California Homeowner Bill of Rights COLLABORATIVE

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

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In this issue—

The HBOR Collaborative has created a chart comparing the servicing rules under the Consumer Financial Protection Bureau, California's Homeowner Bill of Rights, and the National Mortgage Settlement. It is attached to the end of the Newsletter, but also available on the HBOR Collaborative website.

Recent case summaries including important state cases: *Fonteno*, *Alvarez*, *Mendoza*, and *Yvanova*.

Too Many Choices: Navigating the Mortgage Servicing Maze

Constantly flipping through various code sections, official guidance, consent judgments exhibits, and toggling through 20-odd statutes online can be overwhelming and frustrating. And yet, advocates representing homeowners facing foreclosure must navigate at least three sources of law and regulations to effectively evaluate potential claims, develop pleadings, and negotiate with servicers. The HBOR Collaborative has therefore developed a comprehensive chart that compares these laws and regulations side by side. Ideally, this chart will clarify the CFPB mortgage servicing rules, HBOR, and the National Mortgage Settlement –and how these laws interact—and help California advocates more effectively (and quickly) employ these important tools on behalf of borrowers.

Sources of law & regulation

Created by the Dodd-Frank Act,[1] the Consumer Financial Protection Bureau's (CFPB) new mortgage servicing rules add to and amend the existing federal framework provided by the Real Estate

[1] Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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Settlement and Procedures Act (RESPA) and the Truth in Lending Act (TILA),[2] and became effective January 10, 2014. These are federal regulations and apply nationally. California's Homeowner Bill of Rights (HBOR), by comparison, is state law and only applicable to California residences. Finally, the chart includes the National Mortgage Settlement (NMS) servicing rules, which are not creatures of state or federal law, but derive instead from a court settlement between 49 state attorneys general and five of the country's largest mortgage servicers.[3] The chart cites to the exhibits attached to the consent judgments that came from this settlement.

Using this chart

Advocates should note several things before incorporating this chart into their practice. First, it is not exhaustive. In an effort to make these laws accessible and digestible, the chart only briefly describes the various code sections, statutes, and exhibit excerpts. Once oriented, advocates should refer to the cited provisions for greater context and accuracy. Further, the chart does not answer questions dealing with small servicers, under either the CFPB or HBOR definitions. And there are surely fact scenarios that this chart does not address: it covers the most common loss mitigation situations and problems. Second, the chart tracks a typical, nonjudicial foreclosure timeline, rather than following the circuitous ordering of rules prevalent in all three sources. It also begins with topics that will determine which law *can possibly* apply to a specific situation, including effective dates, entities regulated and property protected, and who can file suit. Advocates should work through the first two

[2] RESPA's implementing regulations are codified as "Regulation X," at 12 C.F.R. § 1024; TILA's implementing regulations are codified as "Regulation Z," at 12 C.F.R. § 1026.
[3] The U.S. Department of Justice, HUD, and state attorneys general filed claims against the five signatories (Ally/GMAC, Citigroup, Bank of America, JP Morgan Chase, and Wells Fargo) for deceptive and wrongful foreclosure practices. *See* Complaint at 21-39, United States v. Bank of Am., No. 1:12-cv-00361-RMC (D.D.C. Mar. 12, 2012), *available at* https://d9klfgibkcquc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf.

pages to determine if they even *have* a choice of law before moving on to more specific topics like appeal timelines.

Key concepts

This chart addresses the issues listed below (or at least points advocates in the right direction, depending on the fact-pattern at issue). But because these issues are so critical to mortgage servicing law, and arguably affect *any* fact-pattern subjected to chart analysis, we briefly note the most common and important topics:

Preemption

Even though the CFPB servicing rules are federal law, promulgated under RESPA and TILA, Congress tailored them specifically to coincide with existing and future state law and regulations. Very few of the CFPB rules, therefore, preempt *more protective* state laws (rules governing servicing transfers are the main exceptions), so advocates will generally be able to select whichever law is more tailored to their client's situation. In fact, as noted and cited in the chart, drafters referred particularly to HBOR and the NMS as bodies of law that may contain more borrower-friendly provisions, depending on a particular situation. Advocates should think of the CFPB rules as a protective floor, not a ceiling.

HBOR's NMS "Safe Harbor"

Relatedly, as advocates evaluate whether to cite HBOR or NMS rules (in a demand letter for example), they should note that HBOR is inapplicable in certain situations, for a somewhat unobvious reason. There is a "safe harbor" provision in HBOR, under CC 2924.12(g):

> A signatory to [the NMS] that is in compliance with the relevant terms of the Settlement . . . with respect to the borrower who brought an action pursuant to this section while the consent judgment is in effect shall have no liability for a violation of sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.

The "with respect to the borrower" language is important. First, advocates should analyze whether the servicer was compliant with the NMS, not generally, but as applied to the specific client in question. If servicer was noncompliant, then the safe harbor does not apply and servicer is susceptible to HBOR liability. If servicer was compliant with *every* aspect of the NMS as applied to the client,[4] then it escapes HBOR liability. Though some servicers have routinely argued borrowers must demonstrate servicer's NMS noncompliance to adequately plead HBOR claims, courts have rejected this argument. The safe harbor is an affirmative defense, to be proved by the servicer.[5] An easy way to forestall this argument, however, is to prepare to demonstrate servicer's NMS noncompliance from the beginning of the representation.

Private right of action

Advocates should constantly keep this issue in mind (the chart addresses it in the "Who can sue?" space). Borrowers have a private right of action to sue under both RESPA and HBOR. There are exceptions to the types of claims they can bring and which particular borrowers can sue (noted in the chart). Critically, borrowers have no private right of action to enforce NMS provisions.

Remedies

The CFPB rules only provide for damages under RESPA statutes.[6] Borrowers cannot use the CFPB rules to stop a foreclosure sale,[7] but injunctive relief *is* available under HBOR. On the other hand, a pre-

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[4] *See* Gilmore v. Wells Fargo Bank, N.A., 2014 WL 2538180 (N.D. Cal. June 5, 2014) (finding that servicer's failure to provide an online portal violated the NMS, opening servicer up to HBOR dual tracking liability).
[5] *Id.*; Bowman v. Wells Fargo Home Mortg., 2014 WL 1921829 (N.D. Cal. May 13, 2014); Rijhwani v. Wells Fargo Home Mortg., Inc., 2014 WL 890016 (N.D. Cal. Mar. 3, 2013).
[6] *See* 12 U.S.C. § 2605(f). Whether or not borrowers may recover damages against their servicers, as opposed to their creditors, under the applicable TILA statutes is unclear. *See* NCLC, *Truth in Lending*, § 11.6.9 (8th ed. and 2013 Supp.).
[7] *But see* HBOR Collaborative, *Litigating under the California Homeowner Bill of Rights*, section II.D (May 2014) (explaining the possible use of California's Unfair Competition Law to enforce CFPB rules).

foreclosure cause of action for damages is available under RESPA but unavailable under HBOR, which only allows for damages post-sale. Because there is no private right of action under the NMS, there are no remedies.

So which law is better?

Broadly speaking, HBOR provides greater dual tracking protections because borrowers have no deadline to submit their modification application: as long as servicer receives borrower's complete first lien loan modification application before a foreclosure sale, the servicer cannot move ahead with the sale while the application, or an appeal period, is "pending."[8] The CFPB rules provide complete dual tracking protections to borrowers who submit their application in their first 120 days of delinquency or before their loan is referred to foreclosure.[9] Post-NOD, however, CFPB protections depend on when a complete loan modification application is submitted. If a borrower submits an application more than 37 days pre-sale, a servicer cannot conduct the sale until making a determination on the application,[10] but only borrowers who submit their application 90 or more days pre-sale are entitled to an appeal of this decision.[11] By contrast, all borrowers (with large servicers)[12] receive an appeal opportunity under HBOR.[13] Borrowers who submit their application less than 37 days before a scheduled foreclosure sale receive no dual tracking protections from the CFPB rules.[14] The CFPB rules also provide that a "facially complete application," where a servicer later determines that more

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[8] CAL. CIV. CODE § 2923.6(c) (2013). Servicers may maintain policies of denying those applications, but they must comply with the denial and appeal timelines and procedures outlined in the dual tracking provisions.
[9] Servicers cannot even begin the foreclosure process in this case, until making a determination on borrower's application and allowing the 14-day appeal period to pass. 12 C.F.R. § 1024.41(f)(2) (effective Jan. 10, 2014).
[10] § 1024.41(g) (effective Jan. 10, 2014).
[11] § 1024.41(h) (effective Jan. 10, 2014).
[12] Borrowers with small servicers do not receive an appeal period. *See* CAL. CIV. CODE § 2924.18 (2013).
[13] *See* § 2923.6(d) (2013). Under the CFPB rules, borrowers who do receive an appeal opportunity have only 14 days to appeal. 12 C.F.R. § 1024.41(h)(2) (effective Jan. 10, 2014). California borrowers have 30 days to appeal a denial. CAL. CIV. CODE § 2923.6(d) (2013).
[14] *See* 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).

information or clarification is necessary, must be treated as "complete" as of the date that it was facially complete.[15] HBOR does not contain such distinctions and leaves the "completeness" of an application up to the servicer and to the courts.[16] Under HBOR, a borrower may submit more than one application, and gain dual tracking protection, if they can "document" and "submit" a material change in financial circumstances to their servicer.[17] The CFPB rules only grant dual tracking protections to one application, making no exceptions for a change in financial circumstances.

On pre-foreclosure outreach, the CFPB rules may be slightly more borrower-friendly. RESPA established an absolute freeze on initiating foreclosure activity: servicers must wait for borrowers to become more than 120 days delinquent before recording the notice of default.[18] HBOR, by contrast, only prevents servicers from recording a notice of default for 30 days after servicer made (or attempted to make) contact with a delinquent borrower.[19] HBOR specifies that pre-NOD contact be made "in person or by telephone," to discuss foreclosure alternatives,[20] but the CFPB requires two separate forms of contact. First, a servicer must make (or attempt) "live contact" with a borrower by their 36th day of delinquency.[21] Next, by the borrower's 45th day of delinquency, a servicer must make (or attempt) written contact with borrower.[22] Notably, HBOR requires a post-NOD notice,[23] where the CFPB does not. While most California foreclosures are non-judicial, the CFPB rules also apply to judicial foreclosures in California, while HBOR does not.

A significant drawback of the NMS the absence of a private right of action. Citing violations may be helpful in terms of demand letters, but

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[15] § 1024.41(c)(2)(iv) (effective Jan. 10, 2014).
[16] *See* CAL. CIV. CODE § 2923.6(h).
[17] *See* § 2923.6(g).
[18] 12 C.F.R. § 1024.41(f) (effective Jan. 10, 2014).
[19] CAL. CIV. CODE §§ 2923.5, 2923.55 (2013).
[20] § 2923.55(b)(2) (2013). Servicers must also send written notice that a borrower may request certain documents, but that notice need not explain foreclosure alternatives. § 2923.55(b)(1) (2014).
[21] 12 C.F.R. § 1024.39(a) (effective Jan. 10, 2014).
[22] § 1024.39(b) (effective Jan. 10, 2014).
[23] CAL. CIV. CODE § 2924.9 (2013). The notice is only required if the borrower has not yet "exhausted" modification attempts. *Id.*

the NMS rules will not aid advocates bringing causes of action. The chart includes these rules mainly to give advocates the opportunity to assess potential HBOR liability for NMS signatories that want to take advantage of the safe harbor.

Summaries of Recent Cases

Published State Cases

FHA Loans: Borrowers May Bring Post-Sale, Equitable Claims on Breach of Contract Theory; Inequitable Exception to Tender Rule; Foreclosing is not "Debt Collection" under FDCPA

Fonteno v. Wells Fargo Bank, __ Cal. App. 4th __, 2014 WL 4058867 (Aug. 18, 2014): Deeds of trust in FHA-insured mortgages incorporate by reference HUD servicing requirements servicers must comply with *before* initiating foreclosure. One of those requirements is a face-to-face meeting between borrower and servicer. Without this meeting (or attempt to make contact) the lender is prevented from initiating foreclosure proceedings. 24 C.F.R. § 203.604. In *Pfeifer v. Countrywide Home Loans*, 211 Cal. App. 4th 1250 (2012), the Court of Appeal held borrowers may use violations of FHA requirements defensively to bring equitable, pre-foreclosure claims. Here, borrowers brought equitable claims to unwind a *completed* foreclosure sale based on servicer's failure to comply with the face-to-face meeting requirement and resulting DOT breach. The Court of Appeal extended its holding in *Pfeifer* (or "clarif[ied]" it) to apply to all equitable claims, both pre- and post-foreclosure, as opposed to claims for damages. Borrowers, then, may use FHA violations defensively, as a shield to prevent *or unwind* a foreclosure sale; they may not use FHA violations affirmatively, as a sword to recover damages.

Borrowers bringing equitable claims to prevent or unwind foreclosure sales must tender the amount due on their loan. There are several exceptions to this rule, including where the allegations, if true, would render the foreclosure sale void (as opposed to voidable), or when it would be inequitable to require tender. Here, the court did not reach the question of whether this foreclosure was potentially void or voidable, focusing instead on the inequitable exception. As the court held in *Pfeifer*, it would be inequitable to require tender where the circumstances being litigated—servicer's failure to provide a face-to-

face meeting to discuss foreclosure alternatives—show that borrowers are unable to tender the amount due on their loan. They would not need the face-to-face meeting otherwise. "To require [borrowers] not to make . . . tender in order to obtain cancellation of a sale allegedly conducted in disregard of this [meeting] condition precedent and without any legal authority is inequitable under the circumstances." The Court of Appeal reversed the trial court's grant of servicer's demurrer to borrower's wrongful foreclosure and quiet title causes of action.

The FDCPA defines "debt collector" as: 1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts;" 2) or any person "who regularly collects or attempts to collect, directly or indirectly, debts owed . . . or due another." This Court previously held (in *Pfeifer*) that the act of foreclosure, alone, does not constitute "debt collection" under the FDCPA. Here, borrowers alleged the foreclosing trustee was a "debt collector" because its "principal business" was the collection of debt through nonjudicial foreclosure. Additionally, trustee's NOD indicated it "*may* be acting as a Debt Collector attempting to collect a debt." The Court of Appeal allowed that this statement contemplates the *possibility* trustee was a debt collector, but refused to characterize trustee as such without allegations that trustee did more than conduct a nonjudicial foreclosure (like attempt to collect mortgage payments). That trustee served borrowers this NOD before being properly substituted in as trustee bears no weight on its status (or non-status) as a "debt collector" under the FDCPA. The court affirmed the trial court's grant of trustee's demurrer to borrowers' FDCPA claim.

Negligence: Servicer Owes Borrower a Duty of Care if Servicer Chooses to Undertake Loan Modification Process

Alvarez v. BAC Home Loans Servicing, 228 Cal. App. 4th 941 (2014): Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical

lender-borrower relationship. Many courts use the *Biankaja* test to determine whether a duty of care existed between a financial institution and borrower. Here, servicer agreed to consider borrower's loan modification application. Servicer did not review the application in a timely manner, or use the proper income information provided by borrowers. While still reviewing the application, servicer foreclosed on borrower's property. The Court of Appeal found the six *Biankaja* factors met. Servicer's agreement to review the application was "intended to affect the [borrowers]," for it would impact their ability to keep their homes. Second, it was foreseeable that servicer's bungling of the application could significantly harm borrowers. Third, injury was certain: while a loan modification was not guaranteed, borrowers lost the *opportunity* to modify and the house was sold, resulting in damaged credit, costs associated with trying to prevent foreclosure, and increased tax liability. Fourth, there was a close connection between servicer's negligent handling of the application and the harm incurred—but for the negligence, borrowers *could* have qualified for a modification. "Should [borrowers] fail to prove that they *would* have obtained a loan modification absent [servicer's] negligence, damages will be affected accordingly, but not necessarily eliminated." Fifth, borrowers' "lack of bargaining power" in the servicing process, "coupled with conflicts of interest that exist in the modern loan servicing industry," impose a duty of care on servicers, who exercise complete control over the modification process and may be financially incentivized to mishandle it. Servicer's dual tracking, a practice now prohibited, also increases its moral blameworthiness. Finally, public policy is served in preventing future dual tracking. The court notes that while HBOR was not effective during servicer's alleged negligence, its passage "sets forth policy considerations" that contribute to a duty of care (quoting *Jolley*). Having found all six *Biankaja* factors fulfilled, the court reversed the trial court's grant of servicer's demurrer to borrowers' negligence claim. Importantly, the court noted servicers are under no duty to modify a loan or to engage in the modification process. Once they *agree* to engage in that process, however, a duty of care arises.

Rejection of *Glaski*; Prejudice Required in Wrongful Foreclosure Claims; Defaulting Borrowers Lack Standing to Pursue Robo-Signing Claims

Mendoza v. JP Morgan Chase Bank, N.A., 228 Cal. App. 4th 1020 (2014): In general, California borrowers lack standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower claims her loan was improperly assigned to a trust (securitized) because servicer attempted the assignment after the trust had already closed, violating the trust's own PSA. The court considered *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a recent California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on a similar PSA violation and New York trust law. This court disagreed with *Glaski's* standing analysis: "[w]e can find no state or federal cases to support the *Glaski* analysis and will follow the federal lead in rejecting this minority holding." Even if the loan was actually assigned to the trust late, in violation of the PSA, and *even if borrower presented specific evidence demonstrating this violation*, nothing in California's nonjudicial foreclosure statutory framework allows a borrower to challenge a foreclosure based on a "glitch in an attempted securitization." The securitization of borrower's loan — botched or not—"did not deprive the beneficiary of the deed of trust of the legal right to foreclose."

To state a valid wrongful foreclosure claim, a borrower must show that the problems in the foreclosure process that made it "wrongful" prejudiced borrower in some way, specifically, in their ability to pay their mortgage. A borrower can also demonstrate prejudice by showing "that the original lender would not have foreclosed under the circumstances." If the proper party *could* have foreclosed, in other words, the borrower cannot sue the improper party who *actually* foreclosed, if foreclosure was warranted because of borrower's default. And simply pointing to irregularities in the foreclosure process does not allege prejudice. Here, borrower alleged the failed assignment to the trust voided the assignment, robbing the foreclosing party of the authority to foreclose and rendering the foreclosure itself void. This

fails to allege prejudice. Borrower defaulted on her loan and did not demonstrate how the voided assignment prevented her from paying her mortgage. Notably, the *Glaski* court did not address prejudice at all. The Court of Appeal affirmed the trial court's grant of servicer's demurrer and published its decision.

Many federal cases have held: "where a [borrower] alleges that a document is void due to robo-signing, yet does not contest the validity of the underlying debt, and is not a party to the assignment, the [borrower] does not have standing to contest the alleged fraudulent transfer." Here, borrowers alleged that two assignments of their loan were robo-signed by employees who either did not work for the entity listed in the assignment, or who held different titles than those listed in the assignment. The Court of Appeal agreed with the lower court and the many federal courts that have found robo-signing claims unavailing. First, borrowers did not allege that the employees *actually lacked* authorization to sign the assignments. Second, borrowers made no allegations that the financial institutions in question did not eventually ratify their employee's (or their non-employee's) signatures. Most critically, as non-parties to the assignments, borrowers lack standing to challenge the propriety of those assignments. Finally, borrowers have not alleged how any robo-signing, even if true, affected their ability to pay their mortgage. The robo-signing did not harm them in any way. The Court of Appeal granted servicer's demurrer on borrowers' robo-signing claim; this constitutes the first published Court of Appeal opinion on this issue.

Unpublished & Trial Court Decisions[24]

California Supreme Court Grants Review of *Yvanova*

Yvanova v. New Century Mortg., 226 Cal. App. 4th 495 (2014), *depublished and review granted*, __ P.3d __, 2014 WL 4233383 (Cal.

[24] 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.

Aug. 27, 2014) (No. S218973). In general, California borrowers do not have standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower cited *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on PSA violations and New York trust law. Borrower alleged that the assignment to the trust and the substitution of trustee were both backdated, in violation of trust rules, and therefore void. The Court of Appeal affirmed the trial court's grant of defendants' demurrer, explicitly rejecting *Glaski*. Without really analyzing *Glaski*, the court chose to follow *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497 (2013), a pre-*Glaski* case that denied borrower standing to challenge the PSA. Following *Jenkins*, the Court of Appeal reasoned that botched assignments or substitutions are not the borrower's problem: they do not affect the borrower's obligation to pay their mortgage. If any entity is harmed and deserves a chance to challenge a PSA, it would be the "true" owner of the loan, who *should have* had the right to foreclose, but was deprived of it by the improper assignment. The Court of Appeal opinion was published, but the California Supreme Court recently granted borrower's petition for review, asking: "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?" The grant of review supersedes the Court of Appeal opinion, which is no longer published or citable.

Servicer Denies Permanent FHA-HAMP Mod Based on Borrower's Failure to Obtain HUD Signature: Valid Breach of Contract, UCL Claims

Mikesell v. Wells Fargo Bank N.A., No. 34-2014-00160603-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 21, 2014): Promissory estoppel claims can substitute for breach of contract claims in certain circumstances, when consideration is absent. Here, servicer offered borrowers a FHA-HAMP TPP agreement and accepted borrowers'

timely payments. At the conclusion of the TPP period, servicer demanded borrowers obtain a HUD signature to a Subordination Agreement. HUD, in turn, would only sign if the agreement came directly from servicer. Without HUD's signature, servicer never permanently modified borrowers' loan. Borrowers brought both breach of contract and promissory estoppel claims based on these facts. Because the TPP amounted to a bargained for exchange—an agreement to permanently modify in exchange for borrowers' compliance and TPP payments—it must be pled as a breach of contract claim. The court granted servicer's demurrer to the promissory estoppel claim; servicer did not demurrer to borrowers' contract claim.

Under California's Unfair Competition Law (UCL), a plaintiff must demonstrate an injury in fact (lost money or property) caused by the unfair competition. Here, borrowers alleged servicer's TPP offer, (and their acceptance) led to their continued payment (the TPP installments) which they would not have otherwise made. This continuation of the modification process resulted in "overcharges and penalties" that would not have accrued without the TPP. This constitutes injury in fact and grants borrowers UCL standing.

Borrower Defeats Summary Judgment Motion: Document Submission Requirements in HAMP TPPs

Neep v. Bank of Am., N.A., No. 34-2013-00152543-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 18, 2014): Under the federal HAMP program, borrowers who successfully complete Trial Period Plans (TPPs) must receive a permanent modification offer from their servicer. Successful TPP completion requires a borrower to make timely, modified mortgage payments, but also to submit all documents requested by their servicer. Here, borrower completed his TPP but servicer refused to permanently modify his loan citing borrower's failure to provide requested tax information. Specifically, servicer sent borrower notices that he must submit tax information "IF [borrower] was self-employed." Borrower repeatedly told servicer that he was not self-employed but servicer continued to request the unnecessary tax

documentation. Servicer moved for summary judgment and adjudication, arguing borrower's failure to submit the required documentation was undisputed. The court, however, distinguished between a failure to submit documentation, and whether those documents were *actually missing* from borrower's application. A servicer representative submitted a declaration asserting servicer mailed borrower letters requesting the tax information. But servicer presented no evidence that any documentation was actually missing from borrower's file. It therefore failed to show that borrower had not complied with TPP requirements. Additionally, even if servicer had supplied admissible evidence on this point, borrower presented evidence to the contrary, asserting that this documentation was not required and that he complied with all TPP requirements. Triable issues of material fact are inappropriate for summary judgment, so the court denied servicer's motion.

Viable Deceit Claim; Duty of Care Standard under *Lueras*; Promise & Damages under PE Claim; Transferee Liability; Pre-NOD Outreach Claim

Schubert v. Bank of Am., N.A., No. 34-2013-00148898-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 11, 2014): Deceit (a type of common law fraud) requires: 1) misrepresentation; 2) knowledge of falsity; 3) intent to defraud; 4) justifiable reliance; and 5) causal damages. Here, borrowers alleged their SPOC misrepresented that the impending foreclosure sale could not be postponed within five days of its scheduled date. The SPOC knew, however, that the sale could be postponed at any time, as it eventually was. Borrowers further pled this misrepresentation was made to induce borrowers not to fight the seemingly inevitable sale, thereby allowing servicer to sell their home during their loan modification review. The court found this a valid deceit claim and denied servicer's demurrer.

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

Lueras v. BAC Home Loan Servicing, however, servicers do owe a duty "to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale." Here, borrowers alleged servicer misrepresented that a pending foreclosure sale could not be postponed, and then postponed it. Borrowers' damages included ruined credit, extra penalties and fees, arrearages that would not have accrued if borrowers had more aggressively pursued their short sale, and the time and expense associated with pursuing a modification. The court found these allegations sufficient to state a "negligence/negligent misrepresentation" claim. That borrower's damaged credit resulted from their bankruptcy, and not servicer's misrepresentation, does not discount borrower's other alleged damages. The court allowed the claim to survive.

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 that if they halted their short sale efforts and instead entered into loan modification negotiations, they could continue to pursue a short sale if the modification was denied. Servicer subsequently denied borrower's modification and refused to allow borrowers to conduct a short sale. Servicer argued that because borrowers had failed to allege their short sale proposal would have been *approved*, they failed to state a valid PE claim. That, however, was not the promise at issue. Rather, servicer promised, and ultimately failed to allow, borrowers to even *pursue* a short sale. The court found servicer made a clear promise, which it then breached. Additionally, the court found sufficiently pled damages. Again, servicer misstated the actual damages borrowers sought, which were accrued fees and penalties resulting from a prolonged foreclosure process, which would have been truncated, had borrowers been allowed to short sell their home. Servicer incorrectly argued that damages from a short sale are "too speculative," and that because short sales by definition admit zero equity, damages are unavailable. Servicer's demurrer to borrower's PE claim was denied.

Servicing rights are often transferred from one servicer to another, without input or approval from borrowers. Servicers, however, are mere agents of the loan's beneficiary. Here, borrowers' loan was originally serviced by Bank of America, which promised to allow short sale negotiations if borrowers' modification fell through. Bank of America subsequently sold its servicing rights to Nationstar, which did not rectify Bank of America's failure to adhere to its promise. Borrowers therefore brought their PE claim (above) against both Bank of America and Nationstar. Borrowers convinced the court that Nationstar was equally liable for Bank of America's promise: "'although [BOA] is no longer the purported servicer of the Loan, [BOA] acted on behalf of Beneficiary and Beneficiary is responsible for the promises made by [BOA]. As such, enforcement of the promise can be demanded against Nationstar, the new . . . servicer.'" Nationstar, in other words, bought not just Bank of America's servicing rights, but its liabilities. The court rejected Nationstar's demurrer to borrowers' PE claim.

Servicers must contact (or diligently attempt to contact) borrowers at least 30 days before recording an NOD to assess the borrowers' financial situation and explore foreclosure alternatives. Here, borrowers alleged servicer failed to contact them to discuss foreclosure alternatives at least 30 days before the NOD was recorded. Borrowers, though, admittedly submitted a modification application before servicer recorded the NOD. Servicer even requested follow-up documentation to this application. The court found this contact insufficient to defeat borrowers' claim: while servicer may have contacted borrowers prior to recording the NOD, it allegedly failed to discuss the exact topics required by the pre-NOD outreach statute. Defendant's demurrer was overruled.

"Complete" Mod Application & Duplicative Document Requests

Velez v. JP Morgan Chase Bank, N.A., No. 34-2013-00149821-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014): Servicers may not move forward with foreclosure while a borrower's complete,

first lien loan modification is pending. An "application shall be deemed 'complete' 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." CC § 2923.6(h). Here, borrower alleged he submitted several complete applications, and each time, servicer would request duplicative documents. Servicer then recorded an NTS while at least one of these complete applications was still pending. One day later, servicer solicited *another* application from borrower, claiming that, because *this* application was not complete until weeks later, when borrower submitted additional documents, a complete application was not pending when servicer recorded the NTS. The court rejected this argument. Borrower clearly alleged he had submitted at least one complete application which was still pending prior to servicer's recording of the NTS. Servicer's claim that borrower's pre-NTS applications were incomplete is contested by borrower, who alleges servicer merely requested duplicative information. "Whether the application was *actually* complete within the meaning of the statutes is a factual question no appropriately resolved on demurrer." The court denied servicer's demurrer.

Federal Cases

California's Four-Year SOL Barred Proof of Claim Despite Note's Election of Ohio Law

***In re* Sterba**, __ B.R. __, 2014 WL 4219481 (B.A.P. 9th Cir. Aug. 27, 2014): In bankruptcy proceedings, federal choice of law rules apply rather than state law rules. Here, debtors defaulted on their mortgage loans in 2008, and the senior lienholder completed a nonjudicial foreclosure in 2009, wiping out the junior lien, a second mortgage on debtor's California property, but made by an Ohio-based bank. The debtors filed their bankruptcy in 2013, and the junior lienholder filed a proof of claim in April 2013. The debtors objected, arguing that California's four-year statute of limitations barred the claim. Applying California choice of law rules, the bankruptcy court overruled the

objection on the ground that Ohio's six-year statute of limitation applied because California choice of law rules honors the election of Ohio law in the Note. The Bankruptcy Appellate Panel disagreed, holding that the bankruptcy court erred in applying California choice of law rules rather than federal choice of law rules. Under federal choice of law rules, a standard, contractual, choice of law provision does not cover choice of law questions involving statutes of limitations: SOLs are procedural in nature and therefore controlled by the forum state's laws. Here, that meant California's four-year statute of limitations controlled and the court reversed the bankruptcy court's order overruling debtor's objection to the junior lienholder's proof of claim.

Loan Origination & Servicing Claims: Delayed Discovery Rule, Fraud & Negligent Misrepresentation, Breach of Covenant of Good Faith and Fair Dealing, Pre-NOD Outreach

Castillo v. Bank of Am., 2014 WL 4290703 (N.D. Cal. Aug. 29, 2014): All claims must be filed within each claim's statute of limitation, unless the plaintiff adequately alleges delayed discovery of the facts constituting the claim. Here, borrower brought many common law and contract based claims rooted in loan origination conduct, all of which occurred eight years before borrower brought suit and well outside the SOL for any of his claims. Basically, he alleged he was fraudulently induced into entering a higher cost loan by lender's representative, who misstated borrower's income and misrepresented Association of Community Organization for Reform Now (ACORN's) down payment assistance. The court agreed with borrower that the SOLs tolled because of the delayed discovery rule. First, borrower adequately alleged he never received the loan documents, despite requesting them from the lender multiple times. Second, the loan documents were not in borrower's native language. Third, servicer only provided borrower with payment coupons (as opposed to mortgage statements) that did not disclose the loan balance. The court held that borrower had adequately shown that, "despite his reasonably diligent efforts to discover" problems with the loan, those problems only became

apparent when he received the NOD. The court refused to dismiss borrower's claims based on servicer's SOL argument.

To plead a cause of action for fraud, borrowers must allege: 1) misrepresentation of a material fact; 2) knowledge of falsity (or scienter); 3) intent to defraud; 4) justifiable reliance on the misrepresentation; and 5) resulting damage. A negligent misrepresentation claim requires the same elements, except that the statement need only be made "without reasonable grounds for believing it to be true," rather than knowledge of its falsity. Here, borrower alleged lender's representative fraudulently inflated borrower's income and misstated ACORN's coverage of three-percent of borrower's down payment in order to qualify borrower for his loan. The court found borrower's allegations an adequately pled fraud claim. Borrower's allegation that lender promised not to report borrower's missing payments to credit reporting agencies during modification negotiations –and lender's subsequent reporting of those missing payments—also stated valid fraud and misrepresentation claims. Borrower sufficiently alleged he justifiably relied of lender's assurances during the origination process because the loan documents were not in his native language, he was rushed and pressured into signing them, and because lender never provided him copies despite repeated requests. In addition, allegations of ruined credit, overcharges and fees, attorneys' fees and costs, and initiation of foreclosure proceedings sufficiently satisfy the damages element. The court denied servicer's motion to dismiss borrower's fraud and negligent misrepresentation claims.

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 unfair interference with borrower's right to receive the benefits of the contract; and 4) damages caused by servicer's breach. Here, borrower alleged servicer interfered with his ability to realize benefits under the DOT by representing that if borrower missed mortgage payments, this would "assist" him in the

modification process. Servicer interfered with borrower's ability to pay his loan, in other words. The court agreed and found these allegations sufficient to state a claim for breach of the covenant of good faith and fair dealing.

Servicers may not file an NOD until 30 days after contacting the borrower in person or by telephone to assess the borrower's financial situation and explore foreclosure alternatives. Among other things, servicers must inform borrowers of their right to request a face-to-face meeting with a servicer representative. CC § 2923.55. Here, servicer argued borrower's multiple meetings with servicer representatives discussing his modification eligibility met servicer's pre-NOD outreach obligations. The court disagreed, citing borrower's allegations that servicer did not contact him at least 30 days before recording the NOD and failed to inform him of his meeting rights. Borrower also disputed that the conversations explored foreclosure alternatives. The court denied servicer's motion to dismiss.

Breach of DOT: Servicer Failed to Provide Pre-Acceleration Notice

Contreras v. JP Morgan Chase, 2014 WL 4247732 (C.D. Cal. Aug. 28, 2014): Breach of contract claims require borrowers to show the existence of an enforceable contract, borrower's performance or excused non-performance, servicer's breach, and damages. Here, borrower alleged servicer breached borrower's DOT, which required the lender to provide written notice to the borrower of the following, before accelerating the loan:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

Borrower received no such pre-acceleration notice before servicer accelerated the loan and began foreclosure proceedings. Servicer argued borrower's own non-performance (defaulting on his loan) defeated his breach of contract claim. The court rejected this argument, stating that "default alone [did] not excuse [servicer's] obligation to mail the required notices. To find otherwise would be an unjust result as 'any default by a [borrower] would allow the . . . [lender] to foreclose without any notice to the [borrower] regardless of the foreclosure procedures delineated in the mortgage documents.'" Further, the DOT itself imposes these notice requirements on the lender precisely in cases when the borrower is in default. The court denied servicer's MTD borrower's breach of contact claim.

Reinstatement Claim Requires Payment of Arrearages; Specific Allegation of Timely Modification Submission Not Required to State CC 2923.6 Claim; Servicer Owes Duty of Care to Process Completed Loan Modification Application

Penermon v. Wells Fargo Home Mortg., 2014 WL 4273268 (N.D. Cal. Aug. 28, 2014):[25] California nonjudicial foreclosure procedures dictate how borrowers may reinstate their loans and avoid foreclosure. CC 2924c governs this process and requires servicers to list the correct arrearage amount on the NOD, so borrowers know exactly how much they need to pay to reinstate their loan. Here, borrower alleged servicer misstated the amount due in the NOD, interfering with her ability to reinstate and violating CC 2924c. The court found that to bring such a claim, borrower must pay the *arrearage*, which differs from requiring her to tender the full balance of the loan. Because borrower did not allege her ability to pay the arrearage, the court dismissed her claim. It allowed, however, that these allegations should

[25] This case was originally summarized in the July 2014 Newsletter as *Penermon v. Wells Fargo Bank, N.A.*, __ F. Supp. 2d __, 2014 WL 2754596 (N.D. Cal. June 11, 2014). There, the court held that a national bank cannot invoke HOLA preemption to defend its own conduct, that borrower stated a valid CC 2924.17 claim, granted borrower leave to amend her dual tracking claim to allege a "complete" application, and denied servicer's MTD borrower's SPOC claim.

be asserted as part of borrower's CC 2924.17 claim, which requires servicers to ensure the accuracy of defaults before recording NODs.

A servicer may not move forward with the foreclosure process while borrower's first lien loan modification application is pending. HBOR does not specify a deadline, allowing borrowers to submit complete applications at any point before a sale and receive dual tracking protection. Here, borrower alleged she submitted her complete application "in or around April 2013," less than one month after receiving a list of missing documents from servicer. Servicer argued borrower's dual tracking claim fails because she did not specifically plead a submission date or whether her submission met servicer's internal deadline. The court disagreed and found borrower's allegation that she submitted a complete application within one month servicer's document request sufficient. The court denied servicer's MTD borrower's CC 2923.6 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 elected to engage in modification negotiations with her. Consistent with the recent *Alvarez* decision summarized earlier in the newsletter, the court held that "once [servicer] provided [borrower] with the loan modification application and asked her to submit supporting documentation, it owed her a duty to process the completed application once it was submitted." The court denied servicer's MTD borrower's negligence claim.

Limits of FCRA Preemption; Valid Contract Claims Based on Permanent Mod; Valid Negligent Misrepresentation Claim Based on *Biankaja* Factors

Desser v. US Bank, 2014 WL 4258344 (C.D. Cal. Aug. 27, 2014): The Fair Credit Reporting Act (FCRA) governs what "furnishers" of credit information, including servicers, may report to credit rating agencies (CRAs). "No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated

under [the section paraphrased above] . . . relating to the responsibilities of persons who furnish information to consumer reporting agencies." State claims, both statutory and common law, that seek damages related to a servicer's furnishing of information to CRAs, then, are preempted by the FCRA. Here, borrower alleged servicer improperly reported her delinquency to CRAs while her permanent modification was in place. Borrower had a pending employment offer withdrawn when her prospective employer learned of her negative credit report. As part of her negligent and fraudulent misrepresentation claims, borrower alleged this lost employment opportunity among her damages, which also included wrongfully accrued interest, late charges, and the prospect of foreclosure. The court agreed with servicer that, to the extent borrower's tort claims sought damages related to her lost employment opportunity, those claims are preempted by the FCRA. They are not preempted, however, as they relate to the other asserted damages, which were unrelated to credit reporting. Borrower's breach of contract claims are also unaffected by FCRA preemption, which only prohibits claims brought under "legal duties 'imposed under the laws of any State,'" not under contractual duties. Borrower may use contract claims to assert all her damages, even those related to the lost employment opportunity. The court only dismissed borrower's misrepresentation claims as they relate to the employment damages.

To state a contract claim, borrowers must show, *inter alia*, a contract, servicer's breach, and damages. Here, borrowers received a permanent modification offer and mailed the signed agreement to servicer. Servicer failed to respond to borrowers' requests for a fully executed copy and claimed it never received borrowers' executed copy. Borrowers then re-mailed the signed agreement to servicer, and were instructed by servicer representatives to refrain from making any payments while servicer addressed the situation. More than one year after contract formation, servicer sent borrowers a monthly statement that finally reflected the modified interest rate and monthly payments. The statement identified an arrearage, however, and servicer soon initiated foreclosure proceedings. The court found borrower's

"acceptance of the [permanent modification] Agreement . . . all that was required to create a contract," despite explicit language that no modification would form without borrowers' receipt of servicer's signed copy. Citing *Barroso* and *Corvello*, the court rejected this language as unfairly imbuing servicer with complete control over contract formation. Having identified a valid contract, the court then found servicer's refusal to acknowledge the modification for over a year a breach of that contract. Borrowers' allegations that servicer also breached the contract by refusing to bring their loan current when it finally acknowledged the contract, however, failed. Under the contract terms, servicer was only required to bring borrowers' loan current upon contract formation. Borrowers argued this part of the agreement was verbally modified when servicer representatives instructed borrowers to stop making payments, and their loan should have been brought current when servicer finally acknowledged the contract. Because such a modification to the agreement related to real property, it needed to be in writing to satisfy the statute of frauds. Any damages resulting from servicer's verbal promises may not, therefore, be recovered under a breach of contract theory. On the initial breach, however, the court found borrowers to have adequately pled damages, including the interest that accrued during servicer's protracted delay in recognizing the loan modification, resulting late payments, and the initiation of the foreclosure sale. The court declined to dismiss borrowers' contract claim.

Some courts require borrowers to show their servicer owed them a duty of care to bring a negligent misrepresentation claim. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Many courts use the *Biankaja* test to determine whether a duty of care existed between a financial institution and borrower. Here, servicer offered borrowers a permanent modification and then refused to acknowledge its existence until more than a year later. The court found five of the six *Biankaja* factors met. First, offering borrowers a permanent modification was intended to affect them, as it would allow them to avoid foreclosure. Second, it was foreseeable that servicer's stalling could significantly harm borrowers because the

growing arrearage led to foreclosure. Third, injury is certain: foreclosure proceedings have commenced, borrowers have accrued improper interest and late fees, and have lost an employment opportunity due to bad credit. Fourth, these harms derived directly from servicer's misconduct. Fifth, public policy—as expressed in the federal HAMP program and "recent state-level reforms"—is served in preventing servicers from misleading borrowers into further default, as servicer representatives allegedly did here. The court declined to weigh-in on the sixth factor, the moral blameworthiness of servicer's (in)action. The court found a duty of care and rejected servicer's MTD borrower's negligent misrepresentation claim.

National Banks Cannot Invoke HOLA Preemption to Defend Their Own Conduct

Kenery v. Wells Fargo, N.A., 2014 WL 4183274 (N.D. Cal. Aug. 22, 2014):[26] The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Here, borrower brought state-law foreclosure claims (UCL, quiet title, and declaratory relief) against her servicer, a national bank. Normally, national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. This court acknowledged the "growing divide in the district courts' treatment of this issue" and explored three different options: 1) HOLA preemption follows the loan, through assignment and merger; 2) national banks can never invoke HOLA; or 3) application of HOLA should depend on the nature of the conduct at

[26] This case was originally summarized in our February 2014 newsletter, as *Kenery v. Wells Fargo Bank, N.A.*, 2014 WL 129262 (N.D. Cal. Jan. 14, 2014). There, the court (under a different judge) dismissed borrower's HBOR claims as preempted by HOLA.

issue: claims arising from the federal savings association's actions may be defended with HOLA, but claims arising from the bank's conduct may not be defended with HOLA. This court found the third option the most logical. Notably, the court considered that servicer had not submitted "any evidence that it has subjected itself to OTS supervision with respect to [borrower's] loan or any of the numerous other Wachovia loans it took over in the merger. The Court concludes that [servicer] may not avail itself of the benefits of HOLA without bearing the corresponding burdens." To the extent that borrower's claims, however vaguely, relate to the securitization of her loan—which happened under the federal savings association's watch—those claims are preempted. But because borrower's claims are most clearly rooted in *servicer's* conduct, not the federal savings association's conduct, her claims are not preempted by HOLA. The court ultimately dismissed borrower's claims on non-preemption grounds.

Borrower's Request for Loan Modification Triggers Servicer's Obligation to Provide SPOC

McFarland v. JP Morgan Chase Bank, 2014 WL 4119399 (C.D. Cal. Aug. 21, 2014):[27] HBOR requires servicers to provide a single point of contact (SPOC) "[u]pon request from a borrower who requests a foreclosure prevention alternative." CC § 2923.7(a). SPOCs may be an individual or a "team" of people and have several responsibilities, including informing borrowers of the status of their applications and helping them apply for all available loss mitigation options. Here, borrower alleged her servicer violated these requirements by transferring her between representatives, requiring her to re-fax modification documents over and over, and failing to provide her with the status of her modification. Servicer argued that because borrower failed to specifically request *a SPOC*, not just a foreclosure prevention alternative, servicer was under no duty to appoint a SPOC, according

[27] This case was originally summarized in our May 2014 Newsletter, as *McFarland v. JP Morgan Chase Bank*, 2014 WL 1705968 (C.D. Cal. Apr. 28, 2014). In that case, the court held that NBA preemption is not analogous to HOLA preemption and does not preempt HBOR causes of action.

to a strict reading of the statute. The court disagreed, citing other courts that have rejected that argument, preferring instead a "plain reading" of the statute that only requires a borrower to request a foreclosure prevention alternative to be assigned a SPOC. The court then concluded that servicer representatives violated CC 2923.7, as none of the representatives, even if they were part of a "team," duly performed their SPOC duties. The court denied servicer's motion to dismiss borrower's SPOC claim.

Court Withholds Judicial Notice of Disputed Tax Statement, Giving Rise to Viable CC 2954 Claim; UCL Relationship with Contract Claims

Rosell v. Wells Fargo Bank, 2014 WL 4063050 (N.D. Cal. Aug. 15, 2014): Judicial notice may be granted to at least the existence of certain foreclosure-related documents and government documents if they are not disputed and if they can be verified by public record. Fed. R. Ev. 201(b)(2). Here, borrowers pled a CC 2954 claim, which prohibits servicers from imposing escrow accounts except as allowed in specific circumstances, including where borrower failed to pay "two consecutive tax installments on the property." Servicer asked the court to take judicial notice of borrower's county tax statement, a public record from a government website. Servicer requested judicial notice of the statement's existence, but also its veracity, to prove borrowers missed two consecutive property tax payments, rendering the servicer-imposed escrow account lawful. Since borrowers disputed that they had missed two consecutive property tax payments, the court declined to take judicial notice of the tax statement. Borrowers therefore stated a valid CC 2954 claim and the court denied servicer's MTD on that issue.

There are three distinct prongs of a UCL claim: unlawful, unfair, and fraudulent. "A breach of contract claim may form the basis of a UCL claim but only if [borrower] alleges conduct that is unlawful, unfair or fraudulent *independent* of the breach." In other words, a borrower may not bring a UCL claim simply by alleging that the contract breach

itself was unfair. There must be another aspect of the breach ("a 'plus' factor") that fulfills one of the UCL's three prongs. Here, borrowers did not expand upon their breach of contract claim in a way that would constitute a separately actionable UCL violation. The court dismissed their UCL claim.

National Banks Cannot Invoke HOLA Preemption to Defend Their Own Conduct; HBOR's "Owner Occupied" & "Principal Residence" Requirements; UCL Claim Allowed to Stand Based on Borrower's Leave to Amend HBOR Claim

Corral v. Select Portfolio Servicing, Inc., 2014 WL 3900023 (N.D. Cal. Aug. 7, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings associations (FSAs). HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing of FSAs. Here, borrowers brought HBOR claims against their servicer, Select Portfolio Servicing (SPS), and US Bank, the owner of their loan and a national bank. SPS and US Bank argued they are entitled to assert HOLA preemption because the loan originated with an FSA, and that US Bank and SPS stepped into the FSA's shoes, allowing them to employ a preemption defense that was meant only for FSAs. This court disagreed, adopting the growing view that any conduct occurring *after* the loan passed to a non-FSA is protected against a HOLA preemption defense. Here, the conduct at issue revolved around loan modification negotiations and foreclosure activity, conducted by SPS and occurring well after the FSA assigned borrowers' loan to US Bank. The court therefore denied SPS's MTD borrower's HBOR claims based on preemption.[28]

For HBOR dual tracking claims, borrowers must plead that the subject property is "owner-occupied:" "property [that] is the principal residence of the borrower." CC § 2924.15. Here, borrowers took out the subject

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[28] Notably, the vast majority of these HOLA inheritance arguments are proffered by Wells Fargo; this is the first case the Collaborative has identified where SPS and US Bank invoked this argument.

loan jointly, and brought suit as co-plaintiffs. While their complaint alleged that one of the borrowers was a "resident at the property," it was silent on the residence of the other borrower, and did not assert that *either* borrower occupied the property as their principal residence. The court rejected servicer's argument that each of the borrowers must allege both requirements: that the property is owner-occupied and their principal residence. "[I]t is enough for one Plaintiff to live at the Subject Property as her primary residence." The court did dismiss their claim, however, with leave to amend to allege that at least one of the borrowers occupied the property as their principal residence.

There are three possible prongs within a UCL claim: unlawful, unfair, and fraudulent. The unlawful prong bases a UCL violation on another actionable claim. To bring a claim under any of these prongs, borrowers must assert injury in fact (loss of property or money) arising from servicer's conduct. Here, the court dismissed borrower's HBOR dual tracking claim, but with leave to amend. Even with this dismissal, however, the court allowed borrower's UCL claim –based on servicer's alleged HBOR violation—to stand. Additionally, the court accepted borrowers' alleged damages caused by servicer's HBOR violation: foreclosure initiation, damaged credit, and attorney costs. Because borrowers alleged "lost money" caused by servicer's conduct, the court granted them UCL standing and refused to dismiss their UCL claim.

A National Bank Cannot Invoke HOLA Preemption to Defend its Own Conduct; Pleading Requirements for Subsequent Mod Applications; Valid SPOC Claim

Hixson v. Wells Fargo Bank, 2014 WL 3870004 (N.D. Cal. Aug. 6, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings associations (FSAs). HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Normally, national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency

(OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Here, borrower brought state HBOR claims against her servicer, a national bank. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. This court acknowledged that many district courts (including this court) have allowed Wells Fargo to invoke HOLA preemption if the subject loan originated with a federal savings bank, but pointed to the lack of analysis in these opinions. The court then opted to follow a growing view that only allows a national bank to invoke HOLA preemption to defend the conduct of the federal savings association. Any conduct occurring *after* the loan passed to the national bank is not subject to a HOLA preemption analysis. Here, the conduct at issue revolved around loan modification negotiations that occurred well after borrower's loan was transferred to Wells Fargo. The court therefore rejected Wells Fargo's HOLA preemption argument. The court also rejected Wells Fargo's more specific arguments: first, borrower agreed to be bound by HOLA preemption when she signed the DOT. The court, however, found no language in the DOT that would indicate HOLA preemption applies to a non-FSA like Wells Fargo. The note and DOT simply invoke "applicable federal law," not HOLA itself. Second, servicer argued that OTS opinion letters granted national banks the right to use HOLA preemption. The court found that was true, but only to defend against origination claims related to the *FSA's conduct*. Having found Wells Fargo unable to use HOLA preemption as a defense to its own conduct, the court evaluated borrower's claims on their merits.

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's previous applications were denied. She submitted a new application,

however, after renting a room in her home and increasing her income. She submitted a new application to her servicer citing this material change in her financial circumstances. Servicer acknowledged the application in writing shortly before recording a NTS. The court found borrower adequately stated a dual tracking claim. That her *complaint* (not her application) omitted the amount of rent she was now collecting is unimportant at the pleading stage. Similarly, borrower's failure to allege how servicer's dual tracking violation was "material" is not required at the pleading stage. Both issues are questions of fact inappropriately resolved on a motion to dismiss. The court denied servicer's MTD borrower's dual tracking 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." CC § 2923.7. SPOCs may be a "team" of people, or an individual, and must facilitate the loan modification process and document collection, possess current information on the borrower's loan and application, and have the authority to take action. Here, borrower alleged she was assigned eight SPOCs over five months, none of whom could provide her with any pertinent information about her loan or modification application. Some SPOCs were seemingly unaware of their status as her SPOC. The court considered servicer's argument that borrower did not specifically request a SPOC (rather than a foreclosure prevention alternative) mooted because neither party disputed that SPOC(s) *were* assigned. Because none of the borrower's SPOCs fulfilled their statutory duties, the court dismissed servicer's MTD.

Advising Borrower against Reinstatement Falls Short of "Interference" in Good Faith & Fair Dealing Context; But Servicer May Still be Liable for Intentionally Interfering with DOT; Viable Fraud Claim

Fevinger v. Bank of Am., 2014 WL 3866077 (N.D. Cal. Aug. 4, 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 unfair interference with borrower's right to receive the benefits of the contract; and 4) damages caused by servicer's breach. Here, borrower alleged her servicer prevented her from realizing the benefits under her DOT, specifically, her right to reinstate her loan. After a brief delinquency, borrower contacted servicer to determine her arrearage. In her pleadings, she alleged that her servicer both provided her with an *inaccurate* amount, and failed to provide *any* amount. "Given this irreconcilable inconsistency," the court did not believe borrower's assertion that no amount was ever provided. Further, borrower had actual knowledge of the arrearage, since the delinquency was short-lived and she knew the amount of her mortgage payments. And because her reinstatement right depended on her own "payment of all sums under agreement," she failed to prove her own performance under the DOT, or any "cognizable excuse" for nonperformance. Even if she had fulfilled this requirement, this court held that "a lender's inducement of a homeowner to stop making payments on a home mortgage loan through the promise of forestalling future foreclosure proceedings" is mere encouragement and *does not* amount to unfair interference with borrower's right to benefit under the DOT. The court dismissed borrower's good faith and fair dealing claim.

Interestingly, the same set of facts provided the basis for borrower's viable intentional interference with a contract claim. To state a claim under this theory, a borrower must show: 1) a contract; 2) servicer (as a stranger to the contract) had knowledge of the contract; 3) servicer's intentional inducement of a breach "or disruption" of the contract; 4) actual breach or disruption; and 5) damages. Here, borrower alleged servicer, as an outside party, intentionally interfered with borrower's contract—the DOT—with her lender. After alleging servicer interfered with her ability to benefit from the DOT as part of her good faith and fair dealing claim, borrower then pled (in the alternative) that servicer, as a stranger to the DOT, interfered with that contract. And because

"[i]nterference with an existing contract does not require wrongful conduct aside from the alleged interference in and of itself," the court agreed that this was a viable claim and denied servicer's MTD.

Fraud allegations require, *inter alia*: 1) a misrepresentation; 2) borrower's justifiable reliance; and 3) damages. Justifiable reliance, in turn, requires actual and reasonable reliance. Borrower here cited several misrepresentations, all basically alleging "she was getting jerked around by [servicer]," as it promised not to foreclose while her applications were under review, and constantly requested duplicative, "lost" documents. Because borrower specifically pled servicer promised not to initiate foreclosure, as opposed to not selling borrower's home, the court found her fraud claim viable. On the justifiable reliance element, "California courts have found reasonable reliance where the [servicer] allegedly misrepresented that it had not scheduled a trustee's sale of the borrower's home while the borrower was requesting a reevaluation of the [servicer's] denial of a loan modification." On actual reliance, borrower pled that, "but for [servicer's multiple] misrepresentations, she would have" reinstated her loan. Finally, borrower adequately alleged damages including costs associated with saving her home, foreclosure initiation, overcharges, loss of reputation, credit damage, and various forms of emotional distress. The court denied servicer's MTD borrower's fraud claim.

Pre-NOD Outreach Requires Written Notice & Live Contact; Dual Tracking Applied to Multiple Applications; SPOC "Team" Must Perform SPOC Duties

Johnson v. SunTrust Mortg., 2014 WL 3845205 (C.D. Cal. Aug. 4, 2014): Generally, CC 2923.55 prevents servicers from initiating foreclosure until contacting, or diligently attempting to contact, a borrower to discuss foreclosure alternatives. Specifically, CC 2923.55(b)(1)(B) prevents servicers from recording an NOD before sending borrower written notice that borrower may request certain documents, including their promissory note, DOT or mortgage, and any applicable assignment. Further, under CC 2923.55(b)(2), a servicer is

required to contact borrower by phone or in person to assess borrower's financial situation and to discuss foreclosure alternatives. During this contact, a servicer must advise a borrower that they may request a meeting and must provide HUD contact information. Here, borrower alleged he never received the required written notice. Servicer argued that, like the statute that governs the mailing of NODs, this statute merely requires servicer to *mail* this notice, and says nothing about borrower's actual receipt. The court disagreed and found the analogy to the NOD mailing statute inapplicable. The court did, however, agree with servicer that borrower failed to sufficiently allege violation of the live contact requirement, as he conceded that he had multiple discussions with servicer regarding his financial situation and loan modification options prior to servicer's recording of the NOD. That servicer did not explicitly inform borrower he could request a face-to-face meeting, or provide HUD contact information, does not expose servicer to liability. Despite its specific language, CC 2923.55 "only 'contemplates contact and some analysis of the borrower's financial situation.'" The court denied servicer's MTD borrower's CC 2923.55 written notice claim, but granted it on borrower's live contact claim.

Ordinarily, a servicer need only evaluate a borrower for a loan modification once. If a borrower submits documentation of a "material change" in their financial circumstances, however, HBOR's dual tracking protections apply to that borrower's new application. Dual tracking protections prevent servicers from recording an NOD, NTS, or conducting a foreclosure sale while a borrower's complete, first lien loan modification application is pending. Servicers define what constitutes a "complete" application. Here, borrower submitted three loan modifications. After his first was denied, he submitted his second, which was still pending when servicer recorded an NOD and NTS. Servicer argued that dual tracking protections did not apply to this second application because it was incomplete, evidenced by servicer's request for further documentation. The court somewhat agreed, noting the lack of clarity in the complaint: borrower alleged only that servicer "*informed* them that the application was incomplete–not that the application *actually was* incomplete." Additionally, since this was

borrower's second application, he had to "submit" and "document" a material change in financial circumstances to take advantage of dual tracking protections. While borrower alleged this in regards to his third application, the complaint is silent on the second application. The court therefore dismissed borrower's dual tracking claim on his second application without prejudice. If borrower can amend to allege a complete application showing a documented material change in financial circumstances, he may have a valid dual tracking claim. On borrower's third application, servicer had already recorded the NOD and NTS before borrower submitted this application. It did not then cancel the scheduled sale. The court found that merely keeping a sale 'scheduled' does not violate CC 2923.6 and dismissed borrower's dual tracking claim based on this third application.

HBOR requires servicers to provide borrowers with a "direct means of communication 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. Importantly, each member of a SPOC team must fulfill these responsibilities. Here, borrower alleged that servicer's team of personnel failed to "timely, accurately, and adequately" inform him of the status of his applications, were unable to facilitate the loan modification process, and were often unreachable. Further, servicer never provided borrower with a "direct means to contact" anyone from his SPOC team. The court agreed borrower had stated a valid SPOC claim and denied servicer's MTD.

Any **Borrower Who Occupies the Property as their Principal Residence May Bring HBOR Claims**

Agbowo v. Nationstar Mortg., 2014 WL 3837472 (N.D. Cal. Aug. 1, 2014): For HBOR dual tracking claims, borrowers must plead that the subject property is owner-occupied: "property [that] is the principal

residence of *the borrower*." CC § 2924.15. Here, two borrowers brought a dual tracking claim against their servicer. Each borrower is listed as such on the note and DOT, but only one borrower occupies the home as her principal residence. Servicer argued that because the statute specifies "*the* borrower," rather than "*a* borrower," or "*any* borrower," each borrower listed in the DOT must occupy the home to take advantage of this HBOR provision. Servicer further warned that finding otherwise would lead to a rash of "absentee signator[ies] demanding SPOCs and suing to halt foreclosure sales as long as one signatory lived in the home. The court found otherwise: the language cited by servicer is at least ambiguous, and servicer's interpretation is unsupported by any case law. Further, HBOR's very purpose is to make sure borrowers are considered for foreclosure alternatives. The parade of horribles servicer envisions are not absurd at all, and actually contribute to this legislatively intended end. Further, nothing in HBOR requires a servicer to actually *grant* a modification that is unsigned by all borrowers; assigning SPOCs to all borrowers should be unaffected by borrowers' varying locations; and servicers must reach out to borrowers to discuss foreclosure alternatives regardless of where borrowers live. The court denied servicer's MTD borrower's HBOR dual tracking claim.

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

Massett v. Bank of Am., 2014 WL 3810364 (C.D. Cal. July 25, 2014):[29] CC 1717 allows for attorney's fees in actions "on a contract." In this limited, attorney's fees context, California courts interpret "on a contract" liberally to include any action "involving a contract." To recover attorney's fees under this statute, the moving party must show: 1) the operative contract specifically allows attorney's fees; 2) it has prevailed in the action; and 3) its request is reasonable. Importantly, there is no "prevailing party" if the borrower voluntarily dismisses

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[29] This case was originally summarized in our October 2013 newsletter as *Massett v. Bank of Am., N.A.*, 2013 WL 4833471 (C.D. Cal. Sept. 10, 2013), where the court granted borrower's TRO based on dual tracking allegations.

their case. CC § 1717(b)(2). Here, borrowers brought dual tracking and fraud claims against their servicer, won a TRO, and engaged in "extended motion practice" before voluntarily dismissing their case. This court followed California precedent and found these claims to be "on a contract" because they essentially challenged servicer's authority to foreclose under the DOT. The court therefore rejected servicer's argument that the action included "non-contract" claims. Determining CC 1717 to be the operative statute, the court then reasoned that since borrowers voluntarily dismissed their case, servicer was not entitled to attorney's fees. Even if the court had not found borrower's claims to be "on a contract" and evaluated servicer's request using only the attorney's fees provision in the DOT, servicer would still be unsuccessful. "A Court may only award 'off-contract' fees under a contractual fee provision if that provision is expansive enough to actually cover those causes of action." This DOT is narrow, only allowing attorney's fees if there is a "legal proceeding that might significantly affect Lender's interest in the Property and/or rights under [the DOT]." Because servicer's interest and rights are "creatures *of contract*," the DOT, and the DOT does not allow for "off-contract" fees, the court dismissed servicer's motion for attorney's fees. The court did, however, award servicer its costs. CC 1717 does not regulate non-attorney's fee costs, so servicer was considered the "prevailing party" under the costs-awarding statutes (CC §§ 1032; 1033.5).

Recent Regulatory Updates

Consumer Financial Protection Bureau, Bulletin 2014-01 (Aug. 19, 2014)

"[D]ue to the continued high volume of servicing transfers," the CFPB issued new compliance guidelines for servicers and sub-servicers. This guidance replaces CFPB Bulletin 2013-01 (Feb. 11, 2013).

Servicers are required to "maintain policies and procedures that are reasonably designed to achieve the objectives of facilitating the transfer of information during mortgage servicing transfers and of properly evaluating loss mitigation applications." 12 C.F.R. § 1024.38(a), (b)(4). There is no private right of action to enforce this general requirement.

Specifically, RESPA requires transferor and transferee servicers to contact the borrower, in writing, 15 days prior to the servicing transfer (transferor's responsibility) and within 15 days after the servicing transfer (transferee's responsibility). Each written notice must include the date of transfer, contact information for each servicer, and the date the borrower should start making payments to the transferee servicer. *See* 12 C.F.R. § 1024.33(b)(1)-(4).

The transferor must transfer all documents and information related to borrower's loan to the transferee servicer. Transferee has an obligation to identify and request (from the transferor) any missing documents. 12 C.F.R. § 1024.33(b)(4). Documents already submitted to the transferor servicer may qualify as a loss mitigation "application." Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(i)-1.

This guidance provides examples demonstrating how servicers can accomplish the requirements listed above. There is also an FAQ section targeted directly at transferee servicers, addressing their responsibilities related to Requests for Information and Notices of Error, SPOCs, and loss mitigation. Advocates representing clients with servicing transfer problems should consult this extensive guidance.

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

MINUTE ORDER

DATE: 08/21/2014 TIME: 02:00:00 PM DEPT: 53

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

CASE NO: **34-2014-00160603-CU-OR-GDS** CASE INIT.DATE: 03/20/2014
CASE TITLE: **Mikesell vs. Wells Fargo Bank NA as successor**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11416001
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Wells Fargo Bank NA as successor
CAUSAL DOCUMENT/DATE FILED: Demurrer to Complaint, 06/04/2014

APPEARANCES

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Wells Fargo Bank's Demurrer to the Complaint is sustained/overruled as follows:

This case arises out of a default on a mortgage loan for property at 1239 Lamberton Circle, Sacramento, CA 95838. Plaintiffs allege that they were promised a loan modification, paid the Trial Plan Payments as agreed, but were ultimately denied the permanent loan modification and then placed in foreclosure. Plaintiffs allege that Wells Fargo Bank wrongfully denied them a loan modification based on Plaintiff's failure to obtain a signature from HUD on the Subordination Agreement prepared by Wells Fargo that contained many errors. Plaintiffs allege that HUD would not accept any documentation, including the Subordination agreement itself, from plaintiffs but required documentation to be provided directly from Wells Fargo. In or around February 2014, Plaintiffs received a letter from Wells Fargo representative Ms. Williams, dated February 6, 2011, informing Plaintiffs that their HAMP loan modification was denied and their only options were a short sale or deed in lieu of foreclosure.

On or around August 22, 2013, Plaintiffs received notification from WELLS FARGO that they were approved for a trial loan modification administered by FHA Home Affordable Modification Program ("HAMP.") Plaintiffs signed the Trial Plan Loan Modification Agreement (Trial Plan) on September 2, 2013. Pursuant to this Trial Plan, Plaintiffs were to make monthly mortgage payments of $814.02 on October 1, 2013, November 1, 2013 and December 1, 2013. Plaintiffs made these payments pursuant to the Trial Plan. Moreover, Plaintiffs made an additional payment for the month of January 2014. (Complaint ¶¶ 12, 13) Wells Fargo required plaintiffs to obtain a signature from Housing and Urban Development ("HUD") on a Subordination Agreement.

1st cause of action Breach of Contract (no demurrer)

2nd cause of action Promissory Estoppel: Sustained with leave to amend for failure to state facts sufficient to constitute a cause of action. The current allegations in support of this cause of action are the same as the breach of contract, which is a promise supported by consideration. Promissory

estoppel only arises when there is no agreed upon consideration at the time the promise is made. A claim for promissory estoppel does not lie when the promise was given in return for proper consideration. The claim instead must be pleaded as one for breach of the bargained-for contract. *Fontenot v. Wells Fargo Bank. N.A..(*2011) 198 Cal.App.4th 256, 275. Plaintiffs are given leave to amend in the event that there is another promise not accompanied by consideration that would support a claim for promissory estoppel.

3rd cause of action Wrongful Foreclosure: Overruled. Defendant contends plaintiff cannot allege a violation of the foreclosure statutes unless a foreclosure has occurred. The Court is not persuaded by this argument. There are many statutes within the Civil Code "2924 et seq." that provide for a remedy without a completed foreclosure.

4th cause of action Fraud in the Inducement: Sustained with leave to amend for failure to state facts sufficient to constitute a cause of action. Plaintiffs allege defendants fraudulently induced them to enter the loan modification agreement with no intent to actually offer them a permanent loan. Plaintiffs allege detrimental reliance in that they continued the loan modification process and then were unable to pay the arrearages, including excessive fees, costs, and penalties that were added to the loan as a result of plaintiff having made the Trial Plan Payments.

Plaintiff has not adequately alleged fraud with the required specificity. When pleading a claim for fraud, each and every element must be alleged, "and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." *Stansfield v Starkey* (1990) 220 Cal.App.3d 59, 73; *Cadlo v Owens-Illinois, Inc*. (2004) 125 Cal.App.4th 513,519 (stating that "[e]ach element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged"). To satisfy the particularity requirement, the plaintiff must plead facts which "show how, when, where, to whom, and by what means the representations were tendered." *Stansfield*, supra, 220 Cal.App.3d at p. 74; see also *Lazar v Superior Court* (1996) 14 Cal.4th 631, 645. Also, when asserting a fraud claim against an entity, plaintiff must "'allege the names of the persons who made the allegedly fraudulent misrepresentation, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.'" *Lazar*, supra, 12 Cal.4th at p. 645 (quoting *Tarmann v State Farm Mut Auto Ins Co* (1991) 2 Cal.App.4th 153, 157).
Plaintiffs have not adequately alleged the identity of the persons who made the representations, when they were made, and content of the representations.

The Court rejects the argument that this claim is a "retooled" claim for breach of contract. The burden to prove wrongful intent is an evidentiary burden, not a pleading burden.

5th cause of action Violation of Business & Professions Code section 17200: Overruled. Plaintiffs' have adequately alleged injury in fact, including overcharges and penalties that they would not have paid had they not been induced to make the TPP agreement, therefore they have standing.

Plaintiffs may file and serve an Amended Complaint on or before September 10, 2014. Response to be filed and served within 20 days of service of the amended complaint, 25 days if served by mail.

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

COURT RULING

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

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

MINUTE ORDER

DATE: 08/18/2014 TIME: 02:00:00 PM DEPT: 53

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

CASE NO: **34-2013-00152543-CU-OR-GDS** CASE INIT.DATE: 10/03/2013
CASE TITLE: **Neep vs. Bank of America NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11366560
EVENT TYPE: Motion for Summary Judgment and/or Adjudication - Civil Law and Motion - MSA/MSJ/SLAPP
MOVING PARTY: Bank of America NA
CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment and/or Adjudication, 05/23/2014

APPEARANCES

Nature of Proceeding: Motion for Summary Judgment and/or Adjudication

TENTATIVE RULING

Defendant Bank of America's ("Bank") Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication is denied.

Plaintiff's evidentiary objections to the Declaration of Scott Horowitz are granted.

Plaintiff alleges causes of action for Breach of a HAMP Modification Contract, Conversion of HAMP payments, Promissory Estoppel, Fraud, Negligent Misrepresentation, Unfair Business Practices, and Negligence arising out of Bank's breach of a promise to modify a loan.

Plaintiff alleges that he made the three TPP payments but that Bank contended that plaintiff failed to provide the required documentation. Bank sent plaintiff two letters asking for certain tax information IF plaintiff was self-employed. Plaintiff alleges he repeatedly told Bank he was not self-employed. However, Bank continued to request documentation that was inapplicable. If plaintiff made the three TPP payments and complied with the documentation, the HAMP guidelines require that a permanent loan modification be offered. (cite)

Defendant's Separate Statement sets forth facts that Plaintiff Neep was granted a trial modification with payments set at $1,170 beginning January 2010. (UMF 5) Neep made all payments under the TPP (UMF 6). Bank contends Neep failed to send in all required documentation, but does not specify what that documentation was. (UMF 7) The Bank initially denied the loan modification for failure to submit the documentation. (UMF 8) Bank had told Neep that his loan was in default and it intended to accelerate his loan.. (UMF 9) Later, On October 14, 2010, Bank sent Neep a letter advising him that it WAS offering him a permanent loan modification on the same terms as the Trial Plan. (UMF 11) Bank interpreted Neep's response to the loan offer as a rejection, and it conducted a foreclosure sale on February 7, 2012.

Bank relies on UMF 7 in support of summary adjudication of all causes of action. That fact states that Neep failed to submit the required documentation. The evidence relied on is the Declaration of Horowitz, the Bank employee, who states that plaintiff was mailed letters regarding the missing documentation. (Ex. 5-7) However, there is no admissible evidence from a person with personal knowledge that there was any *missing* documentation, only that a letter was sent stating that not all documentation was *received*. (See plaintiff's evidentiary objections.)

In opposition, Plaintiff explains that he sent in all required information, but that he received two letters stating that IF he was self-employed he must send in certain documents. Plaintiff state he told the Bank he was **not** self-employed but they continued to ask for this non-existent information. (Declaration of Neep)

Initially, the Bank has failed to meet its burden to present admissible evidence in support of UMF #7. Even if Bank had met its initial burden, Plaintiff's evidence raises a triable issue of material fact as to whether he had submitted all required documentation. Therefore, since all causes of action rely on UMF #7, which is disputed, summary adjudication of each cause of action is denied.

In Reply that Bank focuses on later events such as the eventual loan modification and purported rejection. However, if any issue of fact deemed by bank to be material is disputed, then the motion must be denied. The facts enumerated in a moving separate statement have a due-process dimension in that they define for the opposing party the facts which, if disputed with admissible evidence, result in the motion being denied. (Rutter, Civil Procedure Before Trial, Ch.10:95.1].) *Nazir v United Airlines* (2009) 178 Cal.App.4th 243, [citation omitted].) In reliance on the discrete universe of facts in the moving separate statement, a party opposing a summary judgment motion is entitled to stop working on its opposition once (s)he has produced admissible evidence demonstrating that a single fact presents a triable issue. Thus, the Fourth Appellate District Court of Appeal observed: "Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849 [citation omitted].) Hence, a party moving for summary judgment may not signal to its adversary that the motion can be defeated with evidence that a fact in the moving separate statement presents a triable issue, on the one hand, and then make the contradictory argument that the disputed fact is not truly material, on the other. The fact is that if moving party had submitted a different separate statement, the opposing party might have submitted different evidence with the Opposition. As observed by the 3rd DCA, "The due process aspect of the separate statement requirement is self evident-to inform the opposing party of the evidence to be disputed to defeat the motion." *Hawkins v. Wilton* (2006) 144 Cal. App. 4th 936, 946.

The prevailing party is directed to prepare a formal order complying with C.C.P. §437c(g) and C.R.C. Rule 3.1312.

COURT RULING

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

MINUTE ORDER

DATE: 08/11/2014 TIME: 02:00:00 PM DEPT: 53

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

CASE NO: **34-2013-00148898-CU-OR-GDS** CASE INIT.DATE: 08/16/2013
CASE TITLE: **Schubert vs. Bank of America NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11362923
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: U.S. Bank, N.A. as Trustee, Mortgage Electronic Registration System Inc, Nationstar Mortgage, LLC, Recontrust Company N.A., Bank of America NA
CAUSAL DOCUMENT/DATE FILED: Demurrer to 1st Amended Complaint, 05/22/2014

APPEARANCES
Danny A Barak, counsel, present for Plaintiff,Attorney(s).
David Pinch, counsel present for defendant, telephonically

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Bank of America, N.A. ("BOFA"), U.S. Bank, N.A. as Trustee for Benefit of the Certificateholders of the Harborview Mortgage Loan Trust 2005-2, Mortgage Registration Services, Inc., Nationstar Mortgage LLC and Reconstruct Company, N.A.'s demurrer to Plaintiffs Carl and Pamela Schubert's first amended complaint ("FAC") is ruled upon as follows.

In this foreclosure action, Plaintiffs allege causes of action for deceit, negligence, promissory estoppel, violation of Civil Code § 2923.5, declaratory relief, conversion, elder abuse, and for violations of Business & Professions Code § 17200.

First Cause of Action (Deceit/False Promise)

Defendants' demurrer is overruled. Plaintiffs allege that an unnamed BOFA customer relationship specialist for BOFA told them in late December 2012 that going through a HAMP modification process would not affect their pending short sale process. (FAC ¶ 67.) They allege that when the HAMP modification was denied they were then told that they could not proceed with a short sale. (Id.) They also allege that in July 2013, Ms. Betters, the assigned single point of contact, told them the foreclosure sale could not be postponed. (FAC ¶ 68.) They allege this was false because the sale was postponed. (Id.)

The only attack on the second representation regarding the foreclosure postponement is that the representation was not false. Defendants argue that Plaintiffs only alleged that Ms. Betters told them that the foreclosure could not be postponed except within five days of the sale and that the sale was in fact postponed. Yet, Plaintiffs alleged that the representation was false because Ms. Betters knew that the sale could be postponed at any time and they alleged that even within five days prior to the sale Ms. Betters stated that the sale would not be postponed. (FAC ¶¶ 32-35.) Plaintiffs have adequately alleged

that the representation was false, that it was made to induce them to allow BOFA to sell their home despite being in a loan medication review, and that they suffered emotional distress as a result. (FAC ¶ 68.) Given that this was the only attack on the second alleged representation, the demurrer must be overruled in its entirety even if Defendants are correct that first misrepresentation was inadequately alleged, a question the Court need not decide. "[A] demurrer cannot rightfully be sustained to a part of a cause of action or to a particular type of damage or remedy." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047.)

Second Cause of Action (Negligence/Negligent Misrepresentation)

Defendants' demurrer is overruled. This cause of action essentially tracks the allegations of the first cause of action and alleges that BOFA breached duties owed to them with respect to the status of the foreclosure and loan workout solution and also regarding the short sale process. Defendants' arguments essentially track the arguments as to the first cause of action and also argue that generally a financial institution owes no duty of care to a borrower. (*Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1093.)

The demurrer is overruled. "[A] lender owes a duty to a borrower not to make material misrepresentations about the status of an application for a loan modification...It is foreseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification application, and the connection between the misrepresentation and the injury suffered could be very close." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.Ap.4th 49, 68-69.) Here as explained in connection with the first cause of action, Plaintiffs alleged that Ms. Betters falsely represented that the foreclosure sale could not be postponed in order to induce Plaintiffs to allow BOFA to sell the property even thought they were in middle of a loan modification review. (FAC ¶¶ 68, 71, 73.) The Court therefore rejects the argument that Plaintiffs failed to allege any duty, regardless of the sufficiency of the allegations related to the short sale.

Further, while Defendants argue that Plaintiffs failed to allege facts indicating that their credit report was damaged because they admitted receiving a discharge in bankruptcy, this is not a basis for demurrer. "[A] demurrer cannot rightfully be sustained to a part of a cause of action **or to a particular type of damage** or remedy." (*Kong, supra,* 108 Cal.App.4th at 1047.) Indeed, Plaintiffs alleged they were damaged as a result of Defendants' conduct in a number of ways in addition to the credit report damage "including but not limited to penalties and fees, arrearages they would not have accrued had the short sale occurred, damage to their credit, time, and money spent engaging in the modification process..." (FAC ¶ 76.) Defendants' argument at most might form the basis of a motion to strike, not a demurrer.

Third Cause of Action (Promissory Estoppel)

Defendants' demurrer is overruled. To state a claim for promissory estoppel Plaintiffs were required to allege "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise was made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Ass'n* (1976) 60 Cal.App.3d 885, 890.)

Plaintiffs allege that in December 2012, BOFA promised them that if they stayed their short sale attempts, for which they had two viable offers, and engaged in a further loan modification review they could continue with their short sale attempts if the modification was denied. They allege that BOFA denied their modification and when they attempted to renew the short sale, BOFA informed them that they could no longer conduct a short sale in breach of the agreement. (FAC ¶¶ 77-79.)

Defendants simply argue that Plaintiffs did not allege that they would be approved for a short sale and

instead alleged they declined the existing short sale offers. This misses the point. The allegations are that there was an agreement in which Plaintiffs would be allowed to renew their short sale efforts if they engaged in a loan modification process and if that process was unsuccessful they could return to the short sale process. Plaintiff specifically allege that BOFA breached that promise because once the modification was denied BOFA refused to allow them to return to the short sale process. The fact that they did not allege that they would be approved for a short sale does not render their promissory estoppel claim insufficient.

Defendants also argue that "the potential for damages is too speculative to state a cause of action" and that a disallowance of a short sale could not create damages because any damages as a result of a wrongful foreclosure would be the difference between the fair market value of the property and the amount of any liens and a short sale is an admission of no equity. Defendants apparently ignore the basis for the damages in this cause of action which is that the breach of the agreement prevented Plaintiffs from selling the property at an earlier date and that they therefore "accumulate[d] fees and penalties as a result" and that they "spent time and money engaging in the modification process and gave BOFA personal financial information that BOFA was not otherwise entitled to receive..." (FAC ¶¶ 83, 84.) These are sufficient allegations of damage. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 928.)

Finally, Defendants argue that the cause of action is deficient with respect to defendant Nationstar, the current loan servicer as the alleged promise was made by BOFA, and there "is no factual basis" to include Nationstar in this cause of action. The Court disagrees. Plaintiffs alleged that "although BOFA is no longer the purported servicer of the Loan, BOFA acted on behalf of BENEFICIARY and BENEFICIARY is responsible for the promises made by BOFA. As such, enforcement of the promise can be demanded against NATIONSTAR, the new purported servicer." (FAC ¶ 85.) Plaintiffs also alleged that "where the conduct and acts of BOFA as agent of BENEFICIARY made BENEFICIARY liable to Plaintiffs, NATIONSTAR adopted the same liability where it failed to correct such conduct." (FAC ¶ 58.) Defendants fail to address these allegations and thus the Court rejects the argument that there is no basis to include Nationstar in the cause of action.

Fourth Cause of Action (Violation of Civil Code § 2923.5)

Defendants' demurrer is overruled. Civil Code § 2923.5 precludes a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default until certain conditions are met. Specifically it must wait until either 30 days after initial contact is made to assess the borrower's financial situation and explore foreclosure alternatives is made or 30 days after satisfying the due diligence requirements in attempting to contact the borrower. (Civ. Code § 2923.5(a)(1)(A).) The mortgage servicer must also comply with the requirements set forth in Section 2924.18 if the borrower is in a loan modification review. (Id. § 2923.5(a)(1)(B).) Here, Plaintiffs allege that they were not contacted prior to 30 days before the notice of default was filed by anyone as required by Section 2923.5. (FAC ¶¶ 87-91.)

Defendants only argue that Plaintiffs submitted a loan modification application and that it was reviewed and declined. (Opp. 7:9-10.) This fails to even address the allegations of the instant cause of action. That Plaintiffs were reviewed for a loan modification does not show that the allegations that Defendant failed to contact them 30 days prior to recording the Notice of Default as required by Section 2923.5 are insufficient in any way. While Defendants point out in reply that Plaintiffs allege that a BOFA representative contacted them in August 2010, this does not render the cause of action deficient. Plaintiffs only alleged that the representative contacted them to request documents to support another loan modification review. (FAC 21.) This does not show that Defendants contacted them to discuss the specific information required by Section 2923.5 prior to recording a Notice of Default.

Fifth Cause of Action (Declaratory Relief)

Defendants' demurrer is sustained with leave to amend. In this cause of action, Plaintiffs essentially allege that Defendants lacked the authority to assign the note or deed of trust because they attempted to pool the loan into a securitized trust but such attempt failed because the attempted transfers by way of assignments of the Deed of Trust in 2012 was more than six years after the securitized trust closed. This theory is based upon *Glaski v. Bank of America, N.A*. (2013) 218 Cal.App.4th 1079.

Plaintiffs' declaratory relief as currently pled is insufficient. The weight of current authority is contrary to *Glaski*, including the recent well reasoned case of *Yvanova v New Century Mortgage*, (2014) 226 Cal. App. 4th 495, in which the 2nd District held that a plaintiff has no standing to challenge the transfer of the promissory note or subsequent securitization. The position set forth in *Glaski* has been rejected by yet another California Court of Appeal, one which this Court elects to follow, along with *Yvanova*. (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 514-515.) "As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [Plaintiffs] lack[ ] standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions." (*Id*.) The federal courts in the Ninth Circuit have generally rejected *Glaski* and embraced *Jenkins* noting that *Glaski* represents a minority view. (*Lanini v. JP Morgan Chase Bank* (E.D.Cal. April 3, 2014) 2014 U.S.Dist.LEXIS 47348 at *13.) Of note, "Every court in [the Northern] district that has evaluated Glaski has found it is unpersuasive and not binding authority. See also: (to name but a few federal cases) *Subramani v. Wells Fargo Bank N.A.*, No. C 13-1605, 2013 U.S. Dist. LEXIS 156556, 2013 WL 5913789, at *3 (N.D. Cal. Oct. 31, 2013) (Judge Samuel Conti); *Dahnken v. Wells Fargo Bank, N.A.*, No. C 13-2838, 2013 U.S. Dist. LEXIS 160686, 2013 WL 5979356, at *2 (N.D. Cal. Nov. 8, 2013) (Judge Phyllis J. Hamilton); *Maxwell v. Deutsche Bank Nat'l Trust Co.*, No. C 13-3957, 2013 U.S. Dist.LEXIS 164707, 2013 WL 6072109, at *2 (N.D. Cal. Nov. 18, 2013) (Judge William H. Orrick Jr.); *Apostol v. Citimortgage, Inc.*, No. C 13-1983, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6140528, at 6 (N.D. Cal. Nov. 21, 2013) (Judge William H. Orrick Jr.)." (*Zapata v. Wells Fargo Bank, N.A*. (N.D.Cal., Dec. 10, 2013, No. C 13-04288 WHA) 2013 U.S.Dist. Lexis 173187 at *5.) This Court follows *Jenkins* and finds that Plaintiffs have not alleged any valid theory based on allegations that the Loan was improperly transferred to a securitized trust. Further while Plaintiffs argue that they have even more allegations than those in *Glaski*, specifically, that the note contained no endorsements on its face showing that it was transferred from the original lender on its way to the securitized trust, such argument is based on an unbinding decision from a New Jersey Bankruptcy Court.

Sixth Cause of Action (Conversion)

Defendants' demurrer is sustained with leave to amend for failure to state facts sufficient to constitute a cause of action. Plaintiffs allege that they paid substantial sums to Defendants based on their representations that they were the servicers/beneficiaries, etc. when in fact they were not based on the *Glaski* theory set forth in connection with the fifth cause of action. The cause of action fails to the extent it is based upon the *Glaski* theory for the same reasons set forth above in connection with the fifth cause of action. In addition, as Defendants correctly point out, even though Plaintiffs allege that Defendants had no right to collect the money, Plaintiff do not allege that the money which they did collect was not applied to their mortgage balance. "Conversion is the wrongful exercise of dominion over the property of another." (*Avidor v. Sutter's Place, Inc*. (2013) 212 Cal.App.4th 1439, 1452 [citations omitted].) In addition, "[i]t has been held, as a general, that, where the relationship of debtor and creditor only exists, conversions of the funds representing the indebtedness will not lie against the debtor, unless he holds the deposit in a fiduciary capacity and is bound to return the owner the identical money." (*Watson v. Stockton Morris Plan Co*. (1939) 34 Cal.App.2d 393, 403.) Plaintiffs have not alleged facts showing anything other than a creditor/debtor relationship.

Seventh Cause of Action (Elder Abuse)

Defendants' demurrer is sustained with leave to amend for failure to state facts sufficient to constitute a cause of action. Plaintiffs allege that Defendants engaged in financial elder abuse in violation of Welfare & Institutions Code § 15610.30(a). Financial elder abuse is present when one "[t]akes, secretes, appropriates, obtains or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code § 15610.30(a)(1).) Plaintiffs allege that Defendants engaged in such abuse by wrongfully collecting payment from them under the loan. This cause of action is also premised on the *Galski* theory which the Court found lacked merit. As a result the demurrer here is sustained on the same basis that the demurrer to the fifth cause of action was sustained.

Eight Cause of Action (Business & Professions Code § 17200)

Defendants' demurrer is overruled. Defendants argue that the eighth cause of action fails because it is based on Plaintiffs' deceit and elder abuse causes of action which are themselves deficient. However, the Court found that the deceit cause of action was sufficient and thus the demurrer on this basis is overruled. In addition while Defendants argue that Plaintiffs lack standing, the Court disagrees. Plaintiffs were required to allege that they suffered injury and lost money or property as a result of the unfair competition. (Bus. & Prof. Code § 17204.) For example, in connection with the deceit cause of action on which this cause of action is premised, Plaintiffs alleged that they suffered injury, "including but not limited to damage to their credit as a result of the fraudulent modification attempts and fraudulent scheme to induce Plaintiffs to postpone attempts to short sell the Subject Property, fees and penalties, and increased interest and arrears...Further, Plaintiffs spent time and money engaging in the modification process..." This is sufficient.

As a result, the demurrer is overruled as to the first, second, third, fourth and eighth causes of action and sustained with leave to amend as to the fifth through seventh causes of action.

Where leave was given, Plaintiffs may file and serve an amended complaint no later than August 21, 2014. Defendants shall file and serve their response within 10 days thereafter, 15 days if the amended complaint is served by mail.

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

COURT RULING

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

Where leave was given, Plaintiffs may file and serve an amended complaint no later than August 21, 2014. Defendants shall file and serve their response within 20 days thereafter, 25 days if the amended complaint is served by mail.

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

MINUTE ORDER

DATE: 08/14/2014 TIME: 02:00:00 PM DEPT: 53

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

CASE NO: **34-2013-00149821-CU-OR-GDS** CASE INIT.DATE: 08/28/2013
CASE TITLE: **Velez vs. JPMorgan Chase Bank NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11376191
EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: JPMorgan Chase Bank NA
CAUSAL DOCUMENT/DATE FILED: Demurrer to First Amended Complaint, 05/27/2014

APPEARANCES

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant JPMorgan Chase Bank, N.A.'s demurrer to Plaintiff Edmundo Velez's First Amended Complaint ("FAC") is ruled upon 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.")

In this foreclosure action, Plaintiff asserts causes of action for violation of the Home Owners' Bill of Rights ("HBOR') and causes of action for negligence and fraud.

<u>First Cause of Action (Violation of the HBOR)</u>

Defendant's demurrer to the first cause of action is overruled. Plaintiff alleges that Defendant engaged in dual tracking while he was under a loan modification review. He alleges that prior to June 14, 2013, he submitted a "complete loan modification on several occasions" but each time Defendant requested duplicative documents. (FAC ¶ 12.) He alleges that he met with Defendant's representative to assist him with the application and after June 14, 2013 Defendant submitted another complete application on his behalf which Defendant acknowledged. (Id.) He alleges that Defendant filed a Notice of Sale on June 13, 2013 and refused to cancel the September 2013 sale until Plaintiff brought the instant lawsuit. (Id.)

Defendant argues that Plaintiff cannot establish that it engaged in dual tracking because the Notice of Sale was recorded on June 13, 2014 and he did not actually submit a completed application until August 2, 2013 when he alleged that he submitted additional documents requested by Defendant in connection with the application submitted on June 14, 2013. (FAC ¶ 9) The Court rejects this argument. Civil Code §§ 2923.6 and 2924.18 prohibit a "mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent" from recording a NOD, NOS or conducting a trustee's sale where a borrower has submitted a completed loan modification application and the application is pending. Despite Defendant's argument that Plaintiff did not submit a complete application because he alleged that he submitted documents in response to its requests for additional information, Plaintiff alleged that he had submitted **complete** applications, prior to the date the June 13, Notice of Sale was recorded and that the documents requested by Defendant were simply duplicative. (FAC ¶¶ 7, 8, 9, 12.) In fact he specifically alleged that at the time Defendant recorded the Notice of Sale on June 13, 2013, it was in possession of his "**complete** loan modification application prior to this date" and "a duplicate of the application [that] was submitted by a Chase representative on June 14, 2013." (FAC ¶ 8.) Contrary to Defendant's argument, Plaintiff alleged that he submitted a complete loan modification application prior to the time Defendant recorded a Notice of Sale in violation of Civil Code §§ 2923.6 and 2924.18. Whether the application was actually complete within the meaning of the statutes is a factual question not appropriately resolved on demurrer.

The Court need not address Defendant's other arguments addressed towards the other Civil Code Sections referenced in the caption of the First Cause of Action.

Second Cause of Action (Negligence Per Se)

Defendant's demurrer to the second cause of action is sustained with leave to amend for failure to state facts sufficient to state a cause of action. Defendant demurs on the basis that negligence per se is not a cause of action but merely a rule of evidence. Negligence per se creates a presumption of negligence if: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused injury to the person or property; (3) the injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the injury was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285.) Defendant reasons that Plaintiff failed to actually allege a negligence cause of action and even if he had, he failed to allege facts showing that any underlying statute was violated because this cause of action is premised on his HOBR cause of action.

In opposition, Plaintiff fails to address the argument that negligence per se is not a cause of action, or address the elements set forth above, instead simply arguing that he alleged a negligence cause of action based on allegations that Defendant negligently reviewed his loan modification review. The label on the cause of action is not controlling and thus the Court analyzes whether Plaintiff has properly alleged a negligence cause of action (as opposed to a negligence per se claim). He has not. Plaintiff argues that Defendant failed to comply with the HOBR, failed to fairly and accurately review his loan modification, and refused to update him regarding the status of the loan modification. (Opp. P.6.) Other than alleging that Defendant violated the HOBR when it continued with the foreclosure while he was under loan modification review, there are no allegations regarding the actual review of the application or failure to provide a status update on the application. (FAC ¶¶ 17-21.) To the extent such allegations existed in the FAC, however, they would be insufficient. Indeed, a financial institution generally owes no duty of care to a borrower where the institution's involvement does not exceed the scope of a conventional lender of money. (*Nymark v. Heart Federal Sav. & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1096.) A lender's obligation to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant

directives and announcements from the United States Department of the Treasury." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67.) Plaintiff cites to dicta set forth in *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 899, 901, a case involving a construction loan which suggested that based upon an analysis of the *Biakanja* factors, a lender of home loans may owe a duty even in its traditional role as a lender of money. However, *Lueras* expressly rejected *Jolley's* suggestion. "We disagree with *Jolley* to the extent it suggests a residential lender owes a common law duty of care to offer, consider, or approve a loan modification, or to explore and offer foreclosure alternatives." (*Id.*) Thus, Plaintiffs' opposition, essentially relying entirely on *Jolley* fails to show that a duty of care was owed under the circumstances set forth in the complaint.

The Court will allow leave to amend as *Lueras* recognized that a borrower has a duty not to make material misrepresentations regarding the status of an application for a loan modification or regarding the status of a foreclosure. (*Lueras, supra.* at 68-69 [granting leave to amend a negligence cause of action against a financial institution as it "is foreseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification, and the connection between the misrepresentation and the injury suffered could be very close"].)

Given the above, the Court need not address Defendant's additional argument that Plaintiff failed to allege damages because he only alleged that it caused the foreclosure and damage to his credit which are a result of the fact that he was in default on his loan obligations since 2011, not anything it did.

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

Defendant's demurrer is sustained with leave to amend for failure to state facts sufficient to constitute a cause of action. "Fraud must be pled specifically; general and conclusory allegations do not suffice. 'Thus the policy of liberal construction of the pleadings...will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [citations omitted].) When alleging fraud against a corporate entity, a plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

Here, Plaintiff alleges that he met an unnamed representative of Defendant's on June 14, 2013 at the branch near his home and that the representative stated that Plaintiff had submitted a complete loan modification and was not at risk of foreclosure while under loan modification review. (FAC ¶ 24.) He alleges this was false because Defendant knew that it had scheduled a Trustee's Sale for September 2013. (Id. ¶ 25.)

Defendant is correct that Plaintiff failed to plead this cause of action with the requisite level of specificity. Indeed, Plaintiff failed to allege the name of the representative he met with in person, failed to allege facts showing the authority of that person to speak on Defendant's behalf, and whether the representations were oral or written. (*Tarmann*, supra, 2 Cal.App.4th at 157.)

In addition, Defendant is correct that Plaintiff has failed to adequately allege damage. Plaintiff alleged that he was damaged because had the loan modification been approved he would not have received "additional credit markings." (FAC ¶ 28.) This is inadequate as Plaintiff did not allege that Defendant represented that his loan modification would be approved. The allegation that his "health has suffered tremendously" also is inadequate as it entirely conclusory. In opposition, Plaintiff argues that he suffered damages because he "spent numerous hours and resources trying to save his home by being fairly reviewed for a loan modification." There are no such allegations in the third cause of action.

The Court, however, rejects the argument that Plaintiff cannot show any misrepresentation because while he alleged the unnamed representative promised that he was not at risk of foreclosure, the sale date was ultimately continued to September 2013. Despite the fact that the sale date was continued, the foreclosure process continued and Plaintiff adequately alleged that Defendant misrepresented that he was not at risk of foreclosure. In fact he alleged that Defendant refused to cancel the sale until the instant lawsuit was filed. (FAC ¶ 10.)

In sum, the demurrer is overruled as to the first cause of action and sustained with leave to amend as to the second and third causes of action. While Defendant argues that Plaintiff should not be given leave to amend because he has had two opportunities to cure the defects in the pleading, this is the first demurrer that the Court has ruled upon and thus the first opportunity that the Court has had to address any defects in the pleading (Plaintiff filed the FAC prior to the hearing on the first demurrer). Leave to amend is properly granted.

Where leave was given, Plaintiff shall file and serve an amended complaint no later than August 25, 2014. Defendant shall file and serve its response within 10 days thereafter, 15 days if the amended complaint is served by mail.

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

COURT RULING

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

TOPIC	CFPB	HBOR	NMS
Effective date	January 10, 2014.	January 1, 2013.	April 4, 2012.
Entities regulated	All servicers of federally related mortgage loans (nearly all servicers). §1024.2.* Exception: small servicers** currently service 5,000 or fewer mortgages they either own or originated. §1026.41(e)(4)(ii). They are exempt from most outreach, SPOC, and dual tracking requirements. §1024.30(b)(1).	Servicers and sub-servicers; not trustees acting under a DOT. §2920.5(a).* Exceptions: Small servicers** foreclosed on 175 or fewer residential properties in the previous fiscal year. §2924.18(b). They are subject to fewer restrictions and requirements. NMS-signatories that are NMS-compliant with respect to an individual borrower may escape HBOR liability. §2924.12(g).	Signatories to the NMS: Wells Fargo Bank of America Ally (formerly GMAC) JP Morgan Chase CitiMortgage This includes sub-servicers performing loss mit on a signatory's behalf. IV, p. A-16.*
Property protected	Typical mortgages on principal residences, including close-ended junior loans. §1024.30(c)(2). Exceptions: HELOCs. §1024.31. Rental or vacation homes. §1024, pmbl. at 95.	The most senior lien (§2920.5(d)) on owner-occupied, principal residences in California with no more than 4 dwelling units. §2924.15(a).	Mortgages on owner-occupied principal residences serviced by an NMS signatory. Introduction, p. A-1.

*This chart uses short cites. CFPB cites are to Regulations X and Z of the Code of Federal Regulations, 12 C.F.R. § __, which implement the Real Estate Settlement Procedures Act (Reg X) and the Truth in Lending Act (Reg Z). The §1024 cites are to Reg X and the §1026 cites are to Reg Z. Homeowner Bill of Rights cites are to the California Civil Code. Unless otherwise noted, National Mortgage Settlement cites refer to "Exhibit A" of the NMS consent judgments, available at http://www.nationalmortgagesettlement.com/. There have been other settlements involving servicers who were not parties to the NMS that may provide similar relief to homeowners. This chart only considers the NMS.
**This chart only covers rules applying to large servicers. Exceptions and separate rules may apply to small servicers and advocates should refer to RESPA and HBOR for specific guidance.

This chart was created by the National Housing Law Project, as part of the Homeowner Bill of Rights Collaborative. 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.

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	Reverse mortgages. §1024.30(b)(2). (See §1026.33 for definition of reverse mortgages.)		
Who can sue?	Borrowers. 12 U.S.C. 2605(f). Exception: borrowers have no private right of action to enforce SPOC or general servicing rules.	Borrowers. §2920.5(c)(1). Exception: borrowers in active bankruptcy. §2920.5(c)(1)(C).	Not borrowers. Only state attorneys general may bring a cause of action under the NMS. Exh. E, J(2), p. E-14-15. Possible exception: contract claims related to servicing transfers may be available (see below).
Preemption: which law trumps?	More protective state laws and regulations are not preempted by the CFPB servicing rules, including more protective provisions of HBOR and the NMS. §1024.5(c); 78 Fed. Reg. 10,706 (Feb. 14, 2013); Official Bureau Interpretation, ¶ 1024.5, n.27. Exception: notices and disclosures related to servicing transfers. §1024.33(d).	More protective HBOR rules are not preempted by CFPB rules (see left); more protective CFPB rules trump HBOR. NMS can only trump HBOR if the servicer is an NMS signatory. If a signatory violated the NMS *as applied to the borrower in question*, however, servicer is liable under HBOR. §2924.12(g).	More protective NMS rules are not preempted by CFPB rules (see left); more protective CFPB rules trump NMS. (Note the available remedies, however, below). NMS only trumps HBOR if the servicer is an NMS signatory. If a signatory violated the NMS *as applied to the borrower in question*, however, servicer is liable under HBOR. §2924.12(g).
Earliest servicer can initiate foreclosure	121st day of borrower's delinquency. §1024.41(f)(1).	30 days after contacting (or diligently attempting to contact) borrower to discuss foreclosure alternatives. §2923.55(a). Only after ensuring the NOD (and NTS, assignments, and substitutions of trustee) are "accurate and complete and supported by competent and reliable evidence" (§2924.17(a)), and after substantiating borrower's default and servicer's right to foreclose. §2924.17(b).	15 days after sending borrower written notice including reinstatement amount, servicer's authority to foreclose, and info for HUD counseling agencies. I-A-18, p. A-4; I-B-10-a, p. A-7. Only after ensuring NOD, NTS, and "similar notices" are "accurate and complete and are supported by competent and reliable evidence" and substantiating borrower's default and servicer's right to foreclose. I-A-1, p. A-1.

This chart is a quick reference guide: it is not exhaustive. Please refer to the cited material for a full description of the provisions.

Servicer authority to foreclose	Nothing in these rules "should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan . . . or to eliminate any such right that may exist pursuant to applicable law." §1024.41(a).	Only the beneficiary under the DOT, the original or properly substituted trustee, or the designated agent of the beneficiary may record an NOD or initiate a foreclosure. §2924(a)(6). Before recording an NOD, a servicer must send borrower written notice that borrower may request a copy of any assignment required to demonstrate servicer's authority to foreclose. §2923.55(b)(1)(B)(iii). Servicer must also review competent and reliable evidence to substantiate borrower's default and servicer's right to foreclose. §2924.17(b).	<u>At least 14 days before initiating foreclosure</u>: servicer must send borrower written statement "setting forth facts supporting" servicer's authority to foreclose. I-A-18, p. A-4. Servicer must "implement processes" ensuring a documented authority to foreclose. I-C, p. A-8.
Required pre-foreclosure contact	<u>By day 36 of delinquency</u>: attempt live contact (phone or in-person) and inform borrower of loss mit options, if appropriate. §1024.39(a). This obligation renews each month of delinquency. <u>By day 45 of delinquency</u>: contact borrowers in writing. This obligation is only triggered once during any 180-day period. Notice must give servicer contact info, loss mit instructions and examples, and HUD counseling info. §1024.39(b).	Before recording an NOD, servicer's must: Provide borrower with a written statement outlining docs borrower may request. §2923.55(b)(1)(B). Contact borrower by phone or in person to explore foreclosure alternatives and to offer a subsequent meeting, which must occur within 14 days of meeting request. §2923.55(b)(2). If above contact is unsuccessful: send a first class letter, attempt telephone contact on 3 different days and times, and finally send a certified letter with return receipt requested, giving HUD counseling info. §2923.55(f).	Servicer must make reasonable effort (HAMP handbook v.3.2 standards and timelines) to contact borrowers who are potentially eligible for loss mit. IV-D-1, p. A-23. Must also notify borrowers of available loss mit options. IV-A-1, p. A-16. Servicers may not instruct or encourage borrowers to go into default to qualify for loss mit. IV-H-8, p. A-29. At least 14 days before recording NOD, servicer must send borrower written notice including reinstatement amount, servicer's authority to foreclose, and info for HUD counseling agencies. I-A-18, p. A-4; I-B-10-a, p. A-7.

This chart is a quick reference guide: it is not exhaustive. Please refer to the cited material for a full description of the provisions.

Required contact after referral to foreclosure	None.	Within 5 bus. days of recording NOD: written notice outlining loan mod app process. Only required for borrowers who have *not* already exhausted loan mod process. §2924.9(a).	Within 5 bus. days of referral: must send a "Post Referral to Foreclosure Solicitation Letter" stating that borrower must submit loan mod app to be considered for loss mit. IV-D-6, p. A-24-25.
Single Point of Contact (SPOC)	By day 45 of delinquency: servicer should assign personnel to borrower, to help them in the loss mit process. §1024.40(a)(1). See §1024.40(b) for a full list of SPOC requirements. No private right of action (see above).	Servicer shall promptly establish a SPOC and provide SPOC's contact info "upon request from a borrower who requests a foreclosure prevention alternative." §2923.7(a). May be a "team" of individuals but each team member must comply with SPOC requirements. §2923.7(e). See §2923.6(b)-(d) for a full list of SPOC requirements.	Servicer shall establish a SPOC for every potentially-eligible borrower; servicer shall identify the SPOC to the borrower soon after borrower requests loss mit. IV-C, p. A-21. See IV-C-4-9, p. A-22-23 for a full list of SPOC requirements.
Servicer duty to make information publicly available	None.	To comply with the "due diligence" pre-NOD outreach requirement (§2923.55), servicer must provide a "prominent link" on its homepage, providing borrowers with loss mit descriptions and instructions, documents often required, and servicer contact info. §2923.55(f)(5).	Servicers must make their loss mit qualification processes available to the public. IV-I-1, p. A-29. Must also develop online "loan portals," allowing borrowers to check the status of their apps. IV-E-1, p. A-25.
Are eligible borrowers guaranteed a mod?	No. §1024.41(a). Servicer evaluation methods are also unregulated. [Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(c)(1)-1].	No. § 2923.4(a).	Servicers "shall offer" a loan mod to eligible borrowers if borrowers are NPV positive and meet investor criteria. IV-A-2, p. A-16.
How many mod apps receive dual tracking protections?	Only 1: borrower's first *complete* application submitted to a particular servicer, received after Jan. 10, 2014. §1024.41(i). No exceptions for a material change in financial circumstances or for previous non-modification applications (ex:	1+: servicers are not required to evaluate borrowers who were already evaluated, before or after January 1, 2013. Servicers must, however, evaluate subsequent applications if borrower "documents" and "submits" a "material change in financial circumstances" that warrants a fresh	1+: servicers are not required to evaluate borrowers who were already evaluated under any program, before or after April 4, 2012. Servicers must, however, evaluate subsequent applications if borrower "documents" and "submits" a "material change in financial circumstances" that warrants

This chart is a quick reference guide: it is not exhaustive. Please refer to the cited material for a full description of the provisions.

	forbearances, short sale apps). Dual tracking protections do apply to subsequent apps submitted to a *new* servicer after a servicing transfer. Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(i)-1.	look. Dual tracking protections apply to these apps. §2923.6(g).	a fresh look. IV-H-12, p. A-29.
Prohibited fees during loss mit	None.	Servicer may not collect any late fees when a complete loan mod app, other foreclosure alternative, or appeal is pending, or when borrower is compliant with any foreclosure prevention alternative plan. §2924.11(f).	Servicer may not collect late fees when a complete loan mod or short sale app is pending, or when a borrower is TPP compliant. VI-B-4-c, p. A-36.
Types of loan mod applications that receive some level of dual tracking protections	Complete application: all info servicer needs (from borrower, not from other sources) to review borrower. §1024.41(b)(1); Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(b)(1)-5. Application: at minimum, borrower's expressed interest in loss mit *and* at least some information used to determine borrower eligibility. May be verbal. Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(b)(1)-2. If received 45 or more days pre-sale, requires acknowledgment letter. §1024.41(b)(2)(i). Facially complete application: borrower provides all information requested by servicer, even if servicer *later* determines app is not complete. Must be treated as complete for most	Complete application: necessary documents and "complete" status are determined by servicer. §2923.6(h); §2924.10(b).	Substantially complete application: only missing required documentation of hardship. IV-B-1, p. A-17. May still get dual tracking protection if submitted early enough (see "dual tracking protections due an incomplete application," below). Complete application: undefined, but likely an application that includes all information requested by servicer.

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	dual tracking protections until borrower is given a reasonable opportunity to complete app. §1024.41(c)(2)(iv).		
Acknowledgement upon receipt of incomplete application	When did servicer receive app? 45+ days pre-sale: servicer must determine if app is complete or incomplete, provide written acknowledgment of receipt, and request missing documents in 5 bus. days. §1024.41(b)(2)(i)(A)-(B). Less than 45 days pre-sale: no acknowledgement required.	Within 5 bus. days: servicer must provide written acknowledgement of receipt, describe loan mod process, missing docs and deadlines, and expiration dates for submitted documents. §2924.10(a).	Within 3 bus. days: servicer must provide written acknowledgment of receipt of any document submitted "in connection with" a loan mod app, describe process, and identify deadlines and expiration dates for any docs. IV-F-1, p. A-25-26. Within 5 bus. days: servicer must notify borrower of any missing documents. IV-F-2, p. A-26.
Acknowledgement upon receipt of complete application	When did servicer receive app? 45+ days pre-sale: servicer must determine if app is complete or incomplete and provide written acknowledgment of receipt and completeness in 5 bus. days. §1024.41(b)(2)(i)(A)-(B). Less than 45 days pre-sale: none.	Within 5 bus. days: servicer must provide written acknowledgement of receipt, describe loan mod process, estimate of when borrower can expect decision, expiration dates for submitted documents. §2924.10(a).	Within 3 bus. days: servicer must provide written acknowledgment of receipt of app, describe process, and identify expiration dates for any docs. IV-F-1, p. A-25-26.
Borrower's time to submit missing docs	"Reasonable" deadlines determined by servicer. §1024.41(b). Deadlines must be provided to borrower in app acknowledgement letter (only required if app received 45 or more days pre-sale). §1024.41(b)(2)(ii).	"Reasonable timeframes" determined by servicer. §2923.6(h); §2924.10(b).	30 days from the date of servicer's letter notifying borrower of missing documents. IV-F-3, p. A-26.
When do documents grow stale?	Determined by servicer, but servicer must notify borrower of date in app acknowledgement letter (only required if app received 45 or more days pre-sale). §1024.41(b)(2)(ii)(A).	Determined by servicer. §2923.6(h).	Borrower financials shall be used for 90 days from the date the servicer received the documents. IV-F-6, p. A-26.

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Dual tracking protections due a complete application	When did servicer receive app? <u>Pre-NOD *or* before 121st day of delinquency</u>: servicer cannot initiate foreclosure process while app or appeal is pending. §1024.41(f)(2). Must provide borrower with written determination within 30 days of app receipt. §1024.41(c)(1)(ii). <u>37+ days pre-sale</u>: servicer cannot conduct a foreclosure sale while app or appeal is pending. §1024.41(g). Must provide borrower with written determination within 30 days of app receipt. §1024.41(c)(1)(ii). <u>Less than 37 days pre-sale</u>: no dual tracking restrictions; no app review required. §1024.41(g).	Servicer cannot record an NOD, an NTS, or conduct a sale while the application is pending (§2923.6(c)) and, if app is denied, until 31 days after providing borrower with a written denial. §2923.6(e)(1). No deadline for borrower's application. No deadline for servicer's app evaluation.	When did servicer receive app? <u>Pre-NOD *and* before 121st day of delinquency:</u> servicer cannot initiate foreclosure process while app is pending. IV-A-1, p. A-16; IV-B-1, p. A-17. Must make determination within 30 days of app receipt (IV-F-4, p. A-26) and provide written notice of a denial within 10 bus. days of decision. IV-F-7, p. A-26. <u>Less than 31 days after Post Referral to FC Solicitation Letter *or* 37+ days pre-sale</u>: servicer cannot conduct a foreclosure sale while app is pending. IV-B-4, p. A-18; IV-B-6, p. A-19. Must make determination within 30 days of app receipt (IV-F-4, p. A-26) and provide written notice of a denial within 10 bus. days of decision. IV-F-7, p. A-26. <u>15+ days pre-sale:</u> servicer must give application "expedited review," but may proceed with sale. IV-B-8, p. A-18-19. <u>Less than 15 days pre-sale:</u> before sale date, servicer must notify borrower of determination, or of servicer's inability to conduct a review (no duty to actually review), but may proceed with sale. IV-B-9, p. A-20.

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Dual tracking protections due an incomplete application	Facially complete app: treat as "complete" for dual tracking protections provided in §1024.41(f)(2) and (g). Basically, servicer cannot initiate foreclosure or conduct a sale while app is pending. §1024.41(c)(2)(iv).	None.	When did servicer receive app? Pre-NOD *and* before 121st day of delinquency: upon receipt of a substantially complete app (defined above), and receipt of missing hardship info before 131st of delinquency, servicer cannot initiate foreclosure while app is pending. IV-B-1, p. A-17. Whenever a servicer finally denies *any* "loan modification request" (not just a complete application) it must notify borrowers of the denial in writing, within 10 bus. days *of making that decision* (if a decision is required). IV-F-7, p. A-26.
Borrower options after mod is offered	When did servicer receive app? 90+ days pre-sale: must accept within 14 days of receiving offer, or offer considered rejected. §1024.41(e)(1). 37+ days pre-sale: must accept within 7 days of receiving offer, or offer considered rejected. §1024.41(e)(1). Less than 37 days pre-sale: servicer may establish any deadline for acceptance.	Must accept within 14 days of offer, or offer considered rejected. §2923.6(c)(2).	Must accept within 14 days of offer, or offer considered rejected. Once servicer offers a mod, it must postpone a pending sale until the expiration of borrower's 14-day decision making period. IV-B-2, p. A-17; IV-B-4, p. A-18; IV-B-6, p. A-19; IV-B-9, p. A-20.
Servicer duties upon receipt of borrower's executed loss mit agreement	None.	Provide the borrower with a fully executed copy of the agreement "following receipt" of borrower's copy. §2924.11(c). No exact deadline or timeframe specified.	Within 45 days: provide borrower with a fully executed copy of the loan *mod* agreement. IV-H-7, p. A-28. No requirements for other types of loss mit agreements.

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		If applicable, record a rescission of an NOD or cancel a pending sale. §2924.11(d).	
Requirements for denial letters	Must state appeal rights and deadlines and specific reasons for denial of a *mod* option (not other loss mit options). §1024.41(d). If applicable, must give the identity of a disallowing investor and state its reasoning, and NPV inputs if NPV test failed. Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(d)-1-2.	Must state appeal rights and deadlines, specific reasons for investor disallowance (if applicable), NPV inputs if NPV test failed, and a description of other loss mit options and how to apply for them. §2923.6(f).	Must state specific reasons and info relied upon, including reasons for investor denial and NPV inputs; must explain appeal process. IV-G-2-a-c, p. A-27.
Appeal rights	When did servicer receive app? 90+ days pre-sale: borrower must appeal within 14 days of denial. §1024.41(h)(1)-(2). Less than 90 days pre-sale: none.	All borrowers who submit a complete application and are denied have the opportunity to appeal. Borrower must appeal within 30 days from the date of the denial letter and provide evidence that denial was incorrect. §2923.6(d).	When did servicer receive app? Pre-NOD *and* before 121st day of delinquency, *or* less than 31 days after Post Referral to Foreclosure Solicitation Letter: borrower must appeal within 30 days of date of denial letter and provide evidence that denial was incorrect. IV-G-3-a, p. A-27. 37+ days pre-sale: if "reasonable to believe" sale date is 90+ days away, borrower may appeal within 30 days of date of denial letter and must provide evidence that denial is incorrect. IV-B-7, p. A-19; IV-G-3-a, p. A-27.
Appeal timelines and requirements	Within 30 days of appeal: servicer must make a determination. §1024.41(h)(4). Within 14 days of offer: borrower must accept, or offer considered	Servicer may not record an NOD, NTS, or conduct a sale until the later of: 1) 15 days after the appeal is denied; or 2) 14 days after mod is offered	Within 30 days of appeal: servicer must "communicate" its appeal decision to borrower. IV-G-3-c, p. A-28. Within 14 days of offer: borrower

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	rejected. §1024.41(e)(2)(iii); §1024.41(h)(4).	but rejected by borrower. §2923.6(e)(2). No deadline to process appeal.	must accept, or offer considered rejected. IV-B-3, p. A-17. Servicer cannot conduct sale until the later of: 1) 15 days after the appeal is denied; or 2) 14 days after mod is offered but rejected by borrower. IV-B-3, p. A-17. Appeal denial letter must include descriptions of other loss mit alternatives. IV-G-3-d, p. A-28.
Dual tracking protections once loss mit plan is in place	When did servicer receive app? <u>Pre-NOD *or* before 121st day of delinquency</u>: servicers may not initiate foreclosure while a borrower is compliant with a loss mit agreement. §1024.41(f)(2)(iii). <u>37+ days pre-sale</u>: servicers may not conduct a sale while a borrower is compliant with a loss mit agreement. §1024.41(g)(3).	If foreclosure alternative is approved of in writing, servicer cannot record an NOD, NTS, or conduct a sale while borrower is compliant with agmt or has provided servicer proof of funds/financing. §2924.11(a)-(b).	Servicer may not conduct a foreclosure sale while borrower is compliant with a TPP, perm mod, forbearance, or repayment plan, or if a short sale or deed in lieu has been approved by all parties and borrower has provided servicer with proof of funds/financing. IV-B-11, p. A-20.
Remedies	Borrowers may recover the following relief for *each* of servicer's RESPA violations: Actual damages incurred by the borrower directly caused by violation; additional damages if there is a "pattern and practice" of noncompliance, up to $2,000 for each	<u>Before a trustee's deed has been recorded</u>: borrowers may obtain injunctive relief for material violations of HBOR's pre-NOD outreach, dual tracking, SPOC, post-NOD outreach, app acknowledgement, late fees, servicing transfers, or document reliability provisions. §2924.12(a).	None. <u>Possible exception</u>: contract claims related to servicing transfers (see below).

	violation; attorney's fees and costs. 12 U.S.C. §2605(f).	After a trustee's deed has been recorded: borrowers may obtain actual economic damages for material violations of the above provisions, if the violation was not remedied before the deed was recorded. Borrowers may obtain the greater of treble actual damages or $50K in statutory damages for intentional, reckless, or willful violations. §2924.12(b).	
Servicing Transfers	At least 15 days before transfer: old servicer must provide notice of transfer including date of transfer, contact info for both new and old servicers, and date borrower should start making payments, to new servicer. §1024.33(b)(1)-(4). Within first 15 days after transfer: new servicer must provide notice of transfer with identical info as above. §1024.33(b)(1)-(4). For 60 days after transfer date: payments made to old servicer cannot be considered late. §1024.33(c). Old servicer must transfer all docs and info related to borrower's loan to new servicer; new servicer must identify and request any missing docs. §1024.33(b)(4). Docs may count as loss mit "application." Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(i)-1.	New servicer must honor any modification or foreclosure prevention alternative approved by the old servicer, if that approval was in writing. §2924.11(g). No specific protections for borrowers who have a pending application during a servicing transfer.	Old servicer must inform new servicer if a loan mod app is pending. IV-M-1-a, p. A-32. Any contract between old and new servicer must obligate the new servicer to continue processing any pending loan mod app, and to honor a TPP or perm mod agmt entered into by old servicer. Any such contract must also "designate that borrowers are third party beneficiaries" of these requirements. IV-M-1-b-d, p. A-32.

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	Most recent CFPB guidance on servicing transfers is available in Bulletin 2014-01 (Aug. 19, 2014).		
"Widows & Orphans" Protection	Upon notification of borrower's death: servicer must promptly "identify and facilitate" communication with the widowed spouse or heir regarding the property. §1024.33(b)(vi). "Successors-in-interest" who acquire title and want to be added as a "borrower" to the mortgage or DOT are not subject to TILA's "Ability to Repay" Rule under §1026.43. CFPB Interpretive Rule. No private right of action.	None.	None.
Servicer duty to provide payoff statements†	Within 7 bus. days of receipt of borrower's written request: must provide an accurate payoff statement (total outstanding balance of loan). Applies to all loans including HELOCs and loans on vacation or rental homes. For loans in foreclosure, statement must be provided in a "reasonable time." §1026.36(c)(3).	Within 21 days of receipt of borrower's written "payoff demand statement:" must provide borrower a payoff statement, if demand statement is received before NTS is recorded. §2943(c).	At least 14 days before initiating foreclosure: must send borrower written statement including borrower's reinstatement amount. I-B-10-a, p. A-7.
Servicer duty to provide periodic statements‡	Every billing cycle: must provide borrowers a periodic statement including recent account information, how partial payments are credited,	None.	Every billing cycle: must provide borrowers a periodic statement showing total due, payment allocation, unpaid principal, fees, escrow balance,

† Servicer liability for TILA violations, as opposed to creditor liability, is still an open question due to complexities in the TILA remedies provision. *See* NCLC, *Truth in Lending*, § 11.6.9 (8th ed. and 2013 Supp.).
‡ *See id.*

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	delinquency information, etc. §1026.41(a)(2); (d)(1)-(8). There is a private right of action to enforce this provision, but borrower must show actual damages. 15 U.S.C. §1640 (not listing §1638(f) violations as leading to statutory damages).		etc. I-B-5, p. A-5-6. Exception: borrowers in foreclosure or bankruptcy. I-B-5, p. A-5.
Short Sales	Borrowers receive no appeal rights for a short sale denial. Servicers may not initiate foreclosure or conduct a sale while a borrower is "performing" under a short sale agreement. A borrower is deemed "performing" under a short sale agreement during the listing or marketing period. Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41(g)(3)-1.	If a short sale is approved of in writing by all parties, and servicer was provided with proof of funds or financing, servicer must record a rescission of an NOD and/or cancel a pending sale. §2924.11(d).	When did servicer receive borrower's *first* short sale app? Within 10 bus. days of receipt: servicer must provide a written confirmation of app, including info about the process and requirements. IV-K-4, p. A-30. Within 30 days of receipt: servicer must provide written notice of any missing docs. IV-K-5, p. A-31. Within 30 days of receipt of *complete* app: servicer must provide borrower with written decision. IV-K-6, p. A-31. Denials require specific reasoning. IV-K-7, p. A-31.
Borrowers in bankruptcy	Borrowers in active bankruptcies or who have sent an FDCPA "cease communication notice" are not protected by pre-foreclosure contact requirements. §1024.39(d)(1)-(2).	Borrowers who filed for bankruptcy are not considered "borrowers" under HBOR until the bankruptcy court has entered an order closing or dismissing the case, or granted a servicer or trustee relief from a stay of foreclosure. §2920.5(c)(1)(C).	Bankruptcy should not be a reason for denying loss mit. Timelines should be delayed to accommodate bankruptcy court approvals. IV-L, p. A-31.

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