No. _____

In the

Supreme Court of the United States

LEONARD GOMES, JR.,

Petitioner,

v.

BANK OF AMERICA, N.A. and
BAC HOME LOANS SERVICING, LP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do mortgage borrowers as a matter of federal law have a private right of action under the Treasury Department's Home Affordable Modification Program (HAMP) to redress loan modification abuses by lenders and/or loan servicers, and if so, to what extent?

2. Are mortgage borrowers exercising a private right of action under the Treasury Department's Home Affordable Modification Program (HAMP) to redress loan modification abuses by lenders and/or loan servicers required to prove that they were damaged by such abuses, or are such abuses *per se* violations of federal law?

3. Are mortgage borrowers exercising a private right of action under State unfair and deceptive acts and practices prohibitions to redress loan modification abuses by lenders and/or loan servicers required to prove that they were damaged by such abuses, or are such abuses *per se* violations of state law?

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PETITION FOR WRIT OF CERTIORARI

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail, postmarked on or before June 7, 2016, thus filed within ninety days of the Order entered March 9, 2016, denying reconsideration by a Panel of the United States Court of Appeals for the Ninth Circuit of its February 17, 2016 Memorandum decision affirming the Judgment of the United States District Court for the District of Hawaii entered on May 15, 2013.

This Court has jurisdiction to review this Petition pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(a) and 13(1).

The jurisdiction of the District Court was found to have been based upon Section 1332 of Title 28 of the United States Code (diversity of citizenship), upon removal from State Court. Venue was found to have been proper, based upon Section 1391(b)(2) of Title 28 of the United States Code.

II. AUTHORITATIVE PROVISIONS

The decisions being challenged concern the interpretation and application of Section 480-13 of the Hawaii Revised Statutes prohibiting unfair and deceptive trade practices, the text of which Section is set forth in its entirety in the District Court's decision contained within the Appendix to this Petition, Section "A", pages A17 – A19.

III. CONCISE STATEMENT OF THE CASE

A. Introduction

For most Americans, home ownership has always been their largest and most important asset.

Indeed, many view home ownership as more than a mere financial asset, representing in many cases a borrower's entire life savings, but constituting the very economic, social and political bedrock of all of American Democracy.

Our Nation's Courts, for example, have long recognized the special importance to the welfare of society of protecting a family's residence.

This is true, not only from an economic point of view, but also for its inherent social values, as its location often determines where children go to school, where families worship, where family and friends reside, and where the elderly spend their remaining years.

Moreover, in the absence of home ownership, borrowers may become dependent on public housing and welfare, if available, and parental control may be lost and marriages may break up as a result, and not only physical and emotional illness, but even suicides have resulted; see *Sawada v. Endo*, 57 Haw. 608, 616, 561 P.2d 1291 (1977).

This Petition seeks review and redress as a matter of law. A resolution of this Petition and the framing of relief for this Petitioner does not depend upon a detailed factual inquiry by this Court. The detailed factual recitals below are believed necessary only for the purpose of permitting an understanding of the background of this dispute and why a *per se* rule establishing liability in such cases is necessary.

B. The TARP Program

In response to the rapidly deteriorating 2008 financial mortgage market conditions, Congress enacted the Emergency Economic Stabilization Act, P.L. 110-343, 122 Stat. 3765.

The center focus of that Act was the Troubled Asset Relief Program (TARP), which required the Secretary of the Treasury, *inter alia*, to "implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures." 12 U.S.C. § 5219(a).

Those programs became known as the federally-sponsored Loan Modification Programs, what became the only hope for homeowners, like this Petitioner, to save his home.

C. The Federal Loan Modification Program

Today, tens of millions of Americans, like this Petitioner, have applied for loan modification relief, most of whom will be affected by whether this Court reviews this Petition.

Pursuant to TARP authority, in February 2009 the Treasury Secretary set aside up to $50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure.

The Treasury Secretary negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers, including Petitioner's lender.

Under the terms of the SPAs, loan servicers

agreed to identify homeowners in default or would likely soon would be in default on their mortgage payments, and to modify the loans of those eligible under the program.

In exchange, servicers would receive a $1,000 payment for each permanent modification, along with other incentives.

The SPAs stated that servicers "shall perform the loan modification . . . described in . . . the Program guidelines and procedures issued by the Treasury . . . and . . . any supplemental documentation, instructions, bulletins, letters, directives, or other communications . . . issued by the Treasury."

D. How The Program Was Supposed To Work

In supplemental guidelines, Treasury directed servicers to determine each borrower's eligibility for a modification by following what amounted to a three-step process:

1. the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower's primary residence; the mortgage payments were more than 31 percent of the borrower's monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than $729,750.

2. the loan servicer calculated a modification using a "waterfall" method, applying enumerated changes in a specified order until the borrower's monthly mortgage payment ratio dropped "as close as possible to 31 percent."

3. the loan servicer applied a Net Present

Value (NPV) test to assess whether the modified mortgage's value to the servicer would be greater than the return on the mortgage if unmodified.

The NPV test is essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure.

If the NPV result was negative — that is, the value of the modified mortgage would be lower than the servicer's expected return after foreclosure — the servicer was not obliged to offer a modification.

If the NPV was positive, however, the Treasury directives said that "the servicer MUST offer the modification." Supplemental Directive 09-01.

If a borrower qualified for a HAMP loan modification, the modification process itself consisted of two stages.

After determining a borrower was eligible, the loan servicer implemented a Trial Period Plan (TPP) under the new loan repayment terms it formulated using the waterfall method.

The trial period under the TPP lasted three or more months, during which time the lender "must service the mortgage loan . . . in the same manner as it would service a loan in forbearance." Supplemental Directive 09-01.

After the trial period, if the borrower complied with all terms of the TPP Agreement — including making all required payments and providing all required documentation — and if the borrower's representations remained accurate, the loan servicer had to offer a permanent modification. See

Supplemental Directive 09-01 ("If the borrower complies with the terms and conditions of the Trial Period Plan, the loan modification will become effective on the first day of the month following the trial period . . . .").

Unfortunately, like many government programs, there were virtually no enforcement mechanisms.

E. Abuses In The TPP Program

Without adequate oversight, homeowners in the United States have been subjected to what is commonly known as "loan modification hell," were loan modifications are rejected with false excuses like the application is not complete or the application needs to be resubmitted as more than a made up number of months has expired.

Loan modification abusive practices have been well documented by the issuance of governmental report after governmental report, culminating in tens of billions of dollars in fines and other sanctions.

See, for example, the 2012 *AG Settlement* between the major banks and the U.S. Department of Justice and forty-nine States, covering a wide range of unfair and deceptive acts and practices, *including by the Respondents to this Petition*,, including:

1. failing to perform loan modification underwriting;

2. failing to gather or losing loan modification application documentation and other paperwork;

3. failing to provide adequate staffing to

implement programs;

4. failing to adequately train staff responsible for loan modifications;

5. failing to establish adequate processes for loan modifications;

6. allowing borrowers to stay in trial modifications for excess time periods;

7. wrongfully denying modification applications;

8. failing to respond to borrower inquiries;

9. providing false or misleading information to consumers while referring loans to foreclosure during the loan modification application process;

10. providing false or misleading information to consumers while initiating foreclosures where the borrower was in good faith actively pursuing a loss mitigation alternative offered by the Bank;

11. providing false or misleading information to consumers while scheduling and conducting foreclosure sales during the loan application process and during trial loan modification periods;

12. misrepresenting to borrowers that loss mitigation programs would provide relief from the initiation of foreclosure or further foreclosure efforts;

13. failing to provide accurate and timely information to borrowers who are in need of, and eligible for, loss mitigation services, including loan modifications;

14. falsely advising borrowers that they must

be at least 60 days delinquent in loan payments to qualify for a loan modification;

15. miscalculating borrowers' eligibility for loan modification programs and improperly denying loan modification relief to eligible borrowers;

16. misleading borrowers by representing that loan modification applications will be handled promptly when Banks regularly fail to act on loan modifications in a timely manner;

17. failing to property process borrowers' applications for loan modifications, including failing to account for documents submitted by borrowers and failing to respond to borrowers' reasonable requests for information and assistance;

18. failing to assign adequate staff resources with sufficient training to handle the demand from distressed borrowers; and

19. misleading borrowers by providing false or deceptive reasons for denial of loan modifications.

F. Why Such Abuses Occurred

The multiple causes of such widespread unfair and deceptive acts and practices among loan servicers, for which the Respondents here are notorious, are many, fueled not only by inexperience and by poor training, but also by conflicts of interest among loan servicers who make more money if homeowners' property is foreclosed on rather than if their loans are modified, and also by undisclosed restrictions in the governing instruments of securitized trusts that own the loans which hinder or render loan modifications contractually impossible.

See, for example, discussions of such causes in

Thompson, Foreclosing Modifications: *How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011); Stark, *A Duty To Reevaluate A Duty of Care for Mortgage Servicers*, 30 Maine Bar J. 77 (2015); Levitin and Tworney, *Mortgage Servicing*, 28 Yale J. on Reg.1 (2011); Kinney, *Evaluating the Impact of the Home Affordable Modification Program in Response to the Foreclosure Crisis: Why Real Estate Securitization Demands a New Approach*, 17 UDC-DCSL L. Rev. 244 (2014); The Foreclosure Hour, *What Every Homeowner Needs To Know About Loan Modifications*, www.foreclosurehour.com (June 5, 2016).

G. Respondents' Unfair/Deceptive Acts/Practices

Petitioner's loan modification experience, attempting to modify his $654,000 home loan, was a textbook example, as the District Court found, of just about every conceivable loan modification abuse identified in the regulatory literature.

The District Court, for instance, conceded for purposes of otherwise denying summary judgment, that based on Petitioner's uncontroverted deposition testimony:

1. Petitioner attempted many times to modify his loan, but was told that he had to be in default first (A2);

2. Petitioner then became delinquent, received a default letter dated September 16, 2009, requesting $9,229.58 including late charges and fees, whereas he earlier had submitted two loan modification requests, one on May 2, 2009 and another on August 28, 2009, yet had had no responses from Respondents, his loan servicers (A5);

3. Petitioner on September 29, 2009, then

talked with "Sarah" who took his information over the phone and said she would send him a loan modification application (A6);

4. Petitioner in December 2009 then received an attorney's letter threatening foreclosure instead (A6);

5. Petitioner on or about January 20, 2010, then talked with "James" who told him, after taking down his financial information, that he qualified for HAMP relief provided he sent documentation substantiating the information (A6);

6. Petitioner thereafter on February 19, 2010 received a letter from Respondents' attorney that his loan modification was under review, later also confirmed by an April 16, 2010 letter from Respondents (A6), but calling back later was told on July 29, 2010 that his file was closed because of insufficient information, and nevertheless that he had been approved except that substantiating documentation was still needed (A7);

7. Petitioner then on August 13, 2010 received a letter telling him that he may be eligible for a HAMP modification (A7);

8. Petitioner then received a new notice of intent to foreclose in the mail dated August 23, 2010 (A7);

9. Petitioner on September 28, 2010 was thereafter told by "Doris" that his loan modification had been approved and that he would receive a modification agreement within 30 days (A7-A8);

10. Petitioner was thereafter told by "Svetlana" on November 12, 2010 that he needed merely to sign a certified copy of his financial

statements, later her telling him by email on November 17, 2010 that his file was being transferred to the closing department and that he could expect to receive a HAMP modification agreement within the next 30 to 40 days (A8);

11. Petitioner instead received a letter dated January 26, 2011 informing him that his HAMP application had been denied because of a negative NPV (described *supra*) based on his submitted financial statements (A8);

12. Petitioner and his attorney then met with "Maria" on June 10, 2011 providing Respondents with his most recent financial statements and he offered to pay $20,000 in settlement to get a loan modification, and they were told that it was very likely that he would be approved for a loan modification (A9);

13. Petitioner then by letter dated June 16, 2011 was told that he was eligible for a trial program (TPP, described *supra*), receiving not one but two contradictory trial payment offers, one trial program requiring a monthly payment of $5,039.12 and then the same amount monthly permanently, and the other $9,533.91 monthly in addition to a lump sum payment of $103,980.17, neither of which could he afford (A9), whereas by comparison his original monthly loan payment was only $3,976.82 (Civil No. 12-cv-00311, Doc. No. 43-5, page 2).

H. Petitioner Found Injured, But Loses His Case

After various pretrial motions were disposed of, Petitioner's remaining claims were for damages for the Respondents' alleged negligence and alleged unfair and deceptive acts and practices in relation to his attempt to secure a loan modification.

Respondents filed a motion for summary judgment, claiming that there were no material issues in genuine dispute as (1) supposedly they had no duty to offer Petitioner a loan modification and that (2) he suffered no injury because of them.

The District Court accepted somewhat skeptically the prior ruling in the case by District Judge Ezra, Petitioner's first presiding judge before being reassigned outside the District, that there was such a duty (A12-A13), and denied summary judgment on that issue.

The District Court further found that for purposes of ruling on Respondents' summary judgment motion, Petitioner had shown he was damaged: "[a]though it may be questioned whether given his many [other] loan delinquencies, Gomes's [sic] failure to modify his loan adversely affected his credit score, the court makes that assumption for purposes of this motion" (A15) (words in brackets added).

Yet, after finding that Respondents had a duty to modify loans in good faith and finding that Petitioner was damaged by Respondents' failure to modify his loan at least with respect to the lowering of his credit score – ignoring his other obvious damages, including hiring an attorney to help him with the loan modification and the emotional distress damages his "loan modification hell" caused him -- nevertheless the District Court inconsistently concluded that "Gomes fails to raise a genuine issue of fact as to whether he suffered damages flowing from any failure by the bank to process his loan modification applications" (A15).

The District Court's reasoning in support of its conclusion, which resulted in defeating Petitioner's claim of negligence, was similarly

unsatisfying and furthermore self-contradictory, concluding that "Gomes does not and could not state what the terms of any acceptable loan modification would have been" (A15), which ignores the fact that he could not do so because of the misconduct of the Respondents, who otherwise have profited by their own wrongdoing.

The District Court also used the same self-contradictory reasoning to defeat Petitioner's unfair and deceptive acts and practices claim.

For, after conceding for purposes of ruling on Respondents' motion for summary judgment that "[a]though it may be questioned whether given his many [other] loan delinquencies, Gomes's [sic] failure to modify his loan adversely affected his credit score, the court makes that assumption for purposes of this motion," it nevertheless granted summary judgment on the unfair and deceptive acts and practices claim as well, because "he fails to demonstrate that he suffered damages relating to the loan modification process" (A21).

I. The Court of Appeals' Panel Affirmed

Petitioner's Ninth Circuit Panel affirmed without oral argument in a brief Memorandum, reasoning mistakenly with a string of *non sequiturs*:

1. The Panel tersely concluded that "First, Defendants were not responsible for Gomes's [sic] default" (A25), when of course no one was contending that they were, whereas loan modifications by definition are sought and only sought where and when borrowers are in financial distress.

2. The Panel further concluded that "Second, Gomes did not show that Defendants' actions negatively affected his credit after he defaulted

[although the District Court so found]; . . . rejected the loan modification offer he ultimately received because he could not afford its payments [because they were unreasonable]; . . . defaulted on other mortgages [more the reason why he needed a loan modification for this loan]; . . . provided no evidence he would have successfully pursued the alternative forms of relief he identified on appeal, such as reorganization through bankruptcy [the issue is Respondents' misconduct, however, not his]" (words in brackets added in rebuttal) (A25-26).

3. Finally, the Panel concluded "Third, Gomes admitted that he paid no costs and fees associated with a delay in processing his loan modification applications and he presented no evidence that he accrued such costs and fees [which is irrelevant to his damage claim]" (words in brackets further added in rebuttal) (A26).

IV. LEGAL ARGUMENT SUPPORTING WRIT

Despite the fact that issues surrounding loan modification rights and remedies have in recent years become the central focus of enormous federal and state litigation, there is no consistency in the manner in which these issues are being considered and resolved.

Indeed, Federal Courts of Appeals are deeply divided on the issues, yet this Court has yet to consider a loan modification case, notwithstanding the importance of such issues to tens of millions of homeowners throughout the United States.

Loan modifications, as we have come to know them, are a creature of Congress, yet Congress also has provided very little guidance on the interpretation of HAMP rights and remedies.

The split among the Federal Circuits concerns *as a matter of law* whether, for example, there is a enforceable duty arising out of federal legislation and/or arising out of general contract law to conscientiously modify mortgage loans, whether promissory estoppel can create a binding loan modification contract where material modifying terms have not been agreed to, and whether unfair and deceptive loan modification acts and practices are actionable *per se* without proof of damages except for establishing the amount of recovery.

For example, irrespective of whether the decisional context is a motion to dismiss or a motion for summary judgment:

FIRST CIRCUIT: *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224 (1st Cir. 2013) (First Circuit recognizes private contractual rights and liability for economic damages);

FOURTH CIRCUIT: *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769 (4th Cir. 2013) (Fourth Circuit recognizes no private right of action or liability under HAMP/TPP);

FIFTH CIRCUIT: *Pennington v. HSBC Bank USA, N.A.*, 493 F. App'x 548 (5th Cir. 2012) (Fifth Circuit recognizes no private right of action or liability under HAMP/TPP);

SIXTH CIRCUIT: *Rush v. Mac*, 792 F.3d 600 (6th Cir. 2015) (Sixth Circuit recognizes no private right of action or liability under HAMP/TPP);

SEVENTH CIRCUIT: *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (Seventh Circuit recognizes no private right of action or liability under HAMP/TPP, but recognizes state law rights and remedies for breach of contract,

negligence, and unfair and deceptive acts and practices);

EIGHT CIRCUIT: *Freitas v. Wells Fargo Home Mortgage, Inc.*, 703 F.3d 436 (8th Cir. 2013) (Eighth Circuit recognizes no private right of action or liability under HAMP/TPP);

NINTH CIRCUIT: *Compton v. Countrywide Financial Corp.*, 761 F.3d 1046 (9th Cir. 2014) (Ninth Circuit does not require a showing that a lender owed borrower a duty of care to support an unfair and deceptive violation in Hawaii regarding loan modifications and does not require a borrower to even allege that a lender exceeded the scope of its conventional role as a mere lender of money before being liable for such violations regarding loan modifications; decided on appeal after *Gomes* was decided by the District Court below); see also *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878 (9th Cir. 2013) (Ninth Circuit recognizes some private rights of action and some liability under HAMP/TPP);

Indeed, another Panel of the Ninth Circuit Court of Appeals in *Compton*, 761 F.3d at 1053-1054, directly contradicted what the *Gomes* Panel held, a split even without the Ninth Circuit and within eventually the same District Court, when the *Compton* Panel concluded:

> Although the statute does not define either "injury" or "damages," see Zanakis-Pico, 98 Haw. at 316, Hawaii courts have not set a high bar for proving these elements. The plaintiff must show only that the alleged violations of section 480-2(a) caused "private damage," Kekauoha-Alisa v. Ameriquest Mortg. Co. (In re

> Kekauoha-Alisa), 674 F.3d 1083, 1092 (9th Cir. 2012) (quoting Ai, 61 Haw. at 618), and that the plaintiff's injury is "fairly traceable to the defendant's actions," Flores v. Rawlings Co., 117 Haw. 153, 167 n.23, 177 P.3d 341 (2008) (quoting Cieri, 80 Haw. at 66). Because deceptive acts "do their damage when they induce action that a consumer would not otherwise have undertaken," a consumer who can show "a resulting injury" is entitled to damages even if the consumer has not actually consummated a particular transaction. Zanakis-Pico, 98 Haw. at 317. For instance, a consumer could recover damages for "out-of-pocket expenses for a money order, gasoline, parking, and wear and tear on [an] automobile that resulted from [an] unfair business practice."

ELEVENTH CIRCUIT: *Miller v. Chase Home Finance, LLC*, 677 F.3d 1113 (11th Cir. 2012) (Eleventh Circuit recognizes no private right of action or liability under HAMP/TPP).

These conflicting holdings above with respect to interpretations of federal law alone pertaining to loan modifications were helpfully summarized by the Fifth Circuit Court in *Pennington*, 493 F. App'x at 552-553, as follows:

> Whether the TPP itself is a contract, and what obligations it imposes, are questions of first impression in this circuit. Courts have proposed a wide variety of answers to whether the TPP is a contract requiring the lender to provide a permanent modification

under HAMP even to a borrower who complies with the TPP requirements. Some courts have used general reasoning to resolve the issue for all TPPs at once, attacking the plan for lack of consideration or definite terms or as being an attempted end-run around HAMP's lack of a private cause of action. Courts finding no consideration reason that all the terms are either required by the initial loan (i.e. regular payments) or are best understood as conditions of applying for the HAMP program. E.g., Senter v. JPMorgan Chase Bank, N.A., 810 F. Supp. 2d 1339, 1348-49 (S.D. Fla. 2011).

Other courts have decided that the additional terms in the TPP constitute consideration, namely opening new escrow accounts, undergoing credit counseling if asked, and proving financial information. E.g., Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 564 (7th Cir. 2012). A few courts have declared that state breach-of-contract claims fail to state a cause of action independently of HAMP. E.g., Bourdelais v. J.P. Morgan Chase, No. 3:10CV670-HEH, 2011 U.S. Dist. LEXIS 35507, 2011 WL 1306311, at *4 (E.D. Va. Apr. 1, 2011). Because HAMP affords no private right of action, Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 [553] (11th Cir. 2012), the Bourdelais court's reasoning means dismissal of a claim.

Various courts have more narrowly

addressed whether particular TPPs required lenders to offer a permanent modification, regardless of whether a TPP in general is a contract. Some of those courts have determined that the TPP does not require a lender to offer a permanent loan unless the plaintiff alleges that the lender determined that the plaintiff met the requirements of the TPP or provides evidence of a loan modification with a new monthly payment that both lender and borrower agreed to in executed loan documents. E.g., Lonberg v. Freddie Mac, 776 F. Supp. 2d 1202, 1210 (D. Or. 2011). Other courts have found that the TPP is not effective unless

> after [the borrower] sign[s] and return[s] two copies of this Plan to the Lender, the Lender [sends] [the borrower] a signed copy of this Plan if [the borrower] qualif[ies] for the Offer or [sends] [the borrower] written notice that [the borrower] does not qualify for the Offer. This plan will not take effect unless and until both [the borrower] and the lender sign it and Lender provides [the borrower] with a copy of this Plan with the Lender's signature.

Soin v. Fed. Nat'l Mortg. Ass'n, No. 2:12-634, 2012 U.S. Dist. LEXIS 51824, 2012 WL 1232324, at *5 (E.D. Cal. Apr. 12, 2012) (analyzing contractual language that matches the TPP in the instant case).

V. CONCLUSION

Petitioner's case provides a fertile basis for urgently needed answers *as a matter of law* to many of these conflicting issues that only this Court is uniquely in a position to unravel and answer with needed certainty for our presently divided Courts of Appeal.

This Court's analysis and guidance are long overdue, in an area of enormous importance not only for homeowners like Petitioner, but for the future of the American economy as well, as it continues to rely without clear guidance from our Courts upon loan modifications, struggling to overcome the devastating effects of the still lingering mortgage crisis of 2008.

Respectfully submitted,

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June 6, 2016

APPENDIX

A. ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, FILED MAY 15, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LEONARD GOMES, JR., Plaintiff, v. BANK OF AMERICA, N.A.; BAC HOME LOANS SERVICING, LP; JOHN AND MARY DOES 1-10, Defendants.	CIVIL NO. 12-00311 SOM/BMK ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This removed action arises out of an attempt by Plaintiff Leonard Gomes, Jr., to obtain a modification of a $654,500 loan. Gomes's First Amended Complaint asserts claims of negligence and violating on the handling of his loan modification application.

On March 15, 2013, Defendants filed a motion for summary judgment. See ECF No. 42. That motion is granted.

I. BACKGROUND.

In 2007, the National Bank of Kansas City loaned Gomes $654,500. This loan was secured by a note, ECF No. 43-5, and a mortgage on his residence, ECF No. 43-6. In 2010, the loan was assigned to Deutsche Bank National Trust Company, Trustee of BCAP LLC Trust 2007-AA4. See ECF No. 43-7. Gomes's loan was serviced by Defendant BAC Home Loans Servicing, LP. See 43-8 (notice of intent to foreclose); Declaration of Michele C. Sexton ¶¶ 2, 6, ECF No. 43-4.

The original complaint asserted causes of action for negligence and unfair and deceptive acts in violation of section 480-2 of Hawaii Revised Statutes. Id. As detailed in Judge David Alan Ezra's order of July 25, 2012, Gomes alleged that he attempted numerous times to modify his loan, only to be told that his loan needed to be in default before it could be modified.[1] Judge Ezra ruled that Gomes had alleged sufficient facts to support a negligence claim given BAC Servicing's duty to Gomes to process his loan modification application. See ECF No. 14. Although lenders and loan servicers generally owe borrowers no duty of care giving rise to any negligence claim, Judge Ezra ruled that the allegations suggested that BAC Servicing had exceeded its role as a conventional loan servicer.

On August 8, 2012, Gomes filed a First Amended Complaint. This document adds factual

allegations concerning Gomes's alleged damages. In the original Complaint, Gomes had merely alleged that his credit score had been damaged and that he might have sold his property but for being told he qualified for a Home Affordable Modification Program ("HAMP") loan modification. See Complaint ¶¶ 95 and 97, ECF No. 1-2. In the First Amended Complaint, Gomes adds that, because of the bad marks on his credit report, he had to provide a $20,000 security deposit and $100,000 mortgage on behalf of his construction company. See First Amended Complaint ¶ 103. He says he also paid a higher interest rate on a loan he obtained for a truck purchase because of his allegedly damaged credit score. Id. ¶ 104.

Gomes complains that Bank of America told him that, to be considered for a loan modification, he had to be delinquent. He testified in his deposition, however, that after that statement was made, he continued to make payments on his mortgage and only stopped paying his mortgage when he ran out of money. See Deposition of Leonard Gomes, Jr., at 70-71, ECF No. 43-3.

In his deposition, Gomes admitted to having had money trouble since the fall of 2008. In September or October 2008, Gomes had an approximate principal balance of $90,000 on his Wells Fargo credit card. When he fell 30 days behind in his payments, Wells Fargo offered him a 15% reduction in the principal and a no-interest 7-year payment plan to pay it off. Gomes concedes

that that modification affected his credit score. See Gomes Depo. At 18-19.

Gomes says that, given the many mortgage payments he has, he cannot say what the balance is on each one. See id. at 29. He says that, in a good year, his construction business made about $120,000. Id. at 24. At one point, he had six mortgages on five properties. Id. at 63. He testified that each default negatively affected his credit score. Id. at 64-65.

For example, Gomes testified that he defaulted on a $500,000+ mortgage in August 2009, when he was delinquent for four months. Id. at 29-30. Gomes testified that, although he brought that loan current, he defaulted again in December 2011 and made no further payment on that loan as of the time of his deposition in February 2013. Id. at 30-31. Gomes conceded that the default affected his credit score. Id. at 31-32.

Gomes testified that he also defaulted on a $400,000+ loan with American Savings Bank in August 2009. See id. at 33. He says that he became current on that loan in April 2010. Id. at 34. He concedes that this default affected his credit score. Id.

In testifying about the 2007 $650,000+ loan at issue in this case, Gomes said that he had obtained prior loans and understood that, if he defaulted on his payments, his credit score would

be affected. See id. at 41-42. Michele C. Sexton of Bank of America testified that Bank of America was the loan servicer for Gomes's loan, number xxxxx5420, for the property on Hokulani Street. See Sexton Decl. ¶¶ 2, 6, ECF No. 43-4. Since October 31, 2012, the loan servicer of Gomes's loan has been Specialized Loan Servicing. Id. ¶ 6.

Gomes testified that, since July 2009, he has made no payments on his loan because he has been unable to do so for financial reasons. See Gomes Test. at 66 ("Q: And as of today, you haven't made any payments on this loan since 2009, is that correct? A: That's correct. Q: Is that simply because you haven't had the ability to make those payments since 2009? A: Correct.") and at 51 (indicating that Gomes made no payments from July 2009 to August 2010 because he was financially unable to do so).

On September 16, 2009, Bank of America mailed Gomes a Notice of Intent to Accelerate. See ECF No. 43-8. To cure the default, Gomes was allegedly told he had to pay $9,229.58, which included the monthly charges and late fees owed. Id. By the time the notice was sent to Gomes, Gomes had allegedly submitted two loan modification requests, one on May 2, 2009, and another on August 28, 2009. Gomes says he did not hear back from Bank of America on either of these requests. See affidavit of Leonard Gomes, Jr., ¶¶ 4-6, ECF No. 47-1.

On September 24, 2009, Gomes allegedly called Bank of America and spoke with "Sarah." Gomes says that Sarah took his financial information over the phone and told him that she would send out another loan modification application. Id. ¶ 8.

In December 2009, Gomes allegedly received a debt collection notice from Bank of America's Attorneys, Routh Crabtree Olson. This notice told Gomes that the law firm had been retained to initiate foreclosure proceedings. See id. ¶ 10. Gomes says that, in response, he sent updated financial information to Bank of America on December 20, 2009. Id. ¶ 11.

Gomes says that, on or about January 20, 2010, he called Bank of America and spoke with "James." Gomes says that James told him that, based on the financial information Gomes had given James, he would be approved for a HAMP loan modification, provided he could send documentation substantiating the financial information. See Gomes Aff. ¶¶ 12-13.

On February 19, 2010, Gomes allegedly received a letter from Bank of America's lawyer that confirmed that his loan was being reviewed for modification. Id. ¶ 15. Bank of America also confirmed that review in a letter Gomes says he received on April 16, 2010. Id. ¶ 16. On May 13 and June 18, 2010, Gomes allegedly told Gomes that his application was still under review. Id. ¶¶

17-18.

However, when Gomes called Bank of America on July 29, 2010, he was allegedly told that his file had been closed, either because of insufficient information or for some unspecified reason. Id. ¶ 19. Gomes says that, on August 2, 2010, Bank of America told him again that he had been approved for a HAMP loan modification based on information provided over the phone, but that the modification would be contingent on substantiation of his financial position. Id. ¶ 20.

On August 13, 2010, Bank of America allegedly sent Gomes a letter that told him that he may be eligible for a HAMP loan modification. See ECF No. 43-9. The letter encourage Gomes to apply for the HAMP modification if he met certain criteria. Id.

On August 23, 2010, Deutsche Bank, the relevant Mortgagee, sent Gomes a notice of its intention to foreclose. See ECF No. 43-10. A foreclosure auction was scheduled for November 29, 2010. This document was filed in the State of Hawaii Bureau of Conveyances as Document Number 2010-121802. Id.

On September 28, 2010, Gomes allegedly called Bank of America again. This time he allegedly spoke with "Doris." Gomes says that Doris told him that his loan modification had been approved and that he should receive a modification

agreement within 30 days. Id. ¶ 22.

Gomes says that, when he did not receive the loan modification agreement by November 8, 2010, he hired his own attorney, David McCreight. McCreight got the foreclosure auction postponed from November 29, 2010, to January 4, 2011.

Gomes says that, on November 12, 2010, "Svetlana Martynova" of Bank of America called him, asking that he sign a certified copy of his financial statements. See Gomes Aff. ¶ 25. Gomes says he immediately did so and faxed the material back to Bank of America. Id. Gomes says that, on November 17, 2010, Martynova sent him an e-mail, saying that his file was being transferred to the "Closing Department" and that he could expect to receive the HAMP modification agreement within the next 30 to 40 days. See Gomes Aff. ¶ 26.

On January 26, 2011, instead of sending a HAMP modification agreement, Bank of America allegedly sent Gomes a letter telling him that his request for a loan modification under HAMP had been denied. See ECF No. 43-11. The letter informed Gomes that he was not eligible for a loan modification because he had a negative Net Present Value ("NPV"), meaning that, based on information that included the amount of the loan and Gomes's income, it was not in the interest of the mortgage to modify the loan. Id.

On June 10, 2011, McCreight and Gomes met

with "Maria" of Bank of America to give the bank Gomes's most recent financials and to offer $20,000 as a settlement towards the loan modification. See Gomes Aff. 34. Gomes says that he was told that it was very likely that he would be approved for a loan modification. Id.

On June 16, 2011, Bank of America sent Gomes a letter informing him that he was eligible for a trial modification. Under the "Trial Period Plan," his first payment of $5,039.12 was due no later than 30 days after he successfully made three payments, the bank would contact him to discuss a permanent modification. See ECF No. 43-14. Gomes says that he could not take advantage of that offer because he lacked that kind of money. Id. at 86-87. The same was true with respect to a proposal of June 17, 2011, which involved a three-month payment plan of $9,533.91 per month, in addition to a lump sum payment of $103,980.17. See ECF No. 43-13. Gomes says that he was confused by the two simultaneous offers, See Gomes Aff. ¶ 40, but concedes that he could not accept either of these offers because he could not afford either. See Gomes Test at 87-88. Nothing in the record indicates what Gomes could have afforded.

II. SUMMARY JUDGMENT STANDARD.

Summary Judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(a) (2010). See Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The movants must support their position that a material fact is or is not genuinely disputed by either "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"; or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See id. at 323. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc., 2010 F.3d 1099, 1102 (9th Cir. 2000).

The burden initially falls on the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the

absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp., 477 U.S. at 323). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (footnote omitted).

The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. T.W. Elec. Serv., Inc., 809 F.2d at 630. At least some "'significant probative evidence tending to support the complaint'" must be produced. Id. (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). See Addisu, 198 F.3d at 1134 ("A scintilla of evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact."). "[I]f the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." Cal. Arch'l Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., 475 U.S. at 587). Accord Addisu, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

All evidence and inferences must be

construed in the light most favorable to the nonmoving party. T.W. Elec. Serv., Inc., 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. Id. When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." Id.

III. ANALYSIS.

A. Judge Ezra Ruled That the Facts Alleged Supported a Claim That, Having Exceeded the Scope of a Normal Lender, Bank of America Breached a Duty to Process Gomes's Loan Modification Application.

Without acknowledging an earlier ruling by Judge Ezra, see ECF No. 14, Bank of America reargues a position rejected by Judge Ezra before the case was reassigned to this judge. Judge Ezra denied a motion to dismiss by Bank of America. The bank had argued that Gomes's claim based on its alleged mishandling of (or failure to process) his application for a loan modification failed because the bank owed no duty to Gomes in the regard. Judge Ezra ruled that a bank that goes beyond the role of a traditional lender, as he concluded Gomes's allegations suggested Bank of America

had done with respect to a loan modification, did indeed have a duty to process the loan modification application. Instead of starting with Judge Ezra's ruling, Bank of America says, in the papers now before this court, "Plaintiff's negligence claim fails because BANA [Bank of America] did not owe Plaintiff a duty when processing his loan modification." ECF No. 42-1 at 10.

At the hearing on the present motion, Bank of America said that its earlier motion had sought dismissal, while the present summary judgment motion is based on actual evidence. But that evidence does not undermine the factual allegations that Judge Ezra relied on! Nothing the bank submits in support of its summary judgment motion goes to how the bank mishandled (or failed to handle) Gomes's HAMP application. Instead, the present motion presents evidence as to whether its alleged actions caused Gomes any injury. That is, the evidence goes to the results of the alleged breach of a duty, not the existence of that duty.

This judge is not saying that Judge Ezra's recognition of a duty is not subject to challenge. Certainly Judge Ezra was defining the role of a traditional lender in a manner that might be debated. This judge might or might not have reached a different conclusion. But what Bank of America may not do is proceed as if Judge Ezra's ruling does not exist. This court declines to allow Bank of America to, in effect, seek reconsideration with the present motion.

B. Summary Judgment is Granted in Favor of Bank of America With Respect to the Negligence Claim Because Gomes Fails to Raise a Genuine Issue of Fact As to Whether the Alleged Breach of Duty Caused Gomes Harm.

Although the court has declined to revisit Judge Ezra's ruling as to the existence of a duty, it nevertheless grants Bank of America summary judgment with respect to the negligence claim on the ground that Gomes establishes no breach of duty.

To prevail on his negligence claim, Gomes must prove, in addition to the existence of a duty or obligation on the part of a bank to conform to a certain standard of conduct, that Bank of America failed to conform to that standard (i.e., breached that duty), that there was a reasonably close casual connection between the conduct and the resulting injury, and that Gomes suffered actual loss or damage. See Takayama v. Kaiser Found. Hosp., 82 Haw. 486, 498-99, 923 P.2d 903, 915-16 (1996).

In connection with another motion to dismiss, this judge ruled that Gomes had alleged that he suffered damages arising out of the alleged breach of duty in that, because his credit score was further damaged, he had to provide a $20,000 security deposit on a $100,000 mortgage and had to pay a higher interest rate on a car loan. See ECF No. 29 at 5. On this motion, Bank of America

challenges Gomes's ability to raise a question of fact as to whether it actually cause him such damages.

Although it may be questioned whether, given his many loan delinquencies, Gomes's failure to modify his loan adversely affected his credit score, the court makes that assumption for purposes of this motion. The court nevertheless agrees that Gomes fails to raise a genuine issue of fact as to whether he suffered damages flowing from any failure by the bank to process his loan modification applications.

Gomes does not and could not state what the terms of any acceptable loan modification would have been. He admits that, with respect to Bank of America's two offers to modify his loan, he could not have afforded their terms. The evidence before this court indicates that, since August 2009, Gomes has lacked the finances to pay his loans. Nothing in the record indicates that he would have been able to comply with the terms of any loan modification offered him. In other words, even assuming that Gomes's credit score was damaged when the bank failed to process his loan modification requests, Gomes fails to show that he would have been able to avoid that damage to his credit score had his loan modification applications been processed but ultimately resulted in no modification. Under these circumstances, Gomes fails to show that Bank of America's alleged failure to process his loan modification requests caused him to sustain

any damage.

C. Chapter 480 Claim.

Gomes claims that Bank of America violated section 480-2 of Hawaii Revised Statutes, which states, "Unfair methods of competition and unfair or deceptive acts of practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2. Two distinct causes of action exist under section 480-2: claims alleging unfair methods of competition and claims alleging unfair or deceptive acts or practices. See Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 113 Haw. 77, 110, 148 P.3d 1179, 1212 (2006). Gomes is asserting a claim of unfair or deceptive acts or practices.

The phrase "unfair or deceptive acts or practices in the conduct of any trade or commerce" is not defined in chapter 480. See Eastern Star, Inc. v. Union Bldg. Materials Corp., 6 Haw. App. 125, 132, 712 P.2d 1148 1154 (Haw. App. 1985). Hawaii courts have held that a "practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Id. at 133, 712 P.2d at 1154 (citations omitted). A deceptive act is defined as "an act causing, as a natural and probable result, a person to do that which he would not otherwise do." Id. A plaintiff establishes that there was "deception" under chapter 480 by demonstrating that there was: (1) a representation, omission, or practice that

(2) was likely to mislead consumers acting reasonably under the circumstances when (3) the representation, omission, or practice was material. Tokuhisa v. Cutter Mgmt. Co., 122 Haw. 181 195, 223 P.3d 246, 260 (2009). A representation, omission, or practice is "material" if it involves information that is important to consumers and is likely to affect their conduct regarding a product. Id. Whether an act or practice is deceptive is judged by an objective "reasonable person" standard. Yokoyama v. Midland Nat'l Life Ins. Co., 594, F.3d 1087, 1092 (9th Cir. 2010) ("Hawaii's consumer protection laws look to a reasonable consumer, not the particular consumer.").

Any consumer injured by an unfair or deceptive act or practice forbidden by section 480-2, may sue for damages under section 480-13, which states:

> (a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:
>
> (1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that

indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney's fees together with the costs of suit in actions not brought under section 480-14(c); and

(2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.

(b) Any consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2:

(1) May sue for damages sustained by the consumer, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that where the plaintiff is an elder, the plaintiff, in the alternative, may be awarded a sum not less than $5,000 or threefold any damages sustained by the plaintiff, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit. In determining whether to adopt the $5,000 alternative amount in an award to an elder, the court shall consider the factors set forth

in section 480-13.5; and

> (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.

Gomes says that he is seeking damages under both section 480-13 (a) and section 480-13 (b). To prevail on a claim under section 480-13 (a), Gomes must establish: "(1) a violation of chapter 480; (2) which causes an injury to the plaintiff's business or property; and (3) proof of the amount of damages." Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 435, 228 P.3d 303, 315 (2010) (internal citations and alterations omitted). On the other hand, to prevail on a claim under section 480-13 (b), Gomes must show that he or she is a consumer who was injured within the meaning of section 480-2. Id. at 441, 228 P.3d at 322. Section 480-1 defines "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

As Bank of America argues, private damages are necessary to support a request for damages under both subsections of section 480-13. In Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Company, 91 Haw. 224, 254, n.30, 982 P.2d 853, 883 n.30 (1999), the Hawaii Supreme

Court quoted Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 618, 607 P.2d 1312 (1980), for the proposition that, "[w]hile proof of a violation of chapter 480 is an essential element of an auction under §480-13, the mere existence of a violation is not sufficient ipso facto to support the action; forbidden acts cannot be relevant unless they cause private damage." Both Robert's Hawaii and Ai involved an earlier version of section 480-13(a), but both versions contained language identical to the present version, allowing any person "who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter to sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is greater ...." See Robert's Hawaii, 91 Haw, at 248, 982 P.2d at 877 (quoting the 1992 version of section 480-13(a)) (internal alterations omitted); Haw. Rev. Stat. §480-2 (Michie 2012).

In Robert's Hawaii, the Hawaii Supreme Court rejected an argument that section 480-13(a) was an automatic damages provision because it refers to statutory damages of $1,000. Instead, the court stated that the plain language of the statute requires some evidence of damages. 91 Haw. At 254, n.30, 982 P.2d at 883 n.30.

Because section 480-13(b) has language identical to that in section 480-13(a), although

"consumer" is substituted for "person," this court has no reason to think that the Hawaii Supreme Court would treat that language differently with respect to the damages requirement.

In his Opposition and at the hearing, Gomes clarified that he is asserting his chapter 480 claim based only on Bank of America's alleged misrepresentations concerning: 1) Gomes's qualifications for a HAMP modification; 2) Gomes's approval for a HAMP modification; 3) promised notification to Gomes concerning a HAMP trial period plan; and 4) Gomes's simultaneous receipt of two loan modifications. Gomes has therefore waived any other possible basis or bases for his section 480-2 claim. Even if the court assumes that these four acts are unfair or deceptive for purposes of section 480-2, Bank of America is entitled to summary judgment on the claim because, as discussed above in the section on Gomes's negligence claim, he fails to demonstrate that he suffered damages relating to the loan modification process. Because damages are required by section 480-13, summary judgment is granted to Bank of America on the chapter 480 claims.

IV. CONCLUSION.

For the foregoing reasons, Defendants' motion for summary judgment is granted. The Clerk of Court is directed to enter judgment in favor of Defendants and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, May 15, 2013.

/s/ Susan Oki Mollway

Susan Oki Mollway
Chief United States District Judge

[1] This case was reassigned to this judge after Judge Ezra transferred his duty station. See ECF No. 17.

B. JUDGMENT IN A CIVIL CASE,
FILED MAY 15, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LEONARD GOMES, JR., Plaintiff(s), v. BANK OF AMERICA, N.A.; et al. Defendant(s).	CIVIL NO. 12-00311 SOM/BMK JUDGMENT IN A CIVIL CASE

[√] Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor the Defendants pursuant to the "Order: (1) Granting in Part and Denying in Part Defendant's Motion to Dismiss and (2) Granting Plaintiff Leave to Amend" filed on July 25, 2012, the "Order Denying Motion to Dismiss Negligence Claim in First Amended Complaint" filed on October 24, 2012 and the "Order Granting Motion for Summary Judgment" filed on May 15, 2013.

C. MEMORANDUM,
FILED FEBRUARY 17, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD GOMES, JR., Plaintiff-Appellant, v. BANK OF AMERICA, N.A. and BAC HOME LOANS SERVICING, LP, Defendants-Appellees.	No. 13-16236 D.C. No. 1:12-cv-00311-SOM-BMK MEMORANDUM*

Appeal from the United States District Court
For the District of Hawaii
Susan Oki Mollway, Chief District Judge, Presiding

Submitted February 10, 2016**
Honolulu, Hawaii

Before: GRABER, BYBEE, and CHRISTEN, Circuit Judges.

Plaintiff Leonard Gomes, Jr., appeals the district court's order granting summary judgment in favor of defendants on Gomes's negligence claim and on Gomes's unfair and deceptive acts and practices (UDAP) claim brought under Hawaii Revised Statutes § 480-2. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Assuming that Defendants had a duty of care and breached it, Gomes failed to establish a triable issue as to whether the breach caused him any injury. First, Defendants were not responsible for Gomes's default. Gomes defaulted because he could no longer afford payments, not because he relied on Defendants' statements or was expecting a loan modification. Defendants' statements did not cause Gomes to forgo other options. He tried to sell his house but did not receive any offers on it.

Second, Gomes did not show that Defendants' actions negatively affected his credit after he defaulted. Gomes rejected the loan modification offer he ultimately received because he could not afford its payments. He defaulted on other mortgages and did not show that the damage to his credit was proximately caused by Defendants' actions here. Further, Gomes provided no evidence that, absent Defendants' actions, he would have successfully pursued the alternative forms of relief he identifies on appeal, such as reorganization through bankruptcy.

Third, Gomes admitted that he paid no costs

and fees associated with a delay in processing his loan modification applications, and he presented no evidence that he accrued such costs and fees.

2. Because Gomes did not create a triable issue that Defendants' actions injured him, he also failed to create a triable issue on his UDAP claim, which required that he demonstrate "an injury resulting in damages." *Compton v. Countrywide Fin. Corp.*, 761 F.3d 1046 1056 (9th Cir. 2014). We decline to analyze Gomes's UDAP claim under the "relaxed burden" reserved for antitrust claims because Gomes's claim rests only on unfair or deceptive acts or practices. *See Brunswick Corp. v. Pueblo Bowl O Mat, Inc.*, 429 U.S. 477,489 (1977) (noting that compensable antitrust injury should "reflect the anticompetitive effect either of [defendants'] violation or of anticompetitive acts made possible by the violation").

AFFIRMED.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

D. ORDER,
FILED MARCH 9, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD GOMES, JR., Plaintiff-Appellant, v. BANK OF AMERICA, N.A. and BAC HOME LOANS SERVICING, LP, Defendants-Appellees.	No. 13-16236 D.C. No. 1:12-cv-00311-SOM-BMK ORDER

Before: GRABER, BYBEE, and CHRISTEN, Circuit Judges.

Plaintiff-Appellant's petition for rehearing is DENIED. The panel declines to treat the petition for rehearing as a motion for an extension of time.