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ZOOM PROGRAM

AVOIDING THE FORECLOSURE TSUNAMI DUE TO COVID-19

FACULTY

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Program Moderator: Glenn P. Warmuth, Esq.

June 25, 2020
Suffolk County Bar Association, New York

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Avoiding the Foreclosure Tsunami
Presented by the Suffolk Academy of Law
June 25, 2020

Speaker:

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Materials:

THE COURT'S JURISDICTION OVER NON COMPLIANT LOAN SERVICERS CONCERNING COVID-19 FORBEARANCE PROGRAMS

Charles Wallshein, Esq., May 2020

The entire county is affected by the COVID-19 virus. The State and federal government's issued warnings and orders that prohibit human association such that people cannot operate businesses or otherwise engage in commerce. As a result of these stay at home and quarantine precautions, household income has been affected for millions of Americans who cannot now afford to pay their mortgages and other debts. Even though the government has made emergency relief available for all government backed mortgages, there will be a wave of homeowners who are behind in payment that will have to work out repayment plans with their lenders when the forbearance period ends or end up in foreclosure. Unlike the last crisis, the courts now have a wide range of regulatory law to check bank and loan servicer misconduct in the foreclosure process.

The largest guarantors of home mortgages Fannie Mae, Freddie Mac and HUD have taken action to help make sure homeowners who are directly or indirectly impacted by COVID–19 are able to stay in their homes during this challenging time.[1] This includes offering the following mortgage relief options for those who are unable to make their mortgage payments due to a decline in income: 1) Providing mortgage forbearance for up to 12 months, 2) Waiving assessments of penalties and late fees, 3) Halting all foreclosure actions and evictions of borrowers until at least May 17, 2020, and 4) Offering loan modification options that lower payments or keep payments the same after the forbearance period.

Even if we were to assume that the economy returns to pre-virus levels in 2Q 2021, loan servicers and borrowers will still have to unwind forbearances by either paying back arrearages in lump sums or by modifying the arrearages into their existing loans. The loan forbearances last a maximum of 12 months. If repayment arrangements cannot be agreed to then we can expect a wave of 90-day notices being mailed in 3Q 2021 and the foreclosure complaints being filed in 4Q 2021 and thereafter. I do not have a utopian vision of loan workouts where homeowners who have taken advantage of the forbearance program are allowed to repay their arrears within the context of programs specifically created to accomplish that goal.

My personal opinion is that the virus has permanently altered the economic paradigm. The disruption has caused a ripple effect that will affect businesses, personal income and property values long after we have a vaccine and the health crisis is over. The disruption is likely to make at least some people unable to afford their homes. Second, and more importantly, I am wary as to how loan servicers are treating homeowners seeking assistance now at the beginning of the crisis. I am more wary as to how loan servicers will address repayment plans and modifications that repay the mortgage arrears accrued during the forbearance. The court has no jurisdiction over the mortgage modification process until the foreclosure action is commenced. There is nothing the court system can do prior to the commencement of the foreclosure action. However, once the foreclosure is commenced the parties have to negotiate in good faith at the settlement conferences subject to CPLR §3408.

It is very possible that the crisis will persist for longer than the forbearance programs provide relief. There is very little that anyone, including the courts can do to provide relief for people whose lives have been changed so dramatically that they cannot afford to pay their mortgages even after the crisis is behind us. I believe that there is a wave of foreclosures ahead of us and that the courts are going to have to devote significant resources to deal with this specific problem. I also believe that this time around, the courts will not have to endure years of needless litigation. This is because during the last decade the Legislature and the Executive enacted legislation and administrative rules that can be used to prevent the fiasco caused by errant and recalcitrant loan servicing conduct. These rules were not available at the beginning of the last crisis and it is an understatement to say that we have all learned from experience and we will use these lessons to lessen the impact of the upcoming crisis on the docket.

The concern for the Court system as a whole should be how to predict the success of the forbearance programs in achieving the programs' goal for homeowners to be " . . . able to stay in their homes during this challenging time." The possibility of the massive wave of foreclosure filings will only be averted if loan-servicing agents adhere to GSE guidelines and state and federal loan servicing laws and rules. The concern for the courts should concentrate on how to ensure that mortgagors are able to come out of the forbearance program without being declared in default and ending up in foreclosure. My experience thus far in counseling people in this area is that the forbearance program is relatively easy to apply for and to enter. As of May 5, 2020, Fannie Mae, Freddie Mac and HUD have published guidelines for repayment of the "short term repayment plan."[2] For Example, the "short term repayment plan" is a term of art defined by statute.

> "In addition, for purposes of the rule, a short-term repayment plan generally is a loss mitigation option under which a borrower would repay all past due payments over a specified period of time to bring the mortgage loan account current. A short-term repayment plan allows for the repayment of no more than three months of past due payments and allows a borrower to repay the arrearage over a period lasting no more than six months. Comment 41(c)(2)(iii)-4."

Fannie Mae, Freddie Mac and HUD adhere to published rules established by the Consumer Financial Protection Bureau (CFPB). Each program has rules for application and criteria for review. The rule as amended for Fannie Mae and Freddie Mac loans may produce a disturbing result because the" short term forbearance" into which all borrowers are entering now will require repayment in full within 90 to 360 days. These programs may prove to be of no real help at all because the borrower that has difficulty paying the mortgage now cannot be expected to come up with a lump sum payment that cures three, six or twelve months of arrears. The reason the forbearance is offered is that it does not require any proof at application beyond a simple request for assistance by the borrower. Experience has shown that loan servicers have been less than forthcoming when asked to identify the terms of long-term modification options. With deference to the immediacy of the problem and the exigent need for information, the GSE and non-GSE loan servicers have engaged in varying degrees of meaningful communication as to how these loans will be serviced in the future. We all realize that this is an ongoing process and that it is definitely too early to anticipate future loan servicer conduct.

Information is published concerning the programs that will be available at the end of the forbearance periods that enable those whose situations have improved to repay the amount accrued. For example, Fannie Mae's and Freddie Mac's internal loan servicing website states the following:[3]

> During a forbearance plan, interest is not paid but still accrues. After the forbearance plan is complete, if the borrower is approved for another workout option, the type of workout option offered will determine how the interest is handled. For example, if the mortgage loan is modified via a Cap and Extend Modification for Disaster Relief, the missed principal and interest payments will not be capitalized into the new modified UPB [Unpaid Principal Balance]. Instead, the term of the mortgage loan will be extended by the number of missed payments. Alternatively, if the borrower receives a Cap and Extend Modification for a Disaster Relief or a Flex Modification based on the Unique Requirements for a Borrower Impacted by a Disaster Event after the forbearance, the accrued interest is capitalized into the new modified UPB. See Servicing Guide D2-3.2-05, Fannie Mae Cap and Extend Modification for Disaster Relief and D2-3.2-06, Fannie Mae Flex Modification, as well as Lender Letter LL-2017-09R, Fannie Mae Extend Modification for Disaster Relief.

The procedure for evaluating FHA borrowers is as follows:[4]

> A borrower who receives a COVID-19 Forbearance is responsible for repaying the suspended mortgage payments or the balance of reduced mortgage payments. Mortgagees must offer eligible borrowers the COVID-19 Standalone Partial Claim. For those that do not qualify, Mortgagees must offer the standard FHA Loss Mitigation Options to assist in making these payments as outlined in the Single-Family Housing Policy Handbook 4000.1, Section III.A.2.k HUD's Loss Mitigation Options. All late charges, fees, and penalties must be waived as long as the borrower is on a COVID-19 Forbearance Plan.

As one can see, the procedures for COVID-19 relief for borrowers are in writing, published and are readily available on the Fannie Mae, Freddie Mac and HUD-FHA websites. These programs were in existence before the crisis in generally the same form and substance as described under the COVID publications. My opinion is that congress will amend the CARES Act to further clarify the scope and requirements it believes necessary to avert another foreclosure crisis. Irrespective of future clarifications, it is important to understand that if a loan servicer departs from Fannie, Freddie or HUD guidelines it is violating the saving provisions of CPLR §3408(f)(2) and the dual tracking prohibitions contained at 12 C.F.R. §1024.41(f) and (g) and 3 NYCRR §419.10(a)(4).

PREDICTIONS FOR THE NEXT 18 MONTHS

I would not be surprised if at least some borrowers with Fannie, Freddie and FHA loans will have trouble during the forbearance application process and the long-term modification of the unpaid balance resulting from forbearance. Moreover, I am witnessing in real-time people who up to now have never been late or in foreclosure and who are current on their GSE loans being denied the forbearance plans altogether on the basis that the particular loan servicer does not

participate. This is pure misinformation on the part of the loan servicer. Every GSE servicing manual contains provisions for emergency forbearance without qualification. Some people whom I have been advising over the last 45 days are calling me franticly explaining that their servicer will not accept their application for forbearance. With due consideration of some of the loan servicers' behavior during the last crisis, I am therefore not shocked when I hear of misconduct for emergency hardship forbearance requests caused by economic impacts due to the corona virus.

What really captures my attention is the brazen nature of the cavalier manner in which the misinformation is transmitted to borrowers. This is especially true since the information on the GSE websites directly contradicts what people are being told when they finally reach a loan servicer representative on the phone. It is important to note that most loan servicers are acting responsibly at this stage of the crisis. However, others definitely are not. Each GSE has a specific script that was created for loan servicers so that the information provided to borrowers is accurate and uniform from servicer to servicer concerning the particular type of GSE loan.[5] One cannot help but wonder that if people are being lied to now to keep them out of the forbearance program then one may imagine what is going to happen when the very same people try to repay the accrued arrears.

The fact of the matter is that it takes 30 days for a loan servicer to respond to a Request for Information from a borrower.[6] Fannie Mae, Freddie Mac and HUD all issued directives to their respective loan servicers to post links to the websites where people can obtain information about forbearance and how to go about getting into the appropriate program. Servicer misconduct involving dissemination of false information to borrowers seeking assistance is in large part one of the bases for the National Mortgage Settlement and the reason that strict compliance with RPAPL §1304 is taken so seriously. The terms of the National Mortgage Settlement were agreed to by the major loan servicers and are directly incorporated into and form the basis for 12 CFR§1024. This is one of the reasons that it cannot be easily repealed. It is very clear that prior to the commencement of a foreclosure, the Legislature and the Courts want people to speak with impartial loan counselors rather than with the representatives of the servicers that manage their mortgage loans. Dismissal is an understandably draconian penalty for failing to provide accurate notice pursuant to RPAPL §1304.

It is rather easy to observe, witness and document servicer misconduct because it happens literally in front of one's eyes. The reason some loan servicers make it easy for borrowers to get into the forbearance program and others make it impossible is rather more complicated. The reasons involve the type of relationship the loan servicer has with the GSE and the loan servicer's reserve liquidity for losses. There are two types of GSE loan servicers, bank and non-bank. Wells Fargo, Chase, Bank of America, CitiMortgage, HSBC are examples of bank servicers. Nationstar/Mr. Cooper, PHH, Selene, Bayview, Caliber, Loan Care and Shellpoint for example, are non-bank loan servicers. When a loan defaults the loan servicer must continue to make advances to the certificate holder investors in the GSE loan pool as well as to continue to make escrow advances. Even though the loan is guaranteed either implicitly or explicitly by the federal government, the guarantee does not vest until the loan is foreclosed and the property is liquidated.

The guarantee is not for payment, it is for repayment to the loan servicer (after the contractual carry period expires) after the loan is foreclosed and when the loss, if any, is actually realized. In the meantime, the loan servicer has to continue to make payments to the investor irrespective of whether it receives sufficient payment from the pool to remit full payment to the certificate-holder investors. The bottom line is that bank servicers have access to the Federal Reserve window and are infinitely more financially equipped than non-bank servicers to sustain cash flow deficiencies caused by a wave of unexpected mortgage defaults. The fact is that non-bank servicers are now feeling tremendous pressure because the wave of defaults caused by the corona virus economic downturn will soon make every one of them illiquid. Theoretically at least, there is a strong possibility that they will all soon run out of capital. It is therefore easy to understand why at this stage of the crisis bank servicers are accepting and approving forbearance applications for GSE loans and why at least some non-bank servicers are not.

Another less significant segment of the mortgage servicing market concern those loans held by Non-GSE entities. This class of loans includes private label securitized "trust" loans, loans "Held For Investment" by banks ("HFI"), and credit line mortgages. The holders of the latter two classes of loans have a wide latitude as to how the arrearages are repaid as long as the repayment plan offer is geared towards home retention and that the parties negotiate in good faith in the event of a foreclosure pursuant to CPLR §3408. The first class of loans, private label securitizations, are treated differently by loan servicers. For years loan servicers have denied borrowers loan modifications that should otherwise be eligible. The reasoning for this is that the investor is contractually restricted from modifying loans. This is a nonsense excuse. There is no such thing as a contractual restriction. It is a fiction and a false pretext for denial. Applicants, defendants and the courts should likely expect a repeat of prior servicer misconduct in this respect.

USING EXISTING LAW TO PREVENT FUTURE ABUSE

The most notable difference between the last wave of foreclosures and the one that is likely to appear in 2021 is that CPLR §3408 now has teeth. It is established law that a Court cannot modify the terms of the mortgage contract unilaterally. However, a court may impose a wide range of remedial sanctions against a loan servicer that flouts the statute and engages in bad faith conduct during the loan modification process. While CPLR §3408 applies only during a foreclosure action, 12 C.F.R. §1024 and 3 NYCRR §419 govern loan servicer conduct both prior to and during the foreclosure. The ultimate purpose of 12 C.F.R. §1024 and 3 NYCRR §419 is to prevent people from losing their homes due to loan servicer misconduct. As a threshold matter the state and federal regime accomplishes this by strictly prohibiting "dual tracking". Dual Tracking is defined as where a lender commences an action or proceeds to judgment and sale[7] while simultaneously having an active and open loss mitigation application that has not been decided pursuant to 12 C.F.R. §1024.41(c) and 12 C.F.R. §1024.41(d) or is currently subject to a loss mitigation appeal as defined by 12 C.F.R. §1024.41(h).

The plain meaning of CPLR §3408(f)(2) read together with 12 C.F.R. §1024.41 and the Superintendent's rules pursuant to 3 NYCRR §419 set forth the criteria that defines "a meaningful effort to settle the foreclosure". The threshold analysis should be whether the loan servicer has made the modification process transparent as required by state and federal law. In

the past, thousands if not tens of thousands of applicants' loan modification applications were denied without the loan servicer ever explaining the program parameters under which the review was conducted. Moreover, loan servicers transmitted denials without a detailed explanation for the denial as is required by law.[8] Logic dictates and the statute accordingly requires that the loan servicer identify the program under which the borrower is being reviewed and the reason for denial for the application to be RESPA and now NYCRR compliant. The main reason the Courts have not enforced the rules with reference to compliance with 12 CFR, CPLR 3408(f)(2) and 3 NYCRR §419 were amended is that defendants' counsel is still generally unaware of how §3408(f)(2) incorporates state and federal law into the process. It would be entirely within a Court's discretion to utilize CPLR §3408(f)(2) the way it is now intended to be utilized, to make the modification process transparent and to increase the number of settlements and decrease the number of cases marked out for litigation.

New York has recently adopted most of 12 C.F.R. §1024 into the Superintendent of Financial Services regulations at 3 NYCRR §419. One area that has received special attention is how the rules define specific prohibitions and the duty of fair dealing. These rules and prohibitions restate those found in 12 CFR and in many instances exceed the consumer protections found in the federal rules. The last crisis advanced without any consumer protections from errant loan servicers until 2014 when12 C.F.R. §1024 was enacted and adopted by the CFPB as an extension of 12 U.S.C. §2301-§2105 (RESPA).

Most significant is the specific incorporation by reference of federal RESPA Rule 12 C.F.R.§1024 on December 20, 2016 and most recently the Superintendent's Regulations contained in 3 NYCRR §419 as of December 18, 2019. The Bill Jacket to CPLR §3408 explains the justification for the incorporation by reference of federal law and all other rules, regulations and servicer guidelines into a court's "totality of the circumstances" analysis for a bad faith holding. The bill jacket for the amendments to CPLR §3408 in December 2016 is clear as to the Legislature's intent in amending CPLR§3408. The Sponsor's Memo to states as justification for the bill as follows:[9]

> JUSTIFICATION:
> New York State has implemented various laws to help avoid foreclosures and preserve homeownership. CPLR section 3408 is among the laws instituted in New York State that foster the early settlement of foreclosure actions as a means of preserving home ownership. A key provision of this law requires the court to hold mandatory settlement conferences in any residential foreclosure action involving a home loan. The purpose of this conference is to determine whether the parties can reach a mutually agreeable resolution to help the homeowner avoid losing his or her home, and evaluate the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to. (CPLR 3408(a)). In addition, CPLR 3408 requires both sides to negotiate in good faith to reach a mutually agreeable resolution. (CPLR 3408(f)).
>
> We have learned that banks often flout the express statutory language and the core purpose of the settlement conference law designed to promote negotiation of affordable loan modifications or other home-saving solutions. They do this in a number of ways including by incorrectly arguing that the law permits only certain types of workout

options, by providing misinformation, repeatedly losing homeowner paperwork, improperly denying loan modifications, commencing foreclosure actions after promising not to do so in a loan modification offer, and by employing a range of dilatory tactics, including sending counsel to settlement conferences unprepared, without required information and/or without settlement authority, and delaying the appearance at such conferences of a bank representative with full settlement authority. This conduct frustrates the purpose of New York's settlement conference law, prolonging the foreclosure process, often for over a year, that results in costs to the homeowner that makes home-saving solutions difficult, if not impossible.

This measure provides clarification and guidance on the rights and remedies of the parties to ensure compliance with the express provisions of the settlement conference law and its original purpose.

CPLR §3408(f) establishes the standard for prima facie bad faith. The statute states:

> (f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation, if possible. Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:
>
> 1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;
>
> 2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and . . .
>
> 3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.
>
> Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.
>
> Emphasis added

CONCLUSION

There is nothing to prevent a noncompliant loan servicer from commencing a foreclosure action. However, once the case is commenced the Court would be within its sound discretion to invoke CPLR §3408(f)(2) & (3) to enforce rules already in place to prevent a wave of unnecessary and perhaps unlawful foreclosure litigation. The author respectfully suggests that Courts should enact administrative rules and assemble a short checklist of information required of the plaintiff at the first conference that is consistent with requirements that already exist under 12 C.F.R. and 3 NYCRR §419. The mandatory disclosures should include the identity of the owner of the loan, the identity of the originating investor, the loan modification program options made available for the loan and the reasons for denial if application had already been made. In the event of loan

servicer non-compliance, the Court, as one possible sanction remedy, may refuse to mark the case out to the trial part until such time as the Court is satisfied the loan servicer has complied and conducted a lawful review.

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[1] https://www.fanniemae.com/portal/covid-19.html, http://www.freddiemac.com/about/covid-19.html, https://www.hud.gov/sites/dfiles/SFH/documents/SFH_COVID_19_QA.pdf

[2] See 12 C.F.R. §1024.41(c)(2)(iii)

[3] https://singlefamily.fanniemae.com/media/22361/display

[4]https://www.ginniemae.gov/investors/disclosures_and_reports/Pages/BulletinsDispPage.aspx?ParamID=457&Ident=2020-028

[5] https://singlefamily.fanniemae.com/servicing/covid-19-forbearance-script-servicer-use-homeowners

[6] See; 12 C.F.R. §1024.36

[7] See; 12 C.F.R. §1024.41(f) & (g).

[8] See; 12 C.F.R. §1024.41(d), 3 NYCRR §419.10(h) and 3 NYCRR §419.10(f)(ii) & (iii).

[9] AO/1298 passed the Assembly on May 24, 2016 by a vote of 108 Yea to 31 Nay.

Effective: April 20, 2017

McKinney's CPLR Rule 3408

Rule 3408. Mandatory settlement conference in residential foreclosure actions

Currentness

(a) 1. Except as provided in paragraph two of this subdivision, in any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (i) determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate.

2. (i) Paragraph one of this subdivision shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless:

(A) the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or

(B) the last surviving borrower's successor in interest, who, by bequest or through intestacy, owns, or has a claim to the ownership of the property subject to foreclosure, and who was a resident of such property at the time of the death of such last surviving borrower.

(ii) The superintendent of financial services may promulgate such rules and regulations as he or she shall deem necessary to implement the provisions of this paragraph.

(b) At the initial conference held pursuant to this section, any defendant currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person under section eleven hundred one of this chapter. The court shall determine whether such permission shall be granted pursuant to standards set forth in section eleven hundred one of this chapter. If the court appoints defendant counsel pursuant to subdivision (a) of section eleven hundred twoof this chapter, it shall adjourn the conference to a date certain for appearance of counsel and settlement discussions pursuant to subdivision (a) of this section, and otherwise shall proceed with the conference.

(c) At any conference held pursuant to this section, the plaintiff and the defendant shall appear in person or by counsel, and each party's representative at the

conference shall be fully authorized to dispose of the case. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant. Where appropriate, the court may permit a representative of the plaintiff or the defendant to attend the settlement conference telephonically or by video-conference.

(d) Upon the filing of a request for judicial intervention in any action pursuant to this section, the court shall send either a copy of such request or the defendant's name, address and telephone number (if available) to a housing counseling agency or agencies on a list designated by the division of housing and community renewal for the judicial district in which the defendant resides. Such information shall be used by the designated housing counseling agency or agencies exclusively for the purpose of making the homeowner aware of housing counseling and foreclosure prevention services and options available to them.

(e) The court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section. The notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending, and shall advise the parties of the documents that they shall bring to the conference.

1. For the plaintiff, such documents shall include, but are not limited to, (i) the payment history; (ii) an itemization of the amounts needed to cure and pay off the loan; (iii) the mortgage and note or copies of the same; (iv) standard application forms and a description of loss mitigation options, if any, which may be available to the defendant; and (v) any other documentation required by the presiding judge. If the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note. For cases in which the lender or its servicing agent has evaluated or is evaluating eligibility for home loan modification programs or other loss mitigation options, in addition to the documents listed above, the plaintiff shall bring a summary of the status of the lender's or servicing agent's evaluation for such modifications or other loss mitigation options, including, where applicable, a list of outstanding items required for the borrower to complete any modification application, an expected date of completion of the lender's or servicer agent's evaluation, and, if the modification(s) was denied, a denial letter or any other document explaining the reason(s) for denial and the data input fields and values used in the net present value evaluation. If the modification was denied on the basis of an investor restriction, the plaintiff shall bring the documentary evidence which provides the basis for the denial, such as a pooling and servicing agreement.

2. For the defendant, such documents shall include, but are not limited to, if applicable, information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge.

(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale,

deed in lieu of foreclosure, or any other loss mitigation, if possible. Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:
1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;
2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and
3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.
Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.
(g) The plaintiff must file a notice of discontinuance and vacatur of the lis pendens within ninety days after any settlement agreement or loan modification is fully executed.
(h) A party to a foreclosure action may not charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorneys' fees, for appearance at or participation in the settlement conference.
(i) The court may determine whether either party fails to comply with the duty to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to subdivisions (j) and (k) of this section, either on motion of any party or sua sponte on notice to the parties, in accordance with such procedures as may be established by the court or the office of court administration. A referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process may hear and report findings of fact and conclusions of law, and may make reports and recommendations for relief to the court concerning any party's failure to negotiate in good faith pursuant to subdivision (f) of this section.
(j) Upon a finding by the court that the plaintiff failed to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to this subdivision and subdivision (k) of this section the court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the plaintiff, and where appropriate, the court may also impose one or more of the following:
1. Compel production of any documents requested by the court pursuant to subdivision (e) of this section or the court's designee during the settlement conference;
2. Impose a civil penalty payable to the state that is sufficient to deter repetition of the conduct and in an amount not to exceed twenty-five thousand dollars;
3. The court may award actual damages, fees, including attorney fees and expenses to the defendant as a result of plaintiff's failure to negotiate in good faith; or
4. Award any other relief that the court deems just and proper.

(k) Upon a finding by the court that the defendant failed to negotiate in good faith pursuant to subdivision (f) of this section, the court shall, at a minimum, remove the case from the conference calendar. In considering such a finding, the court shall take into account equitable factors including, but not limited to, whether the defendant was represented by counsel.
(l) At the first settlement conference held pursuant to this section, if the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall:
1. advise the defendant of the requirement to answer the complaint;
2. explain what is required to answer a complaint in court;
3. advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and
4. provide information about available resources for foreclosure prevention assistance.
At the first conference held pursuant to this section, the court shall also provide the defendant with a copy of the Consumer Bill of Rights provided for in section thirteen hundred three of the real property actions and proceedings law.
(m) A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule 320 of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.
(n) Any motions submitted by the plaintiff or defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules.

Credits

(Added L.2008, c. 472, § 3, eff. Aug. 5, 2008. Amended L.2009, c. 507, § 9, eff. Feb. 13, 2010; L.2013, c. 306, § 2, eff. Aug. 30, 2013; L.2016, c. 73, pt. Q, §§ 2, 3, eff. Dec. 20, 2016; L.2017, c. 58, pt. FF, § 2, eff. April 20, 2017; L.2018, c. 58, pt. HH, § 2.)

McKinney's Statutes § 92

§ 92. Legislative intent as primary consideration

a. Generally

The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature.

3 NYCRR 419.10

Section 419.10. Servicing prohibitions & the duty of fair dealing

(a) A servicer is prohibited from:

(1) engaging in unfair, deceptive or abusive business practices or misrepresenting or omitting any material information in connection with the servicing of a mortgage loan, including, but not limited to, misrepresenting the amount, nature or terms of any fee or payment due or claimed to be due on the loan, the terms and conditions of the servicing agreement or the borrower's obligations under the loan;

(2) requiring funds to be remitted by means more costly to the borrower than a bank or certified check or attorney's check from an attorney's account;

(3) refusing to communicate with an authorized representative of the borrower who provides a written authorization signed by the borrower, provided that the servicer may adopt procedures, not including the collection of the representative's social security number, reasonably related to verifying that the representative is in fact authorized to act on behalf of the borrower;

(4) commencing a residential foreclosure action against a borrower:

(i) if a borrower submits a complete loss mitigation application to a servicer before the servicer has commenced a residential foreclosure action against the borrower, unless:

(*a*) The servicer has sent the borrower a notice pursuant to subdivision (f)(2) of section 419.7 of this Part that the borrower is not eligible for any loss mitigation option and the appeal process in subdivision (h) of section 419.7 of this Part is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(*b*) The servicer has complied with subdivision (f)(1) of section 419.7 of this Part and the borrower rejects all loss mitigation options offered by the servicer;

(*c*) The borrower is more than 30 days in default under a trial or permanent modification agreement; or

(*d*) The foreclosure is based on a borrower's violation of a due on sale clause.

(ii) If a borrower submits an incomplete loss mitigation application to a servicer before the servicer has commenced a residential foreclosure action against the borrower, unless the borrower has not provided the servicer with the documents necessary for a complete loss mitigation application within 15 days (excluding legal public holidays, Saturdays and Sundays) after the servicer has provided the notice required by subdivision (d)(2)(ii) of section 419.7 of this Part. A servicer is only required to comply with the requirements of this subparagraph for a single incomplete loss mitigation application for a borrower's mortgage loan.

(5) moving for a judgment of foreclosure and sale, or conducting a foreclosure sale when:

(i) a borrower is in compliance with the terms of a trial loan modification, forbearance, or repayment plan; or

(ii) a short sale or deed-in-lieu of foreclosure has been approved by all parties (including, for example, first lien investor, junior lien holder and mortgage insurer, as applicable), and proof of funds or financing has been provided to the servicer; or

(iii) a borrower has submitted a complete loss mitigation application after a servicer has commenced a residential foreclosure action against the borrower but more than 37 days before a foreclosure sale, unless:
(1) The servicer has sent the borrower a notice pursuant to subdivision (f)(2) of section 419.7 of this Part that the borrower is not eligible for any loss mitigation option and the appeal process in subdivision (h) of section 419.7 of this Part is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;
(2) The servicer has complied with subdivision (f)(1) of section 419.7 of this Part and the borrower rejects all loss mitigation options offered by the Servicer; or
(3) The borrower is more than 30 days delinquent under a trial or permanent modification agreement.
(6) failing to provide the borrower with the notice required by Real Property Actions and Proceedings Law section 1304 at least 90 days before commencing legal action against the borrower or in the case of a residential cooperative, failing to provide the debtor with the notice required by Uniform Commercial Code section 9-611 at least 90 days before disposing of the debtor's cooperative interest; and
(7) failing to make the filings with the Superintendent as required by Real Property Actions and Proceedings Law section 1306 and in accordance with the rules prescribed by the Superintendent.
(b) A servicer shall act in good faith and deal fairly in its course of dealings with each borrower in connection with the servicing of the borrower's mortgage loan. However, nothing in this subsection shall be considered a derogation of the affirmative duty to negotiate in good faith mandated by New York Civil Practice Laws & Rules Section 3408. This includes, but is not limited to, the duty to:
(1) Safeguard and account for any payment made by or any money belonging to the borrower;
(2) Follow reasonable and lawful instructions from the borrower consistent with the underlying note and mortgage;
(3) Act with reasonable skill, care and diligence;
(4) Consider alternatives to foreclosure when a borrower demonstrates that he or she is in imminent risk of delinquency on the mortgage loan as a result of a financial hardship or has experienced a financial hardship and is unable to maintain the payment at the current amount required under the mortgage loan or is unable to make up the delinquent payments.
(5) Structure loan modifications to result in payments that are reasonably affordable and sustainable for the borrower at the time the modification is made.

Credits

Emergency rulemaking eff. Oct. 1, 2010, expired Oct. 27, 2010; emergency rulemaking eff. Nov. 1, 2010, expired Jan. 29, 2011; emergency rulemaking eff. Feb. 1, 2011, expired May 1, 2011; emergency rulemaking eff. May 2, 2011, expired July 26, 2011; emergency rulemaking eff. July 27, 2011, expired Oct. 19, 2011; emergency rulemaking eff. Oct. 20, 2011, expired Jan. 16, 2012; emergency rulemaking eff. Jan. 17, 2012, expired Apr. 11, 2012; emergency rulemaking eff.

Apr. 17, 2012, expired July 11, 2012; emergency rulemaking eff. July 12, 2012, expired Oct. 6, 2012; emergency rulemaking eff. Oct. 7, 2012, expired Jan. 2, 2013; emergency rulemaking eff. Jan. 3, 2013, expired Apr. 1, 2013; emergency rulemaking eff. Apr. 1, 2013, expired June 25, 2013; emergency rulemaking eff. June 26, 2013, expired Sept. 22, 2013; emergency rulemaking eff. Sept. 23, 2013, expired Dec. 18, 2013; emergency rulemaking eff. Dec. 19, 2013, expired Mar. 17, 2014; emergency rulemaking eff. Mar. 18, 2014, expired June 14, 2014; emergency rulemaking eff. June 15, 2014, expired Sept. 10, 2014; emergency rulemaking eff. Sept. 11, 2014, expired Dec. 8, 2014; emergency rulemaking eff. Dec. 9, 2014, expired Mar. 7, 2015; emergency rulemaking eff. Mar. 8, 2015, expired June 3, 2015; emergency rulemaking eff. June 4, 2015, expired Aug. 29, 2015; emergency rulemaking eff. Aug. 30, 2015, expired Nov. 25, 2015; emergency rulemaking eff. Nov. 26, 2015, expired Feb. 21, 2016; emergency rulemaking eff. Feb. 22, 2016, expired May 21, 2016; emergency rulemaking eff. May 22, 2016, expired Aug. 17, 2016; emergency rulemaking eff. Aug. 18, 2016, expired Nov. 13, 2016; emergency rulemaking eff. Nov. 14, 2016, expired Feb. 7, 2017; emergency rulemaking eff. Feb. 8, 2017, expired May 6, 2017; emergency rulemaking eff. May 7, 2017, expired Aug. 1, 2017; emergency rulemaking eff. Aug. 2, 2017, expired Oct. 29, 2017; emergency rulemaking eff. Oct. 30, 2017, expires Jan. 23, 2018; emergency rulemaking eff. Jan. 24, 2018, expired April 21, 2018; emergency rulemaking eff. April 21, 2018, expired July 18, 2018; emergency rulemaking eff. July 18, 2018, expired Oct. 15, 2018; emergency rulemaking eff. Oct. 15, 2018, expired Jan. 12, 2019; emergency rulemaking eff. Jan. 11, 2019, expired April 10, 2019; emergency rulemaking eff. April 11, 2019, expired July 9, 2019; emergency rulemaking eff. July 9, 2019, expired Oct. 6, 2019; emergency rulemaking eff. Oct. 7, 2019, expired Jan. 4, 2020; new adopted filed Dec. 3, 2019 eff. Dec. 18, 2019.
Current with amendments included in the New York State Register, Volume XXLII, Issue 20 dated May 20, 2020. Court rules under Title 22 and Executive Orders under Title 9 may be more current.
3 NYCRR 419.10, 3 NY ADC 419.10

Effective: April 19, 2018

12 C.F.R. § 1024.35

§ 1024.35 Error resolution procedures.

Currentness

(a) Notice of error. A servicer shall comply with the requirements of this section for any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred. A notice on a payment coupon or other payment form supplied by the servicer need not be treated by the servicer as a notice of error. A qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of this section, and a servicer must comply with all requirements applicable to a notice of error with respect to such qualified written request.

(b) Scope of error resolution. For purposes of this section, the term “error” refers to the following categories of covered errors:

(1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.

(2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.

(3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1).

(4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(a), or to refund an escrow account balance as required by § 1024.34(b).

(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.

(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 CFR 1026.36(c)(3).

(7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.

(8) Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.

(9) Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).

(10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

(11) Any other error relating to the servicing of a borrower's mortgage loan.

(c) Contact information for borrowers to assert errors. A servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit a notice of error in accordance with the procedures in this section. The notice shall include a statement that the borrower must use the established address to assert an error. If a servicer designates a specific address for receiving notices of error, the servicer shall designate the same address for receiving information

requests pursuant to § 1024.36(b). A servicer shall provide a written notice to a borrower before any change in the address used for receiving a notice of error. A servicer that designates an address for receipt of notices of error must post the designated address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer.
(d) Acknowledgment of receipt. Within five days (excluding legal public holidays, Saturdays, and Sundays) of a servicer receiving a notice of error from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the notice of error.
(e) Response to notice of error—
(1) Investigation and response requirements—
(i) In general. Except as provided in paragraphs (f) and (g) of this section, a servicer must respond to a notice of error by either:
(A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or
(B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.
(ii) Different or additional error. If during a reasonable investigation of a notice of error, a servicer concludes that errors occurred other than, or in addition to, the error or errors alleged by the borrower, the servicer shall correct all such additional errors and provide the borrower with a written notification that describes the errors the servicer identified, the action taken to correct the errors, the effective date of the correction, and contact information, including a telephone number, for further assistance.
(2) Requesting information from borrower. A servicer may request supporting documentation from a borrower in connection with the investigation of an asserted error, but may not:
(i) Require a borrower to provide such information as a condition of investigating an asserted error; or
(ii) Determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation pursuant to paragraph (e)(1)(i)(B) of this section.
(3) Time limits—
(i) In general. A servicer must comply with the requirements of paragraph (e)(1) of this section:
(A) Not later than seven days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error for errors asserted under paragraph (b)(6) of this section.

(B) Prior to the date of a foreclosure sale or within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error, whichever is earlier, for errors asserted under paragraphs (b)(9) and (10) of this section.
(C) For all other asserted errors, not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the applicable notice of error.
(ii) Extension of time limit. For asserted errors governed by the time limit set forth in paragraph (e)(3)(i)(C) of this section, a servicer may extend the time period for responding by an additional 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30–day period, the servicer notifies the borrower of the extension and the reasons for the extension in writing. A servicer may not extend the time period for responding to errors asserted under paragraph (b)(6), (9), or (10) of this section.
(4) Copies of documentation. A servicer shall provide to the borrower, at no charge, copies of documents and information relied upon by the servicer in making its determination that no error occurred within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receiving the borrower's request for such documents. A servicer is not required to provide documents relied upon that constitute confidential, proprietary or privileged information. If a servicer withholds documents relied upon because it has determined that such documents constitute confidential, proprietary or privileged information, the servicer must notify the borrower of its determination in writing within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receipt of the borrower's request for such documents.
(5) Omissions in responses to requests for documentation. In its response to a request for documentation under paragraph (e)(4) of this section, a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if:
(i) The information pertains to a potential or confirmed successor in interest who is not the requester; or
(ii) The requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester.
(f) Alternative compliance—
(1) Early correction. A servicer is not required to comply with paragraphs (d) and (e) of this section if the servicer corrects the error or errors asserted by the borrower and notifies the borrower of that correction in writing within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving the notice of error.
(2) Error asserted before foreclosure sale. A servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section for errors asserted under paragraph (b)(9) or (10) of this section if the servicer receives the applicable notice of an error seven or fewer days before a foreclosure sale. For any such notice of error, a servicer shall make a good faith attempt to respond to the borrower, orally or in writing, and either correct the error or state the reason the servicer has determined that no error has occurred.
(g) Requirements not applicable—

(1) In general. A servicer is not required to comply with the requirements of paragraphs (d), (e), and (i) of this section if the servicer reasonably determines that any of the following apply:
(i) Duplicative notice of error. The asserted error is substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligation to respond pursuant to paragraphs (d) and (e) of this section, unless the borrower provides new and material information to support the asserted error. New and material information means information that was not reviewed by the servicer in connection with investigating a prior notice of the same error and is reasonably likely to change the servicer's prior determination about the error.
(ii) Overbroad notice of error. The notice of error is overbroad. A notice of error is overbroad if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account. To the extent a servicer can reasonably identify a valid assertion of an error in a notice of error that is otherwise overbroad, the servicer shall comply with the requirements of paragraphs (d), (e) and (i) of this section with respect to that asserted error.
(iii) Untimely notice of error. A notice of error is delivered to the servicer more than one year after:
(A) Servicing for the mortgage loan that is the subject of the asserted error was transferred from the servicer receiving the notice of error to a transferee servicer; or
(B) The mortgage loan is discharged.
(2) Notice to borrower. If a servicer determines that, pursuant to this paragraph (g), the servicer is not required to comply with the requirements of paragraphs (d), (e), and (i) of this section, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making such determination. The notice to the borrower shall set forth the basis under paragraph (g)(1) of this section upon which the servicer has made such determination.
(h) Payment requirements prohibited. A servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to a notice of error.
(i) Effect on servicer remedies—
(1) Adverse information. After receipt of a notice of error, a servicer may not, for 60 days, furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the notice of error.
(2) Remedies permitted. Except as set forth in this section with respect to an assertion of error under paragraph (b)(9) or (10) of this section, nothing in this section shall limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.

Credits

[78 FR 60437, Oct. 1, 2013; 81 FR 72371, Oct. 19, 2016]
AUTHORITY: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

12 C.F.R. § 1026.36

§ 1026.36 Prohibited acts or practices and certain requirements for credit secured by a dwelling.

Currentness

(a) Definitions—
(1) Loan originator.
(i) For purposes of this section, the term “loan originator” means a person who, in expectation of direct or indirect compensation or other monetary gain or for direct or indirect compensation or other monetary gain, performs any of the following activities: takes an application, offers, arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities. The term “loan originator” includes an employee, agent, or contractor of the creditor or loan originator organization if the employee, agent, or contractor meets this definition. The term “loan originator” includes a creditor that engages in loan origination activities if the creditor does not finance the transaction at consummation out of the creditor's own resources, including by drawing on a bona fide warehouse line of credit or out of deposits held by the creditor. All creditors that engage in any of the foregoing loan origination activities are loan originators for purposes of paragraphs (f) and (g) of this section. The term does not include:
(A) A person who does not take a consumer credit application or offer or negotiate credit terms available from a creditor, but who performs purely administrative or clerical tasks on behalf of a person who does engage in such activities.
(B) An employee of a manufactured home retailer who does not take a consumer credit application, offer or negotiate credit terms available from a creditor, or advise a consumer on credit terms (including rates, fees, and other costs) available from a creditor.
(C) A person that performs only real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person is compensated by a creditor or loan originator or by any agent of such creditor or loan originator for a particular consumer credit transaction subject to this section.
(D) A seller financer that meets the criteria in paragraph (a)(4) or (a)(5) of this section, as applicable.
(E) A servicer or servicer's employees, agents, and contractors who offer or negotiate terms for purposes of renegotiating, modifying, replacing, or subordinating principal of existing mortgages where consumers are behind in their payments, in default, or have a reasonable likelihood of defaulting or falling behind. This exception does not apply, however, to a servicer or servicer's employees, agents, and contractors who offer or negotiate a transaction that constitutes a refinancing under § 1026.20(a) or obligates a different consumer on the existing debt.
(ii) An “individual loan originator” is a natural person who meets the definition of “loan originator” in paragraph (a)(1)(i) of this section.

(iii) A “loan originator organization” is any loan originator, as defined in paragraph (a)(1)(i) of this section, that is not an individual loan originator.
(2) Mortgage broker. For purposes of this section, a mortgage broker with respect to a particular transaction is any loan originator that is not an employee of the creditor.
(3) Compensation. The term “compensation” includes salaries, commissions, and any financial or similar incentive.
(4) Seller financers; three properties. A person (as defined in § 1026.2(a)(22)) that meets all of the following criteria is not a loan originator under paragraph (a)(1) of this section:
(i) The person provides seller financing for the sale of three or fewer properties in any 12–month period to purchasers of such properties, each of which is owned by the person and serves as security for the financing.
(ii) The person has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.
(iii) The person provides seller financing that meets the following requirements:
(A) The financing is fully amortizing.
(B) The financing is one that the person determines in good faith the consumer has a reasonable ability to repay.
(C) The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR.
(5) Seller financers; one property. A natural person, estate, or trust that meets all of the following criteria is not a loan originator under paragraph (a)(1) of this section:
(i) The natural person, estate, or trust provides seller financing for the sale of only one property in any 12–month period to purchasers of such property, which is owned by the natural person, estate, or trust and serves as security for the financing.
(ii) The natural person, estate, or trust has not constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of the person.
(iii) The natural person, estate, or trust provides seller financing that meets the following requirements:
(A) The financing has a repayment schedule that does not result in negative amortization.
(B) The financing has a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR.
(6) Credit terms. For purposes of this section, the term “credit terms” includes rates, fees, and other costs. Credit terms are selected based on the consumer's financial

characteristics when those terms are selected based on any factors that may influence a credit decision, such as debts, income, assets, or credit history.
(b) Scope. Paragraphs (c)(1) and (2) of this section apply to closed-end consumer credit transactions secured by a consumer's principal dwelling. Paragraph (c)(3) of this section applies to a consumer credit transaction secured by a dwelling. Paragraphs (d) through (i) of this section apply to closed-end consumer credit transactions secured by a dwelling. This section does not apply to a home equity line of credit subject to § 1026.40, except that paragraphs (h) and (i) of this section apply to such credit when secured by the consumer's principal dwelling and paragraph (c)(3) applies to such credit when secured by a dwelling. Paragraphs (d) through (i) of this section do not apply to a loan that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D).
(c) Servicing practices. For purposes of this paragraph (c), the terms “servicer” and “servicing” have the same meanings as provided in 12 CFR 1024.2(b).
(1) Payment processing. In connection with a closed-end consumer credit transaction secured by a consumer's principal dwelling:
(i) Periodic payments. No servicer shall fail to credit a periodic payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in paragraph (c)(1)(iii) of this section. A periodic payment, as used in this paragraph (c), is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle. A payment qualifies as a periodic payment even if it does not include amounts required to cover late fees, other fees, or non-escrow payments a servicer has advanced on a consumer's behalf.
(ii) Partial payments. Any servicer that retains a partial payment, meaning any payment less than a periodic payment, in a suspense or unapplied funds account shall:
(A) Disclose to the consumer the total amount of funds held in such suspense or unapplied funds account on the periodic statement as required by § 1026.41(d)(3), if a periodic statement is required; and
(B) On accumulation of sufficient funds to cover a periodic payment in any suspense or unapplied funds account, treat such funds as a periodic payment received in accordance with paragraph (c)(1)(i) of this section.
(iii) Non-conforming payments. If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of five days after receipt.
(2) No pyramiding of late fees. In connection with a closed-end consumer credit transaction secured by a consumer's principal dwelling, a servicer shall not impose any late fee or delinquency charge for a payment if:
(i) Such a fee or charge is attributable solely to failure of the consumer to pay a late fee or delinquency charge on an earlier payment; and
(ii) The payment is otherwise a periodic payment received on the due date, or within any applicable courtesy period.

(3) Payoff statements. In connection with a consumer credit transaction secured by a consumer's dwelling, a creditor, assignee or servicer, as applicable, must provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date. The statement shall be sent within a reasonable time, but in no case more than seven business days, after receiving a written request from the consumer or any person acting on behalf of the consumer. When a creditor, assignee, or servicer, as applicable, is not able to provide the statement within seven business days of such a request because a loan is in bankruptcy or foreclosure, because the loan is a reverse mortgage or shared appreciation mortgage, or because of natural disasters or other similar circumstances, the payoff statement must be provided within a reasonable time. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this paragraph (c)(3) to provide a payoff statement.
(d) Prohibited payments to loan originators—
(1) Payments based on a term of a transaction.
(i) Except as provided in paragraph (d)(1)(iii) or (iv) of this section, in connection with a consumer credit transaction secured by a dwelling, no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on a term of a transaction, the terms of multiple transactions by an individual loan originator, or the terms of multiple transactions by multiple individual loan originators. If a loan originator's compensation is based in whole or in part on a factor that is a proxy for a term of a transaction, the loan originator's compensation is based on a term of a transaction. A factor that is not itself a term of a transaction is a proxy for a term of the transaction if the factor consistently varies with that term over a significant number of transactions, and the loan originator has the ability, directly or indirectly, to add, drop, or change the factor in originating the transaction.
(ii) For purposes of this paragraph (d)(1) only, a “term of a transaction” is any right or obligation of the parties to a credit transaction. The amount of credit extended is not a term of a transaction or a proxy for a term of a transaction, provided that compensation received by or paid to a loan originator, directly or indirectly, is based on a fixed percentage of the amount of credit extended; however, such compensation may be subject to a minimum or maximum dollar amount.
(iii) An individual loan originator may receive, and a person may pay to an individual loan originator, compensation in the form of a contribution to a defined contribution plan that is a designated tax-advantaged plan or a benefit under a defined benefit plan that is a designated tax-advantaged plan. In the case of a contribution to a defined contribution plan, the contribution shall not be directly or indirectly based on the terms of that individual loan originator's transactions. As used in this paragraph (d)(1)(iii), “designated tax-advantaged plan” means any plan that meets the requirements of Internal Revenue Code section 401(a), 26 U.S.C. 401(a); employee annuity plan described in Internal Revenue Code section 403(a), 26 U.S.C. 403(a); simple retirement account, as defined in Internal Revenue Code section 408(p), 26 U.S.C. 408(p); simplified employee pension described in

section 408(k), 26 U.S.C. 408(k); annuity contract described in Internal Revenue Code section 403(b), 26 U.S.C. 403(b); or eligible deferred compensation plan, as defined in Internal Revenue Code section 457(b), 26 U.S.C. 457(b).
(iv) An individual loan originator may receive, and a person may pay to an individual loan originator, compensation under a non-deferred profits-based compensation plan (i.e., any arrangement for the payment of non-deferred compensation that is determined with reference to the profits of the person from mortgage-related business), provided that:
(A) The compensation paid to an individual loan originator pursuant to this paragraph (d)(1)(iv) is not directly or indirectly based on the terms of that individual loan originator's transactions that are subject to this paragraph (d); and
(B) At least one of the following conditions is satisfied:
(1) The compensation paid to an individual loan originator pursuant to this paragraph (d)(1)(iv) does not, in the aggregate, exceed 10 percent of the individual loan originator's total compensation corresponding to the time period for which the compensation under the non-deferred profits-based compensation plan is paid; or
(2) The individual loan originator was a loan originator for ten or fewer transactions subject to this paragraph (d) consummated during the 12–month period preceding the date of the compensation determination.
(2) Payments by persons other than consumer—
(i) Dual compensation.
(A) Except as provided in paragraph (d)(2)(i)(C) of this section, if any loan originator receives compensation directly from a consumer in a consumer credit transaction secured by a dwelling:
(1) No loan originator shall receive compensation, directly or indirectly, from any person other than the consumer in connection with the transaction; and
(2) No person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) shall pay any compensation to a loan originator, directly or indirectly, in connection with the transaction.
(B) Compensation received directly from a consumer includes payments to a loan originator made pursuant to an agreement between the consumer and a person other than the creditor or its affiliates, under which such other person agrees to provide funds toward the consumer's costs of the transaction (including loan originator compensation).
(C) If a loan originator organization receives compensation directly from a consumer in connection with a transaction, the loan originator organization may pay compensation to an individual loan originator, and the individual loan originator may receive compensation from the loan originator organization, subject to paragraph (d)(1) of this section.
(ii) Exemption. A payment to a loan originator that is otherwise prohibited by section 129B(c)(2)(A) of the Truth in Lending Act is nevertheless permitted pursuant to section 129B(c)(2)(B) of the Act, regardless of whether the consumer makes any upfront payment of discount points, origination points, or fees, as described in section 129B(c)(2)(B)(ii) of the Act, as long as the loan originator does not receive

any compensation directly from the consumer as described in section 129B(c)(2)(B)(i) of the Act.
(3) Affiliates. For purposes of this paragraph (d), affiliates shall be treated as a single "person."
(e) Prohibition on steering—
(1) General. In connection with a consumer credit transaction secured by a dwelling, a loan originator shall not direct or "steer" a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer's interest.
(2) Permissible transactions. A transaction does not violate paragraph (e)(1) of this section if the consumer is presented with loan options that meet the conditions in paragraph (e)(3) of this section for each type of transaction in which the consumer expressed an interest. For purposes of paragraph (e) of this section, the term "type of transaction" refers to whether:
(i) A loan has an annual percentage rate that cannot increase after consummation;
(ii) A loan has an annual percentage rate that may increase after consummation; or
(iii) A loan is a reverse mortgage.
(3) Loan options presented. A transaction satisfies paragraph (e)(2) of this section only if the loan originator presents the loan options required by that paragraph and all of the following conditions are met:
(i) The loan originator must obtain loan options from a significant number of the creditors with which the originator regularly does business and, for each type of transaction in which the consumer expressed an interest, must present the consumer with loan options that include:
(A) The loan with the lowest interest rate;
(B) The loan with the lowest interest rate without negative amortization, a prepayment penalty, interest-only payments, a balloon payment in the first 7 years of the life of the loan, a demand feature, shared equity, or shared appreciation; or, in the case of a reverse mortgage, a loan without a prepayment penalty, or shared equity or shared appreciation; and
(C) The loan with the lowest total dollar amount of discount points, origination points or origination fees (or, if two or more loans have the same total dollar amount of discount points, origination points or origination fees, the loan with the lowest interest rate that has the lowest total dollar amount of discount points, origination points or origination fees).
(ii) The loan originator must have a good faith belief that the options presented to the consumer pursuant to paragraph (e)(3)(i) of this section are loans for which the consumer likely qualifies.
(iii) For each type of transaction, if the originator presents to the consumer more than three loans, the originator must highlight the loans that satisfy the criteria specified in paragraph (e)(3)(i) of this section.
(4) Number of loan options presented. The loan originator can present fewer than three loans and satisfy paragraphs (e)(2) and (e)(3)(i) of this section if the loan(s)

presented to the consumer satisfy the criteria of the options in paragraph (e)(3)(i) of this section and the provisions of paragraph (e)(3) of this section are otherwise met.
(f) Loan originator qualification requirements. A loan originator for a consumer credit transaction secured by a dwelling must, when required by applicable State or Federal law, be registered and licensed in accordance with those laws, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act, 12 U.S.C. 5102 et seq.), its implementing regulations (12 CFR part 1007 or part 1008), and State SAFE Act implementing law. To comply with this paragraph (f), a loan originator organization that is not a government agency or State housing finance agency must:
(1) Comply with all applicable State law requirements for legal existence and foreign qualification;
(2) Ensure that each individual loan originator who works for the loan originator organization is licensed or registered to the extent the individual is required to be licensed or registered under the SAFE Act, its implementing regulations, and State SAFE Act implementing law before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling; and
(3) For each of its individual loan originator employees who is not required to be licensed and is not licensed as a loan originator pursuant to § 1008.103 of this chapter or State SAFE Act implementing law:
(i) Obtain for any individual whom the loan originator organization hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual) and for any individual regardless of when hired who, based on reliable information known to the loan originator organization, likely does not meet the standards under § 1026.36(f)(3)(ii), before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling:
(A) A criminal background check through the Nationwide Mortgage Licensing System and Registry (NMLSR) or, in the case of an individual loan originator who is not a registered loan originator under the NMLSR, a criminal background check from a law enforcement agency or commercial service;
(B) A credit report from a consumer reporting agency described in section 603(p) of the Fair Credit Reporting Act (15 U.S.C. 1681a(p)) secured, where applicable, in compliance with the requirements of section 604(b) of the Fair Credit Reporting Act, 15 U.S.C. 1681b(b); and
(C) Information from the NMLSR about any administrative, civil, or criminal findings by any government jurisdiction or, in the case of an individual loan originator who is not a registered loan originator under the NMLSR, such information from the individual loan originator;
(ii) Determine on the basis of the information obtained pursuant to paragraph (f)(3)(i) of this section and any other information reasonably available to the loan originator organization, for any individual whom the loan originator organization hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background

standards in effect at the time of hire or before January 1, 2014, used to screen the individual) and for any individual regardless of when hired who, based on reliable information known to the loan originator organization, likely does not meet the standards under this paragraph (f)(3)(ii), before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling, that the individual loan originator:
(A)(1) Has not been convicted of, or pleaded guilty or nolo contendere to, a felony in a domestic or military court during the preceding seven-year period or, in the case of a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering, at any time;
(2) For purposes of this paragraph (f)(3)(ii)(A):
(i) A crime is a felony only if at the time of conviction it was classified as a felony under the law of the jurisdiction under which the individual was convicted;
(ii) Expunged convictions and pardoned convictions do not render an individual unqualified; and
(iii) A conviction or plea of guilty or nolo contendere does not render an individual unqualified under this §1026.36(f) if the loan originator organization has obtained consent to employ the individual from the Federal Deposit Insurance Corporation (or the Board of Governors of the Federal Reserve System, as applicable) pursuant to section 19 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1829, the National Credit Union Administration pursuant to section 205 of the Federal Credit Union Act (FCUA), 12 U.S.C. 1785(d), or the Farm Credit Administration pursuant to section 5.65(d) of the Farm Credit Act of 1971 (FCA), 12 U.S.C. 227a-14(d), notwithstanding the bars posed with respect to that conviction or plea by the FDIA, FCUA, and FCA, as applicable; and
(B) Has demonstrated financial responsibility, character, and general fitness such as to warrant a determination that the individual loan originator will operate honestly, fairly, and efficiently; and
(iii) Provide periodic training covering Federal and State law requirements that apply to the individual loan originator's loan origination activities.
(g) Name and NMLSR ID on loan documents.
(1) For a consumer credit transaction secured by a dwelling, a loan originator organization must include on the loan documents described in paragraph (g)(2) of this section, whenever each such loan document is provided to a consumer or presented to a consumer for signature, as applicable:
(i) Its name and NMLSR ID, if the NMLSR has provided it an NMLSR ID; and
(ii) The name of the individual loan originator (as the name appears in the NMLSR) with primary responsibility for the origination and, if the NMLSR has provided such person an NMLSR ID, that NMLSR ID.
(2) The loan documents that must include the names and NMLSR IDs pursuant to paragraph (g)(1) of this section are:
(i) The credit application;
(ii) The disclosures required by § 1026.19 (e) and (f);
(iii) The note or loan contract; and
(iv) The security instrument.

(3) For purposes of this section, NMLSR ID means a number assigned by the Nationwide Mortgage Licensing System and Registry to facilitate electronic tracking and uniform identification of loan originators and public access to the employment history of, and the publicly adjudicated disciplinary and enforcement actions against, loan originators.
(h) Prohibition on mandatory arbitration clauses and waivers of certain consumer rights—
(1) Arbitration. A contract or other agreement for a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling) may not include terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claims arising out of the transaction. This prohibition does not limit a consumer and creditor or any assignee from agreeing, after a dispute or claim under the transaction arises, to settle or use arbitration or other non-judicial procedure to resolve that dispute or claim.
(2) No waivers of Federal statutory causes of action. A contract or other agreement relating to a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling) may not be applied or interpreted to bar a consumer from bringing a claim in court pursuant to any provision of law for damages or other relief in connection with any alleged violation of any Federal law. This prohibition does not limit a consumer and creditor or any assignee from agreeing, after a dispute or claim under the transaction arises, to settle or use arbitration or other non-judicial procedure to resolve that dispute or claim.
(i) Prohibition on financing credit insurance.
(1) A creditor may not finance, directly or indirectly, any premiums or fees for credit insurance in connection with a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling). This prohibition does not apply to credit insurance for which premiums or fees are calculated and paid in full on a monthly basis.
(2) For purposes of this paragraph (i):
(i) “Credit insurance”:
(A) Means credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, but
(B) Excludes credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to a separate insurance contract and are not paid to an affiliate of the creditor;
(ii) A creditor finances premiums or fees for credit insurance if it provides a consumer the right to defer payment of a credit insurance premium or fee owed by the consumer beyond the monthly period in which the premium or fee is due; and

(iii) Credit insurance premiums or fees are calculated on a monthly basis if they are determined mathematically by multiplying a rate by the actual monthly outstanding balance.
(j) Policies and procedures to ensure and monitor compliance.
(1) A depository institution must establish and maintain written policies and procedures reasonably designed to ensure and monitor the compliance of the depository institution, its employees, its subsidiaries, and its subsidiaries' employees with the requirements of paragraphs (d), (e), (f), and (g) of this section. These written policies and procedures must be appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the depository institution and its subsidiaries.
(2) For purposes of this paragraph (j), “depository institution” has the meaning in section 1503(3) of the SAFE Act, 12 U.S.C. 5102(3). For purposes of this paragraph (j), “subsidiary” has the meaning in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.
(k) Negative amortization counseling.
(1) Counseling required. A creditor shall not extend credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling, other than a reverse mortgage transaction subject to § 1026.33 or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), that may result in negative amortization, unless the creditor receives documentation that the consumer has obtained homeownership counseling from a counseling organization or counselor certified or approved by the U.S. Department of Housing and Urban Development to provide such counseling.
(2) Definitions. For the purposes of this paragraph (k), the following definitions apply:
(i) A “first-time borrower” means a consumer who has not previously received a closed-end credit transaction or open-end credit plan secured by a dwelling.
(ii) “Negative amortization” means a payment schedule with regular periodic payments that cause the principal balance to increase.
(3) Steering prohibited. A creditor that extends credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling, other than a reverse mortgage transaction subject to § 1026.33 or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), that may result in negative amortization shall not steer or otherwise direct a consumer to choose a particular counselor or counseling organization for the counseling required under this paragraph (k).

Credits

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12 C.F.R. § 1024.41

§ 1024.41 Loss mitigation procedures.
Currentness
(a) Enforcement and limitations. A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.
(b) Receipt of a loss mitigation application—
(1) Complete loss mitigation application. A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.
(2) Review of loss mitigation application submission—
(i) Requirements. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:
(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and
(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.
(ii) Time period disclosure. The notice required pursuant to paragraph (b)(2)(i)(B) of this section must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.

(3) Determining protections. To the extent a determination of whether protections under this section apply to a borrower is made on the basis of the number of days between when a complete loss mitigation application is received and when a foreclosure sale occurs, such determination shall be made as of the date a complete loss mitigation application is received.
(c) Evaluation of loss mitigation applications—
(1) Complete loss mitigation application. Except as provided in paragraph (c)(4)(ii) of this section, if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving the complete loss mitigation application, a servicer shall:
(i) Evaluate the borrower for all loss mitigation options available to the borrower; and
(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage. The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal, as provided for in paragraph (h) of this section.
(2) Incomplete loss mitigation application evaluation—
(i) In general. Except as set forth in paragraphs (c)(2)(ii) and (iii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.
(ii) Reasonable time. Notwithstanding paragraph (c)(2)(i) of this section, if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a single complete loss mitigation application for purposes of paragraph (i) of this section.
(iii) Short-term loss mitigation options. Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a short-term payment forbearance program or a short-term repayment planto a borrower based upon an evaluation of an incomplete loss

mitigation application. Promptly after offering a payment forbearance program or a repayment plan under this paragraph (c)(2)(iii), unless the borrower has rejected the offer, the servicer must provide the borrower a written notice stating the specific payment terms and duration of the program or plan, that the servicer offered the program or plan based on an evaluation of an incomplete application, that other loss mitigation options may be available, and that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all loss mitigation options available to the borrower regardless of whether the borrower accepts the program or plan. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program or repayment plan offered pursuant to this paragraph (c)(2)(iii). A servicer may offer a short-term payment forbearance program in conjunction with a short-term repayment plan pursuant to this paragraph (c)(2)(iii).
(iv) Facially complete application. A loss mitigation application shall be considered facially complete when a borrower submits all the missing documents and information as stated in the notice required under paragraph (b)(2)(i)(B) of this section, when no additional information is requested in such notice, or once the servicer is required to provide the borrower a written notice pursuant to paragraph (c)(3)(i) of this section. If the servicer later discovers thatadditional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it first became facially complete, for the purposes of paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of this paragraph (c). A servicer that complies with this paragraph (c)(2)(iv) will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B) of this section.
(3) Notice of complete application.
(i) Except as provided in paragraph (c)(3)(ii) of this section, within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving a borrower's complete loss mitigation application, a servicer shall provide the borrower a written notice that sets forth the following information:
(A) That the loss mitigation application is complete;
(B) The date the servicer received the complete application;

(C) That the servicer expects to complete its evaluation within 30 days of the date it received the complete application;
(D) That the borrower is entitled to certain foreclosure protections because the servicer has received the complete application, and, as applicable, either:
(1) If the servicer has not made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer cannot make the first notice or filing required to commence or initiate the foreclosure process under applicable law before evaluating the borrower's complete application; or
(2) If the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer has begun the foreclosure process, and that the servicer cannot conduct a foreclosure sale before evaluating the borrower's complete application;
(E) That the servicer may need additional information at a later date to evaluate the application, in which case the servicer will request that information from the borrower and give the borrower a reasonable opportunity to submit it, the evaluation process may take longer, and the foreclosure protections could end if the servicer does not receive the information as requested; and
(F) That the borrower may be entitled to additional protections under State or Federal law.
(ii) A servicer is not required to provide a notice pursuant to paragraph (c)(3)(i) of this section if:
(A) The servicer has already provided the borrower a notice under paragraph (b)(2)(i)(B) of this section informing the borrower that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower pursuant to paragraph (c)(2)(iv) of this section;
(B) The application was not complete or facially complete more than 37 days before a foreclosure sale; or
(C) The servicer has already provided the borrower a notice regarding the application under paragraph (c)(1)(ii) of this section.
(4) Information not in the borrower's control—
(i) Reasonable diligence. If a servicer requires documents or information not in the borrower's control to determine which loss mitigation options, if any, it will offer to the borrower, the servicer must exercise reasonable diligence in obtaining such documents or information.
(ii) Effect in case of delay.
(A)(1) Except as provided in paragraph (c)(4)(ii)(A)(2) of this section, a servicer must not deny a complete loss mitigation application solely because the servicer lacks required documents or information not in the borrower's control.

(2) If a servicer has exercised reasonable diligence to obtain required documents or information from a party other than the borrower or the servicer, but the servicer has been unable to obtain such documents or information for a significant period of time following the 30–day period identified in paragraph (c)(1) of this section, and the servicer, in accordance with applicable requirements established by the owner or assignee of the borrower's mortgage loan, is unable to determine which loss mitigation options, if any, it will offer the borrower without such documents or information, the servicer may deny the application and provide the borrower with a written notice in accordance with paragraph (c)(1)(ii) of this section. When providing the written notice in accordance with paragraph (c)(1)(ii) of this section, the servicer must also provide the borrower with a copy of the written notice required by paragraph (c)(4)(ii)(B) of this section.

(B) If a servicer is unable to make a determination within the 30–day period identified in paragraph (c)(1) of this section as to which loss mitigation options, if any, it will offer to the borrower because the servicer lacks required documents or information from a party other than the borrower or the servicer, the servicer must, within such 30–day period or promptly thereafter, provide the borrower a written notice, informing the borrower:

(1) That the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage;

(2) Of the specific documents or information that the servicer lacks;

(3) That the servicer has requested such documents or information; and

(4) That the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documents or information.

(C) If a servicer must provide a notice required by paragraph (c)(4)(ii)(B) of this section, the servicer must not provide the borrower a written notice pursuant to paragraph (c)(1)(ii) of this section until the servicer receives the required documents or information referenced in paragraph (c)(4)(ii)(B)(2) of this section, except as provided in paragraph (c)(4)(ii)(A)(2) of this section. Upon receiving such required documents or information, the servicer must promptly provide the borrower with the written notice pursuant to paragraph (c)(1)(ii) of this section.

(d) Denial of loan modification options. If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria.

(e) Borrower response—
(1) In general. Subject to paragraphs (e)(2)(ii) and (iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower.
(2) Rejection—
(i) In general. Except as set forth in paragraphs (e)(2)(ii) and (iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option.
(ii) Trial Loan Modification Plan. A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (e)(1) of this section, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (e)(1) of this section.
(iii) Interaction with appeal process. If a borrower makes an appeal pursuant to paragraph (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to paragraph (c)(1)(ii) of this section shall be extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.
(f) Prohibition on foreclosure referral—
(1) Pre-foreclosure review period. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:
(i) A borrower's mortgage loan obligation is more than 120 days delinquent;
(ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or
(iii) The servicer is joining the foreclosure action of a superior or subordinate lienholder.
(2) Application received before foreclosure referral. If a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial

foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:
(i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;
(ii) The borrower rejects all loss mitigation options offered by the servicer; or
(iii) The borrower fails to perform under an agreement on a loss mitigation option.
(g) Prohibition on foreclosure sale. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:
(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;
(2) The borrower rejects all loss mitigation options offered by the servicer; or
(3) The borrower fails to perform under an agreement on a loss mitigation option.
(h) Appeal process—
(1) Appeal process required for loan modification denials. If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.
(2) Deadlines. A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.
(3) Independent evaluation. An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.
(4) Appeal determination. Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no

earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.
(i) Duplicative requests. A servicer must comply with the requirements of this section for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application.
(j) Small servicer requirements. A small servicer shall be subject to the prohibition on foreclosure referral in paragraph (f)(1) of this section. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.
(k) Servicing transfers—
(1) In general—
(i) Timing of compliance. Except as provided in paragraphs (k)(2) through (4) of this section, if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the requirements of this section for that loss mitigation application within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application. All rights and protections under paragraphs (c) through (h) of this section to which a borrower was entitled before a transfer continue to apply notwithstanding the transfer.
(ii) Transfer date defined. For purposes of this paragraph (k), the transfer date is the date on which the transferee servicer will begin accepting payments relating to the mortgage loan, as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).
(2) Acknowledgment notices—
(i) Transferee servicer timeframes. If a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by paragraph (b)(2)(i)(B) of this section has not expired as of the transfer date and the transferor servicer has not provided such notice, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, and Sundays) of the transfer date.
(ii) Prohibitions. A transferee servicer that must provide the notice required by paragraph (b)(2)(i)(B) of this section under this paragraph (k)(2):
(A) Shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section,

notwithstanding paragraph (f)(1) of this section. For purposes of paragraph (f)(2) of this section, a borrower who submits a complete loss mitigation application on or before the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section shall be treated as having done so during the pre-foreclosure review period set forth in paragraph (f)(1) of this section.

(B) Shall comply with paragraphs (c), (d), and (g) of this section if the borrower submits a complete loss mitigation application to the transferee or transferor servicer 37 or fewer days before the foreclosure sale but on or before the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section.

(3) Complete loss mitigation applications pending at transfer. If a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the applicable requirements of paragraphs (c)(1) and (4) of this section within 30 days of the transfer date.

(4) Applications subject to appeal process. If a transferee servicer acquires the servicing of a mortgage loan for which an appeal of a transferor servicer's determination pursuant to paragraph (h) of this section has not been resolved by the transferor servicer as of the transfer date or is timely filed after the transfer date, the transferee servicer must make a determination on the appeal if it is able to do so or, if it is unable to do so, must treat the appeal as a pending complete loss mitigation application.

(i) Determining appeal. If a transferee servicer is required under this paragraph (k)(4) to make a determination on an appeal, the transferee servicer must complete the determination and provide the notice required by paragraph (h)(4) of this section within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later.

(ii) Servicer unable to determine appeal. A transferee servicer that is required to treat a borrower's appeal as a pending complete loss mitigation application under this paragraph (k)(4) must comply with the requirements of this section for such application, including evaluating the borrower for all loss mitigation options available to the borrower from the transferee servicer. For purposes of paragraph (c) or (k)(3) of this section, as applicable, such a pending complete loss mitigation application shall be considered complete as of the date the appeal was received by the transferor servicer or the transferee servicer, whichever occurs first. For purposes of paragraphs (e) through (h) of this section, the transferee servicer must treat such a pending complete loss mitigation application as facially complete under paragraph (c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer.

(5) Pending loss mitigation offers. A transfer does not affect a borrower's ability to accept or reject a loss mitigation option offered under paragraph (c) or (h) of this section. If a transferee servicer acquires the servicing of a mortgage loan for which the borrower's time period under paragraph (e) or (h) of this section for accepting or rejecting a loss mitigation option offered by the transferor servicer has not expired as of the transfer date, the transferee servicer must allow the borrower to accept or reject the offer during the unexpired balance of the applicable time period.

Credits

[78 FR 60437, Oct. 1, 2013; 81 FR 72373, Oct. 19, 2016]

AUTHORITY: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

12 U.S.C.A. § 2605

§ 2605. Servicing of mortgage loans and administration of escrow accounts

Currentness

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by--

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.
(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.
(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.
(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.
(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by--
(i) termination of the contract for servicing the loan for cause;
(ii) commencement of proceedings for bankruptcy of the servicer; or
(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice
Any notice required under paragraph (1) shall include the information described in subsection (b)(3).
(d) Treatment of loan payments during transfer period
During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.
(e) Duty of loan servicer to respond to borrower inquiries
(1) Notice of receipt of inquiry
(A) In general
If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 5 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.
(B) Qualified written request
For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--
(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.
(2) Action with respect to inquiry
Not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall--
(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);
(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--
(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and
(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or
(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and
(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of Title 15).

(4) Limited extension of response time

The 30-day period described in paragraph (2) may be extended for not more than 15 days if, before the end of such 30-day period, the servicer notifies the borrower of the extension and the reasons for the delay in responding.

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of--
(A) any actual damages to the borrower as a result of the failure; and
(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of--
(A) any actual damages to each of the borrowers in the class as a result of the failure; and
(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $2,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of--
(i) $1,000,000; or
(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the

servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. Any balance in any such account that is within the servicer's control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

(i) Definitions

For purposes of this section:

(1) Effective date of transfer

The term “effective date of transfer” means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) Servicer

The term “servicer” means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include--

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by--

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term “servicing” means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Bureau shall establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2).

(k) Servicer prohibitions

(1) In general

A servicer of a federally related mortgage shall not--

(A) obtain force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance;

(B) charge fees for responding to valid qualified written requests (as defined in regulations which the Bureau of Consumer Financial Protection shall prescribe) under this section;

(C) fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties;

(D) fail to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan; or

(E) fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter.

(2) Force-placed insurance defined

For purposes of this subsection and subsections (l) and (m), the term “force-placed insurance” means hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage.

(l) Requirements for force-placed insurance

A servicer of a federally related mortgage shall not be construed as having a reasonable basis for obtaining force-placed insurance unless the requirements of this subsection have been met.

(1) Written notices to borrower

A servicer may not impose any charge on any borrower for force-placed insurance with respect to any property securing a federally related mortgage unless--

(A) the servicer has sent, by first-class mail, a written notice to the borrower containing--

(i) a reminder of the borrower's obligation to maintain hazard insurance on the property securing the federally related mortgage;

(ii) a statement that the servicer does not have evidence of insurance coverage of such property;

(iii) a clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage; and

(iv) a statement that the servicer may obtain such coverage at the borrower's expense if the borrower does not provide such demonstration of the borrower's existing coverage in a timely manner;

(B) the servicer has sent, by first-class mail, a second written notice, at least 30 days after the mailing of the notice under subparagraph (A) that contains all the information described in each clause of such subparagraph; and

(C) the servicer has not received from the borrower any demonstration of hazard insurance coverage for the property securing the mortgage by the end of the 15-day period beginning on the date the notice under subparagraph (B) was sent by the servicer.

(2) Sufficiency of demonstration

A servicer of a federally related mortgage shall accept any reasonable form of written confirmation from a borrower of existing insurance coverage, which shall include the existing insurance policy number along with the identity of, and contact information for, the insurance company or agent, or as otherwise required by the Bureau of Consumer Financial Protection.

(3) Termination of force-placed insurance

Within 15 days of the receipt by a servicer of confirmation of a borrower's existing insurance coverage, the servicer shall--

(A) terminate the force-placed insurance; and

(B) refund to the consumer all force-placed insurance premiums paid by the borrower during any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect, and any related fees charged to the consumer's account with respect to the force-placed insurance during such period.

(4) Clarification with respect to Flood Disaster Protection Act

No provision of this section shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 4012a(e) of Title 42.

(m) Limitations on force-placed insurance charges

All charges, apart from charges subject to State regulation as the business of insurance, related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable.

CREDIT(S)

(Pub.L. 93-533, § 6, as added Pub.L. 101-625, Title IX, § 941, Nov. 28, 1990, 104 Stat. 4405; amended Pub.L. 102-27, Title III, § 312(a), Apr. 10, 1991, 105 Stat. 154; Pub.L. 103-325, Title III, § 345, Sept. 23, 1994, 108 Stat. 2239; Pub.L. 104-208, Div. A, Title II, § 2103(a), Sept. 30, 1996, 110 Stat. 3009-399; Pub.L. 111-203, Title X, § 1098(4), Title XIV, § 1463, July 21, 2010, 124 Stat. 2104, 2182.)

Borrower Authorization of Third Party

Mortgage Servicer name

Customer Service/Loss Mitigation Phone Number

Borrower(s) name(s)

Property address

Mortgage loan account number(s)

Third Party Information (all applicable fields must be completed)

Name of Entity, Agency, Firm Charles Wallshein Esq. Phone number 631-824-6555

Name(s) of authorized person(s) Charles Wallshein Esq. / Roberto Rivera

Mailing address 35 Pinelawn ROAD #106E Melville NY 11747

Office address Same

Email CWallsheinCa Wallsheinlegal.com Website URL

Tax ID# State license # (if required) Issuing state

For non-profit agencies only*

HUD Approved Counseling Agency?

☐ Yes ☐ No

Approval valid until (date) _____

HUD HCS # _____

* Attach National Foreclosure Mitigation Counseling form if needed

For attorneys only **

Do you represent the above named Borrower for a workout arrangement with the named Servicer?

☒ Yes ☐ No

Firm Name Charles Wallshein Esq.

Individual Attorney name(s) Charles Wallshein Esq

All states where licensed NY

** Attorney who represents Borrower must sign below

Third Party Acknowledgement

The undersigned, on behalf of the Third Party, represents that: (i) it is in compliance with Regulation O (Mortgage Assistance Relief Services), if applicable, and all other applicable laws and regulations; and (ii) the Third Party information provided above is true and correct. The undersigned acknowledges that a misrepresentation or omission of fact made in connection with a government program such as Making Home Affordable may result in civil/criminal prosecution.

Signature of Third Party Date

Printed name Title

Borrower Authorization (please initial all items)

Third Party you are authorizing (from first page)

✓ I (Borrowers listed below) authorize the above named Third Party to discuss, assist with, or, if applicable, negotiate a workout arrangement on my mortgage(s) with the above named Mortgage Servicer (its affiliates, agents, employees, and successors). A workout arrangement could include a modification or other relief.

✓ I authorize my Mortgage Servicer, and Third Party and Treasury (and its agents) to share with each other public and non-public information about my finances and my mortgage for the purpose of assisting me in obtaining a workout arrangement, including but not limited to: (i) my mortgage payment history, terms of my mortgage; and (ii) my social security number, credit score, income, debts and other information related to obtaining and servicing my mortgage.

✓ I understand that my Mortgage Servicer may contact me directly except in limited situations, such as when I am represented by an attorney, and the Servicer and I must agree to any workout arrangement. I may still contact my Mortgage Servicer at any time.

✓ I understand that this Third Party Authorization Form may not be accepted by my Mortgage Servicer and my Mortgage Servicer will notify me in writing if it is not accepted. Mortgage Loan Servicers have procedures designed to detect fraud or improper activity and must follow privacy laws to protect borrower information.

This Authorization expires one year from the date signed unless Borrower cancels it earlier by writing to the Servicer or by completing an Authorization of a different Third Party.

Do not sign this form until the form is fully completed. Keep a copy of this form.

Be aware of scams!

Federal and State government agencies have prosecuted hundreds of companies and lawyers who illegally charge up-front fees.

Report scams at HOPE Hotline:

888-995-HOPE (4673)

#1

Signature of borrower _____

Printed name _____ Date _____

Last 4 digits of SSN _____

Phone # _____ Email _____

#2

Signature of co-borrower _____

Printed name _____ Date _____

Last 4 digits of SSN _____

Phone # _____ Email _____

This form should be transmitted to the Mortgage Servicer as soon as possible and no later than 90 days after the date signed.

CHARLES WALLSHEIN
Attorney at Law
35 Pinelawn Road
Suite 106E
Melville, New York 11747
Tel: 631 824-6555 cwallshein@wallsheinlegal.com Fax: 631 824-6558

January 29, 2020

Chase
P.O. Box 183166
Columbus, OH 4218-3166

In the Matter of:

Mortgage Loan No.:

Re: Notice of Error and Notice of Appeal pursuant to 12 CFR Section 1024.35(b)(5) and 12 CFR Section 1024.41(d) & (h), and 12 C.F.R. §1024.41(g) Dual Tracking

Dear Sir or Madam:

Please consider this letter to constitute a Notice of Error under **12 CFR Section 1024.35** & **12 CFR Section 1024.41(d) & (h)** of Regulation X of the Mortgage Servicing Act under RESPA, which Regulation became effective on January 10, 2014. These amendments implemented the Dodd-Frank Wall Street Reform and Consumer Protection Act provisions regarding mortgage loan servicing. Under these amendments, you must acknowledge receipt of this Notice within five (5) days thereof (excluding legal public holidays, Saturdays and Sundays) and must advise us of your responses to this notice within thirty (30) days of receipt thereof (excluding legal public holidays, Saturdays and Sundays).

Under Section 1024.35(b) of Amended Regulation X, the term "error" means the following categories of covered errors:

As per new Regulations X rules effective January 10, 2014, a mortgage servicer is required to cancel or postpone a foreclosure sale when the servicer initiated the foreclosure while still evaluating the homeowner for loss mitigation options.

Violation of § 1024.41(d)
The debtor submitted to you a complete loss mitigation application. The loan servicer denied the application without stating the specific reason for denial. The denial letter fails to provide an explanation for denying the loan modification application as required by 12 C.F.R. §1024.41(d).

The borrower disputes the denial and hereby appeals the decision pursuant to 12 C.F.R. §1024.41(h) based upon the following criteria:

1. CitiMortgage failed to respond Borrower's July 27, 2018 Notice of Error wherein the borrower gave notice that Citi did not provide a list of home retention options pursuant to12 C.F.R. §1024.41(d) and also failed to provide the basis for denial of the appeal pursuant to 12 C.F.R. §1024.41(h).
2. Citimortgage is also in violation of 12 C.F.R. §1024.41(g) by filing a motion for summary judgment. The filing of the motion is construed as Citimortgage proceeding to judgment or sale. Although CitiMortgage denied the mortgage modification application pursuant to

Accordingly, we are demand that you immediately suspend and stay the pending foreclosure proceeding and that Chase refresh its analysis using the correct monthly income provided

Please correct all of these errors and provide us with notification of the correction, the date of the correction, and contact information for further assistance; or after conducting a reasonable investigation and providing the borrower through our firm with a notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information for further assistance.

Please be advised that for 60 days after receipt of a Notice of Error, you may not furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the Notice of Error pursuant to § 1024.35(i) and 12 C.F.R. §1024.41(d) & (h).

With best regards, I remain
very truly yours,

Charles Wallshein, Esq.

CHARLES WALLSHEIN
Attorney at Law
35 Pinelawn Road
Suite 106E
Melville, New York 11747
Tel: 631 824-6555 cwallshein@wallsheinlegal.com Fax: 631 824-6558

February 27, 2020

Rushmore Loan Management Service LLC
Compliance Department
P.O. Box 52262
Irvine, CA 92619

Loan Number:
Borrower Name:
Subject Property

Re: Notice of Error and Notice of Appeal pursuant to 12 CFR Section 1024.35(b)(5) and 12 CFR Section 1024.41(d) & (h), and 12 C.F.R. §1024.41(g) Dual Tracking

Dear Sir or Madam:

Please consider this letter to constitute a Notice of Error under **12 CFR Section 1024.35** & **12 CFR Section 1024.41(d), (h) & (g)** of Regulation X of the Mortgage Servicing Act under RESPA, which Regulation became effective on January 10, 2014. These amendments implemented the Dodd-Frank Wall Street Reform and Consumer Protection Act provisions regarding mortgage loan servicing. Under these amendments, you must acknowledge receipt of this Notice within five (5) days thereof (excluding legal public holidays, Saturdays and Sundays) and must advise us of your responses to this notice within thirty (30) days of receipt thereof (excluding legal public holidays, Saturdays and Sundays).

Under Section 1024.35(b) of Amended Regulation X, the term "error" means the following categories of covered errors:

As per new Regulations X rules effective January 10, 2014, a mortgage servicer is required to cancel or postpone a foreclosure sale when the servicer initiated the foreclosure while still evaluating the homeowner for loss mitigation options.

Violation of § 1024.41(d)
The debtor submitted to you a complete loss mitigation application. The loan servicer denied the application without stating the specific reason for denial. The denial letter fails to provide an explanation for denying the loan modification application as required by 12 C.F.R. §1024.41(d).

The borrower disputes the denial and hereby appeals the decision pursuant to 12 C.F.R. §1024.41(h) based upon the following criteria:

1. CitiMortgage failed to respond Borrower's July 27, 2018 Notice of Error wherein the borrower gave notice that Citi did not provide a list of home retention options pursuant to12 C.F.R. §1024.41(d) and also failed to provide the basis for denial of the appeal pursuant to 12 C.F.R. §1024.41(h).
2. Citimortgage is also in violation of 12 C.F.R. §1024.41(g) by filing a motion for summary judgment. The filing of the motion is construed as Citimortgage proceeding to judgment or sale. Although CitiMortgage denied the mortgage modification application pursuant to 12 C.F.R. §1024.41(g)(1), the borrower believes that the denial is pro-forma, that the decision was made without proper review and in bad faith.

CitiMortgage may remedy its error with the following actions: identify the loss mitigation options the borrower that have been available to him since the date of his first application, conduct a proper appeal review pursuant to 12 C.F.R. Section 1024.41(d) & (h) and to and to cease dual tracking the borrower's foreclosure pursuant to 12 C.F.R. §1024.41(g).

Accordingly, we are demand that you immediately suspend and stay the pending foreclosure proceeding and that Chase refresh its analysis using the correct monthly income provided

Please correct all of these errors and provide us with notification of the correction, the date of the correction, and contact information for further assistance; or after conducting a reasonable investigation and providing the borrower through our firm with a notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information for further assistance.

Please be advised that for 60 days after receipt of a Notice of Error, you may not furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the Notice of Error pursuant to § 1024.35(i) and 12 C.F.R. §1024.41(d), (g) & (h).

With best regards, I remain
very truly yours,

Charles Wallshein, Esq.

CHARLES WALLSHEIN
Attorney at Law
35 Pinelawn Road
Suite 106E
Melville, New York 11747
Tel: 631 824-6555 cwallshein@wallsheinlegal.com Fax: 631 824-6558

May 4, 2020

Servicer Address:
Customer Service
PO Box 25430
Portland, Oregon 97298-0430

Loan Number:
Borrower Name:
Subject Property Address:

Re: Request for Information Pursuant to Section 1024.36 of Regulation X

Dear Sir or Madam:

This is a Request for Information related your servicing of the mortgage loan of the above-named debtors. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

Pursuant to Section 1024.36(c) of Regulation X, you must within five (5) days (excluding legal public holidays, Saturdays and Sundays) provide our office with a response to this Request acknowledging receipt of the same.

Pursuant to Section 1024.36(d)(ii)(2)(A), not later than ten (10) days (excluding public holidays, Saturdays and Sundays) after you receive this request for information you must provide us with the identify of, and address or other relevant contact information for the owner of the mortgage loan identified herein. For all of the other information requested herein, and pursuant to Section 1024.36(d)(ii)(2)(B), you must respond not later than thirty (30) days (excluding legal public holidays, Saturdays and Sundays) after you receive this request for information.

For purposes of this request, the term "transaction activity" includes any activity that credits or debits the outstanding account balance of the mortgage loan in this case. With respect to the transaction activity for the subject loan, please provide a complete summary of the following:

1. Please provide a copy of the most recent Periodic Billing Statement.
2. Please provide the guidelines for home retention options pertaining to the COVID-19 Emergency Forbearance programs.

3. Please provide a list of home retention programs that are available per the investor if this Mortgage Loan.
4. Please provide the details for eligibility and qualification of all home retention programs per the investor of this loan.
5. Please provide a copy of all loan modifications, trials plans and forbearance plans that borrower has been offered.
6. Copies of all lost mitigation rules for forbearance, emergency forbearance and loan modification polices or procedures that are applicable to the mortgage loan identified herein.
7. Copies of all broker price opinions, valuations or appraisals for the mortgage loan identified herein.

With best regards,
I remain very truly yours,

Charles Wallshein Esq.
35 Pinelawn Road
Suite 106E
Melville, NY 11747
(631) 824-6555

CHARLES WALLSHEIN
Attorney at Law
115 Broadhollow Road
Suite 350
Melville, New York 11747
Tel: 631 824-6555 cwallshein@wallsheinlegal.com Fax: 631 824-6558

April 20, 2020

In the Matter of:

Re: Request for Information Pursuant to Section 1024.36 of Regulation X

Dear Sir or Madam:

This is a Request for Information related your servicing of the mortgage loan of the above-named debtors. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

Pursuant to Section 1024.36(c) of Regulation X, you must within five (5) days (excluding legal public holidays, Saturdays and Sundays) provide our office with a response to this Request acknowledging receipt of the same.
Pursuant to Section 1024.36(d)(ii)(2)(A), not later than ten (10) days (excluding public holidays, Saturdays and Sundays) after you receive this request for information you must provide us with the identify of, and address or other relevant contact information for the owner of the mortgage loan identified herein. For all of the other information requested herein, and pursuant to Section 1024.36(d)(ii)(2)(B), you must respond not later than thirty (30) days (excluding legal public holidays, Saturdays and Sundays) after you receive this request for information.

For purposes of this request, the term "transaction activity" includes any activity that credits or debits the outstanding account balance of the mortgage loan in this case. With respect to the transaction activity for the subject loan, please provide a complete summary of the following:

1. An exact reproduction of the life of loan mortgage transactional history for this loan on the system of record used by the servicer. For purposes of identification, the life of loan transactional history means any software program or system by which the servicer records the current mortgage balance, the receipt of all payments, the assessment of any late fees or charges, and the recording of any corporate advances for any fees or charges including but not limited to property inspection fees, broker price opinion fees, legal fees, escrow fees, processing fees, technology fees, or any other collateral charge. Also, to the extent this life of loan transactional history includes in numeric or alpha-numeric codes, please attach a complete list of all such codes and state in plain English a short description for each such code.

2. A detailed summary of all corporate advances made against the mortgage loan identified herein that you consider to be non-recoverable as against the obligors of the mortgage loan identified herein.
3. A current and itemized statement of the amount needed to payoff the mortgage loan identified herein in full. This payoff must be provided within 10 days of the date of your receipt of this Request.
4. A current and itemized statement of the amount needed to reinstate to a current status the mortgage loan identified herein. This statement must be provided within 10 days of the date of your receipt of this Request.
5. A copy of all information you have provided to any consumer reporting agency with respect to the status of the mortgage loan identified herein within the 12 month period prior to your receipt of this request for information.
6. A detailed copy of your last two analysis of the escrow account of the mortgage loan identified herein.
7. If you have forced placed insurance, as described in Section 1024.37 of Regulation X, then please attach a copy of the master insurance policy and of the check or wire transfer for any funds you advanced to pay for the same. Also, identify and state the amount of any commission or fee the servicer received for force-placing such insurance and produce the 30 day and 45 day notice letters to the Debtors herein before such insurance was placed and an advance charged for the premium.
8. Please state all facts that your relied on that led you to believe that the obligors of the mortgage loan identified herein failed to comply with the mortgage loan contract's requirement to maintain hazard insurance on the subject real property.
9. Please attach copies of any and all other written notices you provided to the obligors the mortgage loan identified herein before you forced placed the hazard insurance.
10. A Statement of the current balance in any suspense or unapplied funds account.

With best regards,
I remain very truly yours,

Charles Wallshein Esq.
115 Broadhollow Road
Suite 350
Melville, NY 11747
(631) 824-6555

CHARLES WALLSHEIN
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February 3, 2017

CitiMortgage, Inc.

Fax: 866-768-1540

In the Matter of:
Borrower and Address
Mortgage Loan No.:

Re: Request for Information Pursuant to Section 1024.36 of Regulation X

Dear Sir or Madam:

This is a Request for Information related your servicing of the mortgage loan of the above-named debtors. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority of the debtors to my law firm for this Request is attached hereto and incorporated herein by this reference.

Pursuant to Section 1024.36(c) of Regulation X, you must within five (5) days (excluding legal public holidays, Saturdays and Sundays) provide our office with a response to this Request acknowledging receipt of the same.

Pursuant to Section 1024.36(d)(ii)(2)(A), not later than ten (10) days (excluding public holidays, Saturdays and Sundays) after you receive this request for information you must provide us with the identify of, and address or other relevant contact information for the owner of the mortgage loan identified herein. For all of the other information requested herein, and pursuant to Section 1024.36(d)(ii)(2)(B), you must respond not later than thirty (30) days (excluding legal public holidays, Saturdays and Sundays) after you receive this request for information.

For purposes of this request, the term “transaction activity” includes any activity that credits or debits the outstanding account balance of the mortgage loan in this case. With respect to the transaction activity for the subject loan, please provide a complete summary of the following:

1. Copies of receipts and or other proof pf payment for the alleged disbursements for the following items listed on the attached most recent payoff and or reinstatement letter delivered to the borrower and or the borrower's attorneys:

    a) Legal disbursements, (included in Corporate Advances) itemized by line item. To include but not limited to:
        1. non-lawyer time billing expenditures,
        2. lawyer billing expenditures,
        3. filing fees,
        4. hearing transcript fees,
        5. reproduction fees,
        6. service of process fees,
        7. Title reports and continuations
    b) Corporate advances not itemized in sub.par. "a", itemized by line item, to include but not limited to:
        1. Property Tax advances,
        2. Property Insurance Advances,
        3. Broker Price Opinion letter(s),
        4. Property appraisals,
        5. Property inspections.
    c) Legal fees, itemized as "hourly" or "flat fee" (not included in Corporate Advances), itemized by line item.
    d) Legal fees (included in Corporate Advances), itemized by line item.
    e) Any cost that is added to the principal unpaid balance under the terms of the note and or mortgage not enumerated and described in subparagraphs "a" through "d'.

With best regards,
I remain very truly yours,

Charles Wallshein Esq.
35 Pinelawn Road
Suite 106E
Melville, NY 11747
(631) 824-6555

2017 WL 5478355
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

Sherry L. WEISHEIT, Plaintiff

v.

ROSENBERG & ASSOCIATES, LLC, et al., Defendants.

CIVIL NO. JKB-17-0823
Signed 11/15/2017

Attorneys and Law Firms

F. Peter Silva, II, Gowen Rhoades Winograd & Silva PLLC, Washington, DC, for Plaintiff.
Mark David Meyer, Sara Tussey, Rosenberg and Associates LLC, Bethesda, MD, Andrew M. Williamson, Blank Rome LLP, Washington, DC, Edward Win-Teh Chang, Blank Rome LLP, Philadelphia, PA, for Defendants.

MEMORANDUM

James K. Bredar, Chief Judge

***1** Plaintiff Sherry L. Weisheit brings this action against Defendants Rosenberg & Associates, LLC ("Rosenberg") and Bayview Loan Servicing, LLC ("Bayview") alleging violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, in connection with Defendants' servicing of Plaintiff's mortgage and their scheduling of a foreclosure sale in March 2017. Plaintiff filed this action on March 27, 2017 (Compl., ECF No. 1) and then amended her complaint on August 11, 2017. Defendants responded with motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). (*See* Bayview Mot. Dismiss, ECF No. 21; Rosenberg Mot. Dismiss, ECF No. 22.) Plaintiff has responded (ECF No. 25), Bayview has replied (ECF No. 28) and the issues have been fully briefed. No hearing is necessary to resolve the matter. *See* Local Rule 105.6 (D. Md. 2016). Plaintiff has stated a claim against Bayview for violations of RESPA and against both Defendants for violations of the FDCPA. Accordingly, Defendants' motions will be denied by accompanying order.

I. *Facts*[1]

Plaintiff Sherry Weisheit executed a mortgage in 2007, went into default in 2009, and Bayview took over servicing the loan in 2012. (*Id.* ¶¶ 13-15.) On April 26, 2016, Rosenberg, working as a debt collector for Bayview, began foreclosure proceedings against Plaintiff. (*Id.*) Almost five months later, but more than thirty-seven days prior to any scheduled foreclosure sale, Plaintiff submitted a "complete loan modification application" to Bayview, applying for a loan modification under the Home Affordable Mortgage Program ("HAMP"). (*Id.* ¶ 17); *see Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556-57 (7th Cir. 2012) (explaining HAMP). Under RESPA and its implementing regulations if a borrower submits a complete loss mitigation application[2] more than thirty-seven days prior to a scheduled foreclosure sale, the

loan servicer must evaluate that application before proceeding with foreclosure. 12 C.F.R. § 1024.41(g). To proceed with foreclosure while loss mitigation is pending is to engage in a prohibited practice known as "dual-tracking." (Am. Compl. ¶ 46.) After a failed attempt at mediation, Bayview denied Plaintiff's application by letter on November 15. (*Id.* ¶ 20; Denial Letter, Compl. Ex. 1, ECF No. 1-1.)

***2** In Bayview's denial letter ("Denial Letter"), Bayview explained that it denied Plaintiff's request for a HAMP Modification because the modified monthly payment that would result from such a modification was outside the "required range of 10-55% of [Plaintiff's] monthly gross income." (Denial Letter at 1, ECF No. 1-1 at 2.) In the vernacular of mortgage regulations, Bayview believed that Plaintiff could not meet the qualification of 10-55% DTI ("debt to income ratio") for a HAMP Tier 1 loan modification. (*See* Am. Compl. ¶ 20.) Essentially, the Denial Letter stated that Plaintiff's loss mitigation application was denied because the monthly payment that Plaintiff would have to make if the loan was paid off over 480 months would be outside (either above or below) 10-55% of Plaintiff's gross income. (*See* Denial Letter at 5, ECF No. 1-1 at 8 (listing the amortization term as 480 months).)

Under RESPA and its regulations, a borrower is entitled to appeal the denial of her loss mitigation application, *see*12 C.F.R. § 1024.41(h), and Plaintiff availed herself of this opportunity, (Am. Compl. ¶ 21). Plaintiff's appeal ("Appeal Letter"), on November 29, 2016, notified Bayview that Plaintiff's monthly debt payment in fact would be within 10-55% of her income. (*Id.*; Appeal Letter, Compl. Ex. 2, ECF No. 1-2.) In other words, Bayview had done the math wrong. Bayview sent Plaintiff a response ("Response Letter") dated December 29, 2016. (Response Letter, Compl. Ex. 3, ECF No. 1-3.)

The substance of Bayview's response is highly important to the outcome of this motion. Bayview did not dispute the accuracy of Plaintiff's calculations, but instead of reversing course and approving Plaintiff's loss mitigation application, Bayview asserted that it was bound by an "investor restriction" that prevented it from extending the term of the loan (*Id.* at 2-3, ECF No. 1-3 at 3-4.). The Response Letter did not name the investor nor did it describe the nature of the investor restriction, other than to say that it prevented extension of the loan term. Towards the end of Bayview's Response Letter it stated that "[w]e have enclosed all supporting documentation used to complete the review on your account." (Response Letter at 3, ECF No. 1-3 at 4.) The letter, however, did not contain any such documents. (Am. Compl. ¶ 24.) Plaintiff responded to Bayview stating that she would be appealing this denial once she had received the supporting documentation. (January 12 Letter to Bayview, Compl. Ex. 4, ECF No. 1-4.) She also let Rosenberg know that she was still in the process of appealing and that Rosenberg should therefore not restart the foreclosure process—a request with which Rosenberg appeared to agree. (*See* Rosenberg Emails, Compl. Ex. 5, ECF No. 1-5.)

Despite Rosenberg's apparent agreement, the next communication Plaintiff received from Rosenberg was a letter on February 9, 2017 informing her that her home would be sold one month later, on March 9. (Am. Compl. ¶ 30.) This notice informed Plaintiff not only that her home was to be sold but that the sale had been advertised in a local newspaper. (Notice of Sale, Compl. Ex. 6, ECF No. 1-6.) It was not until

February 22 that Plaintiff received her next communication from Bayview: a letter dated February 15 that did not address the foreclosure at all, but did explain that the "supporting documentation" language had been in error and there was no such documentation forthcoming. (February 15 Letter, Compl. Ex. 7, ECF No. 1-7.) Plaintiff responded to this letter and the notice of foreclosure by mailing a letter to Bayview on February 28. (*See*February 28 Letter, Compl. Ex. 8, ECF No. 1-8.) Plaintiff set forth her appeal of Bayview's decision in its Response Letter, explaining that *even if* there were "investor restrictions" preventing Bayview from extending the loan term, Plaintiff would still meet the DTI requirements. (*Id.* at 2, ECF No. 1-8 at 3.) In addition to appealing the denial of her loss mitigation application, Plaintiff also set forth the rules and regulations of RESPA and explained that "[b]y scheduling a foreclosure sale of Ms. Weisheit's home for March 9, 2017, Bayview is engaging in dual tracking" because Plaintiff was "still engaged in loss mitigation with Bayview." (*Id.* at 3, ECF No. 1-8 at 4.)

***3** Bayview did not respond. (Am. Compl. ¶ 34.) Neither Rosenberg nor Bayview agreed to cancel the foreclosure sale even after multiple requests from Plaintiff, forcing Plaintiff to file an Emergency Motion to stay the sale, which was granted on March 8, 2017. (*Id.* ¶¶ 35, 37.) The state court stated that the sale of the home was stayed "until loss mitigation has been completed," strongly suggesting that the state court, at least, believed that loss mitigation was ongoing as of March 8, 2017. (*Id.* ¶ 37.)

Throughout this process, Plaintiff has been required to expend attorneys' fees to prevent Bayview and Rosenberg from proceeding with the foreclosure, has seen attorneys' fees and costs assessed to her mortgage account, and has suffered emotional distress. (Am. Compl. ¶ 42.) Not long after succeeding in having the state court stay the foreclosure sale, Plaintiff brought this action against Bayview and Rosenberg, alleging violations of RESPA, as well as the FDCPA. Defendants have moved to dismiss Plaintiff's complaint under Rule 12(b)(6). (*See* ECF Nos. 21, 22.)

II. *Standard for Dismissal for Failure to State a Claim*

A complaint must contain "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 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. An inference of a mere possibility of misconduct is not sufficient to support a plausible claim. *Id.* at 679. As the *Twombly* opinion stated, "Factual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' ... Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

III. *Analysis*

Only Bayview is considered a "servicer" under RESPA, *see* 12 C.F.R. § 1024.2, and therefore Plaintiff has brought her RESPA claims against Bayview only. Both Bayview and Rosenberg are "debt collectors" as that term is defined under the

FDCPA, 15 U.S.C. § 1692a(6), and therefore Plaintiff has brought her FDCPA claims against both Defendants. The Court will begin its analysis by discussing RESPA and the claims against Bayview before proceeding to the FDCPA claims against both Defendants.

a. RESPA

RESPA is a consumer protection statute, designed to protect mortgagors from "certain abusive practices in the real estate mortgage industry." *Nash v. PNC Bank, N.A.*, Civ. No. 16-2910, 2017 WL 1424317, at *3 (D. Md. April 20, 2017) (internal quotation marks omitted). It is implemented by Consumer Financial Protection Bureau ("CFPB") regulations, collectively known as "Regulation X." *See* 12 C.F.R. §§ 1024.1 *et seq.* RESPA has been read remedially in favor of greater coverage to further its goals of providing more information for consumers and preventing abusive practices by servicers. *See Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 665-66 (9th Cir. 2012); *McLean v. GMAC Mortg. Corp.*, 398 Fed.Appx. 467, 471 (11th Cir. 2010); *In re Carter*, 553 F.3d 979, 985, 985 n.5 (6th Cir. 2009); *Alston v. Countrywide Financial Corp.*, 585 F.3d 753, 764 (3d Cir. 2009).

Plaintiff brings two claims against Bayview for violations of RESPA. Count one of Plaintiff's amended complaint alleges that Bayview violated RESPA by engaging in dual-tracking. (Am. Compl ¶ 46.) Count three alleges that Bayview violated RESPA's notice of error provisions, *see* 12 C.F.R. § 1024.35, when it did not respond to Plaintiff's February 28, 2017 letter. Bayview asserts that Plaintiff has failed to state a claim for either the dual-tracking or notice of error provisions of RESPA, and that Plaintiff has failed to plead damages related to the alleged RESPA violations. The Court will discuss each issue in turn.

i. Dual-tracking

***4** Dual-tracking is the practice of moving towards foreclosure while the loss mitigation process is ongoing, and it is prohibited under RESPA. *See* 12 C.F.R. § 1024.41(g). The loss mitigation process begins when a borrower submits a complete loss mitigation application, and ends when the servicer denies that application on appeal (or after the servicer's first denial, if the borrower fails to appeal). *See id.* § 1024.41(g). A denial of a loan modification application must state the "specific reason or reasons for the servicer's determination." *Id.* According to the CFPB's official interpretation of this regulation, if the denial is due to a restriction by the investor—that is, if the modification cannot be made by the servicer because the owner of the mortgage would not allow some condition necessary for the modification—then the explanation for the denial "must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial." *Id.* Pt. 1024, Supp. 1.[3] Simply stating that the denial is "based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient." *Id.*

A denial ostensibly based on an investor restriction that does not name the investor or explain the restriction has been held to be insufficient. *See Nash*, 2017 WL 1424317. Much like the case before the Court, in *Nash* a borrower submitted a loss mitigation application to a mortgage servicer seeking a HAMP modification. *Id.* at *1. The servicer denied the modification and in its denial letter stated that the "investor

or group of investors ha[d] not given [it] the contractual authority to modify [the] loan." *Id.* The borrower appealed to the servicer, arguing that the servicer should have included the details of the investor restriction, but the servicer affirmed its decision. *Id.* The borrower then sued the servicer, alleging that the servicer violated RESPA, specifically 12 C.F.R. § 1024.41(d) which provides the requirements for a denial of a loss mitigation application. *See id.* Relying on the language of the regulation and CFPB's interpretation, the court held that "the denial of a loan modification option based on an investor requirement is 'insufficient' if it does not provide 'the specific applicable requirement' that was not met." *Id.* at *4 (quoting *In re Wiggins*, No. 12-26993 (JKS), 2016 WL 7115864, at *5 (Bankr. D.N.J. Dec. 6, 2016)).

Bayview's denial was ostensibly based on an investor restriction, but it did not name the investor or explain the restriction, and it was therefore insufficient. According to Bayview, the reason for denying Plaintiff's loss mitigation application was that her DTI, calculated according to a restriction by an owner or assignee of the loan, was outside the necessary range of 10-55%. Bayview's November 15 Denial Letter provided less information for the consumer than the insufficient denial letter in *Nash*, because it did not even mention that there was an investor restriction. Bayview's December 29 letter is closer to the denial letter in *Nash* in that it at least explains that there was an investor restriction. But, also like the denial in *Nash*, the December 29 letter did not name the investor or explain the restriction. If, as Plaintiff alleges, this was the sum and substance of Bayview's "denial" of Plaintiff's loss mitigation application, that denial was not sufficient under Regulation X.

If Bayview's December 29 letter was an insufficient denial, then the loss mitigation process did not end on December 29. The provision of Regulation X that prohibits dual-tracking states that once a complete loss mitigation application is submitted by the borrower more than thirty-seven days before a foreclosure sale, the "servicer shall not ... conduct a foreclosure sale, unless" the borrower has been notified that they are not eligible for loss mitigation and has failed to appeal, "*or the borrower's appeal has been denied.*" 12 C.F.R. 1024.41(g)(1) (emphasis added). A denial that purports to rest on an investor restriction but does not provide the name of the investor or the substance of the restriction, is not a sufficient denial for purposes of Section 1024.41(d) *and* for purposes of Section 1024.41(g). That is why, assuming the veracity of Plaintiff's complaint and making all inferences in her favor, the Court agrees with the conclusion of the state court: as of March 8, 2017 loss mitigation had not been completed. Scheduling a foreclosure sale when loss mitigation is not complete constitutes dual-tracking, and therefore Plaintiff has stated a claim of dual-tracking in violation of RESPA.

ii. Notice of Error

***5** RESPA contains a provision obligating loan servicers to respond to borrower inquiries. *See* 12 U.S.C. § 2605(e). If a borrower sends a servicer a notice that meets the requirements of a "Qualified Written Request" ("QWR"), the servicer must respond. *See* 12 C.F.R. § 1024.35(e). There are three pertinent requirements. First, the notice must "include[ ], or otherwise enable[ ] the servicer to identify, the name and account of the borrower [as well as a] statement of the reasons" for why the

borrower believes the servicer is in error and/or what information the borrower is seeking. *Id.* Second, because this is separate from the loss mitigation application process, the error(s) asserted in the notice must be related to the servicing of the loan, and cannot only be about the denial of a loss mitigation application. *See Nash*, 2017 WL 1424317, at *5. Third, a servicer does not have to respond to a duplicative notice of error, i.e. one that simply restates information the borrower has already provided to the servicer. 12 C.F.R. § 1024.35(g)(1)(i).

Plaintiff has alleged sufficient facts from which a factfinder could conclude that her letter to Bayview on February 28 was a QWR, and therefore that Bayview's failure to respond was a violation of RESPA. First, the letter included the name of the account and the borrower, and provided a detailed explanation of the errors that Plaintiff believed Bayview had made. Second, the February 28 letter stated that a foreclosure sale had been scheduled for March 9, 2017 and that Plaintiff believed this sale was in violation of RESPA's dual-tracking prohibition. The February 28 letter may have largely been an appeal of Bayview's reasons for denial set forth in its December 29 letter, and if the February 28 letter had *only* been an appeal, it would likely not have been a QWR. But this letter did more than appeal a loss mitigation application denial—it asserted an error related to the servicing of Plaintiff's loan, i.e. the improper scheduling of a foreclosure sale. Third, because the February 28 letter included notice of this error, and was not entirely another appeal of Bayview's denial, this notice was not "duplicative." This was the first time Plaintiff had notified Bayview that she believed Bayview had improperly scheduled a foreclosure sale. Both in form and, at least partially, in substance Plaintiff's February 28 letter plausibly falls within the requirements of a QWR under Regulation X.

iii. Failure to plead damages

As a final attempt to dismiss Plaintiff's RESPA claims, Bayview correctly asserts that in order to survive a motion to dismiss, Plaintiff must allege actual damages attributable to the alleged RESPA violations. *See* 12 U.S.C. § 2605(f)(1); (Bayview Mot. Dismiss Mem. Supp. 15 (citing *Minson v. CitiMortgage, Inc.*, Civ. No. 12-2233, 2013 WL 2383658, at *5 (D. Md. May 29, 2013).)) Bayview, however, incorrectly asserts that Plaintiff has not done so.

Plaintiff alleged that she has paid and been charged for Attorneys' fees and costs associated with the scheduling of the foreclosure sale, both those assessed to her mortgage account and whatever she has had to pay in order to get a stay in state court; all of which fees and costs she would not have had to pay if Bayview had not violated RESPA and proceeded with foreclosure. She is not seeking damages simply to punish Bayview for its alleged failure to follow the letter of the law in regard to RESPA. Plaintiff is seeking to be compensated for the fees she has allegedly had to expend in state court fighting to prevent a foreclosure that, according to her, would have never occurred if Bayview had followed the letter of the law. These are actual damages, and Plaintiff has properly alleged them in her complaint.[4]

IV. *FDCPA*

***6** Congress enacted the FDCPA after being confronted with "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). Both Bayview and Rosenberg are "debt collectors" as defined under the

FDCPA, 15 U.S.C. § 1692a(6), a fact that neither party has contested, and Plaintiff alleged that both Defendants violated two provisions of the FDCPA, Section 1692e and Section 1692f.

Sections 1692e and 1692f prohibit debt collectors from using any "false ... representations" or "unfair ... means" to collect a debt. 15 U.S.C. § 1629e (false representations); *id.* § 1692f (unfair means). Both sections are broad, covering any false representations or unfair means, but both sections also contain non-exhaustive lists of conduct that Congress explicitly considered false or unfair. Section 1692f's list of unfair practices includes "threatening to take any nonjudicial action to effect dispossession ... of property if" the debt collector has no right to take possession of the property or "the property is exempt by law from such dispossession." 15 U.S.C. § 1692f(6).

Plaintiff asserts that Defendants scheduled a foreclosure sale and notified Plaintiff of that sale when they could not legally conduct such a sale under RESPA, thus making a false representation under Section 1692e and using unfair means to collect a debt under Section 1692f. (Am. Compl. ¶¶ 64-65.) Bayview makes three arguments in support of its motion to dismiss Plaintiff's FDCPA claims:[5] 1) it has made no misrepresentation to Plaintiff 2) it has made no material representation to Plaintiff, whether false, deceptive or otherwise and 3) at the very least Plaintiff's Section 1692f claim fails because that provision only applies to conduct that falls outside the scope of the FDCPA's other provisions. Plaintiff makes a plausible case that Bayview is wrong on all three.

According to Bayview, the February notice of a foreclosure sale was not a "misrepresentation" because the December 29 letter was the end of loss mitigation and it was free to proceed with foreclosure in February. The Court has held, however, that Plaintiff has plead facts which, if proven, demonstrate that the December 29 letter was *not* the end of the loss mitigation application process, and that Bayview could not proceed with foreclosure. A notice of foreclosure sale when no foreclosure sale can be conducted could be considered "false." *See* 15 U.S.C. § 1692e.

Bayview's second argument is that even if the notice of the foreclosure sale was a misrepresentation, it was not "material." The Fourth Circuit has held that in order to be actionable, a violation of either Section 1692e or 1692fmust be material. *See Stewart v. Bierman*, 859 F. Supp. 2d 754, 762-64 (D. Md. 2012) (citing *Warren v. Sessoms & Rogers*, 676 F.3d 365 (4th Cir. 2012)). In determining materiality, the Court is guided by the standard employed in the Fourth Circuit under which a representation is "material" if it would affect a least sophisticated consumer's decisionmaking with regard to her debt. *See Goodrow v. Friedman & MacFadyen, P.A.*, Civil Action No. 3:11cv20, 2013 WL 3894842, at *6 (E.D. Va. July 26, 2013). By this and any reasonable definition, a representation that a debt collector is going to sell a person's home is a "material" representation, as it would likely affect a person's decisionmaking with regard to her debt.[6]

***7** Finally, Bayview contends that Plaintiff cannot avail herself of both Sections 1692e and 1692f. Section 1692f is a catch-all that can only serve as the basis for liability when a debt collector has not violated any other provision of the

FDCPA, *unless* a plaintiff alleges that a debt collector engaged in conduct explicitly prohibited in Section 1692f's list. *See Winberry v. United Collection Bureau, Inc.*, 697 F. Supp. 2d 1279, 1292 (M.D. Ala. 2010) (noting that there is a "growing consensus, at least among district courts, that a claim under § 1692f must be based on conduct *either within the listed provisions*, or be based on conduct which falls outside of those provisions, but which does not violate another provision of the FDCPA." (emphasis added)). The Plaintiff here alleged that Defendants engaged in conduct that could be construed as falling under the listed provisions. *See, e.g.*, 15 U.S.C. § 1692f(6). Therefore, Plaintiff has sufficiently alleged facts that support a claim for a violation of both Sections 1692e and 1692f.

V. *Conclusion*

Plaintiff has alleged sufficient facts to state claim for relief against Bayview for violations of RESPA's dual-tracking provision, 12. C.F.R. § 1024.41(g), and notice of error provisions, 12 C.F.R. § 1024.35, and for violations of the FDCPA, 15 U.S.C. §§ 1692e-1692f. Plaintiff has alleged sufficient facts to state a claim against Rosenberg for violations of the FDCPA, 15 U.S.C. §§ 1692e-1692f. Therefore, Bayview's and Rosenberg's motions to dismiss will be denied by accompanying order.

All Citations

Not Reported in Fed. Supp., 2017 WL 5478355

Footnotes

1
As this memorandum is evaluating a motion to dismiss, the facts are recited here as alleged by Plaintiff, *see Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997), including those facts set forth in exhibits attached to Plaintiff's original complaint, *see Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012); Local Rule 103.6(b) (2016).

2
Plaintiff appears to use the terms "loss mitigation application" and "loan modification application" interchangeably. In substance these terms are virtually identical. The Court will use the term "loss mitigation application" as that is the term used in the federal regulations. *See* 12 C.F.R. § 1024.41.

3
"Although the CFPB's commentary is not binding authority, courts have found its official interpretations to be highly persuasive when they fill a gap in the text of Section 1024.41 and squarely address the factual situation described in the Complaint." *Nash*, 2017 WL 1424317 *4 (internal quotations marks and alterations omitted) (citing cases).

4
Plaintiff has also alleged that she suffered "emotional damages manifested from the embarrassment, humiliation, and fear that Bayview is going to disregard her rights and simply proceed to foreclosure sale through Rosenberg," (Am. Compl. ¶ 42), and Bayview contends that such damages are not recoverable for this type of RESPA

violation. As the Plaintiff has at least alleged some pecuniary damage resulting from Bayview's alleged RESPA violations, the Court need not address whether or not the emotional distress damages that Plaintiff has alleged are recoverable.

5
Arguments which Rosenberg joins. (*See* Rosenberg Mot. Dismiss Mem. Supp. at 3.)

6
Bayview does not so much argue that an improper notice of a foreclosure sale is immaterial as it misunderstands what representation Plaintiff alleges as the basis of her FDCPA claims. Plaintiff alleges that Defendants violated the FDCPA "[b]y scheduling and advertising foreclosure sales [sic] of the Plaintiffs' [sic] property." (Am. Compl. ¶ 64.) Bayview, however, seems to think that Plaintiff's FDCPA claims emerge from Bayview's December 29 Response Letter. (*See* Bayview Mot. Dismiss Mem. Supp. at 18.) It would seem that a denial of a borrower's loan modification application would be a material representation as well, but regardless, the Court has no need to decide that issue.

159 A.D.3d 869
Supreme Court, Appellate Division, Second Department, New York.
CITIMORTGAGE, INC., respondent,
v.
Ronald A. **NIMKOFF**, appellant, et al., defendants.
2016–00111(Index No. 8816/12)
Argued—November 20, 2017March 21, 2018

Synopsis

Background: Servicer of residential mortgage brought foreclosure action against mortgagor. Servicer moved for summary judgment and mortgagor cross-moved for summary judgment or a hearing to determine whether servicer had met its obligation to negotiate in good faith. The Supreme Court, Nassau County, Thomas A. Adams, J., denied all motions. Mortgagor appealed.

Holding: The Supreme Court, Appellate Division, held that mortgagor was entitled to a hearing on question of whether servicer negotiated in good faith.

Reversed and remitted.

Attorneys and Law Firms

***578** Ronald A. **Nimkoff**, Syosset, NY, appellant pro se.

Akerman, LLP, New York, N.Y. (Jordan M. Smith of counsel), for respondent.

MARK C. DILLON, J.P. JOHN M. LEVENTHAL HECTOR D. LASALLE VALERIE BRATHWAITE NELSON, JJ.

DECISION & ORDER

***869** Appeal from an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), dated October 22, 2015. The order, insofar as appealed from, denied that branch of the cross motion of the defendant Ronald A. **Nimkoff**which was for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f).

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the cross motion of the defendant Ronald A. **Nimkoff** which was for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f) is granted, and the matter is remitted to the Supreme Court, Nassau County, for a hearing and determination on that issue.

The plaintiff commenced this action against, among others, the defendant Ronald A. **Nimkoff**, seeking to foreclose a mortgage on **Nimkoff's** home in Syosset. As mandated by CPLR 3408(a), the plaintiff and **Nimkoff** participated in settlement conferences for the statutorily intended purpose of determining whether they could reach a “mutually agreeable resolution” (CPLR 3408[f]). After the parties failed to reach a resolution, the plaintiff moved, inter alia, for summary judgment on the complaint and an order of reference. **Nimkoff** cross-moved for summary judgment dismissing the complaint insofar as asserted against him or, in the alternative, a hearing to determine whether the plaintiff met its obligation to negotiate in good faith

pursuant to CPLR 3408(f). In the order appealed from, the Supreme Court denied the motion and the cross motion with leave to renew on the issue of summary judgment upon the completion of discovery.

The court also denied that branch of **Nimkoff's** cross motion which was for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f). **Nimkoff**appeals from so much of the order as denied that branch of his cross motion which was for a hearing. We reverse the order insofar as appealed from.

1Pursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution (*see* CPLR 3408[f]; *U.S. Bank N.A. v. Sarmiento,*121 A.D.3d 187, 200, 991 N.Y.S.2d 68; ***870 Wells Fargo** *Bank, N.A. v. Meyers,* 108 A.D.3d 9, 966 N.Y.S.2d 108). The purpose of the good-faith requirement in CPLR 3408 is to ensure that ****579** both the plaintiff and the defendant are prepared to participate in a meaningful effort at the settlement conference to reach a resolution (*see U.S. Bank N.A. v. Sarmiento,* 121 A.D.3d at 200, 991 N.Y.S.2d 68). To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (*U.S. Bank N.A. v. Sarmiento,* 121 A.D.3d at 203, 991 N.Y.S.2d 68; *see Aurora Loan Servs., LLC v. Diakite,* 148 A.D.3d 662, 663, 48 N.Y.S.3d 490; *LaSalle Bank, N.A. v. Dono,* 135 A.D.3d 827, 828, 24 N.Y.S.3d 144; *U.S. Bank N.A. v. Smith,* 123 A.D.3d 914, 916, 999 N.Y.S.2d 468).

2In support of his cross motion, **Nimkoff** submitted, among other things, his own affidavit in which he averred that the plaintiff refused to negotiate with him for the stated reason that another entity, Hudson City Savings Bank (hereinafter Hudson City), was the holder of the mortgage and did not allow loan modifications. In opposition, the plaintiff contended that its counsel properly appeared at the two foreclosure settlement conferences and advised the court that Hudson City does not participate in the home affordable modification program. The plaintiff submitted, among other things, the master mortgage loan purchase and servicing agreement (hereinafter PSA) between the plaintiff and Hudson City to establish that the plaintiff was the servicer of the subject mortgage and Hudson City was the purchaser. However, the PSA also authorized the plaintiff to modify the terms of the subject mortgage loan with Hudson City's consent. In any event, the statute requires the parties to negotiate in good faith to reach a mutually agreeable resolution. There is no evidence in the record that the plaintiff attempted to gain Hudson City's consent to offer a loan modification or offered **Nimkoff** another nonretention solution, such as a deed in lieu of foreclosure. In fact, there is no evidence in the record that any effort was made to reach a resolution at the two foreclosure settlement conferences. Under the totality of the circumstances of this case, **Nimkoff** raised a factual issue as to whether the plaintiff met its obligation to negotiate in good faith (*see Onewest Bank, FSB v. Colace,* 130 A.D.3d 994, 996, 15 N.Y.S.3d 109; *U.S. Bank N.A. v. Smith,* 123 A.D.3d at 916–917, 999 N.Y.S.2d 468).

Accordingly, the Supreme Court should have granted that branch of **Nimkoff's** cross motion which was for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f), and we remit the ***871** matter to the Supreme Court, Nassau County, for a hearing and determination on that issue. DILLON, J.P., LEVENTHAL, LASALLE and BRATHWAITE NELSON, JJ., concur.

All Citations

159 A.D.3d 869, 73 N.Y.S.3d 577, 2018 N.Y. Slip Op. 01900

596 B.R. 140
United States Bankruptcy Court, D. New Jersey.

IN RE: Christine R. COPPOLA, Debtor.
Christine R. Coppola, Plaintiff,
v.
Wells Fargo Bank, N.A., Defendant.

Case No.: 17-14944 VFPAdv. Pro. No.: 17-1621 VFP
Signed November 1, 2018

Synopsis

Background: Chapter 13 debtor brought adversary proceeding against loan servicer, alleging that it did not properly process or respond to her postpetition application for loss mitigation or a mortgage loan modification, in purported violation of federal and state statutes and federal regulations. On servicer's motion to dismiss, the court dismissed one count of complaint with prejudice and granted debtor leave to move to amend second count. Debtor then moved to file amended complaint, asserting causes of action under the Real Estate Settlement Procedures Acts (RESPA) and Regulation X, the New Jersey Law Against Discrimination (NJLAD), and the New Jersey Consumer Fraud Act (NJCFA). Servicer objected on grounds that amendment would be futile.

Holdings: The Bankruptcy Court, Vincent F. Papalia, J., held that:

1 addressing an issue of apparent first impression for the court, RESPA provides borrowers a private right of action for violations of Regulation X;

2 debtor stated a plausible claim for violation of Regulation X with respect to servicer's failure to respond to her Notices of Error;

3 debtor stated a plausible claim for violation of RESPA and Regulation X with respect to servicer's failure to respond to her Request for Information;

4 debtor stated a plausible claim for servicer's violation of the provision of Regulation X governing denial of loan modification options; and

5 servicer's alleged failure to consider the commission income of debtor's husband in calculating her creditworthiness did not violate the New Jersey Law Against Discrimination (NJLAD).

Motion granted in part and denied in part.

Attorneys and Law Firms

***145** LAW OFFICES OF ANDY WINCHELL, PC, 100 Connell Drive, Ste. 2300, Berkeley Heights, NJ 07922, Andy Winchell, Esq., Attorney for Debtor/Plaintiff, Christine R. Coppola

REED SMITH LLP, Henry F. Reichner, Esq., Three Logan Square, Ste. 3100, 1717 Arch Street, Philadelphia, PA 19103-7301, Attorneys for Defendant, Wells Fargo Bank, N.A.

OPINION

VINCENT F. PAPALIA, Bankruptcy Judge

I. INTRODUCTION

This matter is before the Court on the Motion (the "Motion") filed by the Debtor, Christine R. Coppola (the "Debtor"), to file a First Amended Complaint. Defendant Wells Fargo Bank, N.A. ("Wells Fargo" or the "Bank") has filed an Objection on the grounds that amendment would be futile,[1] and the Debtor, a Reply.[2] The Complaint arises from Debtor's contention that the Bank did not properly process or respond to Debtor's application for a post-petition mortgage loan modification, resulting in alleged violations of federal and state statutes and federal regulations.

II. JURISDICTIONAL STATEMENT

The Court has jurisdiction over this matter under 28 U.S.C. § 1334(b) and the Standing Orders of Reference entered by the United States District Court on July 10, 1984 and amended on September 18, 2012.[3] The Debtor alleges in the Complaint that this is "primarily a non-core proceeding" outside 28 U.S.C. § 157(b)(2), but consents to entry of final judgment by this Court.[4] Venue is proper in this Court under 28 U.S.C. § 1408. The Court issues the following findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. To the extent that Wells Fargo does not consent to entry of final judgment by this Court, these are the Court's proposed findings of fact and conclusions of law. To the extent that any of the findings of fact (final or proposed) might constitute conclusions of law, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

*146 III. STATEMENT OF RELEVANT FACTS

A. Immediate Procedural Background

This is the second round of motion practice between Debtor and the Bank in this adversary proceeding that Debtor initiated by filing a two-count Complaint on September 19, 2017. In the first round, the Debtor sought to:

(1) disallow the proof of claim filed by Wells Fargo, as servicer for present trustee/mortgagee, U.S. Bank, N.A., on the grounds that it does not have standing to file the claim; and

(2) charge Wells Fargo with violations of 12 U.S.C. § 2601 *et seq.*, the Real Estate Settlement Procedures Acts ("RESPA"), and 12 C.F.R. § 1024 *et seq.* ("Regulation X"), for Wells Fargo's management of the loss mitigation/loan modification process post-petition.[5]

The Debtor made clear at that time and reiterates in her instant Motion that, as a remedy, she seeks RESPA damages only and not a loan modification.[6]

On October 20, 2017, the Bank moved to dismiss the Complaint under FED. R. BANKR. P. 12(b)(1) and (b)(6). After a hearing and oral argument on March 27, 2018, the Court issued an oral decision on that date. The Court's ruling was memorialized in an April 4, 2018 Order that dismissed the First Claim for Relief ("Count I") with prejudice and granted Debtor leave to move to amend her Second Claim for Relief ("Count II") by May 22, 2018 with related instructions, including requiring the submission of the May 22, 2017 letter from the Bank that denied Debtor's loan modification and on which Debtor's Notice of Error and appeal were based.[7]

The Debtor filed the instant Motion in compliance with the April 4, 2018 Order, including with it the proposed First Amended Complaint, the May 22, 2017 letter and

certain other letters generated after the initial motion practice.[8]Specifically, the Proposed First Amended Complaint (the "Amended Complaint") does the following:

(i) modifies Count II (as discussed below) and renumbers it as Count I;

(ii) adds Count II, alleging violation of New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. § 10:5-12, on the grounds that the Bank failed or refused to consider the income of Debtor's spouse in determining her creditworthiness; and

(iii) adds Count III, alleging violation of New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. § 56:8-2, unconscionable commercial practice, as a function of the NJLAD violation.[9]

***147** **B. The Loan and State Court Proceedings**

The Debtor signed a Note for $371,500 to NJ Lenders Corp. on April 5, 2006 and the Debtor and her nondebtor spouse, Robert John Coppola, signed a Mortgage securing the Note with the borrowers' real property at 46 Hamilton Road, Verona, New Jersey 07044 (the "Property").[10] The Mortgage was recorded on April 21, 2006.[11]

The Debtor defaulted on the loan, and U.S. Bank, as assignee, filed a foreclosure complaint on June 17, 2013.[12]The State Court held a trial on May 20, 2015 and June 4, 2015.[13] The State Court rejected the Debtor's challenge of the standing of U.S. Bank to file the foreclosure action and Debtor's other alleged claims and defenses.[14] The State Court therefore struck Debtor's answer and returned the case to the Foreclosure Unit.[15] Final Judgment of Foreclosure was entered on July 19, 2016 for $452,684.38.[16] The Debtor appealed the Judgment, and the Appellate Division upheld the Judgment in a decision entered post-petition on November 8, 2017.[17]

C. The Bankruptcy Proceeding

The Debtor filed the instant Chapter 13 petition (her first case) on March 13, 2017 and scheduled the Property with a value of $480,000 and a debt of $470,461.80 due to the Bank.[18] The Plan proposed a loan modification by August 2017.[19] U.S. Bank filed an objection to confirmation on March 23, 2017 on the grounds that Debtor provided no treatment for its claim in the Plan other than through loan modification.[20] There appears to be no dispute that the Debtor's Plan cannot be confirmed absent a loan modification.

The Debtor applied for loss mitigation under the Court's program on March 23, 2017.[21] The Court entered an Order for loss mitigation on April 12, 2017 with an end date of July 10, 2017.[22] Debtor did not seek an extension of that date, and the deadline expired.

D. The U.S. Bank Proof of Claim and Motion to Expunge

U.S. Bank filed Claim No. 2-1 on April 11, 2017 for $486,254 (secured). The Debtor filed a motion objecting to the Claim on May 17, 2017, and U.S. Bank filed a response on August 10, 2017.[23] That motion ***148** was marked "moot" on September 21, 2017 after the Debtor filed the instant adversary proceeding on September 19, 2017. As noted above, by Order entered on April 4, 2018, the Court dismissed with prejudice Count I of the original Complaint, which sought to disallow Claim No. 2-1 and to declare that the Bank, which serviced the loan for U.S. Bank, lacked standing

to file a proof of claim.[24] Thus, Claim No. 2-1 is an allowed claim, and the Debtor's objection to that Claim was overruled.[25]

E. The Loss Mitigation/Loan Modification Application

The course of the Debtor's loss mitigation/loan modification application is described in letters attached to the Proposed Amended Complaint at Exhibits A-H (only Exhibits B through E were attached to the original Complaint):[26]

Ex. A: May 22, 2017 letter from Bank (signed by Amanda Solsma, Home Preservation Specialist) to Debtor denying loan modification on the grounds that her gross monthly income, at $5,836, was too low.

Ex. B: May 29, 2017 letter from Debtor's counsel, Andy Winchell, Esq. ("Winchell") to Bank couched as a "Notice of Error under 12 C.F.R. § 1024.35 of Regulation X of the Mortgage Servicing Act under [RESPA]" indicating that the Debtor submitted a complete loan modification package on May 16, 2017 and was denied a loan modification in a "May 20, 2017" letter.[27] Winchell states in his May 29, 2017 letter that the lender miscalculated Debtor's income as $5,860, rather than as $8,968.

Ex. C: June 7, 2017 letter from Bank (again signed by Amanda Solsma, Home Preservation Specialist) denying appeal of May 29, 2017 without further explanation; stating that Debtor still does not qualify for a loan modification; but suggesting short sale or deed in lieu of foreclosure if Debtor qualifies for those options.[28]

Ex. D: June 12, 2017 letter from Winchell to Bank, also couched as "Notice of Error," reiterating much of the language of Debtor's May 29, 2017 letter and claiming that the lender's "Appeal Denial" of June 7, 2017 was inadequate and did not conform to 12 C.F.R. § 1024.41(d).

Ex. E: June 28, 2017 letter from Henry F. Reichner, Esq., of ReedSmith LLP, on behalf of the Bank ("Reichner") to Winchell responding to the Debtor's letters and advising the Debtor that a "Notice of Error" was not the proper mechanism for appealing the denial of loan modification, citing *Wiggins v. Hudson City Savings Bank*, 2015 WL 4638452, at *8 (Bankr. D.N.J. Aug. 4, 2015).

The remaining three exhibits are new and arise from the Debtor's having submitted ***149** a second "loss mitigation" application on March 6, 2018:[29]

Ex. F: March 19, 2018 letter from Bank (signed by Hiliary Phillips, Home Preservation Specialist) to Debtor:

(i) advising her that she is eligible for a short sale; and

(ii) denying her loan modification based on a gross monthly income of $5,503.

Ex. G: April 5, 2018 letter from Winchell to Reichner couched as:

(i) a Request for Information under 12 C.F.R. §§ 1024.36(c) and (d) of Regulation X; and

(ii) a Notice of Error under 12 C.F.R. § 1024.35 of Regulation X, specifically for denying loan modification on a finding of $5,503 in gross monthly income, where Debtor claims that her gross, bi-monthly [sic, bi-weekly] paystubs are $2,993.05 (for a monthly total of $6,484.94) and that her nondebtor spouse's monthly income is $5,373.33 for a grand total of $11,858.27, as calculated by Winchell.[30] Winchell demanded an explanation "for discounting our Client's income."[31]

Ex. H: May 3, 2018 letter from Reichner to Winchell reiterating the statements in Reichner's June 28, 2017 letter that a Qualified Written Request ("QWR") is not the

proper mechanism for challenging "the accuracy of a loss mitigation denial decision," again citing *Wiggins v. Hudson City Savs. Bank*, 2015 WL 4638452, at *8 (Bankr. D.N.J. Aug. 4, 2015).[32]

The Bank denied this appeal on May 1, 2018:

Ex. I: May 1, 2018 letter from Bank (again signed by Hiliary Phillips, Home Preservation Specialist) denying Debtor's appeal without further explanation.[33]

Based on the record to date, neither the Debtor nor the Court knows if the Bank disregarded or discounted the income of Debtor's spouse, why it may have done so, or how the Bank came to its conclusion as to the income of the Debtor and her nondebtor spouse as set forth in the denial letters of May 22, 2017 and March 19, 2018.[34]

F. The Instant Motion to Amend

The Debtor timely filed her Motion to Amend on May 22, 2018. Debtor seeks to file a three-count Amended Complaint as follows:

Count I alleges that the Bank violated 12 U.S.C. § 2601 *et seq.*, the Real Estate Settlement Procedures Acts ("RESPA"), and 12 C.F.R. § 1024.36, Regulation X, by ***150** the Bank's actions in connection with the post-petition loss mitigation/loan modification process. This Count, formerly Count II, has undergone certain limited changes (described below) from the original Complaint.

Count II is new and alleges that the Bank violated the New Jersey Law Against Discrimination ("NJLAD," or "LAD"), N.J.S.A. § 10:5-1 *et seq.*, particularly N.J.S.A. §§ 10:5-12 and 10:5-13, by disregarding the Debtor's spouse's income in analyzing the Debtor's creditworthiness for a loan modification.

Count III is also new and alleges that the Bank violated the New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. § 56:8-2, by disregarding certain components of Debtor's income in violation of NJLAD.[35] Count III is dependent upon Count II, as was acknowledged by Debtor's counsel at oral argument on July 31, 2018 and in Debtor's prior filings.

In Amended Count I, the Debtor proposes the following changes to the following three paragraphs (quoting):[36]

Old ¶ 69. The Defendant failed to respond appropriately to the Plaintiff's May 29 Notice of Error and June 12 Notice of Error.

New ¶ 61. The Defendant failed to respond appropriately to the Plaintiff's May 29, 2017 Request for Information/Notice of Error, June 12, 2017 Request for Information/Notice of Error, and April 5, 2018 Request for Information/Notice of Error.

Old ¶ 73. Upon information and belief, the most plausible explanation for the Defendant's failure to correct obvious miscalculation on appeal is that the Defendant staffed the appeal with the same personnel that evaluated the Plaintiff's original application.

New ¶ 65. The Defendant staffed one or more of the [Plaintiff's] appeals with some of the same personnel that evaluated the Plaintiff's original application.

Old ¶ 74. The Defendant ignored its obligations under 12 C.F.R. 1024.36 and failed to respond as required to the Plaintiff's Application, Notice of Error and Request for Information.

New ¶ 66. The Defendant ignored its obligations under 12 C.F.R. 1024.36 and failed to respond as required to the Plaintiff's May 29, 2017 Request for Information/Notice of Error, June 12, 2017 Request for Information/Notice of Error, and April 5, 2018 Request for Information/Notice of Error.

IV. ARGUMENTS OF PARTIES

In support of her Motion to amend, the Debtor submitted a five-page brief (of which only two pages contain substantive argument) and argued generally that:

(i) As to Count I, that the Bank never provided an adequate or specific explanation in its denial letters for failing to consider or discounting Debtor's spouse's income in its loan modification analysis, or how it arrived at its income number generally, and therefore violated RESPA;

(ii) As to Count II, that the Bank discriminated against the Debtor under N.J.S.A. § 10:5-12(i)(4) which prohibits a lender which is extending credit from "discriminat[ing] against any person or group of persons because of the source of any lawful income received by that person ***151** ...."[37] Here, the Debtor adds the general allegation that "The [Bank] routinely and systematically discriminates against borrowers whose income comes from self-employment or sales commissions rather than salary or wages";[38] and

(iii) As to Count III, Debtor essentially alleges that the Bank's actions above constitute "unconscionable" commercial practice within the meaning of the New Jersey Consumer Fraud Act.[39] As was noted above, the Amended Complaint makes clear, and the Bank interprets Debtor to mean, that the NJLAD violation is also an NJCFA violation so that if the former fails, so does the latter.[40]

The Bank argues in its Objection that:

(i) Although 12 C.F.R. § 1024.41(h)(3) requires that the person who handles the loss mitigation appeal be different from the person who made the initial review (even if only the supervisor of the initial reviewer), Debtor's presumption that the same person "must have" reviewed the initial application and the appeal is speculative and unsubstantiated.[41]

(ii) The denial of a RESPA appeal is unappealable. 12 C.F.R. § 1024.41(h)(4) ("A servicer's determination under [Section 1024.41(h)] is not subject to any further appeal").[42] The Bank declares, "That should have been the end of it," but offers no further information about its analysis of Debtor's income or the Debtor's requests for information, either in its responses to the Debtor's Notice of Error/Request for Information/Appeal correspondence or in the Bank's otherwise extensive submissions to this Court;[43]

(iii) A Notice of Error ("NOE") is not a valid mechanism for contesting a loss mitigation evaluation under 12 C.F.R. § 1024.35(b);[44]and

(iv) A loan modification does not warrant a Qualified Written Response ("QWR") because it does not involve "loan servicing."[45]

The Debtor filed a Reply that more substantively addressed the Bank's objection and the Debtor's affirmative claims.[46]

V. STATEMENT OF LAW

A. 12 U.S.C. § 2601 *et seq.* ("RESPA") and 12 C.F.R. § 1024 *et seq.* ("Regulation X")

The arguments of the parties turn on conflicting interpretations and application of the Real Estate Settlement Procedures ***152** Act ("RESPA"), 12 U.S.C. § 2601 through § 2617, and its implementing regulations at 12 C.F.R. § 1024.1 through § 1024.41 (and Appendices) ("Regulation X") (effective on January 10, 2014). In particular, the parties' dispute centers on 12 C.F.R. §§ 1024.35, 1024.36 and 1024.41, which describe the error resolution and "loss mitigation" procedures and address requests for information by borrowers.

The Court in *Smallwood v. Bank of Am., N.A.,* 2015 WL 7736876, at *5, n.10 (S.D. Ohio Dec. 1, 2015) described the purpose of the RESPA statute and regulations as follows:

RESPA is a consumer protection statute that requires loan servicers to provide timely written responses to borrowers under certain circumstances. 12 U.S.C. § 2605. The Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) is a Consumer Financial Protection Bureau regulation promulgated pursuant to section 1022(b) of the Dodd–Frank Act, 12 U.S.C. § 5512(b), and RESPA, 12 U.S.C. § 2601, *et seq*. Regulation X became effective on January 10, 2014. 78 FR 10696–01 (February 14, 2013) (codified at 12 C.F.R. pt. 1024). 12 C.F.R. § 1024.35 outlines error resolution procedures by which a borrower may notify a servicer of errors on its account, triggering a response by the servicer. 12 C.F.R. § 1024.36 outlines requests for information, under which a servicer must provide certain requested information pursuant to a QWR.

Within RESPA, 12 U.S.C. § 2605 ("Servicing of mortgage loans and administration of escrow accounts") sets forth certain general parameters for servicing and disclosure:

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing.

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

12 U.S.C. § 2605(a).

12Although the Bank's counsel appeared to assert during oral argument that there is no private right of action for violation of RESPA procedures under 12 C.F.R. § 1024.35 or § 1025.36, no case law or other authority was cited for that proposition. Thus, the Court is not required to address this argument.[47] Nonetheless, 11 U.S.C. § 2605(f) does authorize individual rights of action for damages for RESPA violations:

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of--

(A) any actual damages to the borrower as a result of the failure; and

***153** (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000.

12 U.S.C. § 2605(f).[48] Under the majority view, this private right of action includes violations of the regulations under RESPA including 12 C.F.R. §§ 1024.35, 1024.36 and 1024.41, even if the underlying regulation does not specifically reference 12 U.S.C. § 2605(f).[49] The cases that allow a private right of action for Regulation X violations, even where the regulation does not reference the 12 U.S.C. § 2605(f) remedies, often cite the remedial nature of RESPA and of Regulation X and the broad mandate of the Consumer Financial Protection Bureau, which declared in its Mortgage Servicing Rules, 78 Fed. Reg. at 10714 n.64 that " '*regulations* established pursuant to section 6 of RESPA [12 U.S.C. § 2605] are subject to section 6(f) of RESPA [12 U.S.C. § 2605(f)], which provides borrowers a private right of action to enforce such regulations.' " *Sutton*, 228 F.Supp.3d at 271 (emphasis supplied). This Court agrees with the majority view and the Bureau, including the reasoning on which those determinations are based.

B. The Meaning of "Servicer" and "Servicing" Under Regulation X

3Wells Fargo argues that its involvement in the loss mitigation process does not fall within the meaning of "servicing," as defined in Regulation X and RESPA, and that therefore the Notice of Error procedure does not apply to loss mitigation. For the following reasons, this Court finds that this interpretation is too narrow, and that it is inconsistent with the terms of Regulation X generally and the notice of error, loss mitigation and request for information regulations specifically.

Wells Fargo's argument is based on the definition of servicing in RESPA in 12 U.S.C. § 2605(i)(3) and Regulation X in 12 C.F.R. § 1024.2(b). Specifically, 12 U.S.C. § 2605(i)(3) defines servicing as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan ... and making the payment of principal and interest and such other amounts received from the borrower as may be required pursuant to the terms of the loan."

Additionally, Regulation X has general definitions at 12 C.F.R. § 1024.2 ("Definitions") ***154** that include the following definitions of "servicer" and "servicing" at § 1024.2(b):

Servicer means a person responsible for the servicing of a federally related mortgage loan (including the person who makes or holds such loan if such person also services the loan) [with exceptions not relevant here for FDIC, NCUA, FNMA].

....

Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.

12 C.F.R. § 1024.2(b).

Subpart C of Regulation X ("Mortgage Servicing") has its own "scope" and definitions. 12 C.F.R. § 1024.30(a)("Scope") provides that "this subpart applies to

any mortgage loan, as that term is defined in § 1024.31" [with exceptions for "small servicer" and reverse mortgages not relevant here]. 12 C.F.R. § 1024.30(a). 12 C.F.R. § 1024.31 ("Definitions") does *not* have a new definition for "servicer" or "servicing" (amplifying or supplanting 12 C.F.R. § 1024.2, *supra*). The nearest addition is "service provider" ("Service provider means any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee"). 11 C.F.R. § 1024.31.

Though helpful, the Court finds that these definitions are not exhaustive or exclusive descriptions of duties or rights of a servicer under Regulation X. Instead, the duties and rights of a servicer (and a borrower) are further described at length and in detail in other provisions of Regulation X, including (as is particularly relevant here): 12 C.F.R. § 1024.35 ("Error Resolution Procedures"); § 1024.36 ("Requests for Information") and § 1024.41 ("Loss Mitigation Procedures"). For example, 12 C.F.R. § 1024.35 provides in pertinent part as follows:

(a) Notice of error. A *servicer* shall comply with the requirements of this section for any written notice from the borrower that asserts an error and that ... enables the *servicer* to identify the borrower's mortgage loan account.... A notice on a payment coupon or other payment form supplied by the *servicer* need not be treated by the *servicer* as a notice of error. A qualified written request that asserts an error relating to the *servicing* of a mortgage loan is a notice of error for purposes of this section, and a *servicer* must comply with all requirements applicable to a notice of error with respect to such qualified written request.

12 C.F.R. § 1024.35(a) (emphases supplied). Each of the other subsections of § 1024.35 includes references to a servicer and/or servicing and what a "servicer" must do in "servicing" a loan, much of which goes well beyond accepting and making payments. See subsections (b), (c), (d), (e), (f), (g), (h) and (i).

Similarly, § 1024.36, which does not include an apparently limiting "scope of error regulation" section that is part of § 1024.35, sets forth the duties of a servicer ***155*** and obligations of a borrower in connection with a Request for Information. In language virtually identical to § 1024.35(a), section 1024.36(a) provides initially and in pertinent part as follows:

(a) Information request. A *servicer* shall comply with the requirements of this section for any written request for information from a borrower that ... enables the *servicer* to identify the borrower's mortgage loan account.... A qualified written request that requests information relating to the *servicing* of the mortgage loan is a request for information for purposes of this section, and a *servicer*must comply with all requirements applicable to a request for information with respect to such qualified written request.

12 C.F.R. § 1024.36(a) (emphases supplied). Each of the other subsections of § 1024.36(b) through (i) refers to the servicer and servicing of a mortgage loan and similarly describes servicer duties that go significantly beyond accepting and making payments.

Section 1024.41, which sets forth "Loss Mitigation Procedures," also refers repeatedly to the servicer and its duties and obligations in each of its subsections. Thus, in this Court's view, the duties, obligations and rights of a servicer (and

borrower) are not expressly limited by the "servicer" or "servicing" definitions in RESPA or Regulation X. Instead, the Court will read RESPA and particularly Regulation X as an integrated set of laws and regulations and determines that the duties and obligations of a servicer and the definition of servicing must be read to include the duties and obligations specifically described in the various sections of Regulation X, including (without limitation) §§ 1024.35, 1024.36, and 1024.41.[50] For these reasons and as a matter of common sense, the Court rejects Wells Fargo's argument that the definition and scope of servicer and servicing should be limited to what essentially amounts to accepting and remitting payments. As is made plain by these (and other) sections, the duties of a "servicer" in "servicing" a mortgage loan go substantially beyond the limited definitions argued by Wells Fargo. The Court rejects those unnecessarily and improperly limiting interpretations of servicer and servicing in favor of an interpretation that includes what a servicer is required to do under the specific provisions of Regulation X, as described in this Opinion and those regulations. The Court will now proceed to analyze the Debtor's claims under these sections of Regulation X as set forth in Count I of the Amended Complaint.

C. Error Resolution Procedures and Related Requests for Information

As was noted above, C.F.R. § 1024.35(a) ("Error resolution procedures") states as a general premise that:

A servicer shall comply with the requirements of this section for any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred...

***156** 12 C.F.R. § 1024.35(b) sets forth eleven events which fall under the scope of "error resolution":

(b) Scope of error resolution. For purposes of this section, the term "error" refers to the following categories of covered errors:

(1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.

(2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.

(3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 C.F.R. § 1026.36(c)(1).

(4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(a), or to refund an escrow account balance as required by § 1024.34(b).

(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.

(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 C.F.R. § 1026.36(c)(3).

(7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.

(8) Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.
(9) Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).
(10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).
(11) Any other error relating to the servicing of a borrower's mortgage loan.
12 C.F.R. § 1024.35(b).
4In this case, the Debtor argues that she falls under subsection (7) and/or (11). However, in this Court's view, subsection (7) does not apply on its face since the Notices of Error asserted by the Debtor do not relate to the description of loss mitigation options or foreclosure, and the Debtor does not assert otherwise in her Amended Complaint. Further, the Bank did provide the Debtor with its loss mitigation and foreclosure options in its responses. Whether subsection (11) applies is less clear and is the subject of conflicting opinions, as is noted by the parties.[51]In analyzing this issue and attempting to resolve the conflicting decisions, the Court will look to what the Bank's servicing obligations include under Regulation X, as noted above.
Those regulations provide that a “servicer” must make an initial response to the Notice of Error within 7-30 days. 12 C.F.R. § 1024.35(e)(3) (“Time limits”) (the actual response time within these 7-30 days depends upon the nature of the request). 12 C.F.R. § 1024.35(e) (“Response ***157*** to notice of error”) imposes precise duties of investigation upon the servicer with exceptions not relevant here[52] and states in most relevant part:
12 C.F.R. § 1024.35(e) Response to notice of error.
(1) Investigation and response requirements.
(i) In general. Except as provided in paragraphs (f) and (g) of this section, a servicer must respond to a notice of error by either:
(A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or
(B) *Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination*, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.
(ii) Different or additional error. If during a reasonable investigation of a notice of error, *a servicer concludes that errors occurred other than, or in addition to, the error or errors alleged by the borrower, the servicer shall correct all such additional errors and provide the borrower with a written notification that describes the errors the servicer identified, the action taken to correct the errors,* the effective date of the correction, and contact information, including a telephone number, for further assistance.

(2) Requesting information from borrower. A servicer may request supporting documentation from a borrower in connection with the investigation of an asserted error, but may not:
(i) Require a borrower to provide such information as a condition of investigating an asserted error; or
(ii) Determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation pursuant to paragraph (e)(1)(i)(B) of this section.
....
(4) Copies of documentation. *A servicer shall provide to the borrower, at no charge, copies of documents and information relied upon by the servicer in making its determination* that no error occurred within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receiving the borrower's request for such documents. A servicer is not required to provide documents relied upon that constitute confidential, proprietary or privileged information. If a servicer withholds documents relied upon because it ***158** has determined that such documents constitute confidential, proprietary or privileged information, the servicer must notify the borrower of its determination in writing within 15 days (excluding legal public holidays, Saturdays, and Sundays) of receipt of the borrower's request for such documents.
12 C.F.R. § 1024.35(e) (emphases supplied).
The Debtor asserts that the Bank did virtually none of this. The Amended Complaint alleges that the Bank did not substantively respond to Debtor's Notices of Error or Request for Information, nor did it provide any explanation (or documentation) as to how it arrived at the income number that formed the basis of the denial of Debtor's Loss Mitigation Application. The Bank's argument in opposition is that it is not required to respond to the Notice of Error or Request for Information because neither is the proper vehicle to challenge that denial and that the alleged error does not relate to the "servicing" of the Debtor's loan. Nonetheless, the Bank's denial letters (Exhibits A and F), specifically identify Wells Fargo as the borrower's servicer and invite the borrower to "notify us of an error" and "request information." That is precisely what the Debtor did here; however, the Bank did not respond in a substantive manner.
The Bank's position is that it did not have to respond substantively -- other than by identifying the income number it used -- and that the only proper vehicle to review a loss mitigation denial is to take an appeal, which is what Debtor did, twice, and which was twice denied without any explanation. The Bank argues that is all the Debtor is entitled to under the applicable regulation, 12 C.F.R. § 1024.41(h).[53]
In making these arguments, the Bank relies heavily on the decision of a sister bankruptcy court in this district, *Wiggins v. Hudson City Savings Bank,* 2015 WL 4638452 (Bankr. D.N.J. Aug. 4, 2015) ("*Wiggins I* "), *aff'd in part, rev'd in part and remanded* 2016 WL 5952739 (D.N.J. Oct. 13, 2016) ("*Wiggins II* "), *on remand* 2016 WL 7115864 (Bankr. D.N.J. Dec. 6, 2016) ("*Wiggins III* "). As noted by Wells Fargo, *Wiggins I* held that the plaintiffs were essentially "challeng[ing] the substance of Wells Fargo's determination that they did not qualify for a loss mitigation program"

and that the way to challenge such a denial was through "the appeals process of § 1024.41(h) and not the error resolution procedures of § 1024.35(b) ..."[54]

5Insofar as the *Wiggins I* case deals with a challenge to a decision to deny loss mitigation, this Court agrees that the appropriate way to challenge that decision is through the appeal process. However, as was noted above, Plaintiff here is expressly *not* challenging the loss mitigation denial, thus making *Wiggins I* distinguishable. Further, *Wiggins I*did not involve a borrower's claimed Regulation X violation based on a mistake or error by the lender relating to the factual information provided ***159** to the lender and on which the loss mitigation denial was apparently based. Also, on remand, the *Wiggins III* court held that the borrower stated a plausible claim under Regulation X by alleging that the lender failed to provide the specific information required by 12 C.F.R. § 1024.41(d) regarding the reasons for its denial. There, the lender generally stated only that the reasons for denial arose from "limitations in the servicing agreement" and "failure to meet investor guidelines."[55] Based on these vague descriptions, *Wiggins III* allowed that portion of the Amended Complaint to proceed.[56]

6Finally, to the extent (if any) that *Wiggins I* and *III* can be read to mean that the exchange of information relating to a loss mitigation application does not constitute servicing of a mortgage loan (as Wells Fargo appears to argue), this Court disagrees with Wells Fargo for the reasons stated above. In particular, 12 C.F.R. § 1024.41 describes "Loss Mitigation Procedures" and the rights and duties of the parties in that process. The principal (if not the only) parties described in that section (and in most of the other provisions of Regulation X, including §§ 1024.35 and 1024.36) are the "borrower" and the "servicer." In this Court's view, duties (and rights) expressly ascribed to a "servicer" in the loss mitigation process must constitute the servicing of a mortgage loan. Thus, the Court finds that an asserted error relating to the information underlying a loss mitigation application falls within 12 C.F.R. § 1024.35(b) as an "error relating to the servicing of a borrower's mortgage loan." 12 C.F.R. § 1024.35(b)(11). This, in turn, requires the "servicer" (Wells Fargo) to respond as provided in 12 C.F.R. § 1024.35(e). The Court further finds that the "servicing" functions of the Bank in this case include the Bank's duties and obligations in processing and exchanging information relating to a loss mitigation application, as defined and described in §§ 1024.35, 1024.36, and 1024.41.[57]

D. <u>The Request for Information</u>

7The Debtor also couched her April 5, 2018 letter to the Bank as a Request for Information under 12 C.F.R. § 1024.36 (as well as a Notice of Error under 12 C.F.R. § 1024.35), in another effort to elicit a more substantive response from the Bank as to the factual basis for the denial of her loan modification, particularly as related to the income determination.[58] The immediate precursor to the Debtor's April 5, 2018 letter was the Bank's March 19, 2018 denial letter, which offered a short sale; flatly stated that the Bank had calculated Debtor's income at $5,503 per month without further detail on its calculation; and noted that Debtor was ineligible for loan modification. That same letter also identified the Bank as servicer and invited Debtor to appeal or to "notify us of an error."[59] The Debtor's April 5, 2018 letter included a

succinct, one-paragraph counter-calculation of her monthly income (apparently with paystubs as exhibits).[60] The Bank responded with a May 3, 2018 letter from counsel, who acknowledged the Debtor's letter as a "purported" QWR (Qualified ***160*** Written Request) and declared that it was not the proper mechanism "to challenge the accuracy of a loss mitigation denial decision."[61]

Here again, there is no dispute that Wells Fargo did not provide the Debtor with a substantive response to the Request for Information (or the Notice of Error), other than to advise of the Bank's position that the QWR was not the way to challenge a loss mitigation denial. However, as previously noted, the Debtor's position is that she is not challenging the denial, but rather how the Bank arrived at its income number and the information on which that determination was based. So the real issue here is whether Wells Fargo is required to provide a substantive response to the Request for Information in these circumstances. The Court begins its analysis with 12 C.F.R. § 1024.36 ("Requests for Information"), which states in primary part:

(a) Information request. A servicer shall comply with the requirements of this section for any written request for information from a borrower that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and states the information the borrower is requesting with respect to the borrower's mortgage loan.... A qualified written request that requests information relating to the servicing of the mortgage loan is a request for information for purposes of this section, *and a servicer must comply with all requirements applicable to a request for information with respect to such qualified written request.* 12 C.F.R. § 1024.36 (emphasis supplied).

This Regulation requires the servicer to acknowledge the request within five business days and to make a substantive response within thirty business days. 12 C.F.R. § 1024.36(c) and (d)(2)(i)(B). The parameters of the servicer's response are simple: the servicer must (i) provide the information; or (ii) notify the borrower, after a "reasonable search" that it does not have the information (with an explanation for *that* determination), and provide the borrower with contact information for the likely source of the information:

(d) Response to information request—

(1) Investigation and response requirements. Except as provided in paragraphs (e) and (f) of this section, a servicer must respond to an information request by either:

(i) Providing the borrower with the requested information and contact information, including a telephone number, for further assistance in writing; or

(ii) Conducting a reasonable search for the requested information and providing the borrower with a written notification that states that the servicer has determined that the requested information is not available to the servicer, provides the basis for the servicer's determination, and provides contact information, including a telephone number, for further assistance.

12 C.F.R. § 1024.36(d)(1)(i) and (ii).

The servicer is not required to respond if it deems the borrower's request "[d]uplicative"; a demand for "[c]onfidential, proprietary or privileged information"; "[i]rrelevant"; "[o]verbroad or unduly burdensome"; or "[u]ntimely" (requested more than a year (i) after the servicing function was transferred from this servicer; or (ii)

after the loan was discharged). 12 C.F.R. § 1024.36(f)(1). If the servicer deems that one of these exceptions applies, ***161** the servicer must so notify the borrower within five business days after making that determination and provide the reasons therefor. 12 C.F.R. § 1024.36(f)(2).

In this case, nonavailability under § 1024.36(d)(ii) is not a plausible response, nor did Wells Fargo assert that position in its correspondence with the Debtor's counsel or in its briefing to this Court. Similarly, Wells Fargo did not notify the Debtor that any of the exceptions set forth in § 1024.36(f)(2) apply. Thus, § 1024.36(a) applies and requires Wells Fargo to provide the requested information.

The Debtor simply asked for an explanation of how Wells Fargo determined or calculated the Debtor's income and the information on which that determination was based. The Bank does not indicate in any of its responsive letters that an entity other than itself was responsible for that calculation or that it is otherwise unavailable.[62] Moreover, Debtor's generally clear and succinct counter-calculation in her April 5, 2018 letter meets none of the exceptions that would excuse the servicer's response:

Please review the enclosed application and paystubs for our Client and her non-borrower contributor spouse. Our Client's paystubs clearly show gross income of $2,993.05 per individual bi-monthly [sic, bi-weekly] pay period for our Client alone, or a monthly gross income of approximately $6,484.94. Her husband's documented contribution to the household is approximately an additional $5,373.33. Their combined documented income is approximately $11,858.27. Your calculation ignores more than fifty percent of our Client's documented income without providing any justification for the discount.[63]

As was previously noted, no substantive response or information was provided to this Request. Thus, Wells Fargo's failure to respond to this Request for Information is a plausible Regulation X violation. *See, e.g., Wilson v. Bank of Am., N.A.*, 48 F.Supp.3d 787, 806-07 (E.D. Pa. 2014). *Wilson* involved a servicer's motion to dismiss a complaint that included two counts for RESPA violations, namely: (i) failure to conduct a reasonable investigation in response to a Notice of Error; and (ii) failure to respond to Requests for Information.

In *Wilson*, the borrower received contradictory explanations about why her loan could not be modified followed by contradictory responses to her Requests for Information and Notice of Error. *Wilson*, 48 F.Supp.3d at 805. The court first found plausible plaintiff's claim that the servicer had not made a “reasonable investigation” in response to her Notice of Error. *Wilson*, 48 F.Supp.3d at 805. In *Wilson*, the borrower also requested, in its Request for Information, copies of servicing logs, audio files, property inspection reports, invoices from the foreclosure firm and documents which the borrower submitted to the servicer (a demand much more extensive than Debtor's in the instant case). *Wilson*, 48 F.Supp.3d at 806. The servicer refused to provide most of the documents and, in its motion to dismiss, invoked the 12 C.F.R. § 1024.36(f)(i)-(iv) exceptions, apparently in blanket fashion. *Wilson*, 48 F.Supp.3d at 794, 806.

The *Wilson* court found that this blanket denial did not meet the 12 C.F.R. § 1024.36(f)(1) obligation that the servicer***162** “reasonably determine[ ]” that one or

more of these exceptions were applicable.[64] *Id.* at 806. The court accordingly denied the servicer's request to dismiss both RESPA counts of the plaintiff-borrower's complaint. *See also Alfaro v. Wells Fargo, N.A.*, 2017 WL 4969334, at *5 (D.N.J. Nov. 1, 2017) (Bank's lack of a sufficient response as to plaintiff's claim that the Bank gave inconsistent or contradictory reasons for loss mitigation denial in response to a Notice of Error set forth a plausible RESPA violation claim). In this case, the Bank's failure to respond to Debtor's Request for Information as to the income determination also states a plausible claim for violation of 12 C.F.R. § 1024.36(d).

Similarly, in the analogous circumstance of an alleged RESPA violation, and in the unreported decision of *Herrera v. Central Loan Administration & Reporting*, 2017 WL 4548268, at *3 (D.N.J. Oct. 12, 2017), Chief Judge Linares held that the plaintiffs/borrowers stated a plausible claim for a RESPA claim where the borrower alleged that the lender failed to adequately respond to Requests for Information and Notices of Error relating to the facts underlying the denial of their loss mitigation application. *Id.* at *1. The plaintiffs/borrowers alleged that the lender first sent incomplete or contradictory documents to plaintiffs and that the lender did not respond to the borrowers' requests for their servicing files. *Id.* at *1. In denying the defendant/lender's motion to dismiss, the court first found that at least one of the plaintiffs' letters requesting information constituted a QWR. The court then rejected as insufficient defendant's argument that it had previously provided plaintiffs with “most” of the requested information. *Id.* at *3. In this regard, the court noted that at least five of the plaintiffs' requests, including the request for their entire loss mitigation files, were not met. *Id.* at *3. Thus, plaintiffs alleged enough facts to survive a motion to dismiss.

8Here, there is no serious dispute that at least Plaintiff's April 5, 2018 letter constituted a QWR, even though it was acknowledged by Wells Fargo as only a “purported” QWR. As was determined by the *Herrera* court, a QWR is “written correspondence ... that includes a statement of reasons for the belief of the borrower, ... that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.” *Id.* at *2. Like the letters in *Herrara*, the detailed letters here, including particularly the April 5, 2018 letter, make clear the information that the borrower was looking for, i.e., how the income of the borrower and her spouse was calculated (among the other items listed).

Like *Herrara,* the borrower here has set forth a plausible RESPA claim for failure to adequately respond to their Request(s) for Information.[65]

E. Loss Mitigation Procedures

12 C.F.R. § 1024.41 (“Loss mitigation procedures”) states at the outset at ***163** 12 C.F.R. § 1024.41(a)(“Enforcement and limitations”):

(i) that “a borrower may enforce the provisions of this section pursuant to [12 U.S.C. § 2605(f), the RESPA individual rights of action and remedies section]”; and

(ii) that “[n]othing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss

mitigation option or to eliminate any such right that may exist pursuant to applicable law."

12 C.F.R. § 1024.41(a). Section 1024.41 explicitly describes the duties of a servicer in connection with the loss mitigation or loan modification process, including the disclosure of the "specific reason or reasons" for denial:

912 C.F.R. § 1024.41(d) ("Denial of loan modification options") states in full:

(d) Denial of loan modification options. If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a *servicer* shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section *the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria.*

12 C.F.R. § 1024.41(d) (emphasis supplied). Thus, on the face of 12 U.S.C. § 2605(f) (and 12 C.F.R. § 1024.41generally), the statute and related regulation contemplate the participation of the servicer in the loss mitigation/loan modification process.

In this Court's view, the procedures of § 1024.41, as complemented by 12 C.F.R. §§ 1024.35 and 1024.36, expressly describe and define the duties of a servicer in the loan modification/loss mitigation process, including how errors can be identified and addressed, how requests for information can be made, and what the duties of the servicer (and borrower) are in these circumstances. These provisions must be read as an integrated whole, rather than as discrete and essentially unrelated pieces, as Wells Fargo seems to argue.

10For these reasons, the Court rejects the Bank's arguments to the effect that the definition of "servicer" or "servicing" does not include these specific duties. To the contrary, they are included explicitly in these sections. Indeed, to adopt the Bank's argument, the Court would have to ignore essentially all of the provisions of these sections that describe in detail what the servicer needs to do in responding to Notices of Error, Requests for Information and Loss Mitigation applications. Instead, the Court concludes that these sections further describe and define the duties of a servicer in these circumstances. Thus, for the reasons set forth above, this Court finds that the Debtor set forth a plausible claim for the Bank's violation of 12 C.F.R. § 1024.41(d) by failing to set forth the *specific*reasons for its denial of the Debtor's application (other than by referring to an income number that is nowhere found in the Debtor's submissions).

F. <u>Appeal Process and Interpretative Comments</u>

12 C.F.R. § 1024.41(h) sets forth the appeal process after denial of loss mitigation:

(h) Appeal process.

***164** (1) Appeal process required for loan modification denials. If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.

(2) Deadlines. A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.
(3) Independent evaluation. An appeal shall be reviewed by *different personnel* than those responsible for evaluating the borrower's complete loss mitigation application.
(4) Appeal determination. Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.
12 C.F.R. § 1024.41(h) (emphasis supplied).
The Bank in addressing this section invoked "Supplement I to Part 1024—Official [Consumer Financial Protection] Bureau Interpretations" that provide the Bureau's guidance on 12 C.F.R. § 1024.41 (among other sections of Regulation X). These interpretations include in relevant part:
41(c)(1) Complete loss mitigation application.
1. Definition of "evaluation." *The conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer*. A servicer meets the requirements of § 1024.41(c)(1)(i) if the servicer makes a determination regarding the borrower's eligibility for a loss mitigation program. Consistent with § 1024.41(a), because nothing in section 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option, § 1024.41(c)(1) does not require that an evaluation meet any standard other than the discretion of the servicer.
41(d) Denial of loan modification options.
1. Investor requirements. *If a trial or permanent loan modification option is denied because of a requirement of an owner or assignee of a mortgage loan, the specific reasons in the notice provided to the borrower must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial*. A statement that the denial of a loan modification option is based on an investor requirement, without additional information specifically ***165** identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient. However, where an owner or assignee has established an evaluation criteria that sets an order ranking for evaluation of loan modification options (commonly known as a waterfall) and a borrower has qualified for a particular loan modification option in the ranking established by the owner or assignee, it is sufficient for the servicer to inform the borrower, with respect to other loan modification options ranked below any such option offered to a borrower, that the investor's requirements include the use of such a ranking and that an offer of a loan modification option necessarily results in a denial for any other loan modification options below the option for which the borrower is eligible in the ranking.

2. Net present value calculation. If a trial or permanent loan modification is denied because of a net present value calculation, the specific reasons in the notice provided to the borrower must include the inputs used in the net present value calculation.
3. Determination not to offer a loan modification option constitutes a denial. A servicer's determination not to offer a borrower a loan modification available to the borrower constitutes a denial of the borrower for that loan modification option, notwithstanding whether a servicer offers a borrower a different loan modification option or other loss mitigation option.
4. Reasons listed. *A servicer is required to disclose the actual reason or reasons for the denial*. If a servicer's systems establish a hierarchy of eligibility criteria and reach the first criterion that causes a denial but do not evaluate the borrower based on additional criteria, a servicer complies with the rule by providing only the reason or reasons with respect to which the borrower was actually evaluated and rejected as well as notification that the borrower was not evaluated on other criteria. A servicer is not required to determine or disclose whether a borrower would have been denied on the basis of additional criteria if such criteria were not actually considered. Supplement I to Part 1024—Official Bureau Interpretations (emphases supplied).

11In this Court's view, these comments and the regulations themselves do not expressly or implicitly mean that a borrower cannot seek to correct or clarify the information on which the servicer's decision is based, as the Bank appears to argue. To the contrary, both the express language of the regulations and the comments make clear that the servicer is required to disclose the *specific* reasons for the denial (among other obligations). This, of course, makes sense because that would assist the borrower in determining whether to appeal and what the appeal should address. In this case, to better understand the bases for the Bank's denial and to attempt to address the reasons for denial on appeal, the Debtor understandably sought the information on which the Bank's conclusory statements about the Debtor's income were based. Since the Bank used income numbers that were significantly different and lower than the Debtor provided, ***166** the Debtor sought an explanation of how the Bank arrived at its numbers. That is not a challenge to the Bank's decision to deny her application. Instead, the Debtor was simply trying to understand how the Bank got to the numbers that led to the denial. This is at least one step toward, but prior to, the evaluation process, not the evaluation itself. To use a somewhat extreme example, if a borrower provided a W-2 that stated she made $200,000 in the prior year and the Bank denied her application because her income was $20,000, the borrower would and should be entitled to try to correct that information ($200,000 vs. $20,000) so as to ensure that the Bank's determination is made on the proper factual grounds. Certainly, the borrower is entitled to an explanation as to how the Bank arrived at its substantially different income number and the underlying information on which that determination was based.

1213In sum, in this Court's view, (i) attempting to correct an income number utilized by the Bank in making its determination that the borrower believes is incorrect on its face and (ii) seeking to understand how the Bank reached its different income numbers, are precisely the types of errors or deficiencies that the regulations seek to

address by Notices of Error and Requests for Information and by requiring specific reasons for any denial.[66] For the reasons stated, the Bank's failure to respond beyond providing a different income number that is otherwise unsupported and its similar failure to provide the underlying information state plausible claims under §§ 1024.35, 1024.36 and 1024.41of Regulation X. The same is true of the Debtor's claim that the Bank's same personnel were utilized in making the initial denial decision and determining the appeal, as the denial and appeal letters were signed by the same person with respect to the first application. The same person (though different than the first application) also signed both the denial and appeal letters relating to the Debtor's second loss mitigation application. Thus, it *could* be, or, in other words, it is plausible that the same personnel were utilized on the initial denial and on appeal. Of course, plausibility does not mean the Debtor proved her claims. Instead, they are sufficient to survive a motion to dismiss at this stage of the proceedings.

G. Applicability of N.J.S.A. § 10:5-12(i)(4), the New Jersey Law Against Discrimination

14Debtor argues that the Bank's failure to consider her husband's commission income in calculating her creditworthiness violates § 10:5-12(i)(4), the New Jersey Law Against Discrimination ("NJLAD"), which states in relevant part:

N.J.S.A. § 10:5-12. Unlawful employment practice or unlawful discrimination.

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

i. For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution involved in the making or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential real estate or not, including but not limited to financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof or any agent or employee thereof: ...

***167** (4) To discriminate against any person or group of persons because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property; ....

N.J.S.A. § 10:5-12(i)(4). The remedies for violation of NJLAD are set forth at N.J.S.A. § 10:5-13 and include "[a]ll remedies available in common law tort actions ... in addition to any provided by this act or any other statute." The complainant may initiate the action through the Division on Civil Rights or through the Superior Court of New Jersey. N.J.S.A. § 10:5-13.

The Debtor argues that the Bank's denial is based on the source of the income of the Debtor's spouse (i.e., commissions) and, therefore, violates NJLAD. The Bank argues that the NJLAD does not apply for three reasons. First, the alleged discrimination is as to the nondebtor spouse's income, so the statute does not apply on its face. Second, that a loss mitigation application is not "the making or purchasing of any loan or extension of credit," so the statute does not apply on this ground as well. And third, the Bank argues that commission income does not fall within the scope of NJLAD.

15The Court will address these arguments in turn. First, the Debtor urges the Court to apply the plain meaning rule in interpreting this section of NJLAD. The Court will do so and agrees with the Bank that the plain language of the statute requires the discrimination to relate to income attributable to the aggrieved person, i.e., "because of the source of lawful income received by the person." N.J.S.A. 10:5-12(i)(4) (the "Source of Income Provision"). Here, the income that is the subject of the Amended Complaint "is derived from her husband's sales commissions,"[67] rather than the Debtor. Additionally, the Debtor is the plaintiff, and Debtor's husband is not a party to this action. Thus, the NJLAD claim fails as the provision relied upon by Debtor is not applicable to the income of her nonparty spouse on its face.[68]

16The Court also agrees with the Bank that commission income does not fall within the Source of Income Provision of NJLAD, but for reasons different than those asserted by the Bank. By prohibiting discrimination based on the source of income, NJLAD makes clear that so long as the source of income was lawful, there could be no discrimination on that basis. However, the Debtor's argument conflates the meaning of "source" of income with the *evaluation* of that income in making a ***168** credit decision. The Bank has a necessary and, in this Court's view, undeniable right to *evaluate* the quality or consistency of the Debtor's (or any borrower's) income, irrespective of its source. Not even the Debtor will argue (and counsel essentially conceded as much at oral argument) that the Bank may not evaluate obviously contingent income like a commission -- that is subject to all sorts of variables -- differently than, for example, income based on a straight salary.

1718In sum, if a Bank chooses to discount – or even reduce to zero -- commission income, that is not discrimination but the exercise of necessary discretion in evaluating whether to extend credit or offer a loan modification. To take away this necessary discretion based on NJLAD would sweep too broadly. That type of broad interpretation would unnecessarily and inappropriately restrict a lender's ability to evaluate the quality or consistency of different types of income. Finally, reading NJLAD as broadly as the Debtor suggests would indirectly allow the Debtor to do what RESPA and Regulation X say you cannot do – claim a violation of those laws and regulations based on a lender's discretionary determination *not* to grant a loan modification.[69] Thus, Debtor's NJLAD claim fails on this separate and independent ground as well.[70]

H. Application of N.J.S.A. § 56:8-2, the New Jersey Consumer Fraud Act

Debtor argues that the Bank's alleged violation of NJLAD for failing to consider her spouse's income from sales commissions in determining her creditworthiness also violates N.J.S.A. § 56:8-2, the New Jersey Consumer Fraud Act ("NJCFA") as an "unconscionable business practice." N.J.S.A. § 56:8-2. The NJCFA states in relevant part:

The act, use or employment by any person of any *unconscionable commercial practice*, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not ***169** any person has in

fact been misled, deceived or damaged thereby, is declared to be an unlawful practice [with exceptions not relevant here].
N.J.S.A. § 56:8-2 (emphasis supplied). In this regard, the Debtor notes that the New Jersey Supreme Court in *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 580-81, 25 A.3d 1103 (2011) determined that post-judgment mortgage forbearance agreements could be subject to the Consumer Fraud Act as a "fraud 'in connection with' 'subsequent performance' of a loan."
19While the *Gonzalez* case makes clear that post-judgment forbearance agreements may fall within the NJCFA, that is certainly not the end of the inquiry. As is noted by the Bank, the Debtor's NJCFA claim is based entirely on the Bank's alleged violation of the NJLAD as an unconscionable practice.[71] No other claim of fraud, deception or the like is made. Since the Court has already held that the Debtor's NJLAD claim fails, the NJCFA claim necessarily fails as well as the Debtor has not alleged any "unconscionable commercial practice." Accordingly, the Court will deny the Debtor's motion to amend as to Counts II and III, but without prejudice to the Debtor's right to subsequently seek leave to amend under the standards set forth in Bankruptcy Rule 7015, which is discussed in the following section.

I. Standard for Amending Complaint under FED. R. BANKR. P. 7015/FED. R. CIV. P. 15

2021FED. R. BANKR. P. 7015 fully incorporates FED. R. CIV. P. 15 (Amended and Supplemental Pleadings) which states at Rule 15(a)(2) that a party may amend pleadings (after specific deadlines have passed) "only with the opposing party's written consent or the court's leave." The Rule provides that: "The court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). The Supreme Court identifies the following factors to consider:
If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."
Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); see also *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) ("[w]e have held that motions to amend pleadings [under Rule 15(a)] should be liberally granted"); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) ("[u]nder Rule 15(a), if a plaintiff requests leave to amend a complaint ... such leave must be granted in the absence of undue delay, bad faith, dilatory motive, unfair prejudice, or futility of amendment"); *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir. 1997); *Lorenz v. CSX Corp.,* 1 F.3d 1406, 1413-14 (3d Cir. 1993).
22"Futility" -- on which the Bank's entire objection is based -- means that "the proposed amendment still cannot state a claim on which relief can be granted or withstand a further motion to dismiss under Fed. R. Civ. P. 12(b)(6)."***170** *In re Albanes*, 560 B.R. 155, 164-65 (Bankr. D.N.J. 2016), *aff'd* 2017 WL 3037384 (July 18, 2017), citing *In re Burlington*, 114 F.3d at 1434:

"Futility" is therefore assessed under Rule 12(b)(6) standard. *In re Burlington,* 114 F.3d at 1434. *See also In re NAHC, Inc., Sec. Litig.,* 306 F.3d 1314, 1332-33 (3d Cir. 2002) (leave to amend a securities fraud complaint denied as one claim was time-barred and plaintiffs had not demonstrated their ability to develop facts to support another claim).
In re Albanes, 560 B.R. at 165.
23242526To decide a motion under FED. R. CIV. P. 12(b)(6), which is incorporated into FED. R. BANKR. P. 7012, the Court accepts all well-pleaded allegations in the complaint as true, views them in the light most favorable to the plaintiff, and determines whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). To survive dismissal, a complaint must contain sufficient factual matter which, if accepted as true, "state[s] a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). The pleadings must raise the possibility, though not the probability, of the conduct complained of and show " 'enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).
272829Under these standards, the Court undertakes a two-part analysis which requires it: (i) to identify and reject labels, conclusory allegations, and formulaic recitation of the elements of a cause of action; and then (ii) to "draw on its judicial experience and common sense" to determine whether the factual content of a complaint plausibly gives rise to an entitlement to relief. *Iqbal*, 556 U.S. at 678-79, 129 S.Ct. 1937. The Court "generally consider[s] only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record" along with authenticated documents which form the basis of the claim. *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042, 114 S.Ct. 687, 126 L.Ed.2d 655 (1994). A court may also "take judicial notice of a prior judicial opinion." *McTernan v. City of York, Pa.*, 577 F.3d 521, 526 (3d Cir. 2009); *see Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).
30In the instant case, for the reasons stated above, the Debtor's First Amended Complaint states a claim that is plausible on its face—that the Bank did not state with sufficient specificity the grounds for denial, consistent with 12 C.F.R. § 1024.41(d) and Supplement I to Part 1024, particularly § 41(d)(1) and (2), particularly when the Debtor asked the Bank:

(i) by May 29, 2017 letter to explain why the Bank used a figure of $5,860 rather than $8,968 as monthly income;[72] and

(ii) by April 5, 2018 letter to explain why the Bank used a figure of $5,503 rather than $11,858.27 as ***171*** monthly income.[73]

These requests are not (in this Court's view) “overbroad” Notices of Error that would relieve the Bank of the duty to respond.[74] The Bank also failed to respond to the Debtor's Notices of Error and provide the Debtor with any of the information she requested regarding the income determination, in potential violation of 12 C.F.R. §§ 1024.35 and 1024.36.

Additionally, on the face of the Bank's letters, the Bank *appears* to have used the same person to (i) deny loan modification; and (ii) deny the appeal on both the first and second applications, in derogation of 12 C.F.R. § 1024.41(h)(3) (“An appeal shall be reviewed by *different personnel* than those responsible for evaluating the borrower's complete loss mitigation application”) (emphasis supplied):

(i) The May 22, 2017 letter denying loan modification and June 7, 2017 letter denying appeal were both signed by Amanda Solmsa, Home Preservation Specialist;[75]

(ii) The March 19, 2018 letter denying loan modification and May 1, 2018 letter denying appeal were both signed by Hiliary Phillips, Home Preservation Specialist.[76]

At this early stage of the proceedings, the Bank's observation that a supervisor may review an employee's initial evaluation pursuant to 12 C.F.R. Part 2014, Supp. I, ¶ 41(h)(3)-1 is not sufficient to rebut the Debtor's plausible claim when the names are identical on both sets of letters.

Finally, to the extent that Mr. Reichner's letter of June 28, 2017 states that it is a response to Debtor's May 29, 2017 Notice of Error, Mr. Reichner's letter does not appear to conform to the requirements of 12 C.F.R. § 1024.35(e)(1)(i)(B), particularly because it did not notify the Debtor that she had the right to request the documents upon which the Bank relied in denying her loan modification.[77]

For all the forgoing reasons, the Court finds that the Debtor has stated a plausible claim for Regulation X violations under ***172** Count I of the Amended Complaint, but has not stated plausible claims for relief under Counts II and III based on the current state of the record. However, the denial of the Debtor's Motion as to these Counts is without prejudice to her right to seek leave to amend her claims under FED. R. CIV. P. 15 and Bankruptcy Rule 7015. *See, e.g., Wiggins II*, 2016 WL 5952739 at *4 (urging the trial court to dismiss a complaint with prejudice only if the court also “make[s] a finding that any amendment would be inequitable or futile” and directing that the trial court should “approach” futility “with caution”). At this early stage, the Court simply cannot say that any proposed amendment would necessarily be “inequitable” or “futile.”

* * *

In concluding, the Court is compelled to note that an answer by the Bank to the relatively simple and straightforward questions as to: (i) whether and why the Debtor's husband's income was discounted or disregarded; and (ii) how the Bank determined her income as reported in the denial letters, may have avoided this extensive motion practice (and perhaps the entire case) and certainly would have made for a much easier and understandable process, legally and practically. Frankly, the Court does not understand why the Bank did not provide this basic information, based on the applicable law or as a simple matter of substantively responding to inquiries that the Bank, as servicer, invited in its correspondence to the Debtor.

VI. CONCLUSION

For all the foregoing reasons, the Debtor's Motion to file the Amended Complaint is granted as to Count I and denied without prejudice as to Counts II and III. An Order consistent with this Opinion is being separately entered by the Court.

All Citations

596 B.R. 140

Footnotes

1
Dkt. No. 11.
2
Dkt. No. 12.
3
In its prior Motion to Dismiss the original Complaint, the Bank argued that this Court lacked subject matter jurisdiction over Count I of the Complaint. The Court dismissed Count I of the original Complaint by Order Granting in Part and Denying in Part, Defendant's Motion to Dismiss, entered on April 4, 2018 (Dkt. No. 7).
4
Dkt. No. 1, Compl., ¶¶ 4-5. The Debtor also alleged that the Bank consented to jurisdiction by filing Claim No. 2-1 (Dkt. No. 1, Compl., ¶ 6).
5
Dkt. No. 1, Compl., ¶¶ 48-52, 67-72, 74. The Bank appears to use “loss mitigation” synonymously with “loan modification.”
6
For example, Debtor's counsel argued in her objection to the Bank's prior motion: “Here, although the [Debtor] believes that she would have been offered a loan modification if the Defendant had implemented the required procedures correctly, the Plaintiff is not challenging the ultimate decision at this juncture. She brings this action because the Defendant did not follow the procedures mandated by Regulation X. *She is challenging the process, not the result.*” Dkt. No. 4, Debtor's Br., at 5 (emphasis supplied).
7
Dkt. No. 7, Order Granting in Part and Denying in Part, Defendant's Motion to Dismiss.
8
Dkt. No. 9-1, Am. Compl.
9
Dkt. No. 9-1, Am. Compl., ¶¶ 70-86.
10
Claim No. 2-1.
11
Claim No. 2-1.
12

Dkt. No. 3-3, Reichner Certif., Ex. 1, Hr'g Tr. 22:10-11, June 4, 2015. U.S. Bank was represented by Phelan Hallinan Diamond & Jones, PC at the foreclosure proceeding in State Court; on its Proof of Claim No. 2-1 in Bankruptcy Court; and on its objection to confirmation in Bankruptcy Court.

13

Dkt. No. 5-2, Reichner Reply Certif., Ex 1, Hr'g Tr. 21:6-11, May 20, 2015.

14

Dkt. No. 3-3, Reichner Certif., Ex. 1, Hr'g Tr. 27:6-13, June 4, 2015.

15

Dkt. No. 3-3, Reichner Certif., Ex. 1, Hr'g Tr. 28:3-7, June 4, 2015.

16

Dkt. No. 3-3, Reichner Certif., Ex. 3, July 19, 2016 Final Judgment of Foreclosure.

17

Dkt. No. 11, Bank Br., at 3, citing to *U.S. Bank, N.A. as Trustee v. Coppola*, 2017 WL 5171864, at *1 (N.J. Super. Ct. App. Div. Nov. 8, 2017).

18

Main Dkt. No. 1, Pet., Sch. D.

19

Main Dkt. No. 2, Plan, at 2

20

Main Dkt. No. 11. The Trustee also filed an objection on grounds unrelated to the treatment of the mortgage debt (Main Dkt. No. 15).

21

Main Dkt. No. 10.

22

Main Dkt. No. 13, Loss Mitigation Order.

23

Main Dkt. Nos. 17 and 20.

24

Dkt. No. 7, April 4, 2018 Order.

25

As is acknowledged by the Debtor, she is no longer challenging the Bank's foreclosure. All the claims in the Amended Complaint relate to the Bank's post-petition conduct in processing her loss mitigation/loan modification applications. Thus, there is no remaining challenge or objection to the Bank's prepetition Proof of Claim.

26

Dkt. No. 9-1, Am. Compl., Exs. A-H.

27

It appears that “May 20, 2017” is a misnomer, and that the Debtor means the Bank's May 22, 2017 letter, attached to the Amended Complaint as Exhibit A.

28

Dkt. No. 11, Bank. Br., at 3-4 (Bank acknowledges that the May 29, 2017 letter was an appeal of the loan modification denial); see also Dkt. No. 9-1, Am. Compl., Ex. C.

29

The Debtor and Bank indicate that Debtor made this submission at the Court's suggestion. Dkt. No. 9-1, Am. Compl., ¶¶ 28-30; Dkt. No. 11, Bank Br., at 5. However, the Court does not recall making any such suggestion. Instead, the Court's recollection is that the Debtor advised at the March 27, 2018 hearing that she intended to submit another loan modification application that would likely form the basis of an Amended Complaint, which is how the Debtor proceeded.

30

Dkt. No. 9-1, Am. Compl., Ex. G, at 2-3. The Court notes that a *bi-weekly* income of $2,993.05 would result in a monthly gross income of $6,484.94 to the Debtor ($2,993.05 *x* 26 ÷ 12 = $6,484.94).

31

Dkt. No. 9-1, Am. Compl., Ex. G, at 3.

32

Dkt. No. 9-1, Am. Compl., Exs. A-H.

33

Dkt. No. 11, Bank Br., Ex. 1, May 1, 2018 letter from Bank to Debtor.

34

Dkt. No. 9-1, Am. Compl., Exs. A and F.

35

Dkt. No. 9-1, Am. Compl., ¶¶ 70-86.

36

D.N.J. LBR 7015-1(a)(ii) requires the Plaintiff to submit a redlined (or similar) copy of the original Complaint along with any amended Complaint. Debtor failed to provide this redlined copy.

37

Dkt. No. 9, Debtor's Br., at 4.

38

Dkt. No. 9, Debtor's Br., at 4. The Amended Complaint alleges at ¶ 41 that Debtor found “over 17,000 consumer complaints against the [Bank] with the tag of ‘loan modification, collection, foreclosure’ within the CFPB [Consumer Financial Protection Bureau] database,” but does not develop this allegation with exhibits or with any argument in the Motion (Dkt. No. 9-1, Am. Compl., ¶ 41).

39

Dkt. No. 9, Debtor's Br., at 4.

40

Dkt. No. 9-1, Am. Compl., Count III, ¶¶ 76-86; Dkt. No. 11, Bank Br., at 2.

41

Dkt. No. 11, Bank Br., at 15-16; 12 C.F.R. § 1024, Supp. I, ¶ 41(h)(3)-1.

42

Dkt. No. 11, Bank Br., at 17.

43

Dkt. No. 11, Bank Br., at 17.

44

Dkt. No. 11, Bank. Br. at 18.

45

Dkt. No. 11, Bank Br. at 19-21.
46
Dkt. No. 12.
47
The Court notes that Wells Fargo did argue that there is no private right of action under § 1024.41 based on a servicer's substantive evaluation of a loss mitigation application. See Dkt. No. 11, Bank Br., at 12-13. However, as noted previously, Debtor's claim is not based on Wells Fargo's substantive evaluation of her application for loss mitigation. Instead, Debtor's claim is that Wells Fargo made a factual error as to her and her spouse's income and failed to respond to her Notices of Error and Requests for Information relating to that asserted error.
48
Lage v. Ocwen Loan Servicing, LLC, 839 F.3d 1003, 1007 (11th Cir. 2016) (12 U.S.C. § 2605(f)"create[es] a private right of action for a borrower to sue '[w]hoever fails to comply with any provision of this section' ").
49
For the majority view, *see, e.g., Lage v. Ocwen Loan Servicing, LLC*, 839 F.3d at 1007 (as to 12 C.F.R. §§ 1024.35 and 1024.41; *Sutton v. CitiMortgage, Inc.*, 228 F.Supp.3d 254, 270-71 (S.D.N.Y. 2017); *Ford v. Nationstar Mortgage, LLC*, 2018 WL 2418541, at *3 (D. Nev. May 28, 2018); *Weber v. Seterus, Inc.*, 2018 WL 1519163, at *7 (N.D. Ill. Mar. 28, 2018); *Starke v. Select Portfolio Servicing, Inc.*, 2017 WL 6988657, at *5 (N.D. Ill. Dec. 18, 2017) (all as to 12 C.F.R. § 1024.35); *Anderson v. Wells Fargo Home Mortgage*, 2017 WL 4181114, *5 (E.D. Calif. Sept. 21, 2017); and *Brewer v. Wells Fargo Bank, N.A.*, 2017 WL 1315579, at *5 (N.D. Calif. Apr. 6, 2017) (both as to 12 C.F.R. § 1024.36). For the minority view, *see e.g., Librizzi v. Ocwen Loan Servicing, LLC*, 120 F.Supp.3d 1368, 1378-79 (S.D. Fla. 2015) (deeming that RESPA creates a private right of action for only three types of conduct listed in 12 U.S.C. §§ 2605(f); 2607(a); 2608(b)); *Miller v. HSBC Bank, U.S.A., N.A.*, 2015 WL 585589, at *11 (S.D.N.Y. Feb. 11, 2015); and *Willson v. Bank of Am., N.A.*, 2016 WL 8793204, at *8 (S.D. Fla. May 2, 2016) (both of which deem that the borrower has no private right of action for a 12 C.F.R. § 1024.35 violation because that regulation does not specifically reference 12 U.S.C. § 2605(f) remedies, as 12 C.F.R. § 1024.41 does).
50
TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal citations omitted) (interpreting the Fair Credit Reporting Act under 15 U.S.C. § 1681e(a).
51
Dkt. No. 11, Bank Br., at 23-25; Dkt. No. 12, Debtor Reply Br., at 14-17.
52
These exceptions at 12 C.F.R. § 1024.35(f) and (g) include errors self-corrected by the servicer; certain errors noticed too close to a foreclosure sale or otherwise out of time; "duplicative" and "overbroad" notices of error.

53
The Bank acknowledged Debtor's May 29, 2017 letter (styled “Notice of Error” under 12 C.F.R. § 1024.35) as an *appeal*; denied it without explanation by its June 7, 2017 letter, which also invited the Debtor to “notify us of an error” (Dkt. No. 9-1, Am. Compl., Ex. C, Bank's June 7, 2017 letter). By letter dated June 12, 2017, again styled “Notice of Error” under 12 C.F.R. § 1024.35, the Debtor repeated her request for an explanation (Dkt. No. 9-1, Am. Compl., Ex. D, June 12, 2017 letter). The Bank, through counsel, responded in a June 28, 2017 letter that an *appeal*, not “Notice of Error” was not the correct mechanism for challenging a denial (Dkt. No. 9-1, Am. Compl., Ex. E, June 28, 2017 letter).
54
Wiggins I, 2015 WL 4638452, at *8.
55
Wiggins III, 2016 WL 7115864, at *7.
56
Wiggins III, 2016 WL 7115864, at *5.
57
See also Wilson v. Bank of Am., N.A., 48 F.Supp.3d 787, 806-07 (E.D. Pa. 2014) discussed *infra.*
58
Dkt. No. 9-1, Am. Compl., Ex. G, Apr. 5, 2018 letter.
59
Dkt. No. 9-1, Am. Compl., Ex. F, Mar. 19, 2018 letter.
60
Dkt. No. 9-1, Am. Compl., Ex. G, Apr. 5, 2018 letter.
61
Dkt. No. 9-1, Am. Compl., Ex. H, May 3, 2018 letter.
62
Dkt. No. 9-1, Am. Compl., Exs. A, C, E, F and H.
63
Dkt. No. 9-1, Am. Compl., Ex. G, Apr. 5, 2018 letter. The Court notes that a *bi-weekly* income of $2,993.05 would result in a monthly gross income of $6,484.94 ($2,993.05 *x* 26 ÷ 12 = $6,484.94).
64
The District Court determined:
Regulation X, however, changes the requirement imposed on the servicer from conducting just an “investigation” for the information to conducting a “a reasonable search for the requested information.” 12 C.F.R. § 1024.36(d)(1)(ii). Further, this regulation makes clear that a servicer's duty to comply with its response obligations are obviated only “if the servicer ***reasonably*** determines that” the documents meet any of the enumerated exceptions. 12 C.F.R. § 1024.36(f)(1) (emphasis added). *Wilson*, 48 F.Supp.3d at 806 (emphasis in original). As noted above, Wells Fargo has not agreed that any of the exceptions are applicable.
65

The Court also notes that Wells Fargo does not even refer to 12 C.F.R. § 1024.36, which is the regulation regarding Requests for Information, in its thirty-two-page brief.

66
See § 1024.41(d).

67
See Dkt. No. 9-1, Am. Compl., ¶ 33.

68
The Court also rejects the Debtor's argument that because the court in *Franklin Tower One, L.L.C. v. N.M.*, 304 N.J. Super. 586, 591, 701 A.2d 739 (App. Div. 1997), *aff'd*, 157 N.J. 602, 725 A.2d 1104 (1999)held that the statute (a precursor to N.J.S.A. § 10:5-12(g), which prohibits income discrimination in real property rentals) was intended to protect spouses "dependent on alimony and child support payments," its protection should also extend to *any* income of the aggrieved person's spouse. First, the holding is simply not that broad, i.e., it did not extend to *any* income from a spouse. Further, alimony and support are paid to the allegedly aggrieved person. Here, the commission income is paid to the Debtor's spouse, not the Debtor. Second, the categories of income referred to in the *Franklin Tower One* case – welfare, alimony and child support, tenant assistance – are consistent with the statute's stated purpose at the time: to prevent housing discrimination against tenants with lawful income. *Id.* at 591, 701 A.2d 739. Thus, the *Franklin Tower One* case cannot be relied upon for the exceedingly broad interpretation urged by the Debtor.

69
City of New York v. F.C.C., 486 U.S. 57, 63, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988) (under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, federal government can create laws that preempt state laws "to the extent it is believed that such action is necessary to achieve its purpose"); *Crozier v. Johnson & Johnson Consumer Cos., Inc.*, 901 F.Supp.2d 494, 503 (D.N.J. 2012) (federal preemption "will not lie unless it is the clear and manifest purpose of Congress") (internal citations omitted). The intent of Congress to displace state law may be evidenced by (i) a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; (ii) the existence of a field "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"; (iii) a situation in which "the state policy may produce a result inconsistent with the objective of the federal statute"; or (iv) a circumstance in which it is impossible to comply with both the federal and the state statute. *Maryland v. Louisiana,* 451 U.S. 725, 746-47, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (internal citations omitted). Virtually all of these factors are plainly present here, including particularly the pervasive regulatory scheme and the possibility of inconsistent results.

70
Because the Court has held that NJLAD is not applicable on these separate grounds, it need not reach the issue of whether a loss mitigation application involves

an “extension of credit.” This issue is a much closer call, with cases cited by each side supporting either argument. Thus, that determination is left for another day.
71
See Dkt. No. 9-1, Am. Compl. at ¶¶ 76-86.
72
Dkt. No. 9-1, Am. Compl., Ex. B, Debtor's May 29, 2017 letter.
73
Dkt. No. 9-1, Am. Compl., Ex. G, Debtor's April 5, 2018 letter. The Debtor characterized this April 5, 2018 letter as a Qualified Written Request (“QWR”) rather than as a Notice of Error (“NOE”), apparently to try to circumvent the Bank's response in Spring 2017 that an appeal (not an NOE) was not a proper response to a denial of loan modification. The Bank (through Mr. Reichner) did not respond substantively to either of Debtor's letters.
74
12 C.F.R. § 1024.35(g)(1)(ii) relieves the servicer of the duty to respond to a Notice of Error, if, among other events, the Notice of Error is “overbroad.” That regulation provides: “A notice of error is overbroad if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account.”
75
Dkt. No. 9-1, Am. Compl., Ex. A, May 22, 2017 letter from Bank; Ex. C, June 7, 2017 letter from Bank.
76
Dkt. No. 9-1, Am. Compl., Ex. F, March 19, 2018 letter from Bank; Dkt. No. 11-1, Reichner Certif., Ex. 1, May 1, 2018 letter from Bank.
77
Dkt. No. 9-1, Am. Compl., Ex. E, June 28, 2017 letter from Reichner. 12 C.F.R. § 1024.35(e)(1)(i)(B)requires the Bank, in responding to a Notice of Error, to provid[e] the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.
12 C.F.R. § 1024.35(e)(1)(i)(B).

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United States Bankruptcy Court, D. New Jersey.

IN RE: Andre G. WIGGINS and Sheila S. Bell-Wiggins, Debtors.
Andre G. Wiggins and Sheila S. Bell–Wiggins, Plaintiffs,
v.
Hudson City Savings Bank and Wells Fargo Bank, N.A., Defendants.

Case No.: 12–26993 (JKS)Adv. No.: 15–01938 (JKS)
Filed 12/06/2016

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DECISION AND ORDER REGARDING REMAND OF SECOND MOTION FOR RECONSIDERATION

JOHN K. SHERWOOD, UNITED STATES BANKRUPTCY JUDGE

***1** The relief set forth on the following pages, numbered two (2) through fifteen (15), is hereby **ORDERED**.

INTRODUCTION

1. By its order and opinion dated October 13, 2016, the District Court reversed and remanded this Court's order denying Andre G. Wiggins and Sheila S. Bell–Wiggins's ("Plaintiffs") second motion for reconsideration dated November 17, 2015. (ECF No. 21). Specifically, this Court has been asked to determine whether Plaintiffs' proposed amended complaint would have cured the deficiencies found in the original complaint or whether the amendment would be futile. The Court's decision on this issue is set forth below.

BACKGROUND AND PROCEDURAL HISTORY

2. Plaintiffs filed a Chapter 13 petition on July 5, 2012. (Main Case, ECF No. 1).
3. On May 18, 2015, Plaintiffs filed an adversary complaint ("Complaint") against Hudson City Savings Bank and Wells Fargo Bank, N.A. ("Defendants") alleging claims for violations of the automatic stay pursuant to 11 U.S.C. § 362 and of the Real Estate Settlement Procedures Act ("RESPA") and Implementing Regulation X. (ECF No. 1).
4. On June 17, 2015, Defendants filed a motion to dismiss the Complaint. (ECF No. 4).
5. Following a hearing on the motion to dismiss, the Court entered an opinion and order dismissing the Complaint in its entirety on August 4, 2015. (ECF Nos. 7, 8).
6. On August 18, 2015, Plaintiffs moved for reconsideration of the order, asserting that the Court erred by dismissing the Complaint without granting Plaintiffs' request for leave to amend. (ECF No. 11). The Court entered an order denying the motion because Plaintiffs failed to provide a proposed amended complaint or otherwise set forth any factual or legal assertions that could serve as the basis for a viable cause

of action when they requested leave to amend in connection with the initial motion for reconsideration. (ECF No. 15).
7. On September 24, 2015, Plaintiffs filed a second motion for reconsideration, this time attaching a proposed amended complaint. ("Amended Complaint") (ECF No. 17, Ex. A). The Court entered an order denying the motion for leave to amend because Plaintiffs had failed to show: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the Court granted Defendants' motion to dismiss; or (3) the need to correct a clear error of law or fact to prevent manifest injustice. (ECF No. 21) (citing *Max's Seafood Café ex rel. Lou–Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).
8. On December 2, 2015, Plaintiffs filed a notice of appeal of this Court's order denying the second motion for reconsideration to the District Court. (ECF No. 23).
9. On March 24, 2016, Plaintiffs filed a motion for a stay pending appeal. (ECF No. 27). This motion was granted with certain conditions. (ECF No. 30).
10. On October 13, 2016, the District Court entered an order reversing and remanding this Court's denial of Plaintiffs' second motion for reconsideration and directed that the Court determine whether permitting the filing of the proposed Amended Complaint would be futile. (ECF No. 32).

DISCUSSION

*2 A. **FIRST AND SECOND COUNTS OF PROPOSED AMENDED COMPLAINT— VIOLATION OF THE AUTOMATIC STAY**

11. The First and Second Counts of Plaintiffs' Amended Complaint seek damages and injunctive relief based upon Defendants' alleged willful violation of the automatic stay imposed under 11 U.S.C. § 362by filing a foreclosure action against real property located at 812 Cleveland Avenue, Scotch Plains, New Jersey. (Amended Complaint, ¶¶ 51–57). These claims for relief are the same as the first and second counts of Plaintiffs' original Complaint. (ECF No. 1). The merits of these claims were addressed in the Court's decision of August 4, 2015. (ECF No. 7, at 6–10). Based on that analysis, the Court finds that Plaintiffs' claims under the First and Second Counts of the Amended Complaint are futile.

B. **THIRD COUNT OF PROPOSED AMENDED COMPLAIN— VIOLATIONS OF RESPA AND REGULATION X**

12. The Third Count of Plaintiffs' Amended Complaint is similar to the original Complaint, but not exactly the same. Both complaints describe violations of 12 C.F.R. §§ 1024.35 and 1024.41. The Amended Complaint adds claims based on violations of 12 C.F.R. §§ 1024.36, 1024.38 and 1024.41(d) to the mix and seeks damages based on violations of these provisions of Regulation X.
13. Because the subject property ceased to be an asset of the estate following its surrender pursuant to Plaintiffs' confirmed Chapter 13 Plan, the Court probably does not have core jurisdiction over the Real Estate Settlement Procedures Act ("RESPA") or Fair Debt Collection Practices Act ("FDCPA") claims. At best, the Court has "related to" jurisdiction over Plaintiffs' claims in Counts Three and Four of the Amended Complaint pursuant to 28 U.S.C. § 1334(b). Though Plaintiffs have indicated that they consent to the entry of final orders by this Court (Amended Complaint, ¶ 2), Defendants have not yet expressed such consent. Accordingly, the

following constitutes the Court's proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1).

i. **Failure to Properly Respond to a Notice of Error pursuant to 12 C.F.R. § 1024 35**

14. Count Three of Plaintiffs' Amended Complaint alleges that Defendants failed to properly respond to notices of error dated April 21, 2015, September 1, 2015, and September 9, 2015, in violation of 12 C.F.R. § 1024.35. (Amended Complaint, ¶¶ 30–31, 41–43, 60). In the Amended Complaint, Plaintiffs emphasize that Defendants' responses to the April 21, 2015 notice of error letter were untimely because they were not sent to their attorney's correct address. (*Id.*, ¶¶ 33–35). The record shows that Wells Fargo sent three responses to the April 21, 2015 notice of error letter—one to Plaintiffs at their home address, and two to their attorney at an incorrect address. Plaintiffs acknowledge in the Amended Complaint that the responses sent to the attorney were ultimately received, but stress the fact that receipt was beyond the 30–day response deadline set forth in 12 C.F.R. § 1024.35(e).

15. The Court concludes based on a review of the allegations in the Amended Complaint and the three responses sent by Wells Fargo (Amended Complaint, Ex. F, H, J) that the alleged violations of 12 C.F.R. § 1024.35(e) were unintentional and immaterial. There is simply no nexus between these alleged violations and a viable claim for damages. Also, these alleged 12 C.F.R. § 1024.35 violations were rejected by the Court in its decision of August 4, 2015 because of the bankruptcy exemption under 12 C.F.R. § 1024.37(d) and the Court's view that Plaintiffs should have invoked the appeals process. (ECF No. 7, at 13–16). For the same reasons, the Court finds that Plaintiffs' claims in the Third Count of the proposed Amended Complaint that are based on violations of 12 C.F.R. § 1024.35would be futile.

ii. **Failure to Properly Respond to a Request for Information pursuant to 12 C.F.R. § 1024.36**

***3** 16. Count Three of Plaintiffs' Amended Complaint also alleges that Defendants failed to respond to requests for information dated September 1, 2015, and September 9, 2015, in violation of 12 C.F.R. § 1024.36. (Amended Complaint, ¶¶ 41–42, 59, 64). This claim was not made in the original Complaint, so it will be addressed in more detail here.

17. The only “request[s] for information” pursuant to 12 C.F.R. § 1024.36 that are part of the record are Plaintiffs' September 1, 2015 and September 9, 2015 correspondence. (Amended Complaint, Ex. G, I). The timing of these requests is noteworthy, because they came: (1) after the denial of Plaintiffs' loss mitigation application on February 26, 2015 and expiration of the appeal period with respect to the denial on March 28, 2015; (2) after this adversary proceeding was filed on May 18, 2015; and (3) after this Court decided to dismiss Plaintiffs' original Complaint on August 4, 2015.

18. The fact that the requests for information referred to in the Amended Complaint were first served after this adversary proceeding had been filed and dismissed is somewhat out of the ordinary. At a time when the parties were engaged in litigation with one another over Wells Fargo's denial of Plaintiffs' loss mitigation request, it

would seem that a mortgage servicer should not be obligated to respond to requests for information outside the context of the litigation. Of course, Defendants relied upon this sequence of events as a basis for their response to the correspondence dated September 1, 2015, and September 9, 2015. The Court believes that Defendants' reliance upon the August 4, 2015 decision was justified and finds it hard to imagine that Defendants' response could be the basis for a damage claim by Plaintiffs.

19. Also, requests for information under 12 C.F.R. § 1024.36 must relate to the servicing of the mortgage loan.[1]

20. RESPA defines "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan ... and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3).

21. In the Amended Complaint, Plaintiffs do not refer to any requests for information relating to Defendants' receipt or application of their mortgage payments. Instead, the correspondence sent by Plaintiffs questions the reason for Defendants' denial of the loss mitigation application and alleges errors related thereto. None of these communications relate to the servicing of the loan as defined above. Thus, there is no viable claim for damages under 12 C.F.R. § 1024.36.

***4** 22. For these reasons, the Court finds that Plaintiffs' claims in the Third Count of the proposed Amended Complaint that are based on violations of 12 C.F.R. § 1024.36 would be futile.

iii. **Failure to Establish Policies and Procedures as set forth under 12 C.F.R. § 1024.38**

23. Count Three of Plaintiffs' Amended Complaint also alleges that Defendants have failed to establish policies and procedures reasonably designed to ensure the provision of accurate information regarding loss mitigation options and the proper evaluation of individual borrowers for these options. Plaintiffs allege that this failure violates 12 C.F.R. § 1024.38. (Amended Complaint, ¶¶ 62, 67). This claim was also raised for the first time in the proposed Amended Complaint.

24. RESPA directs mortgage servicers to maintain policies and procedures reasonably designed to provide accurate and timely information to borrowers about their loans, including information related to loss mitigation options. *See* 12 C.F.R. § 1024.38(b)(2). The question here is whether mortgage servicers should be subject to claims brought by borrowers under 12 C.F.R. § 1024.38 or is the oversight of the Consumer Financial Protection Bureau ("Bureau") enough to incentivize mortgage servicers to comply.

25. During the rulemaking process, the Bureau found that "supervision and enforcement by the Bureau and other Federal regulators for compliance with, and violations of, 12 C.F.R. § 1024.38, respectively, would provide robust consumer protection" and determined that no private right of action exists for borrowers. *See* 78 Fed. Reg. 10696, 10778–79 (Feb. 14, 2013).

26. The courts agree that only the Bureau has the power to enforce 12 C.F.R. § 1024.38.

27. For these reasons, the Court finds that Plaintiffs' claims in the Third Count of the proposed Amended Complaint that are based on violations of 12 C.F.R. § 1024.38 would be futile.

iv. **Failure to Provide Information required under 12 C.F.R. § 1024.41(d)**

28. Count Three of Plaintiffs' Amended Complaint also alleges that Defendants failed to list in the February 26, 2015 denial letter the various loan modification options for which Plaintiffs were reviewed, as well as the specific criteria they failed to satisfy. Plaintiffs contend that Defendants' actions violated 12 C.F.R. § 1024.41(d). (Amended Complaint, ¶¶ 26–27, 63).

29. In response, Defendants claim the denial letter properly lists each loss mitigation option for which Plaintiffs were reviewed, the reasons for the decision, and fully complies with the requirements of 12 C.F.R. § 1024.41(d). (Defendants' Opposition to Motion, ECF No. 18).

***5** 30. 12 C.F.R. § 1024.41(d) provides in pertinent part:

If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower...a servicer shall state in the notice sent to the borrower...the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria.

31. In promulgating 12 C.F.R. § 1024.41, the Bureau recognized consumers were often frustrated with the lack of information provided by servicers when issuing a loss mitigation decision. To assist consumer understanding and to effectuate the appeal, the Bureau determined that when a loan modification is denied due to investor requirements, the servicer must specify "the owner or assignee of the mortgage loan and the requirement that is the basis of the denial." *See* 78 Fed. Reg. 10696, 10830 (Feb. 14, 2013). Further, "a statement that the denial of a loan modification option is based on an investor requirement, without additional information specifically identifying...the specific applicable requirement, is insufficient." *Id.*

32. To assist consumers, the Bureau established a private right of action to "ensure that individual borrowers have the necessary tools" to "receive the benefit of [these] loss mitigation procedures." 78 Fed. Reg. at 10823. Borrowers may enforce the provisions of 12 C.F.R. § 1024.41 against a servicer pursuant to 12 U.S.C. § 2605(f), which provides in pertinent part that:

Whoever fails to comply with any provisions of this section shall be liable to the borrower for each such failure in the following amounts:

(1) In the case of any action by an individual, an amount equal to the sum of:

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000.

33. The denial letter identifies Hudson City Savings Bank as the investor and sets forth three separate loss mitigation programs for which Plaintiffs were reviewed: (1) loan modification; (2) cap to reinstate; and (3) repayment plan. (Amended Complaint, Ex. A).

34. In regard to the loan modification and cap to reinstate programs, the letter states that Wells Fargo did “not have the contractual authority to modify [Plaintiffs'] loan because of limitations in our servicing agreement.” In a subsequent letter dated May 12, 2015, (Amended Complaint, Ex. F), Wells Fargo also indicated that Plaintiffs could not qualify for a loan modification “that met investor guidelines.” The Court agrees with Plaintiffs' contention that these responses may lack the specificity required by 12 C.F.R. § 1024.41 and the Bureau's guidelines. Thus, it cannot conclude that claims based on these responses would be futile under 12 C.F.R. § 1024.41.
35. Defendants' statement in the February 26, 2015 denial letter that Plaintiffs did not qualify for repayment plan modification because doing so would conflict with the terms of Plaintiffs' bankruptcy plan or increase Plaintiffs' monthly mortgage payment is less troubling. At the time of this letter, Plaintiffs had filed four Chapter 13 plans, none of which referred to loan modification as the method of dealing with the mortgage debt. It would be futile for the Plaintiffs to claim that this response was inconsistent with 12 C.F.R. § 1024.41.
C. **VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT**
***6** 36. Count Four of Plaintiffs' Amended Complaint alleges that Wells Fargo is a debt collector under the FDCPA and made false, deceptive or misleading statements when it claimed to lack authority to modify Plaintiffs' loan and that it was unable to approve a loan modification that met investor guidelines. Plaintiffs contend these actions are prohibited under 15 U.S.C. § 1692e of the FDCPA. (Amended Complaint, ¶¶ 75–82). As the Court has acknowledged above, these specific responses may not have been in compliance with the Bureau's guidelines under 12 C.F.R. § 1024.41.
37. But, Defendants assert that they are not debt collectors as defined by the FDCPA because servicing of Plaintiffs' loan began prior to default and even if they were debt collectors, Plaintiffs have failed to show how Defendants engaged in any act prohibited by the FDCPA. (Defendants' Opposition to Motion, ECF No. 18). The FDCPA provides that a debt collector may not use “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e.
38. To prevail on a FDCPA claim, “a plaintiff must prove that: (1) she is a consumer; (2) the defendant is a debt collector; (3) the defendant's challenged practice involves an attempt to collect a ‘debt’ as the Act defines it; and (4) the defendant has violated a provision of the FDCPA in attempting to collect the debt.” *Jensen v. Pressler & Pressler*, 791 F.3d 413, 417 (3d Cir. 2015).
39. There is no dispute that Plaintiffs are consumers for purposes of the Court's review.
40. 15 U.S.C. § 1692a(6) of the FDCPA defines a “debt collector” as:
...any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another...the term includes any creditor, who, in the

process of collecting his own debt, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts...
41. Although Plaintiffs claim Wells Fargo is a debt collector under the FDCPA and is not the original lender, they do not allege that servicing of the loan by Wells Fargo began after the date of default.
42. When Congress enacted the FDCPA, it sought to protect consumers and remedy egregious collection practices by third parties. The legislative history shows that Congress' focus was not to punish creditors, whom it believed were generally "restrained by the desire to protect their good will when collecting past due accounts" or those who "collect[ed] a debt for another in an isolated instance." S. Rep. No. 382, 95TH Cong., 1ST Sess. 1977, at 2. Rather, Congress sought to reign in those unscrupulous independent debt collectors who "collect for others in the regular course of business" and are "often unconcerned with the consumer's opinion of them." S. Rep. No. 382, at 3. Thus, Congress did not define a debt collector as those "in house" collectors for creditors collecting debt owed them, banks collecting mortgage and student loan debt they had originated, or mortgage servicing companies who serviced loans that were not in default at the time they began servicing the loan. *Id.* at 3–4.
43. The FDCPA excludes from the definition of "debt collector" any person collecting or attempting to collect a debt due or owed to another, to the extent the activity "concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F). Courts have interpreted this to apply to mortgage servicing companies who begin servicing a loan prior to default. *See Slimm v. Bank of America Corporation,* 2013 WL 1867035, at *6 (D.N.J. May 2, 2013) (citing *Siwulec v. Chase Home Finance, LLC,* 2010 WL 5071353, at *2–3 (D.N.J. Dec. 7, 2010); *Stolba v. Wells Fargo & Co.,* 2011 WL 3444078, at *2 (D.N.J. Aug. 8, 2011).
***7** 44. In *Siwulec,* the court dismissed the plaintiff's FDCPA claim because she failed to sufficiently allege that her loan was in default at the time the defendant began servicing the loan. The court noted that "[w]hile Plaintiff is not required at this stage to know the exact date [servicer] began servicing of the loan, she is required to plead some facts—rather than no facts—that would raise her claim above the speculative level." 2010 WL 5071353, at *5–6.
45. Here, Plaintiffs have failed to allege their loan was in default at the time Defendants began servicing the loan and it is likely that it was not. For example, Plaintiffs allege their loan was sold shortly after its 2007 origination and Defendants' role has "always been as a servicer." (Amended Complaint, ¶¶ 10–14). As in *Slimm* and *Siwulec* above, Plaintiffs' failure to allege that the loan was in default when it was acquired by Wells Fargo is fatal to their FDCPA claim. 2013 WL 1867035; 2010 WL 5071353.
46. Plaintiffs also have failed to allege facts to support their claim that Defendants violated the FDCPA by engaging in prohibited practices in attempting to collect a debt.
47. Plaintiffs allege Wells Fargo violated the FDCPA when it advised that it lacked authority to modify Plaintiffs' loan and that it could not approve a loan modification

that met investor guidelines. This was not an attempt by Defendants to collect a debt from Plaintiffs. Indeed, the denial letter itself clearly states that “THIS IS NOT A BILL OR A REQUEST FOR PAYMENT AS TO THESE CUSTOMERS.” (Amended Complaint, Ex. A). Rather, the communication's sole purpose was to respond to Plaintiffs' loss mitigation request.

48. Plaintiffs' claims in the Fourth Count of the proposed Amended Complaint that are based on violations of the FDCPA are futile.

CONCLUSION

49. As the District Court noted, where a complaint is dismissed pursuant to Fed. R. Civ. P. 12(b)(6), a “court must permit a curative amendment, unless an amendment would be inequitable or futile.” *Alston v. Parker,* 363 F.3d 229, 235 (3d Cir. 2004).

50. Counts One, Two and Four of Plaintiffs' proposed Amended Complaint are futile for the reasons set forth above and the Court will not permit the filing of an amended complaint with respect to these claims.

51. With respect to Count Three, the Court has noted that Wells Fargo's responses regarding lack of authority to offer a loan modification due to limitations in the servicing agreement and failure to meet investor guidelines may not have satisfied the specificity requirements of 12 C.F.R. § 1024.41(d). Thus, the Court is unable to conclude based on the record that claims based on these responses would be futile. It is further noted that the damages for violations of 12 C.F.R. § 1024.41(d) are governed by 12 U.S.C. § 2605(f), and would be limited to any actual damage to Plaintiffs due to the lack of specificity in Wells Fargo's responses and, in the case of a pattern or practice of noncompliance, additional damages of no more than $2,000.[3]

52. Before any amendments are filed, the parties are directed to confer and schedule a conference call with the Court to discuss future proceedings and whether the stay pending appeal shall remain in effect.

All Citations

Not Reported in B.R. Rptr., 2016 WL 7115864

Footnotes

1

“A qualified written request that requests information relating to the servicing of the mortgage loan is a request for information for purposes of this section...” 12 C.F.R. § 1024.36(a) (emphasis added). *See, e.g., Hintz v. JPMorgan Chase Bank, N.A.,* 2011 WL 579339 at *8 (D. Minn. Feb. 8, 2011) (dismissing RESPA claim where communication did not identify errors in plaintiff's account or relate to servicing of the mortgage); *Bray v. Bank of Am.,* 2011 WL 30307, *12 (D.N.D. Jan 5, 2011) (dismissing RESPA claim where “none of the communications relate to the servicing of the loan as that term is defined by statute”); *Gates v. Wachovia Mortg., FSB,* 2010 WL 2606511, at *3 (E.D. Cal. June 28, 2010) (noting that “[c]ourts routinely interpret 12 U.S.C. § 2605(i)(3) as requiring [requests for information] to relate to the servicing of a loan, rather than the creation or modification of a loan”).

2
See *Andrade v. Carrington Mortg. Services, LLC,* 2015 WL 7108119, at *3 (W.D. Mich. Nov. 13, 2015) (borrowers do not have a private right of action under 12 C.F.R. § 1024.38); *Sharp v. Deutsche Bank Nat'l Trust Co.,* 2015 WL 4771291, at *6–7 (D.N.H. Aug. 11, 2015)(concluding that, based upon the Bureau's interpretation of 12 C.F.R. § 1024.38, a plaintiff has no private right to enforce the rule); *Deming–Anderson v. PNC Mortg.,* 2015 WL 4724805, at *40 (E.D. Mich. Aug. 10, 2015) (citing the Bureau's final rule, enforcement by the Bureau of provisions regarding servicing policies, procedures, and requirements provides sufficient consumer protection).

3
"A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA." 12 C.F.R. § 1024.41(a).

176 A.D.3d 1194
Supreme Court, Appellate Division, Second Department, New York.

M & **T** BANK, Respondent,

v.

Frank **BIORDI**, Appellant, et al., Defendants.

2017–043542017–11336(Index No. 11691/14)

Argued - May 20, 2019October 30, 2019

Synopsis

Background: Mortgagee commenced mortgage foreclosure action against mortgagor. On cross motions for summary judgment, the Supreme Court, Nassau County, Thomas A. Adams, J., granted mortgagee's motion, denied mortgagor's motion, and subsequently entered a judgment of foreclosure and sale. Mortgagor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

1 affidavits from mortgagee's assistant vice president and assistant treasurer were insufficient to establish compliance with default notice requirements;

2 mortgagor's bare denial of receipt of default notice was insufficient to establish his prima facie entitlement to judgment as a matter of law; and

3 mortgagor was entitled to a hearing on whether mortgagee negotiated in good faith before trial court ruled on his cross motion.

Reversed and remitted.

Attorneys and Law Firms

*****385*** Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York, N.Y. (Virginia K. Trunkes, Andrew I. Bart, Paul N. Gruber, and David B. Rosenbaum of counsel), for appellant.

Cohn & Roth, Mineola, N.Y. (Michael Nayar of counsel), for respondent.

CHERYL E. CHAMBERS, J.P., SHERI S. ROMAN, JEFFREY A. COHEN, COLLEEN D. DUFFY, JJ.

*****386*** DECISION & ORDER

****1194*** In an action to foreclose a mortgage, the defendant Frank **Biordi** appeals from (1) an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered February 8, 2017, and (2) an order and judgment of foreclosure and sale (one paper) of the same court entered September 8, 2017. The order entered February 8, 2017, granted the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant Frank **Biordi** and for an order of reference, and denied that defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against him. The order and judgment of foreclosure and sale granted the plaintiff's motion to confirm a referee's report and, inter alia, directed the foreclosure sale of the subject property.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the order and judgment of foreclosure and sale is reversed, on the law, the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant Frank **Biordi** and for an order of reference is denied, the cross motion of the defendant Frank **Biordi** is granted to the extent that the matter is remitted to the ***1195** Supreme Court, Nassau County, for further proceedings consistent herewith, and the order entered February 8, 2017, is modified accordingly; and it is further,
ORDERED that one bill of costs is awarded to the defendant Frank **Biordi**
The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho,* 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501[a][1]; *Matter of Aho,*39 N.Y.2d at 248, 383 N.Y.S.2d 285, 347 N.E.2d 647).

In August 2010, Frank **Biordi** (hereinafter the defendant) borrowed the sum of $750,000 from Hudson City Savings Bank (hereinafter Hudson City). The loan was memorialized by a note and secured by a mortgage encumbering certain residential property in Old Westbury. In December 2014, Hudson City commenced the instant action against the defendant, among others, to foreclose the mortgage. After the defendant interposed an answer, Hudson City moved, inter alia, for summary judgment on the complaint and for an order of reference. The defendant opposed the motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against him, inter alia, on the grounds that the plaintiff failed to comply with RPAPL 1304 and 1306 and failed to negotiate in good faith in violation of CPLR 3408(f). The plaintiff opposed the cross motion. By order entered February 8, 2017, the Supreme Court granted the plaintiff's motion and denied the defendant's cross motion. On September 8, 2017, the court entered an order and judgment of foreclosure and sale, granting the plaintiff's motion to confirm a referee's report and, inter alia, directing the foreclosure sale of the subject property. The defendant appeals.
***387** 123In a residential foreclosure action, a plaintiff moving for summary judgment must tender "sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304" (*Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d 95, 106, 923 N.Y.S.2d 609). "[P]roper service of RPAPL 1304notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d at 106, 923 N.Y.S.2d 609; *see Citibank, N.A. v. Wood,* 150 A.D.3d 813, 814, 55 N.Y.S.3d 109).
45A plaintiff may prove that it mailed the RPAPL 1304 notices ***1196** in accordance with the statute by proffering an affidavit of service from someone with personal knowledge of the mailing (*cf. U.S. Bank N.A. v. Henderson,* 163 A.D.3d 601, 603, 81 N.Y.S.3d 80). However, that is not the only method by which a residential foreclosure plaintiff may establish that it properly mailed the required notice (*see*

e.g. Flagstar Bank, FSB v. Mendoza, 139 A.D.3d 898, 900, 32 N.Y.S.3d 278). By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, " 'the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing,' which can be 'established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' " (*Bank of Am., N.A. v. Bittle,* 168 A.D.3d 656, 658, 91 N.Y.S.3d 234, quoting *Wells Fargo Bank, NA v. Mandrin,* 160 A.D.3d 1014, 1016, 76 N.Y.S.3d 182; *see Viviane Etienne Med. Care, P.C. v. Country–Wide Ins. Co.,* 25 N.Y.3d 498, 508–509, 14 N.Y.S.3d 283, 35 N.E.3d 451).

6Here, to establish its compliance with RPAPL 1304, the plaintiff relied upon the affidavit of an Assistant Vice President of Hudson City, who averred that a 90–day notice was sent in accordance with the statute to the last known address of the borrower, and if different, to the residence which is the subject of the 90–day notice, but did not attest to personal knowledge of the mailing or of Hudson City's mailing practices or procedures. Attached to the affidavit were copies of 90–day notices, bearing indicia of mailing by certified mail, but not first-class mail, and bearing no postmark or date of mailing. The plaintiff additionally submitted an affidavit of mailing of an Assistant Treasurer/Manager of Hudson City, who attested to the mailing of 90–day notices by first-class and certified mail, but did not attest to personal knowledge of the mailing and did not set forth any details regarding Hudson City's mailing practices or procedures. Since the plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 (*see Citibank, N.A. v. Conti–Scheurer,* 172 A.D.3d 17, 21, 98 N.Y.S.3d 273; *U.S. Bank N.A. v. Cope,* 175 A.D.3d 527, 529–530, 107 N.Y.S.3d 104; *U.S. Bank N.A. v. Henry,* 157 A.D.3d 839, 841, 69 N.Y.S.3d 656).

7The plaintiff additionally failed to demonstrate, prima facie, ***1197** its compliance with RPAPL 1306, a condition precedent to commencement of the action (*see* ****388** *Hudson City Savings Bank v. Seminario,* 149 A.D.3d 706, 707, 51 N.Y.S.3d 159).

Accordingly, the Supreme Court should have denied the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

8However, we agree with the Supreme Court's denial of that branch of the defendant's cross motion which was for summary judgment dismissing the complaint for failure to comply with RPAPL 1304. The defendant's bare denial of receipt of the RPAPL 1304 notice, without more, was insufficient to establish his prima facie entitlement to judgment as a matter of law (*see Citibank, N.A. v. Conti–Scheurer,* 172 A.D.3d at 24, 98 N.Y.S.3d 273).

9Finally, we find that the defendant's submissions in support of his cross motion raised a factual issue as to whether the plaintiff negotiated in good faith and deprived him of a meaningful opportunity to resolve the action through loan modification or other potential workout options (*see* CPLR 3408[f]). Under the circumstances, the court should have held a hearing to determine this issue before deciding the defendant's cross motion (*see* *U.S. Bank N.A. v. Fisher,* 169 A.D.3d 1089, 1092–1093, 95 N.Y.S.3d 114). Accordingly, we remit the matter to the Supreme Court, Nassau County, for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f) and, if it did not, to impose an appropriate remedy (*see* CPLR 3408[j]).

In light of our determination, we need not reach the defendant's remaining contention.

CHAMBERS, J.P., ROMAN, COHEN and DUFFY, JJ., concur.

All Citations

176 A.D.3d 1194, 111 N.Y.S.3d 384, 2019 N.Y. Slip Op. 07775

2017 WL 1424317
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

Scott NASH, Plaintiff,

v.

PNC BANK, N.A., d/b/a PNC Mortgage, Defendant.

Civil Action No. TDC-16-2910
Signed 04/20/2017

Attorneys and Law Firms

Ellery Johannessen, Goitein Law, LLC, Bethesda, MD, for Plaintiff.
Daniel Christopher Fanaselle, Ballard Spahr LLP, Philadelphia, PA, Daniel Joseph Tobin, Ballard Spahr LLP, Washington, DC, for Defendant.

MEMORANDUM OPINION

THEODORE D. CHUANG, United States District Judge

***1** After Plaintiff Scott Nash's mother passed away, the mortgage payments on her home lapsed. Nash, who lives in the home, sought a loan modification from Defendant PNC Bank ("PNC") in hopes of assuming the mortgage and finding a way to keep the property. PNC denied his application. Nash now brings this civil action against PNC, alleging that the explanation given for the denial of his loan modification was inadequate under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2617 (2012), and its implementing regulations, known as Regulation X, 12 C.F.R. §§ 1024.1-1024.41 (2016). Pending before the Court is PNC's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

Scott Nash's mother, Patricia Nash, owned real property located in Montgomery Village, Maryland (the "Property"). Patricia Nash passed away in September 2014, and Scott Nash ("Nash") was appointed the personal representative of her estate. The Property is encumbered by a Refinance Deed of Trust (the "Mortgage") in favor of PNC, which is the servicer of the Mortgage. After Patricia Nash's death, payments on the Mortgage lapsed. PNC initiated foreclosure proceedings in the Circuit Court for Montgomery County, Maryland. *See Ward v. Nash*, No. 405281-V (Md. Dist. Ct. filed May 21, 2015). Nash is contesting the foreclosure.

On or about March 23, 2016, Nash, through counsel, submitted a loan modification application to PNC pursuant to, among other grounds, the Home Affordable Modification Program ("HAMP"). PNC confirmed receipt of the application on March 24, 2016. On or about April 22, 2016, PNC sent a letter to Nash requesting

that he submit additional documentation by May 6, 2016. Nash, through counsel, submitted the additional paperwork on May 5, 2016. PNC acknowledged receipt of the documents the same day.

PNC denied Nash's loan modification application on June 3, 2016. The letter denying the application (the "Denial Letter"), which Nash attached to the Complaint, informed Nash that:

[Y]our assignee or mortgage owner, FEDERAL HOME LOAN BANK CINCINNATI, cannot approve your request for assistance for the:

- Making Home Affordable HAMP Modification because we service your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan for this alternative to foreclosure option.
- Making Home Affordable HAMP Tier II Modification because we service your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan for this alternative to foreclosure option.

Compl. Ex. 1 at 3, ECF No. 2-1. The Denial Letter informed Nash that he could dispute the denial of the HAMP modifications by sending an email to MHA_inquiry@pncmortgage.com or submitting a request in writing to an address in Miamisburg, Ohio. According to the Denial Letter, certain other types of loan modifications and hardship assistance were unavailable to Nash for the same reason the HAMP modifications were denied. Other forms of relief were denied for a variety of reasons, including the amount of unpaid principal remaining, PNC's inability to verify Nash's income "in conjunction with the assignee/mortgage owner or private mortgage insurance modification guidelines," Nash's failure to document a "temporary financial hardship that meets the guidelines set forth by the assignee/mortgage owner or private mortgage insurance company of your loan," and Nash's intent to retain the Property. *Id.* PNC informed Nash that he could appeal denials of the non-HAMP modifications and hardship assistance to a different office at the same address in Miamisburg, Ohio. It provided a third address, in Dayton, Ohio, to which Nash could send notice of errors in, or request information about, his account.

***2** On June 14, 2016, Nash, through counsel, sent a letter to the address provided for disputing denial of the HAMP modifications (the "Appeal Letter"). The Appeal Letter, a copy of which was attached to the Complaint, purported to be both an appeal of the HAMP modification denial and a Qualified Written Request ("QWR") under RESPA, 12 U.S.C. § 2605(e). In the Appeal Letter, Nash stated that PNC "failed to identify and provide copies of" the restrictions that PNC claimed to have necessitated the denial of Nash's HAMP modification. Compl. Ex. 2 at 3, ECF No. 2-2. Asserting that HAMP guidelines require a servicer to identify what applicable servicing or investor guidelines "make it unfeasible" to evaluate an

application for a HAMP modification, the Appeal Letter claimed that it was "inexplicable that, despite an obvious investor restriction, PNC still conducted the HAMP review only to deny the same." *Id.* The Appeal Letter noted that the Denial Letter did not report any efforts to convince Federal Home Loan Bank of Cincinnati ("FHLBC") to waive its restrictions, even though HAMP guidelines require a servicer to maintain records demonstrating that the servicer "made a reasonable effort to seek a waiver from the investor." *Id.*

On June 20, 2016, PNC transmitted a letter to Nash (the "Response Letter") stating that "an independent appeal review determined that the information provided in your complete Loss Mitigation Application was correctly evaluated for a loan modification according to PNC rules and your investor-provided guidelines." Compl. Ex. 3 at 2, ECF No. 2-3. Nash's appeal was therefore denied. Nash filed suit in the Circuit Court for Montgomery County, alleging that PNC violated RESPA because (1) the substance of the Denial Letter and the Response Letter was inadequate; and (2) PNC failed to comply with the requirements for processing a QWR. After PNC removed the case to this Court, Nash filed the Amended Complaint that is the subject of the pending Motion to Dismiss.

DISCUSSION

In its Motion to Dismiss, PNC asserts that Nash has failed to state a plausible claim for relief under RESPA because (1) Nash lacks standing because there is no private right of action under HAMP; (2) Nash has failed to state a claim under Regulation X because PNC's Denial Letter contained an adequate explanation for the denial of the HAMP loan modifications and did not have to identify the investor guidelines that barred consideration of such a modification; (3) the Appeal Letter does not constitute a Qualified Written Request within the meaning of RESPA and was not sent to the appropriate address; and (4) Nash has failed sufficiently to allege damages caused by the alleged violations.

Because a fair reading of the Amended Complaint does not support the conclusion that Nash is asserting a claim under HAMP directly, and establishes that Nash's claim arises under RESPA, PNC's standing argument fails. The Court addresses the remaining arguments in turn.

I. Legal Standard

To defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the complaint must allege enough facts to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when the facts pleaded allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Legal conclusions or conclusory statements do not suffice. *Id.* The Court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268

(1994); *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 268 (4th Cir. 2005).
Courts are permitted to consider documents attached to a complaint "so long as they are integral to the complaint and authentic." *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty.*, 684 F.3d 462, 467 (4th Cir. 2012) (quoting *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)). Accordingly, the Court considers the Denial Letter, the Appeal Letter, and the Response Letter, each of which was attached to the original Complaint and relied upon in the Amended Complaint and briefing on the Motion to Dismiss.

II. 12 C.F.R. § 1024.41(d)

***3** Congress enacted RESPA to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices" in the real estate mortgage industry, and to ensure "that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process." 12 U.S.C. § 2601(a). RESPA's implementing regulations, which are codified at 12 C.F.R. §§ 1024.1 to 1024.41 and known as "Regulation X," *see*12 C.F.R. § 1024.1, prescribe additional duties and responsibilities of mortgage servicers under RESPA. Under a provision of Regulation X entitled "Loss mitigation procedures," servicers of federally related mortgages must take certain steps when a borrower applies for loss mitigation measures, such as the loan modifications sought in this case. *See* 12 C.F.R. § 1024.41. As relevant here, "[i]f a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower," the servicer must state in the required notice to the borrower "the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification and, if applicable, that the borrower was not evaluated on other criteria." *Id.* § 1024.41(d). A borrower may enforce violations of this provision through a private cause of action pursuant to 12 U.S.C. § 2605(f). 12 C.F.R. § 1024.41(a).
In notifying Nash that his HAMP loan modification application had been denied, PNC stated that FHLBC could not approve his request for a modification because "we service your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan for this alternative to foreclosure option." Compl. Ex. 1 at 3. After Nash appealed the decision, PNC confirmed that his application was evaluated "according to PNC rules and your investor-provided guidelines." Compl. Ex. 3 at 1. According to Nash, 12 C.F.R. § 1024.41 required PNC "to provide a substantive response to Plaintiff's loan modification application, and specifically, to identify investor restrictions that prohibit a loan modification." Am. Compl. ¶ 20. PNC contends that the Denial Letter adequately stated the "specific reason or reasons" for its decision to deny Nash's application for a HAMP modification, and that 12 C.F.R. § 1024.41 does

not require a servicer to identify applicable investor restrictions that prohibit a loan modification.

Few courts have considered the scope of 12 C.F.R. § 1024.41(d) and what specifically must be provided to a borrower whose application for a loan modification is denied. Neither party has cited authority to direct the Court in determining whether the information included in the Denial Letter was sufficient. However, the Consumer Financial Protection Bureau ("CFPB") has released an "official Bureau interpretation" of 12 C.F.R. § 1024.41 that specifically addresses this question. *See* 12 C.F.R. Pt. 1024, Supp. I, § 41(d), cmt. 1. On February 14, 2013, the CFPB issued "Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)," a final rule that amended Regulation X to implement sections of the Dodd-Frank Wall Street Reform and Consumer Protection Act and included "a commentary that sets forth an official interpretation to the regulation." Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10696 (Feb. 14, 2013) [hereinafter, "Mortgage Servicing Rules"]. This commentary, published in the Code of Federal Regulations at 12 C.F.R. Pt. 1024, Supp. I, "is the primary vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation X." 12 C.F.R. Pt. 1024, Supp. I, Intro., cmt. 1. In its official interpretation of 12 C.F.R. § 1024.41(d), the CFPB stated:

If a trial or permanent loan modification option is denied because of a requirement of an owner or assignee of a mortgage loan, the specific reasons in the notice provided to the borrower must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial. *A statement that the denial of a loan modification option is based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient.*

***4** 12 C.F.R. Pt. 1024, Supp. I, § 41(d), cmt. 1 (emphasis added). In the Summary of the Rulemaking Process published in the Federal Register with the amendments to Regulation X and the official interpretations, the CFPB explained that the addition of this comment stemmed from its recognition of:

the consumer frustration resulting from servicer statements that investor requirements or net present value tests bar a loan modification option when the proper application of such purported requirements or tests may or may not actually result in such a determination. To assist consumer understanding, and to effectuate the appeal process, the Bureau believes that servicers that deny a loan modification on the basis of an investor requirement or net present value model must provide additional detail to support such statements.

Mortgage Servicing Rules, 78 Fed. Reg. at 10830.

Although the CFPB's commentary is not binding authority, courts have found its official interpretations to be "highly persuasive" when they fill "a gap in the text of Section 1024.41 and squarely address[ ] the factual situation described in the Complaint." *He v. Ocwen Loan Servicing, LLC*, No. 15-CV-4575(JS)(AKT), 2016 WL 3892405, at *2 (E.D.N.Y. July 14, 2016) (relying on the official interpretations of 12 C.F.R. § 1024.41(c) and (g)); *see also Sutton v. CitiMortgage, Inc.*, —— F. Supp. 3d ——, No. 16-Civ-1778 (KPF), 2017 WL 122989, at *6, *11 (S.D.N.Y. Jan. 12, 2017)(relying on the official interpretations of 12 C.F.R. §§ 1024.35 and 1024.36 and 12 U.S.C. § 2605(k)(l)(C)); *Zaychick v. Bank of America, N.A.*, No. 9:15-CV-80336-ROSENBERG, 2015 WL 4538813, at *2 (S.D. Fla. July 27, 2015) (relying on official commentary to 12 C.F.R. §§ 1024.35 and 1024.36found in the Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 60382-01 (Oct. 1, 2013)). *Cf. Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 (4th Cir. 2009) (stating that an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))). One court has specifically relied on the CFPB's official interpretation of 12 C.F.R. § 1024.41(d) to allow a plaintiff to proceed with an amended complaint asserting the precise claim before this Court: that a servicer violated 12 C.F.R. 1024.41(d) by providing only a general explanation that a loan modification was denied based on a failure to meet investor guidelines. *In re Wiggins*, No. 12-26993 (JKS), 2016 WL 7115864, at *5 (Bankr. D.N.J. Dec. 6, 2016).

In light of the CFPB's guidance that the denial of a loan modification option based on an investor requirement is "insufficient" if it does not provide "the specific applicable requirement" that was not met, the Court concludes that Nash has adequately alleged that the Denial Letter's explanation for denying his HAMP loan modification "may lack the specificity required by 12 C.F.R. 1024.41(d)." *See Wiggins*, 2016 WL 7115864, at *5. Accordingly, the Motion is denied as to the alleged violation of 12 C.F.R. § 1024.41(d).

III. QWR

***5** Asserting that his Appeal Letter constituted a QWR under RESPA, Nash claims that PNC failed to comply with RESPA's requirements for responding to a QWR. Under 12 U.S.C. § 2605, servicers of federally related mortgage loans owe to borrowers a duty to respond to QWRs seeking "information relating to the servicing of such loan." *Id.* § 2605(e). *See also id.* § 2602(1) (defining "federally related mortgage loan"). RESPA defines a QWR as a written correspondence that "includes, or otherwise enables the servicer to identify, the name and account of the borrower" and "includes a statement of the reasons for the belief of the

borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." *Id.* § 2605(e)(1)(B). Within 30 days of its receipt of a QWR, the servicer must conduct an appropriate investigation, take any necessary action, such as making appropriate corrections to the borrower's account, and provide a written response to the borrower providing any requested information, describing any corrections made, or explaining its reasons for failing to do so. *Id.* § 2605(e). A servicer that fails to comply with § 2605(e) (or any provision of § 2605) is liable for actual damages and, upon a finding of a "pattern or practice" of noncompliance by the servicer, up to $2,000 in statutory damages. *Id.* § 2605(f).

PNC argues that (1) the Appeal Letter did not qualify as a QWR because its substance did not concern the servicing of the Mortgage and (2) PNC had no obligation to respond to the Appeal Letter because it was not sent to the address PNC designated for receipt of QWRs. Nash argues that, in light of RESPA's broad consumer protection goals, the Court should view as a QWR his request for information about the denial of the loan modification, such as details on PNC's efforts to convince FHLBC to approve a loan modification. Nash further contends that even if the letter was not sent to PNC's address for receiving QWRs, the requirement that QWRs be directed to a specific address is irrational because it forces borrowers seeking to address different issues arising from the same servicer action, such as filing an appeal and requesting information, to send multiple, identical letters to different addresses.

The Court agrees with PNC that Nash's request for information relating to the denial of his HAMP loan modification application, including his request for a description of steps taken to convince FHLBC to approve a loan modification, was not a QWR within the meaning of RESPA, such that PNC was not required to provide a response that complied with the requirements of 12 U.S.C. § 2605(e). Section 2605(e) requires servicers to respond to QWRs seeking information "relating to the servicing of" the borrower's mortgage. 12 U.S.C. 2605(e)(1)(A). "Servicing" is defined in RESPA as:

> receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

Id. § 2605(i)(3). Courts have repeatedly held that requests for information related to loan modifications do not concern "servicing" and therefore are not QWRs. *See, e.g.*, *Sirote v. BBVA Compass Bank*, 857 F. Supp. 2d 1213, 1221-22 (N.D. Ala. 2010) ("Courts routinely interpret section 2605 as requiring a QWR to relate to the *servicing* of a loan, rather than the *creation* or *modification*of a loan."

(quoting *Gates v. Wachovia Mortg, FSB*, No. 2:09-cv-02464-FCD/EFB, 2010 WL 2606511, at *3 (E.D. Cal. June 28, 2010))), *aff'd*, 462 Fed.Appx. 888 (11th Cir. 2012); *see also**Hudgins v. Seterus, Inc.*, 192 F. Supp. 3d 1343, 1349-51 (S.D. Fla. 2016) (noting that "[a] number of courts have held that inquiries about a loan modification do not relate to 'servicing' within the meaning of § 2605" and holding the same); *Bullock v. Ocwen Loan Servicing*, No. PJM-14-3836, 2015 WL 5008773 at *10 (D. Md. Aug. 20, 2015) ("[A] request for information about loan modification does not constitute a QWR."); *Mbakpuo v. Wells Fargo Bank, N.A.*, No. RWT-13-2213, 2015 WL 4485504, at *7-8 (D. Md. July 21, 2015) (holding that a series of letters contending that Wells Fargo improperly denied the plaintiff's request for a HAMP modification were not QWRs); *Van Egmond v. Wells Fargo Home Mortg.*, No. SACV-12-0112, 2012 WL 1033281, at *4 (C.D. Cal. Mar. 21, 2012) (stating that the defendant was "not obligated" to respond to the plaintiff's requests for information concerning the denial of his loan modification application because they did not concern "servicing"). *Cf. Martini v. JPMorgan Chase Bank*, 634 Fed.Appx. 159, 164 (6th Cir. 2015) ("Loan modification requests do not qualify as QWRs because they do not relate to the loan's servicing."). Consequently, PNC was not required to comply with the QWR requirements of § 2605(e) in responding to Nash's Appeal Letter requesting information about the denial of his loan modification application.

***6** The comparatively broad language found in 12 C.F.R. § 1024.36(a), which addresses QWRs seeking information, does not alter this conclusion. That regulation states that a servicer shall provide a response to "any written request for information from a borrower that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and states the information the borrower is requesting with respect to the borrower's mortgage loan."12 C.F.R. § 1024.36(a). Nash argues that the Appeal Letter sought information "with respect to the borrower's mortgage loan," thus obligating PNC to respond within the QWR requirements, even if the Appeal Letter did not concern "servicing" as required of a QWR under 12 U.S.C. § 2605(e). This argument fails because the language in a regulation cannot be read to broaden the scope of the statutory definition of "servicing" or to expand the types of requests for information constituting a QWR beyond those established by the statute. *See, e.g.*, *Smallwood v. Bank of America, N.A.*, No. 1:15-cv-336, 2015 WL 7736876, at *7 n.13 (S.D. Ohio Dec. 1, 2015) (declining to read 12 C.F.R. § 1024.36 to expand the definition of "servicing" under RESPA). Accordingly, reference to 12 C.F.R. § 1024.36 cannot transform a request for information about a loan modification into a QWR. *Bracco v. PNC Mortgage*, No. 8:16-cv-1640-T-33TBM, 2016 WL 4507925, at *4 (M.D. Fla. Aug. 29, 2016)("Regulation X's requirements governing a servicer's response to loss mitigation applications are found in § 1024.41, not §

1024.36(c).”); *Hudgins*, 192 F. Supp. 3d at 1351 (holding that a request for loan modification information does not suffice to bring a claim under RESPA “if premised on a failure to comply with § 1024.36(d)(2)(i)(B) of Regulation X”). Thus, 12 C.F.R. § 1024.36 did not mandate that PNC treat the Appeal Letter as a QWR and respond pursuant to the requirements of 12 U.S.C. § 2605(e).

Likewise, the Appeal Letter does not qualify as a “notice of error,” a form of QWR described in 12 C.F.R. § 1024.35. That section imposes a duty upon servicers to respond to notices informing the servicer of particular specified categories of “covered errors.” 12 C.F.R. § 1024.35(b). Upon receipt of a notice of a covered error, a servicer must investigate the borrower’s assertions and provide a response within the specified time, which depends upon the nature of the alleged error. *See* 12 C.F.R. § 1024.35(e). Failure to comply with the requirements of 12 C.F.R. § 1024.35 is enforceable by private action under 12 U.S.C. 2605. *See Lage v. Ocwen Loan Servicing LLC*, 839 F.3d 1003, 1007 (11th Cir. 2016) (stating that there is a private right of action to enforce 12 C.F.R. § 1024.35under 12 U.S.C. § 2605). *But see Miller v. HSBC Bank U.S.A., N.A.*, No. 13-Civ-7500, 2015 WL 585589, at *11 (S.D.N.Y. Feb. 11, 2015) (stating that 12 C.F.R. § 1024.35 does not provide a private right of action for damages).

The “failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by 12 C.F.R. 1024.39,” which identifies information that a servicer must provide to a delinquent borrower within 45 days of delinquency, is a form of covered error. *See* 12 C.F.R. 1024.35(b)(7). However, courts have held that a claim that a loss mitigation application was improperly denied, or that the information provided about such a denial was inadequate, is not a “covered error” under 12 C.F.R. § 1024.35(b). *See Sutton*, 2017 WL 122989, at *15 (“RESPA (through Regulation X) regulates many aspects of loss mitigation practices, but does not regulate the correctness of a loss mitigation decision, and certainly does not encompass errors in loss mitigation decisions within the catch-all provision in the definition of ‘covered errors.’ ”); *Farraj v. Seterus, Inc.*, No.15-cv-11878, 2015 WL 8608906, at *3-4 (E.D. Mich. Dec. 14, 2015) (holding that failure to provide the calculations leading to denial of a HAMP modification is not a “covered error” under 12 C.F.R. § 1024.35); *Wiggins v. Hudson City Sav. Bank*, No. 15-01938 (JKS), 2015 WL 4638452, at *8 (D.N.J. Bankr. Aug. 4, 2015) (holding that a claim that a borrower disagrees with a loan modification decision is not a “notice of error” under 12 C.F.R. 1024.35). If a borrower believes that the denial of a loan modification application is incorrect or that the information provided was insufficient, the remedy is to “challenge it by invoking the appeals process of § 1024.41(h),” just as Nash did, not by pursuing “the error resolution process of § 1024.35(b).” *Wiggins*, 2015 WL 4638452, at *8. Thus, Nash has failed to state a

plausible claim that the Appeal Letter was a QWR asserting a "notice of error" that required PNC to satisfy the specific requirements for responding to that form of QWR.

***7** Finally, the Court considers PNC's alternative argument for dismissal of the QWR claim, that Nash did not mail the Appeal Letter to the address designated by PNC for QWRs. PNC notes that every page of the Denial Letter provides an address in Dayton, Ohio for a borrower to send a "written request/notice" to "request information or notify [PNC] of an error regarding your account." *See* Compl. Ex. 1. The Appeal Letter, however, reflects that it was sent to the separate address in Miamisburg, Ohio designated for disputes regarding loan modifications under the HAMP program.

By regulation, a servicer may "by written notice provided to a borrower, establish an address that a borrower must use to request information in accordance with the procedures in this section." 12 C.F.R. § 1024.36(b). The notice "shall include a statement that the borrower must use the established address to request information." *Id.* Based on this regulation, courts have held that where such an address has been designated for the receipt of QWRs, the failure to send a request for information to that address is fatal to a claim under RESPA. *See, e.g.*, *Roth v. CitiMortgage, Inc.*,756 F.3d 178, 181-82 (2d Cir. 2014); *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1149 (10th Cir. 2013). *Cf. Lupo v. JPMorgan Chase Bank, N.A.*, No. DKC-14-0475, 2015 WL 5714641, at *6 (D. Md. Sept. 28, 2015) (granting summary judgment to the defendant where the plaintiff failed to establish that the request for information was sent to the address designated for QWRs).

Unlike in those cases, however, neither the Amended Complaint nor the exhibits establish that PNC provided notice to Nash that he "must use the established address to request information." 12 C.F.R. § 1024.36(b). The purported notice of a designated QWR address identified by PNC is the statement in the Denial Letter: "To request information or notify us of an error regarding your account, please send a written request/notice to: PNC Mortgage, P.O. Box 8807, Dayton, OH 45401-8807." Compl. Ex. 1 at 2. This statement did not explicitly identify this address as the designated address for borrowers to send QWRs within the meaning of RESPA. It in no way provided notice that a QWR must be sent to this address in order to qualify as a QWR. Such notice was particularly necessary where there were other addresses provided in the Denial Letter. By contrast, in *Roth*, the notice of a designated QWR address explicitly stated:

PURSUANT TO § 6 OF RESPA, A "QUALIFIED WRITTEN REQUEST" REGARDING THE SERVICING OF YOUR LOAN MUST BE SENT TO THIS ADDRESS: CITIMORTGAGE, INC. ATTN: CUSTOMER RESEARCH TEAM, PO BOX 9442, GAITHERSBURG, MD 20898-9442. A "qualified written

request" is written correspondence, other than notice on a payment coupon or statement, which includes your name, account number and the reason(s) for the request.
Roth, 756 F.3d at 182. Because PNC did not provide notice that all QWRs "must" be sent to the designated address, the failure to send the Appeal Letter to the Dayton, Ohio address does not disqualify it as a QWR. 12 C.F.R. 1024.36(b). Nevertheless, because the Appeal Letter's request for information about Nash's loan modification denial did not relate to servicing and otherwise did not constitute a QWR in any form, the Court will dismiss Nash's RESPA claim arising from the alleged failure properly to respond to a QWR pursuant to 12 U.S.C. § 2605(e), 12 C.F.R. § 1024.36, or 12 C.F.R. § 1024.35.

IV. Damages

PNC further argues that Nash has failed to state a claim because he has not sufficiently pleaded damages, either actual damages caused by any alleged violation of RESPA or a "pattern or practice" of noncompliance with RESPA that would warrant statutory damages. The Court agrees that Nash's claim that PNC sent a single allegedly deficient letter does not establish a "pattern or practice" of noncompliance. *See Bulmer v. MidFirst Bank, FSA*, 59 F. Supp. 3d 271, 279 (D. Mass. 2014) (holding that failure to respond to one QWR does not demonstrate a pattern or practice of noncompliance); *Galante v. Ocwen Loan Servicing, LLC*, No. ELH-13-1939, 2014 WL 3616354, at *34 (D. Md. July 18, 2014) (holding that the plaintiffs failed to "identify any actionable pattern or practice" where the complaint alleged a single instance of noncompliance).

***8** With respect to actual damages, Nash has pled sufficient detail to state a claim under RESPA. Nash alleges damages of $7,000 consisting of expenses for "yard maintenance, electric and water bills, and other miscellaneous repairs" incurred during the time period when the inadequate explanation of the reason for the denial of his loan modification caused him to continue to maintain the Property under the false hope that a loan modification could be secured. Am. Compl. ¶¶ 26-27. Drawing all reasonable inferences in favor of Nash, as is required at the this stage of the proceedings, the Court finds that Nash has adequately alleged that PNC's failure to provide sufficient detail about the reasons for the denial caused him to incur these expenses. Courts have denied motions to dismiss based on considerably less detailed, more tenuous claims. *See**Mellentine v. Ameriquest Mortg. Co.*, 515 Fed.Appx. 419, 425 (6th Cir. 2014) (finding that plaintiffs adequately pleaded damages by stating that the defendant's alleged violation of RESPA caused "damages in an amount not yet ascertained, to be proven at trial"); *Bennett v. Bank of America, N.A.*, 126 F. Supp. 3d 871, 880-81 (E.D. Ky. 2015) (finding that the plaintiffs adequately alleged damages where the provision of inadequate information "hindered their ability to evaluate their past and present loss mitigation

options based on the actual investor guidelines"); *Colonial Sav., FA v. Gulino*, No. CV-09-1635-PHX-GMS, 2010 WL 1996608, at *7 (D. Ariz. May 19, 2010) (finding that the plaintiffs sufficiently alleged damages stemming from a violation of RESPA by claiming that the refusal to respond to requests for information "creates uncertainty as to the validity of the title to their property"). Accordingly, the Court will not dismiss the Complaint on this basis.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The Motion is DENIED as to Nash's claim under 12 C.F.R. § 1024.41(d), as enforceable through 12 U.S.C. § 2605(f), that the Denial Letter provided inadequate information about the reason for the denial of his HAMP loan modification application.

The Motion is GRANTED as to Nash's claims that PNC violated the requirements for responding to a QWR under 12 U.S.C. § 2605(e), 12 C.F.R. § 1024.35, and 12 C.F.R. § 1024.36. A separate Order shall issue.

All Citations

Not Reported in Fed. Supp., 2017 WL 1424317

135 A.D.3d 827 (2016)
24 N.Y.S.3d 144
2016 NY Slip Op 00340

LaSALLE BANK, N.A., as Trustee for MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-4 MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-4, Appellant,

v.

BRIAN DONO, Respondent, et al., Defendants.

2015-00285, Index No. 4422/09.

Appellate Division of the Supreme Court of New York, Second Department.

Decided January 20, 2016.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Spinner, J.), dated August 12, 2014, which, after settlement conferences pursuant to CPLR 3408, granted the motion of the defendant Brian Dono to impose a sanction upon it for its failure to negotiate in good faith pursuant to CPLR 3408(f), abated all interest, disbursements, costs, and attorney's fees that had accrued during the period between October 1, 2010, and the date of the order, and permanently barred the plaintiff from collecting any interest, disbursements, costs, or attorney's fees absent further court order.

Eng, P.J., Mastro, Cohen and Miller, JJ., concur.

Ordered that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof permanently barring the plaintiff from collecting any interest, disbursements, costs, or attorney's fees absent further court order; as so modified, the order is affirmed, with costs to the defendant Brian Dono.

828 The plaintiff (hereinafter the Bank) commenced this action *828 to foreclose a residential mortgage after the defendant Brian Dono (hereinafter the homeowner) defaulted. The homeowner subsequently submitted an application for a loan modification in October 2010. Over the next 40 months, the Bank made numerous requests for various additional documentation, including requests for documentation that had already been provided, and required the homeowner to complete numerous additional loan modification applications to two different loan servicers. At least 24 separate court appearances were held during this period, and the Bank repeatedly failed to comply with court directives requiring it to turn over certain documentation to the homeowner.

In February 2014, the Bank transmitted a loan modification offer to the homeowner. The homeowner did not accept the offer on the ground that it was unconscionable on its face and failed to comply with certain federal guidelines. The homeowner made a counteroffer, but the Bank refused to consider it, responding that it would not negotiate the terms of the loan modification.

The homeowner thereafter moved to impose a sanction upon the Bank for its failure to negotiate in good faith as required by CPLR 3408 (f). The Supreme Court concluded that the homeowner demonstrated

that the Bank failed to negotiate in good faith and imposed a sanction. The court abated all interest, disbursements, costs, and attorney's fees that had accrued during the period between October 1, 2010, and August 12, 2014, the date of the order. The court further directed that the Bank was permanently barred from collecting any interest, disbursements, costs, or attorney's fees in the future absent a further court order. We modify.

Pursuant to CPLR 3408 (f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution (*see* CPLR 3408 [f]; *U.S. Bank N.A. v Smith,* 123 AD3d 914, 916 [2014]). "`The purpose of the good faith requirement [in CPLR 3408] is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution'" (*US Bank N.A. v Sarmiento,* 121 AD3d 187, 200 [2014], quoting Governor's Program Bill Mem No. 46R, Bill Jacket, L 2009, ch 507 at 11). To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408 (f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (*US Bank N.A. v Sarmiento,* 121 AD3d at 203; *see U.S. Bank N.A. v Smith,* 123 AD3d at 916).

829 *829 Here, contrary to the Bank's contention, the totality of the circumstances support the Supreme Court's conclusion that it failed to negotiate in good faith. The homeowner's submissions demonstrated that the Bank, among other things, engaged in dilatory conduct by "making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided" (*Onewest Bank, FSB v Colace,* 130 AD3d 994, 996 [2015]; *see US Bank N.A. v Sarmiento,* 121 AD3d at 204). The Bank failed to offer any evidence in opposition to the homeowner's motion and did not controvert the homeowner's account of the mandatory settlement negotiations. Accordingly, under the circumstances, the Supreme Court properly concluded that the Bank violated CPLR 3408 (f) by failing to negotiate in good faith (*see U.S. Bank N.A. v Smith,* 123 AD3d at 916; *US Bank N.A. v Williams,* 121 AD3d 1098, 1102 [2014]; *US Bank N.A. v Sarmiento,* 121 AD3d at 204-205; *see also Onewest Bank, FSB v Colace,* 130 AD3d 994, 996 [2015]).

The Bank further contends that the Supreme Court erred in imposing the sanction. "Courts are authorized to impose sanctions for violations of CPLR 3408 (f)" (*U.S. Bank N.A. v Smith,* 123 AD3d at 917; *see Bank of Am., N.A. v Lucido,* 114 AD3d 714, 715 [2014]). However, "CPLR 3408 (f) does not set forth any specific remedy for a party's failure to negotiate in good faith" (*Wells Fargo Bank, N.A. v Meyers,* 108 AD3d 9, 19 [2013]). "In the absence of specific guidance ... as to the appropriate sanctions or remedies to be employed where a party is found to have violated its obligation to negotiate in good faith pursuant to CPLR 3408 (f), the courts have resorted to a variety of alternatives in an effort to enforce the statutory mandate to negotiate in good faith" (*Wells Fargo Bank, N.A. v Meyers,* 108 AD3d 9, 20 [2013]; *see U.S. Bank N.A. v Smith,* 123 AD3d at 917).

Here, the Supreme Court providently exercised its discretion in imposing a sanction that abated all interest, disbursements, costs, and attorney's fees that had accrued during the period between October 1, 2010, and August 12, 2014, the date of the order, since that period corresponds to the period during which the Supreme Court concluded that the Bank had failed to negotiate in good faith (*see U.S. Bank N.A. v Smith,* 123 AD3d at 917; *US Bank N.A. v Williams,* 121 AD3d at 1102). However, the Supreme Court improvidently exercised its discretion to the extent that it imposed a sanction permanently barring the Bank from collecting any interest, disbursements, costs, or attorney's fees in the future absent
830 further court order (*see US* *830 *Bank N.A. v Williams,* 121 AD3d at 1102-1103). Accordingly, we modify

the order appealed from by deleting the provision permanently barring the Bank from collecting any interest, disbursements, costs, or attorney's fees in the future absent further court order.

169 A.D.3d 1089
Supreme Court, Appellate Division, Second Department, New York.

U.S. BANK NATIONAL ASSOCIATION, etc., Respondent,

v.

Robert I. FISHER, etc., Appellant, et al., Defendants.

2016–041212016–04122(Index No. 650/13)
Argued—March 6, 2018February 27, 2019

Synopsis

Background: Mortgagee brought foreclosure action against mortgagor on residential property. The Supreme Court, Nassau County, Thomas A. Adams, J., granted mortgagee's motion for summary judgment and denied mortgagor's cross motion to impose sanctions for failing to negotiate in good faith. Mortgagor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

1 mortgagee established its standing to commence foreclosure action;

2 mortgagee failed to establish that it served statutorily-required mortgage default notice upon mortgagor; and

3 mortgagor was entitled to hearing on whether mortgagee failed to negotiate in good faith before proceeding with litigation.

Reversed and vacated.

Attorneys and Law Firms

Berger, Fischoff & Shumer, LLP, Syosett, N.Y. (Gabrielle D. Wasenius of counsel), for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains, N.Y. (Jessica J. Yoo and Geraldine Cheverko of counsel), for respondent.

RUTH C. BALKIN, J.P., SHERI S. ROMAN, ROBERT J. MILLER, VALERIE BRATHWAITE NELSON, JJ.

DECISION & ORDER

***1089** In an action to foreclose a mortgage, the defendant Robert I. **Fisher** appeals from (1) an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered November 18, 2015, and (2) an order of the same court entered November 19, 2015. The order entered November 18, 2015, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Robert I. **Fisher** and for an order of reference, and denied the cross motion of that defendant, inter alia, to impose a sanction upon the plaintiff for failing to negotiate in good faith as required by CPLR 3408(f). The order entered November 19, 2015, insofar as appealed from, granted and denied the same relief as the order entered November 18, 2015, and appointed a referee to compute the amount due on the mortgage loan.

ORDERED that the appeal from the order entered November 18, 2015, is dismissed, as that order was superseded by the order entered November 19, 2015; and it is further,

ORDERED that the order entered November 19, 2015, is reversed insofar as appealed from, on the law, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant Robert I. **Fisher** and for an order of reference are denied, that defendant's ***1090*** cross motion is granted to the extent that the matter is remitted to the Supreme Court, Nassau County, for further proceedings consistent herewith, and the order entered November 18, 2015, is vacated; and it is further,
ORDERED that one bill of costs is awarded to the defendant Robert I. **Fisher**.
The plaintiff commenced this action against, among others, the defendant Robert I. **Fisher** and his now-deceased wife, seeking to foreclose the mortgage on their home in Locust Valley. **Fisher** joined issue by verified answer, in which he raised affirmative defenses, including lack of standing and, in effect, failure to comply ***117*** with statutory notice requirements. The plaintiff and **Fisher** subsequently participated in statutorily mandated settlement conferences, meeting 11 times over the course of approximately 19 months, until the final conference, at which the plaintiff reported that the application for a loan modification had been denied due to “lack of affordability.”
The plaintiff moved, inter alia, for summary judgment on the complaint and for an order of reference. **Fisher** opposed the motion and cross-moved, inter alia, to impose a sanction upon the plaintiff for failing to negotiate in good faith as required by CPLR 3408(f).

The Supreme Court, inter alia, granted those branches of the plaintiff's motion and denied that branch of **Fisher's** cross motion. **Fisher** appeals.
1234We agree with the Supreme Court's determination that the plaintiff established its standing to commence this action. Where, as here, the plaintiff's standing is placed in issue by a defendant, the plaintiff must prove its standing as part of its prima facie showing (*see JPMorgan Chase* ***Bank****, N.A. v. Weinberger,* 142 A.D.3d 643, 644, 37 N.Y.S.3d 286; ***U.S****.* ***Bank****, N.A. v. Collymore,* 68 A.D.3d 752, 753, 890 N.Y.S.2d 578). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it was the holder or assignee of the underlying note at the time the action was commenced (*see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d 355, 361, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Deutsche* ***Bank*** *Natl. Trust Co. v. Brewton,* 142 A.D.3d 683, 684, 37 N.Y.S.3d 25).

Either a written assignment of the underlying note or the physical delivery of the note is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident (*see JPMorgan Chase* ***Bank****, N.A. v. Weinberger,* 142 A.D.3d at 644, 37 N.Y.S.3d 286; ***U.S****.* ***Bank****, N.A. v. Collymore,* 68 A.D.3d at 753, 890 N.Y.S.2d 578).
56Here, a copy of the underlying note, which was endorsed in blank, was annexed to the complaint. Thus, the plaintiff established, prima facie, that it had standing to commence the action by demonstrating that it had physical possession of the ***1091*** note when it commenced the action (*see Wells Fargo* ***Bank*** *N.A. v. Frankson,* 157 A.D.3d 844, 845, 66 N.Y.S.3d 529; ***Bank*** *of N.Y. Mellon v.*

Burke, 155 A.D.3d 932, 933, 64 N.Y.S.3d 114; *Wells Fargo* ***Bank****, N.A. v. Thomas,* 150 A.D.3d 1312, 1313, 52 N.Y.S.3d 894; *Deutsche* ***Bank*** *Natl. Trust Co. v. Logan,*146 A.D.3d 861, 862, 45 N.Y.S.3d 189). Contrary to **Fisher's** contention, there is no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it (*see* UCC 3–204[2]; *Wells Fargo* ***Bank****, N.A. v. Thomas,* 150 A.D.3d at 1313, 52 N.Y.S.3d 894; *Deutsche* ***Bank*** *Natl. Trust Co. v. Logan,* 146 A.D.3d at 863, 45 N.Y.S.3d 189; *JPMorgan Chase* ***Bank****, N.A. v. Weinberger,* 142 A.D.3d at 645, 37 N.Y.S.3d 286). "Further, where the note is affixed to the complaint, 'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date' " (*Deutsche* ***Bank*** *Natl. Trust Co. v. Logan,* 146 A.D.3d at 863, 45 N.Y.S.3d 189, quoting *JPMorgan Chase* ***Bank****, N.A. v. Weinberger,* 142 A.D.3d at 645, 37 N.Y.S.3d 286; *see Aurora Loan Servs., LLC v. Taylor,* 25 N.Y.3d at 362, 12 N.Y.S.3d 612, 34 N.E.3d 363; *HSBC* ***Bank*** *USA, N.A. v. Ozcan,* 154 A.D.3d 822, 824, 64 N.Y.S.3d 38; *Wells Fargo* ***Bank****, N.A. v. Thomas,* 150 A.D.3d at 1313, 52 N.Y.S.3d 894). In opposition, **Fisher** failed to raise a triable issue of fact as to whether the plaintiff had standing (*see* *****118*** *JPMorgan Chase* ***Bank****, N.A. v. Weinberger,* 142 A.D.3d at 645, 37 N.Y.S.3d 286; *Flagstar* ***Bank****, FSB v. Mendoza,* 139 A.D.3d 898, 900, 32 N.Y.S.3d 278).

7RPAPL 1304(1), which applies to home loans, provides that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, ... including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." The statute sets forth the requirements for the content of such notice (*see* RPAPL 1304[1]), and provides that such notice must be sent by registered or certified mail and by first-class mail to the last known address of the borrower and to the subject residence (*see*RPAPL 1304[2]). "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (*Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d 95, 106, 923 N.Y.S.2d 609; *see Wells Fargo* ***Bank****, N.A. v. Lewczuk,* 153 A.D.3d 890, 891–892, 61 N.Y.S.3d 244; *Citibank, N.A. v. Wood,* 150 AD3d 813, 814; *Flagstar* ***Bank****, FSB v. Damaro,* 145 A.D.3d 858, 860, 44 N.Y.S.3d 128).

8Here, the plaintiff failed to demonstrate, prima facie, its strict compliance with RPAPL 1304 (*see Wells Fargo* ***Bank****, N.A v. Trupia,* 150 A.D.3d 1049, 1050, 55 N.Y.S.3d 134; *Citibank, N.A. v. Wood,* 150 A.D.3d at 814, 55 N.Y.S.3d 109). The plaintiff submitted the affidavit ****1092*** of Sherry Benight, an officer of the plaintiff's loan servicer, Select Portfolio Servicing, Inc. (hereinafter SPS), stating that her review of records maintained by SPS revealed that a "[ninety-day pre-foreclosure notice] dated September 13, 2012, ... was sent to Borrower(s) by certified and first class mail." A copy of the notice to **Fisher** was annexed to Benight's affidavit, which contained a bar code with a 20–digit number below it, but no language indicating that a mailing was done by first-class or certified mail, or even that a mailing was done by the U.S. Postal Service (*see* ***Bank*** *of N.Y. Mellon v. Zavolunov,* 157 A.D.3d

754, 756, 69 N.Y.S.3d 356; *Wells Fargo* ***Bank****, N.A. v. Lewczuk,* 153 A.D.3d at 892, 61 N.Y.S.3d 244; *Wells Fargo* ***Bank****, N.A v. Trupia,* 150 A.D.3d at 1050, 55 N.Y.S.3d 134). Further, Benight did not make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (*see* ***Bank*** *of N.Y. Mellon v. Zavolunov,* 157 A.D.3d at 757, 69 N.Y.S.3d 356; *Wells Fargo* ***Bank****, N.A. v. Lewczuk,* 153 A.D.3d at 892, 61 N.Y.S.3d 244; *Wells Fargo* ***Bank****, N.A v. Trupia,* 150 A.D.3d at 1050, 55 N.Y.S.3d 134; *Citibank, N.A. v. Wood,* 150 A.D.3d at 814, 55 N.Y.S.3d 109; *CitiMortgage, Inc. v. Pappas,* 147 A.D.3d 900, 901, 47 N.Y.S.3d 415). Since the plaintiff failed to establish, prima facie, that it strictly complied with the requirements of RPAPL 1304, the Supreme Court should have denied those branches of its motion which were for summary judgment on the complaint insofar as asserted against **Fisher** and for an order of reference, regardless of the sufficiency of the opposing papers (*see****Bank*** *of N.Y. Mellon v. Zavolunov,* 157 A.D.3d at 754, 69 N.Y.S.3d 356; *Wells Fargo* ***Bank****, N.A. v. Lewczuk,* 153 A.D.3d at 892, 61 N.Y.S.3d 244; *Wells Fargo* ***Bank****, N.A v. Trupia,* 150 A.D.3d at 1051, 55 N.Y.S.3d 134; *Citibank, N.A. v. Wood,* 150 A.D.3d at 814, 55 N.Y.S.3d 109).

9In addition, the Supreme Court should not have denied **Fisher's** cross motion without first conducting a hearing on the issue of whether the plaintiff negotiated in good faith as required by CPLR 3408(f). CPLR 3408(f) requires the parties *****119*** to a residential foreclosure action to attend settlement conferences at an early stage of the litigation, at which they must "negotiate in good faith to reach a mutually agreeable resolution." In support of his cross motion, **Fisher** submitted evidence that the plaintiff "engaged in dilatory conduct by making piecemeal document requests, providing contradictory information, and repeatedly requesting documents which had already been provided" (*Deutsche* ***Bank*** *Natl. Trust Co. v. Varelis,* 151 A.D.3d 934, 935, 54 N.Y.S.3d 703; *see Aurora Loan Servs., LLC v. Diakite,* 148 A.D.3d 662, 663, 48 N.Y.S.3d 490; *LaSalle* ***Bank****, N.A. v. Dono,* 135 A.D.3d 827, 829, 24 N.Y.S.3d 144; *Onewest* ***Bank****, FSB v. Colace,* 130 A.D.3d 994, 996, 15 N.Y.S.3d 109).

Since **Fisher's** submissions raise a factual issue as ****1093*** to whether the plaintiff negotiated in good faith and deprived him of a meaningful opportunity to resolve the action through loan modification or other potential workout options (*see* CPLR 3408[f]), the court should have held a hearing to determine this issue before deciding the plaintiff's motion (*see Onewest* ***Bank****, FSB v. Colace,*130 A.D.3d at 996, 15 N.Y.S.3d 109). Accordingly, we remit the matter to the Supreme Court, Nassau County, for a hearing to determine whether the plaintiff met its obligation to negotiate in good faith pursuant to CPLR 3408(f) and, if it did not, to impose an appropriate remedy (*see* CPLR 3408[j]).

Fisher's contention that the Supreme Court erred in granting judgment against his deceased wife is not properly before this Court (*see Wells Fargo* ***Bank****, N.A. v. Bachmann,* 145 A.D.3d 712, 713, 43 N.Y.S.3d 107).

BALKIN, J.P., ROMAN, MILLER and BRATHWAITE NELSON, JJ., concur.

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Suffolk County Bar Association

- Co-Coordinator - Suffolk County High School Mock Trial Tournament (2016-Present)
- Board of Directors - Director (2012-2015)
- Suffolk Academy of Law - Officer (2011-2015)
- Suffolk Academy of Law - Advisory Committee Member (2015-Present)
- Appellate Practice Committee - Co-Chair
- Creditors' Rights Committee - Member, Former Co-Chair
- Leadership Development Committee - Member (2015-Present)
- Bench - Bar Committee - Member (2017-Present)
- Nominating Committee - Member (2015-2018)
- Technology Committee - Member (2018-Present)
- Charitable Foundation - Assistant Managing Director (2013-2015)
- "Dog Day Afternoon" - Volunteer (2012-2015)
- Surrogate's Court Committee - Member
- Awarded on three occasions for providing pro-bono legal services as part of Bar Association's foreclosure settlement project

Continuing Legal Education Seminars:

- Coordinator - New Rules of the Appellate Terms 2020
- Coordinator - New Rules of the Appellate Division 2018
- Presenter - “A Mockery of a Closing” 2018
- Mentor - “Trial Practicum” 2018
- Speaker - “Hot Topics in Foreclosure Appeals” 2018
- Coordinator - “Evidence Update” 2017
- Coordinator - “Witness Identification and Wrongful Conviction” 2017
- Moderator - “Unique Challenges When Perfecting Appeals to the Appellate Term” 2017
- Coordinator & Speaker “Bankruptcy Issues for Creditors’ Attorneys” 2016
- Speaker “Foreclosure Boot Camp” 2014
- Speaker “Foreclosure Appeals” 2013
- Coordinator “Basics of Appellate Practice” 2013
- Speaker “Cloud Computing” 2013
- Coordinator “E-Discovery - Talk the Talk and Avoid Disaster” 2012
- Coordinator “Criminal Appeals from the District Court” 2012
- Coordinator “Foreclosure Defense Series part 1 - Answers & Settlement Conferences” 2011
- Coordinator “Foreclosure Defense Series part 2 - HAMP” 2011
- Coordinator & Speaker “Appeals from the Surrogate’s Court” 2011
- Coordinator “Practice in the Appellate Division” 2011
- Speaker “Foreclosure Law & Procedure: Soup to Nuts” 2011

Publications:

- "Hot topics in Foreclosure Appeals" (The Suffolk Lawyer, May 2020)(pending)
- "Mock Trial - A Coordinator's View" (The Suffolk Lawyer, February 2020
- "Warning signs from the Second Department" (The Suffolk Lawyer, December 2019)
- "Using Twitter as a Leadership Tool" (The Suffolk Lawyer, September 2019)
- “Hot Topics in Foreclosure Appeals” (The Suffolk Lawyer, January 2018)
- “Standing after *Aurora v Taylor*“ (The Suffolk Lawyer, June 2016)
- “Are LegalZoom and Others Like It Illegal?” (The Suffolk Lawyer, November 2015)
- Special Section Editor for Technology (The Suffolk Lawyer, February 2015)
- “Avvo.com Ratings” (The Suffolk Lawyer, February 2015)
- “Practical Tips for Oral Argument” (The Suffolk Lawyer, October 2014)
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- “Anonymous Bloggers, Defamation and Pre-Action Disclosure” (The Suffolk Lawyer, June 2009)

Teaching:

- Adjunct Assistant Professor of Drama & Media Studies - Dowling College (2006-2015)
- Lectured annually at Columbia University on topic of “Entertainment & Media Law” (2011-2019)
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