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**IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY**

**STATE OF UTAH**

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<p><b>CRAIG HIGLEY, an individual,</b></p> <p><b>Plaintiff,</b></p> <p><b>vs.</b></p> <p><b>BAC HOME LOANS SERVICING, LP,</b> <b>a State of Utah Company,</b></p> <p><b>Defendants.</b></p>	<p><b>COMPLAINT</b></p> <p><b>Case No.:</b></p> <p><b>Judge:</b></p>
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COMES NOW the Plaintiff, Craig Higley (hereinafter, "**Plaintiff**"), by and through his attorneys of record, Brian E. Arnold and Matt G. Wadsworth of ARNOLD & WADSWORTH, PLLC, and for his causes of action submits the following Complaint:

**PARTIES AND JURISDICTION**

1. Plaintiff is an individual who resides at 7362 South 2050 East, South Weber, Davis County, Utah 84405.

2. Defendant, BAC Home Loans Servicing, LP (hereinafter, "BAC"), does business in Utah, and has its registered agent listed at 136 East South Temple, Suite 2100, Salt Lake City, Utah 84111

3. Jurisdiction is proper in this Court pursuant to Utah Code Ann. §78A-5-102 (1953, as amended).

4. Venue is proper in this Court pursuant to Utah Code Ann. §78B-3-301 (1953, as amended).

### **FACTS OF THE CASE**

5. Plaintiff entered into a loan with BAC to refinance their home located in South Weber City, Davis County, State of Utah (hereinafter "Property").

6. BAC did not provide Plaintiff with a Truth in Lending Disclosure Statement, which is required by law.

7. BAC did not provide Plaintiff with a Good Faith Estimate, which is required by law.

8. BAC did not provide Plaintiff with a Consumer Handbook on Adjustable Rate Mortgages, which is required by law.

9. BAC did not provide Plaintiff with an Equal Credit Opportunity Act statement, which is required by law.

10. BAC did not provide Plaintiff with a HUD Booklet, which is required by law.

11. BAC did not provide Plaintiff with a copy of the appraisal, if any was even conducted, on the Property, which is required by law.

12. BAC did not provide Plaintiff with a copy of his credit score, which is required by law.

13. Plaintiff applied for a mortgage modification under the Making Home Affordable Program with BAC.

14. Plaintiff met all necessary requirements of the Making Home Affordable Program.
15. Plaintiff's primary residence is at the Property.
16. The value of the Property is approximately \$342,449.
17. The mortgage associated with the Property (hereinafter, the "Mortgage") is Plaintiff's first mortgage on the Property and is through BAC. The total amount of the Mortgage is less than Seven Hundred Twenty Nine Thousand Seven Hundred Fifty Dollars and No Cents (\$729,750.00).
18. Plaintiff received the Mortgage from BAC before January 1, 2009.
19. Plaintiff was having a hard time paying the Mortgage due to a reduction in income which forced him to become late on the Mortgage. An Affidavit of Hardship detailing more specific information was submitted to BAC.
20. Plaintiff's payment on the Mortgage, including principle, interest, taxes and insurance, was in excess of 31% of their current gross monthly income.
21. On October 3, 2008 Congress passed the Emergency Economic Stabilization Act of 2008 (hereinafter, the "Act"). Pursuant to the Act both the Treasury Secretary and the Director of the Federal Housing Finance Agency announced HAMP the Making Home Affordable Program (hereinafter, "HAMP") on February 18, 2009. The Act also granted the Secretary of the Treasury the authority to establish the Troubled Asset Relief Program (hereinafter, "TARP").
22. HAMP mandates every Freddie Mac and Fannie Mae loan as well as any loan serviced by an entity receiving TARP funds or that agrees to participate in the HAMP program to be modified if the HAMP guidelines are met, which Defendant has.
23. BAC has refused to grant Plaintiff a loan modification even though Plaintiff qualifies for a loan modification, in direct violation of the Making Home Affordable Program.
24. Under the Making Home Affordable Program, a foreclosure sale cannot be conducted unless the borrower is: 1) notified that he or she does not qualify for a loan modification,

with the reasons for denial, or 2) until a loan modification is granted and the borrower defaults on the loan modification.

25. According to the Making Home Affordable Program, once a loan has been applied for a mortgage modification or a trial payment plan, such as the one Plaintiff has applied for, the bank is barred from continuing any foreclosure proceedings which had begun prior to the onset of the mortgage modification.

### **FIRST CAUSE OF ACTION**

#### **(Negligent Misrepresentation)**

26. The Plaintiff realleges and incorporates by reference all allegations and facts contained hereinabove.

27. BAC informed Plaintiff that the Property was not and would not be in foreclosure until BAC made a decision on the loan modification under the Making Home Affordable Program.

28. Plaintiff reasonably relied on this information and moved forward with the application for a loan modification under the Making Home Affordable Program.

29. BAC had a pecuniary interest in the agreement under HAMP, of which Plaintiff is an intended third party beneficiary.

30. BAC was in a superior position to know the material facts, as it was the company who would have to issue the foreclosure and because it was regularly engaged in the business of lending and modifying loans.

31. BAC should have reasonably foreseen that Plaintiff was likely to rely upon the BAC's representations regarding their unwillingness to proceed to foreclosure until the modification was complete.

32. As a result of BAC's Negligent Misrepresentations, Plaintiff is entitled to have the foreclosure to be ordered to stop until BAC complies with the Making Home Affordable Program.

Plaintiff is entitled to damages in the amount of the value of the home, the exact amount of which will be determined at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by California law, the amount of which should be not less than \$342,449.00.

## **SECOND CAUSE OF ACTION**

### **(Breach of Implied Covenant to Negotiate in Good Faith and Fair Dealing)**

33. Plaintiff realleges and incorporates by reference all allegations and facts contained hereinabove.

34. “An implied covenant of good faith and fair dealing inheres in every contract. Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party’s right to receive the benefits of the contract.” Eggett v. Wasatch Energy Corp., 2004 UT 28 ¶14, 94 P.3d 193 (citations omitted).

35. The good faith performance doctrine permits the exercise of discretion for any purpose-including ordinary business purposes-reasonably within the contemplation of the parties. Thus, a contract would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range-a reason beyond the risks assumed by the party claiming the breach. Markham v. Bradley, 2007 UT App 379, ¶34, 173 P.3d 865 (emphasis omitted)(internal quotation marks omitted).

36. “[W]hether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law.” Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 291 (Utah Ct. App. 1994).

37. Here, there are two agreements at issue. The first is the original trust deed and note. The second is the modification of the note. The benefit of the original contract to buy the home was eliminated by the foreclosure sale. This would have not happened if BAC and its agents would have

allowed Plaintiff to make a payment to keep the loan current during the servicing transfer and during the negotiation of the loan modification.

38. Loan modifications are always within the contemplation of the parties when a loan is originated and the servicer has an FHA and HUD required duty to mitigate damages and offer partial claims for all FHA mortgages. BAC completely neglected to make Plaintiff aware of their federal rights and contractual rights granted by their FHA insurance. Now, Defendant stands to take all the gain from the FHA insurance-that Plaintiff paid for-and which will make BAC completely whole.

39. The issue here is not only the duties imposed by the original note and trust deed, but the obligations that arose after the execution of those documents when the loan modification process began. Plaintiff was told that they qualified for a loan modification and that their paperwork need only be processed. They were told, as mentioned above, numerous times by multiple parties to not make payments and that their modification was a done deal. This counsel was confirmed after the fact by myriad BAC employees. This was a breach of good faith on the original contracts and the contemplated modification.

40. It appears that BAC intentionally falsified facts during the loan modification process in order to proceed to foreclosure. On one hand BAC stated that no foreclosure would occur and that the loan modification process was progressing perfectly, however, on the other hand BAC foreclosed on the property and never deviated from this goal. Not allowing Plaintiff to make payments and not postponing the foreclosure sale until all possible resolutions were found to be futile was to intentionally deprive Plaintiff of the fruit of the original contract for the purchase of the home and the loan modification negotiations. Plaintiff could have easily made arrangements to reinstate the loan if necessary, but Plaintiff did not do so because the representations made by BAC.

41. A servicer will be held to a fiduciary duty with their borrower when the servicer or lender exerts extraordinary influence over the borrower. *See e.g., Webster v. Lehmer*, 742 P.2d 1203 at 1206 (Utah 1987). Here, multiple representatives from BAC all told Plaintiff not to make payments and that their loan modification would be harmed if they did. Clearly, all the parties contemplated a new loan to supersede the old and the duty to perform (i.e. make payment) by Plaintiff was excused.

42. At the very least, BAC had a duty to not lie to Plaintiff, which happened in this case multiple times when Plaintiff was told affirmatively not to make payments and that foreclosure auction would be stayed.

43. Accordingly, Plaintiff are entitled to judgment against the BAC for breach of the covenant of good faith and fair dealing and payment of general damages and consequential damages in an amount to be proven at trial but not less than \$342,449.00, plus pre and post judgment interest, plus costs.

### **THIRD CAUSE OF ACTION**

#### **(Detrimental Reliance)**

44. Plaintiff realleges and incorporates by reference all allegations and facts contained hereinabove.

45. Representatives of BAC told Plaintiff on multiple occasions to not make payments even though Plaintiff were prepared to make them due to the ongoing modification and change of servicing.

46. Plaintiff relied on these representations and did not make payments per instruction from BAC's representatives.

47. BAC either knew or should have known that Plaintiff would rely on these representations.

48. Plaintiff suffered serious harm and damages due to his detrimental reliance on BAC's representations.

49. Plaintiff had means and other options that could have been pursued to stop the foreclosure, but did not because of the representations by BAC's representatives.

50. This reliance has damaged Plaintiff's credit and now his family will be without a home.

51. As a result of Plaintiff's Detrimental Reliance on BAC's statements, Plaintiff is entitled to have the foreclosure to be ordered to stop until BAC complies with the Making Home Affordable Program. Plaintiff is entitled to damages in the amount of the value of the home, the exact amount of which will be determined at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law, the amount of which should be not less than \$342,449.00.

#### **FOURTH CAUSE OF ACTION**

##### **Breach of Contract – Third Party Beneficiary**

52. Plaintiff reallege and incorporate by reference all allegations and facts contained hereinabove.

53. On October 3, 2008 Congress passed the Act. Pursuant to the Act both the Treasury Secretary and the Director of the Federal Housing Finance Agency announced HAMP on February 18, 2009. The Act also granted the Secretary of the Treasury the authority to establish TARP.

54. HAMP mandates every Freddie Mac and Fannie Mae loan as well as any loan serviced by an entity receiving TARP funds or that agrees to participate in the HAMP program to be modified if the HAMP guidelines are met.



55. Freddie Mac is responsible for policing the loan industry to make sure that all servicers accepting HAMP or TARP funds abide by the contract. BAC has accepted the contract offer under HAMP.

56. HAMP outlined all the content and subject matter of the agreement as well as all essential terms. The offer to participate in HAMP was communicated to all servicers and BAC accepted the terms. Both parties have objectively communicated their intention to be presently bound by the agreement. Receiving TARP funds and other government funds is the consideration for participating services to implement the HAMP guidelines.

57. On or about January 25, 2010 BAC entered into an Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement (“Contract”) with Fannie Mae, as Fannie acting as the financial agent of the United States. (See Exhibit A).

58. BAC entered into the Contract and agreed to receive \$7,206,300,000.00 in consideration of the contract.

59. The purpose of the contract is stated as “Servicer (BAC) shall perform the Services for all mortgage loans it services, whether it services such mortgage loans for its own account or for the account of another party, including any holders of mortgage-backed securities (each such other party, an “Investor”).” (See Exhibit A, ¶ 2(A))

60. According to the Contract, “Services” is HAMP, first and second lien modifications of mortgages, providing home price decline protection incentives, second lien extinguishments, and making other foreclosure prevention services available to the marketplace (i.e. Homeowners).

61. Plaintiff is a homeowner with a first lien mortgage with BAC.

62. Plaintiff is a third party done beneficiary to the Contract between Fannie Mae (as financial agent for the United States) and BAC. Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314, 1315-1316 (Utah 1982) See Schwinghammer v. Alexander, 21 Utah 2d 418, 446 P.2d 414

(1968 See also 2 S. Williston, A Treatise On The Law Of Contracts, § 356 (Rev.Perm.Ed.1981); Section 302, Restatement of Contracts, Second Edition, 1981.

63. The Contract was entered into for the purpose of establishing modifications under HAMP and other programs for the benefit of Homeowners.

64. Fannie Mae entered into the Contact with BAC with the intent that BAC would modify such first lien and second lien mortgages it services.

65. The Contract forces BAC to modify such mortgages under HAMP, and HAMP's "primary purpose of which was the modification of first lien mortgage loan obligations" for which Aurora has failed to perform for Plaintiff.

66. Here, Plaintiff is an expressed intended donee beneficiary.

67. Plaintiff is filing to enforce this contract.

68. Plaintiff prays that the Court will enforce the contractual obligations matured under the agreement and compel specific performance to modify the Plaintiff's loan and restore possession of the Property; or, in the alternative, grant Plaintiff monetary damages resulting from Defendant's Breach of the Contract.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff prays for relief from the Court as follows:

1. On their First Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$342,449.00, or such greater amount as may be proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

2. On their Second Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$342,449.00, or such greater amount as may be

proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

3. On their Third Cause of Action, Plaintiff prays that the Court will enforce the contractual obligations matured under the agreement and compel specific performance to modify the Plaintiff's loan and restore possession of the Property to Plaintiff; or, in the alternative, grant Plaintiff monetary damages resulting from Defendant's Breach of the Contract.

4. On their Fourth Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$342,449.00, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

5. Such other relief that the Court deems necessary.

DATED this \_\_\_\_ day of April, 2011.

ARNOLD & WADSWORTH, PLLC

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Brian E. Arnold, Esq.