

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

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| In re: Michael Stuart Brown, Debtor. | Case No.: 2:20-bk-14485-ER Adv. No.: 2:20-ap-01635-ER |
| Michael Stuart Brown, Plaintiff, v. JPMorgan Chase Bank, N.A. and Citibank N.A., Defendants. | MEMORANDUM OF DECISION GRANTING MOTION FOR SUMMARY JUDGMENT FILED BY JPMORGAN CHASE BANK, N.A. Date: June 23, 2021 Time: 10:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012 |

At the above-captioned date and time, the Court conducted a hearing on the *Motion for Summary Judgment Filed Pursuant to Court's May 28, 2021 Order* [Doc. No. 35] (the "MSJ") filed by JPMorgan Chase Bank, N.A. ("Chase").¹ For the reasons set forth below, the Court is

¹ The Court considered the following pleadings in adjudicating this matter:

- 1) Verified Complaint: (1) to Set Aside Foreclosure Sale; (2) to Cancel Trustee's Deed on Sale; (3) for Declaratory Relief to Determine Title to Real Property; (4) to Quiet Title; (5) for Attorney Fees; (6) for Violations of Cal. Civil Code Sections 2924B and 2924F; (7) for Breach of Promissory Note; (8) for Breach of Deed of Trust; (9) for Breach of Cal. Civil Code Section 2914; (10) for Breach of Oral Contract; (11) for Promissory Estoppel; and (12) for Fraud [Doc. No. 1] (the "Complaint");
- 2) Plaintiff's Voluntary Dismissal of Claims for Relief Numbers 6–12 from Adversary Complaint [Doc. No. 32];

prepared to enter summary judgment in favor of Chase. However, the findings set forth herein will not become the order of the Court until after Michael Stuart Brown (“Brown”) has had the opportunity to show cause why summary judgment should not also be entered in favor of Citibank, N.A. (“Citibank”). A separate Order to Show Cause, which will provide the parties the opportunity to respond to the Court’s reasoning as to why the entry of summary judgment as to Chase compels the entry of summary judgment as to Citibank, will be issued concurrently herewith.

I. Facts and Summary of Pleadings

A. Procedural Background

Brown filed a voluntary petition under Subchapter V of Chapter 11 on May 15, 2020 (the “Petition Date”). Brown’s objective in seeking bankruptcy protection was to settle disputes regarding title to real property located at 2089 Stradella Road, Los Angeles, CA 90077 (the “Property”).

On October 1, 2020, Brown filed the instant adversary proceeding against Chase and Citibank (collectively, the “Defendants”). The Complaint seeks to set aside a foreclosure sale of the Property that occurred on February 14, 2019 (the “Foreclosure Sale”), to cancel the Trustee’s Deed on Sale (the “TDUS”), to obtain declaratory relief regarding title to the Property, to quiet title to the Property, and to obtain an award of attorney’s fees. Among other things, Brown alleges that (1) Chase conducted the Foreclosure Sale without providing Brown 30 days’ notice to appeal Chase’s denial of Brown’s loan modification application, in violation of Cal. Civ. Code § 2923.6; (2) Chase failed to provide adequate notice of the Foreclosure Sale; and (3) Chase conducted the Foreclosure Sale even though its representatives had orally promised Brown that the foreclosure would not proceed as long as loan modification negotiations continued.

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- 3) Order: (1) Providing Notice that the Court will Treat the Motion to Dismiss as a Motion for Summary Judgment and (2) Continuing the Hearing on the Motion for Summary Judgment from May 19, 2021 at 10:00 a.m. to June 23, 2021 at 10:00 a.m. [Doc. No. 33];
 - 4) Defendant JPMorgan Chase Bank, N.A.’s Motion for Summary Judgment Filed Pursuant to Court’s May 28, 2021 Order [Doc. No. 35] (the “MSJ”);
 - a) Request for Judicial Notice Supporting Motion for Summary Judgment [Doc. No. 36];
 - b) Statement of Uncontroverted Facts and Conclusions of Law in Support of Defendant JPMorgan Chase Bank, N.A.’s Motion for Summary Judgment [Doc. No. 37];
 - c) Declaration of Alicia Hernandez in Support of Motion for Summary Judgment [Doc. No. 38];
 - 5) Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant JPMorgan Chase’s Motion for Summary Judgment [Doc. No. 43];
 - a) Plaintiff’s Statement of Genuine Issues in Opposition to Defendant JPMorgan Chase’s Motion for Summary Judgment [Doc. No. 44];
 - b) Plaintiff’s Evidentiary Objections to Alicia Hernandez Declaration in Opposition to Defendant JPMorgan Chase’s Motion for Summary Judgment [Doc. No. 45];
 - 6) Citibank N.A.’s Response to Debtor’s Opposition to JPMorgan Chase’s Motion for Summary Judgment [Doc. No. 48];
 - a) Declaration of Dillon D. Chen in Support of Citibank, N.A.’s Response to Debtor’s Opposition to JPMorgan Chase’s Motion for Summary Judgment [Doc. No. 49];
 - 7) Reply Brief Supporting Defendant JPMorgan Chase Bank, N.A.’s Motion for Summary Judgment [Doc. No. 50]; and
 - a) Defendant JPMorgan Chase Bank, N.A.’s Response to Plaintiff’s Evidentiary Objections to the Declaration of Alicia Hernandez [Doc. No. 51].

B. Summary of Papers Filed in Connection with the MSJ

Chase moves for summary judgment in its favor. Brown opposes the MSJ. He asserts that the evidence Chase has submitted in support of the MSJ has not been properly authenticated; that Chase is not entitled to summary judgment because it failed to clearly apprise Brown of his right to appeal Chase's denial of his first loan modification application; and that Brown should be entitled to obtain further discovery from Chase. In reply, Chase asserts that the evidence it has proffered in support of the MSJ is admissible and that Brown's arguments as to why Chase is not entitled to summary judgment lack merit.

II. Evidentiary Rulings

Brown contends that Chase failed to properly authenticated correspondence between Chase and Brown regarding Brown's loan modification applications, and that such correspondence is inadmissible. According to Brown, Chase has not shown that declarant Alicia Hernandez ("Hernandez") has personal knowledge of the correspondence. Brown's evidentiary objections are overruled.

Hernandez testifies that she is "employed as a Business Ops Sr. Specialist III at Chase" and has "personal knowledge of and [is] familiar with the systems Chase uses to maintain, record and create information related to its loans." Hernandez Decl. [Doc. No. 38] at ¶ 2. She testifies that the correspondence which she authenticates in her declaration was "created and/or maintained in the regular course of Chase's business," and that Chase "relies on those records in the ordinary course of loan servicing." *Id.*

Federal Rule of Evidence ("FRE") 803(6) provides that records of a regularly conducted activity—also known as business records—are admissible if the following conditions are satisfied:

- A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
- B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- C) making the record was a regular practice of that activity;
- D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

FRE 803(6).

Hernandez's testimony establishes that all the criteria for admissibility under FRE 803(6) are satisfied. First, Hernandez testifies that the records are created by Chase employees with knowledge of the information contained therein. *See* Hernandez Decl. at ¶ 2 ("[I]n situations where Chase employees manually enter data relating to loans in [Chase's] systems, they have personal knowledge of that information and enter it into the system at or near the time they acquired that knowledge."). Second, Hernandez testifies that the records are kept in the ordinary course of Chase's business, and that creating and maintaining the records is a regular practice at Chase. *Id.* ("These records are created and/or maintained in the regular course of Chase's business, and Chase relies on those records in the ordinary course of loan servicing.").

Brown asserts that Hernandez does not testify that she “*personally* worked on [Brown’s] files at or around the time of the events she described in her declaration, or that she was aware of Chase’s procedures for servicing its defaulted loans in or around the 2018 and 2019 time frame of the events at issue in Plaintiff’s litigation.” Doc. No. 45 at p. 2 (emphasis added). Brown’s objection misses the mark. Brown does not need to establish that Hernandez was the custodian of the records. It is sufficient for Hernandez to show, through her testimony, that she understands how Chase’s record-keeping system operates. *See United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990), *as amended on denial of reh’g* (Apr. 23, 1991) (internal citations omitted) (“The phrase ‘other qualified witness’ is broadly interpreted to require only that the witness understand the record-keeping system. Here, Webber testified that she was familiar with the filing and reporting requirements for public assistance benefits and the forms used in connection with those requirements. Thus, although Webber was not the custodian of Ray’s welfare records, she was a ‘qualified witness’ to establish that Rule 803(6)’s foundational requirements had been met.”).

Brown also maintains that Hernandez is not qualified to testify that in December 2018, Chase postponed the Foreclosure Sale to February 14, 2019. *See Hernandez Decl.* at ¶ 14. Brown is incorrect. As a business operations specialist who works in Chase’s loan servicing department, Brown has the ability to proffer testimony regarding Chase’s postponement of the Foreclosure Sale. Contrary to Brown’s contention, Chase is not required to produce testimony from a representative of the foreclosing trustee to establish facts regarding the timing of the Foreclosure Sale.

III. Findings and Conclusions

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law.” Civil Rule 56 (made applicable to these proceedings by Bankruptcy Rule 7056). The moving party has the burden of establishing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact is ‘material’ only if it might affect the outcome of the case[.]” *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The court is “required to view all facts and draw all reasonable inferences in favor of the nonmoving party” when reviewing the Motion. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004).

The Supreme Court has held that an affidavit containing conclusory allegations not supported by specific facts is not sufficient to defeat entry of summary judgment:

The object of this provision [Civil Rule 56(c)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.... Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side’s case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888–89 (1990).

The Ninth Circuit has similarly held that an affidavit containing only vague assertions cannot defeat entry of summary judgment. In *Sullivan v. Dollar Tree Stores*, 623 F.3d 770, 779 (9th Cir. 2010), the parties disputed whether Dollar Tree was a “successor in interest” to Factory 2-U under the Family and Medical Leave Act of 1993. *Sullivan*, 623 F.3d at 770. Critical to adjudication of the successor in interest issue was a finding as to how many personnel employed at Factory 2-U had continued to work for Dollar Tree. The court held that Plaintiff’s testimony that “[m]ost of the same personnel continued to work when Dollar Tree took Factory 2-U over at my store” was too vague to create a genuine dispute as to a material fact, where Dollar Tree had provided detailed factual assertions about which employees it hired and for what purposes. *Id.* at 779.

In accordance with the Local Bankruptcy Rules, Brown filed a *Statement of Genuine Issues in Opposition to Defendant JPMorgan Chase’s Motion for Summary Judgment* [Doc. No. 44] (the “Statement”). In that Statement, Brown designates certain of the facts asserted by Chase as “disputed.” To the extent that Brown disputes facts based upon his evidentiary objections, such disputes are not “genuine” because the Court has found that the evidentiary objections lack merit. In addition, in some instances, Brown fails to cite to specific portions of the record to identify the basis for the alleged dispute. Brown cannot render a fact subject to a “genuine dispute” merely by asserting that a dispute exists without providing a basis in the record for that dispute.

A. Material Facts Not Subject to a Genuine Dispute

Having reviewed the MSJ and the supporting evidence and declarations, the Opposition, and the pleadings on file, the Court finds that there is no genuine dispute as to the following material facts:

In 2004, Brown obtained a \$1,000,000 loan from Washington Mutual Bank, FA, secured with a deed of trust recorded against the Property. On November 20, 2015, this senior deed of trust was transferred to Chase. In 2005, Brown obtained a home equity line of credit for \$500,000 from Citibank, secured with a deed of trust recorded on March 4, 2005.

On February 23, 2018, Trustee Corps, in its capacity as trustee, recorded a *Notice of Default and Election to Sell Under Deed of Trust* (the “Notice of Default”) against the Property, reflecting \$121,978.05 in arrearages.

After recordation of the Notice of Default, Brown submitted a mortgage assistance application to Chase, which Chase deemed complete on April 23, 2018. Chase acknowledged the application and advised Brown that it would inform him of the results by May 23, 2018.

By letter dated May 22, 2018 (the “May 2018 Letter”), Chase informed Brown that he was eligible for a short sale or a deed in lieu of foreclosure, but was not eligible for a loan modification. The May 2018 Letter further advised Brown that he could dispute or appeal his eligibility for a loan modification by June 21, 2018:

If you believe any of the information that was used to determine your eligibility was incorrect or you don’t agree with the options for which you’re eligible, aren’t eligible or weren’t considered, please write to us by June 21, 2018 with detailed reasons to explain why. We may ask you to send documentation to support your reasons. You can also write to us to request additional documentation supporting the decision.

Fax: 1-866-590-3805; it's free from any Chase branch

Mail: Chase
Mail Code LA4-5555
700 Kansas Lane
Monroe, LA 71203-4774

E-mail: chase.nonapproval.disputes@chase.com

Doc. No. 38, Ex. B.

In the Complaint, Brown does not allege disputing or appealing his eligibility for a loan modification.

On July 13, 2018, Trustee Corps recorded a *Notice of Trustee's Sale*, setting a foreclosure sale for August 21, 2018.

Prior to July 19, 2018, Brown submitted a second loan modification application to Chase. By letter dated July 19, 2018 (the "July 2018 Letter"), Chase acknowledged receipt of the application. The July 2018 Letter also outlined additional documentation that Chase required before it could initiating review. Following receipt of the second application, Chase postponed the sale set for August 21, 2018.

By letter dated September 7, 2018 (the "Sept. 2018 Letter"), Chase advised Brown that he needed to submit additional documents to facilitate Chase's review of his second application. The Sept. 2018 Letter asked Chase to submit the additional documents no later than October 7, 2018.

By letter dated October 18, 2018 (the "Oct. 2018 Letter"), Chase advised Brown that his second application remained incomplete, and requested that Brown submit the missing documentation no later than November 17, 2018.

By letter dated November 6, 2018 (the "Nov. 2018 Letter"), Chase advised Brown that it had discovered additional missing information needed to complete Brown's second application. The Nov. 2018 Letter stated that the additional information needed to be submitted no later than December 6, 2018.

Brown failed to submit the additional information which Chase contends was required by the December 6, 2018 deadline. By letter dated December 18, 2018, Chase requested that Brown supply the additional information no later than January 20, 2019 (the "Dec. 2018 Letter"). The Dec. 2018 Letter warned that Brown's loan modification application would not necessarily stop the foreclosure process until all necessary documentation had been received.

In December 2018, Chase continued the Foreclosure Sale to February 14, 2019.

By letter dated February 8, 2019 (the "Feb. 2019 Letter"), Chase advised Brown that it had cancelled its review of his second loan modification application because it had not received the necessary documentation:

We canceled our review of your request for mortgage assistance ...

We're committed to helping you with your mortgage. However, we can't complete our review for mortgage assistance because we didn't receive all the documents we need.

Your prior request and any future requests for mortgage assistance may not stop the foreclosure process or sale. Do not ignore any notices.

Doc. No. 38, Ex. H.

On February 14, 2019, the Foreclosure Sale of the Property occurred. The Property sold to the junior lien holder, Citibank, for \$1,434,600.00.

On February 20, 2019, Brown filed a still-pending state-court complaint against Chase seeking to set aside the sale of the Property.

B. Chase is Entitled to Summary Judgment on Brown's Claim that Chase Violated Cal. Civ. Code § 2923.6(f)

Brown asserts that the May 2018 Letter, by which Chase advised him that his first loan modification application had been denied, did not conspicuously advise him of his right to appeal the denial, as required by Cal. Civ. Code § 2923.6(f).

Brown's argument is a non-starter. First, the statutory language Brown relies on regarding his right to be notified of an appeal—Cal. Civ. Code § 2923.6(f)—was not in effect as of May 2018. The current version of Cal. Civ. Code § 2923.6(f), upon which Brown relies, did not take effect until January 1, 2019. *See Lewine v. BSI Fin. Servs.*, No. B293975, 2021 WL 235179, at *3 (Cal. Ct. App. Jan. 25, 2021) (“Before turning to the merits of the appeal, we observe the Lewines are correct that in 2019, the Legislature did indeed reenact appeal and notice provisions that are virtually identical to those in the version of section 2923.6 that existed in 2017, and that were repealed in 2018, albeit briefly as it turned out. More specifically, Senate Bill No. 818 reenacted the substance of the pre-January 1, 2018 version of section 2923.6, and those reenacted provisions went into effect on January 1, 2019.”).

Even if the current version of Cal. Civ. Code § 2923.6(f) had been effect at the time Chase sent the May 2018 Letter, Brown's argument would still fail. Under current law, if a “borrower's application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error.” During this 30-day appeal period, the mortgage servicer cannot proceed with a foreclosure sale. Cal. Civ. Code § 2923.6(e). In addition, Cal. Civ. Code § 2923.6(f) requires the mortgage servicer to send the borrower a written notice containing certain information, including “[t]he amount of time from the date of the denial letter in which the borrower may request an appeal of the denial of the first lien loan modification and instructions regarding how to appeal the denial.”

Brown asserts that the May 2018 Letter, by which Chase advised him that his first loan modification application had been denied, did not conspicuously contain the information required by Cal. Civ. Code § 2923.6(f). According to Brown, the May 2018 Letter failed to adequately apprise Brown of his appeal rights because the language regarding such rights was not sufficiently conspicuous and did not contain the word “appeal.”

There is no merit to Brown's argument. An entire page of the May 2018 Letter sets forth Brown's appeal rights. That page provides:

If you believe any of the information that was used to determine your eligibility was incorrect or you don't agree with the options for which you're eligible, aren't eligible or weren't considered, please write to us by June 21, 2018 with detailed reasons to explain

why. We may ask you to send documentation to support your reasons. You can also write to us to request additional documentation supporting the decision.

Fax: 1-866-590-3805; it's free from any Chase branch

Mail: Chase
Mail Code LA4-5555
700 Kansas Lane
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E-mail: chase.nonapproval.disputes@chase.com

Doc. No. 38, Ex. B.

This language complies with the requirements of Cal. Civ. Code § 2923.6(f) and is more than sufficient to apprise Brown of his appeal rights. Brown's argument that the language is deficient because it does not contain the word "appeal" exalts form over substance. The language clearly advises Brown of his ability to write to Chase explaining why he disagrees with Chase's decision. That is the definition of an appeal.

Chase's decision to use informal language devoid of legal terms of art more effectively comports with the intent of the statute than the approach advocated by Brown. Most borrowers are not lawyers and would be confused had Chase had attempted to provide the notice required by the statute using legal terminology.

Brown's contention that the May 2018 Letter failed to comply with Cal. Civ. Code § 2923.6(f) is without merit, and Chase is entitled to summary judgment on Brown's claim under § 2923.6(f).

C. Chase is Entitled to Summary Judgment on Brown's Claim that Chase Violated Cal. Civ. Code § 2923.6(e)

As discussed in Section B, above, where a *complete* loan modification application is denied, a mortgage servicer cannot proceed with a foreclosure sale until the 30-day appeal period set forth in Cal. Civ. Code § 2923.6(d) has expired.

Brown advances various arguments as to why Chase allegedly violated Cal. Civ. Code § 2923.6(e), none of which have merit.

First, Brown takes issue with the manner in which he was advised that his second loan application was cancelled. According to Brown, the Feb. 2019 Letter's statement "[w]e canceled our review of your request for mortgage assistance" (emphasis in original) did not actually cancel Brown's second loan modification application. Instead, Brown asserts, Chase only cancelled its *review* of the second loan application; it did not cancel the loan application itself.

Brown's argument misapprehends the statute. As explained by the California Court of Appeal:

Under the version of section 2923.6 that was in effect prior to January 1, 2018 and the version that is currently operative, a borrower is entitled to written notice of a denial of a loan modification application and an appeal therefrom only if the borrower has submitted a *complete* application. Subdivision (c) of the statute prescribes the legal consequences that follow "[i]f a borrower submits a complete application for a first lien loan

modification” (e.g., a trustee's sale shall not be conducted during the pendency of the application), and subdivisions (d), (e), and (f) of the statute afford notice and appellate rights to “the borrower.” (See § 2923.6, subds. (c)–(f).) Given the text (i.e., subdivisions (d)’s, (e)’s, and (f)’s placement of the definite article “the” before “borrower”) and the structure of these four provisions (i.e., subdivisions (d), (e), and (f) follow subdivision (c)), it is apparent that subdivisions (c), (d), (e), and (f) all confer rights to the same borrower—to wit, the borrower who has submitted a complete loan modification application.

Furthermore, several federal district courts have arrived at the same conclusion, that is, a borrower is entitled to these notice and appeal rights only if he or she has submitted a complete application. In fact, the Lewines conceded during the proceedings below and before our court that *Rocha* stands for this proposition, yet they do not contend that *Rocha* was wrongly decided.

Lewine v. BSI Fin. Servs., No. B293975, 2021 WL 235179, at *6 (Cal. Ct. App. Jan. 25, 2021).

Brown’s second application was not complete because he had failed to provide Chase all the information that it had required. Therefore, Chase was not required to wait 30 days for the appeal period to elapse after advising Brown of the incompleteness of his application.

Brown’s assertion that Chase did not adequately apprise him that the second loan application was incomplete is also without merit. In addition to stating “[w]e canceled our review of your request for mortgage assistance,” the Feb. 2019 Letter states “we can’t complete our review for mortgage assistance because we didn’t receive all the documents we need.” This language sufficiently advised Brown that Chase had deemed his second loan application to be incomplete.

Brown next contends that Chase’s decision to deem his second application incomplete and proceed with the Foreclosure Sale was improper because Chase failed to provide Brown a reasonable period of time to submit the required documentation. According to Brown, the only remaining documents to be submitted were his son’s 2018 tax forms, and his son had not received those documents as of the issuance of the Feb. 2019 Letter.

Brown testifies that the issues with the second application arose because he had difficulty supplying documentation related to his son’s income:

The loan modification stalled on the issue of my son, Garrett Brown’s income. At the time, he worked in the entertainment industry and received income from many different sources in 2018. I provided Chase representatives with copies of checks and paystubs he received in 2018, but Chase indicated it wanted to see all his various 2018 W-2 and 1099 tax forms in order to decide its decision on the second loan modification application.

I spoke with a Chase representative on the phone during the first week of January 2019 who agreed that it was acceptable for me to provide my son’s 2019 tax documents when they were available.

Brown Decl. [Doc. No. 43] at ¶¶ 6–7.

For purposes of Cal. Civ. Code § 2923.6, “an application shall be deemed ‘complete’ when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.” Cal. Civ. Code § 2923.6(h).

The Oct. 2018 Letter advised Brown that he needed to submit additional information regarding his son's income by November 17, 2018. That letter also warned Brown that the Property remained at risk of foreclosure:

If you are in default, your request for mortgage assistance may not stop the foreclosure process. Previously placed foreclosure protection may expire before the time frame allotted to provide missing documents listed above. Until we receive all of the information we need to evaluate your file, we may not be able to extend additional foreclosure protection. Do not ignore any notices you receive.

Oct. 2018 Letter (emphasis in original).

The Nov. 2018 Letter likewise advised Brown that additional information regarding his son's income was required, and contained the identical foreclosure warning as the Oct. 2018 Letter. The Nov. 2018 Letter informed Brown that the information needed to be received by December 6, 2018.

Like the Oct. 2018 and Nov. 2018 Letters, the Dec. 2018 Letter advised Brown of the need to supply additional information regarding his son's income, and contained the same foreclosure warning. The Dec. 2018 Letter stated that the additional information needed to be submitted no later than January 20, 2019.

By the time Chase advised Brown that his second application was incomplete by way of the Feb. 2019 Letter, that application had been pending for more than seven months, and Brown had been advised on three separate occasions of the need to supply additional information regarding his son's income. Chase provided Brown more than four months to provide the information as to his son's income. That is a reasonable amount of time.

Brown attempts to shift the blame to Chase by arguing that Chase wanted to receive his son's tax documents, which could not reasonably have been provided by the date of issuance of the Feb. 2019 Letter. Assuming *arguendo* that Chase did in fact advise Brown that tax documents were *one* acceptable means of supplying the missing information, Brown still had an obligation to make reasonable efforts to supply the information in a timely manner through other means if receipt of his son's tax documents were delayed. Nothing in the statute required Chase to forbear from exercising its foreclosure rights indefinitely while Brown's incomplete application continued to languish.

D. Brown's Testimony Regarding Chase's Oral Representations Does Not Defeat Summary Judgment

Brown contends that during January and February 2019, he "was promised multiple times by Chase representatives in telephone calls recorded by Chase ... that with respect to the second loan modification application no foreclosure sale would take place on the [Property] so long as the loan modification application was pending." Brown Decl. [Doc. No. 43] at ¶ 7. Brown asserts that the Court should defer consideration of the MSJ for 120 days, so that Brown can obtain discovery regarding these telephone conversations.

With respect to motions for summary judgment, Civil Rule 56(d) provides that if the nonmoving party shows by "affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer considering the motion or deny it."

Brown's request for additional time to conduct discovery cannot defeat the MSJ, because even if Chase's representatives had made the oral representations alleged by Brown, Chase

would still be entitled to entry of summary judgment in its favor. If Chase's representatives did in fact advise Brown that the foreclosure sale would not occur while the application remained pending, these statements would have been accurate. At the time the Foreclosure Sale occurred, the application was *not* pending, because Chase had cancelled its review of the application after determining that the application was incomplete. As discussed, Chase's decision to deem the application incomplete and cancel its review was reasonable. Chase took this action only after Brown had failed to provide the required information despite having been given more than four months to do so.

In addition, although there is nothing in Brown's testimony regarding the oral statements made to him by Chase's representatives that demonstrate that Chase mislead Brown with respect to the Foreclosure Sale, the written representations made by Chase to Brown that his loan modification application "may not stop the foreclosure process" would supersede any oral representations. *See Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 343, 83 P.3d 497, 502 (2004) (stating that the parol evidence rule "generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument."). Chase's written representations consistently advised Brown that notwithstanding his request for mortgage assistance, the Property remained at risk of foreclosure.

E. Citibank's Execution of a Loan Modification Agreement with Brown is Not a Judicial Admission that the Foreclosure Sale was Ineffective

Prior to the filing of the instant action, Brown and Citibank entered into a loan modification agreement. At the time the agreement was executed, Citibank, Chase, and Brown were discussing a global settlement agreement that would have provided Brown with title to the Property.

Brown asserts that Citibank's execution of the loan modification constitutes a judicial admission that the Foreclosure Sale was ineffective. There is no merit to this argument. Citibank's counsel testifies that the parties "entered into the loan modification solely in the context of the global settlement that the parties, including Chase, were contemplating." Chen Decl. [Doc. No. 49] at ¶ 5. However, after "entering into the loan modification with [Citibank], [Brown] rejected the settlement agreement and filed the instant adversary proceeding." *Id.* at ¶ 8. An agreement entered into in connection with settlement negotiations does not constitute a judicial admission.

F. There is No Genuine Dispute Regarding the Identity of the Foreclosing Trustee

Brown asserts that it is possible that McCarthy & Holthus may have acted as the foreclosing trustee, and that if so, the Foreclosure Sale would have been invalid because McCarthy & Holthus never substituted in as the foreclosing trustee. Brown asserts that discovery is needed to determine the identity of the foreclosing trustee.

Brown's arguments regarding the identity of the foreclosing trustee are not well taken. The Notice of Default and the Notice of Trustee's Sale clearly indicate that the foreclosing trustee was Trustee Corps. Trustee Corps substituted in as trustee via a substitution recorded with the Los Angeles County Recorder's Office on April 8, 2016 bearing instrument number 20160388417. Had Brown taken the time to review the publicly available foreclosure history, he would have been aware of these facts.

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G. There is No Genuine Dispute Regarding the Fairness of the Foreclosure Sale

According to Brown, Chase is not entitled to summary judgment because disputes exist as to (1) whether there was unfairness in the conduct of the Foreclosure Sale and (2) whether the price at which the Property sold was adequate.

“A debtor may apply to a court of equity to set aside a trust deed foreclosure on allegations of unfairness or irregularity that, coupled with the inadequacy of price obtained at the sale, mean that it is appropriate to invalidate the sale.” *Lo v. Jensen*, 88 Cal. App. 4th 1093, 1097–98, 106 Cal. Rptr. 2d 443, 446 (2001). In *Lo*, the court set aside a foreclosure sale on fairness grounds where two bidders who had each planned on submitting separate bids of \$100,000 for a property decided to instead submit a collusive joint bid, which enabled the bidders to jointly purchase the property for only \$5,412. *Id.* at 1094.

Brown asserts that the conduct of the Foreclosure Sale was unfair because he did not receive the Feb. 2019 Letter—which advised him that Chase deemed his second loan modification application incomplete and was accordingly cancelling its review of that application—until February 13, 2019, the day prior to the Foreclosure Sale. Brown’s receipt of the Feb. 2019 Letter the day prior to the Foreclosure Sale does not create a triable issue of fact regarding the fairness of the Foreclosure Sale. The Oct. 2018 Letter, Nov. 2018 Letter, and Dec. 2018 Letter each warned Brown that the Property was still at risk of foreclosure because his second application remained incomplete. There was no unfairness or irregularity in Chase’s decision to proceed with the Foreclosure Sale shortly after sending the Feb. 2019 Letter.²

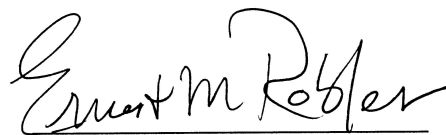
IV. Conclusion

Based upon the foregoing, the Court is prepared to **GRANT** the MSJ. The findings set forth herein will not become the order of the Court until after Brown has had the opportunity to show cause why summary judgment should not also be entered in favor of Citibank.

² It is not necessary for the Court to address Brown’s arguments regarding the inadequacy of the sale price. To set aside the Foreclosure Sale, Brown must show both that the process was unfair and that the sale price was inadequate. Having failed to demonstrate that a triable issue of fact exists as to the fairness of the Foreclosure Sale, Brown’s claim to set aside the Foreclosure Sale would fail even if Brown could show that the sale price was inadequate.

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Date: June 24, 2021

A handwritten signature in black ink, reading "Ernest M. Robles". The signature is written in a cursive style with a horizontal line underneath the name.

Ernest M. Robles
United States Bankruptcy Judge