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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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PAUL SCHRUPP,  
  
                                Plaintiff,  
  
          v.  
  
WELLS FARGO BANK, N.A.; NDEX  
WEST, LLC; and DOES 1-20,  
inclusive,  
  
                                Defendants.

CIV. NO. 2:16-00636 WBS KJN  
  
MEMORANDUM AND ORDER RE: MOTION  
TO DISMISS

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Plaintiff Paul Schrupp initiated this action against defendants Wells Fargo Bank, N.A. ("Wells Fargo") and NDEX West, LLC, alleging several causes of action based upon Wells Fargo's failure to provide plaintiff a permanent loan modification prior to foreclosing on his property. Presently before the court is Wells Fargo's motion to dismiss plaintiff's Complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docket No. 6.) Defendant NDEX West, LLC, the agent for the beneficiary and

1 trustee under the deed of trust against plaintiff's home, joins  
2 Wells Fargo's motion to dismiss. (Docket No. 7.)

3 I. Factual and Procedural History

4 On December 12, 2005, plaintiff borrowed \$520,000 from  
5 World Savings Bank secured by a deed of trust on his home. (Req.  
6 for Judicial Notice ("RJN") Ex. A (Docket No. 6-1).) World  
7 Savings Bank later changed its name to Wachovia Mortgage, FSB  
8 before eventually becoming Wells Fargo Bank, N.A. (Id. Ex. F.)  
9 Plaintiff defaulted on his loan in December 2009 and Wells Fargo  
10 caused a Notice of Default to be recorded in the Yolo County  
11 Recorder's Office on March 26, 2010. (Id. Ex. G.)

12 On August 10, 2010, plaintiff filed a Chapter 13  
13 bankruptcy petition in the Eastern District of California  
14 bankruptcy court. (Id. Ex. H.) The bankruptcy court confirmed  
15 plaintiff's Chapter 13 plan on February 2, 2011, requiring  
16 plaintiff to pay monthly installments of \$2,899.24 to Wells  
17 Fargo. (Id. Ex. I.)

18 In May 2011, Wells Fargo invited plaintiff to  
19 participate in a Home Affordable Modification Program ("HAMP")  
20 Trial Period Plan ("TPP"), promising to offer plaintiff a  
21 permanent loan modification if he made three timely monthly  
22 payments of \$1,500.01 and submitted the required documents. (Id.  
23 Ex. J.) The bankruptcy court approved plaintiff's trial loan  
24 modification with Wells Fargo on June 21, 2011. (Id. Ex. O.)  
25 The bankruptcy court noted, however, that it was approving the  
26 trial modification despite plaintiff's failure to comply with the  
27 requirements of the Federal Rules of Bankruptcy Procedure and  
28 that plaintiff would be "well served to ensure that future

1 filings comply.” (Id.) Plaintiff alleges he began making the  
2 modified trial payments on May 26, 2011. (Id. Ex. L.)

3 On June 23, 2011, plaintiff moved to confirm his  
4 modified Chapter 13 plan, which incorporated the terms of Wells  
5 Fargo’s loan modification. (Id. Ex. K.) On August 2, 2011,  
6 however, the bankruptcy court denied plaintiff’s motion to  
7 confirm the modified plan without prejudice due to plaintiff’s  
8 procedural errors. (Id.) The bankruptcy court found that  
9 plaintiff had “failed to meet the burden of proving the  
10 requirements of confirmation” and explained the type of evidence  
11 that a debtor must submit. (Id.)

12 Plaintiff defaulted on his bankruptcy payment plan and  
13 the bankruptcy trustee filed a motion to dismiss the bankruptcy  
14 case on October 13, 2011. (Id. Ex. L.) On November 23, 2011,  
15 the bankruptcy court found that plaintiff had failed to cure the  
16 default and dismissed the case. (Id.)

17 Plaintiff alleges that he made the three trial payments  
18 and continued to make modified payments of \$1,500.01 to Wells  
19 Fargo for two months after the bankruptcy court denied his  
20 amended Chapter 13 plan and two more months after his bankruptcy  
21 case was dismissed. (Compl. ¶ 25; see also RJN Ex. L.) Wells  
22 Fargo accepted these payments until January 20, 2012, when a  
23 branch employee allegedly refused to accept the payment. (Compl.  
24 ¶ 25.) Plaintiff alleges that Wells Fargo gave him contradictory  
25 information over the next several years--first informing him that  
26 it would investigate and correct the error the branch employee  
27 made when he or she refused to accept payment, later refusing to  
28 correct the error, and then again agreeing to correct the error.

1 (Id. ¶ 26.) Wells Fargo later refused to communicate with  
2 plaintiff because he was represented by counsel. (Id. ¶ 27.)  
3 Throughout this time, Wells Fargo sent monthly mortgage  
4 statements to plaintiff demanding the higher amount due under the  
5 original mortgage. (Id. ¶ 29.)

6 On November 10, 2015, NDEX West, LLC, at the direction  
7 of Wells Fargo, recorded a notice of trustee's sale. (Id. ¶ 30.)  
8 NDEX West, LLC conducted a foreclosure sale of plaintiff's home  
9 on December 3, 2015 and Wells Fargo took title to the property.  
10 (Id. ¶ 31; Wells Fargo's Mot. to Dismiss ("Mot. to Dismiss") at 3  
11 (Docket No. 6).) Plaintiff owed \$722,059.93 on his loan at the  
12 time of the foreclosure sale. (RJN Ex. M.)

13 Plaintiff alleges five causes of action against Wells  
14 Fargo for: 1) breach of contract; 2) promissory estoppel; 3)  
15 violations of California's Rosenthal Fair Debt Collection  
16 Practices Act ("Rosenthal Act"), Cal. Civ. Code § 1788; 4)  
17 violations of the Equal Credit Opportunity Act ("ECOA"), 15  
18 U.S.C. § 1691(d); and 5) violations of California's Unfair  
19 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.  
20 Plaintiff also asserts a wrongful foreclosure claim against both  
21 Wells Fargo and NDEX West, LLC. Plaintiff seeks to set aside the  
22 foreclosure sale, specific performance of the alleged contractual  
23 obligations, statutory damages, actual damages, restitution, and  
24 attorney's fees. (Compl. at 13-14.)

## 25 II. Legal Standard

### 26 A. Motion To Dismiss

27 On a motion to dismiss under Rule 12(b)(6), the court  
28 must accept the allegations in the complaint as true and draw all

1 reasonable inferences in favor of the plaintiff. Scheuer v.  
2 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by  
3 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.  
4 319, 322 (1972). To survive a motion to dismiss, a plaintiff  
5 must plead "only enough facts to state a claim to relief that is  
6 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.  
7 544, 570 (2007). This "plausibility standard," however, "asks  
8 for more than a sheer possibility that a defendant has acted  
9 unlawfully," and where a complaint pleads facts that are "merely  
10 consistent with a defendant's liability," it "stops short of the  
11 line between possibility and plausibility." Ashcroft v. Iqbal,  
12 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

13 "While a complaint attacked by a Rule 12(b)(6) motion  
14 to dismiss does not need detailed factual allegations, a  
15 plaintiff's obligation to provide the 'grounds' of his  
16 'entitle[ment] to relief' requires more than labels and  
17 conclusions . . . ." Twombly, 550 U.S. at 555 (alteration in  
18 original) (citations omitted). "Threadbare recitals of the  
19 elements of a cause of action, supported by mere conclusory  
20 statements, do not suffice." Iqbal, 556 U.S. at 678; see also  
21 Iqbal, 556 U.S. at 679 ("While legal conclusions can provide the  
22 framework of a complaint, they must be supported by factual  
23 allegations.").

24 B. Judicial Notice

25 In general, a court may not consider items outside the  
26 pleadings when deciding a motion to dismiss, but it may consider  
27 items of which it can take judicial notice. Barron v. Reich, 13  
28 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial

1 notice of facts "not subject to reasonable dispute" because they  
2 are either "(1) generally known within the territorial  
3 jurisdiction of the trial court or (2) capable of accurate and  
4 ready determination by resort to sources whose accuracy cannot  
5 reasonably be questioned." Fed. R. Evid. 201; see Castillo-  
6 Villagra v. INS, 972 F.2d 1017, 1026 (9th Cir. 1992). Plaintiff  
7 does not oppose Wells Fargo's requests for judicial notice.

8           The court will thus take judicial notice of the  
9 documents related to the deed of trust, notice of default, and  
10 the trustee's sale in exhibits A, G, M, and N. (RJN Exs. A, G,  
11 M, N.) These are publicly recorded documents appropriate for  
12 judicial notice. See Lee v. City of Los Angeles, 250 F.3d 668,  
13 689 (9th Cir. 2001) (noting that a court may take judicial notice  
14 of matters of public record); see also Hopkins v. Wells Fargo  
15 Bank, N.A., Civ. No. 2:13-444 WBS JFM, 2013 WL 2253837, at \*1  
16 (E.D. Cal. May 22, 2013) (taking judicial notice of a deed of  
17 trust, notice of default and election to sell under deed of  
18 trust, notice of trustee's sale, and trustee's deed upon sale).

19           The court will also judicially notice the United States  
20 Department of Treasury documents in exhibits B through F related  
21 to the charter and certification of World Savings Bank and its  
22 renaming as Wells Fargo. (RJN Exs. B-F.) These documents are  
23 readily verifiable and undisputed. See Ferguson v. Wells Fargo  
24 Bank, N.A., Civ. No. 2:12-2944 WBS GGH, 2013 WL 504709, at \*3  
25 (E.D. Cal. Feb. 8, 2013) (taking judicial notice of similar  
26 documents reflecting official acts of the executive branch of the  
27 United States that were readily verifiable and undisputed).

28           Finally, the court will take judicial notice of the

1 bankruptcy court documents within exhibits H, J, K, L, O, and P,  
2 (RJN Exs. H, J, K, L, O; Suppl. RJN Ex. P (Docket No. 14)),  
3 because "the authenticity and existence of a particular order,  
4 motion, pleading or judicial proceeding, which is a matter of  
5 public record, is judicially noticeable." United States v. S.  
6 Cal. Edison Co., 300 F. Supp. 2d 964, 974 (E.D. Cal. 2004); see  
7 also Lane v. Vitek Real Estate Indus. Grp., 713 F. Supp. 2d 1092,  
8 1097 (E.D. Cal. 2010) (taking judicial notice of court documents  
9 relating to plaintiff's bankruptcy proceedings); Lee, 250 F.3d at  
10 690 (finding a court may take judicial notice of another court's  
11 opinion, but not of the truth of the facts recited therein).

### 12 III. Discussion

#### 13 A. Breach of Contract

14 A claim for breach of contract requires (1) the  
15 existence of a contract, (2) plaintiff's performance or excuse  
16 for nonperformance, (3) defendant's breach, and (4) resulting  
17 damages to plaintiff. Reichert v. Gen. Ins. Co. of Am., 68 Cal.  
18 2d 822, 830 (1968). Plaintiff alleges that the TPP offered  
19 pursuant to HAMP constituted a valid, enforceable contract and  
20 Wells Fargo breached by failing to offer plaintiff a permanent  
21 modification after he successfully paid the three trial payments.  
22 (Pl.'s Opp'n at 3-4 (Docket No. 11).)

23 The United States Treasury Department started the HAMP  
24 program in 2009 in response to the financial crisis to  
25 incentivize banks to refinance mortgages of distressed homeowners  
26 so they could stay in their homes. Corvello v. Wells Fargo Bank,  
27 NA, 728 F.3d 878, 880 (9th Cir. 2013). HAMP aims to assist  
28 homeowners who have defaulted or are in imminent danger of

1 defaulting on their home mortgages. Inman v. Suntrust Mortg.,  
2 Inc., Civ. No. 1:10-1031 AWI GSA, 2010 WL 3516309, at \*1 n.2  
3 (E.D. Cal. Sept. 3, 2010).

4 Eligible borrowers who wish to permanently modify their  
5 loan through HAMP must first enter a TPP, which is a period of  
6 three or more months during which the borrower must make timely  
7 trial payments of the modified amount and provide required  
8 documentation to the loan servicer. Reichert, 68 Cal. 2d at 880-  
9 81. If the servicer concludes that the borrower is not eligible  
10 for HAMP after reviewing the documents submitted or the borrower  
11 does not make the required trial payments, the servicer must  
12 promptly communicate the ineligibility determination to the  
13 borrower in writing. Id. at 881. If the borrower complies with  
14 the terms of the TPP, the servicer must offer the borrower a  
15 permanent loan modification. Id. Home loan servicers and  
16 lenders receive significant financial incentives from the  
17 Treasury Department for each permanent modification they make.  
18 Id. at 880.

19 “[A] trial loan modification under HAMP constitutes a  
20 valid, enforceable contract under state law, at least at the  
21 pleading stage of litigation.” West v. JPMorgan Chase Bank,  
22 N.A., 214 Cal. App. 4th 780, 799 (4th Dist. 2013) (citing Wigod  
23 v. Wells Fargo Bank, N.A., 673 F.3d 547, 556-57 (7th Cir. 2012));  
24 see also Corvello, 728 F.3d at 883-84 (citing West with  
25 approval); Meixner v. Wells Fargo Bank, N.A., 101 F. Supp. 3d  
26 938, 947 (E.D. Cal. Apr. 24, 2015) (Nunley, J.) (“The Ninth  
27 Circuit has recently held that, . . . a TPP Agreement offered  
28 pursuant to HAMP is a contract, and a party to that contract may



1 sue for breach if the lender violates a term contained within the  
2 four corners of the TPP." (citing Corvello, 728 F.3d at 880)  
3 (internal quotation marks omitted)). While the modification is  
4 not complete until all of the conditions are met, banks are  
5 contractually obligated under the terms of the TPP to offer a  
6 permanent modification to borrowers who comply with the TPP by  
7 submitting accurate documentation and timely making the required  
8 trial payments. Corvello, 728 F.3d at 883. The Ninth Circuit  
9 has explained that this "interpretation of the TPP avoids the  
10 injustice that would result were . . . [banks] allowed to keep  
11 borrowers' trial payments without fulfilling any obligations in  
12 return." Id. at 884.

13 In this case, Wells Fargo offered plaintiff a TPP that  
14 required plaintiff to make its first monthly trial period payment  
15 of \$1,550.01 by June 1, 2011 to accept the HAMP modification  
16 offer. (RJN Ex. J.) In order to qualify for a permanent  
17 modification, the offer required plaintiff to make three timely  
18 payments of \$1,550.01 by the first of June, July, and August  
19 2011. (Id.) The offer letter notified plaintiff that, "[a]fter  
20 all trial period payments are timely made and you have submitted  
21 all the required documents, your mortgage would then be  
22 permanently modified." (Id.) Accepting the allegations in the  
23 Complaint as true, plaintiff made all three trial monthly  
24 payments on time.<sup>1</sup> (Compl. ¶ 25.) As a result, plaintiff has

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25 <sup>1</sup> Wells Fargo disputes that plaintiff made his first  
26 payment on time as plaintiff did not seek bankruptcy court  
27 approval of the trial modification until June 26, 2011. (Wells  
28 Fargo's Reply at 1 (Docket No. 13); RJN Ex. J.) Plaintiff  
alleges, however, that he made his trial payments on time.  
(Compl. ¶¶ 25, 35.) Further, he contends that the trustee's

1 sufficiently alleged that he accepted the offered modification  
2 and Wells Fargo breached the resulting modification agreement  
3 when it failed to provide him a permanent modification.

4           The parties were not precluded from entering into this  
5 modified agreement because plaintiff was in Chapter 13 bankruptcy  
6 proceedings and already had a confirmed Chapter 13 plan in place  
7 requiring monthly mortgage payments of \$2,899.24 to Wells Fargo.  
8 First, Wells Fargo did not condition the permanent modification  
9 on approval by the bankruptcy court or confirmation of an amended  
10 Chapter 13 plan. As the drafter of the terms of its offer and,  
11 presumably, the more sophisticated party, Wells Fargo cannot now  
12 invoke a condition it did not include.

13           Further, the bankruptcy court approved the trial loan  
14 modification and held that plaintiff was "authorized to amend the  
15 terms of the loan with Wachovia Mortgage, a division of Wells  
16 Fargo Bank, N.A., which is secured by the real property commonly  
17 known as 517 D Street, Davis, California, and such other terms as  
18 stated in the Trial Modification Agreement." (Suppl. RJN Ex. P;  
19 see also RJN Ex. O.) The bankruptcy court therefore implicitly  
20 approved the terms of the TPP, including the promise that the  
21 loan would be permanently modified if all trial payments were  
22 timely made and documents submitted. While the bankruptcy court  
23 subsequently denied confirmation of plaintiff's amended Chapter  
24 13 plan, this was because of procedural errors unrelated to the  
25 modified loan agreement. (RJN Ex. K.) Lastly, plaintiff's

26  
27 notice of default demonstrates he made his first modified payment  
28 on May 26, 2011, prior to the June 1, 2011 deadline. (Pl.'s  
Opp'n at 4; see RJN Ex. L.)

1 bankruptcy case was dismissed in its entirety in November 2011,  
2 releasing the parties from the confirmed Chapter 13 plan and any  
3 restrictions the bankruptcy rules may have imposed on them. The  
4 bankruptcy proceedings therefore did not prevent the parties from  
5 entering into a separate modification agreement.

6 Accordingly, the court finds plaintiff has adequately  
7 alleged that the trial loan modification under HAMP constituted a  
8 valid, enforceable contract and Wells Fargo breached that  
9 contract by failing to offer plaintiff a permanent loan  
10 modification. The court must therefore deny Wells Fargo's motion  
11 to dismiss plaintiff's breach of contract claim.

12 B. Tender Requirement for Equitable Claims

13 Wells Fargo argues that plaintiff's failure to allege  
14 he made a tender of his full outstanding debt precludes any  
15 equitable relief. (Mot. to Dismiss at 5.) In California,  
16 "[t]ender is required only when foreclosure has already occurred  
17 and the plaintiff alleges irregularities in the foreclosure  
18 process itself." McGarvey v. JP Morgan Chase Bank, N.A., Civ.  
19 No. 2:13-01099 KJM EFB, 2013 WL 5597148, at \*11 (E.D. Cal. Oct.  
20 11, 2013) (finding tender was not required under California law  
21 because the plaintiff's promissory estoppel, negligence, and UCL  
22 claims did not rely on any irregularities in the foreclosure  
23 process); Ohlendorf v. Am. Home Mortg. Servicing, 279 F.R.D. 575,  
24 580 (E.D. Cal. 2010) (finding that an allegation of tender was  
25 required only for a cause of action for irregularity in the  
26 foreclosure sale procedure, not the plaintiff's claims of  
27 negligence, fraud, violation of the Real Estate Settlement  
28 Procedures Act, the Rosenthal Act, or the UCL); Nugent v. Fed.

1 Home Loan Mortg. Corp., Civ. No. 2:12-00091 GEB EFB, 2013 WL  
2 1326425, at \*7 (E.D. Cal. Mar. 29, 2013) (finding tender was  
3 required because the plaintiffs' claims for wrongful foreclosure  
4 were based on irregularities in the sale notice and procedure and  
5 no exception to the tender rule applied). The rationale behind  
6 the tender requirement is that if the borrower "could not have  
7 redeemed the property had the sale procedures been proper, any  
8 irregularities in the sale did not result in damages to the  
9 [borrower]." Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 112  
10 (6th Dist. 2011) (citation omitted).

11 Plaintiff need not have alleged tender for his  
12 promissory estoppel, Rosenthal Act, ECOA, UCL, or wrongful  
13 foreclosure claims as they do not challenge any procedural  
14 irregularities in the foreclosure process but rather allege Wells  
15 Fargo failed to honor its promise to permanently modify his loan,  
16 acted in a commercially unreasonable and unfair manner, and  
17 lacked authority to foreclose on plaintiff's home when he was not  
18 in default under the modified loan agreement.

19 C. Promissory Estoppel

20 The elements of promissory estoppel are: "(1) a promise  
21 clear and unambiguous in its terms; (2) reliance by the party to  
22 whom the promise is made; (3) [the] reliance must be both  
23 reasonable and foreseeable; and (4) the party asserting the  
24 estoppel must be injured by his reliance." U.S. Ecology, Inc. v.  
25 State, 129 Cal. App. 4th 887, 901 (4th Dist. 2005) (citation and  
26 internal quotation marks omitted) (alteration in original); see  
27 also Poway Royal Mobilehome Owners Ass'n v. City of Poway, 149  
28 Cal. App. 4th 1460, 1471 (6th Dist. 2007); Diede Constr., Inc. v.

1 Monterey Mech. Co., 125 Cal. App. 4th 380, 385-86 (1st Dist.  
2 2004). "Because promissory estoppel is an equitable doctrine to  
3 allow enforcement of a promise that would otherwise be  
4 unenforceable, courts are given wide discretion in its  
5 application." U.S. Ecology, Inc., 129 Cal. App. 4th at 902  
6 (citing C & K Eng'g Contractors v. Amber Steel Co., 23 Cal. 3d 1,  
7 7-8 (1978)).

8 As discussed above, plaintiff alleges sufficient facts  
9 to put forth a plausible claim that Wells Fargo made a clear  
10 promise to plaintiff to offer him a permanent loan modification  
11 if he timely made the trial payments and submitted the required  
12 documents. Plaintiff also adequately alleges that he relied on  
13 this promise by timely making the three trial payments and  
14 continuing to pay Wells Fargo the modified amount for several  
15 more months. (Compl. ¶¶ 25-28.) Wells Fargo accepted these  
16 payments even after plaintiff's modified Chapter 13 plan was  
17 rejected and his bankruptcy case dismissed. (Id.) Wells Fargo  
18 did not reject the modified payment amount until January 2012  
19 and, even then, allegedly informed plaintiff it would investigate  
20 and "correct its error." (Id. ¶¶ 25-26.) These allegations  
21 support plaintiff's claim that Wells Fargo made a promise and  
22 acted in accordance with this promise.

23 Lastly, plaintiff sufficiently alleges that he relied  
24 to his detriment on Wells Fargo's promise to provide a  
25 modification because he forewent other opportunities to avoid  
26 foreclosure such as borrowing money to pay the default amount or  
27 locating a buyer who would have allowed him to remain in the home  
28 in exchange for rent. (Id. ¶ 42); see West, 214 Cal. App. 4th at

1 805 (finding detrimental reliance where the plaintiffs alleged  
2 they lost opportunities, including selling their home or finding  
3 a co-signer); cf. Turbeville v. JPMorgan Chase Bank, Civ. No.  
4 8:10-1464 DOC JCG, 2011 WL 7163111, at \*5 (C.D. Cal. Apr. 4,  
5 2011) (finding the plaintiffs sufficiently alleged detrimental  
6 reliance by stating that they put their money towards TPP trial  
7 payments rather than pursuing other avenues of curing their  
8 default such as immediate bankruptcy proceedings); Wilcox v. EMC  
9 Mortg. Corp., Civ. No. 8:10-1923 DOC JCG, 2011 WL 10065501, at \*6  
10 (C.D. Cal. July 25, 2011) (finding detrimental reliance where  
11 plaintiffs alleged they put their money towards modified mortgage  
12 payments rather than curing their default through bankruptcy,  
13 short sales, cashing in on 401(k) funds, or paying other  
14 creditors). Plaintiff also alleges he suffered injuries from  
15 higher loan balances, late charges, foreclosure related servicing  
16 fees, potential income tax liability, and poor credit. (Compl.  
17 ¶ 42.)

18           Despite Wells Fargo's contention that any injury  
19 plaintiff suffered was due to plaintiff's own failure to secure  
20 an amended Chapter 13 plan incorporating the loan modification,  
21 plaintiff has sufficiently alleged that the parties had a valid  
22 agreement and plaintiff invested time and money in complying with  
23 that agreement rather than pursuing other strategies. Further,  
24 even if the TPP did not constitute an enforceable contract,  
25 plaintiff could arguably assert a promissory estoppel claim based  
26 on Wells Fargo's failure to write that its permanent modification  
27 offer was conditioned on bankruptcy court approval of an amended  
28 Chapter 13 plan and continued acceptance of plaintiff's modified

1 payments even after the bankruptcy court rejected the amended  
2 Chapter 13 plan.

3 Accordingly, the court will deny Wells Fargo's motion  
4 to dismiss plaintiff's promissory estoppel claim.

5 D. Rosenthal Fair Debt Collection Practices Act

6 California's Rosenthal Act prohibits debt collectors  
7 from engaging in unfair or deceptive practices in the collection  
8 of consumer debts. Cal. Civ. Code § 1788.1. As a threshold, the  
9 defendant must fall within the Rosenthal Act's definition of  
10 "debt collector" in order to be held liable for violating the  
11 Act. The Rosenthal Act defines a "debt collector" as "any person  
12 who, in the ordinary course of business, regularly, on behalf of  
13 himself or herself or others, engages in debt collection." Id.  
14 § 1788.2(c). Foreclosure pursuant to a deed of trust is not debt  
15 collection within the meaning of the Rosenthal Act unless it  
16 includes "debt collection activities beyond the scope of the  
17 ordinary foreclosure process." Walters v. Fid. Mortg. of Cal.,  
18 730 F. Supp. 2d 1185, 1203 (E.D. Cal. 2010) (Damrell, J.); Webb  
19 v. Bank of Am., N.A., Civ. No. 2:13-2006 MCE AC, 2013 WL 6839501,  
20 at \*5-6 (E.D. Cal. Dec. 23, 2013).

21 The Ninth Circuit has recognized that a loan servicer  
22 offering a TPP under HAMP with a concomitant demand for trial  
23 payments is engaged in debt collection activities beyond the  
24 scope of the ordinary foreclosure process and, consequently, a  
25 remedy may be available under the Rosenthal Act. Corvello, 728  
26 F.3d at 885 (finding Wells Fargo was a debt collector engaged in  
27 debt collection when it offered the plaintiffs a TPP and demanded  
28 trial payments); see also Webb, 2013 WL 6839501, at \*6 (finding

1 the plaintiff sufficiently alleged the defendant was a debt  
2 collector and its debt collection activities fell outside of the  
3 normal foreclosure process where the defendant demanded payments  
4 not owed under the modification agreement and informed plaintiff  
5 she was in default when she was not).

6 Plaintiff has sufficiently alleged that Wells Fargo  
7 engaged in debt collection under the Rosenthal Act by offering  
8 plaintiff a TPP, requesting trial payments, and engaging in  
9 improper activities servicing the loan by making "false,  
10 deceptive, or misleading" statements to plaintiff that if he made  
11 the TPP payments it would provide him a permanent loan  
12 modification. (Compl. ¶ 49.) Plaintiff also alleges Wells Fargo  
13 used unfair or unconscionable means to collect the debt when it  
14 attempted to collect on the original amount due under the  
15 promissory note rather than the modified agreement and provided  
16 mixed messages about whether the rejection of the modified  
17 payment in January 2012 was an error. (Id. ¶ 50.) Wells Fargo  
18 was therefore engaged in conduct beyond enforcing the original  
19 deed of trust. Accordingly, plaintiff has stated a plausible  
20 claim under the Rosenthal Act and the court must deny Wells  
21 Fargo's motion to dismiss that claim.

22 E. Equal Credit Opportunity Act

23 The ECOA prohibits creditors from discriminating  
24 against credit applicants "on the basis of race, color, religion,  
25 national origin, sex or marital status, or age." 15 U.S.C.  
26 § 1681(a)(1). In order to effectuate this goal, the ECOA  
27 contains strict notice requirements that provide a basis for a  
28 cause of action against creditors even without allegations of



1 discrimination. See Schlegel, 720 F.3d 1204, 1210 (9th Cir.  
2 2013); Errico v. Pac. Capital Bank, N.A., 753 F. Supp. 2d 1034,  
3 1042 (N.D. Cal. 2010) (“[A] procedural violation of the notice  
4 provisions of ECOA may provide the basis for a cause of action  
5 even without regard to allegations of discrimination.” (citing  
6 Dufay v. Bank of Am., 94 F.3d 561 (9th Cir. 1996))).

7 Under the ECOA, when a lender takes an adverse action  
8 against an applicant, the applicant is entitled to a statement of  
9 reasons for the action or a written notification of the adverse  
10 action that discloses the applicant’s right to a statement of  
11 reasons within thirty days after receipt of the applicant’s  
12 request. 15 U.S.C. § 1691(d)(2)(A)-(B). Adverse action means “a  
13 denial or revocation of credit, a change in the terms of an  
14 existing credit arrangement, or a refusal to grant credit in  
15 substantially the amount or on substantially the terms  
16 requested.” 15 U.S.C. § 1691(d)(6). The term does not include a  
17 “refusal to extend additional credit under an existing credit  
18 arrangement where the applicant is delinquent or otherwise in  
19 default.” Id.; see also 12 C.F.R. § 202.2(c)(2)(ii) (providing  
20 that the term adverse action does not include “any action or  
21 forbearance relating to an account taken in connection with  
22 inactivity, default, or delinquency as to that account”).

23 The Ninth Circuit has found that termination of a loan  
24 modification agreement constitutes an adverse action. Schlegel,  
25 720 F.3d at 1211; see also Vasquez v. Bank of Am., N.A., Civ. No.  
26 3:13-2902 JST, 2013 WL 6001924, at \*13 (N.D. Cal. Nov. 12, 2013)  
27 (finding a home loan modification request under HAMP constitutes  
28 a credit application under ECOA); Cooksey v. Select Portfolio

1 Servicing, Inc., Civ. No. 2:14-1237 KJM KJN, 2014 WL 4662015, at  
2 \*3 (E.D. Cal. Sept. 18, 2014) (same).

3 For example, in Schlegel, the plaintiffs fell behind on  
4 their mortgage payments, filed a Chapter 7 petition in  
5 bankruptcy, and reaffirmed their loan with Wells Fargo. 720 F.3d  
6 at 1206. The plaintiffs then obtained a loan modification  
7 agreement from Wells Fargo, which was approved by the bankruptcy  
8 court, and began making modified monthly payments. Id. Wells  
9 Fargo, however, failed to properly record the status of the  
10 plaintiffs' loan modification and sent plaintiffs a series of  
11 default notices informing them that it would be accelerating the  
12 loan and commencing foreclosure proceedings. Id. at 1206-07.  
13 The plaintiffs sent Wells Fargo a letter asking it to explain its  
14 failure to acknowledge the loan modification and, when Wells  
15 Fargo did not respond, the plaintiffs filed suit under the ECOA.  
16 Id. at 1207. The Ninth Circuit found that Wells Fargo's default  
17 notices constituted adverse actions under the ECOA as they  
18 communicated Wells Fargo's refusal to abide by the terms of the  
19 loan modification agreement, revoking the prior credit  
20 arrangement. Id. at 1211. The Ninth Circuit therefore held that  
21 the plaintiffs had sufficiently alleged an ECOA claim as Wells  
22 Fargo failed to provide an explanation for this revocation of  
23 credit until after the plaintiffs filed their complaint. Id.

24 Just as in Schlegel, plaintiff defaulted on his loan,  
25 entered into Chapter 13 bankruptcy, received an offer from Wells  
26 Fargo for a TPP, obtained approval from the bankruptcy court of  
27 the trial modification, and began making modified payments.  
28 Without providing an explanation and after accepting the modified

1 payment for months, Wells Fargo allegedly refused to accept the  
2 modified payment amount in January 2012, thereby revoking the  
3 terms of the loan modification agreement. (Compl. ¶¶ 66-69.)  
4 Despite Wells Fargo's assertion that the ECOA does not apply  
5 because plaintiff was in default, plaintiff has sufficiently  
6 alleged that the modified loan agreement cured his prior default  
7 and he was current on his payments under the modified loan.  
8 Wells Fargo's rejection of payment therefore constituted an  
9 "adverse action" for which it failed to provide a written  
10 statement of reasons or written notification.

11 Accordingly, the court must deny Wells Fargo's motion  
12 to dismiss plaintiff's ECOA claim.

13 F. Unfair Competition Law

14 California's UCL prohibits "any unlawful, unfair or  
15 fraudulent business act or practice." Cal. Bus. & Prof. Code  
16 § 17200. "The UCL's purpose is to protect both consumers and  
17 competitors by promoting fair competition in commercial markets  
18 for goods and services." Kasky v. Nike, Inc., 27 Cal. 4th 939,  
19 949 (2002) (citing Barquis v. Merchs. Collection Ass'n, 7 Cal. 3d  
20 94, 110 (1972)). Under this statute, a prevailing plaintiff is  
21 generally limited to injunctive relief and restitution of any  
22 interest acquired by means of unfair competition. See Cal. Bus.  
23 & Prof. Code § 17203; Cel-Tech Commc'ns, Inc. v. L.A. Cellular  
24 Tel. Co., 20 Cal. 4th 163, 179 (1999).

25 Here, plaintiff alleges that Wells Fargo's conduct was  
26 unlawful because it violated the Rosenthal Act and the ECOA;  
27 unfair because Wells Fargo promised but failed to provide a  
28 permanent loan modification and initiated foreclosure proceedings

1 when plaintiff was current under the modified agreement; and  
2 fraudulent in that Wells Fargo promised but failed to provide a  
3 permanent modification. (Compl. ¶¶ 72-75.)

4 Wells Fargo first contends that plaintiff does not have  
5 standing to assert a UCL claim. A private person has standing to  
6 sue under the UCL if he can "(1) establish a loss or deprivation  
7 of money or property sufficient to qualify as injury in fact,  
8 i.e., economic injury, and (2) show that that economic injury was  
9 the result of, i.e., caused by, the unfair business practice or  
10 false advertising that is the gravamen of the claim." Kwikset  
11 Corp. v. Superior Ct., 51 Cal. 4th 310, 322 (2011). The purpose  
12 of the UCL standing requirement is to "eliminate standing for  
13 those who have not engaged in any business dealings with would-be  
14 defendants and thereby strip such unaffected parties of the  
15 ability to file 'shakedown lawsuits,' while preserving for actual  
16 victims of deception and other acts of unfair competition the  
17 ability to sue and enjoin such practices." Id. at 317.

18 Plaintiff clearly had a business relationship with  
19 Wells Fargo and, as discussed above, has sufficiently alleged  
20 injury due to a loss of real property through foreclosure and  
21 financial loss due to late charges, foreclosure related servicing  
22 fees, potential income tax liability, and poor credit. (Compl.  
23 ¶ 42); see Kwikset Corp., 51 Cal. 4th at 323 (noting there are  
24 "innumerable ways in which economic injury" may be shown  
25 including surrendering more or acquiring less in a transaction  
26 than one otherwise would have, diminishment of a present or  
27 future property interest, deprivation of money or property to  
28 which one has a cognizable claim, or being required to enter into

1 a transaction costing money or property that would otherwise have  
2 been unnecessary).

3 To establish that the economic injury was the result of  
4 an unfair business practice, a plaintiff must show a "causal  
5 connection or reliance on the alleged misrepresentation."

6 Kwikset Corp., 216 Cal. App. at 326 (citation and internal  
7 quotation marks omitted). A plaintiff is not, however,  
8 "'required to allege that [the challenged] misrepresentations  
9 were the sole or even the decisive cause of the injury-producing  
10 conduct.'" Id. at 327 (citation omitted) (alteration in  
11 original). "A plaintiff fails to satisfy the causation prong of  
12 the statute if he or she would have suffered 'the same harm  
13 whether or not a defendant complied with the law.'" Jenkins v.  
14 JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 522 (4th Dist.  
15 2013) (quoting Daro v. Superior Ct., 151 Cal. App. 4th 1079, 1099  
16 (1st Dist. 2007)).

17 For example, in Jenkins, the court found the plaintiff  
18 lacked standing under the UCL because she could not establish a  
19 causal link between the foreclosure of her home and the  
20 defendant's six unlawful or unfair acts, all of which occurred  
21 after the plaintiff defaulted on her loan. Id. at 523. Even if  
22 the defendant had not acted unfairly, the plaintiff still would  
23 have defaulted and suffered the same economic injury.

24 Unlike in Jenkins, plaintiff has plausibly alleged that  
25 he was not in default under the modified loan agreement and lost  
26 his home because of Wells Fargo's misrepresentations regarding a  
27 permanent modification and rejection of payment. Accordingly,  
28 the court must deny Wells Fargo's motion to dismiss plaintiff's

1 UCL claim for lack of standing.

2 "Each prong of the UCL is a separate and distinct  
3 theory of liability" and offers an "independent basis for  
4 relief." Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir.  
5 2009) (citing S. Bay Chevrolet v. Gen. Motors Acceptance Corp.,  
6 72 Cal. App. 4th 861 (4th Dist. 1999)). "An action is unlawful  
7 under the UCL and independently actionable if it constitutes a  
8 violation of another law, 'be it civil or criminal, federal,  
9 state, or municipal, statutory, regulatory, or court-made.'" "  
10 Cooksey, 2014 WL 4662015, at \*7. Given that plaintiff's  
11 Complaint sufficiently alleges claims for breach of contract,  
12 promissory estoppel, and violations of the Rosenthal Act and the  
13 ECOA, it also states a claim under the UCL. See Ramos v.  
14 Citimortgage, Inc., Civ. No. 08-02250 WBS KJM, 2009 WL 86744, at  
15 \*6 (E.D. Cal. Jan. 8, 2009). Accordingly, the court will deny  
16 Wells Fargo's motion to dismiss plaintiff's UCL claim.

17 G. Wrongful Foreclosure

18 The elements of wrongful foreclosure are: "(1) the  
19 trustee or mortgagee caused an illegal, fraudulent, or willfully  
20 oppressive sale of real property pursuant to a power of sale in a  
21 mortgage or deed of trust; (2) the party attacking the sale  
22 suffered prejudice or harm; and (3) the trustor or mortgagor  
23 tenders the amount of the secured indebtedness or was excused  
24 from tendering. West, 214 Cal. App. 4th at 800. "It is the  
25 general rule that courts have power to vacate a foreclosure sale  
26 where there has been fraud in the procurement of the foreclosure  
27 decree or where the sale has been improperly, unfairly or  
28 unlawfully conducted, or is tainted by fraud, or where there has

1 been such a mistake that to allow it to stand would be  
2 inequitable to purchaser and parties." Bank of Am. Nat'l Trust &  
3 Sav. Ass'n v. Reidy, 15 Cal. 2d 243, 248 (1940).

4           The first element is satisfied if, for example, "the  
5 trustee did not have the power to foreclose" or the "trustor was  
6 not in default, no breach had occurred, or the lender had waived  
7 the breach." Lona, 202 Cal. App. 4th at 104-05. In Barroso v.  
8 Ocwen Loan Servicing, LLC, 208 Cal. App. 4th 1001 (2d Dist.  
9 2012), the court found that the plaintiff had alleged a basis for  
10 wrongful foreclosure where the parties had reached an enforceable  
11 agreement to modify the plaintiff's loan pursuant to HAMP, the  
12 plaintiff timely paid all subsequent payments, and the defendant  
13 nonetheless foreclosed. Id. at 1017-18. Similarly, in Bank of  
14 America, N.A. v. La Jolla Group II, 129 Cal. App. 4th 706 (5th  
15 Dist. 2005), the court found that the foreclosure sale was  
16 invalid where the bank accepted the homeowner's tender of his  
17 defaulted loan four days prior to when the foreclosure sale was  
18 scheduled to take place but the trustee, ignorant of the tender,  
19 still proceeded with the foreclosure sale. Id. at 709, 712. The  
20 court found that "the trustor and beneficiary entered into an  
21 agreement to cure the default" and reinstate the loan and, as a  
22 result, no contractual basis remained for exercising the power of  
23 sale and "the foreclosure sale was invalid." Id. at 712.

24           In this case, plaintiff has adequately alleged that he  
25 entered into a valid loan modification agreement with Wells Fargo  
26 that cured the prior default, he timely made the modified  
27 payments, and Wells Fargo nonetheless rejected his January 2012  
28 payment and initiated foreclosure. As in Barroso and Bank of

1 America, N.A., Wells Fargo lacked contractual authority to reject  
2 the modified payment and foreclose. The Complaint therefore  
3 contains sufficient facts that the non-judicial foreclosure was  
4 conducted illegally and the court must deny Wells Fargo's motion  
5 to dismiss plaintiff's wrongful foreclosure claim.

6 In addition to joining in Wells Fargo's motion to  
7 dismiss, NDEX West, LLC also argues that plaintiff's wrongful  
8 foreclosure claim against it should be dismissed because, as  
9 trustee, it is protected from liability under California Civil  
10 Code section 2924(b).<sup>2</sup> (NDEX Joinder at 4 (Docket No. 7).)  
11 Section 2924(b), which deals with transfers and sales of deeds of  
12 trust, states: "the trustee shall incur no liability for any good  
13 faith error resulting from reliance on information provided in  
14 good faith by the beneficiary regarding the nature and the amount  
15 of the default under the secured obligation, deed of trust, or

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16 <sup>2</sup> NDEX West, LLC also claims plaintiff has no viable  
17 claim against it because it has no financial interest in the  
18 property. (NDEX Joinder at 4.) It did not, however, file a  
19 declaration of nonmonetary status pursuant to California Civil  
20 Code section 29241. Section 29241 provides that a trustee under  
21 a deed of trust may serve on the parties a declaration of  
22 nonmonetary status if it "is named in an action or proceeding in  
23 which that deed of trust is the subject, and in the event that  
24 the trustee maintains a reasonable belief that it has been named  
25 in the action or proceeding solely in its capacity as trustee,  
26 and not arising out of any wrongful acts or omissions on its part  
27 in the performance of its duties as trustee." Cal. Civ. Code  
28 § 29241(a). If no parties object to the nonmonetary judgment  
status of the trustee within fifteen days from service of the  
declaration, "the trustee shall not be required to participate  
any further in the action or proceeding." Id. § 29241(d). If a  
party timely objects, the trustee shall be required to  
participate. Id. § 29241(e); see also Cabriales v. Aurora Loan  
Servs., Civ. No. C-10-161 MEJ, 2010 WL 761081, at \*1 n.1 (N.D.  
Cal. Mar. 2, 2010) (noting the trustee had filed a declaration of  
nonmonetary status and the trustee was therefore no longer a  
party to the action).



1 mortgage." Cal. Civ. Code § 2924(b).

2 For example, in Shelby v. Ocwen Loan Serv., LLC, Civ.  
3 No. 2:14-2844 TLN DAD, 2015 WL 5023020 (E.D. Cal. Aug. 24, 2015),  
4 the court found that the trustee was entitled to immunity under  
5 section 2924(b) for "carrying out its routine duties as trustee"  
6 in furtherance of the non-judicial foreclosure and the plaintiffs  
7 had failed to substantiate allegations of malice or any other  
8 exception to immunity. Id. at \*4. The court therefore dismissed  
9 the plaintiffs' wrongful foreclosure claim against the trustee.  
10 Similarly, in Lundy v. Selene Finance LP, Civ. No. 15-5676 JST,  
11 2016 WL 1059423 (N.D. Cal. Mar. 17, 2016), the court dismissed  
12 the plaintiff's claims against the trustee because they were  
13 "based entirely on its role in initiating foreclosure proceedings  
14 at the direction of the other Defendants" and the plaintiff  
15 identified no allegations that the trustee "acted with malice or  
16 in bad faith in discharging its duties as trustee and initiating  
17 foreclosure proceedings." Id. at \*5; see also Swanson v. EMC  
18 Mortg. Corp., Civ. No. 09-1507 LJO DLB, 2009 WL 4884245, at \*5  
19 (E.D. Cal. Dec. 10, 2009) (dismissing the plaintiff's wrongful  
20 foreclosure claim against the trustee because of the protection  
21 provided by section 2924(b)); Powell v. Wells Fargo Home Mortg.,  
22 2015 WL 4719660, \*6-7 (N.D. Cal. Aug. 7, 2015) (finding the  
23 trustee was "immune to Plaintiff's state law claims arising from  
24 recording of the notice of default and related acts" under  
25 section 2924(b) to the extent the trustee relied on the lender's  
26 information).

27 Plaintiff alleges only that NDEX West, LLC, "in  
28 accordance with Wells Fargo's directions, filed a Notice of

1 Trustee Sale" and, "in accordance with Wells Fargo's directions,  
2 conducted or allowed to be conducted a foreclosure sale of the  
3 Subject Property." (Compl. ¶¶ 30-31.) He states that  
4 "[d]efendants were guilty of malice, fraud, or oppression" but  
5 fails to substantiate this conclusory statement with any  
6 supporting facts. (Id. ¶ 59.) Plaintiff's wrongful foreclosure  
7 claim against NDEX West, LLC appears to be based entirely on NDEX  
8 West, LLC's initiation of non-judicial foreclosure at the  
9 direction of Wells Fargo--privileged trustee activity.  
10 Accordingly, the court will grant NDEX West, LLC's motion to  
11 dismiss plaintiff's wrongful foreclosure claim without prejudice.

12 IT IS THEREFORE ORDERED that Wells Fargo's motion to  
13 dismiss plaintiff's Complaint (Docket No. 6) be, and the same  
14 hereby is, DENIED.

15 IT IS FURTHER ORDERED that NDEX West, LLC's motion to  
16 dismiss plaintiff's wrongful foreclosure claim against it (Docket  
17 No. 7) be, and the same hereby is, GRANTED without prejudice.

18 Plaintiff has twenty days from the date this Order is  
19 signed to file a First Amended Complaint setting forth a wrongful  
20 foreclosure claim against NDEX, West, LLC, if he can do so  
21 consistent with this Order.

22 Dated: July 13, 2016

23 

24 **WILLIAM B. SHUBB**  
25 **UNITED STATES DISTRICT JUDGE**