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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

COBY GOODMAN, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., Defendant and Respondent.	B243614 (Los Angeles County Super. Ct. No. LC090605)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, John Shepard Wiley, Jr., Judge. Reversed.

Blood Hurst & O'Reardon, Timothy G. Blood, Thomas J. O'Reardon; Kaplan Lee, Jonathon Kaplan, Yitz E. Weiss, and Paul Y. Lee for Plaintiff and Appellant.

K&L Gates, Kevin S. Asfour, Irene C. Freidel, pro hac vice, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Coby Goodman appeals from a judgment in favor of defendant and respondent Wells Fargo Bank, N.A. following the trial court's sustaining of defendant's demurrer to the second amended complaint (SAC). Plaintiff contends that the trial court erred because he stated facts sufficient to constitute the causes of action pleaded in the SAC: breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and violations of unfair competition law (UCL), Business & Professions Code sections 17200 et seq. We reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The SAC

Plaintiff filed a SAC as a class action lawsuit against defendant seeking damages for himself, and all others similarly situated, based on causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and violations of the UCL. Plaintiff alleged that in 2006, he obtained a loan from defendant, secured by a parcel of real property. In 2009, defendant caused to be recorded a notice of default alleging that plaintiff failed to make payments due on the loan and defendant was electing to sell the property. Plaintiff alleged that the notice of default was defective.

Plaintiff alleged that in 2009, he requested a loan modification from defendant, and at defendant's request, plaintiff provided to defendant "all of the detailed financial disclosures [requested by defendant] necessary to determine if he [was] qualified for a loan modification under [the home affordable modification program (HAMP)]." In the latter part of 2009, plaintiff obtained a "HOME AFFORDABLE MODIFICATION PROGRAM LOAN TRIAL PERIOD (Step One of Two-Step Documentation Process)"—known as a trial period plan (TPP)—from defendant, and signed it. Plaintiff attached a copy of the TPP to the SAC; it provided signature blocks for plaintiff and defendant, but the copy attached to the SAC was unexecuted.

Plaintiff alleged that on January 5, 2010, defendant sent a letter to plaintiff congratulating him on entering into the HAMP TPP. The letter was attached to the SAC, and it provided, "You did it. By entering into a Home Affordable Modification Trial Period Plan you have taken the first step toward making your payment more affordable. We want to remind you that when you signed your [TPP], you agreed to work with a HUD-approved housing counseling agency. . . . [¶] Your next step is to choose from the following housing counseling options: . . . ." The top of the letter contained a logo or other mark bearing the names of defendant and Federal Home Loan Mortgage Corporation (Freddie Mac).

The TPP stated, "If [plaintiff is] in compliance with this [TPP] and [plaintiff's] representations in Section 1 continue to be true and correct in all material aspects, then [defendant] will provide [plaintiff] with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage. [¶] If [plaintiff has] not already done so, [plaintiff is] providing confirmation of the reasons [plaintiff] cannot afford my mortgage payment and documents to permit verification of all of [plaintiff's] income . . . to determine whether [plaintiff] qualif[ies] for the offer described in this [TPP]. [Plaintiff] understand[s] that after [plaintiff] sign[s] and returns[s] two copies of this [TPP] to [defendant], [defendant] will send [plaintiff] a signed copy of this [TPP] if [plaintiff] qualif[ies] for the Offer[1] or will send [plaintiff] written notice that [plaintiff does] not qualify for the Offer. This [TPP] will not take effect unless and until both [plaintiff] and [defendant] sign it and [defendant] provides [plaintiff] with a copy of this [TPP] with [defendant's] signature. "

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1 "Offer" is not defined in the TPP. The TPP states that, "Capitalized terms used in this [TPP] and not defined have the meaning given to them in the Loan Documents," and "[t]he Mortgage and Note, together, as they may previously have been amended, are referred to as the 'Loan Documents.'" The loan documents are not included in the record. Plaintiff alleges that "Offer," as used in the TPP means defendant's offer. In context, we interpret reasonably "Offer" as used in the TPP to mean defendant's TPP offer to provide plaintiff with a loan modification agreement.

Plaintiff made several representations to defendant in section 1 of the TPP; including that he was unable to afford his existing mortgage; he lived on the real property, the documents he had provided to defendant, "including the documents and information regarding [his] eligibility for the program," were true and correct; and "[i]f [defendant] requires me to obtain credit counseling, I will do it." Section 2 of the TPP, under the heading "The Loan Trial Period," stated that plaintiff will pay defendant three monthly installments of a specified sum by specified dates. Those payments are "an estimate of the payment[s] that will be required under the modified loan terms . . . ." Plaintiff alleged that the monthly installment payments under the TPP were "larger payments than Plaintiff's regular monthly mortgage payments . . . ."

Section 3 of the TPP stated, inter alia, that, "If [plaintiff] compl[ies] with the requirements in Section 2 [i.e., signing the TPP and making the three monthly installments payments] and [plaintiff's] representations in Section 1 continue to be true in all material respects, [defendant] will send [plaintiff] a Modification Agreement for [plaintiff's] signature which will modify [plaintiff's] Loan Documents as necessary to reflect [a] new payment amount and waive any unpaid late charges accrued to date."

Section 2 of the TPP states, inter alia, in paragraph F, "If prior to the Modification Effective Date,[2] (i) [defendant] does not provide [plaintiff] a fully executed copy of this [TPP] and the Modification Agreement; (ii) [plaintiff has] not made the Trial Period payments required under Section 2 of this [TPP]; or [defendant] determines that [plaintiff's] representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this [TPP] will terminate."

Section 2, paragraph G, of the TPP states, "[Plaintiff] understand[s] that the [TPP] is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) [plaintiff] meet[s] all of the conditions required for modification, (ii) [plaintiff] receive[s] a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed."

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[2] "Modification Effective Date" is not defined in the TPP.

Plaintiff alleged that he fully performed under the terms of the TPP, including providing defendant with all necessary documentation, keeping his information accurate, and making each of the required payments. Plaintiff continued to make two additional monthly installment payments after he had made the three installment payments specified in the TCC, and "complied with the TPP Contract's credit counseling requirement and contacted a HUD-approved housing counseling agency."

Plaintiff alleged that on June 28, 2010, defendant sent a letter to plaintiff, a copy of which was attached to the SAC, stating that, "Unfortunately, after carefully reviewing the information you've provided, we are unable to adjust the terms of your mortgage. [¶] We are unable to offer you a Home Affordable Modification because you did not provide us with the documents we requested. . . . [¶] You have 30 calendar days from the date of this notice to contact [defendant] to discuss the reason for non-approval for a HAMP modification . . . . Your loan may be referred to foreclosure during this time, or any pending foreclosure action may continue. However, if allowed by state law and investor guidelines, no foreclosure sale will be conducted and you will not lose your home during this 30-day period" Plaintiff alleged that defendant's reason that it was unable to offer plaintiff a permanent modification of his loan—that he did not provide defendant with the documents it requested—was false, and notwithstanding defendant's promise to refrain from conducting a foreclosure sale for at least 30 days from June 28, 2010, on or about July 14, 2010, defendant foreclosed on plaintiff's home.

Plaintiff alleged that defendant failed to provide him with a permanent loan modification, and as a proximate cause thereof, plaintiff, inter alia, lost title to his property, lost equity in his property, incurred costs and expenses in connection with preparing and presenting documents and information to defendant, did not seek alternatives to modification such as refinancing or selling the property, given a lowered credit score, and suffered emotional distress.

B. Demurrer

Defendant demurred to the SAC on several grounds, including that each of the causes of action failed to state a cause of action. Defendant, in part, relied on *Nungaray v. Litton Loan Servicing, LP* (2011) 200 Cal.App.4th 1499 (*Nungaray*) for the proposition that the TPP there was not a "contract for a permanent modification." Plaintiff opposed the demurrer relying, in part, on *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547 (*Wigod*) for the proposition that the TPP "constitutes 'an ***unambiguous promise'*** supporting a breach of contract claim."

The trial court sustained defendant's demurrer, and directed defendant's counsel "to give [his] colleagues a form of judgment . . . ." In what the parties describe as a tentative ruling, the trial court stated that the breach of contract claim failed to state facts sufficient to constitute a cause of action. The trial court quoted *Nungaray, supra*, 200 Cal.App.4th 1499 at page 1504, stating that, "'As a matter of law, there was no contract here. The plain and clear language of paragraph 2G states that the Plan "is not a modification of the Loan Documents" and the documents will not be modified unless the Nungarays "meet all of the conditions required for modification," including the Nungarays' receipt of a "fully executed copy of a Modification Agreement."'" The trial court stated that *Wigod, supra*, 673 F.3d 547 takes a conflicting view of "this contract," but it was not controlling because it was a federal court case applying Illinois law, and was not persuasive.

The trial court found that the breach of the implied covenant of good faith and fair dealing claim failed. It cited *Rosenfeld v. JPMorgan Chase Bank, N.A.* (N.D.Cal. 2010) 732 F.Supp.2d 952 at pages 968-969, without discussion. Presumably by citing *Rosenfeld*, the trial court found that the claim failed because it ruled that plaintiff failed to allege facts stating a cause of action for breach of contract, so "the implied covenant ha[d] nothing upon which to act as a supplement . . . ." (*Id*. at p. 968.) The trial court found that because plaintiff failed to allege facts stating a cause of action for breach of contract, the cause of action for promissory estoppel also failed.

As to the claim for violations of the UCL, the trial court stated that "[t]he parties previously divided [this claim] into two categories: 'notice of default' problems, and 'agreement-related conduct.[3]'" The trial court ruled that the claim regarding the notice of default portion of the claim failed because plaintiff did not allege prejudice. As to the agreement-related conduct portion of the claim, the claim failed because, as noted above, the trial court ruled that plaintiff failed to alleged facts stating a cause of action for breach of contract. The trial court also ruled that the claim for violations of the UCL failed because plaintiff alleged "fraud, bad faith, and false pretenses against [defendant]" but plaintiff did not plead "these accusations of fraud with particularity."

Shortly after the hearing on the demurrer, the Northern District of California issued an opinion in *Sutcliffe v. Wells Fargo Bank, N.A.* (N.D.Cal. 2012) 283 F.R.D. 533 (*Sutcliff*). Plaintiff filed a motion for reconsideration, arguing, inter alia, that *Sutcliff* distinguished *Nungaray, supra,* 200 Cal.App.4th 1499, and held "at least at the pleading stage, that the TPP offers a sufficient basis to show the existence of an enforceable agreement." (*Sutcliffe, supra*, 283 F.R.D. at p. 550.) According to the trial court, *Sutcliffe, supra,* 283 F.R.D. 533 is an unpublished federal trial court opinion, and therefore is not "new law for the purpose of reconsideration." In addition, the trial court declined to consider *Sutcliffe* because it was simply the "*Nungaray* versus *Wigod*" analysis that had been discussed when the trial court granted defendant's demurrer. The trial court acknowledged that *Nungaray, supra,* 200 Cal.App.4th 1499 was distinguishable because unlike here, in that case the borrowers had not met the condition precedent of providing their documents to the lender. The trial court stated, however, that it believed it was bound by *Nungaray* because it is "a proper and a wholehearted

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3 It is unclear from the record whether, and if so, when, the parties divided the UCL claim into the two categories described by the trial court. Plaintiff stated in his opposition to defendant's demurrer, "[Defendant] improperly reduces plaintiff's claims under the UCL to a breach of the TPP Agreement and issuing an unlawful notice of default. . . . Plaintiff's UCL claims are much broader . . . ." Plaintiff nonetheless acknowledged that the basis for his UCL claim included systematic breaches of contract and deficient notice of defaults.

treatment of . . . state appellate authority that is binding on me directly, binding on all trial courts in California, all state trial courts." Judgment was entered in favor of defendant and against plaintiff.

DISCUSSION

A. Standard of Review

"On appeal from a dismissal following the sustaining of a demurrer, we review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. We view the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citations.]" (*Tom Jones Enterprises, Ltd. v. County of Los Angeles* (2013) 212 Cal.App.4th 1283, 1290.) We may consider judicially noticeable matters and facts in the exhibits attached to the complaint. (*Picton v. Anderson Union High School Dist*. (1996) 50 Cal.App.4th 726, 732-733.) Plaintiff did not seek leave to amend his SAC in the trial court.

B. Applicable Law

"In response to the unfolding financial crisis of 2008, Congress passed the Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3765. This law included the Troubled Asset Relief Program ('TARP'), 'which required the Secretary of the Treasury, among many other duties and powers, to "implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures."' [Citations.]" (*Corvello v. Wells Fargo Bank, NA* (9th Cir. 2013) 728 F.3d 878, 880 (*Corvello*).) Therefore, "'[t]he United States Department of the Treasury implemented the Home Affordable [Modification] Program (HAMP) . . . . "The goal of HAMP is to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable levels, without

discharging any of the underlying debt." [Citation.]' [Citation.]" (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56, fn. 1.)

"[I]n February 2009 the Secretary set aside up to $50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure. The Secretary negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers, including Wells Fargo. Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program. In exchange, servicers would receive a $1,000 payment for each permanent modification, along with other incentives. The SPAs stated that servicers 'shall perform the loan modification . . . described in . . . the Program guidelines and procedures issued by the Treasury . . . and . . . any supplemental documentation, instructions, bulletins, letters, directives, or other communications . . . issued by the Treasury.'" (*Wigod, supra,* 673 F.3d at p. 556.)

In April 2009, the Treasury issued Supplemental Directive 09-01, a regulation delineating HAMP's eligibility requirements and modification procedures. (U.S. Dept. Treasury, HAMP Supplemental Directive No. 09-01, Apr. 6, 2009, pp. 2-18; *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 923 (*Bushell*).) "As for HAMP's eligibility requirements, under Supplemental Directive 09-01, before a lender offers a TPP to a distressed borrower, the lender (1) has already found that the borrower satisfies certain simple threshold requirements under HAMP regarding the basic nature of the loan obligation . . .; (2) has already calculated a trial modification payment amount using a 'waterfall' method of specified steps . . .; and (3) most significantly from the lender's perspective, has already determined, pursuant to application of a net present value (NPV) test based in part on income/financial representations provided by the borrower, that it is more profitable to modify the loan under HAMP than to foreclose upon it. [Citations.] Furthermore, Supplemental Directive 09-01 specifies that, upon receiving the signed TPP from the borrower (with the income verification documents), the lender 'must confirm' that the borrower continues to meet these HAMP eligibility

criteria and, if not, the lender 'should promptly communicate' that fact in writing to the borrower 'and consider the borrower for another foreclosure prevention alternative.' [Citation.]" (*Bushell, supra*, 220 Cal.App.4th at pp. 923-924.)

C. Breach of Contract

Plaintiff contends that he sufficiently pleaded a cause of action for breach of contract. He alleged that the TPP constituted a valid, binding contract requiring defendant to provide plaintiff with a permanent loan modification agreement contingent upon plaintiff complying with the terms of the TPP. Plaintiff alleged that defendant breached the contract because he performed all of the conditions required of him by the TPP, but defendant failed to provide him with a permanent loan modification agreement for his signature. We hold that at this pleading stage plaintiff stated facts sufficient to constitute a cause of action for breach of contract.

1. Applicable Law

"The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40 [69 Cal.Rptr. 561, 442 P.2d 641] (*Pacific Gas & Electric*).) In engaging in the function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. (Civ. Code, § 1636.) Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. (Civ. Code, § 1639 ['[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . .']; Civ. Code, § 1638 [the 'language of a contract is to govern its interpretation . . .'].) [¶] The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. (Code Civ. Proc., § 1856, subd. (a); *Cerritos Valley Bank v. Stirling* (2000) 81 Cal.App.4th 1108, 1115-1116 [97 Cal.Rptr.2d 432]; *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord &*

Freedman (1998) 65 Cal.App.4th 1469, 1478 [77 Cal.Rptr.2d 479] [parol evidence may not be used to create a contract the parties did not intend to make or to insert language one or both parties now wish had been included].) Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. (Code Civ. Proc., § 1856, subd. (g); *Pacific Gas & Electric*, *supra*, 69 Cal.2d at p. 37 [if extrinsic evidence reveals that apparently clear language in the contract is, in fact, susceptible to more than one reasonable interpretation, then extrinsic evidence may be used to determine the contracting parties' objective intent]; *Los Angeles City Employees Union v. City of El Monte* (1985) 177 Cal.App.3d 615, 622 [220 Cal.Rptr. 411].)" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126.)

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) "'The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.' [Citation.]" (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1111-1112.)

The elements of a breach of contract claim are (1) the existence and terms of the contract, (2) the plaintiff's performance or excuse for failing to perform, (3) the defendant's breach, and (4) plaintiff's damages. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1031.)

2. Analysis

After the trial court ruled on defendant's demurrer, several state and federal appellate decisions were issued that provide guidance of TPP's under HAMP.[4] For

[4] Defendant refers to federal court of appeal cases from jurisdictions other than California, and federal district court cases from several jurisdictions including California, to support its contention that the trial court properly sustained its demurrer. We, however, agree at this pleading stage with the reasoning in the cases referred to herein,

example, in *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 (*West*), the borrower was approved for a TPP, complied with the terms of the TPP, including making the monthly payments required by the TPP. (*Id*. at p. 786.) Nonetheless, the bank stated that the borrower did not qualify for a HAMP loan modification, and therefore did not provide the borrower with a permanent loan modification agreement. The borrower filed a lawsuit against the bank alleging, inter alia, breach of the TPP contract. In reversing the trial court's order sustaining the bank's demurrer, the court stated, "[W]hen a borrower complies with all the terms of a TPP, and the borrower's representations remain true and correct, the loan servicer must offer the borrower a permanent loan modification. As a party to a TPP, a borrower may sue the lender or loan servicer for its breach. [Citation.] Because [the borrower] complied with all the terms of the TPP, [the bank] had to offer her a permanent loan modification." (*Id*. at p. 786.) The court explained that the bank's "reevaluation upon completion of the trial period would be limited to determining whether [the borrower] had complied with the terms of the [TPP] and whether [the borrower's] original representations remained true and correct." (*Id*. at p. 798.)

In *Corvello*, *supra*, 728 F.3d 878, the plaintiffs, after falling behind on their mortgages, enrolled in a TPP. "The TPP requires borrowers to submit documentation to confirm the accuracy of their initial financial representations, and to make trial payments of the modified amount to the servicer." (*Id*. at pp. 880-881.) Despite complying with their obligations under the TPP, the plaintiffs were never offered a permanent loan modification by the defendant, Wells Fargo. The plaintiffs sued for breach of contract, alleging that "that they complied with their trial plans and made the required payments, and should have been offered permanent modifications." (*Ibid*.)

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including recent California appellant court cases, that hold that where borrowers allege that they have fulfilled all of their obligations under the TPP, and the lender or loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement.

Applying California law, the court in *Corvello, supra,* 728 F.3d 878 followed *Wigod, supra,* 673 F.3d 547 (discussed below), and *West, supra,* 214 Cal.App.4th 780, to reverse the district court's order of dismissal, holding that the defendant, Wells Fargo, was contractually obligated under the terms of the TPP to offer a permanent modification to the plaintiffs because they complied with the TPP by submitting accurate documentation and making required payments under the TPP. "Where, as here, borrowers allege . . . that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement." (*Id*. at p. 884.) Subsequently, *Corvello, supra,* 728 F.3d 878, has been cited with approval in *Chavez v. Indymac Mortgage Services et al*. (2013) 219 Cal.App.4th 1052 (*Chavez*), at page 1059; *Bushell, supra,* 220 Cal.App.4th at page 927, footnote 7; *Lueras v. BAC Home Loans Servicing, LP, supra,* 221 Cal.App.4th at page 74.

In *Bushell, supra,* 220 Cal.App.4th 915, the plaintiffs received from their lender a TPP. The plaintiffs alleged that for over two years they made the payments under the TPP and provided the lender with the documents it requested. (*Id*. at p. 926.) The lender denied the plaintiffs a permanent loan modification and foreclosed on the plaintiff's home. The plaintiff sued the lender based on causes of action for breach of contract, promissory estoppel, and fraud based on intentional misrepresentation or false promise. The court reversed the trial court's judgment following an order sustaining the lender's demurrer. The court relied on *West, supra,* 214 Cal.App.4th 780, and *Wigod, supra,* 673 F.3d 547, stating that, "These two decisions . . . concluded that when a borrower has alleged that he or she has complied with all the terms of a trial modification plan offered under HAMP—including making all required payments and providing all required documentation—and if the borrowers representations on which the modification is based remain true and correct, the lender or loan servicer . . . must offer the borrower a good faith permanent modification; and if the lender fails to do so, the borrower may sue the lender, under state law, for breach of contract of the trial modification plan, among other causes of action." (*Bushell, supra,* 220 Cal.App.4th at pp 918-919.)

The court in *Bushell*, *supra*, 220 Cal.App.4th 915, explained, "This 'must offer' mandate is because, as *West* explains, citing *Wigod*, 'When [a lender] received public tax dollars under [TARP], it agreed to offer TPP's and loan modifications under HAMP according to [regulations] . . . issued by the Department of the Treasury. (*Wigod*, *supra*, 673 F.3d at p. 556.) Under . . . [the] HAMP [S]upplemental [D]irective 09-01 [regulation] . . . , if the lender approves [(i.e., offers)] a TPP, and the borrower complies with all the terms of the TPP and all of the borrower's representations remain true and correct, the lender *must offer* a permanent loan modification. (*Wigod*, *supra*, at p. 557.) [Supplemental] Directive 09-01 . . . at page 18, states: "If the borrower complies with the terms and conditions of the [TPP], the loan modification will become effective on the first day of the month following the trial period . . . ."' (*West*, *supra*, 214 Cal.App.4th at pp. 796-797, fn. omitted.)" (*Id*. at p. 925.)

The court in *Bushell*, *supra*, 220 Cal.App.4th 915 also stated, "[P]laintiffs have alleged . . . that they have complied with all terms of the TPP—including making all required payments, providing all required documentation, and maintaining the integrity of their modification-based representations, and they have alleged that they 'qualif[ied] for the modification under HAMP' (given [the] offer [by plaintiff's lender] of a TPP to them, and no 'prompt[] communicat[ion]' to the contrary from plaintiff's lender). (Supplemental Directive 09-01, *supra*, p. 15.) As a result, plaintiffs have alleged a cause of action for breach of contract under California law. They have alleged that [their lender] breached the TPP contract by failing to offer plaintiffs a good faith permanent loan modification." (*Id*. at p. 926.)

a) *Nungaray* and *Wigod*

Defendant contends that pursuant to *Nungaray*, *supra*, 200 Cal.App.4th 1499, we should hold that the TPP is not an enforceable contract for a permanent modification. The trial court in sustaining defendant's demurrer to plaintiff's breach of contract cause of action, quoted *Nungaray*, *supra*, 200 Cal.App.4th at page 1504, stating that, "'As a matter of law, there was no contract here. The plain and clear language of paragraph 2G

states that the Plan "is not a modification of the Loan Documents" and the documents will not be modified unless the Nungarays "meet all of the conditions required for modification," including the Nungarays' receipt of a "fully executed copy of a Modification Agreement."'"

In *Nungaray, supra,* 200 Cal.App.4th 1499, the Nungarays, borrowers on a mortgage loan who were delinquent on their mortgage payments, sought a HAMP modification, and ultimately were provided with a TPP. (*Id*. at 1502-1503.) The Nungarays made the required payments under the TPP, but failed to provide all of the required documentation under the TPP to their lender and the entity that serviced the loan on the lender's behalf (defendants). (*Id*. at p. 1503.)

Claiming that the TPP "is an enforceable loan modification," the Nungarays filed a lawsuit against the defendants alleging causes of action for breach of contract, negligence, and quiet title. The trial court granted summary judgment in favor of the defendants because "the Plan was not an enforceable agreement requiring defendants to enter into a loan modification because it 'was expressly contingent upon a number of factors which never came to fruition.'" (*Nungaray, supra,* 200 Cal.App.4th at p. 1504.) The court affirmed the trial court's ruling granting the defendants' motion for summary judgment for the reasons stated by the trial court here. The court also stated, "The Plan also required the Nungarays to submit financial information regarding their hardship and states that [the loan servicer] and the Bank would determine whether they 'qualif[ied] for the Offer.'" (*Ibid*.)

Relying on *Nungaray, supra,* 200 Cal.App.4th 1499, defendant here argues that plaintiff did not allege that he received a fully executed copy of a loan modification agreement from defendant, a condition required under section 2 of the TPP for the loan documents to be modified. The requirement that plaintiff received a fully executed copy of a loan modification agreement from defendant, however, is not a condition to defendant providing plaintiff with a permanent loan modification agreement. That provision in the TPP means the permanent loan modification agreement will not take effect until that agreement is signed. As stated in *Wigod, supra,* 673 F.3d 547, "Wells

Fargo [the defendant bank] argues that its obligation to send [the borrower] a permanent Modification Agreement was triggered only if and when it actually sent [the borrower] a Modification Agreement. Wells Fargo's proposed reading of section 2 would nullify other express provisions of the TPP Agreement. Specifically, it would nullify Wells Fargo's obligation to 'send [the borrower] a Modification Agreement' if she 'compl[ied] with the requirements' of the TPP and if her 'representations . . . continue to be true in all material respects.' . . . [¶] The more natural interpretation is to read the provision as saying that no permanent modification existed 'unless and until' [the plaintiff] (i) met all conditions, (ii) [the bank] executed the Modification Agreement, and (iii) the effective modification date passed. Before these conditions were met, the loan documents remained unmodified and in force, but under paragraph 1 and section 3 of the TPP, [the bank] still had an obligation to offer [the plaintiff] a permanent modification once she satisfied all her obligations under the agreement." (*Id*. at p. 563; see *Corvello*, *supra*, 728 F.3d at p. 883 ["Under Paragraph 2G of the TPP, there could be no actual mortgage modification until all the requirements were met, but the servicer could not unilaterally and without justification refuse to send the offer"]; *Gaudin v. Saxton Mortgage Services, Inc*. (N.D.Cal. 2011) 820 F.Supp.2d 1051, 1054 fn.5 ["the provisions referring to an executed permanent modification agreement are best understood as explaining that the modification will not take legal effect until such a document is signed, but do not serve as a condition precedent to the lender's obligation to provide such an executed document"].) Also, the court in *Wigod*, *supra*, 673 F.3d at page 563 characterized the requirement that plaintiff received a fully executed copy of a loan modification agreement from defendant as, under one interpretation, an exercise of "unbridled discretion" by defendant, turning "an otherwise straightforward offer into an illusion."

The reasoning in *Nungaray, supra,* 200 Cal.App.4th 1499—that defendant must provide a fully executed copy of a modification agreement to plaintiff before the loan documents are modified—does not apply here. Unlike in *Nungaray*, plaintiff does not contend that the TPP "is" an enforceable loan modification agreement. Instead, he

contends that under the TPP and under the circumstances defendant failed to "provide" him with a permanent loan modification agreement.

We must determine the objective intent of the parties based on reading the TPP as a whole. (Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].) The language of the TPP provides that if plaintiff complies with the TPP and his representations made in Section 1 of the TPP continue to be true and correct in all material aspects, defendant will provide him with a loan modification agreement. Plaintiff alleged that he fully performed as required.

In addition, although relied upon by the trial court, *Nungaray, supra,* 200 Cal.App.4th 1499, is distinguishable. In that case, the plaintiffs failed to provide all of the required documentation under the TPP to defendants. Here, plaintiff alleged that he fully performed under the terms of the TPP, including providing defendant with all necessary documentation. "*Nungaray* does not apply because the borrowers there had failed to submit the documents required by the TPP." (*Corvello, supra,* 728 F.3d at p. 884; *Sutcliffe, supra,* 283 F.R.D. at p. 552 [rejecting the defendant's reliance on *Nungaray* because "its holding appears to have been based on the fact that the borrowers had not complied with the terms of TPP; in particular, they failed to provide the required financial information"].) Plaintiff alleged that he provided defendant with all the requested documentation.

Also in sustaining the demurrer to the breach of contract cause of action, the trial court acknowledged that *Wigod, supra,* 673 F.3d 547 is contrary to *Nungaray, supra,* 200 Cal.App.4th 1499. In *Wigod,* the plaintiff, a home mortgage loan borrower, requested a HAMP loan modification from her lender, Wells Fargo. (*Wigod, supra,* 673 F.3d at p. 558.) After providing the financial information requested by Wells Fargo, it was determined that the plaintiff was qualified for HAMP. (*Ibid*.) Wells Fargo therefore sent plaintiff a TPP agreement for a four month trial term. (*Ibid*.) The plaintiff timely made, and Wells Fargo accepted, all four payments due under the TPP agreement. (*Wigod, supra,* 673 F.3d at p. 558.) The court stated that "[o]n the pleadings," it "assume[d] that

[the plaintiff] complied with all other obligations under the TPP Agreement." (*Ibid*.) Wells Fargo, however, did not offer the plaintiff a permanent loan modification agreement, informing her that it was "'unable to get you to a modified payment amount that you could afford per the investor guidelines on your mortgage.'" (*Ibid*.) In analyzing the plaintiff's breach of contract claim, the Seventh Circuit rejected Wells Fargo's assertion that she had never actually qualified for loan modification, finding this involved a "factual question" that could not be resolved on a motion to dismiss. (*Id*. at p. 559, fn 3).

Interpreting the TPP contract, the court in *Wigod, supra*, 673 F.3d 547, concluded that "[i]n two different provisions of the TPP Agreement, paragraph 1 and section 3, Wells Fargo promised to offer [the plaintiff] a permanent loan modification if two conditions were satisfied: (1) she complied with the terms of the TPP by making timely payments and disclosures; and (2) her representations remained true and accurate." (*Id*. at p. 560.) The court stated that "when Wells Fargo executed the TPP, its terms included a unilateral offer to modify [the plaintiff's] loan conditioned on her compliance with the stated terms of the bargain." (*Id*. at p. 562.) Thus, "a reasonable person in [the plaintiff's] position would read the TPP as a definite offer to provide a permanent modification that she could accept so long as she satisfied the conditions." (*Ibid*.) The court also held that "[a]lthough [the defendant bank] may have had some limited discretion to set the precise terms of an offered permanent modification, it was certainly required to offer some sort of good-faith permanent modification to [the borrower] consistent with HAMP guidelines. It has offered none." (*Id*. at p. 565.)

The trial court disregarded *Wigod, supra*, 673 F.3d 547 because it was a federal court case applying Illinois law. However, as stated in *Corvello, supra*, 728 F.3d at page 884, "The Seventh Circuit in *Wigod* was applying Illinois contract law, and we deal with California law. There is now no material difference. In *West*[, *supra,* 214 Cal.App.4th 780] the California Court of Appeal expressly adopted the reasoning of *Wigod* and concluded that the trial plan agreement in that case authorized banks, before offering a modification, to evaluate only whether borrowers had complied with the agreement's

terms and whether their representations remained true. Once the bank determined that a borrower had complied and the representations were still true, then the bank was required by the agreement to offer a permanent modification." (See *Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at pp. 73-74 [relying on *Wigod*, *supra*, 673 F.3d 547]; *Bushell, supra,* 220 Cal.App.4th at p. 925 [same].)

Defendant contends that plaintiff's breach of contract claim fails because he did not allege that he was "qualified" to receive a permanent loan modification agreement, and seeks to distinguish *Wigod, supra,* 673 F.3d 547 because in that case the plaintiff had been determined qualified for a permanent modification before she received her TPP, and Wells Fargo executed the plaintiff's TPP, thus indicating, according to the court, that Wells Fargo had determined and communicated to the plaintiff that she would obtain a permanent modification. The authorities cited, however, perhaps other than *Nungaray, supra,* 200 Cal.App.4th 1499, which concerned whether the TPP was itself an enforceable loan modification, do not require that the borrower be "qualified" to receive a loan modification agreement; the borrower just has to comply with the TPP.

The TPP provides that defendant "will send [plaintiff] a signed copy of this [TPP] if [plaintiff] qualify[ies] for the Offer or will send me written notice that I do not qualify for the Offer." Even if defendant needed to determine that plaintiff was to be qualified for a loan modification other than complying with the TPP, instead of sending plaintiff a signed copy of the TPP or a permanent loan modification agreement, defendant refused to send them to plaintiff—giving him only one reason for not doing so—because he "did not provide [defendant] with the documents [defendant] requested." Plaintiff, however, alleged that defendant's purported reason for being unable to offer him a permanent modification of his loan was false. We view the demurrer as admitting all material facts properly pleaded. (*Tom Jones Enterprises, Ltd. v. County of Los Angeles, supra,* 212 Cal.App.4th at p. 1290.) We therefore view as false the reason defendant did not provide plaintiff with the permanent loan modification agreement. Therefore, although plaintiff did not specifically allege the term "qualified," plaintiff alleged sufficient facts at this

pleading stage that he was qualified to receive from defendant a permanent modification agreement because he satisfied the TPP conditions.

b) Mutual Consent, Definite Terms, and Consideration

i) Mutual consent

Defendant contends that there was no mutual consent of "a contract whereby [plaintiff's] loan would be permanently modified no matter what." Plaintiff, however, did not allege that defendant was obligated to offer him a loan modification agreement "no matter what." Plaintiff alleged that pursuant to the TPP agreement, defendant was obligated to offer plaintiff a permanent modification agreement if he satisfied the TPP conditions.

"Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.' [Citations.] . . . Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts . . . .' [Citations.]" (*Bustamante v. Intuit, Inc*. (2006) 141 Cal.App.4th 199, 208.)

Defendant offered plaintiff the TPP agreement, which he signed and returned. Defendant acknowledged receipt of plaintiff's executed TPP agreement, and welcomed him into the trial period. Plaintiff alleged that he fully performed under the terms of the TPP, including providing defendant with all necessary documentation, keeping his information accurate, and making each of the required payments. There was mutual consent to enter into the TPP agreement whereby defendant was obligated to offer plaintiff a permanent modification agreement if he satisfied the TPP conditions. "[A] reasonable person in [the plaintiff's] position would read the TPP as a definite offer to provide a permanent modification that she could accept so long as she satisfied the conditions." (*Wigod, supra,* 673 F.3d at p. 562.)

ii) Definite terms

Defendant contends that the TPP did not constitute an agreement because its terms were not sufficiently definite. Citing *Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 115, and *Laks v. Coast Fed. Sav. & Loan Ass'n* (1976) 60 Cal.App.3d 885, 890-91, for the proposition that in a lending context, necessary terms for a loan agreement include "the identity of the lender and borrower, the amount of loan, and the terms of repayment," defendant contends these terms were not in the TPP. Defendant's contention is without merit.

In order for a contract to be enforceable the terms of the contract must be sufficiently certain so as to provide a basis for determining to what obligations the parties have agreed. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.) Whether a proposed contract, as interpreted by the trier of fact when there is parol evidence, is sufficiently definite to form an enforceable contract is a question of law for the court. (*Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 770, fn. 2; *Ersa Grae Corp. v. Fluor Corp*. (1991) 1 Cal.App.4th 613, 623; Robinson & Wilson, Inc. v. Stone (1973) 35 Cal.App.3d 396, 407.)

Despite defendant's contention, the TPP, which provides that plaintiff may under certain circumstances, obtain from defendant a loan modification agreement, identifies defendant as the "Lender or Servicer," plaintiff as the "Borrower," the date of the original note and mortgage, and the original loan number. The TPP also identifies the TPP payments, set at $2,332.07 per month, and the TPP provides that the monthly payments under the TPP are "an estimate of the payment that will be required under the modified loan terms . . . ."

In addition, the court in *Sutcliffe, supra*, 283 F.R.D. 533 rejected defendant's contention that the TPP was not sufficiently definite because it did not include the identity of the lender and borrower, the amount of loan, and the terms of repayment. "Typically, where a contract involves a loan it should include the identity of the lender and borrower, the amount of the loan, and the terms for repayment in order to be sufficiently definite. [Citation.] The California Supreme Court has cautioned, however,

that the destruction of contracts on the basis of indefiniteness is disfavored and therefore, courts should, if feasible, 'construe agreements as to carry into effect the reasonable intentions of the parties if [they] can be ascertained.' [Citation.] [¶] Wells Fargo contends that the TPP cannot give rise to an enforceable contract because it does not set forth the repayment terms that would apply to the modified loan and therefore it is indefinite. The Court disagrees. As the court explained in *Wigod*[, *supra*, 673 F.3d at p. 562], while the TPP did not set forth the specific terms of repayment, Wells Fargo was required to offer a modification that was consistent with HAMP guidelines and therefore, the agreement did not give Wells Fargo unlimited discretion as to the repayment terms. [Citation.] Therefore, the *Wigod* court concluded that the TPP was sufficiently definite for a contract to exist. [Citation.] Similarly, the courts in *In re Ossman*, 2012 Bankr. LEXIS 326, 2012 WL 315485, at *3, and *Turbeville*, 2011 U.S. Dist. LEXIS 42290, 2011 WL 7163111, at *4, found that the TPP was not indefinite to the extent that the terms of the modification had to be calculated consistent with HAMP guidelines. Because Wells Fargo was required to comply with HAMP guidelines in determining the terms of repayment under a modification agreement, the Court concludes, at least at the pleading stage, that the terms of the TPP are sufficiently definite to support the existence of a contract." (*Id*. at p. 552.) We agree with the court's analysis in *Sutcliffe, supra*, 283 F.R.D. 533.

iii) Consideration

Defendant contends that plaintiff did not allege that he provided valid consideration for a permanent modification of his loan. The contract at issue here is not a permanent modification agreement; there is no such agreement. The contract at issue is the TPP agreement pursuant to which, under certain circumstances, defendant is obligated to provide plaintiff with a loan modification agreement. There was sufficient consideration to support the TPP.

California Civil Code, section 1605, defines "good consideration" to support a contract as, "Any benefit conferred, or agreed to be conferred, upon the promisor, by any

other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

"Doing or promising to do what one is already legally bound to do cannot be consideration for a promise. [Citation.] On the other hand, '[u]nder California law, consideration exists even if the performance due "consists almost wholly of a performance that is already required and that this performance is the main object of the promisor's desire. It is enough that some small additional performance is bargained for and given. . . . [It is sufficient] if the act or forebearance given or promised as consideration differs in any way from what was previously due.' [Citations.] [I]n *Ansanelli [v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 32350] the Court held that the additional time spent preparing the disclosures that were required under the trial payment plan—which were not required under the original loan—was adequate consideration to support the existence of a contract. *Id*. [at *2.] Likewise, the Seventh Circuit in *Wigod*[*, supra,* 673 F.3d 547] found that the TPP was supported by consideration because the borrower agreed to 'open new escrow accounts, to undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information.' 673 F.3d at 564." (*Sutcliffe, supra,* 283 F.R.D. at pp. 552-553.)

Plaintiff alleged that he provided defendant, inter alia, with all necessary documentation, kept his information accurate, and underwent credit counseling as required by the TPP. Plaintiff also alleged that he made all of the monthly installment payments under the TPP, and they were "larger payments than Plaintiff's regular monthly mortgage payments . . . ." Plaintiff's allegations are sufficient to show that the TPP was supported by adequate consideration.

c) Statute of Frauds

Defendant contends that "the TPP. . . fails to constitute a contract for a permanent modification pursuant to the statute of frauds." We disagree.

As noted above, plaintiff does not contend that the TPP constitutes a permanent modification agreement. Instead, plaintiff contends that the TPP agreement is one which, under certain circumstances, defendant is obligated to provide plaintiff with a loan modification agreement.

Civil Code section 1624, subdivision (a) provides, "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: [¶] (1) An agreement that by its terms is not to be performed within a year from the making thereof." The statute of frauds does not apply to the TPP because the TPP was for a three month period. It provided for three monthly payments from February 1, 2010 through April 1, 2010, and plaintiff acknowledged certain facts "[d]uring [that three-month] period." The TPP stated that time was of the essence.

Even if the statute of frauds applied to the TPP, defendant could be estopped from asserting it. In *Chavez*, *supra*, 219 Cal.App.4th 1052, the court stated, "[E]stoppel may preclude the use of a statute of frauds defense. [Citation.] '"The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute."' [Citation.]" (*Id*. at p. 1058.) "Whether a party is precluded from using the statute of frauds defense in a given case is generally a question of fact. [Citation.]" (*Ibid*.)

"'The payment of money is not "sufficient part performance to take an oral agreement out of the statute of frauds" [citation], for the party paying money "under an invalid contract … has an adequate remedy at law."' [Citations.]" (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 555-556.) The court in *Corvello*, *supra*, 728 F.3d at page 885, however, rejected the argument that a claim for breach of an oral agreement to modify a mortgage is barred by the statute of frauds in California when the party asserting a breach had alleged full performance of its obligations under the contract.

Here, plaintiff alleged that that he fully performed under the TPP, including making the monthly installment payments that were "larger payments than Plaintiff's regular monthly mortgage payments . . .," provided defendant with all necessary documentation, kept his information accurate, and underwent credit counseling. Plaintiff also alleged that as a result of entering into the TPP, he did not seek alternatives to modification such as refinancing or selling the property. At this pleading stage, plaintiff alleged facts sufficient to estop defendant from asserting the statute of frauds as a defense.

Furthermore, plaintiff alleged that defendant sent a letter to plaintiff in connection with the TPP, congratulating him on entering into the HAMP, and reminding plaintiff of his obligation to obtain credit counseling. The top of the letter contained a logo or other mark bearing the name of defendant. "The signature of the party to be charged 'need not be manually affixed, but may in some cases be printed, stamped or typewritten.' [Citation.]" (*Chavez, supra*, 219 Cal.App.4th at p. 1057.) A signature on one document may be sufficient to satisfy the statute of frauds regarding another document if the writings "relate to the same matter and constitute several parts of one connected transaction." (*Thompson v. Walsh* (1946) 76 Cal.App.2d 188, 194.) Additionally, at this pleading stage, discovery may reveal that defendants signed the TPP.

D. Implied Covenant of Good Faith and Fair Dealing

Plaintiff contends that he stated facts sufficient to constitute a cause of action for breach of the implied covenant of good faith and fair dealing. We agree.

"'"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." [Citation.]'" (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc*. (1992) 2 Cal.4th 342, 371.) However, "[t]he implied covenant 'is designed to effectuate the intentions and reasonable expectations of parties reflected by mutual promises within the contract.' [Citations.] For this reason, it is well established that an implied covenant cannot create an obligation inconsistent with an express term of the agreement. [Citations.]" (*Nein v. HostPro, Inc.* (2009) 174

Cal.App.4th 833, 852; *Spinks v. Equity Residential Briarwood Apartments, supra,* 171 Cal.App.4th at p. 1033.)

As discussed above, plaintiff stated facts sufficient to constitute a cause of action for breach of the TPP agreement that expressly provided that, "If [plaintiff is] in compliance with this [TPP] and [plaintiff's] representations in Section 1 continue to be true and correct in all material aspects, then [defendant] will provide [plaintiff] with a Loan Modification Agreement . . . ." As alleged by plaintiff, the TPP stated that time is of the essence. Plaintiff alleged that defendant breached the implied covenant of good faith and fair dealing by, inter alia, "unreasonably delaying in the modification process for purposes of foreclosing," "repeatedly reassuring Plaintiff and the other Class members that all required documentation was in order when [defendant] intended to deny the modification on the ground that not all required documentation had been submitted," and "denying the modification on the false pretense that the required documents [were] not submitted. Plaintiff has alleged sufficiently a cause of action for a breach of the implied covenant of good faith and fair dealing based on the allegations concerning the breach of contract.

E. Promissory Estoppel

Plaintiff contends that he stated fact sufficient to constitute a cause of action for promissory estoppel, which might apply if there were no enforceable contract. We agree.

"'Under [the doctrine of promissory estoppel,] a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement. [Citations.]' [Citation.]" (*Raedeke v. Gibraltar Sav. & Loan Assn*. (1974) 10 Cal.3d 665, 672, fn. 1.) "[T]he doctrine of promissory estoppel is used to provide a substitute for the consideration which ordinarily is required to create an enforceable promise." (*Id*. at p. 672.)

In sustaining defendant's demurrer, the trial court found that because plaintiff failed to alleged facts stating a cause of action for breach of contract, the cause of action

for promissory estoppel also failed. This does not follow because promissory estoppel may apply when there is no contract because there is no consideration to support the contract. Defendant contends that because the trial court sustained properly the demurrer to that breach of contract cause of action, it sustained properly defendant's demurrer to the cause of action for promissory estoppel. As discussed above, however, as we hold that plaintiff stated facts sufficient to constitute a cause of action for breach of contract, the elements are present for a claim of promissory estoppel.

Defendant also contends that plaintiff did not state fact sufficient to constitute a cause of action for promissory estoppel because there was no clear, express promise to provide plaintiff with a modification agreement. "The elements of promissory estoppel are (1) a clear and unambiguous promise by the promisor, and (2) reasonable, foreseeable and detrimental reliance by the promisee." (*Bushell, supra,* 229 Cal.App.4th at p. 922; *Laks v. Coast Fed. Sav. & Loan Assn*., *supra*, 60 Cal.App.3d at p. 890; *Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc*. (2011) 196 Cal.App.4th 1559, 1573.)

As discussed above, there are sufficient allegations of an express promise to provide plaintiff with a modification agreement. Plaintiff alleged that defendant represented to plaintiff in the TPP, "If [plaintiff is] in compliance with this [TPP] and [plaintiff's] representations in Section 1 continue to be true and correct in all material aspects, then [defendant] will provide [plaintiff] with a Loan Modification Agreement . . . ." Plaintiff has alleged sufficient facts to constitute a cause of action for promissory estoppel. (*Bushell, supra,* 220 Cal.App.4th at p. 930 ["The allegation of the TPP contract—through which a permanent modification was to be offered if certain conditions were met—meets the element of a clear and unambiguous promise"].)

F. Unfair Business Practices

Plaintiff contends that he alleged facts sufficient to constitute a cause of action for violations of the UCL. We agree.

"The UCL permits civil recovery for 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . .' [Citation.]

‘“Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.…”’ [Citation.]” (*Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at pp. 80-81.)

Plaintiff alleged that defendant violated the UCL by: “a) inducing Plaintiff and the other Class members to engage in a loan modification process in bad faith and with no intention of complying with the TPP Contact; [¶] b) foreclosing on Plaintiff’s and the other Class members’ home when [defendant] lacked valid reasons to do so; [¶] c) failing to provide information to Plaintiff and the other Class members regarding the status of their loans; [¶] d) routinely demanding information already in [defendant’s] files; [¶] e) unreasonably delaying the modification process for purposes of foreclosing; [¶] f) repeatedly reassuring Plaintiff and the other Class members that all required documentation was in order when [defendant] intended to deny the modification or the ground that all required documentation had been submitted; [¶] g) refusing to provide permanent modification offers on the false pretense that the required documentation was not submitted; [¶] h) refusing to provide permanent modification offers on the false pretense that the borrower did not meet income eligibility requirements; [¶] i) issuing notices of default that do not comply with the requirements of Civil Code sections 2923 *et seq.*, including but not limited to section 2924 and 2924c, subdivision (b)(1); and [¶] j) going forward with the foreclosure proceedings based upon defective and invalid notices of default.” In sustaining defendant’s demurrer to plaintiff’s cause of action for violation of the UCL, the trial court stated that it adopted the parties categorization of this claim as being “divided . . . into two categories: ‘notice of default’ problems, and ‘agreement-related conduct.’”

Defendant contends that the trial court was correct in ruling that agreement-related conduct portion of the UCL claim failed because plaintiff’s cause of action for breach of contract failed. As noted above, however, plaintiff filed his SAC as a class action on behalf of himself and all others similarly situated, and plaintiff stated facts sufficient to constitute a cause of action for breach of contract. Systematic breaches of consumer

contracts can constitute an unfair business practice under the UCL. (*Arce v. Kaiser Foundation Health Plan, Inc*. (2010) 181 Cal.App.4th 471, 489-490.) Plaintiff's allegations that defendant systematically breached the TPP contract by refusing to provide him and the putative class members with a permanent loan modification agreement are sufficient to state a class action claim under the UCL. We therefore do not reach plaintiff's contentions that he pleaded sufficient facts to support his fraud-based UCL claim and his UCL claim based on the "'notice of default' problems."

DISPOSITION

The judgment is reversed. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

KRIEGLER, J.

MINK, J.*

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