

No. \_\_\_\_\_  
6<sup>th</sup> Circuit 17-1930

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IN THE  
*Supreme Court of the United States*

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MAREK BISZCZANIK,  
PETITIONER,  
*v.*

NATIONSTAR MORTGAGE, LLC AND FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,

RESPONDENTS.

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*PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MICHIGAN OPINION AFFIRMING THE RESPONDENTS' ORDER AND JUDGMENT ADOPTING REPORT AND RECOMMENDATION AND DISMISSING AMENDED COMPLAINT?

**PARTIES TO THE PROCEEDING**

**MAREK BISZCZANIK,  
PETITIONER**

**NATIONSTAR MORTGAGE, LLC.  
AND FEDERAL NATIONAL MORTGAGE ASSOCIATION,  
RESPONDENT**

**TABLE OF CONTENTS**

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE PETITION	2
CONCLUSION	17

## TABLE OF AUTHORITIES

CASES	Page
<i>Body Rustproofing, Inc v Michigan Bell Tel Co</i> , 149 Mich App 385, 390, 385 NW2d 797 (1986) .....	6
<i>Brown v. Kalamazoo Circuit Judge</i> , 75 Mich 274 at 284, (1988) .....	16
<i>Brown v. Lynn</i> , 392 F Supp 559, 562, 563 (ND IL 1975) .....	11
<i>Bruno v Detroit Inst of Technology</i> , 51 Mich App 593, 215 NW2d 745 (1974) .....	6
<i>Corl v Huron Castings, Inc</i> , 450 Mich 620, 626, 544 NW2d 278 (1996) .....	6
<i>Dumas v. Midland Mortgage Co.</i> , 2012 Mich App LEXIS 1801 .....	11
<i>El-Seblani v. IndyMac Mortgage Services</i> , 510 F. App'x 425, 428 (6th Cir. 2013) .....	12
<i>Family Financial Services v. Carmen Spencer</i> , 41 Conn App 754(1996) .....	11
<i>First National Mortgage Association v. Lecrone</i> , 1985 US Dist LEXIS 23468 .....	11
<i>Freeman v. Wozniak</i> , 241 Mich. App. 633, 617 N.W.2d 46, 49 (2000) .....	12
<i>Giordano v Markovitz</i> , 209 Mich App 676, 681, 531 NW2d 815 (1995) .....	6
<i>Hornbuckle v. Mortg. Elec. Registration Sys., Inc.</i> , No. 10-14306, 2011 WL 5509214, at *5 (E.D. Mich. Nov. 10, 2011) .....	5

CASES	Page
<i>Jenness v. St. Clair Circuit Judge</i> , 42 Mich. 469, 471, 4 N.W. 220, 222 (1880) .....	13
<i>Jim-Bob, Inc v Mehling</i> , 178 Mich App 71, 98, 443 NW2d 451 (1989) .....	6
<i>Kim v. JPMorgan Chase Bank, N.A.</i> , 493 Mich. 98, 115, 825 N.W.2d 329, 338 (2012) .....	15
<i>Langley v. Chase Home Fin. LLC</i> , No. 10-604, 2011 WL 1130926, at *2 n. 2 (W.D. Mich. Mar. 28, 2011) .....	5
<i>Mik v. Federal Home Loan Mortgage L.loan Corporation</i> , 743 F3d 149, 165 (6th Cir 2014) .....	10
<i>Mitchell v Dahlberg</i> 215 Mich App 718, 547 NW2d 74 (1996) .....	17
<i>Overton v. Mortg. Elec. Registration Sys.</i> , No. 284950, 2009 WL 1507342, at *1 .....	5
<i>PHH Mortgage Corp. v. O'Neal</i> , No. 311233, 2013 WL 3025566 .....	13
<i>Roberts v Farmers Ins Exch</i> , 275 Mich App 58, 737 NW2d 332 (2007) .....	6
<i>Senters v Ottawa Savings Bank</i> , FSB, 443 Mich. 45, 56-57; 5-3 NW2D 639 (1999) .....	17

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Sixth Circuit and the opinion of the United States District Court for the Eastern District of Michigan were unpublished opinions.

**JURISDICTION**

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the appeal from the District Court's ruling finding that the Petitioners failed to state a claim for which relief can be granted, was handed down on March 28, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

**RELEVANT PROVISIONS INVOLVED**

MCLA 600.3208

**STATEMENT**

IN THE STATE CIRCUIT COURT, PETITIONERS FILED AN ACTION COMPLAINT FOR QUIET TITLE AND REQUEST TO SET ASIDE SHERIFF'S SALE AND TOLL THE RUNNING OF THE REDEMPTION PERIOD INJUNCTION AND OTHER RELIEF. THE ACTION WAS REMOVED TO FEDERAL COURT BASED UPON DIVERSITY OF CITIZENSHIP.

The Petitioner appealed to the Sixth Circuit Court of Appeals which affirmed the Federal District Court opinion.

### **REASONS FOR GRANTING THE PETITION**

The subject matter of this action is situated in Oakland County, State of Michigan more fully described as follows:

**LOT 90, MEADOWLAKE FARMS, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 63, PAGES 38 AND 39, OAKLAND COUNTY RECORDS.**

**Tax Parcel I.D. No. C-19-31-153-019**

**A/K/A 6876 Meadowlake Road, Bloomfield, MI 48301.**

Petitioner, Marek Biszczanik, claimed as interest in the above-described property as follows: Warranty Deed. (Notice of Removal; Complaint, Exhibit Warranty Deed, R. 1-2, Page ID# 49) Respondent, Nationstar Mortgage LLC, ("Nationstar") claimed an interest in the same property as follows: Mortgagee. Respondent, Federal National Mortgage Association, ("Fannie Mae") claimed an interest in the same property as follows: Sheriff's

Deed. The Petitioner purchased the subject property in 2000, and the Petitioner is currently residing in the subject property. On August 19, 2015, Petitioner received correspondence from Nationstar offering modification assistance. On September 8, 2015, Petitioner through his representative sent a Modification package to Gary Melendez, Nationstar Foreclosure Prevention Specialist and requested a call back on September 8, 2015, Gary Melendez asked for follow up on Thursday, September 10, 2015, and Respondent, Nationstar acknowledged receipt of modification package and Nationstar confirmed it utilized the Home Affordable Modification Program.

On September 14, 2015, the September 15, 2015, scheduled Sheriff's Sale was postponed indefinitely pending the application for modification. On September 25, 2015, Respondent, Nationstar issued a denial letter. However, the denial letter was not received by Petitioner until thirty (30) days later. In the denial Letter, Respondent, Nationstar failed to provide a Net Present Value worksheet, although requested by Petitioner for several weeks.

Respondent, Nationstar misread the original Modification package and used an incorrect income figure for Petitioner. On October 26, 2015, as a result of the denial which was based on admittedly faulty analysis by Respondent, Petitioner through his representative provided Respondent with an updated/revised Profit and Loss statement(P&L). During the Loan Modification process, on November 11, 2015, without any warning, Petitioner's representative was verbally notified that the Sheriff's Sale occurred on November 10, 2015.

In an attempt to resolve the matter out of court on January 11, 2016, Petitioner requested an Appeal/Reconsideration which was to be taken under advisement until March 15, 2016. On March 14, 2016, Respondent denied Petitioner's Appeal/Reconsideration by letter that was factually incorrect, in that;

- a. Petitioner timely submitted his documentation.
- b. Respondent misread Petitioner's NPV worksheet that clearly indicated that Petitioner was qualified and eligible for a HAMP loan modification.
- c. The original foreclosure sale was not delayed for "2 days," but for several weeks.

Petitioner is prejudiced by Respondents' actions in that Petitioner was not notified about the Sheriff's Sale and therefore Petitioner could not file a lawsuit to convert the foreclosure by advertisement to a judicial foreclosure. Moreover, after the Sheriff's Sale Petitioner attempted to have Respondent, Nationstar set aside the Sheriff's Sale by a reconsideration to no avail. Petitioner did attempt to redeem the property however because of the shorten redemption period Petitioner ran out of time and Petitioner therefore requested an extension of the redemption period.

## **ARGUMENT**

**A. THE TRIAL COURT ERRED IN ACCEPTING THE RECOMMENDATION OF THE MAGISTRATE JUDGE AND THEREFORE ERRONEOUSLY RULED ON THE FOLLOWING:**

## **I. PETITIONER IS ENTITLED TO AN ORDER QUIETING TITLE TO THE PROPERTY**

In the case at bar, the subject property was sold at a Sheriff's Sale on November 10, 2015. Therefore, Petitioner had until May 10, 2016, to redeem the subject property. Petitioner did not redeem the property, but rather filed a lawsuit against Respondents on May 9, 2016. While the potential expiration of the redemption period has serious consequences for Petitioner's legal rights, the Court retains the power to rescind the foreclosure sale -- even after the expiration of the redemption period -- if the sale itself was invalid based on a showing of fraud or irregularity. *Overton v. Mortg. Elec. Registration Sys.*, No. 284950, 2009 WL 1507342, at \*1. Otherwise, statutory foreclosures could never be set aside once the redemption period had expired. While 'statutory foreclosures should not be set aside without very good reason,' it is possible for courts to set statutory foreclosures aside." *Hornbuckle v. Mortg. Elec. Registration Sys., Inc.*, No. 10-14306, 2011 WL 5509214, at \*5 (E.D. Mich. Nov. 10, 2011) (quoting *United States v. Garno*, 974 F. Supp. 628, 633 (E.D. Mich. 1997)). *See also Langley v. Chase Home Fin. LLC*, No. 10-604, 2011 WL 1130926, at \*2 n. 2 (W.D. Mich. Mar. 28, 2011).

Therefore, despite the expiration of the redemption period, Petitioner may challenge the foreclosure of the subject property and request the opportunity to do so based upon the facts of this case, the supporting documentation, the applicable case law and legal argument set forth below.

## II. PETITIONER HAS STATED A COGNIZABLE CLAIM FOR BREACH OF DUTY UNDER THE HAMP GUIDELINES

### A. BREACH OF DUTY

A party injured by another party's breach of contract "has a right to damages based on his expectation interest." *Restatement (Second) of Contracts* §347. An injured party is entitled to receive "benefit-of-the-bargain damages." *Giordano v Markovitz*, 209 Mich App 676, 681, 531 NW2d 815 (1995). An award of expectation, or benefit-of-the-bargain, damages places an injured party in the same position it would be in if the breaching party had fully performed the contract. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98, 443 NW2d 451 (1989); *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390, 385 NW2d 797 (1986); *Bruno v Detroit Inst of Technology*, 51 Mich App 593, 215 NW2d 745 (1974). It is a fundamental precept of contract law that the remedy for breach of contract focuses on making the nonbreaching party whole. *Corl v Huron Castings, Inc*, 450 Mich 620, 626, 544 NW2d 278 (1996); *Roberts v Farmers Ins Exch*, 275 Mich App 58, 737 NW2d 332 (2007). Contract law is geared towards the goal of compensating an injured party, not punishing the breaching party. *Id.* at 626 n8. Thus, the focus of damages calculations will be on the nonbreaching party's expectations. See *Soloman v Western Hills Dev Co*, 110 Mich App 257, 312 NW2d 428 (1981); *Tel-Ex Plaza, Inc v Hardees Rests, Inc*, 76 Mich App 131, 255 NW2d 794 (1977).

Offer and acceptance analysis is a traditional approach in contract law used to determine whether an agreement exists between two parties. An offer is an expression of willingness to contract on certain terms made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed, the offeree. It is in the present contractual intent to be bound by a contract with definite and certain terms communicated to the offeree G.H. Treitel, The Law of Contract, 10th edition, p.8. Where the two parties have an agreement, or a valid offer is an issue which is determined by the court using the objective tests. Therefore, the intention referred to in that definition is objectively judged by the Courts. The English case of *Smith v. Hughes*, LR6 QB 597. The Court emphasized that the important thing is not a party's real intentions just how a reasonable person would view the situation. This is due mainly to the common sense as each party would not wish to breach his side of the contract if it would make him culpable to damages it would especially be contrary to the principle of certainty and clarity and commercial contracts and the topic of mistake and how to fix the contract.

In the instant case, on August 19, 2015, Petitioner received correspondence from Nationstar offering modification assistance. On September 8, 2015, Petitioner through his representative sent a Modification package to Gary Melendez, Nationstar Foreclosure Prevention Specialist and requested a call back. On September 8, 2015, Gary Melendez asked for follow up on Thursday, September 10, 2015, and Respondent, Nationstar acknowledged receipt of

modification package and Nationstar confirmed it utilized the Home Affordable Modification Program.

On September 14, 2015, the September 15, 2015, scheduled Sheriff's Sale was postponed indefinitely pending the application for modification. On September 25, 2015, Respondent, Nationstar issued a denial letter. However, the denial letter was not received by Petitioner until thirty (30) days later. In the denial Letter, Respondent, Nationstar failed to provide a Net Present Value worksheet, although requested by Petitioner for several weeks.

Respondent, Nationstar misread the original Modification package and used an incorrect income figure for Petitioner. On October 26, 2015, as a result of the denial which was based on admittedly faulty analysis by Respondent, Petitioner through his representative provided Respondent with an updated/revised Profit and Loss statement(P&L). During the Loan Modification process, on November 11, 2015, without any warning, Petitioner's representative was verbally notified that the Sheriff's Sale occurred on November 10, 2015.

In an attempt to resolve the matter out of court on January 11, 2016, Petitioner requested an Appeal/Reconsideration which was to be taken under advisement until March 15, 2016. On March 14, 2016, Respondent denied Petitioner's Appeal/Reconsideration by letter that was factually incorrect, in that;

- a. Petitioner timely submitted his documentation.

b. Respondent misread Petitioner's NPV worksheet that clearly indicated that Petitioner was qualified and eligible for a HAMP loan modification.

c. The original foreclosure sale was not delayed for "2 days", but for several weeks.

Petitioner is prejudiced by Respondents' actions in that Petitioner was not notified about the Sheriff's Sale and therefore Petitioner could not file a lawsuit to convert the foreclosure by advertisement to a judicial foreclosure. Moreover, after the Sheriff's Sale Petitioner attempted to have Respondent, Nationstar set aside the Sheriff's Sale by a reconsideration to no avail. Petitioner did attempt to redeem the property however because of the shortened redemption period Petitioner ran out of time and Petitioner is therefore requesting an extension of the redemption period.

In applying an objective standard, it is fair and reasonable to conclude Petitioner intended to keep his home for 15 plus years by Petitioner through his representative sending a Modification package to Gary Melendez, Nationstar Foreclosure Prevention Specialist.

The "mirror image rule" states that if you are to accept an offer you must accept an offer exactly without modifications if you make changes to the offer this is a counter offer. But in the instant case the Petitioner through his representative sent a Modification package to Gary Melendez, Nationstar Foreclosure Prevention Specialist. Secondly Respondent, Nationstar misread the original Modification package and used an incorrect income figure for Petitioner. On October 26, 2015, as a result of the denial which was based on admittedly faulty

analysis by Respondent, Petitioner through his representative provided Respondent with an updated/revised Profit and Loss statement(P&L).

### **B. Non-Compliance With Federal Regulations Can Be Raised As A Defense To Foreclosure**

In Count II of his Complaint, Petitioner alleged that Respondent(s)' failure to abide by the Federal HAMP regulations in evaluating Petitioner for a loan modification and proceeding to foreclosure in violation of those regulations is a defense to the foreclosure. [Petitioner's Amended Complaint, Paragraphs 25-28].

In *Mik v. Federal Home Loan Mortgage Loan Corporation*, 743 F3d 149, 165 (6th Cir 2014), the court held that noncompliance with federal regulations can be raised as a defense to eviction actions undertaken pursuant to a foreclosure. The *Mik* Court further held that violations of the PFTA can be used "offensively" to establish a state law cause of action, positively citing *Wigod v. Wells Fargo Bank, N A.*, 673 F.3d 547, 544 (7th Cir. 2012). Id. at 166, 167.

Consistent with the Sixth Circuit decision in *Mik*, *supra*, even if this Court was to hold that HAMP does not create a private cause of action, this Court should still hold that Petitioner was entitled to raise the failure of Respondents to properly evaluate his application for mortgage assistance as a defense to his foreclosure.

Petitioner is asserting that Respondents' failure to properly evaluate him for a loan modification under HAMP is a defense to the foreclosure. Courts similarly

have recognized in the context of the Truth in Lending Act, that a claim for rescission in violation of the TILA can be interposed as a defense to foreclosure even when it might be barred as an independent damage claim. *Family Financial Services v. Carmen Spencer*, 41 Conn App 754(1996)

In *Brown v. Lynn*, 392 F Supp 559, 562, 563 (ND IL 1975), the court held that even where violation of *HUD* servicing guidelines did not create an independent cause of action, this did not limit the power of state courts from exercising their equity powers by refusing to grant foreclosures where mortgagees have disregarded the forbearance provisions of the *HUD* handbook, and where mortgagors raise non-compliance as a defense to foreclosure.

In *First National Mortgage Association v. Lecrone*, 1985 US Dist LEXIS 23468, the U.S. District Court for the Southern Ohio Eastern Division cited *Brown*, supra, for the principle that "on the theory that the guidelines are sensible, equitable standards of conduct, consistent with, and issued in furtherance of the national housing policy, foreclosure courts can, and in appropriate circumstances should, direct the parties to pursue and exhaust alternatives to foreclosure enumerated." The court noted that this is not just the view of Ohio courts, but of state courts generally.

In addition, in the Michigan Court of Appeals case of *Dumas v. Midland Mortgage Co.*, 2012 Mich App LEXIS 1801, while the court held that HAMP did not create an independent cause of action for the

homeowner, in footnote 4 it cited to the case of *Wells Fargo Home Mtg, Inc v. Neal*, 398 Md. 705 (2007), for the principle that "Regulatory noncompliance can be used as a shield against unauthorized foreclosure actions."

In this case, Respondents were obligated to meet specific guidelines to evaluate Petitioner for a loan modification in accordance with HAMP, and to suspend foreclosure activity while such evaluation was being undertaken. Their refusal to do so constitutes a defense to the foreclosure in this case.

### **III. PETITIONER HAS IDENTIFIED ERROR IN THE FORECLOSURE PROCESS PERMITTING REVERSAL OF THE FORECLOSURE SALE**

The redemption period was to expire on May 10, 2016. This Honorable Court should extend the Petitioners' redemption period as a matter of equity. Michigan courts allow an "equitable extension" of the redemption period in a statutory foreclosure case because most lawsuits are not resolved before the end of the redemption period. *El-Seblani v. IndyMac Mortgage Services*, 510 F. App'x 425, 428 (6th Cir. 2013). "The standards for obtaining such an extension are stringent." *Id.* at 429. In order to extend the redemption period, the Petitioner must make "a clear showing of fraud, or irregularity." *Ibid.* (quoting *Schulthies v. Barron*, 16 Mich. App. 246, 167 N.W.2d 784, 785 (1969)); *see also Freeman v. Wozniak*, 241 Mich. App. 633, 617 N.W.2d 46, 49 (2000) ("[I]n the absence of fraud, accident or mistake, the possibility of injustice is not enough to tamper with the strict

statutory requirements.”); *Sweet Air Inv., Inc. v. Kenney*, 275 Mich. App. 492, 739 N.W.2d 656, 659

(2007) (“[I]t would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside.”) (quoting *United States v. Garno*, 974 F. Supp. 628, 633 (E.D. Mich.1997)). Additionally, the “misconduct” that results in the fraud or irregularity “must relate to the foreclosure procedure itself.” *El-Seblani*, 510 F. App’x at 429 (citing *Freeman*, 241 Mich. App. at 637, 617 N.W.2d at 49

“[N]o caselaw has defined what constitutes an irregularity” sufficient to set aside a foreclosure. *PHH Mortgage Corp. v. O’Neal*, No. 311233, 2013 WL 3025566, at \*5 (Mich. Ct. App. June 18, 2013). However, courts have held that “the simple existence of an irregularity is insufficient; it must rise to a particular level before a foreclosure sale will be set aside.” *Ibid.* (citing *Garno*, 974 F. Supp. at 633).

The dictionary defines “irregularity” as “not being or acting in accord with laws, rules, or established custom.” Webster’s Collegiate Dictionary Tenth Edition, p. 619 (1997). Michigan cases offer other definitions. The Michigan Supreme Court has defined irregularity as a “proceeding that is taken without any foundation for it or that is essentially defective,” *Jenness v. St. Clair Circuit Judge*, 42 Mich. 469, 471, 4 N.W. 220, 222 (1880); and elsewhere as the “want of adherence to some prescribed rule or mode of proceeding,” *Turrill v. Walker*, 4 Mich. 177, 183 (1856). A mortgagee establishes a clear showing of irregularity if a bank forecloses on a mortgagee that

is not in default under the terms of the agreement or a subsequent modification.

The Petitioners argue that an irregularity exists in the foreclosure here because Respondent, Nationstar misread the original Modification package and used an incorrect income figure for Petitioner. On October 26, 2015, as a result of the denial which was based on admittedly faulty analysis by Respondent, Petitioner through his representative provided Respondent with an updated/revised Profit and Loss statement(P&L). During the Loan Modification process, on November 11, 2015, without any warning, Petitioner's representative was verbally notified that the Sheriff's Sale occurred on November 10, 2015.

In an attempt to resolve the matter out of court on January 11, 2016, Petitioner requested an Appeal/Reconsideration which was to be taken under advisement until March 15, 2016. On March 14, 2016, Respondent denied Petitioner's Appeal/Reconsideration by letter that was factually incorrect, in that;

- a. Petitioner timely submitted his documentation.
- b. Respondent misread Petitioner's NPV worksheet that clearly indicated that Petitioner was qualified and eligible for a HAMP loan modification.
- c. The original foreclosure sale was not delayed for "2 days," but for several weeks.

The Respondent(s) contend otherwise. The heart of the dispute is whether the Respondent(s) engaged in "dual tracking" and upon information and belief is now expressly prohibited by dual-tracking has been determined to be one of the most egregious forms of

servicer misconduct, addressed and now precluded under the terms of the National Mortgage Settlement of 2012, amendments to Reg. X of the Real Estate Settlement and Procedures Act, (12 CFR part 1024)

The Petitioners' Complaint and supporting documents raise serious questions about whether there was "dual tracking" when the Petitioner's Loan Modification was still pending and the Sheriff's Sale occurred. And his assertions also should lead the Court to question whether the Respondent(s)' dealing with the Petitioner was entirely above board.

The Respondent(s) says that even if an irregularity existed in the foreclosure, the Petitioner cannot establish prejudice. It is true that "[t]o set aside the foreclosure sale, Petitioner must show that he was prejudiced by Respondent(s)' failure to comply with [Michigan's foreclosure by advertisement statute]." *Kim v. JPMorgan Chase Bank, N.A.*, 493 Mich. 98, 115, 825 N.W.2d 329, 338 (2012). However, a showing of prejudice can be made if the Petitioner can demonstrate "that (he) would have been in a better position to preserve their interest in the property absent Respondent(s)' noncompliance with the statute." *Ibid.*

The Petitioners can easily establish prejudice if Respondent, Nationstar misread the original Modification package and used an incorrect income figure for Petitioner and went forward with the Sheriff's Sale during the reconsideration period.

#### **IV. PETITIONER ESTABLISHES A CLAIM FOR INJUNCTIVE RELIEF AS A MATTER OF LAW**

Since the redemption period expired in violation of Breach Of Duty Under Hamp Guidelines the Petitioner had a great likelihood of success on the merit of the case. The irreparable harm is obvious, the subject matter is Real Property and the Petitioner would ultimately be evicted from his home with no adequate remedy at law. The harm to the Respondent is considerably less if the Temporary Restraining Order had been issued than the harm to the Petitioner if the Temporary Restraining Order had not issued for the reason that if Petitioner is evicted from his home the subject property will most probably be vandalized and the value of the property will be greatly diminished. While on the other hand, if the Temporary Restraining Order had been issued and continued the subject property is maintained. The granting of the Temporary Restraining Order will further the public interest.

The Petitioner prays that this Honorable Court Stay and Toll the Redemption Period based upon the fact that Respondent had offered Petitioner modification assistance, that the Petitioner sent the Respondent the required documentation, that the Respondent erroneously used incorrect information to deny Petitioner the HAMP Loan Modification and went forward with the Sheriff's Sale during the reconsideration period.

The right to have equitable controversies dealt with by equitable methods is as sacred as the right of trial by jury. *Brown v. Kalamazoo Circuit Judge*, 75 Mich 274 at 284, (1988). In the case at bar, upon information and belief, the Redemption Period expired, May 10, 2016. The court should grant a constructive

trust over the property in favor of Petitioner. Constructive trust is an equitable remedy that the court may impose where the facts justify it, *In re Estate of Swantek*, 172 Mich App 509, 517; 432 NW2d 307 (1988). Constructive trusts are creatures of equity.

Michigan has permitted its courts to exercise their equitable powers to preclude forfeiture or foreclosure under unusual circumstances or where the party against whom the action has been brought has raised a valid fraud claim. *Mitchell v Dahlberg* 215 Mich App 718, 547 NW2d 74 (1996), quoting *Senters v Ottawa Savings Bank*, FSB, 443 Mich. 45, 56-57; 5-3 NW2D 639 (1999)

## V. CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

**DARWYN P. FAIR & ASSOCIATES**

/s/Darwyn P. Fair  
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Dated: June 26, 2018

**APPENDIX**

United States Court of Appeal For the  
Sixth Circuit Order and Opinion                    19a-19j

United States District Court Eastern  
District of Michigan Order and Judgment Adopting Report and  
Recommendation and Dismissing Amended Complaint                    20a-20d

United States District Court Eastern  
District of Michigan Judgment of  
Dismissal    21a

Report and Recommendation Regarding Defendants' September 16, 2016  
Motion (DE 16) To Dismiss Plaintiff's Amended Complaint (DE8)  
22a-22gg

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
100 EAST FIFTH STREET, ROOM 540  
POTTER STEWART U.S. COURTHOUSE CINCINNATI, OHIO 45202-3988**

Deborah S. Hunt Clerk

Tel. (513) 564-7000

[www.ca6.uscourts.gov](http://www.ca6.uscourts.gov)

Filed: March 28, 2018

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Re: Case No. 17-1930, Marek Biszczanik v. Nationstar Mortgage LLC, et al  
Originating Case No: 2:16-cv-11957

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,  
s/Jennifer Earl  
Case Manager  
Direct Dial No. 513-564-7066

cc: Mr. David J. Weaver

Enclosure

Mandate to issue

**NOT RECOMMENDED FOR PUBLICATION**

No. 17-1930

UNITED STATES COURTS OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

Mar 28, 2018

DEBORAH S. HUNT, Clerk

MAREK BISZCZANIK,

Plaintiffs-Appellant,

NATIONSTAR MORTGAGE, LLC; FEDERAL NATIONAL MORTGAGE ASSOCIATION,

### Defendant-Appellees.

## ORDER

BEFORE: GUY, DAUGHTREY, and SUTTON, Circuit Judges

Marek Biszczanik, a pro se Michigan resident, appeals the judgment of the district court granting a motion to dismiss filed by defendants, Nationstar Mortgage, LLC (“Nationstar”), and Federal National Mortgage Association (“Fannie Mae”), in Biszczanik’s action to quiet title. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2000, Biszczanik borrowed \$300,000 to purchase property in Bloomfield, Michigan. The loan was secured by a mortgage that was assigned to Nationstar in 2015. In a notice dated August 19, 2015, Nationstar informed Biszczanik that payment on his loan was 199 days past due and that his failure to bring the loan current could result in foreclosure. The notice indicated that there were several solutions that might be available to bring the loan current, depending on Biszczanik’s situation, including loan modification. On August 20, 2015, notice was posted at the subject property—where Biszczanik resided—that a sheriff’s sale would occur on September 15, 2015. Notice of the sale was also published in the Oakland County Legal News.

Biszczanik thereafter submitted an application for loan modification. On September 10, 2015, Nationstar sent Biszczanik a letter indicating that review of his documentation could take 30 days; the letter cautioned Biszczanik that “there is no guarantee that you will qualify or receive any loss mitigation options.” Nationstar sent Biszczanik another letter on September 25, 2015, informing him that it had evaluated his request for loan modification under three different programs—one of which was the Home Affordable Modification Program (“HAMP”)—and that he did not qualify for any of the programs.

Biszczanik requested reconsideration of his application on October 26, 2015, asserting that Nationstar used several incorrect calculations in its initial evaluation. Nationstar informed Biszczanik that there was not sufficient time for review, however, because the foreclosure sale “was active and set for November 10, 2015.” On November 10, 2015, a sheriff’s sale was held at which Fannie Mae purchased the property for \$284,945.25. The six-month redemption period allowed by Michigan law began to run on November 11, 2015, and expired on May 11, 2016.

On May 10, 2016, Biszczanik filed a civil action against Nationstar in the Oakland County Circuit Court seeking to quiet title, set aside the sheriff’s sale, and toll the running of the redemption period. Biszczanik alleged claims of breach of duty under the HAMP guidelines, promissory and equitable estoppel, breach of the foreclosure-by-advertisement statute (Michigan Compiled Laws § 600.3204), specific performance, and injunctive relief. Biszczanik also applied for a temporary restraining order (“TRO”). The state court issued the TRO on May 25, 2016, stayed the redemption period, and scheduled a show-cause hearing for June 1, 2016.

On May 31, 2016, Nationstar removed the action to the United States District Court for the Eastern District of Michigan. On July 29, 2016, Biszczanik filed an amended complaint, naming Fannie Mae as an additional defendant. The amended complaint raised the following causes of action: (1) quiet title; (2) breach of

duty under the HAMP guidelines; (3) promissory estoppel; (4) equitable estoppel; (5) breach of section 600.3204 by foreclosing on a loan that was not in default; and (6) specific performance.

Meanwhile, on May 19, 2016 (more than two months *before* it was included in Biszczanik's amended complaint), Fannie Mae filed a termination-of-tenancy complaint in state court, alleging that Biszczanik remained in possession of the property after the redemption period expired. Biszczanik responded, asserting that the redemption period had not expired and attaching a copy of the TRO. The state district court ordered that Fannie Mae could apply for an eviction order. Biszczanik appealed to the Oakland County Circuit Court, which affirmed. The circuit court concluded that the TRO provided no defense to Fannie's Mae's complaint because it was issued after the redemption period had expired, it was applicable only to Nationstar, and, by its terms, it expired two weeks after it was issued and was not extended.

In the district court, Nationstar and Fannie Mae filed a joint motion to dismiss Biszczanik's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). They argued that, due to the expiration of the redemption period, Biszczanik lacked standing to challenge the foreclosure because he had not alleged fraud or irregularity sufficient to set aside the sale. They otherwise argued that Biszczanik failed to state a claim upon which relief could be granted.

The magistrate judge determined that Biszczanik lacked an interest in the subject property because he had failed to redeem it within the six-month period allowed by Michigan law, and although he alleged that the defendants used incorrect information to deny him a HAMP loan modification, he did not demonstrate any fraud or irregularity in the foreclosure process itself. The magistrate judge further concluded that: HAMP does not create a private right of action; Biszczanik's claims for promissory and equitable estoppel—based on alleged promises that he would receive a loan modification—were barred by Michigan's Statute of Frauds; Biszczanik did not establish a violation of section 600.3204; and there was no basis for injunctive relief. The magistrate judge therefore recommended granting the defendants' motion to dismiss.

Biszczanik filed objections to the report and recommendation. On review, the district court concluded that Biszczanik's objections were insufficient "general" objections, which did not require *de novo* review. Nevertheless, the district court reviewed the report and recommendation for clear error and found none. The district court therefore overruled Biszczanik's objections, adopted the magistrate judge's report and recommendation, granted the defendants' motion to dismiss, and entered judgment in favor of the defendants.

On appeal, Biszczanik argues that, despite the expiration of the redemption period, he is entitled to quiet title because he established a cognizable claim for breach of duty under the HAMP guidelines, which is sufficient to set aside the sheriff's sale. Specifically, he asserts that defendant Nationstar offered him a loan modification, which he accepted by submitting his loan modification application. He

argues that Nationstar was then obligated to meet specific guidelines by properly evaluating his loan modification and to stay the sheriff's sale during the application process. Nationstar's failure to do so, he contends, constituted a breach of contract, which caused him prejudice due to the "shorten [sic] redemption period."

We review *de novo* a district court's order dismissing a claim under Rule 12(b)(6). *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 457 (6th Cir. 2013). In doing so, we accept all well-pleaded factual allegations as true and determine whether they plausibly state a claim for relief. *Roberts v. Hamer*, 655 F.3d 578, 581 (6th Cir. 2011). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

At the outset, the defendants argue that Biszczanik forfeited review of all of his claims by failing to file proper objections to the magistrate judge's report and recommendation. Generally, a petitioner's failure to file objections to a magistrate judge's report, when properly informed about the consequences of such failure, constitutes a forfeiture on appeal of the issues not objected to. *See Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). Also, objections that are vague, general, or conclusory are tantamount to no objection at all. *See id.* However, the general rule is procedural, not jurisdictional; "the court of appeals retains subject matter jurisdiction over the appeal regardless of the untimely filing or nonfiling of objections." *Kent v. Johnson*, 821 F.2d 1220, 1222-23 (6th Cir. 1987). In this case, the district court concluded that Biszczanik's objections were insufficient to trigger *de novo* review, but it reviewed the magistrate judge's report for clear error. Because the district court ultimately reviewed Biszczanik's claims, we will also review them on appeal.

Michigan's foreclosure-by-advertisement laws, Mich. Comp. Laws §§ 600.3201– 600.3285, limit a mortgagor's right to redeem foreclosed property to a six-month period following a sheriff's sale. Mich. Comp. Laws § 600.3240. When a mortgagor fails to redeem the property within the allotted time, his "right, title, and interest" in and to the property are extinguished. Mich. Comp. Laws § 600.3236. If a mortgagor fails to redeem the property during the statutory redemption period, however, he can still set aside the foreclosure sale if he can demonstrate "a clear showing of fraud or irregularity, but only as to the foreclosure procedure itself." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 359-60 (6th Cir. 2013). He must also allege that he was prejudiced by such fraud or irregularity; that is, he must show that he would have been in a better position to preserve his interests absent the fraud or irregularity. *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012); *Conlin*, 714 F.3d at 360-62.

In his complaint, Biszczanik acknowledged that he failed to redeem the property within the period allowed by Michigan law but argued that the period should be extended for equitable reasons because the defendants used incorrect information to deny him a HAMP loan modification, continued the foreclosure

proceedings during the application process, and held the postponed sheriff's sale without notifying him.

Only the claim of lack of notice of the sheriff's sale is related to the foreclosure process itself. The other alleged failures concern alleged improprieties in the loan modification process. We have held that HAMP does not create a private right of action and noted that "Michigan courts have not recognized that the HAMP regulations impose a duty of care by servicers to borrowers." *See Rush v. Mac*, 792 F.3d 600, 605-06 (6th Cir. 2015) (citation omitted).

Biszczanik's allegations that the defendants violated the foreclosure-by-advertisement statute are premised on his contention that he had applied for modification assistance and was not in default. Nevertheless, the record is clear that Biszczanik *was* in default. The materials that Biszczanik submitted with his own complaint included a notice sent to him by Nationstar that he had missed seven months of payments. Moreover, even assuming that the defendants violated provisions of the foreclosure statute, Biszczanik's remedy would have been the right to a judicial foreclosure as opposed to a foreclosure by advertisement. *See* Mich. Comp. Laws § 600.3205c(8) (repealed 2013). Biszczanik did not allege facts showing that he would have been able to retain his interest in the property if the defendants had proceeded with a judicial foreclosure, however. Therefore, any alleged violation of section 600.3204 was insufficient to show prejudice to set aside the sheriff's sale. *See Kim*, 825 N.W.2d at 337.

Biszczanik also raised claims of promissory and equitable estoppel and specific performance—based on Nationstar's alleged promises that he would receive a proper assessment for a loan modification and that the sheriff's sale would be postponed. The district court concluded these claims were both unsupported and barred by Michigan's Statute of Frauds. This determination was not in error. Under Michigan's Statute of Frauds, a financial institution's promise regarding a loan modification is void unless it is (1) in writing and (2) signed with an authorized signature by the party to be charged with the promise. Mich. Comp. Laws § 566.132(2)(c). The correspondence that Biszczanik received from Nationstar satisfies neither of these requirements. The documents allegedly promising Biszczanik a loan modification stated merely that modification "might be available" and, thus, did not constitute an enforceable promise of anything. Nor does Biszczanik have any written documentation regarding the indefinite postponement of the sheriff's sale. Accordingly, Biszczanik's claims of estoppel do not warrant relief.

Finally, to the extent that Biszczanik alleged a claim of quiet title, he bore the burden of proof and must have made a *prima facie* case that he had superior title or right to the property. *See Beulah Hoagland Appleton Qualified Pers. Residence Tr. v. Emmet Cty. Rd. Comm'n*, 600 N.W.2d 698, 700 (Mich. Ct. App. 1999). Biszczanik failed to allege any such facts. At best, he asserted that Nationstar wrongly proceeded with the sheriff's sale, but that is insufficient to establish a *prima facie* case. “[A] plaintiff must succeed first and foremost in making his own *prima facie* case, without relying on the weakness of a defendant's title.” *Stern v. Marjieh*, No. 295487, 2011 WL 1140129, at \*2 (Mich. Ct. App. Mar. 29, 2011). The district court thus properly dismissed this claim.

We therefore **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MAREK BISZCZANIK,

Plaintiff

CASE NO. 16-11957

v.

NATIONSTAR MORTGAGE LLC, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant.

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**ORDER ADOPTING REPORT AND RECOMMENDATION AND  
DISMISSING AMENDED COMPLAINT**

Plaintiff objects to the Report and Recommendation (“R&R”) of Magistrate Judge Anthony Patti that this court dismiss the complaint in its entirety for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (Dkt. #34.) Plaintiff filed timely objections (Dkt. #35), and Defendants have filed a response (Dkt. #36). The court will overrule Plaintiff’s objections, adopt the report and recommendation, and dismiss the complaint for the reasons stated below and in the well-reasoned R&R.

The filing of timely objections to an R&R requires the court to “make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667 (1980); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). This de novo review requires the court to re-examine all of the relevant evidence previously reviewed by the magistrate judge in order to determine whether the recommendation should be accepted, rejected, or modified in whole or in part. 28 U.S.C. § 636(b)(1).

“The filing of objections provides the district court with the opportunity to consider the specific contentions of the parties and to correct any errors immediately,” *Walters*, 638 F.2d at 950, enabling the court “to focus attention on those issues—factual and legal—that are at the heart of the parties’ dispute,” *Thomas v. Arn*, 474 U.S. 140, 147 (1985). As a result, “[o]nly those specific objections to the magistrate’s report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not preserve all the objections a party may have.” *McClanahan v. Comm’r of Soc. Sec.*,

474 F.3d 830, 837 (6th Cir. 2006) (quoting *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987)).

In the instant case, Plaintiff's "objections" appear to consist nearly entirely of material copied and pasted verbatim from Plaintiff's response brief in opposition to Defendants' motion to dismiss. (*Compare* Dkt. #19, *with* Dkt. #35.) Confronted with a similar circumstance, the court in *Shade v. Commissioner of Social Security*, explained:

Each written objection presented pursuant to Federal Rule of Civil Procedure 72(b) must be "specific" and address the "proposed findings and recommendations." This court expects that each such objection will be numbered, identify a proposed finding or conclusion, and explain why and how the magistrate judge's analysis is incorrect. In order for this court to apply meaningful de novo review, it is insufficient for the objecting party to simply incorporate by reference earlier pleadings or reproduce an earlier unsuccessful motion for dismissal or judgment (or response to the other party's dispositive motion). Insufficient objections to a magistrate judge's analysis will ordinarily be treated by the court as an unavailing general objection.

No. 14-12629, 2015 WL 5693665, at \*1 (E.D. Mich. Sept. 29, 2015) (citations omitted). This court also reached the same conclusion in *Wallace v. Commissioner of Social Security*, where the objections were "simply Parts 3 and 4 of the Argument section from her Motion for Summary Judgment . . . copied, pasted, and rebranded as objections to the R&R." No. 15-11839, 2016 WL 4409062, at \*2 (E.D. Mich. Aug. 19, 2016) ("Because

Plaintiff raises no specific objections to [the] R&R but merely repeats her brief word for word, Plaintiff has waived any matter therein that might otherwise be cast as an objection.").

Here as well the court will interpret Plaintiff's filing as constituting fundamentally insufficient "general" objections. "However, there is some authority that a district court is required to review the R&R for clear error." *Hill v. Comm'r of Soc. Sec.*, No.

13-CV-15257, 2014 WL 6686789, at \*1 (E.D. Mich. Nov. 26, 2014) (citing Fed. R. Civ. P. 72). Having reviewed the meticulously researched and cogently reasoned R&R, the court finds no clear error. The court agrees with the result reached as well as the stated reasoning. Accordingly,

IT IS ORDERED that Plaintiff's objections (Dkt. #35) are OVERRULED. The magistrate judge's Report and Recommendation (Dkt. #34) is ADOPTED in its entirety and incorporated by reference.

IT IS FURTHER ORDERED that Defendants' motion to dismiss (Dkt. #16) is GRANTED.

s/Robert H. Cleland  
ROBERT H. CLELAND  
UNITED STATES DISTRICT JUDGE

Dated: July 10, 2017

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, July 10, 2017, by electronic and/or ordinary mail.

s/Lisa Wagner  
Case Manager and Deputy Clerk  
(810) 292-6522

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MAREK BISZCZANIK,

Plaintiff

Case No. 16-11957

v.

NATIONSTART MORTGAGE LLC, and FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,

Defendants

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**JUDGMENT**

In accordance with the court's "Order Adopting Report and Recommendation and Dismissing Amended Complaint," dated July 10, 2017,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants Nationstar Mortgage LLC and Federal National Mortgage Association, and against Plaintiff, Marek Biszczanik. Dated at Port Huron, Michigan, this 10th day of July 2017.

s/Robert H. Cleland  
ROBERT H. CLELAND  
UNITED STATES DISTRICT JUDGE

Dated: July 10, 2017

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, July 10, 2017, by electronic and/or ordinary mail.

s/Lisa Wagner  
Case Manager and Deputy Clerk  
(810) 292-6522

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MAREK BISZCZANIK,

Case No. 2:16-cv-11957

Plaintiff District Judge Robert H. Cleveland  
v. Magistrate Judge Anthony P. Patti

NATIONSTART MORTGAGE LLC,  
and FEDERAL NATIONAL MORTGAGE ASSOCIATION, d/b/a Fannie Mae

## Defendants

REPORT AND RECOMMENDATION REGARDING DEFENDANTS'  
SEPTEMBER 16, 2016 MOTION (DE 16) TO DISMISS PLAINTIFF'S AMENDED  
COMPLAINT (DE 8)

**I. RECOMMENDATION:** The Court should grant Defendants' motion (DE 16) to dismiss Plaintiff's amended complaint (DE 8).

## II. REPORT:

## A. Factual Background<sup>1</sup>

On December 6, 2000, the property commonly known as 6876 Meadowlake Road, Bloomfield, MI 48301 was warranted and conveyed to Marek Biszczanik for consideration of \$280,000. (DE 8-1 at 2.) On April 29, 2003, Biszczanik borrowed \$300,000 from lender Stratford Funding, Inc., and monthly mortgage payments were to be made to Waterfield Mortgage Company, Inc. (DE 16-2.) At the same

<sup>1</sup> To the extent this report refers to certain attachments to Defendants' motion to dismiss, such as the note, the mortgage, the assignments of mortgage, and the sheriff's deed (DEs 16-2 through DE 16-5), I agree with Defendants that consideration of these attachments does not require the Court to convert this Rule 12 motion to dismiss into a Rule 56 motion for summary judgment. (DE 16 at 12-13 n.1.) Although the note is not expressly mentioned, the concurrently executed April 29, 2003 mortgage is a subject of Plaintiff's amended complaint. (See, e.g., DE 8 ¶¶ 28, 57, 59.) Likewise, although the assignments of the mortgage are not expressly mentioned, they do establish the chain of title which leads to the November 10, 2015 sheriff's sale an event which is, indeed, a subject of the amended complaint. (See, e.g., DE 8 ¶¶ 16, 28.) As such these documents are either: (1) referred to in the complaint and central to Plaintiff's claims, *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999); *QQC, Inc. v. Hewlett-Packard Co.*, 258 F. Supp.2d 718, 721 (E.D. Mich. 2003) (internal citations omitted), or (2) matters regarding which I may take judicial notice, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."). This includes documents such as notes, mortgages and assignments. *Thompson v. Bank of N.Y. Mellon Trust Co.*, No. 4:13CV000120 SWW, 2013 WL 12180765, at \*2 (E.D. Ark. Sept. 3, 2013).

time, Biszczanik executed a mortgage in favor of Stratford Funding. (DE 16-3.) On the same day, Stratford Funding assigned the mortgage to Union Federal Bank of Indianapolis. (DE 16-4 at 2.) On April 20, 2006, to be effective May 1, 2006, Union Federal assigned the mortgage to Mortgage Electronic Registration Systems, Inc. (MERS). (DE 16-4 at 3.)

On July 20, 2015, MERS assigned the mortgage to Nationstar. (DE 16-4 at 4.) By a notice dated August 19, 2015, Nationstar Mortgage (Nationstar) informed Biszczanik that his loan was currently 199 days past due, that failure to bring the loan current “may result in...foreclosure and the loss of your home[,]” and mentioned some “solutions that *might* be available[.]” including several options which “may” be acceptable to the note holder, suggesting the possibility of “exploring solutions that *could* help you keep your home.” (DE 8-1 at 8) (emphases added). On August 20, 2015, notice that sale would occur on September 15, 2015 was posted at the subject property. (DE 16-5 at 6.) Notice of the foreclosure sale scheduled for September 15, 2015 was also published in the Oakland County Legal News on dates from August 12, 2015 through September 2, 2015. (DE 16-5 at 7.)

Meanwhile, on August 31, 2015, Kendra Pack of Bloomfield Financial Services ordered Real Estate Services and Technology (REST) reports, including an affordable mortgage payment analysis, a loan disposition analysis, and an EPV / NPV (Net Present Value) break-even analysis. Included in these reports were HAMP Tier 1 and HAMP Tier 2 analyses. (See DE 8-2 at 2-5, 42.) On September 8, 2015, Ms. Pack communicated with Gary Melendez of Nationstar. (DE 8-3 at 2, 4.) By a letter dated September 10, 2015, Nationstar acknowledged receipt of Biszczanik’s application for loss mitigation options and supporting documentation. (DE 8-3 at 6-7.) On or about September 25, 2015, Nationstar informed Biszczanik that it was “unable to grant [hi]s request at this time[.]” and provided a number of reasons for its decision. (DE 8-4 at 2-3.)

Biszczanik’s request for reconsideration is dated October 26, 2015 and asserts that use of the “proper gross monthly income” would lead to a debt to income (DTI) ratio “well within [the] guidelines[,]” and “an acceptable Hamp Tier 1 modification . . . .” (DE 8-4 at 6-7.) That same day, Ms. Pack emailed Biszczanik’s “signed appeal” to Mr. Melendez. (DE 8-4 at 5.) Approximately two weeks later, by way of a November 10, 2015 sheriff’s deed on mortgage sale, the property was granted to Federal National Mortgage Association (Fannie Mae) for consideration of \$284,945.25. (DE 8-1 at 4-6; *see also* DE 16-5 at 2-5, 8.) This resulted in a date of redemption of May 11, 2016, under Michigan’s six month redemption rule. Mich. Comp. Laws §§ 600.3240(1), (8). (DE 8-4 at 11-12.)

By a letter dated February 22, 2016, Nationstar confirmed receipt of Biszczanik's January 11, 2016 correspondence<sup>2</sup> and informed him "the new expected date of resolution is March 15, 2016." (DE 8-4 at 9.) In a March 14, 2016 letter to Ms. Pack, Nationstar responded about: (1) the modification timeline, (2) the delay in receiving the Modification Denial and Net Present Valuation (NPV) Worksheet, and (3) the foreclosure chronology. (DE 8-4 at 11-12.) Biszczanik wrote to Nationstar on or about May 5, 2016, claiming that he was not properly notified of the new, November 10, 2015, sheriff's sale date. (DE 1-2 at 98-99.)<sup>3</sup>

## **B. Procedural History**

### **1. The instant lawsuit**

On May 9, 2016, via counsel, Plaintiff filed a state court complaint against Nationstar to quiet title seeking to set aside sheriff's sale and toll the running of the redemption period. (DE 1-2 at 26-39, Case No. 2016-152908-CH (Oakland County Circuit Court).) On May 25, 2016, Judge Denise Langford Morris entered a temporary restraining order (TRO) and order to show cause. Among other things, this order stayed and tolled the redemption period and set a show cause hearing for June 1, 2016. (DE 1-2 at 2-3.)

Defendant Nationstar removed the case to this Court on May 31, 2016. (DE 1, DE 1-3.) On July 29, 2016, Plaintiff filed an amended complaint against Nationstar and Federal National Mortgage Association, also known as Fannie Mae. The causes of action include quiet title, breach of duty under Home Affordable Mortgage Program (HAMP) guidelines, promissory estoppel, equitable estoppel, breach of Mich. Comp. Laws § 600.3204, specific performance, and injunction and other relief. (DE 8.)

### **2. Fannie Mae's May 19, 2016 state court complaint for termination of tenancy**

On May 19, 2016, over two months before it was named as a defendant in the case at bar, Fannie Mae filed a termination of tenancy complaint in Michigan's 40<sup>th</sup> District Court against Biszczanik and "all other occupants." Specifically, Fannie Mae alleged that "person(s) remain in possession of property after the period of redemption has expired [Mich. Comp. Laws § 600.5714(1)(g)][.]"

These defendants – presumably Biszczanik and "other occupants" – answered the complaint on May 31, 2016 and, further, presented the sole defense that "the redemption period has not expired." (DE 32-3 at 2-6.) Attached to their answer was a copy of the May 9, 2016 state court complaint filed in Oakland County Circuit

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<sup>2</sup> The Court was unable to locate this correspondence in the record before it

<sup>3</sup> This appears to have been an exhibit to Plaintiff's state court complaint.

Court (DE 32-3 at 11-24) and the May 25, 2016 Oakland County Circuit Court TRO and order to show cause (DE 32-3 at 8-9). *See Case No.*

1631531LT3 (48<sup>th</sup> District Court). On August 18, 2016, Judge D'Agostini found that Fannie Mae "has a right to recover possession of the property." She ordered that Fannie Mae can apply for an order evicting the defendant if the defendant does not move out on or before August 29, 2016. She also denied defendant's motion to dismiss. (DE 32-4 at 2.)

A claim of appeal was filed on August 29, 2016. *See Case No. 16-154770- AV* (Oakland County Circuit Court). On March 10, 2017, Judge Michael Warren entered an opinion and order affirming the trial court's judgment of possession. Generally, Judge Warren stated: "Because Biszczanik has defaulted on a mortgage and has failed to show that Plaintiff [Fannie Mae] failed to follow appropriate foreclosure procedures, the trial court did not err and its ruling is affirmed." (DE 32-5 at 2-3.) More specifically, he concluded that: (A) "The appeal is grounded on issues that have not been properly preserved for appellate review[.]" (B) "The appeal is not salvaged by documents that were not part of the record below[.]" and (C) "The lower court record supports the judgment entered by the trial court in [Fannie Mae's] favor[.]" (DE 32-5 at 7-12.)

On April 27, 2017, Plaintiff filed a delayed application for leave to appeal to the Michigan Court of Appeals. (DE 33-1.) The docket in that case indicates that a letter was sent to all parties on May 1, 2017. *See Case No. 338134 (Mich. App.).*

### **C. Instant Motion**

Currently before the Court is Defendant Nationstar and Defendant Fannie Mae's combined motion to dismiss Plaintiff's amended complaint, in which they argue that: (1) Plaintiff is not entitled to an order quieting title to the property, (2) Plaintiff has not stated a cognizable claim for breach of duty under the HAMP guidelines, which provide no basis for a private cause of action, (3) Plaintiff's various claims based on an alleged agreement for a loan modification should be dismissed, (4) Plaintiff has not identified any error in the foreclosure process permitting reversal of the foreclosure sale, and (5) Plaintiff's claim for injunctive relief fails as a matter of law. (DE 16 at 16-28.)

Plaintiff filed a response, and Defendants have filed a reply. (DE 19, DE 21.)<sup>4</sup> Judge Cleland has referred this motion to me for entry of a report and

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<sup>4</sup> In addition to being a response, Plaintiff's October 17, 2016 filing purports to be a "request for a settlement conference by the *magistrate*." (DE 19 at 1, 2 (emphasis added).) *Preliminarily*, I note that Plaintiff's various references to "magistrate," both within the body of the response and the various captions, are incorrect. (DE 19 at 1, 2, 9, 25, 26.) Defendants make the same mistake in the captions of their motion and reply. (DE 16 at 1, 3; DE 21 at 1.) The parties are put on notice that, in federal court, there are only "magistrate judges," and this has been so for the past quarter century. 28 U.S.C. §§ 631-639; *see also* Judicial Improvements Act of 1990, 104 Stat. 5089, Pub. L. No. 101-650, §321 (1990); *see note*: "Change of Name," 28 U.S.C. § 631 ("Section 321 of Pub.L. 101-650

recommendation. (DE 20, DE 27.) In addition to the above-described motion papers, the parties have also been permitted to and filed supplemental briefs. (DE 32, DE 33.)

#### **D. Fed. R. Civ. P. 12(b)(6)**

Defendants bring their motion pursuant to Federal Rule of Civil Procedure P. 12(b)(6). When deciding a motion to dismiss under Rule 12(b)(6), the Court must “construe the complaint in the light most favorable to plaintiff and accept all allegations as true.” *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (concluding that a plausible claim need not contain “detailed factual allegations,” but it must contain more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action”).

Facial plausibility is established “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant’s conduct.” *16630 Southfield Ltd., P’Ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503 (6th Cir. 2013).

#### **E. The Court Should Grant Defendants’ Motion on the Basis That Plaintiff Has Failed to State a Claim Upon Which Relief May Be Granted.**

##### **1. Quiet title**

“To state a claim for quiet title under Michigan law, a plaintiff must show ‘(a) the interest the plaintiff claims in the premises; (b) the interest the defendant claims in the premises; and (c) the facts establishing the superiority of the plaintiff’s claim.’” *Mandingo v. PNC Bank Nat’l Ass’n*, No. 2:15-CV-12079, 2017 WL 914026, at \*3 (E.D. Mich. Mar. 8, 2017) (citing MCR § 3.411(B)(2) (providing elements for action to quiet title under Mich. Comp. Laws § 600.2932)).

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provided that: “After the enactment of this Act [Dec. 1, 1990], each United States magistrate appointed ... shall be known as a United States magistrate judge ...”). *Substantively*, any request for a settlement conference should be sought by way of a separate filing presented to the district judge, as the only matters referred to me are the instant motion to dismiss (DE 16) and the related motion for leave to file a supplemental brief (DE 28). Moreover, I note that, on February 24, 2017, Judge Cleland denied Plaintiff’s November 3, 2016 motion for a settlement conference, stating that “[t]he court does not ordinarily devote court or other resources to mandating settlement discussion unless both parties are in agreement on the utility of such efforts.” (DE 22, 26.) That Defendants’ October 31, 2016 reply is silent on the issue of settlement (DE 21) convinces the Undersigned that circumstances have not changed

Defendants are entitled to dismissal of Plaintiff's "quiet title" cause of action. First, Plaintiff's claimed interest in the premises is unclear. As previously noted, "Michigan law explicitly provides that mortgagors of residential properties have six months from the date of the sheriff's sale to redeem the property." *Jarbo Bank of New York Mellon*, 587 F.App'x 287, 289 (6<sup>th</sup> Cir. 2014) (citing Mich. Comp. Laws §§ 600.3240(1), (8)). "When the six-month period expires, the mortgagor forfeits any right, title, or interest he or she had in the property." *Jarbo*, 587 F.App'x at 289 (citing Mich. Comp. Laws § 600.3236; *Piotrowski v. State Land Office Bd.*, 302 Mich. 179, 4 N.W.2d 514, 517 (1942)). Plaintiff's own complaint admits that he "did attempt to redeem the property however because of the shorten[ed] redemption period Plaintiff ran out of time . . ." (DE 8 ¶ 19.).<sup>5</sup>

To be sure, Plaintiff does, in his amended complaint, "request an extension of the redemption period." (DE 8 ¶ 19.) He also responds that the redemption period should be extended "as a matter of equity." (DE 19 at 21.) However, Plaintiff must "clearly show[] fraud or irregularities *in the foreclosure process* that actually prejudiced the mortgagor in preserving his or her interest in the property." *Jarbo*, 587 F.App'x at 289 (emphasis added) (citing *Khoshiko v. Deutsche Bank Trust Co. Ams.*, 574 F.Appx. 539, 540–41 (6th Cir.2014)). Within his quiet title claim, Plaintiff alleges that Defendant "erroneously used incorrect information to *deny Plaintiff the HAMP Loan Modification[.]*" and "refused and failed to *offer Plaintiff a HAMP Loan Modification*," and "we[nt] forward with the Sheriff's Sale *without notice* to the Plaintiff or his representatives and failed to rescind the unlawful Sheriff's Sale." (DE 8 ¶¶ 22, 23 (emphases added).)

Of these, only the allegation of the lack of notice of the November 10, 2015 sheriff's sale and the failure to rescind it is related to the foreclosure process; the other allegations related to HAMP loan modification. *See, e.g., Williams v. Pledged Prop. II, LLC*, 508 F. App'x 465, 468 (6th Cir. 2012) ("Williams's claim of fraud relies on oral assurances during a negotiation to change the terms of the contract. Despite the fact that the negotiations may have taken place during the foreclosure process, these negotiations remained separate from the foreclosure process itself."). However, even if the claimed "fraud" or "irregularity" in the foreclosure process was the failure to notify Plaintiff of the forthcoming November 10, 2015 sheriff's sale (or the failure to rescind it once it happened), the Court must consider whether the alleged prejudice of not being able to "file a lawsuit to convert the foreclosure by

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<sup>5</sup> Although the Court notes Plaintiff's allegation that he received the September 25, 2015 denial letter "thirty (30) days later[.]" which would have been on or about October 25, 2015, it is not clear to the Court what Plaintiff means by a "shorten[ed] redemption period . . ." (See DE 8 ¶¶ 13, 19.) It seems undisputed that the 6- month redemption period here began with the November 10, 2015 sheriff's sale and expired on May 10 or 11, 2016. (DE 8 ¶¶ 16, 28, 74; see DE 8-1 at 6.) The Court can only assume that Plaintiff is referring to the period between the March 14, 2016 letter denying his appeal/reconsideration and the May 11, 2016 expiration of the redemption period. (DE 8 ¶ 18; DE 8-4 at 11-12.)

advertisement into a judicial foreclosure[,]” (DE 8 ¶ 19; *see also* DE 19 at 11, 14, 18 and 20), “actually prejudiced” Plaintiff in preserving his interest in the property. *Jarbo*, 587 F.App’x at 289. Assuming such an opportunity was an appropriate step under the circumstances of this case, Plaintiff has not explained how a judicial foreclosure would have resulted in the preservation of the interest in his property. Moreover, Plaintiff asserts in his motion response that his representative – perhaps Ms. Pack - received notice of the November 10<sup>th</sup> sheriff’s sale the very next day, apparently still leaving him with six months in which to redeem. (DE 8 ¶ 16, DE 19 at 14). If this is accurate, it is unclear how he was appreciably prejudiced.

Second, “quiet title is a remedy, not a freestanding claim.” *Jarbo*, 587 F. App’x at 290 (citing *Goryoka v. Quicken Loan, Inc.*, 519 F.Appx. 926, 928 (6th Cir.2013)). “Like a request for an injunction or disgorgement, a request for quiet title is only cognizable when paired with some recognized cause of action.” *Jarbo*, 587 F. App’x at 290. Therefore, because Plaintiff asserts his quiet title claim as a “as a discrete count,” coupled with his failure to allege the superiority of his title claim, and his failure to pair it with a legally cognizable claim (as discussed *infra*.), it should be dismissed. *Id.*

## **2. Breach of duty under HAMP guidelines**

Plaintiff alleges that the August 19, 2015 letter from Defendant Nationstar “offer[ed] modification assistance.” (DE 8 ¶ 9.) In this cause of action, Plaintiff alleges that “once the Defendant *offered* Plaintiff modification assistance Defendant had to properly consider Plaintiff for a HAMP Loan Modification.” (DE 8 ¶ 26 (emphasis added).) Furthermore, Plaintiff alleges:

Defendant[s] breached their *duty* by failing and refusing to properly consider Plaintiff for a HAMP Loan Modification, in that Defendant erroneously used incorrect information to deny Plaintiff the HAMP Loan Modification, refused and *failed to offer* Plaintiff a HAMP Loan Modification, then going forward with the Sheriff’s Sale without notice to the Plaintiff or his representatives and finally failing to rescind the unlawful Sheriff’s Sale.

(DE 8 ¶ 27 (emphases added).)

This alleged “erroneous use” appears to be “incorrect information for the NPV calculation.” (DE 8 ¶ 36.) As Plaintiff contends: “HAMP Supplemental Directive 09-01, p. 4., April 6, 2009, provides that if the NPV calculation result for the modification scenario is greater than the NPV result for no modification, the servicer *must* offer the modification.” (DE 8 ¶ 34.) By way of background, Plaintiff generally alleges that Defendant Nationstar’s September 25, 2015 denial letter “failed to provide a Net Present Value worksheet, although requested by Plaintiff for several weeks.” (DE 8 ¶ 13, DE 8-4 at 2-3.) Contending that Defendant Nationstar misread the original modification request and used an incorrect income figure, Plaintiff asserts that faulty analysis resulted in the October 26, 2015 denial. (DE 8 ¶¶ 14-15.) On October 26, 2015, he provided an updated/revised profit and loss statement and requested an appeal/reconsideration, but it was denied on March

14, 2016. (DE 8 ¶¶ 15, 17-18.) According to Plaintiff, the denial was “factually incorrect,” including that “Defendant misread Plaintiff’s NPV worksheet that clearly indicated that Plaintiff was qualified and eligible for a HAMP loan modification.” (DE 8 ¶ 18b.)

That all may be so. However, as this Court has previously held, “assuming that the Lending Statutes impose a duty on Defendant to modify Plaintiff’s mortgage (which they do not),” HAMP “do[es] not create a private right of action under which Plaintiff may seek relief.” *Hart v. Countrywide Home Loans, Inc.*, 735 F. Supp. 2d 741, 748 (E.D. Mich. 2010). Plaintiff responds that “non- compliance” with HAMP “can be raised as a defense to foreclosure[.]” (DE 19 at 15-17 (emphasis added).) Relying upon *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 160, 167 (6th Cir. 2014), which held that the Protecting Tenants at Foreclosure Act of 2009 (PTFA) “does not provide an express or implied private right of action[,]” and that Plaintiffs *can* “use violations of the PTFA to establish their state law claims[,]” Plaintiff contends that he “was entitled to raise the failure of Defendants to properly evaluate his application for mortgage assistance as a defense to his foreclosure.” (DE 19 at 16.) However, to the extent Plaintiff attempts to bring a state-law negligence claim, based upon an alleged violation of *HAMP*, he has failed to state a claim upon which relief may be granted. “While the allegations that Fannie Mae failed to comply with HAMP regulations may provide evidence of negligent conduct under Michigan law, [Plaintiff] must still show that the HAMP regulations impose on servicers a duty of care owed to borrowers.” *Campbell v. Nationstar Mortg.*, 611 F. App’x 288, 299 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 272 (2015). “Michigan courts have not recognized that such a duty exists under HAMP. Its decision accords with the decisions of other Michigan federal district courts that have declined to find a duty exists under Michigan law.” *Campbell*, 611 F. App’x at 299. *See also Rush v. Mac*, 792 F.3d 600, 605 (6th Cir. 2015), *reh’g denied* (Aug. 12, 2015); *Ray v. U.S. Bank Nat. Ass’n*, 627 F. App’x 452, 457 (6th Cir. 2015).

Also, Plaintiff contends that Defendants “are mandated to abide by CFPB [Consumer Financial Protection Bureau] regulations and standards in evaluating homeowners for loan modifications prior to placing them in foreclosure, which is in keeping with the statements made by Defendant’s representatives.” (DE 19 at 19.) However, while the Court notes a reference to the CFPB within the August 19, 2015 letter (DE 8-1 at 8), the Court does not see a reference to a CFPB regulation within the complaint’s allegations. Therefore, to the extent it cites the CFPB, Plaintiff’s response is unavailing.

### **3. Promissory estoppel, equitable estoppel and specific performance**

#### **a. The Statute of Frauds**

Plaintiff’s claims for promissory estoppel and equitable estoppel are based on alleged promises and representations that: (a) Plaintiff would be offered modification assistance; (b) “the September 15, 2015, Sheriff’s Sale would be

postponed indefinitely pending the application for modification[;]" and/or (c) that Plaintiff's eligibility for HAMP or other modification assistance would be properly assessed. (DE 8 ¶¶ 37, 38, 47; *see also* DE 8 ¶ 50.) Likewise, Plaintiff's specific performance cause of action treats Defendant Nationstar's August 19, 2015 letter as an "offer" of modification assistance, which Plaintiff claims to have "accepted" and met its conditions; still, Plaintiff alleges that "Defendant failed or refused to continue with the Loan Modification and incorrectly and unlawfully denied Plaintiff a HAMP loan Modification." (DE 8 ¶ 62-63.)

Defendants argue that these three causes of action are barred by Michigan's Statute of Frauds. Mich. Comp. Laws § 566.132 ("Agreements, contracts, or promises for which signed writing required; enforcement"). (DE 16 at 19-21.) In particular, this statute provides:

An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:

- (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
- (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
- (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

Mich. Comp. Laws § 566.132(2). The Court should agree.

### **i. Promissory estoppel and specific performance**

First, Plaintiff treats the August 19, 2015 letter from Defendant Nationstar as "offering modification assistance." (DE 8 at ¶¶ 9; *see also* DE 19 at 17.) However, Defendants argue that the August 19, 2015 letter "does not constitute an offer for a loan modification," but, rather, it "informed Plaintiff that he was in default under his payment obligations and that a loan modification may be an option." (DE 16 at 22; *see also* DE 21 at 5.) On the face of the document, this is entirely accurate. Specifically, the letter states:

Here are some of the solutions that might be available, depending on your situation:

- Modifying the terms of your current loan.
- Receiving a payment forbearance that temporarily gives you more time to pay your monthly payment.
- If you simply can't pay your mortgage, an alternative to foreclosure may be selling your home and using the proceeds to pay off your current loan. A short payoff may be acceptable, or a deed in lieu of foreclosure may be an option.

(DE 8-1 at 8.) Thus, the letter does not constitute a promise, let alone an agreement to modify his loan. Consistent with that interpretation, as Defendants point out, is Plaintiff's own allegation that he was "unlawfully denied . . . a HAMP loan Modification." (DE 8 ¶ 63; DE 16 at 23.)

Furthermore, even if the letter contained an actual promise, it "does not satisfy the Statute of Frauds, as it is not a written commitment for a financial accommodation nor does it include an authorized signature by Nationstar." (DE 21 at 5.) The Court can hardly be expected to require specific performance of an unenforceable promise. Much less can the Court be expected to enforce an *oral promise* – such as the one possibly alleged in paragraph 38 of the amended complaint that the sheriff's sale "would be postponed indefinitely pending the application for modification" – when the alleged commitment clearly involves "a delay in repayment or performance of a loan," or a promise to "extend, modify, or permit a delay in repayment or performance of a loan...or other financial accommodation[,] all of which fit squarely within the statute of frauds. Mich. Comp. Laws § 566.132(2)."<sup>6</sup>

Similar attempts to get around the statute of frauds by pleading promissory estoppel have been consistently rejected by this Court and others. For example, in *Wypych v. Deutsche Bank Nat'l Trust Co.*, No. 16-cv-13836, 2017 WL 1315721, \*6 (E.D. Mich. Apr. 10, 2017), a case decided by Judge Leitman just last month, the plaintiff's complaint strikes a familiar tone, alleging:

Defendants promised Plaintiff approval of the loan modification on submittal of the required documents. Plaintiff, relying on Defendants' statements, submitted all requisite documents timely on reasonable belief that he could be to protect his home from being foreclosed. Thereby, Defendants induced Plaintiff to refrain from defending the foreclosure, which ultimately led to the sheriff's sale causing damages to Plaintiff.

The Court stated in no uncertain terms that promissory estoppel cannot be used to avoid the prohibitions of the statute of frauds:

Wypych's reliance on the doctrine of promissory estoppel fails. As this Court has previously recognized — in a case involving Wypych's counsel — Michigan's statute of frauds, M.C.L. § 566.132(2), "requires that any agreement by a financial institution to modify a loan agreement or forbear from proceeding with their foreclosure rights must be in writing and signed by an authorized agent of the financial institution." *Fredericks*, 2015 U.S. Dist. LEXIS 70883, 2015 WL 3473972, at \*5. And Wypych cannot avoid this statute of frauds on the basis of promissory estoppel. As this Court has explained, "under the 'unqualified and broad ban' of section 566.132," a plaintiff "is precluded from bringing a claim — no matter its label — against [a financial institution] to enforce the terms of an oral promise ... including

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<sup>6</sup> Plaintiff generally alleges that his own May 5, 2016 letter, which expresses "shock" at "the actions of [his] mortgage company." supports this "postponement." (See DE 8 ¶ 12; DE 8-3 at 9-10.) It is unclear how.

[an] action for promissory estoppel." 2015 U.S. Dist. LEXIS 70883, [WL] at \*6 (quoting *Crown Technology Park v. D & N Bank, FSB*, 242 Mich. App. 538, 619 N.W.2d 66, 72 (Mich. App. 2000)); see also *Koole v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 57455, 2016 WL 1732731, at \*\* 7-8 (E.D. Mich. Apr. 29, 2016) (rejecting same promissory estoppel argument raised by Wypych's counsel in [\*13] different mortgage foreclosure case); *Martin v. Bank of New York Mellon Corp.*, 2015 U.S. Dist. LEXIS 157050, 2015 WL 7352006, at \*4 (E.D. Mich. Nov. 20, 2015) (same). Thus, promissory estoppel cannot save Wypych's claims here.

*Id.* Simply stated, a promissory estoppel claim based upon reliance on a loan modification agreement is barred by the statute of frauds without evidence of a signed, written modification agreement. *Crown Tech. Park v. D&N Bank, FSB*, 242 Mich. App. 538, 550, 619 N.W.2d 66 (2000). Given the number of cases which have so held, it is surprising that Plaintiff's counsel would have been unaware of the inefficacy of such a claim. *See, e.g., See Vittands v. Bank of Am., NA*, No. 11-CV-15241, 2012 U.S. Dist. LEXIS 67651, 2012 WL 1696708, at \*4 (E.D. Mich. May 15, 2012) (internal citations omitted) (finding that estoppel claim was merely a creative attempt at skirting the evidentiary burden established by the Statute of Frauds, which Michigan courts have made clear "effectuates a broad ban on claims against financial institutions to enforce promises regarding loan modifications"); *Watts v. Mortg. Bridge Solutions, LLC*, 2016 U.S. Dist. LEXIS 183222, \*30-31 (E.D. Mich. Dec. 7, 2016) (Cleland, J.) ("To the extent that such a claim has been pleaded, it certainly appears to be barred by the statute of frauds.").

## **ii. Equitable estoppel**

Similarly, the statute of frauds cannot be avoided by pleading a claim for equitable estoppel. *Blackward Props., LLC v. Bank of Am.*, 476 F. App'x 639, 641 (6<sup>th</sup> Cir. 2012) ("Blackward persists that equitable exceptions to the statute of frauds—promissory estoppel, part performance, unjust enrichment—save its claim. Blackward is wrong on each front.") (citing *Crown*, 619 N.W.2d at 73); *Coleman v. Ditech Fin.*, 2016 U.S. Dist. LEXIS 82309, \*11-12, 2016 WL 3522556 ( E.D.Mich. June 24, 2016) (Levy, J.) ("Even accepting as true plaintiff's assertion that he signed and returned the Loan Modification Agreement, plaintiff does not allege that defendant signed that agreement; therefore, Michigan's Statute of Frauds dictates that the Loan Modification Agreement does not govern any promises between these two parties. It follows that plaintiff's breach-of-contract claim based on the Loan Modification Agreement is unavailing, as are his claims based on promissory estoppel, equitable estoppel, and implied contract.") (citing *Crown*, 242 Mich. App. at 550, for the proposition that the Michigan statute of frauds "is meant 'to preclude all actions' against financial institutions."). Likewise, partial performance does not remove the claim from the Statute of Frauds. *See Saad v. Wayne Cnty. Register of Deeds*, No. 11-15590, 2013 U.S. Dist. LEXIS 95218, 2013 WL 3455628, at \*6 (E.D.

Mich. July 9, 2013) ("[P]art performance is not sufficient to remove a claim from the statute of frauds applicable to financial institutions."); *see also, Blackward Props*, 476 F. App'x at 642 ("If not promissory estoppel, what about part performance?" – argument rejected).

### **iii. "Dual tracking"**

Nor do Plaintiff's allegations about "dual tracking" change this conclusion. Specifically, within his causes of action for promissory and equitable estoppel, Plaintiff's alleges that "dual tracking," *i.e.*, simultaneously engaging in the loan modification process and pursuing a sheriff's sale, is "expressly prohibited." Yet, he doesn't identify which particular regulation prohibits it. (DE 8 ¶¶ 41, 51.) Here, the Court assumes that Plaintiff's reference to 12 C.F.R. Part 1024 (DE 8 ¶¶ 41, 51) can be narrowed to those regulations related to "Mortgage Servicing," 12 C.F.R. §§ 1024.30-1024.41. In particular, the Court looks to 12 C.F.R. § 1024.41 ("Loss mitigation procedures."), which states, in part: "Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option." Therefore, Plaintiff's allegations about "dual tracking" do not state a claim upon which relief may be granted.

### **iv. Lost opportunities**

Finally, the same can be said about Plaintiff's allegation that he "lost the opportunity to pursue other loss mitigation opportunities to save his home," for example, by "seeking another type of loan modification, refinancing the existing loan, pursuing a short sale or renting the property and relocating." (DE 8 ¶ 43; *see also* DE 8 ¶ 60.) To be sure, the Court recognizes that some of these options were discussed within the aforementioned August 31, 2015 REST reports ordered by Plaintiff's representative, such as analysis of "HAMP Tier 1," "HAMP Tier 2," "other loan workout alternatives," "short sale," "foreclosure," and "bankruptcy." (See, *e.g.*, DE 8-2 at 6.) Moreover, Plaintiff's May 5, 2016 letter contends that the failure to properly notify him of the November 10, 2015 sheriff's sale resulted in him not being able to avail himself of "other legal remedies such as bankruptcy." (DE 8-3 at 9.) However, Plaintiff's claim about these lost opportunities is unavailing given that the promissory estoppel count in which he makes this allegation is, as discussed above, barred by the Statute of Frauds.

## **b. Equitable Estoppel Revisited**

### **i. The distinction between estoppel theories**

Contrary to popular belief, it does not appear that equitable estoppel is appropriately pursued as an independent cause of action. Confusion abounds in attempts to distinguish the two types of estoppel, leading some courts to treat "reliance induced by a promise as a reason to foreclose an attack on the enforceability of the promise and to limit the remedy to the loss suffered in reliance." Murphy and Speidel, *Studies in Contract Law* (3d) (1984) at 38; *see e.g.*, *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1966). However, there is an important, if

sometimes overlooked, distinction between the two types of estoppel. *Black's Law Dictionary* (7<sup>th</sup> ed.) at 571 (Promissory estoppel is “[a]lso termed (inaccurately) *equitable estoppel*.”) Promissory estoppel, sometimes considered to be a theory within or related to quasi-contract, permits the affirmative enforcement of an existing promise for equitable reasons where consideration is lacking. It allows for the enforcement of “a promise made without consideration” in order to “prevent injustice” if the “the promisor should have reasonably expected the promisee to rely on the promise and that the promisee did actually rely on the promise to his or her detriment.” Black’s at 571. Equitable estoppel, in contrast, is a defensive tool, used to preclude the denial of a particular set of facts. As one court explained the difference, “Equitable estoppel... is available only as a ‘shield’ or defense, while promissory estoppel can be used as a ‘sword’ in a cause of action for damages.” *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644, 646 (1980). “Promissory is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact.” Black’s at 571. All of this is consistent with the leading case on equitable estoppel in Michigan, *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 459 N.W.2d 288 (1990), in which the Michigan Supreme Court explained:

Equitable estoppel enables a party to avoid litigating, in a second proceeding, claims which are plainly inconsistent with those litigated in a prior proceeding. However, “[b]ecause the doctrine is intended to insure fair dealing between the parties, the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent’s prior position.”

459 N.W.2d at 292. In light of these distinctions, equitable estoppel does not appear to be a viable, independent cause of action; rather, it is a defensive mechanism used to prevent contradictory assertions from being made in court.

## ii. The key allegations are defective

Even ignoring the writing requirement with respect to the alleged promise and overlooking the limitations on how equitable estoppel theory may be used, a closer analysis of what exactly is alleged to have been represented is likewise problematic. Paragraph 47 of the amended complaint blurs the distinction between promises and representations, describing them as follows:

Defendant made negligent and/or intentional *misrepresentations* of material facts *by promising and representing* to Plaintiff that it would properly assess Plaintiff’s eligibility for a HAMP or other modification assistance.

(DE 8 ¶ 47 (emphasis added).)

The written communications which are incorporated in these pleadings, examined above, do not support this alleged promise or representation. Even if the Court assumes that Plaintiff is referring to *an oral promise or representation*, and even if equitable estoppel could provide an independent avenue for affirmative relief, these pleadings do not provide the basis for a legally cognizable claim here. The first amended complaint informs the Court that Defendants' alleged promise was "that it *would properly assess* Plaintiff's eligibility for a HAMP or other modification assistance." (DE 8 ¶ 47 (emphasis added).) As discussed above, there is no private right of action under HAMP. The alleged promise or misrepresentation which forms the basis of Plaintiff's equitable estoppel claim is suspiciously similar to the alleged offer and breach which form the bases of Plaintiff's HAMP claim, which I have rejected for the reasons stated above. (Compare DE 8 ¶¶ 26-27, DE 8 ¶¶ 47, 52.) Plaintiff may not re-package this claim under a new rubric to thereby create a private cause of action under HAMP.

Moreover, Plaintiff alleges that the promise to "properly assess" his eligibility for "a HAMP or other modification assistance" contained "negligent and/or intentional misrepresentations of material facts[,]" sounding remarkably similar to a fraud or misrepresentation claim. Plaintiff does not specify what these "material facts" might be, nor is the count pleaded with the requisite specificity required for successfully pleading fraud in federal court. Fed. R. Civ. P. 9(b) (requiring a party to "state with particularity the circumstances constituting fraud or mistake...."). See *Watts*, *supra*. 2016 U.S. Dist. LEXIS 183222 at \*29 (Cleland, J.) (rejecting fraud claim in context of mortgage loan modification for failure to plead with particularity, as required by Rule 9(b)). The approach used here has been attempted before in this context and rejected by the Sixth Circuit. In a strikingly similar case, also alleging "irregularities" in a mortgage foreclosure process and also involving an "attempt to work out a modification of the mortgage loan[,]" the Court of Appeals, citing *Lichon*, refused to apply the doctrine of equitable estoppel where "plaintiffs do not adequately plead what fraudulent acts or omissions the defendant committed."

*Gjokaj v. HSBC Mortgage Serv., Inc.*, 602 App'x 275, 277-279 (6<sup>th</sup> Cir. 2015). Likewise, here, Plaintiff has not adequately pleaded what fraudulent acts or omissions these defendants have committed. His references to "misrepresentations" are not only vague, but to the extent that they can be discerned at all, involve only a future course of conduct, not a present state of facts; however, an action for fraudulent misrepresentation or actionable fraud must be predicated on a statement relating to a past or an existing fact. Future promises may not be the basis of an action for fraud. *State Bank of Standish v Curry*, 190 Mich. App. 616, 623, 476 N.W.2d 635 (1991) (citing *Hi-Way Motor Co v International Harvester Co*, 398 Mich. 330, 336, 247 N.W.2d 813 (1976)), *aff'd in part, rev'd in part on other grounds*, 442 Mich. 76, 500 N.W.2d 104 (1993); *see also, Blackward Props.*, 476 F. App'x at 639 (A party generally cannot state a claim for fraudulent misrepresentation based on another party's failure to do something it promised to do in the future).

For all these reasons, the equitable estoppel claim should be rejected.

#### 4. Breach of Mich. Comp. Laws § 600.3204<sup>7</sup>

In Michigan, foreclosure of mortgages by advertisement is governed by Mich. Comp. Laws §§ 600.3201-600.3285. Central to Plaintiff's cause of action is the provision that “[a] party may foreclose a mortgage by advertisement if certain circumstances exist, including “[a] default in a condition of the mortgage has occurred, by which the power to sell became operative.” Mich. Comp. Laws § 600.3204(1)(a); (DE 8 ¶ 55).

Plaintiff alleges that “Defendant apparently premised its authority to foreclose by advertisement upon its assertion that the Plaintiff had Defaulted upon the conditions of payment of the mortgage even though Plaintiff was being considered for modification assistance.” (DE 8 ¶ 57.) Then, after taking issue with the denial of his request for a HAMP loan modification, Plaintiff alleges he “has established the requisite irregularity to set aside the foreclosure sale through the Defendant's conduct in foreclosing a mortgage that was *not in Default*.” (DE 8 ¶¶ 58-59 (emphases added).) As he did within his promissory estoppel claim, here, too, Plaintiff contends that the resulting prejudice included “the loss of other opportunities to save his home,” such as “seeking another type of loan modification, refinancing the existing loan, pursuing a short sale, renting the property and relocating.” (DE 8 ¶ 60; *see also* DE 8 ¶ 43.)

The allegations in Plaintiff's own complaint lead this Court to conclude that Plaintiff was in default with regard to the mortgage in question. To be sure, one portion of the complaint contends that Plaintiff's mortgage “was not in Default.” (DE 8 ¶ 59.) However, the Court reads paragraph 57 of the amended complaint as an attempt to argue that Nationstar taking consideration of Plaintiff's request for modification assistance should prevent it from foreclosing based upon Nationstar's assertion of default. That Plaintiff was engaged in a loan modification process is not, standing alone, synonymous with his loan not being in default. Plaintiff does not allege in his amended complaint that he was up-to-date in his mortgage payments at the time of the communications regarding a possible modification or at the time of the sheriff's sale.<sup>8</sup> Nor did he so argue in his communications or his

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<sup>7</sup> I note that Plaintiff's amended complaint contends that “Defendant executed a foreclosure by advertisement upon the subject property on May 27, 2014.” (DE 8 ¶ 56.) Moreover, Plaintiff's response contends the redemption period was to expire on November 27, 2014. (DE 19 at 21.) As previously noted, according to correspondence from Nationstar, the loan was referred to its foreclosure attorney on July 6, 2015. (DE 8-4 at 11-12.) Therefore, these dates appear to be typographical errors - a conclusion that is substantiated by a reference to May 10, 2016 as the expiration of the redemption period, more accurately May 11, 2016. (DE 8 ¶ 74; DE 8-1 at 6.

<sup>8</sup> Elsewhere in his amended complaint, Plaintiff mentions “his satisfaction of the trial period plan and ongoing payments under the terms of the trial plans.” (DE 8 ¶¶ 42.) Perhaps this is a reference to a previous modification during 2010. (DE 8-2 at 10.) If not, it alleges no more than the fact that Plaintiff made efforts to mitigate his deficiency in financial obligations after his default.

representative's emails, which are attached to his amended complaint. (See DE 8-3 at 2, 4, 9-10; DE 8-4 at 5-7.). This reading of Plaintiff's amended complaint is buttressed by his allegations that he "did attempt to redeem the property however because of the shorten[ed] redemption period Plaintiff ran out of time" (DE 8 ¶ 19),<sup>9</sup> and that the "breach on November 10, 2015," denied Plaintiff of "an opportunity to bring the Mortgage current or explore any other financial options the Plaintiff ha[d] available to [him]." (DE 8 ¶ 28 (emphasis added).) Moreover, this reading is consistent with the attached August 19, 2015 letter from Defendant Nationstar showing six unpaid installments (DE 8-1 at 8) and the August 31, 2015 REST Loan Disposition Analysis, which seems to indicate that Plaintiff was seven months past due (DE 8-2 at 10).

## 5. Injunction and other relief

Plaintiff's final cause of action seeks "injunction and other relief." (DE 8 ¶¶ 67-76.) Therein, he alleges that there is a likelihood of success on the merits of his second through sixth causes of action. (DE 8 ¶ 68.) Furthermore, he prays that the Court:

. . . grant his Motion and Stay and Toll the Redemption Period based upon the fact that Defendant had offered Plaintiff modification assistance, that the Plaintiff sent the Defendant the required documentation, that the Defendant erroneously used incorrect information to deny Plaintiff the HAMP Loan Modification[.]

(DE 8 ¶ 72.) He seems to ask the Court to grant equitable relief, in the forms of a preliminary and ultimately permanent injunction, and perhaps in the form of a constructive trust. (DE 8 ¶¶ 62-66, 74-76; DE 8 at 18-19 ¶¶ A-D; *see also* DE 19 at 23-25.)

However, "[i]t is well settled that an injunction is an equitable remedy, not an independent cause of action." *Terlecki v. Stewart*, 278 Mich. App. 644, 663, 754 N.W.2d 899, 912 (2008) (citing cases). *See also Lucido v. U.S. Bank Nat'l Ass'n*, No. 15-13697, 2016 WL 3667955, at \*8 (E.D. Mich. July 11, 2016) (dismissing claim where, "[a]lthough styled as a separate count, [it was] simply a demand for injunctive relief and alleges no substantial cause of action.").

Moreover, "[i]t is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." *Henry v. Dow Chem. Co.*, 473 Mich. 63, 96-

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<sup>9</sup> Plaintiff admits that he "did not redeem the property, but rather filed a lawsuit against Defendants on May 9, 2016." (DE 19 at 11.) Out of a sense of completeness, I note that "the filing of a lawsuit is 'insufficient to toll the redemption period[.]'" *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 360 (6th Cir. 2013) (quoting *Overton v. Mortg. Elec. Registration Sys.*, No. 284950, 2009 WL 1507342, at \*1 (Mich. App. May 28, 2009) (citing *Schulthies*, 167 N.W.2d at 785)).

97, 701 N.W.2d 684, 701 (2005) (quoting *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 855 (Ky., 2002)).

Plaintiff having failed to state a claim upon which relief may be granted, the Court need not further consider his requests for injunctive relief.

## **6. Effect of state court judgment of possession, and Plaintiff's appeal therefrom, upon Plaintiff's instant complaint**

Defendants' supplemental brief contends that "Plaintiff's Amended Complaint should be dismissed pursuant to the doctrines of *res judicata* and collateral estoppel[,]" based upon the state circuit court's March 10, 2017 opinion and order (affirming the trial court's judgment of possession). (DE 32 at 2.) However, given that Plaintiff's amended complaint fails to state a claim upon which relief may be granted, the Court need not address whether the claims therein are barred by the doctrines of collateral estoppel and *res judicata*. Likewise, the Court does not need to address the issues posed in Plaintiff's responding supplemental brief, including the effect, if any, of Plaintiff's April 27, 2017 delayed application (to appeal) upon these doctrines. (DE 33 at 1 ¶ D.)

### **F. Conclusion**

At this time, Defendants' request for an award of costs and attorney fees (DE 16 at 2, 28) should be denied as premature. If the Court enters judgment in favor of Defendants, they may apply for such relief in accordance with Fed. R. Civ. P. 54(d) ("Costs; Attorney's Fees.") and 28 U.S.C. § 1920 ("Taxation of costs"). Meanwhile, for all of the above stated reasons, I recommend dismissal of the complaint in its entirety under Fed. R. Civ. P. 12(b)(6).

### **III. NOTICE TO PARTIES REGARDING OBJECTIONS:**

The parties to this action may object to and seek review of this Report and Recommendation but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1273 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No.2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the

objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as “Response to Objection No. 1,” “Response to Objection No. 2,” *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

Dated: May 19, 2017      s/Anthony P. Patti

Anthony P. Patti  
UNITED STATES MAGISTRATE JUDGE

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court’s ECF System to their respective email or First-Class U.S. mail addresses disclosed on the Notice of Electronic Filing on May 19, 2017.

s/Marlena Williams

In the absence of Michael Williams Case Manager



