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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

_____)	
In re:)	Case No. 12-12020 (MG)
)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,)	Chapter 11
)	
Debtors.)	Jointly Administered
_____)	

**RESCAP BORROWER CLAIMS TRUST'S SUPPLEMENTAL OBJECTION IN
SUPPORT OF ITS OBJECTION TO PROOF OF CLAIM NO. 3695 FILED
ON BEHALF OF ROSALIND ALEXANDER-KASPARIK**



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**TO THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE:**

The ResCap Borrower Claims Trust (the “**Borrower Trust**”), established pursuant to the terms of the chapter 11 plan confirmed in the above-captioned bankruptcy cases [Docket No. 6065], as successor in interest to the above-captioned debtors (the “**Debtors**”) with respect to Borrower Claims,¹ hereby submits this supplemental objection (the “**Supplemental Objection**”) in further support of the *ResCap Borrower Claims Trust’s Objection to Proof of Claim No. 3695 Filed on Behalf of Rosalind Alexander-Kasparik* [Docket No. 9402] (the “**Objection**”) seeking to disallow and expunge, without leave to amend, proof of claim number 3695 (the “**Claim**”) asserting claims of Rosalind Alexander-Kasparik (the “**Claimant**”) against Debtor GMAC Mortgage, LLC (“**GMAC Mortgage**”) pursuant to section 502(b) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 3007(a) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”). The Borrower Trust seeks entry of an order, substantially in the form attached hereto as **Exhibit 1** (the “**Proposed Order**”), granting the requested relief. In support of this Supplemental Objection, the Borrower Trust respectfully states as follows:

PRELIMINARY STATEMENT

1. On January 21, 2016, this Court sustained the Borrower Trust’s Objection to all causes of action asserted in the Claim other than negligence and promissory estoppel, on the basis of res judicata and collateral estoppel. See Transcript of Hearing at 48:2-7, In re Residential Capital, Case No. 12-12020 (MG) (Bankr. S.D.N.Y. Jan. 21, 2016), attached hereto as **Exhibit 2** (the “**January 21 Transcript**”).

¹ All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

2. On October 23, 2015, the California Superior Court entered a minute order (the “**Minute Order**”)² that sustained without leave to amend Freddie Mac’s unopposed demurrer (the “**June 17 Demurrer**”)³ to the Third Amended Complaint in its entirety. Accordingly, the doctrine of collateral estoppel bars the Claimant from now re-litigating before this Court its negligence and collateral estoppel claims against GMAC Mortgage, because these claims are based on the exact same issues of fact and law that the California Superior Court decided in the Minute Order.

3. Furthermore, as with the prior iterations of the Claimant’s allegations against the named defendants, each of the aforementioned causes of action relates only to a purported conversation on July 2, 2012 between Claimant and a Freddie Mac representative in which the Freddie Mac representative allegedly advised Claimant that GMAC Mortgage would postpone a trustee’s sale of Claimant’s home that was scheduled for the next day. GMAC Mortgage did not participate in the July 2, 2012 conversation between Claimant and Freddie Mac. Furthermore, the Third Amended Complaint does not identify any specific representations allegedly made by GMAC Mortgage to the Claimant that GMAC Mortgage would delay the trustee’s sale of Claimant’s home scheduled for July 3, 2012, so there is no underlying factual basis that could support a cause of action for either negligence or promissory estoppel against GMAC Mortgage.

4. In addition, Claimant’s claim for negligence fails because GMAC Mortgage owed Claimant no fiduciary duties or duty of care and a gratuitous oral promise to postpone a foreclosure sale comes within the California statute of frauds and is therefore unenforceable.

² A copy of the Minute Order is attached to the *Declaration of Jordan Wishnew Concerning ResCap Borrower Claims Trust’s Objection to Claim No. 3695 Filed on Behalf of Rosalind Alexander-Kasparik* [Docket No. 9561] (the “**Wishnew Declaration**”) as Exhibit 2.

³ A copy of the June 17 Demurrer is attached to the Wishnew Declaration as Exhibit 1.

Likewise, Claimant's claim for promissory estoppel fails because: (i) Freddie Mac's statement that the "sale was being postponed" was a "mere statement of fact," not a "clear and unambiguous" promise to actually postpone the trustee's sale; (ii) Claimant's speculation as to how she hypothetically would have acted with respect to filing bankruptcy does not satisfy the requirements for detrimental reliance under California law; and (iii) to the extent that Claimant's promissory estoppel claim relies upon a violation of HAMP, that statute does not provide for a private right of action.

5. For all of these reasons, neither of the remaining two elements of the Claim, on its face, asserts a valid prepetition cause of action against GMAC Mortgage, and as a result, the Claim should be disallowed and expunged with prejudice.

JURISDICTION, VENUE, AND STATUTORY PREDICATE

6. This Court has jurisdiction over this Objection under 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

7. The statutory predicates for the relief requested herein are section 502(b) of the Bankruptcy Code and Bankruptcy Rule 3007(a).

BACKGROUND

8. This Supplemental Objection incorporates by reference the background facts set forth in the Objection (¶¶ 9-42) and the Lathrop Declaration. The summary below provides certain additional facts that are material to this Supplemental Objection.

9. On April 3, 2015, the California Superior Court entered the Superior Court Order, which sustained the February 13 Demurrer to the Second Amended Complaint without leave to amend as to all causes of action, with the exception that Claimant was allowed leave to amend as to promissory estoppel and to plead a negligence cause of action. See Lathrop Declaration ¶ 28;

see also Superior Court Order at Ex. M to the Lathrop Declaration; California Action Docket, D.E. 104.

10. On April 14, 2015, Claimant filed the Third Amended Complaint consistent with the Superior Court Order. See Lathrop Declaration ¶ 29; see also Third Amended Complaint at Ex. N to the Lathrop Declaration; California Action Docket, D.E. 109. On June 17, 2015, Freddie Mac filed the June 17 Demurrer to the Third Amended Complaint. See Lathrop Declaration ¶ 29; see also June 17 Demurrer at Ex. 1 to the Wishnew Declaration; California Action Docket, D.E. 115. GMAC Mortgage did not file a response to the Third Amended Complaint and did not join in the June 17 Demurrer. Claimant did not file a response to the June 17 Demurrer.

11. On October 23, 2015, the California Superior Court entered the Minute Order, which sustained the June 17 Demurrer in its entirety without leave to amend. See Lathrop Declaration ¶ 29; see also Minute Order at Ex. 2 to the Wishnew Declaration; California Action Docket, D.E. 131. On November 3, 2015, the California Superior Court entered the Superior Court Dismissal, which entered judgment against Claimant and in favor of both Freddie Mac and GMAC Mortgage. The Superior Court Dismissal stated that Claimant “shall take nothing by way of her Third Amended Complaint from Freddie Mac and/or GMAC Mortgage, LLC.” See Lathrop Declaration ¶ 30; see also Superior Court Dismissal at Ex. O to the Lathrop Declaration; California Action Docket, D.E. 136. On November 5, 2015, Freddie Mac had a notice of entry of the Superior Court Dismissal served upon Claimant’s counsel via U.S. Mail. See Lathrop Declaration ¶ 30; see also California Action Docket, D.E. 137.

12. On December 31, 2015, the California Superior Court entered an order (the “**December 31 Order**”) that vacated and set aside the Superior Court Dismissal as to GMAC

Mortgage only. See December 31 Order at Ex. A to *Claimant Rosalind Alexander-Kasparik's Request for Judicial Notice in Support of Opposition to ResCap Borrower's Claims Trust's Objection to Proof of Claim No. 3695* [Docket No. 9465]; see also California Action Docket, D.E. 146.

13. At a hearing on January 21, 2016, this Court sustained the Borrower Trust's Objection "to all causes of action other than negligence and promissory estoppel, on the basis of res judicata and collateral estoppel" and held that the Superior Court Order was "final as to those other causes of action." See January 21 Transcript at 48:2-7.

RELIEF REQUESTED

14. The Borrower Trust files this Objection pursuant to section 502(b) of the Bankruptcy Code, seeking to disallow and expunge the Claim in its entirety from the Claims Register.

OBJECTION

15. A filed proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Section 502(b)(1) of the Bankruptcy Code provides, in relevant part, that a claim may not be allowed to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law" 11 U.S.C. § 502(b)(1). Once a debtor refutes an essential element of the claim, the burden of persuasion is on the holder of a proof of claim to establish a valid claim by a preponderance of the evidence. Feinberg v. Bank of N.Y. (In re Feinberg), 442 B.R. 215, 220-22 (Bankr. S.D.N.Y. 2010).

I. The Claim Is Barred by Collateral Estoppel

16. The doctrine of collateral estoppel provides that, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Allen v. McCurry, 449

U.S. 90, 94 (1980). “The law is well settled that a state court judgment must be given preclusive effect, at least for collateral estoppel purposes, in a subsequent federal court proceeding if the state in which the judgment was rendered would do so.” Wharton v. Shiver (In re Shiver), 396 B.R. 110, 117 (Bankr. S.D.N.Y. 2008).

17. Under California law, a court may apply the doctrine of collateral estoppel only if five threshold requirements have been met: (1) “the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding,” (2) the “issue must have been actually litigated in the former proceeding,” (3) “[the issue] must have been necessarily decided in the former proceeding,” (4) “the decision in the former proceeding must be final and on the merits,” and (5) “the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.” Lucido v. Superior Court, 795 P.2d 1223, 1225 (Cal. 1990).

18. Additionally, California courts will consider whether public policies will be advanced by the application of the doctrine of collateral estoppel in a particular setting. Id. at 1226. These policies include “preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation” Id. at 1227.

19. For the reasons set forth below, the Minute Order satisfies the requirements for the application of collateral estoppel under California law. Accordingly, the remaining causes of action asserted in the Claim are barred by the doctrine of collateral estoppel and should be disallowed.

A. The California Superior Court Decided Identical Issues in the California Action

20. Under California law, the doctrine of collateral estoppel is only applicable if “identical factual allegations” were at stake in the prior proceeding. *Id.* at 1225. To determine whether two proceedings involved “identical issues,” California courts consider, among other things: (i) whether there is a “substantial overlap between the evidence or argument[s]” advanced in the two proceedings; (ii) whether the evidence or arguments “involve application of the same rule of law”; and (iii) whether the claims involved in the two proceedings are “closely related.” *Burdette v. Carrier Corp.*, 71 Cal. Rptr. 3d 185, 201 (Cal. Ct. App. 2008), as modified on denial of reh’g, No. C050299, 2008 Cal. App. LEXIS 236 (Cal. Ct. App. Feb. 14, 2008).

21. Claimant’s remaining allegations against GMAC Mortgage overlap entirely with its allegations against Freddie Mac in the Third Amended Complaint. Claimant’s remaining claims against GMAC Mortgage involve the same rules of law as its claims against Freddie Mac in the Third Amended Complaint. Likewise, Claimant’s claims against GMAC Mortgage and Freddie Mac arise out of the same transaction, and are therefore “closely related.” Accordingly, the “identical issue” requirement for the application of collateral estoppel is satisfied because the California Superior Court considered and decided factual allegations identical to those asserted here against GMAC Mortgage when it entered the Minute Order dismissing Claimant’s claims against Freddie Mac.

B. Each of the Causes of Action Asserted in the Claim Was Actually Litigated in the California Action

22. Under California law, the doctrine of collateral estoppel requires that the issues were actually litigated in the prior proceeding. “An issue is actually litigated only when it is raised by the pleadings and factually resolved either by proof or failure of proof.” *Betyar v. Pierce*, 252 Cal. Rptr. 907, 909 (Cal. Ct. App. 1988) (citations omitted). Each of the remaining

factual allegations and causes of action asserted here against GMAC Mortgage is identical to a factual allegation or cause of action previously asserted by Claimant against Freddie Mac and resolved by the California Superior Court. See Third Amended Complaint ¶¶ 18-30. Accordingly, the “actually litigated” requirement for the application of collateral estoppel is satisfied.

C. Each of the Causes of Action Asserted in the Claim Was Necessarily Decided in the California Action

23. Under California law, the doctrine of collateral estoppel applies only to issues that were “necessarily decided” in the prior proceeding. An issue is “necessarily decided” in a proceeding so long as the issue is not “‘entirely unnecessary’ to the judgment in the . . . proceeding.” Lucido, 795 P.2d at 1226. The remaining causes of action asserted here by Claimant against GMAC Mortgage are identical to the causes of action expressly dismissed as to Freddie Mac by the California Superior Court. See Minute Order at 2 (“For these reasons, Defendants’ demurrer as to the negligence cause of action is sustained without leave to amend.”); id. at 3 (“Defendants’ demurrer to the promissory estoppel cause of action is sustained without leave to amend.”). Accordingly, the “necessarily decided” requirement for the application of collateral estoppel is satisfied.

D. The California Action Terminated with a Final Judgment on the Merits

24. The Minute Order was a judgment issued on the merits by the California Superior Court. Notice of entry of the Superior Court Dismissal was served on Claimant on November 5, 2015. Both the Minute Order and the Superior Court Dismissal were final and non-appealable as of January 11, 2016. See CAL. SUPER. CT. L.R. 8.104(a) (requiring that a notice of appeal be filed within 60 days from date of service of notice of entry); CAL. CIV. CODE § 1013(a) (Deering 2016) (adding five days to appeal period if service is made by mail within California). No

appeal of the Minute Order or the Superior Court Dismissal was taken by Claimant as to Freddie Mac. Therefore, the “final judgment on the merits” requirement for the application of collateral estoppel is satisfied.

E. The Claimant Was Party to the California Action

25. The “privity” requirement for the application of collateral estoppel is satisfied so long as the doctrine is “asserted against a party to the prior action” Kelly v. Vons Cos., 79 Cal. Rptr. 2d 763, 769 (Cal. Ct. App. 1998). Here, GMAC Mortgage is asserting the doctrine of collateral estoppel against Claimant, the plaintiff in the California Action. Therefore, the privity requirement is satisfied even though the Minute Order was vacated by the December 31 Order as to GMAC Mortgage.

F. Public Policy Supports the Application of Collateral Estoppel to Bar the Claim Against GMAC Mortgage

26. Finally, public policy supports the application of collateral estoppel in these proceedings. The Claimant had a full and fair opportunity in the California Action to litigate against Freddie Mac causes of action identical to those raised here against GMAC Mortgage. Appellate review of an adverse ruling in the California Action was available. Application of collateral estoppel in these proceedings preserves the integrity of the California judicial system by giving credit to the factual and legal findings made by the California Superior Court, and estopping the Claimant from re-litigating identical issues before this Court promotes judicial economy.

II. The Claim Fails on the Merits

A. Applicability of Federal Pleading Standards

27. “Federal pleading standards apply when assessing the validity of a proof of claim.” In re Residential Capital, LLC, No. 12-12020 (MG), 2015 WL 2375979, at *6 (Bankr. S.D.N.Y. May 15, 2015).

28. While factual allegations are not required to be detailed under Rule 8 of the Federal Rules of Civil Procedure, they nonetheless must contain more than “labels and conclusions[] and a formulaic recitation of the elements of a cause of action” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). Instead, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “Facts that are merely consistent with the plaintiff’s legal theory will not suffice when, without some further factual enhancement [they] stop short of the line between possibility and plausibility of entitle[ment] to relief.” Weissman v. Nat’l Ass’n of Secs. Dealers, Inc., 500 F.3d 1293, 1310 (11th Cir. 2007) (citation and internal quotations omitted). Should the plaintiff fail to “nudge [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed.” Twombly, 550 U.S. at 570.

B. The Claim Fails as a Matter of Law Because Claimant Fails to Identify Any Representations Made by GMAC Mortgage

29. Each cause of action asserted by Claimant against GMAC Mortgage relies on an allegation that GMAC Mortgage made a false representation to Claimant regarding a postponement of the Trustee’s Sale. Notably, the Complaint identifies no such statement. The

Complaint identifies only alleged false representations made to the Claimant by a Freddie Mac representative.

30. Claimant alleges that she contacted non-debtor Freddie Mac on or about July 2, 2012 and spoke with Emily, a representative of Freddie Mac, who allegedly told Claimant that “a request was being submitted to defendant [GMAC Mortgage] to postpone the July 3, 2012 foreclosure sale (by [Freddie Mac]) pending review of [Claimant’s] application for [a] loan modification.” See Third Amended Complaint ¶ 14. Claimant further alleges that Emily, the Freddie Mac representative, advised Claimant that “the sale was being postponed, and that [Claimant] should check the electronic system to make sure that the sale was actually postponed.” See id. Claimant also alleges that, “[Claimant] was advised on July 2, 2012 by the mortgage lender/investor, defendant [Freddie Mac] that the sale would be postponed” See id. Nowhere does the Third Amended Complaint allege any false representation by GMAC Mortgage.⁴

31. Thus, Claimant’s causes of action for negligence and promissory estoppel should be disallowed and expunged because they arise out of Claimant’s unsupported allegations regarding purported false representations by GMAC Mortgage.

C. Claimant’s Negligence Claim Fails

32. Although allowed leave to amend to plead a negligence cause of action, the Third Amended Complaint relies on allegations of fiduciary duties owed from GMAC Mortgage to Claimant.

⁴ Claimant further alleges that the Defendants: (i) “were charging her on an unauthorized and improper impound account,” (ii) were engaged in “mis-accounting . . . in at least the amount of \$10,000 to \$20,000,” (iii) “refused to credit [Claimant’s] account with overcharges on tax and insurance payments,” and (iv) were “unjustly enriched by late fees and/or foreclosure fees.” See Complaint ¶ 11. However, it is unclear how these facts support the causes of action alleged in the Complaint.

33. On January 21, 2016, this Court disallowed and expunged, without leave to amend, Claimant's cause of action for breach of fiduciary duty asserted in the Second Amended Complaint. Accordingly, Claimant's purported "negligence" cause of action is barred by the doctrine of *res judicata*. Moreover, as set forth below, Claimant's negligence theory fails for several additional reasons.

(i) *GMAC Mortgage Owes No Fiduciary Duties to Claimant*

34. Under California law, to establish a claim for breach of fiduciary duty, a plaintiff must prove "(1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage." Pellegrini v. Weiss, 81 Cal. Rptr. 3d 387, 397 (Cal. Ct. App. 2008) (citation omitted). "A fiduciary or confidential relationship may arise whenever confidence is reposed by persons in the integrity and good faith of another. If the latter voluntarily accepts or assumes that confidence, he or she may not act so as to take advantage of the others' interest without their knowledge or consent." City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 80 Cal. Rptr. 2d 329, 355 (Cal. Ct. App. 1998), as modified on denial of reh'g, 69 Cal. App. 4th 909D (Cal Ct. App. 1999) (citation omitted).

35. California courts have consistently held that a lender does not owe a fiduciary duty to a borrower. See, e.g., Cleveland v. Johnson, 147 Cal. Rptr. 3d 772, 794 (Cal. Ct. App. 2012) ("a debtor/creditor relationship . . . does not create a fiduciary duty.") (citation omitted); Kouzine v. Countrywide Home Loans, Inc., No. B249022, 2014 WL 1696289, at *6 (Cal. Ct. App. Apr. 30, 2014) ("A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such." (citation omitted)).

36. Here, none of Claimant's factual allegations demonstrate an understanding by either Claimant or GMAC Mortgage that a special trust and confidence was reposed in GMAC Mortgage. The relationship between Claimant and GMAC Mortgage was that of a typical lender

and borrower. Thus, Claimant's cause of action for negligence fails as a matter of law, to the extent that it is based upon Claimant's purported breach of fiduciary duty.

(ii) *GMAC Mortgage Owes No Duty of Care to Claimant*

37. Under California law, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." In re Residential Capital, LLC, No. 12-12020 (MG), 2015 WL 4747860, at *14 (Bankr. S.D.N.Y. Aug. 4, 2015) (quoting Nymark v. Heart Fed. Savs. & Loan Assn., 283 Cal. Rptr. 53, 56-57 (Cal. Ct. App. 1991)). However, there is a lack of consensus among California courts regarding whether a financial institution owes a borrower a duty of care when a loan modification is involved. See, e.g., Segura v. Wells Fargo Bank, N.A., No. CV-14-04195(MWF), 2014 WL 4798890, at *12 (C.D. Cal. Sept. 26, 2014) ("The existence of a duty of care owed by financial institutions in the process of considering borrowers for a loan modification . . . is an unsettled issue."); Armstrong v. Chevy Chase Bank, FSB, No. 5:11-cv-05664 (EJD), 2012 WL 4747165, at *4 (N.D. Cal. Oct. 3, 2012) (observing that numerous courts have "characterized a loan modification as a traditional money lending activity" and finding that the minority of cases that hold otherwise are "unpersuasive") (internal citations omitted).

38. California courts examine and balance the following factors to determine whether a duty of care exists between a financial institution and a borrower when a loan modification is at issue: (i) "the extent to which the transaction was intended to affect the plaintiff," (ii) "the foreseeability of harm to him," (iii) "the degree of certainty that the plaintiff suffered injury," (iv) "the closeness of the connection between the defendant's conduct and the injury suffered," (v) "the moral blame attached to the defendant's conduct," and (vi) "the policy of preventing future harm." See Residential Capital, 2015 WL 4747860, at *14 (quoting Nymark, 283 Cal. Rptr. at 58).

39. The California Court of Appeal has held that the foregoing factors “do not support imposition of a common law duty to offer or approve a loan modification” or other foreclosure alternatives. See Residential Capital, 2015 WL 4747860, at *14 (quoting Lueras v. BAC Home Loans Servicing, LP, 163 Cal. Rptr. 3d 804, 820 (Cal. Ct. App. 2013)). Rather, a lending institution’s “rights, duties, and obligations” with respect to loan modifications, if any, are “set forth in the note and deed of trust, the [parties’ forbearance agreement], federal and state statutes and regulations, and the directives and announcement of the United States Department of Treasury and Fannie Mae.” See Residential Capital, 2015 WL 4747860, at *14 (quoting Lueras, 163 Cal. Rptr. 3d at 820-21). Moreover, a negligence claim against a lending institution fails unless the plaintiff can demonstrate that “his or her default in paying the monthly loan payments was a result of, or exacerbated by, the defendant’s conduct.” See Residential Capital, 2015 WL 4747860, at *14 (quoting Lueras, 163 Cal. Rptr. 3d at 820-21) (“If the lender did not place the borrower in a position creating a need for a loan modification, then no moral blame would be attached to the lender’s conduct.”).

40. Here, Claimant fails to state a claim for negligence because such a duty, if any, would have been “imposed by the loan documents and the [parties’ forbearance agreements], statutes and regulations” and, if GMAC Mortgage failed to follow through on those agreements, then Claimant’s remedy would lie “in breach of contract not negligence.” See Residential Capital, 2015 WL 4747860, at *14 (quoting Lueras, 163 Cal. Rptr. 3d at 820-21). Claimant’s negligence claim also fails because Claimant has failed to demonstrate through her factual allegations in the Third Amended Complaint that her need for the loan modification was a result of, or exacerbated by, GMAC Mortgage’s conduct. See Residential Capital, 2015 WL 4747860, at *14 (quoting Lueras, 163 Cal. Rptr. 3d at 820-21). Finally, Claimant has also failed to

demonstrate that GMAC Mortgage acted outside of its “conventional role” as a loan servicer such that the Nymark factors would support a finding that GMAC Mortgage owed a duty of care to Claimant.

(iii) *An Oral Promise to Postpone a Foreclosure Sale Is Unenforceable*

41. Claimant also bases her negligence claim, in part, on Freddie Mac’s alleged oral promise to postpone a foreclosure sale while she applied for a loan modification. See Third Amended Complaint ¶ 20. However, “a gratuitous oral promise to postpone a foreclosure sale or to allow a borrower to delay monthly mortgage payments is unenforceable.” See Garcia v. World Savs., FSB, 107 Cal. Rptr. 3d 683, 690 (Cal. Ct. App. 2010); Secrest v. Sec. Nat’l Mortg. Loan Trust 2002-2, 84 Cal. Rptr. 3d 275, 277 (Cal. Ct. App. 2008) (“[A]n agreement by which a lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real property comes within the statute of frauds.”). Thus, Claimant’s negligence claim must also fail for this reason.

D. Claimant’s Promissory Estoppel Claim Fails

42. Under California law, the elements of promissory estoppel are as follows: (1) “a promise clear and unambiguous in its terms,” (2) “reliance by the party to whom the promise is made,” (3) reliance that is “both reasonable and foreseeable,” and (4) “the party asserting the estoppel must be injured by his reliance.” See U.S. Ecology, Inc. v. Cal., 28 Cal. Rptr. 3d 894, 905 (Cal. Ct. App. 2005) (citations omitted).

(i) *Claimant Has Not Identified A Clear Promise by GMAC Mortgage*

43. To seek enforcement of an alleged promise under promissory estoppel, the promise must be clear and unambiguous in its terms. See id. In other words, the promise must be “definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of

damages.” Ladas v. California State Auto. Assn., 23 Cal. Rptr. 2d 810, 814 (Cal. Ct. App. 1993) (citations omitted).

44. Several California courts have recently held that a loan servicer’s communications with a delinquent borrower about the status of a trustee’s sale is “a mere statement of fact,” not an unambiguous promise sufficient to support a claim for promissory estoppel. See Granadino v. Wells Fargo Bank, N.A., 186 Cal. Rptr. 3d 408, 413 (Cal. Ct. App. 2015); id. at 411, 413 (holding that the loan servicer’s statement that appellants were “under active review for a modification and, therefore, there no longer was a trustee [sale] date scheduled” was “a mere statement of fact,” not a promise, because a promise requires “an assurance that a person will or will not do something.”); Valencia v. Wells Fargo Bank, No. B254999, 2015 WL 3474881, at *6 (Cal. Ct. App. June 2, 2015) (“Telling a borrower that a loan modification application is under review and no sale was scheduled is not an actionable promise.”).

45. Here, Claimant alleges that “[Claimant] was advised by Emily (at FHLMC) that the sale was being postponed, and that she could check the electronic system to make sure that the sale was actually postponed.” These allegations constitute a “mere statement of fact” by GMAC Mortgage, not an “assurance” that GMAC Mortgage would in fact postpone the Trustee’s Sale. Accordingly, Claimant’s promissory estoppel claim must fail because Claimant’s allegations are insufficient under California law to establish a “clear and unambiguous promise” by GMAC Mortgage to Claimant.

(ii) *Claimant Has Not, And Cannot, Plead Detrimental Reliance*

46. Under California law, the application of promissory estoppel requires that the party asserting the estoppel be injured by its reliance on the defendant’s promise. See U.S. Ecology, 28 Cal. Rptr. 3d at 905. Here, Claimant’s alleged injury is that she refrained from pursuing “other courses of action to stop the foreclosure sale,” including, but not limited to,

filing for bankruptcy protection or exploring the possibility of refinancing or marketing and selling the Property.

47. In Goffman v. Bank of America, N.A., the California Court of Appeals found that a delinquent borrower who “[p]assed-up the other options available to her such as full reinstatement, refinance to access equity, and/or bankruptcy” failed to demonstrate detrimental reliance on a lender’s promise to reinstate her loan because she did “not assert that she . . . qualified for bankruptcy protection or that she did anything toward seeking bankruptcy protection, even though she could have done so up until the time of the foreclosure sale.” No. G045942, 2012 WL 6011906, at *6-7 (Cal. Ct. App. Nov. 29, 2012).

48. Similarly, in Kajeh v. Select Portfolio Servicing, Inc., the California Court of Appeals found that a delinquent borrower could not establish detrimental reliance on a loan servicer’s promise to suspend foreclosure proceedings because the borrower failed to allege that the loan servicer had “requested plaintiff not to proceed with other actions in return for [the loan servicer’s] promise to suspend foreclosure proceedings.” No. D064426, 2014 WL 1911411, at *4 (Cal. Ct. App. May 14, 2014). The court rejected the delinquent borrower’s allegation that he “forwent other means of curing his loan default, including the opportunity to refinance his property or obtain loans from other third parties” as “pure speculation and factually unsubstantiated.” See id.

49. Here, Claimant cannot demonstrate detrimental reliance on any statement by GMAC Mortgage because Claimant has failed to demonstrate that she actually took any steps to initiate bankruptcy, refinance the Loan, or market and sell the Property. Furthermore, Claimant does not allege that GMAC Mortgage or Freddie Mac instructed Claimant to forego filing for bankruptcy, refinancing the Loan, or marketing and selling the Property in exchange for a

postponement of the Trustee's Sale. Claimant's speculation as to how she hypothetically would have acted in the absence of Freddie Mac's alleged statement does not satisfy the requirements for detrimental reliance under California law.

(iii) *There Is No Private Right Of Action Under HAMP*

50. Finally, Claimant's efforts to allege violations of the Home Affordable Modification Program ("HAMP") fail because "HAMP does not create a private right of action for borrowers against loan servicers." In re Residential Capital, LLC, No. 12-12020 (MG), 2014 WL 5358762, at *9 (Bankr. S.D.N.Y. Oct. 20, 2014) (quoting Wheeler v. Citigroup, 938 F. Supp. 2d 466, 471 (S.D.N.Y. 2013)). As there is not a private right of action under HAMP, Claimant's promissory estoppel claims tethered to HAMP must fail as a matter of law.

NOTICE

The Borrower Trust has provided notice of this Motion in accordance with the Case Management Procedures Order approved by this Court on May 23, 2012 [Docket No. 141] and the Claims Procedures Order [Docket No. 3294].

CONCLUSION

WHEREFORE, the Borrower Trust respectfully requests entry of an Order, substantially in the form attached here to as **Exhibit 1**, granting the relief requested herein and such other and further relief as the Court may deem proper.

Dated: February 4, 2016

/s/ Norman S. Rosenbaum

Norman S. Rosenbaum
Jordan A. Wishnew
Benjamin W. Butterfield
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*Counsel for the ResCap Borrower
Claims Trust*

Exhibit 1

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

_____)	
In re:)	Case No. 12-12020 (MG)
)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,)	Chapter 11
)	
Debtors.)	Jointly Administered
_____)	

**ORDER SUSTAINING RESCAP BORROWER CLAIMS TRUST'S
OBJECTION TO PROOF OF CLAIM NO. 3695 FILED ON
BEHALF OF ROSALIND ALEXANDER-KASPARIK**

Upon the objection [Docket No. 9402] (the “**Objection**”) and the supplemental objection [Docket No. ____] (the “**Supplemental Objection**”)¹ of the ResCap Borrower Claims Trust (the “**Borrower Trust**”) established pursuant to the terms of the confirmed Plan filed in the Chapter 11 Cases, as successor in interest to the above-captioned debtors (collectively, the “**Debtors**”) with respect to Borrower Claims, to Proof of Claim Number 3695 (the “**Proof of Claim**”) filed on behalf of Rosalind Alexander-Kasparik, seeking entry of an order (the “**Order**”) pursuant to section 502(b) of title 11 of the United States Code (the “**Bankruptcy Code**”), Rule 3007(a) of the Federal Rules of Bankruptcy Procedure, disallowing and expunging the Proof of Claim on the basis that the Debtors have no liability with respect to the Proof of Claim, all as more fully set forth in the Objection and the Supplemental Objection; and the Court having jurisdiction to consider the Objection and the Supplemental Objection and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Objection and the Supplemental Objection and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Supplemental Objection.

and sufficient notice of the Objection and Supplemental Objection having been provided; and upon consideration of the Objection and the Supplemental Objection; and the Court having found and determined that the relief requested in the Objection and the Supplemental Objection is in the best interests of the Borrower Trust, the Borrower Trust's beneficiaries, and all parties in interest; and the Court having found and determined that the legal and factual bases set forth in the Objection and the Supplemental Objection establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED that the relief requested in the Objection and Supplemental Objection is sustained to the extent provided herein; and it is further

ORDERED that, pursuant to section 502(b) of the Bankruptcy Code, the Proof of Claim is hereby disallowed and expunged in its entirety with prejudice; and it is further

ORDERED that Kurtzman Carson Consultants LLC, the Debtors' claims and noticing agent, is directed to disallow and expunge the Proof of Claim such that it is no longer maintained on the Debtors' Claims Register; and it is further

ORDERED that the Borrower Trust is authorized and empowered to take all actions as may be necessary and appropriate to implement the terms of this Order; and it is further

ORDERED that notice of the Objection and Supplemental Objection as provided therein shall be deemed good and sufficient notice of such objections, and the requirements of Bankruptcy Rule 3007(a), the Case Management Procedures entered on May 23, 2012 [Docket No. 141], the Procedures Order, and the Local Bankruptcy Rules of this Court are satisfied by such notice; and it is further

ORDERED that this Order shall be a final order with respect to the Proof of Claim; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to this Order.

Dated: _____, 2016
New York, New York

THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 2

In Re:

RESIDENTIAL CAPITAL, LLC, et al.

Case No. 12-12020-mg

January 21, 2016

eScribers, LLC

(973) 406-2250

operations@escribers.net

www.escribers.net

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

- - - - -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

January 21, 2016
10:04 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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(CC: Doc# 9296) ResCap Borrower Claims Trust's Ninetieth
Omnibus Objection to Claims ((I) No Liability Borrower Claims,
(II) Reduce and Allow Borrower Claims, and (III) Allowed in
Full Borrower Claim).

Going Foward as to Claim(s) Filed by Mary R. Biancavilla and
Thomas G. and Catherine D. Cooper.

(CC: Doc# 9402, 9492) ResCap Borrower Claims Trust's Objection
to Proof of Claim No. 3695 Filed on Behalf of Rosalind
Alexander-Kasparik.

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A P P E A R A N C E S :

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BY: ALLAN O. CATE, ESQ. (TELEPHONICALLY)

MARY R. BIANCAVILLA (TELEPHONICALLY)

PRO SE

1 P R O C E E D I N G S

2 THE COURT: Please be seated. All right, we're here
3 in Residential Capital, 12-12020. Mr. Wishnew?

4 MR. WISHNEW: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. WISHNEW: Jordan Wishnew, Morrison & Foerster for
7 the ResCap Borrower Claims Trust. Your Honor, the first
8 matter --

9 THE COURT: Could you bear with me. I left one thing
10 on my desk.

11 MR. WISHNEW: Absolutely.

12 THE COURT: Okay, thank you.

13 MR. WISHNEW: Jordan Wishnew, Morrison & Foerster, for
14 the ResCap Borrower Claims Trust. Your Honor, two matters that
15 were scheduled for today have been resolved. Those are
16 identified under section 2 of today's agenda. So the first
17 matter going forward is under section 3 on page 4, two claims
18 carried over from the earlier hearing on the ResCap Borrower
19 Claims Trust's ninetieth omnibus claims objection. The two
20 claims deal with those of Thomas and Catherine Cooper, claim
21 number 6720, and Mary Biancavilla. I believe Ms. Biancavilla
22 is on the phone today.

23 THE COURT: Ms. Biancavilla, are you on the phone?

24 MS. BIANCAVILLA: Yes, I am, Your Honor. Good
25 morning.

1 THE COURT: Thank you. Good morning to you.

2 MR. WISHNEW: I'm going to take the --

3 MS. BIANCAVILLA: Thank you.

4 MR. WISHNEW: -- Cooper claim first, and then I'll go
5 to Ms. Biancavilla's claim.

6 THE COURT: Okay. Is anyone on the phone for Cooper?

7 Just bear with me a second, Mr. Wishnew.

8 Your basic argument on Cooper is that it's time
9 barred, statute of limitations.

10 MR. WISHNEW: Correct. In addition, also waiver, Your
11 Honor.

12 THE COURT: Right. And just lay out for me the
13 statute of limitations.

14 MR. WISHNEW: Your Honor, the statute of limitations
15 for breach of contract in New Hampshire is three years. The
16 alleged attempt to close the HELOC was in May of 2005. So any
17 claim for breach of contract would have expired in May 2008,
18 four years before the petition date.

19 THE COURT: Okay, all right. I'm going to take it
20 under submission.

21 MR. WISHNEW: Thank you, Your Honor.

22 THE COURT: Okay.

23 MR. WISHNEW: Your Honor, that brings us to Ms.
24 Biancavilla's claim. This is a claim in which the Borrower
25 Trust seeks to reduce and allow the claim in a modified amount

1 against GMAC Mortgage.

2 Briefly, the background of this claim is that Ms.
3 Biancavilla sought a loan modification from the debtors. A
4 loan modification was given, however the problem was that -- or
5 the mistake made by the debtors was that --

6 THE COURT: Two mistakes.

7 MR. WISHNEW: Well, two mistakes -- was that they
8 offered her a HAMP trial plan. She completed the HAMP trial
9 plan and then when the loan was reviewed for -- to be put into
10 a permanent plan, they recognized that she couldn't qualify
11 under HAMP, and so offered her a traditional --

12 THE COURT: She couldn't qualify under HAMP according
13 to the letter, because her income was insufficient.

14 MR. WISHNEW: That's correct, Your Honor.

15 THE COURT: Okay. So instead, you offered her a more
16 expensive loan modification.

17 MR. WISHNEW: Correct, Your Honor. And so what we
18 were trying to do is make her whole by offering her the
19 difference in payment for what we are saying would have been
20 the HAMP terms versus the terms she was actually offered. And
21 we calculate that -- originally in our objection we had
22 quantified the claim as approximately 24,000 dollars and
23 change. Upon further review, and as recognized in our reply,
24 we would suggest the claim is actually \$29,840.32.

25 THE COURT: Let me focus on that, okay?

1 MR. WISHNEW: Sure.

2 THE COURT: And then I'll obviously give Ms.
3 Biancavilla a chance to respond. So your reply, which is ECF
4 9510, in paragraph 26 on page 10 --

5 MR. WISHNEW: Yes, Your Honor.

6 THE COURT: And Ms. Biancavilla, I don't know whether
7 you have it so I'll read it so you know what I'm talking about,
8 okay?

9 MS. BIANCAVILLA: I appreciate that, thank you.

10 THE COURT: So it says, "The respondent's
11 calculation," referring to Ms. Biancavilla, "is also flawed,
12 because she uses the monthly payment under the trial HAMP
13 modification as the amount that her monthly principal and
14 interest payment would have been under a permanent HAMP
15 modification. However, this assumes that the respondent's
16 interest rate under a permanent HAMP modification would have
17 been fixed at 0.6377 percent. However, as stated in paragraph
18 17 supra, given that the permanent traditional modification
19 executed by the respondent included a step-rate interest rate,
20 a permanent HAMP modification more likely than not would have
21 also included a step-rate interest rate."

22 So that's the argument that you make. And then you
23 include -- that gets you to your -- you do a comparison of what
24 the difference in payments would be.

25 MR. WISHNEW: That's right.

1 THE COURT: So when I look at -- just bear with me
2 now.

3 So Exhibit F to the reply --

4 MR. WISHNEW: Um-hum.

5 THE COURT: -- includes the trial plan that Ms.
6 Biancavilla countersigned.

7 MR. WISHNEW: Correct, Your Honor.

8 THE COURT: Okay. And so in paragraph 2, it says what
9 the amount of the initial trial payments would be: \$679.83.

10 MR. WISHNEW: Um-hum.

11 THE COURT: And below those three payments it says,
12 "The trial period payment is an estimate of the payment that
13 will be required under the modified loan terms, which will be
14 finalized in accordance with section 3 below."

15 So section 3 is on page 4 of 4 of this exhibit.

16 MR. WISHNEW: Um-hum.

17 THE COURT: And it's called -- that section is headed
18 "The Modification". And there's nothing here about a step-rate
19 increase. So what my question really is, is the assumption
20 that you've made in paragraph 26 and was the basis for your
21 calculation of the differential, you acknowledge this assumes
22 that respondent's interest rate under the permanent HAMP
23 modification would have been fixed, however as stated, given
24 that the permanent traditional modification executed by the
25 respondent included a step-rate increase, you went ahead and

1 applied a -- you assumed -- and you had to -- how you got the
2 numbers, I'm not quite sure, but you assumed a step-rate
3 increase. What is it that supports -- other than your
4 assumption, which is unsupported by evidence, what is it that
5 would support your view that there's a -- does a HAMP
6 modification -- do you have some evidentiary support that HAMP
7 modifications have step-rate increases?

8 MR. WISHNEW: We would rely upon, Your Honor, the
9 statements made in the supplemental declaration set forth in
10 footnote 7 --

11 THE COURT: Let me look at it. Hold on.

12 MR. WISHNEW: Sure.

13 THE COURT: What page?

14 MR. WISHNEW: Page 6 --

15 THE COURT: Okay.

16 MR. WISHNEW: -- of docket number 9510, footnote 7,
17 the -- I'll read it as stated: "The HAMP program permitted
18 step-rate modifications, and since the initial interest rate is
19 already lower than what would have been permitted by HAMP, the
20 Borrower Trust felt this assumption was appropriate," and we
21 incorporate Ms. Lathrop's declaration where she makes that
22 statement.

23 THE COURT: Sure. So show me again -- here's the
24 point. Footnote 7 is on the sentence, "The permanent
25 traditional modification provided the respondent with a step-

1 rate mortgage." Yes, I agree, it did. Okay. And then the
2 footnote talks about the step-rate increase on the permanent
3 modification. Okay?

4 But my question to you is, where's the evidence that
5 on a HAMP modification, that a step-rate increase would apply?
6 I don't see any evidence -- I searched through this and I
7 didn't find any evidence. I may have missed it.

8 MR. WISHNEW: Sure.

9 THE COURT: You make an assumption --

10 MR. WISHNEW: Yeah.

11 THE COURT: -- but I don't see any evidence.

12 MR. WISHNEW: So I'll also reference Your Honor to
13 Exhibit K to, I believe, the supplemental declaration.

14 THE COURT: Sure.

15 MR. WISHNEW: Docket number 9510-12 --

16 THE COURT: Yes.

17 MR. WISHNEW: -- page 9.

18 THE COURT: Let me get there, hold on. Page 9 of 39
19 or page 9 of the --

20 MR. WISHNEW: Oh, I apologize. Page 10 of 39, Your
21 Honor. That's page 9 in the bottom right-hand corner.

22 THE COURT: Okay. Yes, what are you pointing to?

23 MR. WISHNEW: Okay. So in the middle of the page,
24 Step 2, it says: "Reduce the interest rate". And I'll go --
25 I'll start at the second paragraph which starts, "Reducing the

1 starting interest rate in increments of .125 percent to get as
2 close as possible to the target monthly mortgage payment ratio.
3 The interest rate floor in all cases is 2 percent."

4 And then subpoint, "If the resulting rate is below the
5 Interest Rate Cap, this reduced rate will be in effect for the
6 first five years followed by annual increases of one percent
7 per year (or such lesser amount as may be needed) until the
8 interest rate reaches the Interest Rate Cap, at which time it
9 will be fixed for the remaining loan term."

10 So Your Honor, I would suggest that the approach taken
11 in the chart on paragraph 17 of our reply is consistent with
12 the rate being in effect for the first five years and then
13 stepping up one percent thereafter.

14 THE COURT: And what's the interest rate cap?

15 MR. WISHNEW: The interest rate cap, Your Honor --

16 THE COURT: It says it's the Freddie -- I'm looking --

17 MR. WISHNEW: The Freddie Mac --

18 THE COURT: -- the last paragraph under "Step 2".

19 MR. WISHNEW: Right. The interest rate cap --

20 THE COURT: The rate for thirty-year fixed rate
21 conforming loans --

22 MR. WISHNEW: Rounded to the nearest eighth percent as
23 of the date the agreement is prepared.

24 THE COURT: And what would have been the interest rate
25 cap for a HAMP modification for Ms. Biancavilla at the date

1 that she entered into the trial plan?

2 MR. WISHNEW: I'm not certain, Your Honor.

3 THE COURT: I'm going to ask a question that
4 doesn't -- I want to make clear, it's not a suggestion that
5 that would be the ultimate outcome if this matter is resolved
6 by the Court. But can you tell me if -- what the differential
7 would be for Ms. Biancavilla between the rates in the permanent
8 modification that was approved and a HAMP modification, if it
9 remained fixed as it was at the start, and you didn't step up?

10 MR. WISHNEW: Well, I guess the answer would be the
11 difference between 5 percent and 0.6377, Your Honor. I'm
12 referring to paragraph --

13 THE COURT: Look, let me -- what I'm concerned -- I
14 understand that you endeavored to settle the matter and you've
15 been unsuccessful.

16 MR. WISHNEW: Correct, Your Honor.

17 THE COURT: Okay. And I don't impose settlements.
18 Settlements have to be consensual.

19 MR. WISHNEW: Yep.

20 THE COURT: It seems to me that solely on the issue of
21 damages, because the Trust for purposes of this claim, whether
22 it would be -- whether it had to or not, the Trust has conceded
23 liability for breach of contract.

24 MR. WISHNEW: Correct, Your Honor.

25 THE COURT: You agree with that?

1 MR. WISHNEW: I do, Your Honor.

2 THE COURT: Okay. So the issue is, what are Ms.
3 Biancavilla's recoverable damages?

4 MR. WISHNEW: Yeah.

5 THE COURT: And there're disputed issues as to that.
6 And it may be necessary, therefore, if the matter is not
7 resolved consensually, for the Court to go forward, I think,
8 with a very short trial, on the issue of damages alone.

9 MR. WISHNEW: Um-hum.

10 THE COURT: And it may be that you have the much more
11 persuasive side. I'm not -- and that isn't a comment that you
12 do. You may or Ms. Biancavilla may. Okay?

13 I think without deciding the point, I think one of the
14 points you argue is that the only recoverable damages deal with
15 the differential in monthly payments for principal and interest
16 that the escrow obligations -- because Ms. Biancavilla had
17 included the escrow payments --

18 MR. WISHNEW: Correct, Your Honor.

19 THE COURT: -- in her calculation.

20 MR. WISHNEW: Yes.

21 THE COURT: And I'll give you a chance to talk to
22 this, Ms. Biancavilla. And I'm not deciding anything today,
23 but --

24 MS. BIANCAVILLA: Thank you.

25 THE COURT: -- but it seems to me, the Trust has the

1 better side of the argument that what -- because this comes up
2 quite often. They have no control over what your taxes and
3 insurance premiums are.

4 MS. BIANCAVILLA: Sure, um-hum.

5 THE COURT: And so that's got to come out of your
6 calculation.

7 MS. BIANCAVILLA: Right.

8 THE COURT: To me, the issue is what's the
9 appropriate -- the recoverable damages are most likely going to
10 be the differential between what you would have paid if a HAMP
11 modification had been approved -- you made -- you signed the
12 agreement, they signed the agreement for the trial plan. You
13 successfully made the three trial payments. And for purposes
14 of this proceeding, the Trust agrees you should have been given
15 that permanent modification. It may have been a mistake,
16 whatever, but they agree for purposes of this proceeding --
17 they might not in another matter -- but for purposes of this
18 proceeding, they're agreeing they should have done it. They
19 didn't. Your recoverable damages -- and I think you
20 essentially argue the same thing -- is how much more you had to
21 pay under the permanent traditional modification that was
22 approved. And so that really the dispute is how you calculate
23 it.

24 MS. BIANCAVILLA: Yes.

25 THE COURT: But let me give you a chance to address

1 whatever you want to -- whatever you want to talk about. Go
2 ahead.

3 MS. BIANCAVILLA: Okay. So just to that point, and
4 then I want to back up a little bit, my understanding from the
5 telephone reps -- and the unfortunate part of this process was
6 that most of the information that was given wasn't actually by
7 way of documentation that was intelligible or to the points
8 that you're requesting information on the phone. There was a
9 great deal of confusion in this entire process to include the
10 reason I originally called was only to get information about
11 the loans that were being offered by this new administration,
12 because there was an awful lot of to-do about all these
13 foreclosures were happening, and it seemed like it might be a
14 national catastrophe.

15 And I knew that I had a mortgage that I was going to
16 be doing something about in the upcoming years, and I knew
17 that, you know, the economy was getting tight, and that it was
18 a place for me to, you know, pick up the phone, make a phone
19 call, see what kind of products were being offered.

20 By where I was looking for a fixed rate loan, because
21 when you're trying to manage a situation with a limited budget,
22 you must keep your budget in mind. And so the amount of
23 payments you're going to, you know, be making every month on a
24 mortgage is the most important thing, and then you look at the
25 interest rate and see, when you're shopping a mortgage, if you

1 can buy down points in order to bring it even, you know, better
2 within your budget.

3 So to my surprise, the people on the phone told me
4 that there was no way they could give me any information about
5 any of the programs that were being set forth, that it was
6 going to be based entirely on my financials. And I said, well,
7 that's odd. Usually you don't, you know, take the financials
8 until after the person decides on a product. And they said
9 well, there's a number of different products being developed,
10 and so we don't know.

11 And I thought it was odd, and I thought well, okay,
12 this administration is new and so maybe they were still
13 developing some of these things. So but I made it clear to
14 all, and I believe the reason that this documentation has not
15 been put forth in this very large package from the counsel for
16 ResCap that it's not included, my original application
17 information must have said -- I'm sure I have it here
18 somewhere, but I didn't know I was going to have to lay all
19 this out today -- that this was not an application to the loan
20 that it was merely I'm looking for information.

21 So imagine my surprise when they did not collect my
22 payment in December of '09, telling me that I was eligible for
23 the trial.

24 All of these things that you just discussed with the
25 attorney regards to the internal information about these loans

1 were never given to anybody as far as I know. I certainly
2 didn't get any of it. If anyone told me in advance that this
3 would be what I would end up in, I would have hung up the phone
4 on them after thanking them very much, no thank you.

5 THE COURT: Well, you still wound up with --

6 MS. BIANCAVILLA: But -- yeah, I didn't get the
7 opportunity to do that. Because once they defaulted my loan
8 and I called and I said, I'm sorry, I think there was a
9 mistake, I don't know why you did not draft my December payment
10 and I need to rectify that; but you're eligible for this, you
11 know, modification. And we're going to move into it, and let's
12 move quickly. And I'm like, well, I need documentation in
13 order to be able to decide, you know, what the terms are before
14 I, you know, move forward.

15 So they said well, you know, this is your opportunity.
16 If you don't take it now, you know -- and I said, but I'm
17 concerned about my late payment, and I can't fall behind on
18 anything, because you know, as you can probably see from my
19 financials, my situation is tight.

20 And so moving forward, that's what happened, and I
21 ended up with -- I have submitted -- I'm sure you received
22 also, a copy of the GMAC "what I needed to catch up with" so
23 that I didn't get pushed into the step rate. They wanted 4,415
24 dollars over three months, of taking me through this trial
25 thing, and then they told me that I was not eligible.

1 There was no way I had that kind of money. I was
2 pretty much strong-armed into having to sign on to this step
3 rate, because otherwise there would have been foreclosure.

4 THE COURT: Let me just stop you there. So I don't
5 give anybody legal advice; let me make clear. But the HAMP
6 program, which I've obviously dealt with a lot, when you say
7 they wouldn't tell you what your payments would be until you
8 provided financials --

9 MS. BIANCAVILLA: Oh, I did get by phone -- I'm sorry,
10 by phone -- and not to interrupt -- and this is where I was
11 going to start at, and I got on a different train. I was told
12 by phone that it would be thirty-one percent of the income that
13 I was reporting. And I was reporting income as I was advised
14 by the representative by phone. And if you look at the log of
15 phone calls and things, it's huge. I mean, I was constantly in
16 contact with these people talking to someone on the phone.

17 If there was a record of everything that we discussed,
18 it would be very time consuming. We discussed many points and
19 many things, and I was upset about many points and many things.
20 But what I got from this is that the HAMP trial payment was
21 supposed to -- was supposed to be what -- would include the
22 escrows, okay, and that my new fixed rate moving out of the
23 trial into the permanent loan would be that amount, the 679 and
24 change, or less. And then as things progressed, I was told
25 that it was going to be thirty-one percent of what my reported

1 income was.

2 THE COURT: So --

3 MS. BIANCAVILLA: And somewhere along the line --

4 THE COURT: Ms. Biancavilla.

5 MS. BIANCAVILLA: -- somebody told me.

6 THE COURT: Ms. Biancavilla, just stop for a minute.

7 MS. BIANCAVILLA: Sure.

8 THE COURT: The HAMP program, which is a federal
9 program, is designed to reduce a borrower's principal and
10 interest payments --

11 MS. BIANCAVILLA: Right.

12 THE COURT: -- to no greater than thirty-one percent
13 of their income. And what it does is it moves the written
14 mortgage -- whatever your existing mortgage was, down in
15 quarter-percent increments to see if it can get down to thirty-
16 one percent.

17 Now, there are floors and ceilings, and it can't
18 always be done, but -- okay? So --

19 MS. BIANCAVILLA: All right.

20 THE COURT: -- what you're saying is that's not -- the
21 HAMP program was not a GMAC program. It was a federal
22 government program designed to try and help homeowners in
23 financial distress by reducing their mortgage payments. But it
24 covers principal and interest. What your taxes and your
25 insurance are, your taxes and insurance are. I mean, it

1 obviously varies.

2 MS. BIANCAVILLA: Right.

3 THE COURT: Okay. And then the formula gets more
4 complicated because they have to determine, if they move you
5 down to that point, is the net present value of the loan more
6 than the foreclosure value. But we don't have to get -- that
7 doesn't apply here. Okay? So but the issue about whether
8 there are step increases or not -- and you heard my questions
9 to Mr. Wishnew -- because the trial plan document which you
10 signed, which is a contract, is certainly silent about whether
11 there are step-ups or not.

12 MS. BIANCAVILLA: Right.

13 THE COURT: Mr. Wishnew points to the Exhibit K -- was
14 it?

15 MR. WISHNEW: Yes, Your Honor.

16 THE COURT: Exhibit K in the supplement which is not a
17 GMAC document, it's the HAMP document. It describes the Home
18 Affordable Modification Program, supplemental directive 09-01
19 April 6, 2009. And all I can tell you is, there were constant
20 updates of these HAMP guidelines, as the program evolved.

21 But Mr. Wishnew is pointing to, on page 9 of that
22 document, what happens with the reduction in interest rates,
23 and whether it increases after five years. So he answered my
24 question with respect to whether under a HAMP permanent
25 modification, whether there would be a step-up from the

1 original -- the starting interest rate. And he points to the
2 language what's under Step 2 on page 9 of the HAMP directive.

3 MS. BIANCAVILLA: Right.

4 THE COURT: So --

5 MS. BIANCAVILLA: Yes.

6 THE COURT: -- I don't know whether you ever got that.
7 I'm not saying they had to give it to you.

8 MS. BIANCAVILLA: No. No details -- no details on --
9 this was given me before the process.

10 THE COURT: Right.

11 MS. BIANCAVILLA: So how do you say no to a process
12 where you're being told this is good, you will be happy, this
13 trial payment of 679 and change is the amount we're testing
14 your ability to be able to pay over the next three months, and
15 that's what's in the document I signed. It will include your
16 escrows and there's --

17 THE COURT: Well, the document -- stop, for a second.
18 Because let me go back to the document. Bear with me a second,
19 okay? Because this issue about the escrow payments is an
20 important one, okay?

21 MS. BIANCAVILLA: Yeah, it says it in there.

22 THE COURT: Well, hold on. Let me --

23 MS. BIANCAVILLA: Okay. I'm looking at Exhibit A --

24 THE COURT: Okay.

25 MS. BIANCAVILLA: -- page 13.

1 THE COURT: Okay. It says -- you're looking on --
2 they have it attached as -- maybe in a couple places. But I'm
3 looking at -- let me find -- there was another copy of it in
4 here. Hold on, bear with me.

5 MS. BIANCAVILLA: Yeah, it is in a couple of places.
6 You're right.

7 THE COURT: Yeah, just bear with me. Okay?

8 Okay. Exhibit F to the supplement that the Trust
9 submitted, it's signed by you on December 23, 2009. And in
10 paragraph 2 the loan --

11 MS. BIANCAVILLA: The loan workout plan?

12 THE COURT: -- workout plan.

13 MS. BIANCAVILLA: Um-hum.

14 THE COURT: Mr. Wishnew it does say, "On or before
15 each of the following dates, I will pay the Lender the amount
16 set forth below," which includes payment for escrow items.

17 MS. BIANCAVILLA: That's right.

18 THE COURT: So what's your response to that? It does
19 say that, Mr. Wishnew.

20 MR. WISHNEW: You're right.

21 THE COURT: And it says "including real estate taxes,
22 insurance premiums and other fees." And Ms. Biancavilla says
23 you sent her a letter -- not you obviously -- your client --

24 MR. WISHNEW: Yes.

25 THE COURT: -- sent a letter --

1 MR. WISHNEW: Yes.

2 THE COURT: -- telling her that her payments are
3 679.83 and that includes real estate taxes, insurance, and
4 other fees, if any.

5 MR. WISHNEW: Um-hum.

6 THE COURT: So she's right about that?

7 MR. WISHNEW: She's right that for the purposes of the
8 trial plan, the trial plan included escrow amounts, Your Honor.

9 THE COURT: So but where -- when I look at paragraph
10 3, the modification --

11 MR. WISHNEW: Um-hum.

12 THE COURT: -- I don't see anything -- I see that the
13 amounts may be adjusted: "The final amounts of unpaid interest
14 an any other delinquent amounts (except late charges) to be
15 added to my loan balance, and after deducting from my loan
16 balance any remaining money held at the end of the Trial Period
17 under Section 2D above, the Lender will determine the new
18 payment amount."

19 It doesn't say anything about adding to it the escrow
20 payments, does it?

21 MR. WISHNEW: One minute, Your Honor. Your Honor,
22 section -- I'll refer the Court to section 4B --

23 THE COURT: Okay.

24 MR. WISHNEW: -- a little further down the page:
25 Additional Agreements. "I" -- and that would be the

1 borrower -- "agree to the following". Section B: "To comply,
2 except to the extent that they are modified by this Plan, with
3 all covenants, agreements, and requirements of Loan Documents,
4 including my agreement to make all payments of taxes, insurance
5 premiums, assessments, Escrow items, impounds, and all other
6 payments, the amounts of which may change periodically over the
7 term of my loan."

8 THE COURT: Okay, so let me ask you this. I think Ms.
9 Biancavilla has an argument -- I'm not saying it's the winning
10 argument, I'm not saying it's not the winning argument -- that
11 okay, the 679.83 includes taxes and insurance escrow. Okay.
12 And you're pointing to paragraph 4B which refers to the escrow
13 items, and say the amount may change periodically over the term
14 of my loan. Okay?

15 So I guess you'd have a good argument that to the
16 extent that her tax payments and insurance increased from when
17 this is signed, she's on the hook for that incremental
18 increase, but not for the entire amount of the taxes and
19 insurance.

20 So hypothetically, if her taxes started out as 2,000
21 dollars a year --

22 MR. WISHNEW: Right.

23 THE COURT: -- and increased to 2,500 dollars a year,
24 you point to paragraph -- it would seem to me that she has the
25 argument that reading paragraph 2 and paragraph 4B, she's on

1 the hook for that incremental amount. So if it increased 500
2 dollars a year, you divide it by twelve and that would -- that
3 could be added to her monthly payments. But not the entire --
4 how do you get to your argument that this contract permits you
5 to add to the 679 the entire amount of taxes and insurance as
6 opposed to any adjustment, because taxes and insurance
7 increased? The hypothetical I gave you --

8 MR. WISHNEW: Well --

9 THE COURT: -- if the taxes and insurance
10 hypothetically increased 500 dollars a year --

11 MR. WISHNEW: Sure.

12 THE COURT: -- okay, you've got the argument that 4B
13 says okay, that gets added on.

14 MR. WISHNEW: Right.

15 THE COURT: But not the 2,000.

16 MR. WISHNEW: Well, see, I think -- I would read 4B
17 Your Honor, to say that she agrees to comply with the existing
18 obligation to make all payments of taxes, insurance,
19 assessments, escrow items, impounds and other payments, which
20 could change. So it's not that we are agreeing to say to cap a
21 number of set a number, and then say if it increases, well,
22 then you're responsible only for the increase.

23 The fact of the matter is, we were working with her to
24 modify principal and interest. We don't -- as the Court
25 recognized and as we argued in our papers, we don't control

1 these different categories of items. So we have control of
2 principal and interest, and that's what we agreed to modify.
3 The underlying loan documents require her to pay taxes,
4 insurance premiums --

5 THE COURT: But how do you reconcile that argument
6 with paragraph 2 --

7 MR. WISHNEW: Well --

8 THE COURT: -- which says -- stop -- that the trial
9 period payment includes payment for escrow items?

10 MR. WISHNEW: Well, I think you have to bifurcate the
11 two, Your Honor. Paragraph 2 clearly sets forth a fixed
12 trial -- a fixed payment for the trial period. It then
13 distinguishes between the trial period and the permanent
14 period. And so in 3 and 4 it says, okay, if you succeed with
15 trial, then you get the permanent. And then on -- and you have
16 the obligation to address these additional items.

17 So the idea is the trial payment was an estimate of
18 essentially an all-in payment. And then assuming that she's
19 shown an ability to make that all-in payment, she would then
20 get modded into a modified principal and interest amount, but
21 still have the existing -- but still maintain her existing
22 obligation to cover these additional items, which included
23 escrow.

24 THE COURT: Going to 4B, it says "to comply, except to
25 the extent that they are modified by this plan."

1 MR. WISHNEW: Um-hum.

2 THE COURT: Okay. So paragraph 2, which says the
3 679.83 includes payment for escrow items. Why doesn't that
4 modify the plan?

5 MR. WISHNEW: My argument would be, Your Honor, that
6 the paragraph 2 only modifies for the purposes of a trial
7 period.

8 THE COURT: Where's it say that?

9 MR. WISHNEW: It's at -- well, it defines -- Your
10 Honor, in the second line of paragraph 2, it defines the three
11 itemized items as the "trial period payment". The trial period
12 payment -- and then I go to the second paragraph of section 2:
13 "The Trial Period Payment is an estimate of the payment that
14 will be required under the modified loan terms, which will be
15 finalized in accordance with Section 3."

16 Section 3 then says --

17 THE COURT: But you don't argue that the 679 had to be
18 adjusted because of the final amount of unpaid interest and any
19 other delinquent amounts after deducting my loan balance and
20 any remaining held at the end." So you haven't argued that
21 that language came into play?

22 You've essentially -- well, I mean, you haven't, have
23 you?

24 MR. WISHNEW: I don't believe so, Your Honor.

25 THE COURT: Okay. Well, look, I think we've gotten as

1 far as I can get to -- is there anything -- Ms. Biancavilla, is
2 there anything you want to add now.

3 MS. BIANCAVILLA: I don't even know where to go with
4 this. Because this is -- it's beyond me. That's why I like
5 fixed loans.

6 THE COURT: Yeah, I'm sure, but you know.

7 MS. BIANCAVILLA: Yeah. I understand there's a lot of
8 things going on here that attorneys have hard times working
9 through. And so --

10 THE COURT: So do judges.

11 MS. BIANCAVILLA: I'm trying -- I see. And I
12 appreciate all that you're doing in order to try to help me get
13 to a place that makes sense.

14 THE COURT: Look, here's what I want you both to do,
15 okay. You need to go back and try to settle this again. And I
16 don't force settlements, Ms. Biancavilla, okay, I don't; but
17 let me just tell you what -- if you don't settle it, we're
18 going to have a trial on damages. Where do you live?

19 MR. WISHNEW: Pennsylvania.

20 MS. BIANCAVILLA: Me?

21 THE COURT: Yes.

22 MS. BIANCAVILLA: I live in the State of Pennsylvania.

23 THE COURT: Okay, where in Pennsylvania are you?

24 MS. BIANCAVILLA: I'm in the Harrisburg area, near
25 Cumberland.

1 THE COURT: Okay, yeah. Okay. So look, if you can't
2 settle it, we're going to have a trial on damages. The Trust
3 has agreed -- I mean, having read all the papers, the only
4 issue that's separating you and the trust is what your damages
5 are. Whether they had to do it or not, they've acknowledged
6 that once that trial plan was signed, they agree that's a
7 contract. Whether it was right or wrong, they figure they've
8 got to live by it, and you're entitled to the differential
9 between what you'd pay under a permanent HAMP modification and
10 what you were paying over with the non-HAMP modification.

11 They do make the point that if it's not settled -- and
12 I think they're probably right about this -- they're going to
13 seek to discount to present value, because they tried to
14 calculate over the life of the loan, what the differential is.
15 If it goes to trial, they're entitled to at least offer
16 evidence of what the discounted amount would be, because 29,000
17 or 100,000 over twenty years, is not worth 100,000 dollars
18 today. Okay? All right. But that's not before me today.
19 Okay.

20 MS. BIANCAVILLA: Yes, so --

21 THE COURT: So just let me finish. Okay?

22 MS. BIANCAVILLA: I'm sorry.

23 THE COURT: So if it goes to trial, I'll set a date
24 where I attempt to try to be convenient to you, because you're
25 going to have to come to New York for it. We don't do trials

1 over the phone. You're going to have to offer your evidence of
2 your damage calculation. I think that we've identified today
3 some issues where I think you have a genuine dispute with the
4 trust. I think what you -- we'll have to see what the answer
5 is as to whether your escrow payments should or shouldn't be
6 included. I'm not deciding that today. I think I understand
7 better the arguments about it under the contract.

8 But Mr. Wishnew, I'm not trying to persuade you to --
9 it's going to cost you more -- it's going to cost your client
10 more to try this case than I think you can settle this case
11 for.

12 MR. WISHNEW: I know I'm not supposed to disclose --
13 I'm not going to get --

14 THE COURT: I don't want to know the amount. Okay.

15 MR. WISHNEW: I'm just going to say it's greater than
16 what we're seeking to allow the claim at right now.

17 THE COURT: I'm sorry?

18 MR. WISHNEW: We made offers --

19 THE COURT: Okay.

20 MR. WISHNEW: -- to Ms. Biancavilla greater than what
21 we're talking about as an allowed claim.

22 THE COURT: Okay.

23 MR. WISHNEW: So --

24 THE COURT: Look --

25 MR. WISHNEW: -- I don't know where to go.

1 THE COURT: -- Ms. Biancavilla --

2 MS. BIANCAVILLA: Um-hum. Yes.

3 THE COURT: -- where we are at this point is that when
4 I set a trial in these matters, I enter a scheduling order that
5 requires each side to exchange their trial exhibits, whatever
6 paper -- whatever exhibits you have that you want to introduce
7 at trial, you're going to be required to number them; each have
8 a unique exhibit number. They'll have to give you their
9 documents; you have to give them yours.

10 We're going to set a trial date. I don't even think
11 you want her deposition, do you, Mr. Wishnew? I mean, this is
12 really --

13 MR. WISHNEW: This is really, I think, just putting
14 the evidence in, Your Honor.

15 THE COURT: It is. And I'm going to set a --

16 MS. BIANCAVILLA: Is the --

17 THE COURT: -- I'm going to set a trial date and
18 you're going to have to come to New York. It seems to me, this
19 is at most a half-day trial, because it's a pretty -- one, I've
20 got to interpret the dispute about the contract, whether escrow
21 payments are included or not included, and whether they're
22 entitled to step-up in a HAMP modification. They point to the
23 HAMP guidelines. You ought to look at that,

24 Mr. Wishnew you ought to -- I know it's in your
25 exhibit, but maybe you ought to -- you ought to have some more

1 conversations with Ms. Biancavilla, send her that document
2 again --

3 MR. WISHNEW: Okay.

4 THE COURT: -- okay -- so she can see what you're
5 pointing to as the authority for the Trust, even with a
6 permanent HAMP modification, after five years, to step up the
7 interest rate.

8 After how many years was it stepped up here?

9 MR. WISHNEW: I think it was five, Your Honor.

10 THE COURT: Was it? Okay.

11 MR. WISHNEW: Yeah.

12 THE COURT: Look, you'll either settle it or not. And
13 if you don't talk about a schedule, see if you can work out a
14 scheduling order --

15 MR. WISHNEW: Yeah.

16 THE COURT: -- as to exchange of exhibits, and find
17 out -- Ms. Biancavilla, do you work?

18 MR. WISHNEW: Yes, Your Honor.

19 MS. BIANCAVILLA: Yeah. And my schedule is not
20 regular. It's different every week.

21 THE COURT: Okay, well I want to -- within limits, I
22 try to accommodate your schedule and my schedule, obviously.
23 And you've obviously got to come from the Harrisburg area to
24 New York for it. We don't do trials over the phone.

25 MS. BIANCAVILLA: Right.

1 THE COURT: And we'll -- talk to Mr. Wishnew about a
2 date that's the least inconvenient for you and that works with
3 the Court's schedule and with the Trust's counsel's schedule.

4 MS. BIANCAVILLA: May I inject something here about
5 settlement?

6 THE COURT: Sure. Go ahead.

7 MS. BIANCAVILLA: Okay. We actually had a settlement
8 on the table that I was okay with. The problem that I ran into
9 is that a question that I had asked was never answered until a
10 couple of weeks before we went into all of this.

11 THE COURT: Okay.

12 MS. BIANCAVILLA: And I had stated, by e-mail, that I
13 didn't have enough time to deal with it at that time, because
14 there were other things going on, and I couldn't jump in right
15 here, right now.

16 THE COURT: Okay.

17 MS. BIANCAVILLA: What I was asking of that last
18 settlement amount is whether or not that would be a lump sum or
19 they were going to drag it out.

20 THE COURT: Well, I'm not going to get -- because I
21 have to be the one, if it goes to trial, Ms. Biancavilla, I
22 can't get in the middle of your settlement talks. I want
23 you --

24 MS. BIANCAVILLA: Yeah.

25 THE COURT: -- and Mr. Wishnew to have a discussion

1 and see whether you can come to a resolution.

2 MS. BIANCAVILLA: Right.

3 THE COURT: Mr. Wishnew, what I would ask is, within
4 two weeks, to send me a status report.

5 MR. WISHNEW: Okay.

6 THE COURT: And if you can't settle it, talk to Ms.
7 Biancavilla about a schedule, and we'll try and accommodate
8 both sides for a date for trial. I think, looking at what I've
9 seen, this is probably like a half a day trial.

10 Realistically, Harrisburg is far enough away that
11 you're probably going to have to stay overnight, either before
12 the trial or after the trial, so -- but talk to Mr. Wishnew;
13 see what you can work out. I hope you can resolve it. If you
14 can't, I mean, I'm here to decide disputes, but frequently the
15 best result is one both -- the best settlements are one that
16 neither side is entirely happy with but it just makes the most
17 sense for both of them. Okay?

18 MS. BIANCAVILLA: Yeah. I'm sorry. I thought I had
19 middle ground working with the 679 number because in the
20 calculations of the thirty-one percent of the amount that would
21 have been in the HAMP file of my income, as reported, it would
22 have been, like, 200 dollars less.

23 THE COURT: All right. Let's --

24 MS. BIANCAVILLA: And so --

25 THE COURT: Let's -- I don't want to get into the --

1 talk to Mr. Wishnew and -- or --

2 MS. BIANCAVILLA: Yeah.

3 THE COURT: -- or I don't know -- are you going to
4 have this discussion directly, Mr. Wishnew?

5 MR. WISHNEW: Yes, Your Honor.

6 THE COURT: Okay. All right. So get in touch with
7 Ms. Biancavilla, see whether you can get it resolved, give me a
8 status letter within two weeks. If not, get a schedule done.
9 You can get a date for trial from Deanna. It does seem to me
10 like a half a day. And see -- work with Ms. Biancavilla as to
11 whether morning or afternoon is more convenient.

12 How long is the drive from Harrisburg to -- or from
13 where you are to New York?

14 MS. BIANCAVILLA: Me?

15 THE COURT: Yes.

16 MS. BIANCAVILLA: I haven't been there in a lot of
17 years.

18 THE COURT: Okay.

19 MS. BIANCAVILLA: I know my car won't make it; I will
20 have to rent a vehicle.

21 THE COURT: Okay. Well, look, I -- Mr. Wishnew will
22 talk to you about it, and I'm going to try and accommodate, but
23 there are limits to what I can do on that, okay?

24 MS. BIANCAVILLA: Yeah.

25 THE COURT: Okay.

1 MS. BIANCAVILLA: I appreciate your time today and
2 looking into details that I had no idea were even there.

3 THE COURT: Okay.

4 MS. BIANCAVILLA: So it's been a pleasure, and I want
5 to thank you for your generosity in allowing me to enter in on
6 the live line and at no cost.

7 THE COURT: Okay.

8 MS. BIANCAVILLA: So I appreciate that.

9 THE COURT: All right. Let's see; hopefully you'll
10 get it resolved. If not, we'll go ahead and try it. And I
11 think -- I have the papers that were filed for today's hearing.
12 It may be that the Trust and maybe you were going to want to
13 file something further. I've at least explored what issues I
14 see in interpreting the contract and computing damages, and
15 let's see where we get to.

16 Thanks very much, Ms. Biancavilla. Okay. You
17 don't --

18 MS. BIANCAVILLA: Okay.

19 THE COURT: You can stay on the phone or not; it's up
20 to you. Okay? We're going to move onto another matter in this
21 case, okay?

22 MS. BIANCAVILLA: Okay. Thank you so much.

23 THE COURT: Thanks. Okay.

24 Kasparik.

25 MR. WISHNEW: Thank you, Your Honor. The last matter

1 on today's calendar is item six, on page 5, the Borrower Claims
2 Trust objection to proof of claim number 3695, filed on behalf
3 of Rosalind Alexander-Kasparik.

4 THE COURT: Okay. Are they -- is anyone for Ms.
5 Kasparik on the phone?

6 MR. CATE: Good morning, Your Honor. Allan Cate on
7 behalf of claimant Rosalind Alexander-Kasparik.

8 THE COURT: Okay. Go ahead, Mr. Wishnew.

9 MR. WISHNEW: Thank you, Your Honor. Your Honor, the
10 Borrower Claims Trust filed its objection at docket number
11 9465. Claimant filed their response at docket number 9464.
12 And we followed up with our reply at 9492.

13 Your Honor, this matter derives from a complaint which
14 was amended multiple times. It was filed against Freddie Mac
15 and GMAC Mortgage in 2012. It's been the subject of multiple
16 [de-mu-ers] --

17 THE COURT: Demurrers.

18 MR. WISHNEW: -- demurrers. Two-and-a-half years and
19 I still can't get it right.

20 THE COURT: Yeah, you still can't get it right.

21 MR. WISHNEW: -- in the California courts, which
22 claimant participated in on each occasion. The claimant has
23 made multiple claims against both defendants, but has never
24 distinguished between the defendants. All allegations are
25 against "the defendants", being both Freddie Mac and GMAC

1 Mortgage. So it's the Trust's position that the claimant's
2 prosecution of the claim in the California courts -- I'm
3 sorry -- that the claimant's prosecution of the claim in the
4 bankruptcy court is nothing more than a duplication of prior
5 court proceedings in which it fully participated.

6 Accordingly, the Borrowers Trust brings its objection
7 to disallow and expunge the claim on the basis of collateral
8 estoppel arising from a spring 2015 judgment in defendant's
9 favor, and to the extent the Court does not agree with the
10 collateral estoppel argument, also provides reasons why each
11 substantive cause of action lacks merit and should be
12 disallowed.

13 Claimant filed its reply, but its only argument was
14 that a recent dismissal, at the end of 2015, of GMAC Mortgage,
15 somehow precludes or does not allow for --

16 THE COURT: Well, it was vacated. The judgment was
17 vacated.

18 MR. WISHNEW: Right, the judgment as to GMAC Mortgage
19 was vacated. However, the claimant has misinterpreted the
20 Borrowers Trust objection and, in our opinion, the objection,
21 as filed, stands largely uncontested. The allegations in
22 plaintiff's complaint are against both Freddie Mac and GMAC
23 Mortgage, and as I mentioned, do not distinguish --

24 THE COURT: Actually, they weren't; they were against
25 Ally, and the Severson firm, who appeared on behalf of GMAC, I

1 think, regularly footnoted that it was misnamed as Ally and it
2 was actually GMAC Mortgage.

3 MR. WISHNEW: Correct, Your Honor. I was actually
4 going to make that exact point. Yeah. So --

5 THE COURT: You agree, I take it, that, despite the
6 caption, that GMAC Mortgage was a party to the California
7 litigation?

8 MR. WISHNEW: I do, absolutely, Your Honor.

9 So the fact of the matter is, is that the rulings in
10 favor of Freddie Mac, in the underlying California litigation,
11 apply equally in favor of GMAC Mortgage.

12 THE COURT: Well, let me drill down a little bit.
13 Okay. So the demurrers to the complaint -- first amended
14 complaint and second amended complaint were all sustained.
15 When the Court sustained the demurrer to the second amended
16 complaint --

17 MR. WISHNEW: Yeah.

18 THE COURT: -- it was with prejudice as to all causes
19 of action, except leave to amend was granted to allege a
20 negligence claim and promissory estoppel claim, correct?

21 MR. WISHNEW: Correct, Your Honor, yes.

22 THE COURT: And that applied as to GMAC as well?

23 MR. WISHNEW: Correct, Your Honor.

24 THE COURT: Okay. And so Kasparik filed a third
25 amended complaint --

1 MR. WISHNEW: Right.

2 THE COURT: -- which Freddie Mac alone demurred to?

3 MR. WISHNEW: Correct, Your Honor.

4 THE COURT: And the Court sustained the demurrer to
5 the third amended complaint, which has only two causes of
6 action: negligence and promissory estoppel.

7 MR. WISHNEW: Um-hum.

8 THE COURT: And the Court, initially, in its judgment,
9 applied it as to GMAC as well, correct?

10 MR. WISHNEW: Correct, Your Honor.

11 THE COURT: And then Kasparik moved to vacate the
12 judgment as to GMAC because it hadn't filed a demurrer,
13 correct?

14 MR. WISHNEW: Correct, Your Honor.

15 THE COURT: And the Court vacated the judgment as to
16 GMAC.

17 MR. WISHNEW: Um-hum.

18 THE COURT: Correct?

19 MR. WISHNEW: Correct, Your Honor.

20 THE COURT: Okay. So one of the things you say in
21 your objection is you seem to -- and I want you to tell me
22 why -- that Kasparik's claim is limited to what was alleged in
23 the original complaint, not the first amended, second amended,
24 the third amended complaint. When I look at the proof of
25 claim --

1 MR. WISHNEW: Right.

2 THE COURT: -- which is attached as Exhibit A to the
3 supplemental declaration of Ms. Lathrop --

4 MR. WISHNEW: Um-hum.

5 THE COURT: -- under "basis for claim", it says,
6 "wrongful foreclosure", and it has a case number. And the case
7 number is the case that went through the complaint, first
8 amended complaint, second amended complaint, and then third
9 amended complaint.

10 MR. WISHNEW: Right, Your Honor.

11 THE COURT: So it seemed to me that the Trust was on
12 notice, because it participated in the litigation --

13 MR. WISHNEW: Right.

14 THE COURT: -- that the claim was what was in the
15 complaint, first amended complaint, second amended complaint,
16 third amended complaint.

17 MR. WISHNEW: Right.

18 THE COURT: So the third amended complaint, judgment
19 of which has been vacated as to GMAC, has this negligence and
20 promissory estoppel claim.

21 MR. WISHNEW: Um-hum.

22 THE COURT: And those survive. Do you agree or
23 disagree?

24 MR. WISHNEW: I agree.

25 THE COURT: Okay. What I don't have in your binder

1 is -- at least I didn't see it -- is the Freddie Mac demurrer
2 to the third amended complaint. And I don't know whether
3 there's a transcript or a minute order. The California state
4 courts -- Mr. Cates (sic throughout), I used to practice in
5 California, so I'm familiar with the tentative ruling. I don't
6 know, was there -- maybe you can tell me, Mr. Cates, was there
7 a tentative ruling on the demurrer to the third amended
8 complaint?

9 MR. CATE: Yes, Your Honor. There was a detailed
10 tentative ruling, two pages, maybe, single-spaced, and it was
11 adopted as part of the order of dismissal --

12 THE COURT: It's not --

13 MR. CATE: -- and judgment and included in those
14 documents also. So --

15 THE COURT: Well, Mr. Wishnew has it. Do you have any
16 objection to him showing me the tentative?

17 MR. CATE: No, Your Honor.

18 THE COURT: Why don't you bring that up here?

19 So where I'm -- look, here's what's going through my
20 mind about this. The judgment dismissing all the causes of
21 action in the second amended complaint as anything other than
22 negligence and promissory estoppel, that's final. It was fully
23 litigated, same issues, same parties, and it seems to me res
24 judicata, collateral estoppel is going to apply as to the
25 dismissal of all of the causes of action asserted in the second

1 amended complaint.

2 What remains are the two causes of action in the third
3 amended complaint. And so then the issue for me becomes, on
4 the merits, has the Trust properly argued that those claims
5 should be expunged. It's essentially a motion-to-dismiss
6 standard. Okay? And because I didn't have either the moving
7 papers on -- you know, what I'd like to see is, okay, so you
8 argue that the sustaining of the demurrer to the third amended
9 complaint, without leave to amend, didn't apply as to GMAC.
10 But I sure would like to see what the arguments were that
11 Freddie Mac made, and what you made, Mr. Cates, and what the
12 basis for the Court's ruling.

13 So let's stop for a minute. I'm going to read the
14 tentative, okay?

15 (Pause)

16 THE COURT: Okay. I've read it, and I'm going to
17 return it to Mr. Wishnew. What -- give me a second, Mr.
18 Wishnew. Let's see if I can find this.

19 (Pause)

20 THE COURT: So Mr. Wishnew, what I'm looking at is the
21 Trust's objection to the Kasparik claim. And what I'm not
22 seeing is a legal argument why the negligence and promissory
23 estoppel claims fail on the merits, why they should be expunged
24 on the merits. You've got a twenty-five-page brief, but it
25 doesn't seem to address that.

1 I would note, for both parties, in the judge's
2 decision sustaining the demurrer to the second amended
3 complaint, in his discussion of breach of fiduciary duty -- and
4 then of course he allows an amended to assert the two causes of
5 action: negligence and promissory estoppel -- the judge
6 distinguished one of Mr. Cate's arguments. And he cited
7 Alvarez v. BAC Home Loans Servicing LP, 228 Cal.App 4th 941
8 (2014). And he says, in one sentence, he distinguishes it
9 because it's a negligence case. So that's a negligence case.
10 One of the things -- I didn't do exhaustive research, but I did
11 see that in Garcia -- you may want to take a note of this -- in
12 Garcia v. PNC Mortgage, 2015 WL 5461563, (N.D. Cal.), September
13 16, 2015, the district court, in its order granting the motion
14 to dismiss -- it's District Judge Phyllis Hamilton in the
15 Northern District -- has a discussion of the negligence claim,
16 and notes that -- not notes; it's in the text.

17 I'll read it: "In the third cause of action, plaintiff
18 alleges the claim for negligence based on PNC's handling of
19 'mortgage assistance and foreclosure prevention services' for
20 his loan, including the handling of the loan modification
21 application" -- applications, plural. "The dispute here is as
22 to whether a loan servicer owes a duty of care to a borrower.
23 There is a split of authority in the California Court of
24 Appeal. See Lueras v. BAC Home Loans Servicing, LP, 221
25 Cal.App.4th 49, 67-78 (2013)(no duty of care); Alvarez v. Home

1 Loans Servicing, 228 Cal.App 4th 941, 945-950 (2014)(duty of
2 care)." And what Judge Hamilton says is, "In the absence of
3 some guidance from the Ninth Circuit, this court finds the
4 reasoning in the Lueras decision to be more persuasive, and
5 finds that a servicer, as any financial institution, owes no
6 duty of care to a borrower in the provision of ordinary
7 financial services such as loan modifications."

8 So my research wasn't necessarily exhaustive, but -- I
9 didn't look at the promissory estoppel law, but -- so here's
10 what I want from both sides. I want -- so look, Mr. Cates, I
11 do conclude that res judicata and collateral estoppel apply to
12 all of the causes of action which were dismissed on the merits
13 by the California trial court, as to which no appeal was taken.
14 And so you're blocked from pursuing any of those elements of
15 the claim. But the negligence and promissory estoppel claim,
16 because of the vacating of the judgment, remain live. And I'm
17 going to consider them on the merits. And so I'm going to
18 give -- how much time, Mr. Cates, do you want to submit a
19 brief -- well, here's what we ought to do.

20 Mr. Wishnew, how much time do you want to submit a
21 brief in support of dismissal of those claims, those two
22 claims, on the merits?

23 MR. WISHNEW: Two weeks, Your Honor.

24 THE COURT: Okay. And Mr. Cates, is two weeks enough,
25 after you get that brief, to respond to the brief?

1 MR. CATE: That's just fine, Your Honor.

2 THE COURT: Okay. So Mr. Wishnew, what I want you to
3 do is confirm a schedule with Mr. Cates, that two weeks/two
4 weeks is right. It seems to me you can have three business
5 days to do a reply brief, if you want, after that. Put it in a
6 letter. The two of you agree on the schedule. Put it in a
7 letter to me. Put it on -- talk to Mr. Cates. Put it on the
8 calendar for an omnibus hearing date. And I'm going to go
9 ahead and decide whether those claims -- the remaining claims
10 should be expunged.

11 So am I correct, Mr. Cates, that when the court
12 vacated the judgment it stayed the action, so the California
13 court is not anxious to go ahead and decide those two remaining
14 causes of action; is that a fair statement?

15 MR. CATE: Yes, Your Honor, the action is stayed.

16 THE COURT: Okay. All right. So I'm going to go
17 ahead and deal with it.

18 And Mr. Wishnew, talk to Mr. Cates, finalize this
19 briefing schedule. I'm sure you've got some omnibus hearing
20 dates coming up. Talk to Mr. Cates.

21 Mr. Cates, I'll let you appear by telephone.

22 MR. CATE: I appreciate that, Your Honor. Thank you.

23 THE COURT: And what we're going to do is we're going
24 to have a -- it's going to be a merits argument as to those two
25 remaining causes of action.

1 And what I'd ask in the meantime, Mr. Wishnew --

2 MR. WISHNEW: Um-hum.

3 THE COURT: -- before you even file the briefs --

4 MR. WISHNEW: Yeah.

5 THE COURT: -- I would ask that you not -- you don't
6 have to -- well, go ahead and file it. I would like the
7 demurrer -- the Freddie Mac demurrer -- Mr. Cates, I assume he
8 filed an opposition to it, and the tentative that you showed
9 me. File them all together as a single -- with the exhibits to
10 a single pleading.

11 MR. WISHNEW: Okay.

12 THE COURT: All right?

13 MR. CATE: Yes, Your Honor.

14 THE COURT: Is there anything else that relates to the
15 sustaining of the demurrer to the third amended complaint,
16 other than the Freddie Mac brief, your brief, and the
17 tentative, that I ought to see? Obviously I have the judgment
18 and the vacating of the judgment.

19 MR. CATE: I don't think so, Your Honor.

20 THE COURT: Okay. All right. I just -- all right, so
21 Mr. Wishnew's going to put that together and obviously serve
22 you with a copy of it. Okay? Don't wait for your brief -- I
23 want to see that even before I get the briefs from both sides.

24 MR. WISHNEW: All right.

25 THE COURT: Okay? All right.

1 MR. CATE: Very good.

2 THE COURT: So I'm not going to enter a written order
3 today, but I'm so-ordering the transcript; I'm sustaining the
4 Trust's objection to all causes of action other than negligence
5 and promissory estoppel, on the basis of res judicata and
6 collateral estoppel. The California judgment is final as to
7 those other causes of action.

8 Okay. Anything else you want to add, Mr. Cates?

9 MR. CATE: No, Your Honor. That's all. Thank you.

10 THE COURT: Okay. Mr. Wishnew, anything you want to
11 add on this?

12 MR. WISHNEW: That's it for Your Honor.

13 THE COURT: Okay. Is that it for today?

14 MR. WISHNEW: That's it.

15 THE COURT: Thank you very much.

16 MR. WISHNEW: Thank you.

17 THE COURT: When's our next hearing? Well, we've got
18 a trial next week.

19 MR. WISHNEW: We have a very brief hearing Monday, a
20 second trial Tuesday, a status conference later in the week,
21 and then I think we're back on the omnibus mid-February --

22 THE COURT: Okay.

23 MR. WISHNEW: -- but there's also a trial February
24 9th.

25 THE COURT: Okay. Thanks very much. All right, we're

1 adjourned.

2 MR. WISHNEW: Thank you, Your Honor.

3 (Whereupon these proceedings were concluded at 11:13 AM)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: January 22, 2016

January 21, 2016

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