Court Decisions in Mortgage & Foreclosure Cases

Avoiding Foreclosure Update 2012
Pennsylvania Legal Aid Network
June 12, 2012

Case Summaries

Bank of New York Mellon v. Ellis, PA Super April 23, 2012 (summary judgment in foreclosure reversed re no showing of compliance with FHA servicing requirements)

Beneficial Consumer Discount Co. v. Vukman, 2012 PA Super 18 (court set aside mortgage foreclosure sheriff sale based on defect in Act 91 pre-foreclosure notice)

Bennett et al. v. A.T. Masterpiece Homes, PA Super. March 6, 2012 (a UDAP issue, UDAP sometimes being used in cases involving mortgage companies)

Cave v. Saxon Mortgage Services Inc. and Ocwen Loan Servicing LLC**,** 2012 U.S. Dist. LEXIS 75276 (E.D. Pa. May 30, 2012). Court declined to dismiss breach of contract count in class action case seeking to enforce HAMP trial plan.

Healey v. Wells Fargo, 2012 WL 994564 (Pa.Com.Pl.), CCP Lackawanna, March 12, 2012. Court declined to dismiss (preliminary objections) breach of contract, UDAP, fraud in the execution and promissory estoppel counts in action seeking to enforce HAMP trial plan. Court sustained p.o.'s re fraud in the inducement, negligent misrepresentation, infliction of emotional distress. (Note: Wells provided borrowers a copy of the trial plan signed by a Wells employee.)

Jones v. Wells Fargo, 2012 Bankr LEXIS 1450 (E.D. La. 2012) (debtor awarded punitive damages of $3.1 against Wells Fargo for servicing abuses). Court declared that Wells Fargo exhibited "reprehensible" The court had previously found that the bank improperly applied payments to interest and fees instead of principal and improperly charged the debtor more than $24,000 in fees.

WMC Mortgage v. Baker, 2012 WL 628003 (E.D.Pa. Feb. 28, 2012) (TILA rescission upheld in case where securitization trust proceeded with foreclosure case even though borrower had rescinded the loan within 3 days of origination and original lender had repurchased the loan from the trust.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR CWMBS Appellee v. APPEAL OF: COLLEEN C. ELLIS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1418 EDA 2011

Appeal from the Order Entered of April 21, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): December Term, 2009, No. 0143

BEFORE: BENDER, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED APRIL 23, 2012**

Colleen C. Ellis appeals from the order entered April 21, 2011 in the Court of Common Pleas of Philadelphia County granting summary judgment in favor of Bank of New York Mellon (BNY) in an action for foreclosure. Ellis claims: (1) the grant of summary judgment was improper because she asserted the affirmative defense that BNY had improperly ignored HUD regulations regarding loss mitigation, thereby raising an open question of material fact, and (2) the trial court erred in granting summary judgment prior to the close of discovery on the issue of loss mitigation, thereby making the order premature. After a thorough review of the submissions by

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* Former Justice specially assigned to the Superior Court.

the parties, the official record, and relevant law, we vacate the judgment and remand for further proceedings, consistent with this decision.

Ellis and her partner, Dierdra Turpin, purchased their home in December 2001. The purchase was financed by a mortgage from Encore Mortgage Services and was guaranteed by the Department of Housing and Urban Development.[1] The mortgage amount was $39,089. Paragraph 9(d) of the mortgage specifically limited the rights of the lender to foreclose pursuant to the regulations as issued by the Secretary of the Department of Housing and Urban Development.[2] On the closing day, Encore assigned the note and mortgage to Wells Fargo Home Mortgage, Inc. ("Wells Fargo").[3] In 2008, Ellis and Turpin fell behind on the mortgage payments. Ellis and Wells Fargo were in contact and negotiations took place attempting to find a solution.

Wells Fargo assigned the mortgage and note to BNY on December 7, 2009. BNY immediately filed for foreclosure. As noted, the mortgage

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[1] An FHA (Federal Housing Administration) loan.

[2] Paragraph 9(d) states in whole: "Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit lender's rights, in the case of payment defaults, to require immediate payment in full and foreclosure if not paid. This Security Instrument does not authorize acceleration of foreclosure if not permitted by regulations of the Secretary." Mortgage, 12/20/01, Exhibit "A" of Complaint.

[3] Wells Fargo held the note and provided service for the loan until December 2009.

included language referring to HUD regulations. Those regulations, found in the Code of Federal Regulations, provide for the lender, "before four full monthly installments on the mortgage have become unpaid," to evaluate various loss mitigation techniques to determine which, if any, are appropriate. ***See*** 24 C.F.R. § 203.605. The loss mitigation techniques, found at 24 C.F.R. § 203.501 include, but are not limited to: deeds in lieu of foreclosure, partial claims, special forbearance and recasting mortgages.

Relevant to this appeal, Ellis claims BNY did not properly investigate loss mitigation possibilities. The foreclosure amount sought in the complaint is based upon accelerated amounts that, pursuant to the mortgage note, cannot be claimed without first complying with the HUD regulations. Therefore, the amount claimed has been specifically denied pending discovery.

BNY claims that the HUD regulations are not binding and cannot form the basis of a valid defense against foreclosure. ***See Fleet Real Estate Funding Corp. v. Smith***, 530 A.2d 919 (Pa. Super. 1987). BNY has argued that it has provided all the relevant documentation needed to support its claim and therefore is entitled to summary judgment.

We agree with BNY that the ***Fleet*** decision recognizes that "the HUD Handbook is merely a statement of HUD policy which does not have the force of law and which does not establish procedural prerequisites to foreclosure." ***Id***. at 920.[4] However, ***Fleet***, considers the application of the regulations and states that while the Handbook might not be legally binding, this "did not limit state or federal foreclosure courts from exercising their equitable powers by refusing to grant foreclosures where mortgagees have flagrantly disregarded forbearance provisions of the HUD Handbook." ***Id***. at 923 (internal citation omitted). Pursuant to Pennsylvania case law, the failure to follow the regulations does not provide an absolute defense to foreclosure, but represents an appeal to the equitable powers of the trial court to determine the applicability of those regulations.

In light of the above, we are required to determine whether, in granting summary judgment in favor of BNY, the trial court abused its discretion in refusing to exercise its equitable powers regarding the application of the regulations to this foreclosure.

Generally, an appeal to the equitable powers of the court is committed to the sound discretion of the hearing court and will not be disturbed absent a manifest abuse of that discretion. ***PNC Bank v. Bluestream Technology, Inc.***, 14 A.3d 831, 835 (Pa. Super. 2010).

In ***Fleet***, ***supra***, the trial court granted summary judgment in favor of the bank in a foreclosure action. The mortgagor, Smith, claimed the bank

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[4] The HUD Handbook is the source of the regulations found in the C.F.R. Therefore, references to the handbook are references to the regulations, as well.

had not complied with the forbearance procedures outlined in the Handbook. As in the instant case, the bank claimed the Handbook/regulations do not carry the force of law and so are not defenses to foreclosure. We have already noted that our Court determined the regulations could still form the basis of an equitable defense. Additionally, ***Fleet*** noted, "mortgagees benefit from participation in the HUD program since the risk of loss in cases of default is substantially reduced, if not eliminated. ***See*** 12 U.S.C.A. § 1710. If such mortgagees do not care to abide by HUD forbearance procedures, they should not participate in HUD's mortgage insurance program." ***Id***. at 924. Finally, upon noting Smith's claim that Fleet "had not offered to help her save her home from foreclosure",[5] ***id***. at n.4, this Court reversed the grant of summary judgment finding there were issues of material fact in question.

The language in ***Fleet*** regarding a mortgagee's participation in a HUD program appears to imply a mandatory adherence to the relevant sections of the C.F.R. We have already noted that this is not so. Nonetheless, the level

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[5] This is the only evidence cited in the decision to support Smith's claim that Fleet had not followed the regulations. Ellis has provided similar statements in this matter. We note that Mellon claims that loss mitigation has been attempted, but failed. Mellon cites to the 2005 mortgage modification in support of this assertion. ***See*** Appellee's Brief, at 21. The duty to investigate loss mitigation does not arise until the mortgage is in arrears. ***See*** 24 CFR § 203.605(a). It is unclear how the renegotiation of loan terms, three years prior to missed payments, qualifies as loss mitigation under the federal regulations.

of compliance with the loss mitigation provisions is relevant to our determination of whether the hearing court abused its discretion in releasing the mortgagee from those provisions. Here, the hearing court has made no comment on BNY's compliance, or its decision not to comply, with the loss mitigation regulations. Additionally, there appears to have been minimal discovery regarding the foreclosure proceedings. While it is Ellis' burden to convince the hearing court to exercise its equitable powers, that task is complicated if discovery is not allowed. We agree with the decision in ***Fleet*** that a mortgagee must be, minimally, mindful of the loss mitigation regulations when accepting FHA guaranteed loans. Recognizing that the procedures are not mandatory, the mortgagee must still be prepared to provide information why the procedures were not implemented. Without such information, we do not believe a hearing court can reasonably respond to a plea for equitable consideration.

The hearing court abused its discretion in determining Ellis had not carried her burden and granting summary judgment against her before relevant discovery had taken place. Therefore, we are required to vacate the entry of summary judgment and remand this matter for further proceedings.

Judgment is vacated. Matter remanded for further proceedings consistent with this decision. Jurisdiction relinquished.

Judgment Entered.

Prothonotary
Date: 4/23/2012

2012 PA Super 18

BENEFICIAL CONSUMER DISCOUNT COMPANY D/B/A BENEFICIAL MORTGAGE COMPANY OF PENNSYLVANIA, Appellant v. PAMELA A. VUKMAM, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 259 WDA 2011

Appeal from the Order of January 10, 2011,
in the Court of Common Pleas of Allegheny County,
Civil Division at No. GD-06-024554

BEFORE: MUSMANNO, DONOHUE and COLVILLE*, JJ.

OPINION BY COLVILLE, J.: Filed: January 30, 2012

This is an appeal from an order that sustained Appellee's "Motion to Set Aside Judgment and Sheriff's Sale." We affirm.

The relevant background underlying this matter can be summarized in the following manner. In October of 2006, Appellant filed a complaint in mortgage foreclosure against Appellee. According to the complaint, Appellee owns a home subject to a mortgage for which Appellant is the mortgagee. Appellant averred that Appellee's mortgage was in default due to Appellee's failure to pay her monthly mortgage costs. The parties eventually agreed to settle the matter. In short, the parties agreed to enter a judgment in favor of Appellant for $217,508.81 together with interest. They further agreed

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*Retired Senior Judge assigned to the Superior Court.

that, so long as Appellee made regular payments to Appellant, Appellant would not execute on the judgment. The trial court approved the parties' settlement on May 7, 2009.

On April 5, 2010, Appellant filed an affidavit of default wherein it alleged that Appellee had defaulted on her payment obligations. The following day, Appellant filed a praecipe for writ of execution. On August 2, 2010, the subject property was sold by sheriff's sale; Appellant was the successful bidder.

On August 31, 2010, Appellee filed a document which she entitled "Motion to Set Aside Judgment and Sheriff's Sale." Appellee contended that the trial court lacked subject matter jurisdiction over the matter because Appellant failed to comply with the notice requirements of the Homeowner's Emergency Mortgage Act, 35 P.S. §§ 1680.401c *et seq.* ("Act 91"). More specifically, Appellee maintained that the Act 91 notice she received from Appellant failed to inform her that she had thirty days to have a face-to-face meeting with Appellant. After holding a hearing, the trial court agreed with Appellee that the Act 91 notice was deficient. The court issued an order setting aside the sheriff's sale and the judgment; the order also dismissed Appellant's complaint without prejudice. Appellant timely filed an appeal.[1]

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[1] As to the manner in which we review such orders, our Supreme Court has stated the following:

> A petition to set aside a sheriff sale is governed by our rules of civil procedure which provide that [u]pon petition of any party in interest before delivery of the . . . sheriff's deed to real property,

(Footnote Continued Next Page)

In its brief to this Court, Appellant asks us to consider the following questions:

> A. Did Section 403c of Act 91 require [Appellant] to notify [Appellee] of an option to have a face to face meeting with [Appellant] where both the plain language of the statute and the history of such Act evidence a legislative intention to vest in the Agency the discretion to select which of these options should have been offered to homeowners in the Uniform Notice adopted by the Agency for use by all Lenders under the Act?
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> B. Was not the determination of the Pennsylvania Housing Finance Agency to remove any reference in its model Uniform Act 91 notice to homeowners having a face to face meeting with their lenders reasonable and consistent with the stated purpose and goals of such Act?
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> C. Should not the court below have deferred to the experience and expertise of the Agency in its administration of the Act, and should not the court below have upheld the validity of the Act 91 Notice sent to [Appellee] herein where such notice was entirely consistent with the model Uniform Notice adopted by the Agency for use by all lenders?
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> D. Even if the Act 91 notice should have offered [Appellee] the option of having a face to face meeting with her lender, should the court below have dismissed this action for lack of subject

(Footnote Continued) ———————————

> the court, may upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances. In ***Doherty v. Adal Corp.***, 437 Pa. 109, 261 A.2d 311 (1970) we held that a petition to set aside a sheriff sale is an equitable proceeding, governed by equitable principles. Appellate review of equitable matters is limited to a determination of whether the lower court committed an error of law or abused its discretion.

Marra v. Stocker, 615 A.2d 326, 328 (Pa. 1992) (citations, quotation marks, and footnote omitted).

> matter jurisdiction where [Appellee] had fully exercised her rights under Act 91 and was not in any way prejudiced by such omission?
>
> E. Should not [Appellee] have been estopped from raising any objection to the Act 91 notice provided to her, and should not [Appellee's] objection to such notice have been barred by laches, where [Appellee] admitted to the validity of such notice in discovery and consented to the entry of judgment, and where [Appellee's] objection to such notice was made for the first time after a sheriff's sale had been held almost four (4) years after the commencement of the action?

Appellant's Brief at 3-4.

As an initial matter, we will consider whether the trial court properly entertained the Act 91 notice issue that Appellee presented in her "Motion to Set Aside Judgment and Sheriff's Sale." The trial court determined that, when a mortgagee provides to a mortgagor a deficient Act 91 notice and then files a mortgage foreclosure action, the court lacks subject matter jurisdiction to entertain the action. In its argument to this Court, Appellant raises a number of doctrines, including laches and *res judicata*, in arguing that Appellee untimely presented her Act 91 notice issue. Appellant's Brief at 31-33.

We begin our analysis of this threshold issue by noting the following principles of law.

> The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs.

In re Administrative Order No. 1-MD-2003, 936 A.2d 1, 5 (Pa. 2007) (citation omitted).

> It is the law of this Commonwealth that a judgment may be attacked for lack of jurisdiction at any time, as any such judgment or decree rendered by a court that lacks subject matter or personal jurisdiction is null and void.

Bell v. Kater, 943 A.2d 293, 298 (Pa. Super. 2008) (citation omitted).

Appellee has never questioned the competency of the trial court to entertain mortgage foreclosure actions. Indeed, the Rules of Civil Procedure govern such actions, Pa.R.C.P. 1141 *et seq.*, and save for exceptions that are irrelevant to this matter, the courts of common pleas have unlimited original jurisdiction over all actions and proceedings in this Commonwealth. 42 Pa.C.S.A. § 931(a). Appellee's complaints regarding the deficiencies in the Act 91 notice sound more in the nature of a jurisdictional challenge based upon procedural matters. Procedurally based jurisdictional challenges can be waived. ***See***, ***e.g.***, ***Hauger v. Hauger***, 101 A.2d 632, 633 (Pa. 1954) ("It is the rule that consent or waiver will not confer jurisdiction of the cause of action or subject matter where no jurisdiction exists. However, this rule does not apply to . . . jurisdiction based upon procedural matters, as to which defects can always be waived.") (citation omitted).

However, Appellee correctly highlights that, in the context of discussing subject matter jurisdiction, this Court has concluded, "[T]he notice requirements pertaining to foreclosure proceedings are jurisdictional, and, where applicable, a failure to comply therewith will deprive a court of jurisdiction to act." ***Philadelphia Housing Authority v. Barbour***, 592

A.2d 47, 48 (Pa. Super. 1991) (citation omitted), *affirmed without opinion*, 615 A.2d 339 (Pa. 1992); ***see also***, ***Marra v. Stocker***, 615 A.2d 326 (Pa. 1992) (concluding that, despite the fact that a judgment had been entered in the underlying mortgage foreclosure action, the trial court erred by refusing to set aside a sheriff's sale where the mortgagee failed to provide to the mortgagor the mortgage foreclosure notice required by 41 P.S. § 403). We are bound by these decisions. ***See***, ***e.g.***, ***Commonwealth v. Hull***, 705 A.2d 911, 912 (Pa. Super. 1998) ("It is beyond the power of a panel of the Superior Court to overrule a prior decision of the Superior Court."). For this reason, we conclude that the trial court properly considered whether the pertinent Act 91 notice was deficient.

Moving forward, we note that the parties agree that, at the time relevant to this appeal, Act 91 provided, in pertinent part, as follows:

> **Before any mortgagee may accelerate the maturity of any mortgage obligation covered under this article, commence any legal action including mortgage foreclosure to recover under such obligation, or take possession of any security of the mortgage debtor for such mortgage obligation, such mortgagee shall give the mortgagor notice as described in section 403-C.** [35 P.S. § 1680.403c.] Such notice shall be given in a form and manner prescribed by the [Pennsylvania Housing Finance Agency ("agency")]. Further, no mortgagee may enter judgment by confession pursuant to a note accompanying a mortgage, and may not proceed to enforce such obligation pursuant to applicable rules of civil procedure without giving the notice provided for in this subsection and following the procedures provided for under this article.

35 P.S. § 1680.402c (amended July 8, 2008, effective September 8, 2008) (emphasis added).

> (a) Any mortgagee who desires to foreclose upon a mortgage shall send to such mortgagor at this or her last known address the notice provided in subsection (b): Provided, however, That such mortgagor shall be at least sixty (60) days contractually delinquent in his mortgage payments or be in violation of any other provision of such mortgage.
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> (b)(1) The agency shall prepare a notice which shall include all the information required by this subsection and by section 403 of the act of January 30, 1974 (P.L. 13, No. 6), referred to as the Loan Interest and Protection Law. This notice shall be in plain language and specifically state that the recipient of the notice may qualify for financial assistance under the homeowner's emergency mortgage assistance program. This notice shall contain the telephone number and the address of a local consumer credit counseling agency. This notice shall be in lieu of any other notice required by law. **This notice shall also advise the mortgagor** of his delinquency or other default under the mortgage and **that such mortgagor has thirty (30) days to have a face-to-face meeting with the mortgagee who sent the notice or a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise.**
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> (2) The notice under paragraph (1) must be sent by a mortgagee at least thirty (30) days before the mortgagee:
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> > (i) asks for full payment of any mortgage obligation; or
> >
> > (ii) begins any legal action, including foreclosure, for money due under the mortgage obligation or to take possession of the mortgagor's security.
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> (3) The proposed notice under paragraph (1) shall be published by the agency in the Pennsylvania Bulletin within one hundred twenty (120) days of the effective date of this paragraph. The notice actually adopted for use by the agency shall be promulgated as part of the program guidelines required by [35 P.S. § 1680.401c]. . . .

35 P.S. § 1680.403c (amended July 8, 2008, effective September 8, 2008) (emphasis added).

As to the facts of this case, the parties agree that Appellant sent to Appellee an Act 91 notice and that the notice informed Appellee that she had thirty days to have a face-to-face meeting with a consumer credit counseling agency. They further agree that the Act 91 notice did not inform Appellee that she could meet face-to-face with the mortgagee, *i.e.*, Appellant. The trial court interpreted the language highlighted above to mean that the Act 91 notice sent by Appellant to Appellee had to inform Appellee that she had thirty days either to have a face-to-face meeting with Appellant or to have a face-to-face meeting with a consumer credit counseling agency. Because the Act 91 notice Appellant sent to Appellee failed to inform Appellee that she could meet with Appellant, the trial court concluded that the notice was deficient and that the court thus lacked subject matter jurisdiction to entertain the matter, presumably from the time that Appellant filed its complaint. Consequently, the court set aside the sheriff's sale and the judgment and then dismissed Appellant's complaint without prejudice.

Appellant begins its argument to this Court by documenting the history of Act 91 and its notice requirements. Appellant next challenges the trial court's interpretation of the relevant version of the Act 91 notice provision. According to Appellant, the trial court's interpretation of Section 1680.403c of Act 91 failed to give effect to the word "or." Appellant maintains that the Legislature intended to vest the agency with the discretion to decide whether the notice sent from a mortgagee to a mortgagor should include the option of the mortgagor meeting face-to-face with the mortgagee or the alternate option of the mortgagor meeting face-to-face with a consumer credit counseling agency. Appellant believes that the agency reasonably chose to include in the notice that it promulgated the option of the mortgagor meeting face-to-face with a consumer credit counseling agency. Appellant argues that the trial court failed to give the agency's interpretation and prerogative due deference. Jumping forward a bit in Appellant's brief, Appellant contends that it was entitled to rely on the notice promulgated by the agency. We pause at this point to address these aspects of Appellant's argument.

While there are multiple layers to Appellant's argument, a relatively straightforward statutory construction analysis reveals whether the trial court erred in its interpretation of Act 91. All matters requiring statutory interpretation are guided by the provisions of the Statutory Construction Act, 1 Pa.C.S.A. § 1501 *et seq*.[2] ***Swords v. Harleysville Insurance Companies***, 883 A.2d 562, 567 (Pa. 2005) (citations omitted).

> Under the Statutory Construction Act, the object of all statutory construction is to ascertain and effectuate the General Assembly's intention. 1 Pa.C.S.[A.] § 1921(a). When the words of a statute are clear and free from all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S.[A.] § 1921(b).

Id.

At the time relevant to this matter, Section 1680.402c of Act 91 clearly and unambiguously provided that, before a mortgagee could, *inter alia*,

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[2] As with all questions of law, when we interpret a statute, "our standard of review is *de novo.* Our scope of review, to the extent necessary to resolve the legal question before us, is plenary." ***Swords v. Harleysville Insurance Companies***, 883 A.2d 562, 567 (Pa. 2005).

commence a mortgage foreclosure action against a mortgagor, the mortgagee was required to give the mortgagor a notice as described in Section 1680.403c of Act 91. Pursuant to the plain language employed in Subsection 1680.403c(b)(1), this notice was to, *inter alia*, advise the mortgagor that the mortgagor has thirty days to have a face-to-face meeting with the mortgagee who sent the notice or a consumer credit counseling agency to attempt to resolve the delinquency or default. In other words, Subsection 1680.403c(b)(1) clearly and unambiguously required a mortgagee to provide to a mortgagor notice that the mortgagor had a choice of whether to meet face-to-face with the mortgagee or a consumer credit counseling agency. While Act 91 undeniably empowered the agency to prepare a uniform notice, the Legislature mandated that the notice include **all** of the information outlined by Act 91's notice provision. 35 P.S. § 1680.403c(b)(1) (amended July 8, 2008, effective September 8, 2008) ("The agency shall prepare a notice which shall include all the information required by this subsection . . ..").

Here, the notice that Appellant provided to Appellee failed to inform Appellee that she could choose to meet face-to-face with Appellant. Consequently, the notice was deficient. Yet, such a conclusion does not end our inquiry.

Relying on ***Wells Fargo Bank v. Monroe***, 966 A.2d 1140 (Pa. Super. 2009), Appellant maintains that Appellee was required to prove that she was prejudiced by the deficiency in the Act 91 notice. According to Appellant, Appellee could not meet her burden of proof in this regard because she, in fact, met with Appellant's representatives, which led to the parties entering the agreed upon judgment.

In ***Wells Fargo Bank***, the Monroes defaulted on their mortgage. The mortgage servicer sent to the Monroes an Act 91 notice. Wells Fargo later filed a mortgage foreclosure action against the Monroes. The parties filed competing motions for summary judgment. The Monroes argued, *inter alia*, that the Act 91 notice was deficient. The trial court nonetheless granted summary judgment in favor of Wells Fargo. The Monroes appealed to this Court.

The Monroes' first issue on appeal was "[w]hether the Trial Court erred by requiring the [Monroes] to show the occurrence of prejudice as the result of their receipt of a defective Act 91 Notice from [Wells Fargo?]" ***Wells Fargo Bank***, 966 A.2d at 1142. This Court described the Monroes' argument under this issue as follows:

> Specifically, the Monroes contend that the Act 91 Notice they received "did not identify the Mortgagee, it only identified the Servicer, Countrywide." Monroes' brief at 8. Therefore, they claim that they "did not have the address of the note-holder where they could have sent items pursuant to the Real Estate Settlement Procedures Act or more importantly, a Truth–in–Lending request to rescind their mortgage." ***Id.*** The Monroes further assert that "the Act 91 Notice did not provide a place of cure within Westmoreland County where the property is located, nor did it provide a place of cure within a County contiguous to Westmoreland County" and that it "included additional proscribed costs and fees." ***Id.*** Based upon these identified errors and in addition to them, the Monroes argue that the trial court required them to show that they were prejudiced by the improper notice, a requirement that they claim does not comply with Pennsylvania law. ***Id.*** at 9. Essentially, the Monroes assert

> that if the Act 91 Notice is improper, prejudice should be presumed.

Wells Fargo Bank, 966 A.2d at 1143.

The Court disposed of this argument as follows:

> In response to the Monroes' assertions regarding the Act 91 Notice and the requirement that they show prejudice, we agree with the trial court's conclusion.[FN1] The Monroes received an Act 91 Notice and, even if it was defective, they were given and availed themselves of the opportunity to pursue mortgage assistance through the Pennsylvania Homeowners' Emergency Mortgage Assistance Program. They met with a credit counseling agency within the thirty days as provided by the Act 91 Notice and applied for the mortgage assistance. Moreover, the Monroes have provided no legal authority for their position, nor do they suggest what rights they were due above and beyond those that were afforded to them. ***See*** Pa.R.A.P. 2119; ***Bombar v. West American Ins. Co.,*** 932 A.2d 78, 93 (Pa. Super. 2007) (stating that failure to cite relevant authority may result in waiver of the issue). Accordingly, we conclude that the Monroes' first issue is without merit.
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> > FN1. Specifically, the trial court indicated that any issues regarding fees and costs would be addressed at the accounting which takes place after a sheriff's sale and at the time of distribution of the proceeds. T.C.O. at 3. Moreover, we note as to the assertion that the Act 91 Notice failed to provide a local location at which the mortgagor could cure a default, the Pennsylvania Code indicates that an address to which the cure may be sent by mail is sufficient. ***See*** 10 Pa.Code § 7.2(ii) (definition of "performance"). Here, an address for Countrywide in Dallas, Texas, was provided as the location to which any cure could be mailed. The Monroes did not take advantage of this option.

Wells Fargo Bank, 966 A.2d at 1143-44.

We find ***Wells Fargo Bank*** to be sufficiently distinguishable from the matter *sub judice*, such that the decision in ***Wells Fargo Bank*** has no impact on our decision in this case. As best we can discern, the deficiencies cited by the Monroes, with regard to the Act 91 notice they received, did not implicate Act 91's explicit requirement that the mortgagee's Act 91 notice must inform the mortgagor that the mortgagor can meet face-to-face with the mortgagee or a consumer credit counseling agency. Moreover, unlike in ***Wells Fargo Bank***, there is no failure on the part of the parties to this appeal to provide this Court with pertinent legal authority.

Act 91 contains no language that suggests that an Act 91 notice which fails to advise a mortgagor that the mortgagor can meet with the mortgagee will suffice so long as, during the course of the mortgage foreclosure litigation, the mortgagor cannot prove that he or she was prejudiced by the deficient notice. In fact, Act 91 explicitly states that, before a mortgagee can even commence a mortgage foreclosure action, it must give the mortgagor the notice described in Section 1680.403c; Subsection 1680.403c(b)(1) clearly and unambiguously mandates that the notice must inform a mortgagor, *inter alia*, that the mortgagor can meet face-to-face with the mortgagee.

We conclude that the trial court did not make an error of law or abuse its discretion by sustaining Appellee's "Motion to Set Aside Judgment and Sheriff's Sale." In conjunction with its ruling, the court properly set aside the sheriff's sale, vacated the judgment, and dismissed Appellant's complaint without prejudice. Accordingly, we affirm the court's order.

Order affirmed.

LISA CAVE AND SCOTT CAVE, on behalf of themselves and all others similarly situated v. SAXON MORTGAGE SERVICES, INC. AND OCWEN LOAN SERVICING, LLC

CIVIL ACTION NO. 11-4586

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2012 U.S. Dist. LEXIS 75276

May 30, 2012, Decided
May 30, 2012, Filed

COUNSEL: [*1] For LISA CAVE, SCOTT CAVE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs: ANN MILLER, ANN MILLER, LLC, PHILADELPHIA, PA; ERIC LECHTZIN, TODD S. COLLINS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.

For SAXON MORTGAGE SERVICES, INC., Defendant: JASON R. SCHERR, PRO HAC VICE, BINGHAM MCCUTCHEN LLP, WASHINGTON, DC; JEANETTE VIGGIANO TORTI, PRO HAC VICE, BINGHAM MCCUTCHEN LLP, NEW YORK, NY; RICHARD A. O'HALLORAN, DINSMORE & SHOHL LLP, WAYNE, PA.

For OCWEN LOAN SERVICING, LLC, Defendant: ALEXANDER D. BONO, JAMES L. BEAUSOLEIL, JR., MICHAEL J. LYON, RYAN E. BORNEMAN, DUANE MORRIS LLP, PHILADELPHIA, PA.

JUDGES: John R. Padova, J.

OPINION BY: John R. Padova

OPINION

MEMORANDUM

Padova, J.

Plaintiffs Lisa and Scott Cave bring this proposed class action for breach of contract and other claims arising out of Defendants' failures to permanently modify home mortgage loans after providing homeowners with temporary modifications. Defendant Saxon Mortgage Services, Inc. ("Saxon") has filed a Motion to Dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons that follow, the Motion is granted in part and denied in part.

I. BACKGROUND

A. The Home Affordable Modification Program

In February 2009, **[*2]** the Secretary of the Treasury and the Director of the Federal Housing Finance Agency announced the Making Home Affordable program (the "MHA"), an effort to stem the foreclosure crisis. As part of the MHA, the Home Affordable Modification Program ("HAMP") was created. Under HAMP, borrowers who are struggling to pay their mortgages can apply to their loan servicer for a permanent loan modification to get a reduced monthly payment. Defendants Saxon and Ocwen Loan Servicing, LLC, are loan servicers who entered into agreements with the federal government in which they agreed to comply with HAMP and provide qualifying borrowers with permanent modifications.

After a borrower applies for permanent modification, loan servicers are required under HAMP regulations to determine, based on financial information submitted by the borrower, whether the borrower is eligible for a loan modification which would reduce the borrower's monthly loan payment to 31% of their gross monthly income. [1]

1 Specifically, HAMP requires Defendants to take a specific set of steps, called a "waterfall," to reach the target monthly payment of 31% of income. These steps include capitalizing accrued interest and escrow advances, **[*3]** reducing the interest rate, and providing a principal forbearance. If the application of these steps produces terms that yield the target monthly payment, Defendants must perform the Net Present Value test to determine whether a modified loan agreement is more valuable to the investor than no modification. If the modification is more valuable, Defendants must offer a contract to borrowers. If the modification would be less valuable to the investor, Defendants must send a "Non-Approval" Notice to the borrower and consider the borrower for other foreclosure prevention options. HAMP regulations require that Defendants pre-qualify borrowers for a permanent modification before entering into a trial period contract.

Before a borrower receives a permanent modification, a loan servicer and a borrower enter into a 3-month trial period, during which the borrower makes lower monthly payments towards their mortgage. The terms of the trial period are governed by a form contract entitled "HAMP TPP" (the "TPP"). [2] The TPP states that the Lender will send the borrower a permanent modification agreement if: 1) the borrower's representations of their financial state continue to be true; 2) the borrower **[*4]** complies with the terms of the temporary payment plan; 3) the borrower provides all required documentation; and 4) the Lender determines that the borrower qualifies. The TPP requires that the borrower make three monthly payments of a reduced amount. In the introduction to the TPP, the TPP states that the loan servicer will provide a borrower with a permanent modification if the borrower is qualified, or will send the borrower a written denial if they do not qualify.

2 This agreement is Exhibit A to the Complaint.

Plaintiffs allege, however, that Defendants never intended to provide permanent loan modifications to the majority of applicants. Rather, Defendants routinely failed to meet their obligations under HAMP by, *inter alia*, thwarting implementation of permanent HAMP modifications, keeping inadequate records, failing to disclose accurate information to mortgagors, charging unreasonable fees without explanation, violating federal and state laws, and leaving mortgagors in limbo regarding the status of their loans. Since HAMP's inception through November 2010, loan servicers cancelled roughly 729,000 of the 1.4 million trial modifications started. Saxon put about 40,000 homeowners into **[*5]** trials, but only about 11,000 received a permanent modification. [3]

3 Plaintiffs allege that it was profitable for Saxon to enter into temporary modifications but not offer borrowers permanent modifications. Defendants receive $1,000 from the U.S. Government for each HAMP modification they process, collect fees and interests on mortgages that are past due or in default, and delay loan modifications to collect excessive fees on troubled mortgages. Defendants further profit from "double tracking" mortgagors - initiating foreclosure while still collecting payments pursuant to illusory promises of forbearance, permanent modifications, or a "permanent workout solution." (Compl. ¶ 45.)

B. Plaintiffs' TPP

In August 2009, after incurring unexpected parental medical expenses, Plaintiffs Lisa and Scott Cave applied to Defendant Saxon, their mortgage servicer, for a HAMP mortgage modification. In September 2009, in support of their application, Plaintiffs sent Saxon a package containing all requested financial information and documents, including a Hardship Affidavit. After receiving these documents, Saxon sent Plaintiffs a loan modification package, which included a proposed TPP providing for a trial **[*6]** payment period beginning on September 1, 2009, and ending on November 30, 2009, and a modified monthly payment of $1007.50.

Plaintiffs allege that they were pre-qualified for their TPP on the basis of verified financial information. Plaintiffs accepted Saxon's offer by executing the TPP and promptly returning the signed contract to Saxon. Plaintiffs fully performed all of their obligations under the TPP, including making all payments on time and providing additional copies of previously supplied documents as requested by Saxon.

In April 2010, months after the trial period ended, Plaintiffs attempted to pay school and other taxes on their property, but were informed that these taxes had already been paid. Saxon had never told them that it would pay taxes on the property and that it was escrowing funds for this purpose. Plaintiffs subsequently received from Saxon an Escrow Shortage Statement, dated July 16, 2010. Plaintiffs called Saxon, and a customer service representative told them to disregard the statement, that their loan modification was current, and that they should continue to make the modified monthly payments of $1,007.50.

On October 14, 2010, Plaintiffs received from Saxon an **[*7]** Act 91 Notice which stated that they were past due in the amount of $23,210.64, including late fees, escrow charges, and inspection charges, with respect to the period November 1, 2009, to October 12, 2010. Plaintiffs called Saxon, and three representatives told them that Saxon had removed them from HAMP on April 29, 2010, without notice to them and despite the fact that they had made all payments on time. No representative could explain the reason or basis for Saxon's Act 91 Notice. Defendants claim that they removed Plaintiffs from HAMP on April 29, 2010, because Plaintiffs' monthly housing expense did not exceed 31% of their income.

In accord with the Act 91 Notice, Plaintiffs had a meeting with a certified credit and housing counselor, after which they applied for a Homeowners Emergency Mortgage Assistance Program ("HEMAP") loan through the Commonwealth of Pennsylvania in order to obtain funds to discharge any alleged past due amounts owed to Saxon. Plaintiffs qualified for the HEMAP loan, but did not obtain the loan as a result of Saxon's failure to provide certain required information to the Commonwealth.

By letter dated April 21, 2011, Plaintiffs were advised that the servicing **[*8]** of their mortgage was being transferred from Saxon to Defendant Ocwen, effective May 16, 2011. Ocwen informed Plaintiffs that they would again need to apply for a HAMP modification, and if they did not qualify for HAMP then they would be considered for an in-house modification. Plaintiffs applied to Ocwen for a HAMP modification, which Ocwen denied.

By letter dated June 28, 2011, Ocwen offered Plaintiffs an in-house modification on terms that were significantly worse than the terms of the HAMP modification set forth in the TPP. The Ocwen modification provided for an initial monthly payment of $1,285.39, of which $1,000.02 went to principal and interest payments, and $285.37 to escrow. Upon modification, the annual rate of interest on Plaintiffs' mortgage would be 2% until August 2016, and 4.5% from then until the loan reached maturity. Under the modified terms, even if Plaintiffs made all payments in full and on time, their loan would not be paid in full by the final payment date. Instead, a single balloon payment would be due on December 1, 2035, in an unspecified amount. Plaintiffs were advised that their property was in foreclosure and, fearing that result, accepted the Ocwen in-house **[*9]** modification.

According to the Complaint, Plaintiffs' injuries from Defendants' breach of the TPP and other actions include: payment of increased interest; longer loan payment times; higher principal balances; deterrence from seeking other remedies to address their default and/or unaffordable mortgage payments; damage to their credit; additional income tax liability; and costs and expenses incurred to prevent or fight foreclosure.

Plaintiffs assert the following causes of action: Breach of Contract/Breach of Duty of Good Faith and Fair Dealing (Count I); Promissory Estoppel (Count II); violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count III); violation of Pennsylvania Fair Credit Extension Uniformity Act (Count IV); and violation of the Fair Debt Collection Practices Act (Count V). Defendant Saxon has moved to dismiss all five counts against it, arguing primarily that it had no obligation under the TPP to provide a permanent modification, and that it did not violate the TPP in any way. We held oral argument on May 2, 2012.

II. LEGAL STANDARD

When considering a motion to dismiss pursuant to *Rule 12(b)(6)*, we "consider only the complaint, exhibits attached **[*10]** to the complaint, [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010)* (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993))*. We take the factual allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Phillips v. Cnty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)* (citing *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002))*. Legal conclusions, however, receive no deference, and the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain, 478 U.S. 265, 286 (1986)* (cited with approval in *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))*.

A plaintiff's pleading obligation is to set forth "a short and plain statement of the claim," *Fed. R. Civ. P. 8(a)(2)*, which gives the defendant "'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly, 550 U.S. at 555* (alteration in original) (quoting *Conley v. Gibson, 355 U.S. 41, 47 (1957))*. The "complaint must contain **[*11]** sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)* (quoting *Twombly, 550 U.S. at 570*). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting *Twombly, 550 U.S. at 556*). In the end, we will dismiss a complaint if the factual allegations in the complaint are not sufficient "to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)).

III. DISCUSSION

Saxon argues that the entire Complaint should be dismissed because the TPP was essentially an application for a permanent modification and, as such, contained no enforceable promises. Saxon further argues that it complied with any promises in the TPP, and that all of its actions were authorized by the TPP, by HAMP, or under the terms of Plaintiffs' mortgage. Plaintiffs argue that the TPP is an enforceable contract that required Saxon either to provide them with a permanent loan modification if they **[*12]** qualified for one under HAMP, or to send them a timely written denial if they did not qualify. [4] Plaintiffs also allege, in the alternative, that the TPP contained clear promises that are enforceable under the doctrine of promissory estoppel. Finally, Plaintiffs assert claims under state and federal consumer protection laws arguing that Saxon engaged in deceptive and unfair conduct insofar as it strung them along, charged fees, and obstructed their efforts to obtain financial relief. [5]

4 HAMP and TPPs have been the subject of scores of suits across the country. Initially, plaintiffs attempted to bring claims directly under HAMP or as third-party beneficiaries to the contracts between the federal government and the loan servicers. See *Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 559 n.4 (7th Cir. 2012)* (detailing the history of HAMP and TPP litigation). These suits were mostly unsuccessful, as courts held that there was no private right of action under HAMP and that borrowers were not intended beneficiaries of the contracts between the government and the loan servicers. Id. In another set of cases, plaintiffs brought state law breach of contract claims, alleging that the loan servicers **[*13]** breached the TPP by not offering permanent loan modifications. Id. Cases in which the plaintiffs alleged that the TPP itself was a contract for permanent modification met with little success. See, e.g., Bourdelais v. J.P. Morgan Chase, Civ. A. No. 10-670, 2011 WL 1306311, at *5-6 (E.D. Va. Apr. 1, 2011). However, cases in which plaintiffs argued that the TPP entitled them to either an offer for a permanent modification *or* a written denial have survived motions to dismiss. See, e.g., *Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342, 352 (D. Mass. 2011).* Plaintiffs here have advanced this latter interpretation, arguing that Saxon was required by the terms of the TPP to offer them a permanent modification if they qualified under HAMP Guidelines, or to send them a written denial explaining why they did not qualify.

5 Saxon first argues that HAMP has no private right of action, and thus Plaintiffs' claims fail. Plaintiffs, however, have not brought a claim under HAMP, but rather are trying to enforce only the terms of the TPP. We decline to dismiss Plaintiffs' state law claims solely because HAMP contained no private cause of action. See *Wigod, 673 F.3d at 581-82*. Saxon also argues that **[*14]** Plaintiffs cannot incorporate HAMP guidelines into the terms of the TPP. The extent to which the parties intended HAMP guidelines to be reflected in the terms of the TPP is an issue better left for a later stage in the litigation.

A. Breach of Contract (Count I)

Under Pennsylvania law, a plaintiff asserting a breach of contract claim must allege "'(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages.'" *Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003)* (alteration in original) (quoting *CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)).*

1. Existence of a Contract

Saxon argues that Plaintiffs' breach of contract claim fails to state a claim upon which relief may be granted because the TPP was part of the application process for a permanent modification, was not itself a contract for a permanent modification, and did not require Saxon to offer a permanent modification under any circumstances. Plaintiffs counter that the TPP was an enforceable contract that obligated Saxon to either 1) offer them a permanent modification if they qualified, or 2) send them a timely written **[*15]** denial if they did not qualify. [6]

6 Plaintiffs argue in the alternative that, by the terms of the TPP, whether they qualified for permanent modification was determined *before* they entered into the TPP, and that by sending Plaintiffs a signed copy of the TPP, Saxon necessarily had already determined that Plaintiffs qualified for permanent modification. This is how the Seventh Circuit interpreted the TPP at issue in *Wigod, 673 F.3d at 563*.

However, as Saxon points out, the TPP in our case contains language not in the Wigod TPP, which indicates that whether Plaintiffs qualified was still to be determined. For example, Plaintiffs' TPP states in Section 2.G that "the Lender will not be obligated or bound to make any modification of the Loan Documents if the Lender determines that I do not qualify." Similarly, Section 3 states, "[i]f . . . the Lender determines that I qualify, the Lender will send me a Modification Agreement."

This language makes the TPP in our case materially different from the TPP in Wigod, and belies Plaintiffs' argument that merely by entering into the TPP with them, Saxon had necessarily determined already that Plaintiffs qualified for permanent modification. The provisions **[*16]** in Section 2.G and Section 3 show that Saxon still had to determine whether the Plaintiffs qualified for permanent modification.

The introductory sentence of the TPP states, "If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement ("Modification Agreement"), as set forth in Section 3." (TPP Intro.) Later in the TPP, this apparent promise to provide a permanent modification is conditioned on whether Plaintiffs qualified for permanent modification:

> I understand that after I sign and return two copies of this Plan to the Lender, the lender will send me a signed copy of this Plan, if I qualify for the Offer, or will send me written notice that I do not qualify for the Offer. This Plan will not take effect unless and until both I and the Lender sign it and the Lender provides me with a copy of this Plan with the Lender's signature.

(TPP Intro. (emphasis added).) In the body of the TPP, all of the conditions precedent required to trigger Saxon's obligation to provide a permanent modification are set forth:

> If (1) my representations **[*17]** in Section 1 were and continue to be true in all material respects; (2) I comply with all the requirements in Section 2; (3) I provide the Lender with all required information and documentation; and (4) the Lender determines that I qualify, the Lender will send me a Modification Agreement for my signature . . . .

(TPP § 3.) We therefore conclude that the TPP contains a clear promise that Saxon will provide Plaintiffs with a permanent modification if several conditions precedent are met. However, it is clear that Saxon was only obligated to provide a permanent modification if Plaintiffs qualified.

Saxon argues that the TPP cannot be interpreted as containing any promise for a permanent modification, whether Plaintiffs qualified or not. Saxon relies on Sections 2.F and 2.G of the TPP, which state that there will be no permanent modification if "the Lender does not provide me a fully executed copy of the Plan and the Modification Agreement," (TPP § 2.F), and that there will be no permanent modification unless Plaintiffs "receive a fully executed copy of the Modification Agreement," (TPP § 2.G). [7] Saxon argues that these provisions show that Saxon was not bound to provide Plaintiffs with **[*18]** a permanent modification under any circumstances, as Saxon had the power to trigger -- or not trigger -- what was essentially a condition precedent to a permanent modification: Plaintiffs' receipt of a final executed copy of a permanent modification contract.

7 Section 2.F of the TPP states:

> If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of the Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; (iii) the Lender determines that any of my representations in Section 1 were not true and correct as of the date I signed this Plan or are no longer true and correct during the Trial Period; or (iv) I do not provide all information and documentation required by the Lender, the Loan Documents will not be modified and this Plan will terminate. . . .
>
> (TPP § 2.F.)

Similarly, Section 2.G states that "the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed." (TPP § 2.G.)

We reject Saxon's interpretation **[*19]** of these provisions. First, these provisions, rather than giving Saxon unfettered discretion as to its obligations under the TPP, simply set forth reasons why the permanent modification *would not occur automatically* upon the expiration of the three-month trial period. One such reason is because Saxon had not sent Plaintiffs a contract for permanent modification. Accord *Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 563 (7th Cir. 2012)* (stating that the "more natural interpretation is to read the provision as saying that no permanent modification *existed*" until the loan servicer sent to the plaintiff the contract for permanent modification, and that this provision did not affect the loan servicer's obligation to provide this contract).

Second, Saxon's interpretation contradicts other provisions in the TPP that unequivocally state that Saxon will provide a permanent modification if Plaintiffs qualify and other conditions are met. Saxon's interpretation of the select portions of Sections 2.F and 2.G "conflicts with the clear tenor of the remainder of the document and would render the other agreement promises illusory." Gaudin v. Saxon Mortg. Servs., Inc., Civ. A. No. 11-1663, 2011 WL 5825144, at *4 (N.D. Cal. Nov. 17, 2011) **[*20]** (denying Saxon's motion to dismiss); see also *Wigod, 673 F.3d at 563* ("Wells Fargo's proposed reading of Section 2 would nullify other express provisions of the TPP Agreement.").

Saxon offers two further arguments for why the TPP was not a binding contract: 1) it lacked material terms, and 2) it lacked consideration. First, Saxon argues that the TPP lacked material terms and thus would be, at most, an unenforceable agreement to agree. Saxon argues that the TPP did not include terms for a permanently modified loan, such as the principal amount of the modified loan, the loan's duration, and the interest rate, and it maintains that such terms are necessary to have an enforceable loan contract. However, Plaintiffs do not argue that the TPP itself was the contract for a permanent modification, so Saxon's argument misses the mark. See *Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342, 352 (D. Mass. 2011)* (rejecting defendant's argument that TPP is unenforceable because it lacks terms such as repayment dates, repayment amounts and interest rate, because "plaintiffs' theory is that the TPP is a contract governing the three-month trial period . . . [and the TPP] does establish clear terms **[*21]** with respect to the modified payments during the three-month period"). Moreover, at oral argument, Saxon appeared to acknowledge that the HAMP Guidelines provided the means to determine these terms, should Plaintiffs qualify for a permanent modification. Cf. *Wigod, 673 F.3d at 565* (finding that HAMP provided the means to fill in the terms for permanent modification). Accordingly, we reject Saxon's argument that the TPP is missing material terms.

Saxon also argues that the TPP lacked consideration and, thus, is not an enforceable contract. Consideration is, of course, a requirement for an enforceable contract. *Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291, 299 (3d Cir. 1986)* (citations omitted). "Consideration 'confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance, or return promise bargained for and given in exchange for the original promise.'" Id. (quoting *Curry v. Estate of Thompson, 481 A.2d 658, 661 (Pa. Super. Ct. 1984))*.

Plaintiffs argue that the TPP required the Plaintiffs to make modified loan payments, provide extensive financial information that was not required under their original mortgage; make **[*22]** representations in a hardship affidavit concerning their personal circumstances; make payments into newly established escrow accounts; and undergo credit counseling at Saxon's request. Plaintiffs further argue that, by making lower payments, they exposed themselves to the potential of late fees and other penalties should their application for permanent modification be rejected. All of these promises and actions, Plaintiffs argue, constitute consideration.

We conclude that Plaintiffs' promise in the TPP to undergo credit counseling if Saxon so requested was consideration for Saxon's return promises. (TPP § 1.F.) Indeed, undergoing credit counseling confers both a benefit to Saxon and a detriment to Plaintiffs. It is a benefit to Saxon because, once Plaintiffs have undergone counseling, they might be in a better position to manage their finances and continue making their mortgage payments, i.e., to continue paying Saxon, as opposed to defaulting on their loan. It is a detriment to Plaintiffs because it takes time and money to undergo credit counseling. Accordingly, the promise to undergo credit counseling upon request of Saxon constitutes consideration for Saxon's promise to provide Plaintiffs **[*23]** with a permanent loan modification or a timely denial. [8] See *Wigod, 673 F.3d at 564* (finding consideration in the plaintiff's agreement to "open new escrow accounts, to undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information"); see also *Fletcher v. OneWest Bank, FSB, 798 F. Supp. 2d 925, 931-32 (N.D. Ill. 2011)* (rejecting defendant's argument that lower monthly payments were a windfall to plaintiff, because plaintiff "suffered some detriment" by incurring fees and likely having to pay a higher total amount in the long run).

8 We therefore need not reach Saxon's arguments that the other alleged promises cannot constitute consideration. See *Antkowiak v. TaxMasters, 455 F. App'x 156, 161 n.9 (3d Cir. 2011)* (stating that only slightly more than a "mere peppercorn" is required for consideration).

Accordingly, we conclude that the TPP is an enforceable contract. Under its plain terms, the TPP obligated Saxon to provide Plaintiffs with a permanent loan modification if Plaintiffs qualified, or send Plaintiffs a written denial if they did not qualify.

2. Breach

Saxon argues that Plaintiffs have failed to state a breach of contract claim upon which **[*24]** relief may be granted because Plaintiffs do not allege that they qualified for a permanent modification, and because Saxon eventually sent Plaintiffs a written denial explaining why they did not qualify. Saxon therefore argues that, even accepting all of the allegations in the Complaint as true, it is apparent that it satisfied its obligations under the TPP. Saxon further argues that Plaintiffs have not plausibly alleged that it breached the implied covenant of good faith and fair dealing.

We do not agree that Plaintiffs have failed to allege that they qualified for a permanent modification. Admittedly, the Complaint does not contain any explicit allegation that Plaintiffs qualified for permanent modification under HAMP's Guidelines. The Complaint does, however, generally allege that Plaintiffs satisfied all conditions precedent under the TPP. (Compl. ¶¶ 57, 60, 94.) As Saxon acknowledges, whether Plaintiffs qualified was a condition precedent to permanent modification, and under the Federal Rules of Civil Procedure, it is sufficient for a plaintiff to allege generally that all conditions precedent were satisfied. See *Fed. R. Civ. P. 9(c)*. Moreover, the Complaint as a whole would not **[*25]** make any sense if Plaintiffs were not alleging that they were qualified. The Complaint alleges numerous times that Saxon breached the TPP by not offering Plaintiffs a permanent modification which, as discussed, would only be the case if Plaintiffs qualified. (E.g. Compl. ¶¶ 59, 93.) Accordingly, we find that the Complaint alleges that Saxon breached the TPP by not offering Plaintiffs a permanent modification.

We also find that the Complaint plausibly alleges in the alternative that, even if Plaintiffs were not qualified for permanent modification, Saxon breached the TPP because it did not send Plaintiffs a timely written denial explaining why they did not qualify. The Complaint only alleges that Plaintiffs were informed over the telephone that they did not qualify for permanent modification; there are no allegations about any written denial from Saxon. Accordingly, we conclude that the Complaint adequately alleges, in the alternative, that Saxon breached the TPP by not sending a written denial if Plaintiffs did not qualify for permanent modification.

Saxon asserts that it did send Plaintiffs a written denial, and attaches to its Motion a copy of a November 2010 letter addressed to Plaintiffs **[*26]** denying Plaintiffs' request for a permanent modification and explaining why they did not qualify. Saxon argues that, even though this notice was sent over a year after Plaintiffs entered into the TPP in September 2009, it satisfied Saxon's requirement to provide written notice. This letter, however, cannot be considered on a Motion to Dismiss, as it was not attached to the Complaint and it is not a public record or an undisputedly authentic document on which the Complaint is based. See *Mayer, 605 F.3d at 230* (citation omitted). Quite to the contrary, Plaintiffs stated at oral argument that they never received this letter. Accordingly, we will not consider at this time whether this letter satisfied Saxon's obligations to send written notice to Plaintiffs and we need not address the potentially crucial question of *when* written notice had to be sent to Plaintiffs. We therefore conclude that Plaintiffs have plausibly alleged that Saxon breached the express terms of the TPP.

Plaintiffs also assert that Saxon breached the implied covenant of good faith and fair dealing by acting in bad faith with respect to fulfilling its obligations under the TPP. Saxon argues that Plaintiffs are improperly **[*27]** attempting to use the implied covenant of good faith and fair dealing to read into the TPP an unconditional promise to provide them with a permanent modification and a promise to comply with HAMP regulations.

Under Pennsylvania law, "'[e]very contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.'" *Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 722 (Pa. Super. Ct. 1996)* (quoting *Restatement (Second) of Contracts § 205*). Bad faith includes: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992)* (citing *Restatement (Second) of Contracts § 205(d)*).

Plaintiffs argue that Saxon acted in bad faith by not diligently determining whether they qualified and delaying further in informing them that they did not qualify. Plaintiffs allege that Saxon acted in bad faith to cause this delay, by failing to hire sufficient staff and by failing to accurately respond to their inquiries. Plaintiffs further argue **[*28]** that Saxon has misunderstood their claim for breach of this implied covenant, as they are not arguing that the implied covenant obligated Saxon to provide them with a permanent modification or comply with other HAMP provisions. We conclude that Plaintiffs have plausibly alleged that Saxon breached its implied duty to perform its TPP obligations in a diligent fashion by not informing them that they did not qualify for a permanent modification until over a year after Plaintiffs applied for a permanent modification, and months after actually determining that Plaintiffs did not qualify. Indeed, as the TPP contains no express provision stating when Saxon had to send a written denial, the implied covenant of good faith and fair dealing may ultimately be the only aspect of the TPP that Saxon breached.

Accordingly, we find that the Complaint plausibly alleges that Saxon breached the TPP and we reject Saxon's arguments to the contrary.

3. Damages

Finally, Saxon argues that Plaintiffs have not alleged plausible or non-speculative damages, and therefore the breach of contract claim must be dismissed. Plaintiffs' alleged damages are: "payment of increased interest, longer loan payoff times, higher **[*29]** principle [sic] balances, deterrence from seeking other remedies to address their default and/or unaffordable mortgage payments, damage to their credit, additional income tax liability, costs and expenses incurred to prevent or fight foreclosure, and other damages for breach of contract." (Compl. ¶ 95.)

Plaintiffs allege that Saxon was obligated to send them a contract for permanent modification and that the loan modification they eventually received from Ocwen contained less favorable terms than a HAMP modification. Alternatively, they allege that Saxon should have informed them sooner that they would not be receiving a HAMP modification, and allege that they forewent other opportunities and incurred unnecessary fees and expenses while waiting to hear from Saxon. We conclude that these allegations satisfy Plaintiffs' burden of alleging that Saxon's breach resulted in damages. See Belyea v. Litton Loan Servicing, LLP, Civ. A. No. 10-10931, 2011 WL 2884964, at *9 (D. Mass. July 15, 2011) (stating that the plaintiff plausibly alleged damages for breach of a TPP "in terms of accrued . . . fees and charges in the period during which [defendant] allegedly should have tendered a permanent **[*30]** loan modification or at least a decision, and in terms of relief foregone by the Plaintiffs during that same period.").

Accordingly, we conclude that Plaintiffs have plausibly alleged that the TPP was an enforceable contract, that Saxon breached the TPP, and that Plaintiffs were damaged by that breach. Therefore, Saxon's Motion to Dismiss is denied as to Count I, the breach of contract claim.

B. Promissory Estoppel (Count II)

In Count II of the Complaint, the promissory estoppel count, Plaintiffs assert that the TPP, even if not a binding contract, contains an enforceable promise to either provide them with a permanent modification or send them a written denial. Under Pennsylvania law, a promissory estoppel claim requires Plaintiffs to allege that: 1) Saxon made a promise that it should have reasonably expected to induce action or forbearance on the part of Plaintiffs; 2) Plaintiffs actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise. See *Edwards v. Wyatt, 335 F.3d 261, 277 (3d Cir. 2003)* (citing *Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000))*.

Saxon's arguments for dismissal of the promissory **[*31]** estoppel claim echo its arguments for dismissal of the breach of contract claim; namely, it argues that the TPP was just an application for a permanent modification and did not contain the promises that Plaintiffs allege it containted. Saxon acknowledged at oral argument that, if we deny its Motion to Dismiss as to the breach of contract claim, it necessarily follows that we deny the Motion as to the promissory estoppel claim. Having refused to dismiss the contract claim, we therefore deny Saxon's Motion to Dismiss as to Count II. See *Fletcher, 798 F. Supp. 2d at 932-33* (finding that plaintiff had stated a promissory estoppel claim based on a TPP, and that this "claim is actually stronger [than the contract claim] because it is not clear from the TPP that [defendant] promised an answer to [plaintiff's] application by any date certain"); see also *Wigod, 673 F.3d at 566* (finding that plaintiff adequately alleged claim for promissory estoppel in addition to claim for breach of the TPP).

C. Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count III)

Plaintiffs allege that Saxon violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law (the "UTPCPL") by: **[*32]** 1) misrepresenting to them the status of their loan modification application and informing them to continue to make modified payments despite having already determined that they did not qualify under HAMP; 2) charging late fees during the time period when Plaintiffs made the lower payments; and 3) failing to provide the Commonwealth with the information needed for Plaintiffs to get a HEMAP loan.

The UTPCPL, in its catchall provision, bars engaging in "fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" in the conduct of trade or commerce. *73 Pa. Stat. Ann. § 201-2(4)(xxi)*; *Toy v. Metro. Life Ins. Co., 928 A.2d 186, 190 n.4 (Pa. 2007)*. To state a claim under the UTPCPL, a plaintiff must allege that he "'justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of the reliance.'" Molley v. Five Town Chrysler, Inc., Civ. A. No. 07-5415, 2009 WL 440292, at *2 (E.D. Pa. Feb. 18, 2009) (quoting *Hunt v. U.S. Tobacco Co., 538 F.3d 217, 222 (3d Cir. 2008))*. A plaintiff may allege deception, as opposed to common law fraud, to set forth an actionable claim under the UTPCPL. *Flores v. Shapiro, 246 F. Supp. 2d 427, 432 (E.D. Pa. 2002)*.

Saxon **[*33]** first argues that the UTPCPL claim should be dismissed because Plaintiffs have not alleged a deceptive act, insofar as charging them late fees and denying a permanent modification was wholly consistent with the terms of the TPP and Plaintiffs' mortgage. However, Saxon has ignored the allegations relating to Saxon's statements that Plaintiffs were still in the HAMP program and should continue to make modified payments, even though Saxon had already decided against offering a permanent modification. Moreover, Plaintiffs have alleged that Saxon failed to provide the Commonwealth with necessary documents and that this failure prevented Plaintiffs from obtaining a loan under HEMAP. We find that these allegations plausibly allege that Saxon committed a deceptive or fraudulent act. See *Wallace v. Pastore, 742 A.2d 1090, 1093 (Pa. Super. Ct. 1999)* (citation omitted) ("The UTPCPL must be liberally construed to effect the law's purpose of protecting consumers from unfair or deceptive business practices.").

Saxon next argues that Plaintiffs' claim under UTPCPL is barred by the economic loss doctrine because Plaintiffs have not alleged damages under the UTPCPL claim that are distinct from the breach **[*34]** of contract claim. The economic loss doctrine "'prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract.'" *Werwinski v. Ford Motor Co., 286 F.3d 661, 671 (3d Cir. 2002)* (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995)).* "Like the gist of the action doctrine, the economic loss doctrine is designed to 'maintain[] the separate spheres of the law of contract and tort.'" Kimberton Healthcare Consulting, Inc. v. Primary PhysicianCare, Inc., Civ. A. No. 11-4568, 2011 WL 6046923, at *7 (E.D. Pa. Dec. 6, 2011) (quoting *Duquesne Light Co., 66 F.3d at 620*). [9] Under the economic loss doctrine, "a plaintiff should be limited to a contract claim 'when loss of the benefit of a bargain is the plaintiff's sole loss.'" *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3d Cir. 2001)* (quoting *Duquesne Light Co., 66 F.3d at 618*).

9 The overlap between the economic loss doctrine and the gist of the action doctrine is substantial. "The distinction between the gist of the action and economic loss doctrines is largely one of pedigree. The economic loss doctrine 'developed in the context of **[*35]** courts' precluding products liability tort claims in cases where one party contracts for a product with another party and the product malfunctions, injuring only the product itself.'" Kimberton Healthcare, 2011 WL 6046923, at *7 (quoting *Bohler-Uddeholm America, 247 F.3d at 104 n.11*). The economic loss doctrine applies to claims under the UTPCPL. *Werwinski, 286 F.3d at 681*. In contrast, the gist of the action doctrine does not appear to apply to UTPCPL claims. See Clark v. EMC Mortg. Corp., Civ. A. No. 08-1409, 2009 WL 229761, at *6 (E.D. Pa. Jan. 29, 2009) (finding no case law to support the application of the gist of the action doctrine to the UTPCPL).

As we have explained,

> Like the gist of the action doctrine, the rationale of the economic loss rule is that tort law is not intended to compensate parties for losses suffered as result of a breach of duties assumed only by agreement. [*Sun Co. v. Badger Design & Constructors, Inc., 939 F.Supp. 365, 371 (E.D. Pa. 1996)]*. Compensation in such cases requires an analysis of damages which were in the contemplation of the parties at the origination of the agreement, an analysis within the sole purview of contract law. The policy consideration **[*36]** underlying tort law is the protection of persons and property from loss resulting from injury, while the policy consideration underlying contract law is the protection of bargained for expectations. Thus in the light of these distinctions, to recover in tort a plaintiff must allege facts showing a breach of some duty imposed by law, rather than the parties' contract. In other words, there must be a showing of harm that is distinct from the disappointed expectations evolving solely from an agreement. Id. (citing Auger v. The Stouffer Corp., No. 93-2529,1993 WL 364622 at *2 (E.D. Pa. August 31,1993)).

Sunburst Paper, LLC v. Keating Fibre Int'l, Inc., Civ. A. No. 06-3959, 2006 WL 3097771, at *3 n.3 (E.D. Pa. Oct. 30, 2006) (emphasis added).

Saxon argues that Plaintiffs have not alleged that they suffered any damages distinct from those arising from the breach of contract claim, and thus the economic loss doctrine bars the UTPCPL claim. Plaintiffs argue that 1) the economic loss doctrine applies only in cases in which a product is damaged, such as products liabilities cases, and 2) even if the economic loss doctrine does apply, they have alleged damages under the UTPCPL claim that are distinct **[*37]** from those under the breach of contract claim.

We do not agree that the economic loss doctrine applies only in products liability cases. To the contrary, the economic loss doctrine has been extended beyond the context of the product liability cases in which it arose, notably to cases involving fraudulent representations concerning a party's performance of a service contract. See Ferki v. Wells Fargo Bank, N.A., Civ. A. No. 10-2756, 2010 WL 5174406, at *10 (E.D. Pa. Dec. 20, 2010); *Sun Co., 939 F. Supp. at 372*. Thus, we reject Plaintiffs' first argument.

To resolve Plaintiffs' second argument, we must consider whether Plaintiffs have alleged "a showing of harm that is distinct from the disappointed expectations evolving solely from an agreement." Sunburst Paper, 2006 WL 3097771, at *3 n.3 (citation omitted). At the same time, we must exercise "caution . . . in dismissing a tort action on a motion to dismiss because whether tort and contract claims are separate and distinct can be a factually intensive inquiry." Haymond v. Lundy, Civ. A. Nos. 99-5015, 99-5048, 2000 WL 804432, at *8 (E.D. Pa. June 22, 2000) (citations omitted); see also Kimberton Healthcare, 2011 WL 6046923, at *7-8 (declining **[*38]** to determine whether gist of action and economic loss doctrine bar a claim when deciding a motion to dismiss). We cannot, based solely on the Complaint, find that Plaintiffs have not suffered damages as a result of Saxon's alleged deceptive conduct that are distinct from any breach of the TPP. At the minimum, Plaintiffs have alleged that Saxon failed to provide the paperwork that Plaintiffs needed to get a HEMAP loan, and any damages that flowed from Plaintiffs' inability to get a HEMAP loan are likely different than the damages from Saxon's failure to perform its obligations under the TPP. We therefore decline, at this time, to conclude that Plaintiffs' UTPCPL claim is barred by the economic loss doctrine. Saxon's Motion to Dismiss is thus denied with respect to Count III.

D. Pennsylvania Fair Credit Extension Uniformity Act (Count IV) and Fair Debt Collection Practices Act (Count V)

The Fair Debt Collection Practices Act ("FDCPA") and its state analog, the Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA"), both bar debt collectors from engaging in unfair debt collection practices. Saxon argues that both of these claims should be dismissed because mortgage servicers who begin **[*39]** servicing a loan before it goes into default are exempt from liability under both acts. See *Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985)* ("The legislative history of [the FDCPA] indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." (citations omitted)); see also *73 Pa. Cons. Stat. Ann. § 2270.3* (stating that an entity that begins servicing a loan before it goes into default is not liable under the FCEUA). In this case, the Complaint alleges that Saxon was the original mortgage servicer for Plaintiffs, indicating that Saxon was servicing Plaintiffs' mortgage before it went into default. At oral argument, Plaintiffs agreed that their claims against Saxon under the FCEUA and the FDCPA should be dismissed on that basis. Accordingly, we grant Saxon's Motion as to Counts IV and V and dismiss those claims against Saxon. [10]

> 10 Plaintiffs requested leave to amend in the event we dismiss any of their claims. However, given that Plaintiffs conceded that they cannot state a claim against Saxon under the FCEUA and the FDCPA, **[*40]** the only claims we are dismissing, no amendment is warranted.

IV. CONCLUSION

For the foregoing reasons, Saxon's Motion to Dismiss is denied in part and granted in part. The Motion is denied as to Counts I, II, and III. The Motion is granted as to Counts IV and V, and those counts are dismissed insofar as they assert claims against Saxon. Saxon shall have 20 days from the date of this Memorandum to file an answer to Plaintiffs' Complaint. An appropriate Order follows.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

ORDER

AND NOW, this 30th day of May, 2012, upon consideration of Defendant Saxon Mortgage Services, Inc's ("Saxon") Motion to Dismiss (Docket No. 22), and all documents filed in connection thereto, and after a hearing on the Motion on May 2, 2012, for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** that the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. The Motion to Dismiss is **DENIED** as to Counts I, II, and III.

2. The Motion is **GRANTED** as to Counts IV and V, and Counts IV and V are **DISMISSED** as against Saxon only.

3. Saxon shall file an answer to the Complaint within 20 days of the date of this Order.

BY THE COURT:

/s/ John R. Padova

John **[*41]** R. Padova, J.

Court of Common Pleas of Pennsylvania.
Lackawanna County
Colleen HEALEY and Paul Healey, Plaintiffs,
v.
Wells FARGO, N.A., Defendant.
No. 11 CV 3340.
March 20, 2012.

Memorandum and Order

Terrence R. Nealon, J.
CIVIL ACTION - LAW

NEALON, J.

The defendant lender's preliminary objections raise an issue of apparent first impression in Pennsylvania: whether borrowers, who participate in a Trial Period Plan (TPP) under the Home Affordable Modification Program (RAMP) and fulfill their contractual obligations under the TPP agreement that they executed with their lender, may sue their lender for breach of contract and tortious conduct if they are not offered a permanent loan modification agreement following their successful completion of the trial program? Although HAMP does not create a private federal right of action for borrowers, the language of the parties' TPP agreement arguably obligated the lender to offer the borrowers a permanent loan modification once they made their required trial period payments and satisfied their other obligations under the TPP contract. Since the borrowers have alleged that the lender breached the parties' agreement by failing to offer a permanent loan modification after the borrowers discharged their contractual duties, and that the borrowers have sustained damages as a result, they have stated a cause of action for breach of contract and the lender's demurrer to the borrowers' contract claim will be overruled.

However, for the reasons set forth below, the borrowers' fraud in the inducement claim is precluded by the parol evidence rule and the female plaintiffs claim for negligent infliction of emotional distress is barred by the gist of the action doctrine which also bars the borrowers' fraudulent and negligent misrepresentation claims to the extent that they relate to the lender's performance of duties under the parties' contract. Additionally, the borrowers' independent cause of action for breach of the implied covenant of good faith and fair dealing is subsumed in their breach of contract claim. In all other respects, the preliminary objections to the borrowers' fraud and promissory estoppel claims and their cause of action based upon the Unfair Trade Practices and Consumer Protection Law will be overruled.

I. FACTUAL BACKGROUND

Plaintiffs Colleen Healey and Paul Healey ("the Healeys") allege that they refinanced their home mortgage loan through Defendant Wells Fargo, N.A. ("Wells Fargo") in 2001 and timely made all monthly mortgage payments through August 2009.[FN1] (Docket Entry No. 10, ¶¶4, 10-11). In August 2009, Plaintiff Colleen Healey was required "to take a medical leave from her job," as a result of which the Healeys experienced.a twenty five percent decrease in their monthly income. (*Id.*, ¶13). The Healeys contacted "Wells Fargo to inquire whether they would be able to temporarily lower their mortgage payments during Plaintiff Colleen Healey's disability leave from work” and were advised by Wells Fargo's customer service representative “to write a hardship letter.” (*Id.*, ¶¶14-15). The Healeys faxed a letter to the “Wells Fargo Loss and Mitigation Department” on August 11, 2009 stating that “as of 8/10/09 Colleen [Healey] has taken a medical disability leave from work due to health issues... for up to 16 weeks,” resulting in a “25% reduction” in the Healeys' monthly income. (*Id.*, ¶16, Exhibit A). The Healeys expressly “inquire[d] as to what might be available in terms of assisting with our monthly payment on our mortgage for the next several months.” (*Id.*). In connection with that request, the Healeys also provided an itemization of their “monthly living expenses.” (*Id.*)

FN1. When considering preliminary objections in the nature of a demurrer, all well-pleaded facts and any reasonable inferences deducible from those facts must be accepted as true. *Toney v. Chester County Hospital*, 36 A.3d 83, 99-100 (Pa. 2011).

On August 21, 2009, the Healeys “received a letter from Wells Fargo asking for updated proof of income, a hardship letter, and financial worksheet,” and the Healeys forwarded the requested documentation to Wells Fargo “in late August.” (*Id.*, ¶17). The Healeys received another letter from Wells Fargo on September 8, 2009 again requesting “a financial worksheet, tax return, proof of income and hardship explanation,” and the Healeys “promptly sent the aforesaid documents.” (*Id.*, ¶18). By letter dated September 14, 2009, Wells Fargo informed the Healeys that they had been entered “into a Home Affordable Modification Trial Period Plan.” (*Id.*, ¶19, Exhibit B).

On October 6, 2009, Wells Fargo's Senior Vice-President, Ben Windust, forwarded a letter to the Healeys advising them that Wells Fargo had “pre-qualified [the Healeys] for a loan modification program and mailed [the Healeys] a package of materials including a loan modification agreement” for their signature. (*Id.*, ¶20, Exhibit C). Section 2 of the “Home Affordable Modification Program Loan Trial Period Plan” agreement that was later delivered to the Healeys required them to make three loan trial period payments of $2,567.79 on October 1, 2009, November 1, 2009 and December 1, 2009. (*Id.*, Exhibit D, §2). Section 1 of that Trial Period Plan (“TPP”) agreement entitled “My Representations” obligated the Healeys to represent to Wells Fargo that: (a) they were unable to afford their regular mortgage payments for the reasons stated in their hardship affidavit; (b) the mortgaged property was their principal residence and had not been condemned; (c) there was no change in the ownership of that property; (d) they had provided documentation for their income; (e) the financial documents and information they provided were true and correct; (f) they would obtain credit counseling if Wells Fargo required them to do so; and (g) they would notify Wells Fargo if they were discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the loan documents. (*Id.*, § 1). More importantly, the TPP contract specifically stated that “[i]f I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then [Wells Fargo] *will* provide me with a Loan Modification Agreement, as set forth in Section 3....” (*Id.*, p. 1) (emphasis added). Section 3 of the TPP agreement similarly states that “[i]f I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, [Wells Fargo] *will* send me a Modification Agreement for my signature which *will* modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accrued to date.” (*Id.*, §3) (emphasis added).

The Healeys executed and returned the TPP contract to Wells Fargo on October 21, 2009. (*Id.*, ¶21, Exhibit D at p. 3). The Healeys made the prescribed monthly payments on October 1, 2009, November 1, 2009 and December 1, 2009 in compliance with the TPP agreement. (*Id.*, ¶¶25-26). They also promptly provided Wells Fargo with any documentation it requested, often furnishing duplicate copies of those materials after Wells Fargo “lost or misplaced those documents." (*Id.,* ¶23).

"In December 2009, [the Healeys] contacted the Defendant Wells Fargo to inquire when they would receive their permanent loan modification and whether they should pay their original mortgage rate in January 2010 or the amount specified [$2,567.79] in the [trial] Loan Modification Agreement." (*Id.,* ¶27). Wells Fargo advised the Healeys to continue making monthly payments in the amount specified in the TPP agreement, and the Healeys proceeded to make those same monthly mortgage payments which were accepted by Wells Fargo "without notice of rejection and without qualification." (*Id.,* ¶¶28-29). Wells Fargo's representative executed the TPP contract on December 28, 2009 after Wells Fargo had received the Healeys' three trial period payments. (*Id.,* p. 3).

The second introductory paragraph of the TPP contract states that "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan *if I qualify for the Offer* or will send me written notice that I do not qualify for the Offer." (*Id.,* Exhibit D, p. 1) (emphasis added). Thus, by providing the Healeys with a signed copy of the TPP agreement, Wells Fargo indicated to the Healeys that they had qualified for the offer of a permanent loan modification. Nevertheless, Wells Fargo subsequently forwarded a notice to the Healeys on January 12, 2010 stating that it still needed "critical documents" in order to modify their mortgage under HAMP. (*Id.,* ¶30, Exhibit E).

To further compound that confusion, Wells Fargo's Senior Vice President, Ben Windust, sent a letter to the Healeys on January 15, 2010 indicating that Wells Fargo had "pre-qualified [the Healeys] for a loan modification program and mailed [the Healeys] a package of materials including a Loan Modification Agreement that [the Healey's] need[ed] to sign." (*Id.,* ¶¶3 1, Exhibit F). Mr. Windust's correspondence of January 15, 2010 was identical to the letter he had previously mailed to the Healeys on October 6, 2009. (*Id.,* Exhibits C and F). At the time that the Healeys received Wells Fargo's letter of January 15, 2010 advising them that they needed to sign and return the TPP agreement, both the Healeys and Wells Fargo had already signed that agreement. (*Id.,* Exhibit D, p. 3).

After the Healeys made numerous unreturned phone calls to Wells Fargo regarding "the status of their permanent loan modification," they were advised that Wells Fargo's representative, "Jason," would be handling their account. (*Id.,* ¶¶32-33). "Jason" requested additional documentation which the Healeys faxed to Wells Fargo on January 22, 2010. (*Id.,* ¶¶33). Following several unreturned phone calls to "Jason," the Healeys "were transferred to Diane Sobreo and informed [that] she would be handling their account." (*Id.,* ¶33). Ms. Sobreo ultimately "informed [the Healeys] that information, which they had already provided, was missing from their file" and that "the original borrower information sheet they sent could not be located." (*Id.,* ¶¶34-35). By fax transmission dated February 18, 2010, the Healeys again forwarded "financial information sheets (2) to replace the ones previously sent (they apparently can't be found)" and "Page 1 and 2 of [their] 2008 income tax returns (also sent previously but can't be located)." (*Id.,* ¶35, Exhibit G).

The Healeys continued to make the TPP monthly payments and made several unreturned "phone calls to Diane Sobreo to find out the status of their modification." (*Id.,* ¶¶36). Although the Healeys had never been asked to submit their 2009 W-2 forms, Ms. Sobreo eventually "informed them that their 2009 W-2's were missing," and on March 8, 2010, the Healeys faxed their 2009 W-2 forms to Ms. Sobreo. (*Id.,* Exhibit H). Several weeks later, the Healeys were contacted by another Wells Fargo's customer service representative and advised "that their mortgage rate was being lowered to 2%" which led them to believe that the promised permanent loan modification agreement was about to be consummated. (*Id.,* ¶37).

Despite the fact that the Healeys had continued to make the required monthly payments of $2,567.79 and their representations in Section 1 of the HAMP TPP agreement continued to be true, Wells Fargo transmitted a letter to the Healeys on April 28, 2010 informing them that they had not been approved for a permanent HAMP loan modification. (*Id.,* ¶39, Exhibit I). Upon receipt of that letter, the Healeys contacted Wells Fargo on April 30, 2010 “and were told that their application for HAMP was still under review.” (*Id.,* ¶40). On May 3, 2010, Wells Fargo informed the Healeys “that they might qualify for a Wells Fargo Home Modification Program” and directed them to resend “a hardship letter, financial worksheet, and paystubs on May 4, 2010.” (*Id.,* ¶41).

The Healeys promptly furnished that information as requested. (*Id.,* ¶42). However, even though they had fulfilled their obligations under the TPP contract and had complied with every request for information and documentation, they received foreclosure notices from Wells Fargo in early May 2010 stating that they were in default since “they had not made payments from January through May 2010.” (*Id.,* ¶42). The notices advised the Healeys that they “had to make a balloon payment of $6,543.51 to avoid foreclosure.” (*Id.,* ¶¶42-43). To forestall any foreclosure, Plaintiff Paul Healey was forced to make “a hardship withdrawal from his 401K plan” and immediately forwarded $6,543.51 to Wells Fargo. (*Id.,* ¶44). On June 17, 2010, the Healeys “received correspondence from Wells Fargo stating that the pre-foreclosure sale had been cancelled.” (*Id.,* ¶46).

“On or about June 28, 2010, [the Healeys] received a letter from Wells Fargo informing them that [Wells Fargo] could not adjust the terms of their mortgage because [the Healeys] did not accept the terms of the loan modification offered to them.” (*Id.,* ¶48). Since the Healeys had complied with every TPP requirement and all loan modification demands made by Wells Fargo from August 2009 through June 2010, the Healeys “did not understand what was happening with their home mortgage loan.” (*Id.*). As a consequence, the Healeys commenced this litigation against Wells Fargo asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, violations of the Unfair Trade Practices and Consumer Protection Law (UTP/CPL), promissory estoppel, negligent misrepresentation, and negligent infliction of emotional distress. (*Id.,* ¶¶58-101). Wells Fargo filed preliminary objections to the original complaint in response to which the Healeys filed an amended complaint. (Docket Entry Nos. 5, 10). Wells Fargo filed amended preliminary objections to the amended complaint on November 21, 2011. (*Id.,* No. 12).

In its original and amended preliminary objections, Wells Fargo demurs to the Healeys' breach of contract claim (Count III) on two grounds. First, Wells Fargo submits that federal and state courts have uniformly held that HAMP provides no private right of action to borrowers for a lender's failure to furnish a permanent loan modification. (Docket Entry No. 5, ¶28-32). Second, relying upon Section 2(F) and (G) of the TPP agreement stating that “the Loan Documents will not be modified” unless Wells Fargo provided the Healeys with “a fully executed copy” of a “Modification Agreement,” Wells Fargo contends that the Healeys' contract claim fails as a matter of law inasmuch as they never received an executed copy of a permanent modification agreement from Wells Fargo. (*Id.,* ¶¶24-27).

Wells Fargo seeks to dismiss the Healeys' claims for fraud (Count II) and violations of the UTP/CPL (Count I) on two independent bases. Wells Fargo maintains that the parol evidence rule bars evidence of prior or contemporaneous oral representations concerning subjects that are specifically addressed in the parties' written agreement. Since the TPP contract “addresses the subject matter of the alleged promise to modify the mortgage loan,” Wells Fargo argues that proof of any prior or contemporaneous oral agreements relating to a permanent loan modification are precluded by the parol evidence rule. (*Id.,* ¶¶34-37). Wells Fargo alternatively asserts that any alleged oral promises to permanently modify the Healeys' mortgage loan are barred by the statute of frauds. (*Id.,* ¶38-41).

Wells Fargo also challenges the Healeys' claims for fraud (Count II), negligent misrepresentation (Count VI), and negligent infliction of emotional distress (Count VII) based upon the gist of the action doctrine. Wells Fargo alleges that the Healeys' tort claims "all stem from the [Healeys'] breach of contract claim," as a result of which they are not actionable under the gist of the action doctrine. (*Id.,* ¶¶42-46). In addition, noting that Pennsylvania does not recognize an independent cause of action for breach of the covenant of good faith and fair dealing in cases where a plaintiff has advanced a breach of contract claim, Wells Fargo submits that the Healeys' claim for breach of the implied covenant of good faith and fair dealing (Count IV) should be dismissed as subsumed by their breach of contract claim. (*Id.,* ¶¶47-49).

With regard to the Healeys' promissory estoppel claim (Count V), Wells Fargo contends that the Healeys have failed to aver that Wells Fargo made any "promise" to them, such that the promissory estoppel claim should also be stricken. (*Id.,* ¶¶50-55). In its amended preliminary objections demurring to the Healeys' fraudulent inducement claim (Count VIII) in the amended complaint, Wells Fargo asserts the same parol evidence rule, statute of frauds, and gist of the action doctrine arguments it raised in its original preliminary objections demurring to the Healeys'. Original Complaint (Docket Entry No. 12, ¶¶18-30, 33-41).

Wells Fargo also challenges the Healeys' fraudulent inducement claim on three additional grounds. Wells Fargo contends that the "fraudulent inducement claim should be dismissed because a breach of a promise to do something in the future is not fraud," (*Id.,* ¶31), and that the Healeys' "fraudulent inducement claim also fails for lack of reasonable or justifiable reliance." (*Id.,* ¶¶ 48-51 and Exhibit A). Finally, Wells Fargo alleges that the Healeys have neglected to aver fraudulent inducement with particularity as required by Pa. R.C.P. 1019(b). [FN2] (*Id.,* ¶¶53-56). Following the filing of the Healeys' brief on December 21, 2011, Wells Fargo's original and amended preliminary objections were submitted for a decision.

> FN2. Wells Fargo also sought to strike the verification signed by the Healeys' counsel and attached to the amended complaint since the verification did not comply with Pa. R.C.P. 1024(c) by specifying why the verification was not made by a party. (*Id.,* ¶¶57-62). However, subsequent to the filing of the amended preliminary objections, the Healeys filed their own substitute verification on November 29, 2011. (Docket Entry No. 13).

II. DISCUSSION

(A) STANDARD OF REVIEW

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. *Discover Bank v. Stucka,* 33 A.3d 82, 86 (Pa. Super. 2011). The question presented by a demurrer "is whether, on the facts averred, the law says with certainty that no recovery is possible." *Betts Industries, Inc. v. Heelan,* 33 A.3d 1262, 1265 (Pa. Super. 2011). Preliminary objections seeking the dismissal of a claim may be sustained only in cases that are clear and free from doubt. *In re Estate of Sauers,* 32 A.3d 1241, 1247-48 (Pa. 2011). To be clear and free from doubt, it must appear with certainty that the law would not permit recovery based upon the facts averred. *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co.,* 2012 WL 29299, at * 4 (Pa. Super. 2012). If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Soto v. Nabisco, Inc.,* 32 A.3d 787, 790 (Pa. Super. 2011).

(B) BREACH OF CONTRACT

To successfully maintain a cause of action for breach of contract, the Healeys must establish: (1) the existence of an agreement, including its essential terms; (2) a breach of a duty imposed by that agreement; and (3) damages resulting from the breach. *Guerra v. Redevelopment Authority of City of Philadelphia,* 27 A.3d 1284, 1289 (Pa. Super. 2011). In order for an enforceable contract to be formed, there must be an offer, acceptance, and exchange of consideration. *Pennsylvania Workers' Compensation Judges Professional Ass'n v. Executive Bd. of Com.,* 2012 WL 150074, at * 3 (Pa. Cmwlth. 2012); *Step Plan Services, Inc. v. Koresko,* 12 A.3d 401, 409 (Pa. Super. 2010). Consideration is deemed sufficient when it confers a benefit upon the promissor or a detriment to the promissee. *Pennsylvania Workers' Compensation Judges Professional Ass'n, supra; DTK Ventures, L.P. v. Russo,* 2006 WL 2988463, at * 5 (Lacka. Co. 2006). When a party fails to perform any obligation imposed by the parties' agreement, the lack of performance is considered to be a breach of the agreement creating that obligation. *John B. Conomos, Inc. v. Sun Company, Inc.,* 831 A.2d 696, 707-08 (Pa. Super. 2003), *app. denied,* 577 Pa. 697, 845 A.2d 818 (2004); *Rizzo v. MSA, Inc.,* 2010 WL 8355241, at * 6 (Lacka. Co. 2010), *aff'd,* 32 A.3d 830 (Pa. Super. 2011).

The Healeys aver that the TPP agreement that was forwarded to them in October 2009 "constitute[d] a valid offer" which the Healeys accepted when they signed and returned the agreement on October 21, 2009. (Docket Entry No. 10, ¶¶72-73). The Healeys alternatively allege that "by executing the loan modification agreement, [the Healeys] sent an offer to [Wells Fargo] which [Wells Fargo] accepted by signing the loan modification agreement and/or accepting [the Healeys'] mortgage payments at the trial rate." (*Id.,* ¶74). The Healeys allegedly "gave consideration for the contract by providing the documentation requested by Wells Fargo, making payments as specified in the loan modification agreement, making legal representations about their personal circumstances, and/or by foregoing alternative means of meeting their monthly mortgage payments." (*Id.,* ¶75). The Healeys maintain that "Wells Fargo breached the contract by failing to grant [the Healeys] permanent HAMP modifications as promised in the contract" and "by failing to render a decision as to whether [the Healeys] were entitled to a permanent modification by the end of the original trial period." (*Id.,* ¶¶77-78).

Wells Fargo submits that the Healey's contract "claims should be dismissed because HAMP does not afford borrowers such as [the Healeys] a private right of action against lenders and servicers." (Docket Entry No. 7, p. 5). Additionally, Wells Fargo asserts that the Healeys have failed to state a cause of action for breach of contract under Pennsylvania law. Citing Section 2(F) and (G) of the agreement which states that the Healeys' "Loan Documents will not be modified" unless the Healeys received "a fully executed copy of the this Plan and the Modification Agreement" before "the Modification Effective Date," Wells Fargo argues that the Healeys "do not allege that they ever received a fully executed copy of the Modification Agreement from Wells Fargo" prior to "the Modification Effective Date."[FN3] (*Id.,* p. 8). Therefore, Wells Fargo contends that the Healeys have "failed to state a breach of contract claim against Wells Fargo based on the trial period agreement since they do not plead a necessary condition precedent to such a claim, namely that they received a fully executed copy of the Modification Agreement." (*Id.,* pp. 8-9).

> FN3. The TPP agreement does not specifically define "the Modification Effective Date," but case law cited by Wells Fargo identifies that date as "the first day of the month following the month in which the last Trial Period Payment is due." *Bourdelais v. J. P. Morgan Chase Bank*, 2011 WL 1306311, at * 4 n. 7 (E.D. Va. 2011). That being the case, the Healeys' "Modification Effective Date" was January 1, 2010.

The Healeys counter that "this Court should not allow [Wells Fargo] to use the 'private cause of action argument' under HAMP to dismiss claims that are properly pled under state, statutory and common law causes of action.” (Docket Entry No. 8, p. 6).

According to the Healeys, “[t]his Court need not delve into the minutia of HAMP” since “HAMP and its guidelines are not indispensible to the [Healeys'] claims for violation of the Unfair Trade Practices and Consumer Protection Law, common law fraud, breach of the covenant of good faith and fair dealing, promissory estoppel, negligent infliction of emotional distress, and negligent misrepresentation.” (*Id.*). As for Wells Fargo's alternate “condition precedent” argument, the Healeys submit that they have “sufficiently alleged the breach of the contract with Wells Fargo where [they] state at paragraph 77 [of the amended complaint] that Defendant Wells Fargo breached the contract by failing to grant the [Healeys] permanent HAMP modifications as promised in the contract, and at paragraph 78 that Defendant Wells Fargo breached the contract by failing to render a decision as to whether the [Healeys] were entitled to permanent modification by the end of the original term.” (*Id.*, p. 9). To date, no federal or state court in Pennsylvania has considered whether a borrower may pursue a breach of contract claim against a lender or mortgage servicer for failing to offer the borrower a permanent loan modification after the borrower has satisfied the TPP requirements under HAMP and the TPP contract.

In the midst of the financial crisis in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act, 12 U.S.C. §§5201-5253, which included the Troubled Asset Relief Program (TARP) that delegated broad powers to the Secretary of the Department of Treasury “to mitigate the financial impact of the foreclosure crisis and preserve homeownership.” *Bosque v. Wells Fargo Bank,* 762 F.Supp.2d 342, 346 (D. Mass. 2011) (citing 12 U.S.C. §§5201, 5211-5241). Congress granted the Secretary of the Treasury the express authority to “use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.” 12 U.S.C. §5219(a). In early 2009, the Secretary of the Treasury announced the “Making Home Affordable Program” that features the Home Affordable Modification Program (HAMP) which is designed to assist “3 to 4 million at-risk homeowners” in averting foreclosure “by reducing monthly payments to sustainable levels.” *Allen v. Citimortgage, Inc.,* 2011 WL 3425665, at * 1 (D. Md. 2011) (quoting HAMP Suppl. Directive 09-901). To that end, “the Secretary set aside up to $50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure.” *Wigod v. Wells Fargo Bank,* 2012 WL 727646, at * 2 (7th Cir. 2012). Lenders and home loan servicers were provided government incentive payments of $1,000.00 for each permanent loan modification that they negotiated under HAMP. *Alien, supra; Olivares v. PNC Bank,* 2011 WL 4860167, at * 2 (D. Minn. 2011). “After receiving billions of dollars from the United States government through the Troubled Asset Relief Program, defendant Wells Fargo Bank voluntarily agreed to participate in the Home Affordable Modification Program.”[FN4] *Bosque*, 762 F.Supp.2d at 346.

FN4. Participation in HAMP is required for government-sponsored entities (“GSEs”) such as Fannie Mae and Freddie Mac, but voluntary for non-GSEs. *J. P. Morgan Chase Bank v. Ilardo*, 2012 WL 695032, at * 5 (N.Y. Sup. 2012); *Allen, supra,* at * 1. Non-GSE servicers that elect to participate in HAMP are required to enter into a Servicer Participation Agreement (“SPA”) with the federal government, which expressly incorporates the HAMP guidelines and supplemental directives issued by the Treasury Department. *Allen, supra.*

Through a series of directives issued by the Treasury Department, the HAMP loan modification system developed into a two-step process. First, the lender or mortgage servicer determined whether the borrower was qualified to participate in HAMP under its eligibility criteria, and if so, the servicer offered and implemented a Trial Period Plan (TPP) in which the borrower made modified mortgage payments, submitted additional financial information and, if requested, underwent credit counseling for a period of three months. *Allen, supra;*

Bosque, 762 F.Supp.2d at 347-348 (citing Suppl. Directive 09-01, at 17). Second, ?[a]fter the trial period, if the borrowers complied with all terms of the TPP Agreement - including making all required payments and providing all required documentation - and if the borrower's representations remained true and correct, the servicer had to offer a permanent modification." *Wigod, supra,* at * 3. *Accord, In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation,* 2011 WL 2637222, at * 2 (D. Mass. 2011) ("As long as the borrower complied with the terms of the TPP and the income representations were verified, the servicer was directed under the terms of the TPP to offer the borrower a permanent modification at the end of the three-month period."). In that regard, HAMP Supplemental Directive 09-01 provides that "[i]f the borrower complies with the terms and conditions of the Trial Period Plan, the loan modification will become effective on the first day of the month following the trial period as specified in the Trial Period Plan." *Bosque,* 762 F.Supp.2d at 348 n. 7 (quoting SD 09-01, at 18).

Although the Treasury Department "originally projected that 3 to 4 million homeowners would receive permanent modifications under HAMP," during the first year of the program "only 170,000 borrowers had received permanent modifications - - fewer than 15 percent of the 1. 4 million homeowners who had been offered trial plans." *Wigod,* supra, at * 3 n. 2. The failure of homeowners to receive permanent loan modifications after participating in Trial Period Plans has resulted in HAMP-related litigation, primarily in the federal courts. Disgruntled borrowers have advanced three theories of liability which have yielded varying results. Some homeowners have attempted to assert rights arising under HAMP, but those claims have been uniformly rejected on the ground that HAMP does not create a private federal right of action for borrowers. *See e.g., Bourdelais, supra,* at *3; *Phipps v. Wells Fargo Bank,* 2011 WL 302803, at * 9 (E.D. Cal. 2011); *Simon v. Bank of America,* 2010 WL 2609436, at * 10 (D. Nev. 2010). Other borrowers have claimed to be third-party beneficiaries of the Service Participation Agreement (SPA) that their non-GSE servicers signed with the federal government. *Compare, Moore v. Mortgage Electronic Registration Systems. Inc.,* 2012 WL 253834, at * 15 (D.N.H. 2012) ("The Moores do not point to any other provision of the SPAs, or allege any other facts, plausibly suggesting that they are among the intended third-party beneficiaries of those agreements."), *with Samson v. Wells Fargo Home Mortgage, Inc.,* 2010 WL 5397236, at * 3 (C.D. Cal. 2010) (stating that "the court is persuaded that Plaintiff-an individual facing foreclosure of her home - has made a substantial showing that she is an intended beneficiary of the HAMP, a federal agreement entered into by Defendants."). The Healeys have not asserted direct claims under HAMP, nor have they claimed third party beneficiary status under any SPA.

Rather, the Healeys' contract claim falls into the third category of proffered liability in which litigants have based their causes of action upon the language of the TPP agreements and state law principles of offer and acceptance. Courts have reached conflicting conclusions regarding the viability of these state law contract claims. One school of judicial thought has adopted the lower court rationale in *Wigod v. Wells Fargo Bank,* 2011 WL 250501 (N.D. Ill. 2011), *rev'd in part,* 2012 WL 727646 (7th Cir. 2012) and rejected such common law claims as barred by HAMP since they are not "wholly independent" of HAMP and the alleged offers to modify were ostensibly made under the rubric of HAMP. *See e.g., Senter v. J. P. Morgan Chase Bank,* 810 F.Supp.2d 1339, 1356 (S.D. Fla. 2011); *Stolba v. Wells Fargo & Co.,* 2011 WL 3444078, at * 5 (D.N.J. 2011); *Bourdelais, supra,* at * 4.[FN5]

> FN5. *Stolba* and *Bourdelais* both state that the trial court in *Wigod* relied upon *Vida v. OneWest Bank,* 2010 WL 5148473 (D. Or. 2010) in finding that state law breach of contract claims are not sufficiently independent of HAMP. *See, Bourdelais, supra* ("Like the plaintiffs in *Vida* and *Wigod,* Plaintiff here does not allege a breach of contract claim wholly independent of HAMP."). It bears noting, however, that the district court in *Vida* summarized its holding as follows:

"The court agrees with the district courts in this circuit that HAMP does not authorize a private right of action against participating lenders. *That said, the court does not agree with Defendants'premise that they are wholly immunized for their conduct so long as the subject transaction is associated with HAMP*. " Even so, the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently independent to state a separate state law cause of action for breach of contract."

Vida, supra, at * 5 (emphasis added).

The better reasoned decisions have concluded that "[t]he absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law." *Wigod,* 2012 WL 727646, at * 24. *Accord, Olivares, supra,* at * 5 ("In summary, the mere fact that Plaintiffs' claims arise from a fact pattern implicating HAMP does not preclude them from asserting claims premised upon the common law and statutory law of Minnesota."); *Allen, supra,* at * 5 ("Thus, even if a private right of action does not exist under HAMP, the Allens may be permitted to assert a breach of contract claim stemming from the TPP Agreement as long as they have stated a proper claim in their amended complaint."); *Bosque,* 762 F.Supp.2d at 351 ("The fact that a TPP has a relationship to a federal statute and regulations does not require the dismissal of any state-law claims that arise under a TPP."). Indeed, as several federal district courts have observed, the trial courts in *Wigod* and *Vida* do not provide citation to "a general rule that where a state common law theory provides for liability for conduct that is also violative of federal law, a suit under the state common law is prohibited so long as the federal law does not provide for.a private right of action." *Picini v. Chase Home Finance LLC,* 2012 WL 580255, at * 5 (E.D.N.Y 2012); *Wright v. Chase Home Finance, LLC,* 2011 WL 4101513, at * 2 (D. Ariz. 2011); *Fletcher,* 798 F.Supp.2d at 930-931. We agree with those jurisdictions which have found that state law contract actions are not preempted by HAMP, such that the Healeys are not foreclosed from pursuing a breach of contract claim under Pennsylvania law simply because their TPP contract involves HAMP. *See, Fletcher,* 798 F.Supp.2d at 931 ("Thus, without some explicit direction from Congress that it intended programs such as HAMP to have such preemptive force, the Court will not preclude Fletcher from pursing her basic state common law remedies....Why should the fact that OneWest contracted to follow federal law prohibit Fletcher from holding it to that contract?"). "To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead." *Wigod, supra,* at * 24.

Having rejected Wells Fargo's argument that HAMP precludes a state law breach of contract claim, we must address Wells Fargo alternate contention that the Healeys cannot establish an enforceable agreement under Section 2(F) and (G) of the TPP contract since they never received a fully executed copy of a permanent modification agreement prior to the "Modification Effective Date." Characterizing the Healeys' receipt of a permanent loan modification agreement as "a necessary condition precedent" to a breach of contract claim, Wells Fargo challenges the legal sufficiency of that claim under state law. (Docket Entry No. 7, pp. 8-9). In repudiating the same "condition precedent" argument that was advanced by Wells Fargo in *Wigod,* the U. S. Court of Appeals for the Seventh Circuit reasoned:

Here the TPP spelled out two conditions precedent to Wells Fargo's obligation to offer a permanent modification: Wigod had to comply with the requirements of the trial plan and her financial information had to remain true and accurate. But these were conditions to be satisfied by the promissee (Wigod) rather than conditions requiring further manifestation of assent by the promissor (Wells Fargo). These conditions were therefore consistent with treating the TPP as an offer for permanent modification.

Wells Fargo insists that its obligation to modify Wigod's mortgage was also contingent on its determination,

after the trial period began, that she qualified under HAMP guidelines. That theory conflicts with the plain terms of the TPP. At the beginning, when Wigod received the unsigned TPP, she had to furnish Wells Fargo with "documents to permit verification of.. [her] income to determine whether [she] qualify[ied] for the offer." TPP ¶2. The TPP then provided: "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan *if I qualify for the Offer* or will send me written notice that I do not qualify for the Offer." TPP ¶2 (emphasis added). Wigod signed two copies of the Plan on May 29, 2009, and returned them along with additional financial documentation to Wells Fargo.
Under the terms of the TPP Agreement, then, that moment was Wells Fargo's opportunity to determine whether Wigod qualified. If she did not, it could have and should have denied her a modification on that basis. Instead, Wells Fargo countersigned on June 4, 2009 and mailed a copy to Wigod with a letter congratulating her on her approval for a trial modification. In so doing, Wells Fargo communicated to Wigod that she qualified for HAMP and would receive a permanent "loan Modification Agreement" after the trial period, provided she was "in compliance with this Loan Trial Period and [her] representations... continue[d] to be true in all materials respects." TPP ¶1.

Wigod, supra, at * 7 (emphasis in original). *See also, Gaudin v. Saxon Mortgage Services, Inc.,* 2011 WL 5825144, at * 2 (N.D. Cal. 2011) ("...the TPP indicates that while it may initially be presented to the borrower only as an offer to determine eligibility, once the lender returns a signed copy of it to the borrower (rather than notifying the borrower that he or she does not 'qualify for the Offer'), then the borrower's eligibility for permanent modification has been determined, and the only remaining contingencies are those listed specifically in the TPP and summarized above.").

The TPP contract that was mailed to the Healeys *after* Wells Fargo had informed them that they pre-qualified "for a loan modification program" could be construed as an offer of a permanent loan modification contingent upon the Healeys fulfilling their TPP obligations. Not unlike *Wigod,* the Healeys signed and returned the TPP agreement, thereby manifesting their acceptance of Wells Fargo's conditional offer. Wells Fargo subsequently countersigned that TPP contract, and by doing so, advised the Healeys that they qualified for HAMP and would receive a permanent loan modification agreement so long as they made the trial period payments and their "representations" remained true in all material respects. Therefore, the Healeys have alleged a valid offer and acceptance for purposes of a cognizable contract. *See, Bosque,* 762 F.Supp.2d at 351 ("Here, it is plain that the TPPs were offers, and that plaintiffs' signatures and subsequent monthly payments under the terms of the TPP constituted acceptance of those offers....Indeed, the HAMP guidelines referred to the TPP as an 'offer' and the monthly payments under it as 'contractual payments.' ").

Besides an offer and acceptance, there must be an exchange of consideration in order for an enforceable contract to be formed. *See, Step Plan Services, Inc., supra.* In addition to her existing duty to make mortgage payments, the TPP also obligated the Healeys to provide documentation about their finances, to make legal representations concerning their personal circumstances and to undergo credit counseling if requested. Since the Healeys did not have an existing duty to perform those additional actions, their completion of those tasks may constitute adequate consideration to support a contract. *See, Wigod, supra,* at * 8 ("In exchange for Wells Fargo's conditional promise to modify her home mortgage, [Wigod] undertook multiple obligations above and beyond her existing legal duty to make mortgage payments."); *Picini, supra,* at * 5 ("The TPP required Plaintiffs to do more than just make the payments that they were already obligated to make...; the alleged contract required Plaintiffs to provide Defendants with documents describing Plaintiffs' financial picture. This satisfied the consideration requirement."); *In re Bank of America HAMP Contract Litigation, supra,* at * 4 ("Here, however, plaintiffs did more than merely pay a discounted amount in satisfaction of a pre-existing debt. They gave consideration in the form of legal representations about the material truth of information provided, promises to undergo credit counseling, (if asked), opening new escrow accounts and provision of financial information and trial payments.”); *Ansanelli v. J. P. Morgan Chase Bank,* 2011 WL 1134451, at *4 (N.D. Cal. 2011) (finding that the plaintiffs stated “a valid claim for breach of contract including the existence of consideration” since “[a]fter the parties allegedly reached an agreement that plaintiffs' loans would be permanently modified if they complied with the trial period plan, plaintiffs expended time and energy and made financial disclosures in furtherance of the agreement, which they would not have been required to do under the original contract.”); *Bosque,* 762 F.Supp.2d at 352 (“These conditions of the TPP all constitute new legal detriment to Plaintiffs that flowed from their acceptance of the TPP.”).

Consequently, the allegations of the amended complaint support the formation of an enforceable contract through an offer, acceptance, and exchange of consideration. The opening paragraph of the TPP contract states that Wells Fargo “will provide [the Healeys] with a Loan Modification Agreement” if they satisfied their trial period obligations and their “representations” remained true. The second paragraph provides that after the Healeys signed and returned the TPP agreement, Wells Fargo “will send [them] a signed copy” of the TPP contract if they qualified “for the Offer.” Furthermore, Section 3 of the TPP agreement likewise states that if the Healeys complied with the TPP requirements and their “representations” remained true in all material respects, Wells Fargo “will send [them] a Modification Agreement for [their] signature which will modify [their] Loan Documents....” In both common usage and legal parlance, the word “will” or “shall” is considered mandatory. *See, Riddle v. W.C.A.B. (Allegheny City Elec., Inc.),* 603 Pa. 74, 80, 981 A.2d 1288, 1291 (2009); *Den-Tal-Ez, Inc. v. Siemens Capital Corp.,* 389 Pa. Super. 219, 237, *566* A.2d 1214, 1223 (1989). The use of such a term in a contract creates a mandatory or imperative obligation. *See, School District of Amity Tp. v. Daniel Boone Joint School System,* 411 Pa. 188, 192-193, 191 A.2d 817, 819 (1963). Thus, the foregoing provisions of the TPP contract reflect that Wells Fargo was obligated to provide the Healeys with a permanent loan modification agreement if they complied with the TPP requirements and their “representations” continued to be true.

Nevertheless, Wells Fargo submits that the Healeys' breach of contract claim must be dismissed due to other language contained in the TPP contract indicating that the Healeys' loan documents would not be permanently modified unless, *inter alia,* they received a fully executed copy of the “Modification Agreement.” Since it is undisputed that Wells Fargo never delivered a fully executed permanent loan modification agreement to the Healeys, Wells Fargo claims that the Healey's contract claim fails as a matter of law. Once again, we adopt the sound appellate reasoning in *Wigod* which rejected this very same argument by Wells Fargo and held:
According to Wells Fargo, this provision meant that all of its obligations to Wigod terminated if Wells Fargo itself chose not to deliver “a fully executed TPP *and* ‘ Modification Agreement’ by November 1, 2009.” In other words, Wells Fargo argues that its obligation to send Wigod a permanent Modification Agreement was triggered only if and when it actually sent Wigod a Modification Agreement.
Wells Fargo's proposed reading of section 2 would nullify other express provisions of the TPP Agreement. Specifically, it would nullify Wells Fargo's obligation to “send [Wigod] a Modification Agreement” if she “compl [ied] with the requirements” of the TPP and if her “representations... continued to be true in all material respects.” TPP §3. Under Wells Fargo's theory, it could simply refuse to send the Modification Agreement for any reason whatsoever - - interest rates went up, the economy soured, it just didn't like Wigod - -and there would still be no breach. Under this reading, a borrower who did all the TPP required of her would be entitled to a permanent modification only when the bank exercised its unbridled discretion to put a Modification Agreement in the mail. In short, Wells Fargo's interpretation of the qualifying language in section 2 turns an otherwise straightforward offer into an illusion.

The more natural interpretation is to read the provision as saying that no permanent modification *existed* "unless and until" Wigod (i) met all conditions, (ii) Wells Fargo executed the Modification Agreement, and (iii) the effective modification date passed. Before these conditions were met, the loan documents remained unmodified and in force, but under paragraph 1 and section 3 of the TPP, Wells Fargo still had an obligation to *offer* Wigod a permanent modification once she satisfied all her obligations under the agreement. This interpretation follows from the plain and ordinary meaning of the contract language stating that "the Plan is not a modification... unless and until" the conditions precedent were fulfilled. TPP §2.G. And, unlike Wells Fargo's reading, it gives full effect to all of the TPP's provisions. [citations omitted]. Once Wells Fargo signed the TPP Agreement and returned it to Wigod, an objectively reasonably person would construe it as an offer to provide a permanent Modification Agreement if she fulfilled its conditions.

Wigod, supra, at * 7-8 (emphasis in original). We fully endorse the above-quoted interpretation of the TPP contract.[FN6] *See also, Gaudin, supra,* at *4 (discussing mortgage service's proffered interpretation of Section 2(F) and (G) of the TPP contract and stating that "[r]ead literally, this language would suggest that even if all other conditions are satisfied, a lender has no obligation to provide a loan modification agreement unless it in fact provides a modification agreement. As noted in the prior order, this provision conflicts with the clear tenor of the remainder of the document and would render the other agreement promises illusory.").

FN6. A federal district court has concluded that the above-referenced conflicting provisions in the TPP contract are ambiguous since they cannot "be read in reasonable harmony." Due to those ambiguities, the court held that "Plaintiffs breach of contract claim hinges on ambiguities in the contract and precludes dismissal as a matter of law." *Darcy v. CitiFinancial, Inc.,* 2011 WL 3758805, at * 6 (W.D. Mich. 2011).

In sum, the factual allegations of the Healeys' amended complaint and the wording of the TPP agreement are sufficient to establish an enforceable agreement by Wells Fargo to provide a permanent modification to the Healeys once they satisfied their obligations under the TPP contract. When Wells Fargo failed to do so, its lack of performance could be deemed a breach of the parties' agreement. Since the Healeys have alleged that they suffered damages as a result of that alleged breach, they have stated a cause of action for breach of contract under Pennsylvania law.[FN7] Hence, Wells Fargo's demurrer to Count III will be overruled.

FN7. The allegations of the amended complaint do not indicate whether Wells Fargo instituted a foreclosure action and acquired title to the Healeys' home at a Sheriffs Sale or the Healeys withdrew more funds from Paul Healey's 401 K plan to pay the mortgage in full.

(C) PAROL EVIDENCE RULE/STATUTE OF FRAUDS

Wells Fargo next challenges the Healeys' claims for fraud and violations of the Unfair Trade Practices and Consumer Protection Law ("UTP/CPL"). In Count I of the complaint, the Healeys charged Wells Fargo with violating the UTP/CPL by committing "unfair and/or deceptive acts which caused confusion and misunderstanding" regarding the loan modification procedure and program, and "engaging in fraudulent and/or deceptive conduct which created a likelihood of confusion or misunderstanding in violation of 73 P.S. §201-2(4)(xxi)." (Plaintiffs' Complaint, ¶¶59-60). The instances of wrongful conduct by Wells Fargo allegedly included: (a) misrepresenting to the Healeys that if they complied with the trial period program requirements, they would be granted a permanent loan modification; (b) "failing to disclose to [the Healeys] the financial repercussions they would suffer if they were not granted a permanent modification;" (c) repeatedly "advising [the Healeys] to continue making trial period payments" even though Wells Fargo "knew that it did not intend to comply with the terms of the loan modification agreement;" (d) falsely representing to the Healeys "that they were eligible for mortgage modification" under HAMP and "acting recklessly as to whether those misrepresentations were true or false;" (e) "failing to grant [the Healeys] a permanent modification of their mortgage as specified in the loan modification agreement" and otherwise "failing to fulfill their obligations under the loan modification agreement and the oral representations made by its employees and agents;" (f) "misrepresenting the requirements needed to qualify" for a loan modification agreement; (g) "delaying consideration of [the Healeys'] mortgage modification application until well past the date required by the loan modification agreement;" and (h) "misrepresenting to [the Healeys] in correspondence dated January 12, 2010 that they were still in the trial payment plan and were required to continue making the trial period payments in accordance with that plan." (*id.,* ¶60(d)-(h), (1)-(o)). The Healeys seek to recover treble damages under the UTP/CPL for Wells Fargo's alleged violations. (*id.,* ¶62).

The Healeys have set forth their fraud claims in Counts II and VIII of the complaint. In Count II, the Healeys aver that Wells Fargo "intentionally misrepresented and/or omitted material facts" concerning the loan modification agreement and advised the Healeys "to continue making monthly payments at the trial rate" based upon its assurances that their loan would be permanently modified upon the completion of the trial period. (Docket Entry No. 10, ¶¶64-66). The Healeys allegedly "relied upon [Wells Fargo's] misrepresentations and/or omissions to their detriment," and in the process, Wells Fargo "procure [d] pecuniary gain from a security interest in [the Healeys'] home" and "monetary consideration from the [Healeys]." (*id.,* ¶¶67-68).

In the Healeys' "Fraudulent Inducement" count, they maintain that Wells Fargo misrepresented to them "that if they executed the loan modification plan and made payments under the terms of the agreement for three months, their loan would be modified under the HAMP program" and that Wells Fargo "would take action on their loan modification within a reasonable period of time." (*id.,* ¶¶98, 100). The Healeys assert that "[b]y reasonably relying on these misrepresentations, [the Healeys] were induced to sign a TPP and made modified home mortgage payments...for seven months." (*Id.,* ¶¶102, 104). Due to their reasonable reliance upon Wells Fargo's misrepresentations, the Healeys were allegedly "required to withdraw $6,543.51 from a retirement account to make up for their arrears" and "suffered other damages to their finances and financial reputation which will be revealed by further discovery." (*Id.,* ¶¶106-107).

Wells Fargo contends that the Healeys' UTP/CPL and fraud "claims should be dismissed because the parol evidence rule bars any allegations of any prior or contemporaneous oral representations or agreements concerning subjects specifically dealt with in the trial period agreement and because any alleged oral representations that Wells Fargo made concerning a modification of the mortgage are barred by the statute of frauds." (Docket Entry No.7, p. 10). The Healeys submit that since Wells Fargo asserted in its first demurrer that there was not an enforceable agreement between the parties to permanently modify the Healeys' loan, Wells Fargo cannot claim that the Healeys are precluded from offering parol "evidence extraneous to the agreement between the parties." (Docket Entry No. 8, p. 11). The Healeys posit that "[i]n light of this contradictory argument and the law supporting a claim for demurrer, [the Healeys] urge this Court to deny the motion to strike" their fraud and UTP/CPL claims and thereby "allow the pleadings to stand." (*Id.*). As for Wells Fargo's statute of frauds argument, the Healeys submit that they do not assert "any sort of oral contract between the parties for the sale of land." (Docket Entry No. 16, p. 14). The Healeys maintain that their remaining claims relate to the "TPP contract which is a written agreement and therefore complies with the statute of frauds." (*Id.*).

Although the parol evidence rule addresses the admissibility of prior oral representations, it is regarded as a substantive principle of contract law rather than an exclusionary rule of evidence. *See, Baker v. Lafayette College,* 350 Pa. Super. 68, 83 n. 4, 504 A.2d 247, 254 n. 4 (1986); *Abel v. Miller,* 293 Pa. Super. 6, 9, 437 A.2d 963, 964 (1981); *LeDonne v. Kessler,* 256 Pa. Super. 280, 287 n. 4, 389 A.2d 1123, 1127 n. 4 (1978). As a rule of substantive law, its applicability may be raised by preliminary objections challenging the legal sufficiency of a claim. *See, Sokoloff v. Strick,* 404 Pa. 343, 348-349, 172 A.2d 302, 304-305 (1961) (quoting *O'Brien v. O'Brien,* 362 Pa. 66, 71-72, 66 A.2d 309, 311 (1949)); *Youndt v. First National Bank of Port Allegany* 868 A.2d 539, 545-546 (Pa. Super. 2005). The parol evidence rule recognizes that where "the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement." *Toy v. Metropolitan Life Insurance Company,* 593 Pa. 20, 49, 928 A.2d 186, 204 (2007). In that event, "[a]ll preliminary negotiations, conversations and verbal agreements are merged in. and superseded by the subsequent written contract... and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence." *Yocca v. Pittsburgh Steelers Sports. Inc.,* 578 Pa. 479, 497, 854 A.2d 425, 436 (2004). Stated otherwise, "[o]nce a writing is determined to be the parties' entire contract, the parol evidence rule applies and evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract." *PNC Bank, N.A. v. Bluestream Technology, Inc.,* 14 A.3d 831, 842 (Pa. Super. 2010) (quoting *Yocca,* 578 Pa. at 498, 854 A.2d at 436-37).

Pennsylvania law recognizes exceptions to the parol evidence rule and its preclusion of evidence concerning prior or contemporaneous oral representations. Parol evidence "may be introduced to vary a writing meant to be the parties' entire contract where a party avers that a term was omitted from the contract because of fraud, accident or mistake." *Yocca,* 578 Pa. at 498, 854 A.2d at 437. Furthermore, "where a term in the parties' contract is ambiguous, 'parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances.' " *PNC Bank,* 14 A.3d at 842 (quoting *Yocca, supra). Accord, Old Forge Bank v. Adomiak,* 2003 WL 25430180, at * 3 (Lacka. Co. 2000), *aff'd,* 779 A.2d 1229 (Pa. Super. 2001). The parol evidence rule also does not prohibit evidence of a subsequent modification of the parties' contract by writings, words or conduct which post-date the written agreement. *Iron Workers Savings and Loan Association v. IWS. Inc.,* 424 Pa. Super. 255, 269, 622 A.2d 367, 374 (1993); *House of Pasta, Inc. v. Mayo,* 303 Pa. Super. 298, 312, 449 A.2d 697, 704 (1982).

Not all forms of fraud operate as exceptions to the parol evidence rule's ban regarding prior or contemporaneous oral representations and statements. On the contrary, "while parol evidence may be introduced based on a party's claim that there was a fraud in the execution of the contract, i.e., that a term was fraudulently omitted from the contract, parol evidence may not be admitted based on a claim that there was fraud in the inducement of the contract, i.e., that an opposing party made false representations that induced the complaining party to agree to the contract." *Yocca, supra,* at n. 26; *PNC Bank, supra.* The reason for this distinction is "that when fraud in the execution is alleged, representations made prior to contract formation are not considered superseded and disclaimed by a fully integrated written agreement, as they are when fraud in the inducement is asserted." *Toy,* 593 Pa. at 53, 928 A.2d at 206-07.

Since the parol evidence rule is inapplicable only where certain types of fraud have been averred, the Healeys' fraud claims must be examined. The Healeys' fraud allegations in Count II of the amended complaint include assertions of fraud in the execution of the TPP contract. For example, the Healeys contend that Wells Fargo intentionally omitted material facts in conjunction with the TPP agreement. (Docket Entry No. 10, ¶64). Those averments of fraud in the execution are not barred by the parol evidence rule. *Yocca, supra; PNC Bank, supra.* Other allegations of fraud contained in the amended complaint concern actions which post-date the execution of the

TPP agreement, (*id.,* ¶¶27-43, 47-48), and those subsequent instances of alleged fraud are not precluded by the parol evidence rule. *Iron Workers Savings and Loan Association, supra.*

In contrast, the allegations contained in Count VIII of the amended complaint relate solely to claims of fraud in the inducement. Since the subject of those alleged fraudulent representations is the same topic addressed by the TPP contract which represents the parties' agreement, the parol evidence rule prohibits the use of any such fraud in the inducement allegations. Therefore, as it relates to the parol evidence rule, Wells Fargo's demurrer will be overruled with respect to the Healeys' fraud in the execution averments and their allegations of fraud occurring after the execution of the TPP contract on October 21, 2009, but sustained as to their fraud in the inducement allegations.[FN8]

FN8. Since Wells Fargo's demurrer to Count VIII will be sustained on that basis, it is not necessary to address Wells Fargo's remaining objections to the fraud in the inducement claim which are set forth in its amended preliminary objections.

Wells Fargo's requested dismissal of the Healeys' UTP/CPL count based upon the parol evidence rule will also be overruled. The UTP/CPL makes it unlawful to engage in “unfair or deceptive acts or practices in the conduct of any trade or commerce,” *Toy,* 593 Pa. at 27 n. 4, 928 A.2d at 190 n. 4 (citing 73 P.S. §201-2(4)(xvii)), and creates a private right of action for anyone who “suffers any ascertainable loss of money or property” as a result of an unlawful method, act or practice. 73 P.S. §201-9.2(a). Proof of common law fraud is not necessary to prove “deceptive conduct which creates a likelihood of confusion or of misunderstanding” under 73 P.S. §201-2(4)(xxi). *Bennett v. A. T. Masterpiece Homes at Broadsprings. LLC,* 2012 WL 698132, at * 7-8 (Pa. Super. 2012). Many of the specific allegations of “unfair or deceptive acts” by Wells Fargo regard conduct which occurred after the execution of the TPP contract. (*See,* Docket Entry No 10, ¶60(j)-(o)). Other purported deceptive acts are also reflected in Wells Fargo's written communications, some of which post-date the Healeys' execution of the TPP agreement. (*id.,* ¶60(j), (o)). As a result, those charges of “fraudulent or deceptive conduct” are not prohibited by the parol evidence rule, and Wells Fargo's preliminary objections to Count I will, therefore, be overruled.[FN9]

FN9. In connection with the Healeys' breach of contract claim (Count III), parol evidence may be admissible to resolve any apparent ambiguities in the TPP contract which are discussed in Section II(B) above. *See, Resolution Trust Corp. v. Urban Redevelopment Authority of Pittsburgh,* 536 Pa. 219, 225-226, 638 A.2d 972, 975 (1994).

Nor are the Healeys' UTP/CPL and remaining fraud claims barred by the statute of frauds. The statute of frauds, 33 P.S. § 1 *et seq.,* generally requires that interests in land may be granted, assigned or surrendered only by a writing. The purpose of the statute of frauds is to prevent the enforcement of unfounded fraudulent claims by requiring that contracts pertaining to interests in real estate be supported by written evidence. *Kurland v. Stolker,* 516 Pa. 587, 592, 533 A.2d 1370, 1372 (1987); *Firetree, Ltd. v. Department of General Services,* 978 A.2d 1067, 1073 (Pa. Cmwlth. 2009). An agreement not to foreclose is considered a surrender of an interest in land which falls within the statute of frauds. *Atlantic Financial Federal v. Orianna Historic Associates,* 406 Pa. Super. 316, 319-20, 594 A.2d 356, 357 (1991). Thus, “[a]n agreement to forebear from foreclosure, between mortgagor and mortgagee, has been held to represent an interest in land such that the agreement is subject to the statute of frauds and must be in writing.”[FN10] *Strausser v. PRAMCO III,* 944 A.2d 761, 765 (Pa. Super. 2008); *Hansford v. Bank of America,* 2008 WL 4078460 at * 13 (E.D. Pa. 2008).

FN10. The statute of frauds can be satisfied by any combination of multiple documents which taken together make out the necessary terms of the parties' agreement. *Strausser, supra.* In rare instances, a plaintiff can enforce an agreement to convey real property on the strength of an oral agreement, as in cases where the seller admits there was an oral agreement or has waived the statute of frauds, or where there is sufficient proof that the buyer paid consideration for the land and took possession of it and the buyer's harm cannot be compensated in damages. *Firetree, Ltd.,* 978 A.2d at 1074. The statute of frauds also excludes from its ambit “any conveyance by which a trust or confidence shall or may arise or result by implication or construction of law.” *Makozy v. Makozy,* 874 A.2d 1160, 1169 (Pa. Super. 2005), *app. denied, 586* Pa. 740, 891 A.2d 733 (2005).

The gravamen of the Healeys' contract and tort claims is that Wells Fargo no longer possessed the right to foreclose once it advised the Healeys by letter that they pre-qualified for the Trial Period Plan and would be receiving a TPP agreement. One federal court has concluded that the TPP contract cannot be characterized as a forbearance agreement for that reason (i.e., the lender had already agreed not to foreclose by the time it was executed), as a result of which it is not subject to the statute of frauds. *See, Ansanelli, supra,* at *4. Even if Wells Fargo's Trial Period Plan could be construed as an agreement to forebear from foreclosure, that promise not to foreclose is in fact reflected in a writing (the TPP contract) in compliance with the statute of frauds.

Several of the Healeys' UTP/CPL averments concerning “unfair or deceptive acts” do not relate to a grant, assignment or surrender of an interest in land as envisioned by the statute of frauds. Some instances of Wells Fargo's post-execution conduct which the Healeys maintain was fraudulent are contained in letters and writings authored by Wells Fargo's representatives. That amalgam of documents addresses the parties' understanding regarding forbearance from foreclosure and satisfies the statute of frauds. *See, Strausser, supra.* Consequently, Wells Fargo's demurrer based upon the statute of frauds will be overruled.

(D) GIST OF THE ACTION DOCTRINE

Wells Fargo also seeks to dismiss the Healeys' claims for fraud, negligent misrepresentation and negligent infliction of emotional distress. Fraud is a generic term that is used to describe “anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture.” *Hart v. Arnold,* 884 A.2d 316, 339 n. 7 (Pa. Super. 2005), *app. denied,* 587 Pa. 695, 897 A.2d 458 (2006). To state a claim for common law fraud, the plaintiff must allege: (1) a representation; (2) material to the transaction at issue; (3) made falsely, with either knowledge or reckless disregard of its falsity; (4) with the intent to mislead another person or induce justifiable reliance; and (5) some injury caused by the reliance. *Bennett, supra,* at * 5 n. 5. The intent to defraud may be established by circumstantial evidence, that is, by inferences that reasonably may be drawn from the facts and circumstances. *Integrated Behavioral Health Services v. Department of Public Welfare,* 871 A.2d 296, 300 (Pa. Cmwlth. 2005); *Brown v. Jones,* 2012 WL 756607, at * 4 (Lacka. Co. 2012).

Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. *Bortz v. Noone,* 556 Pa. 489, 500, 729 A.2d 555, 561 (1999); *Smalanskas v. Indian Harbor Insurance Company,* 2008 WL 3889290, at * 7 (Lacka. Co. 2008), *aff'd,* 970 A.2d 490 (Pa. Super. 2009). The primary difference between fraudulent misrepresentation and negligent misrepresentation is the state of mind of the person making the representation. *Busy Bee, Inc. v. Corestates Bank,* 67 D. & C. 4th 496, 521-522 (Lacka. Co. 2004). With a negligent misrepresentation claim, the speaker need not know that the spoken words are untrue, but must have failed to make a reasonable investigation of the truthfulness of the representation. *Bortz,* 556 Pa. at 501, 729 A.2d at 561; *Com. v. TAP Pharmaceutical Products, Inc.,* 2011 WL 4056170, at * 68 (Pa. Cmwlth. 2011).

A cause of action for negligent infliction of emotional distress (NIED) is recognized only in four sets of circumstances: (1) situations where the defendant owed the plaintiff a pre-existing duty based upon a special relationship; (2) the plaintiff was subjected to a physical impact; (3) the plaintiff was in a zone of danger, thereby reasonably experiencing a fear of impending injury; or (4) the plaintiff observed a tortious injury to a close relative. *Toney v. Chester County Hospital,* 961 A.2d 192, 197-198 (Pa. Super. 2008), *aff'd,* 36 A.3d 83 (Pa. 2011); *Mellor v. O'Brien,* 2012 WL 407389, at * 4 (Lacka. Co. 2012). Since the Healeys were not subjected to a physical impact, located in a zone of danger or witnesses to an injury to a close relative, they may only pursue a "special relationship" claim for NIED. The Supreme Court of Pennsylvania has held that NIED claims asserted under that category are limited to certain special relationships, such as the relationship between a doctor and patient or a deceased's loved ones and a person responsible for burial of the corpse, "involving duties that obviously and objectively hold the potential of deep emotional harm in the event of breach." *Toney,* 36 A.3d at 95. Such a relationship must "involve an implied duty to care for the plaintiffs emotional well-being that, if breached, has the potential to cause emotional distress resulting in physical harm." *Id.* Furthermore, in all four types of NIED cases, the plaintiff must have experienced some form of physical manifestation of emotional suffering, such as continued nausea or headaches, nightmares, severe depression, repeated hysterical attacks, weight gain or sexual difficulties. *See, Toney,* 961 A.2d at 200; *Pacheco v. Golden Living Center - Summit,* 2011 WL 744656, at * 7 n. 6 (M.D. Pa. 2011); *Yanchick v. Tyler Memorial Hospital,* 101 Lacka. Jur. 331, 337 (2000).

In Count II of the amended complaint, the Healeys allege that Wells Fargo made fraudulent misrepresentations and omissions "concerning HAMP and the Loan Modification Agreement," that Wells Fargo "knew [its] representations were false and/or acted recklessly as to whether the misrepresentations and/or omissions were true or false," that the Healeys "reasonably relied upon [Wells Fargo's] misrepresentations and/or omissions to their detriment," and that the Healeys "sustained damages as ha[ve] been previously stated."[FN11] (Docket Entry No. 10, ¶¶64-69). The Healeys also aver in their negligent misrepresentation count that "Wells Fargo had a duty of care in taking reasonable steps to insure the truth of its representations to consumers," that it "breached its duty of care in making the misrepresentations previously stated," that the Healeys "reasonably relied on such misrepresentations to their detriment," and that the Healeys "sustained damages as have been previously stated." (*id.,* ¶¶90-93). The Healeys' NIED claim charges that Wells Fargo acted negligently and recklessly by placing the Healeys in the HAMP plan "without investigating whether [the Healeys] were eligible for such a program," failing "to grant [the Healeys] a permanent loan modification as promised in the Loan Modification Agreement," and "repeatedly misplacing and/or losing the documentation provided by [the Healeys]" in connection with their HAMP request. (*Id.,* ¶95). In earlier paragraphs of the amended complaint, the Healeys identified their damages as "financial loss, including opportunity and/or equity, additional fees and costs, increased mortgage costs, mental anguish and embarrassment, damage to their credit rating, ineligibility to refinance their mortgage, attorney fees and costs." (*id.,* ¶52). The Healeys further contend that "Plaintiff Colleen Healey became unnerved and upset and has suffered, yet suffers and will/may suffer for an indefinite time in the future, migraines, high blood pressure, anxiety, mental anguish, and aggravation of arthritis and pre-existing medical conditions." (*id.,* ¶53).

FN11. The Healeys' fraud in the inducement claims (Count VIII) will not be reviewed in Section II(D) since they will be dismissed for the reasons stated in Section II(C) above.

Wells Fargo demurs to those tort claims based upon the gist of the action doctrine. Wells Fargo asserts that the

Healeys' tort claims “all stem from the [Healeys'] breach of contract claim” and “merely recast their breach of contract claim as tort claims,” as a result of which the “tort claims should be dismissed with prejudice pursuant to the gist of the action doctrine.” (Docket Entry No. 7, pp. 12-13). The Healeys' brief in opposition to that particular demurrer reviews the substance of their tort allegations and discusses the factual sufficiency of those averments, but does not address whether their claims for fraud, negligent misrepresentation and NIED claims are barred by the gist of the action doctrine. (Docket Entry No. 8, pp. 13-16).

“Under Pennsylvania law, a cause of action framed as a tort but reliant upon contractual obligations will be analyzed to determine whether the cause of action properly lies in tort or contract.” *Autochoice Unlimited, Inc. v. Avangard Auto Finance, Inc.,* 9 A.3d 1207, 1212 (Pa. Super. 2010). The gist of the action “doctrine ‘maintains the conceptual distinction between breach of contract claims and tort claims,’ and precludes plaintiffs from recasting ordinary breach of contract claims as tort claims.” *McShea v. City of Philadelphia*, 606 Pa. 88, 96, 995 A.2d 334, 339 (2010) (quoting *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002)). Under this approach, “[t]ort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.” *Mirizio v. Joseph,* 4 A.3d 1073, 1079 (Pa. Super. 2010) (quoting *eToll, supra*), *app. denied,* 14 A.3d 829 (Pa. 2010). The gist of the action doctrine acts to bar tort claims (1) arising solely from the contractual relationship between the parties, (2) when the alleged duties breached were grounded in the contract itself, (3) where any liability stems from the contract, and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.[FN12] *Strausser,* 944 A.2d at 767; *Reardon v. Allegheny College,* 926 A.2d 477, 486 (Pa. Super. 2007), *app. denied,* 596 Pa. 755, 947 A.2d 738 (2008).

FN12. In contrast to the Superior Court's four-part analysis, the Commonwealth Court employs a “misfeasance/nonfeasance” test in determining whether an action sounds in contract or in tort under the gist of the action doctrine. Under the Commonwealth Court's approach, if there is a “misfeasance” or an improper performance of a contractual obligation, the defendant breaches a duty imposed by law as a matter of social policy and the gist of the action sounds in tort. Conversely, if there is a nonfeasance or mere failure to perform, the wrong attributed to the defendant is solely a breach of the defendant's duty to perform under the contract, in which instance the gist of the plaintiffs action sounds solely in contract. *Pratter v. Penn Treaty American Corp.,* 11 A.3d 550, 559 n. 9 (Pa. Cmwlth. 2010) (quoting *Yocca v. Pittsburgh Steelers Sports, Inc.*, 806 A.2d 936, 944 (Pa. Cmwlth. 2002), *rev'd on other grounds,* 578 Pa. 479, 854 A.2d 425 (2004)).

Claims of fraud in the performance of a contract are clearly barred under the gist of the action doctrine. *Autochoice Unlimited, Inc. v. Avengard Auto Finance, Inc.*, 9 A.3d 1207, 1212 (Pa. Super. 2010) (quoting *Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. 2005), *app. denied,* 587 Pa. 695, 897 A.2d 458 (2006)); *Sparrow v. PACE/CM, Inc.,* 2011 WL 1131487, at *10 (Lacka. Co. 2011). However, a tort claim asserting fraudulent inducement to enter into a contract is not precluded by the gist of the action doctrine since fraudulent inducement allegations do not relate to the defendant's failure to perform obligations under the parties' contract. *Mirizio,* 4 A.3d at 1085-1086; *Busy Bee, Inc. v. Wachovia Bank, N.A., 2006* WL 723487, at * 20 (Lacka. Co. 2006), *aff'd,* 932 A.2d 248 (Pa. Super. 2007), *app. denied,* 598 Pa. 778, 959 A.2d 318 (2008). *But see, Vives v. Rodriguez,* 2012 WL 298760 at *11 (E.D. Pa. 2012) (“We ultimately side with the authority from our Circuit, and predict that the Pennsylvania Supreme Court would find fraudulent inducement claims predicated upon misrepresentations as to a party's intent to perform under a contract to be barred by the gist of the action doctrine.”). Inasmuch as the Healeys' fraud in the inducement claims are being stricken based upon the parol evidence rule, only the

Healeys' remaining fraud allegations need be considered under the gist of the action doctrine.

While Pennsylvania courts have addressed the application of the gist of the action doctrine to claims for fraud in the performance of a contract and fraud in the inducement to enter into a contract, it does not appear that any court has analyzed “fraud in the execution” claims in the context of the gist of the action doctrine. Unlike claims for fraud in the performance of a contract, a claim for fraud in the execution is premised upon the contention that the plaintiff “executed the agreement because [s]he was defrauded by being led to believe that the document contained terms that actually were omitted therefrom.” *Blumenstock v. Gibson,* 811 A.2d 1029, 1036 (Pa. Super. 2003), *app. denied,* 573 Pa. 714, 828 A.2d 349 (2003). Under the four part test governing the application of the gist of the action doctrine, tort claims are foreclosed by that doctrine “when the alleged duties breached were grounded in the contract itself.” In a fraud in the execution claim, the duty purportedly breached cannot possibly be found in the parties' contract since the plaintiff contends that the agreed upon terms were fraudulently omitted from the agreement. Conceptually, the gist of the action doctrine should not apply to fraud in the execution claims inasmuch as the duty at issue is not “grounded in the contract itself.” Therefore, Wells Fargo has not established that it is free and clear from doubt that the Healeys' fraud in the execution claims are barred by the gist of the action doctrine.

In Count VI of the amended complaint entitled “Negligent Misrepresentation,” the Healeys do not specifically identify which representations were negligently made and instead generally aver that Wells Fargo allegedly “breached its duty of care in making the misrepresentations previously stated.” (Docket Entry No. 10, ¶91). To the extent that those negligent misrepresentations relate to Wells Fargo's performance of its duties under the TPP contract, they are barred by the gist of the action doctrine. *See, Driscoll/Intech II v. Scarborough,* 3 D. & C. 5th 279, 287-88 (Phila. Co. 2008) (dismissing negligent misrepresentation claims based upon the gist of the action doctrine, and holding that “[t]he negligent misrepresentation allegations are rooted in the defendants' contractual obligations under the subcontract.”). Conversely, if the negligent misrepresentations concern matters that are collateral to the performance of the TPP agreement, they are not precluded by the gist of the action doctrine. *See, Sullivan v. Chartwell Investment Partners, LP,* 873 A.2d 710, 719 (Pa. Super. 2005) (declining to dismiss fraud and negligent misrepresentation claims and “conclud[ing] that since [plaintiffs] tort claims relate to the inducement to contract, they are collateral to the performance of the contracts and are not barred by the gist of the action doctrine.”). Hence, Wells Fargo's demurrer to the Healeys' negligent misrepresentation claim will be sustained only as to those misrepresentations which relate to the performance of Wells Fargo's obligations under the TPP agreement.

The instances of alleged negligence set forth in the Healeys' NIED count pertain to Wells Fargo's duties under the Trial Period Plan or TPP agreement and its performance of those duties. (Docket Entry No. 10, ¶95). As such, they are proscribed by the gist of the action doctrine. *Oehlmann v. Metropolitan Life Insurance Company,* 644 F.Supp.2d 521, 535 (M.D. Pa. 2007) (“Because MetLife does not stand in a fiduciary capacity to Plaintiff, any duty owed to Plaintiff must be contractual, and arise from the insurance contract” such that “Plaintiffs claim for negligent infliction of emotional distress is barred by the gist of the action doctrine.”); *Cimildoro v. Metropolitan Property & Casualty Insurance Company,* 2010 WL 891838, at * 4 (E.D. Pa. 2010) (citing *Oehlmann* and holding that “Cimildoro's negligent infliction of emotional distress claim against Metropolitan is also barred by the gist of the action doctrine.”). Thus, the demurrer to Count VII (Negligent Infliction of Emotional Distress) of the amended complaint will be sustained.[FN13]

FN13. The Healeys have not alleged, nor does Pennsylvania law suggest, that the relationship between a lender and borrower involves “duties that obviously and objectively hold the potential of deep emotional harm in the event of breach." *Toney,* 36 A.3d at 95. Absent such a special relationship, Wells Fargo cannot be liable to the Healeys for NIED. *Id.,* The only reported decision addressing a NIED claim in the context of the denial of a permanent loan modification under HAMP dismissed that NIED claim on the ground of legal insufficiency. *See, Parker v. Bank of America,* 2011 WL 6413615, at * 13 (Mass. Super. 2011) (dismissing NIED claim against lender and mortgage servicer which "serially delayed and obstructed the Plaintiffs efforts at modification in order to pad their revenues and protect their financial interest to the detriment of Plaintiff in violation of the federal mandates included with Defendants' acceptance of Troubled Asset Relief Program (TARP) funding.").

(E) IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Healeys aver in Count IV of the amended complaint that Wells Fargo breached the implied covenant of good faith and fair dealing by "repeatedly demanding documentation" that the Healeys had already provided, "inaccurately determining [the Healeys'] eligibility for HAMP," and failing "to grant [the Healeys] a permanent loan modification to which they were entitled" under the TPP agreement and "to timely review [the Healeys'] modification application." (Docket Entry No. 7, ¶¶81-82). In its demurrer to Count IV, Wells Fargo maintains that "Pennsylvania law does not recognize an independent cause of action for breach of the covenant of good faith and fair dealing." (Docket Entry No. 14, p. 13). In response, the Healeys cite *Creeger Brick and Building Supply, Inc. v. Mid-State Bank and Trust Company,* 385 Pa. Super. 30, 560 A.2d 151 (1989) and *Engstrom v. John Nuveen & Company,* 668 F.Supp. 953 (E.D. Pa. 1987) for the proposition "that a claim for breach of duty of good faith and fair dealing is actionable." (Docket Entry No. 8, p. 17).

Every contract imposes upon each party a duty of good faith and fair dealing in the contract's performance and enforcement. *Table and Associates Insurance Agency v. Commercial National Bank of Pennsylvania,* 875 A.2d 361, 364 (Pa. Super. 2005); *Busy* Bee, Inc., supra, at * 28. The implied duty of good faith has been defined as "[h]onesty in fact in the conduct or transaction concerned." *Gorski v. Smith,* 812 A.2d 683, 710 (Pa. Super. 2003), *app. denied,* 579 Pa. 692, 856 A.2d 834 (2004). Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts. *Creeger Brick and Building Supply* 385 Pa. Super. at 35, 560 A.2d at 153; *Zaloga v. Provident Life and Accident Insurance Company of America,* 671 F.Supp.2d. 623, 630 (M.D. Pa. 2009). There is, however, no independent cause of action for breach of the covenant of good faith and fair dealing since such a breach merges with a breach of contract claim. *LSI Title Agency, Inc. v. Evaluation Services, Inc.,* 951 A.2d 384, 392 (Pa. Super. 2008), ("Having determined...that the claim for breach of the implied covenant of good faith and fair dealing is subsumed in a breach of contract claim, we conclude that the trial court correctly granted LSI's motion for judgment on the pleadings...."), *app. denied,* 599 Pa. 694, 960 A.2d 841 (2008); *Zaloga,* 671 F.Supp.2d at 631.

Even the *Engstrom* decision cited by the Healeys states that "[t]here may be an express or implied covenant of good faith and fair dealing in any contract between the parties, but if so, its breach is a breach of contract rather than an independent breach of a duty of good faith and fair dealing." *Engstrom,* 667 F.Supp. at 958. *Accord, McHale v. NuEnergy Group,* 2002 WL 321797, at * 8 (E.D. Pa. 2002) ("A breach of such covenant is a breach of contract action, not an independent action for breach of a duty of good faith and fair dealing."). *Creeger Brick,* which predates *LSI Title,* does not hold to the contrary. To the extent that the Healeys have attempted to assert an independent cause of action for breach of the implied duties of good faith and fair dealing in Count IV of the amended complaint, Wells Fargo's preliminary objections will be sustained. *See, JHE, Inc. v. SEPTA,* 2002 WL 1018941, at * 7 (Phila. Co. 2002) ("Based on this analysis, this court holds that a breach of the covenant of good faith is nothing more than a breach of contract claim and that separate causes of action cannot be maintained for each, even in the alternative."); *McHale, supra* (dismissing independent claim for breach of covenant of good faith and fair dealing as subsumed by breach of contract claim). The Healeys may pursue the implied duty claims asserted in paragraphs 81-82 of the amended complaint in conjunction with their breach of contract claim, but may not advance the independent claims set forth in Count IV. *See e.g., Busy Bee, Inc., supra,* at *28.

(F) PROMISSORY ESTOPPEL

In its final preliminary objection, Wells Fargo demurs to the Healeys' promissory estoppel claim on the basis that the Healeys "do not allege that Wells Fargo made any related *promise* to them that can ground a promissory estoppel claim." (Docket Entry No. 7, p. 14) (emphasis in original). The Healeys retort that "the Court in this case should find that a claim for promissory estoppel is sufficiently pled where [the Healeys] stated they relied upon the statements of Wells Fargo's employees or agents to their detriment and took all actions upon the assumption that the mortgage would be modified to their detriment." (Docket Entry No. 8, p. 18).

To maintain an action for promissory estoppel, the plaintiff must show that: (1) the promissor made a promise that [s]he should have reasonably expected to induce action or forbearance on the part of the promissee; (2) the promissee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only be enforcing the promise. *Crouse v. Cyclops Industries,* 560 Pa. 394, 403, 745 A.2d 606, 610 (2000); *Guerra v. Redevelopment Authority of City of Philadelphia,* 27 A.3d 1283, 1292 (Pa. Super. 2011). "In effect, the detrimental reliance of the promissee creates the consideration necessary for the formation of a contract, the breach of which is actionable." *Matarazzo v. Millers Mutual Group, Inc.,* 927 A.2d 689, 692 (Pa. Cmwlth. 2007). Promissory estoppel makes an otherwise unenforceable agreement binding and permits an equitable remedy to a contract dispute. *Crouse, supra; Guerra, supra.*

The Healeys allege in Count V of the amended complaint that Wells Fargo advised them "in late December 2009 that they should continue making mortgage payments at the trial mortgage rate until final approval of the modification application." (Docket Entry No. 10, ¶85). The Healeys assert that Wells Fargo "should have reasonably expected" that such advice "would induce [the Healeys] to make such payments," which the Healeys proceeded to make for five consecutive months "[i]n reliance on this promise." (*id.,* ¶¶86-87). The Healeys maintain that Wells Fargo "improperly applied [the Healeys'] payments and/or failed to apply [the Healeys'] payments to their account and, as a result, [the Healeys] incurred late fees, additional charges, damage to their credit report, and other financial losses." (*Id.* ¶88).

Accepting those factual averments as true and affording the Healeys all reasonable inferences which may be deduced from the facts averred in prior paragraphs of the amended complaint, the Healeys have adequately pled a claim for promissory estoppel. The Healeys allege throughout the amended complaint that Wells Fargo promised to provide them with a permanent loan modification, induced them to make five additional trial period payments after the expiration of the "Modification Effective Date," and failed to properly apply those payments to their account. Taken as a whole, those averments are sufficient to state a cause of action for promissory estoppel. *Cf., Wigod, supra,* at * 11 n. 8 ("One or more of Wells Fargo's contract defenses may remain in dispute for the remainder of the litigation. For this reason, Wigod may preserve her promissory estoppel claim as an alternative in the event the district court or jury later concludes as a factual matter that an enforceable contract did not exist.").

ORDER

AND NOW, this 20th day of March, 2012, upon consideration of Defendant's original and amended preliminary objections to Plaintiffs' original and amended complaints, the memoranda of law submitted by the parties and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. Defendant's original and amended preliminary objections are SUSTAINED in part and OVERRULED in part;

2. Defendant's preliminary objections in the nature of a demurrer to the plaintiffs' breach of contract claim (Count III) are OVERRULED;

3. Defendant's preliminary objections to the plaintiffs' fraud claims based upon the parol evidence rule are SUSTAINED with respect to the plaintiffs' fraud in the inducement claims set forth in Count VIII of the amended complaint, but OVERRULED relative to the plaintiffs' remaining fraud claims (Count II) and their cause of action based upon the Unfair Trade Practices and Consumer Protection Law (Count I);

4. Defendant's preliminary objections to Counts I and II of the amended complaint predicated upon the statute of frauds are OVERRULED;

5. With regard to Defendant's preliminary objections based upon the gist of the action doctrine, those preliminary objections are SUSTAINED as to (a) plaintiffs' claims for fraud in the performance of defendant's duties under the Trial Period Plan contract, (b) plaintiffs' negligent misrepresentation claims relating to the performance of defendant's obligations under that contract and (c) plaintiffs' claim for negligent infliction of emotional distress, but OVERRULED in all other respects;

6. Since plaintiffs' claims for breach of the implied covenant of good faith and fair dealing are incorporated into their breach of contract claim contained in Count III of the amended complaint, the preliminary objections to plaintiffs' assertion of an independent cause of action for breach of the implied covenant of good faith and fair dealing in Count IV of the amended complaint are SUSTAINED;

7. Defendant's preliminary objections to plaintiffs' promissory estoppel claim in Count V of the amended complaint are OVERRULED; and

8. Within the next twenty (20) days, defendant shall file a responsive pleading to the amended complaint.

BY THE COURT:

<<signature>>

Terrence R. Nealon

Healey v. Fargo
2012 WL 994564 (Pa.Com.Pl.) (Trial Order)

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PHILADELPHIA, PA 19102-2556

IN RE: MICHAEL L. JONES DEBTOR; MICHAEL L. JONES, PLAINTIFF VERSUS WELLS FARGO HOME MORTGAGE, INC., DEFENDANT

CASE NO. 03-16518, SECTION A, CHAPTER 13, ADVERSARY NO. 06-1093

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2012 Bankr. LEXIS 1450

April 5, 2012, Decided

PRIOR HISTORY: *Wells Fargo Bank, N.A. v. Jones (In re Jones), 439 Fed. Appx. 330, 2011 U.S. App. LEXIS 17867 (5th Cir. La., 2011)*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant mortgage creditor was found to have wilfully violated the automatic bankruptcy stay by misapplying plaintiff bankruptcy debtor's payments, and the sanction requiring the creditor to implement remedial practices in lieu of punitive damages was found to be beyond the bankruptcy court's jurisdiction. Upon remand from the U.S. District Court for the Eastern District of Louisiana, the bankruptcy court considered punitive damages.

OVERVIEW: The creditor violated the stay by misapplying postpetition payments made by the debtor and the bankruptcy trustee to undisclosed postpetition fees and costs not authorized by the bankruptcy court, without notice to the debtor or the trustee, and in contravention of the debtor's confirmed plan of reorganization and the court's confirmation order, and the creditor routinely engaged in the same practices in numerous other bankruptcy cases. The bankruptcy court held that substantial punitive damages were warranted against the creditor for its egregious misconduct. The creditor violated the stay intentionally through affirmative acts of misconduct, engaged in particularly vexing litigation concerning its conduct which caused the debtor substantial delay and expense, and steadfastly refused to voluntarily correct any errors except through litigation. Further, the creditor possessed significant resources and was not deterred by previous sanctions in this and other cases, and a substantial punitive damage award was warranted to deter the creditor's misconduct and motivate the creditor to rectify its practices.

OUTCOME: Punitive damages were awarded against the creditor.

LexisNexis(R) Headnotes

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Estate Property
Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Contempt
Bankruptcy Law > Estate Property > Content
Bankruptcy Law > Practice & Proceedings > Jurisdiction > Core Proceedings
[HN1] A bankruptcy court has jurisdiction over all property of a bankruptcy estate wherever located. *28 U.S.C.S. §§ 157(a), 1334(e)*; *11 U.S.C.S. § 541*. Upon filing of the case, all actions to collect, enforce, or possess property of the estate are automatically enjoined. *11 U.S.C.S. § 362*. Proceedings to prosecute violations of the automatic stay are core proceedings. A proceeding to enforce the automatic stay by means of civil contempt is a core proceeding within the meaning of *28 U.S.C.S. § 157* and within the scope of the bankruptcy court's powers. *11 U.S.C.S. § 105(a)*. A contempt order is purely civil if the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages
[HN2] *11 U.S.C.S. § 362(k)* allows for the award of actual damages, including costs and attorneys' fees, as a result of a violation of the automatic bankruptcy stay, and punitive damages in appropriate circumstances. Punitive damages are warranted when the conduct in question is willful and egregious, or when the defendant acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN3] Punitive damage awards must address both reasonableness and adequate guidance concerns to satisfy the *Fourteenth Amendment's due process clause*. A two-part test helps courts determine whether the requirements are met: (1) whether the circumstances of the case indicate that the award is reasonable; and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the factfinder.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN4] A court examines three factors in determining the propriety of a punitive damage award: (1) the degree of reprehensibility; (2) the ratio between the punitive damages and the actual harm; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN5] Infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages
[HN6] See *11 U.S.C.S. § 362(k)(1)*.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages
[HN7] Punitive damages may be recovered when a creditor acts with actual knowledge of a violation of the automatic bankruptcy stay or with reckless disregard of the protected right. Where an arrogant defiance of federal law is demonstrated, punitive damages are appropriate.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN8] Exemplary damages must bear a reasonable relationship to compensatory damages. The proper inquiry whether there is a reasonable relationship between the punitive damages award and the harm likely to result from a defendant's conduct as well as the harm that actually has occurred. There is no mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. Instead, punitive damages must address both reasonableness and adequate guidance concerns to satisfy the *Fourteenth Amendment's due process clause*.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN9] When necessary to deter reprehensible conduct,

courts often award punitive damages in an amount multiple times greater than actual damages.

Civil Procedure > Remedies > Damages > Punitive Damages

[HN10] Fairness requires that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty. In determining an appropriate punitive damage amount, substantial deference must be given to legislative judgments concerning appropriate sanctions for the conduct at issue.

COUNSEL: [*1] For Michael L. Jones, Debtor (03-16518): Allan L. Ronquillo, DeLeo & Ronquillo, L.L.P., Mandeville, LA.

Trustee (03-16518): S. J. Beaulieu, Jr., Metairie, LA.

For Michael L. Jones, Plaintiff (06-01093): Allan L. Ronquillo, LEAD ATTORNEY, DeLeo & Ronquillo, L.L.P., Mandeville, LA; Ashley Stelly Green, LEAD ATTORNEY, Gordon, Arata, et al, L.L.P., Lafayette, LA; Louis Middleton Phillips, Ryan James Richmond, LEAD ATTORNEYS, Gordon, Arata, et al, L.L.P., Baton Rouge, LA; Peter A. Kopfinger, LEAD ATTORNEY, Gordon Arata, Baton Rouge, LA; Robin R. DeLeo, Mandeville, LA.

For Wells Fargo Home Mortgage, Inc., Defendant (06-01093): Anthony Rollo, LEAD ATTORNEY, McGlinchey, Stafford, Cellini and Lang, Baton Rouge, LA; Daniel Plunkett, Heather A. LaSalle, LEAD ATTORNEYS, McGlinchey Stafford, PLLC, New Orleans, LA; Eric J Simonson, Rudy J. Cerone, LEAD ATTORNEYS, New Orleans, LA.

For U. S. Trustee Region V, U.S. Trustee (06-01093): Mary S. Langston, Office of the U.S. Trustee, New Orleans, LA.

JUDGES: Hon. Elizabeth W. Magner, U.S. Bankruptcy Judge.

OPINION BY: Elizabeth W. Magner

OPINION

MEMORANDUM OPINION

This matter is on remand from the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit")[1] and the United States [*2] District Court for the Eastern District of Louisiana ("District Court").[2] The mandate required reconsideration of monetary sanctions in light of *In re Stewart*.[3] The parties were afforded time to file additional briefs, after which the matter was taken under advisement.[4] Wells Fargo Bank, N.A. ("Wells Fargo") also filed an *Ex Parte* Motion to Take Judicial Notice[5] which will be addressed in this Opinion.

1 5th Cir. case no. 10-31005; *Wells Fargo Bank, N.A. v. Jones (In re Jones), 439 Fed.Appx. 330 (5th Cir. 2011)*.
2 *USDC, EDLA, 391 B.R. 577*.
3 *Wells Fargo Bank, N.A. v. Stewart (In re Stewart), 647 F.3d 553 (5th Cir. 2011)*.
4 Docket no. 455. The parties indicated that the Court should use the briefs they previously filed in connection with the Motion for Sanctions rather than submitting entirely new briefs. Docket nos. 78, 96. The parties were allowed to supplement these initial briefs.
5 Docket no. 459.

I. Jurisdiction

[HN1] The bankruptcy court has jurisdiction over all property of the estate wherever located.[6] Upon filing of the case, all actions to collect, enforce, or possess property of the estate are automatically enjoined.[7] Proceedings to prosecute violations of the automatic stay are core proceedings.[8] [*3] A proceeding to enforce the automatic stay by means of civil contempt is a "core proceeding" within the meaning of *28 U.S.C. § 157* and within the scope of the bankruptcy court's powers.[9] A contempt order is purely civil "[i]f the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation."[10] The Court finds that it has jurisdiction over this proceeding for civil contempt.

6 *28 U.S.C. §§ 157(a)* and *1334(e)* and *11 U.S.C. § 541*.
7 *11 U.S.C. § 362*.
8 *Budget Service Co. v. Better Homes of Virginia, Inc., 804 F.2d 289, 292 (4th Cir. 1986)*; *Milbank v. McGee (In re LATCL&F, Inc.), 2001 U.S. Dist. LEXIS 12478, 2001 WL 984912, *3 (N.D.Tex. 2001)*.
9 *11 U.S.C. § 105(a)*; *Matter of Terrebonne Fuel*

and Lube, Inc., 108 F.3d 609 (5th Cir. 1997); *In re Johnson, 575 F.3d 1079, 1083 (10th Cir. 2009)*; *MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 108-109 (2nd Cir. 2006)*; *In re Nat. Century Financial Enterprises, Inc., 423 F.3d 567, 573-574 (6th Cir. 2005)*.

10 *Lamar Financial Corp. v. Adams, 918 F.2d 564, 566 (5th Cir. 1990)*.

II. Procedural Background

This adversary proceeding was filed by Michael L. Jones, debtor, ("Jones" or "Debtor") in an effort to recoup [*4] overpayments made to Wells Fargo on his home mortgage loan. The complaint requested return of the overpayments, reimbursement of actual damages, and punitive damages for violation of the automatic stay. At trial, the parties severed Debtor's request for compensatory and punitive damages from the merits of Debtor's claim for return of overpayments. On April 13, 2007, the Court entered an Opinion[11] and Partial Judgment[12] awarding Jones $24,441.65, plus legal interest for amounts overcharged by Wells Fargo. In addition, the Opinion found Wells Fargo to be in violation of the automatic stay because it applied postpetition payments made by Jones and his trustee to undisclosed postpetition fees and costs not authorized by the Court, noticed to Debtor or his trustee, and in contravention of Debtor's confirmed plan of reorganization and the Confirmation Order.[13] Wells Fargo's conduct was found to be willful and egregious.[14]

11 Docket no. 69; *In re Jones, 366 B.R. 584 (Bankr.E.D.La. 2007)*.

12 Docket no. 68.

13 Docket no. 69.

14 *Id*.

A second hearing on sanctions, damages, and punitive relief was held on May 29, 2007.[15] At the hearing, Wells Fargo offered to implement several remedial measures designed [*5] to correct systemic problems with its accounting of home mortgage loans ("Accounting Procedures").[16] The new Accounting Procedures were negotiated between the Court and Wells Fargo's representative. They were embodied in a subsequent Supplemental Memorandum Opinion,[17] Amended Judgment,[18] and Administrative Order 2008-1. The Amended Judgment also awarded Jones $67,202.45 in compensatory sanctions for attorney's fees and costs.[19]

15 Jones also filed a Motion for Sanctions, Including Punitive Damages. Docket no. 77.

16 Tr.T. 5/29/01, 48:18-23; 63:2-21; 83:4-10; 92:24-93:4. Docket no. 126.

17 Docket no. 153; *Jones v. Wells Fargo Home Mortgage, Inc., (In re Jones), 2007 Bankr. LEXIS 2984, 2007 WL 2480494 (Bankr.E.D.La. 2007)*.

18 Docket no. 154.

19 *Id*.

Following its agreement, Wells Fargo reversed its legal position and appealed the Amended Judgment to the District Court.

On appeal, the District Court affirmed the findings of this Court and increased the compensatory civil award to $170,824.96. However, because Wells Fargo withdrew its consent to the nonmonetary relief ordered, the issue of punitive damages was remanded for further findings and consideration.[20] Wells Fargo appealed the District Court remand, but the Fifth [*6] Circuit dismissed the appeal for lack of jurisdiction.[21]

20 USDC, EDLA case no. 07-3599, docket nos. 76, 77; *Wells Fargo Bank, N.A. v. Jones, 391 B.R. 577 (E.D.La. 2008)*.

21 5th Cir. case no. 08-30735.

For the reasons set forth in the Opinion dated October 1, 2009, this Court imposed the original sanctions ordered, the Accounting Procedures, *in lieu* of punitive damages ("Partial Judgment on Remand").[22] Based on the findings of the District Court, this Court also entertained Jones' request for an increase in compensatory sanctions. Wells Fargo opposed the request, but settled the matter for an undisclosed stipulated amount.[23] Jones appealed the denial of punitive damages.[24]

22 Docket nos. 390, 392; *Jones v. Wells Fargo Home Mortgage, Inc., (In re Jones), 418 B.R. 687 (Bankr.E.D.La. 2009)*.

23 Docket no. 417.

24 Docket no. 424.

On August 24, 2010, the District Court affirmed the Partial Judgment on Remand.[25] Again, Jones appealed the denial of punitive relief to the Fifth Circuit.

25 USDC, EDLA case no. 07-3599, docket no. 139; *Jones v. Wells Fargo Bank N.A., 2010 U.S.*

Dist. LEXIS 98127, 2010 WL 3398849 (E.D.La. 2010). *See also* USDC, EDLA case no. 09-7635, docket no. 11.

On August 23, 2007, more than four (4) months after this [*7] Court entered its initial opinion in this case, Ms. Dorothy Stewart filed an Objection to the Proof of Claim of Wells Fargo in her bankruptcy case pending in this district. The Objection alleged in part that the amount claimed by Wells Fargo in its proof of claim was incorrect because prepetition payments had been improperly applied.[26]

26 USBC, EDLA case no. 07-11113, docket no. 24.

The Memorandum Opinion issued in the *Dorothy Stewart* case found that Wells Fargo misapplied her payments in a fashion identical to *Jones*.[27] As with the *Jones* decision, Wells Fargo's actions resulted in an incorrect amortization of Ms. Stewart's debt and the imposition of unauthorized or unwarranted fees and costs. Because Wells Fargo's failure was a breach of its obligations under the Partial Judgment on Remand, it was ordered to audit every borrower with a case pending in this district for compliance with the Accounting Procedures ("*Stewart* Judgment").[28]

27 *Id*. at docket no. 61; *In re Stewart, 391 B.R. 327 (Bankr.E.D.La. 2008)*.
28 *Id*. at docket no. 62.

The *Stewart* Judgment was affirmed by the District Court after Wells Fargo appealed.[29] Wells Fargo then appealed the *Stewart* Judgment to the Fifth Circuit.

29 *In re Stewart, 2009 U.S. Dist. LEXIS 53441, 2009 WL 2448054 (E.D.La. 2009)*.

The [*8] Fifth Circuit affirmed the findings and compensatory award contained in the *Stewart* Judgment.[30] However, the Fifth Circuit also found that the order requiring audits of debtor accounts was beyond this Court's jurisdiction. As a result, this portion of the relief was vacated. The *Stewart* appeal preceded hearing on the *Jones*' appeal. In light of *Stewart*, the Fifth Circuit remanded the Partial Judgment on Remand for consideration of alternative, punitive monetary sanctions.[31]

30 *In re Stewart, 647 F.3d 553 (5th Cir. 2011)*.

31 *Id*.

III. Facts

The facts of this case are well documented in previous Opinions. Those facts are incorporated by reference.[32] Only facts immediately relevant to remand will be restated. Wells Fargo willfully violated the automatic stay imposed by *11 U.S.C. § 362* when it:

> [C]harged Debtor's account with unreasonable fees and costs; failed to notify Debtor that any of these postpetition charges were being added to his account; failed to seek Court approval for same; and paid itself out of estate funds delivered to it for payment of other debt.[33]

32 Docket nos. 69, 153, 390; *USDC, EDLA, 391 B.R. 577*, docket no. 76; USDC, EDLA case no. 09-7635, docket no. 11.
33 *Jones, 366 B.R. at 600*.

Jones [*9] has already been awarded $24,441.65 for amounts overcharged on his loan; legal interest from March 30, 2006, until paid in full; and $170,824.96 in actual attorney's fees and costs. In addition, the to the amounts included in judgments rendered to date, Jones also incurred additional legal fees of $118,251.93 and $3,596.95 in costs. The additional fees and costs are supported by Jones' Application for Award Of Fees And Costs Related To Remand filed in the record of this case.[34]

34 Docket no. 396.

IV. Motion to Take Judicial Notice

Both the Partial Judgment on Remand and Administrative Order 2008-1 contemplated an internal review by Wells Fargo of all loan files to ensure the proper application of payments on home mortgage loans. Wells Fargo did not comply as evidenced by the *Stewart* decision. Instead, Wells Fargo continued to seek payment on prepetition monetary defaults calculated through the improper amortization of home mortgage loans.

As a result, in *Stewart*, this Court ordered Wells Fargo "to audit all proofs of claim [] filed in this District in any case pending on or filed after April 13, 2007, and to provide a complete loan history on every account."[35] Wells Fargo was ordered to [*10] amend the proofs of claim to comport with the loan histories. Wells Fargo appealed *Stewart* arguing that the Court was without authority to enforce the Accounting Procedures. Wells Fargo did not argue to the Fifth Circuit that the relief it challenged had already been performed. Quite simply if it had, its appeal would have been rendered moot.

35 *In re Stewart, 391 B.R. 327, 357 (Bankr.E.D.La. 2008).*

Wells Fargo now requests this Court take judicial notice of its compliance with Administrative Order 2008-1 as a mitigating factor in any assessment of punitive damages. To evaluate this claim, the problems found in this case and the remedies embodied in Administrative Order 2008-1 must be examined in detail.

In this case, Wells Fargo testified that every home mortgage loan was administered by its proprietary computer software. The evidence established:

1. Wells Fargo applied payments first to fees and costs assessed on mortgage loans, then to outstanding principal, accrued interest, and escrowed costs. This application method was directly contrary to the terms of Jones' note and mortgage, as well as, Wells Fargo's standard form mortgages and notes. Those forms required the application of payments [*11] first to outstanding principal, accrued interest, and escrowed charges, then fees and costs. The improper application method resulted in an incorrect amortization of loans when fees or costs were assessed. The improper amortization resulted in the assessment of additional interest, default fees and costs against the loan. The evidence established the utilization of this application method for every mortgage loan in Wells Fargo's portfolio.

2. Wells Fargo applied payments received from a bankruptcy debtor or trustee to the oldest charges outstanding on the mortgage loan rather than as directed by confirmed plans and confirmation orders. This resulted in the incorrect amortization of mortgage loans postpetition. Again, the improper amortization resulted in additional interest, default fees and costs to the loan. The evidence established the utilization of this application method for every mortgage loan administered by Wells Fargo in bankruptcy.

3. When postpetition fees or costs were assessed on a loan in bankruptcy, Wells Fargo applied payments received from the bankruptcy debtor to those fees and charges without disclosing the assessments or requesting authority. The payments were property [*12] of the estate, they were applied contrary to the terms of plans and confirmation orders, and in violation of the automatic stay. This practice resulted in the incorrect amortization of mortgage loans postpetition. Again, the improper amortization resulted in the addition of increased interest, default fees and costs to the loan balance. The evidence established the utilization of this application method for every Wells Fargo mortgage loan in bankruptcy.

Wells Fargo's practices led to the following conclusions:

1. Applications contrary to the contract terms of Wells Fargo's standard form notes and mortgages resulted in an incorrect amortization of the loan. As a result, monetary defaults claimed by Wells Fargo on the petition date were incorrect.

2. Misapplication of payments received postpetition resulted in incorrect amortization of Wells Fargo loans and threatened a debtor's fresh start, as well as, discharge.

3. Application of postpetition payments to new, undisclosed postpetition fees or costs also threatened a debtor's fresh start and discharge.

The Partial Judgment on Remand and Accounting Procedures were crafted to remedy the above problems. They were designed to protect debtors [*13] from incorrectly calculated proofs of claim, to verify that loans were properly amortized prepetition in accordance with the terms of notes and mortgages, and to ensure that postpetition amortizations were in compliance with the terms of confirmed plans and orders. Because the evidence established that the problems exposed with the *Jones*' loan were systemic, Administrative Order 2008-1 and the Partial Judgment on Remand required corrective action on existing loans in bankruptcy for past errors, as well as, ongoing future performance.

There is nothing in the record supporting Wells Fargo's assertion that it has corrected its past errors. There is nothing in the record to assure future compliance with the terms of notes, mortgages, confirmed plans or confirmation orders. Therefore, Wells Fargo's request for judicial notice of compliance is denied.

Wells Fargo has also requested judicial notice of the fact that after the completion of the first remand to this Court, it abandoned any challenge to the compensatory portions of the judgments in favor of Jones. This request has been granted. The overpayments on the loan and costs associated with recovery are limited to costs and legal fees incurred [*14] through the initial remand. Specifically, they are based on awards rendered prior to that remand and include additional fees and costs incurred by Jones through the remand, as set forth in the Application.

V. Law and Analysis

This Court previously found that Wells Fargo willfully violated the automatic stay imposed by *11 U.S.C. § 362*.[36] That ruling is not at issue. The only issue before the Court is the appropriate relief available. In light of the Fifth Circuit's ruling in *Stewart*, the application of the Accounting Procedures to all debtors in the district would be an improper exercise of authority beyond the bounds of this case. Because this relief was ordered *in lieu* of punitive sanctions, the mandate on remand directs that monetary relief be considered.

36 Docket nos. 153, 154; *In re Jones, 2007 Bankr. LEXIS 2984, 2007 WL 2480494 (Bankr.E.D.La. 2007)*.

[HN2] *Section 362(k)* allows for the award of actual damages, including costs and attorneys' fees, as a result of a stay violation, and punitive damages "in appropriate circumstances." Punitive damages are warranted when the conduct in question is willful and egregious,[37] or when the defendant acted "with actual knowledge that he was violating the federally protected [*15] right or with reckless disregard of whether he was doing so."[38] There is no question that Wells Fargo's conduct was willful. As previously decided, Wells Fargo clearly knew of Debtor's pending bankruptcy and was represented by bankruptcy counsel in this case. Wells Fargo is a sophisticated lender with thousands of claims in bankruptcy cases pending throughout the country and is familiar with the provisions of the Bankruptcy Code, particularly those regarding the automatic stay.

37 *In re Ketelsen, 880 F.2d 990, 993 (8th Cir. 1989)*.

38 *In re Sanchez, 372 B.R. 289, 315 (Bankr. S.D.Tex. 2007)* (citations omitted).

Wells Fargo assessed postpetition charges on this loan while in bankruptcy. However, it was not the assessment of the charges, but the conduct which followed that this Court found sanctionable. Despite assessing postpetition charges, Wells Fargo withheld this fact from its borrower and diverted payments made by the trustee and Debtor to satisfy claims not authorized by the plan or Court. Wells Fargo admitted that these actions were part of its normal course of conduct, practiced in perhaps thousands of cases. As a result of the evidence presented, the Court also found Wells Fargo's [*16] actions to be egregious. There is also no question that Wells Fargo exhibited reckless disregard for the stay it violated.

The imposition of punitive awards are designed to discourage future misconduct and benefit society at large.[39] Sanctions are "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."[40]

39 *See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267, 101 S.Ct. 2748, 2759, 69 L. Ed. 2d 616 (1981)* ("[punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); *Restatement (Second) of Torts § 908* (1979) (the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence).

40 *National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L. Ed. 2d 747 (1976)*.

The Supreme Court, in *Pacific Mutual Life Ins. Co. v. Haslip*, ruled that [HN3] punitive damage awards must address both reasonableness and adequate guidance concerns [*17] to satisfy the *Fourteenth Amendment's due process clause*.[41] The Fifth Circuit developed a two part test to help courts determine whether the requirements set forth under *Haslip* are met: "(1) whether the circumstances of the case indicate that the award is reasonable; and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the factfinder."[42]

41 *Pacific Mutual Life Ins. Co. v. Haslip, 499*

U.S. 1, 17, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

42 *Eichenseer v. Reserve Life Ins. Co.., 934 F.2d 1377, 1381 (5th Cir. 1991).*

In *BMW of North America, Inc. v. Gore*, [HN4] the Supreme Court examined three (3) factors in determining the propriety of a punitive damage award:

> 1) "the degree of reprehensibility;"
>
> 2) the ratio between the punitive damages and the actual harm; and
>
> 3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[43]

43 *BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 1598-1599, 134 L. Ed. 2d 809 (1996).*

A. Degree of Reprehensibility

[HN5] "[I]nfliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target [*18] is financially vulnerable, can warrant a substantial penalty."[44] Wells Fargo did not adjust Jones' loan as current on the petition date and instead continued to carry the past due amounts contained in its proof of claim in Jones' loan balance. It also misapplied funds regardless of source or intended application, to pre and postpetition charges, interest and non-interest bearing debt in contravention of the note, mortgage, plan and confirmation order. Wells Fargo assessed and paid itself postpetition fees and charges without approval from the Court or notice to Jones.

44 *Id. at 1599.*

The net effect of Wells Fargo's actions was an overcharge in excess of $24,000.00. When Jones questioned the amounts owed, Wells Fargo refused to explain its calculations or provide an amortization schedule. When Jones sued Wells Fargo, it again failed to properly account for its calculations. After judgment was awarded, Wells Fargo fought the compensatory portion of the award despite never challenging the calculations of the overpayment. In fact, Wells Fargo's initial legal position both before this Court[45] and in its first appeal[46] denied any responsibility to refund payments demanded in error! The cost [*19] to Jones was hundreds of thousands of dollars in legal fees and five (5) years of litigation.

45 Docket no. 50, pp. 11-17.

46 Docket no. 97, p. 2.

While every litigant has a right to pursue appeal, Wells Fargo's style of litigation was particularly vexing. After agreeing at trial to the initial injunctive relief in order to escape a punitive damage award, Wells Fargo changed its position and appealed. This resulted in:

> 1. A total of seven (7) days spent in the original trial, status conferences, and hearings before this Court;
>
> 2. Eighteen (18) post-trial, pre-remand motions or responsive pleadings filed by Wells Fargo, requiring nine (9) memoranda and nine (9) objections or responsive pleadings;
>
> 3. Eight (8) appeals or notices of appeal to the District Court by Wells Fargo, with fifteen (15) assignments of error and fifty-seven (57) sub-assignments of error, requiring 261 pages in briefing, and resulting in a delay of 493 days from the date the Amended Judgment was entered to the date the Fifth Circuit dismissed Wells Fargo's appeal for lack of jurisdiction;[47] and
>
> 4. Twenty-two (22) issues raised by Wells Fargo for remand, requiring 161 pages of briefing from the parties in the District Court [*20] and 269 additional days since the Fifth Circuit dismissed Wells Fargo's appeal.

47 *See Jones, 391 B.R. at 582.*

The above was only the first round of litigation contained in this case. After the District Court remanded based on Wells Fargo's change of heart, Wells Fargo appealed the decision to remand. When that was denied, it took the legal position that the remand did not afford this Court the right to impose punitive damages *in lieu* of the Accounting Procedures it had both proposed and consented to undertake. That position if valid, would have allowed Wells Fargo to propose alternative relief to escape punitive damages; when the offer was accepted, challenge the relief it proposed; and avoid any punitive award, a position as untenable as it was illogical.

Following this Court's ruling on remand, Wells Fargo appealed to the District Court once again, unsuccessfully. Yet another appeal to the Fifth Circuit was abandoned, but the same issues were then challenged by litigating and appealing the *Stewart* case.[48]

48 Wells Fargo was also sanctioned in two other cases for similar behavior since the Partial Judgment was entered on April 13, 2007. *See In re Stewart, 391 B.R. 327 (Bankr. E.D.La. 2008)*; [*21] *In re Fitch, 390 B.R. 834 (Bankr. E.D.La. 2008)*.

Wells Fargo has taken the position that every debtor in the district should be made to challenge, by separate suit, the proofs of claim or motions for relief from the automatic stay it files. It has steadfastly refused to audit its pleadings or proofs of claim for errors and has refused to voluntarily correct any errors that come to light except through threat of litigation. Although its own representatives have admitted that it routinely misapplied payments on loans and improperly charged fees, they have refused to correct past errors. They stubbornly insist on limiting any change in their conduct prospectively, even as they seek to collect on loans in other cases for amounts owed in error.

Wells Fargo's conduct is clandestine. Rather than provide Jones with a complete history of his debt on an ongoing basis, Wells Fargo simply stopped communicating with Jones once it deemed him in default. At that point in time, fees and costs were assessed against his account and satisfied with postpetition payments intended for other debt without notice. Only through litigation was this practice discovered. Wells Fargo admitted to the same practices [*22] for all other loans in bankruptcy or default. As a result, it is unlikely that most debtors will be able to discern problems with their accounts without extensive discovery.

Unfortunately, the threat of future litigation is a poor motivator for honesty in practice. Because litigation with Wells Fargo has already cost this and other plaintiffs considerable time and expense, the Court can only assume that others who challenge Wells Fargo's claims will meet a similar fate.

Over eighty (80%) of the chapter 13 debtors in this district have incomes of less than $40,000.00 per year. The burden of extensive discovery and delay is particularly overwhelming.

In this Court's experience, it takes four (4) to six (6) months for Wells Fargo to produce a simple accounting of a loan's history and over four (4) court hearings. Most debtors simply do not have the personal resources to demand the production of a simple accounting for their loans, much less verify its accuracy, through a litigation process.

Wells Fargo has taken advantage of borrowers who rely on it to accurately apply payments and calculate the amounts owed. But perhaps more disturbing is Wells Fargo's refusal to voluntarily correct its [*23] errors. It prefers to rely on the ignorance of borrowers or their inability to fund a challenge to its demands, rather than voluntarily relinquish gains obtained through improper accounting methods. Wells Fargo's conduct was a breach of its contractual obligations to its borrowers. More importantly, when exposed, it revealed its true corporate character by denying any obligation to correct its past transgressions and mounting a legal assault ensure it never had to. Society requires that those in business conduct themselves with honestly and fair dealing. Thus, there is a strong societal interest in deterring such future conduct through the imposition of punitive relief.

Both parties agree that a legal remedy to address stay violations exists under *section 362(k)(1)*, which provides that [HN6] "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[49] Wells Fargo argues that the Court has already imposed an adequate legal remedy because Debtor has been reimbursed for his actual damages, *i.e.* his attorney fees. "[HN7] Punitive damages may be [*24] recovered when the creditor acts with actual knowledge of the violation or with reckless disregard of the protected right."[50] It has also been held that "where an arrogant defiance of federal law is demonstrated, punitive damages are appropriate."[51] Either standard justifies the assessment of punitive damages in this case.52 Due to the prevalence and seriousness of Wells Fargo's actions, punitive damages are warranted.

49 *See also In re Fisher, 144 B.R. 237, n.1 (Bankr. D.RI 1992)* (noting that the compensatory and punitive damages provided for a willful stay violation under *section 362* is a legal remedy).

50 *In re Dynamic Tours & Transportation, Inc., 359 B.R. 336, 343 (Bankr. M.D.Fla. 2006)* (citation omitted).

51 *Id. at 344*.

52 Further, the District Court found that "[t]he Bankruptcy Court clearly had the authority to impose punitive damages against Wells Fargo pursuant to *Section 362* because the Bankruptcy Court determined that Wells Fargo's conduct was egregious."

B. Ratio Between Punitive Damages and Actual Harm

[HN8] "[E]xemplary damages must bear a 'reasonable relationship' to compensatory damages."[53] "[T]he proper inquiry 'whether there is a reasonable relationship between the punitive damages [*25] award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'"[54] The Supreme Court has stated that it "cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[55] Instead, punitive damages must address both "reasonableness" and "adequate guidance" concerns to satisfy the *Fourteenth Amendment's due process clause*.[56]

53 *Id. at 1601*.

54 *Id. at 1602* (quoting *TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 453, 113 S.Ct. 2711, 2717-2718, 125 L. Ed. 2d 366 (1993)* (emphasis in original)). In TXO, the Supreme Court compared the punitive damage award and the damages that would have ensued had the offending party succeeded.

55 *Haslip, 111 S.Ct. at 1043*.

56 *Id*.

In *Eichenseer v. Reserve Life Insurance Co.*,[57] the Fifth Circuit awarded $1,000.00 in compensatory damages and $500,000.00 in punitive damages for wrongful denial of an insurance claim. Specifically, the Fifth Circuit found that the insurance company acted with "reckless disregard ... for the rights of the insured," and that "[i]ts actions were far more offensive than mere incompetent record keeping or clerical [*26] error."[58] The Fifth Circuit also considered that this was not the first instance which a court assessed punitive damages against the insurance company, and if the previous award did not deter sanctionable conduct, a larger award was necessary.[59]

57 *Eichenseer, 934 F.2d at 1381*.

58 *Id. at 1382-1383*.

59 *Id. at 1384*.

Norwest Mortgage, Inc., n/k/a Wells Fargo, was assessed $2,000,000 in exemplary damages in *Slick v. Norwest Mortgage, Inc.*[60] for charging postpetition attorneys fees to debtors' accounts without disclosing the fees to anyone.[61] Four years after the ruling in *Slick*, Jones found that Wells Fargo continued to charge undisclosed postpetition fees despite that multi-million dollar damage assessment. Following *Jones*, Wells Fargo was involved in at least two (2) additional challenges to the calculation of its claims *in this Court*. In both cases the evidence revealed that Wells Fargo continued to improperly amortize loans by employing the same practices prohibited by *Jones*.[62] In short, Wells Fargo has shown no inclination to change its conduct.

60 *Slick v. Norwest Mortgage, Inc., 2002 Bankr.Lexis 772 (Bankr.S.D.Ala. 2002)*.

61 *Id. at *32*.

62 *In re Stewart, 391 B.R. 327 (Bankr. E.D.La. 2008)*; *In re Fitch, 390 B.R. 834 (Bankr. E.D.La. 2008)*.

[HN9] When [*27] necessary to deter reprehensible conduct, courts often award punitive damages in an amount multiple times greater than actual damages. In *Haslip*, the Supreme Court upheld as reasonable punitive damages that were more than four (4) times the amount of compensatory damages and two hundred (200) times the amount of out-of-pocket expenses when the trial court found that the conduct was serious and deterrence was important.[63] The Supreme Court found, "While the monetary comparisons are wide and, indeed, may be close to the line, the award [] did not lack objective criteria."[64]

63 *Haslip, 111 S.Ct. at 1046*.

64 *Id*.

The Supreme Court found it proper for the underlying court to examine as a factor in determining the amount of punitive damages, the "financial position" of the defendant.[65] Wells Fargo is the second largest loan servicer in the United States. With over 7.7 million loans under its administration at the time this matter went to trial, it possesses significant resources. Previous sanctions in *Slick*, *Stewart*, *Fitch* and even this case have not deterred Wells Fargo.As recognized in *Eichenseer*, if previous awards do not deter sanctionable conduct, larger awards may be necessary.

65 *Id. at 1045*.

C. [*28] **Comparison of Punitive Damages and Civil or Criminal Penalties**

[HN10] Fairness requires that a person receive "fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty."[66] In determining the appropriate punitive damage amount, "substantial deference" must be given to "legislative judgments concerning appropriate sanctions for the conduct at issue."[67] Other courts have recognized that this comparison may be difficult in bankruptcy cases:

> Obviously, this latter guidepost poses something of a problem as there is not a complex statutory scheme designed to respond to violations of the automatic stay other than the Bankruptcy Code itself. Significantly, *§ 362(h)*[68] specifically provides for the award of punitive damages. Thus, creditors must be presumed to be on notice that if they violate the automatic stay they will be liable for punitive damages.[69]

66 *BMW, 116 S.Ct. at 1598*.
67 *Id. at 1603*.
68 This provision is now *section 362(k)*.
69 *In re Johnson, 2007 Bankr. LEXIS 2678, 2007 WL 2274715, *15 (Bankr.N.D.Ala. 2007)* (quoting *In re Ocasio, 272 B.R. 815, 826 (1st Cir.BAP 2002)*.

As previously set forth, Wells Fargo is a sophisticated lender and a regular participant in bankruptcy [*29] proceedings throughout the country. It is represented by able counsel and it well versed in the Bankruptcy Code and the provisions of the automatic stay. Wells Fargo was on notice by the language of *section 362(k)* that it could be subject to punitive damages, and it was on notice through jurisprudence that those damages could be severe.

VI. Conclusion

Wells Fargo's actions were not only highly reprehensible, but its subsequent reaction on their exposure has been less than satisfactory. There is a strong societal interest in preventing such future conduct through a punitive award. The total monetary judgment to date is $24,441.65, plus legal interest, $166,873.00 in legal fees and $3,951.96 in costs. Other fees and costs incurred by Jones through the first remand were also incurred and are not included in the foregoing amounts. Because the Court cannot reveal the sealed amount stipulated to by the parties when they settled Jones' Application for Award of Fees and Costs Related to Remand ("Application"),[70] the Court will use Jones' Application itself as evidence of fees and costs actually incurred up to the date of the Application. The Application and supporting documentation establish [*30] that an additional $118,251.93 in attorneys' fees and $3,596.95 in costs was also incurred by Jones.[71] The amounts previously awarded plus the additional amounts incurred establish that the cost to litigate the compensatory portion of this award was $292,673.84. After considering the compensatory damages of $24,441.65 awarded in this case, along with the litigation costs of $292,673.84; awards against Wells Fargo in other cases for the same behavior which did not deter its conduct; and the previous judgments in this case none of which deterred its actions; the Court finds that a punitive damage award of $3,171,154.00 is warranted to deter Wells Fargo from similar conduct in the future. This Court hopes that the relief granted will finally motivate Wells Fargo to rectify its practices and comply with the terms of court orders, plans and the automatic stay.

70 Docket no. 396.
71 Evidence of the fees and costs incurred is attached to the Application.

New Orleans, Louisiana, April 5, 2012.

/s/ Elizabeth W. Magner

Hon. Elizabeth W. Magner

U.S. Bankruptcy Judge

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WMC Mortgage v. Baker, 2012 WL 628003 (E.D.Pa. Feb. 28, 2012)

Home mortgage loan originated June 3, 2005. Closing held at borrowers' home. Borrowers sent TILA Notice of Right to Cancel w/in the required 3 days. Lender – WMC -- funded the loan anyway, then sold it on the secondary market, into a securitization trust; servicing began on the loan, by Litton Loan Servicing.

Homeowners tried repeatedly to enforce their rescission through contact with the broker and title company, including returning checks sent to them by the title company.

In March 2006, title company issued new checks and sent them directly to homeowners' creditors. Title company employee also threatened to put a lock box on the house.

Apparently because no payments had ever been made on the loan, WMC was required to repurchase the loan from the trust, which was done in April 2006.

In May 2006, after WMC bought the loan back from the trust, a foreclosure complaint was filed naming the trust as the Plaintiff. Default judgment was taken, then opened by the homeowners. Homeowners defeated plaintiff's motion for judgment, plaintiff then dismissed complaint without prejudice and filed an action on the Note in federal court.

Homeowners defended the action via TILA rescission and raised counterclaims for TILA statutory & actual damages, and damages under federal FDCPA, Pa's UTCPL & Pa. debt collection statute (FCEUA – Fair Credit Extension Uniformity Act).

Opinion includes lengthy discussion of MERS (that MERS does not have any rights in the Note – this was a detriment to a point pursued by the homeowners in this situation).

The Court:
(1) Affirmed the TILA rescission.
(2) Ordered the immediate voiding of the mortgage/security interest per strict reading of TILA.
(3) Required homeowners to repay net proceeds of the loan, denying their argument that WMC forfeited its right to repayment by ignoring the recission.
(4) Awarded homeowners $2,000 TILA statutory damages; $6,500 actual damages for amount they paid their foreclosure defense lawyer.
(5) Found that the transaction constituted a "door to door sale" per Pa. UTPCPL, 73 Pa Stat. 201-7(a), because the loan was closed in their home; and that homeowners were entitled to the required notice of right to cancel (by implication, in addition to the TILA notice of right to cancel)
(6) Found a concurrent violation of UTPCPL and awarded $100.
(7) Denied homeowner counterclaims under FDCPA & FCEUA, which were based on premise that the action on the Note was time-barred, which the Court rejected