California Homeowner Bill of Rights COLLABORATIVE

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

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In this issue—

An article dissecting reasonable accommodation law applied in a mortgage servicing context, and summaries of recent federal and state cases.

Announcement—

Mark your calendars! HBOR Collaborative partner NCLC will be hosting a webinar on Limiting Confidentiality in Mortgage Litigation on **February 25, 12:00pm PST**. Look for sign up information on our website soon!

Reasonable Accommodations in Mortgage Servicing and Loss Mitigation*

Facing foreclosure and navigating the loss mitigation process is a challenging and frustrating ordeal for most borrowers. Dealing with unresponsive single points of contact, duplicative document requests, "lost" modification applications, and improper denials can be even more complicated and wearisome for borrowers with physical and mental disabilities.[1] While reasonable accommodations are often

* This article is adapted from Brittany McCormick & Annette Kirkham, *Reasonable Accommodations in Mortgage Servicing & Loss Mitigation*, 45 HOUS. L. BULL. (Jan. 2015). Ms. McCormick is a National Housing Law Project staff attorney and Ms. Kirkham is a senior attorney with the Fair Housing Law Project, a program of the Law Foundation of Silicon Valley.

[1] "[Sixty percent] of [housing] counselors reported that their clients with disabilities 'always,' 'often,' or 'sometimes' faced additional hurdles in trying to access loss mitigation relief and had difficulties receiving reasonable accommodations in the loan modification process. Furthermore, more than 40% reported that their clients with disabilities received worse outcomes than other clients 'always,' 'often,' or 'sometimes.'" Nat'l Hous. Res. Ctr., National Mortgage Settlement Servicing Standards & Noncompliance, Results of a National Housing Counselor Survey, 9 (June 5, 2013), *available at* http://www.hsgcenter.org/wp-

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associated with companion animals and accessible parking spaces, advocates are beginning to apply reasonable accommodation principles to mortgage servicing, requesting that servicers provide large-print loan modification documents to vision-impaired borrowers, for example. This article provides a brief overview of possible reasonable accommodation arguments and counter-arguments in the mortgage servicing context. It then offers various strategies for advocating on behalf of disabled clients negotiating loss mitigation plans with mortgage servicers.

Background

People who experience disabilities have been considered a protected class under the federal fair housing laws since 1988.[2] As such, they are protected against discriminatory housing policies and practices under the Fair Housing Amendments Act (FHAA). Specifically, a housing provider may not "refuse to rent or sell," refuse to negotiate a rent or sale, or "otherwise make unavailable or deny" a dwelling because a person is disabled.[3] The FHAA also affirmatively obligates housing providers to "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling."[4] Aside from the FHAA, disabled persons may also obtain reasonable accommodations under the Americans with

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content/uploads/2013/06/NMS_Findings.pdf [hereinafter NHRC study]. In a California study, "over one-quarter of [housing] counselors reported clients with disabilities 'always' or 'often' receive worse loss mitigation outcomes [compared to nondisabled borrowers], even with [the housing counselor's] intervention." Cal. Reinvestment Coal., Chasm between Words & Deeds IX: Bank Violations Hurt Hardest Hit Communities, 16 (2013), *available at* http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTMvMDQvMDIvMjJfMTVfMzNfNjI3X0NoYXNtX0J3X1dvcmRzX2FuZF9EZWVkc19JWF9GaW5hbF9SZXBvcnQucGRmIl1d/Chasm%20Bw%20Words%20and%20Deeds%20IX%20Final%20Report.pdf [hereinafter CRC study].

[2] *See* 42 U.S.C.A. § 3601, *et seq*. (2015).

[3] 42 U.S.C.A. § 3604(a), (f)(1) (2015).

[4] 42 U.S.C.A. § 3604(f)(3)(B). For a comprehensive history of reasonable accommodations and their application in federally subsidized housing programs, see NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, § 13.12 (2012).

Disabilities Act (ADA)[5] and the Rehabilitation Act,[6] though application and enforcement of these laws depend on the type of housing provider.[7]

The intersection between reasonable accommodations and mortgage servicing often emerges when defaulting, disabled borrowers apply for loan modifications.[8] Broadly, mortgage servicers act as agents of a loan's beneficiary and conduct the day-to-day servicing, or handling, of a borrower's mortgage loan. Servicers collect monthly payments, calculate late fees, manage escrow accounts, track and sometimes impose hazard insurance, and, critically, negotiate and process loss mitigation applications with borrowers.

Disabled borrowers can benefit from reasonable accommodations in the loss mitigation process in several potential ways. First, physical barriers may influence a borrower's ability to effectively communicate with servicer representatives, especially a borrower's designated single point of contact (SPOC).[9] Housing counselors report SPOCs hanging up on hearing impaired borrowers, for example.[10] And, absent a working SPOC relationship (a difficult and fraught relationship under the best of circumstances), a borrower may miss critical document submission deadlines, increasing his or her risk of modification denial and

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[5] 42 U.S.C.A. § 12101, *et seq*. (2015).
[6] 29 U.S.C.A. § 794 *et seq*. (2015).
[7] Title II of the ADA applies to all programs, services, and activities provided or made available by public entities. Title III of the ADA covers public and common-use areas of housing developments when these public areas are, by their nature, open to the general public. The Department of Housing and Urban Development (HUD) and the Department of Justice enforce the ADA. *See* NHLP, *supra* note 4, at § 13.12 n.1783 (2012). The Rehabilitation Act prevents discrimination by programs or activities receiving federal funding. *See id.* at n.1782. *See also* discussion *infra*, Other Roads to Reasonable Accommodation.
[8] A loan modification changes the terms of a mortgage contract, often decreasing or stabilizing adjustable interest rates, extending the life of a loan, and (in the best cases) reducing the loan principal. The modification process, however, is notorious for being complicated, unnecessarily long, and repetitive. *See generally* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011) (explaining a mortgage servicer's role in the loan modification process). There are certainly other ways reasonable accommodations and mortgage servicing can intersect, but this article focuses on loan modifications and loss mitigation in general.
[9] Under new federal servicing regulations, servicers must appoint SPOCs to delinquent borrowers. Reg. X, 12 C.F.R. § 1024.40 (effective Jan. 10, 2014). States may impose even stricter SPOC rules. *See, e.g.*, CAL. CIV. CODE § 2923.7(a) (2015) (requiring servicers to appoint a SPOC to any borrower that requests information about a foreclosure prevention alternative).
[10] *See, e.g.*, NHRC study, *supra* note 1, at 9; CRC study, *supra* note 1, at 16.

foreclosure. Second, cognitive disabilities can impact a borrower's ability to submit a modification application on time, or to gather financial information. It may even render a borrower incapable of completing the loss mitigation process entirely, eliminating any chance of avoiding foreclosure.[11] Finally, the very fact that some borrowers receive disability benefits has created barriers to qualifying for a loan modification. These borrowers are often asked for information they cannot possibly obtain, including projected timelines for continued disability benefits.[12] Servicers may also reject a loss mitigation plan simply because a borrower's income is based mostly or totally on disability benefits.[13]

[11] *E.g.*, CRC study, *supra* note 1, at 16 ("Our clients with disabilities usually have a difficult time explaining their situation to their servicer. They do not receive any accommodation that I can see, especially when it is a cognitive disability (*i.e.*, ADHD, OCD) where the borrower has difficulty answering questions over the phone with the SPOC. The borrower is often put in a position where they answer a question (not fully understanding what is being asked) and then this information is inputted by an inexperienced servicer representative who tends to misinterpret the borrower's situation/intent.").

[12] *E.g.*, *id.* ("Lenders do not understand how complex the process may be due to [disabled] homeowner's benefits and how hard it is to fully document them."). "It is ridiculous that people on SSI have to get an award letter within 30 days from the SSI office when for months and years, their bank statement shows direct deposit of SSI. We have even had the challenge of having to explain penny fluctuations." *Id. See also* Consumer Financial Protection Bureau (CFPB) Bulletin 2014-03, Social Security Disability Income Verification (Nov. 18, 2014), *available at* http://files.consumerfinance.gov/f/201411_cfpb_bulletin_disability-income.pdf [hereinafter CFPB Bulletin] ("In the past, Social Security disability income participants have faced special challenges in providing proof that their disability payments are likely to continue. The Social Security Administration . . . generally will not provide documentation regarding how long benefits will last.").

[13] The CFPB recently addressed this type of discrimination in the lending context. *See* CFPB Bulletin, *supra* note 12. The Bureau pointed to HUD, Veterans Affairs, Freddie Mac, and Fannie Mae guidance in establishing its own guidance (which pertains to all mortgage servicers): a servicer may request an award letter as proof of disability benefits, but it should not make inquiries into the nature, severity, or longevity of a loan applicant's disability. *Id.* at 2, 4-5. This guidance should also apply to the mortgage servicing context. *But see* note 39.

Reasonable Accommodation Theory Applied to Mortgage Servicing

The Fair Housing Argument: Section 3604

Applying reasonable accommodation logic to mortgage servicing is an unsettled area of law still in its infancy.[14] Thus far, advocacy has occurred outside the courtroom (through demand letters and administrative fair housing complaints) and has focused on using the federal fair housing laws to argue that denying a borrower a meaningful opportunity to be evaluated for loss mitigation can render housing unavailable. Possibly the most obvious vehicle for accomplishing this is Section 3604 of the FHAA, titled: "Discrimination in the sale or rental of housing *and other prohibited practices*," which, advocates argue, includes failing to provide reasonable accommodations in mortgage servicing. Specifically, Section 3604(b) prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services or facilities in connection therewith*."[15]

While there has not been a specific ruling on the application of Section 3604 to mortgage servicing in the context of loss mitigation, courts have recognized that Section 3604(b) prohibits "discrimination in the terms or conditions under which housing is sold or leased,"[16] and that Congress intended Section 3604 to regulate "a broad range of activities that have the effect of denying housing opportunities to a

[14] Advocates should think creatively about making existing fair housing case law relevant to reasonable accommodations in the context of loan modifications. In *Giebeler v. M & B Assocs*., 343 F.3d 1143 (9th Cir. 2003), for example, plaintiff's disability benefits fell short of a landlord's income requirements. Plaintiff asked the landlord to waive its "no-cosigner" policy as a reasonable accommodation of his disability, allowing his mother to financially contribute to rent. The Ninth Circuit described "[t]he central issue . . . is whether bending a landlord's usual means of testing a prospective tenant's *likely ability to pay the rent over the course of the lease* is an 'accommodation' . . . within the meaning of the FHAA," and found that it was. *Id.* at 1148. Advocates could apply the *Giebeler* court's fair housing analysis to a loan modification context, where servicers assess a borrower's *likely ability to pay the mortgage over the course of the loan*.

[15] 42 U.S.C.A. § 3604(b) (2015).

[16] Maki v. Laakko, 88 F.3d 361, 365 (6th Cir. 1996).

member of a protected class."[17] Additionally, courts have broadly construed the phrase "or in the provision of services or facilities" in Section 3604(b).[18]

Some courts have applied this broad understanding of Section 3604 to mortgage lending, albeit not to servicing. In *Beard v. Worldwide Mortg. Corp.*, for example, the court found that the language of Section 3604(b) can "encompass home improvement loans and refinancing loans because the burden of the debt affects [a borrower's] ability to buy or sell a dwelling."[19] A more recent case held that, given the broad application of the FHAA, "it is clearly appropriate to treat mortgage lending as a service that may 'otherwise make unavailable or deny' dwellings to interested purchasers."[20]

Finally, some courts have applied the FHAA to discriminatory denials of homeowner's insurance and discriminatory insurance pricing where those practices effectively precluded homeownership because of the applicant's race[21] or disability.[22] At least one court has linked Section 3604's application in the insurance coverage context to mortgage lending:

> In the insurance coverage context, this Court has recognized that since mortgage companies will not lend to

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[17] Mich. Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 344 (6th Cir. 1994).
[18] *See, e.g.*, Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143–44 (N.D. Ill. 1993) (evaluating the FHAA in a racial discrimination context); Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1110 (S.D. Ohio 1979) (noting that the phrase "or in the provision of services or facilities" has been broadly construed to encompass municipal services such as sewage treatment).
[19] Beard v. Worldwide Mortg. Corp., 354 F. Supp. 2d 789, 809 (W.D. Tenn. 2005).
[20] Hirschfeld v. Metlife Bank, N.A., 2012 WL 3240669, at *6 (E.D.N.Y. July 31, 2012). *See also* Nat'l Cmty. Reinvestment Coal. v. Novastar Fin., Inc., 2008 WL 977351, at *2 (D.D.C. Mar. 31, 2008) (finding mortgage financing an essential service and speculating that with the coverage of Section 3604(a), the denial of certain essential services related to a dwelling might result in the denial of housing).
[21] Ojo v. Farmers Group, Inc., 565 F.3d 1175, 1180–81 (9th Cir. 2009) ("The application of the FHA to homeowners insurance is fully consistent with the statute's purpose in eliminating discrimination resulting in segregated housing and lack of equal housing opportunities.") (quoting *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 211–12 (1972)).
[22] Nevels v. W. World Ins. Co., Inc., 359 F. Supp. 2d 1110, 1120 (W.D. Wash. 2004). Plaintiffs alleged that defendant insurance company discriminated against them by denying insurance coverage to adult family homes that care for mentally disabled individuals. On a motion to dismiss, the court upheld plaintiffs' claims for failing to reasonably accommodate. *Id.* at 1123.

> borrowers who lack homeowner's insurance, the denial of insurance renders housing unavailable. . . . Certainly, if the refusal to provide insurance coverage violates § 3604 because of the consequential inability to secure a loan, then a mortgage lender's refusal to issue loans based on discriminatory purposes clearly violates the same provision.[23]

Working with these cases as a foundation—citing to Section 3604's broad application, and analogizing lending and insurance coverage to servicing—advocates should look for test cases to take this theory further, applying Section 3604 logic directly to mortgage servicing. This approach could potentially obtain reasonable accommodations for clients working through the loss mitigation process.

The Fair Housing Counter Argument: Section 3605

Not all courts grant Section 3604 such wide application, however, finding that an application of Section 3604 to mortgage lending would render FHAA Section 3605 superfluous. Section 3605 makes it:

> unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.[24]

Several courts have found sections 3604 and 3605 mutually exclusive, and have therefore limited the scope of Section 3604.[25] Relatedly, in *Gaona v. Town & Country Credit*, the Eighth Circuit distinguished the two sections, noting that Section 3604 "bars

[23] *Nat'l Cmty.*, 2008 WL 977351, at *3.
[24] 42 U.S.C.A. § 3605(a) (2015).
[25] *See, e.g.*, Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423 (4th Cir. 1984) (noting that "if [§ 3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, [§ 3605's] specific prohibition of discrimination in the provision of financing would have been superfluous"); Webster Bank v. Oakley, 265 Conn. 539, 556-57 (2003) (finding that the application of § 3604 to discriminatory financing is "precluded by the existence of § 3605").

discrimination in sales and rentals, rather than loans," and that because Section 3605 "does not define discrimination to include a lender's refusal to make reasonable accommodations, the lender was under no obligation under Section 3605 . . . to provide a reasonable accommodation."[26]

Advocates could use Section 3605, however, as part of a direct disability claim. Under this theory, a failure to accommodate a borrower's disability in the loss mitigation process would be couched as discrimination in the provision of services in connection with a residential real estate transaction or in the "terms or conditions" of such transaction.

Other Roads to Reasonable Accommodation

Advocates pursuing reasonable accommodations for disabled borrowers should consider other avenues besides the FHAA, depending on what type of entity owns the borrower's loan. Section 504 of the Rehabilitation Act,[27] for example, may apply to Fannie Mae and Freddie Mac loans because those entities are currently under a federal conservatorship and therefore qualify as programs receiving federal funding.[28] Under Section 504 reasoning, Fannie or Freddie's unwillingness to accommodate a borrower's disability in the loss mitigation process would deny that borrower the benefits of a federally funded program based on the disability. Similarly, the ADA prohibits discrimination in the provision of services,[29] including credit and, arguably, loan modifications, since modifications reconfigure a borrower's loan, or credit. And since HUD enforces the ADA, any

[26] Gaona v. Town & Country Credit, 324 F.3d 1050, 1057 (8th Cir. 2003).
[27] "No otherwise qualified individual with a disability . . . as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C.A. § 794(a) (2015).
[28] *See supra* note 7.
[29] "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132 (2015).

mortgage insured by the Federal Housing Administration falls under the purview of the ADA.[30]

Disabled borrowers should also be eligible for reasonable accommodations according to a policy paper issued by the Federal Deposit Insurance Corporation (FDIC).[31] The policy statement suggests that lenders should be making reasonable accommodations to comply with the FHAA. Further, when borrowers are purchasing property, reasonable accommodations are available. Servicers then, should be making reasonable accommodations in the loss mitigation process, as they act as agents of lenders in servicing the loans. Overall, this policy statement should encourage servicers to create and enforce internal policies consistent with fair housing laws.

Finally, some advocates have used the Equal Credit Opportunity Act (ECOA)[32] to argue for reasonable accommodations. ECOA prohibits discrimination on the basis of a credit applicant's "receipt of income derived from any public assistance program" "in any aspect of a credit transaction."[33] Servicers are "creditors" and liable under ECOA because they "regularly arrange for the extension, renewal, or continuation of credit."[34] Further, a modification of an existing loan should be considered an "extension of credit" under ECOA.[35] According

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[30] *But see* Scherer v. Mission Bank, 34 Fed. App'x 656, 657-58 (10th Cir. 2002) (finding the ADA does not require a lender to make an "individualized inquiry" into a potential borrower's disability as a reasonable accommodation). Advocates should also consider that the ADA only provides for injunctive relief and attorney's fees under Title III public accommodations.

[31] Fed. Deposit Ins. Corp., Policy Statement on Discrimination in Lending, *available at* https://www.fdic.gov/regulations/laws/rules/5000-3860.html [hereinafter FDIC Policy Paper].

[32] 15 U.S.C.A. § 1691 *et seq*. (2015).

[33] 15 U.S.C.A. § 1691(a) (2015).

[34] 15 U.S.C.A. § 1691a(e) (2015).

[35] *See* Estate of Davis v. Wells Fargo, 633 F.3d 529, 538 (7th Cir. 2011); *see also* HAMP Supplemental Directive 09-08, at 1 (Nov. 3, 2009), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0908.pdf (requiring that servicer notices to borrowers comply with ECOA). A loan modification by a loan servicer constitutes an "extension of credit" under ECOA because under a loan modification, the servicer extends the right to defer payment of a debt by capitalizing accrued interest and certain escrow advances, reducing the interest rate, extending the loan term, or providing for principal forbearance.

to the FDIC, ECOA prohibits servicers from "treat[ing] a borrower differently in servicing a loan or invoking default remedies."[36]

Advocacy Strategies and Examples

When possible, advocates should keep reasonable accommodation requests simple and straightforward and not too burdensome for the servicer. In many cases, convincing a servicer to speak with a borrower's housing counselor or attorney, rather than directly to the borrower, may constitute the appropriate reasonable accommodation.[37] A brief introductory email to the servicer with follow-up telephone calls often resolves the situation and provides a borrower with more meaningful access to a SPOC or a better opportunity to apply for foreclosure alternatives. In a recent Law Foundation of Silicon Valley case, an advocate made a reasonable accommodation request on behalf of a client with dementia. Because of her cognitive disability, the client could not submit her loan modification application within the time specified by her servicer and the servicer foreclosed. After the advocate requested to take over gathering the information and communicating with the servicer, the servicer eventually agreed to repurchase the home from the third party bona fide purchaser and to reinstate the client's loan, with an affordable modification.

If a reasonable accommodation request does not succeed, however, advocates should consider writing a demand letter, or even bringing an affirmative action against the servicer using the FHAA and other strategies discussed here. The Oregon Law Center (OLC), for

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[36] FDIC Policy Paper, *supra* note 31.

[37] Servicers should speak with these entities even for nondisabled borrowers who supply appropriate third-party authorization. "For purposes of responding to a borrower's inquiries and assisting a borrower with loss mitigation options, the term 'borrower' includes a person authorized by the borrower to act on the borrower's behalf, such as a housing counselor or the borrower's attorney." John Rao, NCLC eReports, *New RESPA "Continuity of Contact" Requirements for Borrowers in Default*, 2-3 (Jan. 2014) (citing Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 40(a)–1 (effective Jan. 10, 2014)). "A servicer may adopt reasonable procedures to determine if the person that claims to be the borrower's agent has authority to act on behalf of the borrower, such as by requiring an authorization from the borrower or other documentation." *Id.* at 3.

example, recently filed an administrative fair housing complaint against JP Morgan Chase for failing to reasonably accommodate a borrower in her attempts to secure a trial period plan (TPP), the first step toward a permanent loan modification. The borrower was just months away from possible disability and definite Social Security retirement benefits, so her attorney requested a reasonable accommodation: that the TPP start-date coincide with these projected benefits. This would enable the borrower to better afford the payments and complete the TPP. Chase denied the accommodation and continued with foreclosure. Subsequently, Chase offered a second TPP, which the borrower successfully completed. Her loan modification, however, began later than it would have if Chase had granted the accommodation when borrower first requested it. OLC therefore filed an administrative fair housing complaint based on Chase's reasonable accommodation denial.[38] The administrative complaint has not yet been resolved by the administrative agency or through a conciliation agreement.

Conclusion

The Law Foundation and OLC examples demonstrate two important points about reasonable accommodations in the mortgage servicing area: (1) how effective advocacy can impact a borrower's ability to obtain a loan modification and save their home; and (2) the lack of a clear national policy overseeing fair housing (and reasonable accommodations in particular) applied to banks and mortgage servicers. Aside from one-on-one advocacy on behalf of specific clients, advocates should also consider pushing for a national settlement on this issue, and encouraging the Consumer Financial Protection Bureau (CFPB) to enforce the FHAA, the ADA, the Rehabilitation Act, and ECOA against banks, lenders, and the government, in the servicing context.[39] The Law Foundation of Silicon Valley is currently looking for

[38] In its response to the administrative fair housing complaint, Chase agreed it was obligated to provide the borrower a reasonable accommodation, but argued she was not financially harmed because she ultimately received a modification.
[39] While the CFPB guidance on mortgage lending referred to in this article, *supra* note 12, should logically transfer to the mortgage servicing context, CFPB staff

cases to apply reasonable accommodation principles to mortgage servicing, and advocates are encouraged to contact Annette Kirkham at annettek@lawfoundation.org if interested in collaborating.

recently admitted it did not know whether the CFPB has plans to issue similar guidance specific to mortgage servicing. CFPB Telephonic Press Conference, Statement of Daniel Dodd-Ramirez, Assistant Dir., CFPB Office of Fin. Empowerment (Jan. 16, 2015). Mr. Dodd-Ramirez encouraged advocates to write to the CFPB with "suggestions." *Id.*

Summaries of Recent Cases

Unpublished State Cases[40]

Viable Good Faith & Fair Dealing Claim Based on Breach of Loan Mod and Inflated Escrow

Silkes v. Select Portfolio Servicing, 2014 WL 6992144 (Cal. Ct. App. Dec. 11, 2014): The implied covenant of good faith and fair dealing is read into every contract and prevents one party from depriving the other of the benefits imparted by the contract. To state a claim, borrowers must show: 1) a contract; 2) borrower's performance, or excused nonperformance; 3) servicer's breach; and 4) damages caused by servicer's breach. To show excused non-performance, a borrower may assert that his performance "would obviously be useless, [if] . . . the other party repudiates the contract and gives notice of his or her refusal to perform." Here, borrower entered into a permanent loan modification agreement with servicer. The agreement specified borrower's monthly payments, acknowledging that payments may change based on a fluctuating escrow charge. Before borrower could tender his first modified payment, however, servicer inexplicably tripled his escrow and refused to accept the original modified amount. Borrower likewise refused to pay the inflated amount. The court agreed with borrower that he adequately pled excused non-performance since servicer "refused" to accept the modified payment, which, in essence, was a refusal to perform under the modified agreement. Additionally, the court found that borrower adequately pled that servicer "failed to exercise [its] discretion to change the escrow amount in good faith, thereby depriving [borrower] of the benefits of the loan modification agreement." Finally, borrower's allegations that the inflated amount put his modification "out of reach," caused him to hire an attorney, resulted in an NOD and a

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

significant loss of money, demonstrated damages at the pleading stage. The court reversed the trial court's grant of servicer's demurrer on borrower's good faith and fair dealing claim. Notably, the Court of Appeal found that the trial court had *not* abused its discretion in denying borrower leave to amend to add a breach of contract claim based on the same facts, citing the modification's clear allowance for a mutable escrow amount.

Non-Borrower, Joint Tenant, and Successor-in-Interest Allowed to Bring HBOR Claims

Knutson v. Nationstar Mortg. LLC, No. 34-2014-00156277-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Dec. 12, 2014): Under HBOR, "'borrower' means any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative program offered by, or through, his or her mortgage servicer." CC § 2920.5(c)(1). Only "borrowers" so defined may bring HBOR causes of action. Here, borrower applied for a modification and was allegedly wrongfully denied before transferring his property by grant deed to his son and himself as joint tenants. Shortly after making the transfer, borrower died. His son then brought dual tracking and SPOC claims against borrower's servicer, as both the property owner and as his father's successor-in-interest. Servicer argued the son could not assert HBOR claims because he is not considered a "borrower" under HBOR. The son then argued that under HAMP rules, any non-borrower that inherits property "may be eligible for a HAMP modification." Without explanation, the court agreed with the son that, at the pleading stage, he had successfully pled dual tracking and SPOC claims. The court merely noted that the son does not have to plead that the loan is a non-GSE loan to make his HAMP argument. The court denied servicer's demurrer to the son's HBOR and attendant UCL claims.

Federal Cases

Viable, TPP Based Claims: Contract, Good Faith & Fair Dealing, Constructive Fraud, Intentional Fraud

Curley v. Wells Fargo & Co., 2014 WL 7336462 (N.D. Cal. Dec. 23, 2014):[41] Contract claims require: 1) a contract; 2) borrower's performance or excused non-performance; 3) servicer's breach; and 4) borrower's damages. Here, borrower asserted he tendered all three payments under his TPP agreement and submitted all requested documentation to servicer, fully performing under the TPP. Whether or not borrow submitted all required documentation is a factual issue inappropriate for resolution on a motion to dismiss. Borrower also asserted two breach allegations. First, servicer agreed "to send [borrower] a copy of the proposed loan modification or a notification that he did not qualify for the offer after he returned signed copies of the TPP." Servicer did neither, breaching the TPP. Second, servicer foreclosed on borrower while he was TPP compliant, breaching explicit language in the TPP agreement. This second allegation also constituted adequately pled damages since the loss of borrower's home to foreclosure directly resulted from servicer's breach of the TPP. Borrower's breach of contract claim survived the MTD.

The implied covenant of good faith and fair dealing is read into every contract and prevents one party from depriving the other of the benefits imparted by the contract. Here, the court found two valid grounds for borrower's claim. First, servicer never sent borrower a permanent modification or explained reasons for denying him a modification, which breached the TPP and prevented borrower from realizing the benefits of the TPP. Second, servicer accelerated the loan and foreclosed after accepting four of borrower's TPP payments,

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[41] Two previous iterations of this case are summarized in our Case Compendium as *Curley v. Wells Fargo & Co.*, 2014 WL 988618 (N.D. Cal. Mar. 10, 2014) (denying servicer's motion for summary judgment on borrower's good faith and fair dealing claim), and *Curley v. Wells Fargo & Co.*, 2014 WL 2187037 (N.D. Cal. May 23, 2014) (granting borrower leave to amend to add fraud and contract claims after borrower survived summary judgment on his good faith and fair dealing claim).

benefiting itself from the TPP, but not allowing borrower to benefit from the TPP. The court denied servicer's MTD borrower's good faith and fair dealing claim.

Constructive fraud—an "act or omission . . . involving a breach of legal or equitable duty . . . which results in damage to another even though the conduct is not otherwise fraudulent"—only occurs in the context of a "fiduciary or confidential relationship." This relationship does not generally exist within the context of traditional borrower-lender activities. An exception applies, however, if a bank's activities extend beyond this relationship. Here, the court agreed with recent negligence precedent and found servicer owed borrower a duty of care by entering into a TPP contract. Foreclosing on borrower during the TPP agreement breached servicer's duty. The court denied servicer's MTD borrower's constructive fraud claim.

Fraud claims require borrowers to show: 1) servicer's misrepresentation; 2) servicer's awareness of the false nature of the misrepresentation; 3) servicer's intent to induce borrower's reliance; 4) borrower's reliance; and 5) damages. Here, borrower alleged servicer falsely misrepresented that it would refrain from foreclosing while borrower was TPP compliant. Servicer intentionally induced borrower's reliance because it benefited from borrower's TPP payments. The court agreed that borrower stated a viable fraud claim with the required level of specificity. He alleged the date the TPP was entered into and the exact TPP language at issue. Borrower did not need to include the name of the person who prepared the TPP, as this fact is uniquely in servicer's knowledge. The court also accepted borrower's claims of justifiable reliance, pointing to his acceptance of the TPP agreement in lieu of filing Chapter 13 bankruptcy, obtaining private financing to reinstate the loan, or attempting to sell the house himself. Borrower pled damages in the loss of his home to foreclosure, attorney's fees in defending two unlawful detainers, and in the TPP payments themselves. Borrower's fraud claim also survived the MTD.

Dual Tracking: "Complete" Application Pleading Standards; Fraudulent Misrepresentation Claim Based on Servicer's Statement No Sale Would Occur; Viable Negligence Claim under *Alvarez*; Tender Not Required to Recover Damages under HBOR

Medrano v. Caliber Home Loans, 2014 WL 7236925 (C.D. Cal. Dec. 19, 2014): "[T]o be effective, a [borrower's] complaint need only offer a set of facts that put a [servicer] on notice of a legal wrong the [borrower] alleges plausibly that the [servicer] committed." Here, borrower alleged she submitted a complete loan modification application and, while that application was pending, servicer sold her home. The court found borrower's assertion that her application was "complete" sufficient to bring a dual tracking claim under HBOR, which prohibits servicers from moving forward with foreclosure while a borrower's complete, first lien loan modification is pending. Though HBOR defines a "complete" application as when "a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer," the court declined to require borrower to cite this specific language in her pleading: "[T]here is no reason to force [borrower] to break the term 'complete application' into its constituent parts: [servicer] know[s] what 'complete application' means." The court therefore denied servicer's MTD borrower's dual tracking claim.

Fraudulent misrepresentation claims require a borrower to show: 1) servicer's misrepresentation; 2) that servicer knew was false; 3) made with the intention that borrower rely on the misrepresentation; 4) and that borrower actually relied on the misrepresentation; 5) to his detriment. Like other fraud-based claims, the factual circumstances surrounding a fraudulent misrepresentation claim require a high-level of pleading specificity. But elements two and three, collectively known as "scienter," may be alleged generally, since they deal with the fraudulent party's state of mind. Here, borrower alleged a servicer representative told her on the eve of foreclosure that no sale would occur the next day. Predictably, the sale *did* occur and borrower failed to take any actions to prevent the sale, including asking friends for reinstatement money, or seeking a TRO. The court found that borrower pled the factual circumstances with the requisite level of specificity, and scienter with a base level of generality. Servicer argued borrower's reliance on the representative's statement was unreasonable because borrower should have confirmed that servicer rescinded the NTS in the county's property records. The court found no authority to suggest that this level of double-checking by a borrower is necessary to show reasonable reliance on servicer's projected sale date. Finally, the court found servicer's argument that borrower's damages were caused by her default, not its own misrepresentation, "a myopic" view of causation. Whether or not borrower could have successfully raised enough funds to reinstate her loan, or won a TRO, is unknown and therefore the court cannot say borrower did not suffer damages related to servicer's misrepresentation. The fraudulent misrepresentation claim (and negligent misrepresentation claim, which does not require scienter) survived the MTD.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. A recently published Court of Appeal decision, *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941 (2014) found that while servicers have no duty to *initiate* the modification process or to grant a modification, they "cannot offer modifications, generally, and then claim they have no duty to avoid processing the applications for those modifications in a slipshod manner." Here, borrower alleged her servicer mishandled several modification applications, losing her first, wrongfully denying her second based on missing documents while simultaneously acknowledging the application's "completeness," and ultimately dual tracking her third. The court agreed with *Alvarez's* logic and declined to dismiss borrower's negligence claim.

According to the "tender rule," a borrower who sues to set aside a foreclosure sale must show that he or she is ready, willing, and able to pay the full amount due on the loan. Tender has been excused where borrowers bring statutory causes of action. Here, borrower brought an HBOR dual tracking claim post-sale, seeking only damages rather than to undo the completed foreclosure sale. The court declined to dismiss borrower's damage-seeking claims, including her HBOR claim, based on her failure to tender.

Viable FDCPA Claims Based on Servicer's Attempts to Collect Debt After Borrower's BK Discharge

Redjai v. Nationstar Mortg., 2014 WL 7238355 (C.D. Cal. Dec. 16, 2014): "A creditor retains the right to foreclose on a property subject to a debt discharged in a Chapter 7 bankruptcy." Here, borrower obtained a Chapter 7 discharge that included a large part, if not all (it is unclear from the opinion) of his mortgage debt. Servicer subsequently reported the discharge to credit reporting agencies (CRAs). After borrower instructed servicer to cease verbal communication, servicer sent borrower several letters demanding payment under his mortgage note. Servicer also telephoned borrower at least three times in similar efforts, even after borrower alerted servicer he was represented by counsel. Finally, servicer reported borrower as delinquent on his mortgage to CRAs. Borrower brought several FDCPA claims against servicer, alleging servicer attempted to collect amounts discharged in bankruptcy, misrepresented the true amount of debt, reported false information to CRAs, failed to inform CRAs that he disputed the debt, and contacted borrower when it knew he was represented by counsel. The court allowed all of borrower's claims to survive the MTD, noting that none of the claims or alleged factual circumstances dealt with servicer's attempts to foreclose on borrower's property, which would have been permitted under the FDCPA.

HBOR's National Mortgage Settlement (NMS) Safe Harbor; Dual Tracking: "Complete" Application and Material Change in Financial Circumstances; Rescission of NTS is Not an HBOR Remedy; Viable Negligence Claim using *Biakanja* Factors; Negligence Damages

Gilmore v. Wells Fargo Bank, __ F. Supp. 3d __, 2014 WL 7183796 (N.D. Cal. Dec. 16, 2014):[42] As long as the NMS is in place, a signatory that is NMS-compliant, with respect to the individual borrower bringing suit, is not liable for various HBOR violations, including dual tracking. CC § 2924.12(g). Here, servicer proffered three arguments invoking the NMS safe harbor, none of which worked. First, servicer

[42] Summaries of the previous TRO and preliminary injunction opinions are available in our Case Compendium.

argued its compliance with the NMS is more or less presumed, and that *borrower* bears the burden of proving servicer was *not* compliant. The court disagreed, rightly reading the HBOR safe harbor as an affirmative defense and NMS compliance to be proved by the servicer. Second, servicer argued it *was* compliant. The court found two possible NMS violations to defeat this argument: 1) servicer did not provide an online portal for borrower to check the status of his application; and 2) servicer dual tracked borrower by proceeding with foreclosure when he had submitted an application more than 37 days pre-sale. Finally, and somewhat uniquely, servicer "argue[d] that its compliance can only be determined according to the report issued by the [national NMS] monitor. . . . [and to] the extent that [HBOR] is interpreted to create a different standard of 'compliance' that is not in the NMS, . . . allowing California courts to interpret the NMS would invade the District of Columbia court's exclusive jurisdiction." This court disagreed with servicer's jurisdictional interpretation, finding HBOR's safe harbor provision crystal clear: "The plain meaning of that [safe harbor provision] demonstrates that a defendant must comply with the terms *with respect to the borrower in question*." There is no ambiguity to be interpreted. Further, the national NMS monitor "does not govern the administration of California law." The court summarily dismissed servicer's NMS related arguments by referencing its previous preliminary injunction decision (the summary of which is repeated here) and rejected servicer's MTD borrower's dual tracking claim based on the NMS safe harbor.

Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification is pending. This dual tracking protection does not apply to borrowers who have already been afforded a fair opportunity to be evaluated for a modification, but can be reignited if a borrower documents and submits a "material change in financial circumstances" to their servicer. Here, borrower alleged that after several previous applications were denied, he documented and submitted a material change in financial circumstances as part of another complete application. Specifically, his income had increased to $5,400 per month and his monthly expenses decreased by $1,000. He submitted documentation supporting this financial shift as part of his complete application and at a servicer-sponsored event, turning in everything listed on a servicer-created checklist. A servicer representative even acknowledged that borrower's application was complete as she accepted it. The next day, servicer recorded an NTS. The court determined that borrower had adequately pled both a "complete" application and that he documented and submitted a material change in financial circumstances to his servicer. The court paid particular attention to the specific increase and decrease in income borrower reported, finding it more than a mere "barebones" allegation that his circumstances had changed. The court denied servicer's MTD borrower's dual tracking claim.

Before a servicer records a trustee's deed up sale, a borrower may only seek an injunction as a remedy to a viable HBOR claim. Should a borrower win an injunction, it must remain in place until the servicer "correct[s] and remedie[s] the violation . . . giving rise to the . . . injunction." Here, borrower brought a viable dual tracking claim against servicer (see discussion above) and sought rescission of the offending NTS as his remedy. Servicer argued this remedy is unavailable under HBOR, and the court agreed. Instead of dismissing borrower's claim, however, the court chose to interpret borrower's cause of action as one for injunctive relief. If borrower prevails on his dual tracking claim, the injunction will remain in place until servicer corrects the NTS (presumably by rescinding it and recording another, though the court does not specify the correction required).

Negligence claims require servicers to owe borrowers a duty of care, to breach that duty of care, and for borrowers to show that the breach caused them harm. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty of care to borrowers. An exception applies, however, if a lender's activities extend beyond this relationship. Recently, the *Alvarez* decision has prompted many courts to find that a servicer who accepts a loan modification application from a borrower owes that borrower a duty of care to not mishandle the application. Some courts, including the *Alvarez* court, use the six-factor test from *Biakanja v. Irving*, 49 Cal. 2d 647 (1958), to analyze whether servicer offered to engage in modification negotiations in a manner that extended beyond the normal lender-borrower relationship. Here, borrower based his negligence claim mainly on servicer's dual tracking violations, alleging it was negligent for servicer to accept his application and then record an NTS and schedule a sale before giving him a determination. He also alleged servicer unnecessarily delayed processing his application. Applying the *Biakanja* factors, and citing *Alvarez*, the court found: 1) the loan modification process was intended to affect borrower, as it could potentially modify *his* loan; 2) it was foreseeable that borrower would be harmed by any delay or mishandling of his application; 3) servicer definitely knew 4) that a mishandling of the application would directly result in no modification for borrower and certain foreclosure; and 5) recent state and federal legislation speak to the growing policy concerns about dual tracking and negligently mishandling applications. The court found that these five factors weighed so heavily in establishing a duty of care that it did not view borrower's failure to address the sixth factor, servicer's moral blameworthiness, as a fatal oversight. The court also found borrower to have adequately pled damages resulting from servicer's breach of its duty. Specifically, borrower alleged servicer's delayed processing of his application "made it difficult for him to seek alternative assistance." Borrower did not plead, by comparison, that servicer's negligence directly led (or will lead) to the loss of his home. Borrower's negligence claim survived the MTD.

SPOC Claims: Rotating SPOCs are not a "Team," SPOCs Must Consider Borrowers for All Available FC Alternatives and Transfer to Supervisors upon Borrower Request; Interference with Prospective Economic Advantage Claim against Servicer; Duty of Care Found under *Alvarez*

Cortez v. Citimortgage Inc., 2014 WL 7150050 (C.D. Cal. Dec. 11, 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 "ensur[e] that a borrower is considered for all foreclosure prevention alternatives" and transfer a borrower to a supervisor upon request. Here, borrower alleged her original SPOC was unable or unwilling to provide her with information about her rejected TPP payment, stating only that servicer "'would never say why the payment was rejected.'" She also alleged she was assigned new SPOCs on multiple occasions. Notably, borrower did not allege that she was reassigned to "different members of a team which comprised her SPOC; she alleges that the SPOCs themselves changed." The court found this practice "prohibited by statute." Borrower also alleged, and servicer did not refute, that a SPOC told her she could not qualify for a modification, without evaluating her application, contrary to the SPOC duty to evaluate borrowers for all foreclosure alternatives. Finally, borrower alleged several SPOCs refused to transfer her to their supervisors as she repeatedly requested. The court found borrower to have stated several viable SPOC claims and denied servicer's MTD.

Interference with prospective economic advantage claims cannot be brought against the other party to the economic relationship. Instead, a borrower must show, *inter alia*, a valid economic relationship between themselves and a third party, not the defendant. Here, borrower alleged she had an economic relationship with the beneficiary of her loan, evidenced by her note and deed of trust. She further alleged that servicer improperly interfered with this economic relationship by improperly recording an NOD and NTS in violation of HBOR. Servicer argued it was merely furthering the beneficiary's interests and that its actions did not breach the mortgage contract. The court found several problems with this argument. First, acting as a servicer does not, by itself, insulate the servicer from liability for interfering with economic advantage involving the loan's beneficiary. Second, while it is true that an agent "cannot be liable for interfering with his principal's economic relations with third parties," the complaint (and apparently servicer) never alleged that servicer was the agent of beneficiary. And finally, a potential breach of the mortgage contract has nothing to do with borrower's economic advantage claim. The court therefore denied servicer's MTD borrower's interference with economic advantage claim.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Here, borrower alleged servicer negligently delayed processing her modification application, and violated HBOR's SPOC and dual tracking regulations during the application process. Consistent with the recent *Alvarez* decision, the court held that "once [servicer] had agreed to consider" the application, it owed borrower a duty of care not to mishandle it. The court denied servicer's MTD borrower's negligence claim.

UCL's "Unfair" Prong Analysis

Zuniga v. Bank of America, N.A., 2014 WL 7156403 (C.D. Cal. Dec. 9, 2014): There are three possible prongs within a UCL claim: unlawful, unfair, and fraudulent. California courts have devised three tests to evaluate allegedly "unfair" conduct. Some courts evaluate the conduct using a balancing test, weighing the borrower's harm against "the utility of the [servicer's] conduct." Other courts use a much narrower definition of "unfair," requiring borrowers to allege the conduct was "tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law." The final test subjects a servicer's conduct to a three-factor analysis: 1) was the borrower's injury substantial; 2) do benefits to consumers or competition outweigh the injury; and 3) would the injury have been avoided by other reasonable borrowers? Here, borrower alleged servicer verbally offered a modification but that no written documentation was forthcoming and servicer eventually foreclosed. A servicer representative also told her that the wrongful foreclosure would be reversed, but servicer eventually recorded a trustee's deed upon sale. This court adopted the three-factor analysis test and found borrower to have stated a viable unfair prong UCL claim. First, because servicer offered borrower a modification and foreclosed anyway, dual tracking her, borrower lost the *opportunity* to modify her mortgage and keep her house. Loss of a home and loss of potentially lower monthly mortgage payments are substantial injuries (and the basis for borrower's UCL standing). Second, the court determined that servicer's dual tracking provides absolutely no benefits to consumers or to competition. Third, other reasonable consumers could not have avoided borrower's injury: "While it is true [borrower] might be responsible for her default on the loan, once she was in default, she could not avoid [servicer's] practice of dual tracking." Further, servicer explicitly offered borrower a modification—borrower was reasonable to assume a modification would be forthcoming. All three factors met, the court denied servicer's MTD borrower's unfair UCL claim.

Dual Tracking: Document and Submit a "Material Change in Financial Circumstances" Pleading Requirements

Penaloza v. Select Portfolio Servicing, Inc., 2014 WL 6910334 (C.D. Cal. Dec. 8, 2014): Under HBOR, a servicer is not obligated to consider a borrower's modification application if it considered a previous application. If a borrower can show she "documented" and "submitted" a "material change in financial circumstances" to servicer, however, dual tracking protections can reignite and protect the borrower while that subsequent application is pending. CC § 2923.6(g). Here, borrower alleged several of her previous applications had been denied and she then submitted another application to her servicer, documenting an income increase of $5,500 per month and a $1,500 decrease in monthly expenses. Servicer refused to accept the application and recorded an NTS. After originally granting servicer's motion to dismiss borrower's dual tracking claim, but granting borrower leave to amend to address the document and submit requirements under CC 2923.6(g), the court now denied servicer's MTD, satisfied with borrower's pleading specificity.

RESPA's (Former) Qualified Written Request (QWR) Pleading Standards; "Pattern & Practice" Pleading Standards

Turner v. Ocwen Loan Servicing, 2014 WL 6886054 (S.D. Cal. Dec. 3, 2014): Prior to the CFPB's new servicing rules, effective January 10, 2014, RESPA required a servicer to provide a timely written response to a borrower's QWR. 12 U.S.C. § 2605(e). A borrower's QWR was sufficient and required servicer's response if it: 1) identified the borrower's name and account; and 2) stated the borrower's reasons for believing their account was in error, or asked for information and "provide[d] sufficient detail to the servicer regarding [the] information" sought. Here, borrowers submitted two QWRs after servicer failed to properly credit one of borrowers' forbearance payments and tacked on improper late fees. Even without attaching the actual QWRs, borrowers sufficiently pled that they identified borrowers' names and account number and articulated the reasons why borrowers believed their account was in error. The second QWR sufficiently, though sparsely, put servicer on notice of borrowers' claims. The court therefore denied servicer's motion to dismiss borrowers' RESPA claim based on insufficient pleading as to the existence of QWRs.

RESPA allows recovery of statutory damages up to $1,000 if a borrower can show servicer engaged in a "pattern or practice of noncompliance." Here, borrowers alleged servicer failed to adequately respond to *two* QWRs. The court found that these two separate incidents sufficiently demonstrated a "pattern or practice" of RESPA noncompliance and denied servicer's MTD.

Promissory Estoppel Claim Fails because TPP Ended Before Foreclosure; Banks Owe Borrowers No Duty to Foreclose Properly

Campos-Riedel v. JP Morgan Chase, 2014 WL 6835203 (E.D. Cal. Dec. 3, 2014):[43] Promissory estoppel (PE) claims require borrowers to allege a clear and unambiguous promise, reasonable and foreseeable reliance on that promise, and injury caused by their reliance. Here, borrower entered into a TPP agreement with servicer, wherein servicer

[43] Previously, the court granted servicer's motion to dismiss borrower's entire case, with leave to amend, as barred by res judicata with a previous unlawful detainer judgment against borrower. The court repeated its reasoning in this new motion to dismiss, as applied to borrower's amended negligence claim, and it not repeated here. See our summary in the Case Compendium under *Campos-Riedel v. JP Morgan Chase Bank*, 2013 WL 6070432 (E.D. Cal. Nov. 13, 2013).

promised that any pending sale would be postponed during the TPP period. More than two years after TPP commencement, servicer foreclosed on borrower's home. Borrower pled that the TPP was still in place, but servicer was able to demonstrate that by the TPP's own terms, it concluded three months after its initiation, long before the foreclosure sale. Accordingly, the court granted servicer's motion to dismiss borrower's PE claim.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Here, borrower alleged servicer owed her a duty to foreclose properly and that it breached that duty by sending the NOD and NTSs to her ex-husband, even though she had properly assumed the loan years before. The court found that even if these allegations were true, servicer's "involvement in the foreclosure process would not exceed the scope of its conventional role as a mere lender of money" and found no duty.

Tender Not Required if Foreclosure is Allegedly Void; TPP Related Claims: Good Faith and Fair Dealing, Promissory Estoppel, & Fraud

Blankenchip v. Citimortgage, Inc., 2014 WL 6835688 (E.D. Cal. Dec. 3, 2014): California law requires borrowers bringing wrongful foreclosure claims to tender the amount due on their loan. There are several exceptions to this rule, including when "the foreclosure is void, rather than voidable, such as when a [borrower] proves that the entity lacked the authority to foreclose on the property." Here, borrowers alleged servicer wrongfully foreclosed when borrowers were current with their Trial Period Plan (TPP) and while servicer was still reviewing borrowers for a permanent modification. The court agreed with borrowers that these allegations were unrelated to any improper foreclosure procedures, and anchored in an allegation that the entire sale was void, rather than voidable. The court therefore denied servicer's motion to dismiss based on borrowers' failure to tender.

The covenant of good faith and fair dealing is implied into every contact. Pleading a breach of the covenant requires borrowers to show they either performed under the contract at issue, or their performance was excused, and that servicer unfairly interfered with borrower's rights to see the benefits under the contract. Here, borrowers entered into a HAMP TPP agreement with servicer. The TPP language promised borrowers a permanent modification if they complied with the TPP, including making all timely payments. It also promised that servicer would not foreclose while the TPP was in place. Despite servicer refusing to offer borrowers a permanent modification after three successful payments, borrowers continued to make TPP payments. One week before the scheduled foreclosure sale, servicer sent borrowers a letter extending the deadline for submitting some extra paperwork required to remain in the TPP and to continue to be considered for a permanent modification. Borrowers alleged that servicer breached the express provisions of the TPP and acted in bad faith when it foreclosed: 1) while the TPP was still active and; 2) before the deadline to file the paperwork expired. Though servicer argued that borrowers did not make timely TPP payments, the court accepted borrowers' assertions as true and denied servicer's motion to dismiss their good faith and fair dealing claim.

Promissory estoppel (PE) claims require borrowers to allege a clear and unambiguous promise, reasonable and foreseeable reliance on that promise, and injury caused by their reliance. Here, borrowers alleged servicer promised not to foreclose during the TPP period. In reliance on this promise, borrowers agreed to the TPP instead of pursuing other foreclosure alternatives. The court found these allegations sufficient for a PE claim and denied servicer's motion to dismiss.

To state a valid fraud claim, borrowers must show, *inter alia*, that servicer intended not to perform its allegedly fraudulent promise or misstatement. Here, borrowers claimed servicer never intended to refrain from foreclosing during the TPP, as promised. Borrowers pointed to the foreclosure sale occurring only seven days after servicer gave borrows written notice that their filing deadline for additional documents had been extended for one month. Borrowers also pled more generally that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money before foreclosing. The court found borrowers' claims plausible and denied servicer's MTD.

Retaining Standing to Sue: Chapter 7 vs. Chapter 13 Bankruptcies; Scheduling and Refusing to Postpone Sale Constitutes "Conducting" a Sale under Dual Tracking; Dual Tracking Prohibition Applies to Resubmission of Old Application at Servicer's Request; Dual Tracking Satisfies "Unfair" Prong of UCL

Foronda v. Wells Fargo, 2014 WL 6706815 (N.D. Cal. Nov. 26, 2014): Chapter 7 bankruptcies require debtors "to relinquish possession of the estate to the trustee for liquidation and distribution to creditors." By contrast, a debtor going through a chapter 13 bankruptcy "remains in possession of the property of the estate and cures his indebtedness, under the supervision of the trustee, by way of regular payments to creditors from his earnings through a court approved payment plan." Chapter 7 debtors, then, are prohibited from bringing affirmative cases based on claims they possessed pre-bankruptcy: the debtor no longer "owns" those claims because the estate owns them. This question is a bit more unsettled for chapter 13 debtors, and the Ninth Circuit has not yet decided the issue. Here, borrower filed a chapter 13 bankruptcy on the morning of her scheduled foreclosure sale, halting the sale with the automatic stay. She then brought an affirmative suit against her servicer, which argued that the bankruptcy robbed borrower of the right to sue. This court disagreed with servicer. Though the Ninth Circuit has not yet decided the issue, every circuit that *has* addressed it has found that chapter 13 debtors "maintain standing . . . to prosecute a pre-petition non-bankruptcy cause of action on behalf of the bankruptcy estate." The court agreed with these other circuits, and lower courts within the Ninth Circuit, and denied servicer's motion to dismiss for lack of standing.

Dual tracking prevents a servicer from recording an NOD or NTS or "conduct[ing]" a foreclosure sale while a borrower's modification application is pending. Here, borrower alleged her modification application was wrongfully denied. Servicer requested that borrower resubmit this same application, which borrower did. While this re-submitted application was "under review," according to the servicer itself, servicer scheduled a foreclosure sale and then refused to postpone it. On the eve of sale, the trustee told borrower it had been directly "ordered" to go through with the sale by servicer. The court found this amounted to "conduct[ing] a trustee sale," as prohibited by statute. In so finding, the court rejected servicer's argument that the statute merely prohibits an actual sale. For support, the court cited quotes from HBOR's senate floor debate: dual tracking restrictions were enacted "to give a borrower a clear answer on an application before the servicer may *proceed with foreclosure*." Borrower clearly alleged that servicer was proceeding with foreclosure despite her pending application and the court declined to dismiss borrower's dual tracking claim.

Servicers need not comply with HBOR's dual tracking provisions if borrower was already evaluated for a modification. If, however, borrower submits documentation regarding a material change in financial circumstances, and submits another complete application, dual tracking protections are again activated to protect the borrower. Here, borrower alleged her modification application was wrongfully denied. Servicer requested that borrower resubmit this same application, which borrower did. While this *renewed* application was still pending, servicer scheduled a foreclosure sale and refused to postpone it. Notably, borrower did not "allege that [she] submitted a new loan modification application per se; rather, [she] claimed that [she] resubmitted the same application at [*servicer's*] request." The court then, found a viable dual tracking claim without invoking the "material change in financial circumstances" portion of HBOR's dual tracking statute. The court also rejected servicer's argument that its voluntary "request" for borrower's resubmitted application insulated it from dual tracking liability. Borrower's dual tracking claim survived the MTD.

The "unfair" prong of the UCL forbids business practices that "offend . . . an established public policy or [that] is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Here, borrower alleged servicer's dual tracking constituted an unfair practice under the UCL and the court agreed, without much analysis: "Since [borrower has] plausibly alleged that [servicer] engaged in dual tracking, the Court concludes that [borrower has] stated a claim under the UCL for an unfair business practice" (citing cases). The court denied servicer's MTD borrower's UCL claim, as it pertained her to viable dual tracking claim.

Servicers' Duty to Notify Borrowers of Servicing Transfer under RESPA: Non-borrowers May Not Bring RESPA Claims; Damages Calculation for Borrower without Title; Pre-Dodd-Frank HOLA Preemption of HBOR Claims

Aldana v. Bank of America, N.A., 2014 WL 6750276 (C.D. Cal. Nov. 26, 2014): RESPA requires both a transferor and a transferee servicer to provide borrowers with written notice of any servicing transfer. 12 U.S.C. § 2605. Only borrowers may assert RESPA causes of action and prevailing borrowers must show that servicer's violation caused them actual economic damages. Here, both the borrower on the loan and the non-borrower title-holder of the property asserted § 2605 claims against the transferor and transferee servicers. Specifically, the non-borrower made full mortgage payments to transferor servicer until that servicer returned a payment, explaining it no longer serviced the loan. Non-borrower then attempted to make the payment to transferee servicer. By the time transferee servicer received the payment, however, it had already invoked the loan's acceleration clause and plunged the loan into default. Foreclosure eventually followed. But for servicers' failure to timely notify borrower of the servicing transfer, non-borrower would have known about the change in servicing and made a timely payment to the new servicer, avoiding default and foreclosure. At the outset, the court found that the non-borrower, though she held title to the property, did not assume obligations under the loan and was not a third party beneficiary of the DOT. Therefore, she lacks standing to bring a RESPA claim and the court dismissed her cause of action. The court then found that even if servicers had violated § 2605 as it pertains to *borrower*, the violation did not cause borrower actual economic loss. She had transferred the property to non-borrower before these events transpired and was thus unaffected by the foreclosure. The court dismissed the RESPA cause of action with leave to amend, instructing borrower to explain how the foreclosure may have affected her.

The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings associations. HOLA and OTS regulations occupied the field, preempting any state law that regulated the "processing, origination, *servicing*, sale or purchase of, or investment or participation in, mortgages." The Dodd-Frank Wall Street Reform Act of 2010 dissolved the OTS and transferred its authority to the Office of the Comptroller of the Currency (OCC), explicitly replacing HOLA's field preemption with conflict preemption. Dodd-Frank is not retroactive, so "claims involving [mortgages] formed before July 21, 2010 are [still] subject to [field] preemption," while claims emanating from mortgages formed after that date are subject to conflict preemption. Because the instant mortgage originated pre-2010, and because the servicer in question here is a federal savings association, borrower's HBOR claims were preempted by HOLA as they deal with loan servicing.

Foreclosure Activity Based on Erroneous Default Amounts to Outrageous Behavior and Viable IIED Claim

Smith v. JP Morgan Chase, 2014 WL 6886030 (C.D. Cal. Nov. 26, 2014): To plead a viable intentional infliction of emotional distress

(IIED) claim, a borrower must show: 1) servicer's extreme and outrageous conduct, made with the intention of causing borrower's distress, or with "reckless disregard of the probability of causing" that distress;" 2) borrower's severe or extreme emotional distress; and 3) that servicer's activities directly or proximately caused that distress. Further, outrageous conduct must "be so extreme as to exceed all bounds of [what is] usually tolerated in a civilized community." Here, borrower made all her mortgage payments on time. Because of a mix-up during her refinance, however, servicer's systems placed borrower in default. Servicer gave borrower written acknowledgement stating the default was erroneous and assuring her it would resolve the issue. Inexplicably, servicer then initiated foreclosure proceedings and recorded an NOD without notifying borrower. After the NOD, servicer sent borrower another letter, again acknowledging the erroneous default and insisting that foreclosure had been "terminated." Servicer then served and recorded an NTS. Before the actual foreclosure sale could occur, borrower persuaded a family member to loan her almost $20,000 to reinstate the loan. This finally stopped the foreclosure. To cope with the stressful foreclosure proceedings, however, borrower required anti-anxiety and sleeping pills. The court found several of servicer's actions to amount to "outrageous" conduct. First, servicer threw borrower into default when she was current on her mortgage. Second, servicer *knew* and *admitted* that the default was in error and the foreclosure improper, and yet it continued down the foreclosure path, largely unbeknownst to borrower. Third, servicer forced borrower to pay $20,000, *which she did not owe*, to stop the wrongful foreclosure. The court distinguished this case from cases cited by servicer holding that "merely attempting to collect a debt" does not rise to outrageous conduct. Here, by contrast, borrower did *not* owe the debt servicer attempted to collect. Under these circumstances, servicer's conduct was outrageous, even if a foreclosure sale was never conducted. And because borrower alleged servicer knew and admitted the foreclosure was wrongful, and proceeded anyway, borrower adequately pled that servicer acted with "reckless disregard of the probability of causing [her] emotional distress." Her IIED claim survived.

Proprietary TPP: Breach of Contract and "Fraudulent" Prong UCL Claims

Nava v. JP Morgan Chase, 2014 WL 6886071 (C.D. Cal. Nov. 25, 2014): Breach of contract claims require borrowers to show the existence of an enforceable contract, borrower's performance, servicer's breach, and damages. Here, borrower alleged his proprietary TPP agreement (the opinion is not entirely clear on the type of TPP at issue, but notably does not refer to it as a HAMP TPP) required servicer to permanently modify his mortgage "so long as [borrower] had not defaulted during the [TPP] period." Specifically, borrower pointed to language in the TPP stating: "Defaulting on this [TPP] eliminates the opportunity for a modification of your loan terms." Further, borrower alleged the TPP prevented servicer from foreclosing "as long as [borrower] compl[ied] with the terms of the TPP." Predictably, servicer never offered a permanent modification and proceeded with foreclosure during the TPP. While the court found borrower to have adequately pled the elements of a contract claim, it noted in a footnote that it was disinclined to find that servicer owed borrower a permanent modification because he did not default during the TPP period. Rather, the TPP's language merely stated that borrower's TPP default "*eliminate[d] the opportunity* for a final loan modification." Nevertheless, borrower's contract claim survived.

To have UCL standing, borrowers must allege economic injury directly caused by the unfair business practice. Here, borrower alleged servicer unfairly refused to offer a permanent modification after entering into a TPP with borrower and after borrower successfully performed under the TPP. Further, servicer continued with foreclosure while borrower was current with the TPP, an act specifically prohibited by the TPP. Servicer argued borrower's default caused the foreclosure, not servicer's allegedly unfair practice of breaching a TPP agreement. The court disagreed and found the TPP determinative: "absent the TPP, [borrower] does not suggest that the foreclosure on his home would have been improper. However, by entering the TPP . . . [servicer] altered the status quo in such a way that breach of the TPP constitutes an arguable cause of [borrower's] injury." The court found that borrower alleged UCL standing and later found a viable fraudulent prong claim.

MINUTE ORDER

DATE: 12/12/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: K. Pratchen
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: R. Mays, J. Green

CASE NO: **34-2014-00156277-CU-OR-GDS** CASE INIT.DATE: 01/08/2014
CASE TITLE: **Troy Knutson, individually and as Successor in interest to David Knutson, deceased vs. Nationstar Mortgage LLC**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11845836
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Nationstar Mortgage LLC
CAUSAL DOCUMENT/DATE FILED: Demurrer to 2nd Amended Complaint, 10/06/2014

APPEARANCES

Gurinder Grewal, counsel, present telephonically for the Defendant.

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Nationstar Mortgage LLC's Demurrer to the 2nd Amended Complaint is ruled on as follows:

Defendants' request for judicial notice is granted. (See *Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-18; see also *Stratford Irrig. Dist. v. Empire Water Co*. (1941) 44 Cal.App.2d 61, 68 [recorded land documents, not contracts, are the subject of judicial notice on demurrer].) The court, however, does not accept the truth of any facts within the judicially noticed documents except to the extent such facts are beyond reasonable dispute. (See *Poseidon Devel*., 152 Cal.App.4th at 1117-18.) see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ("[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.")

This action arises out of a residential mortgage loan, Deed of Trust and loan modification applications for the residence located at 1520 Main Avenue, Sacramento, California 95838. The borrower on the loan was David Knutson, plaintiff's father.

Plaintiff alleges that the Notice of Trustee Sale which was set on January 15, 2013 has been continuously postponed for nearly a year due to continual unspecified loan modification procedures. Plaintiff alleges Nationstar sent a letter stating "Your loan modification request as of October 21, 2013 is still in referral status. We are still waiting for an approval from underwriting. Please continue follow-ups every other day for modification status up dates." In a letter dated November 5, 2013, a letter from Nationstar stated that the application for modification was denied. The letter was mailed to a post office box that had been closed for at least 10 years. (SAC 27, 28) Nationstar denied the loan modification on November 5, 2013 even though plaintiff alleges David Knutson had sufficient income to qualify. David

Knutson transferred the property by grant deed to himself and his son, Troy Knutson, as joint tenants, on November 16, 2013. David Knutson passed away on November 22, 2013. Plaintiff Troy Knutson alleges that his wife appealed the loan modification denial in January of 2014.

Plaintiff Troy Knutson alleges that all claims relating to the modification of the loan terms survive and inure to plaintiff as the successor owner of the property. Plaintiff also alleges that pursuant to HAMP the lender is required to accept a loan modification application from the non borrower current owner and evaluate it as if he was the borrower which defendant failed to performed as alleged in this FAC. (SAC ¶ 37)

Plaintiff alleges that he brings this action in his individual capacity **and** as successor in interest to his father, David Knutson, who was the borrower on the loan. Plaintiff alleges that his rights vis a vis Nationstar are as "joint tenant" owner and sole owner by right of survivorship. However it appears that plaintiff is also seeking to bring claims belonging to his deceased father as his father's successor in interest. In ruling on the demurrer to the FAC, the Court directed plaintiff to comply with CCP 377.32 if he was intending to pursue successor in interest claims. However, plaintiff has failed to file such declaration with the Court, and although his opposition states: 'Filed Concurrently herewith is Troy Knutson's CCP 377.32 declaration," the Court could not locate either a bench copy or the filed copy in CCMS.

1st cause of action Intentional Misrepresentation: Sustained **without** leave to amend for failure to state facts sufficient to constitute a cause of action.

Even if plaintiff had satisfied the successor requirements, plaintiff has not cured the defects noted in the prior ruling on demurrer and has stated no cause of action either on his own or David's behalf. He has not adequately alleged the elements of fraud. The elements of a claim for fraud are (l) misrepresentation of a material fact; (2) knowledge of falsity or lack of a reasonable ground for belief in the truth of the representation; (3) intent to induce reliance; (4) actual and justifiable reliance by the plaintiff; and (5) resulting damage. (*Orient Handel v. United States Fid. & Guar. Co*. (1987) 192 Cal.App.3d 684, 693.) It is hornbook law that fraud-based claims are subject to a stricter pleading standard then that governing most California causes of action. To advance a cognizable fraud claim, "every element of the cause of action . . . must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a fraud claim deficient in any material respect." (*Wilhelm v. Pray, Price,Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) The heightened particularity requirement necessitates pleading facts that "show how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) When fraud is alleged against a corporate defendant, the plaintiff must specifically allege the names of the persons who allegedly made the representation, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (*Tarmann v. State Farm Mutual Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) The only misrepresentations alleged in the cause of action is the misrepresentation, by an unnamed representative in a letter to David dated November 5, 2013, that the loan modification was denied due to the fact that David Knutson's income did not qualify for a modification. (FAC ¶ 43) However, it is unclear how plaintiff, as either an owner of the property or successor in interest to his father detrimentally relied on a statement that a loan modification was denied for an allegedly false reason when plaintiff knew the true facts at the time of the misrepresentation. The SAC alleges an additional misrepresentation on November 27, 2013, made to plaintiff's wife, concerning the denial being due to David's income. Plaintiffs allege that the true facts were that they **did** qualify for the loan (facts which they contend they knew already). No detrimental reliance is alleged. The SAC alleges that defendant intended to induce plaintiff to remain delinquent on their loan by telling them their loan modification was denied, and alternatively that they were induced to continue their attempts to obtain a loan modification. These allegations do not constitute detrimental reliance.

Plaintiffs have set forth no facts showing the defects can be cured.

2nd cause of action Breach of Contract: Sustained **without** leave to amend for failure to state facts sufficient to constitute a cause of action. The court previously ruled that Plaintiff had not alleged who the parties to the loan or modification agreement were, the terms of the contract(s) or facts to support a contract between Troy and Nationstar. The defects have not been cured. An action for breach of contract must set forth the terms of the contract verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) Alternatively, "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co* (2002) 29 Cal.4th 189, 198-199.) Here, Plaintiff has not alleged the terms of any oral or written contract between either he or David and Nationstar, or legal effect. Rather, this cause of action appears to allege breach of the HAMP guidelines. This is not a contract between Troy Knutson and Nationstar.

3rd cause of action Promissory Estoppel: Sustained **without** leave to amend for failure to state facts sufficient to constitute a cause of action. A cause of acfion for a promissory estoppel requires (1) a promise that is clear and unambiguous
in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance. (*US Ecology, Inc. v. State of Cal*. (2005) 129 Cal.App.4th 887, 901-02.) This cause of action, like the Fraud cause of action, fails for lack of specificity and absence of detrimental reliance.

4th cause of action Negligence: Sustained **with** leave to amend for failure to state facts sufficient to constitute a cause of action. Pursuant to *Biakanja v. Irving* (1958) 49 Cal.2d 647, Nationstar did not owe Troy Knutson a duty of care with respect to David Knutson's application for a loan modification. Here, under the first three factors, the transaction was not intended to benefit Troy Knutson because David Knutson was the applicant and borrower on the Loan, there was no foreseeability of harm to Troy Knutson because David Knutson was the applicant and borrower, and Troy Knutson did not suffer any injuries because he is not obligated to repay the Loan. (See, e.g., SAC H 21; SAC Ex. 10.) Under the fourth factor, the alleged conduct is not close to any harm suffered by Troy Knutson because Troy Knutson could not have even entered into a loan modification. He is not a party to the contract at issue, the Loan. (See SAC para.8.) Under the fifth factor, Plaintiff simply complains that Nationstar failed to provide a HAMP loan modification. (SAC 66.) However, under HAMP a servicer is not required to modify all loans. Finally, under the sixth factor, there is no public policy related to loss mitigation efforts by non-borrowers. The HBOR, for example, limits its protections to borrowers. (See, e.g., Civ. Code, § 2923.6.) Plaintiff is given leave to amend if he can alleged he is the successor to David.

5th cause of action Unfair Business Practices Business & Professions Code 17200: Overruled. Plaintiff alleges that defendant violated Civil Code sections §2923.6 (no dual tracking), 2923.7 (single point of contact) which could form a predicate for this cause of action. Defendant contends these sections apply only to borrowers. Plaintiff contends that HAMP applies to him because he contends that the HAMP guidebook for non-GSE loans provides that a non-borrower who inherits the property may be eligible for a HAMP modification. Defendant contends plaintiff has not alleged that he has a non-GSE loan, but the Court is not persuaded that this is a pleading requirement.

6th cause of action Violation of Civil Code section 2923.6 (Dual tracking) and 7th cause of action Violation of Civil Code section 2923.7 (single point of contact.): Overruled. Plaintiff alleges that defendant violated Civil Code sections §2923.6 (no dual tracking), 2923.7 (single point of contact). Defendant contends these sections apply only to borrowers. Plaintiff contends that HAMP applies to him because he contends that the HAMP guidebook for non-GSE loans provides that a non-borrower who inherits the property may be eligible for a HAMP modification. Defendant contends plaintiff has not alleged that he has a non-GSE loan, but the Court is not persuaded that this is a pleading requirement.

The Court rejects Nationstar's argument that no private right of action exists for violations of 2923.6 and 2923.7.

Defendant to Answer counts remaining on or before January 9, 2015.

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

COURT RULING

No appearance by or on the behalf of the Plaintiff. Defendant's counsel presented his case. After hearing oral argument the Court affirmed its tentative ruling with the following modification:

As to the 4th Cause of Action, Plaintiff to file his amended Complaint on or before 12/23/14 and the Defendant to file and serve his answer within 15 days or 20 days if mailed.