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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KARAN J. RUSSELL, Plaintiff and Appellant, v. WELLS FARGO BANK, NATIONAL ASSOCIATION et al., Defendants and Respondents.	B278515 Los Angeles County Super. Ct. No. BC503749

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed in part, reversed in part.

Law Offices of Ronald H. Freshman and Ronald H. Freshman for Plaintiff and Appellant.

Keesal, Young & Logan, David D. Piper and Samantha W. Mahoney for Defendants and Respondents.

INTRODUCTION

Plaintiff Karan Russell executed a promissory note and deed of trust encumbering residential property she owned in Los Angeles County. After the loan beneficiary's agent recorded a notice of default on the property, Plaintiff sued Wells Fargo Bank, N.A. ("Wells Fargo"), the trustee for the securities corporation holding all beneficial interest in the loan, and JPMorgan Chase Bank, N.A. ("Chase," collectively with Wells Fargo, "Defendants"), the loan servicer, alleging an assortment of claims related to the loan's origination, securitization, and servicing. Among other things, Plaintiff claimed Chase violated provisions of the California Homeowner's Bill of Rights (the "HBOR") (Civ. Code, § 2923.4 et seq.) by continuing foreclosure proceedings while Plaintiff was under consideration for a loan modification—a practice commonly referred to as "dual tracking."

Defendants demurred, arguing a prior judgment operated as res judicata to bar most of the claims and that the complaint's allegations were otherwise insufficient to state a cause of action. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal for Defendants. We agree the prior judgment precludes most of Plaintiff's claims; however, we find the allegations are sufficient to state a cause of action for dual tracking in violation of the HBOR and the Unfair Competition Law (the "UCL") (Bus. & Prof. Code, § 17200). The dual tracking allegations are also sufficient to support claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel. Accordingly, we reverse the judgment as to those claims and affirm in all other respects.

FACTS AND PROCEDURAL BACKGROUND

Consistent with the applicable standard of review, we draw our statement of facts from the allegations of Plaintiff's operative second amended complaint and other matters properly subject to judicial notice. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.) "[W]e treat as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 178, fn. 3.)

In November 2006, Plaintiff obtained a $391,500 residential loan, secured by a deed of trust encumbering property she owned in Los Angeles County.[1] The deed of trust listed Plaintiff as the borrower, BNC Mortgage, Inc. (BNC Mortgage) as the lender, T.D. Service Company as trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary. In April 2008, MERS assigned all beneficial interest in the promissory note and deed of trust to Wells Fargo, as Trustee for Lehman Structured Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-BCI.

In December 2009, NDEX West, LLC (NDEX), acting as the agent for Wells Fargo, recorded a notice of default on the property.

On August 1, 2011, Plaintiff entered into a " 'trial modification' agreement" with Chase, the loan servicer, under the alleged promise that "Chase would work with Plaintiff on a

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[1] Plaintiff acquired the property in July 1997.

modification to ensure Plaintiff could retain ownership of her home."[2]

On September 2, 2011, NDEX recorded a notice of trustee's sale on the property.

On September 23, 2011, Plaintiff filed a complaint against Wells Fargo, Chase, and NDEX (the "Prior Action"). The second amended complaint in the Prior Action asserted causes of action for (1) cancellation of instruments; (2) breach of contract; (3) quiet title; (4) slander of title; (5) intentional misrepresentation; (6) fraud; (7) constructive fraud; (8) violation of the UCL; (9) forgery; and (10) breach of implied covenant of good faith and fair dealing. The claims were largely premised on the charge that the defendants had "threaten[ed] to sell Plaintiffs' Property at a legally void trustee's sale" despite having "no legally enforceable interest entitling them to enforce payment or declare a default." Plaintiff alleged BNC Mortgage was named as lender but "was not the true party to the transaction," the loan was never properly assigned to Wells Fargo, and NDEX, therefore, had no authority to record the notice of default and notice of trustee's sale against her property.

Notwithstanding the pending Prior Action, Plaintiff alleges she continued to make the requisite trial period payments and, on February 13, 2012, Chase sent her a proposed Home Affordable Modification Agreement (the "Modification Agreement"). The proposed Modification Agreement stated that if, among other things, Plaintiff made "all payments required under a trial period plan" the loan would "automatically become

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[2] Neither the complaint nor the judicially noticeable records disclose what occurred between December 2009 and August 2011.

modified on **MARCH 01, 2012**." Although Chase continued to accept her trial period payments, Plaintiff alleges Defendants subsequently "suspended" the modification due to the pendency of the Prior Action.

On November 20, 2012, the court in the Prior Action entered a judgment of dismissal against Plaintiff and in favor of Wells Fargo, Chase, and NDEX on all counts.

Following the dismissal, Plaintiff alleges she began contacting Chase "requesting the modification be taken off suspension and finalized." She alleges Chase responded by having its agent record a notice of trustee's sale "without any formal notification to Plaintiff that the modification was being revoked or denied." On March 6, 2013, NDEX recorded a notice of trustee's sale on the property, noticing a sale date of March 27, 2013.

On March 25, 2013, Plaintiff filed the current action against Wells Fargo, Chase, NDEX, MERS, BNC Mortgage, and all others claiming any legal or equitable interest in the property. The operative second amended complaint asserted causes of action for (1) declaratory relief; (2) invalidity of contracts; (3) cancellation of instruments; (4) slander of title; (5) violation of the HBOR; (6) violation of the UCL; (7) tortious interference with contract; (8) breach of contract; (9) breach of the implied covenant of good faith and fair dealing; (10) promissory estoppel; (11) violation of the Rosenthal Debt Collection Practices Act; (12) fraud; and (13) accounting. In support of the claims, Plaintiff alleged BNC Mortgage was not the true lender, MERS had no authority to assign the loan to Wells Fargo, and Chase violated the trial period plan, proposed Modification Agreement, and the HBOR by having a notice of trustee's sale recorded on the

property while Plaintiff was under consideration for a loan modification.

Wells Fargo and Chase filed a joint demurrer to the second amended complaint. Defendants argued the complaint should be dismissed in its entirety because (1) most of the claims were barred by the prior judgment under the res judicata doctrine, and (2) the complaint otherwise failed to allege sufficient facts to state a cause of action. In support of the demurrer, Defendants submitted a request for judicial notice of the second amended complaint and judgment of dismissal in the Prior Action.

Additionally, Defendants asked the court to take judicial notice of a document purporting to be "a true and correct copy of the Permanent Modification Chase offered Plaintiff on May [9], 2012."[3] Relying on the purported Permanent Modification, Defendants argued the complaint's dual tracking allegations were factually inaccurate. Their supporting memorandum of points authorities asserted: "Although Plaintiff alleges that Chase only offered [Plaintiff] a modification in February 2012, in reality Chase also sent her the Permanent Modification on or about May 9, 2012. [Citation.] Plaintiff had until May 23, 2012 to sign and accept the Permanent Modification, [citation], yet failed to do so. Thus it was Plaintiff who refused to 'honor' the Permanent Modification, not Chase." Because the second notice of trustee's sale was "recorded months after the Permanent Modification was offered," Defendants argued Chase could not have engaged in dual tracking.

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[3] Defendants' request for judicial notice states the purported copy of the Permanent Modification was offered "on May 23, 2012." However, the document attached to the request is dated "May 9, 2012."

The trial court sustained Defendants' demurrer without leave to amend "for all the reasons set forth in their Demurrer and as justified by the prior judgment as between the parties in [the Prior Action]." After severing Defendants from the action, the court entered a judgment of dismissal in their favor. Plaintiff filed a timely notice of appeal.[4]

DISCUSSION

1. *Standard of Review*

"When the trial court sustains a demurrer, we review the complaint de novo to determine whether it alleges facts stating a cause of action on any possible legal theory. [Citation.] ' " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " [Citations.]' [Citation.] 'Further, "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." [Citations.]' " (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490.)

"When a demurrer is sustained without leave to amend, we also must decide whether there is a reasonable possibility that the defect can be cured by amendment." (*Koszdin v. State Comp. Ins. Fund* (2010) 186 Cal.App.4th 480, 487.) "The plaintiff bears the burden of proving there is a reasonable possibility of

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[4] In its order sustaining Defendants' demurrer, the trial court noticed its own motion, under Code of Civil Procedure sections 436 and 438, to dismiss the action against the remaining defendants. Plaintiff did not oppose the motion, which the court granted "on all the same grounds as the previous dismissals as to the Chase and Wells Fargo defendants." Plaintiff does not appeal this ruling or the subsequent judgment of dismissal for those defendants.

amendment. [Citation.] . . . [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

2. *Res Judicata Bars the Majority of Plaintiff's Claims*

"Generally, ' "[r]es judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' " (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 226 (*Castaic Lake*).) Res judicata bars a subsequent claim when " '(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding.' [Citation.] Upon satisfaction of these conditions, claim preclusion bars 'not only . . . issues that were actually litigated but also issues that could have been litigated.' " (*Ibid.*)

"California's res judicata doctrine is based upon the primary right theory." (*Mycogen Corp. v. Monsanto Co.* (2002)

28 Cal.4th 888, 904.) Under this theory, a " ' "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.' " (*Ibid.*) " ' "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the remedy sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." ' " (*Ibid.*, italics omitted.)

At the demurrer stage, " '[i]f all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer. [Citation.] In ruling on a demurrer based on res judicata, a court may take judicial notice of the official acts or records of any court in this state.' " (*Castaic Lake, supra,* 180 Cal.App.4th at p. 225.)

As the trial court correctly concluded, the judgment in the Prior Action bars most of the claims asserted in this one. Plaintiff sued Wells Fargo and Chase in the Prior Action, and many of the claims in that case, like many of the claims in this one, were premised on the same primary right and corresponding primary duty—namely, Plaintiff's right to withhold performance (such as loan payments) from entities that are not proper parties to the promissory note or deed of trust, and Defendants' duty to

desist from enforcement (such as foreclosure proceedings) unless they are proper parties to the loan contracts. As Plaintiff concedes in her opening brief, her claims for "Declaratory Relief, Invalidity of Contracts, Cancellation of Instruments, Slander of Title, and Fraud & Deceit" are all "potentially subject to Res Judica[ta]" because all are premised on this same primary right that formed the basis for her cancellation of instruments, quiet title, slander of title, and misrepresentation claims in the Prior Action.

Plaintiff nevertheless contends the prior judgment should not be given preclusive effect because it was not a final decision " 'on the merits.' " (*Castaic Lake, supra,* 180 Cal.App.4th at p. 226.) Relying upon our Supreme Court's decision in *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47 (*Goddard*), Plaintiff argues this condition was not met because the Prior Action "was dismissed without leave to amend at the demurrer stage." *Goddard* does not support Plaintiff's contention.

In *Goddard*, our Supreme Court considered whether a prior judgment of dismissal, entered primarily on the ground that "the complaint was framed on a theory of conversion rather than an action on the case," constituted a decision on the merits for res judicata purposes. (*Goddard, supra,* 14 Cal.2d at p. 53.) In holding the judgment did not operate as res judicata to bar a subsequent action, the court stated the following principles that govern the effect of judgments entered after the sustaining of demurrers without leave to amend: "[A] judgment based upon the sustaining of a special demurrer for *technical or formal defects* is clearly not on the merits and is not a bar to the filing of a new action. . . . [However,] [a] judgment given after the

sustaining of a general demurrer on a *ground of substance*, for example, that an *absolute defense* is disclosed by the allegations of the complaint, may be deemed a judgment on the merits, and conclusive in a subsequent suit; and the same is true where the demurrer sets up the *failure of the facts alleged to establish a cause of action*, and the same facts are pleaded in the second action. [Citations.] But even a judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar." (*Id.* at pp. 52-53, italics added.)

Unlike in *Goddard*, the court in the Prior Action entered the judgment of dismissal after sustaining a general demurrer on a ground of substance—principally, an absolute defense to Plaintiff's claim that Defendants were not proper parties to the loan contracts because of alleged defects in the securitization process. As stated most explicitly in its rejection of Plaintiff's claim to cancel the notice of default and notice of trustee's sale, the court in the Prior Action determined "Plaintiff has *no standing* to challenge the securitization of [her] loan" and "to the extent Plaintiff contends that defendants do not have the authority to foreclose because the loan was packaged and resold in the secondary market, this argument is rejected." (Italics added.) That conclusion was consistent with California law governing preforeclosure claims, and it operates as a bar to Plaintiff's current action, which likewise seeks to prevent Defendants from exercising their contractual rights under the promissory note and deed of trust based on alleged defects in the

securitization of Plaintiff's loan. (See *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814-815 [plaintiff lacked standing to bring preforeclosure suit challenging alleged defects in MERS's assignment of loan to real estate mortgage investment conduit trust]; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1156 ["California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure."]; cf. *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 924 (*Yvanova*) ["We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed."]; see also *Olwell v. Hopkins* (1946) 28 Cal.2d 147, 148-150 [where general demurrer in prior action "raised an issue as to plaintiffs' right to recover under any circumstances upon their alleged cause of action," judgment was on the merits and properly given preclusive effect in subsequent action between same parties for vindication of same primary right].)

The trial court properly sustained the demurrer to the claims for declaratory relief, invalidity of contracts, cancellation of instruments, slander of title, and fraud. To the extent the claims for violation of the HBOR, violation of the UCL, breach of contract, and promissory estoppel are likewise premised in part on the allegation that Defendants are not proper parties to the loan contracts, those claims also are precluded by the Prior Action judgment.

3. *The "Table-Funding" Allegations Are Insufficient to State a Cause of Action*

Notwithstanding her prior concession, in her reply brief, Plaintiff argues some of her claims invoke a different primary right by challenging the loan's *origination*, as opposed to the securitization and assignments that were at issue in the Prior Action. In that regard, Plaintiff maintains the complaint's allegations establish that the stated lender, BNC Mortgage, acted merely as an intermediary for an "unlicensed secondary market party" that improperly funded the loan through an undisclosed "table-funding" scheme. The argument fails for two reasons.

First, the April 25, 2008 assignment of deed of trust attached to the complaint belies the contention that Plaintiff's November 6, 2006 loan was table-funded. " 'Table-funding' is defined as a 'settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.' [Citation.] In a table-funded loan, the originator closes the loan in its own name, but is acting as an intermediary for the true lender, which assumes the financial risk of the transaction. The *timing of the assignment* is therefore sometimes pivotal in determining whether a residential mortgage loan is table-funded because the determinative question is who bears the risk of the transaction." (*Easter v. American West Financial* (9th Cir. 2004) 381 F.3d 948, 955, italics added.) Here, the documents attached to Plaintiff's complaint show that for well over a year, the original lender, BNC Mortgage, bore the financial risk of the transaction before assigning the loan to Wells Fargo, the trustee for the structured asset securities corporation that acquired and securitized the

loan. The documents evidence a run-of-the-mill securitization, not an undisclosed table-funding scheme.

Second, even if the table-funding allegations are credited, Plaintiff's reply brief still fails to state a viable legal basis for voiding the loan. Plaintiff cites several provisions of the Financial Code and complementary regulations that she contends were violated by the alleged scheme. (See Fin. Code, §§ 22009, 22100, 50003; Cal. Code Regs., tit. 10, § 1460.) But those provisions are inapposite to this private suit, because regardless of what the cited Financial Code sections and regulations prohibit, they are enforced only by the California Commissioner of Corporations or the Attorney General. (Fin. Code, §§ 22712, 22713; see also *De La Torre v. CashCall, Inc*. (9th Cir. 2017) 854 F.3d 1082, 1085 ["[t]he [Finance Lenders' Law] does not create a private right of action"].) Likewise, Business and Professions Code section 10234, which governs when a trust deed may be recorded in the name of a real estate broker, provides no remedies for a borrower. Thus, even if the table-funding allegations did invoke a different primary right, they were nonetheless insufficient to state a cause of action under the applicable law.

4. *The Complaint Alleges Sufficient Facts to State a Cause of Action for Dual Tracking*

Defendants concede that not all of Plaintiffs' claims are barred by res judicata, as some of the claims allege Chase engaged in unlawful "dual tracking" after the entry of judgment in the Prior Action. Nonetheless, Defendants argue the trial court properly sustained the demurrer to those claims based on a document submitted with their request for judicial notice, which Defendants contend disproves Plaintiff's allegation that she was

still under consideration for a loan modification when Chase's agent recorded a notice of trustee's sale on the property. As we explain, the trial court was not authorized to take judicial notice of the document and thus erred in sustaining the demurrer on this basis.

The HBOR "was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' [Citation.] Among other things, the HBOR prohibits 'dual tracking,' which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure." (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.)

During the relevant period, former Civil Code section 2923.6 provided, "[i]f a borrower submits a complete application for a first lien loan modification," the foreclosing entity "shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending," unless the borrower is provided with a written determination regarding her application and the time for an appeal (30 days) has expired. (Former Civ. Code, § 2923.6, subds. (c) & (e), added by Stats. 2012, ch. 87, § 7 and repealed by Stats. 2012, ch. 86, § 8, eff. Jan. 1, 2018.)[5]

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[5] Civil Code section 2923.6 was amended effective January 1, 2018. (See Stats. 2012, ch. 86, § 8.) Dual tracking is now prohibited by Civil Code section 2924.11, subdivision (a), which became operative the same date. (See Civ. Code, § 2924.11, subd. (g).)

The complaint alleges that between August 1, 2011 and February 13, 2012, Plaintiff submitted a complete application for a first lien loan modification and made all payments required under a trial period plan with Chase. On February 13, 2012, Chase allegedly sent Plaintiff a proposed Modification Agreement, stating her loan would automatically modify, effective March 1, 2012, so long as she continued to make her trial period payments and other representations made in her modification application continued to be true. However, before the Modification Agreement's effective date, Plaintiff alleges Chase "suspended" her modification pending resolution of the Prior Action. Within days of the Prior Action concluding, Plaintiff alleges she "was in contact with Chase requesting the modification be taken off suspension and finalized." She alleges Chase responded by having its agent, NDEX, record a notice of trustee's sale "without any formal notification to Plaintiff that the modification was being revoked or denied."[6]

In their memorandum of points and authorities, Defendants did not argue these allegations were insufficient to state a cause action. Instead, they asserted, much as they do on appeal, that "in reality" Chase sent Plaintiff a subsequent Permanent Modification "on or about May 9, 2012," which Plaintiff "failed" to accept. Defendants based the assertion on a document, attached to their request for judicial notice, purporting to be a "true and correct copy of the Permanent Modification." Because NDEX recorded the notice of trustee's sale on March 6,

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[6] NDEX allegedly recorded the notice of trustee's sale on March 6, 2013—two months after former Civil Code section 2923.6, subdivision (c) became operative. (See Stats. 2012, ch. 87, § 7.)

2013, several months after the deadline for Plaintiff to accept the Permanent Modification, Defendants argued "Chase did not commit dual-tracking."[7]

We agree with Plaintiff that the purported Permanent Modification was not properly subject to judicial notice and could not serve as a basis for sustaining Defendants' demurrer to the dual tracking claims. Under the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them is not required. Judicial notice thus acts as a substitute for formal proof of matters that cannot be reasonably controverted. (1 Witkin, Cal. Evidence (5th ed. 2018) Judicial Notice, § 1.) Critically, "[j]udicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.)

Evidence Code section 452 authorizes discretionary judicial notice of a range of documents and matters, all sharing the unifying characteristic that their truth or validity "cannot reasonably be disputed." (*Post v. Prati* (1979) 90 Cal.App.3d 626, 633, italics omitted; see Evid. Code, § 452 [permitting judicial notice of, among other things, "(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."].) The existence or authenticity of a written agreement between private parties engaged in litigation against one another plainly lacks this characteristic. As the

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[7] In 2013, when NDEX recorded the notice of trustee's sale, former Civil Code section 2923.6, subdivision (c)(2) permitted a loan servicer to proceed with a foreclosure action if the "borrower does not accept an offered first lien loan modification within 14 days of the offer." (See Stats. 2012, ch. 87, § 7.)

court explained in *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1146 (*Gould*), "[w]hile most matters subject to judicial notice can be established by reference to a statute, court file, treatise or other document, a court cannot simply look at a piece of paper and conclude as a matter of law it is a contract between the parties." Moreover, judicial notice cannot serve as a substitute for the *evidentiary* showing normally required to authenticate a private agreement. (See *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 886-887 (*Jolley*) [judicial notice of purchase and assumption agreement between federally insured banks purportedly posted on FDIC website was not authorized where "declarant was not a custodian of records, was not a party to the Agreement, gave no indication she was involved in negotiating or drafting it, and provided no background as to how she acquired knowledge of the document"].)[8]

Not surprisingly then, in requesting judicial notice of the purported Permanent Modification, Defendants did not rely on the discretionary judicial notice statute. Instead, they argued judicial notice "should be granted because the document is a copy of an agreement that Plaintiff refers to in the [complaint]" and it should be considered as part of the "entire modification agreement" underlying "several of Plaintiff's claims." Defendants cited several cases that they maintained authorized judicial notice under similar circumstances. None of the cases is apposite.

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[8] Apart from asserting the document attached to their request for judicial notice was a "true and correct copy of the Permanent Modification," Defendants' counsel made no other averment to establish its authenticity.

Unlike this case, the cases Defendants cited considered a *single* agreement or document, the authenticity of which the plaintiff *admitted* or *relied upon* as a basis for relief. Indeed, although not always explicitly stated, it appears the courts in most of these cases treated the contents of the entire document as facts "not reasonably subject to dispute" (Evid. Code, § 452, subd. (h)), because the plaintiff had relied upon portions of the document to support material allegations of the complaint. (See, e.g., *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn. 3 [letter subject to judicial notice under Evidence Code section 452, subdivision (h) where "the complaint excerpted quotes from the letter and summarized parts of it in some detail," but letter was not attached to complaint, despite "form[ing] the basis of the [complaint's] allegations"]; *Salvaty v. Falcon Cable Television* (1985) 165 Cal.App.3d 798, 800, fn. 1 ["Given the references to the agreement in the complaint, [defendants] were entitled to present the trial court with the complete document."].) That is not the case here, where Plaintiff attached the *full* February 13, 2012 proposed Modification Agreement as an exhibit to her complaint, and where her allegation that Chase failed to respond to her requests to take the modification "off suspension" implicitly disputed Defendants' assertion that Chase offered her the purported Permanent Modification several months later. (See *Gould, supra,* 31 Cal.App.4th at pp. 1145-1146 [where parties disputed whether employment relationship was governed by an oral or written agreement, trial court could not treat existence of written agreement as a matter not reasonably subject to dispute under Evidence Code section 452, subdivision (h)].)

Because the authenticity of the purported Permanent Modification, and the assertion that Plaintiff "failed" to accept it within the time specified by former Civil Code section 2923.6, subdivision (c)(2), constituted the sole basis for Defendants' demurrer to the HBOR, breach of contract, and promissory estoppel claims, the order sustaining the demurrer to those claims must be reversed. Moreover, insofar as Plaintiff alleges she complied with her trial period plan, yet Defendants refused to grant her a loan modification and commenced foreclosure proceedings, the allegations are also sufficient to state claims for breach of the implied covenant of good faith and fair dealing and violation of the UCL. (See *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 928-929 [dual tracking constitutes breach of implied covenant]; *Jolley, supra,* 213 Cal.App.4th at pp. 907-908 [dual tracking in violation of the HBOR constitutes an unlawful and unfair business practice under the UCL]; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522, disapproved on another ground in *Yvanova, supra,* 62 Cal.4th at p. 935 [a plaintiff has standing under the UCL when he or she alleges a lender has commenced the foreclosure process].)[9] To the extent Defendants have evidence to show they in fact offered Plaintiff a permanent loan modification that she failed to accept, that evidence must be presented in a motion for summary judgment or at trial.

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[9] Plaintiff does not challenge the order sustaining the demurrer to her tortious interference with contract, violation of the Rosenthal Debt Collection Practices Act, and accounting claims.

DISPOSITION

The judgment of dismissal is reversed as to the claims for violation of the California Homeowner's Bill of Rights, breach of contract, breach of the implied covenant, promissory estoppel, and violation of the Unfair Competition Law. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.