

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE ESTATE OF MIRIAM  
LYNETTE GISH, DECEASED,

WELLS FARGO BANK, NA,

Plaintiff,

v.

No. D-101-PB-2015-00006

DIANA NIKKEL AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
MIRIAM LYNETTE GISH,

Defendant.

**THE PERSONAL REPRESENTATIVE'S FIRST  
AMENDED COUNTERCLAIM**

Defendant-Counter Claimant, DIANA NIKKEL, as Personal Representative of the Estate of Miriam Lynette Gish (hereinafter "Defendant"), by and through its undersigned counsel, for her First Amended Counterclaim alleges as follows:

1. Upon information and belief, Wells Fargo Bank, NA is authorized to do business in New Mexico.
2. Defendant is the duly appointed personal representative of Miriam Lynette Gish's Estate.
3. Venue and subject matter jurisdiction are appropriately before this Court.

General Allegations

4. Defendant is Miriam Lynette Gish's niece. Beginning in approximately 2006, Defendant became aware of information causing her concern about her Aunt's physical and mental well-being. By way of example, Defendant learned that

during the winter of 2005-06, her Aunt had inadequate heat in her home after of her central heating system failed and she was incapable of arranging for repairs to it on her own. Although funds to repair the system were available through a manufacturer's settlement, Ms. Gish was incapable of submitting the forms. In addition, Ms. Gish was chronically delinquent or late with credit card payments and was unable to ascertain her own entitlement to trust fund payments. Due to her illness and difficulty in dealing with financial matters, she did not seek to pay or otherwise resolve a tax lien from California dating back about 6 years. She mistakenly paid \$30,000 to the U.S. Internal Revenue Service. In short, she had extreme difficulty managing her finances.

5. Ms. Gish would not have understood the complexities of a reverse mortgage, generally, the different Home Equity Conversion Mortgage (HECM) loan terms and payment plans, specifically, or how these would affect her financial future.
6. At all times relevant to this case, Ms. Gish had been suffering from hepatitis contracted from her profession as a dental hygienist. Ms. Gish was frequently ill and increasingly unable to manage her affairs as her condition continued to deteriorate. She was eventually diagnosed with cancer and from time to time, Ms. Gish was prescribed opiates to help her with her pain management. This further limited her ability to understand and manage her finances.
7. Due to her deteriorating condition and need for assistance with managing her finances, keeping up with her bills, and maintaining her home in a livable condition, in 2006 Ms. Gish signed a Power of Attorney naming Defendant as her representative, which Defendant used to assist her Aunt with her financial and

other affairs. For example, Defendant assisted her to settle the tax lien that California had filed, including avoiding the penalties in part due to Ms. Gish's illness. And she assisted Ms. Gish to obtain the funds to repair her central heating and hired a contractor to perform the work.

8. Defendant was not aware that her Aunt had applied for or obtained a reverse mortgage until after the loan had closed. Defendant contacted Plaintiff by phone in 2009 to express her view that her Aunt could not have understood the loan terms, and requested copies of the loan documents. Defendant notified Plaintiff that she had a valid Power of Attorney. Plaintiff refused to acknowledge the Defendant's authority, the validity of the Power of Attorney, to discuss the loan terms, or to provide any loan-related documents. Instead Plaintiff told Defendant that her Aunt must sign a Wells Fargo proprietary Power of Attorney document. Ms. Gish did not want to do so.
9. Defendant's Aunt's condition continued to deteriorate and in 2011, a treating physician opined that she was no longer able to make medical decisions on her own behalf.
10. In 2012, Diana Nikkel had to intervene because a home health care nurse was financially exploiting her Aunt.
11. Ms. Gish died on March 21, 2014, and Defendant was appointed as the personal representative of her Aunt's estate on April 17, 2014.
12. Defendant sent a "Notice to Creditors" on July 14, 2014, informing Plaintiff that she had been appointed as personal representative of her Aunt's estate and providing Plaintiff with the correct mailing address in California for Plaintiff to

communicate with or send official notices to the Estate. Despite receiving this Notice to Creditors, Plaintiff failed to send required or requested loan correspondence to Defendant at her correct address, and continues intermittently to send correspondence to an incorrect address.

13. Defendant made further and numerous requests to obtain copies of her Aunt's complete loan file between 2014 through 2016. In November of 2014 Plaintiff produced only limited documents, which related only to the fixed rate loan. Defendant continued to make requests throughout 2015-2016 for all loan origination documents including the housing counseling certificate and all monthly loan statements.
14. Plaintiff filed a foreclosure action in March 2015, Case # D-101-CV-2015-00623, but voluntarily withdrew its claim without prejudice in April, 2015 at the direction of the U.S. Department of Housing and Urban Development (HUD), in order to permit the Defendant additional time to market and attempt to sell the property.
15. Plaintiff filed a subsequent foreclosure action in October, 2015, Case # D-101-CV-2015-0234, despite HUD's grant of an additional extension of time for Defendant to sell the property.
16. The October 2015 foreclosure action was consolidated with this probate action on January 20, 2016. In March 2016, counsel for the Estate sent Plaintiff a qualified written request (QWR) pursuant to 12 CFR § 2605(e) requesting production of the entire loan file. In response, the Estate received a letter from Plaintiff dated March 8, 2016, indicating that the documents requested would be provided on or before March 21, 2016. Defendant also sent Plaintiff a separate QWR by fax on March 3,

2016. Plaintiff did not acknowledge Defendant's separate QWR.
17. Plaintiff failed to produce the requested documents as promised and required by March 21, 2016. Instead, Plaintiff produced to the Estate's attorney only some of the documents pertaining to the fixed rate note and mortgage. Plaintiff did not provide monthly statements dated prior to Ms. Gish's death or other documents requested.
  18. In November of 2016 Plaintiff finally attached a Housing Counseling Certificate to its Motion for Summary Judgment (MSJ). It also attached a previously undisclosed Truth in Lending Disclosure Statement to its MSJ Reply.
  19. In January 2017, the Estate served Plaintiff with a Request for Production of documents. On April 28, 2017, Plaintiff finally disclosed what they purported to be, but was not, the complete loan origination file, including documents that it had been withholding from Defendant since 2009. Plaintiff had been withholding numerous loan file documents that Defendant had been seeking since 2009 to enable her to understand the loan and protect her Aunt's interests. These documents included the Federal Truth in Lending Disclosure Statement, documents showing that Ms. Gish applied for and was approved for a lower variable rate open ended loan, and at least one document showing a 0% rate signed by Ms. Gish on the date of closing.
  20. Plaintiff continues to withhold documents related to the loan, including the monthly loan statements dated prior to Ms. Gish's death, other notices Plaintiff sent to Ms. Gish about charges made to her loan, and notes of phone calls Defendant made to Plaintiff in an attempt to obtain information about the loan.

Plaintiff also continues to withhold information about the indorsement and transfer or ownership of the loan.

21. The disclosure of the loan origination documents on April 28, 2017, made it evident—for the first time that since 2009—that Plaintiff had been concealing material information about the loan that is highly relevant to its attempt to foreclosure on the property.
22. The loan origination documents reveal that although Ms. Gish purportedly signed documents for a closed-end, fixed rate, lump sum loan, she did not actually apply for that loan prior to the date she purportedly signed all the closing documents. No documents in the loan file demonstrate that Plaintiff made accurate required disclosures about the closed end fixed rate loan terms prior to the date she purportedly signed the related loan documents, application and origination paperwork.
23. By withholding the production of the loan origination documents, Plaintiff concealed that Ms. Gish had originally applied for a loan that was significantly less-expensive and more flexible than the loan she was ultimately provided. Such features would have made greater loan proceeds available to her, over time, as her home value appreciated. Having a line of credit instead of a lump sum loan also would have enabling her to obtain Medicaid assistance that she needed to pay the cost for home health care workers at the end of her life. As it turned out, of having to spend down her loan proceeds prior to applying for Medicaid caused significant stress, placed her into a precarious financial situation, and limited her ability to obtain important health and caregiving benefits.

24. Plaintiff's actions and inactions concealed that Plaintiff originated a loan that is materially more expensive and disadvantageous to Ms. Gish than what she applied for, and that Ms. Gish did not understand the loan terms. This includes but is not limited to:
- a. Plaintiff disclosed the adjustable interest rate as 3.14 % on May 11, 2009, then disclosed a fixed 0 (zero) percent rate on July 28, 2009, the date of closing, both of which compared favorably to the 5.56 % fixed rate that Ms. Gish has been charged. Such conflicting disclosures makes it difficult for anyone to understand what the interest rate actually is, and particularly confusing for Ms. Gish given her deteriorating health and financial management abilities;
  - b. Plaintiff originated a closed-end loan that disbursed all available proceeds in a lump sum shortly after the closing date. This provided a substantial windfall to Plaintiff, because compounding interest immediately began accruing on the total loan proceeds that were disbursed. In contrast, the line of credit option would have enabled Ms. Gish to avoid being charged interest on the funds until she actually needed them to cover an expense.
  - c. Further, having a line of credit rather than a closed end loan is advantageous to the borrower because the available principle of a HECM line of credit can increase over time, whereas the closed end loan is limited by the value of the home and the age of the borrower at the time the loan is originated. The loan Plaintiff originated did not offer Ms. Gish this benefit, which Ms. Gish would not have understood;

25. In contrast, under the fixed-rate single lump sum disbursement option that Plaintiffs originated for Ms. Gish, borrowers may make a draw on home's equity only one time, and only at closing. Such borrowers are not permitted to make any subsequent draws because the loan and interest quickly consumes the principal limit available.
26. Plaintiff's failure to disclose the loan documents also concealed numerous actions and inactions by Plaintiff that violated federal and state laws and fiduciary duty that Plaintiff owed Ms. Gish that are designed to protect home mortgage borrowers, and especially older borrowers applying for a reverse mortgage, from being sold more expensive and less advantageous loans through prohibited, unfair, deceptive or unconscionable practices.
27. Generally, Plaintiff's actions and inactions during and after the loan origination concealed the high cost of the fixed rate loan sold to Ms. Gish, to her detriment. If further obscured her ability to raise both affirmative and/or defensive legal claims to remedy the harm caused by Plaintiff's actions and inactions.
28. Even if Ms. Gish had the mental ability and financial capacity to understand the complex terms of the reverse mortgage, Plaintiff stated incorrect and/or misleading information about the costs of the loan options and the particular terms of the loan she purportedly signed. Plaintiff failed to make clear, conspicuous, and accurate disclosures that are designed and required by law explicitly to enable prospective borrowers to understand the cost of credit, compare loans, and select the loan product that best serves their needs.

29. Plaintiff's concealment of the loan documents would have alerted Defendant to Plaintiff's inaccurate disclosures and wrongdoing and that mislead Ms. Gish, or any borrower, about the loan costs, making it even more confusing to select the best loan product to meet one's needs. For example, Plaintiff inaccurately made the open-ended adjustable rate line of credit appear to be more expensive than it actually was, and made the closed end fixed rate loan appear less expensive than it actually was.

COUNT ONE  
UNDUE INFLUENCE

30. The allegations of paragraphs 1 through 29 above are realleged.

31. At the time she applied for and obtained the reverse mortgage, Ms. Gish was incapable of understanding the nature or terms of the reverse mortgage and its implication for her long-term financial security and well-being, such as by delaying her ability to apply for Medicaid to obtain needed home health care. Ms. Gish was elderly, and in a weakened physical and mental condition and lacked the mental capacity to understand the loan documents and terms or to evaluate the relative advantages or disadvantages of the different available loan products. She also lacked the mental capacity after the loan documents were signed to understand or recognize Plaintiff's numerous violations of federal and state law or to be able to seek remedies for the harm caused by Plaintiff's violations, including rescission and statutory damages.

32. In recognition of the need to protect vulnerable older borrowers from harm caused by the complexity of reverse mortgage loan, Section 255 of the National Housing Act, 12 USC 1715z-20(d)(2)(B), provides that prospective HECM borrowers must

obtain mandatory housing counseling prior to applying for a federally guaranteed reverse mortgage. HUD's regulations and guidance implementing the statutory counseling requirement are designed to protect elderly individual, many of whom may be unaware of or confused by the counterintuitive features and intricacies of a reverse mortgage, as well as those borrowers who may be unable to fully understand the terms and significance of the mortgage documents they are being asked to sign.

33. Specifically, Section 255(f) requires that adequate counseling be provided to prospective borrowers by HUD-certified counselors. Lenders must not begin processing a HECM loan application unless the borrower presents a valid executed certificate from the approved housing counselor attesting that the statutory counseling requirement has been met.
34. The housing counseling required for HECMs must include certain topics, which are described in the HUD Handbook 4235.1, and the HECM Housing Counseling Protocol, HECM Handbook 7610, App 4. The Housing Counseling Protocol provides:

With the line of credit option, clients can draw varying amounts of money at unscheduled intervals of time. This plan is useful for those clients who want a particular sum of money up-front and would maintain a balance upon which to draw in the future. The remaining available funds in the line of credit will grow at the note rate as it adjusts over time, providing the client access to a larger line of credit over time.

Clients may also choose to draw all of the proceeds at closing. Counselors must caution clients against withdrawing all funds at closing if there is not an immediate need to do so. Clients who draw all proceeds at closing will accrue interest on the loan balance and will not benefit from the credit line growth feature.

*Id.* at 93-94.

35. By its own terms and pursuant to HECM Housing Counseling Protocol, the counseling certificate expires 180 days after the date of the counseling session. In the event the counseling certificate expires prior to beginning to process a loan application, a lender must require a prospective HECM borrower to attend counseling again and obtain a valid (i.e., unexpired) counseling certificate. Moreover, all documents in the loan origination package must be dated no earlier than 120 prior to loan closing—lenders must routinely re-verify application data if too much time has passed. *See* HUD Handbook 4155.1 1.B.1.h.
36. Ms. Gish attended a housing counseling session on January 12, 2009 and obtained a Housing Counseling Certificate with an expiration date of July 12, 2009. Thus, the certificate expired prior to her application for the closed end fixed rate loan, dated July 28, 2009, which was also date of closing.
37. Ms. Gish had previously signed a HECM loan application from Plaintiff on May 11, 2009, for an open-end, adjustable rate, line of credit.
38. Plaintiff advised Ms. Gish by letter in June 2009 that her adjustable rate, open end line of credit HECM loan application had been approved.
39. On or after July 13, 2009, Plaintiff altered the terms of Ms. Gish's loan, changing it to a fixed-rate closed-end loan with a single lump sum distribution up front. These altered loan terms generally match those against which the HECM Housing Counseling Protocol requires counselors to caution prospective borrowers and which HUD Handbook 4235.1 Rev. 1, 6-9(F)(1) requires lenders to encourage

prospective borrowers to avoid.

40. Plaintiff changed the loan terms without explanation, and without complying with routine and required loan application and processing requirements, as established by HUD regulations, guidance and federal and state laws. Such requirements were designed to protect prospective borrowers such as Ms. Gish, who are vulnerable to bait and switch tactics and other abusive lending practices. *See* HLPAs, 58-21B-1 et seq., NMSA 1978. Plaintiff's failure to comply with the requirements for the more expensive and less advantageous loan, while complying with many of the disclosure requirements for the less expensive and more flexible open ended line of credit was knowing and/or reckless, and/or intentional. It also failed to comply with Plaintiff's fiduciary duty to protect Ms. Gish's interests in the origination of a mortgage loan.
41. Plaintiff failed to provide Ms. Gish with an adverse action notice or a notice of counteroffer, required by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(d)(2)(B); Reg. B, 12 C.F.R. §§ 1002.9(a)(1)(i) and 1002.9(a)(2), which would have alerted her to the change of terms.
42. HUD Handbooks 4235.1 Rev. 1, 4-7 and 4155.1 Rev. 5, 3-6, requires a lender to obtain a valid application prior to the closing date, provide a blank copy of the first note and loan agreement, and explain the provisions of the loan documents. Within three days of an application, HUD requires a lender to provide an updated Good Faith Estimate of closing costs when the interest rate changes *Id.* (See also 12 CFR § 1024.7(f). Plaintiff did not comply with any of these provisions designed to protect vulnerable older borrowers.

43. Plaintiff recklessly and intentionally failed to comply with the loan origination requirements when it changed the loan terms to a fixed-rate closed-end loan with a single lump sum distribution. The provisions of the open and closed end loans are materially different, such that explaining the open-ended loan is insufficient to alert a borrower to the terms of the fixed rate loan.
44. Not only were the altered loan terms materially different, they had terms which the HECM Housing Counseling Protocol requires counselors to caution prospective borrowers against. They are also less advantageous to Ms. Gish than the terms for which she applied, in violation of Plaintiff's fiduciary duty to Ms. Gish pursuant to 58-21B-20 NMSA 1978.
45. Plaintiff also failed to provide Ms. Gish any other written disclosure or information that accurately and conspicuously memorialized the altered terms of the mortgage loan in advance of closing; none of the loan documents related to the altered, closed end fixed rate loan terms are dated earlier than the date of closing; July 28, 2009. Plaintiff thereby deprived Ms. Gish of any opportunity to review and seek to understand the altered loan terms.
46. Prior to receiving and processing an application based on the altered loan terms, Plaintiff was required, but failed to obtain a valid (i.e., unexpired) housing counseling certificate. Ms. Gish was not offered and did not attend an additional counseling session as mandated by federal law to review the altered loan terms. Plaintiff's failure to refer Ms. Gish to required counseling both prevented her from discussing the altered loan terms, which were far less beneficial to her than the loan for which she had originally applied, with a qualified, independent HUD

certified housing counselor, and eliminated yet another opportunity to alert Ms.

Gish that Plaintiff had changed the loan terms, to her detriment.

47. Specifically, the HUD Housing Counseling Protocol requires counselors to caution borrowers against drawing all the loan funds up front and to explain that a fixed rate loan may only be offered if all funds are drawn up front, making them more expensive and exposing the borrower to greater risk. *See* HUD Handbook 7610, *supra*, App. 4 at 93-94. Specifically, HUD requires that:

When discussing a fixed-rate reverse mortgage, counselors must make clients aware that some lenders may set the interest rates at a level that makes the line of credit with a full, up-front draw at closing the only feasible option. *Drawing the entire loan balance at closing exposes the borrower to many risks, including the lack of future availability of loan proceeds from credit line growth. Additionally, once the full amount is drawn, the borrower will pay interest on that large loan balance for the life of the loan. This may create a significant and unnecessary expense if the borrower does not need all the funds at closing. Over time, a fixed-rate loan which avoids the risk associated with an adjustable interest rate may be less advantageous to the borrower than an adjustable-rate loans which maximizes the amount of equity available up-front and has a lower initial rate.*

*Id.* at App. 4, 103 (emphasis added).

48. Plaintiff was also required by the N.M. Home Loan Protection Act (HLPA) § 58-21A-1 et seq., NMSA 1978, to ensure that the altered loan terms provided a net benefit to Ms. Gish. Plaintiff knowingly failed to ensure that the altered loan provided Ms. Gish with a net benefit. Moreover, the altered loan could not have met the standard, considering that HUD required the counselors to caution borrowers about the substantial expense and risk of such loans. *See* HUD Housing Counseling Protocol, *supra* at 93-94, 103. Plaintiff's failure to ensure that the

loan provided her a net benefit concealed from Ms. Gish that the altered loan was not in her best interest.

49. Plaintiff scheduled and rescheduled the home appraisal and loan closing for Ms. Gish several times because Ms. Gish was too ill to participate, putting Plaintiff specifically on notice of her vulnerability. For example, on July 27, 2009, she contacted Plaintiff to tell them she was ill and could not attend. The closing was rescheduled for July 28, 2009.
50. On July 28, 2009, Plaintiff electronically transmitted a stack of documents to the closing agent for Ms. Gish to sign that included loan application documents reflecting the altered terms, none of which had previously been delivered or disclosed to her. Plaintiff caused these loan application documents to be presented to Ms. Gish for signature. Plaintiff did not alert Ms. Gish at or before the settlement that the loan application and closing documents she was signing had been materially altered, to her detriment. Plaintiff failed to explain to Ms. Gish the differences in the loan terms she was presented with to sign.
51. Plaintiff additionally included documents in the closing package that stated conflicting and affirmatively misleading information about the loan terms. For example, at least one document, the General Loan Acknowledgement, signed on July 28, 2009, indicated that the interest rate on the loan was zero (0.00) percent. Other documents indicated the interest rate was fixed at 5.56 percent. The loan for which Ms. Gish initially applied, however, carried an adjustable rate of 3.14 percent.

52. Plaintiff further interfered with Ms. Gish's opportunity to recognize the altered loan terms by misspelling her name as "Mariam Lynette Gish" instead of "Miriam Lynette Gish" in every place in the stack of closing documents that Ms. Gish's name was preprinted. Plaintiff knew about the error at least 4 hours prior to the scheduled loan closing but failed to correct and retransmit the closing documents to the closing agent. As a result, in addition to signing her name repeatedly, Ms. Gish was also required to cross off each instance in which her preprinted name was misspelled and to handwrite and initial her full legal name. Plaintiff's error required Ms. Gish to focus on writing her name rather than on understanding the terms of the loan documents she was instructed to sign.
53. Plaintiff knew or could have known by the reasonable fulfillment of its statutory and fiduciary obligations that Ms. Gish was incapable of fully understanding the terms and conditions of the reverse mortgage she entered, or even what those terms were because of the inaccurate and inconsistent documents presented to her at closing.
54. Plaintiff took unfair advantage of Ms. Gish's diminished mental and physical capabilities to influence her to execute a reverse mortgage loan that she did not understand and was not in her best interest, and that provided Plaintiff a substantial monetary benefit.
55. Plaintiff also took unfair advantage of Ms. Gish's diminished mental and physical capabilities to prevent her or Defendant from obtaining the loan documents. Plaintiff's action and inactions in concealing the loan documents, and Ms. Gish's diminished capacity, should prevent any statute of limitations from beginning to

run until the loan documents were actually produced and the wrongdoing could first be discovered.

56. Defendant is entitled to a declaration that the loan was not consummated and is unenforceable because the terms were indefinite, and Ms. Gish could not have understood or agreed to the terms, and; Defendant is excused from performing any of her obligations under this contract.

COUNT TWO  
VIOLATION OF NEW MEXICO'S UNFAIR PRACTICES ACT

57. The allegations of paragraphs 1 through 57 above are realleged.
58. Defendant brings this claim pursuant to New Mexico's Unfair Practices Act (UPA), §57-12-2 et seq. N.M.S.A. 1978.
59. Pursuant to New Mexico's Unfair Practices Act (UPA), "unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." §57-12-3 N.M.S.A. 1978.
60. All actions or transactions forbidden by a regulatory body of New Mexico or the United States, are subject to the Unfair Practices Act. §57-12-7 NMSA 1978, and may constitute *per se* violations of the UPA.
61. Plaintiffs' action or inaction in violation of the HLP, § 58-21A-4 et seq., NMSA 1978, constitutes an unfair, deceptive, and/or unconscionable trade practice. Specifically, Plaintiff is a lender covered by the HLP. The closed-end HECM loan that Plaintiff originated for Ms. Gish is a covered loan under § 58-21A-3(J) of the Act. Plaintiff violated the act by:
- a. Knowingly and/or recklessly originating a loan that was not in her best interest and failed to meet the requirements under federal and state law;

- b. failing to evaluate or ensure that the altered loan provided Ms. Gish a net tangible benefit pursuant to § 58-21A-4;
  - c. Failing to provide notice that complies with NMSA 56-21A-6 prior to service of the foreclosure complaint on October 28, 2015;
62. Plaintiff's actions or inactions in violation of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 et seq., and Regulation Z, 12 C.F.R. §§1026, et seq., are *per se* violations of the UPA and/or the HLP.
63. Plaintiff's actions and inactions in violation of TILA 15 U.S.C. §§ 1601 et seq., Regulation Z, 12 C.F.R. §§1026, et seq., constitute unfair and/or deceptive trade practices for reasons including, but not limited to the following:
- a. Plaintiff failed to provide essential disclosures to Ms. Gish about the terms and conditions of her loan, which it was affirmatively obligated to disclose to enable potential borrowers to understand and evaluate the cost of credit and to compare credit products;
  - b. Plaintiff's failure to provide the mandated disclosures withheld essential information and mislead Ms. Gish about the terms and costs of the loan products, causing confusion and significantly increasing the cost of the loan for Ms. Gish, with terms favorable to Plaintiff.
64. Plaintiff's violations of TILA, 15 U.S.C. §§ 1601 et seq., Regulation Z, 12 C.F.R. §§1026, et seq., and the HLP constitute unconscionable trade practices for reasons including, but not limited to the following:
- a. Plaintiff took advantage of the lack of knowledge, ability, experience or capacity of Ms. Gish to a grossly unfair degree; or

- b. Plaintiff's actions and inactions resulted in a gross disparity between the value received by a person and the price paid.
65. Plaintiff's violations of TILA disclosure requirements prevented Ms. Gish from timely having clear, conspicuous, and accurate information that is material to a borrower being able to understand and compare loan terms. Plaintiff violated TILA in ways including, but not limited to, the following
- a. provided Ms. Gish, an initial Total Annual Loan Cost (TALC) rate statement for the open-end adjustable rate line of credit that materially overstated the cost of the credit for which she had applied, in violation of 15 U.S.C. § 1648 and 12 C.F.R. § 226.33 (now § 1026.33)<sup>1</sup>;
  - b. failed to provide Ms. Gish with a TALC rate statement reflecting the cost of the fixed rate lump sum closed-end loan at least 3 days prior to loan closing as required by 15 U.S.C. § 1648, 12 C.F.R. § 226.33; provided a TALC statement to Ms. Gish at closing that incorrectly and materially understated the cost of the closed-end fixed rate lump sum credit, in violation of 15 U.S.C. § 1648, 12 C.F.R. § 226.33, which made the loan cost appear to be a better bargain than it actually was.
  - c. failed to provide Ms. Gish an itemization of the Amount Financed within 3 days of altering the loan terms or at least 7 days prior to closing, as required by 12 C.F.R. § 226.18(c);

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<sup>1</sup> In 2010, Congress transferred implementation of the Truth in Lending Act and other consumer protection statutes to the Consumer Financial Protection Bureau (CFPB). The CFPB adopted Regulation Z without change, other than to renumber the provisions as 12 C.F.R. §§ 1026 et seq., rather than 12 C.F.R. §§ 226 et seq. This complaint uses the numbering in effect at the time that the loan was originated.

- d. Failed to provide a statement initialed by Ms. Gish informing her of her right to obtain, upon a written request, a written itemization of the amount financed as required by 15 U.S.C. § 1638(a)(2)(B), 12 C.F.R. § 226.18(c);
  - e. Failed to make accurate disclosure of material information in excess of error tolerance limits, including the Finance Charge and Amount Financed, in violation of 15 U.S.C. § 1638(a)(3), 12 C.F.R. § 226.18(c);
  - f. Provided a payment schedule on the TILA disclosure statement that impermissibly varies from that stated on the Note in violation of § 15 U.S.C. 1638(a)(6), 12 C.F.R. § 226.18(c);
66. Plaintiff's actions or inactions of failing to provide notice of adverse action or counteroffer following its approval of the adjustable rate open end loan and alteration of the loan terms to more expensive, riskier credit as presented at closing violated the ECOA, 15 U.S.C. § 1691(d)(2)(B); Reg. B, 12 C.F.R. §§ 1002.9(a)(1)(i) and 1002.9(a)(2), are *per se* violations of the UPA, and constitute unfair, deceptive and/or unconscionable trade practice. If Plaintiff had provided such notice as required, it would have alerted Ms. Gish that the loan terms had changed, and failing to do so deprived her of an important opportunity to review and understand the loan terms.
67. Plaintiff is required by 24 CFR § 203.5 to be knowledgeable about and comply with all HUD regulations and HUD handbooks and guidance in performing its due diligence as a Direct Endorsement lender of HECM mortgages. Pursuant to § 203.5, "Compliance with these guidelines is deemed to be the minimum standard of due diligence in underwriting mortgages." Failure to comply with the

minimal standard for originating and underwriting mortgage loans is unfair, deceptive, and/or unconscionable.

68. Plaintiff knew, or should have known, that failure to comply with the requirements enacted into law to protect borrowers, including the HLPA, TILA, RESPA, ECOA, and HUD regulations and Handbooks, amount to unfair and/or deceptive practices in violation of the UPA.
69. Plaintiff's actions or inactions in violation of the Real Estate Settlement Procedures Act (RESPA), 15 U.S.C. §§ 2601 et seq., and Regulation X, 12 C.F.R. § 1024 et seq., are *per se* violations of the UPA, and constitute unfair and unconscionable trade practice. Specifically, Plaintiff:
  - a. Failed to include expenses charged at closing on the Good Faith Estimate provided to Ms. Gish when she applied for the open end, adjustable rate line of credit, including \$428 for a survey;
  - b. Understated on the initial HUD-1 that the costs for the closing agent would be \$20 for courier service, rather than \$40 and despite using electronic transmission of the documents to the closing agent
  - c. Failed to provide an updated HUD-1 at least one day prior to closing, as required by HUD Handbook 4235.1, § 6-9;
  - d. Charged fees in excess of the actual cost of the services provided, in violation of 15 U.S.C. § 2607. Specifically, Plaintiff:
    - i. charged \$160.00 for a document preparation fee, despite having prepared the documents itself and transmitted them electronically to the closing agent;

- ii. charged \$19.00 for a flood certificate, which Plaintiff obtained from its wholly owned subsidiary, although Ms. Gish's home was not in a flood plain and HUD does not permit such a fee to be charged, *see* HUD Handbook 4235.1 6-13;
  - e. Failed timely to provide Defendant with all loan origination documents within 30 days of receiving a Qualified Written Request (QWR) pursuant to her request in March of 2016, and following Defendant's attorney's QWR in March 2016, in violation of 12 C.F.R. § 2605(e);
  - f. Failed to provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date, within a reasonable time, but in no case more than seven business days after receiving a written request, in violation of 12 C.F.R. § 1026.36(c)(3); Plaintiff provided a loan payoff statement to Defendant that significantly overstated the payoff amount, and significantly delayed delivery of the statement, thereby increasing the loan balance through the continued accrual of interest and servicing fees.
  - g. failed to provide a revised Good Faith Estimate 7 days prior to settlement disclosing the new interest rate and terms, pursuant to 12 CFR § 1024.7(f).
70. Plaintiff's actions and inactions that failed to satisfy numerous HUD imposed requirements for originating HECM mortgages, and its false certifications that it met such requirements, violate the Federal Trade Commission Act, are per se violations of the UPA, and/or constitute unfair, deceptive and/or unconscionable trade practices pursuant to the UPA.

71. Plaintiff utilized deceptive, misleading, and/or unconscionable means to advertise and/or originate of reverse mortgage loans, falsely claiming, among other statements, that it complied fully with all the consumer protections and other requirements required by federal law to enable it to originate HECM loans.
72. Plaintiff did not reveal to Ms. Gish that it was violating laws and rules pertaining to HECM mortgages, which was deceptive.
73. Plaintiff materially benefited from falsely certifying compliance with, and knowingly holding itself out as complying with loan origination requirements that purported—but failed—to satisfy all requirements necessary for the reverse mortgage loans. Specifically, Plaintiff failed to comply with various HUD HECM program origination requirements designed to protect elderly borrowers, including, for example:
  - a. Failed to comply with TILA, RESPA, and ECOA, as alleged above, as required by the National Housing Act and 24 C.F.R. § 206 et seq.;
  - b. Originated a lump sum payment loan in violation of HUD Handbook 4235.1, section 5-9, which permits such loans in only two circumstances: 1) to satisfy an existing mortgage, or; 2) to pay off a contractor who made repairs on the home in exchange for a lien to be paid at closing. Neither of these conditions applied to Ms. Gish, contrary to Plaintiff's false indication on the loan application that the loan was a refinance;
  - c. Failed to submit a request to HUD for a new firm commitment for insurance, as required by HUD handbook 4325.1 Rev. 1, 6-9, after the adjustable rate loan application, which had been approved, was changed to a fixed rate and

- the interest rate increased by greater than one percent;
- d. Failed to obtain a valid housing counseling certificate prior to processing a HECM loan application in violation of 12 U.S. Code § 1715z-20, section 255(d) of the National Housing Act, and regulations at 24 CFR § 206.41;
  - e. Failed to obtain an appraisal of the property following the death Ms. Gish, in violation of 24 C.F.R. § 206.125, as necessary to enable Plaintiff to determine and notify Defendant what amount was necessary to pay off the loan;
74. Defendant is entitled to damages under the UPA, including but not limited to statutory damages, actual damages, special enhanced damages in the amount of all finance charges and fees paid by Ms. Gish, treble damages, and the amounts that Plaintiff would have been required to refund had Defendant been able to review the loan file, timely identify the numerous lending and disclosure violations, and assist Ms. Gish to rescind the loan, as well as attorney's fees and costs. In the alternative, Defendant is entitled to recoupment of damages under the UPA to offset the current loan balance.

COUNT THREE  
RECOUPMENT FOR VIOLATIONS OF TILA

75. The allegations of Paragraphs 1 through 74 are realleged.
76. In addition to being violations of N.M. UPA, Plaintiff's violations of TILA give rise to damages that may be raised in recoupment as a set off to any award that Plaintiff may be entitled to. 15 U.S.C. § 1640(e), specifies: "This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the

occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.”

77. Plaintiff’s concealment of documents that would have alerted Defendant to their wrongdoing also provides for equitable tolling of TILA claims, as does Ms. Gish’s diminished capacity and/or lack of capacity.
78. Specifically, Defendant is entitled in recoupment to actual damages, statutory damages, attorney’s fees, costs, declaratory and injunctive relief, and any remedy permitted by law or equity for Plaintiff’s actions and inactions in withholding or failing to provide mandatory foreclosures

COUNT FOUR  
VIOLATION OF RESPA

79. The allegations of Paragraphs 1 through 78 are realleged.
80. Plaintiff failed to provide documents requested pursuant to two separate Qualified Written Requests delivered to Plaintiff in March 2016.
81. Plaintiff has a duty under RESPA to respond on a timely basis to requests for information. 12 U.S.C. § 2605(e); Reg. X, 12 C.F.R. §§ 1024.35, 1024.36.  
Plaintiff refused to provide the information following Defendant’s request for loan files in 2009, and failed to provide all loan origination documents and statements in response to Defendant’s two requests in March of 2016
82. If Plaintiff had not delayed and failed to comply with its obligation, Defendant would have been able to discover the statutory violations that would have enabled her to rescind the loan and better protect her Aunt from difficulty in affording home health care workers being unable to afford adequate home health care

workers and being forced to apply for Medicaid. Plaintiff's non-compliance also caused the interest and fees charged accrue well in excess of the equity in the home.

83. Plaintiff's failure to produce the requested documents while also pursuing a foreclosure action, demonstrates a knowing and intentional pattern and practice of non-compliance with its obligations pursuant to RESPA to the detriment of the Estate.
84. Plaintiff also failed to provide a timely pay-off statement, required by 15 U.S.C. § 1639g; Reg. Z, 12 C.F.R. § 1026.36(c)(3). To the extent Plaintiff provided any pay off statement, it is inaccurate.
85. Plaintiff is liable to Defendant for actual damages, costs, and attorney fees; plus \$2000 per violation for Plaintiff's pattern and practice of failing to respond to the Defendants various requests for information.

COUNT FIVE  
FRAUDULENT CONCEALMENT

86. The allegations of Paragraphs 1 through 85 are realleged.
87. By intentionally failing or refusing to timely provide Defendant with a true and complete copy of her Aunt's entire loan file, Plaintiff fraudulently concealed the nature and extent of the problems with her Aunt's loan and prevented Defendant from timely rescinding the loan transaction pursuant to the Regulation Z (12 C.F.R. § 226.15);
88. Defendant is entitled to relief in the form of equitable rescission, damages in recoupment, including but not limited to statutory damages, actual damages,

special enhanced damages in the amount of all finance charges and fees paid by Ms. Gish, and the amounts that Plaintiff would have been required to refund had Defendant been able to review the loan file, timely identify the numerous lending and disclosure violations, and assist Ms. Gish to rescind the loan.

89. Plaintiff further is concealing that it is not entitled to enforce the note and mortgage based on the allegations in the foreclosure complaint that it is a Holder in possession or, alternatively, a holder of bearer paper, on information and belief. Possession of the note and mortgage are not sufficient to prove ownership of a non-negotiable HECM note and a right to enforce a HECM mortgage.

COUNT SIX  
INVASION OF PRIVACY

90. The allegations of Paragraphs 1 through 89 are realleged.
91. New Mexico recognizes a claim for improper collection activity that arises out of the tort of invasion of privacy. Plaintiff knowingly and intentionally sought to collect a debt that was not owed, or not owed in the amount sought in the payoff statement Plaintiff provided to Defendant. Specifically, Plaintiff:
- a. Included settlement charges not permitted by HUD, including, for example, a flood certification fee, document preparation fee, and unreasonable appraisal fee that exceeded the reasonable and customary charge for an appraisal;
  - b. Provided an untimely loan payoff statement that significantly overstated the payoff balance because it asserted a right to collect 1.5 times the maximum claim amount rather than the outstanding (but overstated) principal balance reflected in its records;
  - c. Failed to provide Defendant with notices required by HUD and the HLP

prior to seeking to foreclose, eliminating an opportunity for Defendant to seek to resolve the dispute in a timely manner and without facing the interference with her privacy and reduction of value to the estate's property;

- d. Failed to send account statements and other official notices to Defendant's address, rather than or in addition to the property address;
  - e. Delayed or failed to obtain an appraisal upon Defendant informing Plaintiff that Ms. Gish had died, making it impossible for Plaintiff to determine accurately how much Defendant would be required to pay pursuant to HUD rules; and failed to send her a pay-off quote based upon 95% of the appraised value.
  - f. Included grossly inflated and spurious fees and charges in the purported loan balance for property preservation and maintenance, attorney's fees for a previous foreclosure that Plaintiff filed but then then voluntarily dismissed because it could not state a valid claim;
  - g. Included excessive interest and servicing fees that have accrued due to the significant delay in Plaintiff responding to requests for the loan file;
  - h. Sought recovery of post-judgement interest to which it is not entitled by contract or statute and which HUD regulations do not permit Plaintiff to seek.
92. Defendants actions or inactions violated the Defendant's privacy by asserting a right to payment that is not supported by fact or law and grossly overstates any amount purportedly due, causing Defendant to have to defend this public foreclosure action and assert facts in this counterclaim to carry out her fiduciary duty protect the interests of the estate.

93. Defendant is entitled to relief in the form of actual and compensatory damages, attorneys fees, and other remedies as are just and equitable.

COUNT SEVEN  
COMMON LAW FRAUD

94. The allegations of Paragraphs 1 through 93 are realleged.
95. A party seeking to foreclose a mortgage must own or control the right to collect the underlying debt. In New Mexico and most other states, the enforcement of a promise to pay a note by foreclosing on a security interest is governed by N.M. Stat. Ann. § 55-9-1 et seq., contrary to plaintiff's assertion in its complaint.
96. Plaintiff falsely and fraudulently asserted that it is entitled to foreclose the mortgage on the Estate's property as a holder in due course. Plaintiff is not, and cannot be a holder in due course with respect to enforcement of a HECM note, however, because the holder in due course concept only applies to negotiable instruments that have been successfully negotiated.
97. A HECM note and mortgage do not meet the definitional requirements necessary to be negotiable instruments. *See* N.M. Stat. Ann. § 55-3-104. Specifically, although this particular note is payable to order at the time it was issued, a HECM note fails to meet the remaining three (3) key defining characteristics, all of which are necessary for a note to be transferred as a negotiable instrument. *See* N.M. Stat. Ann. § 55-3-104. Specifically, the HECM note:

(1) does not contain an unconditional promise to pay a fixed amount of money. HECM loan balances increase daily by the amount of compounding interest that accrues and monthly in the amount of mortgage servicing fees and mortgage insurance premiums. Moreover, the loan is a non-recourse

debt, for which the borrower can never be required to pay more than the value of the house or the loan balance, whichever is lower;

(2) is not payable on demand or at a definite time. In fact, by its express terms, a HECM note is only payable upon breach of a covenant of the mortgage or the death of the borrower, a time that is inherently unknowable, and;

(3) states certain undertakings or instructions by the promisor to do action in addition to the payment of money, because it requires the borrower to maintain the property, comply with HUD statutory and regulatory requirements, including occupying the property as the borrower's principal residence, remaining current on taxes, insurance, and other property charges, and the obligations and rights of the parties are not contained within the four corners of the note or mortgage: the loan documents also incorporate the loan agreement and first and second mortgages, among other terms. See § 55-3-104(a)(3).

98. Because the note is not a negotiable instrument, the concept of enforcement as a holder under Article 3 is not relevant. Plaintiff's assertions about its legal right to enforce the note are false and fraudulent.
99. Rather, in order to seek to enforce the note, Plaintiff must show that it is the true owner of the note. To sell a promissory note under Article 9, the seller and buyer must enter into a signed agreement that includes a description of the promissory notes, the buyer must give value, and the seller must have rights in the property being transferred. N.M. Stat. Ann. § 55-9-203(b). Plaintiff has not alleged facts

necessary to establish its current ownership interest in the note, or its right to enforce the note. Nor could it do so in this case, because contrary to the contrary to the facial allegations made in its complaint that it has a right to enforce because that right has been transferred to it from another entity (i.e., that its alleged right to enforce flows from its purported—but inaccurate—status as a holder in due course), Plaintiff has denied in discovery that it ever sold or assigned the note, notwithstanding that the note contains an indorsement in blank to enable it to pool the mortgage for a security guaranteed by Ginnie Mae.

100. Plaintiff's assertion that it has possession of the original note is false and fraudulent and made with the attempt to collect a debt that it is not entitled to enforce, was obtained by fraud and undue influence, and which unjustly enriches Plaintiff.

Wherefore, Defendant hereby prays that the court declare that the note is rescinded, order the Plaintiff to release the lien, and that it and its successors and assigns be enjoined from seeking to enforce the note or security interest or pursuing claims based thereon against Defendant, the Estate, or the property, *in rem* or otherwise, enter an award of equitable and monetary relief including but not limited to recoupment, actual and statutory damages, special damages, and other relief as this Court finds fair and just, in an amount to be proved at trial, and award attorney's fees, costs, and expenses in favor of Defendant.

Respectfully submitted,

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I HEREBY CERTIFY that on this 5th day of November, 2018, I filed the foregoing electronically through the Odyssey File and Serve system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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