

## January 2018 Newsletter

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### Call to Action: Show Your Support for Bill to Revive Lapsed HBOR Protections

As discussed in recent issues of this newsletter, a number of important HBOR provisions relating to servicer communications and dual-tracking protections expired at the end of 2017. The version of HBOR in effect as of January 1, 2018, lacks certain key protections, including the right to appeal a loan modification denial. For an overview of these recent changes, please see the chart below at page 3-8, which compares the original version of HBOR with the current version and with relevant federal servicing regulations.<sup>1</sup>

On the first day of the current legislative session in Sacramento, State Sen. Jim Beall, joined by an impressive (and growing) list of co-authors, introduced SB 818, a bill to restore critical HBOR protections. NHLP and Housing and Economic Rights Advocates (HERA) are co-sponsors of SB 818. The bill has been referred for hearings in two Senate committees: Judiciary and Insurance, Banking and Financial Institutions. These hearings are expected to take place in April.

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<sup>1</sup> Please note that the chart focuses on the requirements applicable to large servicers and that it does not cover changes to codification (e.g., movement of certain provisions from one Civil Code section to another) or certain protections that are still available under federal servicing regulations (e.g., rules regarding servicing transfers).

We expect industry lobbyists to mount a vigorous opposition to SB 818, so it is crucial that those in support make their voices heard. Here are the best ways to show your support for SB 818:

- Send an individual and/or organizational letter in support of the bill to Sen. Beall via email ([Carrie.Holmes@sen.ca.gov](mailto:Carrie.Holmes@sen.ca.gov)), fax (916-651-4915) or regular mail to: The Honorable Jim Beall, California State Senate, State Capitol, Room 5066, Sacramento, CA 95814.
- If you have homeowner stories to share – especially related to successful appeals of loan modification denials – or are interested in participating in advocacy to help get SB 818 across the legislative finish line, please contact Sen. Beall’s Legislative Director at [Carrie.Holmes@sen.ca.gov](mailto:Carrie.Holmes@sen.ca.gov) or Lisa Sitkin at NHLP at [lsitkin@nhlp.org](mailto:lsitkin@nhlp.org).

**HBOR THEN AND NOW (large servicers only; small servicers are not affected unless otherwise noted)**

TYPE OF PROVISION	ORIGINAL HBOR eff. 1/1/13 – 12/31/17	CURRENT HBOR eff. 1/1/18	FEDERAL LOSS MITIGATION REGS.
<i>Outreach prior to initiation of FC process</i>	<p>Section 2923.55<sup>1</sup>: At least 30 days before initiation of FC process (<i>i.e.</i>, recording Notice of Default (NOD)):</p> <p>Written notice advising that special federal FC protections apply to servicemembers or their dependents;</p> <p>Written notice outlining important mortgage account documentation borrower may request, including a payment history; and</p> <p>Attempt at telephone or in-person contact to explore foreclosure prevention alternatives; and, if that effort is not successful, satisfaction of specified due diligence requirements.</p>	<p><b>No requirement that servicer provide information regarding the SCRA or advise borrower that important account documentation is available upon request.</b></p> <p>Section 2923.5: At least 30 days before initiation of FC process (<i>i.e.</i>, recording NOD):</p> <p>Attempt at telephone or in-person contact to explore foreclosure prevention alternatives; and, if that effort is not successful, satisfaction of specified due diligence requirements.</p>	<p><b>No requirement that servicer provide information regarding the SCRA or advise borrower that important account documentation is available upon request.</b></p> <p>Attempt at live contact with borrower by 36th day of delinquency. §1024.39(a).</p> <p>Written early intervention notice by 45th day of delinquency. §1024.39(b)(1).</p>
<i>Written notice after initiation of the FC process</i>	<p>Within 5 business days after recording NOD: Written notice advising borrower of foreclosure prevention alternatives and outlining the loss mitigation process. §2924.9.</p>	<p><b>No equivalent requirement.</b></p>	<p><b>No equivalent requirement.</b></p>

<sup>1</sup> This chart uses short cites. HBOR cites are to the California Civil Code. Federal cites are to Regulation X of the Code of Federal Regulations, 12 C.F.R. § \_\_.

**HBOR THEN AND NOW (large servicers only; small servicers are not affected unless otherwise noted)**

<b>TYPE OF PROVISION</b>	<b>ORIGINAL HBOR eff. 1/1/13 – 12/31/17</b>	<b>CURRENT HBOR eff. 1/1/18</b>	<b>FEDERAL LOSS MITIGATION REGS.</b>
<i>Letter acknowledging receipt of modification application materials</i>	Servicer required to send written acknowledgement that includes a list of any missing items needed to make the application complete and deadlines to submit them. §2924.10.	<b>No written acknowledgement required.</b>	<b>Not required if borrower submits fewer than 45 days before a scheduled sale. §1024.41(b)(2).</b>
<i>Anti-dual tracking: “freeze” on the foreclosure process</i>	Servicer may not record a Notice of Default or Notice of Sale or conduct a foreclosure sale while a complete application is pending or under appeal. §2923.6(c).	The current version of HBOR may require clarification regarding dual tracking protection pre-NOD. It appears that the intention was to retain this protection. <i>See</i> §2923.5(a)(1)(B) (requiring compliance with §2924.11(a) before recording of an NOD). However, §2924.11(a) only references the recording of a Notice of Sale or the conducting of a foreclosure sale while a complete application is pending. <sup>2</sup>	<b>Not required if borrower submits fewer than 37 days before a scheduled foreclosure sale. §1024.41(g).</b>  Note that some courts have held that the federal rules do not prohibit the recording of Notice of Sale while a complete application is pending. <sup>3</sup>

<sup>2</sup> This appears to have been a drafting error; the original version of HBOR included dual-tracking protection at the pre-NOD stage for both large and small servicers. *See* the pre-1/1/18 versions of §2923.6(c) and §2924.18(a)(1) (both referencing the recording of an NOD).

<sup>3</sup> *See, e.g.,* Vethody v. Nat'l Default Servs. Corp., 2016 WL 7451666, at \*4–5 (N.D. Cal. Dec. 28, 2016) (dismissing §1024.41(g) claim based on recording of NOS).

**HBOR THEN AND NOW (large servicers only; small servicers are not affected unless otherwise noted)**

<b>TYPE OF PROVISION</b>	<b>ORIGINAL HBOR eff. 1/1/13 – 12/31/17</b>	<b>CURRENT HBOR eff. 1/1/18</b>	<b>FEDERAL LOSS MITIGATION REGS.</b>
<i>Anti-dual tracking protection for subsequent applications</i>	Yes, after a documented material change in financial circumstances. §2923.6(g).	<b>Unclear; current version is silent regarding subsequent applications.</b>	<b>In limited circumstances only.<sup>4</sup></b>
<i>Anti-dual tracking: Written denial notice</i>	Required and must include specific information regarding timeline for appeal, income and property value inputs used and, if applicable, investor restrictions so the borrower has the ability to identify and request correction of any errors. §2923.6(f).	Written denial notice required, but the current version only makes certain specific information regarding reasons for denial available upon request rather than requiring the servicer to provide the information as a matter of course. §2924.11(b).	<b>Not required if borrower submits fewer than 37 days before a scheduled foreclosure sale. §1024.41(c)(1).</b>
<i>Anti-dual tracking: Right to appeal before servicer may proceed with the FC process.</i>	Yes. Borrower has 30 days after the date of a denial notice to submit an appeal. §2923.6(c)(1) & §2923.6(d). Servicer may not proceed with foreclosure sale until at least 15 days after a written denial of appeal. §2923.6(e)(2).	<b>No.</b>	<b>Not required if borrower submits fewer than 90 days before a scheduled foreclosure sale. §1024.41(h)(1). Borrowers eligible to appeal must do so within 14 days of the denial notice date. §1024.41(h)(2).</b>

<sup>4</sup> See §1024.41(i) (if “the borrower has been delinquent at all times since submitting the prior complete application” that was reviewed by the servicer, dual tracking protections do not apply to a subsequent application). Under this rule, a delinquent borrower who applies and is denied a modification for insufficient income then reapplies when she increases her income will not receive dual tracking protection for her second application.

**HBOR THEN AND NOW (large servicers only; small servicers are not affected unless otherwise noted)**

TYPE OF PROVISION	ORIGINAL HBOR eff. 1/1/13 – 12/31/17	CURRENT HBOR eff. 1/1/18	FEDERAL LOSS MITIGATION REGS.
<p><i>Anti-dual tracking: Freeze on foreclosure activity for a set period of time after a loan modification is offered.</i></p>	<p>Yes. Borrower has 14 days after the date of a loan modification offer to accept. §2923.6(c)(2).</p>	<p><b>No specified dual tracking protection after borrower is offered loan modification.</b></p>	<p><b>No specified dual tracking protection after borrower is offered loan modification if borrower submits fewer than 37 days before a scheduled foreclosure sale.</b> §1024.41(e)(1). If borrower submits more than 90 days before a scheduled foreclosure sale, borrower has 14 days after the date of a loan modification offer to accept. <i>Id.</i> If borrower submits more than 37 days before a scheduled foreclosure sale, borrower has 7 days after the date of a loan modification offer to accept. <i>Id.</i></p>

**HBOR THEN AND NOW (large servicers only; small servicers are not affected unless otherwise noted)**

<b>TYPE OF PROVISION</b>	<b>ORIGINAL HBOR eff. 1/1/13 – 12/31/17</b>	<b>CURRENT HBOR eff. 1/1/18</b>	<b>FEDERAL LOSS MITIGATION REGS.</b>
<i>Written notice to borrowers of sale date postponements.</i>	Written notice of sale date postponement required within 5 days for any postponement of more than 10 days. §2924(a)(5). <sup>5</sup>	<b>Not required.</b>	<b>Not required.</b>
<i>Prohibition on charging application, processing or other fees for a foreclosure prevention alternative.</i>	Yes. §2924.11(e).	<b>No.</b>	<b>No.</b>
<i>Prohibition on charging late fees while servicer is reviewing a loan modification application or an appeal, evaluating another foreclosure prevention alternative or receiving timely modified payments.</i>	Yes. §2924.11(f).	<b>No.</b>	<b>No.</b>

<sup>5</sup> This provision applied to small servicers as well as large servicers under the original version of HBOR and would apply again to small servicers under SB 818.

**HBOR THEN AND NOW (large servicers only; small servicers are not affected unless otherwise noted)**

<b>TYPE OF PROVISION</b>	<b>ORIGINAL HBOR eff. 1/1/13 – 12/31/17</b>	<b>CURRENT HBOR eff. 1/1/18</b>	<b>FEDERAL LOSS MITIGATION REGS.</b>
<i>Injunctive relief available to postpone a pending foreclosure sale when there has been a violation.</i>	Yes, if action is brought before the foreclosure sale is completed through recording of a Trustee’s Deed. §2924.12(a). After foreclosure is completed, damages are the only remedy. §2924.12(b).	Yes, if action is brought before the foreclosure sale is completed through recording of a Trustee’s Deed. §2924.12(a). After foreclosure is completed, damages are the only remedy. §2924.12(b). However, relief is only available for a more limited set of practices than in the original HBOR.	No. Damages are the only remedy available whether before or after the foreclosure sale is completed. §1024.41(a) (referencing 12 U.S.C. §2605(f))
<i>Servicer required to provide borrower approved for a permanent foreclosure prevention alternative with a fully executed copy of the relevant agreement.</i>	Yes. §2924.11(c).	<b>No equivalent requirement.</b>	<b>No equivalent requirement.</b>
<i>Servicer required to rescind notice of default and cancel any pending trustee’s sale once borrower executes a permanent foreclosure prevention alternative.</i>	Yes. §2924.11(d).	<b>No equivalent requirement.</b>	<b>No equivalent requirement.</b>

## Recent Cases of Note

***Giotta v. Ocwen Loan Servicing, LLC*, 2017 WL 6397179 (9th Cir. Dec. 15, 2017).**

In December 2017, the Ninth Circuit affirmed the dismissal of a borrower's statutory claims against a loan servicer because the borrower failed to give the servicer notice and the opportunity to take corrective action before filing the case. Though unpublished, this decision could be significant because the notice provision at issue is standard in most residential mortgages and deeds of trust, and because this is the first Circuit Court of Appeal to directly address: (1) the notice provision's applicability to non-contractual statutory causes of action; and, (2) a servicer's ability to rely on the notice provision even though the relevant documents only reference the "Lender". These issues have divided district courts around the country, and observers expect that *Giotta* will embolden more servicers and noteholders to raise a notice defense in borrower litigation.

***Rossetta v. CitiMortgage, Inc.*, 18 Cal. App. 5th 628 (Cal. Ct. App. 2017), reh'g denied (Jan. 4, 2018).**

In a thoughtful decision, the Third District Court of Appeal panel held that the trial court had erred in sustaining the demurrer to the plaintiff's negligence claim arising out of the loan modification process. Applying the *Biakanja* factors, the Court found that the servicer did owe a duty of care with respect to its handling of the borrowers loan modification application. The Court noted, "[W]e are convinced that a borrower and lender enter into a new phase of their relationship when they voluntarily undertake to renegotiate a loan, one in which the lender usually has greater bargaining power and fewer incentives to exercise care".

**California Foreclosure Defense Practice Guide**  
**(Updated with Decisions through December 31, 2017)**

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In July 2012, California Governor Jerry Brown signed the Homeowner Bill of Rights (HBOR).<sup>2</sup> This landmark legislation was created to combat the foreclosure crisis and hold loan servicers accountable for exacerbating it.<sup>3</sup> HBOR became effective on January 1, 2013.<sup>4</sup> This practice guide provides an overview of the legislation, developing case law, and related state-law causes of action often brought alongside HBOR claims. Finally, the guide surveys some common procedural issues that arise in HBOR litigation.

Readers of this guide should be aware that certain HBOR provisions expired as of January 1, 2018. A bill to revive those provisions, SB 818 (Beall), is pending in the legislature as of the publication of this guide. Where applicable, we have included citations to both the 2013 and 2018 versions of HBOR provisions.

## I. Homeowner Bill of Rights

A few months before HBOR became law, 49 state attorneys general agreed to the National Mortgage Settlement (NMS) with five of the country's largest mortgage servicers.<sup>5</sup> The servicers agreed to provide \$20 billion worth of mortgage-related relief to homeowners and to abide by new servicing standards meant to address some of the worst

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<sup>2</sup> Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., Attorney General Kamala D. Harris Announces Final Components of California Homeowner Bill of Rights Signed into Law (Sept. 25, 2012), *available at* <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-final-components-california-homeown-0>.

<sup>3</sup> See A.B. 278, 2011-2012 Sess., Proposed Conf. Rep. 1, at 18 (June 27, 2012), *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0251-0300/ab\\_278\\_cfa\\_20120702\\_105700\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0251-0300/ab_278_cfa_20120702_105700_asm_floor.html)

("Some analysts and leading economists have cited a failure by banks to provide long term and sustainable loan modifications as a single reason that the foreclosure crisis continues to drag on.")

<sup>4</sup> State of Cal. Dep't of Justice, Office of the Attorney Gen., Servs. & Info., California Homeowner Bill of Rights, <http://oag.ca.gov/hbor>.

<sup>5</sup> 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://d9klfgibkqcuc.cloudfront.net/Complaint\\_Corrected\\_2012-03-14.pdf](https://d9klfgibkqcuc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf).

foreclosure abuses.<sup>6</sup> Under the NMS, state attorneys general could sue noncompliant banks, but borrowers could not.<sup>7</sup> The California Legislature passed HBOR to give borrowers a private right of action to enforce many of these protections in court<sup>8</sup> and to apply key NMS requirements to all servicers, not just the five NMS signatories.<sup>9</sup> These protections include pre-NOD outreach, single point of contact requirements and restrictions on dual-tracking.

Practitioners should be aware that there are significant limits to HBOR's application. First, HBOR applies only to foreclosures of first liens on owner-occupied, one-to-four unit properties; junior liens are not covered.<sup>10</sup> Advocates should plead the "owner-occupied" requirement in the complaint,<sup>11</sup> with respect to at least one of the plaintiffs.<sup>12</sup> Second, HBOR only provides procedural protections to promote alternatives to foreclosure; nothing in HBOR requires a servicer to give a loan modification to a particular borrower or entitles a borrower to a particular outcome of a loss mitigation review.<sup>13</sup> Third, prior to 2018, HBOR offered fewer protections for borrowers whose

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<sup>6</sup> For example, "robo-signing" and dual tracking. *See* Servicing Standards Highlights 1-3, <https://d9klfgibkqcuc.cloudfront.net/Servicing%20Standards%20Highlights.pdf>.

<sup>7</sup> *See, e.g.*, Citi Consent Judgment Ex. E, § J(2), *United States v. Bank of Am.*, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at*

[https://d9klfgibkqcuc.cloudfront.net/Consent\\_Judgment\\_Citibank-4-11-12.pdf](https://d9klfgibkqcuc.cloudfront.net/Consent_Judgment_Citibank-4-11-12.pdf) ("An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee.").

<sup>8</sup> *See* CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013); CAL. CIV. CODE §§ 2924.12 (2018).

<sup>9</sup> Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., California Homeowner Bill of Rights Takes Key Step to Passage (June 27, 2012), <http://oag.ca.gov/news/press-releases/california-homeowner-bill-rights-takes-key-step-passage> ("The goal of the Homeowner Bill of Rights is to take many of the mortgage reforms extracted from banks in a national mortgage settlement and write them into California law so they could apply to all mortgage-holders in the state.").

<sup>10</sup> *See, e.g.*, *Rijhwani v. Wells Fargo Bank, N.A.*, 2015 WL 3466608, at \*18-19 (N.D. Cal. May 30, 2015) (HBOR not applicable to foreclosure on junior loan, even if both loans is owned by the same lender). "Owner-occupied" means that the property is the principal residence of the borrower." CAL. CIV. CODE § 2924.15(a) (2013; 2018).

<sup>11</sup> Failure to do so could be grounds for dismissal of HBOR claims. *See, e.g.*, *Banuelos v. Nationstar Mortg., LLC*, 2014 WL 1246843, at \*3 (N.D. Cal. Mar. 25, 2014); *Kouretas v. Nationstar Mortg. Holdings, Inc.*, 2013 WL 6839099, at \*3 (E.D. Cal. Dec. 26, 2013). *But cf.* *Cerezo v. Wells Fargo Bank, N.A.*, 2013 WL 4029274, at \*7 (N.D. Cal. Aug. 6, 2013) (finding failure to allege the "owner-occupied" element not fatal to borrower's claim where defendant servicer had requested judicial notice of their NOD declaration in which defendant did not dispute owner-occupancy).

<sup>12</sup> *Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at \*5 (N.D. Cal. Aug. 7, 2014); *Agbowo v. Nationstar Mortg.*, 2014 WL 3837472, at \*5-6 (N.D. Cal. Aug. 1, 2014).

<sup>13</sup> CAL. CIV. CODE § 2923.4(a) (2013; 2018).

loans were serviced by small servicers.<sup>14</sup> Fourth, while the National Mortgage Settlement (NMS) was in effect, a signatory who was NMS-compliant with respect to the individual borrower could assert compliance with the NMS as an affirmative defense.<sup>15</sup>

There is also a “safe harbor” provision if a servicer remedies an HBOR violation before recording a trustee’s deed upon sale.<sup>16</sup> Though still somewhat unsettled, “correct[ing] and remed[ying]” an HBOR violation should include rescinding any improperly recorded Notice of Default (NOD) or Notice of Trustee Sale (NTS).<sup>17</sup> In addition, relief (in

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<sup>14</sup> Compare § 2924.12 (2013) (listing sections with a private right of action against large servicers), with § 2924.19 (2013) (listing sections with a private right of action against small servicers, defined in CAL. CIV. CODE § 2924.18(b) (2013) as servicers that conducted fewer than 175 foreclosures in the previous fiscal year).

<sup>15</sup> CAL. CIV. CODE § 2924.12(g) (2013). The NMS consent judgment was entered on April 4, 2012 and remained in effect for three and half years until October 2015, so this safe harbor would not apply to claims that arose after that date. Courts rejected servicers’ argument that a borrower had to plead a servicer’s noncompliance with the NMS in the borrower’s complaint to state an HBOR claim. *See* Gilmore v. Wells Fargo Bank, 75 F. Supp. 3d 1255, 1262 (N.D. Cal. 2014); Banks v. JP Morgan Chase, 2014 WL 6476139, at \*7 (C.D. Cal. Nov. 19, 2014) (HBOR immunity based on NMS compliance is an affirmative defense best asserted by servicer at summary judgment, not as part of a motion to dismiss).

<sup>16</sup> CAL. CIV. CODE §§ 2924.12(c), 2924.19(c) (2013); § 2924.12(c) (2018). Saji v. Residential Credit Sols., 2017 WL 1407997, at \*5 (N.D. Cal. Apr. 20, 2017) (dismissing claim regarding servicer’s failure to provide a timely acknowledgement letter after receiving borrower’s loan modification application because servicer had later provided an acknowledgement letter); MacDonald v. Wells Fargo Bank N.A., 2017 WL 1150362, at \*2 (N.D. Cal. Mar. 28, 2017) (rejecting §2924.12(c) defense at summary judgment because of factual dispute over whether a subsequent loan modification review had actually remedied the alleged violations); Montes v. Wells Fargo Bank, N.A., 2017 WL 1093940, at \*5 (E.D. Cal. Mar. 23, 2017) (dismissing HBOR damages claims because servicer had conducted a loan modification review after the alleged HBOR violations). If the servicer waits until after a trustee’s deed is recorded to correct the violation, the servicer becomes liable for damages between the date of the recording and the date the trustee’s deed and foreclosure notices were rescinded. *See* McLaughlin v. Aurora Loan Services, 2015 WL 1926268, at \*4 (C.D. Cal. Apr. 28, 2015).

<sup>17</sup> *See* Hestrin v. Citimortgage, 2015 WL 847132, at \*1 (C.D. Cal. Feb. 25, 2015) (finding that “the possibility [of a servicer’s] remediation does not render an ongoing breach moot” and that only rescinding an improperly recorded NOD could moot a borrower’s dual tracking claim); Damos v. Specialized Loan Servicing, LLC, 2014 WL 3362259, at \*5 (N.D. Cal. July 7, 2014) (servicer’s rescinding of dual tracked NTS mooted borrower’s dual tracking claim); Jent v. N. Tr. Corp., 2014 WL 172542, at \*6 (E.D. Cal. Jan. 15, 2014) (servicer’s rescinding of an improper NOD protected it from borrower’s negligence claim based on a CC 2923.55 violation); Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (servicer’s rescission of NTS, but not NOD, insufficient to remedy dual tracking violation); Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (A servicer must rescind a

either the pre-sale injunctive form or as post-sale damages) is only available for a servicer's "material" HBOR violations.<sup>18</sup> Courts have differed widely on what constitutes a material violation.<sup>19</sup> Some have concluded that materiality is a factual question that should not be resolved at the pleading stage.<sup>20</sup> Others suggest that every violation that undermines the purpose of HBOR is a material violation.<sup>21</sup> Other courts have considered whether it is plausible that the violation caused harm to the plaintiff.<sup>22</sup>

HBOR's protections are also limited to "borrowers," as defined by the statute.<sup>23</sup> This limitation excludes borrowers in active bankruptcy,<sup>24</sup> but courts have found standing when the HBOR

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dual tracked NTS before moving forward with foreclosure; simply denying borrower's modification application does not remedy a dual tracking violation.). *But cf.* Gilmore v. Wells Fargo Bank, 75 F. Supp. 3d 1255, 1265-66 (N.D. Cal. 2014) (rejecting borrower's attempt to force servicer to rescind a dual tracked NTS because rescission is not a "remedy" under HBOR, but interpreting borrower's cause of action as one for injunctive relief, rather than dismissing the claim).

<sup>18</sup> CAL. CIV. CODE §§ 2924.12(a), 2924.19(a) (2013); CAL. CIV. CODE § 2924.12(a) (2018). The term "material" is not defined in these provisions.

<sup>19</sup> See Rahbarian v. JP Morgan Chase, 2015 WL 2345395, at \*3 (E.D. Cal. May 14, 2015) (listing various approaches and declining to choose a single test because plaintiff's allegation that he would have qualified for loan modification absent the violation would satisfy any test).

<sup>20</sup> See, e.g., Amer v. Wells Fargo Bank NA, 2017 WL 4865564, at \*10 (N.D. Cal. Oct. 27, 2017) (allegation that servicer recorded NOD while a complete application was pending is sufficient to satisfy materiality requirement) Hestrin v. Citimortgage, Inc., 2015 WL 847132, at \*3 n.4 (C.D. Cal. Feb. 25, 2015); Garcia v. PNC Mortg., 2015 WL 534395, at \*4-5 (N.D. Cal. Feb. 9, 2015); Hixson v. Wells Fargo Bank, 2014 WL 3870004, at \*6 (N.D. Cal. Aug. 6, 2014).

<sup>21</sup> Green v. Wells Fargo Bank, N.A., 2015 WL 2159460, at \*3 (N.D. Cal. May 7, 2015); Hendricks v. Wells Fargo Bank, N.A., 2015 WL 1644028, at \*8-9 (C.D. Cal. Apr. 14, 2015); Rizk v. Residential Credit Solutions., Inc., 2015 WL 573944, at \*12 (C.D. Cal. Feb. 10, 2015).

<sup>22</sup> Compare Mackensen v. Nationstar Mortg., 2015 WL 1938729 (N.D. Cal. Apr. 28, 2015) (finding material violation when the complaint alleged that Nationstar's SPOC violation resulted in his inability to accept the loan modification offer); Hestrin, 2015 WL 847132, at \*3 (finding servicer's failure to perform the required pre-NOD outreach under CC 2923.55 a material HBOR violation, rejecting servicer's argument that borrower must plead that the outreach would have led him to avoid default) with Montes v. Wells Fargo Bank, N.A., 2017 WL 1093940, at \*4 (E.D. Cal. Mar. 23, 2017) (alleged HBOR violations "are not material because they did not deprive [plaintiff] of the opportunity to obtain review of her application and potential loss mitigation"); Colom v. Wells Fargo, 2014 WL 5361421, at \*1-2 (N.D. Cal. Oct. 20, 2014) (servicer's failure to cite NPV numbers in a denial letter, and the SPOC's failure to return emails and phone calls not considered "material" violations of HBOR).

<sup>23</sup> CAL. CIV. CODE § 2920.5(c) (2013).

<sup>24</sup> CAL. CIV. CODE § 2920.5(c)(2)(C).

violation occurred at a time when the borrower’s bankruptcy was not pending.<sup>25</sup> Successors-in-interest who inherit the property or take title after dissolution of a marriage may also find it difficult to assert HBOR’s protections since they are not clearly included in the definition of a “borrower”,<sup>26</sup> however, legislation that went into effect in January 2017 (SB 1150) can also help successors avoid foreclosure.<sup>27</sup> Finally, HBOR exempts bona fide purchasers from liability.<sup>28</sup>

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<sup>25</sup> See *McCarthy v. Servis One, Inc.*, 2017 WL 1316810, at \*4 (N.D. Cal. Apr. 10, 2017) (N.D. Cal. March 7, 2017) (“the appropriate focus is whether a[n] HBOR violation occurred either prior to the filing of the bankruptcy case or after the bankruptcy case was dismissed... .”); *Foronda v. Wells Fargo Home Mortg., Inc.*, 2014 WL 6706815, at \*8 (N.D. Cal. Nov. 26, 2014) (rejecting section 2920.5(c) argument when HBOR violation predated bankruptcy filing, even though bankruptcy remained pending); *Withers v. J.P. Morgan Chase Bank N.A.*, 2014 WL 3418367, at \*5 (N.D. Cal. July 11, 2014) (rejecting section 2920.5(c) argument “because Plaintiff did not have a bankruptcy case pending when the Notice of Trustee’s Sale was recorded”).

<sup>26</sup> See *Baker v. Wells Fargo Bank, N.A.*, 2017 WL 931879, at \*6–7 (E.D. Cal. Mar. 9, 2017) (holding that plaintiff’s allegations that deceased borrower had quitclaimed the property to plaintiff and that he was the trustee of the deceased borrower’s trust were not sufficient to establish prudential standing because he had not alleged that he was obligated on the loan taken out by the deceased borrower); *Deck v. Wells Fargo Bank, N.A.*, 2017 WL 815678, at \*3 (E.D. Cal. Feb. 27, 2017) (sole borrower’s ex-husband was not a “borrower” under HBOR even though he alleged that the property was his primary residence); *Van Zandt v. Select Portfolio Servicing, Inc.*, 2015 WL 574357 (N.D. Cal. Feb. 10, 2015) (denying TRO because plaintiff was not the borrower but successor to the borrower); *Zanze v. Cal. Capital Loans Inc., No. 34-2014-00157940-CU-CR-GDS* (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (finding plaintiff had standing to allege a dual tracking claim because the mortgage note indicated that he was a “borrower” through his capacity as a trustee); *cf. McLaughlin v. Aurora Loan Services*, 2015 WL 1926268, at \*7-9 (C.D. Cal. Apr. 28, 2015) (rejecting argument that plaintiff was not a “borrower” unless she reaffirms the discharged mortgage loan); *Chaghouri v. Wells Fargo Bank, N.A.*, 2015 WL 65291 (N.D. Cal. Jan. 5, 2015) (rejecting section 2920.5 argument when servicer treated the plaintiff as “borrowers” in the Notice of Default).

<sup>27</sup> S.B. 1150 (2016) (adding Civ. Code § 2020.7). For an overview of the “survivor bill of rights”, see Lisa Sitkin, *Subtracting Insult from Injury: How You Can Use California’s “Survivor Bill of Rights” to Protect the Homes of Grieving Heirs*, Vol. 43, Issue 2, *Cal. Trusts and Estates Quarterly* (2017). Gary Menes, *Chapter 838: Foreclosing Preventable Foreclosures for Closure: Successors in Interest*, 48 *U. Pac. L. Rev.* 498, 512 (2017).

<sup>28</sup> CAL. CIV. CODE §§ 2924.12(e), 2924.19(e) (2013); CAL. CIV. CODE § 2924.12(e) (2018).

## A. Pre-NOD Outreach Requirements

HBOR continued an existing requirement in California law that a servicer may not record a notice of default (NOD) until 30 days after contacting,<sup>29</sup> or diligently attempting to contact, the borrower to discuss alternatives to foreclosure.<sup>30</sup> The statutes provide specific instructions on the nature and content of the communication.<sup>31</sup>

Some courts have accepted bare assertions that a borrower was never contacted pre-NOD as sufficient to pass the pleading stage,<sup>32</sup> while others require more specific allegations to overcome a servicer's NOD declaration attesting to its due diligence.<sup>33</sup> Because the statute

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<sup>29</sup> Contact is specifically required 30 days *before* recording an NOD. If a servicer fulfills this requirement and then does not contact borrower within the 30 days *leading up to* the NOD, that is not a violation of either the pre-HBOR or HBOR version of the law. *See* Rossberg v. Bank of Am., N.A., 219 Cal. App. 4th 1481, 1494 (2013).

<sup>30</sup> *See* CAL. CIV. CODE §§ 2923.5(a) & 2923.55(a) (2013) (applying to small and large servicers, respectively); CAL. CIV. CODE § 2923.5(a) (2018) (applying to all servicers). For specific due diligence requirements, see §§ 2923.5(e)(1)-(5) & 2923.55(f)(1)-(5) (2013) or CAL. CIV. CODE § 2923.5(a) (2018). Refer to CEB, CALIFORNIA MORTGAGES, DEEDS OF TRUST, AND FORECLOSURE LITIGATION (4th. ed. 2016), for a more detailed explanation of the similarities and differences between pre-existing law and HBOR.

<sup>31</sup> *See* McNeil v. Wells Fargo Bank, N.A., 2014 WL 6681604, at \*4 (N.D. Cal. Nov. 25, 2014) (allowing borrowers to assert a pre-NOD outreach claim based on servicer's failure to provide borrowers with a copy of the note, identify the loan beneficiary, or any assignment or accounting of the loan); Maomanivong v. Nat'l City Mortg. Co., 2014 WL 4623873, at \*8-9 (N.D. Cal. Sept. 15, 2014) (servicer's failure to discuss every foreclosure alternative available, not just the fact that borrower must be delinquent to qualify for one, led to borrower's valid pre-NOD outreach claim).

<sup>32</sup> *See* Ramirez v. U.S. Bank Nat'l Ass'n, , 2017 WL 3478740, at \*7 (S.D. Cal. Aug. 14, 2017) (denying MTD section 2923.55 claim based on plaintiff's allegation that the servicer had not engaged in required outreach).

*Tavares v. Nationstar Mortg., LLC*, 2014 WL 3502851, at \*6-7 (S.D. Cal. July 14, 2014); *Garcia v. Wells Fargo Bank, N.A.*, 2014 WL 458208, at \*4 (N.D. Cal. Jan. 31, 2014); *Cerezo v. Wells Fargo Bank, N.A.*, 2013 WL 4029274, at \*7 (N.D. Cal. Aug. 6, 2013); *Intengan v. BAC Home Loans Servicing, LP*, 214 Cal. App. 4th 1047, 1057-58 (2013) (overruling trial court's sustaining of servicer's demurrer to borrower's 2923.5 claim because borrower disputed veracity of NOD declaration); *Skov v. Bank Nat'l Ass'n*, 207 Cal. App. 4th 690, 696 (2012) (same).

<sup>33</sup> *See* *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*2-4 (E.D. Cal. Oct. 2, 2013) (reading a CC 2923.5 claim into borrower's pleading based on his allegations that: 1) servicer never made pre-NOD contact; 2) borrower was available by phone and mail; and 3) borrower's answering machine recorded no messages from servicer); *Weber v. PNC Bank, N.A.*, 2013 WL 4432040, at \*5 (E.D. Cal. Aug. 16, 2013) (borrower successfully pled servicer did not and *could not* have possibly contacted borrower pre-NOD because: 1) borrower's home telephone number remained the same since loan origination; 2) servicer had contacted borrower in the past; 3) answering machine recorded no messages from servicer; and 4) borrower

requires the servicer to initiate specific contact, *borrower*-initiated loan modification inquiries, or general contact, generally do not satisfy the pre-NOD contact requirements.<sup>34</sup> However, if the servicer has completed a loan modification review of the borrower, any previous violation of the outreach requirements may be deemed immaterial.<sup>35</sup>

HBOR's pre-NOD outreach requirements expanded upon existing communication requirements. For example, the former Civil Code Section 2923.5 only applied to deeds of trust originated between 2003

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never received a letter from servicer.). *But see* Wyman v. First Am. Title Ins. Co., 2017 WL 1508864, at \*3 (N.D. Cal. Apr. 27, 2017) (servicer's recorded declaration defeats borrower's conclusory allegations); Rodriguez v. Wells Fargo Bank, N.A., 2017 WL 896289, at \*3 (E.D. Cal. Mar. 6, 2017) ("[A] conclusory allegation that the declaration is false is insufficient to overcome the presumption [of compliance]"); Huweih v. US Bank Trust, N.A., 2017 WL 396143, at \*6 (N.D. Cal. Jan. 30, 2017) (outreach claim subject to dismissal because plaintiff "fails to adequately describe the circumstances surrounding such alleged lack of contact."); Peters v. Wells Fargo Bank, N.A., 2016 WL 7474910, at \*6 (E.D. Cal. Dec. 28, 2016) (allegations that "no contact with plaintiff was made nor notice given prior to the recordation of the operative Notice of Default" sufficient to withstand motion to dismiss); Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808, at \*6 (N.D. Cal. July 16, 2013) (finding borrower unlikely to prevail on her CC 2923.5 claim, relying on servicer's NOD declaration that it had attempted to contact borrower with "due diligence" before recording the NOD); *but cf.* Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at \*3-4 (C.D. Cal. Oct. 24, 2014) (failing to find that servicer's inaccurate NOD declaration prejudiced borrower, and granting servicer's MTD).

<sup>34</sup> See, e.g., Mosley v. Wells Fargo Bank NA, 2017 WL 5478628, at \*5 (N.D. Cal. Nov. 15, 2017) (plaintiff's allegation that servicer verbally denied a request for assistance did not satisfy servicer's obligations); Castillo v. Bank of Am., 2014 WL 4290703, at \*5 (N.D. Cal. Aug. 29, 2014) (modification eligibility discussions do not, by themselves, satisfy the requirements of CC 2923.55); Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at \*3-4 (C.D. Cal. July 18, 2014) (finding borrower's multiple, pre-NOD modification applications not fatal to her CC 2923.55 claim because servicer failed to "respond meaningfully" to these applications and no real foreclosure alternative discussion took place); Mungai v. Wells Fargo Bank, 2014 WL 2508090, at \*10-11 (N.D. Cal. June 3, 2014) (considering borrower's modification application submission and servicer's acceptance letter "coincidental contact" that did not absolve servicer of its obligation to reach out to borrower "via specific means about specific topics"). *But see* Trepte v. PHH Mortg. Corp., 2017 WL 2273190, at \*4 (C.D. Cal. May 16, 2017) (dismissing claim because the complaint alleged extensive communications between plaintiff and servicer regarding plaintiff's loan modification application); Johnson v. SunTrust Mortg., 2014 WL 3845205, at \*4 (C.D. Cal. Aug. 4, 2014) (dismissing borrower's CC 2923.55 claim because he admitted to multiple, pre-NOD discussions with servicer regarding his financial situation and loan modification options. That servicer did not explicitly inform borrower about the face-to-face meeting opportunity, or provide HUD information, does not violate CC 2923.55.).

<sup>35</sup> See, e.g., Landry v. Select Portfolio Servicing, Inc., 2017 WL 3614423, at \*6 (C.D. Cal. Aug. 22, 2017) (dismissing section 2923.55 claim because plaintiff was reviewed for and offered a loan modification option).

and 2007; HBOR removed this time limitation.<sup>36</sup> Borrowers who successfully brought claims under the pre-HBOR law were limited to postponing a foreclosure until the servicer complied with the outreach requirements.<sup>37</sup> Enjoining a sale is still a remedy prior to foreclosure, but HBOR also makes damages available after a foreclosure sale.<sup>38</sup>

Before 2018, HBOR required a number of additional outreach requirements from large servicers. These servicers were required to alert borrowers that they could request documentation demonstrating the servicer’s authority to foreclose.<sup>39</sup> They were also required to provide *post*-NOD outreach if the borrower had not yet exhausted the loan modification process.<sup>40</sup> As of January 1, 2018, those additional communications requirements are no longer in effect.

## **B. Single Point of Contact**

Large servicers must also provide borrowers with a single point of contact, or “SPOC.” Specifically, “upon request from a borrower who requests a foreclosure prevention alternative, the . . . servicer shall promptly establish a [SPOC]”<sup>41</sup> and provide borrower with a “direct

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<sup>36</sup> Compare CAL. CIV. CODE § 2923.5 (2012), with §§ 2923.5 & 2923.55 (2013).

<sup>37</sup> See, e.g., *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 214 (2010) (“The right of action is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.”).

<sup>38</sup> CAL. CIV. CODE §§ 2924.12 & § 2924.19 (2013) (applying to large and small servicers, respectively); CAL. CIV. CODE § 2924.12 (2018) (applying to all servicers).

<sup>39</sup> Compare § 2923.5 (2013) (small servicers), with § 2923.55(b)(1)(B) (2013) (large servicers). See *Rahbarian v. JP Morgan Chase*, 2014 WL 5823103, at \*3 (E.D. Cal. Nov. 10, 2014) (finding borrower’s assertion that he never received the notices required by CC 2923.55 sufficient to state a claim and rejecting servicer’s argument that its NOD declaration—which did not discuss this new disclosure aspect of CC 2923.55—signified its compliance with the statute); *Johnson*, 2014 WL 3845205, at \*4 (finding a viable pre-NOD outreach claim where borrower pled he never received written notice regarding his option to request loan documents).

<sup>40</sup> CAL CIV. CODE § 2924.9 (2013) (requiring servicers that routinely offer foreclosure alternatives to contact the borrower within five days of NOD recordation, explain those alternatives, and explain exactly how to apply).

<sup>41</sup> CAL CIV. CODE § 2923.7 (2013); see *Pura v. Citimortgage, Inc.*, 2015 WL 81980, at \*1 (C.D. Cal. Jan. 2, 2015) (finding a viable SPOC claim where borrower spoke with servicer representatives, but was never assigned an identifiable SPOC); *Lapper v. Suntrust Mortg., N.A.*, 2013 WL 2929377, at \*3 (C.D. Cal. June 7, 2013) (finding borrower’s allegation that she never received a SPOC sufficient to show a likelihood of success on the merits for a TRO).

means of communication” with that SPOC.<sup>42</sup> Some servicers have argued the statutory language requires borrowers to specifically request a SPOC to be assigned one. Most federal district courts rejected this argument, finding a borrower’s request for a foreclosure alternative triggers servicer’s duty to assign a SPOC.<sup>43</sup> The Third District Court of Appeal recently held in an unpublished decision that borrowers are required to make a specific request for a SPOC, so the argument may be gaining some traction.<sup>44</sup>

The SPOC provision was intended to reduce borrowers’ frustrations as they attempt to contact their servicers and obtain useful information about the loan modification process. SPOCs may be a “team” of people, not necessarily a single person.<sup>45</sup> Many courts have considered the implications of SPOC “shuffling,” but there appears to be no clear pattern on this issue; some find that incessant SPOC

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<sup>42</sup> CAL CIV. CODE § 2923.7 (2013); *Johnson*, 2014 WL 3845205, at \*6 (borrower adequately pled his SPOC claim by alleging no one from his SPOC “team” was directly reachable).

<sup>43</sup> *See, e.g.*, *Judan v. Wells Fargo Bank, N.A.*, 2017 WL 3115172 at \*5-6 (N.D. Cal. July 21, 2017) (requiring a borrower to request a SPOC would defeat the purpose of the SPOC protections); *Punay v. PNC Mortg.*, 2017 WL 2380115, at \*9 (S.D. Cal. May 31, 2017) (concluding that “a mortgage servicer’s obligation to establish a single point of contact under section 2923.7 is triggered upon a request for a foreclosure prevention alternative, rather than a request for a single point of contact.”); *Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 874 (N.D. Cal. 2015) (collecting cases); *Hild v. Bank of Am., N.A.*, 2015 WL 401316, at \*7 (C.D. Cal. Jan. 29, 2015); *McFarland v. JP Morgan Chase Bank*, 2014 WL 4119399, at \*11 (C.D. Cal. Aug. 21, 2014); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 1000 (N.D. Cal. 2014); *Mungai v. Wells Fargo Bank*, 2014 WL 2508090, at \*10 (N.D. Cal. June 3, 2014); *cf. Hendricks v. Wells Fargo Bank, N.A.*, 2015 WL 1644028, at \*9 (C.D. Cal. Apr. 14, 2015) (no request required for claim that SPOC was inadequate if a SPOC was assigned); *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*6 (C.D. Cal. Oct. 24, 2014) (to fulfill SPOC duties and comply with HBOR’s dual tracking rules, a SPOC must necessarily be appointed before an NOD is recorded.); *Hixson v. Wells Fargo Bank*, 2014 WL 3870004, at \*5, n.4 (N.D. Cal. Aug. 6, 2014) (servicer’s argument that borrower must specifically request a SPOC is mooted by servicer’s assignment of SPOCs.); *see also* Cal. Assem. Floor Analysis, AB 278 (2011-2012 Reg. Sess.), July 2, 2012, p. 5, ¶ (9) (conference committee amendments “[p]rovide for a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact”). *But see, Dare v. Aegis Wholesale Corporation*, 2017 WL 1135587 at \*7 (S.D. Cal. March 27, 2017) (dismissing SPOC claim because plaintiff did not plead that he had requested a SPOC); *Neal v. Select Portfolio Servicing*, 2017 WL 1065284 at \*5 (N.D. Cal. March 20, 2017) (same).

<sup>44</sup> *Conroy v. Wells Fargo Bank N.A.*, 2017 WL 5711804 (Cal.App. 3 Dist., Nov. 28, 2017); *see also, e.g., Amer v. Wells Fargo Bank NA*, 2017 WL 4865564, at \*10 (N.D. Cal. Oct. 27, 2017) (holding that borrower must request a SPOC).

<sup>45</sup> CAL. CIV. CODE § 2923.7(e) (2013).

reassignments constitute a valid SPOC claim,<sup>46</sup> while others require borrower to plead that, not only were SPOCs shuffled, but that none of the SPOCs could perform their statutory duties.<sup>47</sup> To bring a valid claim based on SPOC shuffling, advocates should allege SPOC violations in as much detail as possible.<sup>48</sup>

In either the “team” or individual form, SPOCs must provide the borrower with information about foreclosure prevention alternatives,<sup>49</sup>

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<sup>46</sup> See, e.g., *Alvarez v. Nationstar Mortgage LLC*, 2017 WL 1153029 at \*8 (N.D. Cal. March 28, 2017) (servicer “cannot retroactively label all of its representatives as a ‘team’ when the representatives fail to coordinate and to provide consistent information to [the borrower]”); *Cortez v. Citimortgage Inc.*, 2014 WL 7150050, at \*6 (C.D. Cal. Dec. 11, 2014) (finding a shuffling of SPOCs prohibited by statute, noting that borrower did not allege she was reassigned to “different members of a team which comprised her SPOC; she alleged that the SPOCs themselves changed”); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*9 (C.D. Cal. Nov. 19, 2014) (shuffling SPOCs and the SPOCs’ inability to relay deadlines and requests for missing documents constitute SPOC violations); see also *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*6 (C.D. Cal. Oct. 24, 2014) (finding servicer’s computer-generated form letters insufficient evidence that borrower was appointed a “team” of SPOCs).

<sup>47</sup> *Johnson v. PNC Mortgage*, 80 F. Supp. 3d 980, 986-88 (N.D. Cal. 2015) (finding a viable claim (alleged as a UCL claim) where none of borrower’s many “assigned” SPOCs could perform SPOC duties); *Hild v. Bank of Am., N.A.*, 2015 WL 401316, at \*7 (C.D. Cal. Jan. 29, 2015) (mere shuffling of SPOCs does not constitute a violation, but denying servicer’s MTD borrower’s SPOC claim because none of the SPOCs performed their statutory duties); *Johnson v. Bank of Am.*, 2015 WL 351210, at \*5-6 (N.D. Cal. Jan. 23, 2015) (same); *Rahbarian v. JP Morgan Chase*, 2014 WL 5823103, at \*4 (E.D. Cal. Nov. 10, 2014) (simple allegation that servicer shuffled SPOCs, without more factual information, insufficient to state a SPOC violation); *Shaw v. Specialized Loan Servicing, LLC*, 2014 WL 3362359, at \*7 (C.D. Cal. July 9, 2014) (granting a PI based on borrower’s allegations that he was shuffled from SPOC to SPOC and none could provide him with the status of his modification application); *Diamos v. Specialized Loan Servicing, LLC*, 2014 WL 3362259, at \*4 (N.D. Cal. July 7, 2014) (borrower pled viable SPOC claim where none of servicer’s representatives had the “knowledge or authority” to perform SPOC duties (complaint dismissed on jurisdictional grounds.)); *Mann v. Bank of Am., N.A.*, 2014 WL 495617, at \*4 (C.D. Cal. Feb. 3, 2014) (finding shuffling of SPOCs to violate the statute because even if the SPOCs were a team, no member of the team was able to perform the required duties). *But cf.* *Boring v. Nationstar Mortg., LLC*, 2014 WL 2930722, at \*3 (E.D. Cal. June 27, 2014) (rejecting borrower’s argument that allegation that multiple SPOCs, none of whom could perform SPOC duties, stated a valid CC 2923.7 claim).

<sup>48</sup> See *Shupe v. Nationstar Mortgage LLC*, 231 F.Supp.3d 597, 602 (E.D. Cal. Jan. 31, 2017) (mere allegation that borrowers were repeatedly reassigned to non-responsive representatives insufficient); *Hestrin v. Citimortgage*, 2015 WL 847132, at \*4, n.6 (C.D. Cal. Feb. 25, 2015) (granting servicer’s MTD borrower’s SPOC claim because the borrower did not state the “who, what, or when” of the alleged SPOC violation, including descriptions of conversations with different representatives).

<sup>49</sup> *Nasseri v. Wells Fargo Bank, N.A.*, 147 F. Supp. 3d 937, 944-45 (N.D. Cal. 2015) (holding that advising borrower to apply for a loan modification when the loan had exceeded the total number of modifications allowed by the investor and failure to set

deadlines for applications, how and where a borrower should submit their application, and must alert the borrowers if any documents are missing.<sup>50</sup> Critically, the SPOC must have access to the information and servicer personnel “to timely, accurately, and adequately inform the borrower of the current status of the [application]”<sup>51</sup> and be able to make important decisions like stopping a foreclosure sale.<sup>52</sup> Courts have held that a servicer cannot avoid SPOC obligations by simply claiming there is “nothing to communicate” after denying borrower’s application,<sup>53</sup> or by appointing a SPOC only after a loan modification application has been reviewed.<sup>54</sup> Because SPOC violations are independent from dual tracking violations, borrowers may proceed on SPOC claims even if there is no dual tracking violation,<sup>55</sup> however, they should always allege materiality and the harm arising from the lack or deficiencies of a SPOC with as much specificity as possible.<sup>56</sup>

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up a borrower with the correct type of payment method under a forbearance agreement violated CC 2923.7).

<sup>50</sup> CAL. CIV. CODE § 2923.7(b)(1)-(2); *see* Garcia v. Wells Fargo Bank, N.A., 2014 WL 458208, at \*4 (N.D. Cal. Jan. 31, 2014) (finding SPOC’s failure to follow up on loan modification request violated CC 2923.7).

<sup>51</sup> CAL. CIV. CODE § 2923.7(b)(3)-(4) (2013). *Compare* Colom v. Wells Fargo, 2014 WL 5361421, at \*1-2 (N.D. Cal. Oct. 20, 2014) (denying borrower’s SPOC claim because the SPOC’s failure to return phone calls and emails was not shown to be a material violation of SPOC duties and because borrower was ultimately informed of his application’s status by the denial letter), *with* McLaughlin v. Aurora Loan Services, LLC, 2014 WL 1705832, at \*5 (C.D. Cal. Apr. 28, 2014) (denying motion to dismiss because borrower sufficiently alleged that SPOC did not timely return borrower’s calls and emails).

<sup>52</sup> CAL. CIV. CODE § 2923.7(b)(5) (2013); Segura v. Wells Fargo Bank, N.A., 2014 WL 4798890, at \*6-7 (C.D. Cal. Sept. 26, 2014) (finding a valid SPOC claim where borrowers alleged servicer representative falsely informed borrowers the sale would be postponed).

<sup>53</sup> Arbib v. Nationstar Mortg., 2014 WL 6612414, at \*6 (S.D. Cal. Nov. 19, 2014) (rejecting servicer’s argument that an unresponsive SPOC had “nothing to communicate” where borrower alleged the SPOC failed to consider updated financial information).

<sup>54</sup> Glaser v. Nationstar Mortgage, LLC, 2017 WL 1861850, at \*8 (N.D. Cal. May 9, 2017) (allegations that borrowers submitted a loan modification application two years before being assigned a SPOC sufficient to withstand motion to dismiss).

<sup>55</sup> *See* McLaughlin v. Aurora Loan Services, 2015 WL 1926268, at \*7 (C.D. Cal. Apr. 28, 2015) (listing cases); Salazar v. U.S. Bank Nat’l Ass’n, 2015 WL 1542908, at \*3-7 (C.D. Cal. Apr. 6, 2015); Mann v. Bank of Am., N.A., 2014 WL 495617, at \*3-4 (C.D. Cal. Feb. 3, 2014).

<sup>56</sup> *See, e.g.*, Mosley v. Wells Fargo Bank NA, No. 17-CV-05064-JSC, 2017 WL 5478628, at \*5 (N.D. Cal. Nov. 15, 2017) (SPOC claim dismissed for failure to plead materiality); Hutchings v. Nationstar Mortgage LLC, 2017 WL 4224720, at \*9 (N.D. Cal. Sept. 22, 2017) (SPOC violations immaterial if borrower received loss mitigation review); Monet v. JPMorgan Chase Bank, N.A., 2017 WL 3895790 at \*4 (N.D. Cal.

### C. Dual Tracking

In addition to mandating outreach and communication, the California Legislature has reined in dual tracking, the practice of evaluating a borrower for a modification while simultaneously proceeding with a foreclosure. If the borrower has submitted a complete loan modification application, HBOR prohibits the servicer from “recording” an NOD or NTS, or “conducting” a foreclosure sale.<sup>57</sup> Courts disagree on the meaning of this statutory language with respect to sale date postponements.<sup>58</sup> Regardless of whether postponing a sale

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Sept. 5, 2017) (allegation that “Plaintiff was harmed” insufficient); *Palma v. Select Portfolio Servicing, Inc.*, 2017 WL 1364667, at \*7 (E.D. Cal. Apr. 14, 2017) (dismissing SPOC claim with leave to amend to plead injury); *Alvarez v. Nationstar Mortgage LLC*, 2017 WL 1153029 at \*8-9 (N.D. Cal. March 28, 2017) (dismissing section 2923.7 damages claim for failure to plead cognizable injury); *Beltz v. Wells Fargo Home Mortgage*, 2017 WL 784910 at \*12 (E.D. Cal. March 1, 2017) (conclusory allegations of harm insufficient to support a SPOC claim). *Compare, e.g., Beltz v. Wells Fargo Home Mortg.*, 2017 WL 6344369, at \*6 (E.D. Cal. Dec. 12, 2017) (allegations that SPOC failed to provide borrowers with a list of the necessary documents to start the loan modification process satisfy materiality requirement because the failure affected the loan modification process); *Judan v. Wells Fargo Bank, N.A.*, 2017 WL 3115172 at \*6 (N.D. Cal. July 21, 2017) (allegation that SPOC failed to stop recordation of Notice of Sale during pendency of loan mod review sufficient to establish materiality at motion to dismiss stage).

<sup>57</sup> CAL. CIV. CODE §§ 2923.6(c) (large servicers) and 2924.18 (small servicers) (2013); CAL. CIV. CODE § 2924.11(a) (2018). Note that the current version of § 2924.11(a) does not reference the NOD. The Legislature does appear to have intended to retain pre-NOD dual tracking protections, however. *See* CAL. CIV. CODE § 2924.5(a)(1)(B) (requiring compliance with §2924.11(a) before recording of an NOD).

<sup>58</sup> *Compare* *Foronda v. Wells Fargo*, 2014 WL 6706815, at \*6 (N.D. Cal. Nov. 26, 2014) (scheduling and refusing to postpone a sale is “conducting” a sale and prohibited by statute), *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5 (C.D. Cal. Jan. 3, 2014) (finding the *servicing* of an NOD and NTS on borrowers to violate CC 2923.6), *Pittell v. Ocwen Loan Servicing, LLC*, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (dual tracking protections require a servicer to postpone or cancel an impending sale, regardless of the exact statutory language), *and Singh v. Wells Fargo Bank, N.A.*, No. 34-2013-00151461-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Feb. 24, 2014) (finding servicer’s notice to borrower that a sale had been briefly postponed (but would ultimately occur) as “conducting a sale” and a dual tracking violation), *with Nardolillo v. JPMorgan Chase Bank, N.A.*, 2017 WL 5447633, at \*4-5 (N.D. Cal. Nov. 14, 2017) (granting summary judgment on dual tracking claim premised on postponement notices because statute only prohibits recording notices and conducting sales; note that this same claim had previously survived a motion to dismiss), *Willis v. JPMorgan Chase Bank, N.A.*, 2017 WL 1349744, at \*3 (E.D. Cal. Apr. 5, 2017) (dismissing dual tracking claim because plaintiff only alleged receipt of correspondence about the initiation of foreclosure but did not allege that servicer recorded NOD), *Arbib*, 2014 WL 6612414, at \*7 (no dual tracking claim where

is considered “conducting” a sale in violation of the statute, however, injunctive relief based on dual tracking claims is still possible when the sale has been postponed.<sup>59</sup>

As with all HBOR claims, dual tracking claims are subject to a materiality analysis, and if the borrower received a complete review and either a loan modification offer or a statutorily-compliant denial notice at some point before the foreclosure sale, establishing materiality will be difficult.<sup>60</sup>

## 1. Timing

HBOR does not include specific deadlines or timetables related to the submission of a borrower’s application. Submission of a complete application up to the day of the sale should, therefore, trigger dual-tracking protections, and a servicer may not avoid HBOR liability by imposing its own application deadlines if those deadlines are unreasonable.<sup>61</sup> Servicers may maintain internal policies with regards

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servicer repeatedly threatened to record an NOD, but had not actually done so), *Johnson v. SunTrust Mortg.*, 2014 WL 3845205, at \*5 (C.D. Cal. Aug. 4, 2014) (merely keeping a sale ‘scheduled’ (*i.e.*, refusing to cancel it) does not violate CC 2923.6), *and McLaughlin v. Aurora Loan Servs.*, 2014 WL 1705832, at \*6 (C.D. Cal. Apr. 28, 2014) (finding that only a *recording* of an NTS, not simply *servicing* an NTS or scheduling a sale, violates HBOR’s dual tracking statute).

<sup>59</sup> *See, e.g.*, *Young v. Deutsche Bank Nat’l Trust Co.*, 2013 WL 3992710, at \*2 (E.D. Cal. Aug. 2, 2013) (allowing borrowers leave to amend their complaint to include a dual tracking claim even though servicer had voluntarily postponed the sale and was negotiating a modification with borrowers); *Leonard v. JP Morgan Chase Bank, N.A.*, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014) (granting preliminary injunction even though servicer postponed the sale).

<sup>60</sup> *See Landry v. Select Portfolio Servicing, Inc.*, 2017 WL 3614423, at \*4 (C.D. Cal. Aug. 22, 2017) (dismissing section 2923.6 claim because plaintiff received a complete review and a loan modification offer after foreclosure notices were recorded).

<sup>61</sup> *See Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*5 (N.D. Cal. Apr. 16, 2014) (rejecting servicer’s argument that borrower’s application does not deserve dual tracking protection because servicer does not offer modifications to borrowers who submit their applications less than seven days before a foreclosure sale); *Valbuena v. Ocwen Loan Servicing*, 237 Cal. App. 4th 1267, 1274-75 (2015) (Even though the borrower submitted additional documents after the servicer’s deadline of seven business days prior to date of scheduled foreclosure sale, borrower adequately pled a complete application by “alleging the submission of the loan modification application three days after receipt of the Offer Letter, and the transmittal of the additional documents requested by Ocwen on the date of request.”); *see also Penermon v. Wells Fargo Home Mortg.*, 2014 WL 4273268, at \*4 (N.D. Cal. Aug. 28, 2014) (finding a viable dual tracking claim where borrower alleged she submitted a complete application within one month of receiving servicer’s request for additional documents; borrower did not need to allege the specific date

to the ultimate denial or grant of a modification, including policies that deny all applications submitted on the eve of sale, but they still need to comply with HBOR's communications and procedural requirements before proceeding with foreclosure.

Before 2018, within five business days of receiving a loan modification application –“or any document in connection with a[n] . . . application”– large servicers were required to provide borrowers with written acknowledgement of receipt that included a description of the modification process, pertinent deadlines, and information about any missing application items.<sup>62</sup> As of January 1, 2018, this requirement is no longer in effect.<sup>63</sup>

Prior to January 1, 2018, if a large servicer offered a modification, the borrower had 14 days to accept or reject that offer before the servicer could move ahead with foreclosure.<sup>64</sup> As of January 1, 2018, HBOR is silent with regard to the borrower's deadline for accepting a modification offer.

Currently, if a servicer denies a borrower's loan modification application, the servicer must provide the borrower with a written

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she submitted the application, or that it complied with servicer's internal submission deadline to bring a dual tracking claim). *But see* Cornejo v. Ocwen Loan Servicing, LLC, 2017 WL 469345, at \*4 (E.D. Cal. Feb. 2, 2017) (granting defendant's motion for a new trial after jury verdict in favor of borrowers because borrowers had failed to respond to servicer's outreach for two years and then submitted missing application materials only hours before the scheduled sale date).

<sup>62</sup> CAL. CIV. CODE § 2924.10(a) (2013); Punay v. PNC Mortg., 2017 WL 2380115, at \*8 (S.D. Cal. May 31, 2017) (denying MTD based on allegations that servicer never provided acknowledgment letter); Hestrin v. Citimortgage, 2015 WL 847132, at \*4 (C.D. Cal. Feb. 25, 2015) (finding a viable claim by inferring servicer did not timely acknowledge receipt of borrower's application because borrower submitted the application 25 days before receiving a response); Pura v. Citimortgage, Inc., 2015 WL 81980, at \*1 (C.D. Cal. Jan. 2, 2015) (finding a viable claim where servicer never acknowledged any of borrower's application materials in writing); Banks v. JP Morgan Chase, 2014 WL 6476139, at \*10 (C.D. Cal. Nov. 19, 2014) (finding a viable claim where servicer failed to alert borrower it required utility bills to verify her address, then later denied her application for failing to provide those bills). *But see* Shapiro v. Sage Point Lender Servs., 2014 WL 5419721, at \*7 (C.D. Cal. Oct. 24, 2014) (dismissing borrower's claim for failure to plead any harm suffered from a clear violation of CC 2924.10).

<sup>63</sup> CAL. CIV. CODE § 2924.10(e) (2013) (providing for expiration of § 2924.10 after Dec. 31, 2017).

<sup>64</sup> CAL. CIV. CODE § 2923.6(c)(2) (2013). A borrower's counteroffer, or request to continue negotiations, was considered a rejection of servicer's offer. *See* Johnson v. PNC Mortg., 2014 WL 6629585, at \*6 (N.D. Cal. Nov. 21, 2014). A reinstatement plan did not qualify as a modification offer under this section. *See* Gardenswartz v. Suntrust Mortg. Inc., 2015 WL 900638, at \*4-5 (C.D. Cal. Mar. 3, 2015).

denial notice “identifying with specificity the reasons for the denial”.<sup>65</sup> Prior to January 1, 2018, when a large servicer denied a loan modification application, the servicer’s denial notice also had to explain appeal rights, give specific reasons for any investor-based denials, report certain inputs used in any net present value (NPV) calculations, and describe foreclosure alternatives still available to the borrower.<sup>66</sup> The now-expired version of HBOR also prohibited large servicers from proceeding with a foreclosure until 31 days after the date of the written denial notice,<sup>67</sup> or, if the borrower appealed, 15 days after denying the appeal.<sup>68</sup> HBOR no longer requires that borrowers be

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<sup>65</sup> CAL. CIV. CODE § 2924.11(b).

<sup>66</sup> CAL. CIV. CODE § 2923.6(f) (2013); *see* *Weber v. PNC Bank*, 2015 WL 269473, at \*5 (E.D. Cal. Jan. 21, 2015) (finding a valid dual tracking claim where servicer used incorrect income figures to miscalculate borrowers’ NPV numbers, denied their modification, and vaguely dismissed their appeal); *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*5 (N.D. Cal. May 13, 2014) (borrower pled viable dual tracking claim based on servicer’s failure to provide reason for modification denial or notice of appeal rights). *But see* *Colom v. Wells Fargo*, 2014 WL 5361421, at \*1 (N.D. Cal. Oct. 20, 2014) (finding servicer’s failure to cite NPV numbers or explain other foreclosure alternatives in borrower’s denial letter did not violate CC 2923.6(f) because the denial was not predicated on the NPV test and borrower did not show why servicer’s failure to list alternatives was a material violation). This provision only applies to loan *modification* applications, not to other foreclosure prevention alternatives. *See* *Ware*, 2013 WL 6247236, at \*5 (S.D. Cal. Oct. 29, 2013) (granting servicer’s motion to dismiss borrower’s CC 2923.6(f) claim because servicer was not required to give reasons for a short sale denial).

<sup>67</sup> CAL. CIV. CODE § 2923.6(d) (2013); *see* *Palma v. Select Portfolio Servicing, Inc.*, 2017 WL 1364667, at \*5 (E.D. Cal. Apr. 14, 2017) (allegations that servicer did not provide a denial notice in response to complete application prior to recording NOD survive MTD); *Walls v. Wells Fargo Bank, N.A.*, 2017 WL 1478961, at \*3 (N.D. Cal. Apr. 25, 2017) (granting TRO when servicer had not changed sale date set for a week after the date of its denial notice to borrower); *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5 (C.D. Cal. Jan. 3, 2014) (denying MTD because the borrower received denial only seven days before sale); *Vasquez v. Bank of Am., N.A.*, 2013 WL 6001924, at \*6, 9 (N.D. Cal. Nov. 12, 2013) (denying servicer’s motion to dismiss because servicer recorded an NTS without waiting the 30-day appeal period after denying borrower’s application); *Monterrosa v. PNC Bank*, No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (granting borrower’s preliminary injunction because servicer recorded an NTS before providing a written denial of borrower’s pending modification application).

<sup>68</sup> CAL. CIV. CODE § 2923.6(e)(1)-(2) (2013); *see* *Lane v. Citimortgage*, 2014 WL 5036512, at \*1 (E.D. Cal. Oct. 7, 2014) (granting a TRO because borrower pled servicer planned to continue with sale before responding to borrower’s timely appeal and because servicer may have denied borrower based on incorrect information); *McLaughlin v. Aurora Loan Services, LLC*, 2014 WL 1705832, at \*6 (C.D. Cal. Apr. 28, 2014) (finding a dual tracking violation when servicer moved forward with foreclosure during pending appeal). *But see* *Lane v. Citimortgage, Inc.*, 2014 WL 6670648, at \*4 (E.D. Cal. Nov. 21, 2014) (dissolving the court’s previous TRO (*see*

given an opportunity – and time – to appeal a loan modification denial before the foreclosure process moves forward.

Large servicers were previously prohibited from charging borrowers any application or processing fees or any late fees during the application or appeal processes.<sup>69</sup> As of January 1, 2018, those prohibitions are no longer in the statute.

It is important to remember that HBOR creates a procedural framework requiring a decision on a pending loan modification application before initiating or proceeding with a foreclosure, but the statute does not require any particular result from that process.<sup>70</sup>

## 2. “Complete” applications

Court decisions to date have illustrated the importance of submitting a “complete” application to trigger HBOR’s dual tracking protections. The grant or denial of a TRO or preliminary injunction often turns on whether the borrower has submitted a complete modification application.<sup>71</sup> An application may be complete even if the

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above) and denying a PI because servicer *had* formally denied borrower’s appeal before the TRO and had postponed the sale for more than 15 days post-denial, complying with the statute).

<sup>69</sup> CAL. CIV. CODE § 2924.11(e) and (f) (2013); *see also* Leonard v. JP Morgan Chase, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (finding a viable fee-related claim where borrower pointed to servicer’s written notice his account was “incurring delinquency related fees and charges” while his modification application was pending). *But see* Beck v. Ocwen Loan Servs., LLC, 2015 WL 519052, at \*3 (C.D. Cal. Feb. 6, 2015) (rejecting borrowers’ fee claim because they alleged only that servicer threatened to charge fees during the modification process, not that servicer *actually* exacted those fees).

<sup>70</sup> CAL. CIV. CODE § 2923.4(a) (2013; 2018) (“Nothing in this act ... shall be interpreted to require a particular result of th[e loss mitigation] process.”); Young v. Deutsche Bank Nat’l Tr. Co., 2013 WL 4853701, at \*2 (E.D. Cal. Sept. 10, 2013) (rejecting borrower’s claim that offered modification was unreasonable or not in good faith); Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808, at \*5-6 (N.D. Cal. July 16, 2013); *cf.* Dotter v. JP Morgan Chase Bank, No. 30-2011-00491247 (Cal. Super. Ct. Orange Cnty. Oct. 31, 2013) (*TPP contract*, not HBOR, required servicer to offer a permanent modification similar to TPP and “better than” original loan agreement.).

<sup>71</sup> *Compare* Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at \*5 (N.D. Cal. July 29, 2014) (granting the PI and finding “at least serious questions” going to the completeness of borrower’s application where servicer verbally requested unnecessary information from borrower in a confusing manner), *and* Massett v. Bank of Am., N.A., 2013 WL 4833471, at \*2-3 (C.D. Cal. Sept. 10, 2013) (granting a TRO in part because borrower produced emails from the servicer, acknowledging receipt of an application and stating “no further documentation” was required), *with* Lindberg v. Wells Fargo Bank, N.A., 2013 WL 1736785, at \*3 (N.D. Cal. Apr. 22, 2013) (denying TRO when borrower failed to respond to servicer’s request for further

servicer states that it may request further documentation during the review process.<sup>72</sup> Some courts have declined to decide the “completeness” of an application during the pleading stages of litigation.<sup>73</sup> Recently, courts have considered whether servicers may request duplicative or unnecessary information, and/or falsely claim documents were not received, to assert that an application was

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documentation); *see also* Stokes v. Citimortgage, 2014 WL 4359193, at \*7 (C.D. Cal. Sept. 3, 2014) (denying borrowers’ dual tracking claim because, even though they pled compliance with HAMP document requirements, they did not provide every document requested by servicer); Penermon v. Wells Fargo Bank, N.A., 47 F. Supp. 3d 982, 998-99 (N.D. Cal. 2014) (granting borrower leave to amend her claim to explicitly state she submitted a “complete” application, but noting servicer’s neglect to inform borrower that her application was *incomplete*).

<sup>72</sup> McKinley v. CitiMortgage, Inc., 2014 WL 651917, at \*4 (E.D. Cal. Feb. 19, 2014) (holding the fact that servicer “may hypothetically request additional information in the future does not render implausible [borrower’s] claim that the loan modification application was complete”); Flores v. Nationstar, 2014 WL 304766, at \*4 (C.D. Cal. Jan. 6, 2014) (determining borrower had successfully alleged he submitted a “complete” application by complying with servicer’s additional document requests over the course of two months).

<sup>73</sup> *See, e.g.*, Di Loreto v. Chase Manhattan Mortg. Corp., 2017 WL 5569834, at \*5 (N.D. Cal. Nov. 20, 2017) (servicer not permitted to create a moving target with respect to what constitutes a complete application); Alvarez v. Nationstar Mortg. LLC, No. 15-CV-04204-BLF, 2017 WL 1153029, at \*6 (N.D. Cal. Mar. 28, 2017) (allegations that borrower submitted all the documents requested by the servicer and received no notification of any further missing documents, borrower “plausibly alleged” submission of a complete application, but dismissing claim on other grounds); Hestrin v. Citimortgage, 2015 WL 847132, at \*3 (C.D. Cal. Feb. 25, 2015) (accepting borrower’s assertion that he submitted a “complete” application sufficient and denying servicer’s MTD); Medrano v. Caliber Home Loans, 2014 WL 7236925, at \*7 (C.D. Cal. Dec. 19, 2014) (borrower need not use specific statutory language in asserting that her application was “complete”); Gonzales v. Citimortgage, 2014 WL 7927627, at \*1 (N.D. Cal. Oct. 10, 2014) (finding whether borrower submitted enough information to constitute a “complete” application *despite* using an incorrect form, according to the servicer, is a factual issue giving rise to “serious questions” on the merits of borrower’s dual tracking claim and granting her PI); *cf.* Penermon, 2014 WL 2754596, at \*11 (granting borrower leave to amend her claim to explicitly state she submitted a “complete” application, but noting servicer’s neglect to inform borrower that her application was *incomplete*); Murfitt v. Bank of Am., N.A., 2013 WL 7098636 (C.D. Cal. Oct. 22, 2013) (determining that the completeness of an application is a triable issue of fact, allowing borrower’s ECOA claim (which has the same “complete” definition as HBOR’s dual tracking provision) to survive the pleading stage). *But see* Farren v. Select Portfolio Servicing, Inc., 2017 WL 1063891, at \*3 (E.D. Cal. Mar. 20, 2017) (dismissing dual-tracking claim without leave to amend because plaintiffs alleged that servicer never acknowledged their application); Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716, at \*7 (C.D. Cal. July 18, 2014) (dismissing borrower’s dual tracking claim because borrower did not allege the dates she submitted her “complete” applications to servicer, or any documents showing servicer deemed her applications “complete”).

incomplete, thereby escaping dual tracking liability. So far, courts have sided with borrowers on this issue.<sup>74</sup>

### 3. Subsequent applications

HBOR's original dual tracking protections did not apply to subsequent loan modification applications submitted by a borrower who had already been evaluated or had a "fair opportunity" to be evaluated for modification, unless the borrower had experienced a material change in financial circumstances and submitted documentation of that change to the servicer.<sup>75</sup> The provisions regarding subsequent applications, however, expired as of December 31, 2017. As a result, borrowers may be able to trigger dual tracking protections by submitting subsequent applications even without showing a change in financial circumstances. It is possible, however, that courts will still impose some sort of limitation on protections for subsequent applications in order to prevent borrowers from submitting multiple applications just to delay foreclosure.

Even though borrowers often reapply with increased income, under the prior version of HBOR, a decline in income could also constitute a material change in financial circumstances since some borrowers get denied for having too much income.<sup>76</sup> This provision also covered borrowers who previously obtained a modification and then defaulted

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<sup>74</sup> See, e.g., *Vethody v. Nat'l Default Servs. Corp.*, 2016 WL 7451666, at \*3 (N.D. Cal. Dec. 28, 2016) (rejecting argument that servicer's subsequent request for an updated document rendered application incomplete); *Dias v. JP Morgan Chase NA*, 2015 WL 1263558, at \*5 (N.D. Cal. Mar. 19, 2015) (rejecting servicer's argument that application was not complete in hindsight when servicer failed to notify borrower a need for additional documents before NTS was recorded); *Shapiro v. Sage Point Lender Servs.*, 2014 WL 5419721, at \*4-5 (C.D. Cal. Oct. 24, 2014) (rejecting as "absurd" servicer's assertion that borrower's application was incomplete because servicer representative told borrower he should ignore servicer's form letter stating that all requested documents were not received); *Gilmore*, 2014 WL 3749984, at \*5 (granting a PI and finding "at least serious questions" going to the completeness of borrower's application where servicer verbally requested unnecessary information from borrower in a confusing manner).

<sup>75</sup> See CAL. CIV. CODE 2923.6(g) (2013).

<sup>76</sup> See *Dias v. JP Morgan Chase, N.A.*, 2015 WL 1263558, at \*5 (N.D. Cal. Mar. 19, 2015) (borrower sufficiently pled \$2,000 decline in monthly income as material change); *Valentino v. Select Portfolio Servicing, Inc.* 2015 WL 575385, at \*4 (N.D. Cal. Feb. 10, 2015) (finding "no basis to conclude that a reduction in income cannot satisfy the "material change" requirement of section 2923.6(g)").

due to a subsequent hardship as long as they provided documentation of their changed circumstances to the servicer.<sup>77</sup>

Under the prior HBOR provisions covering subsequent applications, alleging a change in financial circumstances in a complaint without having submitted documentation of that change to the servicer with the subsequent modification application generally did not fulfill the “document” and “submit” requirements under the statute.<sup>78</sup> Courts differ over the manner in which a borrower must document a change in financial circumstances, most accepting specific dollar-amount specificity,<sup>79</sup> and a minority accepting a borrower’s simple assertion that a change was documented as part of a subsequent, complete application.<sup>80</sup> Courts also extended dual tracking protections to

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<sup>77</sup> See, e.g., *Marques v. Wells Fargo Bank, N.A.*, 2016 WL 5942329, at \*4 (N.D. Cal. Oct. 13, 2016) (servicer was obligated to comply with dual tracking requirements for a borrower who submitted a loan modification application showing a material change in circumstances after defaulting on a previous modification). *But see* *Deschaine v. IndyMac Mortg. Servs.*, 617 F. App’x 690, 693 (9th Cir. 2015) (holding that a borrower who previously defaulted on a loan modification does not enjoy dual tracking or SPOC protections pursuant to section 2923.6(c)(3) without addressing the relevance of a material change in circumstances); *Smith v. Wells Fargo Bank, N.A.*, 2016 WL 283521, at \*4 (N.D. Cal. Jan. 25, 2016) (same).

<sup>78</sup> See *Punay v. PNC Mortg.*, 2017 WL 2380115, at \*4 (S.D. Cal. May 31, 2017); *Shaw v. Specialized Loan Servicing, LLC*, 2014 WL 3362359, at \*6 (C.D. Cal. July 9, 2014); *Rosenfeld v. Nationstar Mortg., LLC*, 2013 WL 4479008, at \*4 (C.D. Cal. Aug. 19, 2013). *But cf.* *Hixson v. Wells Fargo Bank*, 2014 WL 3870004, at \*5 (N.D. Cal. Aug. 6, 2014) (that borrower’s complaint, not her new application, omitted the amount of rent she was now collecting does not moot her dual tracking claim based on a material change in financial circumstances).

<sup>79</sup> See, e.g., *Gilmore v. Wells Fargo Bank*, 75 F. Supp. 3d 1255, 1264-65 (N.D. Cal. 2014) (borrower’s subsequent application specifying a \$5,400/month income increase and a \$1,000/month decrease in expenses sufficiently stated a dual tracking claim); *Penaloza v. Select Portfolio Servicing, Inc.*, 2014 WL 6910334, at \*10 (C.D. Cal. Dec. 8, 2014) (borrower demonstrated material change in circumstances with an income increase of \$5,500 per month and a \$1,500 decrease in monthly expenses); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*8 (C.D. Cal. Nov. 19, 2014) (accepting borrower’s assertion that she notified servicer of an \$8,000 increase in monthly income as part of a subsequent application as adequately alleging she “documented” and “submitted” a material change in financial circumstances, though she did not explain the specific reasons behind the increase); *cf.* *Rosenfeld v. Nationstar Mortg., LLC*, 2014 WL 457920, at \*4 (C.D. Cal. Feb. 3, 2014) (finding that the borrower subsequently satisfied the documentation requirement when she pled that she wrote the servicer that she eliminated her credit card debt). *But see* *Winterbower v. Wells Fargo, N.A.*, 2013 WL 1232997, at \*3 (C.D. Cal. Mar. 27, 2013) (denying TRO when borrowers simply wrote their servicer that they decreased their expenses from \$25,000/month to \$10,000/month).

<sup>80</sup> *Kimthu Trinh v. Wells Fargo & Co.*, 2017 WL 5548777, at \*2 (S.D. Cal. Nov. 16, 2017); *Lee v. Wells Fargo Bank, N.A.*, 34-2013-00153873 (Cal. Super. Ct. Sacramento Cnty. July 25, 2014) (evidence of a material change in financial circumstances is not

borrowers who could show that their servicer voluntarily agreed to review a subsequent application,<sup>81</sup> or that the servicer never reviewed borrower's previous applications.<sup>82</sup> Another court viewed (the now-expired) § 2923.6(g) as the basis for an affirmative defense, not an element of a dual-tracking claim.<sup>83</sup> At least one court has made clear, however, that the alleged change in circumstances must have taken place after the most recent loan modification review; changes that

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required at the pleadings stage). *But see* Williams v. Wells Fargo Bank, N.A., 2014 WL 1568857, at \*5 (C.D. Cal. Jan. 27, 2014) (no documented change in financial circumstances in a letter citing borrowers' monthly income and declaring that their expenses have increased); Sevastyanov v. Wells Fargo Bank, N.A., No. 30-2013-00644405-CU-OR-CJC (Cal. Super. Ct. Orange Cnty. July 24, 2013) (borrower's bare statement that their income and expenses had "changed" insufficient to trigger dual tracking protections). *But cf.* Stokes v. Citimortgage, 2014 WL 4359193, at \*6 (C.D. Cal. Sept. 3, 2014) (borrower's submission of previously requested tax returns does not, by itself, constitute a material change in financial circumstances.).

<sup>81</sup> See Amer v. Wells Fargo Bank NA, 2017 WL 4865564, at \*9 (N.D. Cal. Oct. 27, 2017); Norris v. Bayview Loan Servicing, LLC, 2016 WL 337381, at \*3 (C.D. Cal. Jan. 25, 2016); Curtis v. Nationstar Mortg. LLC, 2015 WL 4941554, at \*2 (N.D. Cal. Aug. 19, 2015) ("If the servicer voluntarily undertakes to review a loan modification application, a borrower may avail him or herself of the protections afforded under Cal. Civ. Code § 2923.6."); Dias v. JP Morgan Chase NA, 2015 WL 1263558, at \*5 (N.D. Cal. Mar. 19, 2015) (finding it unlikely borrower submitted subsequent application for the purpose of delay when application solicited by servicer); Vasquez v. Bank of Am., N.A., 2013 WL 6001924, at \*9 (N.D. Cal. Nov. 12, 2013) (allowing borrower's dual tracking claim to survive a motion to dismiss because servicer solicited borrower's second application and CC 2923.6(g) only specifies that servicers are not "obligated" to review subsequent applications); see also Foronda v. Wells Fargo, 2014 WL 6706815, at \*7 (N.D. Cal. Nov. 26, 2014) (court found viable dual tracking claim where servicer requested that borrower resubmit her already existing application, then scheduled and refused to postpone a sale); cf. Rizk v. Residential Credit Solutions, Inc., 2015 WL 573944, at \*12 (C.D. Cal. Feb. 10, 2015) (Servicer's solicitation of multiple applications, coupled with its denial of those applications based on their contents, rather than on missing documents, gives rise to dual tracking claim even where it was unclear if borrower submitted "complete" applications).

<sup>82</sup> See, e.g., Cornejo v. Ocwen Loan Servicing, 2016 WL 4382569 (E.D. Cal. Aug. 16, 2016) (merely providing application materials to borrowers did not constitute fair opportunity to be evaluated); Johnson v. Bank of Am., 2015 WL 351210, at \*4-5 (N.D. Cal. Jan. 23, 2015) (finding servicer never gave borrower a fair opportunity to be evaluated because it denied the application for lack of documents, not on its merits, and because servicer had previously acknowledged borrower's application as complete); Cooksey v. Select Portfolio Servs., Inc., 2014 WL 2120026, at \*2 (E.D. Cal. May 21, 2014) (finding it "unlikely" servicer evaluated borrower's previous applications, or that borrower was ever "afforded a fair opportunity to [be] evaluated," and granting borrower's TRO based on a dual tracking claim).

<sup>83</sup> Norris v. Bayview Loan Servicing, LLC, 2016 WL 337381, at \*3 (C.D. Cal. Jan. 25, 2016).

predate a prior review are not sufficient.<sup>84</sup> Even if a servicer declined to review a subsequent application due to insufficient evidence of material change in financial circumstances, the servicer still had to provide the borrower with a denial stating that reason.<sup>85</sup>

#### 4. Other dual tracking protections

HBOR also provides some protections for borrowers approved for a temporary or permanent loan modification or other foreclosure alternative. A servicer may not record an NOD as long as the borrower remains compliant with an approved loss mitigation plan.<sup>86</sup> If a plan is approved after an NOD is recorded, a servicer may not proceed with the foreclosure process as long as the borrower is plan-compliant.<sup>87</sup> As of January 1, 2018, HBOR no longer includes provisions requiring a servicer provide the borrower with a fully executed copy of any agreement evidencing a permanent foreclosure alternative or to or rescind the NOD and cancel any pending sale once a permanent foreclosure alternative is agreed upon in writing.<sup>88</sup>

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<sup>84</sup> Beltz v. Wells Fargo Home Mortg., 2017 WL 6344369, at \*5 (E.D. Cal. Dec. 12, 2017) (dismissing dual tracking claim premised on a change from 2012-13 when borrower had previously been reviewed in 2014, prior to the 2015 application at issue in the case).

<sup>85</sup> *Id.*; see also Caldwell v. Wells Fargo Bank, N.A., 2013 WL 3789808, at \*5-6 (N.D. Cal. July 16, 2013) (Wells Fargo evaluated borrower's second application based on Wells Fargo's internal policy of denying modification to borrowers who previously defaulted on a modification. The court found this process constituted an "evaluation" and fulfilled the requirements of CC § 2923.6.).

<sup>86</sup> CAL. CIV. CODE § 2924.11(c)(1) (2018). This provision was previously found at § 2924.11(a)(1) (2013).

<sup>87</sup> § 2924.11(d)(1) (2018) (previously § 2924.11(b)(1) (2013)); see also Taylor v. Bank of Am., N.A., No. 34-2013-00151145-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 22, 2014) (denying servicer's demurrer to borrower's dual tracking claim because servicer received proof of short sale financing before foreclosing). *But see* Beck v. Ocwen Loan Servs., LLC, 2015 WL 519052, at \*2 (C.D. Cal. Feb. 6, 2015) (dismissing borrower's dual tracking claim because they did not allege they received a fully executed copy of their TPP agreement from their servicer, as required by the TPP's language).

<sup>88</sup> These requirements previously appeared at CAL. CIV. CODE § 2924.11(c) and (d) (2013), respectively.

## D. HBOR's Interplay with Federal Mortgage Servicing Rules

Created pursuant to the Dodd-Frank Act,<sup>89</sup> the Consumer Financial Protection Bureau's (CFPB) mortgage servicing rules added to and amended the existing federal framework provided by the Real Estate Settlement and Procedures Act (RESPA) and the Truth in Lending Act (TILA).<sup>90</sup> The rules went into effect on January 10, 2014. Whether a borrower may allege RESPA violations for servicer conduct occurring after January 10, 2014, but related to a complete modification application submitted *before* January 10, 2014, is unclear.<sup>91</sup> As advocates weigh whether to bring RESPA claims, they should consider whether any HBOR provisions provide greater protections or better remedies to their clients.<sup>92</sup> Because the CFPB rules only provide for damages under various RESPA statutes, borrowers cannot use the rules to enjoin a foreclosure sale.<sup>93</sup> In contrast, injunctive relief *is* available under HBOR before a sale is completed.<sup>94</sup> On the other hand, a pre-foreclosure cause of action for damages is available under RESPA but unavailable under HBOR.

The two sets of laws both include pre-foreclosure outreach requirements and dual tracking provisions, but there are significant differences in how these requirements operate. First, with respect to the initiation of foreclosure, the federal rules prohibit servicers from recording a notice of default until a borrower is more than 120 days

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<sup>89</sup> Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>90</sup> RESPA is codified as "Regulation X," at 12 C.F.R. § 1024; TILA as "Regulation Z," at 12 C.F.R. § 1026.

<sup>91</sup> *Compare* White v. Wells Fargo Bank, N.A., 2015 WL 1842811, at \*4 (E.D. Mich. Apr. 22, 2015) (finding that even if borrower submitted the application before January 10, 2014, the new RESPA regulations could still apply to servicer's foreclosure that took place after effective date), *with* Kiplinger v. Selene Fin. LP, 2015 WL 9255564 (W.D. Mich. Dec. 18, 2015) (finding new Reg X did not apply to an application submitted two days prior to effective date); Lage v. Ocwen Loan Servicing, 145 F. Supp. 3d 1172 (S.D. Fla. Nov. 19, 2015) (same), *appeal docketed*, No. 15-15558 (11th Cir. Dec. 15, 2015).

<sup>92</sup> Very few of the CFPB rules preempt more protective state laws, so advocates will generally be able to select whichever law (or combination of laws) is more tailored to their client's situation. A notable exception includes rules involving the transfer of servicing rights. *See* 12 C.F.R. § 1024.33(d) (effective Jan. 10, 2014).

<sup>93</sup> *See generally* Nat'l Consumer Law Ctr., *Foreclosures and Mortgage Servicing* § 3.2.10.4 (8th ed. 2014, updated at [www.nclc.org/library](http://www.nclc.org/library)) (discussing case law but arguing injunctive relief should be available under RESPA). *But see* discussion *infra* section II.D (using the UCL to enforce RESPA).

<sup>94</sup> CAL. CIV. CODE § 2924.12(a) (2018).

delinquent.<sup>95</sup> 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.<sup>96</sup> HBOR specifies that pre-NOD contact to discuss foreclosure alternatives be made “in person or by telephone”.<sup>97</sup> RESPA rules require two separate forms of contact: a servicer must make (or attempt) “live contact” by a borrower’s 36th day of delinquency;<sup>98</sup> and written contact by the borrower’s 45th day of delinquency.<sup>99</sup> HBOR previously required a post-NOD notice,<sup>100</sup> but, like the current version of HBOR, the federal rules do not. The federal rules apply to both non-judicial and judicial foreclosures, while HBOR covers only non-judicial foreclosures.

HBOR provides greater dual tracking protections than the federal rules in certain ways. First, there is some disagreement regarding whether RESPA’s dual tracking protections prohibit servicers from recording a Notice of Trustee’s Sale in California while a timely and complete application is under review.<sup>101</sup>

Second, HBOR does not condition dual tracking protections on when the borrower submits a complete loan modification application; as long as a borrower submits the complete application before a foreclosure sale, the servicer may not move ahead with the sale while the application is “pending.”<sup>102</sup> The federal rules, in contrast, provide a tiered set of protections depending on how early the borrower submits an application. Borrowers receive full dual tracking protections – including a notice listing any missing documents and a right to appeal a denial, when they submit an application within the first 120 days of

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<sup>95</sup> 12 C.F.R. § 1024.41(f) (effective Jan. 10, 2014).

<sup>96</sup> CAL. CIV. CODE §§ 2923.5 (2018); *see* discussion *supra* section I.A.

<sup>97</sup> § 2923.5(a)(1)(A) (2018).

<sup>98</sup> 12 C.F.R. § 1024.39(a) (effective Jan. 10, 2014).

<sup>99</sup> § 1024.39(b) (effective Jan. 10, 2014).

<sup>100</sup> CAL. CIV. CODE § 2924.9(a) (2013). The notice was only required if the borrower has not yet “exhausted” modification attempts. *Id.*

<sup>101</sup> *Compare* Judan v. Wells Fargo Bank, No. 15-CV-05029-HSG, 2017 WL 6405615, at \*2 (N.D. Cal. Dec. 15, 2017) (dismissing § 1024.41(g) claim based on recording of NTS) *and* Vethody v. Nat’l Default Servs. Corp., 2016 WL 7451666, at \*4–5 (N.D. Cal. Dec. 28, 2016) (same) *with* Fox v. Manley, Deas, & Kochalski, LLC, No. 16 C 5715, 2016 WL 6092638, at \*5 (N.D. Ill. Oct. 19, 2016) (rescheduling a sale date goes beyond the kind of “incidental conduct” exempted from the dual-tracking prohibition and therefore may form the basis of a claim).

<sup>102</sup> CAL. CIV. CODE § 2923.11(a) (2018). 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. *See supra* discussion in section I.C.1.

a delinquency or before the loan is referred to foreclosure,<sup>103</sup> or, if a Notice of Default has been recorded, 90 or more days before a scheduled sale date.<sup>104</sup> After that, the rights conferred by the federal rules diminish. Applications submitted between 89 and 45 days before a scheduled sale date do not trigger the right to appeal a denial.<sup>105</sup> Applications submitted after the 45-day mark do not entitle the borrower to a notice listing any missing documents.<sup>106</sup> Applications submitted by 37 days before a scheduled sale require a servicer to refrain from conducting the sale until making a determination on the application,<sup>107</sup> but only if the application is complete. Borrowers who submit their application less than 37 days before a scheduled foreclosure sale receive no dual tracking protections under the federal rules.<sup>108</sup> In contrast, prior to January 1, 2018, HBOR provided all borrowers with large servicers<sup>109</sup> with full dual tracking protections, including the right to an appeal, regardless of when the complete application was submitted.<sup>110</sup> The current version of HBOR does not provide for an appeal or certain communications, but the dual tracking protections still are not conditioned on when the application is submitted.

Some RESPA dual tracking rules are more protective than HBOR. For instance, a “facially complete application” (where a servicer receives all requested information but later determines that more information or clarification is necessary), must be treated as

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<sup>103</sup> 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).

<sup>104</sup> § 1024.41(h) (effective Jan. 10, 2014).

<sup>105</sup> *Ibid.* and § 1024.41(b)(2)(i) (effective Jan. 10, 2014). *See also* Wong v. Fay Servicing, LLC, 2017 WL 950863, at \*3-4 (N.D. Cal. March 10, 2017).

<sup>106</sup> § 1024.41(b)(2)(i) (effective Jan. 10, 2014).

<sup>107</sup> § 1024.41(g) (effective Jan. 10, 2014). Servicers must notify borrowers of their evaluation within 30 days of receiving borrower’s complete application. § 1024.41(c); *see* Lage v. Ocwen Loan Servicing, 2015 WL 631014, at \*2-3 (S.D. Fla. Feb. 11, 2015) (finding a viable RESPA claim where servicer did not evaluate borrower’s application until two months after borrower’s application submission).

<sup>108</sup> *See* 12 C.F.R. § 1024.41(g) (effective Jan. 10, 2014).

<sup>109</sup> Borrowers with small servicers do not receive an appeal period. *Compare* CAL. CIV. CODE § 2924.18 (2013) (explaining dual tracking protections applied to borrowers with small servicers), *with* § 2923.6 (2013) (explaining dual tracking protections for borrowers with large servicers).

<sup>110</sup> *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 previously had 30 days to appeal a denial. CAL. CIV. CODE § 2923.6(d) (2013).

“complete” as of the date that it was facially complete.<sup>111</sup> HBOR contains no such distinctions and leaves the “completeness” of an application up to the servicer and the courts.<sup>112</sup> Because the federal rules do not define borrower, case law under those rules has been more favorable to successors-in-interest than under HBOR, which has a statutory definition.<sup>113</sup> However, SB 1150, effective January 1, 2017, expanded HBOR’s coverage to include most successors.

In October 2016, the CFPB finalized rules amending the RESPA servicing regulations.<sup>114</sup> Major revisions included more robust protections for successors-in-interest, more regulations governing servicing transfers, and a rule requiring servicers to notify borrowers when applications are “complete.” The CFPB also revised its previous “one bite at the apple” rule regarding subsequent applications.<sup>115</sup> The new rule is more restrictive than the now-expired HBOR rule on this

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<sup>111</sup> § 1024.41(c)(2)(iv) (effective Jan. 10, 2014).

<sup>112</sup> See discussion *supra* section I.C.2.

<sup>113</sup> *Compare* Barzelis v. Flagstar Bank, F.S.B., 784 F.3d 971, 977 (5th Cir. 2015) (determining plaintiff was a “borrower” under RESPA as the successor in community debt and successor in the promissory note); Frank v. J.P. Morgan Chase Bank, N.A., 2016 WL 3055901, at \*5 (N.D. Cal. May 31, 2016) (determining surviving spouse is a “borrower” under RESPA because she is obligated to make debt payments and named a borrower in the Deed of Trust); Washington v. Am. Home Loans, 2011 WL 11651320, at \*2 (C.D. Cal. Nov. 12, 2011) (determining plaintiff is a “borrower” under RESPA because she was obligated on the loan having signed the deed of trust as a joint tenant, and stood to lose equitable interest in the event of a default); *with* Van Zandt v. Select Portfolio Servicing, Inc., 2015 WL 574357 (N.D. Cal. Feb. 10, 2015) (denying TRO because plaintiff was not the borrower but successor to the borrower); Austin v. Ocwen Loan Servicing, LLC, 2014 WL 3845182 (E.D. Cal. Aug. 1, 2014) (trustee may not sue under HBOR because the trust is not party to the loan).

<sup>114</sup> Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), Final Rule, 81 Fed. Reg. 72,160 (Oct. 19, 2016).

<sup>115</sup> 12 C.F.R. § 1024.41(i) (effective Jan. 10, 2014). This rule excludes all subsequent applications even if the first application was for a non-modification foreclosure alternative, like a short sale. *Id.* A borrower may, however, submit a new application to a new servicer after a servicing transfer. [Official Bureau Interpretation, Supp. 1 to Part 1024, ¶ 41\(i\)-1](#). See, e.g., Thomas v. Wells Fargo Bank, N.A., 2017 WL 3877739, at \*5 (S.D. Cal. Sept. 4, 2017) (granting summary judgment on dual tracking claim based on subsequent application); McMahon v. JP Morgan Bank, NA, 2017 WL 1495214, at \*3-4 (E.D. Cal. Apr. 26, 2017) (RESPA claim pertaining to subsequent application dismissed with prejudice). *But see* Thomas v. Wells Fargo Bank, N.A., 2016 WL 1701878 at\*6-8 (S.D. Cal. Apr. 28, 2016) (reasoning that borrower’s compliance with servicer’s request for additional information after receipt of first complete application does not constitute duplicative loan application requests).

issue, but may provide protection to certain borrowers that the current version of HBOR may not.<sup>116</sup>

For more in-depth information about the federal servicing rules, please consult Chapter 3 of National Consumer Law Center, *Foreclosures and Mortgage Servicing* (8th ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).

## II. Non-HBOR Causes of Action

Because HBOR limits injunctive relief to actions brought before the trustee's deed upon sale is recorded,<sup>117</sup> advocates with post-foreclosure cases should explore whether other claims are available to reverse a completed foreclosure sale. HBOR explicitly preserves remedies available under other laws.<sup>118</sup>

### A. Wrongful Foreclosure Claims

Wrongful foreclosure claims (which can set aside or “undo” foreclosure sales)<sup>119</sup> are important for borrowers who were unable to bring pre-sale claims. Claims challenging the foreclosing party's authority to foreclose<sup>120</sup> are unavailable before the sale because courts are hesitant to add new requirements to the non-judicial foreclosure statutes.<sup>121</sup> As a result, most wrongful foreclosure claims are brought

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<sup>116</sup> See 12 C.F.R. § 1024.41(i) (effective Oct. 19, 2017) (extending Regulation X loss mitigation protections to subsequent applications as long as the borrower was not delinquent on the loan following the prior application).

<sup>117</sup> See CAL. CIV. CODE §§ 2924.12(a)(1) & 2924.19(a)(1) (2013). It is a closer and unsettled question whether injunctive relief is available post-sale, but before a trustee's deed upon sale is recorded. See, e.g., *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6-7 (N.D. Cal. Apr. 16, 2014) (declining to determine at the pleading stage what type of remedy is available in this situation, but noting that some remedy should be available for a dual tracking violation and denying servicer's motion to dismiss).

<sup>118</sup> See CAL. CIV. CODE § 2924.12(g) (2018); §§ 2924.12(h) & 2924.19(g) (2013).

<sup>119</sup> See CEB, *supra* note 29, §§ 7.67A, 10.75, & 10.76, for descriptions of the different bases for wrongful foreclosure claims.

<sup>120</sup> Only certain entities possess the “authority to foreclose”: the beneficiary under the deed of trust, the original or properly substituted trustee, or the authorized agent of the beneficiary. CAL. CIV. CODE § 2924(a)(6) (2013).

<sup>121</sup> See *Lucioni v. Bank of Am., N.A.*, 3 Cal. App. 5th 150 (2016) (dismissing pre-sale CC 2924(a)(6) claim); *Saterbak v. JP Morgan Chase Bank, N.A.*, 245 Cal. App. 4th 808 (2016) (borrower lacked standing to bring pre-sale challenge as to authority to foreclose; distinguishing *Yvanova* as post-foreclosure case); *Gomes v. Countrywide Home Loans*, 192 Cal. App. 4th 1149, 1154 (2011) (“Because of the exhaustive nature

after the sale.<sup>122</sup> Advocates may find it easier to challenge the validity of the foreclosure in a post-sale unlawful detainer action,<sup>123</sup> where the servicer must affirmatively demonstrate proper authority.<sup>124</sup> Ideally, the advocate can persuade the trial court to consolidate a pending unlawful detainer action with a wrongful foreclosure action so that all relevant issues can be fully litigated.<sup>125</sup> Borrowers may be able to

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of this [statutory] scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.”) (quoting *Lane v. Vitek Real Estate Indus. Group*, 713 F. Supp. 2d 1092, 1098 (2010)). Courts sometimes describe these unsuccessful claims as “preemptive.” *See, e.g., Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 82 (2013) (describing “preemptive” actions as those that require the foreclosing entity to prove its authority to foreclose, without alleging a specific factual basis attacking that authority).

<sup>122</sup> *See, e.g., Glaski v. Bank of Am. N.A.*, 218 Cal. App. 4th 1079 (2013). Pre-sale wrongful foreclosure claims are also possible, if less frequent. *See Nguyen v. JP Morgan Chase Bank N.A.*, 2013 WL 2146606, at \*4 (N.D. Cal. May 15, 2013) (A claim for wrongful foreclosure may be brought pre-sale if plaintiff alleges inaccurate or false mortgage documents and if plaintiff has received a notice of trustee sale.); *cf. Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, at \*6 (S.D. Cal. July 31, 2013) (allowing pre-default foreclosure-related claims because economic injury (due to drastically increased mortgage payments) was “sufficient to satisfy the ripeness inquiry.”). *But cf. Rosenfeld v. JP Morgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 961 (N.D. Cal. 2010) (finding a pre-sale wrongful foreclosure claim premature); *Vega v. JP Morgan Chase Bank, N.A.*, 654 F. Supp. 2d 1104, 1113 (E.D. Cal. 2009). Wrongful foreclosure issues may also be resolved in bankruptcy. *In re Takowsky*, 2014 WL 5861379 (B.A.P. 9th Cir. Nov. 12, 2014).

<sup>123</sup> Not only is this tactic often easier, but it is sometimes necessary to avoid *res judicata* issues in any subsequent wrongful foreclosure action. *See, e.g., Melchor v. Arch Bay Holdings LLC*, 2017 WL 4564240, at \*7 (Cal. Ct. App. Oct. 13, 2017) (dismissing wrongful foreclosure claims because they had been resolved in the borrower’s UD case); *Koshak v. 10675 S. Orange Park Boulevard, LLC*, 2017 WL 5776654, at \*5 (Cal. Ct. App. Nov. 29, 2017) (same); *Hopkins v. Wells Fargo Bank, N.A.*, 2013 WL 2253837, at \*4-5 (E.D. Cal. May 22, 2013) (barring a wrongful foreclosure claim because servicer had already established duly perfected title in a UD action). Advocates can refer to NHLP’s [Defending Post-Foreclosure Evictions](#) practice guide for more information on litigating title in the context of a post-foreclosure UD.

<sup>124</sup> *See Bank of N.Y. Mellon v. Preciado*, 224 Cal. App. Supp. 1, 9-10 (2013) (reversing UD court’s judgment for plaintiff because plaintiff had failed to show compliance with CC 2924 – specifically, plaintiff failed to explain why DOT and Trustee’s Deed listed two different trustees); *U.S. Bank v. Cantartzoglou*, 2013 WL 443771, at \*9 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (If the UD defendant raises questions as to the veracity of title, plaintiff has the affirmative burden to prove true title.); *Aurora Loan Servs. v. Brown*, 2012 WL 6213737, at \*5-6 (Cal. App. Div. Super. Ct. July 31, 2012) (voiding a sale where servicer could not demonstrate authority to foreclose and refusing to accept a post-NOD assignment as relevant to title).

<sup>125</sup> *See, e.g., Habtemariam v. Vida Capital Grp., LLC*, 2017 WL 627404, at \*7 (E.D. Cal. Feb. 14, 2017) (granting motion to consolidate UD and wrongful foreclosure action arising out of foreclosure on an allegedly cancelled debt); *Brainangkul v. Superior Court*, Case No. B282454 (Cal. Ct. App. May 23, 2017) (unpublished order

obtain full tort recovery under a wrongful foreclosure claim, including moving expenses, lost rental income, damage to credit, and emotional distress.<sup>126</sup>

### 1. Assignments of the note and deed of trust

Only the holder of the beneficial interest may substitute a new trustee, assign the loan, or take action in the foreclosure process.<sup>127</sup> A beneficiary's assignee must obtain an assignment of the deed of trust before moving forward with the foreclosure process.<sup>128</sup> While foreclosing entities have always been required to have the authority to foreclose, HBOR codified this requirement in Civil Code Section 2924(a)(6) for notices of default recorded after January 1, 2013.

In 2013, notable California Court of Appeal case, *Glaski v. Bank of Am. N.A.*, held that a borrower had standing to challenge a foreclosure by alleging very specific facts to show that the foreclosing entity was not the beneficiary. The borrower had challenged the purported assignment of his loan, which occurred after the closing date of the transferee-trust.<sup>129</sup> Analyzing New York law, the court concluded that the belated attempt to transfer the loan rendered the assignment invalid.<sup>130</sup>

Post-Glaski: *Glaski* initially gave hope to many borrowers with claims involving improper securitization of their loans. The case, though, was roundly rejected by the other Court of Appeal districts and by federal district courts.<sup>131</sup>

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granting writ petition and directing superior court to grant wrongful foreclosure plaintiff's motion to consolidate UD with her affirmative quiet title action against a third party purchaser).

<sup>126</sup> See *Miles v. Deutsche Bank Nat'l Tr. Co.*, 236 Cal. App. 4th 394, 409 (2015).

<sup>127</sup> See CAL. CIV. CODE § 2924(a)(6) (2013; 2018).

<sup>128</sup> See *Nguyen v. JP Morgan Chase Bank, N.A.*, 2013 WL 2146606, at \*5 (N.D. Cal. May 15, 2013) (denying motion to dismiss wrongful foreclosure claim because foreclosing assignee could not demonstrate that it received an assignment from the original beneficiary).

<sup>129</sup> *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1094 (2013).

<sup>130</sup> *Id.*

<sup>131</sup> See, e.g., *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 815 -16 (2016), review denied (Mar. 22, 2017) (gathering cases); *In re Davies*, 565 F. App'x 630, 633 (9th Cir. 2014) (declining to follow *Glaski*); *In re Sandri*, 501 B.R. 369, 374-77 (Bankr. N.D. Cal. 2013) (rejecting the *Glaski* court's reasoning and siding with the majority of California courts that have found borrowers have no standing to

Yvanova: Despite other courts' almost universal rejection of *Glaski*, the California Supreme Court partly vindicated *Glaski* in *Yvanova v. New Century Mortgage*. In *Yvanova*, the court granted review on the question whether a foreclosed borrower has standing to challenge an assignment as void.<sup>132</sup> The court held that “a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment.” In doing so, the court expressly rejected prior Court of Appeal cases that held to the contrary.<sup>133</sup> However, *Yvanova* declined to rule on what specific defects would actually render an assignment void and left the question unresolved. The court also declined to speculate on how its ruling might impact pre-foreclosure challenges.

Post-Yvanova: After *Yvanova*, the California Court of Appeal in *Saterbak v. JP Morgan Chase* declined to extend *Yvanova* to pre-sale challenges.<sup>134</sup> The Court also held that a late transfer into the securitized trust, the defect alleged in *Glaski*, only rendered the transfer voidable, not void.<sup>135</sup> Similarly, in *Yhudai v. Impac Funding*,

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challenge problems with the authority to foreclose); *Rubio v. US Bank, N.A.*, 2014 WL 1318631, at \*8 (N.D. Cal. Apr. 1, 2014) (same); *Diunugala v. JP Morgan Chase Bank, N.A.*, 2013 WL 5568737, at \*8 (S.D. Cal. Oct. 3, 2013) (same).

<sup>132</sup> *Yvanova v. New Century Mortg.*, 62 Cal. 4th 919 (2016).

<sup>133</sup> *Id.* at 939 n.13 (“We disapprove *Jenkins v. JPMorgan Chase Bank, N.A.*, supra, 216 Cal.App.4th 497, *Siliga v. Mortgage Electronic Registration Systems, Inc.*, supra, 219 Cal.App.4th 75, *Fontenot v. Wells Fargo Bank, N.A.*, supra, 198 Cal.App.4th 256, and *Herrera v. Federal National Mortgage Assn.*, supra, 205 Cal.App.4th 1495, to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void.”).

<sup>134</sup> *Saterbak v. JP Morgan Chase Bank, N.A.*, 245 Cal. App. 4th 808, 815 (2016) (“Because *Saterbak* brings a preforeclosure suit challenging Defendant's ability to foreclose, *Yvanova* does not alter her standing obligations.”). *But see* *Lundy v. Selene Fin., LP*, 2016 WL 1059423 (N.D. Cal. Mar. 17, 2016) (predicting that the California Supreme Court would extend *Yvanova* to pre-foreclosure challenges without citing *Saterbak*); *Powell v. Wells Fargo Home Mortg.*, 2016 WL 1718189 at \*13-14 (N.D. Cal. Apr. 29, 2016) (adopting *Lundy* and allowing plaintiff to challenge, with specific factual basis, a defendant's authority to initiate the foreclosure process).

<sup>135</sup> *Saterbak*, 245 Cal. App. 4th at 815 (declining to follow *Glaski* because the New York case *Glaski* relied on was later overturned); *see also* *Ramos v. JP Morgan Chase & Co.*, No. 15-16668, \_\_ F. App'x \_\_, 2017 WL 1755946, at \*1 (9th Cir. May 4, 2017) (affirming dismissal of claims because defects in assignment of a note may render a transfer voidable, not void); *Tjaden v. HSBC Bank USA, Nat'l Ass'n*, \_\_ F. App'x \_\_,

the Court of Appeal followed *Saterbak* to hold that a post-closing date transfer in violation of a PSA is voidable, not void, and therefore a borrower in a post-foreclosure case had no standing to bring a wrongful foreclosure claim based on the PSA violation.<sup>136</sup> In *Sciarratta v. U.S. Bank Nat'l Ass'n*, the Court of Appeal held that an allegation of void assignment is sufficient to satisfy the prejudice element of a wrongful foreclosure tort because harm is created where a defendant with no right to do so forecloses on a property.<sup>137</sup> In general, allegations involving a substantive lack of authority to assign have fared better – at least at the pleading stage – than those involving procedural irregularities in the assignment transaction.<sup>138</sup>

## 2. Substitutions of trustee

Only the original trustee or a properly substituted trustee may carry out a foreclosure, and, unlike assignments of a deed of trust, substitutions of trustee must be recorded.<sup>139</sup> Without a proper substitution of trustee, any foreclosure procedures (including sales) initiated by the unauthorized trustee are void.<sup>140</sup> Courts have upheld

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2017 WL 943943, at \*1 (9th Cir. Mar. 10, 2017) (following *Saterbak*); *Rivac v. NDeX W., LLC*, 2017 WL 1075040, at \*15 (N.D. Cal. Mar. 22, 2017) (same).

<sup>136</sup> *Yhudai v. Impac Funding Corp.*, 1 Cal. App. 5th 1252 (2016); *In re Turner*, 859 F.3d 1145, 1149 (9th Cir. 2017); *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 2016 WL 7217199 (Dec. 13, 2016) (same).

<sup>137</sup> *Sciarratta v. U.S. Bank Nat'l Ass'n*, 247 Cal. App. 4th 552 (2016); *see also* *Jacobsen v. Aurora Loan Services, LLC*, 661 F. App'x 474, 2016 WL 4578367, at \*2-3 (9th Cir. Sept. 2, 2016) (reversing summary judgment of wrongful foreclosure claim when the servicer currently has possession of the note endorsed in blank but did not show that it was the holder of the note before the trustee sale).

<sup>138</sup> *Compare, e.g.,* *Cupp v. Fed. Nat'l Mortg. Ass'n.*, 2017 WL 3276330, at \*6 (Cal. Ct. App. Aug. 2, 2017) (finding that allegation that one assignor in the chain of title purported to transfer the loan after it had already been assigned elsewhere stated a claim) (*unpublished/noncitable*) *with* *In re Turner*, *supra*, 859 F.3d at 1149.

<sup>139</sup> CAL. CIV. CODE § 2934a (2012). The statute provides a very relaxed standard governing the timing of this recording. The substitution may be executed and recorded after the substituted trustee records the NOD, if a copy of the substitution and an affidavit are mailed to the borrower. § 2934a(c). But even this disclosure requirement may be contracted around in the DOT. *See Ram v. Onewest Bank, FSB*, 234 Cal. App. 4th 1, 16 (2015).

<sup>140</sup> *See, e.g.,* *Dimock v. Emerald Props. LLC*, 81 Cal. App. 4th 868, 876 (2000) (finding the foreclosing entity had no power to foreclose because the substitution of trustee had never been recorded as required by section 2934a); *Pro Value Props., Inc. v. Quality Loan Servicing Corp.*, 170 Cal. App. 4th 579, 581 (2009). *But see* *Maomanivong v. Nat'l City Mortg., Co.*, 2014 WL 4623873, at \*6-7 (N.D. Cal. Sept. 15, 2014) (denying borrower's CC 2924(a)(6) claim because the acting trustee

challenges when the signer of the substitution may have lacked authority or the proper agency relationship with the beneficiary.<sup>141</sup> Some courts have also allowed cases to proceed when the substitution of trustee was allegedly backdated.<sup>142</sup>

### 3. Loan origination claims

In rare instances, a court may set aside a foreclosure sale if the underlying loan was unconscionable. For example, the California Court of Appeal reinstated a claim to set aside a sale when the borrowers, who had limited education and English proficiency, took out a loan with monthly payments that exceeded their income by \$1,000 per month.<sup>143</sup>

Some borrowers attempt to stop or reverse a foreclosure by bringing rescission claims under the federal Truth in Lending Act (TILA) regarding disclosure violations at loan origination<sup>144</sup> or by seeking cancellation of instruments related to foreclosure of an allegedly

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eventually recorded a proper substitution in compliance with CC 2934a(c), even if after it recorded an NOD); *Ram*, 234 Cal. App. 4th at 17-18 (finding an NOD allegedly signed by an incorrect trustee not prejudicial to the borrowers because they received all pertinent information to rectify their default, rendering the sale voidable, not void).

<sup>141</sup> See *Engler*, 2013 WL 6815013, at \*6 (allowing borrowers to assert a claim based on an improperly substituted trustee: MERS was the listed beneficiary but the signature on the substitution belonged to an employee of the *servicer*, not an employee of MERS); *Patel v. U.S. Bank, N.A.*, 2013 WL 3770836, at \*1, 7 (N.D. Cal. July 16, 2013) (allowing borrowers' pre-sale claim, based partly on robo-signing allegations pertaining to the substitution of trustee and assignment of the DOT, to proceed); *Halajian*, 2013 WL 593671, at \*6-7 (warning that if the MERS "vice president" executing the foreclosure documents was not truly an agent of MERS, then she "was not authorized to sign the assignment of deed of trust and substitution of trustee [and] both are invalid"); *Tang v. Bank of Am., N.A.*, 2012 WL 960373, at \*11 (C.D. Cal. Mar. 19, 2012); *Sacchi*, 2011 WL 2533029, at \*24 (denying servicer's motion to dismiss because an unauthorized entity executed a substitution of a trustee). *But see Ram*, 234 Cal. App. 4th at 13-14 (granting MTD in part because borrowers agreed that the substituted trustee maintained an agency relationship with the original trustee when it recorded the NOD, even if it was before the substitution was executed).

<sup>142</sup> See *Makreas v. First Nat'l Bank of N. Cal.*, 856 F. Supp. 2d 1097, 1100 (N.D. Cal. 2012).

<sup>143</sup> *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982 (2016).

<sup>144</sup> 15 U.S.C. § 1635(f). See *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 859 (9th Cir. 2017) (remanding with instructions to allow plaintiff to amend complaint to plead a TILA rescission claim).

rescinded loan.<sup>145</sup> While many such claims are barred by the statute of limitations,<sup>146</sup> following the United States Supreme Court decision in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015), holding that a TILA rescission claim is not barred by the statute of limitations as long as the borrower delivered a rescission notice within three years after consummation of the loan, some courts have been more open to such claims.<sup>147</sup> There remain, however, disagreements over whether a completed foreclosure extinguishes a borrower's right of rescission and therefore bars related claims,<sup>148</sup> and over whether allegations of tender are required to state a TILA rescission claim.<sup>149</sup>

#### 4. Procedural foreclosure notice requirements

Attacks on completed foreclosure sales based on noncompliance with notice requirements are rarely successful. Borrowers need to demonstrate prejudice from the notice defect<sup>150</sup> and must tender the

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<sup>145</sup> See, e.g., *Hinrichsen v. Bank of Am., N.A.*, 2017 WL 2992662, at \*5 (S.D. Cal. July 14, 2017) (denying MTD on cancellation of instruments claim arising out of allegations that borrower had timely rescinded under TILA).

<sup>146</sup> See, e.g., *Masoud v. J.P. Morgan Chase Bank, N.A.*, 2017 WL 6270269, at \*5 (S.D. Cal. Dec. 8, 2017) (TILA claims time barred when borrower alleged rescission of a 2005 loan in 2015); *Warren v. Wells Fargo & Co.*, 2017 WL 4876212, at \*17 (S.D. Cal. Oct. 27, 2017).

<sup>147</sup> *Ibid.*; See also *Gaytan v. Bank of N.Y. Mellon*, 2017 WL 914707, at \*4 (C.D. Cal. Mar. 6, 2017) (allowing TILA rescission claim to proceed based on allegations of timely rescission notice).

<sup>148</sup> Compare *id.* at \*6-9 with *Mikels v. Estep*, 2016 WL 1056067, at \*5 (N.D. Cal. Mar. 17, 2016) (finding borrower's rescission right was extinguished by foreclosure sale).

<sup>149</sup> See discussion of tender requirements below in Section III(C).

<sup>150</sup> See, e.g., *Siqueiros v. Fed. Nat'l Mortg. Ass'n*, 2014 WL 3015734, at \*4-5 (C.D. Cal. June 27, 2014) (servicer's failure to mail borrower NOD and NTS directly contributed to the loss of borrower's home); *Passaretti v. GMAC Mortg., LLC*, 2014 WL 2653353, at \*12 (Cal. Ct. App. June 13, 2014) (improper notice of sale prejudiced the borrower a great deal since he was unable to take any action to avoid the sale (the court found it important that borrower had previously cured his defaults)). One court seemed to limit prejudice *only* for claims that attacked a procedural aspect of the foreclosure process, rather than a substantive element like an improper assignment. See *Deschaine v. IndyMac Mortg. Servs.*, 2014 WL 281112, at \*11 (E.D. Cal. Jan. 23, 2014) (The presumption that a foreclosure was conducted properly "may only be rebutted by substantial evidence of prejudicial procedural irregularity." "On a motion to dismiss, therefore, a [borrower] must allege 'facts showing that [he was] prejudiced by the alleged procedural defects,'" or that a "violation of the statute[s] themselves, and not the foreclosure proceedings, caused [his] injury.").

unpaid principal balance of the loan.<sup>151</sup>

## 5. Loan modification related claims

If the servicer foreclosed while the borrower was compliant with a loan modification agreement, the borrower may bring a wrongful foreclosure claim to set aside the sale.<sup>152</sup>

## 6. FHA loss mitigation rules

Servicers of FHA loans must meet strict loss mitigation requirements, including, under specified circumstances, a face-to-face meeting with the borrower, before they may accelerate the loan.<sup>153</sup> Borrowers may bring equitable claims to enjoin a sale or to set aside a completed sale based on a servicer's failure to comply with these requirements; monetary damages, however, are currently unavailable.<sup>154</sup>

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<sup>151</sup> See, e.g., *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112 (2011). For a brief description of prejudice, refer to section II.A.1; for a full discussion of tender, refer to section III.C.

<sup>152</sup> See *Chavez v. Indymac Mortg. Servs.*, 219 Cal. App. 4th 1052, 1062-63 (2013) (holding that the borrower stated a wrongful foreclosure claim based on the servicer's breach of the modification agreement); *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001, 1017 (2012) (finding that the borrower may state a wrongful foreclosure claim when the servicer foreclosed while the borrower was in compliance with the modification agreement). Besides an attendant breach of contract claim, borrowers may also have HBOR claims under these facts. See CAL. CIV. CODE § 2924.11(c) & (d) (2018) (prohibiting certain actions, including conducting a foreclosure sale, where borrower is compliant with a written foreclosure prevention alternative).

<sup>153</sup> 12 U.S.C. § 1715u(a) (2012) ("Upon default of any mortgage insured under this title [12 U.S.C. § 1707 *et seq.*], mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure."); see also *Pfeifer v. Countrywide Home Loans*, 211 Cal. App. 4th 1250, 1267-78 (2012) (finding the face-to-face meeting a condition precedent to foreclosure). For a more in-depth review of FHA loss mitigation requirements, see Nat'l Consumer Law Ctr., *Foreclosures and Mortgage Servicing* § 6.2 (8th ed. 2014, updated at [www.nclc.org/library](http://www.nclc.org/library)).

<sup>154</sup> See *Pfeifer*, 211 Cal. App. 4th at 1255 (allowing borrowers to enjoin a pending sale); *Fonteno v. Wells Fargo Bank, N.A.*, 228 Cal. App. 4th 1358 at \*8 (2014) (extending *Pfeifer* to allow borrowers to bring equitable claims to set aside a completed sale); see also *Urenia v. Public Storage*, 2014 WL 2154109, at \*7 (C.D. Cal. May 22, 2014) (declining to dismiss borrower's wrongful foreclosure claim on the grounds that *Pfeifer* only contemplates pre-sale injunctions).

## Misapplication of payments or borrower not in default

A borrower may bring a wrongful foreclosure claim if the servicer commenced foreclosure when the borrower was not in default or when borrower had tendered the amount in default.<sup>155</sup> If the foreclosure commenced on or after 2013, this conduct may also form the basis for an HBOR claim under Civil Code Section 2924.17.<sup>156</sup>

### B. Contract Claims

Breach of contract claims have succeeded when servicers foreclosed while the borrower was compliant with a Trial Period Plan (TPP)<sup>157</sup> or

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<sup>155</sup> See *In re Takowsky*, 2014 WL 5861379, at \*4-8 (B.A.P. 9th Cir. Nov. 12, 2014) (affirming the bankruptcy court's decision to recognize borrower's wrongful foreclosure claim when borrower had tendered the amount due on the notice of default).

<sup>156</sup> Servicers may not record a document related to foreclosure without ensuring its accuracy and that it is supported by "competent and reliable evidence." Before initiating foreclosure, a servicer must substantiate borrower's default and servicer's right to foreclose. CAL. CIV. CODE § 2924.17(a)-(b) (2013, 2018). While straight robo-signing claims under this statute have generally failed (see *Mendoza v. JP Morgan Chase Bank, N.A.*, 228 Cal. App. 4th 1020 (2014), *depublished and review granted*, 337 P.3d 493 (Cal. 2014) for an example), some borrowers have successfully asserted CC 2924.17 claims unrelated to robo-signing. See, e.g., *Nardolillo v. JPMorgan Chase Bank, N.A.*, 2017 WL 1493273, at \*4 (N.D. Cal. Apr. 26, 2017) (denying MTD on CC 2924.17 claim because borrower alleged that Note was actually assigned to a specific, named entity other than the foreclosing party); *Henderson v. Ocwen Loan Servicing*, 2014 WL 5461955, at \*3 (N.D. Cal. Oct. 27, 2014) (rejecting servicer's argument that CC 2924.17 requires an allegation of widespread and repeated robo-signing and finding that the NOD could not have been "supported by competent and reliable evidence" because borrower was never in default); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 997-98 (N.D. Cal. 2014) (denying servicer's motion to dismiss borrower's CC 2924.17 claim based on servicer's failure to credit her account with accepted mortgage payments, evidence that servicer failed to substantiate her default); *Rothman v. U.S. Bank Nat'l Ass'n*, 2014 WL 1648619, at \*7 (N.D. Cal. Apr. 24, 2014) (allowing borrowers to state a CC 2924.17 claim based on an incorrect NOD which included inappropriate fees and charges, and rejecting servicer's argument that CC 2924.17 only applies to robo-signing claims).

<sup>157</sup> See, e.g., *Moore v. Freedom Mortg. Corp.*, 2017 WL 2633411, at \*3 (E.D. Cal. June 19, 2017) (plaintiff's allegations that she submitted additional financial documents during trial plan period sufficient consideration for a binding contract); *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883-84 (9th Cir. 2013) (HAMP participants are contractually obligated to offer borrowers a permanent modification if the borrower complies with a TPP by making required payments and by accurately representing their financial situation.); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*5 (N.D. Cal. Dec. 23, 2014) (servicer improperly failed to send borrower a permanent loan modification, or a notification that he did not qualify for a permanent modification, and foreclosed on borrower after borrower complied with the

permanent modification.<sup>158</sup> An increasing number of state and federal courts have found that certain TPP agreements require servicers to offer permanent modifications to TPP-compliant borrowers.<sup>159</sup> This is now established law in both California state court and the Ninth Circuit.<sup>160</sup> Claims based on the deed of trust have also succeeded when the servicer refused to accept payments or honor a permanently modified loan.<sup>161</sup>

## 1. The statute of frauds defense

Servicers have invoked the statute of frauds to defend these contract claims.<sup>162</sup> In *Corvello v. Wells Fargo Bank*, for example, a borrower's oral TPP agreement modified her written deed of trust, so

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TPP and returned signed copies of the TPP); *Harris v. Bank of Am.*, 2014 WL 1116356, at \*4-6 (C.D. Cal. Mar. 17, 2014) (breach of contract claim based on TPP agreement); *Karimian v. Caliber Home Loans Inc.*, 2013 WL 5947966, at \*3 (C.D. Cal. Nov. 4, 2013) (“Having entered into the TPP, and accepted payments, CitiMortgage could not withhold a permanent modification simply because it later determined that plaintiff did not qualify for HAMP.”); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 799 (2013).

<sup>158</sup> See, e.g., *Henry v. Ocwen Loan Servicing, LLC*, 2017 WL 3669623, at \*4 (S.D. Cal. Aug. 23, 2017) (denying motion to dismiss claim based on servicer's refusal to honor a permanent loan modification agreement); *Moreno v. Wells Fargo Home Mortg.*, 2014 WL 5934722, at \*7 (E.D. Cal. Nov. 12, 2014) (denying servicer's MTD borrowers' oral contract claim where borrowers made a lump-sum payment and servicer began withdrawing monthly payments but never modified the mortgage as agreed); *Desser v. US Bank*, 2014 WL 4258344, at \*7 (C.D. Cal. Aug. 27, 2014) (leaving a servicer to decide whether to execute and return the final agreement to borrower unfairly imbues servicer with complete control over contract formation; borrower's acceptance of the modification creates a contract); *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001, 1013-14 (2012) (finding the language and intent of a permanent modification forms an enforceable contract even if the agreement is not countersigned by the servicer; once the borrower performs under that contract by making payments, the servicer must perform as well).

<sup>159</sup> See, e.g., *Corvello*, 728 F.3d at 883-84; *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 925-28 (2013); *West*, 214 Cal. App. 4th at 799; see also *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 233 (1st Cir. 2013) (servicer must offer permanent modification before the Modification Effective Date); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 565-66 (7th Cir. 2012).

<sup>160</sup> See *id.*; see also *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 305-06 (2014) (allowing a borrower to amend his complaint to allege not only TPP payments, but continued HAMP eligibility to plead valid contract and wrongful foreclosure claims).

<sup>161</sup> See *Morales v. Nationstar Mortg. LLC*, 2014 WL 6603166, at \*4-5 (S.D. Cal. Nov. 19, 2014) (servicer rejected payments after servicing transfer).

<sup>162</sup> The statute of frauds requires agreements concerning real property to be memorialized in writing. *Chavez v. Indymac Mortg. Servs.*, 219 Cal. App. 4th 1052, 1057 (2013).

her servicer argued statute of frauds.<sup>163</sup> The Ninth Circuit reasoned the borrower’s full TPP performance allowed her to enforce the oral agreement, regardless of the statute of frauds.<sup>164</sup>

The statute of frauds defense has also failed when a servicer merely neglects to execute a permanent modification agreement by signing the final documents.<sup>165</sup> In that case, the borrower’s modified payments, servicer’s acceptance of those payments, and the language of the TPP and permanent modification estopped the servicer from asserting the statute of frauds.<sup>166</sup>

Other courts have declined to dismiss a case based on a statute of frauds defense on the ground that a signed TPP or permanent modification agreement may be found in discovery.<sup>167</sup> One court explained that a TPP does not fall within the statute of frauds because it only contains the *promise* of a permanent modification, and does not, by itself, actually modify the underlying loan documents.<sup>168</sup>

## 2. Non-HAMP breach of contract claims

Many of these breach of contract claims involved TPPs and modification offered under the federal government’s Home Affordable Modification Program (HAMP), but such claims are also possible outside the HAMP context.<sup>169</sup> In 2013, a California Superior Court held that *Corvello* and *Barroso* could apply to borrower’s breach of contract

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<sup>163</sup> *Corvello*, 728 F.3d at 882, 885.

<sup>164</sup> *Id.* at 885.

<sup>165</sup> Ordinarily, agreements subject to the statute of frauds must also be signed “by the party to be charged” with breach of contract. *Harris v. Bank of Am., N.A.*, 2014 WL 1116356, at \*6 (C.D. Cal. Mar. 17, 2014).

<sup>166</sup> *Chavez*, 219 Cal. App. 4th at 1057-61; *see also* *Tirabassi v. Chase Home Fin. LLC*, 2015 WL 1402016, at \*4-6 (C.D. Cal. Mar. 24, 2015) (implied contract); *Moya v. CitiMortgage, Inc.*, 2014 WL 1344677, at \*3 (S.D. Cal. Mar. 28, 2014); *Harris*, 2014 WL 1116356, at \*6.

<sup>167</sup> *See, e.g.*, *Orozco v. Chase Home Fin. LLC*, 2011 WL 7646369, at \*1 (Bankr. E.D. Cal. Aug. 16, 2011); *Chavez*, 219 Cal. App. 4th at 1062.

<sup>168</sup> *Chavez*, 219 Cal. App. 4th at 1062.

<sup>169</sup> *See, e.g.*, *Menan v. U.S. Bank, Nat’l Ass’n*, 924 F. Supp. 2d 1151, 1156-58 (E.D. Cal. 2013) (finding a “Forbearance to Modification Agreement” document an enforceable contract and that defendant breached the agreement by failing to cancel the NOD); *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49, 71-72 (2013) (finding an agreement under the HomeSaver Forbearance Program an enforceable contract obligating servicer to consider borrower for foreclosure alternatives in “good faith,” relying on the reasoning in *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780 (2013)).

claim even though those cases dealt with *HAMP* TPPs and permanent modifications, while the “Loan Workout Plan” relied upon by this borrower was a “proprietary” modification, created by the servicer, not *HAMP*.<sup>170</sup> The borrower argued there was no material difference between a *HAMP* TPP and the agreement at issue because the two contracts used almost identical language. Indeed, the *Corvello* court relied on the *language* in the TPP agreement, not the fact that it was created by *HAMP*, to find a valid breach of contract claim.<sup>171</sup> The superior court agreed and overruled servicer’s demurrer.<sup>172</sup> The court found that nothing in the TPP itself contradicted the allegation of a binding promise to modify, and treated the TPP as a *HAMP* TPP, concluding that servicer was obligated to offer a permanent modification after borrowers’ successful TPP completion.<sup>173</sup> The Ninth Circuit revived a borrower’s breach of contract claim based on mandatory language in a TPP offer.<sup>174</sup> A federal district court and the

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<sup>170</sup> *Hamidi v. Litton Loan Servs. LLP*, No. 34-2010-00070476-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 10, 2013).

<sup>171</sup> *See Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 883-85 (9th Cir. 2013). At least one federal court has expressed the view that the *HAMP* nature of the TPP at issue in *Corvello* did not affect the outcome in that case. *Beck v. Ocwen Loan Servs., LLC*, 2015 WL 519052, at \*3 (C.D. Cal. Feb. 6, 2015) (distinguishing *Corvello* as applying only to *HAMP* TPP agreements and noting Treasury Directive 09-01, which imposes rules on *HAMP* contracts that do not govern proprietary contracts, but declining to dismiss borrower’s contract claim without further discussion on the TPP’s language).

<sup>172</sup> *Hamidi*, No. 34-2010-00070476-CU-OR-GDS (“After reviewing *Barroso* [citation], the court concludes that [borrower’s] allegations can be construed to state breach of the implied covenant of good faith and fair dealing, as well as breach of contract, notwithstanding the absence of [servicer’s] signature on the Loan Workout Plan.”); *see also Natan v. Citimortgage*, 2014 WL 4923091, at \*2 (C.D. Cal. Oct. 1, 2014) (finding that nothing in *Corvello* suggests that borrowers must be *HAMP* eligible to bring contract-related claims based on TPPs – it was the *language* of the TPP in *Corvello* that was determinative, not the fact it was a *HAMP* TPP).

<sup>173</sup> *Id.* If a proprietary TPP does not closely track the *HAMP* language or framework, courts are more skeptical of contract claims. *See Nava v. JP Morgan Chase*, 2014 WL 6886071, at \*2, n.1 (C.D. Cal. Nov. 25, 2014) (allowing borrower’s contract claim to move passed the pleading stage, but noting it was disinclined to find that servicer owed borrower a permanent modification because the TPP’s language merely stated that borrower’s TPP default “*eliminate[d] the opportunity* for a final loan modification”).

<sup>174</sup> *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 858–59 (9th Cir. 2017) (whether or not it was intended as a *HAMP* offer, the TPP agreement stated that the servicer would send the borrower a modification agreement once she completed her trial plan). *See also Dominguez v. Nationstar Mortg., LLC*, No. 37-2013-00077183-CU-OR-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 19, 2014) (finding that a

California Court of Appeal have also found viable deceit, promissory estoppel, and negligence claims based on a borrower's proprietary TPP agreement.<sup>175</sup>

Conversely, in a recent California federal district court case, the borrower argued that *Corvello's* reasoning applied to her Workout Agreement and Foreclosure Alternative Agreement. But because neither contract contained the mandatory language found in *Corvello's* HAMP agreement (servicer "will provide" a modification), the court found *Corvello* inapposite.<sup>176</sup> A California Superior Court came to a similar conclusion.<sup>177</sup>

As the above cases illustrate, the enforceability of a non-HAMP trial modification agreement – and whether it promises a permanent modification – will depend on the precise language of that particular agreement. These cases may also turn on whether the borrower can allege consideration for the TPP contract.<sup>178</sup> Claims based on *permanent* proprietary modifications are easier to assert since these agreements contain no condition precedent triggering a servicer obligation, as trial period plans do.<sup>179</sup>

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proprietary modification "offered as a HAMP modification" could be viewed as a HAMP offer).

<sup>175</sup> See, e.g., *Natan*, 2014 WL 4923091, at \*2 (promissory estoppel claim survived MTD, even assuming borrowers were not HAMP eligible, where TPP was "hopelessly ambiguous"); *Akinshin v. Bank of Am., N.A.*, 2014 WL 3728731, at \*4-8 (Cal. Ct. App. July 29, 2014) (unpublished decision finding viable deceit, promissory estoppel, and negligence claims based on a proprietary TPP).

<sup>176</sup> *Morgan v. Aurora Loan Servs., LLC*, 2014 WL 47939, at \*4-5 (C.D. Cal. Jan. 6, 2014), *aff'd*, 646 F. App'x 546 (9th Cir. 2016). *But see Beck*, 2015 WL 519052, at \*3 (declining to dismiss borrower's contract claim without further discussion on the language in her proprietary TPP, noting that *Morgan* focused on the language in a HAMP TPP compared to the borrower's FAA and WAG at issue).

<sup>177</sup> See *Pittell v. Ocwen Loan Servicing, LLC*, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014) (distinguishing the proprietary agreement at issue with the situations in *West* and *Corvello* in three ways: 1) this borrower made only two of three TPP payments; 2) the TPP dictated that servicer "may" grant borrower a permanent modification upon TPP completion, not "will"; and 3) the proprietary agreement received no outside support from HAMP directives).

<sup>178</sup> E.g., *Moore v. Freedom Mortgage Corp.*, 2017 WL 2633411 at \*3 (E.D. Cal. June 19, 2017) (denying motion to dismiss TPP contract claim because borrower's provision of additional financial documentation during the trial period constituted consideration).

<sup>179</sup> See, e.g., *Le v. Bank of New York Mellon*, 2014 WL 3533148, at \*4 (N.D. Cal. July 15, 2014) (finding a valid contract claim based on servicer's failure to accept borrower's permanently modified payments).

### 3. Promissory estoppel claims

Because promissory estoppel claims are exempt from the statute of frauds,<sup>180</sup> borrowers often bring them when there is no written modification agreement. To state a claim, borrowers must show not only that the servicer promised a benefit (like postponing the sale,<sup>181</sup> not reporting a default to a credit reporting agency,<sup>182</sup> or offering a permanent modification<sup>183</sup>) and went back on that promise, but that

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<sup>180</sup> See *Postlewaite v. Wells Fargo Bank N.A.*, 2013 WL 2443257, at \*4 (N.D. Cal. June 4, 2013) (While the statute of frauds may apply to loan modification agreements, it does not apply to promises to postpone a foreclosure sale.); *Ren v. Wells Fargo Bank, N.A.*, 2013 WL 2468368, at \*3-4 (N.D. Cal. June 7, 2013) (reasoning that promises to refrain from foreclosures do not require written documentation); *Secrest v. Sec. Nat'l Mortg. Loan Trust 2002-2*, 167 Cal. App. 4th 544, 555 (2008).

<sup>181</sup> See *Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*4 (N.D. Cal. Apr. 14, 2014) (allowing promissory estoppel claim to proceed when servicer induced borrower to default to qualify for loan modification and promised not to foreclose during review). *But see* *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411 (2015) (statement that no sale is currently scheduled is not a promise that sale would not happen in the future).

<sup>182</sup> See, e.g., *Cockrell v. Wells Fargo Bank, N.A.*, 2013 WL 3830048, at \*4 (N.D. Cal. July 23, 2013) (finding a valid PE claim where servicer convinced borrower to go into default to qualify for a modification and promised to take no negative actions against borrower for doing so but then reported borrower to credit rating agencies).

<sup>183</sup> See, e.g., *Beltz v. Wells Fargo Home Mortg.*, 2017 WL 784910, at \*8 (E.D. Cal. Mar. 1, 2017) (specific allegation that servicer promised borrower a modification at a two percent interest rate sufficiently concrete); *McNeil v. Wells Fargo Bank, N.A.*, 2014 WL 6681604, at \*4 (N.D. Cal. Nov. 25, 2014) (denying servicer's MTD borrowers' PE claim based on servicer's agreement to modify borrower's mortgage and subsequent breach of the agreed-to terms by improperly inflating borrowers' escrow payment); *Alimena v. Vericrest Fin., Inc.*, 964 F. Supp. 2d 1200, 1216 (E.D. Cal. 2013) (advising borrowers to amend their complaint to allege they fulfilled all TPP requirements, including their continuous HAMP eligibility throughout the TPP process, to successfully plead two promissory estoppel claims based on two separate TPP agreements, each promising to permanently modify the loan if borrower fulfilled TPP requirements); *Passaretti v. GMAC Mortg., LLC*, 2014 WL 2653353, at \*6-7 (Cal. Ct. App. June 13, 2014) (finding a valid promissory estoppel claim based on servicer's assurance it would "work on a loan modification" with borrower if borrower participated in a repayment plan that ultimately required payment of over \$50,000); *see also* *Fernandez v. Bank of Am., N.A.*, 2015 WL 1456748, at \*7 (C.D. Cal. Mar. 30, 2015) (allowing PE claim when permanent modification offered significantly differed from TPP). *But see* *Sharp v. Nationstar Mortg., LLC*, 2017 WL 2859105, at \*2 (9th Cir. July 5, 2017) (letter from servicer that did not include specific modification terms or guarantee a modification insufficient to support promissory estoppel claim); *Chavez v. CitiMortgage, Inc.*, 2017 WL 2171743, at \*3 (N.D. Cal. May 17, 2017) (servicer's alleged offer to conduct a "good faith review" of a loan modification application was not sufficiently definite to support a PE claim); *Neal v. Select Portfolio Servicing, Inc.*, 2017 WL 1065284, at \*6 (N.D. Cal. Mar. 20, 2017)

the borrower detrimentally relied on that promise. Some courts require borrowers to demonstrate specific changes in their actions to show reliance,<sup>184</sup> while others take for granted that the borrowers *would* have acted differently absent servicer’s promise.<sup>185</sup> If the claim *is* based on a written TPP agreement (sometimes brought in conjunction with a breach of contract claim),<sup>186</sup> the court may count the TPP payments

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(allegation of promise to modify loan without any details about terms of the proposed modification not a “clear and unambiguous” commitment); *Fairbanks v. Bank of Am., N.A.*, 2014 WL 954264, at \*4-5 (Cal. Ct. App. Mar. 12, 2014) (a verbal promise to permanently modify upon successful completion of a verbal TPP is conditional because it is based on a future event (TPP completion), so the promise is ambiguous).<sup>184</sup> *See, e.g., Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*2 (N.D. Cal. Apr. 14, 2014) (Borrower’s decision to become delinquent, in reliance on servicer’s promise it would not foreclose during modification evaluation, was enough to show detrimental reliance.); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*10-12 (N.D. Cal. Mar. 3, 2014) (Borrowers demonstrated detrimental reliance by not appearing at the actual foreclosure sale due to lack of notice, where they would have placed a “competitive bid.”); *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*6 (C.D. Cal. Jan. 3, 2014) (Borrowers demonstrated detrimental reliance by pointing to their signed short sale agreement, which they ultimately rejected in reliance on servicer’s promise that a modification was forthcoming.); *Panaszewicz v. GMAC Mortg., LLC*, 2013 WL 2252112, at \*5 (N.D. Cal. May 22, 2013) (requiring a borrower to show pre-promise “preliminary steps” to address an impending foreclosure and then a post-promise change in their activity); *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411 (2015) (borrower may not rely on earlier statement that no sale is scheduled when Wells Fargo specifically told the borrower that sale was going forward); *Jones v. Wachovia Bank*, 230 Cal. App. 4th 935, 948-49 (2014) (finding that borrowers’ informal, unrealized plans to borrow reinstatement funds from a friend and/or seek a sale postponement insufficient to show detrimental reliance); *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 222, 229-30 (2011) (finding that foregoing a Chapter 13 bankruptcy case was sufficiently detrimental).<sup>185</sup> *See, e.g., Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*5 (E.D. Cal. Dec. 3, 2014) (PE claim survived MTD where, relying on servicer’s promise not to foreclose during TPP, borrowers opted for the TPP instead of pursuing other foreclosure alternatives); *Curley v. Wells Fargo & Co.*, 2014 WL 2187037, at \*2-3 (N.D. Cal. May 23, 2014) (Borrower successfully argued, as part of his motion for leave to add a promissory fraud claim, that he passed up opportunities to file bankruptcy, obtain private financing, or sell his home, relying on servicer’s promise to offer a permanent modification after TPP completion.); *Faulks v. Wells Fargo & Co.*, 2014 WL 1922185, at \*5 (N.D. Cal. May 13, 2014) (accepting borrower’s assertion that he chose not to pursue “other alternatives” to foreclosure as adequate detrimental reliance); *West v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 804-05 (2013) (finding plaintiff’s allegation that she would have pursued other options if not for servicer’s promise to stop the foreclosure, sufficient detrimental reliance); *But see Punay v. PNC Mortg.*, 2017 WL 2380115, at \*5 (S.D. Cal. May 31, 2017) (granting MTD because plaintiff did not allege that her reliance on a promise to postpone a sale date caused any injury – *i.e.*, was detrimental – because the sale date was postponed).

<sup>186</sup> *See Harris v. Bank of Am., N.A.*, 2014 WL 1116356 (C.D. Cal. Mar. 17, 2014) and *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005 (N.D. Cal. Mar. 12, 2014)

themselves as reliance and injury.<sup>187</sup> Even though a promissory estoppel claim may not, in most cases, be used to overturn a completed sale,<sup>188</sup> if the lender promised to postpone a foreclosure sale, a Section 2924g(c) claim could be used to cancel the sale.<sup>189</sup> This type of claim does not require a borrower to show detrimental reliance.<sup>190</sup>

#### 4. Breach of the covenant of good faith & fair dealing

Every contract contains an implied covenant of good faith and fair dealing, “meaning that neither party will do anything which will injure the right of the other to receive the contract’s benefits.”<sup>191</sup> Advocates have been successful with these claims (sometimes brought alongside breach of contract claims), by asserting that servicers have frustrated borrowers’ realization of the benefits of their TPP or permanent modification agreements.<sup>192</sup> Some borrowers have also succeeded on an

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for discussions on pleading a PE claim in the alternative with a breach of contract claim.

<sup>187</sup> See *Alimena v. Vericrest Fin., Inc.*, 964 F. Supp. 2d 1200, 1218 (E.D. Cal. 2013).

<sup>188</sup> See *Aceves*, 192 Cal. App. 4th at 231.

<sup>189</sup> A trustee “shall postpone the sale in accordance with . . . [*inter alia*] . . . mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee. CAL. CIV. CODE § 2924g(c)(1)(C) (2005). See *Chan v. Chase Home Fin.*, 2012 WL 10638457, at \*11 (C.D. Cal. June 18, 2012) (holding tender not required under 2924g(c) when servicer foreclosed after agreeing to postpone sale); *Aharonoff v. Am. Home Mortg. Servicing*, 2012 WL 1925568, at \*4 (Cal. Ct. App. May 29, 2012) (allowing a 2924g(c) claim to cancel the sale when Wells Fargo representative conducted trustee sale despite promises to put the sale on hold).

<sup>190</sup> See *Aharonoff*, 2012 WL 1925568 at \*4 (allowing CC 2924g claim without requiring (or discussing) detrimental reliance).

<sup>191</sup> *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 928-29 (2013).

<sup>192</sup> See, e.g., *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*5 (N.D. Cal. Dec. 23, 2014) (finding a viable good faith claim based on servicer’s failure to permanently modify after borrower complied with the TPP, frustrating borrower’s ability to benefit from the TPP agreement); *Silkes v. Select Portfolio Servicing*, 2014 WL 6992144, at \*5 (Cal. Ct. App. Dec. 11, 2014) (finding a viable claim where servicer refused to accept modified payments and instead tripled borrower’s escrow payment, which was not agreed to in the modification); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*4-5 (E.D. Cal. Dec. 3, 2014) (valid claim where servicer foreclosed during TPP and before deadline to submit additional TPP documents); *Henderson v. Ocwen Loan Servicing*, 2014 WL 5461955, at \*4 (N.D. Cal. Oct. 27, 2014) (servicer improperly refused borrower’s automated modified mortgage payments, lied about returning payments, and failed to correct an improper default.); *Lanini v. JP Morgan Chase Bank*, 2014 WL 1347365, at \*6 (E.D. Cal. Apr. 4, 2014) (valid claim based on servicer offering borrowers a TPP knowing borrower’s property was too valuable to qualify for a permanent mod); *Curley v. Wells Fargo & Co.*, 2014 WL 988618, at \*5-8 (N.D. Cal. Mar. 10, 2014) (borrower’s good faith claim based on their TPP agreement survived summary judgment); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1409-10

implied covenant claim based on the deed of trust when the servicer encouraged them to default in order to receive a loan modification but failed to follow through on a modification.<sup>193</sup> This type of claim may also succeed when the servicer interferes with the right to reinstate.<sup>194</sup> Breach of the implied covenant claims based on the Deed of Trust that allege failure to engage in aspects of the loss mitigation process have not fared so well.<sup>195</sup>

## C. Tort Claims

### 1. Negligence

Until recently, servicers that mishandled modification applications were immune to negligence claims because, under normal

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(2014) (allowing borrower's good faith claim because servicer allegedly foreclosed before borrowers' third and final TPP payment was due, frustrating borrowers' ability to realize the benefits of that agreement); *Bushell*, 220 Cal. App. 4th at 929 (servicer frustrated borrower's ability to benefit from a successful TPP agreement in finally receiving a permanent modification offer.).

<sup>193</sup> *Dias v. JP Morgan Chase NA*, 2015 WL 1263558, at \*6 (N.D. Cal. Mar. 19, 2015); *Castillo v. Bank of Am.*, 2014 WL 4290703, at \*4 (N.D. Cal. Aug. 29, 2014) (servicer's representation that missing mortgage payments would "assist" borrower's modification process interfered with his ability to pay his loans under the DOT); *Vasquez v. Bank of Am., N.A.*, 2013 WL 6001924, at \*14 (N.D. Cal. Nov. 12, 2013) (allowing borrower's good faith claim based on the same scenario as that in *Cockrell*, noting that servicer "consciously and deliberately frustrated the parties' common purpose" outlined in the DOT). *But see* *Fevinger v. Bank of Am.*, 2014 WL 3866077, at \*5 (N.D. Cal. Aug. 4, 2014) (agreeing to forestall foreclosure if borrower stopped making mortgage payments is mere "encouragement" and does not deprive the borrower of the benefits of the DOT); *Cockrell v. Wells Fargo Bank, N.A.*, 2013 WL 3830048, at \*3-4 (N.D. Cal. July 23, 2013) (declining to find a good faith claim where servicer *encouraged* borrowers to default in order to qualify for a modification, but did not *actively interfere with* their ability to perform).

<sup>194</sup> *See, e.g., Siqueiros v. Fed. Nat'l Mortg. Ass'n*, 2014 WL 3015734, at \*6-7 (C.D. Cal. June 27, 2014) (viable good faith and fair dealing claim based on servicer's failure to provide borrower with an accurate reinstatement amount, frustrating her ability to benefit from the DOT by reinstating and avoiding foreclosure).

<sup>195</sup> *See, e.g., Williams v. Wells Fargo Bank, N.A.*, 2017 WL 1374693, at \*7-8 (N.D. Cal. Apr. 14, 2017) (granting MSJ because plaintiff failed to identify any provision of the Note or DOT addressing loan modifications or imposing an obligation on the servicer to "refrain from a 'loan modification runaround'"); *Galang v. Wells Fargo Bank, N.A.*, 2017 WL 1210021, at \*5 (N.D. Cal. Apr. 3, 2017) (dismissing claim based on alleged failures to contact borrower prior to foreclosure and allow borrower to review a denial because borrower had not identified any contractual provisions relating to such obligations).

circumstances, a lender does not owe a duty of care to a borrower.<sup>196</sup> The 2013 decision in *Jolley v. Chase Home Finance, LLC*, was the first published opinion that started to undermine this general rule. The *Jolley* court proposed that the general no-duty rule may be outdated, citing HAMP, SB 1137 and HBOR as indicative of an evolving public policy toward the creation of a duty. *Jolley* involved a construction loan, not a residential loan, but suggested it may be appropriate to impose a duty of care on banks, encouraging them to negotiate loan modifications with borrowers and to treat borrowers fairly in this process.<sup>197</sup> “Courts should not rely mechanically on the ‘general rule’ that a duty of care does not exist, and the loan modification process itself can create a duty of care relationship.”<sup>198</sup>

In *Alvarez v. BAC Home Loans Servicing*, a 2014 published decision, the Court of Appeal advanced this negligence theory further, applying it specifically to residential loans. The court found that even though a servicer is not obligated to initiate the modification process or to offer a modification, once it agrees to engage in that process with the borrower, it owes a duty of care not to mishandle the application or negligently conduct the modification process.<sup>199</sup> Though most courts had previously failed to find a duty of care created by engaging in the modification process,<sup>200</sup> *Alvarez* significantly shifted the legal

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<sup>196</sup> See *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231 Cal. App. 3d 1089, 1096 (1991) (“[A] financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.”).

<sup>197</sup> *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 902-03 (2013).

<sup>198</sup> *Id.* at 903; see also, e.g., *Harris v. Bank of Am., N.A.*, 2014 WL 1116356, at \*13-14 (C.D. Cal. Mar. 17, 2014) (finding *Jolley* applicable, not distinguishable, because like *Jolley*, this case involved “ongoing loan servicing issues”); *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005, at \*6-11 (N.D. Cal. Mar. 12, 2014) (denying motion to dismiss negligence claim and finding that the economic loss rule does not bar recovery); *Ware v. Bayview Loan Servicing, LLC*, 2013 WL 6247236, at \*9 (S.D. Cal. Oct. 29, 2013) (denying motion to dismiss borrower’s negligence claim because servicer may owe a duty of care to maintain proper records and timely respond to modification applications); *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148, at \*5-7 (E.D. Cal. Oct. 11, 2013) (deeming servicer’s solicitation of plaintiff-owner’s loan modification application as giving rise to a duty to treat her with reasonable care).

<sup>199</sup> *Alvarez v. BAC Home Loans Servicing*, 228 Cal. App. 4th 941, 945-50 (2014).

<sup>200</sup> See, e.g., *Benson v. Ocwen Loan Servicing, LLC*, 562 F. App’x 567, 570 (9th Cir. 2014) (distinguishing *Jolley* as a construction loan case); *Ragland v. U.S. Bank Nat’l Ass’n*, 209 Cal. App. 4th 182, 207 (2012) (finding no duty because the issue of loan modification falls “within the scope of [servicer’s] conventional role as a lender of money”); cf. *Kramer v. Bank of Am., N.A.*, 2014 WL 1577671, at \*9 (E.D. Cal. Apr. 17,

landscape, and courts are now divided on the negligence issue.<sup>201</sup> A 2017 decision by the Court of Appeal holding that a borrower is in

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2014) (“The Court recognizes a duty of care during the loan modification process upon a showing of either a promise that a modification would be granted or the successful completion of a trial period.”); *Sun v. Wells Fargo*, 2014 WL 1245299, at \*4 (N.D. Cal. Mar. 25, 2014) (A duty may arise when a TPP or mod is offered, but the “mere engaging” in the modification process is a traditional money lending activity.); *Newman v. Bank of N.Y. Mellon*, 2013 WL 5603316 (E.D. Cal. Oct. 11, 2013) (dismissing borrower’s negligence claim because there was no TPP in place, acknowledging that a clear promise to modify or trial agreement *may* have created a duty of care).

<sup>201</sup> See, e.g., *Kimthu Trinh v. Wells Fargo & Co.*, 2017 WL 5548777, at \*3-4 (S.D. Cal. Nov. 16, 2017) (finding duty of care); *Newman v. Bank of New York Mellon*, 2017 WL 4325772, at \*10 (E.D. Cal. Sept. 29, 2017) (finding a duty under *Alvarez*); *Palma v. Select Portfolio Servicing, Inc.*, 2017 WL 1364667, at \*7 (E.D. Cal. Apr. 14, 2017) (denying MTD on negligence claim arising out of extended contact and communications between servicer and borrower regarding his loan modification application); *McCarthy v. Servis One, Inc.*, 2017 WL 1316810, at \*5 (N.D. Cal. Apr. 10, 2017) (following *Alvarez*); *Daniels v. Select Portfolio Servicing, Inc.*, 246 Cal. App. 4th 1150, 1183 (2016) (finding duty using reasoning different from the Court in *Alvarez*); *Newman v. Bank of N.Y. Mellon Corp.*, 649 F. App’x 630, 631 (9th Cir. 2016) (reversing with direction to apply *Alvarez* in the first instance); *MacDonald v. Wells Fargo Bank, N.A.*, 2015 WL 1886000, at \*5-6 (N.D. Cal. Apr. 24, 2015) (listing post-*Alvarez* cases and noting that *Alvarez* marked “a sea change of jurisprudence on this issue”); *Meixner v. Wells Fargo Bank, N.A.*, 101 F. Supp. 3d 938, 951-55 (E.D. Cal. 2015) (following *Alvarez*); *Duran v. Bank of Am., N.A.*, 2015 WL 794672, at \*10 (C.D. Cal. Feb. 24, 2015) (following *Alvarez* to find a viable negligence claim where servicer’s admitted but uncorrected clerical error led to a modification denial); *Johnson v. PNC Mortgage*, 80 F. Supp. 3d 980, 984-86 (N.D. Cal. 2015) (following *Alvarez* and finding a negligence claim where servicer used inflated income numbers to calculate borrower’s modification, resulting in unaffordable payments); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*11 (C.D. Cal. Dec. 19, 2014) (following *Alvarez* to find that servicer breached its duty of care by losing one application and wrongfully denying a second for missing documents while simultaneously acknowledging that application as “complete”); *Gilmore v. Wells Fargo Bank*, 75 F. Supp. 3d 1255, 1266-68 (N.D. Cal. 2014) (citing *Alvarez*, and finding that servicer breached its duty of care by recording an NTS and scheduling a sale while a complete application was pending); *Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*12 (C.D. Cal. Nov. 19, 2014) (following *Alvarez* where servicer allegedly solicited borrowers HAMP applications knowing she could not qualify and then lost or mishandled the applications); cf. *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*6-7 (N.D. Cal. Dec. 23, 2014) (denying servicer’s MTD borrower’s constructive fraud claim, finding servicer owed borrower a duty of care once it entered into a TPP with borrower, and breached that duty by foreclosing while borrower was TPP compliant); *Sokoloski v. PNC Mortg.*, 2014 WL 6473810, at \*8 (E.D. Cal. Nov. 18, 2014) (relying on *Jolley*, rather than *Alvarez*, but finding servicer’s offer of a permanent modification, through the TPP, created a duty of care). *But see Anderson v. Deutsche Bank Nat. Tr. Co. Americas*, 649 F. App’x 550, 552 (9th Cir.), cert. denied sub nom. *Anderson v. Aurora Loan Servs., LLC*, 137 S. Ct. 496 (2016) (Lenders do not owe borrowers a duty of care to process a pending loan-modification application within a particular period of time);

privity of contract with the servicer and therefore cannot state a claim for negligence was vacated after the grant of a petition for rehearing, and the subsequent unpublished decision affirming dismissal of the negligence claim after finding no duty of care under the *Biakanja* factors.<sup>202</sup> Subsequently, however, in *Rossetta v. CitiMortgage, Inc.*, a published opinion from the Court of Appeal, a different Third District panel held that the trial court had erred in sustaining the demurrer to the plaintiff's negligence claim arising out of the loan modification process.<sup>203</sup>

Though *Alvarez* was the main catalyst of change for negligence claims, the shift began even earlier than *Alvarez*, with the court's decision in *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49 (2013). Though that court declined to follow *Jolley* to find a general duty of care, it allowed borrower to amend her complaint to state a claim for negligent misrepresentation instead of negligence. It held that servicers owe a duty *not to misrepresent* the status of borrower's loan modification application or of a foreclosure sale. Indeed, some

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Judan v. Wells Fargo Bank, Nat'l Ass'n, 2017 WL 3115172, at \*8 (N.D. Cal. July 21, 2017) (following *Anderson*); Diller v. Ditech Fin., LLC, 2017 WL 2986247, at \*4 (N.D. Cal. July 13, 2017) (allegations of statutory noncompliance alone cannot support duty of care); Sau King Chan v. J.P. Morgan Chase, N.A., 2017 WL 1807947, at \*6 (S.D. Cal. May 5, 2017) (no duty of care); Saji v. Residential Credit Sols., WL 1407997, at \*5 (N.D. Cal. Apr. 20, 2017) (no "special circumstances" to support duty of care); Willis v. JPMorgan Chase Bank, N.A., \_\_\_F. Supp.3d \_\_\_, 2017 WL 1349744, at \*4 (E.D. Cal. Apr. 5, 2017) (review of loan modification application does not trigger a duty of care); Shupe v. Nationstar Mortgage LLC, 231 F.Supp.3d 597, 602-03 (E.D. Cal. January 31, 2017) (no duty of care); Shumake v. Caliber Home Loans, Inc, 2017 WL 1362681, at \*5 (C.D. Cal. Jan. 6, 2017) (finding no duty under *Nymark* without discussion of *Alvarez* or other post-*Nymark* decisions); Vethody v. Nat'l Default Servs. Corp., 2016 WL 7451666, at \*5 (N.D. Cal. Dec. 28, 2016) (no duty of care arising out of loan modification review absent special circumstances); Geake v. JP Morgan Chase Bank, 2015 WL 331104, at \*6-7 (C.D. Cal. Jan. 23, 2015) (distinguishing *Alvarez* and declining to find a duty of care where transferee servicer (after a servicing transfer) refused to permanently modify borrower's loan based on a TPP with the transferor servicer, sent borrower confusing communications, and refused to answer borrowers' questions).

<sup>202</sup> *Conroy v. Wells Fargo Bank N.A.*, 2017 WL 5711804 (Cal.App. 3 Dist., Nov. 28, 2017) *Conroy v. Wells Fargo Bank, N.A.*, 221 Cal. Rptr. 3d 551, 564-67 (Ct. App. 2017) **unpublished opinion.**

<sup>203</sup> *Rossetta v. CitiMortgage, Inc.*, 18 Cal. App. 5th 628 (Cal. Ct. App. 2017), reh'g denied (Jan. 4, 2018) (servicer had a duty of care under *Biakanja* factors; "we are convinced that a borrower and lender enter into a new phase of their relationship when they voluntarily undertake to renegotiate a loan, one in which the lender usually has greater bargaining power and fewer incentives to exercise care").

courts had already started to apply this reasoning to negligence claims before *Alvarez* was decided.<sup>204</sup>

Borrowers may of course also bring negligence claims outside of, or tangentially related to, the modification process. But there too, borrowers must usually demonstrate that the servicer owed the borrower a duty of care and breached it.<sup>205</sup> And though it is technically a rule of evidence, at least two courts have allowed advocates to allege claims under a negligence *per se* theory.<sup>206</sup>

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim

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<sup>204</sup> See, e.g., *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*5-6 (N.D. Cal. May 13, 2014) (applying the *Biakanja* factors to find servicer owed borrower a duty of care once it accepted borrower's modification application); *Akinshin v. Bank of Am., N.A.*, 2014 WL 3728731, at \*7-8 (Cal. Ct. App. July 29, 2014) (reversing the trial court's grant of servicer's demurrer to borrower's negligence claim based on *Lueras* reasoning).

<sup>205</sup> See, e.g., *Mendez v. Selene Fin. LP*, 2017 WL 1535085, at \*4 (C.D. Cal. Apr. 27, 2017) (finding duty of care under the *Nymark* factors based on allegations that servicer failed to apply reinstatement funds sent by borrower); *Syverson v. Countrywide Home Loans, Inc.*, No. D069829, 2017 WL 977100, at \*17 (Cal. Ct. App. Mar. 14, 2017) (following *Alvarez* and *Daniels* and reversing decision sustaining demurrer on negligent misrepresentation claim related to ordering of an appraisal during loan modification review process); *Hawkins v. Bank of Am. N.A.*, 2017 WL 590253, at \*4 (E.D. Cal. Feb. 14, 2017) (finding that *Alvarez* applies to allegations that servicer provided inaccurate information about existence and status of borrower's loans); *Habtemariam v. Vida Capital Grp., LLC*, 2017 WL 627404, at \*5 (E.D. Cal. Feb. 14, 2017) (lender that failed to timely record release of lien after cancelling debt was acting beyond conventional role as lender and owed a duty); *Mahoney v. Bank of Am., N.A.*, 2014 WL 2197068, at \*7 (S.D. Cal. May 27, 2014) (finding a duty of care to accurately credit borrower's mortgage payments and to provide a reinstatement amount); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*14 (N.D. Cal. Mar. 3, 2014) (finding a valid negligence claim related to servicer's SPOC violations); *Barber v. CitiMortgage*, 2014 WL 321934, at \*3-4 (C.D. Cal. Jan. 2, 2014) (Borrower successfully pled a negligence claim related to servicer's imposition of an escrow even though she provided proof of her property tax payments. If borrower was *actually* current on her taxes, then servicer owed her a duty of care not to impose an unnecessary escrow.); *Hampton v. US Bank, N.A.*, 2013 WL 8115424, at \*3-4 (C.D. Cal. May 7, 2013) (finding a duty of care to accurately credit borrower's accounts with her payment to "cure her default").

<sup>206</sup> *Weber v. PNC Bank*, 2015 WL 269473, at \*5-6 (E.D. Cal. Jan. 21, 2015) (finding a viable negligence claim based on a negligence *per se* theory because borrowers are members of the class of people meant to be protected by HBOR's dual tracking statutes; and 2) borrowers need not prove servicer owed them a duty of care since the doctrine "borrows' statutes to prove duty of care."); *Leonard v. JP Morgan Chase*, No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Oct. 21, 2014) (reframing borrower's negligence *per se* claim as a negligence claim and allowing it to survive servicer's demurrer).

against the servicer,<sup>207</sup> and possibly the servicer representatives.<sup>208</sup> Even when duty and breach are found, however, negligence claims regarding the loan modification process can still fail based on inadequate allegations of causation.<sup>209</sup> An intentional wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress claim,<sup>210</sup> though such claims often fail, and

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<sup>207</sup> See *Khan v. ReconTrust Co.*, 81 F. Supp. 3d 867, 874-75 (N.D. Cal. 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); *Morris v. Residential Credit Solutions, Inc.*, 2015 WL 428114, at \*5-10 (E.D. Cal. Feb. 2, 2015) (granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); *Johnson v. Bank of Am.*, 2015 WL 351210, at \*7 (N.D. Cal. Jan. 23, 2015) (Servicer misrepresented to borrower on five occasions that her applications were complete, only to later deny receipt of those applications, or reject the applications themselves due to missing documents.); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*9 (C.D. Cal. Dec. 19, 2014) (finding borrower was not required to double-check county property records to confirm servicer's misrepresentation that no foreclosure would occur, and a viable fraudulent misrepresentation claim); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD borrower's fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money, citing servicer's foreclosure before the deadline for filing additional documents expired.); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1410 (2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 793-94 (2013) (same). *But see Fairbanks v. Bank of Am., N.A.*, 2014 WL 954264, at \*2-3 (Cal. Ct. App. Mar. 12, 2014) (distinguishing *West* as applying to a written TPP agreement, and finding borrowers here failed to allege their fraud claim, based on a verbal TPP, with specificity).

<sup>208</sup> See, e.g., *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5-6 (C.D. Cal. Jan. 3, 2014) (allowing borrower to impose fraud liability on a SPOC); *Fleet*, 229 Cal. App. 4th at 1411-12 (Borrowers successfully alleged a fraud claim against servicer representatives who assured borrowers their TPP payments were received and credited, and that a foreclosure sale would not occur, which of course it did.).

<sup>209</sup> See, e.g., *Kemp v. Wells Fargo Bank, N.A.*, No. 17-CV-01259-MEJ, 2017 WL 4805567, at \*8 (N.D. Cal. Oct. 25, 2017)

<sup>210</sup> See *Smith v. JP Morgan Chase*, 2014 WL 6886030, at \*4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer put borrower into default though she was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay \$20,000 she did not owe to stop the wrongful foreclosure); *Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182, 203-05 (2012).

borrowers have been more successful alleging emotional distress *damages* related to other types of claims.<sup>211</sup>

## 2. Fraud and Negligent Misrepresentation

Claims for fraud or negligent misrepresentation hinge on a material misrepresentation of fact that causes harm to the plaintiff. In the loss mitigation context, this could include a misrepresentation that the servicer has contractual authority to modify the loan, a foreclosure sale has been canceled, that a loan modification application has been deemed complete and is under active review, or that a borrower is qualified for a loan modification and should refrain from taking other steps to cure the default and avoid foreclosure.

Examples of fraud and misrepresentation claims include (1) misrepresenting contractual authority to modify;<sup>212</sup> (2) reneging on promises about qualification for a modification;<sup>213</sup> (3) stating that foreclosure would not take place during loan modification review;<sup>214</sup>

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<sup>211</sup> See, e.g., *Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*4 (N.D. Cal. Apr. 14, 2014) (allowing borrower's promissory estoppel claim, which alleged severe emotional distress as part of her damages, to survive servicer's motion to dismiss); *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005, at \*9 (N.D. Cal. Mar. 12, 2014) (allowing borrower to claim emotional distress damages related to her negligence claim, invoking an exception to the economic loss doctrine); *Barber v. CitiMortgage*, 2014 WL 321934, at \*4 (C.D. Cal. Jan. 2, 2014) (allowing borrower to allege emotional distress as part of her damages to her breach of contract claim); *Goodman v. Wells Fargo Bank, N.A.*, 2014 WL 334222, at \*3 (Cal. Ct. App. Jan. 30, 2014) (same).

<sup>212</sup> See *Pulley v. Wells Fargo Bank*, 2015 WL 1393417 (N.D. Cal. Mar. 26, 2015).

<sup>213</sup> See *Khan v. ReconTrust Co.*, 81 F. Supp. 3d 867, 874-75 (N.D. Cal. 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify).

<sup>214</sup> *Morris v. Residential Credit Solutions, Inc.*, 2015 WL 428114, at \*5-10 (E.D. Cal. Feb. 2, 2015) (granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*9 (C.D. Cal. Dec. 19, 2014) (finding a viable fraudulent misrepresentation claim and rejecting argument that borrower cannot satisfy justifiable reliance without checking county property records for rescission of sale to confirm servicer's misrepresentation that no

(4) falsely stating that application was complete.<sup>215</sup>

If the servicer misleads the borrower during the loan modification process, the borrower may state a fraud or misrepresentation claim against the servicer,<sup>216</sup> and possibly the

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foreclosure would occur); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD borrower's fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money, citing servicer's foreclosure before the deadline for filing additional documents expired.); *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5-6 (C.D. Cal. Jan. 3, 2014) (allowing fraud when NTS was served on the borrower even though a SPOC told the borrower no action will be taken in 60 days); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1410 (2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 793-94 (2013) (same).

<sup>215</sup> *Johnson v. Bank of Am., N.A.*, 2015 WL 1387478 (N.D. Cal. Mar. 24, 2015)

<sup>216</sup> *See Khan v. ReconTrust Co.*, 81 F. Supp. 3d 867, 874-75 (N.D. Cal. 2015) (fraud claim based on completed TPP and servicer's withdrawal of permanent modification offer because it "did not receive" final income verification from borrower); *Morris v. Residential Credit Solutions, Inc.*, 2015 WL 428114, at \*5-10 (E.D. Cal. Feb. 2, 2015) (granting PI based on borrowers' fraud claim, which was rooted in servicer's dual tracking activity); *Johnson v. Bank of Am.*, 2015 WL 351210, at \*7 (N.D. Cal. Jan. 23, 2015) (Servicer misrepresented to borrower on five occasions that her applications were complete, only to later deny receipt of those applications, or reject the applications themselves due to missing documents.); *Curley v. Wells Fargo & Co.*, 2014 WL 7336462, at \*8 (N.D. Cal. Dec. 23, 2014) (Borrower alleged viable fraud claim where servicer falsely misrepresented it would refrain from foreclosing while borrower was TPP-compliant.); *Medrano v. Caliber Home Loans*, 2014 WL 7236925, at \*9 (C.D. Cal. Dec. 19, 2014) (finding borrower was not required to double-check county property records to confirm servicer's misrepresentation that no foreclosure would occur, and a viable fraudulent misrepresentation claim); *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*6 (E.D. Cal. Dec. 3, 2014) (denying servicer's MTD fraud claim where borrowers pled that servicer never intended to permanently modify their mortgage and simply "lured" them into the TPP to extract more money); *Fleet v. Bank of Am.*, 229 Cal. App. 4th 1403, 1410 (2014) (finding a valid promissory fraud claim based on servicer's grant of a TPP and promise not to foreclose, and borrowers' reliance on that promise and agreement in making the payments and improving the property); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 308-09 (2014) (valid negligent misrepresentation claim based on servicer's falsely assuring borrowers they qualified for a modification while simultaneously foreclosing); *Bushell v. JP Morgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 930-31 (2013) (valid fraud claim based on TPP and servicer's false promise to permanently modify); *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 793-94 (2013) (same). *But see Fairbanks v. Bank of Am., N.A.*, 2014 WL 954264, at \*2-3 (Cal. Ct. App. Mar. 12, 2014) (distinguishing *West* as applying to a written TPP agreement, and finding borrowers here failed to allege their fraud claim, based on a verbal TPP, with specificity).

servicer representatives.<sup>217</sup> An intentionally wrongful foreclosure may also subject the lender to an intentional infliction of emotional distress claim,<sup>218</sup> though borrowers have been somewhat more successful in alleging emotional distress *damages* related to other types of claims.<sup>219</sup>

The complaint also must provide factual support for the assertion that statements at issue were misrepresentations of fact, rather than merely concluding that the representations were false.<sup>220</sup>

Another difficult element of these claims is showing that the plaintiff justifiably relied on the misrepresentations. Justifiable reliance may be refuted if the lender can point to evidence that should have aroused suspicion or disbelief in the plaintiff regarding the accuracy of the misrepresentations.<sup>221</sup> For example, one court found a lack of justifiable reliance on statements that a borrower's loan was "in underwriting" and "under review" and that a foreclosure would not proceed where the complaint also contained allegations that the application had been denied prior to foreclosure, the file was closed, and the plaintiff had "actual knowledge" of the scheduled foreclosure sale. The court found that these alleged facts rendered it unjustifiable for plaintiff to forego taking the actions "she deemed necessary to avoid

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<sup>217</sup> See, e.g., *Copeland v. Ocwen Loan Servicing, LLC*, 2014 WL 304976, at \*5-6 (C.D. Cal. Jan. 3, 2014) (allowing borrower to impose fraud liability on a SPOC); *Fleet*, 229 Cal. App. 4th at 1411-12 (borrowers successfully alleged a fraud claim against servicer representatives who assured borrowers their TPP payments were received and credited, and that a foreclosure sale would not occur).

<sup>218</sup> See *Smith v. JP Morgan Chase*, 2014 WL 6886030, at \*4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer treated account as delinquent when borrower was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay \$20,000 she did not owe to stop the wrongful foreclosure); *Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182, 203-05 (2012).

<sup>219</sup> See, e.g., *Izsak v. Wells Fargo Bank, N.A.*, 2014 WL 1478711, at \*4 (N.D. Cal. Apr. 14, 2014) (allowing borrower's promissory estoppel claim, which alleged severe emotional distress as part of her damages, to survive servicer's motion to dismiss); *Rowland v. JP Morgan Chase Bank, N.A.*, 2014 WL 992005, at \*9 (N.D. Cal. Mar. 12, 2014) (allowing borrower to claim emotional distress damages related to her negligence claim, invoking an exception to the economic loss doctrine); *Barber v. CitiMortgage*, 2014 WL 321934, at \*4 (C.D. Cal. Jan. 2, 2014) (allowing borrower to allege emotional distress as part of her damages to her breach of contract claim); *Goodman v. Wells Fargo Bank, N.A.*, 2014 WL 334222, at \*3 (Cal. Ct. App. Jan. 30, 2014) (same).

<sup>220</sup> *Khan v. CitiMortgage Inc.*, 975 F. Supp. 2d 1127, 1141 (E.D. Cal. 2013).

<sup>221</sup> *Id.*

the foreclosure sale” because the plaintiff “was on notice of problems to frustrate the notion of her justifiable reliance.”<sup>222</sup>

Finally, another challenge to these types of claims is the heightened pleading standard to state fraud claims, at least in federal court. Recall that these claims must be pled with particularity, not just plausibility. One example of this is that in a fraud claim against a corporation, 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.”<sup>223</sup> California state courts, on the other hand, have allowed plaintiffs to proceed without specific details if the information is in the possession of the servicer.<sup>224</sup>

### 3. Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress (IIED) can be difficult to plead, as it requires some pretty extreme facts. The elements of the tort of intentional infliction of emotional distress are:

(1) [E]xtreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.<sup>225</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991).

<sup>224</sup> See Miles v. Deutsche Bank Nat'l Tr. Co., 236 Cal. App. 4th 394 (2015) (explaining that “in an era of electronic signing, it is often unrealistic to expect plaintiffs to know the who-and-the-what authority when mortgage servicers themselves may not actually know the who-and-the-what authority”); West v. JP Morgan Chase Bank, N.A., 214 Cal. App. 4th 780, 793 (2013) (holding that “identification of the Chase Bank employees who spoke with West on those dates is or should be within Chase Bank's knowledge”); Boschma v. Home Loan Center, Inc. 198 Cal. App. 4th 230, 248 (2011) (“While the precise identities of the employees responsible ... are not specified in the loan instrument, defendants possess the superior knowledge of who was responsible for crafting these loan documents.”).

<sup>225</sup> Quinteros v. Aurora Loan Servs., 740 F. Supp. 2d 1163, 1172-73 (E.D. Cal. 2010).

A number of California courts have held that the act of foreclosing on a home (absent other circumstances) is not the kind of extreme conduct that supports an intentional infliction of emotional distress claim.<sup>226</sup> Without other aggravating circumstances showing outrageousness, an intentional infliction of emotional distress claim will fail.<sup>227</sup> However, the court in *Ragland* found that an intentional, unlawful foreclosure conducted in bad faith could be outrageous enough to sustain a claim for IIED.<sup>228</sup> Post-foreclosure lockouts may also serve as a basis for an IIED claim.<sup>229</sup>

#### D. UCL Claims

California's Unfair Competition Law (UCL) provides another opportunity for borrowers to obtain restitution or to stop or postpone a foreclosure<sup>230</sup> if they can show the servicer engaged in an unlawful,

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<sup>226</sup> See *Mendaros v. JPMorgan Chase Bank, Nat'l Ass'n*, 2017 WL 2352143, at \*7 (N.D. Cal. May 31, 2017) (allegations of wrongful foreclosure are insufficient to constitute "outrageous conduct"); *Harvey G. Ottovich Revocable Living Trust Dated May 12, 2006 v. Wash. Mut., Inc.*, 2010 WL 3769459 (N.D. Cal. Sept. 22, 2010); *Mehta v. Wells Fargo Bank, N.A.*, 737 F. Supp. 2d 1185, 1204 (S.D. Cal. 2010) ("The fact that one of Defendant Wells Fargo's employees allegedly stated that the sale would not occur but the house was sold anyway is not outrageous as that word is used in this context").

<sup>227</sup> *Faulks v. Wells Fargo & Co.*, 231 F.Supp.3d 387, 411-12 (N.D. Cal. Feb. 7, 2017) (mishandling of loan modification review and related misrepresentations plus allegedly wrongful foreclosure do not constitute extreme and outrageous behavior); see also *Singh v. Wells Fargo Bank*, 2011 WL 66167, at \*8 (E.D. Cal. Jan. 7, 2011).

<sup>228</sup> *Ragland v. U.S. Bank Nat. Ass'n*, 209 Cal. App. 4th 182, 204-05 (2012) (comparing an unlawful foreclosure to the deliberate, unlawful eviction that supported a claim for IIED in *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1045 (2009)); see also *Smith v. JP Morgan Chase*, 2014 WL 6886030, at \*4 (C.D. Cal. Nov. 26, 2014) (IIED claim upheld where servicer put borrower into default though she was current on her mortgage, continued with foreclosure after admitting its error, and then forced borrower to pay \$20,000 she did not owe to stop the wrongful foreclosure); *Rowen v. Bank of Am., N.A.*, 2013 WL 1182947 (C.D. Cal. Mar. 18, 2013) (allowing IIED claim when servicer conducted foreclosure after admitting mistake with account that led to the default and then proceeded to assure the borrower that she was not in default).

<sup>229</sup> *Makreas v. First Nat'l Bank of N. Cal.*, 2013 WL 2436589 (N.D. Cal. June 4, 2013).

<sup>230</sup> CAL. BUS. & PROF. CODE § 17203 (2004). For a full explanation of UCL claims and available remedies in the foreclosure context, see CEB, *supra* note 29, § 12.27.

unfair, or fraudulent practice.<sup>231</sup>

Unlawful prong claims are based on a violation of an underlying statute, but may be brought regardless of whether that underlying statute provides a private right of action.<sup>232</sup> An “unlawful” UCL claim may also be based on statutory violations *with* a private right of action,<sup>233</sup> and even common law causes of action.<sup>234</sup> In addition, because UCL’s remedies are cumulative to existing remedies, an unlawful prong claim might provide injunctive relief for HBOR violations even after the trustee’s deed is recorded.<sup>235</sup> Such post-sale relief is unavailable under HBOR’s statutory remedies.<sup>236</sup> Additionally, advocates should be able to use the UCL to enforce the RESPA servicing rules that became effective January 10, 2014 as well as the amendments that go into effect on October 19, 2017, and April 19, 2018, respectively), to obtain pre-sale injunctive relief.<sup>237</sup>

The unfair prong of the UCL makes unlawful practices that violate

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<sup>231</sup> See CAL. BUS. & PROF. CODE § 17200 (2012). Conduct can be unlawful, *or* unfair, *or* fraudulent to be liable under the UCL. See *West v. JP Morgan Chase Bank*, 214 Cal. App. 4th 780, 805 (2013) (The statute was written “in the disjunctive . . . establish[ing] three varieties of unfair competition . . .”).

<sup>232</sup> See *Rose v. Bank of Am.*, 57 Cal. 4th 390, 395-96 (2013) (holding that the federal Truth in Savings Act is enforceable through an UCL claim, even though TISA provides no private right of action); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 562 (1998).

<sup>233</sup> See, e.g., *Gaudin v. Saxon Mortg. Servs. Inc.*, 2013 WL 4029043, at \*10 (N.D. Cal. Aug. 5, 2013) (Borrowers in a class action certification hearing were held to possess UCL “unlawful” standing based on Rosenthal Act claims.); *People v. Persolve, LLC*, 218 Cal. App. 4th 1267, 1275 (2013) (The litigation privilege does not bar UCL claims based on the Rosenthal Act and FDCPA.).

<sup>234</sup> See, e.g., *Peterson v. Wells Fargo Bank, N.A.*, 2014 WL 3418870, at \*7 (N.D. Cal. July 11, 2014) (finding a viable UCL claim based on borrower’s fraud claim); *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148, at \*8-9 (E.D. Cal. Oct. 11, 2013) (finding a viable negligence claim serves as a basis for “unlawful” prong UCL claim).

<sup>235</sup> See CAL. BUS. & PROF. CODE § 17205 (2012) (UCL remedies cumulative to those provided under existing law); CAL. CIV. CODE § 2924.12(g) (2018) and §§ 2924.12(h), 2924.19(g) (2013) (HBOR remedies are cumulative). The UCL would not, however, provide relief if the servicer corrected its HBOR violation before the deed was recorded. See, e.g., *Jent v. N. Tr. Corp.*, 2014 WL 172542, at \*5 (E.D. Cal. Jan. 15, 2014) (HBOR’s “safe harbor” provision, relieving servicers from HBOR liability if they correct their errors before a trustee’s deed upon sale is recorded, was fulfilled here, extinguishing the derivative UCL “unlawful” claim.).

<sup>236</sup> See CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013) (outlining remedies for large and small servicers, respectively).

<sup>237</sup> See *supra* section I.D.

legislatively stated public policy,<sup>238</sup> even if the practice is not technically prohibited by statute. It also prohibits practices that are “immoral, unethical, [or] oppressive.”<sup>239</sup> For example, even though HBOR did not become effective until 2013, courts have held pre-2013 dual tracking unfair under the UCL.<sup>240</sup> A borrower may also bring an “unfair” claim by alleging that a servicer’s conduct or statement was misleading.<sup>241</sup> A servicer’s failure to honor a prior servicer’s loan

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<sup>238</sup> See, e.g., *Foronda v. Wells Fargo*, 2014 WL 6706815, at \*10 (N.D. Cal. Nov. 26, 2014) (allegation of dual tracking also states a claim under the UCL as an unfair business practice).

<sup>239</sup> *McGarvey*, 2013 WL 5597148, at \*9 (quoting *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1260 (2006)). Some courts evaluate the allegedly unfair practice using a balancing test, weighing “the gravity of the harm to the [borrower]” against “the utility of the [servicer’s] conduct.” *Perez v. CitiMortgage, Inc.*, 2014 WL 2609656, at \*8 (C.D. Cal. June 10, 2014). Other courts use a much narrower definition of “unfair,” requiring borrowers to allege the conduct was “tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law.” *Graham v. Bank of Am.*, 226 Cal. App. 4th 594, 612-13 (2014).

<sup>240</sup> See *Ware v. Bayview Loan Servicing, LLC*, 2013 WL 6247236, at \*6-7 (S.D. Cal. Oct. 29, 2013) (finding a valid “unfair” UCL claim based on borrower’s 2010 loan modification application and servicer’s 2013 foreclosure activity); *Cabrera v. Countrywide Fin.*, 2012 WL 5372116, at \*7 (N.D. Cal. Oct. 30, 2012) (upholding borrower’s unfair prong claim because, “although the public policy was not codified until 2012, it certainly existed in 2011 as part the general public policy against foreclosures that were occurring without giving homeowners adequate opportunities to correct their deficiencies”); *Majd v. Bank of Am.*, 243 Cal. App. 4th 1293, 1302-04 (2015); *Jolley v. Chase Home Fin., LLC.*, 213 Cal. App. 4th 872, 907-08 (2012) (“[W]hile dual tracking may not have been forbidden by statute at the time, the new legislation and its legislative history may still contribute to its being considered ‘unfair’ for purposes of the UCL.”).

<sup>241</sup> See, e.g., *Zuniga v. Bank of America, N.A.*, 2014 WL 7156403, at \*8 (C.D. Cal. Dec. 9, 2014) (adopting a three-factor test and finding servicer’s verbal offer of a modification and subsequent foreclosure unfair because: 1) loss of property and loss of an *opportunity* to modify constitutes substantial injury; 2) dual tracking practices contribute nothing positive to consumers or to competition; and 3) other reasonable consumers could not have avoided being dual tracked in this situation, regardless of borrower’s responsibility for her default); *Perez*, 2014 WL 2609656, at \*9 (finding servicer’s misrepresentations and possible concealment of borrower’s application status led to a deliberately drawn-out and unsuccessful modification process, resulting in harm to the borrower that outweighed the utility of servicer’s actions); *Canas v. Citimortgage, Inc.*, 2013 WL 3353877, at \*5-6 (C.D. Cal. July 2, 2013) (Servicer’s promise of a permanent modification was misleading because after inducing the borrower to make TPP payments, no modification was forthcoming.); *Majd v. Bank of Am.*, 243 Cal. App. 4th 1293, 1304 (2015) (UCL claim stated when servicer “false asserted plaintiff had failed to provide the required documentation” that the servicer requested.); *Lueras v. Bank of Am.*, 221 Cal. App. 4th 49, 84 (2013) (UCL claim stated when servicer “[f]alsely representing that ... [plaintiff] did not qualify for HAMP modification when, in fact ... [plaintiff] did qualify for a HAMP modification”).

modification after servicing transfer can also be an unfair practice.<sup>242</sup>

The fraudulent prong of the UCL prohibits fraudulent practices that are likely to deceive the public.<sup>243</sup> For example, courts have allowed UCL fraudulent claims against banks that offered TPPs that did not comply with HAMP guidelines,<sup>244</sup> that induced borrowers to make TPP payments by promising permanent modifications and then not offering them,<sup>245</sup> and that misrepresented their fee posting method and misapplied service charges to mortgage accounts.<sup>246</sup> One court even found a lender's pursuit of foreclosure without any apparent authority to foreclose a business practice likely to deceive the public and a valid fraudulent-prong UCL claim.<sup>247</sup>

Because of Proposition 64, a borrower bringing a UCL claim must show: (1) lost money or property that is (2) directly caused by the unfair competition.<sup>248</sup> Courts have found the initiation of foreclosure proceedings to constitute lost property interest<sup>249</sup> but have demanded

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<sup>242</sup> See *Lewis v. Bank of Am., N.A.*, 2013 WL 7118066, at \*3 (C.D. Cal. Dec. 18, 2013).

<sup>243</sup> *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 838 (2006).

<sup>244</sup> *West v. JP Morgan Chase Bank N.A.*, 214 Cal. App. 4th 780, 806 (2013); *Pestana v. Bank of Am., N.A.*, 2014 WL 2616840, at \*5 (Cal. Ct. App. June 12, 2014)

(servicer's incorrect evaluation and denial of HAMP applications).

<sup>245</sup> *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 857 (9th Cir. 2017)

(inducing borrower to make trial plan payments when she was not eligible for a modification meets "fraudulent" and "unfair" prongs of the UCL); *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148, at \*9-10 (E.D. Cal. Oct. 11, 2013) (finding that "a reasonable consumer" would be confused by servicer's offering of a TPP agreement and then failure to modify because plaintiff was not "borrower" on DOT); *Gaudin v. Saxon Mortg. Servs., Inc.*, 297 F.R.D. 417 (N.D. Cal. 2013) (Servicer's systemic practice of denying modifications based on certain criteria, after a borrower complied with a TPP, could deceive the public.); *Canas*, 2013 WL 3353877, at \*6 ("[M]embers of the public would likely be deceived by Defendant's assurances concerning a permanent loan modification.").

<sup>246</sup> See, e.g., *Ellis v. JP Morgan Chase Bank, N.A.*, 2013 WL 2921799, at \*17 (N.D. Cal. June 13, 2013) ("Failure to adequately disclose [the posting method] can shape reasonable expectations of consumers and be misleading."); *Gutierrez v. Wells Fargo Bank, N.A.*, 2013 WL 2048030, at \*5 (N.D. Cal. May 14, 2013) (finding defendant's scheme to deceive borrowers about the posting order of transactions on their accounts, thereby increasing overdraft fees, a viable UCL fraudulent claim).

<sup>247</sup> *Subramani v. Wells Fargo Bank, N.A.*, 2013 WL 5913789, at \*6 (N.D. Cal. Oct. 31, 2013).

<sup>248</sup> CAL. BUS. & PROF. CODE § 17204 (2012).

<sup>249</sup> See, e.g., *Monet v. JPMorgan Chase Bank, N.A.*, 2017 WL 3895790, at \*6 (N.D. Cal. Sept. 5, 2017) (threat of foreclosure is sufficient to establish standing under the UCL); *Williams v. Wells Fargo Bank, N.A.*, 2017 WL 1374693, at \*9-10 (N.D. Cal. Apr. 14, 2017) (distinguishing between alleged actions that resulted in initiation of foreclosure and those that did not); *Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at \*6 (N.D. Cal. Aug. 7, 2014) (Initiation of foreclosure, damaged credit, and attorney costs constituted damages (and adequate UCL standing) caused by

that the loss be directly caused by the wrongful conduct,<sup>250</sup> not simply the borrower's monetary default<sup>251</sup> or other actions.<sup>252</sup> Courts have accepted<sup>253</sup> and rejected<sup>254</sup> other sources of economic loss, but there does not appear to be a consistent pattern in this regard.

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servicer's HBOR violations.); *Woodring v. Ocwen Loan Servicing, LLC*, 2014 WL 3558716, at \*8 (C.D. Cal. July 18, 2014); *Boring v. Nationstar Mortg.*, 2014 WL 66776, at \*5 (E.D. Cal. Jan. 7, 2014). *But cf.* *Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, at \*6-7 (S.D. Cal. July 31, 2013) (foreclosure risk without actual initiation of foreclosure proceedings not particular enough injury for UCL standing).

<sup>250</sup> *See Nava v. JP Morgan Chase*, 2014 WL 6886071, at \*3 (C.D. Cal. Nov. 25, 2014) (finding servicer's failure to comply with TPP directly led to borrower's injury); *Roche v. Bank of Am., Nat'l Ass'n*, 2013 WL 3450016, at \*9 (S.D. Cal. July 9, 2013) (denying servicer's motion to dismiss UCL claim because borrower was able to show that servicer's conduct interfered with borrower's attempt to bring payments current); *Pestana*, 2014 WL 2616840, at \*5-7 (finding servicer's inducement of borrower to become delinquent directly led to late fees and penalties associated with missed mortgage payments and adequate UCL standing); *cf.* *Peterson v. Wells Fargo Bank, N.A.*, 2014 WL 3418870, at \*7 (N.D. Cal. July 11, 2014) (borrowers may allege "causation more generally" at the pleading stage and plead property improvements as damages caused by servicer's false assurances of a future modification); *Boessenecker v. JP Morgan Chase Bank*, 2013 WL 3856242, at \*3 (N.D. Cal. July 24, 2013) (finding UCL standing based on servicer providing inaccurate loan information that prevented them from refinancing their mortgage with favorable interest rates).

<sup>251</sup> *See Hernandez v. Specialized Loan Servicing*, 2015 WL 350223, at \*8 (C.D. Cal. Jan. 22, 2015) (finding borrower's growing loan and clouded title were directly caused by borrower's default, absent an allegation that servicer instructed borrower to become delinquent on her mortgage); *Rahbarian v. JP Morgan Chase*, 2014 WL 5823103, at \*10-11 (E.D. Cal. Nov. 10, 2014) (imminent sale was caused by borrower's default, not servicer's actions); *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49, 83 (2013) (Foreclosure sale constituted economic injury, but borrowers failed to allege sale was caused by something other than their default. The court granted leave to amend to allege servicer's misrepresentations led to unexpected sale.); *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 520-23 (2013) (finding a "diminishment of a future property interest" sufficient economic injury and yet finding no standing because the foreclosure stemmed from debtor's default, not because of alleged wrongful practices); *see also Segura v. Wells Fargo Bank, N.A.*, 2014 WL 4798890, at \*8-9 (C.D. Cal. Sept. 26, 2014) (distinguishing between damage caused by borrowers' default and damage caused by servicer's mishandling of borrowers' modification application, the latter of which formed the basis for UCL standing because it affected borrowers' property interest and/or their ability to lower their mortgage payments).

<sup>252</sup> *See, e.g., Johnson v. PNC Mortg.*, 2014 WL 6629585, at \*8 (N.D. Cal. Nov. 21, 2014) (Borrowers failed to allege UCL standing where *their* rejection of original modification offer—not servicer's SPOC violations—led to their acceptance of a financially worse option).

<sup>253</sup> *See, e.g., Johnson v. PNC Mortgage*, 80 F. Supp. 3d 980, 988-89 (N.D. Cal. 2015) (inflated modified payments based on servicer's use of an improper income figure constituted economic injury); *Esquivel v. Bank of Am., N.A.*, 2013 WL 5781679, at \*4-5 (E.D. Cal. Oct. 25, 2013) (failure to honor FHA-HAMP modification agreement led to borrower's resulted in needless second HUD lien and incorrect credit reporting).

## E. ECOA Notice Claims

Borrowers have brought claims under the Equal Credit Opportunity Act (ECOA), alleging servicers: (1) failed to provide a timely written notice that borrowers were denied a loan modification; or (2) failed to provide a sufficient statement of reasons for taking adverse action.<sup>255</sup> If the borrower submits a complete application,<sup>256</sup> servicers must give the borrower a written denial within 30 days regardless of borrower's membership in a protected class.<sup>257</sup> Several courts have ruled that the notice requirement applies regardless of borrower's default status,<sup>258</sup> although some cases have held that a borrower in default is not entitled to a written denial within 39 days.<sup>259</sup> To bring an adverse action claim, borrowers must also demonstrate

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<sup>254</sup> See, e.g., *Hernandez v. Specialized Loan Servicing*, 2015 WL 350223, at \*8 (C.D. Cal. Jan. 22, 2015) (damaged credit and time/resources spent applying for modifications do not constitute economic damages for UCL standing); *Bullwinkle v. U.S. Bank, N.A.*, 2013 WL 5718451, at \*2 (N.D. Cal. Oct. 21, 2013) (loan payments to the “wrong” entity were nevertheless owed to the “correct” entity, so borrower was “not actually . . . deprived of any money;” legal fees are not considered a loss for purposes of UCL standing; a ruined credit score does not confer UCL standing); *Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, \*7 (S.D. Cal. July 31, 2013) (risk of foreclosure, forgone opportunities to refinance, and attorney and expert fees do not establish UCL standing); *Lueras*, 221 Cal. App. 4th at 81-83 (time and effort spent collecting modification documentation insufficient for UCL standing.).

<sup>255</sup> 15 U.S.C.A. § 1691(d)(1)-(2) (West 2013) (“Within thirty days . . . after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application,” and “[e]ach applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor.”).

<sup>256</sup> See *Cooksey v. Select Portfolio Servicing, Inc.*, 2014 WL 4662015, at \*4-5 (E.D. Cal. Sept. 17, 2014); *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636, at \*4-5 (C.D. Cal. Oct. 22, 2013) (finding adequate pleading of complete application).

<sup>257</sup> See *Banks v. JPMorgan Chase Bank, N.A.*, 2015 WL 2215220, at \*5-6 (C.D. Cal. May 11, 2015) (holding that “neither the borrower's membership in a protected class nor the lender's discrimination is an element of a[n ECOA] claim”). *But see* *Boyle v. Nationstar Mortg., LLC*, 2016 WL 347391, at \*10-11 (E.D. Cal. Jan. 25, 2016) (relying on a prior *Banks* opinion to hold membership in protected class required to state an ECOA notice claim).

<sup>258</sup> See, e.g., *MacDonald v. Wells Fargo Bank, N.A.*, 2015 WL 1886000 at \*3 (N.D. Cal. Apr. 24, 2015); *Vasquez v. Bank of Am., N.A.*, 2014 WL 1614764 at \*2-3 (N.D. Cal. Apr. 22, 2014); *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636 at \*4 (C.D. Cal. Oct. 22, 2013).

<sup>259</sup> See, e.g., *MacDonald v. Wells Fargo Bank N.A.*, 2017 WL 1150362, at \*1-2 (N.D. Cal. Mar. 28, 2017) (same); *Smith v. Wells Fargo Bank, N.A.*, 2016 WL 283521, at \*7-8 (N.D. Cal. Jan. 25, 2016) (holding that ECOA regulations make clear that the notice requirement in the statute does not apply when a borrower is in default).

they were current on their mortgage,<sup>260</sup> but courts have differed on whether the borrower must be current at the time of application or at the time of denial.<sup>261</sup>

## F. Liability after Servicing Transfer

If a transferee servicer refuses to honor a loan modification agreement the borrower has with the previous servicer, courts have allowed the borrower to hold the current servicer liable.<sup>262</sup> Even if the

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<sup>260</sup> See *Rockridge Tr. v. Wells Fargo Bank, N.A.*, 985 F. Supp. 2d 1110, 1139-41 (N.D. Cal. 2013) (denying a modification while the borrower is in default is not an “adverse action”); *Piotrowski v. Wells Fargo Bank, N.A.*, 2013 WL 247549, at \*8 (D. Md. Jan. 22, 2013) (borrower’s reduced payments under a “Special Forbearance Agreement” put borrower in default and precludes a § 1691(d)(2) claim, pertaining to borrower’s second modification request); cf. *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204 (9th Cir. 2013) (borrower stated ECOA adverse action claim when Wells Fargo sent default notices without further explanation even though borrower was current on permanent modification).

<sup>261</sup> Compare *Davis v. CitiMortgage, Inc.*, 2011 WL 891209, at \*2-3 (E.D. Mich. Mar. 11, 2011) (dismissing an ECOA claim because the borrower was not current on the original mortgage when her permanent modification was denied, even though she made all TPP payments and was current at time of application), with *Murfitt v. Bank of Am., N.A.*, 2013 WL 7098636, at \*6 (C.D. Cal. Oct. 22, 2013) (borrower stated an ECOA claim when the borrower was current when applying for loan modification); *Bourdelais v. J.P. Morgan Chase*, 2011 WL 1306311, at \*8 (E.D. Va. Apr. 1, 2011) (finding making reduced payments according to TPP does not make the borrower plainly delinquent).

<sup>262</sup> See, e.g., *Dougherty v. Bank of Am., N.A.*, 2017 WL 1349012, at \*4 (E.D. Cal. Feb. 17, 2017) (finding borrowers who alleged transferee servicer’s failure to honor a pre-transfer modification agreement showed a probability of success on the merits and granting TRO); *Randell v. Flagstar Bank FSB*, 2015 WL 2159595, at \*8 (E.D. Cal. May 7, 2015) (holding that the borrower has a valid loan modification agreement with the original servicer and is entitled to performance of the same agreement upon transfer to the new servicer); *Webb v. Bank of Am., N.A.*, 2013 WL 6839501, at \*6 (E.D. Cal. Dec. 23, 2013) (finding liability under the Rosenthal Act for collection activities after Bank of America refused to honor loan modification granted by previous servicer); *Lewis v. Bank of Am. NA*, 2013 WL 7118066, at \*3 (C.D. Cal. Dec. 18, 2013) (finding liability under UCL against transferee servicer when the original servicer reneged on the loan modification agreement and the new servicer also refused to honor the agreement); *Rampp v. Ocwen Fin. Corp.*, 2012 WL 2995066, at \*3-5 (S.D. Cal. Jul. 23, 2012) (allowing breach of contract and specific performance against the new servicer and granting preliminary injunction to enjoin the foreclosure); *Croshal v. Aurora Bank, F.S.B.*, 2014 WL 2796529, at \*5 (N.D. Cal. Jun. 19, 2014) (holding that the borrower has adequately pled breach of contract claim against the new servicer who has refused to honor the loan modification agreement entered by the borrower and original servicer); *Schubert v. Bank of Am., N.A.*, No. 34-2013-00148898-CU-OR-GDS, 2014 WL 3977856, at \*3 (Cal. Super. Ct. Sacramento Cnty. Aug. 11, 2014) (holding that both the original and new servicers are liable for promissory estoppel after breaking the promise that the original

borrower only entered into a TPP with the original servicer, courts have found liability so long as the borrowers have complied with the terms of the TPP.<sup>263</sup>

### III. Litigation Issues

#### A. Obtaining Injunctive Relief

Because HBOR's enforcement provisions do not allow borrowers to undo completed foreclosure sales, it is critical to seek preliminary injunctive relief before the sale occurs. Under HBOR, borrowers may obtain injunctive relief to stop an impending sale,<sup>264</sup> but a borrower may only recover actual economic damages post-sale.<sup>265</sup>

A borrower only needs to meet a low bar to obtain a TRO in state court in order to determine whether there is sufficient evidence to

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servicer made to the borrower); *cf. In re Pico*, 2011 WL 3501009, at \*3 (Bankr. S.D. Cal. Aug. 9, 2011). (holding loan modification enforceable against transferee servicer because the new servicer accepted modified payments).

<sup>263</sup> *Geake v. JP Morgan Chase Bank, N.A.*, 2015 WL 331104, at \*7-9 (C.D. Cal. Jan. 23, 2015) (holding that by complying with a TPP agreement made with his original servicer, the borrower has pled a viable breach of contract claim against the new servicer); *see also Tirabassi v. Chase Home Fin., LLC*, 2015 WL 1402016, at \*4-6 (C.D. Cal. Mar. 24, 2015) (borrower sufficiently alleged equitable estoppel to preclude the servicers' reliance on the statute of frauds for breach of implied contract claims); *Mendonca v. Caliber Home Loan, Inc.*, 2015 WL 1566847, at \*1 (C.D. Cal. Apr. 6, 2015) (denying the new servicer's motion for summary judgment when the servicer refused to acknowledge the existence of the TPP agreement between borrower and the original servicer); *cf. Lansburg v. Fed. Home Loan Mortg. Corp.*, 607 F. App'x 738, 738 (9th Cir. 2015) (remanding to district court to determine whether new servicer is contractually obligated to offer a permanent loan modification if the borrower complies with the terms of a TPP entered into with the original servicer).

<sup>264</sup> *Shupe v. Nationstar Mortg. LLC*, 231 F.Supp.3d 597, 602 (E.D. Cal. Jan. 31, 2017) (injunctive relief not available because there was no foreclosure sale scheduled and most recent Notice of Trustee's Sale had been rescinded).

<sup>265</sup> *See* CAL. CIV. CODE § 2924.12 (2018) and CAL. CIV. CODE §§ 2924.12 & 2924.19 (2013). Each statute provides for treble actual damages or \$50,000 in statutory damages if borrower can show servicer's conduct was willful. *Id.*; *Cornejo v. Ocwen Loan Servicing, LLC*, No. 1:15-cv-00993 (E.D. Cal. Oct. 21, 2016) (awarding \$39,642 in economic damages); *see also Banks v. JP Morgan Chase*, 2014 WL 6476139, at \*9 (C.D. Cal. Nov. 19, 2014) (rejecting servicer's MTD borrower's SPOC and CC 2924.10 claims for failure to allege actual economic damages where borrower alleged the violations were intentional and could recover statutory damages). At least one court has held that a borrower may be able to bring an equitable wrongful foreclosure claim based on dual tracking violations after the foreclosure sale but before the trustee's deed is recorded. *See Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6-7 (N.D. Cal. Apr. 16, 2014).

support a temporary order to maintain the status quo.<sup>266</sup> To obtain a preliminary injunction in state court, a borrower must show (1) a likelihood of prevailing on the merits and (2) that she will be more harmed by the sale than the servicer will be by postponing the sale.<sup>267</sup>

In the Ninth Circuit, plaintiffs must demonstrate that there are “serious questions going to the merits[,] . . . [that] the balance of hardships tips sharply in [their] favor,” that they will suffer irreparable harm, and that the injunction is in the public interest.<sup>268</sup> In federal court, an identical standard governs the issuance of a temporary restraining order.<sup>269</sup> In both, the loss of one’s home is considered irreparable harm.<sup>270</sup> Both state and federal courts have enjoined pending foreclosure sales when the servicer violated HBOR.<sup>271</sup>

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<sup>266</sup> Landmark Holding Group v. Super. Ct., 193 Cal. App. 3d 525, 528 (1987) (“All that is determined is whether the TRO is necessary to maintain the status quo pending the noticed hearing on the application for preliminary injunction.”).

<sup>267</sup> White v. Davis, 30 Cal. 4th 528, 554 (2003).

<sup>268</sup> Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

Generally, federal courts have held that delaying a foreclosure sale, to enable borrowers to bring valid HBOR claims, is in the public interest. *See* Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359, at \*8 (C.D. Cal. July 9, 2014) (The public interest is served by allowing homeowners “the opportunity to pursue what appear to be valid claims before they are evicted from their homes.”).

<sup>269</sup> *See* Stuhlbarg Int’l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001).

<sup>270</sup> CAL. CIV. CODE § 3387 (2012); Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass’n, 840 F.2d 653, 661 (9th Cir. 1988). The harm, however, must also be “likely and immediate,” which some courts have found not the case where a servicer postpones a foreclosure sale to review borrowers for a loan modification. *See, e.g.,* Cooksey v. Select Portfolio Servicing, Inc., 2014 WL 4662015, at \*8-9 (E.D. Cal. Sept. 17, 2014) (denying borrowers’ motion for a preliminary injunction).

<sup>271</sup> *See, e.g.,* Gonzales v. Citimortgage, 2014 WL 7927627, at \*2 (N.D. Cal. Oct. 10, 2014) (PI granted on dual tracking claim); Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at \*2-5 (N.D. Cal. July 29, 2014) (same); *Shaw*, 2014 WL 3362359, at \*7 (PI granted on SPOC claim, denied on dual tracking claim); *Cooksey*, 2014 WL 2120026, at \*2-3 (TRO granted on dual tracking claim); McKinley v. CitiMortgage, Inc., 2014 WL 651917, at \*8 (E.D. Cal. Feb. 19, 2014) (same); Ware v. Bayview Loan Servicing, LLC, 2013 WL 4446804, at \*5 (S.D. Cal. Aug. 16, 2013) (granting a PI based on servicer’s failure to formally deny borrower’s 2011 modification application and proceeding with a foreclosure in 2013); Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (PI granted on dual tracking claim); Monterrosa v. PNC Bank, No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (same); Zanze v. Cal. Capital Loans Inc., 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (same); Isbell v. PHH Mortg. Corp., No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013) (PI granted on dual tracking claim because servicer *requested* borrower’s third application.). *See generally* discussion *supra* section I.

Courts have also granted preliminary injunctions in non-HBOR cases.<sup>272</sup>

## B. Bona Fide Purchasers

When a bona fide purchaser (BFP) buys a property at trustee sale, the recitals in the trustee deed become conclusive, and it can be very difficult to set aside a foreclosure sale.<sup>273</sup> However, if the challenge to the foreclosure goes to the authority to foreclose, or if the sale was void, then even a sale to a BFP may be overturned.<sup>274</sup> In one post-foreclosure case, the court issued a preliminary injunction against enforcement of the writ of possession,<sup>275</sup> and in an HBOR case, the court granted a TRO to prevent servicer from selling the home to a BFP.<sup>276</sup>

## C. Tender & Bond Requirements

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<sup>272</sup> See, e.g., *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*3-5 (E.D. Cal. Oct. 2, 2013) (enjoining sale due to servicer's noncompliance with former CC 2923.5); *Williams v. Wells Fargo Bank, N.A.*, 2013 WL 5444354, at \*2-3 (N.D. Cal. Sept. 30, 2013) (granting a PI because servicer may have breached the covenant of good faith and fair dealing in stopping automatic withdrawal of borrower's mortgage payments); *Jackmon v. Am.'s Servicing Co.*, 2011 WL 3667478, at \*3 (N.D. Cal. Aug. 22, 2011) (enjoining sale because the borrower fully complied with her TPP); *Jobe v. Kronsberg*, 2013 WL 3233607, at \*9-10 (Cal. Ct. App. June 27, 2013) (affirming the trial court's PI order based on borrower's forgery claim). *But cf.* *Vasquez v. Bank of Am., N.A.*, 2014 WL 1614764, at \*1-2 (N.D. Cal. Apr. 22, 2014) (rejecting the idea that injunctive relief is available for *substantive* wrongful foreclosure claims that attack the validity of an anticipated sale, but allowing that borrowers may win injunctions to delay an impending sale based on a servicer's *procedural* foreclosure violations).

<sup>273</sup> See CAL. CIV. CODE § 2924(c).

<sup>274</sup> See *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 999-1000 (2016); *Bank of Am., N.A. v. La Jolla Group II*, 129 Cal. App. 4th 706, 714-15 (2005).

<sup>275</sup> *Sencion v. Saxon Mortg. Servs., LLC*, 2011 WL 2259764, at \*2 (N.D. Cal. May 17, 2011).

<sup>276</sup> *Nguyen v. Trojan Capital Improvements*, 2015 WL 268919, at \*3 (C.D. Cal. Jan. 16, 2015) (Servicer sold the home without notice to borrower after removing the case to federal court, which dissolved the existing TRO. The federal district court granted a new TRO, finding that borrower will "be permanently denied an opportunity to determine whether his rights were violated, and whether he is entitled to obtain a loan modification" if the home was sold to a BFP.).

To set aside a foreclosure sale, a borrower must generally “tender” (offer and be able to pay) the amount due on their loan.<sup>277</sup> This is especially true when the challenge is premised on a procedural defect in the foreclosure notices.<sup>278</sup> However, tender is not required if it would be inequitable.<sup>279</sup> In addition, courts have excused the tender requirement when (1) the sale is void (e.g., the trustee conducted the sale without legal authority);<sup>280</sup> (2) if the loan was reinstated;<sup>281</sup> (3) if the borrower was current on their loan modification;<sup>282</sup> (4) if the

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<sup>277</sup> See *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112 (2011) (stating the general tender rule).

<sup>278</sup> *Miranda v. SCME Mortg. Bankers, Inc.*, 2017 WL 3131965, at \*7 (C.D. Cal. July 24, 2017) (citing *Ram v. OneWest Bank, FSB*, 234 Cal. App. 4th 1, 20 (2015)); *Vogan v. Wells Fargo Bank, N.A.*, 2011 WL 5826016, at \*7 (E.D. Cal. Nov. 17, 2011) (citing *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1109 (1996)) (“A plaintiff is required to allege tender . . . to maintain any cause of action for irregularity in the non-judicial foreclosure sale procedure.”).

<sup>279</sup> See, e.g., *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6-7 (N.D. Cal. Apr. 16, 2014) (finding tender inequitable where it was unclear if injunctive relief or damages were available to borrowers); *Moya v. CitiMortgage, Inc.*, 2014 WL 1344677, at \*5 (S.D. Cal. Mar. 28, 2014) (finding tender inequitable where servicer accepted borrower’s TPP payments and foreclosed anyway); *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291 (1911); *Fonteno v. Wells Fargo Bank*, 228 Cal. App. 4th 1358, 1368-69 (2014) (finding it would be inequitable to require tender where the circumstances being litigated—servicer’s failure to comply with HUD’s rules governing FHA loans—show that borrowers were unable to tender the amount due on their loan); *Lona*, 202 Cal. App. 4th at 113 (outlining all the reasons for not requiring tender, including when it would be unfair to the borrower).

<sup>280</sup> *Aniel v. Aurora Loan Servs., LLC*, 550 F. App’x 416, 417 (9th Cir. 2013) (tender not required when the borrower alleged that the trustee was not properly substituted in); *Engler v. ReconTrust Co.*, 2013 WL 6815013, at \*7 (C.D. Cal. Dec. 20, 2013) (tender not required where borrower’s lack of authority to foreclose claim, if true, would render the sale void, not voidable); *Subramani v. Wells Fargo Bank, N.A.*, 2013 WL 5913789, at \*4 (N.D. Cal. Oct. 31, 2013) (same); *Cheung v. Wells Fargo Bank, N.A.*, 2013 WL 6017497, at \*4-5 (N.D. Cal. Sept. 25, 2013) (same); *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1100 (2013). *But see* *Kalnoki v. First Am. Tr. Servicing Sols., LLC*, 8 Cal. App. 5th 23, 48 (2017), reh’g denied (Feb. 22, 2017), review denied (May 10, 2017) (tender of full amount owed required when wrongful foreclosure claim is premised on allegations of voidable assignment of deed of trust and borrowers admit in complaint that they owe the debt); *Halajian v. Deutsche Bank Nat’l Trust Co.*, 2017 WL 1505319, at \*2 (9th Cir. Apr. 27, 2017) (affirming grant of summary judgment on quiet title claim premised on unsupported claims of void transfer of loan documents where plaintiff failed to show ability to tender).

<sup>281</sup> *In re Takowsky*, 2013 WL 5183867, at \*9-10 (Bankr. C.D. Cal. Mar. 20, 2013) (borrower reinstated loan by paying servicer amount due listed on NOD; foreclosure was wrongful because servicer then had no authority to foreclose under the NOD); *Bank of Am. v. La Jolla Group*, 129 Cal. App. 4th 706, 711 (2005).

<sup>282</sup> *Blankenchip v. Citimortgage, Inc.*, 2014 WL 6835688, at \*7 (E.D. Cal. Dec. 3, 2014) (Borrowers were TPP-compliant when servicer foreclosed.); *Harris v. Bank of Am., N.A.*, 2014 WL 1116356, at \*7 (C.D. Cal. Mar. 17, 2014) (Borrowers were

borrower is challenging the validity of the underlying debt;<sup>283</sup> and (5) if the sale has not yet occurred.<sup>284</sup>

Courts have also been reluctant to require tender for statutory causes of action. In *Mabry v. Superior Court*, the court considered tender in a claim under former Civil Code Section 2923.5.<sup>285</sup> The Legislature, the court reasoned, intended borrowers to enforce those outreach requirements, and requiring tender would financially bar many claims.<sup>286</sup> Several federal and state courts have rejected servicers' tender arguments in HBOR cases.<sup>287</sup> In *Valbuena v. Ocwen*

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compliant with their permanent loan modification agreement when servicer foreclosed.); *Chavez v. Indymac Mortg. Servs.*, 219 Cal. App. 4th 1052, 1063 (2013); *Barroso v. Ocwen Loan Servicing*, 208 Cal. App. 4th 1001, 1017 (2012).

<sup>283</sup> *Hawkins v. Bank of Am. N.A.*, 2017 WL 590253, at \*6 (E.D. Cal. Feb. 14, 2017) (no tender required where borrowers are challenging validity of underlying debt and where it would be inequitable); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 307 (2014); *Lona*, 202 Cal. App. 4th at 103-04; *see also Sarkar v. World Savings Bank, FSB*, 2014 WL 457901, at \*3 (N.D. Cal. Jan. 31, 2014) (citing *Lona* and excusing tender where borrower alleged his loan originator wrongfully failed to verify income and extended a loan it knew borrower could not afford); *Passaretti v. GMAC Mortg., LLC*, 2014 WL 2653353, at \*10 (Cal. Ct. App. June 13, 2014) (allowing borrower to amend his complaint to plead that his compliance with a repayment plan to justify no-default exception to the tender rule).

<sup>284</sup> *Schneider v. Bank of Am., N.A.*, 2014 WL 2118327, at \*13-14 (E.D. Cal. May 21, 2014) (finding no tender required pre-foreclosure); *Wickman v. Aurora Loan Servs., LLC*, 2013 WL 4517247, at \*3 (S.D. Cal. Aug. 23, 2013) (declining a tender requirement where borrower brought action after NTS was recorded, but before actual sale); *Intengan v. BAC Home Loans Servicing, LP*, 214 Cal. App. 4th 1047, 1053-54 (2013) (collecting cases that consider this issue); *see also Tang v. Bank of Am., N.A.*, 2012 WL 960373, at \*4 (C.D. Cal. Mar. 19, 2012) (explaining that pre-sale tender is less common than post-sale because post-sale actions are more demanding on courts).

<sup>285</sup> *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 213 (2010). HBOR amended the previous § 2923.5 and bifurcated it to apply to large and small servicers. *See CAL. CIV. CODE* § 2923.5 (2018) and §§ 2923.55 and 2923.5 (2013) and section I.A.

<sup>286</sup> *See Mabry*, 185 Cal. App. 4th at 210-13 (“[I]t would defeat the purpose of the statute to require the borrower to tender the full amount of the indebtedness *prior* to any enforcement of the right to . . . be *contacted* prior to the notice of default.” (emphasis in original)). Tender was also inequitable here because borrowers sought to postpone, not to completely avoid, a foreclosure sale. *Id.* at 232.

<sup>287</sup> *See Medrano v. Caliber Home Loans*, 2015 WL 848347, at \*4-5 (C.D. Cal. Feb. 26, 2015) (noting that tender has been excused where borrowers bring statutory causes of action and where borrower merely seeks damages post-sale, rather than to undo the sale); *Stokes v. Citimortgage*, 2014 WL 4359193, at \*9 (C.D. Cal. Sept. 3, 2014) (refusing to require tender at the pleading stage because it is unknown whether requiring tender based on HBOR causes of action is inequitable without more facts); *Bingham v. Ocwen Loan Servicing, LLC*, 2014 WL 1494005, at \*6 (N.D. Cal. Apr. 16, 2014) (holding that a plaintiff may seek injunctive relief under HBOR “regardless of tender”); *Pearson v. Green Tree Servicing, No. C-13-01822* (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013); *Senigar v. Bank of Am., No. MSC13-00352* (Cal. Super.

*Loan Servicing*, the California Court of Appeal held that tender is not required to state a HBOR dual tracking claim.<sup>288</sup>

Advocates moving for TROs or preliminary injunctions should prepare for disputes over the amount of bond. In the foreclosure context, the bond amount is discretionary<sup>289</sup> and can be waived for indigent plaintiffs.<sup>290</sup> Courts consider a variety of factors in determining bond amounts. Some use fair market rent of comparable property,<sup>291</sup> the prior mortgage payment,<sup>292</sup> the modified mortgage payment,<sup>293</sup> or the amount of foreseeable damages incurred by a bank

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Ct. Feb. 20, 2013) (rejecting defendant's tender argument on a dual tracking and SPOC claim, and citing the *Mabry* tender principle).

<sup>288</sup> *Valbuena v. Ocwen Loan Servicing*, 237 Cal. App. 4th 1267, 1273-74 (2015).

<sup>289</sup> See FED.R.CIV.P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security *in an amount that the court considers proper . . .*" (emphasis added)); CAL. CIV. PROC. CODE § 529(a) (1994) (leaving the undertaking amount up to the court).

<sup>290</sup> CAL. CIV. PROC. CODE § 995.240 (1982). Similarly, federal courts have authority to waive the bond requirement for indigent plaintiffs. See, e.g., *Park Vill. Apts. Tenants Ass'n v. Howard*, 2010 WL 431458, at \*4 (N.D. Cal. Feb. 1, 2010), *aff'd in part, rev'd in part*, 636 F.3d 1150 (9th Cir. 2011) (excusing bond requirement for indigent plaintiffs); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (C.D. Cal. 1983), *aff'd in part, vacated in part*, 722 F.2d 1490 (9th Cir. 1984) ("Where . . . suit is brought on behalf of poor persons, preliminary injunctive relief may be granted with no payment of security whatever.").

<sup>291</sup> See, e.g., *De Vico v. US Bank*, 2012 WL 10702854, at \*7 (C.D. Cal. Oct. 29, 2012); *Tamburri v. Suntrust Mortg., Inc.*, 2011 WL 2654093, at \*6 (N.D. Cal. July 6, 2011) (setting bond at the fair rental value of the property); *Magana v. Wells Fargo Bank, N.A.*, 2011 WL 4948674, at \*2 (N.D. Cal. Oct. 18, 2011) (same); cf. *Pugh v. Wells Fargo Home Mortg.*, No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (setting a one-time \$15,000 bond, plus requiring borrowers to pay \$1,600 monthly payments, the fair market rental value); *Monterrosa v. PNC Bank*, No. 34-2014-00162063-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. May 8, 2014) (giving borrowers the option of paying a lump sum, or monthly installments, both based on the fair market rental value of the property).

<sup>292</sup> See *Gilmore v. Wells Fargo Bank, N.A.*, 2014 WL 3749984, at \*6 (N.D. Cal. July 29, 2014) (setting the bond at \$1,800 per month, borrower's previous payment, and requiring payments directly to a trust, not to servicer); *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*5 (E.D. Cal. Oct. 2, 2013) (considering borrower's time living in the home without making any payments, and that CC 2923.5 only delays foreclosure in setting the bond close to borrower's monthly mortgage payments, plus a one-time payment of \$2,800); *Martin v. Litton Loan Servicing LP*, 2013 WL 211133, at \*22 (E.D. Cal. Jan. 16, 2013) (setting the bond at plaintiff's pre-escrow account monthly mortgage payment); *Pearson v. Green Tree Servicing*, No. C-13-01822 (Cal. Super. Ct. Contra Costa Cnty. Sept. 10, 2013) (setting a \$1,000 one-time bond, coupled with monthly mortgage payments).

<sup>293</sup> See *Mazed v. JP Morgan Chase Bank*, 471 F. App'x 754, 755 (9th Cir. 2012) (District court did not abuse its discretion by setting the bond at borrower's modified mortgage payment.); *Dougherty v. Bank of Am., N.A.*, 2017 WL 2403700, at \*6 (E.D. Cal. June 2, 2017) (setting the bond at the monthly payment under modification

in delaying a foreclosure sale.<sup>294</sup> Others deemed the deed of trust sufficient security and chose not to impose a separate, monetary bond.<sup>295</sup> Some courts set extremely low, one-time bonds.<sup>296</sup> Advocates

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allegedly offered by prior servicer that current servicer refused to honor); *Shaw v. Specialized Loan Servicing, LLC*, 2014 WL 3362359, at \*9 (C.D. Cal. July 9, 2014) (setting bond at borrower's first, pre-HBOR modified loan payment); *Rampp v. Ocwen Fin. Corp.*, 2012 WL 2995066, at \*5 (S.D. Cal. July 23, 2012) (determining the proper amount for bond as the modified monthly payment); *Jackmon v. Am.'s Servicing Co.*, 2011 WL 3667478, at \*4 (N.D. Cal. Aug. 22, 2011) (requiring a bond that paid the arrearages, plus monthly payments specified in the Forbearance Agreement).

<sup>294</sup> *Gonzales v. Citimortgage*, 2014 WL 7927627, at \*2 (N.D. Cal. Oct. 10, 2014) (setting the bond at \$2,000 per month to cover servicer's potential damages caused by the PI); *Williams v. Wells Fargo Bank, N.A.*, 2013 WL 5444354, at \*3 (N.D. Cal. Sept. 30, 2013) (setting bond at borrower's arrearages, totaling 6-months of mortgage payments that servicer failed to automatically withdraw from borrower's bank account). *But cf.* *Flaherty v. Bank of Am., N.A.*, 2013 WL 29392, at \*8-9 (Cal. Ct. App. Jan. 3, 2013) (reversing the undertaking order because the borrower's "past arrearages allegedly owed [the bank] is not a proper measure of [the bank]'s future damages caused by a delay in the sale of the property").

<sup>295</sup> *See, e.g.*, *Dougherty v. Bank of Am., N.A.*, 2017 WL 1349012, at \*6 (E.D. Cal. Feb. 17, 2017); *Greene v. Wells Fargo Bank, N.A.*, 2016 WL 360756, at \*5 (N.D. Cal. Jan. 28, 2016); *Lane v. Citimortgage*, 2014 WL 5036512, at \*2 (E.D. Cal. Oct. 7, 2014) (deeming no monetary bond necessary because "there is no evidence [servicer] will suffer damages from the injunction"); *McKinley v. CitiMortgage, Inc.*, 2014 WL 651917, at \*7 (E.D. Cal. Feb. 19, 2014) (waiving bond requirement); *Bitker v. Suntrust Mortg. Inc.*, 2013 WL 2450587, at \*2 (S.D. Cal. Mar. 29, 2013) (citing *Jorgensen v. Cassidy*, 320 F.3d 906, 919-20 (9th Cir. 2003) and declining to set a bond because it was not in the public interest to set one, and because the defendant bank's interests were secured by the DOT); *Bhandari v. Capital One, NA*, 2012 WL 3792766, at \*2 (N.D. Cal. Aug. 30, 2012) (waiving bond because the loan is adequate security); *Tuck v. Wells Fargo Home Mortg.*, 2012 WL 3731609, at \*3 (N.D. Cal. Aug. 28, 2012) (security instrument sufficient to protect lender); *Reed v. Wells Fargo Bank*, 2011 WL 1793340, at \*7 (N.D. Cal. May 11, 2011) (same); *Rivera v. BAC Home Loans Servicing, LP*, 2010 WL 2280044, at \*2 (N.D. Cal. June 7, 2010); *Phleger v. Countrywide Home Loans, Inc.*, 2007 WL 4105672, at \*6 (N.D. Cal. Nov. 16, 2007); *Isbell v. PHH Mortg. Corp.*, No. 37-2013-00059112-CU-PO-CTL (Cal. Super. Ct. San Diego Cnty. Sept. 6, 2013). *But see* *Menis v. NDEX West, LLC*, 2014 WL 2433687, at \*2-7 (Cal. Ct. App. May 30, 2014) (reversing the trial court's decision to set no monetary bond).

<sup>296</sup> *Singh v. Bank of Am., N.A.*, 2013 WL 1858436, at \*2-3 (E.D. Cal. May 2, 2013) (setting a one-time bond of \$1,000); *Jobe v. Kronsberg*, 2013 WL 3233607, at \*8-9, 11-12 (Cal. Ct. App. June 27, 2013) (determining the trial court did not abuse its discretion in setting a \$1,000 bond because the "ample home equity" would more than adequately compensate defendants, should they prevail); *Zanze v. Cal. Capital Loans Inc.*, No. 34-2014-00157940-CU-CR-GDS (Cal. Super. Ct. Sacramento Cnty. May 1, 2014) (reducing its tentative bond set at \$24,000 based on fair market rental value and servicer's costs, to a \$500 bond after finding borrower indigent). *But see* *Pugh v. Wells Fargo Home Mortg.*, No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014) (setting a one-time \$15,000 bond, plus requiring borrowers to pay \$1,600 monthly payments, the fair market rental value); *Leonard v.*

arguing against a bond should reassure the court that the bank's interests are preserved in the deed of trust and unharmed by a mere postponement of foreclosure.<sup>297</sup> In any event, the court should not set the bond at the unpaid loan balance or the entire amount of arrearages.<sup>298</sup>

#### D. Judicial Notice

During litigation over whether the servicer complied with former Section 2923.5, servicers often request judicial notice of the NOD declaration to demonstrate compliance with the statute's contact and due diligence requirements.<sup>299</sup> Most courts have declined to grant judicial notice of the truth of the declaration and limited judicial notice to only the declaration's existence and legal effect.<sup>300</sup> Courts are more

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JP Morgan Chase Bank, N.A., No. 34-2014-00159785-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 27, 2014) (one-time, \$4,000 bond); *Pittell v. Ocwen Loan Servicing, LLC*, No. 34-2013-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty., Dec. 5, 2013) (one-time, \$5,000 bond); *Rogers v. OneWest Bank FSB*, No. 34-2013-00144866-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013) (one-time, \$10,000 bond).

<sup>297</sup> See *Jobe*, 2013 WL 3233607, at \*11.

<sup>298</sup> See *Bever v. Cal-Western Reconveyance Corp.*, 2013 WL 5493422, at \*5 (E.D. Cal. Oct. 2, 2013) (rejecting servicer's request for the full amount due on the loan as "tantamount to requiring tender" and "excessive"); *Flaherty*, 2013 WL 29392, at \*8 (finding the total amount of arrearages an inappropriate gauge of a bank's foreseeable damages).

<sup>299</sup> Servicers must declare that they have contacted the borrower to discuss foreclosure alternatives, or that they fulfilled due diligence requirements. CAL. CIV. CODE §§ 2923.5(b), 2923.55(c) (2013) (applying to small and large servicers, respectively). See discussion *supra*, section I.A.

<sup>300</sup> See, e.g., *Tavares v. Nationstar Mortg., LLC*, 2014 WL 3502851, at \*7 (S.D. Cal. July 14, 2014); *Intengan v. BAC Home Loans Servicing LP*, 214 Cal. App. 4th 1047, 1057 (2013); *Skov v. U.S. Bank Nat'l Ass'n*, 207 Cal. App. 4th 690, 698 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 266 (2011); *Lee v. Wells Fargo Bank, N.A.*, No. 34-2013-00153873-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 25, 2014). *But see* *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1102 (2013) (declining to take judicial notice of legal effect of assignment); *Herrera v. Deutsche Bank Nat'l Trust Co.*, 196 Cal. App. 4th 1366, 1375 (2011) (declining to take judicial notice of legal effect of a recorded document). This principle also applies outside of the pre-NOD declaration context. See, e.g., *Rosell v. Wells Fargo Bank*, 2014 WL 4063050, at \*3-4 (N.D. Cal. Aug. 15, 2014) (declining to take judicial notice of a county property tax statement, purportedly showing two missed payments, because borrowers disputed they had missed the payments).

inclined to take judicial notice if the truth of the declaration's contents is undisputed.<sup>301</sup>

Issues regarding judicial notice have also arisen in litigation over wrongful foreclosure claims based on allegations that the foreclosing party does not have the right to foreclosure. In one unpublished appellate decision, the Court of Appeal for the Fifth District conducted a careful analysis of the defendant's request for judicial notice and refused to accept recorded documents as proof of the chain of title for plaintiff's loan.<sup>302</sup>

### **E. Attorney's Fees**

Prior to HBOR's enactment, loan documents were the only avenue to attorney's fees.<sup>303</sup> Now, HBOR statutes explicitly allow for attorney's fees, even if the borrower obtained only injunctive relief.<sup>304</sup> Until the *Monterossa* decision by the Court of Appeal in 2015, advocates had mixed success convincing courts that "injunctive relief" includes TROs and preliminary injunctions, as opposed to permanent injunctions.<sup>305</sup>

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<sup>301</sup> See *Mena v. JP Morgan Chase Bank*, 2012 WL 3987475, at \*3 (N.D. Cal. Sept. 7, 2012) (taking judicial notice of both the existence and the substances of foreclosure documents because the substance was not disputed); *Scott v. JP Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 754 (2013).

<sup>302</sup> *Gulix v. PennyMac Holdings LLC*, 2017 WL 2963045 at \*8-9 (Cal.App. 5 Dist., July 12, 2017, unpublished/noncitable).

<sup>303</sup> CAL. CIV. CODE § 1717 (1987) (providing for two-way attorneys' fees if contract contains one-way fee clause); see, e.g., *In re Alpine Group, Inc.*, 151 B.R. 931, 932 (9th Cir. 1993) ("The loan documents contained a standard contract enforcement attorney's fees provision."); *Aozora Bank, Ltd. v. 1333 N. Cal. Blvd.*, 119 Cal. App. 4th 1291, 1295 (2004) (evaluating specific language in loan documents allowing for attorney fees if borrower commits waste); *Bergman v. JP Morgan Chase Bank, N.A.*, No. RIC 10014015 (Cal. Super. Ct. Riverside Cnty. Jan. 22, 2014) (awarding attorney's fees in a TPP case where borrowers prevailed at trial on their good faith and fair dealing and misrepresentation claims). See generally CEB, *supra* note 29, §7.23.

<sup>304</sup> "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision *if the borrower obtained injunctive relief* or was awarded damages pursuant to this section." CAL. CIV. CODE § 2924.12(i) (2013), (emphasis added); § 2924.19(h) (same).

<sup>305</sup> Compare *Pearson v. Green Tree Servicing, LLC*, 2014 WL 6657506, at \*4 (N.D. Cal. Nov. 21, 2014) (borrower is "prevailing party" based on issuance of PI which led to servicer's voluntary rescission of dual-tracked NOD); *Ingargiola v. Indymac Mortg. Servs.*, No. CV1303617 (Cal. Super. Ct. Marin Cnty. May 21, 2014) (finding that HBOR's statutory scheme allows interim fee awards because most HBOR cases are not fully tried), and *Roh v. Citibank*, No. SCV-253446 (Cal. Super. Ct. Sonoma Cnty

*Monterossa* dramatically shifted the fee recovery legal landscape by holding attorney's fees available to the borrower after obtaining a preliminary injunction.<sup>306</sup> After *Monterossa*, at least one court has awarded attorney's fees after a TRO stopped a foreclosure sale and the servicer voluntarily postponed the sale in response to a preliminary injunction motion.<sup>307</sup> A bare request for attorney's fees in a TRO application without any citation to authority or specificity regarding the amount claimed, however, risks denial.<sup>308</sup>

Recently, some servicers have aggressively pursued attorney's fees based on deeds of trust clauses and borrower's HBOR claims, even after borrowers voluntarily dismiss their cases. Courts have generally rejected this argument, finding HBOR claims are "on a contract" and therefore subject to Civil Code Section 1717 requirements, which include the existence of a prevailing party.<sup>309</sup> Since voluntarily dismissing an action prevents any party from prevailing, courts have denied servicers' motions for attorney's fees in these situations.<sup>310</sup>

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Jan. 21, 2014) (awarding attorney's fees following preliminary injunction because the statute does not distinguish between a preliminary injunction and a permanent injunction), *with Sese v. Wells Fargo Bank, N.A.*, No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 3, 2013) (denying borrower's motion for attorney fees because a preliminary injunction is "merely a provisional or auxiliary remedy to preserve the status quo until final judgment"); *see also* *Le v. Bank Of N.Y. Mellon*, 152 F. Supp. 3d 1200, 1214-15 (N.D. Cal. 2015) (borrower could be considered prevailing party when expiration of notice of trustee sale rendered HBOR claims moot); *Pearson v. Green Tree Servicing, LLC*, 2015 WL 632457, at \*4-6 (N.D. Cal. Feb. 13, 2015) (granting borrower's attorney's fees motion (see prior *Pearson* case, cited above) for work performed until the NTS was rescinded, and for the work on the attorney's fees motion itself. Any work performed after the NTS was rescinded was not awarded attorney's fees because the rescission "remedied" the HBOR violation under CC 2924.12.).

<sup>306</sup> *Monterossa v. Super. Ct.*, 237 Cal. App. 4th 747 (2015).

<sup>307</sup> *Lac v. Nationstar Mortg. LLC*, 2016 WL 1212582, at \*3 (Mar. 28, 2016).

<sup>308</sup> *See, e.g., Walls v. Wells Fargo Bank*, 2017 WL 1478961 at \*4 (N.D. Cal. April 25, 2017) (single footnote citing fees provision without any supporting argument or detail insufficient); *Warren v. Wells Fargo & Co.*, 2017 WL 4541730, at \*7 (S.D. Cal. Oct. 11, 2017) (declining to award fees claimed for unsuccessful motion for preliminary injunction even though borrower obtained a TRO under HBOR by stipulation).

<sup>309</sup> CAL. CIV. CODE § 1717(a) (1987).

<sup>310</sup> *See Massett v. Bank of Am.*, 2014 WL 3810364, at \*2-3 (C.D. Cal. July 25, 2014); *Caldwell v. Wells Fargo Bank, N.A.*, 2014 WL 789083, at \*4-5 (N.D. Cal. Feb. 26, 2014).

## F. Federal Preemption

Some state laws may be preempted by federal banking laws such as the Home Owner Loan Act (HOLA) and National Banking Act (NBA).<sup>311</sup> HOLA regulates federal savings associations, the NBA, national banks.<sup>312</sup> State statutes face field preemption under HOLA; the NBA only subjects them to conflict preemption.<sup>313</sup>

When the subject of the litigation is a national bank's misconduct, NBA preemption standards should apply, even if the loan was originated by a federal savings association. Some national banks, especially Wells Fargo, regularly assert a HOLA preemption defense where the loan at issue originated with a federal savings association (FSA or FSB). In Wells Fargo's case, the FSA was World Savings Bank, which it acquired early in the financial crisis. Wells argues that HOLA preemption attaches to the loan and insulates Wells Fargo from HBOR liability, regardless of its own conduct as a national bank. Up until early 2014, most federal courts generally accepted this argument without independent analysis.<sup>314</sup> The tide turned in early 2014, however; most (though not all) courts now hold that national banks and other servicers who are not savings associations *cannot* invoke HOLA preemption as a shield against liability for their own conduct.<sup>315</sup>

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<sup>311</sup> HOLA is codified at 12 U.S.C. §§ 1461-1470 (2013), the NBA at 12 U.S.C. §§ 21-216 (2013).

<sup>312</sup> See *Aguayo v. U.S. Bank*, 653 F.3d 912, 919, 921 (9th Cir. 2011).

<sup>313</sup> *Id.* at 922.

<sup>314</sup> See, e.g., *Terrazas v. Wells Fargo Bank, N.A.*, 2013 WL 5774120, at \*3 (S.D. Cal. Oct. 24, 2013) (finding HOLA preemption survives assignment and merger of the loan to a national bank); *Marquez v. Wells Fargo Bank, N.A.*, 2013 WL 5141689, at \*3-4 (N.D. Cal. Sept. 13, 2013) (acknowledging the growing split in authority, but siding with the (then) majority and allowing Wells Fargo to invoke HOLA preemption).

<sup>315</sup> See, e.g., *Kenery v. Wells Fargo, N.A.*, 2014 WL 4183274, at \*5-6 (N.D. Cal. Aug. 22, 2014) (“[Servicer] may not avail itself of the benefits of HOLA without bearing the corresponding burdens.”); *Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at \*3-4 (N.D. Cal. Aug. 7, 2014); *Hixon v. Wells Fargo Bank*, 2014 WL 3870004, at \*2-4 (N.D. Cal. Aug. 6, 2014) (finding borrowers, in signing their deed of trust, did *not* agree to be bound by HOLA preemption invoked by a national bank); *Boring v. Nationstar Mortg., LLC*, 2014 WL 2930722, at \*3 (E.D. Cal. June 27, 2014) (same); *Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 993-96 (N.D. Cal. 2014) (allowing national banks to hide behind HOLA preemption and avoid liability for their own conduct may result in a “gross miscarriage of justice”); *Bowman v. Wells Fargo Home Mortg.*, 2014 WL 1921829, at \*3-4 (N.D. Cal. May 13, 2014); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, 2014 WL 890016, at \*7 (N.D. Cal. Mar. 3, 2014); *Roque v. Wells Fargo Bank, N.A.*, 2014 WL 904191, at \*3-4 (C.D. Cal. Feb. 3, 2014).

Courts applying a proper preemption analysis have found former Section 2923.5 not preempted by the NBA.<sup>316</sup> Under a HOLA preemption analysis, state courts have also upheld the statute,<sup>317</sup> but it has not fared as well in federal courts.<sup>318</sup> Few courts have considered NBA and HOLA preemption of HBOR specifically, but the federal courts that have, for the most part, determined HBOR is preempted by HOLA,<sup>319</sup> but not by the NBA.<sup>320</sup> Importantly, the Dodd-Frank Wall

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*But see* Hayes v. Wells Fargo Bank, N.A., 2014 WL 3014906, at \*4-6 (S.D. Cal. July 3, 2014) (citing OTS opinion letters, and that borrowers seemingly agreed to a HOLA preemption analysis at loan origination, in allowing Wells Fargo to invoke HOLA preemption).

<sup>316</sup> See Cabrera v. Countrywide Home Loans, Inc., 2013 WL 1345083, at \*7 (N.D. Cal. Apr. 2, 2013); Tamburri v. Suntrust Mortg., 875 F. Supp. 2d 1009, 1017-18 (N.D. Cal. 2012); Skov v. U.S. Bank Nat'l Ass'n, 207 Cal. App. 4th 690, 702 (2012).

<sup>317</sup> See Mabry v. Superior Court, 185 Cal. App. 4th 208, 218-19 (2010) (finding the former CC 2923.5 not preempted under HOLA); Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 201-02 (2012) (State laws like CC 2923.5, which deal with foreclosure, have traditionally escaped preemption.).

<sup>318</sup> Compare Heagler v. Wells Fargo Bank, N.A., 2017 WL 1213370, at \*4 (E.D. Cal. Mar. 31, 2017) (noting a split in authority, but finding that HOLA preempts plaintiff's HBOR and negligence claims); Nguyen v. JP Morgan Chase Bank N.A., 2013 WL 2146606, at \*6 (N.D. Cal. May 15, 2013) (preempted), Rodriguez v. JP Morgan Chase, 809 F. Supp. 2d 1291, 1295 (S.D. Cal. 2011) (preempted), and Taguinod v. World Sav. Bank, 755 F. Supp. 2d 1064, 1069 (C.D. Cal. 2010) (same), with Davis v. Wells Fargo Bank, N.A., 2017 WL 729541, at \*2 (E.D. Cal. Feb. 23, 2017) (no preemption); Ambers v. Wells Fargo Bank, N.A., 2014 WL 883752, at \*6 (N.D. Cal. Mar. 3, 2014) (no preemption), Quintero v. Wells Fargo Bank, N.A., 2014 WL 202755, at \*3-6 (N.D. Cal. Jan. 17, 2014) (no preemption), Osorio v. Wells Fargo Bank, 2012 WL 1909335, at \*2 (N.D. Cal. May 24, 2012) (no preemption), Pey v. Wachovia Mortg. Corp., 2011 WL 5573894, at \*8-9 (N.D. Cal. Nov. 15, 2011) (no preemption), and Shaterian v. Wells Fargo Bank, N.A., 2011 WL 2314151, at \*5 (N.D. Cal. June 10, 2011) (same).

<sup>319</sup> See, e.g., Heagler, supra; Warren v. Wells Fargo & Co., 2017 WL 4876212, at \*8 (S.D. Cal. Oct. 27, 2017) (discussing cases going both ways and finding HOLA preemption of HBOR claims); Aldana v. Bank of Am., N.A., 2014 WL 6750276, at \*5-6 (C.D. Cal. Nov. 26, 2014) (preempting HBOR); Sun v. Wells Fargo, 2014 WL 1245299, at \*2-4 (N.D. Cal. Mar. 25, 2014) (preempting CC 2923.55, 2923.6, & 2923.7); Williams v. Wells Fargo Bank, N.A., 2014 WL 1568857, at \*10-13 (C.D. Cal. Jan. 27, 2014) (preempting CC 2923.6 and borrower's negligence and UCL claims, insofar as they are based on dual tracking); Meyer v. Wells Fargo Bank, N.A., 2013 WL 6407516, at \*3-4 (N.D. Cal. Dec. 6, 2013) (same finding as Sun); Deschaine v. IndyMac Mortg. Servs., 2013 WL 6054456, at \*7-10 (E.D. Cal. Nov. 15, 2013) (preempting CC 2923.6, 2923.7, and borrower's authority to foreclose (CC 2924) claims), *aff'd on other grounds*, 617 F. App'x 690 (9th Cir. 2015); Marquez, 2013 WL 5141689, at \*5 (preempting §§ 2923.55, 2923.6, 2923.7, and 2924.17). *But see* Sese v. Wells Fargo Bank, N.A., No. 34-2013-00144287-CU-WE-GDS (Cal. Super. Ct. Sacramento Cnty. July 1, 2013) (dual tracking provision not preempted by HOLA).

<sup>320</sup> Jacobik v. Wells Fargo Bank, N.A., 2017 WL 5665666, at \*7 (N.D. Cal. Nov. 26, 2017) (denying motion to dismiss HBOR claim regarding servicer's failure to provide required NPV input information on NBA preemption grounds); McFarland v. JP

Street Reform and Consumer Protection Act amended HOLA in 2011 to adopt the NBA's less strict conflict preemption analysis.<sup>321</sup> Conflict preemption will apply to federal savings associations for conduct occurring since 2011.<sup>322</sup> However, the new standard does not affect the application of state law to contracts entered into before July 2010.<sup>323</sup>

Courts have been reluctant to find state tort claims preempted by HOLA, especially for laws based in a general duty not to defraud.<sup>324</sup>

## G. Removal from State Court

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Morgan Chase Bank, 2014 WL 1705968, at \*6-7 (C.D. Cal. Apr. 28, 2014) (finding that the HOLA and NBA preemption analyses are not equivalent, and that the NBA does not preempt HBOR).

<sup>321</sup> See 12 U.S.C. § 1465(a) (2012) ("Any determination by a court . . . regarding the relation of State law to [federal savings associations] shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.").

<sup>322</sup> See 12 U.S.C. § 5582 (2010).

<sup>323</sup> 12 U.S.C. § 5553 (2010); see *Williams*, 2014 WL 1568857, at \*10 (declining to extend Dodd-Frank to loan originated before July and finding borrower's HBOR claims therefore preempted by HOLA); *Deschaine v. IndyMac Mortg. Servs.*, 2014 WL 281112, at \*8 (E.D. Cal. Jan. 23, 2014) (same).

<sup>324</sup> See, e.g., *Sun v. Wells Fargo*, 2014 WL 1245299, at \*2-4 (N.D. Cal. Mar. 25, 2014) (HOLA preempts HBOR claims, but not common law causes of action); *Sarkar v. World Savings FSB*, 2014 WL 457901, at \*2-3 (N.D. Cal. Jan. 31, 2014) (borrower's authority to foreclose claims and her fraud based claims not preempted by HOLA because any effect on lending is only incidental); *Cheung v. Wells Fargo Bank, N.A.*, 2013 WL 6017497, at \*4-5 (N.D. Cal. Sept. 24, 2013) (wrongful foreclosure claim escaped HOLA preemption because lenders cannot rely on non-judicial foreclosure framework and then claim that framework is preempted by federal law.); *Wickman v. Aurora Loan Servs., LLC*, 2013 WL 4517247, at \*2-3 (S.D. Cal. Aug. 23, 2013) (fraud, negligent misrepresentation, and promissory estoppel claims were not HOLA preempted because those laws only prevent a servicer from defrauding a borrower – they do not require anything additional from the servicer and only incidentally affect their business practices.); *Gerbery v. Wells Fargo Bank, N.A.*, 2013 WL 3946065, at \*8-9 (S.D. Cal. July 31, 2013) (same). *But see* *Ambers v. Wells Fargo Bank, N.A.*, 2014 WL 883752, at \*6 (N.D. Cal. Mar. 3, 2014) (noting a distinction between fraud and misrepresentation claims based on "inadequate disclosures of fees, interest rates, or other loan terms," and those based on a bank's "general duty" not to "misrepresent material facts," but declining to apply the HOLA preemption analysis to borrower's ill-pled claims); *Terrazas v. Wells Fargo Bank, N.A.*, 2013 WL 5774120, at \*5-6 (S.D. Cal. Oct. 24, 2013) (HOLA preempts authority to foreclose claims, negligence claim, and contract related claims); *Babb v. Wachovia Mortg., FSB*, 2013 WL 3985001, at \*3-7 (C.D. Cal. July 26, 2013) (finding borrower's promissory estoppel, breach of contract, negligence, fraud, and UCL claims preempted by HOLA because all the claims were based on the modification process, which effects "loan servicing").

## 1. Bases for Federal Jurisdiction

Federal courts are given jurisdiction by statute. Federal question jurisdiction and diversity jurisdiction are the two most common bases for federal jurisdiction. These two bases for jurisdiction are reviewed below.

Congress can also grant jurisdiction to federally-chartered corporations if the charter expressly authorizes such jurisdiction or contains a “sued and be sued” clause that specifically mentions federal court.<sup>325</sup> For example, cases involving Freddie Mac are subject to federal question jurisdiction by statute.<sup>326</sup> At least in the Ninth Circuit and pending Supreme Court review, federal jurisdiction also exists in any case where Fannie Mae is a party.<sup>327</sup>

### Federal Question Jurisdiction

Federal question jurisdiction exists in any case involving a federal claim. For example, if the suit is brought on a RESPA or an ECOA claim, then the plaintiff may choose to file in federal court because the claim based on federal law gives rise to federal question jurisdiction.

When a defendant removes a complaint based on federal question jurisdiction, the plaintiff wishing to stay in state court may amend the complaint to remove the federal claim. In that case, the amended complaint supersedes the original pleading in determining federal jurisdiction.<sup>328</sup>

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<sup>325</sup> See *Am. Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 258 (1992) (federal jurisdiction authorized when charter refers to “courts of law and equity, State or Federal).

<sup>326</sup> 12 U.S.C. § 1452(f).

<sup>327</sup> *Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 683 (9th Cir. 2014) (holding sue-and-be-sued clause in Fannie Mae’s charter confers federal jurisdiction over claims brought by or against Fannie Mae), *cert granted*, 136 S. Ct. 2536 (U.S. June 28, 2016) (No. 14-1055).

<sup>328</sup> See *Arco Env’t Remediation, L.L.C. v. Dep’t of Health & Environmental Quality of Montana*, 213 F.3d 1108 (9th Cir. 2000); *Wellness Cmty-Nat’l v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) (no federal question jurisdiction where original complaint alleged both federal and state claims and amended complaint only stated state law claims but insufficient amount in controversy for diversity jurisdiction); *Farmer v. Ocwen Loan Servicing, LLC*, 2010 WL 653098 (E.D. Cal. Feb. 22, 2010).

## Diversity Jurisdiction

While some cases are removed to federal court through federal question jurisdiction, most removals in foreclosure cases are based on diversity jurisdiction. Diversity jurisdiction requires (1) complete diversity of citizenship between plaintiffs and defendants and (2) more than \$75,000 of amount in controversy.

### *Complete Diversity of Citizenship*

Complete diversity of citizenship is required for diversity jurisdiction.<sup>329</sup> In other words, *each* plaintiff must have a different citizenship from *each* defendant. A natural person's citizenship is determined by the person's domicile, the place where he or she resides with the intention to remain or to return. Simply alleging the person's residence is insufficient; citizenship must be alleged.<sup>330</sup> Complete diversity is destroyed even if only one properly joined defendant shares common citizenship with a plaintiff.

National banks are deemed to a citizen of the state where their main offices are located as designated in their articles of association.<sup>331</sup> Mortgage servicers with national bank charters are generally not California citizens and therefore diverse from California plaintiffs. Except OneWest and Recontrust, most national banks' designated main offices are outside of California.<sup>332</sup>

Adding a California foreclosure trustee as a defendant may defeat complete diversity. Courts have wrestled with jurisdictional

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<sup>329</sup> Pullman Co. v. Jenkins, 305 U.S. 534, 541 (1939) (In controversy primarily between citizens of different states, even one properly joined defendant defeats diversity jurisdiction.).

<sup>330</sup> See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001) ("A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state."); Dyer v. Wells Fargo Bank, N.A., 2015 WL 2061781 (C.D. Cal. Apr. 30, 2015) (remanding case when notice of removal only alleged plaintiff's California residence but not citizenship).

<sup>331</sup> See, e.g., Rouse v. Wachovia Mortg., FSB, 747 F.3d 707 (9th Cir. 2014) (holding that because Wells Fargo's articles of association identifies South Dakota as its main office, Wells Fargo is citizen of South Dakota despite principal place of business in California).

<sup>332</sup> See Office of Comptroller of Currency, National Banks Active as of 3/31/2015, <http://www.occ.gov/topics/licensing/national-bank-lists/national-by-name-pdf.pdf> (visited Apr. 28, 2015).

questions involving California trustees, including the effect of a Civil Code § 2924l declaration of nonmonetary status (DNS). Civil Code § 2924l permits a trustee to file a declaration of non-monetary status if it is named in an action concerning a deed of trust, and it has a reasonable belief that it has been named solely in its capacity as trustee, and not as a result of any wrongful acts or omissions in the performance of its duties.<sup>333</sup> If no objection is served within 15 days, the trustee is not required to participate in the action and is not subject to any damages award.<sup>334</sup> The objection period is extended by five days if the notice was served by mail.<sup>335</sup>

As long as the period for objections passed before removal, some district courts recognize defendants who filed a declaration of non-monetary status without objection as nominal parties.<sup>336</sup> When removal is filed less than 15 days after the filing of the declaration, courts will consider the trustee’s citizenship when evaluating jurisdiction.<sup>337</sup> Other courts, however, declined to give any effect to the

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<sup>333</sup> CAL. CIV. CODE § 2924l(a).

<sup>334</sup> CAL. CIV. CODE § 2924l(e).

<sup>335</sup> See *Roberts v. Greenpoint Mortg. Funding*, 2014 WL 3605934, at \*3 n.2 (C.D. Cal. July 22, 2014) (applying Civ. Code § 1013 to the time for objection under § 2924l).

<sup>336</sup> See, e.g., *Jenkins v. Bank of Am., N.A.*, 2015 WL 331114 (C.D. Cal. Jan. 26, 2015) (listing cases); *Chancellor v. OneWest Bank*, 2012 WL 3834951, at \*2 (N.D. Cal. Sept. 4, 2012) (concluding that a defendant trustee was “no longer considered a party to this action” where it filed a declaration of non-monetary status in Alameda Superior Court more than fifteen days prior to removal and no objection was asserted); *Smith v. Bank of Am., N.A.*, 2011 WL 1332035, at \*3 (E.D. Cal. Apr. 6, 2011).

<sup>337</sup> See, e.g., *Silva v. Wells Fargo Bank, N.A.*, 2011 WL 2437514, at \*4 (C.D. Cal. June 16, 2011) (“Here, Removing Defendants filed their notice of removal before the 15 days had passed. Cal–Western filed its declaration of non-monetary status on April 8, 2011, and Removing Defendants filed their notice of removal before the 15 days had passed. Thus, at the time of removal, Cal–Western had not yet become a nominal party by virtue of its declaration of non-monetary status. Removing Defendants must show that diversity of citizenship existed at the time of removal. At the time of removal, the declaration of non-monetary status had not rendered Cal–Western a nominal party whose citizenship was irrelevant for diversity purposes” (citations omitted)); *Moore v. Wells Fargo Bank, N.A.*, 2012 WL 4433323, \*3 (E.D. Cal. Sept. 24, 2012) (“California Civil Code section 2924l permits a trustee to declare ‘non-monetary status’ if it ‘maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee.’ Cal. Civ. Code § 2924l (a). However, that statute also provides for a 15–day objection period. *Id.* § 2924l (d). ‘A party that files a declaration of non-monetary status does not actually become a nominal party until 15 days pass without objection.’ Here, Cal–Western did not file its declaration of non-monetary status until August 13, 2012, the day before

declaration of non-monetary status, even when the declaration was unopposed for the full 15-day period before removal, because the declaration is a state law procedural mechanism with no parallel in federal law.<sup>338</sup> For these latter courts, the trustee has nominal status only if the complaint states no substantive claims against the trustee.<sup>339</sup>

### *Amount in Controversy*

Even with diverse parties, the amount in controversy must also exceed \$75,000 for diversity jurisdiction to exist. In cases seeking an injunction against a foreclosure sale, courts have often counted the entire value of the home in the amount in controversy. Other district courts, however, have declined to consider the entire amount of the

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this action was removed to this court. Therefore, even if the declaration of non-monetary status could have transmuted Cal–Western into a nominal party, here it did not do so since the 15 day objection period did not run, and as a result, Cal–Western's non-monetary status was not perfected” (citations omitted)); *Boggs v. Wells Fargo Bank NA*, 2012 WL 2357428, at \*3 (N.D. Cal. June 14, 2012) (“A party that files a declaration of non-monetary status does not actually become a nominal party until 15 days pass without objection.’ Here, Golden West filed its declaration of non-monetary status on April 28, 2011, and Wells Fargo Defendants filed their Notice of Removal fourteen days later on May 12, 2011. Because the removal occurred less than fifteen days after Golden West filed its declaration of non-monetary status, Golden West had not yet been transmuted into a nominal party at the time of removal. Therefore, the Court cannot disregard Golden West's citizenship for purposes determining whether Plaintiffs and Defendants are completely diverse”).

<sup>338</sup> *See, e.g.*, *Midgette v. Wells Fargo Bank, N.A.*, 2017 WL 1380399, at \*2-3 (C.D. Cal. Apr. 10, 2017) (rejecting servicer’s fraudulent joinder argument and finding no diversity even though trustee defendant filed declaration of non-monetary status); *Duran v. Bank of Am., N.A.*, 2015 WL 794672, at \*4-5 (C.D. Cal. Feb. 24, 2015) (declining to give effect to declaration of non-monetary status because the declaration is a state law procedural mechanism with no parallel in federal law); *Raissan v. Quality Loan Service Corp.*, 2014 WL 6606802, at \*3-4 (C.D. Cal. Nov. 19, 2014); *Hersheu v. Wells Fargo Bank, N.A.*, 2012 WL 439698, at \*2 (S.D. Cal. Feb. 10, 2012).

<sup>339</sup> *Compare Carranza v. Wells Fargo Bank*, 2017 WL 2021362, at \*3-5 (N.D. Cal. May 12, 2017) (trustee that never filed statement of non-monetary status not a nominal party because there is “a non-fanciful possibility’ that Plaintiffs could allege [trustee] acted with malice or reckless disregard for their rights.”); *Raissan v. Quality Loan Service Corp.*, 2014 WL 6606802, at \*3-4 (C.D. Cal. Nov. 19, 2014) (trustee not nominal party when trustee recorded NOD in violation of HBOR); *Pardo v. Sage Point Lender Servs. LLC*, 2014 WL 3503095 (S.D. Cal. July 14, 2014) (trustee not nominal party because borrower sued trustee for wrongdoing) *with* *Duran v. Bank of Am., N.A.*, 2015 WL 794672, at \*5 (C.D. Cal. Feb. 24, 2015) (finding trustee to be nominal party because allegations in the complaint were all directed toward servicer, not trustee).

loan when the borrower only seeks a temporary injunction. In *Olmos v. Residential Credit Solutions, Inc.*, the court held that when seeking an injunction to halt foreclosure until his loan modification application can be processed, a borrower has not put the value of the home at issue.<sup>340</sup> At most, he has put the amount it would cost servicer to evaluate his application and any lost interest on the loan during the evaluation.<sup>341</sup> Other courts have also declined to value the injunctive relief as the entire amount of the loan.<sup>342</sup> In an action to enforce a loan modification agreement, one court found that the difference in payments owed by the borrower under the original loan terms and those that would be owed under the modified loan terms was the proper measure of the amount controversy.<sup>343</sup> In December 2018, the Ninth Circuit weighed in on the issue, holding that when a borrower seeks a temporary injunction until the loss mitigation process is complete, the amount in controversy is not the value of the property or the amount of indebtedness but must be established using other measures relevant to the specific circumstances.<sup>344</sup>

## 2. Remand Considerations

In deciding whether to move to remand a removed case, counsel should consider the differences between the two forums.<sup>345</sup> For example, plaintiff's counsel may prefer state court out of familiarity with state court rules and local practices. Unanimous jury verdicts are

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<sup>340</sup> *Olmos v. Residential Credit Solutions, Inc.*, 92 F. Supp. 3d 954, 956-57 (C.D. Cal. 2015).

<sup>341</sup> *Id.*; see also *Tripp v. Nationstar Mortg. LLC*, 2017 WL 354848, at \*3 (C.D. Cal. Jan. 24, 2017) (loan balance or property value are not accurate measures of the amount in controversy when borrower alleges harm from servicer's failure to complete review of loan modification application and seeks a temporary injunction).

<sup>342</sup> See, e.g., *Aguilar v. Wells Fargo Bank, N.A.*, 2017 WL 3438612, at \*3 (E.D. Cal. Aug. 10, 2017); *Graham v. JPMorgan Chase Bank, N.A.*, 2017 WL 3911577, at \*6 (C.D. Cal. Sept. 6, 2017); *Ulshafer v. PHH Mortg. Co.*, 2017 WL 896290, at \*4-5 (E.D. Cal. Mar. 6, 2017) (analyzing prior decisions and using a functional analysis to determine amount in controversy); *Vergara v. Wells Fargo Bank, N.A.*, 2015 WL 1240421, at \*2 (C.D. Cal. Mar. 17, 2015) (collecting cases and noting HBOR permits injunction only until violation has been remedied); *Cheng v. Wells Fargo Bank, N.A.*, 2010 WL 4923045, at \*2 (C.D. Cal. Dec. 2, 2010).

<sup>343</sup> *Stewart v. Bank of Am. , N.A.*, 2016 WL 7475613, at \*5 (N.D. Cal. Dec. 28, 2016).

<sup>344</sup> *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 775 (9th Cir. 2017).

<sup>345</sup> See generally James M. Wagstaffe et. al, *Rutter Group Practice Guide: Federal Civil Procedure Before Trial*, Ch. 2D (2015) for a comprehensive review.

required in federal court,<sup>346</sup> whereas only a  $\frac{3}{4}$  verdict is required in state court.<sup>347</sup> The jury will also be selected from different jury pools due to the larger geographic draw of a federal district court. Federal courts may also be more inclined to grant summary judgment or summary adjudication on selected issues.<sup>348</sup> In rare cases, the forum choice can even affect substantive law, such as when the Ninth Circuit and the California Court of Appeal disagree over interpretation of a statute.<sup>349</sup>

## H. Interaction with Bankruptcy Proceedings

Defendants in HBOR and other foreclosure cases sometimes attempt to defend against a borrower's claims by invoking the preclusive effect of past or pending proceedings in bankruptcy.<sup>350</sup> For example, the Ninth Circuit affirmed dismissal of a wrongful foreclosure claim on the ground that the plaintiff had not disclosed the claim as an asset in a Chapter 7 bankruptcy case filed after the claim arose.<sup>351</sup> In

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<sup>346</sup> FED. R. CIV. P. 48.

<sup>347</sup> Cal. Const. Art. I, § 16.

<sup>348</sup> Wagstaffe et al., *supra* note 315, § 2:2172.

<sup>349</sup> *Compare* King v. California, 784 F.2d 910, 913 (9th Cir. 1986) (holding a consumer loses right to rescind under TILA when the loan was subsequently refinanced) *with* Pacific Shore Funding v. Lozo, 138 Cal. App. 4th 1342 (2006) (holding rescission is available following refinancing and declining to follow *King*).

<sup>350</sup> *See, e.g.*, Dvorin v. Polymathic Properties, Inc., No. B269193, 2017 WL 993158, at \*4 (Cal. Ct. App. Mar. 15, 2017) (dismissing claims that borrower had listed as an asset in bankruptcy case and that the bankruptcy trustee had not abandoned on the ground that the claims were property of the bankruptcy estate and plaintiff was therefore not a real party in interest); *see also* Sundquist v. Bank of Am., N.A., No. C070291, 2013 WL 4773000, at \*16 (Cal. Ct. App. Sept. 5, 2013) (affirming dismissal of wrongful foreclosure damages claim based on sale of the property in violation of an automatic stay on jurisdictional grounds).

<sup>351</sup> Gehron v. Christiana Trust et al., \_\_\_ Fed. Appx. \_\_\_, 2017 WL 3531452 at \*1 (9th Cir., Aug. 17, 2017) (TILA claim omitted from bankruptcy schedule barred by res judicata); Campillo v. Dovenmuehle Mortg., Inc., 677 Fed.Appx. 325, 2017 WL 393740, at \*1 (9th Cir. Jan. 30, 2017) (judicial estoppel); *see also*, Hobbs v. Wells Fargo Bank, N.A., 2018 WL 288015, at \*4 (E.D. Cal. Jan. 4, 2018) (dismissing claims not scheduled in dismissed bankruptcy cases because borrower had obtained a one-year stay on foreclosure); Flaherty v. Bank of America, N.A., No. B261594 (Cal. Ct. App. Mar. 29, 2017) (affirming dismissal of wrongful foreclosure claims on the ground that borrower who had listed the value of those claims as zero in a bankruptcy case after seeking \$20 million in the instant case was judicially estopped from asserting any damages in the trial court).

other cases, however, courts have found that the mere failure to schedule claims against a servicer or lender in a bankruptcy does not necessarily require dismissal.<sup>352</sup>

While bankruptcy can be a trap for the unwary homeowner, bankruptcy courts have also served as a friendly forum for some claims related to wrongful foreclosures. In one recent case, an outraged bankruptcy court entered a multimillion dollar award for actual and punitive damages against Bank of America for multiple and egregious violations of the automatic stay.<sup>353</sup> The parties ultimately settled following further litigation in which the court rejected Bank of America's attempt to "buy and bury" the underlying judgment.<sup>354</sup>

Depending on the particular facts, bankruptcy court may also provide advocates with an opportunity to challenge a servicer's accounting and demonstrate that a borrower either isn't in default at all or that the delinquent amounts claimed by the servicer are incorrect.<sup>355</sup> Advocates who are unfamiliar with bankruptcy law and procedures are encouraged to consult and/or even co-counsel with bankruptcy experts in pursuing such claims.

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<sup>352</sup> *See, e.g.*, *Saji v. Residential Credit Sols.*, 2017 WL 1407997, at \*4 (N.D. Cal. Apr. 20, 2017) (rejecting judicial estoppel defense against plaintiffs who amended their bankruptcy schedules to include claims that arose well after they filed their bankruptcy petition); *Stewart v. Bank of Am. , N.A.*, 2016 WL 7475613, at \*8 (N.D. Cal. Dec. 28, 2016) (rejecting judicial estoppel defense because the bankruptcy court had not relied on the omission and plaintiffs could still amend their schedules to include the claims at issue; also rejecting defendants' MTD on grounds that the borrowers had not received approval of their loan modification from the bankruptcy court); *see also, e.g.*, *Amer v. Wells Fargo Bank NA*, 2017 WL 4865564, at \*7 (N.D. Cal. Oct. 27, 2017) (distinguishing among different claims based on whether the borrower filed any bankruptcy schedules and when the claims arose in relation to his bankruptcy filings); *Slater v. U.S. Steel Corp.*, \_\_\_ Fed. Appx. \_\_\_, 2017 WL 4110047 at \*1 (11th Cir., Sep. 18, 2017) (holding that totality of circumstances test applies to whether estoppel is appropriate).

<sup>353</sup> *Sundquist v. Bank of Am., N.A.*, 566 B.R. 563, 620 (Bankr. E.D. Cal. 2017).

<sup>354</sup> *See In re Sundquist*, 2018 WL 494630 (Bankr. E.D. Cal. Jan. 18, 2018).

<sup>355</sup> *See, e.g.*, *Cotton, et al. v. Wells Fargo N.A.*, Case No. 17-03056 (W.D. N.C., 2017) (class action complaint alleging that the servicer wrongfully changed payment amounts and other terms of borrowers' mortgages without property notice or consent of the borrowers); *In re Ernestine C.*, Case No. 11-33377-TJC (Bankr. D. Md., Nov. 19, 2015) (order approving settlement for \$81.6 million between Wells Fargo and the U.S. Bankruptcy Trustee in connection with Wells Fargo's filing of inaccurate proofs of claim in mortgage borrowers' bankruptcy cases)

For a more in-depth discussion of the interactions between mortgage servicing, foreclosure and bankruptcy, see Chapter 2, Section 2.4 of National Consumer Law Center, *Foreclosures and Mortgage Servicing* (8th ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).

## **Conclusion**

We hope that this guide will help California advocates advance consumer-friendly interpretations of HBOR and related laws, regulations and common law theories in order to provide strong protections for homeowners across the state and prevent as many unnecessary foreclosures as possible.