[Orcilla v. Big Sur, Inc., 244 Cal. App. 4th 982, 198 Cal. Rptr. 3d 715, 2016 Cal. App. LEXIS 108, 244 Cal. App. 4th 982, 198 Cal. Rptr. 3d 715, 2016 Cal. App. LEXIS 108](https://advance.lexis.com/api/document/collection/cases/id/5J2J-5WH1-F04B-N0P7-00008-00?cite=Orcilla%20v.%20Big%20Sur%2C%20Inc.%2C%20244%20Cal.%20App.%204th%20982%2C%20198%20Cal.%20Rptr.%203d%20715%2C%202016%20Cal.%20App.%20LEXIS%20108&context=1000516)

**Orcilla v. Big Sur, Inc.**

Court of Appeal of California, Sixth Appellate District

February 11, 2016, Opinion Filed

H040021

Reporter  
244 Cal. App. 4th 982 | 198 Cal. Rptr. 3d 715 | 2016 Cal. App. LEXIS 108  
  
VIRGILIO ORCILLA et al., Plaintiffs and Appellants, v. BIG SUR, INC., et al., Defendants and Respondents.  
  
Subsequent History: Modified by Orcilla v. Big Sur, Inc., 2016 Cal. App. LEXIS 184 (Cal. App. 6th Dist., Mar. 11, 2016)  
  
Prior History:

Superior Court of Santa Clara County, No. 112CV225295, Carol Overton, Judge.

Big Sur, Inc. v. Orcilla, 2010 U.S. Dist. LEXIS 96370 (N.D. Cal., Sept. 15, 2010)

**[Hide section](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)Headnotes/Summary**

Headnotes  
CALIFORNIA OFFICIAL REPORTS HEADNOTES  
  
[CA(12)[https://advance.lexis.com/images/IconNavigateDown.png](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) (12) Mortgages § 27—Foreclosure Sale—Action to Set Aside—Demurrer.

Plaintiffs, who lost their home through a nonjudicial foreclosure sale, stated a cause of action to set aside the trustee's sale, such that the trial court erred in sustaining bank defendants' demurrer to that cause of action. The challenge to the trustee's sale was based on the alleged unconscionability, and consequent unenforceability, of the loan agreements. Therefore, the conclusive presumption for bona fide purchasers under Civ. Code, § 2924, did not apply to bar the action.

[Cal. Forms of Pleading and Practice (2015) ch. 555, Trust Deeds and Real Property Mortgages, § 555.10; 4 Witkin, Summary of Cal. Law (10th ed. 2005) Security Transactions in Real Property, §§ 144, 150 et seq., 172, 219, 220 et seq.; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 202 et seq., 247 et seq.; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 772 et seq.; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 663 et seq., 1114; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 431; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 117.]

[CA(19)[https://advance.lexis.com/images/IconNavigateDown.png](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) (19) Contracts § 13—Enforceability—Promissory Estoppel—Elements.

The promissory estoppel doctrine makes a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. Put differently, promissory estoppel employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced. The elements of a promissory estoppel claim are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance.

Counsel: Virgilio Orcilla and Teodora Orcilla, in pro. per., for Plaintiffs and Appellants.  
  
Law Offices of Peter N. Brewer and Julia Ming Hua Wei for Defendant and Respondent Big Sur, Inc.   
  
Bryan Cave, Andrea M. Hicks and Margaret K. Thies for Defendants and Respondents Bank of America, N.A., ReconTrust Company, N.A. and Mortgage Electronic Registration Systems, Inc.  
  
Judges: Opinion by Premo, J., with Rushing, P. J., and Elia, J., concurring.  
  
Opinion by: Premo, J.

**Opinion**

PREMO, J.—Plaintiffs Virgilio and Teodora Orcilla lost their San Jose home (the Property) through a nonjudicial foreclosure sale in May 2010. The Property was purchased by a third party, defendant Big Sur, Inc. (Big Sur). The Orcillas vacated the Property after Big Sur obtained a judgment against them in an unlawful detainer action. Thereafter, the Orcillas sued Big Sur and the parties involved in the nonjudicial foreclosure sale, Bank of America, N.A. (BofA); ReconTrust Company, N.A. (ReconTrust); and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively, the Bank Defendants), to set aside the trustee's sale.

Big Sur and the Bank Defendants successfully demurred to the operative second amended complaint. The Orcillas, proceeding in propria persona, appeal from a judgment entered in favor of defendants. We reverse and remand with instructions.

I. Factual Background

The Orcillas are Filipino and English is their second language. Virgilio is unable to work due to a 2004 medical diagnosis.[1[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) In 2006, Teodora contacted Quick Loan Funding, Inc. (Quick Loan), about refinancing the Property. She did so in response to marketing materials she had received from the company. After speaking with a Quick Loan agent, Teodora applied to refinance the Property for $525,000. At the Quick Loan agent's recommendation, Teodora did not include Virgilio on the loan application. Teodora told the agent she could not afford the loan modification because the monthly payments would be more than her monthly income, but she eventually accepted the agent's false representation that she could afford the loan modification.

On May 9, 2006, Teodora obtained a $525,000 real property loan from Quick Loan. She alone executed an adjustable rate note (the Note), in which she promised to repay the loan at an initial interest rate of 8.99 percent. The Note provided that the interest rate would be variable after two years and would never exceed 14.99 percent. The Note further provided that Teodora's initial monthly payments would be in the amount of $4,220.49. (In 2005 and 2006, Teodora's monthly income was less than $3,000 and Virgilio did not work.)

The Note was secured by a deed of trust (the Deed of Trust) on the Property. The Deed of Trust, which was signed jointly by the Orcillas, named MERS as the beneficiary and LandAmerica Commonwealth as the trustee.

ReconTrust, as trustee of the Deed of Trust, recorded a notice of default and election to sell under deed of trust (First Notice of Default) on February 2, 2007. The First Notice of Default reflected an arrearage of $16,668. ReconTrust rescinded the Notice of Default on May 15, 2007.

On April 18, 2008, ReconTrust recorded a second notice of default (Second Notice of Default), which reflected an arrearage of $32,048. The Second Notice of Default was signed by Anselmo Pagkaliwangan. On March 28, 2013, Teodora contacted ReconTrust. The representatives with whom Teodora spoke could not confirm whether Anselmo Pagkaliwangan had ever worked for ReconTrust. The Orcillas allege that forensic loan audits and lawsuits indicate Anselmo Pagkaliwangan also signed documents for various other entities, including LSI Title Company and Washington Mutual, N.A. Based on the foregoing, the Orcillas allege the Second Notice of Default was “stamped/robo-signed.”

By letter dated August 15, 2008, Countrywide Home Loans (Countrywide) advised Teodora that her loan modification had been approved. The letter advised that Teodora's modified principal loan balance was $570,992.60 and that, effective September 1, 2008, her monthly loan payment would be $4,627.47. The letter stated “[t]his [a]greement will bring your loan current” and requested that Teodora sign, date, and return one copy of the enclosed loan modification agreement to Countrywide by September 14, 2008. The letter further provided “[t]his Letter does not stop, waive or postpone the collection actions, or credit reporting actions we have taken or contemplate taking against you and the property. In the event that you do not or cannot fulfill ALL of the terms and conditions of this letter no later than September 14, 2008, we will continue our collections actions without giving you additional notices or response periods.” Teodora signed the enclosed loan modification agreement on September 11, 2008. The loan modification agreement provided for a five-year fixed interest rate of 8.99 percent followed by a variable interest rate. The Orcillas allege that BofA employees represented in August 2008 that the loan modification would result in a “new loan.” They further allege that defendants admitted in a separate legal action in federal court that the loan modification “added Plaintiffs' previously unpaid balances to a new loan.”

On April 23, 2010, ReconTrust sent a notice of trustee's sale to the Orcillas that listed the sale date as May 18, 2010. Also on April 23, 2010, a substitution of trustee, in which MERS substituted ReconTrust as trustee under the Deed of Trust, was sent to the former trustee. On May 3, 2010, ReconTrust recorded a notice of trustee's sale listing the sale date as May 24, 2010.[2[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

On May 12, 2010, the Orcillas submitted a HAMP[3[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) loan modification application to BofA with the assistance of a nonprofit, California Community Transitional Housing, Inc. Attached to the second amended complaint is the declaration of Nicholas Agbabiaka, the California Community Transitional Housing, Inc., employee who assisted the Orcillas. Agbabiaka declared “I sent the … HAMP package … to Bank of America. I also contacted Bank of America letting them know that the Orcillas … wanted to pursue a HAMP modification. … Bank of America stated that it had received and was reviewing the Orcillas' HAMP application. Bank of America also stated that it would send a packet for the Orcillas to complete and that a Trustee's Sale scheduled for May 24, 2010 would not proceed.” Agbabiaka passed that information along to Teodora.

However, the trustee's sale did proceed. On May 24, 2010, the Bank Defendants sold the Property to Big Sur at a public auction for $495,500. ReconTrust recorded a trustee's deed upon sale stating that the amount of unpaid debt was $688,871.94. The trustee's deed further stated that “[a]ll requirements of law regarding the recording and mailing of copies of the Notice of Default and Election to Sell, and the recording, mailing, posting, and publication of the Notice of Trustee's Sale have been complied with.”

Following the trustee's sale, BofA informed Agbabiaka that it never received the Orcillas' HAMP loan modification application. That application was never granted nor denied.

Big Sur filed an unlawful detainer action against the Orcillas and obtained a judgment against them. The Orcillas and their three minor grandchildren were forced to vacate the Property.

The Division of Corporations revoked Quick Loan's lending license on May 27, 2008, having found Quick Loan had pledged trust funds to obtain gambling markers from Las Vegas casinos and was charging borrowers unauthorized fees. The Orcillas allege Quick Loan never sold or assigned the Note or its interest in the Deed of Trust.

II. Procedural Background

The Orcillas filed suit against Big Sur and the Bank Defendants on May 24, 2012. Defendants successfully demurred to the Orcillas' initial complaint and first amended complaint, but the Orcillas were granted leave to amend those pleadings. The operative second amended complaint, filed on April 2, 2013, asserts 13 causes of action: wrongful foreclosure; violation of Civil Code section 2924;[4[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) violation of section 2924b; violation of section 2924c; violation of section 2924f; violation of section 2932.5; breach of contract; fraud; breach of oral contract; promissory estoppel; quiet title; unlawful business practices in violation of the unfair business competition law (UCL), Business and Professions Code section 17200 et seq.; and declaratory relief.

Each cause of action is largely based on the following allegations: the original loan and the loan modification were unconscionable and unenforceable; no valid notice of default was issued prior to the trustee's sale because the loan modification cured the Second Notice of Default; the trustee's sale was fraudulent because the notice of trustee's sale set forth an incorrect date of sale; the Bank Defendants lacked the authority to foreclose on the Property because the Deed of Trust never was assigned to them; the Bank Defendants lacked the authority to foreclose on the Property because the Deed of Trust was invalid, having been bifurcated from the Note; and the Bank Defendants improperly proceeded with the trustee's sale after promising to postpone it. Big Sur and the Bank Defendants successfully demurred. The trial court sustained defendants' demurrers without leave to amend as to all causes of action except the promissory estoppel claim against the Bank Defendants, for which leave to amend was granted.

After the Orcillas failed to file a third amended complaint within the leave period, the Bank Defendants moved to dismiss the action. The court granted that motion and entered judgment in favor of defendants. The Orcillas timely appealed. [5[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

III. Discussion  
  
A. Standard of Review

We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125 [271 Cal. Rptr. 146, 793 P.2d 479].) The facts alleged in the pleading are deemed to be true, but contentions, deductions, and conclusions of law are not. (Hill v. Roll Internat. Corp. (2011) 195 Cal.App.4th 1295, 1300 [128 Cal. Rptr. 3d 109].) In addition to the complaint, we also may consider matters subject to judicial notice. (Ibid.) Facts that are subject to judicial notice trump contrary allegations in the pleadings. (Ibid.) Facts appearing in exhibits attached to the complaint also are accepted as true and are given precedence, to the extent they contradict the allegations. (Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal.App.3d 1624, 1627 [272 Cal. Rptr. 623].) We do not review the validity of the trial court's reasoning. (B & P Development Corp. v. City of Saratoga (1986) 185 Cal.App.3d 949, 959 [230 Cal. Rptr. 192].) For that reason, and because demurrers raise only questions of law, we may also consider new theories on appeal to challenge or justify the trial court's rulings. (Ibid.)

“Where a demurrer is sustained without leave to amend, [we] must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, [we] will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. [Citation.] The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect.” (Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal.App.4th 1020, 1035 [100 Cal. Rptr. 3d 875].)

B. General Principles Governing Nonjudicial Foreclosure

In California, the financing or refinancing of real property generally is accomplished by the use of a deed of trust. (Calvo v. HSBC Bank USA, N. A. (2011) 199 Cal.App.4th 118, 125 [130 Cal. Rptr. 3d 815].) Under a deed of trust, “the borrower, or ‘trustor,’ conveys nominal title to property to an intermediary, the ‘trustee,’ who holds that title as security for repayment of the loan to the lender, or ‘beneficiary.’” (Kachlon v. Markowitz (2008) 168 Cal.App.4th 316, 334 [85 Cal. Rptr. 3d 532].) “‘The trustee of a deed of trust is not a true trustee, and owes no fiduciary obligations; he merely acts as a common agent for the trustor and the beneficiary of the deed of trust.’” (Jenkins v. JPMorgan Chase Bank, N. A. (2013) 216 Cal.App.4th 497, 508 [156 Cal. Rptr. 3d 912] (Jenkins).)

“The customary provisions of a valid deed of trust include a power of sale clause, which empowers the beneficiary-creditor to foreclosure on the real property security if the trustor-debtor fails to pay back the debt owed under the promissory note.” (Jenkins, supra, 216 Cal.App.4th at p. 508.) “Upon a trustor-debtor's default on a debt secured by a deed of trust, the beneficiary-creditor may elect to judicially or nonjudicially foreclose on the real property security.” (Ibid.)

The California Legislature has established a comprehensive set of legislative procedures governing nonjudicial foreclosures. (See Debrunner v. Deutsche Bank National Trust Co. (2012) 204 Cal.App.4th 433, 440 [138 Cal. Rptr. 3d 830] (Debrunner); §§ 2924–2924k.) “‘The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’” (Debrunner, supra, at p. 440.)

The procedure leading up to a nonjudicial foreclosure has been summarized as follows: “Upon default by the trustor [under a deed of trust containing a power of sale], the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. (Civ. Code, § 2924; [citation].) The foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee. (Civ. Code, § 2924; [citation].) After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. (Civ. Code, § 2924, subd. (b); [citation].) After the 3-month period has elapsed, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. (Civ. Code, § 2924f; [citation].)” (Moeller v. Lien (1994) 25 Cal.App.4th 822, 830 [30 Cal. Rptr. 2d 777].)

“‘The statutes provide the trustor with opportunities to prevent foreclosure by curing the default. The trustor may make back payments to reinstate the loan up until five business days prior to the date of the sale … . [Citations.] Additionally, the trustor has an equity of redemption under which the trustor may pay all amounts due at any time prior to the sale to avoid loss of the property. (§§ 2903, 2905.)’” (Lona v. Citibank, N. A. (2011) 202 Cal.App.4th 89, 101–102 [134 Cal. Rptr. 3d 622] (Lona).)

“‘The manner in which the sale must be conducted is governed by section 2924g. “The property must be sold at public auction to the highest bidder. [Citations.] [¶] … [¶] … A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee's sale is completed, the trustor has no further rights of redemption. [Citation.] [¶] The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. ( … § 2924; [citation].)”’” (Lona, supra, 202 Cal.App.4th at p. 102.)

C. Count 1: Equitable Cause of Action to Set Aside a Foreclosure Sale

The Orcillas' first claim is a cause of action to set aside the trustee's sale. “[T]he elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee … caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a … deed of trust; (2) the party attacking the sale … was prejudiced or harmed; and (3) in cases where the trustor … challenges the sale, the trustor … tendered the amount of the secured indebtedness or was excused from tendering.” (Lona, supra, 202 Cal.App.4th at p. 104.)

1. The First Element: Illegality of the Trustee's Sale

The Orcillas allege the trustee's sale was illegal for two reasons: (1) the original loan from Quick Loan and the 2008 loan modification were unconscionable and (2) the Deed of Trust is invalid because it was “bifurcated” from the Note. On appeal, they include an additional argument—ReconTrust lacked the power to foreclose on BofA's behalf because BofA did not own the Note.

Unconscionability

The Orcillas allege the loan from Quick Loan was unconscionable because the loan payments exceeded their income; they have limited education and English proficiency; they did not understand the details of the transaction; and the loan documents were on standard, preprinted forms in English. They allege the 2008 loan modification agreement also was unconscionable because the loan payments exceeded their income; they have limited education and English proficiency; and the loan documents were on standard, preprinted forms in English.

Unconscionability generally is a legal question we review under the de novo standard. (Parada v. Superior Court (2009) 176 Cal.App.4th 1554, 1567 [98 Cal. Rptr. 3d 743].) “Unconscionability has procedural and substantive aspects,” both of which must be present for a court to refuse to enforce a contract based on unconscionability. (Abramson v. Juniper Networks, Inc. (2004) 115 Cal.App.4th 638, 655 [9 Cal. Rptr. 3d 422] (Abramson); see Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114 [99 Cal. Rptr. 2d 745, 6 P.3d 669] (Armendariz).) Courts use a “‘sliding scale’” approach in assessing the two elements, such that “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (Armendariz, supra, at p. 114.)

i. Procedural Unconscionability

Procedural unconscionability concerns the manner in which the contract was negotiated. (Abramson, supra, 115 Cal.App.4th at p. 656.) “Absent unusual circumstances, evidence that one party has overwhelming bargaining power, drafts the contract, and presents it on a take-it-or-leave-it basis is sufficient to demonstrate procedural unconscionability and require the court to reach the question of substantive unconscionability, even if the other party has market alternatives.” (Lona, supra, 202 Cal.App.4th at p. 109.)

As to both the original loan and the 2008 modification, the Orcillas allege they have limited English fluency and education and that the loan documents were on standard, preprinted forms in English. These allegations are sufficient to allege at least some measure of procedural unconscionability. (See Lona, supra, 202 Cal.App.4th at p. 111 [holding at the summary judgment stage that evidence that plaintiff “had only an eighth grade education, his English was limited, no one explained the [loan] documents to him, and he did not understand what he was signing” and that the “loan documents appear to be on standard, preprinted forms in English” “was sufficient evidence of unequal bargaining power, oppression or surprise to raise a triable issue regarding procedural unconscionability”].)

As noted, the degree of procedural unconscionability present is relevant to the enforceability inquiry. The relevant factors in assessing the level of procedural unconscionability are oppression and surprise. (Abramson, supra, 115 Cal.App.4th at p. 656.) “‘The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.’” (Ibid.) That the loan documents were on standard, preprinted forms suggests the Orcillas had no role in negotiating their terms. (Lona, supra, 202 Cal.App.4th at p. 111.) “The component of surprise arises when the challenged terms are ‘hidden in a prolix printed form drafted by the party seeking to enforce them.’” (Abramson, supra, at p. 656.) The Orcillas do not allege that any of the key terms of the loans, such as the monthly payment or the interest rate, were hidden in fine print. Thus, they do not allege the element of surprise is present. Based on the foregoing, we conclude the Orcillas have alleged a low degree of procedural unconscionability.

ii. Substantive Unconscionability

“Substantive unconscionability pertains to the fairness of an agreement's actual terms … .” (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246 [145 Cal. Rptr. 3d 514, 282 P.3d 1217].) As our Supreme Court has explained, the unconscionability doctrine “ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as ‘“‘overly harsh’”’ [citation], ‘“unduly oppressive”’ [citation], ‘“so one-sided as to ‘shock the conscience’”’ [citation], or ‘unfairly one-sided’ [citation]. All of these formulations point to the central idea that the [substantive] unconscionability doctrine is concerned not with ‘a simple old-fashioned bad bargain’ [citation], but with terms that are ‘unreasonably favorable to the more powerful party’ [citation].” (Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal.4th 1109, 1145 [163 Cal. Rptr. 3d 269, 311 P.3d 184].) Thus, substantive unconscionability exists where a provision is both “one-sided” and there is no justification for its one-sidedness. (Armendariz, supra, 24 Cal.4th at p. 118.)

The Orcillas maintain that the disparity between the monthly loan payments and their income indicates that the loan and loan modification were overly harsh and one sided. We agree that the allegation that the monthly loan payments exceeded the couple's income by more than $1,000 is sufficient to allege substantive unconscionability. (Lona, supra, 202 Cal.App.4th at p. 111 [evidence of an “extreme disparity between the amount of the monthly loan payments and [plaintiff's] income … was sufficient to create a triable issue on the question of whether the loans were overly harsh and one sided and thus substantively unconscionable”].)

In sum, we conclude the Orcillas have alleged that the original loan and the loan modification were unconscionable and unenforceable, such that the trustee's sale of the Property enforcing them was illegal. Accordingly, the Orcillas adequately allege the first element of their cause of action to set aside the trustee's sale. We need not address their bifurcation or power of sale theories.

2. The Second Element: Harm

On appeal, the Orcillas argue that they alleged harm, as required by the second element of an equitable cause of action to set aside a foreclosure sale, by pleading that “they were harmed by the sale of their home of 18 years.” For that argument, they cite to allegations in their fraud cause of action regarding harm caused by their reliance on the misrepresentations of an alleged “robo-signer.” Their first cause of action did not incorporate by reference the allegations of the fraud cause of action or allegations set forth elsewhere in the complaint. Accordingly, their pleading is technically deficient. However, given our duty to liberally construe the complaint's allegations (Code Civ. Proc., § 452), we elect to overlook this pleading deficiency. Therefore, we conclude that the Orcillas adequately allege the second element of their cause of action to set aside the trustee's sale.

3. The Third Element: Tender or Excuse

The third element of an equitable cause of action to set aside a foreclosure sale requires tender. “‘The rationale behind the [tender] rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].’” (Lona, supra, 202 Cal.App.4th at p. 112.) Case law has recognized four exceptions to the tender requirement in actions to set aside a foreclosure sale: (1) the borrower attacks the validity of the debt (e.g., based on fraud); (2) the borrower has a counterclaim or setoff sufficient to cover the amount due; (3) it would be inequitable as to a party not liable for the debt; or (4) the trustee's deed is void on its face (e.g., because the trustee lacked power to convey property). (Id. at pp. 112–113.)

The Orcillas do not allege tender or any exceptions to the tender rule in the first cause of action. However, elsewhere in their complaint (in paragraphs not incorporated into the first cause of action), they allege that all four exceptions to the tender rule apply. As to the first exception, they allege the debt is invalid because the original loan and loan modification were unconscionable. As discussed above, the allegations in the second amended complaint are sufficient to allege those agreements were unconscionable and thus unenforceable. Construing the complaint liberally, as we must, we elect to overlook the Orcillas' failure to incorporate their tender-related allegations into the first cause of action. Thus, we conclude they adequately allege the third element of their cause of action to set aside the trustee's sale.

4. Bona Fide Purchaser

The Bank Defendants assert that “[t]he statutory presumption of validity upon sale to a bona fide purchaser … defeats [each of] the Orcillas' claims seeking to set aside the foreclosure sale.” We disagree with respect to the Orcillas' equitable cause of action to set aside the trustee's sale.

“Under section 2924, there is a conclusive presumption created in favor of a [bona fide purchaser] who receives a trustee's deed that contains a recital that the trustee has fulfilled its statutory notice requirements. Section 2924 reads in relevant part: ‘A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.’” (Melendrez v. D & I Investment, Inc. (2005) 127 Cal.App.4th 1238, 1250 [26 Cal. Rptr. 3d 413], fn. omitted (Melendrez).) This court has held that a bona fide purchaser under section 2924 “‘is one who pays value for the property without notice of any adverse interest or of any irregularity in the sale proceedings.’” (Melendrez, supra, at p. 1250.)

Even assuming Big Sur is a bona fide purchaser, its status as such does not bar the Orcillas' first cause of action. “Section 2924's conclusive presumption language for [bona fide purchasers] applies only to challenges to statutory compliance with respect to default and sales notices.” (Melendrez, supra, 127 Cal.App.4th at p. 1256, fn. 26.) The challenge to the trustee's sale asserted in the first cause of action “does not involve a claim concerning whether [ReconTrust, the trustee,] followed all statutory procedures with respect to the default and sales notices … .” (Id. at p. 1256.) Instead, it is based on the alleged unconscionability, and consequent unenforceability, of the loan agreements. We therefore hold that the conclusive presumption for bona fide purchasers under section 2924 does not apply to bar the Orcillas' first cause of action. (Melendrez, supra, at p. 1256.)

For the foregoing reasons, we conclude the Orcillas have stated a cause of action to set aside the trustee's sale, such that the trial court erred in sustaining the Bank Defendants' demurrer to count 1.

D. Counts 2 and 4: Violation of Sections 2924 and 2924c

Counts 2 and 4 largely rely on the theory that the loan modification agreement cured the Orcillas' default, such that the Second Notice of Default should have been rescinded under section 2924c[6[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) (count 4) and the Bank Defendants failed to issue a valid notice of default prior to the trustee's sale in violation of section 2924[7[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) (count 2). For that theory, the Orcillas rely on language in the letter that accompanied the loan modification agreement stating “[t]his [a]greement will bring your loan current.” They further rely on representations by BofA that the loan modification resulted in a “new loan.”

The Bank Defendants respond that the letter also required Teodora to make monthly payments of $4,627.47 beginning September 1, 2008, and provided “[t]his Letter does not stop, waive or postpone the collection actions, or credit reporting actions we have taken or contemplate taking against you and the property. In the event that you do not or cannot fulfill ALL of the terms and conditions of this letter no later than September 14, 2008, we will continue our collections actions without giving you additional notices or response periods.” The Orcillas do not allege they made their September 2008 monthly payment. Thus, according to the Bank Defendants, the Orcillas do not allege that they fulfilled the terms and conditions of the letter, such that another notice of default was required under the terms of the loan agreement letter.

Section 2924c does not define “cure.” Black's Law Dictionary defines “cure of default” as “A debtor's act to correct its failure to perform, or to refrain from performing, according to the terms of an agreement.” (Black's Law Dict. (10th ed. 2014).) At issue here is whether Teodora cured her failure to make loan payments by signing the loan modification agreement. In isolation, the language on which the Orcillas rely—“[t]his agreement will bring your loan current”—might reasonably be interpreted to mean that merely entering into the loan modification agreement cured the past default. However, the more specific language on which the Bank Defendants rely forecloses that interpretation by making clear that ongoing foreclosure proceedings would continue without additional notice if the terms and conditions of the letter were not satisfied. One of those terms required Teodora to make monthly payments of $4,627.47 beginning September 1, 2008. Because the Orcillas do not allege they did so, we conclude they do not adequately allege violations of section 2924c, subdivision (a)(2) and section 2924, subdivision (a)(1).

In count 2, the Orcillas also complain that the trustee's sale was conducted without the requisite 20 days' advance notice required by section 2924, subdivision (a)(4). But, in that very same count, they alleged the notice of trustee's sale was mailed to them on April 23, 2010, 31 days before the sale. Accordingly, they do not allege a violation of section 2924, subdivision (a)(4).

The Orcillas do not contend they can cure these defects by amendment. Therefore, the trial court did not abuse its discretion in denying them leave to amend counts 2 and 4.

E. Counts 3 and 5: Violation of Sections 2924b and 2924f

In relevant part, section 2924b requires a trustee to mail a copy of the notice of trustee's sale to the trustor at least 20 days before the date of sale, and section 2924f requires that a notice of trustee's sale be posted in a public place in the city where the property is to be sold and on the property in the same time frame. These statutes require the notice to include the time of sale. (§§ 2924b, subd. (b)(2), 2924f, subd. (b)(1).) In counts 3 and 5, the Orcillas allege that the notice of sale that was sent to them and posted on the Property stated an incorrect date of sale, in violation of sections 2924b and 2924f.

To successfully challenge a foreclosure sale based on a procedural irregularity, such as the incorrect date of sale in the notice of sale at issue here, the plaintiff must show that the irregularity caused him or her prejudice. (Knapp v. Doherty (2004) 123 Cal.App.4th 76, 96 [20 Cal. Rptr. 3d 1].) The operative complaint is devoid of any facts showing (or even suggesting) that the Orcillas suffered any actual prejudice as a result of the procedural defect in the notice of sale. For example, the complaint does not allege that the Orcillas would have cured their default had they been notified of the correct sale date. Nor does the complaint allege that bidders at the sale were somehow deterred from bidding on the Property due to the defect in the notice of sale or that the price paid by Big Sur was lower than it would have been had the notice of sale sent to the Orcillas and posted on the Property included the correct date. Because plaintiffs have not alleged facts showing actual prejudice from the procedural irregularity in the notice of sale, the Bank Defendants' demurrer to the third and fifth causes of action was properly sustained.

The Orcillas have not carried their burden on appeal of proving there is a reasonable possibility they can cure the defects in the pleading by amendment. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58].) Indeed, they do not even address potential amendments. Accordingly, they have not shown the trial court abused its discretion in denying them leave to amend counts 3 and 5. (Total Call Internat., Inc. v. Peerless Ins. Co. (2010) 181 Cal.App.4th 161, 173 [104 Cal. Rptr. 3d 319] [“‘Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.’”].)

F. Count 6: Violation of Section 2932.5

Section 2932.5 states: “Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.”

In count 6, the Orcillas allege the Bank Defendants violated section 2932.5 because BofA exercised the Deed of Trust's power of sale when no assignment of the Deed of Trust to BofA ever was recorded. That claim fails because section 2932.5 has no application where, as here, the power of sale is conferred in a deed of trust.

“[S]ection 2932.5 is inapplicable to deeds of trust.” (Jenkins, supra, 216 Cal.App.4th at p. 518.) “Section 2932.5 requires the recorded assignment of a mortgage so that a prospective purchaser knows that the mortgagee has the authority to exercise the power of sale. This is not necessary when a deed of trust is involved, as the trustee conducts the sale and transfers title.” (Haynes v. EMC Mortgage Corp. (2012) 205 Cal.App.4th 329, 336 [140 Cal. Rptr. 3d 32].) In other words, “because a deed of trust does not convey a power of sale directly to the beneficiary-creditor, it is immaterial whether an assignment of a promissory note was properly acknowledged and recorded when a deed of trust is used to secure a debt.” (Jenkins, supra, at p. 518.)

The Orcillas acknowledge that the Note was secured by a deed of trust, not a mortgage. However, they contend the foregoing rule does not bar their claim for two reasons: (1) the Deed of Trust was void and unenforceable because the Note and Deed of Trust were “bifurcated,” and (2) Quick Loan never transferred its interest in the Note to the Bank Defendants so they lacked power of sale. As an initial matter, it is unclear how either of those contentions, if true, would render a statute that applies only to mortgages applicable here. Moreover, the arguments are meritless.

The Orcillas' first contention is that the Deed of Trust is void because MERS was the beneficiary while Quick Loan held the Note. The Orcillas are correct that, “[o]rdinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust.” (Fontenot v. Wells Fargo Bank, N. A. (2011) 198 Cal.App.4th 256, 267 [129 Cal. Rptr. 3d 467].) “Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as ‘nominee’ for the lender, and granted the authority to exercise legal rights of the lender.” (Ibid.) The Orcillas agreed to the terms of their Deed of Trust, which expressly identified MERS as beneficiary and authorized it to exercise all of the rights and interests of the lender, including the right to foreclose. They cannot not complain that those provisions of the Deed of Trust rendered it void.

Moreover, this court rejected an argument similar to the Orcillas' “bifurcation” argument in Debrunner. There, the plaintiff argued that where the beneficiary of the deed of trust is not in possession of the underlying promissory note, “the deed of trust is ‘severed’ from the promissory note and consequently is of no effect.” (Debrunner, supra, 204 Cal.App.4th at p. 440.) We noted that “‘[t]here is no stated requirement in California's non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose. Rather, the statute broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure. Accordingly, the statute does not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale.’” (Id. at p. 441.) Given the exhaustive nature of the nonjudicial foreclosure scheme, we decline to read additional requirements into the nonjudicial foreclosure statute requiring the note and the deed of trust to be held by the same party. (See Jenkins, supra, 216 Cal.App.4th at p. 510.) Accordingly, there is no legal basis for the Orcillas' contention that the separation of the Note and Deed of Trust prevented ReconTrust from foreclosing on their property.

The Orcillas' second contention fails for similar reasons. The trustee, ReconTrust, initiated the nonjudicial foreclosure sale, as permitted by section 2924, subdivision (a)(1). For the reasons discussed above, it was not required to hold a beneficial interest in the Note to do so.

We conclude count 6 fails because the Orcillas's Note was secured by a deed of trust, such that section 2932.5 does not apply. For the same reason, “it would be impossible for [the Orcillas] to cure the fundamental defects in [their sixth] cause of action by way of an amendment. Accordingly, the court's sustainment of [the Bank] Defendants' demurrer without leave to amend to [the Orcillas' sixth] cause of action was proper.” (Jenkins, supra, 216 Cal.App.4th at p. 519.)

G. Breach of Contract Claims

“A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.” (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1388 [272 Cal. Rptr. 387].) “Implicit in the element of damage is that the defendant's breach caused the plaintiff's damage.” (Troyk v. Farmers Group, Inc. (2009) 171 Cal.App.4th 1305, 1352 [90 Cal. Rptr. 3d 589], citing § 3300.)

1. Count 7: Alleged Breach of the Deed of Trust

The Orcillas allege the Bank Defendants breached the Deed of Trust by failing to provide notice of default and by sending them a notice of trustee's sale that did not correctly identify the date of the trustee's sale. On appeal, they contend the Bank Defendants also breached the Deed of Trust by selling the Property “without authority/power of sale.” However, lack of power of sale was not alleged as a breach of the Deed of Trust in the second amended complaint. Even considering that argument, we conclude count 7 fails because the Orcillas do not allege how the Bank Defendants' breaches caused their alleged damage.

The Orcillas allege they were damaged “because they suffered the loss of their home,” which in turn led to “a loss of employment and loss of health.” They do not allege how they would have avoided foreclosure and the loss of the Property absent the alleged breaches. The Orcillas do not dispute that they are in default under the Note. They do not allege that they were willing and able to cure the default before the sale, but were prevented from doing so by the lack of any notice of default or by the inaccurate notice of trustee's sale. Nor do they allege that the party with the power of sale would have refrained from foreclosing under the circumstances.

Because the Orcillas have failed to allege damages caused by the Bank Defendants' alleged contractual breaches, we conclude the trial court properly sustained the demurrer to count 7. We cannot conclude that the trial court abused its discretion when it denied the Orcillas leave to amend count 7, as the Orcillas do not contend on appeal that they can cure the defect discussed above by amendment.

2. Count 9: Alleged Breach of the Oral Agreement to Postpone the Trustee's Sale

The Orcillas allege BofA entered into an oral agreement with them, through Nicholas Agbabiaka at California Community Transitional Housing, Inc., to postpone the trustee's sale “in lieu of the Orcillas' application for a loan modification under HAMP.” The Orcillas further allege their HAMP loan modification application constituted consideration for BofA's promise to halt the sale.

“A contract is … an exchange of promises.” (In re Marriage of Feldner (1995) 40 Cal.App.4th 617, 623 [47 Cal. Rptr. 2d 312].) In the Orcillas' view, the oral contract consisted of their promise to submit a HAMP loan modification application in exchange for BofA's promise to postpone the trustee's sale. But Agbabiaka's declaration contradicts that characterization of the underlying facts. Agbabiaka declared that he sent the Orcillas' HAMP application to BofA and that, after confirming receipt of the application, BofA said the trustee's sale would be postponed. Thus, Agbabiaka's declaration makes clear that there was no bargained-for exchange. Rather, the Orcillas' submitted their HAMP loan modification application prior to receiving any promise from BofA. BofA then made an unsolicited promise to postpone the sale without requiring anything of the Orcillas in exchange.

Consideration is an essential element of a contract. (See § 1550.) Section 1605 defines “good consideration” as “[a]ny benefit conferred, or agreed to be conferred, upon the promisor … or any prejudice suffered, or agreed to be suffered, by [the promisee] … as an inducement to the promisor … .” “It is not enough, however, to confer a benefit or suffer prejudice for there to be consideration. … [T]he benefit or prejudice ‘“must actually be bargained for as the exchange for the promise.”’” (Steiner v. Thexton (2010) 48 Cal.4th 411, 421 [106 Cal. Rptr. 3d 252, 226 P.3d 359]; see Jara v. Suprema Meats, Inc. (2004) 121 Cal.App.4th 1238, 1248 [18 Cal. Rptr. 3d 187] (Jara) [“the Supreme Court [has] authoritatively adopted the concept of consideration as a bargained-for exchange”].)

Agbabiaka's declaration “clearly indicates that [BofA's] promise was gratuitous in the sense of being offered without expectation of any exchanged promise or performance.” (Jara, supra, 121 Cal.App.4th at p. 1251.) Accordingly, the breach of oral contract claim fails because the Orcillas do not allege consideration sufficient to establish the existence of a contract. (Garcia v. World Savings, FSB (2010) 183 Cal.App.4th 1031, 1039 [107 Cal. Rptr. 3d 683] [oral promise to postpone a foreclosure sale held to be unenforceable because there was no exchange of true consideration].)

We are unpersuaded by the Orcillas' contention on appeal that the money BofA would have received under TARP in exchange for considering their HAMP application constituted consideration for the promise to postpone. That benefit would not have been conferred upon BofA by the Orcillas. And, again, the Orcillas had already submitted their HAMP loan modification application when BofA made its promise, making the promise gratuitous.

In sum, the trial court properly sustained the Bank Defendants' demurrer to count 9. Because the Orcillas do not suggest how they might cure the defect in their breach of oral contract claim by amendment, they have not shown the trial court abused its discretion in denying them leave to amend that cause of action.

H. Count 10: Promissory Estoppel

The Orcillas' promissory estoppel claim is based on the same promise as their breach of an oral contract claim—BofA's alleged promise to postpone the trustee's sale while considering the Orcillas' HAMP loan modification application. The lack of consideration discussed above does not bar the Orcillas' promissory estoppel cause of action because the promissory estoppel doctrine makes “a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange.” (Youngman v. Nevada Irrigation Dist. (1969) 70 Cal.2d 240, 249 [74 Cal. Rptr. 398, 449 P.2d 462].) Put differently, promissory estoppel “‘employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.’” (Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305, 310 [96 Cal. Rptr. 2d 747, 1 P.3d 63].) “‘The elements of a promissory estoppel claim are “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.”’” (Jones v. Wachovia Bank (2014) 230 Cal.App.4th 935, 945 [179 Cal. Rptr. 3d 21].)

The Orcillas' promissory estoppel claim fails because they fail to allege reliance. While they allege, in conclusory fashion, that they “relied on the promise” to postpone the trustee's sale, they do not allege any facts showing how they relied. For example, they do not allege that they abandoned plans to cure their default before the sale in reliance on the promise that the sale would not proceed. The Orcillas also fail to allege injury caused by any reliance on the promise. For instance, they do not allege that they could and would have cured their default before the sale had they known it was going to proceed. Accordingly, the trial court did not err in sustaining defendants' demurrer to the Orcillas' promissory estoppel claim.

I. Count 8: Fraud

The elements of a cause of action for fraud are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) actual and justifiable reliance, and (5) resulting damage. (Chapman v. Skype Inc. (2013) 220 Cal.App.4th 217, 230–231 [162 Cal. Rptr. 3d 864] (Chapman).) “‘“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.]’ [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. [Citation.] [¶] ‘“‘“Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages.”’” [Citation.]’ [Citation.] Indeed, ‘“‘[a]ssuming … a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes.’ [Citation.]” [Citation.] If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be alleged and a fraud cause of action cannot be sustained.’” (Rossberg v. Bank of America, N. A. (2013) 219 Cal.App.4th 1481, 1499 [162 Cal. Rptr. 3d 525].)

Each element of a fraud claim must be pleaded with specificity. (Chapman, supra, 220 Cal.App.4th at p. 231.) “The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.” (West v. JPMorgan Chase Bank, N. A. (2013) 214 Cal.App.4th 780, 793 [154 Cal. Rptr. 3d 285] (West).) However, “the requirement of specificity is relaxed when the allegations indicate that ‘the defendant must necessarily possess full information concerning the facts of the controversy’ [citations] or ‘when the facts lie more in the knowledge of the’” defendant. (Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 158 [2 Cal. Rptr. 2d 861].) 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.” (Chapman, supra, at p. 231.)

The Orcillas' fraud cause of action is based on three distinct misrepresentations. We address each in turn and conclude that the Orcillas have failed to state a fraud claim based on any of the alleged misrepresentations.

First, the Orcillas allege the Bank Defendants misrepresented the date of sale in the notice of sale. But they fail to allege either reliance on that misrepresentation or any resulting damages. Aside from the conclusory allegation that the Orcillas relied on the Bank Defendants' representation regarding the date of sale, the complaint does not allege what, if anything, the Orcillas 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 Orcillas could have avoided foreclosure but for the error in the notice of sale, given that the Orcillas do not deny defaulting on their loan and do not allege that they cured, attempted to cure, or could have cured the default.

Second, the Orcillas allege the Second Notice of Default was robo-signed. Again, they fail to allege acts or reliance or resulting damage. Nothing in the complaint suggests that the Orcillas could have prevented the foreclosure sale had the Second Notice of Default not been robo-signed.

Third, the Orcillas allege BofA misrepresented that the trustee's sale would not go forward in light of their HAMP loan modification application. They allege neither facts showing they relied on that misrepresentation, nor facts demonstrating that misrepresentation in any way prevented them from avoiding foreclosure. They also fail to allege “the name[] of the person[] who made the representation[ and] their authority to speak on behalf of [BofA],” as required by the specificity requirement. (West, supra, 214 Cal.App.4th at p. 793.)

In their opening brief, the Orcillas discuss a fourth misrepresentation—that the Bank Defendants owned the Orcillas' loan. The Orcillas did not adequately allege an actionable misrepresentation based on the Bank Defendants' claimed ownership of the Orcillas' loan for two reasons. First, that misrepresentation is not alleged in the operative complaint. Second, the Orcillas “fail to allege any facts showing that they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process. The [Orcillas] do not dispute that they are in default under the [N]ote. The assignment of the [D]eed of [T]rust and the [N]ote did not change the [Orcillas'] obligations under the [N]ote, and there is no reason to believe that [Quick Loan] as the original lender would have refrained from foreclose in these circumstances. Absent any prejudice, the [Orcillas] have no standing to complain about any alleged lack of authority [to foreclose] or defective assignment” of either the Deed of Trust or the Note. (Siliga v. Mortgage Electronic Registration Systems, Inc. (2013) 219 Cal.App.4th 75, 85 [161 Cal. Rptr. 3d 500].)

For the foregoing reasons, we conclude the fraud claim fails. The trial court's refusal to grant the Orcillas leave to amend that cause of action was not an abuse of discretion, as the Orcillas have not demonstrated a reasonable possibility they could cure the defects discussed above by amendment.

J. Count 11: Quiet Title

In count 11, the Orcillas sought quiet title against all defendants.

1. The Orcillas' Quiet Title Claim Against the Bank Defendants

The Bank Defendants contend the quiet title action is defective as to them because they do not have an adverse claim to title. We agree.

“An element of a cause of action for quiet title is ‘[t]he adverse claims to the title of the plaintiff against which a determination is sought.’ (Code Civ. Proc., § 761.020, subd. (c).)” (West, supra, 214 Cal.App.4th at p. 802.) On appeal, the Orcillas concede that “the Bank Defendants have no Adverse claims to title.” That acknowledgement dooms their quiet title claim against the Bank Defendants. Moreover, the Orcillas attached the recorded trustee's deed to the second amended complaint. That deed establishes that the Property was sold to Big Sur, such that none of the Bank Defendants had an adverse claim to title to the Property. (Id. at p. 803.)

2. The Orcillas' Quiet Title Claim Against Big Sur

The quiet title action also was directed against Big Sur, which failed to file a respondent's brief in this appeal.[8[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab) In support of its demurrer to the second amended complaint, Big Sur successfully requested the trial court take judicial notice of an order of the appellate division affirming judgment in favor of Big Sur in its unlawful detainer action against the Orcillas. We conclude that Big Sur's unlawful detainer judgment bars the Orcillas' quiet title claim.

“[A] judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title … .” (Vella v. Hudgins (1977) 20 Cal.3d 251, 255 [142 Cal. Rptr. 414, 572 P.2d 28] (Vella).) “A qualified exception to the rule that title cannot be tried in unlawful detainer is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property such as” Big Sur. (Ibid.) “[Code of Civil Procedure] [s]ection 1161a provides for a narrow and sharply focused examination of title. To establish that he is a proper plaintiff, one who has purchased property at a trustee's sale and seeks to evict the occupant in possession must show that he acquired the property at a regularly conducted sale and thereafter ‘duly perfected’ his title.” (Ibid.; see Code Civ. Proc., § 1161a, subd. (b)(3).) Accordingly, where, as here, an unlawful detainer action is brought pursuant to Code of Civil Procedure section 1161a, subdivision (b)(3), title is at issue. “Applying the traditional rule that a judgment rendered by a court of competent jurisdiction is conclusive as to any issues necessarily determined in that action, the courts have held that subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee's sale are barred by the prior unlawful detainer judgment.” (Vella, supra, at p. 256; see Bliss v. Security-First Nat. Bank (1947) 81 Cal.App.2d 50, 58–59 [183 P.2d 312] [stipulated judgment arising from unlawful detainer action brought under Code Civ. Proc., § 1161a held to bar subsequent claim for quiet title].) “Where, however, the claim sought to be asserted in the second action encompasses activities not directly connected with the conduct of the sale, applicability of the res judicata doctrine, either as a complete bar to further proceedings or as a source of collateral estoppel, is much less clear.” (Vella, supra, at p. 256.)

Here, the Orcillas' quiet title action against Big Sur is premised on allegations that the trustee's sale “was a sham” because of defects in the Notice of Default and Notice of Trustee's Sale. Because the claim is “founded upon allegations of irregularity in [the] trustee's sale,” it is “barred by [Big Sur's] prior unlawful detainer judgment.” (Vella, supra, 20 Cal.3d at p. 256.)

The Orcillas contend that because Big Sur brought its unlawful detainer action as a limited civil case, the superior court lacked jurisdiction to adjudicate title to the Property, which is worth more than $25,000. For that argument, they rely on Vella, in which the Supreme Court concluded that an unlawful detainer action brought in municipal court, which “had no jurisdiction … to adjudicate title to property worth considerably more than its $5,000 jurisdictional limit,” did not bar a subsequent fraud action. (Vella, supra, 20 Cal.3d at p. 257.) We disagree with the Orcillas' contention.

There exist “two different ways in which a court may lack jurisdiction.” (People v. Ford (2015) 61 Cal.4th 282, 286 [187 Cal. Rptr. 3d 919, 349 P.3d 98] (Ford).) “A court lacks jurisdiction in a fundamental sense when it has no authority at all over the subject matter or the parties, or when it lacks any power to hear or determine the case.” (Ibid.) “If a court lacks such ‘“fundamental”’ jurisdiction, its ruling is void.” (Ibid.) “Even when a court has fundamental jurisdiction, however” (ibid.), it may act “‘in excess of its jurisdiction’” (id. at p. 287) where it fails to act in the manner prescribed by the Constitution, a statute, or relevant case law. A ruling issued in excess of a court's jurisdiction “is treated as valid until set aside.” (Ford, supra, at p. 287.)

“Subject to exceptions not relevant here, a civil case in which the damages claimed are $25,000 or less is a limited civil action. (Code Civ. Proc., § 86, subd. (a)(1).) This includes an unlawful detainer proceeding in which the damages claimed are $25,000 or less. (Code Civ. Proc., § 86, subd. (a)(4).) In a limited civil action, the judgment cannot exceed $25,000. (Code Civ. Proc., § 580, subd. (b)(1).)” (AP-Colton LLC v. Ohaeri (2015) 240 Cal.App.4th 500, 505 [192 Cal. Rptr. 3d 754].) Code of Civil Procedure section 86 lists the types of cases that qualify as limited civil cases; it does not include cases to try title to real property.

“In 1998 the California Constitution was amended to permit unification of the municipal and superior courts in each county into a single superior court system having original jurisdiction over all matters formerly designated as superior court and municipal court actions. [Citation.] … Now civil cases formerly within the jurisdiction of the municipal courts are classified as ‘limited’ civil cases, while matters formerly within the jurisdiction of the superior court[]s are classified as ‘unlimited’ civil action[s].” (Ytuarte v. Superior Court (2005) 129 Cal.App.4th 266, 274 [28 Cal. Rptr. 3d 474].) Because “the superior court [is] a court of general jurisdiction, … [it] did not lack the fundamental power to adjudicate” title to the Property. (Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal.App.4th 1093, 1102 [27 Cal. Rptr. 3d 741].) Even if the court acted in excess of its jurisdiction, we treat its ruling as valid because it has not been set aside. (Ford, supra, 61 Cal.4th at p. 287.) Therefore, the Orcillas' quiet title action against Big Sur is barred by the prior unlawful detainer judgment.

In sum, the Orcillas failed to state a quiet title claim against any of the defendants. They do not contend they could amend that cause of action and thus do not carry their burden to show the trial court erred in denying them leave to amend.

K. Count 12: UCL

“The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as ‘any unlawful, unfair or fraudulent business act or practice.’” (Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 320 [120 Cal. Rptr. 3d 741, 246 P.3d 877].) “The California Supreme Court has held the UCL's ‘coverage is “sweeping, embracing ‘“anything that can properly be called a business practice and that at the same time is forbidden by law.”’”’” (Jenkins, supra, 216 Cal.App.4th at p. 520.) “A plaintiff may pursue a UCL action in order to obtain either (1) injunctive relief, ‘the primary form of relief available under the UCL’ or (2) restitution ‘“as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.”’” (Ibid.)

The Orcillas' 12th cause of action alleges the Bank Defendants violated all three prongs of the UCL by (1) failing to rescind the Second Notice of Default, (2) failing to issue a valid notice of default in advance of the trustee's sale, and (3) fore closing on the Property “absent chain of title.” The Orcillas further allege that “[a]ll of the other violations and causes of action alleged herein also constitute unlawful and unfair business acts and serve as basis for the Orcillas' claim for unfair competition against the Bank Defendants.”

“Business and Professions Code section 17204 restricts private standing to bring a UCL action to ‘a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.’” (Jenkins, supra, 216 Cal.App.4th at p. 521.) Thus, the UCL standing requirements include an economic injury prong and a causation prong. (Jenkins, supra, at pp. 521–522.) “A plaintiff fails to satisfy the causation prong of the statute if he or she would have suffered ‘the same harm whether or not a defendant complied with the law.’” (Id. at p. 522.)

The Bank Defendants maintain the Orcillas lack standing because they fail to satisfy the causation prong. Specifically, the Bank Defendants argue that the Orcillas fail to allege their economic injury—loss of the Property—was caused by the Bank Defendants' conduct as opposed to by the Orcillas' default. The Orcillas respond that the Bank Defendants caused their loss by (1) enforcing an unconscionable loan and (2) foreclosing on a loan they did not own.

Liberally construed, count 12 and the allegations it incorporates allege that the Bank Defendants engaged in an unlawful or unfair business practice by enforcing the underlying loan and the loan modification agreement, both of which were unconscionable. (Shadoan v. World Savings & Loan Assn. (1990) 219 Cal.App.3d 97, 101–102 [268 Cal. Rptr. 207] [“that a contractual provision is unconscionable may be relevant to the question of whether a party who drafted—and seeks to enforce—the provision, has committed an unfair business practice”].) We have already concluded that the complaint adequately alleges that both agreements were unconscionable. With respect to causation, we can reasonably infer from the allegations that the Orcillas would not have lost the Property if the Bank Defendants had not enforced the unconscionable agreements by way of foreclosure proceedings.

We have some doubts as to whether the Orcillas have alleged facts entitling them to restitution or injunctive relief, the only remedies the UCL affords private plaintiffs. (See Madrid v. Perot Systems Corp. (2005) 130 Cal.App.4th 440, 452 [30 Cal. Rptr. 3d 210].) However, the Bank Defendants do not raise that issue and, accordingly, we consider it to have been forfeited.

For the foregoing reasons, we conclude the Orcillas have alleged an actionable unlawful or unfair business practice by the Bank Defendants as well as standing to assert a UCL claim. Therefore, the trial court erred in sustaining the Bank Defendants' demurrer to count 12.

L. Count 13: Declaratory Relief

The Orcillas' final cause of action requests declaratory relief on the issue of the parties' rights to and interests in the Property. It alleges the “Bank Defendants have taken actions in violation of their statutory, legal and contractual duties … [, which] have resulted in the wrongful foreclosure of the Subject Property” and that “[a]n actual dispute exists between the Orcillas and all Defendants as to the ownership of the Subject Property, and the validity … and amount … of the liens that were on the Subject Property prior to foreclosure.”

“Code of Civil Procedure section 1060 authorizes ‘[a]ny person … who desires a declaration of his or her rights or duties with respect to another … in cases of actual controversy relating to the legal rights and duties of the respective parties, [to] bring an original action … for a declaration of his or her rights and duties … .’” (Jenkins, supra, 216 Cal.App.4th at p. 513.) “The purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach.” (Babb v. Superior Court (1971) 3 Cal.3d 841, 848 [92 Cal. Rptr. 179, 479 P.2d 379].) Declaratory relief is therefore a remedy that “‘operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.’” (Ibid., italics added.)

Here, the Orcillas seek a remedy for a past wrong: the 2010 foreclosure sale. The complaint lacks any factual allegations indicating that an actual, present controversy exists between the parties. We therefore conclude that the Orcillas have failed to state a cause of action for declaratory relief and defendants' demurrer was properly sustained. (See Jenkins, supra, 216 Cal.App.4th at pp. 513–514.)

IV. Disposition

The judgment is reversed and the matter is remanded to the superior court with directions to vacate its order sustaining the Bank Defendants' demurrer to the second amended complaint without leave to amend. The superior court is further directed to enter a new order (1) sustaining the demurrer as to counts 2 through 11 and 13 without leave to amend and (2) overruling the demurrer as to count 1 and count 12. Defendants to have 30 days to answer. The parties shall bear their own costs on appeal.

Rushing, P. J., and Elia, J., concurred.

A petition for a rehearing was denied March 11, 2016, and the opinion was modified to read as printed above.

Footnotes

* [1[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

We refer to the Orcillas by their first names where necessary for purposes of clarity and not out of disrespect.

* [2[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

The Note, the Deed of Trust, loan modification letter and agreement, and the recorded documents were attached as exhibits to the second amended complaint.

* [3[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

HAMP is the acronym for the federal Home Affordable Modification Program. (Bushell v. JPMorgan Chase Bank, N. A. (2013) 220 Cal.App.4th 915, 918 [163 Cal. Rptr. 3d 539].) “When financial markets nearly collapsed in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 (Pub.L. No. 110-343 (Oct. 3, 2008) 122 Stat. 3765). (Wigod [v. Wells Fargo Bank, N. A. (7th Cir. 2012)] 673 F.3d [547,] 556.) The centerpiece of this act was the federal Troubled Asset Relief Program (TARP) which, in addition to providing a massive infusion of liquidation to the banking system, required the United States Department of the Treasury … to implement a plan to minimize home foreclosures. (See Wigod, at p. 556; 12 U.S.C. § 5219(a).) [¶] That plan was HAMP, introduced in February 2009, and funded by a $50 billion set-aside of TARP monies to induce lenders to refinance mortgages to reduce monthly payments for struggling homeowners. (Wigod, supra, 673 F.3d at p. 556.) Specifically, HAMP enables certain homeowners who are in default or at imminent risk of default to obtain ‘permanent’ loan modifications, by which their monthly mortgage payments are reduced to no more than 31 percent of their gross monthly income for a period of at least five years. Lenders receive from the government a $1,000 incentive payment for each permanent HAMP modification, along with other incentives.” (Id. at pp. 922–923.)

* [4[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

Unspecified statutory references are to the Civil Code.

* [5[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

While this matter was pending, the parties notified us that the case had been settled and the Orcillas requested dismissal of the appeal. “After the record on appeal is filed, dismissal of the action based on abandonment or stipulation of the parties is discretionary, rather than mandatory.” (City of Morgan Hill v. Brown (1999) 71 Cal.App.4th 1114, 1121, fn. 5 [84 Cal.Rptr.3d 361]; Cal. Rules of Court, rule 8.244.) We concluded that the matter is important and of continuing public interest, warranting our review. (Burch v. George (1994) 7 Cal.4th 246, 253, fn. 4 [27 Cal.Rptr.3d 165, 866 P.2d 92].) Accordingly, we denied the request for dismissal. In deciding the appeal on the merits, we follow established precedent in retaining jurisdiction to resolve the issues presented in the case.

* [6[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

In 2010, section 2924c, subdivision (a)(2) provided that if the trustor cured the default, “the beneficiary or mortgagee or the agent for the beneficiary or mortgagee shall, within 21 days following the reinstatement, execute and deliver to the trustee a notice of rescission which rescinds the declaration of default and demand for sale and advises the trustee of the date of reinstatement. The trustee shall cause the notice of rescission to be recorded within 30 days of receipt of the notice of rescission and of all allowable fees and costs.”

* [7[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

In 2010, section 2924, subdivision (a)(1) required “[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents [to] … file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default” before exercising a power of sale. Section 2924, subsection (a)(3) required the notice of default to be filed at least three months before the issuance of a notice of sale.

* [8[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=e20fba77-42e1-4960-ac04-50fe6cb51030&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pddocid=urn%3AcontentItem%3A5J2J-5WH1-F04B-N0P7-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=6d72a4cd-6cac-41cb-b413-c1638eedfeab)

Under rule 8.220 of the California Rules of Court, we may decide the appeal on the record, the opening brief, and any oral argument by the Orcillas. Contrary to the Orcillas' contention, Big Sur has not “waived any adverse claim to title” by failing to file a respondent's brief.

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**Lueras v. BAC Home Loans Servicing, LP**

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Court of Appeal of California, Fourth Appellate District, Division Three

October 31, 2013, Opinion Filed

G046799

Reporter  
221 Cal. App. 4th 49 | 163 Cal. Rptr. 3d 804 | 2013 Cal. App. LEXIS 886  
  
RICHARD LUERAS, Plaintiff and Appellant, v. BAC HOME LOANS SERVICING, LP, et al., Defendants and Respondents.  
  
Prior History:

Appeal from a judgment of the Superior Court of Orange County, No. 30-2011-00481113, Kirk H. Nakamura, Judge.

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A borrower's first amended complaint did not, and could not as a matter of law, state a claim for negligence based on a lender's alleged failure to offer the borrower a loan modification, because the lender and the trustee did not have a common law duty of care to offer, consider, or approve a loan modification, or to offer the borrower alternatives to foreclosure, and because they also did not have a duty of care to handle the borrower's loan in such a way to prevent foreclosure and forfeiture of his property. The borrower did not allege the bank and the trustee did anything wrongful that made him unable to make the original monthly loan payments or that they caused or exacerbated his initial default by negligently servicing his loan.

[Cal. Forms of Pleading and Practice (2013) ch. 95, Banks, Deposits, and Checks, § 95.364; Levy et al., Cal. Torts (2013) ch. 1, § 1.02; Cal. Real Estate Law & Practice (2013) ch. 123, § 123.08D; Simon et al., Matthew Bender Practice Guide: Cal. Unfair Competition and Business Torts (2013) § 2.06; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 773, 808 et seq., 816; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 864; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 798; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 117; 4 Witkin, Summary of Cal. Law (10th ed. 2005) Security Transactions in Real Property, § 145.]

[CA(10)[https://advance.lexis.com/images/IconNavigateDown.png](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) (10) Courts § 9—Rules of Practice and Procedure—Construction—Terminology.

The California Rules of Court distinguish between the words “must,” “may,” “may not,” “will,” and “should.” Under the California Rules of Court, rule 1.5(b), “should” expresses a preference or a nonbinding recommendation, while “must” is mandatory, “may” is permissive, and “will” expresses a future contingency. Case law has defined “should” generally to mean a moral obligation or recommendation.

Counsel: Law Offices of Lenore Albert and Lenore L. Albert for Plaintiff and Appellant.  
  
Reed Smith, David J. de Jesus and Adam M. Forest for Defendants and Respondents.  
  
Judges: Opinion by Fybel, Acting P. J., with Ikola, J., concurring. Concurring and dissenting opinion by Thompson, J.  
  
Opinion by: Fybel, Acting P. J.

**Opinion**

FYBEL, Acting P. J.—

Introduction

Richard Lueras appeals from a judgment entered after the trial court sustained without leave to amend a demurrer to his verified first amended complaint (the First Amended Complaint). After the foreclosure sale of his home, Lueras sued Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP (Bank of America), ReconTrust Company, N.A. (ReconTrust), and Federal National Mortgage Association, commonly called and referred to as “Fannie Mae.” The First Amended Complaint asserted causes of action for negligence, breach of contract, violation of the Perata Mortgage Relief Act (Civ. Code, § 2923.5), fraud/misrepresentation, unfair and unlawful practices (Bus. & Prof. Code, § 17200), and to quiet title.

The First Amended Complaint included no allegations directed specifically to Fannie Mae, and we therefore affirm the judgment in its favor. As to Bank of America and ReconTrust, we affirm the judgment as to the causes of action for violation of Civil Code section 2923.5 and to quiet title, but, in all other respects, reverse and remand to permit Lueras to amend the First Amended Complaint.

The key fact alleged in the First Amended Complaint is that a mere 13 days before Bank of America foreclosed on Lueras's home, Bank of America falsely represented in writing to Lueras that no foreclosure sale would occur while Lueras was being considered for “other foreclosure avoidance programs.” In so doing, Bank of America expressly and in writing informed Lueras he “will not lose [his] home during this review period.” A Bank of America representative also informed Lueras the pending foreclosure sale would be postponed. Nevertheless, days later, Bank of America foreclosed on Lueras's home.

Another key point is the trial court sustained a demurrer without leave to amend to the First Amended Complaint—i.e., Lueras had filed only two complaints in a complicated and evolving area of law before facing dismissal. Given the standard of review and California's policy of liberality in granting of amendments, Lueras should be given an opportunity to amend the First Amended Complaint.

Allegations

In reviewing the order sustaining the demurrer, we accept the factual allegations of the First Amended Complaint as true. (Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal.4th 32, 42 [105 Cal. Rptr. 3d 181, 224 P.3d 920].) We also accept as true facts appearing in exhibits attached to the complaint. (Sarale v. Pacific Gas & Electric Co. (2010) 189 Cal.App.4th 225, 245 [117 Cal. Rptr. 3d 24]; Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal.App.3d 1624, 1626–1627 [272 Cal. Rptr. 623].) If the facts expressly alleged in the complaint conflict with an exhibit, the contents of the exhibit take precedence. (Sarale v. Pacific Gas & Electric Co., supra, at p. 245.)

In March 2007, Lueras refinanced his home loan in the amount of $385,000. The monthly payment on the 30-year loan was $1,965.10. To secure the loan, a trust deed against Lueras's home was recorded.

Lueras made every monthly payment due until he and his wife suffered financial hardship. In 2009, Lueras requested a loan modification from the lender, Bank of America, under the Home Affordable Modification Program (HAMP).[1[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

In 2009, Fannie Mae instituted the HomeSaver Forbearance program, which was available to those who did not qualify for HAMP loan modifications. According to the First Amended Complaint, “[t]he program was supposed to lead to a permanent plan so that the borrower could ‘save’ their [sic] home and in the interim offer the owner a 6 month plan reducing the monthly payment by 30% to 50% less than the current mortgage payment.” Fannie Mae's Announcement 09-05R,[2[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) issued in April 2009, stated: “HomeSaver Forbearance is a new loss mitigation option available to borrowers [who] are either in default or for whom default is imminent and who do not qualify for the HAMP. A servicer should offer a HomeSaver Forbearance if such borrowers have a willingness and ability to make reduced monthly payments of at least one-half of their contractual monthly payment. The plan should reduce the borrower's payments to an amount the borrower can afford, but no less than 50 percent of the borrower's contractual monthly payment, including taxes and insurance and any other escrow items at the time the forbearance is implemented. During the six month period of forbearance, the servicer should work with the borrower to identify the feasibility of, and implement, a more permanent foreclosure prevention alternative. The servicer should evaluate and identify a permanent solution during the first three months of the forbearance period and should implement the alternative by the end of the sixth month.” (Announcement 09-05R, supra, at pp. 31–32 <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].)

Although Lueras requested a HAMP loan modification, “Bank of America apparently offered [him] the Forbearance program instead of the HAMP program.” In a letter dated August 17, 2009, Bank of America notified Lueras that “you qualify for the Fannie Mae HomeSaver Forbearance™ program” and, as a consequence, he was eligible for reduced mortgage payments for a period of up to six months. The letter stated: “Under the HomeSaver Forbearance program, we are working with Fannie Mae, a government-sponsored enterprise, to reduce your mortgage payment by up to 50% for up to 6 months while we work with you to find a long-term solution.”

Lueras accepted Bank of America's offer for reduced monthly payments under the HomeSaver Forbearance program by entering into a forbearance agreement (the Forbearance Agreement), which was attached as an exhibit to the First Amended Complaint. The Forbearance Agreement reduced the monthly payments on Lueras's home loan to $1,101.16 for six months, commencing on September 16, 2009. The Forbearance Agreement stated the “Deferral Period Payment” commenced on September 16, 2009, and ended on the earliest of (1) six months from “the execution date by Servicer”; (2) “execution of an agreement with Servicer for another resolution of my default under my loan Documents …”; or (3) “my default under the terms of this Agreement.” The Forbearance Agreement stated: “The Servicer will suspend any scheduled foreclosure sale, provided I continue to meet the obligations under this Agreement.”

The Forbearance Agreement also stated: “During the Deferral Period, Servicer will review my Loan to determine whether additional default resolution assistance can be offered to me. At the end of the Deferral Period either (1) I will be required to recommence my regularly scheduled payments and to make additional payment(s), on terms to be determined by Servicer, until all past due amounts owed under the Loan documents have been paid in full, (2) I will be required to reinstate my Loan in full, (3) Servicer will offer to modify my Loan[,] (4) Servicer will offer me some other form of payment assistance or alternative to foreclosure, on terms to be determined solely by Servicer … , or (5) if no feasible alternative can be identified, Servicer may commence or continue foreclosure proceedings or exercise other rights and remedies provided Servicer under the Loan Documents.”

Lueras made the monthly payment of $1,101.16 for a period of 10 months. During that time, Bank of America did not work with Lueras to identify the feasibility of, much less implement, a more permanent foreclosure prevention alternative; Bank of America did not evaluate and identify a permanent solution during the first three months of the deferral period; and Bank of America did not implement a permanent solution by the end of the sixth-month period.

Meanwhile, Lueras submitted to Bank of America all information required to determine whether he qualified for a HAMP loan modification. In October 2010, while Lueras waited for Bank of America's determination, he was served with a notice of default by the trustee, ReconTrust. The notice of default stated the total amount in arrears was $64,424.98 as of October 19, 2010. It was not until this notice of default was recorded that Bank of America began to explore with Lueras alternatives to foreclosure. At that point, Lueras enlisted the aid of the California Attorney General's Office, which agreed to monitor and assist with the loan modification process on behalf of Lueras.

In December 2010, Lueras requested a loan modification package from Fannie Mae. In January 2011, Lueras returned the completed package to Fannie Mae, which sent a copy of it to Bank of America. The completed package included over 100 pages of documents from Lueras.

In February 2011, Lueras was served with a notice of trustee's sale with a scheduled sale date of February 22, 2011. Bank of America rescheduled the sale date a total of four times, ultimately setting the sale for May 18, 2011.

The First Amended Complaint alleged that Bank of America eventually determined Lueras was eligible for a HAMP loan modification and made an oral offer to modify the loan. Lueras accepted the offer. But the First Amended Complaint also alleged that, in a letter dated May 5, 2011, Bank of America informed Lueras he was not eligible for a HAMP loan modification. The May 5, 2011 letter, which was attached as an exhibit to the First Amended Complaint, stated Bank of America was reviewing Lueras's financial information “to determine if there are other options available to you” and that Bank of America “will contact you within 10 days to let you know what other options are available to you and the next steps you need to take.” The May 5 letter also stated: “If a foreclosure sale of your home is currently pending and on hold, that hold will continue and remain in effect while you are considered for other foreclosure avoidance programs.” While advising Lueras not to ignore any foreclosure notices, the letter stated, “you will not lose your home during this review period.”

Lueras immediately contacted Nancy Whitaker of Bank of America, who told him the May 5, 2011 letter was sent by “a third party ‘home retention’ vendor” and was an error. Whitaker told Lueras that he had been placed in an approved program in which the interest rate on his loan would be reduced for four years. She advised him that Bank of America needed to obtain Fannie Mae's approval.

In a letter to Lueras, dated May 6, 2011, Bank of America informed him it was reviewing his financial documents to determine whether he was eligible for a HAMP loan modification. The May 6 letter, which was attached as an exhibit to the First Amended Complaint, stated Lueras would receive one of three possible responses: (1) notification he had been approved for a trial period plan under HAMP, (2) notification he was not eligible for a HAMP loan modification, or (3) more information was needed to make a decision.

Lueras immediately contacted Bank of America about the May 6 letter. He was informed the letter was sent in error as his application had already “been approved” by Bank of America. Whitaker told Lueras the trustee's sale, which had been rescheduled for May 18, 2011, would be reset, pending approval by Fannie Mae. On Lueras's copy of the May 6, 2011 letter is this handwritten note: “per Nancy [¶] ‘sent in error’ … [¶] 5/18 reset … [¶] already approved.”

During May 2011, Lueras made many contacts with Fannie Mae, Bank of America, and the California Attorney General's Office, but “[n]o response was ever received stating why the foreclosure was proceeding.” Lueras never received a further response—oral or written—from Bank of America, advising whether he was or was not eligible for a loan modification program. He likewise never received notice from Fannie Mae that it had denied him a loan modification.

According to the First Amended Complaint, the Making Home Affordable Program guidelines require the loan servicer to wait 30 days from the date of denial of a HAMP loan modification before foreclosing so the borrower can appeal the decision.

On May 18, 2011, Lueras was informed by the California Attorney General's Office that the foreclosure sale would be conducted on that date. Minutes later, Lueras's home was sold at the foreclosure sale to H and K Acquisitions, LLC. H and K Acquisitions, LLC, was named as a defendant in the First Amended Complaint but is not a party to this appeal.

Procedural History

Lueras filed this lawsuit in June 2011. The complaint asserted causes of action for negligence, breach of contract, breach of contract (third party beneficiary), fraud/misrepresentation, unfair and unlawful practices, and to quiet title. The trial court sustained, with leave to amend, a demurrer by Bank of America, ReconTrust, and Fannie Mae.[3[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Lueras filed the First Amended Complaint, which asserted causes of action for negligence (against Bank of America, ReconTrust, and Fannie Mae), breach of contract (against Bank of America and Fannie Mae), violation of Civil Code section 2923.5 (against Bank of America and ReconTrust), fraud/misrepresentation (against Bank of America and Fannie Mae), unfair and unlawful practices (against Bank of America and Fannie Mae), and quiet title (against Bank of America, ReconTrust, and Fannie Mae). The trial court sustained without leave to amend Bank of America, ReconTrust, and Fannie Mae's demurrer to the First Amended Complaint and ordered it dismissed with prejudice. Lueras timely appealed from the subsequently entered judgment of dismissal.

Motion to Strike Portions of Lueras's Reply Brief

Bank of America, ReconTrust, and Fannie Mae move to strike several portions of Lueras's reply brief referring to a December 19, 2007 letter, of which Lueras requested we take judicial notice. The motion is made on the ground the request for judicial notice was improper and, therefore, those portions of Lueras's reply brief, which reference the December 19, 2007 letter, should be stricken. We grant the motion.

California Rules of Court, rule 8.204(a)(1)(C) states an appellate brief must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” We may decline to consider passages of a brief that do not comply with this rule. (Ragland v. U.S. Bank National Assn. (2012) 209 Cal.App.4th 182, 195 [147 Cal. Rptr. 3d 41].) As a reviewing court, we usually consider only matters that were part of the record when the judgment was entered. (Ibid.)

By separate order, we previously denied Lueras's request for judicial notice; we therefore decline to consider those portions of Lueras's reply brief which are supported solely by the December 19, 2007 letter. Those portions are (1) on page 4, the first full paragraph beginning “On December 19, 2007 Congress received letters”; and (2) from page 19, the fourth full paragraph beginning “In the letter dated December 19, 2007” through the third full paragraph on page 20, ending “investors would not lose their dividends.”

Standard of Review

We independently review a ruling on a demurrer to determine whether the pleading alleges facts sufficient to state a cause of action. (McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415 [106 Cal. Rptr. 2d 271, 21 P.3d 1189].) In so doing, “[t]he complaint must be liberally construed and survives a general demurrer insofar as it states, however inartfully, facts disclosing some right to relief.” (Longshore v. County of Ventura (1979) 25 Cal.3d 14, 22 [157 Cal. Rptr. 706, 598 P.2d 866].)

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, … [w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained 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. [Citation.]” (City of Dinuba v. County of Tulare (2007) 41 Cal.4th 859, 865 [62 Cal. Rptr. 3d 614, 161 P.3d 1168].)

At the outset, and as part of our discussion of the standard of review, we address the argument that some or all of Lueras's claims are not viable because the foreclosure sale has been rescinded and “any equity Lueras might have in the property remains.” In opposition to the demurrer to the First Amended Complaint, Lueras acknowledged, “the trustee was able to rescind the foreclosure sale” and, in his reply brief, argues, “[t]he rescission of the trustee's deed upon [sale] does not moot Mr. Lueras'[s] claims.”

In reviewing the judgment, we are limited to the well-pleaded facts of the complaint and matters subject to judicial notice. (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126 [119 Cal. Rptr. 2d 709, 45 P.3d 1171]; Walgreen Co. v. City and County of San Francisco (2010) 185 Cal.App.4th 424, 433 [110 Cal. Rptr. 3d 498].) The First Amended Complaint did not allege rescission of the foreclosure sale. No party has requested we take judicial notice of anything establishing such rescission. No party has explained what “rescission” means in this context, briefed the legal consequences of a rescission on possible future attempts to foreclose, or informed us of the status of any current foreclosure proceedings. No party has argued that statements of Lueras's counsel constitute judicial admissions.

In short, nothing in the record permits us to consider the foreclosure sale to have been rescinded or the legal significance of any such rescission in reviewing the judgment and the sufficiency of the First Amended Complaint. Whether a rescission of the foreclosure sale occurred and the legal significance of a rescission is better resolved in the trial court, after Lueras has the opportunity to replead and, as necessary and permitted, upon concrete evidence. Further, assuming there was a “rescission” of the foreclosure sale, we cannot say as a matter of law at this stage that Lueras cannot plead any cause of action.

Discussion  
  
I.  
  
Negligence

In the first cause of action of the First Amended Complaint, for negligence, Lueras alleged Bank of America and ReconTrust breached a duty of care in the handling of his application for a loan modification and in foreclosing his property. Bank of America and ReconTrust argue Lueras failed to allege, and cannot allege, the existence of a duty of care.

A. Overview of the Law of Negligence and Relevant Allegations of the First Amended Complaint

To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. (Thomas v. Stenberg (2012) 206 Cal.App.4th 654, 662 [142 Cal. Rptr. 3d 24].) Whether a duty of care exists is a question of law to be determined on a case-by-case basis. (Parsons v. Crown Disposal Co. (1997) 15 Cal.4th 456, 472 [63 Cal. Rptr. 2d 291, 936 P.2d 70].)

We start by identifying the allegedly negligent conduct by Bank of America and ReconTrust because our analysis is limited to “the specific action the plaintiff claims the particular [defendant] had a duty to undertake in the particular case.” (Vasquez v. Residential Investments, Inc. (2004) 118 Cal.App.4th 269, 280 [12 Cal. Rptr. 3d 846].) In the first cause of action, Lueras alleged that Bank of America and ReconTrust owed him a duty of care to (1) handle his loan “in such a way to prevent foreclosure and forfeiture of his property”; (2) “determine modification approvals, explore and offer foreclosure alternatives with Mr. Lueras prior to default”; (3) “exercise reasonable care and skill in timely and accurately responding to customer requests and inquiries”; (4) “record proper land records”; (5) “properly service the loan”; (6) “ensure chain of title prior to foreclosing”; and (7) “stop all foreclosure sales that are unlawful.”

Lueras alleged Bank of America and ReconTrust breached that duty of care in several ways. Most importantly, Lueras alleged Bank of America and ReconTrust had a duty to offer Lueras a loan modification and breached that duty by refusing to do so. He also alleged Bank of America and ReconTrust breached their duty of care by “failing to timely and accurately respond to customer requests and inquiries,” by “failing to comply with state consumer protection laws, properly service the loan, and use consistent methods to determine modification approvals,” and by “failing to … record proper land records … and ensure chain of title prior to foreclosing and to stop all foreclosure sales that are unlawful.”[4[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Lenders and borrowers operate at arm's length. (Oaks Management Corporation v. Superior Court (2006) 145 Cal.App.4th 453, 466 [51 Cal. Rptr. 3d 561]; Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 579 [37 Cal. Rptr. 2d 653]; Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 476 [261 Cal. Rptr. 735], disapproved on other grounds in Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (2013) 55 Cal.4th 1169, 1182 [151 Cal. Rptr. 3d 93, 291 P.3d 316].) “[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” (Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal.App.3d 1089, 1096 [283 Cal. Rptr. 53] (Nymark).)

In Nymark, supra, 231 Cal.App.3d at page 1092, the court held a lender owed no duty of care to a borrower in preparing an appraisal of the real property security for the loan when the purpose of the appraisal is to protect the lender by satisfying it that the collateral provided adequate security for the loan. The court reached this holding by considering the six factors identified in Biakanja v. Irving (1958) 49 Cal.2d 647 [320 P.2d 16] (Biakanja) to determine whether to recognize a duty of care. (Nymark, supra, at p. 1098.) Those factors are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. (Ibid.)

The Nymark court stressed the purpose of the appraisal was to protect the lender's interest and was not intended to assure the borrower the collateral was sound or to induce him to enter into the loan transaction. (Nymark, supra, 231 Cal.App.3d at p. 1099.) The foreseeability of harm to the borrower—who would know the value of his own property—was remote, the connection between the lender's conduct and the injury suffered was “tenuous,” there was “no moral blame because [the borrower] was in a position to protect himself from loss,” and a strong public policy prevented imposing on the lender a duty of care in the preparation of an appraisal. (Id. at pp. 1099–1100.)

In Ragland v. U.S. Bank National Assn., supra, 209 Cal.App.4th at page 207, a borrower contended the lender misadvised her to miss a loan payment in order to be considered for a loan modification. The borrower alleged the lender negligently caused her severe emotional distress by then failing to modify her loan and selling her home in a foreclosure sale. (Id. at p. 205.) Affirming summary adjudication of a cause of action for negligent infliction of emotional distress, a panel of this court concluded, “[t]he undisputed facts established there was no relationship between [the borrower] and [the lender] giving rise to a duty the breach of which would permit [the borrower] to recover emotional distress damages based on negligence.” (Id. at p. 208.)

Some federal district courts in California have concluded a lender owes no duty of care to a borrower to modify a loan. In Armstrong v. Chevy Chase Bank, FSB (N.D.Cal., Oct. 3, 2012, No. 5:11-cv-05664 EJD) 2012 U.S.Dist. Lexis 144125, pp. \*11–\*12, the court explained: “[A] loan modification, which at its core is an attempt by a money lender to salvage a troubled loan, is nothing more than a renegotiation of loan terms. This renegotiation is the same activity that occurred when the loan was first originated; the only difference being that the loan is already in existence. Outside of actually lending money, it is undebatable that negotiating the terms of the lending relationship is one of the key functions of a money lender. For this reason, ‘[n]umerous cases have characterized a loan modification as a traditional money lending activity.’ ” (See Diunugala v. JP Morgan Chase Bank, N.A. (S.D.Cal., Oct. 3, 2013, No. 12cv2106-WQH-NLS) 2013 U.S.Dist. Lexis 144326, p. \*10 [“Absent special circumstances, there is no duty for a servicer to modify a loan.”]; Sanguinetti v. CitiMortgage, Inc. (N.D.Cal., Sept. 11, 2013, No. 12-5424 SC) 2013 U.S.Dist. Lexis 130129, p. \*17 [“Loan modifications are part of the lending process, and negotiating a lending agreement's terms is one of a bank's key functions.”]; Bunce v. Ocwen Loan Servicing, LLC (E.D.Cal., July 17, 2013, No. CIV. 2:13-00976 WBS EFB) 2013 U.S.Dist. Lexis 100111, p. \*15 [agreeing with Armstrong v. Chevy Chase Bank, FSB that lender does not owe duty in loan modification activities]; Kennedy v. Bank of America, N.A. (N.D.Cal., Apr. 26, 2012, No. 12-CV-952 YGR) 2012 U.S.Dist. Lexis 58636, pp. \*21–\*22 [lender owes borrower no duty of care in process of approving loan modification]; Dooms v. Federal Home Loan Mortgage Corp. (E.D.Cal., Mar. 31, 2011, No. CV F 11-0352 LJO DLB) 2011 U.S.Dist. Lexis 38550, p. \*28 [“The [lender] owed no duty of care to [the borrower] arising from her default, property foreclosure, and loan modification attempts.”]; DeLeon v. Wells Fargo Bank, N.A. (N.D.Cal., Oct. 22, 2010, No. 10-CV-01390-LHK) 2010 U.S.Dist. Lexis 112941, p. \*12 [the defendant lender did not have a duty “to complete the loan modification process”].)

Other United States District Courts have concluded a lender might owe a borrower a duty of care in negotiating or processing an application for a loan modification. (See Ansanelli v. JP Morgan Chase Bank, N.A. (N.D.Cal., Mar. 28, 2011, No. C 10-03892 WHA) 2011 U.S.Dist. Lexis 32350, pp. \*21–\*22 [allegation that lender offered plaintiffs a loan modification and “engage[d] with them concerning the trial period plan” was sufficient to create duty of care]; Becker v. Wells Fargo Bank, NA, Inc. (E.D.Cal., Nov. 30, 2012, No. 2:10-cv-02799 LKK KJN PS) 2012 U.S.Dist. Lexis 170729, pp. \*34–\*35 [complaint stated claim against lender for negligence during the loan modification process]; Crilley v. Bank of America, N.A. (D. Hawaii, Apr. 26, 2012, Civ. No. 12-00081 LEK-BMK) 2012 U.S.Dist. Lexis 58469, p. \*29 [denying motion to dismiss because plaintiffs “have pled sufficient facts to support a finding that Defendant went beyond its conventional role as a loan servicer by soliciting Plaintiffs to apply for a loan modification and by engaging with them for several months” regarding the modification]; Garcia v. Ocwen Loan Servicing, LLC (N.D.Cal., May 10, 2010, No. C 10-0290 PVT) 2010 U.S.Dist. Lexis 45375, pp. \*7–\*11 [plaintiff's allegations of lender's conduct in handling application for loan modification pleaded a duty of care].)

After oral argument, we invited the parties to submit supplemental briefs on three recent opinions, including Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872 [153 Cal. Rptr. 3d 546] (Jolley), which addressed whether a construction lender owed a duty of care to the borrower. In Jolley, the plaintiff and Washington Mutual Bank (WaMu) entered into a construction loan agreement by which the plaintiff borrowed $2,156,000 to renovate a house for use as rental property. (Id. at pp. 877, 878.) Problems arose due to WaMu's alleged failure to properly disburse loan proceeds, and WaMu agreed to modify the loan based on an expansion of the construction project. (Id. at p. 878.) Several months after the last disbursement, WaMu was closed by the Office of Thrift Supervision and placed in receivership under the Federal Deposit Insurance Corporation. (Id. at p. 879.) Certain of WaMu's assets, including the construction loan, were acquired by the defendant bank. (Ibid.)

Soon thereafter, the plaintiff ceased making payments on the loan, claiming he had been forced to default by WaMu's breaches and negligence in the funding of the construction loan. (Jolley, supra, 213 Cal.App.4th at p. 880.) The plaintiff tried to obtain a loan modification from the defendant and was told “there was a ‘high probability’ ” the defendant would modify the loan to avoid foreclosure and it was likely the construction loan could be rolled over into a fully amortized conventional loan. (Id. at pp. 880–881.) So assured, the plaintiff completed construction by borrowing money from family and friends. (Id. at p. 881.) Instead of offering a loan modification, the defendant demanded payment of the loan in full and refused the plaintiff's request to postpone the planned foreclosure sale. (Ibid.)

The plaintiff sued the defendant for various causes of action, including negligence, fraud, breach of contract, and promissory estoppel. (Jolley, supra, 213 Cal.App.4th at p. 881.) The trial court granted summary judgment, and the Court of Appeal reversed. (Id. at pp. 877–878.) On the negligence cause of action, the Court of Appeal recognized the general rule that a financial institution does not owe a duty of care to a borrower when the institution acts within its traditional role as a lender of money. (Id. at p. 898.) The Court of Appeal concluded, however, the general rule did not apply to the facts of the case. The court explained: “When considered in full context, the cases show the question is not subject to black-and-white analysis—and not easily decided on the ‘general rule.’ We conclude here, where there was an ongoing dispute about WaMu's performance of the construction loan contract, where that dispute appears to have bridged the [Federal Deposit Insurance Corporation]'s receivership and Chase's acquisition of the construction loan, and where specific representations were made by a Chase representative as to the likelihood of a loan modification, a cause of action for negligence has been stated that cannot be properly resolved based on lack of duty alone.” (Ibid.)

The Court of Appeal did not end its analysis there. The court next considered the six factors identified in Biakanja, supra, 49 Cal.2d 647, for determining whether to impose a duty of care. (Jolley, supra, 213 Cal.App.4th at pp. 899–901.) The court assessed those factors and concluded they compelled the conclusion the defendant owed the plaintiff a duty to review his request for a loan modification in good faith. (Id. at pp. 899–901.)

The Jolley court acknowledged it was dealing with a construction loan, not a residential home loan “where, save for possible loan servicing issues, the relationship ends when the loan is funded.” (Jolley, supra, 213 Cal.App.4th at p. 901.) “By contrast, in a construction loan the relationship between lender and borrower is ongoing, in the sense that the parties are working together over a period of time, with disbursements made throughout the construction period, depending upon the state of progress towards completion. We see no reason why a negligent failure to fund a construction loan, or negligent delays in doing so, would not be subject to the same standard of care.” (Ibid., fn. omitted.) Despite limiting its holding to construction loans, the Jolley court went to great lengths, in dictum, to explain the “no-duty rule is only a general rule” and to suggest that a lender may be liable for negligence in its handling of a loan transaction within its traditional role as a lender of money. (Id. at pp. 901–902, citing Ottolini v. Bank of America (N.D.Cal., Aug. 19, 2011, No. C-11-0477 EMC) 2011 U.S.Dist. Lexis 92900, pp. \*16–\*17.)

The Jolley court reviewed recent federal and state legislation directed at aiding resident homeowners at risk of losing their homes through foreclosure, and concluded that, while the new legislation did not directly apply to construction loans, it “sets forth policy considerations that should affect the assessment whether a duty of care was owed to [the plaintiff] at that time.” (Jolley, supra, 213 Cal.App.4th at p. 905.) If the new legislation supports imposition of a duty of care on a construction lender, then it would support imposition of such a duty of care on a lender of home loans.

We disagree with Jolley to the extent it suggests a residential lender owes a common law duty of care to offer, consider, or approve a loan modification, or to explore and offer foreclosure alternatives. As the Jolley court recognized, “there is no express duty on a lender's part to grant a modification under state or federal loan modification statutes.” (Jolley, supra, 213 Cal.App.4th at p. 903.) In Aspiras v. Wells Fargo Bank, N.A. (2013) 219 Cal.App.4th 948, 952, 963–964 [162 Cal.Rptr.3d 230], the court distinguished Jolley and declined to impose a duty of care on an institutional lender in handling a loan modification. The Aspiras court agreed with the federal district courts that had held, “ ‘offering loan modifications is sufficiently entwined with money lending so as to be considered within the scope of typical money lending activities.’ ” (Aspiras v. Wells Fargo Bank, N.A., supra, at p. 964.)

We conclude a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. A lender's obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury, Fannie Mae, and other governmental or quasi-governmental agencies. The Biakanja factors do not support imposition of a common law duty to offer or approve a loan modification. If the modification was necessary due to the borrower's inability to repay the loan, the borrower's harm, suffered from denial of a loan modification, would not be closely connected to the lender's conduct. If the lender did not place the borrower in a position creating a need for a loan modification, then no moral blame would be attached to the lender's conduct.

B. Why the Allegations of the First Amended Complaint Do Not State a Cause of Action for Negligence

Accordingly, in this case, Bank of America and ReconTrust did not have a common law duty of care to offer, consider, or approve a loan modification, or to offer Lueras alternatives to foreclosure. Likewise, Bank of America and ReconTrust did not have a duty of care to handle Lueras's loan “in such a way to prevent foreclosure and forfeiture of his property.” Their rights, duties, and obligations in those regards were set forth in the note and deed of trust, the Forbearance Agreement, federal and state statutes and regulations, and the directives and announcements of the United States Department of the Treasury and Fannie Mae. (Cf. Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, 1154 [121 Cal. Rptr. 3d 819] [“ ‘Because of the exhaustive nature of [the nonjudicial foreclosure] scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.’ ”].)

Lueras did not allege Bank of America and ReconTrust did anything wrongful that made him unable to make the original monthly loan payments. Lueras did not allege Bank of America and ReconTrust caused or exacerbated his initial default by negligently servicing the loan. To the contrary, he alleged his inability to make the payments was caused by financial hardship due to the “drastically decreased … demand of his services of his contracting business” and his wife's loss of employment. Lueras's allegations that Bank of America and ReconTrust owed him duties to “follow through on their own agreements,” to comply with consumer protection laws, and to stop foreclosure sales that were unlawful fail to state a cause of action for negligence because such duties, if any, are imposed by the loan documents and the Forbearance Agreement, statutes, or regulations. If Bank of America and ReconTrust failed to “follow through” on those agreements, then Lueras's remedy lies in breach of contract, not negligence.

Thus, the First Amended Complaint did not, and cannot as a matter of law, state a claim for negligence based on Bank of America's alleged failure to offer Lueras a loan modification.

C. Basis for Granting Leave to Amend

We conclude, however, that a lender does owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale. The law imposes a duty not to make negligent misrepresentations of fact. (Civ. Code, § 1710, subd. 2 [defining “deceit” to include “[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true”]; Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 172–174 [132 Cal. Rptr. 2d 490, 65 P.3d 1255].) In a different context, courts have held a bank depositor can state a claim for negligent misrepresentation, based on a bank employee's incorrect statements about the settlement of a check. (Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc. (2011) 196 Cal.App.4th 1559, 1572–1573 [127 Cal. Rptr. 3d 589]; Holcomb v. Wells Fargo Bank, N.A. (2007) 155 Cal.App.4th 490, 498–500 [66 Cal. Rptr. 3d 142].) It is foreseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification application, and the connection between the misrepresentation and the injury suffered could be very close.[5[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Leave to amend must be granted if “there is a reasonable possibility that the defect can be cured by amendment … .” (City of Dinuba v. County of Tulare, supra, 41 Cal.4th at p. 865.) The First Amended Complaint generally alleged Bank of America failed to exercise “reasonable care and skill in timely and accurately responding to customer requests and inquiries.” Based on the record before us and on the grounds we have explained in detail, it is reasonably possible that Lueras could amend the First Amended Complaint to state a cause of action for negligent misrepresentation. We therefore reverse the judgment as to the negligence cause of action and remand to the trial court with directions to allow Lueras the opportunity to amend the First Amended Complaint to plead a cause of action for negligent misrepresentation.

II.  
  
Breach of Contract

In the second cause of action of the First Amended Complaint, for breach of contract, Lueras asserted two theories: (1) Bank of America breached the deed of trust by failing to tender him the difference between the amount of the indebtedness and the auction price of his home at the foreclosure sale and (2) Bank of America breached the Forbearance Agreement.[6[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Bank of America argues the first theory is no longer viable because the foreclosure sale has been rescinded. As we have explained, in reviewing the judgment, we are limited to the well-pleaded facts of the complaint and matters subject to judicial notice. (Zelig v. County of Los Angeles, supra, 27 Cal.4th at p. 1126.) The First Amended Complaint did not allege rescission of the foreclosure sale, no party has requested we take judicial notice of anything establishing such rescission, and no party has argued that statements of Lueras's counsel constitute judicial admissions.

Under the second theory, Lueras alleged Bank of America breached the Forbearance Agreement “by terminating the ‘Deferral Period’ although the Servicer (i) never executed the Agreement, (ii) never offered another resolution of any default such as a modification, pre-foreclosure sale or deed in lieu of foreclosure, or (iii) found Mr. Lueras [in] default under the program.”[7[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) In essence, Lueras alleged Bank of America breached the Forbearance Agreement by failing to offer him a loan modification or some other resolution that would avoid foreclosure before commencing or resuming foreclosure of his home. Because the trial court sustained without leave to amend a demurrer to the breach of contract cause of action, we accept as true the allegations of the breach of contract cause of action and the exhibits attached to the First Amended Complaint. (Sarale v. Pacific Gas & Electric Co., supra, 189 Cal.App.4th at p. 245.)

A. Relevant Principles of Contract Interpretation

The arguments presented require us to interpret parts of the Forbearance Agreement. “The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’ [Citations.]” (Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal.App.4th 944, 955 [135 Cal. Rptr. 2d 505].) Civil Code section 1638 states, “[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

“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 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.” (Id., § 1641.) “To the extent practicable, the meaning of a contract must be derived from reading the whole of the contract, with individual provisions interpreted together, in order to give effect to all provisions and to avoid rendering some meaningless.” (Zalkind v. Ceradyne, Inc. (2011) 194 Cal.App.4th 1010, 1027 [124 Cal. Rptr. 3d 105].)

B. Whether the Forbearance Agreement Was Binding

In a footnote in the respondents' brief, Bank of America states it “does not concede that the forbearance agreement constituted a binding contract, since Lueras admitted that Bank of America did not execute the agreement.” We may decline to address arguments made perfunctorily and exclusively in a footnote. (People v. Turner (1994) 8 Cal.4th 137, 214, fn. 19 [32 Cal. Rptr. 2d 762, 878 P.2d 521] [reviewing court may disregard claims perfunctorily asserted without development and without a clear indication they are intended to be discrete contentions]; Placer Ranch Partners v. County of Placer (2001) 91 Cal.App.4th 1336, 1343, fn. 9 [111 Cal. Rptr. 2d 577]; Opdyk v. California Horse Racing Bd. (1995) 34 Cal.App.4th 1826, 1830–1831, fn. 4 [41 Cal. Rptr. 2d 263].)

We nonetheless reject this argument on the merits for two reasons. First, Bank of America accepted payments during the deferral period and was entitled to receive a $200 incentive fee “upon successful reporting to Fannie Mae of the initiation of a HomeSaver Forbearance plan and the collection of one payment under the forbearance plan.” (Announcement 09-05R, supra, at p. 32 <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) Under those circumstances, Bank of America's failure to sign the Forbearance Agreement did not render it unenforceable. (Barroso v. Ocwen Loan Servicing, LLC (2012) 208 Cal.App.4th 1001, 1012–1013 [146 Cal. Rptr. 3d 90] [lender's failure to sign and return loan modification contract was not a condition precedent precluding formation of a binding contract].)

Second, while a forbearance agreement that modifies a note and deed of trust is subject to the statute of frauds (Secrest v. Security National Mortgage Loan Trust 2002-2 (2008) 167 Cal.App.4th 544, 552–554 [84 Cal. Rptr. 3d 275]), here, in contrast, the Forbearance Agreement states: “No Modification. I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents.” (Original boldface.) The statute of frauds was not raised in the demurrer to the First Amended Complaint.

Lueras argues the deferral period under the Forbearance Agreement has not ended and Bank of America continues to have an obligation under the Forbearance Agreement to suspend foreclosure and offer him assistance. The Forbearance Agreement states the deferral period, under which Lueras made reduced payments on the note, commences “on the date of this Agreement” and ends on the earliest of (1) six months from “the execution date by Servicer,” (2) “execution of an agreement with Servicer for another resolution of my default,” or (3) “my default under the terms of this Agreement.” According to Lueras, none of these events has occurred. Since Bank of America never signed the agreement, Lueras argues that six months from the execution date has not elapsed.

We reject the argument the deferral period under the Forbearance Agreement has not ended. Section 2 of the Forbearance Agreement sets forth a table showing the amount and due dates for six “Deferral Period Payment[s],” with the first payment due on September 16, 2009, and the final payment due on March 1, 2010. Following this table, the Forbearance Agreement sets forth the provision regarding the beginning and ending of the “Deferral Period.” Other than the six payments set forth in the table, the Forbearance Agreement identifies no other deferral period payments.[8[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) Since the Forbearance Agreement was not to be binding until signed by Bank of America, and the first deferral period payment was due on September 16, 2009, a reasonable inference is the parties anticipated and intended that Bank of America would sign the Forbearance Agreement by that date. Viewing section 2 of the Forbearance Agreement in light of the agreement as a whole, we conclude the parties intended the deferral period to end no later than six months from the due date of the first deferral period payment.

C. Bank of America's Obligations Under the Forbearance Agreement  
  
1. The Forbearance Agreement and Announcement 09-05R

Lueras's breach of contract cause of action is based primarily on section 2.C of the Forbearance Agreement, labeled “Additional Assistance” (boldface omitted). The first sentence of section 2.C states that “[d]uring the Deferral Period, Servicer[9[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) will review my Loan to determine whether additional default resolution assistance can be offered to me.” Section 2.C of the Forbearance Agreement then states that, at the end of the deferral period, one of five things will happen: (1) the borrower will be required to resume making regularly scheduled payments and to make additional payments until all past due amounts have been paid; (2) the loan will be reinstated in full; (3) the “Servicer will offer to modify my Loan”; (4) the “Servicer will offer me some other form of payment assistance or alternative to foreclosure, on terms to be determined solely by Servicer …”; or (5) “if no feasible alternative can be identified, Servicer may commence or continue foreclosure proceedings or exercise other rights and remedies provided Servicer under the Loan Documents.”

Section 2.C, on its face, thus expressly required Bank of America to “review” Lueras's loan to determine “whether additional default resolution assistance can be offered.” The Forbearance Agreement did not expressly require Bank of America to offer Lueras a loan modification or an alternative to foreclosure.

However, in 2009, Announcement 09-05R was issued to provide “additional policy clarification and instruction” on HAMP and the HomeSaver Forbearance program. (Announcement 09-05R, supra, at p. 1, boldface omitted <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) As to the HomeSaver Forbearance program, Announcement 09-05R states: “During the six month period of forbearance, the servicer should work with the borrower to identify the feasibility of, and implement, a more permanent foreclosure prevention alternative. The servicer should evaluate and identify a permanent solution during the first three months of the forbearance period and should implement the alternative by the end of the sixth month.” (Announcement 09-05R, supra, at p. 32, italics added.)

We conclude these provisions of Announcement 09-05R must be read into HomeSaver Forbearance agreements. West, supra, 214 Cal.App.4th 780, is instructive. In West, a panel of this court addressed whether a residential borrower stated a cause of action against a residential lender for breach of a trial period plan (TPP) under HAMP. (West, supra, at pp. 796–799.) The borrower alleged the lender had breached the TPP by failing to offer her a permanent loan modification after she had complied with all of the terms of the TPP. (Ibid.) The United States Department of the Treasury, HAMP supplemental directive 09-01 (Apr. 6, 2009) provides that if the borrower complies with all of the TPP's terms and conditions, the loan modification becomes effective on the first day of the month following the trial period. (West, supra, at p. 797.) Following Wigod v. Wells Fargo Bank, N.A. (7th Cir. 2012) 673 F.3d 547 (Wigod), a panel of this court held that if the borrower complies with all of the terms of the TPP, then the lender must offer the borrower a permanent loan modification. (West, supra, at pp. 796–799.) Although the TPP in West, unlike the one in Wigod, did not expressly include such a proviso, this court concluded it was imposed by the United States Department of the Treasury through HAMP supplemental directive 09-01. (West, supra, at p. 797.) To make the TPP lawful and enforceable, it had to be interpreted to include the requirements of that directive. (Id. at pp. 797–798.)

In Corvello v. Wells Fargo Bank, NA (9th Cir. 2013) 728 F.3d 878, 884, the Ninth Circuit Court of Appeals expressly agreed with Wigod and West to conclude: “Where, as here, borrowers allege, and we must assume, 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.” (See Chavez v. Indymac Mortgage Services (2013) 219 Cal.App.4th 1052, 1059 [162 Cal.Rptr.3d 382] [following Corvello v. Wells Fargo Bank, NA].) Even more recently, the Third District Court of Appeal also agreed with West and Wigod. (Bushell v. JPMorgan Chase Bank, N.A. (2013) 220 Cal.App.4th. 915.)

West dealt with a TPP under HAMP, and this case deals with a forbearance agreement under the HomeSaver Forbearance program. For that reason, Bank of America argues in its supplemental brief that West is inapplicable. While HAMP and the HomeSaver Forbearance program differ, the guiding principle of West—i.e., that a TPP under HAMP must be interpreted to include United States Department of the Treasury directives—is applicable here. Announcement 09-05R is similar to United States Department of the Treasury, HAMP supplemental directive 09-01 and sets forth “policy clarification and instruction” regarding the HomeSaver Forbearance program. (Announcement 09-05R, supra, at p. 1, boldface omitted <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) Bank of America does not assert it was not required to follow Announcement 09-05R. Thus, “the reasonable interpretation of the [Forbearance] Agreement—and the one necessary to make it lawful and in compliance with [the HomeSaver Forbearance program]” is that the Forbearance Agreement includes the obligations imposed by Announcement 09-05R. (West, supra, 214 Cal.App.4th at p. 798.)

2. The Meaning of “Should” in Announcement 09-05R

As quoted above, Announcement 09-05R states the lender “should work with the borrower” to identify and implement a permanent foreclosure prevention alternative, “should evaluate and identify” a permanent loan solution, and “should implement” the alternative by the end of the six-month deferral period. (Announcement 09-05R, supra, at p. 32, italics added <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) Bank of America argues the word “should” is permissive rather than mandatory and, therefore, Announcement 09-05R imposed no obligation on it to offer a loan modification or other alternative to foreclosure. In his supplemental brief, Lueras argues the word “should” must be interpreted to mean Bank of America “was obligated to evaluate and identify a permanent solution.”

What does “should” in this context mean? We start by consulting the dictionary.[10[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) According to Webster's Third New International Dictionary, “should” in auxiliary function can be used (1) “to express condition”; (2) “to express duty, obligation, necessity, propriety, or expediency”; (3) “to express futurity from a point of view in the past”; (4) in place of “might” or “could” (capitalization omitted) (archaic); (5) “to express what is probable or expected”; or (6) “to express a desire or request in a polite or unemphatic manner.” (Webster's 3d New Internat. Dict. (2002) p. 2104, cols. 2–3.) Black's Law Dictionary defines “should” to mean: “[T]he past tense of ‘shall,’ which ordinarily implies a command, but ‘should’ used in the present or future tense, while not synonymous with and more forceful than ‘may,’ can convey only a moral obligation or strong recommendation.” (Boam v. Trident Financial Corp. (1992) 6 Cal.App.4th 738, 745, fn. 6 [8 Cal. Rptr. 2d 177], citing Black's Law Dict. (6th ed. 1990) p. 1379.)

The California Rules of Court distinguish between the words “must,” “may,” “may not,” “will,” and “should.” (Cal. Rules of Court, rule 1.5(b).) Under the California Rules of Court, “ ‘[s]hould’ expresses a preference or a nonbinding recommendation,” while “ ‘[m]ust’ is mandatory,” “ ‘[m]ay’ is permissive,” and “ ‘[w]ill’ expresses a future contingency.” (Id., rule 1.5(b)(5), (1), (2) & (4).) Case law has defined “should” generally to mean a moral obligation or recommendation. (See Kucera v. Lizza (1997) 59 Cal.App.4th 1141, 1152 [69 Cal. Rptr. 2d 582] [“The words ‘may’ and ‘should’ are ordinarily permissive …”]; Boam v. Trident Financial Corp., supra, 6 Cal.App.4th at p. 745, fn. 6; Cuevas v. Superior Court (1976) 58 Cal.App.3d 406, 409 [130 Cal. Rptr. 238] [in Pen. Code, § 1538.5, subd. (b), “[t]he word ‘should’ is used in a regular, persuasive sense, as a recommendation, not as a mandate”].)

We agree with Bank of America the word “should” in Announcement 09-05R is not mandatory; however, we reject the notion the word “should” in that announcement is entirely permissive and imposes no responsibilities or obligations whatsoever on loan servicers. Under the variety of definitions offered, “should” in the very least imposes a moral obligation or a strong recommendation, and can mean a duty or necessity. Interpreting “should” as imposing some obligation on the loan servicer is in keeping with the purpose of Announcement 09-05R, which was issued to provide policy clarification and instruction to loan servicers for implementation of the HomeSaver Forbearance program. The sense of moral obligation, strong recommendation, preference, or propriety imparted by the word “should” equates with good faith; that is, although Bank of America had no contractual duty to offer Lueras a loan modification or an alternative to foreclosure, it had a contractual duty to work with him to identify the feasibility of, and implement, a foreclosure prevention alternative, and to do so in good faith.

The duty to act in good faith in working with a borrower is imposed expressly in the Forbearance Agreement through Announcement 09-05R and by the implied covenant of good faith and fair dealing. Every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement such that neither party may do anything to deprive the other party of the benefits of the contract. (Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 371 [6 Cal. Rptr. 2d 467, 826 P.2d 710]; Kendall v. Ernest Pestana, Inc. (1985) 40 Cal.3d 488, 500 [220 Cal. Rptr. 818, 709 P.2d 837]; Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (2002) 100 Cal.App.4th 44, 55 [122 Cal. Rptr. 2d 267].) “ ‘This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.’ ” (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 798, p. 892.)

“The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.” (Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., supra, 2 Cal.4th at p. 372.) Accordingly, while the word “should” as used in Announcement 09-05R gives a loan servicer discretion to work with a borrower to identify the feasibility of a foreclosure prevention alternative, and to evaluate and implement a permanent solution, that discretionary power must be exercised in good faith.

As it stands, the First Amended Complaint alleged Bank of America “never offered another resolution of any default such as a modification, pre-foreclosure sale or deed in lieu of foreclosure.” Although the Forbearance Agreement did not impose on Bank of America the obligation to offer Lueras a loan modification or an alternative to foreclosure, we conclude Lueras should be given leave to amend to state a claim for breach of contract in light of our interpretation of the Forbearance Agreement.

D. Damages

Bank of America argues Lueras failed to allege damages from breach of the Forbearance Agreement. In the First Amended Complaint, Lueras alleged that, as a result of Bank of America's breach of contract, he sustained damages of at least $25,000, “representing moni[e]s collected by Defendants during the ‘special forbearance’ time period and on the sale plus the amount of late fees and charges incurred on the loan as a result of Defendants' breach.” The payments made by Lueras during the deferral period do not constitute contractual damages because they would have been owed under the note and deed of trust in absence of the Forbearance Agreement.

In this opinion, the rights and obligations under the Forbearance Agreement are being identified and described in a definitive way for the first time. Lueras has not had the opportunity to formulate and allege a theory of damages based on our construction of the Forbearance Agreement. We certainly cannot say at this stage that Lueras is unable as a matter of law to allege breach of contract damages. As there is “a reasonable possibility” (City of Dinuba v. County of Tulare, supra, 41 Cal.4th at p. 865) that Lueras could amend to allege recoverable damages, leave to amend must be granted.

III.  
  
Violation of Civil Code Section 2923.5

In his third cause of action of the First Amended Complaint, Lueras alleged Bank of America and ReconTrust violated Civil Code section 2923.5 because they “did not initiate exploration of foreclosure alternatives with [him] until after a Notice of Default was recorded on the property placing [him] in imminent foreclosure.” In Mabry v. Superior Court (2010) 185 Cal.App.4th 208, 213–214 [110 Cal. Rptr. 3d 201], this court held: “Civil Code section 2923.5 requires, before a notice of default may be filed, that a lender contact the borrower in person or by phone to ‘assess’ the borrower's financial situation and ‘explore’ options to prevent foreclosure.” The only remedy afforded by section 2923.5 is, however, a one-time postponement of the foreclosure sale before it happens. (Mabry v. Superior Court, supra, at pp. 214, 225, 235.)

The First Amended Complaint did not seek postponement of the foreclosure sale and alleged the sale had been conducted. The third cause of action therefore did not state and cannot as a matter of law state a claim for violation of Civil Code section 2923.5.

IV.  
  
Fraud/Misrepresentation

In the fourth cause of action of the First Amended Complaint, Lueras alleged Bank of America committed fraud and “led [him] to believe that [his] home would not be sold in May 2011 and that it wanted to help [him] maintain ownership of [his] home.” The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (Lazar v. Superior Court (1996) 12 Cal.4th 631, 638 [49 Cal. Rptr. 2d 377, 909 P.2d 981].)

The First Amended Complaint alleged Bank of America made the following false representations:

1. “Bank of America represented it wanted to help plaintiffs maintain ownership of their home through the language of the [Forbearance A]greement which states ‘Under the HomeSaver Forbearance program, we are working with Fannie Mae, a government sponsored enterprise, to reduce your mortgage payment by up to 50% for up to 6 months while we work with you to find a long-term solution. This is not a permanent payment reduction, but it will allow you to stay in your home as we work together to find a solution.’”

2. “The [Forbearance] Agreement reinforced the representation that Bank of America and Fannie Mae would work with Mr. Lueras to find ‘a long term solution’ on the second page where it stated the Deferral Period would continue until ‘execution of an agreement with Servicer for another resolution of my default … .’ ”

3. “Bank of America led plaintiff to believe that defendants were going to work with [him] so [he] could stay in [his] home so long as [he] made the requested payments.”

4. “[O]n May 5, 2011[,] Bank of America sent another letter stating it would contact Mr. Lueras in 10 days to explore alternatives to foreclosure.”

5. “Bank of America concealed the fact that it was not going to identify a long term solution in order to ‘save’ Mr. Lueras'[s] home from foreclosure.”

The First Amended Complaint did not allege any misrepresentations attributed to Fannie Mae.

The First Amended Complaint alleged Lueras was led to believe “a long-term solution to keep [him] in [his] home was being worked on” and that his “home would not be sold in May 2011.” The First Amended Complaint alleged Lueras did the following in reliance on the alleged misrepresentations:

1. Lueras “continued to make the payments” on the loan.

2. He “[took] the time and t[ook] on the extra burden and expense of compiling and providing the information requested [in] which [he] had a right to privacy” and he “would not have spent [his] valuable money, time and efforts in attempting to modify [his] loan with Bank of America prior to default, if [he] had known that [he] would not have had a genuine opportunity to modify.”

These allegations do not allege detrimental reliance. Continuing to make payments on the loan (reduced under the Forbearance Agreement) does not constitute detrimental reliance because Lueras already had the obligation to make those payments. In Auerbach v. Great Western Bank (1999) 74 Cal.App.4th 1172 [88 Cal. Rptr. 2d 718], the plaintiffs asserted that a bank's promise to engage in good faith negotiations to modify a loan caused the plaintiffs to continue making payments on a note secured by undervalued property. The court rejected that theory because the plaintiffs had a contractual obligation to make payments on the note, notwithstanding the bank's promise to renegotiate its terms. (Id. at pp. 1185–1187.)

Time and effort spent assembling materials for an application to modify a loan is the sort of nominal damage subject to the maxim de minimis non curat lex—i.e., the law does not concern itself with trifles. (Black's Law Dict. (9th ed. 2009) p. 496, col. 2; see Civ. Code, § 3533 [“The law disregards trifles.”]; Merrill v. Hurlburt (1883) 63 Cal. 494, 497 [“Considering the amount involved in the action we cannot say we ought to affirm the judgment upon the maxim de minimis, etc.”]; McAllister v. Clement (1888) 75 Cal. 182, 184 [16 P. 775] [nominal damages not recoverable under maxim de minimis non curat lex]; Wolff v. Prosser (1887) 73 Cal. 219, 220 [14 P. 852] [maxim de minimis non curat lex applies to damages of $10]; Harris v. Time, Inc. (1987) 191 Cal.App.3d 449, 458 [237 Cal. Rptr. 584] [“the present action is ‘de minimis’ in the extreme”].)

Nevertheless, the exhibits attached to the First Amended Complaint—including the Forbearance Agreement, the May 5, 2011 letter, and the May 6, 2011 letter—demonstrate there is a reasonable possibility the defects in the fraud cause of action can be cured by amendment. In the May 5, 2011 letter, Bank of America informed Lueras any pending foreclosure sale would be “on hold” while he was being considered for other foreclosure avoidance programs. Whitaker, a Bank of America representative, told him the May 5 letter was sent in error and he had been approved for a loan modification. In the May 6, 2011 letter, Bank of America informed Lueras it was reviewing his financial documents to determine whether he was eligible for a HAMP loan modification. When Lueras contacted Bank of America about the May 6 letter, Whitaker told him the trustee's sale, which had been rescheduled for May 18, 2011, would be reset, pending approval by Fannie Mae of his loan modification. Despite the express representation in the May 5 letter that no foreclosure sale would proceed, and Whitaker's oral representation that the sale would be reset, the foreclosure sale was conducted on May 18.[11[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

As explained above, Bank of America argues the trustee's sale conducted on May 18, 2011 was rescinded, and, therefore, Lueras suffered no damages. Even if we were to assume the trustee's sale was rescinded, we could not say as a matter of law that Lueras suffered no damages as a result of Bank of America's actions.

V.  
  
Unfair and Unlawful Practices

In the fifth cause of action of the First Amended Complaint, Lueras alleged Bank of America engaged in “deceptive business practices” in violation of California's unfair competition law (UCL), Business and Professions Code section 17200 et seq. He alleged Bank of America engaged in deceptive practices “with respect to mortgage loan servicing, foreclosure of residential properties and related matters” in violation of the UCL.

Bank of America argues Lueras failed to allege it engaged in any unlawful, unfair, or fraudulent practices. Bank of America also argues the trial court was correct in concluding Lueras lacked standing to sue under Business and Professions Code section 17204 (section 17204).

A. The UCL

The UCL permits civil recovery for “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising … .” (Bus. & Prof. Code, § 17200.) “ ‘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. …’ ” (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180 [83 Cal. Rptr. 2d 548, 973 P.2d 527].)

By defining “unfair competition” to include any unlawful act or practice, the UCL permits violations of other laws to be treated as independently actionable as unfair competition. (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at p. 180.) “ ‘[A]n “unfair” business practice occurs when that practice “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” [Citation.]’ [Citation.]” (Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 719 [113 Cal. Rptr. 2d 399].) An unfair business practice also means “ ‘the public policy which is a predicate to the action must be “tethered” to specific constitutional, statutory or regulatory provisions.’ ” (Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940 [134 Cal. Rptr. 2d 101].) A fraudulent practice under the UCL “require[s] only a showing that members of the public are likely to be deceived” and “can be shown even without allegations of actual deception, reasonable reliance and damage.” (Daugherty v. American Honda Motor Co., Inc. (2006) 144 Cal.App.4th 824, 838 [51 Cal. Rptr. 3d 118].)

B. Standing

Before addressing Lueras's specific allegation of unlawful, unfair, or fraudulent practices, we address the threshold issue whether Lueras has alleged standing to assert a UCL claim. To have standing to sue under the UCL, a private plaintiff must allege he or she “has suffered injury in fact and has lost money or property.” (§ 17204.) In Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 322 [120 Cal. Rptr. 3d 741, 246 P.3d 877] (Kwikset), the California Supreme Court held that to satisfy the standing requirement of section 17204, 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 that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.” A UCL claim will survive a demurrer based on standing if the plaintiff can plead “ ‘general factual allegations of injury resulting from the defendant's conduct.’ ” (Kwikset, supra, at p. 327.)

The Kwikset court held a plaintiff can satisfy the economic injury prong of the standing requirement in “innumerable ways” but listed four injuries that would qualify under section 17204: (1) the plaintiff surrendered more or acquired less in a transaction than the plaintiff otherwise would have; (2) the plaintiff suffered the diminishment of a present or future property interest; (3) the plaintiff was deprived of money or property to which the plaintiff had a cognizable claim; or (4) the plaintiff was required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. (Kwikset, supra, 51 Cal.4th at p. 323.)

Bank of America argues Lueras cannot allege the threshold standing requirement because he had been in default for years before suing and his monthly payment under the Forbearance Agreement was less than his monthly payment under the note and deed of trust.[12[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) The First Amended Complaint failed to allege that Lueras lost any out-of-pocket money as a result of Bank of America's acts of alleged deceptive practices, except for costs incurred in preparing and assembling materials for his application for a loan modification. We have deemed such costs to be de minimis, and they are not sufficient to qualify as injury in fact under section 17204.

But the allegation that Lueras's home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of section 17204. (See Jenkins v. JPMorgan Chase Bank, N.A. (2013) 216 Cal.App.4th 497, 522 [156 Cal. Rptr. 3d 912] (Jenkins) [allegation of impending foreclosure and loss of home satisfies economic injury requirement].) Sale of a home through a foreclosure sale is certainly a deprivation of property to which a plaintiff has a cognizable claim. (See Kwikset, supra, 51 Cal.4th at p. 323.) Lueras must also satisfy the “caused by” prong of the section 17204 standing requirement—i.e., show “plaintiff's economic injury [occurred] ‘as a result of’ the unfair competition … .” (Kwikset, supra, at p. 326.) The First Amended Complaint did not allege any such “ ‘causal connection’ ” (ibid.) between Bank of America's allegedly unlawful, unfair, or fraudulent conduct and Lueras's economic injury.

The question is whether Lueras should be granted leave to amend to try to satisfy the “caused by” prong. We believe there is a reasonable possibility that Lueras can cure the defect in the First Amended Complaint. As we explained in addressing the fraud cause of action, Bank of America informed Lueras any pending foreclosure sale would be “on hold” while he was being considered for other foreclosure avoidance programs. Whitaker of Bank of America told him the May 5, 2011 letter was sent in error and he had been approved for a loan modification. Lueras was told the foreclosure sale was to be rescheduled pending Fannie Mae's approval of his loan modification. Those allegations suggest Lueras can amend his UCL cause of action to allege Bank of America's misrepresentations caused him to lose his home through foreclosure. In addition, Lueras might be able to allege Bank of America did not work with him in good faith to evaluate and try to identify and implement a permanent solution, as a consequence of which he lost his home through foreclosure.

In Jenkins, supra, 216 Cal.App.4th at pages 519–521, the plaintiff alleged the defendants' unlawful, unfair, and fraudulent business practices caused her home to be subject to foreclosure. The Court of Appeal held the plaintiff failed to satisfy the “caused by” prong because she admitted in her complaint that she defaulted on her loan, thereby triggering the power of sale clause in the deed of trust that made her home subject to foreclosure. (Id. at pp. 522–523.) The court explained: “As [the plaintiff]'s home was subject to nonjudicial foreclosure because of [the plaintiff]'s default on her loan, which occurred before Defendants' alleged wrongful acts, [the plaintiff] cannot assert the impending foreclosure of her home (i.e., her alleged economic injury) was caused by Defendants' wrongful actions. Thus, even if we assume [the plaintiff]'s third cause of action alleges facts indicating Defendants' actions violated at least one of the UCL's three unfair competition prongs (unlawful, unfair, or fraudulent), [the plaintiff's complaint] cannot show any of the alleged violations have a causal link to her economic injury.” (Id. at p. 523.)

This case is similar to Jenkins in that Lueras's default on the loan, not any conduct on the part of Bank of America, triggered foreclosure proceedings. Jenkins is distinguishable, however, because, in this case, Lueras might be able to allege that Bank of America's alleged misrepresentations about his loan modification and the status of the foreclosure sale, or Bank of America's failure to work with him in good faith to identify and to try to implement a permanent solution, caused him to lose his home through a foreclosure sale.

C. Whether Lueras Alleged Unlawful, Unfair, or Fraudulent Practices  
  
1. Allegations of UCL Violations

Since, we conclude, Lueras should be given leave to amend to allege standing, we address whether he has alleged in the First Amended Complaint unlawful, unfair, or fraudulent practice on the part of Bank of America. Lueras alleged Bank of America violated the UCL in these nine ways:

1. “Refusing to offer a ‘resolution’ of the default after leading [Lueras] to believe that the ‘HomeSaver’ agreement would lead to another agreement that would [c]ure the Arrearages (which they never disclosed in amount) … .”

2. “Selling the home at foreclosure within 30 days of receiving the written denial of modification in violation of the Making Home Affordable Guidelines.”

3. “Failing to stop the foreclosure process when Fannie Mae and Bank of America agreed to permanently modify Mr. Lueras['s] loan in May 2011 in violation of federal regulations that prohibit dual tracking.”

4. “Failing to explore foreclosure alternatives with Mr. Lueras prior to filing the Notice of Default in violation of Civ[il] Code §2923.5 and the HomeSaver plan guidelines … .”

5. “Inserting deceitful language in the forbearance plan using phrases such as ‘HomeSaver’ ‘long term solution[’] and ‘resolution of my default’ leading the public and … Lueras to believe that they were going to be offered some type of permanent solution so that they could save their home if they signed the agreement, supplied the information requested and made all of the payments on time.”

6. “Failing to make a determination or identify a permanent solution so that the public like … Lueras could save their home[s] by the third month of the plan in violation of the HomeSaver Guidelines quoted above in breach of industry standards set by 15 [United States Code section] 1639a.”

7. “Falsely representing that … Lueras did not qualify for HAMP modification when, in fact … Lueras did qualify for a HAMP modification in breach of industry standards set by 15 [United States Code section] 1639a.”

8. “Auctioning off the home for less than the amount owed, yet refusing to reduce the principal which would have resulted in a positive NPV [(net present value)] in breach of industry standards set by 15 [United States Code section] 1639a.”

9. “Representing in the May 16, 2011[13[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) letter by Bank of America to Mr. Lueras that ‘once we have finished reviewing your information, we will contact you within 10 days to let you know what other options are available to you and the next steps you need to take’ then selling the home within 10 days at foreclosure auction without contacting Mr. Lueras and providing other options in breach of industry standards set by 15 [United States Code section] 1639a.”

2. Sufficiency of the Allegations of UCL Violations

Nos. 1, 4, 5, 6, and 8 do not constitute unlawful, unfair, or fraudulent practices. As to Nos. 1, 5, and 6, the Forbearance Agreement did not require Bank of America to offer Lueras a loan modification or other alternative to foreclosure. We find nothing in the Forbearance Agreement or the HomeSaver Forbearance program, which would mislead a borrower into believing “they were going to be offered some type of permanent solution” merely by signing the agreement and making the deferral period payments. Bank of America's August 2009 letter informed Lueras the bank was working with Fannie Mae to reduce his mortgage payment by up to 50 percent “for up to 6 months.” The Forbearance Agreement explicitly stated that, at the end of the deferral period, Bank of America could resume foreclosure. The Forbearance Agreement explicitly stated, “I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents.” (Boldface omitted.) Nothing in the Forbearance Agreement would mislead a borrower into believing Bank of America would always determine or identify a permanent solution to “save” the borrower's home.

Although the Forbearance Agreement did not require Bank of America to offer Lueras a loan modification, we concluded above that the Forbearance Agreement did impose on Bank of America the duty to act in good faith to evaluate and try to identify a permanent solution during the first three months of the forbearance period, and to implement an identified alternative by the end of the sixth month. In light of this interpretation of the Forbearance Agreement, Lueras should be given leave to amend his UCL cause of action.

As to No. 4—failure to explore foreclosure alternatives—we concluded above that Lueras failed to state a cause of action for violation of Civil Code section 2923.5. No. 8—selling Lueras's home for less than the amount owed—does not state a UCL claim because Lueras alleged in the breach of contract cause of action that Bank of America sold his home for more than the amount of the indebtedness and failed to tender him the difference. The breach of contract allegations were incorporated into the UCL cause of action.

Nos. 2, 3, 7, and 9 do allege facts which, if true, would constitute fraudulent and/or unfair practices. It is fraudulent or unfair for a lender to proceed with foreclosure after informing a borrower he or she has been approved for a loan modification, or telling the borrower he or she will be contacted about other options and the borrower's home will not be foreclosed on in the meantime, as represented in the May 5 letter. It is fraudulent or unfair for a lender to misrepresent the status or date of a foreclosure sale. In this case, Lueras alleged he contacted Bank of America about the May 6, 2011 letter, was informed he had already been approved for a loan modification, and was told the trustee's sale, which had been rescheduled for May 18, 2011, would be reset pending approval by Fannie Mae of the loan modification.

Bank of America argues that recent legislation (known as the “California Homeowner Bill of Rights”) that prohibits the practice of “dual tracking” was not effective in 2011 and is not to be applied retroactively.[14[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) Lueras argues the California Homeowner Bill of Rights demonstrates that Bank of America's conduct, though not unlawful at the time, “was unfair and/or fraudulent.” We do not address either argument because Lueras alleged that Bank of America engaged in conduct that amounted to fraudulent practices, independent of the California Homeowner Bill of Rights.

VI.  
  
Quiet Title

In the sixth cause of action of the First Amended Complaint, Lueras sought to quiet title to the property and alleged, “[t]he claims of defendants are without any right whatever and such defendants have no right or interest in the Subject Property.” A borrower may not, however, quiet title against a secured lender without first paying the outstanding debt on which the mortgage or deed of trust is based. (Miller v. Provost (1994) 26 Cal.App.4th 1703, 1707 [33 Cal. Rptr. 2d 288] [“mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee”]; Aguilar v. Bocci (1974) 39 Cal.App.3d 475, 477 [114 Cal. Rptr. 91] [borrower cannot quiet title without discharging the debt].) The cloud on title remains until the debt is paid. (Burns v. Hiatt (1906) 149 Cal. 617, 620–622 [87 P. 196].)

Lueras does not challenge the validity of the underlying debt. He alleged he refinanced his home for $385,000 in 2007 and he executed a deed of trust to secure the loan. Instead, he argues tender of the indebtedness is not required to quiet title because (1) making payments under the Forbearance Agreement constituted a tender of the debt, and (2) tender would not have been required to halt or set aside a foreclosure sale.

As to the first argument, making the monthly payments required under the Forbearance Agreement would not constitute full payment of the outstanding loan. As to the second argument, full tender of the indebtedness must be made to set aside a foreclosure sale based on irregularities in the foreclosure procedure. (Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 103–104 [134 Cal. Rptr. 3d 622].) Full tender of the indebtedness is not required if the borrower attacks the validity of the underlying debt. (Id. at pp. 112–113.) Lueras is not seeking to set aside the foreclosure sale, nor is he challenging the validity of the underlying debt.

In his supplemental brief, Lueras argues Pfeifer v. Countrywide Home Loans, Inc. (2012) 211 Cal.App.4th 1250 [150 Cal. Rptr. 3d 673] supports his contention that tender of the indebtedness was unnecessary to maintain the quiet title action. In Pfeifer, the Court of Appeal held that the borrowers stated a claim for wrongful foreclosure and declaratory and injunctive relief, based on allegations the lenders failed to comply with certain face-to-face interview requirements imposed by the Federal Housing Administration deed of trust before conducting an otherwise valid nonjudicial foreclosure. (Id. at p. 1255.) The face-to-face interview and other servicing requirements imposed by federal regulations were conditions precedent to acceleration of the debt and foreclosure. (Ibid.) The Court of Appeal concluded the borrowers were not required to tender the indebtedness before seeking to enjoin the foreclosure sale because “to permit a foreclosure when the lender has not complied with the requirements that may have prevented any need for a foreclosure would defeat a salient purpose of the … regulations.” (Id. at p. 1280.) In addition, tender of the indebtedness is required only to set aside a completed sale, and is not required in an action to prevent a foreclosure sale. (Ibid.)

Pfeifer v. Countrywide Home Loans, Inc. and the other tender cases are inapplicable here because Lueras has not sued to set aside or prevent a foreclosure sale. In the sixth cause of action, he sought to quiet title to the property, which he cannot do without paying the outstanding indebtedness.

Disposition

The judgment in favor of Fannie Mae is affirmed. The judgment as to the causes of action for violation of Civil Code section 2923.5 and to quiet title is affirmed. In all other respects, the judgment in favor of Bank of America and ReconTrust is reversed and the matter is remanded to the trial court with directions to grant Lueras leave to file an amended complaint. Lueras shall recover costs incurred on appeal.

Ikola, J., concurred.

Concur by: THOMPSON  
  
Dissent by: THOMPSON

**Dissent**

THOMPSON, J., Concurring and Dissenting.—I concur in those portions of the majority opinion which conclude the trial court correctly sustained the demurrers to the first amended complaint, because Lueras did not state any viable cause of action. I respectfully dissent from those portions of the majority opinion which conclude the trial court incorrectly denied leave to amend, because Lueras did not demonstrate a reasonable possibility he can state any viable cause of action. Therefore, the trial court did not abuse its discretion and the judgment should be affirmed in all respects.

INTRODUCTION

There are three core areas of disagreement between my views and the views expressed by my colleagues in the majority opinion.

First, the majority refuses to acknowledge what the parties themselves do not dispute—there is no foreclosure upon which this wrongful foreclosure action can be based. Lueras admitted the trustee's sale was rescinded before the trustee's deed was recorded, and Lueras alleged he was never deprived of ownership or possession of his home. The trial court properly considered these facts when ruling on the demurrers and we are required to do the same when reviewing the propriety of those rulings. The consequence of the majority's refusal to do so is akin to allowing a wrongful death action to proceed when the alleged victim did not die.

Second, despite recognizing the long-standing rule that a residential lender does not owe any duty of care to a borrower, the majority stretches to create an exception, and concludes a residential lender does owe a duty of care to not make misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale. There is no such exception. Furthermore, the majority fails to analyze whether Lueras pleaded or demonstrated a reasonable possibility he can plead facts sufficient to establish the elements of a negligent misrepresentation cause of action against Bank of America. Lueras did not and cannot plead any such facts.

Third, the majority concedes the breach of contract cause of action is hopelessly deficient, but asserts the provisions of Fannie Mae Announcement 09-05R (Announcement 09-05R) must be “read into” the forbearance agreement to circumvent those deficiencies. The majority cites no case which has followed this approach or found a borrower has a private contractual right to sue a lender for money damages based upon alleged noncompliance with Announcement 09-05R. Moreover, this approach violates basic principles of contract law and injects uncertainty into California residential lending.

FACTS  
  
A. Lueras's Factual Allegations

The majority summarizes some of the factual allegations, and fails to note many of the glaring factual omissions in the verified first amended complaint. All of the factual allegations and omissions I find material are set out below. Of necessity there is some repetition, but only to keep everything in proper context.

Lueras owned the property (Property) and occupied it as his primary residence at all relevant times, through and including the date on which the first amended complaint was filed. Lueras did not allege he ever was deprived of ownership or possession of the Property.

In March 2007, Lueras refinanced the Property with a 30-year adjustable rate $385,000 loan (Loan) originated by Gateway Business Bank (Gateway). Gateway, a potentially indispensable party, was not named as a defendant in the first amended complaint and is not a party to this appeal.

The Loan was evidenced by a promissory note (Note) and secured by a deed of trust (Deed of Trust) which encumbered the Property. The Deed of Trust was attached to the first amended complaint.

Lueras did not allege Gateway subsequently retained or sold the Note and the beneficial interest under the Deed of Trust. Thus, the identity of the current lender under the Note and Deed of Trust (collectively Loan Documents) is uncertain.

Bank of America (as successor to Countrywide Home Loans Servicing) was the servicer of the Loan. Lueras did not allege Bank of America was a party to the Loan Documents.

Lueras did not allege Fannie Mae was a party to the Loan Documents. Moreover, Lueras did not allege the Loan was owned or insured by Fannie Mae.

Lueras's regular monthly payment on the Loan was $1,965.10. Lueras has not made a full regular monthly payment on the Loan since December 2008.

In August 2009, more than eight months after Lueras stopped making regular monthly payments on the Loan, Bank of America offered him a forbearance agreement (Forbearance Agreement) and Lueras accepted.

Fannie Mae is not a party to the Forbearance Agreement.

The Forbearance Agreement required Lueras to make reduced monthly payments on the Loan in the amount of $1,101.16 during the deferral period. Bank of America agreed to apply these reduced monthly payments to the delinquent full regular monthly payments on the Loan.

The Forbearance Agreement provides, “The Servicer will suspend any scheduled foreclosure sale, provided I continue to meet the [reduced monthly payment] obligations under this [Forbearance] Agreement.”

The Forbearance Agreement also provides, “If this Agreement terminates, however, then any pending foreclosure action … may be immediately resumed from the point at which it was suspended, and no new notice … will be necessary to continue the foreclosure action, all rights to such notices being hereby waived … .”

Lueras agreed, “Upon termination of this [Forbearance] Agreement, if I have not entered into another agreement with Servicer to cure or otherwise resolve my default under the Loan Document [sic] or reinstated my Loan in full, the Servicer will have all of the rights and remedies provided by the Loan Documents … .”

Lueras acknowledged, “I further understand and agree that the Servicer is not obligated or bound to make any modification of the Loan Documents or provide any other alternative resolution of my default under the Loan Documents.”

Lueras made reduced payments on the Loan during the six-month deferral period under the Forbearance Agreement beginning in September 2009 and ending in March 2010, and “beyond for four more months.”

Lueras has not made any payment on the Loan since July 2010.

In October 2010, more than three months after Lueras stopped making reduced monthly payments, and more than 22 months after he stopped making regular monthly payments, ReconTrust Company (ReconTrust) recorded and served a Notice of Default (the Notice of Default) on Lueras.

The Notice of Default advised Lueras of his rights under the Loan Documents to cure the payment default and reinstate the Loan to avoid acceleration and sale. Lueras did not allege he exercised his right to pay the delinquent amount, cure the default, and reinstate the Loan.

The Notice of Default also advised Lueras, “Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.” Lueras did not allege he tried to sell the Property prior to the trustee's sale.

In February 2011, more than six months after Lueras stopped making reduced monthly payments, and more than 25 months after Lueras stopped making regular monthly payments, ReconTrust recorded and served a Notice of Trustee's Sale (Notice of Sale).

The trustee's sale was originally set for February 22, 2011, and was subsequently postponed three times to “3/2/11, 4/1/11, and 5/4/11.”

On May 5, 2011, Bank of America sent Lueras a letter stating he did not qualify for a modification under the Home Affordable Modification Program (HAMP).

Immediately after receiving the May 5 letter, “[Lueras] contacted Nancy Whitaker at Bank of America who advised plaintiffs [sic] that that letter was sent by a third party ‘home retention’ vendor and was an error. Ms. Whitaker further advised that plaintiffs were put into a program that was already approved … [and s]he just needed Fannie Mae's approval.”

On May 6, 2011, Bank of America sent Lueras another letter stating his financial documents were being reviewed to determine if he qualified for a HAMP modification.

Immediately after receiving the May 6 letter, Lueras contacted Bank of America and was “informed this letter was sent in error as plaintiffs [sic] had already ‘been approved’ by the bank. Nancy Whitaker of Bank of America advised that the scheduled Trustee's Sale of May 18, would be reset, pending approval of FANNIE MAE.”

Lueras implied but did not allege there was an “actual sale” on May 18, 2011. Lueras also did not allege he was deprived of ownership or possession of the Property as a result of that sale.

Lueras did allege he retained ownership and possession of the Property at all relevant times up to and including the date the first amended complaint was filed.

B. Lueras's Factual Admissions

Lueras repeatedly admitted the trustee's sale was rescinded before the trustee's deed was recorded. These admissions were made in his written briefs and oral arguments both in the trial court and in this court, all as described below.

In his opposition to the demurrers to the original complaint, Lueras admitted “after this lawsuit was filed the trustee was able to rescind” the trustee's sale.

At the hearing on the demurrers to the original complaint, counsel for Lueras admitted, “I should inform the court that the sale was rescinded, so we are now at pre-foreclosure status. ”

Similarly, in his opposition to the demurrers to the first amended complaint, Lueras again admitted, “after this lawsuit was filed the trustee was able to rescind” the trustee's sale.

And, at the hearing on the demurrers to the first amended complaint, counsel for Lueras admitted, “as the court properly noted in the tentative ruling, there was a rescission in this case.”

In his opening brief on appeal, Lueras admitted, “after this lawsuit filed, the trustee was able to rescind” the trustee's sale; “the [trial] court focused on the sale that was rescinded after the litigation ensued”; and “as the [trial c]ourt noted, the sale had been rescinded.”

Likewise, in his reply brief on appeal, Lueras admitted and argued, “[t]he rescission of the trustee's deed upon [sic] does not moot Mr. Lueras' claims”; “after the lawsuit was filed, BANA [Bank of America] rescinded the trustee's deed upon sale”; and “the trustee's deed upon sale was not recorded … .”

Finally, at oral argument in this court, counsel for Lueras admitted there is no record of the trustee's sale, the trustee's deed was never recorded, and Lueras still has title to and possession of the Property.

DISCUSSION  
  
A. Standard of Review and Lueras's Burden on Appeal

“When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained 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. [Citation.]” (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58].)

“ ‘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 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.]’ ” (Rossberg v. Bank of America, N.A. (2013) 219 Cal.App.4th 1481, 1491 [162 Cal.Rptr.3d 525].)

No authority commands or even suggests these pleading requirements do not apply unless the plaintiff has been given more than two bites at the apple. We are required to affirm the ruling if there is any ground on which the demurrer could have been properly sustained. (Scott v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 743, 752 [154 Cal. Rptr. 3d 394].) Also, leave to amend should not be granted where an amendment would be futile. (Newell v. State Farm General Ins. Co. (2004) 118 Cal.App.4th 1094, 1100 [13 Cal. Rptr. 3d 343].) It is axiomatic, “The law neither does nor requires idle acts.” (Civ. Code, § 3532.)

B. Factual Allegations, Judicial Notice and Factual Admissions

We accept the factual allegations of the verified first amended complaint as true. “ ‘We also consider matters which may be judicially noticed.’ (Serrano v. Priest (1971) 5 Cal.3d 584, 591 [96 Cal. Rptr. 601, 487 P.2d 1241].)” (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.) To that end, I take judicial notice (Evid. Code, § 452, subd. (d)) the trial court's final minute order ruling on the demurrers expressly relied upon the fact that “plaintiff admits in the Opposition that the foreclosure sale was rescinded.”

We also take into account briefs and arguments, which are “reliable indications of a party's position on the facts as well as the law, and a reviewing court may use statements in them as admissions against the party. [Citations.]” (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 335, p. 386.) Likewise, “[a]n express concession or assertion in a brief is frequently treated as an admission of a legal or factual point, controlling in the disposition of the case. [Citations.]” (Id., § 704, p. 773.)

One court citing Witkin held an admission in the opening brief was “the equivalent of a concession,” which, taken together with the failure to allege a necessary element, “controls the disposition of the case.” (Federer v. County of Sacramento (1983) 141 Cal.App.3d 184, 186 [190 Cal. Rptr. 187].) Another court also citing Witkin relied on concessions made by the plaintiff's counsel during oral argument to show there was no basis for a cause of action. (DeRose v. Carswell (1987) 196 Cal.App.3d 1011, 1019, fn. 3 [242 Cal. Rptr. 368], superseded by statute on another ground as stated in Ramona v. Superior Court (1997) 57 Cal.App.4th 107, 112–113, fn. 6 [66 Cal. Rptr. 2d 766].)

In Brandwein v. Butler (2013) 218 Cal.App.4th 1485 [161 Cal. Rptr. 3d 728] the court affirmed an order sustaining a demurrer without leave to amend, and expressly relied on the factual allegations and omissions in the complaint, together with factual admissions in the trial court and in appellant's briefs. (Id. at p. 1515, fn. 19, citing, inter alia, Fassberg Construction Co. v. Housing Authority of City of Los Angeles (2007) 152 Cal.App.4th 720, 725 [60 Cal. Rptr. 3d 375] [oral statement by counsel in same action is binding judicial admission] & Electric Supplies Distributing Co. v. Imperial Hot Mineral Spa (1981) 122 Cal.App.3d 131, 134 [175 Cal. Rptr. 644] [stipulations in brief constitute binding judicial admissions].)

Similarly, in Setliff v. E. I. Du Pont de Nemours & Co. (1995) 32 Cal.App.4th 1525 [38 Cal. Rptr. 2d 763] the court affirmed an order sustaining a demurrer without leave to amend and stated, “Plaintiff's papers in opposition are reliable indications of his position on the facts and we may use these statements as admissions against him. [Citation.]” (Id. at p. 1536.) Likewise, in Rodas v. Spiegel (2001) 87 Cal.App.4th 513 [104 Cal. Rptr. 2d 439], the court declared, “We also may, and shall, take judicial notice of admissions in plaintiff's opposition to the demurrer. (Evid. Code, § 452, subd. (d).)” (Id. at p. 518.)

In sum, we are not permitted to turn a blind eye to Lueras's admissions the trustee's sale was rescinded before the trustee's deed was recorded. These admissions are consistent with his verified affirmative allegations he was never deprived of ownership or possession of the Property. These admissions were properly considered by the trial court when ruling on the demurrers, without any objection by Lueras. We are required to do the same when reviewing the propriety of those rulings.

C. Negligence and Negligent Misrepresentation

The long-standing rule that a residential lender does not owe any duty of care to a borrower is well settled and summarized in the majority opinion. I would only add that all of the reasons why a residential lender owes no such duty to a borrower apply with even greater force to a servicer, even though courts are not always careful to differentiate between the duties of lenders and the duties of servicers. (Somera v. IndyMac Federal Bank, FSB (E.D.Cal., Mar. 3, 2010, No. 2:09-cv-01947-FCD-DAD) 2010 WL 761221, p. \*5.)

Applying the no-duty rule to the negligence claim, the majority recognizes Bank of America did not owe Lueras a duty to offer, consider, or approve a loan modification, or to explore and offer foreclosure alternatives, or to handle the Loan in any other way so as to prevent foreclosure. I agree. These are all core functions well within the scope of the conventional role of a residential lender and the no-duty rule applies.

Despite recognizing the no-duty rule, the majority stretches to create an exception, and concludes Bank of America “does owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale.” (Maj. opn., ante, at p. 68.) I disagree. There is no such exception. No duty is owed for purposes of negligent misrepresentation or negligence. (Aspiras v. Wells Fargo Bank, N.A. (2013) 219 Cal.App.4th 948, 963–964 [162 Cal.Rptr.3d 230].)

“As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty … owed by a defendant to the injured person. [Citation.] The determination of whether a duty exists is primarily a question of law. [Citation.]” (Eddy v. Sharp (1988) 199 Cal.App.3d 858, 864 [245 Cal. Rptr. 211].) “[T]he test for determining whether a financial institution owes a duty of care to a borrower-client ‘ “involves the balancing of various factors … .” ’ [Citations.]” (Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal.App.3d 1089, 1098 [283 Cal. Rptr. 53].)

Without balancing the various factors discussed in Nymark, the majority discovers a duty which has never before been recognized. But there is no reasoned basis for making any distinction between these residential lender-borrower communications and other residential lender-borrower communications. Communications about the status of a modification application or a trustee's sale are also core functions well within the scope of the conventional role of a residential lender. Hence, the no-duty rule applies equally to negligence and negligent misrepresentation claims in this situation.

Furthermore, the rights and duties of lenders and borrowers regarding these communications are set forth in the Loan Documents and applicable law, including the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.) and the California statutory nonjudicial foreclosure statutes (Civ. Code, §§ 2924 through 2924k.). It is inconsistent with these comprehensive and exhaustive statutory schemes to incorporate common law negligent misrepresentation claims in this context. (Cf. Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, 1154 [121 Cal. Rptr. 3d 819]; Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 824–829 [134 Cal. Rptr. 2d 162].)

Leaving aside the duty question, Lueras did not request leave to plead a negligent misrepresentation cause of action. But even if he had, Lueras also did not demonstrate a reasonable possibility he can plead “ ‘ “(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” ’ [Citation.]” (Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc. (2011) 196 Cal.App.4th 1559, 1573 [127 Cal. Rptr. 3d 589].)

Lueras alleged both oral and written misrepresentations by Bank of America about the status of the loan modification application and the trustee's sale.

The alleged oral misrepresentations were all made by Whitaker in early May 2011 and may be summarized as follows. First, Whitaker told Lueras the May 5 and May 6 letters had been sent in error. Second, she told him the loan modification application had been approved by Bank of America, subject to Fannie Mae approval. Third, she told him the trustee's sale would be reset, again pending Fannie Mae approval.

Regarding the statements the May 5 and 6 letters had been sent in error, Lueras did not allege and cannot allege these statements were untrue or that Whitaker had no reasonable ground for believing them to be true. Obviously, his entire case is predicated upon his alleged reliance on the truth of these statements.

Regarding the statement Bank of America had approved the loan modification application, subject to Fannie Mae approval, again Lueras did not allege this statement was untrue or Whitaker had no reasonable ground for believing it to be true. Besides, this statement is conditional, and he did not allege that condition was satisfied.

Regarding the statement the trustee's sale would be reset, while Lueras did allege this was untrue, he did not allege Whitaker said the trustee's sale had been reset. Instead he alleged she said it would be reset. So this statement is really a prediction about a future event, not a misrepresentation about a past or existing fact.

Lueras also did not allege any facts showing he justifiably relied on the statement the trustee's sale would be reset. In particular, Lueras did not allege he did or refrained from doing anything after this statement was made (on May 6, 2011) and before the trustee's sale occurred (on May 18, 2011). All of the alleged actions or inactions took place well before this statement was made.

Regarding all of these statements, Lueras did not allege and cannot allege any resulting damage. Again the trustee's sale was rescinded so Lueras was never deprived of ownership or possession of the Property.

Regarding the alleged written misrepresentations in the May 5 and 6 letters, Lueras cannot allege he reasonably relied on the contents of those letters, and at the same time allege he relied on the statements that those letters had been sent in error. He cannot have it both ways. But even if he could, again Lueras did not allege and cannot allege he suffered any resulting damage, because the trustee's sale was rescinded.

In conclusion, Lueras did not plead or demonstrate a reasonable possibility he can plead sufficient facts to establish the elements of a negligent misrepresentation cause of action against Bank of America based upon communications concerning the status of the loan modification application or the trustee's sale. Hence, there is no basis for granting Lueras's leave to allege a negligent misrepresentation cause of action.

D. Breach of Contract

Lueras alleged Bank of America breached the Forbearance Agreement by terminating the deferral period, and by failing to offer him a loan modification or some other resolution before commencing or resuming the foreclosure process. But Lueras did not plead sufficient facts to establish the elements of this claim.

1. Breach

Lueras did not plead any facts showing Bank of America breached the Forbearance Agreement “by terminating the ‘Deferral Period’ … .” Actually, Lueras did not plead any facts showing Bank of America terminated the deferral period at all. On this point, I agree with the majority opinion. Examining the first amended complaint as a whole reveals the parties intended the deferral period to terminate and it did terminate by its own terms no later than March 16, 2010.

Lueras also did not plead any facts showing Bank of America breached the Forbearance Agreement by failing to offer him a loan modification or some other resolution before commencing or resuming the foreclosure process. The Forbearance Agreement simply did not require Bank of America to do or abstain from doing any of the things Lueras complained of. Thus, Bank of America did not breach the Forbearance Agreement by failing to offer Lueras a loan modification or some other resolution before commencing or resuming the foreclosure process.

Recognizing the inevitability of this conclusion, the majority asserts the “provisions of [Fannie Mae] Announcement 09-05R must be read into” the Forbearance Agreement to circumvent these deficiencies. (Maj. opn., ante, at p. 73.) The majority has not cited any case which has followed this approach or found a borrower has a private contractual right to sue a lender for money damages based upon alleged noncompliance with Announcement 09-05R. (Cf. Bank of America, N.A. v. Roberts (2013) 217 Cal.App.4th 1386, 1399 [159 Cal. Rptr. 3d 345] [HAMP and programs like HAMP consistently construed to create no private rights or private causes of action for borrowers].) One can easily see why.

To begin with, the Forbearance Agreement is a contract between Lueras, as the borrower under the Loan Documents, and Bank of America, as the servicer and the ostensible agent of the lender under the Loan Documents. Fannie Mae is not a party to the Forbearance Agreement and Lueras did not allege the Loan is owned or insured by Fannie Mae. In short, it appears Fannie Mae is a complete stranger to the Forbearance Agreement with no contractual rights or obligations thereunder vis-à-vis the Loan.

Next, reading Announcement 09-05R into the Forbearance Agreement violates basic principles of contract formation and interpretation. Announcement 09-05R was not part of the Forbearance Agreement offer or acceptance. In fact, there is no reference to Announcement 09-05R in the Forbearance Agreement, and there is no ambiguity in the Forbearance Agreement which requires or even permits resort to this extrinsic evidence for interpretation. Doing so contradicts some of the express terms of the Forbearance Agreement, and renders other express terms meaningless.

The only case cited by the majority to support this radical departure from established law is West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780 [154 Cal. Rptr. 3d 285]. West is legally and factually inapposite.

The contract at issue in West was a trial period plan (TPP) under HAMP, while the Forbearance Agreement at issue here is not. Indeed, the Forbearance Agreement bears no resemblance in form or function to a TPP under HAMP. They are different creatures which serve different purposes. A TPP tests the viability of an identified and agreed upon long-term solution. The Forbearance Agreement merely provides time to see if a viable long-term solution can be identified and agreed upon.

In addition, the TPP in West was still in effect, and the borrower tendered a timely reduced monthly payment just two days before the trustee's sale. (West v. JPMorgan Chase Bank, N.A., supra, 214 Cal.App.4th at p. 790.) Here, the Forbearance Agreement ended no later than March 16, 2010, and Lueras stopped making reduced monthly payments on July 1, 2010, more than nine months before the trustee's sale.

Lastly, the majority suggests the implied covenant of good faith and fair dealing may also be used to circumvent these deficiencies. Not so. “[A]n implied covenant of good faith and fair dealing cannot contradict the express terms of a contract.” (Barroso v. Ocwen Loan Servicing, LLC (2012) 208 Cal.App.4th 1001, 1014 [146 Cal. Rptr. 3d 90].) Similarly, the implied covenant cannot be used to create additional obligations not present in a contract, and cannot be used to vary the terms of an unambiguous contract. (21st Century Ins. Co. v. Superior Court (2009) 47 Cal.4th 511, 527, 98 Cal. Rptr. 3d 516, 213 P.3d 972.)

2. Damages

Lueras did not plead any facts showing he was damaged by Bank of America's alleged termination of the deferral period or failure to offer him a loan modification or some other resolution before commencing or resuming the foreclosure process. Lueras was always obligated to repay the Loan, and the reduced monthly payments allegedly made during and after the deferral period, together with any late fees and charges resulting from his payment default, were always owed under the Loan Documents, separate and apart from the Forbearance Agreement.

3. Leave to Amend

Lastly, Lueras did not demonstrate a reasonable possibility he can plead sufficient facts to establish the elements of a breach of contract cause of action against Bank of America. It is not sufficient for Lueras to assert “an abstract right to amend.” (Rakestraw v. California Physicians' Service (2000) 81 Cal.App.4th 39, 43 [96 Cal. Rptr. 2d 354].) Again, he must set forth the legal authority for the claim, the elements of the claim, and the specific factual allegations that would establish each of those elements. (Rossberg v. Bank of America, supra, 219 Cal.App.4th at p. 1491.) Lueras made no attempt to meet this burden. Therefore, the demurrers to the breach of contract cause of action based upon the Forbearance Agreement were properly sustained without leave to amend. On this point the majority opinion's reliance upon the liberal policy regarding amendments to justify a contrary result is misplaced. (Id., at p. 1503.)

E. Fraud

The majority states the elements of a fraud cause of action. They are the same as the elements of a negligent misrepresentation cause of action discussed above, with the exception of the knowledge element. (Aspiras v. Wells Fargo Bank, N.A., supra, 219 Cal.App.4th at p. 963, fn. 4.) Since the elements are essentially the same, all of the deficiencies in the negligent misrepresentation claim discussed above are also deficiencies in the fraud claim. There are additional deficiencies as well.

Lueras alleged, based upon the Forbearance Agreement, Bank of America led him to believe it was going to work with him so he could stay in his home as long as he made the requested (i.e., reduced) monthly payments, but instead Bank of America concealed the fact it was not going to identify a long-term solution. Yet, Lueras did not allege any part of the Forbearance Agreement was false. And, once again, nothing in the Forbearance Agreement required Bank of America to offer Lueras a loan modification or identify another resolution.

Lueras also alleged the May 5 letter stated Bank of America would contact Lueras in 10 days to explore foreclosure alternatives, but this statement was false, because the trustee's sale occurred before the 10 days had elapsed. Then again, Lueras alleged he relied on the fact he was told the May 5 letter had been sent in error, so any alleged reliance on the contents of that letter was unreasonable. Once more, he cannot have it both ways. Plus, his alleged reliance in making the reduced monthly payments ended in July 2010, more than 10 months before the May 5 letter was sent.

For all of these reasons, I agree with the majority the demurrers to the fraud cause of action were properly sustained. On the other hand, I do not agree with the majority, “the exhibits attached to the First Amended Complaint … demonstrate there is a reasonable possibility the defects in the fraud cause of action can be cured by amendment.” (Maj. opn., ante, at p. 79.) The exhibits at issue are the May 5 and 6 letters.

On this point, the majority relies on the same faulty logic as Lueras.[1[Link to the text of the note](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796) But any alleged reliance on the May 5 and 6 letters was patently unreasonable because Lueras pled he relied on the oral representation those letters had been sent in error.

And at any rate, Lueras did not and cannot allege any “specific damages” he suffered, because the trustee's sale was rescinded. (Rossberg v. Bank of America, supra, 219 Cal.App.4th at p. 1499.) Consequently, the demurrers to the fraud cause of action were properly sustained without leave to amend.

F. Business and Professions Code Section 17200

Finally, I disagree with the majority statement, “the allegation that Lueras's home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of section 17204.” (Maj. opn., ante, at p. 82.) There is no such allegation in the first amended complaint. And, in any event, the exact opposite is true. Lueras has not suffered any legally cognizable harm. Rather, he has experienced an incredible windfall. Lueras has avoided foreclosure on the Property even though he has not made any payment on the Loan since July 2010. Hence, Lueras has no standing and the demurrers to the unfair competition claim were properly sustained without leave to amend.

CONCLUSION

The trial court correctly sustained the demurrers to the first amended complaint and did not abuse its discretion by denying leave to amend. The contrary decision by the majority represents a departure from settled law and creates uncertainty which may disrupt California residential lending. The judgment should be affirmed.

Footnotes

* [1[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

“[T]he United States Department of the Treasury implemented the Home Affordable [Modification] Program (HAMP) to help homeowners avoid foreclosure during the housing market crisis of 2008. ‘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.]” (West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 785 [154 Cal. Rptr. 3d 285] (West).)

* [2[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

United States Department of the Treasury, Announcement 09-05R, Reissuance of the Introduction of the Home Affordable Modification Program, HomeSaver Forbearance, and New Workout Hierarchy (Apr. 21, 2009) available at <https://www.fanniemae.com/content/announcement/0905.pdf> (as of Oct. 31, 2013) (Announcement 09-05R).

* [3[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

The trial court sustained the demurrer without leave to amend as to plaintiff Mary Lueras, and that ruling has not been challenged.

* [4[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

In the appellant's opening brief, Lueras argues that Bank of America's “unreasonable delay in the loan modification process” led to the foreclosure of his home. No such allegation appears in the First Amended Complaint.

* [5[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Nothing we say is intended to alter the rights, obligations, and duties created by the Truth in Lending Act, 15 United States Code section 1601 et seq. or other statutes.

* [6[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

ReconTrust was not named as a defendant in the breach of contract cause of action.

* [7[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Lueras also alleged: “Bank of America never [(1)] offered another resolution of Mr. Lueras'[s] default; (2) informed Mr. Lueras if he was approved or denied a loan modification as he requested at the end of the 6th month; (3) disclosed the amount his loan was in arrears on the 6th month when no other form of relief was forthcoming from Bank of America … ; and (4) by commencing or resuming the foreclosure process by filing a Notice of Default and setting an auction date without providing the HomeSaver resolution Bank of America was required to identify and provide.”

* [8[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

The letter from Bank of America notifying Lueras he was eligible for the HomeSaver Forbearance program stated, “[y]ou are eligible for a reduced mortgage payment for up to six months.” (Boldface omitted, italics added.)

* [9[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Defined in the Forbearance Agreement as BAC Home Loans Servicing, LP, “the subsidiary of Bank of America that services your mortgage.”

* [10[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

A court may refer to dictionaries as sources of a word's ordinary, usual meaning. (Wasatch Property Management v. Degrate (2005) 35 Cal.4th 1111, 1121–1122 [29 Cal. Rptr. 3d 262, 112 P.3d 647].)

* [11[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Rossberg v. Bank of America, N.A. (2013) 219 Cal.App.4th 1481 [162 Cal.Rptr.3d 525] is distinguishable and does not change our conclusion that Lueras should have leave to amend the fraud cause of action. The First Amended Complaint, including the attached exhibits, alleged that Bank of America misrepresented not only that it had approved a loan modification, but also that the pending foreclosure sale had been postponed. We cannot say as a matter of law that Lueras suffered no damages as a result of such misrepresentations. Unlike the situation in Rossberg, here, more than “ ‘an abstract right to amend’ ” (Rossberg v. Bank of America, N.A., supra, at p. 1504) has been shown.

* [12[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

Bank of America also asserts that Lueras “conceded that Bank of America rescinded the May 2011 foreclosure sale.” As we explained above, the First Amended Complaint did not allege rescission of the foreclosure sale, and no party has requested we take judicial notice of anything establishing such rescission. In reviewing the judgment, we are limited to the well-pleaded facts of the complaint and matters subject to judicial notice. (Zelig v. County of Los Angeles, supra, 27 Cal.4th at p. 1126.)

* [13[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

The First Amended Complaint does not include this letter as an exhibit.

* [14[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

On July 11, 2012, the Governor approved legislation known as the “California Homeowner Bill of Rights” (Sen. Bill No. 900 (2011–2012 Reg. Sess.); Assem. Bill No. 278 (2011–2012 Reg. Sess.)). (Governor Brown's signing message on Assem. Bill No. 278 (2011–2012 Reg. Sess.) July 11, 2012.) The California Homeowner Bill of Rights prohibits, among other things, “dual track” foreclosures, which occur when a servicer continues foreclosure proceedings while reviewing a homeowner's application for a loan modification; requires a single point of contact for homeowners who are negotiating a loan modification; and expands notice required to be given to the borrower before the lender can take action on a loan modification or pursue foreclosure. (Governor Brown's signing message; see Stats. 2012, ch. 86, §§ 1–25; Stats. 2012, ch. 87, §§ 1–25.) The California Homeowner Bill of Rights became effective on January 1, 2013. (Cal. Const., art. IV, § 8, subd. (c)(1) [effective date of new statutes is Jan. 1, following 90 days after enactment].)

* [1[Link to the location of the note in the document](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)](https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=7b581169-b258-4b99-86b0-72e71d44b24a&config=00JAA0NDgwMGE5Mi01ODYxLTRkZDEtODQ0OS1mYmEyN2M3ZmZmZWQKAFBvZENhdGFsb2fyUIbYd2jFgdWUbISiHcjK&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pddocid=urn%3AcontentItem%3A59PX-J5W1-F04B-N0M9-00008-00&pdcontentcomponentid=506037&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=5bd5bf80-13d8-4c19-b1ea-f47ab493c796)

For example, the majority states: “In the May 5, 2011 letter, Bank of America informed Lueras any pending foreclosure sale would be ‘on hold’ … . Whitaker … told him the May 5 letter was sent in error … . Despite the express representation in the May 5 letter that no foreclosure sale would proceed, … the foreclosure sale was conducted on May 18.” (Maj. opn., ante, at p. 80.)

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