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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MONIKA AREFI et al.,

Plaintiffs and Appellants,

v.

JP MORGAN CHASE BANK, N.A. et al.,

Defendants and Respondents.

B263947

(Los Angeles County Super. Ct. No. BC534591)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper. Affirmed.

Klapach & Klapach and Joseph S. Klapach for Plaintiffs and Appellants.

Bryan Cave Leighton Paisner; Bryan Cave LLP, Bryan Cave, Glenn J. Plattner and Richard P. Steelman, Jr. for Defendants and Respondents JP Morgan Chase Bank, N.A.

Frandzel Robins Bloom & Csato, Andrew K. Alper, Hal D. Goldfam and Chanel L. Oldham for Defendant and Respondent Miracle Day Investments.

INTRODUCTION

Monika Arefi obtained two loans, both secured by the home she and her husband, Abolhossan Arefi, shared in Beverly Hills. JP Morgan Chase Bank, N.A. acquired the loans in 2008, and the Arefis soon defaulted on both. Chase later sold the Arefis' second loan to Miracle Day Investments, LLC, which subsequently foreclosed on the property in late 2013 under the deed of trust securing the second loan, which was actually a home equity line of credit.

In early 2014 the Arefis filed this action, their fifth against Chase, Miracle Day, or both. They alleged, among other things, Chase violated its duty under the recently-enacted California Homeowner Bill of Rights (HBOR) to review the Arefis' application for a loan modification in good faith. The Arefis also alleged Miracle Day's foreclosure sale under the deed of trust securing the second loan was improper and violated HBOR because the Arefis had a pending application with Chase to modify the first loan.

The Arefis appeal from the trial court's order dismissing their action after the court sustained demurrers by Chase and Miracle Day to the Arefis' second amended complaint without leave to amend. The Arefis also appeal the trial court's order granting Miracle Day's motion for attorneys' fees. We consolidated the two appeals, and now affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *A Tale of Two Loans*

In September 2006 Monika Arefi borrowed $4,810,000 from Washington Mutual Bank, evidenced by a promissory note secured by a deed of trust on the home she and her husband, Abolhossan Arefi, owned in Beverly Hills (the first loan). In November 2006 Ms. Arefi obtained a $750,000 line of credit from Washington Mutual, secured by a second deed of trust on the property (the second loan). In September 2008 Chase acquired substantially all of Washington Mutual's assets and liabilities, including the Arefis' two loans.

In early 2010 the Arefis fell behind on their payments under both loans. In April 2010 the Arefis applied to Chase for a modification of the first loan. A Chase representative initially indicated the bank would reduce the interest rate on the loan, but the loan modification Chase ultimately offered—and the Arefis alleged they accepted "under duress"—significantly increased the Arefis' monthly payments. The Arefis made three monthly payments under the modified terms of the first loan, and defaulted again.

B. *A Series of Lawsuits, Some Federal, Some State*

In March 2012 Ms. Arefi filed an action in federal court against Chase, alleging, among other things, Chase "misrepresented its status as owner of the loan," "engaged . . . in a pattern and practice of defrauding" her, and entered into the 2010 loan modification without "actual or legal authority." On August 3, 2012 the federal district court dismissed the action with prejudice.

In November 2012 Chase recorded a notice of default under the deed of trust securing the first loan, stating the Arefis were $544,127.98 in arrears. In February 2013 Chase recorded a notice of trustee's sale under the deed of trust securing the first loan and scheduled a foreclosure sale for March 22, 2013.

On March 15, 2013, one week before the scheduled foreclosure sale, Ms. Arefi sued Chase again, this time in state court. She sought to rescind the promissory note evidencing the first loan because the loan broker allegedly did not provide her with a translation of the loan documents in German, her primary language. The trial court dismissed the case several months later for failure to prosecute.

In April 2013 the Arefis sued Chase again in state court, alleging Chase had employed a "bait and switch" tactic in connection with the 2010 loan modification. The Arefis acknowledged they had accepted the loan modification agreement Chase had offered them, despite the fact its terms were "shockingly different" from the terms Chase had initially promised. The trial court in that action eventually sustained Chase's demurrer to the Arefis' first amended complaint without leave to amend and dismissed the action with prejudice, in part because the court ruled the judgment in the Arefis' federal action barred the Arefis from relitigating claims relating to the 2010 loan modification.

According to the Arefis' allegations in this action, it was during this time, in approximately April 2013, that Chase, with the Arefis' second state court action pending and Chase anticipating the Arefis would apply for an additional loan modification, "devised a fraudulent scheme" with Miracle Day. Pursuant to this alleged scheme, Chase agreed to sell the second loan and assign the deed of trust securing the second loan to

Miracle Day at "a significantly discounted price," so that Miracle Day could foreclose while Chase was reviewing the Arefis' upcoming request for another loan modification. The Arefis alleged Chase received "some form of compensation" from Miracle Day in exchange.

On May 3, 2013 Chase assigned the deed of trust securing the line of credit to Miracle Day and recorded an "Assignment of Mortgage."[1] The assignment misidentified the instrument number of the deed of trust securing the line of credit by adding

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[1] The document was titled "Assignment of Mortgage." In fact, promissory notes in California are secured by deeds of trust, not mortgages, although deeds of trust and mortgages "perform the same basic function, and . . . a deed of trust is 'practically and substantially only a mortgage with power of sale.'" (*Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 553; see *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507, fn. 2 ["[t]he deed of trust surpassed the common law mortgage as the 'generally accepted and preferred security device in California' during the 19th and early 20th centuries, before the California Legislature eliminated most of the legal and economic distinctions between a mortgage that contains a power of sale and a deed of trust"], disapproved on another point in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919.) The assignment provides that Chase assigned to Miracle Day "all of [Chase's] rights, title and interest as beneficiary under the Deed of Trust . . . [t]ogether with the note and each and every other obligation described in said deed of trust and the money due and to become due thereon." Thus, notwithstanding the document's label, Chase assigned Miracle Day a deed of trust, not a "mortgage."

an extra "8."[2] On May 3, 2013 Miracle Day recorded a notice of default under the deed of trust securing the second loan, which stated the principal balance on the line of credit was "being declared all due and payable" based on the Arefis' default in September 2009. Miracle Day demanded the full sum due under the line of credit: $822,635.41.

On June 26, 2013 Ms. Arefi submitted to Chase another application to modify the terms of the first loan. On July 16, 2013 Chase advised the Arefis it had denied her application. Chase's denial stated: "After completing two reviews of the information you sent us, we determined that you are not eligible for a modification under the Home Affordable Modification Program (HAMP) or under any other modification programs." Chase also stated Ms. Arefi was not eligible for a loan modification because "[t]he unpaid principal balance on [the promissory note] is higher than the programs allow" and because the investors "have not approved a modification under these programs." On August 7, 2013, Ms. Arefi "appealed" Chase's denial of her loan modification request.

On August 28, 2013 Miracle Day recorded a notice of trustee's sale under the deed of trust securing the second loan and scheduled the foreclosure sale for September 20, 2013. On

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2 On September 19, 2013 Chase recorded a corrected assignment with the accurate instrument number and a correct title: "Assignment of Deed of Trust." The Arefis alleged that the first assignment was "defective" and "void," because of the incorrect instrument number reference, and that the new document "corrected the defects." On appeal, however, they do not challenge the validity of Miracle Day's foreclosure on this ground.

September 19, 2013, the day before the scheduled sale, Ms. Arefi filed a petition for bankruptcy under Chapter 11. In her verified bankruptcy schedules, filed in October 2013, she identified Chase as the secured creditor on the first loan, with a lien of over $6 million, and Miracle Day as the secured creditor on the second loan, with a lien of $822,500. On December 5, 2013 the bankruptcy court granted Miracle Day's motion for relief from the automatic stay under 11 U.S.C. § 362, thus allowing Miracle Day to "enforce its remedies to foreclose" on the property. The next day, Miracle Day foreclosed on the property. Meanwhile, Ms. Arefi filed another state court action against Miracle Day.

C. *Yet Another Lawsuit (This One)*

On January 28, 2014 Ms. Arefi filed this action against Chase, alleging causes of action for declaratory relief under Civil Code section 2924.12,[3] violations of sections 2923.55 subdivision (b) and former 2923.6, and unfair business practices. After Chase successfully demurred, the Arefis filed a first amended complaint naming Miracle Day as an additional defendant, adding a cause of action for "conspiracy to commit fraud," and including allegations that Chase sold the second loan to Miracle Day "to avoid the restrictions/limitations imposed by the Homeowner Bill of Rights." The trial court sustained demurrers by Chase and Miracle Day with leave to amend.

The Arefis' operative second amended complaint, which included Mr. Arefi as a plaintiff, alleged causes of action for declaratory relief under section 2924.12, violation of former section 2923.6, fraud, and unfair business practices, and to set

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[3] Undesignated statutory references are to the Civil Code.

aside the trustee's sale, cancel the trustee's deed, and quiet title. Chase and Miracle Day demurred again. The trial court sustained both demurrers without leave to amend and awarded Miracle Day its attorneys' fees under the deed of trust securing the second loan.

The Arefis timely appealed from the trial court's order dismissing their action with prejudice. They challenge the trial court's ruling dismissing their causes of action for violation of former section 2923.6, fraud, and unfair competition. The Arefis also appealed from the trial court's order granting Miracle Day's motion for attorneys' fees.

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162; see *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162 ["we exercise our independent judgment as to whether a cause of action has been stated under any legal theory when the allegations are liberally construed"].) "'We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.'" (*Ramirez v. Tulare County Dist. Attorney's Office* (2017) 9 Cal.App.5th 911, 924.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924; see *Mendoza v. JPMorgan Chase*

Bank, N.A. (2016) 6 Cal.App.5th 802, 808 ["[w]e assume the truth of all properly pleaded facts as well as those that are judicially noticeable"].)

"When the trial court sustains a demurrer without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 833.) "'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.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.)

B. *The Arefis Did Not State a Cause of Action for Violation of HBOR*

1. *Applicable Law*

The Legislature enacted HBOR in 2012,[4] when California was "still reeling from the economic impacts of a wave of residential property foreclosures that began in 2007." (Stats. 2012, ch. 87, § 1(b).) HBOR was intended "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." (§ 2923.4, subd. (a); see *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 157 ["HBOR contains procedures to help borrowers obtain alternatives to foreclosure"].) "Among other things, HBOR attempts to eliminate the practice, commonly known as dual tracking, whereby financial institutions continue to pursue foreclosure while evaluating a borrower's loan modification application." (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 950; see § 2923.6, subds. (c)-(h).) "'"Dual tracking refers to a common bank tactic. When a borrower in default seeks a loan modification, the institution often continues to pursue foreclosure at the same time." [Citations.] The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it.'" (*Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 752.)

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4 "Although the Legislature did not give the legislation a title, the Governor in his signing statement, and courts and commentators, have referred to the legislation as the 'California Homeowner Bill of Rights.'" (*Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 749, fn. 1.)

In particular, former section 2923.6, subdivision (c),[5] provided: "If a borrower submits a complete application for a first lien loan modification offered by, or through the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent 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. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: [¶] (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired. [¶] (2) The borrower does not accept an offered first lien loan modification within 14 days of the offer. [¶] (3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification." (Former § 2923.6, subd. (c).)

Under former section 2923.6, subdivision (e), "[i]f the borrower's application for a first lien loan modification is denied, the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee's sale until the later of: [¶] (1) Thirty-one days after the borrower is notified in writing of the denial. [¶] (2) If

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[5] The dual tracking provisions of section 2923.6 in former subdivisions (c) through (h) "sunsetted" on January 1, 2018 and now appear in section 2924.11, with somewhat different requirements and restrictions. (See former § 2923.6, subd. (k).)

the borrower appeals the denial pursuant to subdivision (d), the later of 15 days after the denial of the appeal . . . ." Former section 2923.6, subdivision (f), provided: "Following the denial of a first lien loan modification application, the mortgage servicer shall send a written notice to the borrower identifying the reasons for denial . . . ."

To allow courts to enforce these statutory requirements, "HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure (§ 2924.12, subd. (a)), and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred. (§ 2924.12, subd. (b).)" (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) In particular, former section 2924.12, subdivision (b), provided: "After a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of . . . [section] 2923.6 . . . by that mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale. If the court finds that the material violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent, the court may award the borrower the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000)."

2. *The Arefis Did Not State a Cause of Action Against Chase for Violation of HBOR*

The Arefis argue Chase violated former section 2923.6 because, according to the Arefis, "California law . . . imposes a duty on a first lien lender such as Chase to engage in loan modification discussions in good faith." In particular, the Arefis allege Chase violated HBOR by not "reviewing Ms. Arefi's loan modification application with an open mind." Instead, the Arefis allege, Chase "actively sought to evade its statutory obligations and proceed immediately with a foreclosure" by assigning the deed of trust securing the second loan to Miracle Day to circumvent the prohibition on dual tracking.[6] Citing former section 2923.6, subdivisions (a) and (c), the Arefis contend they stated a cause of action for violation of HBOR because, even though Chase never proceeded with foreclosure, former section 2923.6 imposed a duty on "first lien lender[s]" to review loan modifications "in good faith." The statutory language, however, does not support the Arefis' contention.

The Legislature enacted subdivisions (a) and (b) of section 2923.6 in 2008.[7] In 2010 the court in *Mabry v. Superior*

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[6] Because Chase made the assignment before the Arefis submitted their (second) request for a loan modification, the Arefis allege Chase assigned the note and deed of trust "in anticipation" that the Arefis would seek (another) modification of the first loan.

[7] Subdivision (a) of former section 2923.6 provided: "The Legislature finds and declares that any duty that mortgage servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan

Court (2010) 185 Cal.App.4th 208 (*Mabry*), a case decided before the enactment of HBOR, held that subdivisions (a) and (b) of section 2923.6 do not "operate substantively" and do not "require[ ] a specified course of action" but rather "merely express[ ] the *hope* that lenders will offer loan modifications on certain terms." (*Mabry,* at pp. 222-223; accord, *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1056; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617.) The court in *Mabry* noted the "absence of any actual duties imposed on anybody" by subdivisions (a) and (b), and suggested those provisions, at most, "seem[] to offer a defense to servicers of loan pools if the servicer tries—say, over the objection of an owner of a share in the pool—to implement a loan modification rather than going straight to foreclosure." (*Mabry,* at p. 222, fn. 9; see also *Pantoja v.*

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pool, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a pooling and servicing agreement, and that a mortgage servicer acts in the best interest of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan for which both of the following apply: [¶] (1) The loan is in payment default, or payment default is reasonably foreseeable. [¶] (2) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis." Subdivision (b) of former section 2923.6 provided: "It is the intent of the Legislature that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such a modification plan is consistent with its contractual or other authority."

Countrywide Home Loans, Inc. (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1188 [former section 2923.6, subdivision (a), "applies only to servicers and parties in a loan pool," and "the wording in [subdivision] (b) does not impose any duty on Defendants"].)

When the Legislature enacted HBOR in 2012 and amended section 2923.6 to add the dual tracking provisions in subdivisions (c) through (h), the Legislature left the language of subdivisions (a) and (b) largely unchanged. (See Stats. 2008, ch. 69, § 3(a), (b).) We assume the Legislature was aware of the courts' interpretation of subdivisions (a) and (b) as non-substantive, and acquiesced to that construction when it enacted HBOR and left that language untouched. (See *Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 688 ["[w]hen a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute"].)[8] Moreover, while subdivision (a) of former section 2923.6 did discuss a loan servicer's "duty," that provision explained the duty is to "maximize net present value," not to act in good faith, and is a duty "owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement," not to borrowers like the Arefis. Therefore, the Arefis' reliance on subdivision (a) is misplaced.

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[8] The inclusion in HBOR of a private right of action for a violation of section 2923.6 does not change the non-substantive nature of subdivisions (a) and (b). Unlike subdivisions (a) and (b), the more recent dual-tracking provisions of section 2923.6 impose a specified course of action.

The Arefis' reliance on former section 2923.6, subdivision (c), fares no better. Subdivision (c) prohibited dual tracking by prescribing specific time frames during which the loan servicer, trustee, or beneficiary cannot proceed with foreclosure; namely, "while the complete first lien loan modification is pending," "[t]hirty-one days after the borrower is notified in writing of the denial," or "15 days after the denial of the appeal." (See *Monterossa v. Superior Court*, *supra*, 237 Cal.App.4th at p. 755 ["[t]he short time periods set out in the statutory scheme suggest the Legislature's understanding that a prevailing borrower's preliminary injunctive victory may often be short-lived and subject to dissolution upon compliance with the statutory scheme's procedural requirements"]; see also *Valbuena v. Ocwen Loan Servicing, LLC*, *supra*, 237 Cal.App.4th at p. 1272 ["HBOR prohibits 'dual tracking,' which occurs when a bank forecloses on a loan while negotiating with a borrower to avoid foreclosure"].) Former section 2923.6, subdivision (c), did not mention a duty on the lender to review loan modification applications in good faith.

Nor is it appropriate for us to read such a duty into former section 2923.6. While the Legislature's purpose in enacting HBOR was to ensure borrowers have "a meaningful opportunity" for loss mitigation review (§ 2923.4, subd. (a)), the Legislature chose to achieve that purpose by proscribing certain lender practices, such as dual tracking (see former § 2923.6), and mandating others, such as requiring lenders to establish a "single point of contact" for the borrower (see § 2923.7) and to give borrowers certain written notices (former §§ 2924.9; 2924.10). Absent from the statutory scheme the Legislature created is an independently-actionable "duty" to review loan modification applications "in good faith." (See *Jolley v. Chase Home Finance,* *LLC* (2013) 213 Cal.App.4th 872, 904 [HBOR "address[es] more pointedly the foreclosure crisis in our state through even *greater encouragement* to lenders and loan servicers to engage in good faith loan modification efforts," emphasis added].) Indeed, the Legislature cautioned that "[n]othing in [HBOR] shall be interpreted to require a particular result of that [review] process." (§ 2923.4, subd. (a).) We may not broaden the scope of the statute "'by reading into it language that does not appear,'" nor may we """"rewrite the statute to conform to an assumed intention which does not appear from its language."""" (*Walent v. Commission on Professional Competence etc. of the LAUSD* (2017) 9 Cal.App.5th 745, 752; see *Lucioni v. Bank of America, N.A.*, *supra*, 3 Cal.App.5th at pp. 159, 161 [declining to make injunctive relief under HBOR "impliedly available" for a violation not listed in the statute and noting that in enacting HBOR "the Legislature addressed when courts may intercede in the nonjudicial foreclosure scheme"].)

The Arefis cite *Lueras v. BAC Home Loans Servicing, L.P.*, (2013) 221 Cal.App.4th 49, 76 (*Lueras*), and *West v. JPMorgan Chase Bank, N.A.*, (2013) 214 Cal.App.4th 780, 797 (*West*) for the proposition, which counsel for the Arefis described at oral argument as a "judicial gloss" on the statute, that former section 2923.6 imposed a duty on first lien lenders to review a loan modification application in good faith. Neither of these cases, however, supports the Arefis' contention. In fact, neither case was decided under HBOR.[9] In *Lueras* the court described a

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[9] The court in *Lueras*, while acknowledging HBOR's recent enactment, declined to address its retroactivity or applicability to

lender's duty to work with a borrower to identify a foreclosure prevention alternative "in good faith" as "a contractual duty," which was "imposed expressly" by the parties' forbearance agreement in that case. (*Lueras*, at pp. 75-76.) The court in *Lueras* gave the borrowers leave to amend to allege a breach of that written agreement. (*Ibid.*) Similarly, in *West* the lender's obligation to offer a good faith modification arose from the borrower's qualification for, and compliance with, a trial modification agreement. (*West*, at pp. 796-798.) The court in *West* concluded the borrowers had stated a viable breach of written contract cause of action. (*Id*. at p. 796.) The Arefis do not allege they had a forbearance or trial modification agreement with Chase, nor do the Arefis claim Chase breached any such agreement.

2. *The Arefis Did Not State a Cause of Action Against Miracle Day for Violation of HBOR*

Because the Arefis did not submit an application for a loan modification to Miracle Day, they could not claim Miracle Day violated HBOR by failing to review an application in good faith. Instead, the Arefis alleged Miracle Day violated HBOR by foreclosing on the deed of trust securing the second loan while Chase was reviewing their application to modify the terms of the first loan. To state such a cause of action, the Arefis argue we should interpret HBOR to prohibit any foreclosure sale while a loan modification application is pending with any lender, even a

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that case. (*Lueras*, *supra*, 221 Cal.App.4th at p. 86.) The court in *West*, *supra*, 214 Cal.App.4th 780 did not mention HBOR at all.

sale by a junior lienholder under a deed of trust securing a second loan. The restrictions and protections of HBOR, however, are limited to first, or senior, lien deeds of trust; they do not apply to second, or junior, lien deeds of trust. Because Miracle Day foreclosed under the deed of trust securing the Arefis' second loan, Miracle Day was not subject to, and did not violate, HBOR.

"""The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.""" (*Monterossa v. Superior Court*, *supra*, 237 Cal.App.4th at p. 751.) The interpretation of HBOR is an issue of law we review de novo. (See *1901 First Street Owner, LLC v. Tustin Unified School District* (2018) 21 Cal.App.5th 1186, 1192.)

Former section 2923.6, subdivision (j), stated unambiguously the statute "shall apply only to mortgages or deeds of trust described in Section 2924.15." Former section 2924.15, subdivision (a), stated that section 2923.6, among other sections of HBOR, "shall apply only to first lien mortgages or deeds of trust . . . ." And section 2920.5, subdivision (d), defines "first lien" as "the most senior mortgage or deed of trust on the property that is the subject of the notice of default or notice of sale." Thus, under the ordinary meaning of the language the

Legislature enacted, HBOR does not apply beyond first, or senior, deeds of trust.

In the face of this unambiguous statutory language, the Arefis contend we should interpret former section 2923.6 to prohibit *any* mortgage servicer or lienholder from foreclosing under *any* deed of trust, senior or otherwise, once the borrower submits an application to modify the first loan. The Arefis contend the Legislature's use of the indefinite article "a" in former section 2923.6, subdivision (c), which prohibited "[a] mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent" from proceeding with foreclosure, rather than the definite article "the," evidenced the Legislature's intent to preclude any entity from foreclosing while a loan modification is pending. The use of "the" and "a" in former section 2923.6, subdivision (c), however, is not of sufficient grammatical significance to negate the express limitation in former section 2923.6, subdivision (j), to first lien deeds of trust. Rather, the use of the indefinite "a" acknowledges there may be more than one of each entity, at least in the "authorized agent" category. (See *Cholakian & Associates v. Superior Court* (2015) 236 Cal.App.4th 361, 370 [courts "'typically find that a term introduced by "a" or "an" applies to multiple subjects or objects, absent a contrary intent'"].)

The Arefis also argue "first lien" and "senior deed of trust" under HBOR do not mean the most senior-in-time deed of trust on the property, but rather the most senior loan in default, so that "a second or third or fourth deed of trust can be a 'first lien' loan for purposes of section 2923.6." The Arefis assert the Legislature intended "to create a cascading effect" such that a loan modification application "temporarily halts foreclosure proceedings on the most senior debt, as well as any subordinate debt." This interpretation, however, would require us to excise "on the property" from the definition of "first lien" in section 2920.5, subdivision (d), in order for the subordinate clause "is the subject of the notice of default or notice of sale" to modify "mortgage or deed of trust." (§ 2920.5, subd. (d).) This we cannot do. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 960, 956 [courts are not "authorize[d] . . . to rewrite statutes"]; *Newark Unified School Dist. v. Superior Court* (2016) 245 Cal.App.4th 887, 905 [same].)

Moreover, the Arefis' proposed interpretation of former section 2923.6 would make lien seniority under HBOR a moving target, dependent on the order in which default occurred, and would upend commonly understood notions of senior and junior lien priority. (See *MTC Financial, Inc. v. Nationstar Mortgage* (2018) 19 Cal.App.5th 811, 814 ["[w]hen a junior lienholder forecloses on a second deed of trust at a nonjudicial trustee's sale . . . the property is purchased at the sale subject to the first deed of trust"]; *Friery v. Sutter Buttes Savings Bank* (1998) 61 Cal.App.4th 869, 878 ["[a] seller who invests in a second deed of trust accepts all the risks of the junior position" and "gambles that the equity in the property will be sufficient to cover her investment in a worst case scenario—a foreclosure sale"].) The term "most senior" should have its ordinary, first-in-time, meaning. (See § 2897 ["[o]ther things being equal, different liens upon the same property have priority according to the time of their creation"]; *MTC Financial, Inc. v. Nationstar Mortgage*, *supra*, 19 Cal.App.5th at p. 814 ["as a general rule, liens 'have relative priorities among themselves according to the time of their creation'"]; *Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 944 ["""California follows the 'first in time, first in right' system of lien priorities"""]; *Travis v.*

Nationstar Mortgage, LLC (9th Cir. May 7, 2018, No. 16-55388) ___ Fed.Appx. ___, ___[2018 WL 2093321, at p. 1] ["HBOR defines a 'first lien' as 'the most senior mortgage or deed of trust' . . . in mortgage parlance, a 'first lien' is one with priority over all others"]; *Graham v. Wells Fargo Bank, N.A.* (N.D.Cal., Jan. 10, 2017, 3:15-cv-04220-JD) 2017 WL 86013, p. 3 [HBOR provision "applies 'only to first lien mortgages or deeds of trust,' and not second loans like [the borrowers' line of credit]"]; *Stephens v. World Sav. Bank* (N.D.Cal., Feb. 22, 2013, C 13-277 CW) 2013 WL 664615, p. 7 [rejecting the borrowers' claim under HBOR because section 2923.6 "do[es] not apply to the second deed of trust at issue here," and "[t]he notices of default and sale at issue here were related to the second deed of trust, not the first"].)

The legislative history of HBOR supports limiting section 2923.6 to first lien deeds of trust. (See *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1335 [although a statute's language "is plain, it is helpful to look at [the statute's] legislative history"]; *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046 ["we [may] look to legislative history to confirm our plain-meaning construction of statutory language"]; *De Vries v. Regents of University of California* (2016) 6 Cal.App.5th 574, 596-597 [even where a statute is "unambiguous," courts may look to the legislative history to "confirm [its] interpretation"]; *United Health Centers of San Joaquin Valley, Inc. v. Superior Court* (2014) 229 Cal.App.4th 63, 79 ["'[r]eviewing courts may turn to the legislative history behind even unambiguous statutes when it confirms or bolsters their interpretation'"].) The Conference Committee Report, adopted by the Legislature when it enacted HBOR (see *Lucioni v. Bank of America, N.A.*, *supra*, 3 Cal.App.5th at p. 159), explained that the new law would "[l]imit the scope of loss mitigation requirements and activities to first lien mortgages." (Sen. Rules

Com., Off. of Sen. Floor Analyses, Conf. Com. Rep. on Assem. Bill No. 278 (2011–2012 Reg. Sess.), adopted by the Assembly on July 2, 2012, p. 2.) The report goes on to state: "In response to concerns raised by industry stakeholders, the proposed conference committee amendments would be limited in scope in several ways. First, the dual track . . . provision[] would apply only to first lien loan mortgages. This restriction is consistent with the national mortgage settlement." (*Id.* at 20.)

The Arefis rely on the same Conference Committee Report, and note the "Background" section states: "Another obstacle to loan modifications arises if borrowers have second liens, like home equity loans, on their properties. These liens are often held by lenders who are also servicers on the first mortgage. They, too, have little interest in seeing any modification because it would harm the value of their holdings and reduce their income from fees." (Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Com. Rep. on Assem. Bill No. 278 (2011–2012 Reg. Sess.), *supra*, at p. 13.) This snippet of legislative history, however, actually reinforces limiting application of former section 2923.6 to first lien deeds of trust: The Legislature knew second liens created an "obstacle" for obtaining a loan modification, and yet, in response to the "concerns" of "industry stakeholders," limited the statute to first liens. As discussed, courts may not expand the provisions of HBOR beyond the circumstances the Legislature stated it applies. (See *Lucioni v. Bank of America, N.A.*, *supra*, 3 Cal.App.5th at pp. 159, 161.)

Finally, the Arefis assert that limiting HBOR to first liens would create "a gaping exception that swallows the rule" because "[b]orrowers who thought they were working out a deal with the senior lender to save their home would be shocked to discover a junior lender had snatched their home out from under them."

The problem the Legislature sought to remedy with HBOR, however, was dual tracking, not risk of foreclosure by junior lienholders. As discussed, Miracle Day recorded its notice of default under the second loan before the Arefis submitted their second loan modification application to Chase. The Arefis never sought a modification for the second loan, nor did they attempt to cure their default of over $800,000. The Arefis cannot contend that they did not know where they stood on their second loan or that Miracle Day's intention to proceed with foreclosure was unclear—problems endemic to dual tracking. (See *Monterossa v. Superior Court*, *supra*, 237 Cal.App.4th at p. 752.) However nefarious this alleged scheme was, it was not dual tracking.

The Arefis also attempt to hold Miracle Day liable for Chase's violation of a statute that did not apply to Miracle Day by alleging there was a conspiracy between the two defendants "to violate the Arefis' statutory rights under section 2923.6." As discussed, however, former section 2923.6 did not create an actionable duty to perform a "good faith" loan modification review, and the Arefis did not allege Chase engaged in dual tracking by proceeding with foreclosure while the loan modification application was pending. Moreover, even if Chase had violated former section 2923.6, Miracle Day would not be liable for any such violation based solely on an alleged conspiracy because conspiracy "is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511; see *Daniels v. Select Portfolio Servicing, Inc.*, *supra*, 246 Cal.App.4th at p. 1172.) "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Applied Equipment*, at p. 511.) Thus, before a plaintiff can hold a defendant liable under a conspiracy theory, the alleged conspirator must be subject to the obligation or duty the plaintiff alleges the defendants violated. (*Id.* at p. 514; see *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 591 ["a defendant, agent or otherwise, cannot actionably conspire to breach a duty to which it is not subject"].) As discussed, the Arefis have not identified any actionable conduct by Miracle Day that violated HBOR. Pleading that Miracle Day participated in a civil conspiracy does not create a duty that otherwise does not exist. (See *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1605 ["'to be liable for conspiracy to breach a duty, the defendant must be bound by that duty and capable of breaching it'"].)

C. *The Arefis Did Not State a Cause of Action for Fraud*

To state a cause of action for fraudulent misrepresentation, the plaintiff must allege (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud or induce the plaintiff's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255; *Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 597.) "To withstand demurrer, facts constituting every element of fraud must be alleged with particularity." (*Kalnoki v. First American Trustee Servicing Solutions, LLC*, *supra*, 8 Cal.App.5th at p. 35; see *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 ["[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice”]; *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, 1090 [“a plaintiff must plead *facts* that show with particularity the elements of the cause of action”].) “‘Thus, “‘the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.’”’” (*Lazar*, at p. 645; accord, *Tenet Healthsystem Desert, Inc. v. Blue Cross of California, supra,* 245 Cal.App.4th at p. 837.) “The specificity requirement serves two purposes: ‘to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action.’” (*Daniels v. Select Portfolio Servicing, Inc., supra*, 246 Cal.App.4th at p. 1167.)

“‘Actual reliance occurs when a misrepresentation is “‘an immediate cause of [a plaintiff’s] conduct, which alters his legal relations,’” and when, absent such representation, “‘he would not in all reasonable probability, have entered into the contract or other transaction.’”’” (*Conroy v. Regents of University of California*, *supra*, 45 Cal.4th at p. 1256.) “‘“A plaintiff asserting fraud by misrepresentation is obliged to . . . ‘establish a complete causal relationship” between the alleged misrepresentations and the harm claimed to have resulted therefrom.”’ [Citation.]’ This requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant’s misrepresentations, but also how the actions he or she took in reliance on the defendant’s misrepresentations caused the alleged damages.” (*Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1500; see *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 776 [“‘“[w]hatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown”’”].)

The Arefis argue Chase fraudulently misrepresented that it "would review [Ms. Arefi's] loan modification in good faith" and that "all decisions on the loan modification would be based off of the principles enumerated in the Homeowner Bill of Rights." Specifically, the Arefis alleged they "reasonably believed that Defendants would have negotiated with [the Arefis] in good faith" and they "reasonably relied" on the "fraudulent misrepresentations made by Defendants." The Arefis, however, did not allege they took any actions, or failed to take any actions, in reliance on Chase's alleged misrepresentations. The two alleged misrepresentations Chase made related to the Arefis' attempt to modify their first loan with Chase; they do not concern Miracle Day's foreclosure under the deed of trust securing the second loan. The Arefis did not allege they took, or failed to take, any action relating to their long-standing default on the second loan in reliance on Chase's promise to review the first loan for a modification in good faith. And, even if the Arefis could make such an allegation, such inaction would not have been justifiable given the undisputed fact that Miracle Day had already recorded a notice of default under the deed of trust securing the second loan (identifying Miracle Day as the current beneficiary) at the time the Arefis submitted to Chase the application to modify the first loan. In other words, with an uncured notice of default by Miracle Day under the second loan still outstanding, the Arefis applied to Chase for a modification of the first loan. The Arefis make no attempt to explain how Chase's representations regarding the first loan modification reasonably led them to take, or not take, any actions regarding their default on the second loan and the resulting foreclosure. There is no causal relationship between Chase's alleged misrepresentations and Miracle Day's foreclosure.

Orcilla v. Big Sur, Inc. (2016) 244 Cal.App.4th 982 is instructive. In that case the defaulting borrowers alleged the bank misrepresented the date of the foreclosure sale and falsely promised the foreclosure sale would not go forward while the borrowers' loan modification application was pending. (*Id*. at pp. 1008-1009.) The court held the borrowers had failed to allege justifiable reliance and causation: "Aside from the conclusory allegation that the [borrowers] relied on the [bank's] representation regarding the date of sale, the complaint does not allege what, if anything, the [borrowers] did in reliance on the representation. Nor does it allege a causal relationship between the alleged misrepresentation and their alleged damages (the loss of their home and associated costs.) And we cannot reasonably infer that the [borrowers] could have avoided foreclosure but for the error in the notice of sale, given that the [borrowers] do not deny defaulting on their loan and do not allege that they cured, attempted to cure, or could have cured the default." (*Id*. at p. 1009; see *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1308 [borrower failed to state cause of action for fraud where there was "no allegation, for example, that [the borrower] expended any money or declined other available offers in reliance on [the lender's] alleged misrepresentation," and, "[t]o the extent plaintiff was damaged, it was by the foreclosure sale itself, not by any representation about the sale being postponed"]; *Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1499 [borrowers failed to state a fraud cause of action because they did "not allege their reliance on the promised loan modifications caused them to default on their loans or prevented them from curing their existing defaults"]; *Cornejo v. Ocwen Loan Servicing, LLC* (E.D.Cal. 2015) 151 F.Supp.3d 1102, 1115-1116 [to state a cause of action for fraud, borrowers "must 'allege facts showing that [their] reliance on [the alleged] statement caused the trustee's sale of [their] home'" and that actions allegedly not taken in reliance "would have been successful in preventing the [foreclosure] sale"].)

The Arefis argue for the first time in their reply brief that, "[g]iven the relatively small size of the second mortgage in relation to the first mortgage, a trier of fact could conclude that a good faith loan modification of the first mortgage would have enabled the Arefis to avoid foreclosure." The Arefis' conclusory speculation about the possible effects of another modification of the first loan, if they even qualified for one, still does not identify any specific action or inaction they took in reliance on Chase's allegedly false promises, let alone explain how they could have avoided foreclosure on the second loan. (See *Rossberg*, *supra*, 219 Cal.App.4th at p. 1501 [borrowers did not state a fraud cause of action where they "failed to allege any connection between their reliance on the promised loan modifications and any specific damages that reliance caused," and their "conclusory allegation they would have obtained a replacement loan" was insufficient]; *Glaski v. Bank of America, N.A.*, *supra*, 218 Cal.App.4th at p. 1091 ["a general allegation of reliance and damage," which "does not identify the particular acts [plaintiff] took because of the alleged [fraud] . . . [and] does not identify any acts [plaintiff] did not take because of his reliance," does not state a cause of action for fraud].) Given this fatal deficiency, for which the Arefis offer no curative amendment, the trial court did not err in sustaining Chase's demurrer to the Arefis' fraud cause of action without leave to amend.

D. *The Arefis Did Not State a Cause of Action for Unfair Competition*

The unfair competition law, Business and Professions Code section 17200 et seq., ""“establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.””" (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 610.) The Arefis contend the conspiracy by Chase and Miracle Day to circumvent HBOR's requirement for a good faith loan modification review by transferring the second loan deed of trust to Miracle Day constituted all three forms of unfair competition.

To have standing under the unfair competition law, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice . . . that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.) While the loss of one's home may qualify as an economic injury (*Lueras v. BAC Loans Servicing, LP*, *supra*, 221 Cal.App.4th at p. 82), the Arefis' inability to plead a causal link between the alleged misconduct by Chase and Miracle Day and the loss of the property to foreclosure under the deed of trust securing the second loan defeats their unfair competition cause of action.

The Arefis were in default on both the first and second loans. Indeed, Ms. Arefi stated in her verified bankruptcy schedules that she owed Miracle Day $822,500 under the second loan. The Arefis do not allege they made any payments on the second loan, sought a modification of the second loan, attempted to contact Miracle Day to explore alternatives to foreclosure, or received or relied on any (mis)representations

Chase or Miracle Day made about the second loan or its impending foreclosure sale. (See *Graham v. Bank of America, N.A.*, *supra*, 226 Cal.App.4th at p. 614 [borrower failed to state a cause of action for unfair competition because "his prospect of losing the home to foreclosure is the result of default, not the alleged conduct of defendants"]; cf. *West v. JPMorgan Chase Bank, N.A.*, *supra*, 214 Cal.App.4th at p. 795 [borrower stated causes of action for fraud and unfair competition where the borrower continued to make loan payments and refrained from "taking legal action to stop the foreclosure sale," in reliance on bank's misrepresentations that no sale was scheduled].)

As discussed, the Arefis did not allege and do not explain how, even if they were eligible for a modification of their first loan, such a modification would have enabled them to cure their default on, and avoid foreclosure under, the second loan—the default that caused them to lose their home. Thus, the Arefis' situation is markedly different from the typical case involving failed negotiations with a lender to modify one loan, after which that lender proceeds to foreclose. (Cf. *Majd v. Bank of America, N.A.*, *supra*, 243 Cal.App.4th at p. 1304 ["plaintiff has sufficiently alleged causation in that, had Bank of America properly waited to foreclose until 30 days after denying the loan modification request, plaintiff may have proven he *was* eligible for a modification"]; *Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at pp. 82-83.)

Finally, the Arefis do not say how they would amend to cure this defect. In their reply brief, the Arefis summarily state the "unfair competition caused them harm . . . because they never received a good faith loan modification, which led to the loss of their home in foreclosure and severe emotional distress." This is exactly the kind of vague and conclusory allegation, devoid of factual support or explanation, that courts routinely find insufficient. (See *Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1491 [plaintiff has the burden of proving a “reasonable possibility” of amendment and must “set forth factual allegations that sufficiently state all required elements . . . [a]llegations must be factual and specific, not vague or conclusionary”].)

E. *The Trial Court Did Not Err in Awarding Attorneys’ Fees to Miracle Day*

The Arefis argue the trial court erred in awarding Miracle Day its attorneys’ fees under the deed of trust’s provision for attorneys’ fees because the Arefis’ action (1) was based on tort, not contract, causes of action and (2) did not fall within the language of the attorneys’ fees provision. The Arefis also argue that, even if the complaint included some contract claims, the trial court abused its discretion by failing to apportion the fee award between tort and contract causes of action. These arguments lack merit.

1. *Applicable Law and Standard of Review*

"Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees." (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*).) While section 1021 of the Code of Civil Procedure codifies this general rule, the statute also permits parties "to contract out" of it. (*Ibid*., see *R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019, 1025.) """Parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.""" (*Mountain Air*, *supra*, 3 Cal.5th at p. 751.) Contracting parties may also "limit the recovery of fees only to claims arising from certain transactions or events, or award them only on certain types of claims." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 818.)

"""On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.'" [Citation.] In other words, 'it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.'" (*Mountain Air*, *supra*, 3 Cal.5th at p. 751; see *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 425 ["'[o]n appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law'"]; *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237 [same].) In determining "'whether the parties entered an agreement for the payment of attorney fees, and, if so, the scope of the attorney fee agreement,'" we "apply traditional rules of contract interpretation." (*Mountain Air*, at p. 752.)

2. *The Attorneys' Fees Provision in the Deed of Trust Securing the Second Loan Applies to This Action*

The attorneys' fees provision in the deed of trust securing the second loan provides the Arefis "shall pay Beneficiary's . . . reasonable attorney's fees, in any lawsuit or other proceeding to foreclose this Deed of Trust; In any lawsuit or proceeding which Beneficiary . . . defends to protect the lien of this Deed of Trust; and in any other action taken by Beneficiary to collect this Debt." The parties agree this was not an action to foreclose on the deed of trust, nor was it an action taken to collect a debt. Thus, the only issue is whether the fees Miracle Day incurred in defending this action were "to protect the lien" of the deed of trust securing the second loan.

The Arefis' second amended complaint included causes of action for declaratory relief, to set aside the trustee's sale, to cancel the trustee's deed upon sale, and to quiet title, along with statutory and tort causes of action. In particular, the Arefis alleged that Miracle Day "claims an estate or interest in the Property adverse to that of [the Arefis], but [Miracle Day's] claims are without any right," and that Miracle Day's foreclosure sale, as well as the resulting trustee's deed upon sale, "should be deemed void" and "should be set aside." The Arefis also alleged that Chase and Miracle Day "conspired to enter into a scheme by which Chase would sell/assign the Second Deed of Trust on the Property to Miracle, so that Miracle could proceed with a foreclosure on the Second Deed of Trust," that the "initial assignment" of the second loan "was defective, did not transfer the actual Deed of Trust, and thereby, void," and that, "due to Defendants['] conduct, the Subject Property was wrongfully foreclosed upon."

In defending this action, Miracle Day had to defend the validity of the nonjudicial foreclosure sale under the deed of trust, one of Miracle Day's remedies against defaulting borrowers like the Arefis. (See *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 280 ["[a] nonjudicial foreclosure sale is a 'quick, inexpensive[,] and efficient remedy against a defaulting debtor/trustor,'" which California provides through "'a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust'"].) The Arefis also challenged the propriety and legality of Chase's assignment, pursuant to which Miracle Day became the lienholder. Thus, Miracle Day defended the action in order to protect its security interest in the property, i.e., its lien. (See *Jenkins v. JP Morgan Chase Bank, N.A.*, (2013) 216 Cal.App.4th 497, 508 ["California courts have described the security interest created by a deed of trust as the functional equivalent of 'a lien on the property'"].) And a beneficiary may take action to defend and protect its security interest. (See *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 548 [describing the attorneys' fees a creditor incurred in defending an action by borrowers to set aside a nonjudicial foreclosure sale as "incurred by a creditor in protecting the security"]; *Buck v. Barb* (1983) 147 Cal.App.3d 920, 925 [affirming a lienholder's award of attorneys' fees incurred in commencing foreclosure proceedings against the defaulting borrower because "the deed of trust *expressly* authorized its beneficiary . . . to 'protect the security,' and in doing so, to 'employ counsel and pay his reasonable fees'"];

Zimmerman v. Aurora Loan Servs. (N.D.Cal. Jan. 12, 2009) No. C 08-3731 MHP, 2009 WL 81392, at p. 1 [awarding a lender its attorneys' fees, under a provision in a deed of trust authorizing recovery of attorneys' fees "to protect Lender's interest in the Property and rights," for successfully defending a borrower's lawsuit in connection with foreclosure of the borrower's home].)

Citing *In re Sublett* (11th Cir. 1990) 895 F.2d 1381, which involved a provision that authorized recovery of attorneys' fees incurred "by reason of litigation with third parties to protect the lien of this mortgage" (*id.* at p. 1387), the Arefis argue the phrase "protect the lien" applies only "where a party challenges the validity of the deed of trust or its priority." *Sublett*, however, was not a foreclosure case. The lender in that case sought interest on attorneys' fees incurred in the borrower's bankruptcy proceeding. (*Id.* at p. 1382.) The court in *Sublett* did not address whether defending the validity of an assignment of the lien and the beneficiary's ensuing foreclosure sale was "protect[ing] a lien."

The Arefis also contend Miracle Day could not have incurred fees to protect the lien because the "lien was extinguished upon the completion of the foreclosure sale." But it was precisely this sale the Arefis challenged and sought to set aside. And the Arefis cite no authority for the proposition that, post-foreclosure, a beneficiary "cannot incur legal fees to protect a lien that no longer exists." Indeed, the Arefis acknowledge that, had they succeeded in setting aside the sale, Miracle Day's lien would "have been reinstated in full."

Finally, the Arefis argue their action was not "on a contract" within the meaning of section 1717,[10] and, to the extent the complaint alleged any contract claims, the trial court abused its discretion by failing to apportion the award of attorneys' fees between contract and tort causes of action. (See § 1717, subd. (a).)[11] Section 1717, however, has "limited application"; in general, its "'only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract.'" (*Brown Bark III, L.P. v. Haver*, *supra*, 219 Cal.App.4th at p. 820.) Where, as here, the language of the provision is broad enough to encompass contract and noncontract claims, and the party seeking fees is the party specified in the attorneys' fees provision, section 1717 does not control. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 ["[i]f a contractual attorney fee provision is phrased broadly enough . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort

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10 Section 1717, subdivision (a), provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

11 The Arefis do not argue the trial court erred by failing to apportion between causes of action Miracle Day defended to protect the lien in the deed of trust and other causes of action. The Arefis argue only the court failed to apportion between contract and tort causes of action.

claims"]; *Brown Bark III, L.P.,* at p. 820 ["parties to a contract are free to agree that one or more of them shall recover their attorney fees if they prevail on a tort or other noncontract claim, but the right to recover those fees depends solely on the contractual language"]; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 ["[b]ecause of its more limited scope . . . section 1717 cannot be said to supersede or limit the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements"].)

Moreover, the phrase "protect the lien" is not limited to contract claims or contractual challenges to the terms of the deed of trust. (Cf. *Khan v. Shim* (2016) 7 Cal.App.5th 49, 60 [attorneys' fees provision applying to """an action or proceeding to enforce the terms hereof or declare rights hereunder""" or "if "'legal action or arbitration is necessary to enforce the terms of this Agreement""" did not apply to tort causes of action].) Rather, the attorneys' fees provision in the deed of trust securing the second loan authorizes an award of attorneys' fees in "any lawsuit or proceeding" the beneficiary "defends to protect the lien." The Arefis' lawsuit was such an action. The trial court did not err in awarding attorneys' fees to Miracle Day.

DISPOSITION

The order dismissing the Arefis' action is affirmed. The order awarding Miracle Day its attorneys' fees is affirmed. Chase and Miracle Day are to recover their costs from the Arefis.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, 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.