PATRICK NATIVIDAD, Plaintiff and Appellant,
v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.

No. A146931.

Court of Appeals of California, First District, Division Five.

Filed March 12, 2018.

Appeal from the Alameda County, Superior Court No. RG15753817.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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BRUINIERS, J.

Patrick Natividad unsuccessfully sought a modification of his home mortgage loan from Bank of America, N.A. (BANA). He complains that BANA repeatedly falsely claimed he had submitted insufficient documentation in support of his applications, falsely claimed he rejected a trial payment plan (TPP) under the Home Affordable Modification Program (HAMP), engaged in dual tracking while considering his applications, and ultimately failed to modify his loan and foreclosed on his property. He argues the trial court erred in dismissing a statutory dual tracking claim under the Homeowner's Bill of Rights (HBOR) (see Civ. Code, former § 2923.6, as enacted by Stats. 2012, ch. 86, § 7, ch. 87, § 7)[1] and a claim under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). We affirm.

I. BACKGROUND[2]

In 2005, Natividad took out a mortgage on property at 1127 Donahue Drive in Pleasanton with Countrywide Home Loans, Inc., which was taken over by BANA in 2008. In 2009, Natividad sought a loan modification, but his inquiries went unanswered. In 2010 and 2011, BANA repeatedly told Natividad, falsely, his documentation was incomplete or illegible or reported

his documentation had been lost. In July 2011, he submitted a new application with all requested documentation. In October 2011, BANA asked if he could pay $3,000 a month and he confirmed he could, but BANA never followed up. At BANA's direction, the trustee recorded a notice of default and election to sell under the deed of trust in November 2011, and a notice of trustee's sale was recorded in February 2012. Although Natividad continued to send in all requested documentation, his application was closed in about February 2012, on the ground of missing documentation.

When a BANA employee told Natividad his home would be sold in March 2012, he objected and his application was reopened. BANA requested documentation that Natividad had previously submitted. The following September, BANA approved Natividad for a HAMP TPP. Natividad requested clarification of some TPP terms, and BANA sent a letter stating Natividad had appealed the TPP. In December, BANA took the position that Natividad had declined the TPP offer. Natividad protested that he had not rejected the TPP, and he subsequently made four payments under the TPP that were rejected by BANA. Later in December, BANA informed Natividad he was ineligible for a HAMP loan modification, apparently because he owed too much on his loan, but said it would review his loan for another modification program. Natividad protested the handling of his loan modification application.

In February 2013, BANA requested and Natividad submitted a new loan modification application. In March, BANA again told Natividad he was ineligible for a HAMP modification because he owed too much on his loan. A May loan modification application was denied and Natividad appealed. In July, an agency helped Natividad submit a new loan modification application: "[b]y using the net present value formula (`NPV'), it was . . . determined that [Natividad] met the financial criteria needed for approval." This application was under review by BANA throughout September. Nevertheless, a notice of trustee's sale was recorded in September. In October, BANA once again denied Natividad's loan for modification under HAMP because he owed too much on the loan.

Natividad's home was sold in foreclosure more than one year later. On January 7, 2015, apparently the day before the scheduled sale, Natividad sued BANA and other defendants for, among other claims, dual tracking in violation of HBOR and in violation of the UCL. BANA demurred, arguing the dual tracking prohibitions in HBOR did not apply because Natividad had

previously been considered for a loan modification on multiple occasions (see former § 2923.6, subd. (g)); he did not allege "material" dual tracking violations that would give rise to a damages claim (see former § 2924.12, as enacted by Stats. 2012, ch. 86, § 16, ch. 87, § 16); he did not allege cognizable damages; and he failed to allege predicate acts or loss of money or property as required for a UCL claim.

The trial court sustained the demurrer without leave to amend. It ruled that the dual tracking provisions of HBOR did not apply to Natividad's 2013 loan modification application pursuant to former section 2923.6, subdivision (g), and in any event Natividad had not alleged the HBOR violations were material or resulted in damages. The UCL claim failed because it was based on the same allegations. The court dismissed the action.

II. DISCUSSION

We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether, as a matter of law, the complaint states a cause of action on any available legal theory. (See *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) In doing so, we assume the truth of all material factual allegations together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Because the trial court sustained the demurrer without leave to amend, Natividad has the burden of proving an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) If we find a reasonable possibility the defect could be cured by amendment, we will conclude the trial court abused its discretion and reverse. (*Ibid.*)

A. *HBOR Violation*

Assuming, without deciding, that Natividad was not excluded from HBOR coverage under former section 2923.6, subdivision (g), we nevertheless conclude he failed to state a cognizable HBOR claim.

The HBOR provided: **"If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's [lender[3]] shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending**. . . ." (Former § 2923.6, subd. (c).) BANA acknowledges a notice of trustee's sale was recorded in September 2013, when a loan modification application by Natividad allegedly was pending.

This constitutes a facial violation of former section 2923.6, subdivision (c). However, **we conclude Natividad has not alleged a viable HBOR claim because facts subject to judicial notice establish BANA corrected the violation before recording a notice of trustee's deed on sale and because Natividad has not alleged a material violation.**

Former section 2924.12 provided: "(a)(1) If a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section . . . 2923.6. . . . [¶] . . . [¶] (b) After a trustee's deed upon sale has been recorded, a [lender] shall be liable to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of Section . . . 2923.6 . . . by that [lender] where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale. **If the court finds that the material violation was intentional or reckless, or resulted from willful misconduct by a [lender], the court may award the borrower the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000)."** At BANA's request, the trial court took judicial notice that a trustee's deed upon sale was recorded on Natividad's property on January 14, 2015. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 [legal significance of recorded documents is properly subject to judicial notice].) Because a trustee's deed has been recorded, Natividad's only possible remedy under former section 2924.12 is for damages.

DAMAGES ARE NOT AVAILABLE IF THE VIOLATION IS "CORRECTED AND REMEDIED PRIOR TO THE RECORDATION OF THE TRUSTEE'S DEED UPON SALE." (Former § 2924.12, subd. (b).) Judicial notice was taken by the trial court of the notices of trustee's sale that were recorded on Natividad's property in December 2013 and December 2014, *following* BANA's October 2013 denial of Natividad's loan modification application. Natividad does not allege a new loan modification application was pending at those times, nor does he claim he can amend the complaint to so allege. **The recording of a new notice of trustee's sale when no loan modification application was pending corrected the alleged former section 2923.6 violation**. While the violation must also be "remedied," Natividad does not allege that he incurred any costs or fees specifically related to the recording of the September 2013 notice of trustee's sale that have not been refunded or alone caused him to lose his home.

In any event, the violation was not material. Natividad alleges the dual tracking violation caused damage to his credit rating, costs and fees incurred in the foreclosure process, loss of opportunities to explore other alternatives to foreclosure, and emotional distress. By September 2013, **Natividad's outstanding balance disqualified him for a HAMP modification, and he had been declined for Department of Justice modification and was no longer TPP eligible. Therefore, the September 2013 dual tracking violation did not cause Natividad to fail to qualify for a loan modification. It cannot reasonably be inferred that the September 2013 recording alone materially damaged Natividad's credit rating, as by that time notices of default and trustee's sale had already been recorded on the property.** Even assuming cognizable damages for emotional distress under former section 2924.12, subdivision (b) (an issue we do not decide), Natividad could not demonstrate serious emotional distress as the violation was corrected within three months and no further action was taken to sell the property for almost a year, thus giving Natividad ample opportunity to explore other foreclosure alternatives. Moreover, it appears from the complaint that Natividad made few or no payments on his outstanding mortgage loan while his applications were pending.

Natividad argues BANA's prior history of repeated dual tracking before the effective date of HBOR—including four alleged instances in 2012—should be taken into consideration in determining whether the September 2013 violation was material. Quoting *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904 (*Jolley*),[4] he claims BANA's repeated dual tracking caused him to "`not know where he . . . [stood], and by the time foreclosure [became] the lender's clear choice, it [was] too late for the borrower to find options to avoid it.'" BANA did not foreclose on the property until more than a year after the last alleged instance of dual tracking, and he alleges no facts supporting his conclusion that he somehow lost other opportunities to avoid foreclosure in the intervening year. In any event, as we discuss further *post,* we disagree with *Jolley*'s view that lenders owe borrowers a common law duty of care in handling loan modification applications. (See *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67-68 (*Lueras*).)

B. *UCL Claim*

Natividad argues he stated a viable UCL claim based on the dual tracking allegations. For the reasons already stated, **Natividad has not adequately**

alleged the dual tracking caused him to lose money or property as required for a UCL claim. (See Bus. & Prof. Code, § 17204.)

Natividad also argues he stated a viable UCL claim based on BANA's "repeated false representations as to either the status of Natividad's loan modification, the completeness of his application, and Natividad's purported and nonexistent denial of the TPP plan offered him." The operative first amended complaint pleaded a UCL claim based on the dual tracking allegations alone,[5] and Natividad opposed BANA's demurrer to that UCL claim solely by arguing it was properly based on the dual tracking allegations. We generally do not review theories not argued in the trial court. (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 906, 908.) However, **"`a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.'"** (*Id.* at p. 908; accord, *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 22.) "A demurrer is directed to the face of a complaint (Code Civ. Proc., § 430.30, subd. (a)) and it raises only questions of law ([*id.*], § 589, subd. (a); [citation]). Thus **an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds."** (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959.)

An action under **the UCL "`is not an all-purpose substitute for a tort or contract action.'"** (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.) Natividad's proposed UCL claim is indistinguishable from his claim that lenders owe borrowers a common law tort duty of care in the handling of their loan modification application. **BREACH OF A CONTRACTUAL PROMISE IS NORMALLY ENFORCED THROUGH CONTRACT LAW, "`EXCEPT WHEN THE ACTIONS THAT CONSTITUTE THE BREACH VIOLATE A SOCIAL POLICY THAT MERITS THE IMPOSITION OF TORT REMEDIES.'"** (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552, 553-554.) **"`The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion.'"** (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57.) **Whether a duty to use due care exists in a particular case is a question of law to be resolved by the court**. (*Ibid.*)

We do not find that the law imposes a general duty of care on lenders in the handling loan modification applications, though we recognize a lack of consistency in how this question has been addressed on appeal. In our own district, one court has held that lenders owe a duty of care in handling modification applications (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 944-950 (*Alvarez*), and another has suggested it in dicta (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 902-905 (*Jolley*)). However, our colleagues in *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299 (*Rufini*) came to a contrary conclusion, as have our colleagues in the Fourth District (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182 (*Ragland*); *Lueras, supra,* 221 Cal.App.4th 49).[6]

Jolley reversed a grant of summary judgment in favor of a foreclosing lender against a borrower who unsuccessfully sought modification of a commercial *construction* loan agreement. (*Jolley, supra,* 213 Cal.App.4th at pp. 877-878.) Jolley's complaint alleged causes of action for intentional misrepresentation, negligent misrepresentation, breach of contract/promissory estoppel, negligence, violation of the UCL, as well as sought declaratory relief, accounting, and reformation. (*Id.* at p. 881.) In addressing the negligence cause of action, the court acknowledged that generally "a financial institution owes no duty of care to a borrower when [its] 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.) The *Jolley* court observed, however, that a lender might nevertheless be liable under some circumstances for negligence in handling of a loan transaction even within its conventional role as a lender of money, considering the six factors articulated in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*)[7] for assessing the existence of a duty of care. (*Jolley,* at pp. 898-899, 901-902.) But the *Jolley* court, in reversing summary judgment on the negligence cause of action, did *not* hold that such a duty existed as a matter of law. (*Id.* at p. 906.) **The court concluded that the existence of a duty depended on factual disputes that needed to be resolved by the trial court**. (*Id.* at pp. 897, 907.) The *Biakanja* factors only "compel[led] a conclusion for Jolley" that summary judgment must be reversed, not that the bank owed him a duty of care. (*Jolley,* at p. 899.) The court went on, in dicta, to suggest that an ordinary mortgage lender might also owe a duty of care when negotiating modification of a residential loan, at least in the context of the 2008 home

mortgage crisis and in light of the remedial policies embodied in the HBOR and other state and federal legislation. (*Id.* at pp. 902-906.)

In *Alvarez,* Alvarez had been told his application for modification of his residential mortgage loan had been rejected because his reported monthly gross income was inadequate, whereas his paystubs showed his actual monthly gross income was over twice the amount reported by the lender. With respect to a loan on a rental property, he was told his application showed a monthly loss, while Alvarez alleged there was no such deficit. With respect to the loan on another rental property, the complaint alleged defendants falsely advised him that no documents had been submitted for review when in fact the documents had been received by defendants. Another plaintiff in the action alleged that, after working with defendants for over two years to obtain a loan modification, defendants falsely advised him that a second lien holder prevented the modification from taking place. (*Alvarez, supra,* 228 Cal.App.4th at p. 945.)

Applying the *Biakanja* factors, the *Alvarez* court held **a home mortgage lender owed a borrower a duty of care in its "review of [borrowers'] loan modification applications once [the lender] agreed to consider them."** (*Alvarez, supra,* 228 Cal.App.4th at pp. 944-945 [expressly distinguishing duty of care to offer or approve a loan modification].) **The *Alvarez* court held the plaintiff borrowers stated a potentially meritorious claim that the lender breached this duty by allegedly "(1) failing to review plaintiffs' applications in a timely manner, (2) foreclosing on plaintiffs' properties while they were under consideration for a HAMP modification and (3) mishandling plaintiffs' applications by relying on incorrect information."** (*Id.* at pp. 944-945; see *id.* at pp. 948-950.) "Plaintiffs allege that the mishandling of their applications `caus[ed] them to lose title to their home, deterrence from seeking other remedies to address their default and/or unaffordable mortgage payments, damage to their credit, additional income tax liability, costs and expenses incurred to prevent or fight foreclosure, and other damages.' . . . Should plaintiffs fail to prove that they would have obtained a loan modification absent defendants' negligence, damages will be affected accordingly, but not necessarily eliminated." (*Id.* at pp. 948-949.)

As note *ante,* other courts have reached a contrary conclusion. In *Ragland, supra,* 209 Cal.App.4th 182, the borrower under a deed of trust sued the assignee of loan and others for negligent misrepresentation, fraud, breach of

oral contract, intentional and negligent infliction of emotional distress, and rescission of a foreclosure sale. The trial court granted summary judgment and summary adjudication to the defendants. (*Id.* at pp. 186-187.) The reviewing court "[a]pplying basic contract and tort law," reversed the judgment on the causes of action for negligent misrepresentation, fraud, wrongful foreclosure, and intentional infliction of emotional distress, finding triable issues of fact as to whether Ragland was induced her to miss a loan payment. The court affirmed summary adjudication of the causes of action for breach of oral contract, negligent infliction of emotional distress, and rescission. (*Id.* at p. 187.)

On the claim for negligent infliction of emotional distress, Ragland argued that a relationship sufficient to create a duty of care arose by virtue of (1) the implied covenant of good faith and fair dealing in the loan documents and (2) financial advice rendered defendants' representatives in telephone calls. (*Ragland, supra,* 209 Cal.App.4th at pp. 205-206; see *id.* at pp. 188-189.) Affirming grant of summary adjudication of this cause of action, the court noted first that, **outside of the insurance context, breach of the implied covenant of good faith and fair dealing does not give rise to tort damages.** (*Id.* at p. 206, citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 692-693;[8] see *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43 [**compensation for breach of covenant of good faith and fair dealing is generally limited to contract remedies**].) Relying on *Nymark,* the court found any advice rendered by the defendants' representatives "directly related to the issue of loan modification and therefore fell within the scope of [defendant lender's] conventional role as a lender of money" and insufficient to create a duty of care. (*Ragland,* at p. 207.)

In *Lueras, supra,* 221 Cal.App.4th 49, the borrower applied for a loan modification under HAMP. He entered into a forbearance agreement with the bank that allowed him to make reduced monthly payments for six months while the bank considered a permanent loan modification. He submitted all requested documentation for a modification and continued making payments. After 10 months, a notice of default was recorded and the borrower was later served with a notice of trustee's sale. The bank eventually orally offered the borrower a HAMP loan modification, subsequently denied it by letter while promising not to foreclose on the home, and then promised a modification again subject to Fannie Mae approval. The borrower never

received a final answer on his application and his house was sold at a foreclosure sale. (*Id.* at pp. 56-59.)

Disagreeing with the dicta in *Jolley,* the *Lueras* court rejected the proposition that "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. . . . [¶]. . . 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."** (*Lueras, supra,* 221 Cal.App.4th at p. 67.) On the facts of the case, the court held the bank "did not owe a duty of care to handle Lueras's loan `in such a way to prevent foreclosure and forfeiture of his property.' . . . **[¶] 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." (*Id.* at p. 68.)

The *Lueras* court did, however, conclude **a lender owes "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. [Citations.] . . . 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."**[9] (*Lueras, supra,* 221 Cal.App.4th at pp. 68-69, fn. omitted; see *id.* at p. 55 [13 days prior to foreclosure, bank "expressly and in writing informed Lueras he `[would] not lose [his] home during this review period"; bank

representative also orally informed Lueras "the pending foreclosure sale would be postponed, [but] days later, [the bank] foreclosed"].)

Similarly, *Rufini, supra,* 227 Cal.App.4th 299 involved an action against brought by a homeowner borrower following a failed loan modification and foreclosure, alleging wrongful foreclosure, breach of contract and of the covenant of good faith and fair dealing, breach of fiduciary duty, negligence, negligent misrepresentation, and unfair business practices. (*Id.* at pp. 302-303.) The trial court sustained demurrers without leave to amend as to all causes of action. The reviewing court affirmed an order sustaining the demurrer to the causes of action for general negligence, breach of fiduciary duty, and an accounting, and reversed it as to the causes of action for breach of contract, negligent misrepresentation and unfair business practices. (*Id.* at p. 302.) Rufini's negligence cause of action alleged breaches of contractual obligations and contended that the loan servicer violated its duty when it "`negligently and carelessly rejected plaintiff's tenders of the reimbursement amounts.'" (*Id.* at p. 311.) The *Rufini* court found general allegations that a lender's actions were negligent insufficient to support a separate cause of action in tort. **"`"[C]OURTS WILL GENERALLY ENFORCE THE BREACH OF A CONTRACTUAL PROMISE THROUGH CONTRACT LAW, EXCEPT WHEN THE ACTIONS THAT CONSTITUTE THE BREACH VIOLATE A SOCIAL POLICY THAT MERITS THE IMPOSITION OF TORT REMEDIES."'"** (*Ibid.*) Rufini alleged that the lender owed him a fiduciary duty to use reasonable care and due diligence in handling his loan modification application. Citing *Ragland* and *Nymark,* the court found the plaintiff's factual allegations failed to show the defendant's activities went beyond its conventional role as a mere lender of money and "therefore do not establish the existence of a fiduciary duty."[10] (*Rufini,* at p. 312.)

We agree with our colleagues in *Ragland, Lueras,* and *Rufini* that no general duty of care is imposed on a lender in handling or processing a loan modification application where "the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark, supra,* 231 Cal.App.3d at p. 1096; see *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34-35; *Alvarado v. Aurora Loan Services, LLC, supra,* 2012 U.S.Dist. Lexis 135637, p. *17 [if lenders were "held to a higher standard of care by offering a service that could benefit borrowers whose circumstances have changed, [lenders] would be discouraged from leniency and would assert their rights to reclaim the

property upon the borrower's default"].) Natividad fails to plead facts establishing that BANA exceeded that role here.

Natividad notes that *Lueras* recognized a valid UCL cause of action based the lender's false representations that the borrower did not qualify for a HAMP loan modification. However, **THE BORROWER IN *LUERAS* SPECIFICALLY ALLEGED A "BREACH OF INDUSTRY STANDARDS SET BY [TITLE] 15 [UNITED STATES CODE SECTION] 1639A."** (*Lueras, supra,* 221 Cal.App.4th at pp. 84-85 [discussing claim number 7]**.) Natividad does not allege such a breach of a public policy.** He posits a tort duty of care in handling loan modification applications. Natividad also cites *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1304, which relied on the *Lueras* in holding that **FALSE REPRESENTATIONS OF INCOMPLETE DOCUMENTATION OF LOAN MODIFICATION APPLICATIONS SUPPORTED A UCL CLAIM**. We do not agree that *Lueras* supports recognition of such a claim. Although *Lueras* also recognized a possible cause of action for negligent misrepresentation based on "material misrepresentations about the status of an application for a loan modification," a negligent misrepresentation claim requires proof of justifiable reliance and damages. (*Id.* at pp. 68-69, 78.) **Natividad does not allege he relied on BANA's false representations that his applications were incomplete**; on the contrary, he alleges he challenged those representations as false and successfully induced BANA to consider new loan modification applications. As for damages, Natividad alleges he "ultimately never obtained a loan modification for which he was clearly qualified and subsequently lost his home in a foreclosure sale." However, his complaint alleges he lost the opportunity for a loan modification due to BANA's careless handling of his applications, not because they induced reliance (e.g., induced Natividad to forego other loan modification opportunities) by stringing out the application process through false claims of missing documentation. The former theory relies on recognition of a duty of care that we reject. (See *Lueras,* at pp. 67-68.)

Natividad's specific allegation that BANA improperly withdrew the 2012 TPP offer on the false ground that he had rejected it is not supported by the exhibits attached to the complaint. On September 27, 2012, BANA informed Natividad he had been approved for a TPP and three monthly payments of $4,408.40 were due beginning November 1. On October 5, Natividad requested an "explanation on how the trial modification amount was derived at in order to make our long term payments viable and how it compared to

the original amount [$3,000 monthly] advised to me by [BANA] last year." On October 13, BANA wrote Natividad: "[TPP's] do not include specific information regarding potential modified principal balances, interest rates or term lengths. . . . The [TPP] provides you with the opportunity to satisfy your lender of your ability and desire to meet financial obligations. . . . If your loan modification is approved, the final documentation of the modification contains the specific details you requested." The letter reiterated that Natividad's TPP payments were due "November 2012 through January 2013." Natividad did not make the TPP payments on November 1 or December 1, 2012. On December 3, 2012, BANA informed Natividad he was not eligible for a modification because "after being offered a [TPP] you notified us that you did not wish to accept the offer" and "you did not make all of the required [TPP] payments by the end of the trial period." Natividad cites no authority requiring BANA to explain the basis for the offered TPP payment amount before Natividad had to accept or reject the plan. Because Natividad did not make the TPP payments even though BANA had informed him that no further explanation for the TPP would be forthcoming, BANA reasonably concluded he had rejected the TPP. The alleged cancellation of the TPP, therefore, was not an unlawful, unfair or fraudulent business act that violated the UCL.

III. DISPOSITION

The judgment is affirmed. Natividad shall bear BANA's costs on appeal.

SIMONS, Acting P. J. and NEEDHAM, J., concurs.

[1] Undesignated statutory references are to the Civil Code. All references to the HBOR are to the statutes in effect from January 1, 2013, to December 31, 2017. (See Assem. Bill No. 278; Sen. Bill No. 900 (2011-2012 Reg. Sess.).)

[2] We assume the truth of all facts properly pleaded and accept as true all facts that may be implied or reasonably inferred from those expressly alleged. We do not assume the truth of contentions, deductions or conclusions of fact or law. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 985-986.)

[3] We use "lender" as shorthand for the statutory language "mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent."

[4] Natividad also improperly cites an unpublished appellate court opinion in support of this argument. His appellate counsel is admonished to comply with California Rules of Court, rule 8.1115.

[5] Although Natividad writes that his first amended complaint "sets forth multiple grounds for [a UCL] claim," he cites to allegations in the body of the complaint not to any language in the UCL cause of action explaining how those prior factual allegations supported the UCL claim.

[6] Federal trial court opinions are frequently discussed by state courts considering whether a duty of care arises in the context of loan modification negotiations. (See, e.g., *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. *1-*3, * 21-*22 [**finding a duty of care where bank offered trial loan modification plan, then reneged on a promise to modify the loan**]; *Alvarado v. Aurora Loan Services, LLC* (C.D.Cal., Sept. 20, 2012, No. SACV 12-0524-DOC-(JPRx)) 2012 U.S.Dist. Lexis 135637, pp. *17-*18 ["offering loan modifications is sufficiently entwined with money lending so as to be considered within the scope of typical money lending activities"; conventional money lender test sufficient "to determine no duty of care owed in servicing [a plaintiff's] mortgage loan and loan modification"].) However, such decisions are not binding authority, and we do not repeat a review of those decisions here.

[7] These nonexhaustive 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." (*Jolley, supra,* 213 Cal.App.4th at p. 899.)

[8] **"The distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate `social policy.'"** (*Foley v. Interactive Data Corp., supra,* 47 Cal.3d at p. 683.)

[9] **TWO OTHER PUBLISHED OPINIONS FOUND A DUTY OF CARE IN CASES INVOLVING LENDERS WHO ADVISED THE BORROWER TO BECOME DELINQUENT IN ORDER TO BE CONSIDERED FOR A LOAN MODIFICATION.** (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1180-1183; *Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 640-641 [emphasizing this element].)

[10] The court found the pleading allegations in that case sufficient to support a cause of action under the UCL based on underlying nonstatutory claims for fraud, negligent misrepresentation, breach of contract and promissory estoppel. (*Rufini, supra,* 227 Cal.App.4th at pp. 310-311.)