UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 12-56892

HELEN GALOPE, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE UNDER POOLING AND SERVICING AGREEMENT DATED AS OF MAY 1, 2007 SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR4; WESTERN PROGRESSIVE, LLC; BARCLAYS BANK PLC, BARCLAYS CAPITAL REAL ESTATE INC. d/b/a HOMEQ SERVICING; OCWEN LOAN SERVICING, LLC, and DOES 4 through 10, Inclusive,

Defendants-Appellees.

Appeal from the U.S. District Court for Central California, Santa Ana
The Honorable Cormac J. Carney
District Court Case 8:12-cv-00323-CJC-RNB

APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Appellee Barclays Bank PLC hereby states that it is a wholly owned subsidiary of Barclays PLC and that no publicly held corporation owns more than 10% of Barclays Bank PLC's stock. Appellee Barclays Capital Real Estate Inc., d/b/a HomEq Servicing, hereby states that it is a wholly owned subsidiary of Barclays Capital Real Estate Holdings Inc. and that its ultimate parent is Barclays PLC, a publicly held company.

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INTRODUCTION

Over a dissent by Judge Nguyen, the Panel Majority held that a purchaser who received the benefit of her bargain and sustained no injury has constitutional and statutory standing to sue. If left undisturbed, the decision will invite meritless lawsuits from countless litigants with buyer's remorse. Appellant Helen Galope purchased a mortgage loan which employed an interest rate that was initially fixed for a two-year term and scheduled to later adjust using a formula linked to the London Interbank Offered Rate ("LIBOR"). But Appellant defaulted on her loan payments long before the rate adjusted. Accordingly, she did not suffer the slightest injury from any alleged manipulation of LIBOR, as both the Dissent and the District Court correctly recognized. Nevertheless, the Majority held that Appellant has standing because she "alleged that she would not have purchased her loan had she known that Defendants were manipulating the LIBOR rate." (Memorandum ("Mem."), attached as Appendix A, at 2.)

This ruling warrants rehearing *en banc* because it conflicts with well-established law by expanding Article III and statutory standing beyond their prescribed limits. Both the Supreme Court and this Court have said time and again that a plaintiff must show a "distinct and palpable injury" to have cause to be heard in federal court. *See, e.g.*, *Birdsong* v. *Apple, Inc.*, 590 F.3d 955, 959-60 (9th Cir. 2009); *see also Schmier* v. *U.S. Ct. of Appeals for the Ninth Circuit*, 279 F.3d 817,

822 (9th Cir. 2002) ("federal courts do not have the constitutional authority to adjudicate" mere "metaphysical injuries"). The cases cited by the Majority reaffirm this fundamental requirement. *See, e.g.*, *Maya* v. *Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (plaintiff must allege "concrete and particularized injury").

Appellant purchased a mortgage loan and that is precisely what she received. Appellant alleged no facts to establish that she was injured in connection with this purchase by any supposed misrepresentations or omissions regarding LIBOR. While she might have been harmed, and hence had standing to sue, had she ever made a LIBOR-linked interest payment, her default before the end of the fixed-rate term of her loan ensured that this hypothetical harm never materialized. Thus, the Majority decision opens a vast loophole for consumers looking to escape purchase contracts, of any kind, that prove unfavorable in hindsight: plaintiffs will contend that they would not have purchased the subject product or service absent some alleged extraneous misconduct, even if the product or service at issue functioned as intended, and the supposed misconduct never affected plaintiffs in any concrete and particularized way.

The Panel, however, could obviate the need for *en banc* review by granting rehearing to correct a factual mistake on which its decision rests. As the Complaint makes clear, Appellant did not purchase her loan from Barclays Bank

PLC or Barclays Capital Real Estate Inc. d/b/a HomeEq Servicing (collectively "Barclays" or "Appellees"). Appellant bought the loan from New Century Mortgage Company ("New Century"). The Majority was misled into believing—based on false assertions made by Appellant's counsel for the first time at oral argument—that New Century sold the loan on behalf of Barclays. *See* Mem. at 3 n.1. But no facts in the Complaint support this conclusion. Indeed, Appellant pleads the opposite: the Complaint and documents of record show that Barclays had no involvement with Appellant's loan until months after Appellant purchased it from New Century.

The Panel therefore should rehear this case, but if it does not, the Court should grant rehearing *en banc*.

BACKGROUND

In December 2006, Appellant borrowed $522,000 from New Century and executed an Adjustable Rate Note ("Note"). (ER 656 ¶ 15.) Under the terms of the Note, Appellant agreed to "pay interest at a yearly rate of 8.775%." (ER 2083; *see also* ER 9.) The Note provided that Appellant's interest rate "may change on the first day of *January, 2009* and on the same day of every 6th month thereafter." (ER 2084 (emphasis added).) Beginning on January 1, 2009, Appellant's new interest rate would be calculated by adding 6.150% to the six-month LIBOR published in *The Wall Street Journal*. (*Id.*) Appellant agreed in

writing that the interest rate on the Note would (i) be fixed at 8.775% for the first two years, and (ii) adjust on January 1, 2009 to a rate that referenced LIBOR. (ER 2084; *see also* ER 659 ¶¶ 43-45.)

Five months after purchasing her mortgage from New Century, in April 2007, HomEq began to service the loan. (ER 287 ¶ 5, 656 ¶ 18.) By April 2008, Appellant was delinquent in her loan obligations. (ER 9-10, 660 ¶ 53.) To cure her default, Appellant obtained a loan modification agreement on April 7, 2008. (ER 10, 660 ¶¶ 54-57, 695-97.) The modification agreement provided that Appellant would pay a lower fixed rate of 5.500% until April 1, 2013, at which time the rate would adjust and become a floating rate linked to LIBOR. (ER 695.) But Appellant again defaulted on her monthly payments (ER 664 ¶¶ 87-88) and, on July 31, 2009, a Notice of Default was recorded on the subject property (*id.*). In January 2010, Appellant filed for Chapter 7 bankruptcy protection. (ER 665 ¶ 89.) Because Appellant defaulted long before April 1, 2013, Appellant never made a single payment at an interest rate linked to LIBOR.

After several failed attempts to secure relief in bankruptcy court, Appellant instituted the instant action on March 1, 2012. (ER 33.) On October 11, 2012, the District Court dismissed all of Appellant's claims based on alleged LIBOR manipulation for failure to plead Article III standing, and dismissed Appellant's claims under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof.

Code § 17200, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, for failure to plead Article III and statutory standing. (ER 13-16.) The District Court held that Appellant did not allege an injury in fact that was traceable to Barclays' alleged LIBOR-related conduct due to the "simple fact that her interest rate, both in her original loan and the Loan Modification Agreement, have not been affected by LIBOR." (ER 13; *see also* ER 15-16.)

On March 27, 2014, a divided Panel of this Court reversed the District Court's dismissal of Appellant's claims against Barclays related to the manipulation of LIBOR. The Majority reasoned that Appellant pled Article III and statutory standing because she "alleged that she would not have purchased her loan had she known that the Defendants were manipulating the LIBOR rate." (Mem. at 2.) The Majority also indicated in a footnote that Appellant "adequately alleged in her complaint that Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product." (Mem. at 3 n.1.) In arriving at its conclusions, the Majority relied on this Court's decisions in *Hinojos* v. *Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013) and *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), which Appellant never raised with the District Court or this Panel, and *Maya*,

which Appellant improperly raised for the first time in her reply brief on appeal. (Docket No. 39 at 9.)[1]

Judge Nguyen dissented from the Majority's finding, recognizing that, although Appellant "allege[d] that she would not have purchased the loan but for Barclays' alleged manipulation of the LIBOR rate," she failed to "allege that she suffered any loss due to [Barclays'] purported deceptive conduct," or "allege that any loss is traceable to a misrepresentation related to the LIBOR-rate manipulation or to the LIBOR-rate manipulation itself." (Dissent at 1-2.)

ARGUMENT

I. THE MAJORITY DECISION IS CONTRARY TO WELL-ESTABLISHED LAW REGARDING ARTICLE III STANDING AND STATUTORY STANDING UNDER THE UCL AND FAL.

Appellant failed to establish standing to bring her claims against Barclays. "This is not a case in which the defendant's alleged misrepresentation caused a consumer to purchase a product that he or she would not have bought but for the misrepresentation *and* the product was worth less than represented by the defendant *or* was different from what the consumer wanted and expected to buy." *Bower* v. *AT&T Mobility, LLC*, 127 Cal. Rptr. 3d 569, 578 (Ct. App. 2011) (emphasis added). Appellant alleged no facts in the Complaint stating that

[1] On January 29, 2014, the Panel issued an order directing the parties to be ready to discuss these cases at oral argument. (Docket No. 51.)

Barclays' alleged LIBOR-related conduct adversely affected Appellant's contractual rights, or the parties' performance of their contractual obligations under the agreements. Put simply, Appellant lacks standing because the "purchaser of a product who receives the benefit of [her] bargain has not suffered [an] Article III injury-in-fact." *See Lee* v. *Toyota Motor Sales, U.S.A., Inc.*, 2014 WL 211462, at *5-6 (C.D. Cal. Jan. 9, 2014) (plaintiffs lacked standing when their cars did not "fail[] to work as described").

Article III standing requires that a "plaintiff must have sustained a 'concrete' injury, distinct and palpable … as opposed to merely abstract." *Schmier*, 279 F.3d at 822 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)). The UCL and FAL incorporate the federal injury in fact standard, and these statutes are even "more restrictive" because they also require plaintiff to allege an "economic injury." *Kwikset Corp.* v. *Superior Court*, 246 P.3d 877, 885-86 (Cal. 2011).

This Court frequently invokes the injury in fact requirement to dispose of meritless suits brought by consumers who suffer no cognizable injury as a result of purportedly harmful transactions. *See, e.g.*, *Birdsong*, 590 F.3d at 961 (no standing to sue over supposed "loss in value" caused by "hypothetical risk"); *Gonzalez* v. *Kinro, Inc.*, 473 F. App'x 768, 769 (9th Cir. 2012) (same); *Lee* v. *Am. Express Travel Related Servs., Inc.*, 348 F. App'x 205, 208 (9th Cir. 2009) (no

standing because "no event" had "yet occurred to deprive [plaintiffs] of the benefit of their bargain"). This case is no different. The Majority erred by disregarding Appellant's failure to allege facts suggesting that she suffered any injury as a result of her purchase of the mortgage loan. Appellant failed to allege that she ever paid "LIBOR-affected interest" (Mem. at 2-3), or otherwise suffered any discernable loss as a result of entering into the loan, regardless of Barclays' alleged LIBOR-related conduct.

Standing requires more than a bare allegation that a plaintiff would not have purchased a product but for a defendant's allegedly unlawful conduct,[2] misstatements or omissions.[3] The defendant's alleged misconduct must have resulted in "'concrete and particularized'" injury, *Gonzalez*, 473 F. App'x at 769, and plaintiff must "be himself among the injured," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 563 (1992). Though Appellant can claim that some "money is 'no longer in [her] possession'" as a result of her purchasing the loan, the same can be

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[2] *See Peterson* v. *Cellco P'ship*, 80 Cal. Rptr. 3d 316, 318, 322-23 (Ct. App. 2008) (purchaser of illegally sold insurance lacked UCL standing because he alleged no "actual economic injury"); *Medina* v. *Safe-Guard Prods. Int'l, Inc.*, 78 Cal. Rptr. 3d 672, 678 (Ct. App. 2008) (same).

[3] *See Herrington* v. *Johnson & Johnson Consumer Cos., Inc.*, 2010 WL 3448531, at *1, 4-5 (N.D. Cal. Sept. 1, 2010) (plaintiffs lacked standing to sue despite allegations that plaintiffs would not have purchased products if "Defendants disclosed the contaminants" in them because plaintiffs pled no "substantial threat to … health").

said after "every purchase or transaction where a person pays with money." *Peterson*, 80 Cal. Rptr. 3d at 321. Under clear Ninth Circuit precedent, the purchase is not enough, without more, to plead an injury in fact. Appellant has alleged no facts showing that she suffered any concrete and particularized injury resulting from the transactions at issue.

As the Dissent explains, the cases on which the Majority relies—*Hinojos*, *Maya*, and *Mazza*—actually demonstrate that Appellant has failed to establish standing. (Dissent at 1.) In each of those cases, plaintiffs alleged *both* that they were induced by a defendant's misrepresentations into transacting with that defendant, *and* that they suffered a concrete and particularized injury as a result of entering into the transaction. In *Hinojos*, plaintiff alleged he suffered injury when he purchased goods that a retailer falsely represented were worth more than the prices he paid for them. 718 F.3d at 1102 & n.1. The Court found that plaintiff had adequately alleged loss represented by the difference in value between the retailer's falsely advertised "regular" prices, which were inflated, and "sale" prices, which were the prices at which the goods were routinely sold. *Id*. at 1102, 1104-05.

In *Maya*, plaintiffs alleged that defendant developers' misstatements about their sales practices caused plaintiffs to purchase homes that were, immediately upon purchase, less valuable than the developers' representations

suggested they were. 658 F.3d at 1065-66. Plaintiffs alleged losses that could be measured by the difference in value between homes in stable neighborhoods—like those the developers advertised they were building—and homes in neighborhoods filled with unqualified buyers and abandoned homes. *Id*. at 1066, 1069-70.

Lastly, in *Mazza*, plaintiffs alleged that, when purchasing cars, they each paid an extra $4,000 for a package of safety features that did not perform as promised. 666 F.3d at 585-87, 595. The Court found that plaintiffs adequately alleged they had been induced by defendants' misrepresentations to purchase the safety package, and were injured because they surrendered $4,000 they otherwise would have retained but for the misrepresentations. *Id*. at 595.

In stark contrast to the allegations in *Hinojos*, *Maya*, and *Mazza*, Appellant alleged no facts showing that she suffered any discernable loss as a result of her purchasing the mortgage loan at issue. Appellant cannot establish standing by insisting that she made payments on a loan that was "less valuable than what [she was] promised" without alleging how she was harmed by entering into the loan or making payments pursuant to it. *Burdick* v. *Union Sec. Ins. Co.*, 2009 WL 4798873, at *4-5 (C.D. Cal. Dec. 9, 2009).

The Complaint concedes that Appellant defaulted on her loan obligations years before they were to adjust to a LIBOR-linked interest rate. Thus, Appellant did not suffer a cognizable injury; she never made a single LIBOR-

linked payment pursuant to the loan, and she alleges no facts to demonstrate any other concrete injury. For example, the Complaint does not plead facts showing that Appellant was somehow harmed by purchasing the loan in the first instance. Appellant nowhere alleges that she purchased the loan instead of a different one because it was advertised as having properties that competing loans lacked. *Compare Kwikset*, 246 P.3d at 890 (purchaser of lockset not "Made in U.S.A." as advertised had standing), *with Peterson*, 164 Cal. App. 4th at 1591 (purchaser of illegally sold insurance lacked standing because he alleged no "actual economic injury").

Finally, the possibility that Appellant *could have been* injured under the terms of the loan—later in time, had she not defaulted and had the interest rate changed to one linked to LIBOR—does not establish standing. Appellant purchased her loan in December 2006, but she could not have been injured by Barclays' alleged LIBOR-related conduct until years later, when her interest rate was to become linked to LIBOR. (ER 2084.) The hypothetical risk that wrongdoing may cause future harm is insufficient to establish standing. *See, e.g.*, *Market Trading, Inc.* v. *AT&T Mobility, LLC*, 388 F. App'x 707, 709 & n. 2 (9th Cir. 2010); *Fineman* v. *Sony Network Entm't Int'l LLC*, 2012 WL 424563, at *3 (N.D. Cal. Feb. 9, 2012). Because Appellant was never obligated to make LIBOR-linked payments, she could not have been deprived of any alleged contractual

rights because of Barclays' LIBOR-related conduct. *See Burdick*, 2009 WL 4798873 at *4-5 (insurance policyholders who never made certain benefits claims lacked standing to sue regarding the underpayment of such benefits). "[N]o event" ever "occurred to deprive [Appellant] of the benefit of [her contractual] bargain." *See Lee*, 348 F. App'x at 207. Unlike the plaintiffs in *Hinojos*, *Maya*, and *Mazza*, Appellant has alleged no injury in fact.[4]

To hold that Appellant has established standing without alleging a concrete injury transforms buyer's remorse into a cognizable legal injury, and invites meritless lawsuits in derogation of this basic standing requirement. This Circuit, and other Circuits, have repeatedly avoided that result by making clear that consumers cannot establish standing merely by insisting that they would not have purchased a product, or would have paid less for it, had they known of some allegedly concealed fact. *See, e.g.*, *Koronthaly* v. *L'Oreal USA, Inc.*, 374 F. App'x 257, 259 (3d Cir. 2010); *Rivera* v. *Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

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[4] Other courts have applied *Kwikset* to find standing where a plaintiff has adequately alleged that defendant's misrepresentations caused concrete and particularized injury. *See, e.g.*, *In re Linkedin User Privacy Litig.*, 2014 U.S. Dist. LEXIS 42696, at *20 (N.D. Cal. Mar. 28, 2014) (plaintiff adequately alleged injury in fact where she purchased a premium service from defendant website operator based on its promise of "industry standard" security, which it failed to deliver, and thereby paid money she otherwise would not have paid). Such decisions illustrate the deficiencies in Appellant's allegations.

II. THE MAJORITY DECISION IS INCORRECT BECAUSE APPELLANT ALLEGED NO FACTS SHOWING THAT SHE SUFFERED ANY INJURY FAIRLY TRACEABLE TO BARCLAYS' ALLEGED CONDUCT.

Article III and statutory standing require Appellant to allege facts showing that she sustained a loss that is "fairly traceable" to the Appellees' alleged misconduct. *Lujan*, 504 U.S. at 560-61; *see also Kwikset*, 246 P.3d at 885 (UCL and FAL require that "the economic injury was the result of, *i.e.*, *caused by*, the unfair business practice or false advertising that is the gravamen of the claim"). Appellant lacks standing because she alleged no facts showing a "causal connection" between her alleged injury and Barclays' LIBOR-related conduct. *See Lujan*, 504 U.S. at 560-61.

Appellant's pleadings affirmatively show that Barclays could not have caused Appellant injury under the theory articulated by the Majority because, by Appellant's own allegations, Barclays had no contact whatsoever with Appellant when she entered into the mortgage loan, let alone induced Appellant into purchasing the loan by misrepresenting relevant facts upon which she relied. *See In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009) (UCL statutory standing requires "actual reliance").

The Majority cited nothing from the Complaint or the record to support its conclusion that Appellant "adequately alleged" that "Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product that is

the subject of this litigation," thus "satisfy[ing] the traceability requirement" for Article III and statutory standing. (Mem. at 3 n.1.)[5] That is unsurprising, because Appellant alleges no facts showing that Barclays contracted with any other entity, let alone New Century, to sell Appellant her loan. (*Contra* Mem. at 3 n.1.)[6] Indeed, the Majority appears to have been misled to its conclusion by false assertions made by Appellant's counsel at oral argument.[7] The Complaint states that,"[t]wo years after plaintiff acquired the Premises, she signed a secured loan

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[5] Although the Majority states that Appellees raised a traceability argument for the first time at oral argument (Mem. at 3 n.1), Appellees were responding to a question of whether it was correct under *Maya*—which Appellant first raised in her reply papers—that Appellant "allege[d] … that but for Barclays' failure to disclose its ability to manipulate LIBOR she would have done business with somebody else?" (Certified Hearing Transcript ("Hr'g Tr."), attached as Appendix B, 12:22-13:1.) As discussed *infra*, the allegations of the Complaint show that Appellant did not conduct any business with Barclays when she purchased her loan from New Century. And there are no alleged facts suggesting that New Century was acting as Barclays' agent when New Century transacted business with Appellant.

[6] Appellant's conclusory allegations that Barclays "contract[ed] with others to sell mortgage loans based on LIBOR" (ER 671 ¶ 130; *see also* ER 671 ¶ 128, 674 ¶ 138(e)) are wholly unsupported by any facts alleged in the Complaint or of record. Such allegations, which fail to meet the most basic pleading requirements under the Federal Rules, provide no basis for the Majority's finding.

[7] At argument, Appellant's counsel stated that New Century was "not a lender" but, rather, sold loans into a securitized trust in which Barclays was involved and, thus, representations made to Appellant about LIBOR were "made by the people in that mortgage-backed securitized trust. That's the whole point of these trusts." (Hr'g Tr. 27:9; 29:12-14.) Not only did Appellant's counsel misrepresent the lending and securitization process, but it is simply not possible that a trust created in May 2007 (ER 1409) could have made any representation about LIBOR to Appellant when she bought her loan from New Century in 2006.

agreement and promissory note whereby *New Century Mortgage Corporation, the loan seller, sold plaintiff a LIBOR interest only adjustable rate mortgage* in the sum of $522,000.00." (ER 656 ¶ 15 (emphasis added).) Further, the Complaint makes clear that Barclays Bank PLC was not involved with Appellant's loan until it was later securitized. (ER 656 ¶¶ 16-19, 666-67 ¶¶ 105-07.) The record also contains evidence, including an affirmation from Karen L. Stacy of HomEq, that "[i]n April 2007, HomEq began to service the Loan." (ER 287 ¶ 5.) Appellant does not allege that Barclays became involved with Appellant's loan until five months *after* it was sold to Appellant by New Century. (*See* ER 287, 656.)

Numerous other portions of the record make clear that Appellant purchased her loan from New Century, not Barclays:

- In her original Complaint, Appellant acknowledged that, "[t]o secure payment of the principal and interest provided in the note … plaintiff, as trustor delivered to New Century Mortgage, as beneficiary, a deed of trust dated on or about December 28, 2006 [sic]." (ER 37 ¶ 17.) Appellant also admitted that, "*[a]fter* entering into the Deed of Trust, New Century Mortgage Corporation sent Ms. Galope a notice that the servicing of her loan had been transferred to HomEq." (*Id.* (emphasis added).)[8]

[8] These facts, confirmed by documentary evidence, were contradicted by Appellant's counsel at oral argument. (*See* Hr'g Tr. 27:7-12 ("With regard to New Century Mortgage, they were considered a loan [seller]. *They were never alleged to be a lender. They're not a lender*.") (emphasis added).) New Century *was* a lender, and the Court may consider that fact. *Warren* v. *Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) ("A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic

(*footnote continued*)

- In an affidavit dated March 1, 2012, Appellant stated that, "[o]n or about December 16, 2006, I signed a secured loan agreement and promissory note whereby *New Century Mortgage Corporation loaned me* the sum of $522,000.00 secured by the Premises as my principal residence." (ER 59 ¶ 5 (emphasis added).)

- The Notice of Default that Appellant received in March 2011 explained that Appellant had executed a Deed of Trust on December 16, 2006 "in favor of New Century Mortgage Corporation." (ER 125.)

Further, Appellant's counsel admitted to the Court that the Complaint lacks facts establishing that New Century was acting as Barclays' agent when it sold Appellant her loan. (Hr'g Tr. 30:14-16.) Absent any misrepresentation by Barclays to Appellant, there is no alleged loss that is "fairly traceable" to Barclays. *See Easter* v. *Am. W. Fin.*, 381 F.3d 948, 961-62 (9th Cir. 2004) (borrowers of second mortgage loans had no standing to sue those investment trusts that did not hold a named plaintiff's note because they could not trace the alleged injury to those defendants); *Frison* v. *Accredited Home Lenders, Inc.*, 2011 WL 2729241, at *4 (S.D. Cal. July 13, 2011) (plaintiff lacked standing where she did not allege

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evidence."). Similarly, the Court may consider facts that contradict Appellant's assertion during oral argument that Barclays is "listed in the mortgage-backed securitized trust as one of their loan sellers." (Hr'g Tr. 27:18-21.) The Prospectus Supplement for the Securitized Asset Backed Receivables LLC Trust 2007-BR4, to which Appellant's counsel referred, lists the "loan sellers" as "NC Capital Corporation ... and its affiliates" including "New Century Mortgage Corporation." (ER 1407.) None of those entities was affiliated with Barclays, and Appellant has not alleged any contrary facts.

facts showing defendant "was involved, either directly or indirectly, in [co-defendant's] acts at the time the loan agreement was executed").

Regardless, even if New Century was acting as Barclays' agent when Appellant purchased her loan (and it was not), Appellant makes no allegation that New Century made any representation to her regarding LIBOR, let alone that she relied upon such a representation in making her purchase. Those facts are fatal to Appellant's alleged standing, even under the Majority's view of the case. *See Wood* v. *Motorola Mobility, Inc.*, 2012 WL 892166, at *7 (N.D. Cal. Mar. 14, 2012) (dismissing claims because plaintiffs "do not allege that they relied upon any affirmative representation" giving rise to duty to disclose omitted facts). At bottom, Appellant has failed to allege a causal connection between her supposed losses and Barclays' alleged conduct. *See Daro* v. *Superior Court*, 61 Cal. Rptr. 3d 716, 729 (Ct. App. 2007); *Hall* v. *Time Inc.*, 70 Cal. Rptr. 3d 466, 473 (Ct. App. 2008).

CONCLUSION

For the reasons set forth above, panel rehearing or rehearing *en banc* should be granted.

Dated: April 10, 2014

Respectfully submitted,

/s/ Adam S. Paris

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____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Adam S. Paris
Signature of Attorney or Unrepresented Litigant

(New Form 7/1/2000)

9th Circuit Case Number(s) No. 12-56892

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Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 27 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HELEN GALOPE, an individual, Plaintiff - Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of May 1, 2007 Securitized Asset Backed Receivables LLC Trust 2007-BR4; et al., Defendants - Appellees.	No. 12-56892 D.C. No. 8:12-cv-00323-CJC-RNB MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted February 11, 2014
Pasadena, California

Before: D.W. NELSON, PAEZ, and NGUYEN, Circuit Judges.

Helen Galope appeals the district court's grant of summary judgment in favor of Deutsche Bank National Trust Company ("DBNTC"), Ocwen Loan

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

Servicing, and Western Progressive, LLC ("WPT") (collectively, "DBNTC Defendants") and dismissal of her claims against Barclays Bank PLC and Barclays Capital Real Estate Inc. d/b/a HomEq Servicing (collectively, "Barclays Defendants"). We affirm in part, reverse in part, and remand for further proceedings.

1. We reverse the district court's ruling that Galope failed to establish injury-in-fact necessary for Article III standing on her LIBOR-based claims. Galope adequately alleged that she would not have purchased her loan had she known that the Defendants were manipulating the LIBOR rate. Article III standing exists when a plaintiff purchases a product she would not have otherwise purchased but for the alleged misconduct of the defendant. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). Contrary to the dissent's assertion, Galope's standing does not turn on whether she actually made interest payments that were adjusted in response to the allegedly manipulated LIBOR rate. Galope's cognizable injury occurred when she

purchased the loan, not upon payment of LIBOR-affected interest.[1] *Maya*, 658 F.3d at 1069.

We therefore reverse and remand for further proceedings on Galope's LIBOR claims against the Barclays Defendants under the Sherman Antitrust Act, 15 U.S.C. §§ 1–2, and her state law claims for breach of the covenant of good faith and fair dealing, and fraud. However, we conclude that the district court properly granted summary judgment on all LIBOR-based claims against the DBNTC Defendants because Galope failed to present any evidence that DBNTC was involved in, or conspired in, the alleged LIBOR manipulation.

2. We reverse the district court's ruling that Galope lacks statutory standing to pursue her LIBOR-based Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, claims against the Barclays Defendants and remand for further proceedings. Galope has statutory standing to pursue these claims because she alleged that she

[1] At oral argument, the Barclays Defendants argued for the first time that Galope's LIBOR-based claims were not traceable to their misconduct because they did not actually sell the loan to Galope. Galope, however, adequately alleged in her complaint that Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product that is the subject of this litigation. At the motion-to-dismiss stage, Galope's allegations are sufficient to satisfy the traceability requirement of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

purchased a loan that she would not have otherwise purchased but for the Barclays Defendants' alleged misconduct. *See Kwikset Corp. v. Superior Court*, 246 P.3d 877, 890 (Cal. 2011); Cal. Bus. & Prof. Code §§ 17204, 17535.

3. We affirm the district court's rulings on all claims associated with the "missing-fax-page scheme." Galope stated in her Third Amended Complaint ("TAC") that the portions of the fax transmission that she received put her on notice that her payments would increase. This admission directly undermines her allegations that the Barclays Defendants and DBNTC deceived her into believing that the initial payment amounts were fixed throughout the term of the loan.

4. We reverse the district court's rulings that Galope's wrongful foreclosure[2] and UCL claims based on the DBNTC Defendants' violation of the bankruptcy court's automatic stay are not justiciable. Although rescission of the sale—almost seven months after the violation—mooted Galope's claims for injunctive and declaratory relief, it did not affect her claim for damages. *See Wilson v. State of Nev.*, 666 F.2d 378, 380-81 (9th Cir. 1982). Further, regardless of whether Galope

[2] Although Galope's seventh claim in her TAC is styled as a "wrongful foreclosure" claim, the content of the claim is exclusively focused on violation of the automatic stay under 11 U.S.C. § 362. The panel thus construes this as a claim for damages under 11 U.S.C. § 362(k)(1).

has equity in the home, 11 U.S.C. § 362(k)(1**)** provides a statutory basis for damages.[3]

5. We reverse the district court's grant of summary judgment on Galope's claim for breach of the covenant of good faith and fair dealing associated with violation of the automatic stay. The covenant of good faith and fair dealing "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." *Hicks v. E.T. Legg & Associates*, 108 Cal. Rptr. 2d 10, 19 (Ct. App. 2001). Discretionary power of this kind "must be exercised in good faith." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 826 P.2d 710, 726 (Cal. 1992). The power of sale in the deed of trust provided the DBNTC Defendants with discretionary authority to foreclose upon Galope's home in the event of default. Contrary to the DBNTC Defendants' argument, there is sufficient evidence in the record to support a reasonable inference that the DBNTC Defendants had notice of the automatic stay when they

[3] The DBNTC Defendants' alternative argument that Galope released her right to pursue her UCL claim when she signed her loan modification agreement fails, in part, because the release only purports to apply to "claims, damages or liabilities . . . existing *on the date of this Agreement* . . . ." The loan modification agreement is dated April 17, 2008. The alleged violation of the automatic stay did not occur until September 1, 2011.

executed the trustee's sale, and that they refused to rescind it upon Galope's request.

6. Galope argues on appeal that the district court erred because it did not provide her with leave to amend her complaint. On remand, Galope may seek further leave to amend at the district court's discretion. However, leave to amend is foreclosed on all claims associated with the alleged missing-fax-page scheme. No additional allegations will change the fact that the portion of the document Galope received and signed provided her with notice that her payments were subject to change after five years and would increase. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.").

7. The parties shall bear their own costs on appeal.

REVERSED, IN PART, AFFIRMED, IN PART, AND REMANDED.

Galope v. Deutsche Bank, 12-56892

NGUYEN, Circuit Judge, dissenting in part:

Because I conclude that Galope failed to establish standing on her LIBOR-based claims, I respectfully dissent from the majority's decision reversing these claims as to the Barclays Defendants. Galope does not allege that she suffered any loss due to the Barclays Defendants' purported deceptive conduct, nor does she allege that any loss is traceable to a misrepresentation related to the LIBOR-rate manipulation or to the LIBOR-rate manipulation itself. *See*, *e.g.*, *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (concluding that the plaintiff adequately had alleged standing where, "because of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend" (quoting *Kwikset Corp. v. Superior Court*, 120 Cal. Rptr. 3d 741, 757 (2011))); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("To the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact'" under Article III (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011))); *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.'" (citing *Allen v. Wright*, 468 U.S. 737,

757 (1984))). Indeed, as the majority concedes, Galope's payments never were affected—she paid a fixed interest rate and defaulted before the allegedly manipulated LIBOR rate went into effect on her loan; she then was granted a loan modification with a (lower) fixed interest rate that likewise was unrelated to the LIBOR rate and defaulted again. Although Galope alleges that she would not have purchased the loan but for the Barclays Defendants' alleged manipulation of the LIBOR rate, Galope alleges no loss from the alleged manipulation—or any related misrepresentation or omission. Therefore, Galope's alleged injury is far too attenuated to establish Article III standing.[1]

[1] For the same reasons, Galope lacks statutory and antitrust standing. *See, e.g.*, *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." (citation omitted)). The interest rates on Galope's loan were unaffected by the Barclays Defendants' anticompetitive behavior.

Appendix B

Helen Galope v. Deutsche Bank National Trust, et al

12-56892 (9th Cir. Feb. 11, 2014)

LENORE ALBERT: Good morning, Your Honors. My name is Lenore Albert and I represent the Appellant Helen Galope. I'd like to reserve five minutes for rebuttal.

I received the Court's order and I have looked at the three cases with regard to Article III standing and the issue of LIBOR in this case. When you look at Hinojos case they clearly said and we cited to the case of Mazza that if the borrower either would not have purchased the product in question or if the product was more expensive then Article III standing would be met because we are talking about the injury in fact prong which was that issue in the District Court.

Here we do have the allegation by Miss Galope which is in the third amended complaint, which would be at page 684 of the fourth volume of the excerpts of transcript, where she alleged she would have never taken out the loan under the FAL cause of action. Then we also had her declaration with regard to the motion for Summary Judgment where she had said the same thing. That can be found in the record on page 2,070.

Third, we had an expert, Mr. Motts, who had also declared in his expert capacity that no

reasonable consumer would take out a loan knowing that the lender was actually manipulating the LIBOR rate against them on a LIBOR loan.

Just as some background, this case was a LIBOR loan case where Miss Galope and potential others similarly situated received loans during the mid-2000s and that loan was based on the LIBOR rate. At the time, unbeknownst to the consumers--

JUDGE JACQUELINE H. NGUYEN: Let me make sure I understand that correctly because she had started with a fixed rate loan, correct? Her loan was fixed, right, and then eventually it would then adjust?

LENORE ALBERT: Yes, it was locked. That's a lock rate. The first year is a lock.

JUDGE JACQUELINE H. NGUYEN: And did she default prior to the end of that lock period?

LENORE ALBERT: The default did occur before that lock period ended, correct.

JUDGE JACQUELINE H. NGUYEN: So with regard to the cases that the Court had asked you to discuss, Hinojos, Mazza and Maya, those are all false advertising claims, misrepresentation type cases basically standing for what, to me, is

very commonsensical proposition that if you pay for something based on a misrepresentation or bought something based on a misrepresentation that you otherwise wouldn't have purchased then you have a claim or if you paid more for something based on a misrepresentation or false advertising then you wouldn't have a claim.

In this case I'm trying to understand how she was injured if she defaulted before the fixed loan adjusted under LIBOR. Doesn't she have to allege some nexus between the product that she claims she wouldn't have bought--? In other words if you had a fixed rate and she never ties the LIBOR rate manipulation to her fixed rate loan then where is the injury there for purposes of Article III standing?

LENORE ALBERT: Even though it was a fixed rate it still was a LIBOR loan. The loan was still accruing interest at the LIBOR rate. What she was paying has no relation to what she owed. So, although you have these exotic loan products that might have an initial two-year period rate lock, like this one did and it was an interest-only note, her note was still accruing. It was still a LIBOR note. It was still a LIBOR

rate note.

However, the conjunction here is or and the conjunction here on standing is whether you pay more or whether you wouldn't have purchased it but for the fact if you had known whatever that misrepresentation was. Here the misrepresentation was that this loan was based on an independent market rate. This loan was not based on some third independent market rate. It was actually being manipulated by the very lender that was giving them the loan. This was not a fixed rate loan on the life of the loan. It was just a rate lock meaning you will pay the same amount of dollars allegedly for the first two years. However, when you look at these exotic loan products they can actually accelerate within that type period which then changes what you actually pay in that period of time.

What was interesting about this loan product is that the mortgage-backed securitized trust that this went into was also a Barclays made trust vehicle. So, Barclays not only lent the money and fixed the rate and manipulated the rate, they put it into their own trust which then they bet against the same homeowners. So what

happened--
JUDGE DOROTHY WRIGHT NELSON: I'm interested in what kind of relief are you seeking from Barclays.
LENORE ALBERT: We have the FAL cause of action, the UCL, the fraud and so they each give different relief. The first one gives restitution under the UCL in the FAL, but the fraud also gives damages and you also can get obviously injunctive relief under UCL too.
JUDGE DOROTHY WRIGHT NELSON: All right and would you have to give back the money that-- you would need to tender the principal balance back to Barclays?
LENORE ALBERT: We never did get to that. The Court never ruled on that tender issue in the Court below. It would appear here that what would occur, if we apply the reasoning it isn't like buying keys in Kwikset that says made in the USA where you would get just the money back. No one ever gives the home back. But what occurred here was if you take away the manipulation, because we're talking about a long-term investment. You're talking about someone's home. It isn't a product that you would readily

either consume or give back. Everybody wants to keep their homes. But restitution to put them back in the same place that they would be would be whatever money that they loaned they would be put back either into a proper vehicle, which then would be a loan modification which you've seen a lot of in other scenarios the government contrived devices for that and you've seen other lawsuits where that device has been employed.
JUDGE DOROTHY WRIGHT NELSON: The reason for my question I'm concerned about your standing.
LENORE ALBERT: Right.
JUDGE DOROTHY WRIGHT NELSON: And whether you satisfy the redressability requirement.
LENORE ALBERT: Correct. Then there's a second option. So there can be this modification of the loan or you can, as we've shown, you could give back the money that was paid because when you're looking at a false advertising claim that's usually what is given in any other type of product scenario. Here we had almost--it was like approximately $100,000 in interest-only payments that was paid towards this rigged LIBOR market

interest, because it didn't go towards the principal of her home. So hers was easy and most of these are. As a matter of fact the whole mortgage-backed securitized trust in this case was set up to have it interest-only until 2012 and we know the rigging ended around 2009 so for everybody it would be the same. It would be that same mortgage interest rate because most of these people were foreclosed upon. You only had in this trust approximately 15 percent of the homeowners that could even sustain this type of exotic vehicle. This trust was truly set up to fail.
The market rigging was set up purposefully to only make money for the banks and they made it on every single side in this case. There was no way that the average homeowner could succeed no matter what they did in this loan. Even if you were going to pay your interest rate under these types of vehicles you would still default. The loan was created, this mortgage-backed securitized trust, was created to default. How the 15 percent survived it's just more of an anomaly than what would be expected.
JUDGE JACQUELINE H. NGUYEN: Can you talk about your claim based on violation of the

automatic stay and before you answer that clarify for me which defendant you're going against with regard to those claims and whether there was notice? There's evidence in the record of notice that there was an automatic stay in place.
LENORE ALBERT: With regard to the claim of violating the automatic stay, that goes to Western Progressive, the trustee, and Ocwen who was the current servicer. Both of them had notice through the Bankruptcy Court that there was a bankruptcy petition filed.
During that course the Bankruptcy Court dismissed it for lack of filing something. The debtor was able to get that bankruptcy stay reinstated before the sale. There was a courtesy notice that was filed by the bank's attorneys themselves so they received notice as soon as that vacate order came through which was a few days before the actual day of the sale.
Then the debtor, as alleged, had also given notice after she learned of the sale that the bankruptcy stay was--the bankruptcy was back in place and that they had violated the stay. Yet the bank continued to hold onto the title and refused to give the title back. Neither the

servicer Ocwen nor Western Progressive would give the title back until after this case was filed. The Court found it to be moot because once they were facing the TRO and possible preliminary injunction they sent in a declaration that the banks were going to go ahead and give title back to Miss Galope.

My point is that standing occurs at the date that the lawsuit is filed. If you do that then most defendants could moot out almost every single action. It's an involuntary settlement and there is some case law that is cited in the brief with that proposition.

Here at the time the lawsuit was filed she still did not have title to her home. She was entitled, since she went that route, to receive damages that she incurred because she still incurred attorney's fees, she still incurred other costs and other time and expense. Her title was clouded for I believe it was almost six months, maybe nine months and where she couldn't use her equity, she couldn't use her home, she couldn't use it for any credit purposes so there was a real damage there.

Back to the standing, under the three

cases it shouldn't make a difference because this is a long-term loan. I know it's different because it is a long-term loan, but because the injury is--it's actually more severe. Because it's so injurious doesn't mean now you lack standing. It should mean now there is some redressability here. It isn't like a political question. Usually when you're talking about Article III standing you're asking am I usurping another branch of the government. I get it that all courts are struggling with the concept in this foreclosure crisis what kind of damages because the damages seem like they're so large, but yes they are and we're seeing settlements like that all the time. We're seeing settlements in the billions of dollars and even with these billions of dollars of settlements, the economic reality is the financial institutions have grown enormously during this period. It's only a portion of their profits that they're even losing in these settlements. So although damages are enormous they're justified. There is redressability here.

JUDGE RICHARD PAEZ: Did you want to save about three minutes for rebuttal?

LENORE ALBERT: Thank you.

JUDGE RICHARD PAEZ: Okay.

MATTHEW PORPORA: Good morning, Your Honors. May it please the Court, my name is Matthew Porpora of Sullivan & Cromwell appearing on behalf of the Barclays Appellees.

Your Honors, I've consulted with counsel for the other Appellees and agreed to split our time in half so I'll be taking seven and a half minutes and then counsel for the other Appellees will round out the argument.

Your Honors, in a well-reasoned decision the District Court dismissed each of the Appellant's six claims against the Barclays Appellees and it did so for several reasons. Most fundamentally though it dismissed because the Appellant has failed to adequately allege that she suffered any injury whatsoever as a result of the conduct she alleges against the Barclays Appellees.

JUDGE DOROTHY WRIGHT NELSON: What about the case of Maya v. Centex? Doesn't she allege and declare that but for Barclays' failure to disclose its ability to manipulate LIBOR she would have done business with somebody else?

MATTHEW PORPORA: She does allege that, Your Honor. Let me draw a distinction between Maya and the other cases that this Court brought to the attention of the parties--the Mazza case and the Hinojos case.

In each of those three cases the Plaintiff had adequately alleged number one that he or they were induced into entering into transactions as a direct result of misrepresentations made by the Defendant to the Plaintiff that induced the Plaintiff to enter into the transaction. The Plaintiff also adequately alleged that by entering into that transaction they were injured at the moment they entered into the contract. They suffered a real injury in fact.

In Maya for instance, they paid more for the homes than those homes were worth because they believed they were paying for homes that actually were in stable neighborhoods. Neither of those two circumstances, the inducement by the Defendant or injury, in fact are present here, Your Honors and I'll explain why.

JUDGE RICHARD PAEZ: Well, she signed her name to a--she committed herself to a long-

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term note.
MATTHEW PORPORA: She did, Your Honor.
JUDGE RICHARD PAEZ: Having done that why isn't that injury, economic injury?
MATTHEW PORPORA: Well, Your Honor--
JUDGE RICHARD PAEZ: She said she wouldn't have done it had she known.
MATTHEW PORPORA: You're correct, Your Honor. But number one, with regard to her saying she wouldn't have engaged in the loan transaction, she didn't transact with either of the Barclays Appellees. She transacted with New Mortgage Corporation, Your Honors, and that's expressly alleged at paragraph 15 of the third amended complaint--the complaint that the District Court properly dismissed. She expressly alleges that she purchased the loan from New Century, that New Century was the seller of the loan, that it sold her the loan.
The only entity that could have made any representations that would have induced her to enter into that transaction was New Century and she doesn't allege that New Century made any such allegations.
Now, getting back to your question,

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Judge Paez, about whether there was actually any injury, regardless of the fact that any misrepresentation could not have been made by a Barclays Appellee, this Appellant did not suffer injury when she entered into the loan. As Judge Nguyen pointed out previously, this was a loan that employed a fixed interest rate on the front end. It was undeniably a fixed interest rate of 8.775 percent. She contracted to get that fixed interest rate. She got that fixed interest rate.
Now, she contracted also to get a loan that would at some point in the future, January 1, 2009 to be precise, would switch from a fixed interest rate loan to a floating interest rate loan that would be calculated in accordance with LIBOR. But, Your Honors, any claim that she would have been injured if and when the loan actually did link to LIBOR if she had not defaulted on her payments, any allegation that she would have been injured is absolutely speculative. It's hypothetical. There's nothing in the complaint that suggests that she would have suffered injury if and when that loan did link to LIBOR.
Your Honors, each one of the three cases, the Maya case, the Mazza case and the

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Hinojos case rely on similar facts. They all require that there be a misrepresentation from the Defendant to the Plaintiff inducing the Plaintiff to enter into the transaction. That didn't occur here. They all required that the Plaintiff allege adequately that he suffered an injury in fact. That did not occur here.
JUDGE RICHARD PAEZ: Barclays stepped in as a servicer, right?
MATTHEW PORPORA: Yes, Your Honor. Barclays stepped in as a servicer actually months after the Appellant even entered into the loan. It's undisputable, Your Honors, from the allegations of the complaint and also from the loan documentation submitted by the Appellant that--
JUDGE RICHARD PAEZ: Was it known at the time of the transaction that Barclays was going to be the servicer?
MATTHEW PORPORA: The record's not clear on that and certainly the Appellant doesn't allege it. The Appellant alleges that she entered into the loan with New Century and that months later, in April of 2007, Barclays took over as the servicer. In any event, the Barclays Appellee

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that took over as services was HomEq Servicing and HomEq Servicing is a corporate affiliate of Barclays Capital Real Estate Incorporated. That entity does not sit on the dollar LIBOR panel, on any LIBOR panel. It's not responsible for making LIBOR submissions.
To the extent that the Appellant is making any suggestion whatsoever that the HomEq Servicing could have made a representation, there's nothing in the complaint that suggests that HomEq Servicing would have had any knowledge whatsoever about any LIBOR manipulation and it's well-established under black letter law that you cannot impute the knowledge of a parent company to a subsidiary merely because of the corporate form. There's nothing in the allegation that suggests even if she had alleged that HomEq made any representations whatsoever that it would have done so in a knowingly false manner.
Your Honors, going back to the reasons that the District Court correctly dismissed the claim, the Appellant has not alleged that she ever made a single payment based on LIBOR. Again, a review of the Appellant's own allegations and the loan agreement show unequivocally that she

made only fixed interest rate payments both on the December 2006 loan and also on the modified 2008 loan.

It is also undisputed that the Appellant defaulted on each of those loans long before they were set to recalculate in accordance with LIBOR. Again, to the extent that there's any suggestion whatsoever that this Appellant could have suffered any kind of injury as a result of LIBOR manipulation, that can't be. It's not a factual possibility and therefore the District Court correctly determined she had neither Article III nor statutory standing to bring her claims.

There is a separate set of allegations, that I'll refer to as the fact scheme allegations, that the Appellant presents. Those allegations essentially boil down to a simple claim that HomEq Servicing in April of 2008 faxed the Appellant a copy of the modified loan agreement and did so in a purposefully misleading way so as to obfuscate certain terms on the agreement. I think the common sense way to put this is the Appellant alleges that when the fax was transmitted through, the bottom three inches

was lopped off of the one or two pages of the agreement.

The Appellant alleges that as a result of that she was falsely led into believing that she was achieving terms that were more favorable than those that were employed by the initial loan agreement. But, Your Honors, that is precisely what happened. By entering into the modified loan agreement the Appellant was materially benefited. She most certainly did not suffer any injury whatsoever. She achieved a significantly decreased monthly interest rate. It went down from 8.775 percent to 5.5 percent and that immediately translated into roughly $800 of savings on her monthly loans. In addition to that, as the Appellant herself alleges at paragraph 54 of the third amended complaint, by entering into the modified loan agreement she staved off foreclosure. She herself expressly states that she cured the then existing default on her December 2006 loan by entering into the modified loan agreement.

In short, Your Honors, there is nothing that the Appellant alleges that establishes any injury in fact. She does not have Article III nor

statutory standing to bring any of her claims against the Barclays Appellees and we would ask that the District Court affirm. I'm sorry, that this Court affirm the District Court's decision.

JUDGE RICHARD PAEZ: Okay, thank you. Let's see, who's next?

ROBERT NORMAN: Good morning. May it please the Court, my name is Robert Norman. I represent the Defendants Deutsche Bank National Trust Company as trustee, Ocwen Loan Servicing and Western Progressive.

Your Honors, I do want to avoid some of the overlap because we share a lot of the arguments with Barclays. But there are a few important distinctions that I would like to make and focusing on the LIBOR standing claims. In particular, Deutsche Bank National Trust Company, or DBNTC, that entity, like the HomEq Servicing entity, was not a LIBOR company that sat on the panel submitting rates. That's Deutsche Bank AG, a separate legal entity organized in the Republic of Germany who was never a party to this case. I think that's an important distinction to make for Deutsche Bank National Trust Company.

Focusing on the injury in fact, again

there are some similarities, but as Judge Nguyen pointed out, the original loan was not tied to LIBOR. This was a fixed rate from New Century, another entity not before this Court. There is an allegation that she would not have obtained this loan, but there has to be misrepresentation from the Defendant Appellees I believe to rely on, let's say, the Hinojos, Mazza or Maya cases and that didn't happen in this case.

With respect to the causation type argument under Article III and could this injury be traceable to any of the challenged conduct, again there's some overlap with the fact that there was no actual injury and that there could be no causation because Deutsche Bank National Trust Company was not on the LIBOR panel. Deutsche Bank National Trust Company, there's no evidence, there's no allegations that that entity ever made a single allegation to Ms. Galope and that makes sense because they were a trustee for a trust. Communications are going to start with either your original lender, which in this case was New Century, and then eventually transition to perhaps a loan servicer. That's the way the industry is set up. So there would have been no

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communications or a link to show some sort of causation.

JUDGE JACQUELINE H. NGUYEN: With regard to the violation of the automatic stay, can you tell us why it took so long for the sale to be rescinded?

ROBERT NORMAN: Yes, Your Honor. There are a few reasons. Number one, and I think the opening brief was a little misleading in that there wasn't this notice to Western Progressive, who is the foreclosure trustee, and what had happened in this case is when the second bankruptcy was filed it was dismissed shortly thereafter because the proper schedules weren't filed. Ms. Galope moved to reinstate that. That happens on August 30th.

There is an allegation that notice was provided to other entities, but not the foreclosure trustee Western Progressive and that's in the record, the declaration from Miss Spurlock indicates that they had not received notice the bankruptcy had been reinstated. Once the bankruptcy--

JUDGE JACQUELINE H. NGUYEN: Did Ocwen get notice?

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ROBERT NORMAN: There's an allegation that notice was provided to counsel for Ocwen, but still not the foreclosure trustee. But I think what was more important for the District Court's reasoning is that the sale was rescinded. The other fact that's a little bit unique, and one you have to look at from the industry's perspective, after the foreclosure sale--

JUDGE RICHARD PAEZ: That may eliminate the need for injunctive and declaratory relief, but that doesn't eliminate her claim for damages.

ROBERT NORMAN: But her claim for damages, Your Honor, was under wrongful foreclosure and the District Court looked at--

JUDGE RICHARD PAEZ: Well, what she's essentially claiming is a violation of the automatic stay which results in the wrongful foreclosure. That's the core of her claim.

ROBERT NORMAN: Your Honor, I would think that the difference here is that she did not allege a violation of the automatic stay as a borrower or a debtor could have done so and I think that changes--

JUDGE RICHARD PAEZ: Well, she essentially--you don't have to use all these

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fancy labels. If you look at the factual allegations she alleges there was a violation of the automatic stay which resulted in an improper foreclosure.

ROBERT NORMAN: Well, I believe the way the District Court had focused its analysis was that it was a wrongful foreclosure claim--

JUDGE JACQUELINE H. NGUYEN: Well, it's styled as a wrongful foreclosure claim, but all of the allegations focus on the violation of the automatic stay so I think it's a fair construction of the claim that the claim is based on an allegation that there was a violation of the automatic stay which could give rise to the claim for damages. I don't see how the damages claim really goes away given those allegations.

So, what evidence would contravene that claim for damages?

ROBERT NORMAN: Well, Ms. Galope had an opportunity at the trial court to oppose a Summary Judgment to bring forth evidence of damages and I don't believe that she did that. I believe that the focus that was there was that there was no equity in the property so there could not have been any damages and that because

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the sale--

JUDGE RICHARD PAEZ: Well, she's not just limited to equity in the property as the only basis for damages.

ROBERT NORMAN: I think under a pure 362 violation I think there could be other damages. There could be emotional distress, potentially other claims.

JUDGE RICHARD PAEZ: Correct.

ROBERT NORMAN: But I just don't think that was the way it was fashioned before the trial court. That's not how it was pled and this was her third amended complaint. I mean if she wanted to allege a specific claim for violation--

JUDGE RICHARD PAEZ: We're dealing with so many claims here I can't remember, was this claim knocked out on Summary Judgment or on a motion to dismiss?

ROBERT NORMAN: All of the claims, Your Honor, for my client Deutsche Bank National Trust Company, Ocwen and Western Progressive were done on Summary Judgment where she had to come forward with the evidence to create the triable issue and the District Court didn't find that she did so.

JUDGE DOROTHY WRIGHT NELSON: She was

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seeking attorney's fees also, was she not?
ROBERT NORMAN: She was generally seeking attorney's fees. There wasn't a showing-- I think again the Court focused here that it didn't view this in the scope of a 362 claim, and I appreciate the Court saying that that was sort of the genesis of a why a wrongful foreclosure, but she didn't couch it as a violation of 362. It was a wrongful foreclosure claim and her other claims against my clients wouldn't allow for attorney's fees. For example, the UCL claims. I mean that's a restitution-based remedy where she's not going to get attorney's fees.
JUDGE RICHARD PAEZ: Thank you.
ROBERT NORMAN: Your Honor, just to conclude, on the redressability by an order, Judge Nelson, you asked about that. I think that there would be a problem here back to the standing argument because what would there be to redress where none of the Appellees were involved in making the communications to Ms. Galope which was the exact opposite in the Hinojos, Mazza and Maya. There were those representations, a direct involvement. Here there is just not that connection to that nexus so I don't know what the

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redressability would be.
Your Honor, I have nothing further unless there are any other questions.
JUDGE RICHARD PAEZ: Nothing further. Okay. You have a few minutes for rebuttal.
LENORE ALBERT: Thank you, Your Honors. With regard to New Century Mortgage, they were considered a loan center. They were never alleged to be a lender. They're not a lender. They're listed in the mortgage-backed securitized trust. They're in the record. The panel can judicially recognize that fact.
JUDGE RICHARD PAEZ: They were a what?
LENORE ALBERT: They were a loan seller, not a lender. A loan seller is someone that--
JUDGE RICHARD PAEZ: Well, is it clear that they were selling on behalf of Barclays?
LENORE ALBERT: Yes, they are listed in the mortgage-backed securitized trust as one of their loan sellers, one of the people that would be peddling their loans. Traditionally banks used to have their own desks and their own sellers inside their banks.
JUDGE RICHARD PAEZ: So they make a distinction between Barclays, I forget what they

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call that, the local one as opposed to the Barclays that sat on the LIBOR panel.
LENORE ALBERT: There is a Deutsche Bank in America, Barclays in America and then there's a Deutsche Bank in Germany and a Deutsche Bank in England. They're just subsidiaries of each other. Although they're subsidiaries and affiliates they're still agents of each other, they just have different units.
When the LIBOR scandal broke we have at least 16 banks approximately that make up the LIBOR loan. That would be Deutsche Bank AG and Barclays PLC London and Germany. They have subsidiaries. So they have all their little financial institutions spread out throughout the world.
What they're saying is that they're trying to break the nexus between their subsidiaries and between Barclays proper. Barclays PLC in London is the same Barclays in this mortgage-backed securitized trust. Deutsche Bank National Trust Company, Deutsche Bank Trust Company of the Americas are the two American-created entities of actually the subsidiaries of Deutsche Bank in Germany. But that doesn't cut

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off the nexus.
That would be like saying, for example in the other case, somehow you have a subsidiary of Ford Motor Company or GM and Chrysler, you don't cut off from each other unless if there's some legal reason to do so and there wouldn't be in this case. But New Century is listed in the mortgage-backed securitized trust. They're a loan seller. They're just a seller for that loan pool. So you would have New Century Mortgage or a couple of other peddlers on the papers, but it doesn't mean that it wasn't representation made by the people in that mortgage-backed securitized trust. That's the whole point of these trusts.
As far as the faxing goes, there were damages because the material term was anything past a certain year was not disclosed in the bottom three inches and therefore she stopped paying after advice of counsel to stop paying because they weren't giving her all the material terms of her loan modification which resulted in the second default.
And then finally, on the automatic stay there was a declaration from page 2,067 to 70 where she does allege her damages. So the damages

were in the record for the Court with regard to the type of damages that resulted with regard to the automatic stay and everything else. But going back to standing, this is redressable. It is redressable. Barclays is getting away with this whole LIBOR rigging across the board. This is the last stand. These are the direct purchasers. If the direct purchasers don't have standing then who does? We see the kind of financial crisis and the greed that occurred here and how the rest of the economy and everyone else has to live with it.

If there is something technical it's just a technical pleading error. If you need to plead that New Century Mortgage is an agent of Barclays that can be pled and it can be proven through their own mortgage-backed securitized trust agreement. Thank you, Your Honors.

JUDGE RICHARD PAEZ: Thank you, counsel. We appreciate your arguments in this interesting case. The matter is submitted and that will end our session for today.

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Attested to by:

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