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15 Attorney for Plaintiffs,  
16 GUSTAVO REYES and MARIA TERESA GUERRERO,  
17 individually, and on behalf of others similarly situated

18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20 GUSTAVO REYES and MARIA TERESA )  
21 GUERRERO, husband and wife, individually, )  
22 and on behalf of others similarly situated, )

23 Plaintiffs, )

24 v. )

25 WELLS FARGO BANK, N.A., a national )  
26 bank; and DOES 1-100, inclusive, )

27 Defendants. )

28 Case No. C 10-01667 JCS

**CLASS ACTION**

FIRST AMENDED COMPLAINT FOR DAMAGES AND RESTITUTION

(1) BREACH OF CONTRACT (COVENANT OF GOOD FAITH AND FAIR DEALING)

(2) RESCISSION AND RESTITUTION (CAL. CIVIL CODE §§ 1688 *ET SEQ*)

(3) UNFAIR DEBT COLLECTION PRACTICES

(4) UNFAIR COMPETITION LAW (CAL.BUS. & PROF. CODE §§ 17200 *ET SEQ*)

**JURY TRIAL DEMANDED**

1 Plaintiffs Gustavo Reyes and Maria Teresa Guerrero, by and through their attorneys,  
2 bring this action on behalf of themselves and all others similarly situated against the above  
3 named Defendants, demand a trial by jury, and complain as follows:

4 **INTRODUCTION**

5 1. This class action lawsuit seeks to redress and remedy Wells Fargo's recent  
6 practice of extracting payments from defaulted residential mortgage customers by falsely  
7 promising them the opportunity to retain their homes through an illusory forbearance-to-  
8 modification program.

9 2. After providing their financial information to Wells Fargo's loss mitigation  
10 department, said mortgage customers, including Plaintiffs, were sent form letters offering them  
11 "good news" in the form of the "opportunity to retain [their] home ... [b]ased on the financial  
12 information [they] provided". Enclosed were "Special Forbearance Agreement[s]" specifying a  
13 three month payment term at a modified payment. The materials explained this as "a trial period  
14 showing you can make regular monthly payments".

15 3. These forbearance-to-modification offer packages were designed to give the  
16 impression that the customers are being put into a trial modification program to assess their  
17 willingness and ability to make the reduced payment when, in fact, based on the information  
18 already available to it, Wells Fargo knew or should have known that it was not prepared to  
19 permanently modify their mortgages to the forbearance payment nor to any payment that the  
20 borrowers could reasonably afford.

21 4. In Plaintiffs' case, they were foreclosed on during the term of the Special  
22 Forbearance Agreement while timely making their payments thereon.

23 5. Plaintiffs contend that the forbearance-to-modification program was essentially a  
24 sham; designed to generate revenue from non-performing mortgage loans without providing  
25 customers with the promised consideration of an opportunity to retain their homes. They seek  
26 restitution of the forbearance payments on behalf of themselves and the class of persons similarly  
27 situated based on claims for breach of contract, breach of the covenant of good faith and fair  
28 dealing in the contract, rescission, unfair debt collection practices, and unfair competition law.

**PARTIES**

1  
2 6. Plaintiffs, Gustavo Reyes and Maria Teresa Guerrero (“Plaintiffs”), are residents  
3 of Alameda County, California at the real property located at 1321 Grove Way, Hayward, CA  
4 94541 (the “Property”).

5 7. Defendant, Wells Fargo Home Mortgage, is a division of Wells Fargo Bank, N.A.  
6 (“Wells Fargo”), which does business throughout California and has its principal place of  
7 business in San Francisco, California.

8 8. Plaintiffs are not aware of the true names and capacities of the defendants sued as  
9 Does 1-100, inclusive, and therefore sue these defendants by such fictitious names. Each of  
10 these fictitiously named defendants is responsible in some manner for the activities alleged in  
11 this Complaint. Plaintiffs will amend this Complaint to add the true names of the fictitiously  
12 named defendants once they are discovered.

13 9. Plaintiffs allege on information and belief that at all times relevant hereto each of  
14 the defendants, including each DOE, was the agent, principle, servant, master, employee,  
15 employer, joint-venturer, partner, successor-in-interest, and/or co-conspirator of each other  
16 defendant and was at all said times acting in the full course and scope of said agency, service,  
17 employment, joint venture, concert of action, partnership, successorship, or conspiracy, and that  
18 each defendant committed the acts, caused or directed others to commit the acts, or permitted  
19 others to commit the acts alleged in this Complaint.

20 **FACTS**

21 10. Plaintiffs purchased the Property in November, 2003 for approximately \$336,000  
22 with a first mortgage for \$268,000.

23 11. On or about September 16, 2005, Wells Fargo refinanced the Property, providing  
24 Plaintiffs with Wells Fargo Loan No. xxxxxxxxx0713 in the amount of \$452,000, and taking a  
25 deed of trust (DOT) as security.

26 12. Plaintiffs used the money the received from the refinance of the property to make  
27 valuable improvements on the Property. They paid Wells Fargo on time every month to the best  
28 of their ability.

1           13.     By June of 2009, however, Plaintiffs had suffered economic hardships that  
2 depleted their savings and prevented them from making full mortgage payments, and the value of  
3 the Property had plummeted to less than half of the subject mortgage. They called Wells Fargo  
4 to request a loan modification due to insufficient income, providing all information and  
5 documentation that Wells Fargo requested. Wells Fargo denied the request.

6           14.     On or about September 10, 2009, Wells Fargo recorded and served a Notice of  
7 Default And Election to Sell (“NOD”) the Property pursuant to section 2924 *et seq* of the  
8 California Civil Code (“Section 2924”).

9           15.     By recording and serving the NOD, Wells Fargo elected to proceed with non-  
10 judicial foreclosure of the Property as its exclusive remedy for the default

11           16.     Plaintiffs continued to seek the opportunity to retain their home through loan  
12 modification or other relief by contacting the Wells Fargo loss mitigation department via the 800  
13 number that Wells Fargo directs such customers to. During those calls, Plaintiffs would provide  
14 their financial information as requested by Wells Fargo.

15           17.     On December 1, 2009, Plaintiffs received from Wells Fargo the letter attached  
16 hereto as Exhibit A (the “Offer Letter”), which enclosed the Special Forbearance Agreement  
17 attached hereto as Exhibit B (the “Agreement”).

18           18.     The Offer Letter read in relevant part:

19           We have good news about the above referenced loan. Our goal is simple. We  
20 want to ensure you have every opportunity to retain your home. Based on our  
21 telephone conversation and the financial information you provided, we would  
like to offer you a Special Forbearance Agreement (“Agreement”).

\*\*\*

...This is ... a trial period showing you can make regular monthly payments ...

22 Exhibit A, (emphasis added).  
23

24           19.     In reliance on the Offer Letter, Plaintiffs executed and returned the Agreement,  
25 and timely made the monthly payments as required thereunder. Specifically, Plaintiffs paid the  
26 monthly payment for December-2009, January-2010, February-2010, and March-2010 (before  
27 learning they had been foreclosed on in February). Wells Fargo accepted and cashed their  
28 checks.

1 20. On December 11, 2009, Wells Fargo recorded a Notice of Trustee's Sale (NOS).

2 21. On February 9, 2010, after receiving the third and final payment due under the  
3 Agreement, Wells Fargo mailed Plaintiffs a letter declining the modification.

4 22. On February 19, 2010, Wells Fargo caused the Property to be sold by non-judicial  
5 foreclosure.

6 **CLASS ALLEGATIONS**

7 23. This class action is brought pursuant to Rules 23(a), (b)(2) and (b)(3) of the  
8 Federal Rules of Civil Procedure by the individual named Plaintiffs on behalf of themselves and  
9 the following class:

10 All California residential mortgage customers of Wells Fargo who (1) were served  
11 with a Notice of Default by or on behalf of Wells Fargo; (2) received the above-  
12 described forbearance-to-modification offers from Wells Fargo, consisting of the  
13 Offer Letter and Agreement, in substantially the same form presented to Plaintiffs;  
(3) accepted the offers and made full payments thereunder; and (4) were  
foreclosed on.

14 24. Plaintiffs do not know the exact size or identities of the proposed Class, since  
15 such information is in the control of defendants. Plaintiffs believe and allege, however, that the  
16 Class encompasses thousands of residential mortgage borrowers who are geographically  
17 dispersed throughout California. Therefore, the proposed class is so numerous that joinder of all  
18 members is impracticable.

19 25. Common questions of fact and law predominate over any questions affecting only  
20 individual members including, but not limited to, the following:

- 21 a. whether the Special Forbearance Agreements were a valid and binding agreement  
22 and whether Wells Fargo had programs in place that constituted material  
23 performance of the Agreements;
- 24 b. whether Wells Fargo's conduct with respect to the forbearance-to-modification  
25 packages subjects the agreements to rescission and restitution for failure of  
26 consideration under section 1688 of the California Civil Code;
- 27 c. whether Wells Fargo's conduct with respect to the forbearance-to-modification  
28 packages constituted unfair debt collection practices;

1 d. whether Wells Fargo's conduct with respect to the forbearance-to-modification  
2 packages violated the Unfair Competition Law (UCL) and, specifically, whether  
3 the representations in the Offer Letter were material within the meaning of *In Re*  
4 *Tobacco II*.

5 26. This is a matter of important public policy because foreclosure avoidance, where  
6 possible, and the fair treatment of distressed borrowers are state and national policy priorities.

7 27. Plaintiffs' claims are typical of the claims of the Class and do not conflict with  
8 the interests of any other members of the Class.

9 28. Plaintiffs will fairly and adequately represent the interests of the Class. They are  
10 committed to the vigorous prosecution of the Class claims and have retained attorneys who are  
11 qualified to pursue this litigation and have experience in class action and foreclosure claims.

12 29. A class action is superior to other methods for the fast and efficient adjudication  
13 of this controversy and to avoid the risk of disparate and inconsistent rulings throughout the  
14 state. A class action regarding the issues in this case does not create any problems of  
15 manageability.

16 **1<sup>ST</sup> CLAIM FOR RELIEF**  
17 **(Breach of Contract/Implied Covenant of Good Faith and Fair Dealing)**  
18 **(Against Wells Fargo and Does)**

19 30. The preceding paragraphs are incorporated by reference.

20 31. Plaintiffs entered into an agreement with defendants whereby, in exchange for the  
21 specified monthly payments, defendants agreed to put them into a forbearance-to-modification  
22 program that would give them the opportunity to retain their home based on information  
23 previously provided to Wells Fargo and Plaintiffs' demonstration of a willingness and ability to  
24 make reduced monthly payments.

25 32. In every contract or agreement, including those at issue here, there is an implied  
26 promise of good faith and fair dealing, which means that each party will not do anything to  
27 unfairly interfere with the right of any other party to receive the benefits of the contract. This  
28 covenant of good faith applies in particular here, where Wells Fargo drafted an adhesive  
agreement whereby it ostensibly retained for itself the unfettered discretion to avoid its

1 obligations under the agreement. In such situations, the law reads a duty of good faith into Wells  
2 Fargo's exercise of such discretion in order that the agreement should not be rendered illusory.

3 33. Plaintiffs performed all their obligations under the agreement except to the extent  
4 that they were excused from performance.

5 34. Defendants breached the agreement AND totally failed to provide the  
6 consideration they promised thereunder. Specifically, the Agreement did not represent or  
7 provide Plaintiffs a meaningful opportunity to retain their home.

8 35. Plaintiffs were harmed as a result of the breach, and are entitled in the alternative  
9 to damages to terminate the agreement and recover their consideration paid under the Agreement  
10 (i.e. their forbearance payments) without formal rescission. *Richter v. Union Land Co.* (1900)  
11 129 Cal. 367, 372-373; *Morrell v. Clark* (1951) 106 Cal.App.2d 198, 203.

12 WHEREFORE, Plaintiffs pray for judgment and relief as set forth below.

13 **2<sup>ND</sup> CLAIM FOR RELIEF**  
14 **(Rescission and Restitution – Cal. Civil Code §§ 1688-1689 )**  
15 **(Against Wells Fargo and Does)**

16 36. The preceding paragraphs are incorporated by reference.

17 37. **NOTICE OF RESCISSION:** In the alternative, Plaintiffs and Class, by service  
18 of this Class Action Complaint on Defendant Wells Fargo, hereby provide notice to Defendant,  
19 its subsidiaries and affiliates that the "Special Forbearance Agreements" described in this  
20 Complaint are subject to rescission and are hereby rescinded for the reasons set forth herein.

21 38. Section 1689(b) of the California Civil Code provides that a "party to a contract  
22 may rescind the contract ... (1) [i]f the consent of the party rescinding ... was given by  
23 mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the  
24 connivance of the party as to whom he rescinds ... (2) [i]f the consideration for the obligation of  
25 the rescinding party fails, in whole or in part, through the fault of the party as to whom he  
26 rescinds .... (4) [i]f the consideration for the obligation of the rescinding party, before it is  
rendered to him, fails in a material respect from any cause."

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28 ///

1           39. Plaintiffs are entitled to rescind the Agreement under Civil Code § 1689(b) and  
 2 recover their consideration paid thereunder because their consent to the Agreement was given  
 3 by mistake, and/or obtained through fraud exercised by Wells Fargo, and/or because the  
 4 consideration promised by Wells Fargo failed in a material respect and through the fault of  
 5 Wells Fargo.

6           40. Specifically, Wells Fargo represented that it had reviewed (or re-reviewed)  
 7 Plaintiffs’ financial information, and on that basis was offering Plaintiffs access to a  
 8 forbearance-to-modification program that would give them the opportunity to retain their home  
 9 provided that they demonstrated an ability to make the reduced payment for the trial period.  
 10 Wells Fargo made these representations with the intent of inducing Plaintiffs to enter into the  
 11 Agreement in reliance thereon, and Plaintiffs did so rely in entering into the Agreement and  
 12 making payments thereunder. In fact, Plaintiffs allege, Wells Fargo had made no review (or re-  
 13 review) of Plaintiffs’ financial information that triggered the offer, and it knew or should have  
 14 known based on the information available at the time that it had no forbearance-to-modification  
 15 program that would have given Plaintiffs the opportunity to retain their home, and that the  
 16 reduced payment it was affirmatively proposing through the Offer as a “trial” payment was not  
 17 a payment that it would be willing to accept on a long term basis.

18           41. Plaintiffs have retained no consideration that must be tendered back to Wells  
 19 Fargo prior to rescission.

20           WHEREFORE, Plaintiffs pray for judgment and relief as set forth below.

21   **3<sup>RD</sup> CLAIM FOR RELIEF**  
 22                                   **(Rosenthal Fair Debt Collection Practices Act – Cal. Civ. Code §§ 1788 et seq.)**  
 23   **(Against Wells Fargo and Does)**

24           42. The preceding paragraphs are incorporated by reference.

25           43. Defendants were “debt collectors” engaging in “debt collection” practices under  
 26 the Rosenthal Fair Debt Collection Practices Act (the “Rosenthal Act”). Cal. Civ. Code §  
 1788.2(c).

27           44. Defendants violated the Rosenthal Act by using false, deceptive, and misleading  
 28 statements in connection with their collection of Plaintiffs’ mortgage debt, as alleged herein.



1 Cal. Civ. Code § 1788.17, incorporating 15 U.S.C.A. § 1692e.

2 45. The 1999 Amendment to the Rosenthal Act allows for class actions for violations  
3 to the same extent they are allowed under the federal Fair Debt Collection Practices Act  
4 (“FDCPA”). Cal. Civ. Code § 1788.17, incorporating 15 U.S.C.A. § 1692k; *Gonzales v. Arrow*  
5 *Financial Services, LLC* 233 F.R.D. 577, 581 (S.D.Cal.,2006).

6 WHEREFORE, Plaintiffs pray for judgment and relief as set forth below.

7 **4<sup>TH</sup> CLAIM FOR RELIEF**  
8 **(Unfair Competition – Cal. Bus. & Prof. Code §§ 17200, *et seq.*)**  
9 **(Against Wells Fargo and Does)**

10 46. The preceding paragraphs are incorporated by reference.

11 47. California’s Unfair Competition Law (the “UCL”) defines unfair competition to  
12 include any “unlawful, unfair, or fraudulent” business act or practice. Cal. Bus. & Prof. Code §§  
13 17200 *et seq.* Defendants’ conduct constitutes unfair competition under the UCL.

14 48. Defendants engaged in “fraudulent” business practices under the UCL because the  
15 forbearance-to-modification offer was intended and likely to mislead the public into believing  
16 that they could obtain an opportunity to retain their homes. A true opportunity to retain their  
17 homes was “material” to Plaintiffs and the class within the meaning of *In re Tobacco II Cases*  
(2009) 46 Cal.4th 298, 325.

18 49. Defendants engaged in “unlawful” business practices under the UCL based on the  
19 violation of the Rosenthal Act.

20 50. Defendants engaged in “unfair” business practices under the UCL because they  
21 violated the laws and underlying legislative policies designed to (a) prevent foreclosure, where  
22 possible, by requiring mortgage holders to engage in honest foreclosure prevention efforts, and  
23 to do so before recordation of a NOD (see Cal. Civil Code § 2923.5); (b) provide Californians  
24 with anti-deficiency protections that prevent mortgage holders from seizing other assets or  
25 monies of the borrowers after electing to sell the security in satisfaction of the mortgage debt  
26 (see C.C.P. § 580d, § 726); and (c) allow contracting parties to enjoy the benefits of their  
27 agreement after paying valuable consideration therefore.

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1 51. Plaintiffs were injured in fact and lost money or property as a result of these  
2 unlawful, unfair, and fraudulent business practices.

3 WHEREFORE, Plaintiffs pray for judgment and relief as set forth below.

4 **DEMAND FOR JURY TRIAL**

5 52. Plaintiffs request a jury trial on all claims so triable.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs request judgment as follows:

8 A. An order certifying the Plaintiff Class, appointing the named Plaintiffs as the  
9 representatives of the Class, and appointing the law firms representing the named Plaintiffs as  
10 counsel for the Class;

11 B. An order rescinding and/or terminating the Special Forbearance Agreements;

12 C. Restitution of the consideration paid by Plaintiffs and the Class for the Special  
13 Forbearance Agreements;

14 D. Class wide statutory damages under the Rosenthal Act, as it incorporates the  
15 remedies provisions of the FDCPA, 15 U.S.C. § 1692k, pursuant to section 1788.17 of the  
16 California Civil Code. *See Gonzales v. Arrow Financial Services, LLC* 233 F.R.D. 577, 581  
17 (S.D.Cal.,2006).

18 E. Such additional orders or judgments as may be necessary to prevent these  
19 practices and to restore to any person in interest any money or property which may have been  
20 acquired by means of the UCL violations;

21 F. Attorneys' fees, costs, and expenses pursuant to the Rosenthal Act, section 1021.5  
22 of the Code of Civil Procedure, and pursuant to Paragraph 22 of the standard Plaintiff's Deed of  
23 Trust as rendered mutual by section 1717 of the California Civil Code; and  
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27 ///

1 G. For such other and further relief as the Court may deem proper.  
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4 DATE: September 22, 2010

LAW OFFICE OF PETER FREDMAN  
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