The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

C. HUGH JONSON AND BONNIE L. JONSON, HUSBAND AND WIFE, Plaintiffs, v. FLAGSTAR BANK, FSB & MORTGAGE REGISTRATION SYSTEMS, INC. ("MERS") Defendants.	Case No. 12-CV-00552RSL RESPONSE IN OPPOSITION TO MOTION TO DISMISS OF DEFENDANT FLAGSTAR BANK, FSB

Comes now Plaintiffs, C. Hugh Jonson and Bonnie L. Jonson (hereinafter referred to collectively as "PLAINTIFF"), appearing through counsel, John A. Cochran

I. UTCR 5.050(1) STATEMENT

Plaintiff requests oral argument on this motion. Plaintiff anticipates that one hour will be required.

II. PRELIMINARY STATEMENT

This suit is indeed part of a recent wave of actions related to the foreclosure crisis created by the banks. Some of the related law is still in its early stages of development, and potentially meritorious claims ought not to be summarily dismissed. A search of this MIN# revealed the "Servicer" as Flagstar and the "Investor" as Freddie Mac (See attached MERS Capture.) A check of the Freddie Mac website confirmed this information and stated that

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Freddie Mac acquired the subject loan shortly after origination on January 13th, 2010. Given the recent ruling in Bain v. Metro. et. al., *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al.,* No. 86206-1, which was filed on August 16, 2012 and Plaintiff filed its Amended Complaint (hereinafter referred to as "Complaint") on June 22, 2012 in this matter, so this case should shed some light on how the Court analyzes the involvement of MERS in its decision whether to invalidate the nonjudicial foreclosure process at question in this case.

Defendant has brought yet another motion to dismiss under Federal Rule of Procedure 12(b)(6). Plaintiff has still not had a chance to ask for Note, loan documents, closing documents or other discoverable documents in order to further substantiate Plaintiff's claims asserted in its Complaint against Flagstar Bank, FSB. In the Parties Joint Status Report filed on June 20, 2012, the parties agreed that discovery completion, under Section 6, would not occur until April 15, 2013. This means that Plaintiff still has time to engage in discovery as stipulated in the Joint Status Report filed with the Court.

Additionally, Plaintiff filed yesterday a motion to modify the scheduling order and a request for leave from Court in order to file a Second Amended Complaint to allow the Plaintiff to shed light on new information Plaintiff has discovered as a result of its new securitization audit in response to Defendants Motion to Dismiss filed on December 13, 2012 and documents attached thereto and the results of the Declaration of Dr. James M. Kelley asserting that the Note attached to the Defendants Motion to Dismiss is a forged document.

Regardless of the above, Plaintiffs seek to respond to this Motion to Dismiss in its entirety. Defendant wrongly frames Plaintiffs' "entire complaint" as premised on the allegation that since Plaintiff submitted the income paperwork and loan application to Defendant then it is only logical that they should be responsible for the terms of this loan that Defendant placed them in. The Defendant is attempting to circumvent any responsibility whatsoever for qualifying Plaintiff for this particular loan and places the entire blame and burden on the Defendant for signing the final paperwork. When Defendant called Flagstar some time after receiving the loan they told him not to worry and he could simply refinance to get the $1700

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payment he was promised. Plaintiff's position is that the Defendant misrepresented several aspects of this loan so that the Lender could make a larger profit on doing several transactions.

Plaintiff and Defendant executed a Deed of Trust dated December 29, 2009 and recorded on January 04, 2010, under Auditor's File No. 201001040075 between C. Hugh Jonson and Bonnie L. Jonson, as Grantor to Joan H. Anderson, EVP on behalf of Flagstar Bank, FSB, as Trustee, in favor of Mortgage Electronic Registration Systems, Inc., the beneficial interest and Flagstar Bank, FSB as "Lender". The Deed of Trust was assigned an 18-digit MIN# 100052550284677431. The report on the MERS Registry, attached as Exhibit 01, stated that Flagstar is the current servicer of the Mortgage, and the MERS file is "inactive."

Plaintiff is informed and believe and therefore allege that Defendants breached their fiduciary duty to Plaintiff because they know or should have known that the Plaintiff will or had a strong likelihood of defaulting on this loan, they have a fiduciary duty to the borrower to not place them in that loan (in harms way).

On page 8 and 9 of the Complaint, Plaintiff outlines the issues with the loan that make it Unconscionable and predatory, namely the debt to income ratio utilized was higher than what is the accepted standard in normal underwriting practices, there was not adequate disclosure of the true cost and final overall payment that was a confusing mask put onto this loan in order to qualify Plaintiff for said loan and obtain large amounts of interest and fees from Plaintiff.

These type of lending practices is the main reason why so many consumers are currently losing their homes to foreclosure. As a policy objective, the banks, such as Flagstar Bank, FSB, should be reprimanded and made to answer for writing so many of these loans and unwilling to fix the loan, modify the loan, refinance the loan as values of real estate plummet and homeowners face loss of income as well as equity while the lender receives the fees up front, the large payments during the loan and then in addition when the borrower eventually

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defaults, the lender even gets the property back.

This is a more systemic problem and should not be casually dismissed as Flagstar's counsel is attempting to do with its many, many cavalier statements as to its Client's complete innocence and compliance with every lending law imaginable in granting/bestowing this loan upon my Client and expressly blaming Plaintiff in its Motion to Dismiss for accepting this loan. The paperwork can be overwhelming and therefore my Client relied on the Lender and Lender's representative to get the proper loan for Plaintiff.

Even more disturbing is the fact that Flagstar recently submitted a color copy of the subject Note, purporting it to be a copy of the "original," as an exhibit to its motion to dismiss submitted to the Court on December 13, 2012. A declaration by Dr. James Kelley indicates that this Note is a forgery attached hereto as Exhibit 06. Dr. Kelley examined the questioned document that contains a purported color copy of the original Note with special attention to page 54 that contains the questioned signatures of Bonnie Louise Jonson and Clarence Hugh Jonson. The examiners opinion is that the signatures are forgeries.

As a result we would ask that the Court rule against Defendants Motion to Dismiss and allow Plaintiff's to engage in intensive discovery to determine if Defendants have the original Note and explore other Claims stemming from this newly discovered evidence and conduct on the part of Defendants.

In regards to the predatory terms and conduct on the part of Defendants in "inducing" Plaintiff into showing up at Closing and dealing with ever changing loan terms and payment schedules, this is the underlying reasoning that lender does have a fiduciary duty to Plaintiff not to write a loan to Plaintiff that Plaintiff will end up defaulting on, ruining Plaintiff's credit, income that will mainly go to pay the mortgage and in the end the Defendant will end up with

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the collateral, the Property.

Moreover, Plaintiffs should be allowed to proceed with discovery or otherwise present evidence of these facts prior to any dispositive ruling. Alternatively, although Plaintiffs do not have to provide detailed factual allegations in the Complaint1, Plaintiffs should be allowed to amend their complaint to allege additional facts if the Court thinks it appropriate under FRCP 15 (leave to amend should be freely given).

III. ISSUES PRESENTED

Plaintiff has stated several claims for which relief can be granted and Defendant's Motion to Dismiss for failure to state a claim should be denied. Plaintiff's Complaint delineates and specifically pleads at least five (5) separate counts under which relief may be granted under the applicable standard of review, making Plaintiff's Motion to Dismiss inappropriate.

(1) Defendant seeks to dismiss Plaintiffs claims because State Law Claims are preempted by HOLA and Plaintiff responds to this below in Section A.

(2) Defendant claims that Plaintiff's fail to state a claim for Declaratory Relief and Plaintiff responds to said allegations under Section B.

(3) Defendant claims that Plaintiffs' Promissory Estoppel Claim fails because its Claim are Governed by Contract and do not Allege Facts Plausibly Showing the Elements of Promissory Estoppel. Plaintiff's response to this argument is laid out below in Section C.

(4) Defendant asserts that Plaintiff's assertion of Contractual Breach of Good Faith and Fair Dealing should be dismissed because there is no duty imposed upon Flagstar and also dismissed because the contractual duty does not arise until the contract is entered into. Plaintiff will address this faulty reasoning in Section D.

(5) Breach of Fiduciary Duty. The Defendant claims that Lender is not a fiduciary of its borrower. We disagree as discussed in Section E.

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1 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

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(6) Unconscionability. The Defendant claims that unconscionability is not an independent claim for damages and bifurcates the claim into procedural unconscionability and procedural unconscionability. The Defendant argues that Plaintiff had a meaningful choice in accepting this loan and Plaintiff vehemently disagrees with this reason as discussed in Section F.

(7) A new claim is proffered as a result of Defendants conduct in this case, UNFAIR AND UNLAWFUL PRACTICES ACT VIOLATIONS OF 18 U.S.C. 1621 as discussed in Section G.

(8) A another new claim is proffered as a result of Defendants conduct in this case, FALSE/MISLEADING REPRESENTATIONS - UNLAWFUL DEBT COLLECTION PRACTICES ACT VIOLATIONS OF 15 U.S.C. 1692(e) as discussed in Section H.

IV. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Dismissal of a complaint may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.2 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.3 Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " 4 A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

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2 Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir.1990).

3 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

4 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (citing Twombly, at 570).

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alleged."5 First, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."6 Secondly, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." 7 In sum, for a complaint to survive a motion to dismiss the non-conclusory factual content, and reasonable inferences from that content must be plausibly suggestive of a claim entitling the pleader to relief. A court may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting into a motion for summary judgment. 8 Where the documents are not physically attached to the complaint, they may be considered if the documents' "authenticity ... is not contested" and "the plaintiff's complaint necessarily relies" on them."9 Finally, the Complaint necessarily relies on certain documents and representations of Defendant. Accordingly, the Court must consider said representations and documents in ruling on this motion to dismiss.

B. **Plaintiff leave to amend**. As stated in *Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir 2007):

> Assuming a substantive or jurisdictional defect in the pleadings, "[d]ismissal without leave to amend is proper only if it is clear, upon de novo review, that the complaint could not be saved by any amendment." *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir.2003) (quotations, citations omitted).

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5 Id.

6 Id., at 1950

7 Id.

8 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

9 Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998).

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C. **The pleading standard defendants urges requires the Judge to weigh "competing inferences"**. The pleading standard the defendant urges requires the Judge to go well beyond determining whether plaintiff has a plausible claim and to discard the usual construction of competing allegations in favor of the non-moving party. The Court would have to actually weigh the competing inferences, without the benefit of anything but very preliminary facts, forcing the Court to rely on hearsay allegations of the attorneys. Plaintiff urges instead that competing allegations of fact must be construed in favor of Plaintiff. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985), cert. denied, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 773 (1986). *Cassettari v. Nevada County, Cal*., 824 F.2d 735, 737 (9th Cir. 1987)

V. DISCUSSION

A. **PREEMPTION BY Home Owner's Loan Act.** Defendant has alleged that Home Owner's Loan Act preempts all State Law Claims. This allegation stands logic on its head by stating that will never allow supplemental jurisdiction over pendant state law claims. As a blanket policy this would appear to violate public policy behind 28 U.S.C. § 1367 in facially dismissing any state law claims that are existing regardless of fact or circumstance because of Defendants overall and blind reliance on HOLA. The case they used to analogize, Mashburn v. Wells Fargo Bank, NA is not similar to this case as it is dealing with entirely different claims and Plaintiff's claims are more involved than Defendant merely failing to give proper disclosures. We are also discussing blatant material misstatements and a large scheme to defraud Client of loan payments, interest, equity, creditworthiness and basically his whole LIVELIHOOD and a perversion and theft of what used to be labeled in America as the "American Dream".

B. PLAINTIFF FAIL TO STATE A CLAIM FOR DECLARATORY RELIEF.

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It is evident that Defendants have not even read the Claims and even if they did they are too concerned with casually dismissing every one of Plaintiff's valid claims and submitting fabricated documents into the court record. Now, one of our main concerns and Claims is validly highlighted and supported by the most important Claim in the Amended Complaint, the declaratory judgment invalidating foreclosure sale based on the chain of title. Based on the recent ruling in the Bain case, *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al.*, No. 86206-1, MERS cannot possibly be a valid beneficiary in this case. The "Beneficiary" on the subject DOT is "Mortgage Electronic Registration Systems, Inc. (MERS) (solely as nominee for lender, as hereinafter defined, and Lender's successors and assigns)." The recent Washington State Supreme Court Ruling in Bain v. MERS is attached above. This ruling destroys the notion that MERS can be a beneficiary of a DOT.

MERS executed an Assignment of Deed of Trust in which the beneficial interest in the Deed of Trust was assigned to Flagstar Bank, FSB, under an Assignment document dated November 09, 2011 and recorded on November 23, 2011 under Auditor's File No. 201111230078 in the Records of Skagit County, attached as Exhibit 04. This document is executed by "Sharon Morgan" - Vice President of MERS. Morgan was actually the "Assistant Vice President - Assistant Manager for Foreclosure" for Flagstar Bank at the time of the assignment (See attached Exhibit 05 - Certification of Sharon Morgan.) The assignment is unusual by the fact that Flagstar's employee is attempting to assign the note and DOT back to itself. Especially considering if Freddie Mac acquired the loan in January of 2010, then why is Flagstar executing the assignment in 2011? This would violate new TILA amendment under The Helping Families Save Their Homes Act of 2009 as the new owner/assignee must notify the borrower within 30 days after the loan is sold and Plaintiffs allege they never received any said notice.

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Additionally, there is further information based on this original claim that is contained as the "First Claim" in the original Complaint that states that there are no recorded transfers between the initial Trust Deed dated Dec. 29, 2009 and the subsequent assignment in November of 2011. Now, a search of this MIN# also revealed the "Servicer" as Flagstar and the "Investor" as Freddie Mac. A check of the Freddie Mac website confirmed this information and stated that Freddie Mac acquired the subject loan on January 13th, 2010 (See attached exhibit 02- Freddie Mac Capture.) This is roughly 2 years before MERS attempted to assign all interest in the Deed of Trust to FLAGSTAR on November 23, 2011. If the loan was indeed purchased by Freddie Mac, it was securitized by this "Gov't Sponsored Entity" (GSE.) A search in Bloomberg identified approximately 57 potential "Freddie Mac REMIC" trusts to which the subject loan could have been pledged around the time of origination (See Bloomberg attached as Exhibit 03.) There is nothing conclusory, speculative or contradictory about this information or what we were attempting to prove in our original and amended Complaint. Plaintiff and Plaintiff's counsel has a large task ahead of it in order to shed light on Defendants conduct in this case.

There is a "blank endorsement" on a separate page of Defense exhibit of the so-called original note, attached as Exhibit 07. Endorsements are to be placed on the signature page of the note if there is room. There appears to have been plenty of space to affix the endorsement on the signature page. This adds credence to the document being altered. One of the signatures on the endorsement on the Note is that of "John Marecki - Trust Vice President." This is a clue that the subject loan may have been securitized internally by Flagstar in addition to Flagstar's selling the loan to Freddie Mac.

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If above allegations are indeed true, it is apparent that Defendants do not have the original Note and do not have proper authority to even have initiated this nonjudicial foreclosure process in the first place. Secondly, Defendants have committed perjury to this court and as a result ask the court to suspend this foreclosure action indefinitely until we can have a hearing on the note and the signatures affixed thereto and consider enjoining this foreclosure sale indefinitely and determining the claims relating to the authenticity of the Note attached to the motion to dismiss and determine if the Defendants have the original Note in their possession. It appears that Defendants have intentionally and falsely claim to be the party entitled to monies due under terms of the Note. That this manufactured document is a fabrication intended to create the illusion of a valid transfer of the promissory note and support the assertion of standing in this particular case. It appears that this manufactured evidence is being used in this case to deceive the court and save the cost to the lender and obtain a motion to dismiss in this case with relative ease.

PROMISSORY ESTOPPEL, RELIANCE & UNJUST ENRICHMENT. As for Promissory Estoppel and Detrimental Reliance, Plaintiff believes they have assuredly plead the proper initial facts to constitute said claims above in that the bank made statements at the time of signing and also later to Plaintiff relied on in trying to refinance at the promised payment per month. Plaintiff did not understand what this loan would truly cost Plaintiff in the end. Given the terms of the loan transaction, there was a predictable scheme that allowed the bank a high likelihood of foreclosing on Plaintiff's home and giving Defendant opportunity to retain the collateral to the detriment of Plaintiff. Plaintiffs allege that Lender promised them a certain payment, TWICE, and they followed like lamb to the slaughter. As a result Plaintiff relied on Lender's statements as the expert professional to place Plaintiff in the correct loan. Plaintiff

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has represented under its Complaint at Page 7 under Section 17 and Page 9 under Section 22 that Defendant made representations that it could guarantee Plaintiff a particular payment per month. Plaintiffs should be allowed to proceed with discovery or otherwise present evidence of these facts prior to any dispositive ruling.

C. **FRAUD CLAIM**. In response to the Fraud claim, Plaintiff will argue below that where the lender offers a "good" loan at certain payment amount and interest rate and turns into another interest rate and payment per month and other contrary terms to the borrower, like offering a market rate when it is not, these type of statements can be held to be false representations. Plaintiff is identifying the specific circumstance of Flagstar's fraudulent conduct being at the time of applying for the loan and filling out the loan application that Flagstar made multiple and specific representations to Plaintiff that the loan would be a particular month payment at a particular rate and no explanation as to why he did not ultimately receive "market interest rate". If there is prior understanding as to the contract terms, the party responsible for drafting the contract has a duty to inform other party of any changes or the drafter's conduct can be viewed as fraudulent.10 In *Greene*, the court found the failure to disclose an unconscionably high broker fee and the lender's charging of interest on that fee to be a misrepresentation. The lender also falsely represented the loan amount and claimed to offer a market interest rate. Accordingly, the court voided the promissory note and deed of trust and permanently enjoined foreclosure proceedings.11 In this case, Plaintiffs should be allowed to present evidence before the Court rules on whether or not there is sufficient evidence to

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10 *People Trust & Saving Bank v. Humphrey*, 451 N.E. 2d 1104 (Ind. Ct. App. 1983)

11 *Greene v. Gibraltar Mortgage Investment Corp*, 488 F. Supp. 177 (D.D.C. 1980), 839 F.2d 680 (D.C. Cir. 1980).

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support a fraud claim. This claim is a dispute of facts, not a matter ripe for dismissal for failure to state a claim for relief.

D. **BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**. The Claim for breach of covenant of good faith and fair dealing is a valid claim as the proper analysis is if one party purported to evade of the spirit of the bargain; abuse of power to specify terms, and interference with or failure to cooperate with the other party's performance. Defendant's analysis is completely misguided. There is in every contract an implied duty of good faith and fair dealing.12 This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.13 Defendant pretends that any and all events and discussions that occurred up and during the time of signing for some reason do not pertain to "good faith" standards in contractual duty of good faith and fair dealing. This is a completely defective argument in and of itself, but moreover, in entering into any contract is the notion that the parties perform the contract in a way that will carry out the purposes of the parties entering into it. I do not believe my Client wished to enter into this loan transaction only to ultimately waste large amounts of loan payments that go nowhere to paying down his loan and only to give Property back to the bank and he ends up not even having proper credit to rent an apartment, but of course Defendant and Defendant's counsel make the pitiful argument that this as a normal course of doing business. Well, of course they do because they receive the windfall here and Plaintiff receives poverty and homelessness. It also needs to be determined when Plaintiff finally requested the refinance that Defendant charged fees and once again

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12 *Badgett v. Security State Bank*, 116 Wn.2d 563, 569 (1991).

13 Id.

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deceived Plaintiff at closing. Is there no recourse for said deceit and equity-stripping scheme. There are many factual issues that need to be investigated through discovery and should not be subject to a motion to dismiss ruling at this time.

Before dismissing a claim for violation of the duty of good faith and fair dealing, the court must investigate the Parties's agreed common purpose and justified expectations, both of which are closely related to the express provisions of the contract."14 There are issues as to what was said to Plaintiff in acquiring this loan and filling out the loan application as well as statements directly before closing and statements made directly after the loan. Moreover, when Plaintiff did a refinance, why did he promise to get him the monthly payment that they promised the first time, why even bother and Plaintiff wishes to depose this person and many others and request several documents from Flagstar in discovery and a request for production. Discovery timelines do not end until April 15, 2013 as indicated and agreed in the Parties Joint Status Report. Therefore there is definitely several a genuine material fact issues.

In weighing the relative expectations and actions of each party in their performance of the contract, "Faithfulness to an agreed common purpose and consistency with the justified expectations of the other party" is to be considered. This reasonable expectation regarding the other party's performance "excludes a variety of types of conduct characterize as involving bad faith because they violate community standards of decency, fairness and reasonableness" *Best*, pp. 562-3 citing *Restatement* 2nd comment a. *Restatement* further goes on to give examples of "bad faith" including: evasion of the spirit of the bargain; abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance. *Restatemen*t,

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14 *Pollock v D.R. Horton, Inc., Portland*, 190 Or.App 1, 11-12, 77 P.3d 1120 (2003).

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comment d. As the court opined in *Best*, "[W]hen one party to a contract is given discretion in the performance of some aspect of the contract, the parties ordinarily contemplate that the discretion will be exercised for particular purposes. If the discretion is exercised for purposes not contemplated by the parties, the party exercising discretion has performed in bad faith." *Best*, 563. Fundamental to "good faith" is that the parties perform the contract in a way that will carry out the purposes of the parties entering into it. *Pollock*, p. 13.

Violations of the covenant has been found in lender actions as diverse as overcharge for NSF checks (plaintiffs reasonably expected the defendant Bank to set its NSF fees to recover its costs of processing but not overcharge, *Bes*t, 566); abrupt refusal to loan additional funds to borrower. (*K. M. C. Co. V. Irving Trust Co.*, 757 F.2d 752 (1984); accelerating a loan under some circumstances; refusal to take a late payment under some circumstances. Submitting fabricated documents as evidence along with a Motion to Dismiss pleading may also make the list.

Violation of Good Faith and Fair Dealing claims involve a weighing of the expectations of the parties, the actions or inactions of the other party. An evidentiary issue exists as to whether the Lender did in fact make false statements to Plaintiff and whether Plaintiff had a reasonable expectation to rely on said statements. A Rule 12 dismissal or even summary judgment phase would preclude a trier of fact from weighing the expectations of the parties and the conduct or inaction that Plaintiff asserts was in bad faith.

E. **Breach of Fiduciary Duty.** The Defendant claims that Lender is not a fiduciary of its borrower. In order to prevail on his breach of fiduciary duty claim, plaintiff must establish (1) the existence of a duty owed, (2) a breach of that duty, (3) a resulting injury, and (4) that the

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claimed breach was the proximate cause of the injury.15 Whether a legal duty exists is a question of law.16 In Washington, a lender is not a fiduciary of its borrower unless a special relationship exists to impose a fiduciary duty.17

Plaintiff argues that defendants owed him a fiduciary duty based on the Mortgage Broker Practices Act (RCW 19.146), and RCW 19.144.080,18 which prohibits any person in connection with making, brokering, obtaining, or modifying a residential mortgage loan to knowingly make misstatements, misrepresentations, or omissions during the mortgage lending process knowing that it may be relied on by a mortgage lender, borrower, or other party to the process. Unlike result in *Thepvongsa,19*, Defendant in this case did indeed assist Plaintiffs in assisting him in obtaining and applying to obtain this residential mortgage loan and the refinance transaction and held themselves out to be able to do the same. In Defendant's Motion to Dismiss they even acknowledge that Flagstar did indeed qualify them for this loan and did indeed take the application from the Plaintiffs. As a result, Plaintiff has pled sufficient facts to plead a valid claim for breach of fiduciary duty.

F. **Unconscionability**. The Defendant claims that unconscionability is not an independent claim for damages and bifurcates the claim into procedural unconscionability and procedural unconscionability. The Defendant argues that Plaintiff had a meaningful choice in accepting this loan and Plaintiff vehemently disagrees with this reasoning.

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15 *Miller v. U.S. Bank*, 72 Wn. App. 416, 426 (1994).

16 *Hansen v. Friend*, 118 Wn. 2d 476, 479 (1992).

17 *Miller*, 72 Wn. App. at 426-27.

18 *Cox v. Helenius*, 103 Wn. 2d 383 (1985),

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Under Washington law, whether a contract is unconscionable is a question of law. *Nelson v. McGoldrick*, 127 Wash.2d 124, 131, 896 P.2d 1258 (1995). Washington courts recognize two forms of unconscionability: "(1) substantive unconscionability, involving those cases where a clause or term in the contract is alleged to be one-sided or overly harsh and (2) procedural unconscionability, relating to impropriety during the process of forming a contract." *Id.* (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wash.2d 256, 260, 544 P.2d 20 (1975)) (internal quotations omitted). The burden of proving that a contract is unconscionable rests with the party attacking the contract. *Tjart*, 107 Wash. App. at 898, 28 P.3d 823 (2001).

Under the respective case law Plaintiff argues that the loan documents constitute a contract of adhesion, that the loan documents are complex and lengthy and written in small fine print and Plaintiff argues that the important terms are hidden in a maze of fine print such as the terms that are the subject of the Complaint. Plaintiff would argue procedurally unconscionable. There was also fraud and misrepresentation involved.

In addition the contract is evidently one-sided and overly harsh in its consequence. All of the terms grossly favor Flagstar and would like opportunity to engage in discovery to further illuminate what the Trust Deed and closing documents constitute substantive unsconscionability. We then conclude that Plaintiff has made a valid claim for unsconscionability, both procedural and substantive under the law.

G. UNFAIR AND UNLAWFUL PRACTICES ACT VIOLATIONS OF 18 U.S.C. 1621.

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19 *Thepvongsa v. Reg'l Tr. Serv. Corp.* (W.D. Wash., 2011)

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Under 18 U.S.C. 1621

Whoever-

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

G-1

That Defendants, through its agent, filed a declaration under penalty of perjury in the U.S. Federal District Court representing that this promissory note was an original and therefore it was entitled to enforce the terms of said promissory note in order to induce the court rule in its favor on its motion to dismiss pleading and incorporated said Note on page 11 of its motion to dismiss and attached said Note as Exhibit D. This pleading was signed by Attorney Fred Burnside as agent and counsel for Defendants Flagstar Bank, FSB and Mortgage Electronic Registration Systems.

G-2

That the" Assignment of Deed of Trust" filed with the King County County Recorder's Office on January 04, 2010, purports to represent that a transfer of the Promissory Note occurred from MERS to Flagstar on January 04, 2010. This does not appear possible.

G-3

That the originally signed Promissory Note is a fabricated document used by

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Defendants in this motion to dismiss hearing, so as to create the illusion that Flagstar holds the original promissory note and therefore is entitled to enforce the terms of said Note.

G-4

A declaration by Dr. James Kelley indicates that this Note is a forgery attached hereto as Exhibit 06. Dr. Kelley examined the questioned document that contains a purported color copy of the original Note with special attention to page 54 that contains the questioned signatures of Bonnie Louise Jonson and Clarence Hugh Jonson. He compared said signature with original signatures from Mr. and Mrs. Jonson. He also extracted the file metadata that contains information about the creation and modification of the document as well as the name of the document creator -"schaj". Pertaining to the alleged signatures of Clarence Hugh Jonson and Bonnie Louise Jonson on the Note document attached to page 54 of the motion to dismiss, this Examiner's professional opinion is that said document is not a copy made directly from the original Note; and the signatures thereon were systematically fabricated to make them appear as direct copies of the "blue Ink" signature of the original Note. The examiners opinion is that the signatures are forgeries.

G-5

Therefore, this Note that Defendants proffered to the Court as an original is actually a forgery and as such should be held against Defendants so as to prove that if Defendants would go to such an extent to produce a forged document in the court record then said original document simply does not exist. If this is the case, Defendants cannot move forward with said nonjudicial foreclosure and must dismiss this case.

G-6

Submitting a forged promissory note along with a motion to dismiss is a prime example

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of the deceptive business practice being utilized by Lenders in these type of cases and Defendants should be penalized for engaging in such conduct.

G-7

That Defendant's business practice creates TWO distinctly false representations of the historical "chain of title" of the Deed of Trust, neither of which is consistent with the Pooling and Servicing Agreement. We cannot even be sure who is the actual legal owner of said Note, when said Note is supposed to follow the Deed of Trust.

G-8

That was false and inaccurate and manufactured for the purpose of deceiving this District Court into accepting Defendants version of the chain of title transfers without regard to the truth as well as the current owner of said Note.

G-9

A debt collector violates *15* USC 1692f by:

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if:

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
(B) there is no present intention to take possession of the property; or
(C) the property is exempt by law from such dispossession or disablement.

G-10

As stated above, Defendants, individually and through its authorized representatives, has caused a false and fabricated promissory note along with its motion to dismiss made under penalty of perjury to be filed with this United States District Court for the Western District of Washington at Seattle.

H. FALSE/MISLEADING REPRESENTATIONS - UNLAWFUL DEBT COLLECTION PRACTICES ACT

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VIOLATIONS OF 15 U.S.C. 1692(e)
15 U.S.C 1692e. False or misleading representations states the following:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(2) The false representation of-
(A) the character, amount, or legal status of any debt; or
(B) any services rendered of compensation which may be lawfully received by any debt
collector for the collection of a debt.
(5) The 'threat to take any action that cannot legally be taken or that is not intended to be taken.
(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to-
(A) lose any claim or defense to payment of the debt; or
(B) become subject to any practice prohibited by this subchapter.
(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer

H-1

That Defendants conduct rises to the level of "un lawful" under the perjury statute.

H-2

That Defendants conduct in this case rises to the level of "fraudulent" under the plain definition of the word and is highly likely to mislead the public including this court.

H-3

That Defendants have presented evidence and assertions as to the chain of title transfers of said promissory note in this District Court matter, that Defendants either knows to be false or where Defendants have no reason to believe that these assertions contained in these documents are true.

H-5

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Rather than satisfy its burden of proof to establish standing, Defendants have determined that manufacturing evidence to accomplish its goals and chill opposition is a more cost effective business practice.

H-6

This use of the fabricated evidence has a chilling effect on borrowers and their attorneys. Said business practice discourages Plaintiff counsel from bringing other good faith arguments based on the transfer of the Deed of Trust and valid securitization claims or from questioning the validity of Defendants false claims based on standing,

H-7

That the fabricated loan documents and possibly other documents used by Defendants, while persuasive, are blatant misrepresentations of the true chain of title transfer of Plaintiff's promissory note and affront to the integrity of the legal system.

H-8

Plaintiffs are further informed and believe and allege thereon that each of these defendants' business practices are likely to continue to deceive the public and are likely to continue to induce the Courts including other Plaintiffs and Plaintiffs counsel into relying to their detriment on false representations made in loan and title documents and affidavits offered in similar District Court matters.

H-9

Defendants' fraudulent, deceptive, unfair, and other wrongful conduct as herein alleged, said Defendants have violated Revised Code of Washington 19.86.093 by consummating an unlawful, unfair, and fraudulent business practice, designed to deprive Plaintiff of their home, equity, as well as their past and future investment as indicated above.

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H-10

As a proximate result of defendants' conduct, plaintiffs, each of them, was injured financially and/or to its property rights. Said conduct as set forth herein resulted in statutory, general and special damages. Plaintiffs are further entitled to injunctive relief and any other equitable relief that the court deems appropriate.

PLEADING STANDARDS: PLAINTIFF'S CLAIMS SHOULD NOT BE DISMISSED WITH PREJUDICE

In summary, Plaintiff's complaint provides notice of a claim for relief. The court may consider matters properly subject to judicial notice as well as matters specifically plead. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court also must accept all allegations of material fact as true and view them in the light most favorable to the non-moving party. *Cassettari v. Nevada County*, Cal., 824 F.2d 735, 737 (9th Cir. 1987). In *Official Cmte. Of the Unsecured Creditors of Color Tile, Inc. V. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir.2003) the court observed " A court's task in ruling on a Rule 12(b)(6) motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." The court must resolve all inferences in plaintiffs favor in deciding whether to dismiss plaintiff's claim. *Al-Kidd v Ashcroft*, 580 F.3d 949 (9th Cir.2009); *Cassettari v Nevada County*, Cal, 824 F.3d 735, 737 (9th Cir. 1987).

Defendants should also not prevail on a motion to dismiss based on their hearsay allegations that plaintiff was not qualified to receive the originally promised monthly payment and in addition because Defendants are ignoring the controlling precedent in regards to the MERS question per the Bain decision. MOST importantly, Defendants appear to think they can submit fabricated evidence to court in order to prevail in this case without having to answer

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for their transgressions proffered in this case and commit an injustice to Plaintiff by depriving Plaintiff of life liberty and their pursuit to have their day in court and save their home from this alleged unlawful taking without due process of law.

In addition there has not been any discovery in this case and Plaintiff has several other claims associated with these claims regarding my Client's lack of knowledge in obtaining this loan, misrepresentations, negligence, fraud, unfair and unlawful practices, intentional infliction of emotional distress and wrongful foreclosure that could be brought upon an amendment of this Complaint. This Complaint is in dire need of another amendment based on the new claims and evidence mentioned herein.

Plaintiff should be allowed to amend unless it is clear that the claim "cannot be saved by any amendment". *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc*., 339 F.3d 1087, 1090 (9th Cir.2003) as quoted in *Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir 2007).

Plaintiff has set forth specific facts sufficient to survive Defendant's Motion to Dismiss because Plaintiff has alleged specific facts on every element necessary to prove Plaintiff's Claim. Defendant's Motion to Dismiss should therefore be denied.

Dated January 04, 2013

/s/ John A. Cochran, WSBA No. 38909
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