

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

U.S. BANK NATIONAL  
ASSOCIATION,

Plaintiff,

v.

JOSEPH C. TAIT, et al.,

Defendants.

CASE NO. C16-767-JCC

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION TO DISMISS  
COUNTERCLAIMS

This matter comes before the Court on Plaintiff/Counter-Defendant U.S. Bank National Association's motion to dismiss counterclaims (Dkt. No. 21). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the motion for the reasons explained herein.

**I. BACKGROUND**

**A. Mediation and Judicial Foreclosure Proceedings**

On May 16, 2016, Plaintiff/Counter-Defendant U.S. Bank National Association filed a complaint for judicial foreclosure in King County Superior Court against Defendants/Counter-Plaintiffs Joseph C. Tait, Kazumi G. Tait, Discover Bank, and any other unknown parties in possession or claiming possession. (Dkt. No. 1-7.) The Tait's are husband and wife and the record owners of the real property at issue in the foreclosure action. (*Id.* at 2; Dkt. No. 19 at 7.) Discover Bank is a judgment creditor of the Tait's and nominal party in this matter. (*See* Dkt. No.

1 1-7 at 1.)

2           The dispute centers around a promissory note the Taitts executed and delivered to U.S.  
3 Bank on December 7, 2004, secured by a deed of trust (Deed) encumbering the property. (*See id.*  
4 at 3.) The Taitts promised to pay the principal sum of \$235,000.00 together with interest thereon  
5 at the rate of 5.625% per annum in monthly installments of \$1,372.95. (*Id.*) Mortgage Electronic  
6 Registration Systems, Inc. (MERS) assigned the Deed to U.S. Bank through a written  
7 assignment. (*Id.*) On July 3, 2012, the loan was modified. (*Id.*) The new loan balance was  
8 \$236,063.66. (Dkt. No. 19 at 10.) The Taitts allege U.S. Bank failed to credit the Taitts' first  
9 payment on their modified note and suspended numerous timely payments beginning in 2012,  
10 totaling approximately \$11,076.74. (Dkt. No. 19 at 10.) The Taitts failed to make their monthly  
11 payment due on April 1, 2013, and have not made any payments on the loan since. (Dkt. No. 1-7  
12 at 3.)

13           In October 2014, the Taitts were referred to foreclosure mediation under Washington's  
14 Foreclosure Fairness Act (FFA), Wash. Rev. Code. § 61.24.163 *et seq.*, and submitted their first  
15 loan modification application to U.S. Bank. (Dkt. No. 19 at 11; Dkt. No. 19-14 at 2.) The Taitts  
16 allege U.S. Bank delayed providing required mediation documents for months. (Dkt. No. 19 at  
17 12.) On August 7, 2015, U.S. Bank denied the loan modification because "requested documents  
18 have yet to be received." (Dkt. No. 19-11 at 3.) The Taitts allege they submitted at least two  
19 complete loan modification applications. (Dkt. No. 19-15 at 3.)

20           On September 22, 2015, the parties began a second mediation session. (Dkt. No. 19 at  
21 13.) U.S. Bank denied the Taitts' loan modification application for insufficient income on  
22 October 23, 2015. (Dkt. No. 19-12 at 3.) However, the Taitts allege U.S. Bank acknowledged that  
23 it miscalculated the Taitts' income and allowed the Taitts to resubmit a loan modification  
24 application if the Taitts agreed to sign a waiver releasing U.S. Bank of any liability. (Dkt. No. 19-  
25 14 at 3.) On February 10, 2016, the foreclosure mediator issued a bad faith certification against  
26 U.S. Bank indicating U.S. Bank "failed to provide timely and/or accurate documents." (Dkt. No.

1 19 at 14.)

2 As a result of the default originating in April 2013, U.S. Bank exercised its option in the  
3 Deed to declare the whole of the balance and the principal in interest thereon due and payable  
4 and filed this action in King County Superior Court. (Dkt. No. 1-7 at 4.) U.S. Bank requested a  
5 judgment against the Taitts or in the event of nonpayment, a judicial foreclosure sale. (*Id.* at 4–5.)

6 **B. The Taitts’ Counterclaims**

7 On May 25, 2016, the Taitts filed a notice of removal (Dkt. No. 1) and filed an answer to  
8 the complaint (Dkt. No. 19) on June 24, 2016. In their answer, the Taitts also filed counterclaims  
9 against U.S. Bank. (*Id.* at 15–31.) The Taitts essentially allege U.S. Bank’s delay in processing  
10 the Taitts’ loan modification application caused the Taitts to owe more than they should on the  
11 loan. (*Id.*) The Taitts allege eight counterclaims against U.S. Bank in connection with the  
12 foreclosure proceedings during mediation: (1) violation of the Washington Consumer Protection  
13 Act (CPA); (2) violation of the Truth in Lending Act (TILA); (3) violation of the Real Estate  
14 Settlement Procedures Act (RESPA); (4) violation of the Equal Credit Opportunity Act (ECOA);  
15 (5) violation of the Fair Housing Act (FHA); (6) violation of their “civil rights” under 42 U.S.C.  
16 § 2000d; (7) violation of 42 U.S.C. § 1981; and (8) breach of the implied duty of good faith and  
17 fair dealing. (*Id.*) U.S. Bank filed a motion to dismiss the counterclaims for failure to state claims  
18 upon which relief can be granted. (Dkt. No. 21.)

19 **II. DISCUSSION**

20 **A. Fed. R. Civ. P. 12(b)(6) Standard**

21 A defendant may move for dismissal when a plaintiff “fails to state a claim upon which  
22 relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must  
23 contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its  
24 face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the  
25 plaintiff pleads factual content that allows the court to draw the reasonable inference the  
26 defendant is liable for the misconduct alleged. *Id.* at 678. The plaintiff is obligated to provide

1 grounds for his entitlement to relief that amount to more than labels and conclusions or a  
2 formulaic recitation of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S.  
3 544, 545 (2007). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual  
4 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me  
5 accusation.” *Iqbal*, 556 U.S. at 678. A dismissal under Fed. R. Civ. P. 12(b)(6) “can [also] be  
6 based on the lack of a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696,  
7 699 (9th Cir. 1988).

8 **B. Consumer Protection Act Counterclaim**

9 The Taitts allege U.S. Bank “violated its duty to mediate in good faith and committed a  
10 *per se* violation” of the CPA, Wash Rev. Code § 19.86, *et seq.* (Dkt. No. 19 at 15.) In order to  
11 recover under the CPA, a plaintiff must prove “(1) unfair or deceptive act or practice;  
12 (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her  
13 business or property; (5) [and] causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title*  
14 *Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986) (en banc).

15 U.S. Bank does not dispute, for purposes of its motion to dismiss the counterclaims, that  
16 the Taitts have provided sufficient allegations on the first three elements of a CPA claim. (Dkt.  
17 No. 21 at 5-6.) The Court agrees. However, U.S. Bank argues the Taitts have not sufficiently pled  
18 the elements of injury or causation. To prove causation, the “plaintiff must establish that, but for  
19 the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.”  
20 *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 22 (2007). The  
21 Taitts allege their injury occurred in the form of a “far more expensive mortgage because [U.S.  
22 Bank’s] delay permitted the loans [*sic*] principle [*sic*] to bloat by operation of the accrual of  
23 capitalization of interest, fees, charges, and fines.” (Dkt. No. 19 at 16–17.) U.S. Bank argues the  
24 Taitts’ injury was self-inflicted and caused by their default, not U.S. Bank’s bad faith during  
25 mediation, and therefore causation is not met. (Dkt. No. 21 at 6–7; Dkt. No. 24 at 5–6.) At this  
26 stage of the litigation, the Court need not determine which of the parties’ allegations are true as

1 to what caused the Taits' injury of an increased principal. The Court looks only at the face of a  
2 complaint to decide a motion to dismiss. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d  
3 977, 980 (9th Cir. 2002). The Taits have alleged enough facts to survive a motion to dismiss  
4 because they have provided facts to support each element of a CPA claim, including causation  
5 and injury. Therefore, U.S. Bank's motion is DENIED as to the CPA counterclaim.

6 **C. Truth in Lending Act Counterclaim**

7 The Taits allege various violations of TILA, 15 U.S.C. § 1601 *et seq.*, including: (1) U.S.  
8 Bank misapplying or improperly suspending payments made by the Taits between 2012 and  
9 March 2013, (Dkt. No. 19 at 18–19); (2) “U.S. Bank’s mute and un-collaborative appearance at  
10 foreclosure mediation,” (*Id.* at 20–21); and (3) U.S. Bank’s failure to give proper notice of the  
11 Taits’ right to rescind the transaction, (*Id.* at 19–20). The Taits seek damages and rescission of  
12 the contract.

13 **1. Improperly Suspended Payments and Mediation Proceedings**

14 U.S. Bank argues the Taits’ first two TILA violations are outside the statute of  
15 limitations, and in the alternative, fail to state a claim on which relief can be granted. (Dkt. No.  
16 21 at 7–8.) Any action for damages under TILA must be brought “within one year from the date  
17 of the occurrence of the violation.” 15 U.S.C. § 1640(e). Here, the Taits made their last payment  
18 in March 2013 (Dkt. No. 1-7 at 3) and began mediation in October 2014 (Dkt. No. 19-14 at 2).  
19 However, they did not file these counterclaims until August 2016. Therefore, any damages  
20 claims based on alleged misappropriations of the payments or mediation bad faith are time  
21 barred.

22 The Taits argue under these circumstances equitable tolling is available because of U.S.  
23 Bank’s alleged false communications and because the payment application issues were discussed  
24 during the foreclosure mediation. (Dkt. No. 23 at 8.) The Taits argue “it would not have made  
25 sense, and may have well been deemed bad faith, for the Taits to have initiated litigation” while  
26 the parties were still in foreclosure mediation. (*Id.*) A court will apply equitable tolling to TILA

1 claims for damages “in situations where, despite all due diligence, the party invoking equitable  
2 tolling is unable to obtain vital information bearing on the existence of the claim.” *Cervantes v.*  
3 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011) (citing *Socop–Gonzalez v.*  
4 *I.N.S.*, 272 F.3d 1176, 1193 (9th Cir. 2001)). In general, plaintiffs must allege “circumstances  
5 beyond their control” to meet this standard. *Id.* See, e.g., *Hubbard v. Fidelity Fed. Bank*, 91 F.3d  
6 75, 79 (9th Cir. 1996) (per curiam) (declining to toll TILA statute of limitations when “nothing  
7 prevented [the mortgagor] from comparing the loan contract, [the lender’s] initial disclosures and  
8 TILA’s statutory and regulatory requirements”).

9 Here, the Taits’ argument that the foreclosure mediation prevented them from bringing  
10 the damages claims does not meet this high standard because the mediation commenced after the  
11 TILA claim was already untimely. Accordingly, the Taits’ claims that U.S. Bank violated TILA  
12 by misapplying or improperly suspending payments and with mediation bad faith are  
13 DISMISSED WITH PREJUDICE.

## 14 2. Notice of Right to Rescind

15 U.S. Bank argues the Taits’ third TILA violation is also outside the statute of limitations,  
16 and in the alternative, fails to state a claim on which relief can be granted. (Dkt. No. 21 at 8.)  
17 Normally, a borrower may rescind a loan subject to TILA within three days of the consummation  
18 of the transaction. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(3). However, if a lender has failed  
19 to provide required notices of a borrower’s right to cancel the transaction, the borrower has three  
20 years to exercise her right to rescind from the date of the consummation of the transaction.  
21 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3). Here, the Taits’ original loan was consummated  
22 in December 2004 and the loan modification was consummated in July 2012. (Dkt. No. 1-7 at 3.)  
23 However, they did not file these counterclaims until August 2016. Therefore, the rescission claim  
24 is time barred even if U.S. Bank failed to provide notice of the right to cancel.

25 The Taits argue under these circumstances equitable tolling is available for the rescission  
26 claim. (Dkt. No. 23 at 8.) The Taits cite *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct.

1 790 (2015), for the proposition that rescission after the three-year statute of limitations period is  
2 permitted. However, the Taits blatantly misstate the holding. The Supreme Court in *Jesinoski*  
3 addressed the issue of whether a borrower exercises the right to rescind by providing written  
4 notice to her lender, or whether a borrower must also file a lawsuit before the three-year period  
5 elapses. The Court held that only notice to the lender is required. *Jesinoski*, 135 S. Ct. at 793.  
6 Here, the Taits do not allege any facts that they gave U.S. Bank notice of their intent to rescind.  
7 Further, the Supreme Court held 15 U.S.C. § 1635(f) “permits no federal right to rescind  
8 defensively or *otherwise*, after the 3-year period of § 1635(f) has run.” *Beach v. Ocwen Fed.*  
9 *Bank*, 523 U.S. 410, 419 (1998). “Section 1635(f) is therefore not merely a statute of  
10 limitations—it completely extinguishes the underlying right itself.” *McOmie-Gray v. Bank of*  
11 *Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012). Therefore, the Taits’ equitable tolling  
12 arguments carry no weight. Accordingly, the Taits’ claim that U.S. Bank violated TILA with its  
13 failure to give proper notice of the Taits’ right to rescind is DISMISSED WITH PREJUDICE.

#### 14 **D. Real Estate Settlement Procedures Act Counterclaim**

15 The Taits allege various violations of RESPA, 12 U.S.C. § 2601 *et seq.*, including  
16 (1) U.S. Bank did not respond to a Qualified Written Request (QWR) for information from the  
17 Taits within sixty days and (2) U.S. Bank engaged in a pattern or practice of non-compliance  
18 with the requirements of the mortgage servicer provisions, as evidenced by their bad faith  
19 certification during mediation. (Dkt. No. 19 at 24.)

##### 20 **1. Qualified Written Request Response**

21 U.S. Bank argues the QWR response allegation does not state a claim for relief. (Dkt. No.  
22 21 at 9.) RESPA requires loan servicers like U.S. Bank to respond to a QWR from a borrower  
23 for information within sixty days. 12 U.S.C. § 2605(e)(2)(C). A QWR must be a “written  
24 correspondence, other than notice on a payment coupon or other payment medium supplied by  
25 the servicer, that—including . . . the name and account of the borrower” and “a statement of  
26 reasons for the belief of the borrower. . . that the account is in error.” 12 U.S.C. § (e)(1)(B). The

1 Taitts do not allege any facts that they made a QWR. Instead, the Taitts attempt to argue the FFA  
2 is the “functional equivalent” of RESPA’s Qualified Written Request procedure (Dkt. No. 19 at  
3 24) and comparison of the two “reveals that compliance with one means compliance with the  
4 other, and a violation of one is the violation of the other.” (Dkt. No. 23 at 11.) Under this  
5 analysis, U.S. Bank’s alleged failure to provide the documents required under the FFA is a  
6 violation of RESPA. The Taitts cite no authority where courts have construed the statutes as  
7 functional equivalents. Further, the Court finds that a plain language reading of the statutes does  
8 not provide such a connection. FFA disclosures are for the purpose of loan modification, not loan  
9 servicing like RESPA. Therefore, the Taitts’ RESPA claim for failure to respond to a QWR is  
10 DISMISSED.

## 11 **2. Non-compliance with Mortgage Servicer Provisions**

12 U.S. Bank argues no provision of RESPA has anything to do with foreclosure mediations,  
13 and therefore the Taitts’ claim that U.S. Bank violated RESPA during the foreclosure mediation  
14 fails to state a plausible claim for relief. (Dkt. No. 21 at 10.) The Taitts argue “U.S. Bank violated  
15 RESPA, 12 U.S.C. § 2605(e)(2)(A), by refusing to make appropriate corrections to the Taitts’  
16 account in response to the requests to do so at the third and last foreclosure mediation.” (Dkt. No.  
17 19 at 24.) However, section 2605(e)(2)(A) requires that the borrower make a QWR before any  
18 corrections to the account of the borrower can be made. It is undisputed that the Taitts never  
19 made a QWR. Therefore, the Taitts’ RESPA claim for non-compliance with mortgage servicer  
20 provisions fails to state a plausible claim and is DISMISSED.

## 21 **E. Equal Credit Opportunity Act Counterclaim**

22 The Taitts allege various violations of ECOA, 15 U.S.C. § 1691 *et seq.*, based on the fact  
23 that they applied for a loan modification, were denied the modification, and were therefore  
24 entitled to a notification of an adverse action. (Dkt. No. 19 at 25.) They further allege that U.S.  
25 Bank’s unexplained suspended expenses were effectively adverse actions in that they increased  
26 the amount of the unpaid principal balance. (*Id.*)



1 ECOA was enacted to protect credit applicants from discrimination on the basis of race,  
2 color, religion, national origin, sex, or age. 15 U.S.C. § 1691(a). Here, the Taites merely state they  
3 are members of a protected racial class because Mrs. Tait is Japanese and Mr. Tait is Puerto  
4 Rican. (Dkt. No. 19 at 27; Dkt. No. 23 at 18.) These are conclusory statements and insufficient to  
5 state a plausible claim of race discrimination because Taites have made no allegations that these  
6 alleged adverse actions were grounded in discrimination.

7 Moreover, if an applicant is denied credit, ECOA requires that the creditor provide a  
8 statement of reasons for its “adverse action.” 15 U.S.C. § 1691(d)(2). An adverse action is  
9 defined in part as “a denial or revocation of credit.” 15 U.S.C. § 1691(d)(6). However, an  
10 adverse action does not include “a refusal to extend additional credit under an existing credit  
11 arrangement where the applicant is delinquent or otherwise in default.” *Id.*<sup>1</sup> Here, it is undisputed  
12 that when U.S. Bank denied the Taites’ loan modification, the Taites were in default and had not  
13 made a payment on the loan since March 2013. Therefore, the Taites fail to state a plausible  
14 adverse action grounded in discrimination and their ECOA claim is DISMISSED.

#### 15 **F. Fair Housing Act Counterclaim**

16 The Taites allege U.S. Bank violated FHA because it refused to negotiate in good faith  
17 during the foreclosure mediation and the “only real offer U.S. Bank ever made was a take-it-or-  
18 leave-it offer which would saddle the Taites with an ambiguously bloated principal . . . and a  
19 waiver releasing U.S. Bank from the substantial liability of its unlawful behavior created.” (Dkt.  
20 No. 19 at 26.) The Taites allege this caused them a loss of rights under “Freddie Mac and the

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21  
22 <sup>1</sup> In their response to U.S. Bank’s motion to dismiss, the Taites claim that a Federal Reserve  
23 Board opinion letter determined that a home loan modification is in fact a credit application  
24 under ECOA. (Dkt. No. 23 at 13.) However, the letter actually states the Making Homes  
25 Affordable Modification Program “requires an adverse action notice when a creditor declines an  
26 application for an extension of credit from a borrower *that is not currently delinquent or in  
default on that loan.*” Federal Reserve Board, Opinion Letter on Mortgage Loan Modifications  
and Regulation B’s Adverse Action Requirement (Dec. 4, 2009), [http://www.federalreserve.gov/  
boarddocs/caletters/2009/0913/caltr0913.htm](http://www.federalreserve.gov/boarddocs/caletters/2009/0913/caltr0913.htm) (emphasis added). The Taites again blatantly  
obfuscate the governing law by citing sources out of context.

1 MHA Program.” (*Id.*)

2           FHA, 42 U.S.C. § 3601 *et seq.*, prohibits discrimination by providers of housing on the  
3 basis of race, color, religion, sex, national origin, familial status, or disability. The Taites seem to  
4 allege a disparate treatment claim. To state a FHA disparate treatment claim, the Taites must  
5 allege: (1) they are a member of a protected class; (2) they attempted to engage in a “real estate-  
6 related transaction” with U.S. Bank; (3) U.S. Bank refused to transact business with the Taites  
7 despite their qualifications; and (4) U.S. Bank transacted business with a similarly situated  
8 parties during a period relatively near the time U.S. Bank refused the Taites. *Gamble v. City of*  
9 *Escondido*, 104 F.3d 300, 305 (9th Cir. 1997).

10           The Taites argue that *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), which deals with  
11 pleading standards for discrimination cases, and *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th  
12 Cir. 1997), should guide the Court in its analysis of whether the Taites state a claim upon which  
13 relief can be granted. (Dkt. No. 23 at 14–15.) However, these cases were decided years before  
14 *Iqbal* and *Twombly* and are entirely inapplicable now. The Supreme Court confirmed that  
15 *Swierkiewicz* did not undermine the fact that a complaint must still be plausibly pled. *Twombly*,  
16 550 U.S. at 546. Further, at least one post-*Twombly* case interprets *Gilligan* as meaning that the  
17 plaintiff need not prove a prima facie case, but must still plead the general elements. *Taylor v.*  
18 *Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1068 (S.D. Cal. 2008). The Court adopts  
19 this holding.

20           Here, the Taites merely state they are members of a protected racial class because Mrs.  
21 Tait is Japanese and Mr. Tait is Puerto Rican. (Dkt. No. 19 at 27; Dkt. No. 23 at 18.) There are  
22 no allegations U.S. Bank continued to engage in this type of transaction with other parties with  
23 similar qualifications. Without more, the Taites fail to state a plausible FHA claim and it is  
24 DISMISSED.

25           **G. Title VI, 42 U.S.C. § 2000d Counterclaim**

26           The Taites allege U.S. Bank “took measures to conceal the real owner and beneficiary

1 from the Taits.” (Dkt. No. 19 at 27.) The Taits believe there was no assignment from Freddie  
2 Mac to U.S. Bank, yet U.S. Bank has held itself out to be the beneficiary. (*Id.*) In connection  
3 with this concealment, the Taits allege U.S. Bank “effectively excluded the Taits from  
4 participation in, and denied the benefits of their options under” the federal Making Home  
5 Affordable Program because of the Taits’ race, color, or national origin. (*Id.*)

6 Title VI of the Civil Rights Act provides that “[n]o person in the United States shall, on  
7 ground of race, color, or national origin, be excluded from participation in, be denied benefits of,  
8 or be subjected to discrimination under any program or activity receiving Federal financial  
9 assistance.” 42 U.S.C. § 2000d. To survive a motion to dismiss, the Taits must allege facts that  
10 U.S. Bank is engaging in racial discrimination and U.S. Bank is the recipient of federal funding.  
11 *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), *overruled on other*  
12 *grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001). A  
13 private individual may sue to enforce Title VI only in instances of intentional discrimination.  
14 *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

15 The Taits do not allege in their counterclaims that U.S. Bank receives federal funds.  
16 Further, the Taits fail to make any allegations that racial bias motivated US Bank’s decision to  
17 deny their participation in the Making Homes Affordable Program. This is fatal to their Title VI  
18 claim. Therefore, the Taits’ Title VI claim is DISMISSED.

19 **H. 42 U.S.C. § 1981 Counterclaim**

20 The Taits allege U.S. Bank “violated its duty to comply with all servicing laws,  
21 regulations, and guidelines, thereby eliminating the Taits’ ability to enforce the Deed of Trust.”  
22 (Dkt. No. 19 at 27.)

23 42 U.S.C. § 1981 prohibits racial discrimination in the formation of contracts solely due  
24 to ancestry or ethnic characteristics. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613  
25 (1987). Therefore, a section 1981 claim may be based only on race. *Id.* To sufficiently allege the  
26 prima facie case, the Taits must plead facts that plausibly establish U.S. Bank’s intentional

1 discrimination interfered with the Tait's right to contract freely without racial discrimination. *See*  
2 *Gen. Bldg. Contractors Ass'n Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982); 42 U.S.C. § 1981.  
3 Here, the Tait's merely state they are members of a protected racial class because Mrs. Tait is  
4 Japanese and Mr. Tait is Puerto Rican. (Dkt. No. 19 at 27; Dkt. No. 23 at 18.) These again are  
5 merely conclusory statements and insufficient to state a plausible claim of intentional race  
6 discrimination. Therefore, the Tait's 42 U.S.C. § 1981 claim is DISMISSED.

7 **I. Breach of Implied Duty of Good Faith and Fair Dealing Counterclaim**

8 The Tait's allege U.S. Bank breached its implied duty of good faith and fair dealing  
9 arising from the Note and Deed. (Dkt. No. 19 at 18.) The Tait's allege various violations of this  
10 duty including (1) the beneficiary declaration signed by U.S. Bank in 2014 is ambiguous and  
11 (2) U.S. Bank failed to process the Tait's loan modification request. (Dkt. No. 19 at 29.)

12 Under Washington law, “[t]here is in every contract an implied duty of good faith and  
13 fair dealing” that “obligates the parties to cooperate with each other so that each may obtain the  
14 full benefit of performance.” *Rekhter v. State, Dep’t of Soc. & Health Servs.*, 323 P.3d 1036,  
15 1041 (Wash. 2014) (citing *Badgett v. Sec. State Bank*, 807 P.2d 356 (1991)). It is possible to  
16 breach the implied duty of good faith even while fulfilling all of the terms of the written contract.  
17 *Id.* However, “the duty [of good faith and fair dealing] arises only in connection with terms  
18 agreed to by the parties.” *Id.* (citing *Johnson v. Yousoofian*, 930 P.2d 921, 924 (Wash. Ct. App.  
19 1996)). If there is no contractual duty, there is nothing that must be performed in good faith. *Id.*

20 **1. Ambiguous Note**

21 As to the first alleged breach, the Tait's cite to paragraph 22 of the Deed as the contract  
22 term that was violated. (Dkt. No. 19 at 28–29.) This paragraph states, in relevant part:

23 If Lender invokes the power of sale, Lender shall give written notice to the  
24 Trustee of the occurrence of an event of default and of the Lender's election to  
25 cause the Property to be sold. Trustee and Lender shall take such action regarding  
notice of sale and shall give such notices to Borrower and to other persons as  
Applicable Law may require.

26 (Dkt. No. 1-7 at 23.) The Tait's seem to claim that, by failing to mention MERS and Freddie Mac,

1 the Note is ambiguous and thus in violation of paragraph 22. (Dkt. No. 19 at 29.) However, these  
2 facts do not support a plausible claim of a breach because they have nothing to do with  
3 paragraph 22's contractual duties.

## 4 **2. Loan Modification**

5 As to the second alleged breach, the Taitts cite paragraph 19 of the Deed as the contact  
6 term that was violated. (Dkt. No. 19 at 29.) This paragraph deals with the Taitts' right to reinstate  
7 after acceleration. (Dkt. No. 1-7 at 21.) The paragraph states, in relevant part, if "Borrower meets  
8 certain conditions, Borrower shall have a right to have this Security Instrument discontinued."  
9 (*Id.*) These conditions include payment of all sums due, cure of all defaults of covenants, and  
10 payment of all expenses incurred. (*Id.*) The Taitts allege "[b]y never properly processing the  
11 Tait's [*sic*] modification application, U.S. Bank blocked the Taitts from obtaining the  
12 modification that would have cured the default." (Dkt. No. 19 at 29.) However, paragraph 19  
13 does not contain a contractual right to modification. The Taitts do not allege any other facts that  
14 indicate there is such a right elsewhere in the Deed. Further, even if paragraph 19 applied to this  
15 allegation, the Taitts allege no facts that they have met the conditions required. Without a  
16 contractual right, there is no implied duty of good faith. As such, the Taitts do not state a  
17 plausible claim on which relief can be granted.

18 Therefore, the Taitts' claim for a breach of the implied duty of good faith and fair dealing  
19 is DISMISSED.

## 20 **III. CONCLUSION**

21 For the foregoing reasons, U.S. Bank's motion to dismiss counterclaims (Dkt. No. 21) is  
22 GRANTED in part and DENIED in part. The only remaining counterclaim is the CPA  
23 counterclaim. The TILA claim is DISMISSED WITH PREJUDICE as it is time barred. The  
24 other claims, RESPA, ECOA, FHA, Title VI, 42 U.S.C. § 1981, and breach of implied duty of  
25 good faith and fair dealing, are DISMISSED.

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1 DATED this 21st day of September 2016.

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8 John C. Coughenour  
9 UNITED STATES DISTRICT JUDGE  
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