loan. Borrowers cited servicer's own nonperformance under the DOT's "Borrower's Right to Reinstate After Acceleration" provision. For many months, borrowers tried in vain to get their arrearage amount from their servicer. Estimating they would need between $50,000 and $60,000 to reinstate their loan, borrowers purposely made (and servicer accepted) a $50,000 payment in December 2012, attempting to receive a significant tax-write off in 2012. After promising it would credit the payment in 2012, servicer failed to credit it until 2013, and did not provide borrowers with the requisite tax form reflecting the payment. Even after this episode, servicer continued to be unresponsive to requests for reinstatement information, refused borrowers' regular monthly payments as "insufficient" to reinstate, and finally provided two different reinstatement amounts. The court accepted borrowers' argument that servicer's actions thwarted borrowers' attempts to reinstate their loan and perform under the DOT. In essence, *servicer*, not borrowers, did not perform under the DOT by refusing to provide accurate (or any) reinstatement information. Borrowers were deemed to have sufficiently pled the performance aspect of their contract claim, despite their default. Borrowers' breach of contract claim survived the MTD.

CC 762.010: Nominee of DOT Beneficiary Not Entitled to Notice of Borrowers' Quiet Title Action

Mortg. Elec. Registration Sys. v. Robinson, 2014 WL 451666 (C.D. Cal. Jan. 28, 2014): California law requires borrowers to name "persons having adverse claims to title" as defendants in any quiet title action. CC § 762.010. These borrowers brought a quiet title action naming only their original lender. Notably, borrowers did not name MERS, which was described in the DOT as both the "nominee for Lender" and, in a different section, as "the beneficiary under the [DOT]." Because the only named defendant—the original lender—did not appear to defend the quiet title action, borrowers won a default judgment and their DOT was expunged. MERS then brought this action for slander of title, asserting that it was entitled to notice of the quiet title action because it was a "person having adverse claims to title." MERS also sought a declaratory judgment that the quiet title action violated its due process rights. Borrowers moved to dismiss these claims and the court agreed that dismissal was appropriate: under the terms of the DOT, MERS' property interest did not amount to a claim against title. The language identifying MERS as the "beneficiary" was "nothing but obfuscation" of its true role, "solely as nominee for Lender." Absent any allegation that the note was ever transferred to MERS, MERS had no adverse claims to title and was therefore not entitled to notice of borrowers' quiet title action. Additionally, any property interest that MERS *did* possess was too vague and ambiguous to qualify for protection under the Due Process Clause. The court granted borrowers' motion to dismiss all claims.

(Former) QWR Standard: Mixing Non-Servicing Requests with Servicing-Related Requests is Permissible

Pendleton v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2013 WL 7118110 (C.D. Cal. Dec. 6, 2013): Before the new mortgage servicing rules went into effect (January 10, 2014), Qualified Written Requests (QWRs) had to: 1) identify borrower's name and account; 2) state why the borrower believes there is an error on their account or give the servicer enough detail to determine what information the borrower is seeking; and 3) "seek information relating to the servicing of (the) loan."[64] If a QWR fulfilled these three elements, regardless of extraneous detail or added material, the servicer was required to respond to the QWR. Further, it can form the basis for a valid RESPA violation if the borrower can also allege actual damages resulting from the servicer's failure to adequately respond. Here, borrower's QWR met the three requirements, but she also requested information regarding loan origination, not its servicing. Because "a letter that mixes servicing requests and non-servicing requests can constitute a valid QWR," this court found this a valid QWR. The complaint also properly alleged actual damages resulting from servicer's failure to respond to the QWR: overpayment of interest, credit repair, a reduction of credit limits, and attorney's fees and costs. Accordingly, the court denied servicer's motion to dismiss borrower's RESPA claim.

(Former) CCP 580b Prevented Lawsuits, It Did Not Extinguish Liens;[65] FCRA May Require Servicers to Notate Their Inability to Collect a Deficiency Judgment in Reporting Debt

Johnson v. Wells Fargo Home Mortg, Inc., 2013 WL 7211905 (C.D. Cal. Sept. 13, 2013): California has several "anti-deficiency" statutes which prevent creditors from seeking deficiency judgments in particular situations. CCP 580b, for instance, "bars a purchase money mortgagee, following foreclosure, from seeking a deficiency judgment for the balance owed on the mortgage." Basically, if a house sold at

[64] Under the new RESPA rules, QWRs are now "Notices of Error" (NOE) and "Requests for Information" (RFI). See the HBOR Collaborative's January newsletter for a piece on NOEs, and the article at the beginning of this newsletter for an explanation of RFIs. The CFPB has removed the requirement that an RFI "seek information relating to the servicing of the loan." Instead, RFIs need only seek information concerning the borrower's mortgage loan. *See supra* p. 2.
[65] CCP 580b was amended in 2013 by Senate Bill No. 426. The current version of the law (effective Jan. 1, 2014) specifies: "No deficiency *shall be owed or collected*, and no deficiency judgment shall lie, on a loan, refinance, or other credit transaction . . . that is used to refinance a purchase money loan . . ." (emphasis added to highlight the additional language). The *Johnson* court acknowledged that, under the current version of the law, reporting an extinguished debt to credit reporting agencies *would* violate the FCRA.

foreclosure for less than what the borrowers owed, this statute prevented borrowers' creditors from taking them to court to recover the balance of the loan. Additionally, a foreclosure on the first lien prevents a creditor holding a second lien from seeking a judgment against borrowers as well. This borrower tried to use (the former) CCP 580b as a basis for an affirmative Fair Credit Reporting Act (FCRA) claim. She argued that not only did CCP 580b prevent a deficiency judgment, but that it "obliterate[d]" the second lien on her property. Since servicer foreclosed on its first lien, in other words, the anti-deficiency statute "wiped out" any remaining debt, including the second lien. In reporting unpaid debt *that did not exist* to credit reporting agencies, then, servicer violated the FCRA because it reported inaccurate information. The court did not accept borrower's arguments. The statute only contemplates and prevents the seeking of a deficiency *judgment*. It says nothing about credit reporting or eliminating the debt entirely. Further, California courts have consistently held that the "debtor-creditor relationship continues after non-judicial foreclosure under section 580b," even though that statute wipes out the debtor's *personal liability* for the debt. The court dismissed borrower's FCRA claim based on non-compliance with CCP 580b.

The 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.'" California's Consumer Credit Reporting Agencies Act (CCRAA) gets at the same issue: "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Here, borrower argued that her former servicer's reporting of debt, without also notating the servicer's inability to recover that debt in court, though technically accurate, is misleading and incomplete, violating the FCRA and CCRAA. Unlike the *Murphy* court (above), this court found borrower's claim meritorious. "In enacting the FCRA, 'Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for *omissions* that render the reported information *misleading*'" (emphasis added). Further, "incompleteness" is meant to encompass statements that are misleading "to such an extent that it can be expected to adversely affect credit decisions." Finding that the failure to notate that a debt "is not subject to a deficiency judgment" on a credit report could be misleading, this court allowed this aspect of borrower's FCRA and CCRAA claims to survive.

Court Follows *Glaski*

Kling v. Bank of Am., N.A., 2013 WL 7141259 (C.D. Cal. Sept. 4, 2013): In general, California borrowers do not have standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower cited *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a recent (at the time this case was decided) California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on PSA violations and New York trust law. This borrower's factual allegation identically tracked the allegations in *Glaski*: "[Purported owners of the loan] did not properly acquire title . . . because the note and mortgage were transferred to [a trust] after the Trust's closing date . . . resulting in an improper and ineffective transfer." The court found this a "real and substantial controversy" and, citing *Glaski*, granted borrower standing to continue with her case.

Viable Fair Credit Reporting Act (FRCA), California Consumer Credit Reporting Agencies Act (CCRAA) Claims[66]

Testo v. Bank of Am., N.A., 2013 WL 7118111 (C.D. Cal. June 25, 2013): The federal Fair Credit Reporting Act (FCRA) requires that, upon notice from a credit reporting agency (CRA), "furnishers" of credit information (in this case mortgage servicers), "modify, delete, or

[66] For detailed discussion of the limited availability of FCRA, state statutory and common law claims against furnishers of information to CRAs, the lack of a private right of action to enforce most requirements, and the impact of the preemption and immunity provisions of the FCRA, see Chapter 10 of National Consumer Law Center, Fair Credit Reporting (8th ed. 2013).

permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" To do so, furnishers must investigate a borrower's credit dispute within 30 days of receiving notice of the dispute from the CRA. Here, borrowers disputed their alleged failure to make a timely mortgage payment. In their complaint, they alleged: 1) they notified a CRA that their credit reports were inaccurate because of their servicer's mistake; 2) the CRA told borrowers that it notified servicer of their dispute; 3) servicer did not adequately investigate the claim and correct the mistaken information. At the pleading stage, these allegations state a viable FCRA claim. Whether or not servicer *actually had notice* of the dispute is a question better addressed at summary judgment.

California's Consumer Credit Reporting Agencies Act (CCRAA) gets at the same issue, but by giving borrowers a private right of action to enforce this provision: "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Importantly, the FRCA does not preempt CCRAA sections that include a private right of action, like this one. To satisfy the elements of their CCRAA claim, borrowers pled: 1) servicer "knew or should have known" that the reported information was inaccurate; and 2) servicer acted with malice and intent to injure by reporting inaccurate information. The court found these allegations sufficient to state a CCRAA claim.

Mistake in Foreclosure Date as Basis for Valid FCRA, CCRAA Claims

Valerie v. Wells Fargo Home Mortg., 2013 WL 7393184 (C.D. Cal. June 25, 2013): The federal Fair Credit Reporting Act (FCRA) requires that, upon notice from a credit reporting agency (CRA), "furnishers" of credit information (in this case mortgage servicers), "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" To do so, furnishers must investigate a borrower's credit dispute within 30 days of receiving notice of the dispute from the CRA. These borrowers alleged that their former loan servicer incorrectly reported a 2009 foreclosure as if it occurred in 2012. Borrowers discovered the error when they applied for a home loan with a different lender in 2012 and were rejected because the lender received information of a 2012 foreclosure. In their complaint, borrowers alleged: 1) they notified a CRA and their former servicer that the date of their past foreclosure was incorrectly reported; 2) the CRA sent the servicer a "consumer dispute verification form" more than once; 3) servicer never conducted the requisite investigation and never responded to the dispute. These specific allegations are enough to survive a motion to dismiss. The court found that the damages inquiry is not appropriately resolved at this stage.

California's Consumer Credit Reporting Agencies Act (CCRAA) gets at the same issue, but by giving borrowers a private right of action to enforce this provision: "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Here, borrowers pled: 1) servicer reported a 2012 foreclosure date; 2) the foreclosure occurred in 2009, so the report was inaccurate; 3) servicer knew or should have known that the date was inaccurate. As with the FRCA claim, these allegations are sufficient to survive the pleading stage. Additionally, borrowers adequately alleged damages at this stage. "[Servicer's] argument . . . that any failure to investigate and correct . . . could not possibly have caused the [loan rejection] that occurred *before* [borrowers] first notified [servicer] of the alleged error—has no merit." The CCRAA regulates the servicer's act in misreporting information, "not the timing of the notification and the subsequent investigation." The court denied servicer's motion to dismiss and found damages a question of fact to be resolved at a later stage.

Out of State Cases

PTFA: "Fair Market" Rent Requirement in Bona Fide Tenant Test

Customers Bank v. Boxer, __ A.3d ___, 2014 WL 713361 (Conn. App. Ct. Mar. 4, 2014): The Protecting Tenants at Foreclosure Act (PTFA) requires that "bona fide" tenants in foreclosed properties receive a 90-day notice to vacate before the purchaser of a property can initiate eviction proceedings. Tenants must meet three requirements to be considered "bona fide" under the statute: 1) they are not the former homeowner, or child, spouse or parent of the former homeowner; 2) the lease was the result of an "arm's length" transaction; and 3) the lease was for rent "not substantially less than fair market rent for the property." Here, tenant appealed the trial court's award of possession to plaintiff-bank, asserting that he was entitled to a 90-day notice as a bona fide tenant under the PTFA. Before foreclosure, tenant made an oral lease (modifying a written lease) with the former homeowner, to "do some things . . . to maintain the property" in exchange for possession of the house. Tenant did not pay traditional rent, but performed work on the property and paid for property improvements as a form of rent. Because the PTFA is silent on what "receipt of rent" means, the court turned to Connecticut law and Black's Law Dictionary to conclude that a bona fide lease, *for purposes of PTFA application in Connecticut*, "requires the receipt of periodic monetary payments or periodic payments of something of value, to the landlord in satisfaction of the tenant's obligation . . . 'not substantially less than fair market rent.'" Tenant would need to show, then, that his property-improvements took the form of periodic payments roughly equal to fair market rent for the property. The tenant had not established that any repairs or improvements were commensurate with fair market rent, so the court affirmed the trial court's award of possession to the bank.

Recent Regulatory Updates

Fannie Mae Servicing Guide Announcement SVC-2014-04, Miscellaneous Servicing Policy Updates (Feb. 26, 2014)

Expense Reimbursement: Documentation & Claims

The announcement updates the Fannie Mae Servicing Guide, Part I, Section 405.01. Servicers must retain, as part of the mortgage loan servicing file, all supporting documentation for all expense reimbursement claims. This would include, for example, expense reimbursement claims for third party vendors. This retention requirement is *in addition to* retention requirements of other servicing and liquidation information, such as property inspection reports, loss mitigation plans, etc. Servicers must keep servicing files for at least four years from the date of payoff, or from the date that claim proceeds are received, unless a longer period is required by local law. Compliance must be documented and the individual file must include all documents and system records that preserve Fannie Mae's ownership interest in the individual mortgage loan.

Announcement SVC-2012-21 is also clarified: Fannie Mae requires documentation for all expense reimbursement claims when the servicer provides a loan file as part of a quality control review. Further, the announcement updates section 201.11.13 of the Servicing Guide (Part I): while servicers are authorized to submit reimbursement claims upon completion of a foreclosure sale, servicers *must* submit the final "Cash Disbursement Request" form within 30 days of completion of a loss mitigation alternative, filing of a mortgage insurance claim (where property will be conveyed to the insurer or guarantor), acquisition of the property by a third party at a foreclosure sale, or disposition of an acquired property. Late submissions may result in denial of reimbursement or assessment of a compensatory fee.

Reimbursement requests for attorney fees must contain an adequate description and/or supporting documentation. This guidance updates Servicing Guide Part VII, Section 501.03 and Part VIII, Section 106.04.

Effect of Servicing Transfers on Variances & Waivers

Where any servicing rights are transferred to another Fannie-Mae approved servicer, any variance or waiver granted to the transferor does not automatically transfer to the transferee servicer. Both servicers must ensure that all existing, special servicing obligations associated with a transferred mortgage are disclosed. The transferee servicer must assume all duties, including special servicing obligations agreed to by the transferor, regardless of whether the obligations were established upon sale to Fannie Mae, or subsequently.

FHA-HAMP: Loan Servicing and Loss Mitigation FAQ (Feb. 10, 2013)

HUD recently released a set of FAQs that further interprets the agency's guidelines for the FHA-HAMP program. Since HUD announced FHA-HAMP in 2009, the program has undergone several revisions.[67] Supplemental HUD Mortgagee Letters released in 2012 and 2013 announced major program changes and clarifications.[68]

One aspect of FHA-HAMP that has led to many interpretive problems has been the use of the HUD "partial claim" as an element of loan modifications. The HUD partial claim is a non-interest bearing lien placed on the property to secure a loan to the borrower, from HUD. For FHA-HAMP, the partial claim may serve several functions. It can include amounts for principal forbearance, allowing reduced payments in much the same way as under the Treasury's HAMP program. The interest-bearing principal is reduced through creation of a non-interest bearing lien. The partial claim may include arrearage amounts needed to bring the loan current, including missed installment payments and

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[67] The rules for FHA-HAMP have appeared primarily in "Mortgagee Letters" issued by HUD and available on its website, http://portal.hud.gov/hudportal/HUD?src=/groups. The original design for FHA-HAMP appeared in Mortgagee Letter 2009-23 (July 30, 2009).

[68] Specifically, Mortgagee Letter 2012-22 (Nov. 16, 2012) (introducing a more flexible target income calculation and new loss mitigation waterfall chart); Mortgagee Letter 2013-32 (Sept. 30, 2013) (updating loss mitigation flow-chart, defining "continuous income," and addressing capitalization of arrears).

accumulated foreclosure costs. Finally, the partial claim may include amounts representing both principal forbearance and arrears. Originally, FHA-HAMP did not permit inclusion of more than twelve months of arrearages in a partial claim. HUD removed this limitation in November, 2012 (Mortgagee Letter 2012-22).

Another limitation on HUD partial claims has created persistent problems for borrowers. Under FHA-HAMP guidelines, the total amount of all partial claims for a property can never exceed 30% of the unpaid principal balance (UPB) as of the time of the borrower's default. Certain borrowers, particularly those with large arrearages, have needed to capitalize additional arrears in excess of this 30% cap. The question arises as to whether FHA-HAMP permits capitalization of additional arrears into the interest-bearing principal, above and beyond amounts included in the partial claim. If a borrower can capitalize additional arrearages outside of the partial claim, does FHA-HAMP set any limits on this option?

In September 2013, with Mortgagee Letter 2013-32, HUD answered the initial question, stating clearly that the partial claim cap of 30% of the UPB did not preclude a borrower from capitalizing additional arrears into the interest-bearing principal as part of an FHA-HAMP modification.[69] Nevertheless, despite the Mortgagee Letter's directive, servicers continued to deny FHA-HAMP applications on the sole basis that the borrower's arrearages exceeded the partial claim cap amount. HUD's new FAQ seek to correct these erroneous denials. HUD provides three examples of what it considers to be appropriate FHA-HAMP calculations, including the treatment of arrearages *not* included in a partial claim. In the process, HUD sheds further light on the general mechanics of FHA-HAMP.

Attachment A to Mortgagee Letter 2013-32 contains a flowchart of the FHA-HAMP modification waterfall. The chart's opaqueness has no

[69] "Outstanding arrearages capitalized into modifications are not subject to the statutory limit [30 percent of UPB at time of default] on Partial Claims. However, arrearages and related foreclosure costs included in Partial Claims are subject to the statutory limit of 30 percent of UPB at the time of initial default." HUD Mortgagee Letter 2013-32 p. 6.

doubt contributed to the troubled implementation of FHA-HAMP. However, when reviewing HUD's new FAQ, it is essential to consider the Attachment.

The FAQ addresses three modification scenarios:

Under FHA-HAMP, borrowers may achieve affordable reduced payments by modifying a loan without a partial claim.

FHA-HAMP does not require that the borrower execute a partial claim in all modifications. FHA-HAMP modifications require certain fixed loan terms. The interest rate for the modified loan must be set permanently at a small increment above the current Freddie Mac Weekly survey rate (roughly 4.5% today). The repayment term must be set at 360 months from the modification date. In assessing a borrower for FHA-HAMP, these modified loan terms may be applied to amortize the current total debt owed. HUD refers to the total debt owed as the "Amount to be Resolved under FHA-HAMP" (*i.e.* the UPB at time of default, accumulated arrears, and accumulated costs). If applying the fixed modification terms to the "Amount to be Resolved under FHA-HAMP" results in an affordable monthly PITI payment, the FHA-HAMP modification must be approved. The formula for determining an affordable PITI payment, or "target payment," is set out in the HUD "Attachment A" waterfall chart. If the fixed modified loan terms (4.5% interest rate and 360 months term), applied to the total amount owed, produce a payment at or below the "target payment" calculated under the waterfall chart, the borrower qualifies for the modification. In this first FAQ example, the waterfall chart calculates the borrower's target monthly payment to be $696.15. Applying the fixed program loan terms to the total amount owed, the modified monthly payment would be $535.40, below the target payment. The borrower does not need a partial claim to reach a payment level at or below the target amount.[70]

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[70] In the introductory text of the first FAQ, HUD notes that to qualify for FHA-HAMP at all, the borrower cannot have "surplus income" over a fixed amount. "Surplus income" was defined in Mortgagee Letter 2000-05. Very few borrowers facing foreclosure will have surplus income over this threshold. The inclusion of the surplus income threshold has the effect of making few borrowers in foreclosure eligible for the traditional (non-FHA-HAMP) FHA modification. Instead, the

In fact, the modified monthly PITI payment here will be equal to 22.68% of the borrower's gross monthly income.

The borrower whose arrearage exceeds the partial claim cap may receive an FHA-HAMP modification.

The second FAQ involves a borrower whose partial claim cap is $13,423.33. This amount represents 30% of the borrower's UPB as of the time of default. The borrower owes arrearages totaling $15,023.24, an amount greater than the partial claim cap. Certain servicers have routinely rejected borrowers seeking FHA-HAMP under this scenario. HUD's FAQ shows that these determinations have been wrong. Here, the borrower owes a total current debt of $61,067.66 (UPB at the time of default plus accumulated arrears and fees). This sum is the "Total Amount to be Resolved under FHA-HAMP" for this borrower. Subtracting the maximum partial claim amount ($13,423.33) from this "Total Amount to be Resolved," leaves $47,644 to be paid-off through a modified loan at the fixed FHA modification terms of 4.50% interest over 360 months. The modification principal balance is roughly $2,900 more than the UPB as of the date of default. Because FHA-HAMP allows additional arrears to be added to the interest-bearing principal, the $2,900 may be included in the new interest-bearing principal, separate from the non-interest bearing partial claim. FHA sets a payment-to-income ratio (front-end DTI) cap of 40% for loans modified under FHA-HAMP. Here, the borrower's payment-to-income ratio after modification is 28.1%, well under the 40% limit. The borrower therefore qualifies for FHA-HAMP. In contrast with the third example, below, this modification reduces the borrower's payment to an amount that is still over the target payment amount. The modified monthly PITI payment is $493.58. The target monthly PITI payment arrived at through the waterfall formula in attachment A would be $439.75. The point of the FAQ is to show that where the borrower has

waterfall channels most borrowers directly into the FHA-HAMP assessment. Because FHA-HAMP offers better options for reduced payments, this channeling is generally helpful to borrowers. The threshold requirement that the borrower have only *de minimus* surplus income (or none at all) will not be a barrier for most borrowers seeking modifications under FHA-HAMP.

exhausted the full partial claim amount to cover arrears, the 40% upper threshold controls, *not* the target payment amount. HUD's priority is to use the partial claim, first to cover arrears, and secondarily to reduce monthly payments. To the extent that this borrower achieves reduced payments here, the reduction comes from the new fixed loan terms (4.5% interest rate and 360 month loan term) and not from a reduction of the interest-bearing principal through a partial claim. The partial claim here functions solely to cover most, but not all, of the arrears.

FHA-HAMP allows partial claims to be used only to the extent needed to reduce the modified monthly payment to the target payment amount.

In the final FAQ example, the borrower has an arrearage that is less than the partial claim cap. Applying the fixed FHA loan terms (4.5% rate and term of 360 months), the monthly PITI payment can be reduced to the target level of 31% of gross income ($451.36) with only a small partial claim. The borrower needs to reduce the interest-bearing principal by only $3,604.62 and amortize the remaining amount owed under the fixed loan terms in order to reach the target payment. The partial claim of $3,604.62 allows the borrower to achieve this target payment. Unlike the borrower in the second example, this borrower has not exhausted the full partial claim allowance. The target payment calculated under the waterfall chart of Attachment A controls. The borrower may not obtain a further reduction below the target payment amount by increasing the amount of the partial claim.

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This webinar will discuss the eviction process that former homeowners face post-foreclosure. It will provide homeowner-advocates with the necessary unlawful detainer background – and tenant-advocates with the necessary foreclosure background—to effectively litigate these cases. We'll walk through the non-judicial foreclosure timeline and a typical unlawful detainer, and then focus on the defenses and arguments unique to the *post-foreclosure* unlawful detainer process, identifying which defenses are also available to tenants in foreclosed homes. The webinar will cover foreclosure notice and recording requirements, duly perfected title/authority to foreclose arguments, UD notice requirements, and presumptions that come with the recording of a trustee's deed upon sale. Strategies will be reviewed that address the res judicata problems that arise when a former homeowner attempts to litigate title in an affirmative wrongful foreclosure suit *after* they lost their unlawful detainer.

1.5 hours of MCLE Credit through National Housing Law Project

Presenters:

Leah Simon-Weisberg, Tenants Together

Brittany McCormick, National Housing Law Project

The HBOR Collaborative, a partnership of four organizations, **National Housing Law Project, National Consumer Law Center, Tenants Together and Western Center on Law and Poverty,** offers free training, technical assistance, litigation support, and legal resources to California's consumer attorneys and the judiciary on all aspects of the new California Homeowner Bill of Rights, including its tenant protections. The goal of the

Collaborative is to ensure that California's homeowners and tenants receive the intended benefits secured for them under the Homeowner Bill of Rights by providing legal representation with a broad array of support services and practice resources.

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System Requirements:
PC-based attendees
Required: Windows® 8, 7, Vista, XP or 2003 Server

After registering, you will receive a confirmation email and instructions for joining the webinar.
For assistance with registration and further information, contact Alexandra Oatman, aoatman@nhlp.org

The HBOR Collaborative and its services, including this free webinar training for attorneys, are funded by a grant from the Office of the Attorney General of California from the National Mortgage Settlement to assist California consumers.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JAN 31 2014

ALAN CARLSON, Clerk of the Court

APPELLATE DIVISION
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

COLFIN AI-CA4, LLC, Plaintiff and Respondent, vs. SARA PHUONG DANG, Defendant, Appellant, And Petitioner.	CASE NO. 30-2013-684596 TRIAL COURT CASE NO. 30-2013-650531 JUDGMENT ON PETITION FOR WRIT OF SUPERSEDEAS HON. CARMEN LUEGE, COMMISSIONER

Defendant/Foreclosed homeowner seeks a writ of supersedeas, or stay pending appeal, in this unlawful detainer after foreclosure action. The trial court granted plaintiff/respondent/foreclosure purchaser's motion for summary judgment. We conclude supersedeas is proper in this case, and grant the petition, for the reasons discussed below.

Pursuant to Code of Civil Procedure section 1176, "Stay of judgment shall be granted when the court finds that the moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by its issuance." This petitioner meets the first prong: if evicted while the appeal is pending, she would lose any benefit from a successful appeal. Moreover, particularly in light of the illness of Petitioner's mother, the risk of harm to Petitioner and her family from eviction outweighs any risk of harm to the investor/purchaser respondent, so long as rent is being paid.

Additionally, it appears the appeal has merit. Pursuant to Code of Civil Procedure section 1161a, a foreclosed homeowner who holds over after service of a 3-day notice may be evicted "[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected." (Code of Civil Procedure Section 1161a(b)(3).) "Perfection" of the purchaser's title is an essential element of the unlawful detainer cause of action. "Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt. (citation) (sic) which includes good record title."(Stephens, Partain & Cunningham v. Hollis (1987) 196 Cal.App.3d 948, 952-953)

Prior to recording of the Trustee's Deed, Respondent did not have "good record title." We are aware that pursuant to Civil Code section 2924h(c), title is deemed perfected as of 8 a.m. on the date of the sale if the Trustee's Deed is recorded within 15 calendar days after the sale. In this case, the sale occurred on April 22, 2013 and the Trustee's Deed was not recorded until June 5, 2013. As such, Civil Code section 2924h(c) did not apply, and Respondent did not have "good record title" as of the time of filing of the complaint. We note further that this apparent defect was pointed out in the order setting the petition for hearing, yet Respondent failed to file any substantive response to address it.

The petition for writ of supersedeas is granted. The stay of proceedings shall remain in effect until the conclusion of the appeal, contingent upon Petitioner's continued posting of "reasonable rent" in the amount of $2,500 per month no later than noon on the first business day of each month. The clerk is directed to remit each month's rent payment to counsel for Respondent, for delivery to Respondent.

DEBORAH C. SERVINO,
Acting Presiding Judge

PETER J. WILSON, Judge

GLENN R. SALTER, Judge

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

MINUTE ORDER

DATE: 02/24/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers

CASE NO: **34-2013-00151461-CU-OR-GDS** CASE INIT.DATE: 09/23/2013
CASE TITLE: **Singh vs. Wells Fargo Bank, N.A.**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,10615782
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Wells Fargo Bank, N.A.
CAUSAL DOCUMENT/DATE FILED: Demurrer to Complaint, 11/12/2013

APPEARANCES
Laszlo Ladi, counsel, present for Defendant(s) telephonically.
Walter Dauterman, counsel present for plaintiff

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Wells Fargo Bank, N.A.'s demurrer to Plaintiff Upendra Singh's complaint is overruled.

Defendant's request for judicial notice is granted.

Plaintiff alleges two causes of action for violation of the California Homeowner Bill of Rights. In the First Cause of Action he alleges that Defendant engaged in dual tracking by negotiating with Plaintiff regarding a loan modification while also continuing foreclosure proceedings in violation of Civil Code § 2923.6(c). In the Second Cause of Action he alleges that Defendant failed to provide a single point of contact for her loan in violation of Civil Code § 2923.7(a).

First Cause of Action (Violation of Civil Code § 2923.6(c))

The demurrer is overruled. Defendant first argues that Plaintiff failed to state facts sufficient to state a cause of action for a violation of Civil Code § 2923.6(c) because he admits in his complaint that he did not submit a loan modification application until 2013, which was after the Notice of Default and Notice of Sale was recorded. Civil Code § 2923.6(c) provides that where a borrower submits a completed loan modification application, a servicer such as Defendant shall not record a notice of default or notice of sale, or conduct a trustee's sale while the application is pending. Here, the allegations in the complaint are sufficient as, although Plaintiff alleged that he submitted his application in 2013 and the judicially noticeable documents show that the notice of default and sale were recorded in 2012, he alleged that Defendant continued with nonjudicial foreclosure proceedings; specifically, that Defendant sent notices that a sale had been postponed for a short time and ultimately that a sale was set to take place on September 30, 2013 (Plaintiff obtained a preliminary injunction stopping the sale). This allegation is sufficient to demonstrate that Defendant was conducting, or at least attempting to conduct a trustee's sale, while Plaintiff's loan modification application was pending. That the sale date may have been set by a Notice of Sale recorded prior to submission of the modification application is irrelevant. Indeed, the inference from the complaint is that despite submission of the application, Defendant intended to proceed with the sale ultimately set for September 30, 2013. Thus, the demurrer on the basis that the Notice of Default and Sale were recorded prior to submission of the application is overruled.

Defendant also argues that Plaintiff has not shown that he submitted a completed application. The Court rejects this argument. Plaintiff plainly alleged that he submitted a "complete loan modification." (Comp. ¶ 3.) This allegation is not conclusory and is sufficient for pleading purposes. While Defendant is correct that Section 2923.6(f) provides that an application is deemed "complete" when the borrower supplies "all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer", this does not mean, as Defendant argues, that Plaintiff was required to specifically allege that Defendant told him his application was complete. Indeed, whether a completed application was or was not submitted is a factual question beyond the scope of the demurrer. For pleading purposes, Plaintiffs' allegations that a completed application was submitted within the meaning of Civil Code Section 2923.6 must be accepted as true.

Finally, the Court rejects Defendant's argument that the HBR did not take effect until January 1, 2013 and therefore cannot reach conduct that occurred before 2013. Here, the cause of action, liberally construed, is based upon conduct that occurred in 2013. Indeed, as already discussed, it relates to a loan modification application that was submitted in 2013, and a sale that was set to take place in September 2013. (Comp. ¶¶ 3-5.) That the Notice of Default and Sale were recorded prior to 2013 does not change the analysis as again the cause of action can be construed as attacking Defendant acts in conducting or attempting to conduct a trustee's sale in 2013. In essence, Plaintiff here is challenging practices engaged in since January 1, 2013, when the HBR was in effect.

Even were the court to credit defendant's argument, the plain language of the statute contemplates application to loans that originated before January 1, 2013. Indeed, the statute provides that a mortgage servicer is not "obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013..., unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer." (Civ. Code § 2923.6(g).) The plain language thus contemplates application to loan originating prior to January 1, 2013, given that the statute will apply where a borrower, who had been evaluated for a loan modification prior to January 1, 2013, submitted a post January 1, 2013 loan modification application based on a change in financial circumstances. Plaintiff here is challenging practices engaged in since January 1, 2013, when the HBR was in effect. If Defendant were correct in its argument that Section 2923.6 cannot apply to loans that were originated prior to January 1, 2013, then this portion of the statute would be rendered meaningless. Simply, to read the statute as defendant suggests would mean the section and its underlying policies would be rendered a dead letter as to all loans originated prior to January 1, 2013, a result the legislature could not have intended. See, e.g. *People v. Barksdale* (1972) 8 Cal.3d 320, 334 . California courts, quite naturally, do not favor constructions of statutes that render them advisory only, or a dead letter. *Mabry v. Superior Court* (2010) 185 Cal. App. 4th 208, 218.

The demurrer to the first cause of action is overruled.

<u>First Cause of Action (Violation of Civil Code § 2923.7)</u>

Defendant's demurrer on the basis that Plaintiff failed to state facts sufficient to constitute a violation of Civil Code § 2923.7 is overruled. 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 or personnel each of whom has the ability and authority to perform the responsibilities" required by Section 2923.7. (Civ. Code § 2923.7(e).)

Here, Plaintiff alleged that during the modification process, he and "his representative were constantly shuttled between a veritable phone tree of Wells Fargo Bank representatives [and] was never provided with any single 'point of contact' with knowledge about the status of his modification request or authority to act on that request." (Comp. ¶ 7.) "Defendant...shuttle[led] [Plaintiff] and his representative around to multiple points of contact about his home loan." (Id. ¶ 14.) These allegations are sufficient. While Defendant argues that Plaintiff was not actually entitled to a single person given the definition of single point of contact in subdivision (e), and that a mere allegation that he had multiple contacts is not sufficient, it ignores the allegations in paragraph 7. Plaintiff was not simply alleging that he talked to numerous people, but that he was shuffled around to numerous people and was never provided any single contact "with knowledge about the status of his modification request or authority to act on that request." This is sufficient.

The demurrer to the second cause of action is overruled.

No later than March 6, 2014, Defendant shall file and serve its answer to the complaint.

The notice of hearing on the demurrer does not provide notice of the Court's tentative ruling system as required by CRC Rule 3.1308 and Local Rule 1.06(D). Defendant's counsel is ordered to notify Plaintiff's counsel immediately of the correct department and time of the hearing and of the tentative ruling system and to be available at the hearing, in person, or by telephone, in the event Plaintiff's counsel appears without following the procedures set forth in Local Rule 1.06(B).

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

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: 02/24/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers

CASE NO: **34-2013-00144451-CU-OR-GDS** CASE INIT.DATE: 05/31/2013
CASE TITLE: **Bolton vs. Carrington Mortgage Services, LLC**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,10617855
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Carrington Holdings Company, Carrington Foreclosure Services LLC, Carrington Mortgage Services, LLC
CAUSAL DOCUMENT/DATE FILED: Demurrer to First Amended Complaint, 11/12/2013

APPEARANCES
Pamela J Palmieri, counsel, present for Plaintiff(s).
Nicole Dunn, counsel present for defendant, telephonically

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendants' Carrington Mortgage Services, LLC, et al.'s unopposed demurrer to Plaintiff Alice Ruthie Bolton's first amended complaint is overruled.

Defendants' request for judicial notice is granted.

Plaintiff alleges causes of action for Violation of the Homeowner's Bill of Rights and for Violation of Business & Professions Code § 17200 et seq.

First Cause of Action (Homeowner's Bill of Rights)

Defendants' demurrer to the first cause of action is overruled. Lack of opposition, by itself, does not deprive the Court of discretion to consider the motion on its merits. Law and motion is not done by default.

Pleadings are to be liberally construed. (Code Civ. Proc., § 452) A general demurrer admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the court. (*Alcorn v. Anbro Engineering, Inc*. (1970) 2 Cal.3d 493, 496. A general demurrer should not be sustained if the pleading, liberally construed, states a cause of action on any theory. (See, e.g. *Minsky v. Los Angeles* (1974) 11 Cal.3d 113, 118) In pleading, the party is required only to set forth the essential facts of her case with reasonable precision and with particularity sufficient to acquaint the opposing party with the nature, source and extent of her cause of action. *Semole v. Sansoucie* (1972) 228 Cal.App.3d 719, 721. Plaintiff has sufficiently alleged that Defendants violated Civil Code § 2923.6(c) in that she alleged that while her loan modification application was pending, Defendants filed a notice of sale in April 2013. Section 2923.6(c) precludes the filing of a notice of sale while a completed loan modification application is pending. Plaintiff alleged that she submitted a completed loan application in June 2012, and again in August 2012 and that the application was still pending in April 2013 when the notice of sale was recorded. (FAC ¶ 33.) Plaintiff alleged that during the early months of 2013, she repeatedly tried to obtain the status of her pending loan modification application but received no response. (Id. ¶ 23.) Defendants' employee confirmed that the application was pending on or about April 25, 2013. (Id. ¶ 24.) Thus, she alleged a violation of Civil Code § 2923.6(c) based upon conduct that occurred after the HBOR went into effect on January 1, 2013. Her cause of action is not, as Defendants present it in their demurrer, based solely upon the theory that Defendants failed to review her application prior to recording the Notice of Default in September 2012 before the HBOR was enacted.

Defendants' argument that Plaintiff admitted she did not submit a completed loan application because she was advised in August and September 2012 that her application was lost or not received is rejected. Indeed, Plaintiff alleged that those statements were false and that the application had been received and was complete and that she submitted another complete application in August 2012. (FAC ¶ 17.) Indeed, she alleged that as of September 1, 2012, her loan modification package was complete and pending. (Id. ¶ 18.) Whether or not the application was "complete" within the meaning of Civil Code Section 2923.6 is a factual question not appropriately resolved on this demurrer. Further, the Court rejects the argument that Plaintiff failed to allege a violation of Civil Code § 2923.6 because a servicer "shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated prior to January 1, 2013..." and she did not allege that she had not been previously evaluated for a loan modification prior to January 1, 2013. (Civ. Code § 2923.6(g). As set forth above, Plaintiff has essentially alleged that Defendants never reviewed her loan modification package.

Plaintiff also alleged that Defendants violated Civil Code § 2923.6(f) because they never provided written notice denying her loan modification application. (FAC ¶¶ 38-39.) These allegations are also sufficient to allege a violation of Civil Code § 2923.6.

Given the Court found that Plaintiff adequately alleged a violation of Civil Code § 2923.6, it need not and does not address Defendants' other arguments that the first cause of action fails to adequately allege violations of Civil Code §§ 2923.5, 2923.55, 2923.7, or 2924.

<u>Second Cause of Action (Bus. & Prof. Code § 17200)</u>

Defendants' demurrer is overruled. Given that Plaintiff adequately alleged a violation of Civil Code § 2923.6 in the first cause of action, she adequately alleged a cause of action for violation of Bus. & Prof. Code § 17200 under the unlawful prong. Indeed, she alleged that Defendants violated Bus. & Prof. Code § 17200 by violating Civil Code § 2923.6. (FAC ¶ 50.) The Court need not and does not reach Defendants' other arguments.

The demurrer is overruled. No later than March 6, 2014, Defendants shall file and serve their answers to the FAC.

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

COURT RULING

After hearing oral argument the Court affirmed its tentative ruling with the following modification:

Subsection (e) of the prayer is stricken.