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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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

CIV. NO. 2:16-636 WBS KJN

MEMORANDUM AND ORDER RE: MOTIONS  
FOR SUMMARY JUDGMENT AND MOTION  
TO AMEND

Plaintiff Paul Schrupp initiated this action against defendant Wells Fargo Bank, N.A. ("Wells Fargo") alleging several causes of action based upon Wells Fargo's failure to provide plaintiff a permanent loan modification prior to foreclosing on his property.<sup>1</sup> Presently before the court are plaintiff's Motion to Amend (Docket No. 55), Wells Fargo's Motion for Summary Judgment (Docket No. 51), and plaintiff's Motion for Partial Summary Judgment (Docket No. 52).

I. Factual and Procedural History

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<sup>1</sup> NDEX West, L.L.C was originally a defendant in this case as well, but was dismissed on September 9, 2016.

1           On December 12, 2005, plaintiff borrowed \$520,000 from  
2 World Savings Bank secured by a deed of trust on his home. (Decl.  
3 of Meredith R. Deal ("Deal Decl.") (Docket No. 51-5) ¶ 9.) World  
4 Savings Bank subsequently changed its name to Wells Fargo. (Id.  
5 ¶ 2.) Plaintiff defaulted on his loan in December 2009 and Wells  
6 Fargo caused a Notice of Default to be recorded in the Yolo  
7 County Recorder's Office on March 26, 2010. (Id. ¶¶ 10, 12.)

8           On August 10, 2010, plaintiff filed a Chapter 13  
9 bankruptcy petition in the Eastern District of California  
10 Bankruptcy Court. (Request for Judicial Notice ("RJN") Ex. H.)<sup>2</sup>  
11 The Bankruptcy Court confirmed plaintiff's Chapter 13 plan on  
12 February 2, 2011, requiring plaintiff to pay monthly installments  
13 of \$2,899.24 to Wells Fargo. (Id., Ex. I; Decl. of D. Dennis La  
14 ("La Decl.") (Docket No. 51-3) ¶ 9.)

15           In May 2011, Wells Fargo invited plaintiff to  
16 participate in a Home Affordable Modification Program ("HAMP")  
17 Trial Period Plan ("TPP"), promising to offer plaintiff a  
18 permanent loan modification if he made three timely monthly  
19 payments of \$1,500.01 and submitted the required documents.  
20 (Deal Decl. ¶¶ 13, 18.) If plaintiff satisfied these  
21 requirements, the modification would be implemented, and after  
22 three years Wells Fargo would waive a total of approximately  
23 \$95,000 in principal balance. (Id.) The Bankruptcy Court  
24 approved plaintiff's trial loan modification with Wells Fargo on  
25 June 21, 2011. (La Decl., Ex. 68.)

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27           <sup>2</sup> The court previously took judicial notice of all  
28 requested documents when issuing its July 13, 2016 Motion to  
Dismiss. (Docket No. 16.)

1           On June 23, 2011, plaintiff moved to confirm his  
2 modified Chapter 13 plan to permanently implement the TPP payment  
3 amount. (RJN, Ex. K.) On June 30, 2011, the bankruptcy trustee  
4 disbursed the first TPP payment of \$1,550.01 to Wells Fargo,  
5 which was received on July 12, 2011. (Deal Decl. ¶ 20.) On July  
6 26, 2011, Wells Fargo sent the trustee and plaintiff's counsel a  
7 letter stating that Wells Fargo was "unable to offer a  
8 modification" because plaintiff failed to make his TPP payments  
9 on time. (Id. ¶ 21.) On August 1, 2011, plaintiff contacted  
10 Wells Fargo, arguing he did in fact make timely payments and  
11 asking how to reinstate his TPP payments. (Id. ¶ 6.)

12           On August 2, 2011, the Bankruptcy Court denied  
13 plaintiff's motion to confirm the modified plan without prejudice  
14 due to plaintiff's procedural errors. (Id.) The Bankruptcy  
15 Court found that plaintiff had "failed to meet the burden of  
16 proving the requirements of confirmation" and explained the type  
17 of evidence that a debtor must submit. (Id.)

18           Plaintiff defaulted on his bankruptcy payment plan; and  
19 the bankruptcy trustee filed a motion to dismiss the bankruptcy  
20 case on October 13, 2011. (RJN, Ex. L.) On November 23, 2011,  
21 the Bankruptcy Court found that plaintiff had failed to cure the  
22 default and dismissed the case. (Id.) Wells Fargo continued to  
23 send plaintiff monthly mortgage statements demanding the amount  
24 due under the original mortgage plan. (Schrupp Decl. ¶ 46, Ex.  
25 I.) On December 3, 2015, Wells Fargo purchased the property at a  
26 foreclosure sale. (Deal Decl. ¶ 25.) Plaintiff owed \$722,059.93  
27 on his loan at the time of the foreclosure sale. (RJN, Ex. M.)

28           Plaintiff initiated this case in Yolo County Superior

1 Court on January 19, 2016, alleging six causes of action against  
2 Wells Fargo for: (1) breach of contract; (2) promissory estoppel;  
3 (3) violations of California's Rosenthal Fair Debt Collection  
4 Practices Act ("Rosenthal Act"), Cal. Civ. Code § 1788; (4)  
5 wrongful foreclosure; (5) violations of the Equal Credit  
6 Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d); and (6) violations  
7 of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.  
8 Code § 17200 et seq.

9 Wells Fargo removed the action to this court and moved  
10 to dismiss plaintiff's claims on April 1, 2016. (Docket No. 6.)  
11 The court denied that motion in full on July 13, 2016. (Docket  
12 No. 16.)

13 II. Plaintiff's Motion for Leave to Amend

14 Plaintiff seeks to amend his complaint in order to  
15 incorporate additional facts that were revealed during discovery.  
16 Generally, "leave to amend shall be freely given when justice so  
17 requires." AmerisourceBergen Corp. v. Dialysist W., Inc., 465  
18 F.3d 946, 951 (9th Cir. 2006); see also United States v. Hougham,  
19 364 U.S. 310, 316 (1960) (discussing the "liberal rules governing  
20 the amendment of pleadings" and how Rule 15 "was designed to  
21 facilitate the amendment of pleadings").

22 However, a district court may decline to grant leave to  
23 amend where the amendment "(1) prejudices the opposing party; (2)  
24 is sought in bad faith; (3) produces an undue delay in  
25 litigation; or (4) is futile." AmerisourceBergen Corp., 465 F.3d  
26 at 951. "[T]he consideration of prejudice to the opposing party  
27 carries the greatest weight." Eminence Capital, LLC v. Aspeon,  
28 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). Additionally, once a

1 scheduling order has been entered, no further amendment of  
2 pleadings is permitted except with leave of court, good cause  
3 having been shown under Federal Rule of Civil Procedure 16(b).  
4 See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir.  
5 1992).

6 Here, the court issued its Scheduling Order on October  
7 5, 2016, expressly ordering that, absent good cause, no further  
8 amendment to pleadings was permitted. (Docket No. 27.)  
9 Plaintiff attempts to argue that the court's "Scheduling Order  
10 did not set a deadline for Plaintiff to amend the pleadings," and  
11 thus he is not held to the good cause standard. (Pl.'s Mem. of  
12 P. & A. in Supp. of Mot. to Amend (Docket No. 55).) Plaintiff's  
13 sole argument in favor of his Motion to Amend, therefore, is that  
14 Wells Fargo would not suffer prejudice from the proposed  
15 amendments. However, the court disagrees and concludes that good  
16 cause is necessary. Plaintiff has not satisfied this heightened  
17 standard.

18 Moreover, because discovery has already closed, Wells  
19 Fargo would not be able to properly investigate these new alleged  
20 facts without reopening discovery, thereby delaying proceedings.  
21 See Solomon v. N. Am. Life & Cas. Ins. Co., 151 F.3d 1132, 1139  
22 (9th Cir. 1998) (affirming denial of motion "on the eve of the  
23 discovery deadline" because it would have required reopening  
24 discovery). Accordingly, the court will deny plaintiff's Motion  
25 to Amend.

### 26 III. Defendant's Motion for Summary Judgment

#### 27 A. Legal Standard

28 Summary judgment is proper "if the movant shows that

1 there is no genuine dispute as to any material fact and the  
2 movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
3 P. 56(a). A material fact is one that could affect the outcome  
4 of the suit, and a genuine issue is one that could permit a  
5 reasonable jury to enter a verdict in the non-moving party’s  
6 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
7 (1986).

8 The party moving for summary judgment bears the initial  
9 burden of establishing the absence of a genuine issue of material  
10 fact and can satisfy this burden by presenting evidence that  
11 negates an essential element of the non-moving party’s case.  
12 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

13 Alternatively, the movant can demonstrate that the non-moving  
14 party cannot provide evidence to support an essential element  
15 upon which it will bear the burden of proof at trial. Id. Any  
16 inferences drawn from the underlying facts must, however, be  
17 viewed in the light most favorable to the party opposing the  
18 motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
19 U.S. 574, 587 (1986).

20 B. Discussion

21 1. Breach of Contract

22 A claim for breach of contract requires (1) the  
23 existence of a contract, (2) plaintiff’s performance or excuse  
24 for nonperformance, (3) defendant’s breach, and (4) resulting  
25 damages to plaintiff. Reichert v. Gen. Ins. Co. of Am., 68 Cal.  
26 2d 822, 830 (1968). Plaintiff alleges that the TPP offered  
27 pursuant to HAMP constituted a valid, enforceable contract that  
28 Wells Fargo breached by failing to offer plaintiff a permanent

1 modification after he successfully paid the three trial payments.

2           “The Ninth Circuit has recently held that, . . . a TPP  
3 Agreement offered pursuant to HAMP is a contract, and a party to  
4 that contract may sue for breach if the lender violates a term  
5 contained within the four corners of the TPP.” Meixner v. Wells  
6 Fargo Bank, N.A., 101 F. Supp. 3d 938, 947 (E.D. Cal. Apr. 24,  
7 2015) (Nunley, J.) (citing Corvello v. Wells Fargo Bank, NA, 728  
8 F.3d 878, 880 (9th Cir. 2013)). Here, Wells Fargo offered  
9 plaintiff a TPP that required plaintiff to make his first monthly  
10 trial period payment of \$1,550.01 by June 1, 2011. (RJN Ex. J.)  
11 In order to qualify for a permanent modification, plaintiff had  
12 to make two additional payments of \$1,550.01 by July 1, 2011 and  
13 August 1, 2011. (Id.) The offer letter notified plaintiff that,  
14 “[a]fter all trial period payments are timely made and you have  
15 submitted all the required documents, your mortgage would then be  
16 permanently modified.” (Id.)

17           Plaintiff alleges that he made all three trial monthly  
18 payments on time. However, between June 1 and August 1, it is  
19 undisputed that Wells Fargo only received one payment of  
20 \$1,550.01 from plaintiff’s trustee. (Deal Decl. ¶ 20.) That  
21 payment was not received until July 12, 2011, after the due date  
22 for both the first and second payments had passed. (Id.)

23           Plaintiff points out that Wells Fargo received  
24 \$3,122.04 from plaintiff’s Bankruptcy Trustee on May 11, 2011,  
25 which he claims should have been applied to his TPP payments.  
26 However, by May 11, 2011, the TPP had not yet been approved, and  
27 the confirmed Chapter 13 plan was still in effect. Plaintiff  
28 himself explains that he was not authorized to make TPP payments

1 until June 21, 2011, when the Bankruptcy Court approved the TPP  
2 plan. (Decl. of Stephen M. Reynolds (Docket No. 60-5) ¶ 6.)  
3 Accordingly, Wells Fargo was not required to construe this May 11  
4 payment as a TPP payment. Indeed, in deference to the Bankruptcy  
5 Court's order, it would have been unwise for defendant to  
6 consider this payment as anything other than part of plaintiff's  
7 Chapter 13 plan. Thus, the court concludes that the \$3,122.04  
8 payment made on May 11 cannot be considered a TPP payment.

9 Plaintiff admits that the Bankruptcy Trustee "didn't  
10 make timely payments to Wachovia."<sup>3</sup> (Deal Decl. ¶ 22, Ex. 18  
11 (Docket No. 56-1).) The terms of the payment plan explicitly  
12 state that "[i]f each payment is not received by Wachovia  
13 Mortgage in the month in which it is due, this offer will end and  
14 your loan will not be modified under the Making Home Affordable  
15 program." (Deal Decl. ¶ 19, Exs. 14, 15.) Plaintiff did not  
16 satisfy this requirement and therefore he cannot hold defendant  
17 liable for breach of contract.

18 Moreover, plaintiff has suffered no damages, and as  
19 such cannot prevail on this claim even if the court were to  
20 conclude that plaintiff had timely made the required payments.  
21 The TPP states that only if "your loan is permanently modified,  
22 you may be eligible to have some of your principal forgiven on a  
23 deferred basis." (Deal Decl. ¶¶ 18, 19, Ex. 13.) Accordingly,  
24 any forgiveness that was available to plaintiff was merely  
25 possible, not guaranteed. However, plaintiff's loan was never  
26 permanently modified, and thus he never became eligible for loan

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27 <sup>3</sup> Wachovia later changed its name to Wells Fargo Bank,  
28 N.A. (RJN, Ex. A)



1 forgiveness. Thus, because the loan forgiveness was merely  
2 speculative, it cannot form the basis of plaintiff's damages  
3 claim. See Mozzetti v. City of Brisbane, 67 Cal. App. 3d 565,  
4 577 (1st Dist. 1977) ("[i]t is black-letter law that damages which  
5 are speculative, remote, imaginary, contingent or merely possible  
6 cannot serve as a legal basis for recovery").

7 Furthermore, any principal forgiveness that plaintiff  
8 argues he was entitled to, but did not receive, cannot constitute  
9 damages because plaintiff would still owe repayment of the loan.  
10 Even if plaintiff had been granted partial principal forgiveness,  
11 he was required to continue making loan payments, and he has  
12 presented no evidence to suggest that he could have continued  
13 making such payments after January 2012. Accordingly, plaintiff  
14 would still be in default even if Wells Fargo permanently  
15 modified his loan and reduced the principal owed under the TPP.  
16 The court therefore concludes that plaintiff is unable to provide  
17 evidence in support of damages, an essential element of his  
18 breach of contract claim. Accordingly, because plaintiff cannot  
19 prevail on this claim, the court will grant summary judgment in  
20 favor of defendant.

## 21 2. Promissory Estoppel

22 The elements of promissory estoppel are "(1) a promise  
23 clear and unambiguous in its terms; (2) reliance by the party to  
24 whom the promise is made; (3) [the] reliance must be reasonable  
25 and foreseeable; and (4) the party asserting the estoppel must be  
26 injured by his reliance." Laks v. Coast Fed. Sav. & Loan Ass'n,  
27 60 Cal. App. 3d 885, 890 (2d Dist. 1976). Plaintiff alleges that  
28 Wells Fargo made a promise to plaintiff that if he agreed to the

1 terms of the TPP and made the proposed monthly payments, he would  
2 receive a HAMP modification. Plaintiff further alleges that he  
3 reasonably relied on that promise by submitting monthly payments.  
4 Lastly, he argues that he was damaged because, although he  
5 allegedly complied with the modification agreement, he was still  
6 denied a permanent modification, and thus he lost the opportunity  
7 to pursue other strategies to avoid foreclosure. (Compl. ¶ 42.)

8           However, plaintiff failed to make the payments in  
9 accordance with the TPP, and thus there can be no reliance on any  
10 promise, or any related damage, because Wells Fargo made no  
11 promises in the event that plaintiff failed to make timely  
12 payments. Accordingly, defendant cannot be held liable for  
13 promissory estoppel.

14           3.    Rosenthal Act

15           The Rosenthal Act is intended "to prohibit debt  
16 collectors from engaging in unfair or deceptive acts or practices  
17 in the collection of consumer debts and to require debtors to act  
18 fairly in entering into and honoring such debts." Cal. Civ. Code  
19 § 1788.1. As this court previously explained in its July 13,  
20 2016 Order, a loan servicer violates the Rosenthal Act when it  
21 offers a TPP, borrowers comply with the TPP, but the bank then  
22 fails to implement a permanent modification. See Corvello, 728  
23 F.3d at 885 (concluding that bank is contractually required to  
24 offer permanent mortgage modification if plaintiffs comply with  
25 TPP requirements).

26           Here, because of plaintiff's failure to make timely  
27 payments, Wells Fargo was not obligated to offer plaintiff a  
28 permanent loan modification, and thus the original Chapter 13

1 Plan requirements were reinstated. Therefore, Wells Fargo did  
2 not violate the Rosenthal Act but rather simply tried to collect  
3 the amount of debt previously agreed to. Accordingly, the court  
4 will grant defendant's Motion for Summary Judgment with respect  
5 to this claim.

6 4. Wrongful Foreclosure

7 Plaintiff asserts that he "reached an enforceable  
8 agreement to modify the terms of his loan and to bring his loan  
9 current" and "[s]ince plaintiff made all payments subsequent to  
10 that date when due until Wells Fargo refused to accept a timely  
11 monthly payment in accordance with the Modification Agreement[,]  
12 he has a basis for wrongful foreclosure." (Compl. ¶ 57.)

13 A plaintiff will prevail on a wrongful foreclosure  
14 claim only "if the trustor or mortgagor can establish that at the  
15 time the power of sale was exercised or the foreclosure occurred,  
16 no breach of condition or failure of performance existed on the  
17 mortgagor's or trustor's part which would have authorized the  
18 foreclosure or exercise of the power of sale." See Roque v.  
19 Suntrust Mortg., Inc., Civ. No. 09-40 RMW, 2010 WL 546896 (N.D.  
20 Cal. Feb.10, 2010) (quoting Collins v. Union Fed. Sav. & Loan  
21 Ass'n, 99 Nev. 284, 662 P.2d 610, 623 (Nev. 1983)).

22 In this case the TPP agreement never became permanent,  
23 and the original Chapter 13 Plan terms were reinstated.  
24 Plaintiff failed to continue to make these plan payments, he  
25 defaulted, and his bankruptcy petition was dismissed. Therefore,  
26 plaintiff cannot claim that there was no breach of condition or  
27 failure of performance at the time of the foreclosure sale.  
28 Accordingly, the court will grant Wells Fargo's Motion for

1 Summary Judgment in regards to plaintiff's claim of wrongful  
2 foreclosure.

3 5. Equal Credit Opportunity Act

4 The Equal Credit Opportunity Act ("ECOA") prohibits  
5 creditors from discriminating against credit applicants "on the  
6 basis of race, color, religion, national origin, sex or marital  
7 status, or age." 15 U.S.C. § 1681(a)(1). In order to effectuate  
8 this goal, the ECOA contains strict notice requirements that  
9 provide a basis for a cause of action against creditors even  
10 without allegations of discrimination. See Schlegel v. Wells  
11 Fargo Bank, NA, 720 F.3d 1204, 1210 (9th Cir. 2013); see also  
12 Errico v. Pac. Capital Bank, N.A., 753 F. Supp. 2d 1034, 1042  
13 (N.D. Cal. 2010) ("[A] procedural violation of the notice  
14 provisions of ECOA may provide the basis for a cause of action  
15 even without regard to allegations of discrimination." (citing  
16 Dufay v. Bank of Am., 94 F.3d 561 (9th Cir. 1996))).

17 Under the ECOA, when a lender takes an adverse action  
18 against an applicant, the applicant is entitled to a statement of  
19 reasons for the action or a written notification of the adverse  
20 action that discloses the applicant's right to a statement of  
21 reasons within thirty days after receipt of the applicant's  
22 request. 15 U.S.C. § 1691(d)(2)(A)-(B). If a creditor fails to  
23 provide the required notices, the applicant may sue for a  
24 violation of ECOA. See 15 U.S.C. §1961(e); see also Schlegel,  
25 720 F.3d at 1204.

26 Here, plaintiff alleges that Wells Fargo engaged in an  
27 "adverse action," for which it failed to provide a written  
28 statement of reasons, when it refused to accept the modified

1 payment amount in January 2012. (Compl. ¶¶ 66-69.) However,  
2 plaintiff was in default, and therefore the ECOA does not apply.  
3 12 C.F.R. § 202(c)(2)(iii) (adverse action does not include "any  
4 action or forbearance relating to an account taken in connection  
5 with inactivity, default, or delinquency as to that account").  
6 The denial of a loan modification sought by a borrower in default  
7 is not an adverse action that requires written notice. Rockridge  
8 Trust v. Wells Fargo, N.A., 985 F. Supp. 2d 1110, 1138-39 (N.D.  
9 Cal. Sept. 25, 2013). Therefore, the ECOA notice requirements do  
10 not apply, and defendant cannot be liable for a violation of the  
11 ECOA. Accordingly, the court will grant defendant's Motion for  
12 Summary Judgment with regard to this claim.

13 6. Unfair Competition Law

14 California's Unfair Competition Law ("UCL") prohibits  
15 "any unlawful, unfair or fraudulent business act or practice."  
16 Cal. Bus. & Prof. Code § 17200. "The UCL's purpose is to protect  
17 both consumers and competitors by promoting fair competition in  
18 commercial markets for goods and services." Kasky v. Nike, Inc.,  
19 27 Cal. 4th 939, 949 (2002) (citing Barquis v. Merchs. Collection  
20 Ass'n, 7 Cal. 3d 94, 110 (1972)). An act is "unlawful" under the  
21 UCL if it violates an underlying state or federal statute or  
22 common law. Cal-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.,  
23 20 Cal. 4th 163, 180 (1999).

24 Plaintiff argues that because Wells Fargo violated the  
25 Rosenthal Act and ECOA, it also violated the UCL. However,  
26 because the court concludes that Wells Fargo did not violate  
27 either of these acts, it must also conclude that Wells Fargo has  
28 not violated the UCL. Accordingly, the court will grant

1 defendant's Motion for Summary Judgment with regard to  
2 plaintiff's UCL claim.

3 IV. Plaintiff's Motion for Partial Summary Judgment

4 Because the court grants summary judgment in favor of  
5 Wells Fargo on all of plaintiff's claims, for the same reasons it  
6 denies plaintiff's Motion for Partial Summary Judgment on his  
7 first claim for breach of contract, his third claim for  
8 violations of the Rosenthal Act, his fifth claim for violations  
9 of the ECOA, and his sixth claim for violations of UCL.

10 IT IS THEREFORE ORDERED that plaintiff's Motion to  
11 Amend (Docket No. 55) be, and the same hereby is, DENIED.

12 IT IS FURTHER ORDERED that Wells Fargo's Motion for  
13 Summary Judgment (Docket No. 51) be, and the same hereby is,  
14 GRANTED.

15 IT IS FURTHER ORDERED that plaintiff's Motion for  
16 Partial Summary Judgment (Docket No. 52) be, and the same hereby  
17 is, DENIED.

18 The Clerk of Court is instructed to enter judgment in  
19 favor of defendant and against plaintiff.

20 Dated: May 15, 2018



21 **WILLIAM B. SHUBB**  
22 **UNITED STATES DISTRICT JUDGE**

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