

judgment on the pleadings  
FRCP 12(c)  
wrongful foreclosure  
judicial notice  
FRE 201  
judicial estoppel  
ORS 86.780  
ORS 86.770(1)  
Oregon Trust Deed Act (OTDA)  
declaratory judgment  
violation of automatic stay  
§ 362(k)  
violation of order granting  
relief from stay  
breach of contract  
Fair Debt Collection Practices  
Act (FDCPA)  
15 U.S.C. § 1692  
ORS 646.639  
Unlawful Trade Practices Act  
(UTPA)  
ORS 646.638(1)  
elder abuse  
ORS 124.100(2)  
intentional infliction of  
emotional distress

Harris v. Wells Fargo Bank, Adversary No. 12-3113  
James E. Harris, Case No. 09-39428

10/04/2013 elp

Unpublished

Debtor filed this action for wrongful foreclosure and other relief relating to the servicing and foreclosure of the trust deed on debtor's house. Defendants sought judgment on the pleadings on all claims, and debtor sought partial summary judgment on some of the claims.

The court took judicial notice of a number of documents related to the deed of trust. The court first held that debtor was judicially estopped from pursuing prepetition claims, because he had failed to disclose any of those claims in his bankruptcy schedules, and had not sought to amend to include the claims. In fact, he had moved to reopen his case to obtain a discharge the day after he had filed an action in state court for wrongful foreclosure.

As for the postpetition nonjudicial foreclosure, debtor waited too long to challenge the sale. Debtor did not bring his

wrongful foreclosure action until six months after the foreclosure sale had occurred and the trustee had recorded the trustee's deed. Under Oregon law, the recording of a trustee's deed is final as to a bona fide purchaser. Because the sale to a BFP had occurred and the deed recorded before debtor brought this action, the foreclosure sale was final and could not be set aside.

The court then considered debtor's other claims. The motion for judgment on the pleadings was granted on debtor's claim for declaratory judgment, because it merely duplicated his other claims. Debtor was not entitled to damages for his claims for violation of the automatic stay or of the order granting relief from stay, because the damages he sought arose from the foreclosure sale, which could not be challenged after the sale was final.

The court rejected debtor's argument that his breach of contract claim should survive defendants' motion; the damages he sought were caused by his default and the final foreclosure sale, which could no longer be challenged.

Debtor's claims under the state and federal Fair Debt Collection Practices Acts survived to the extent that he sought damages for postpetition conduct. He was required to replead facts to support his allegation of damages for multiple known instances of wrongful conduct.

Debtor's remaining claims failed. The claim for violation of the Oregon Unlawful Trade Practices Act was barred because debtor was judicially estopped from claiming damages for prepetition conduct, the damages he sought for postpetition conduct were caused by his default, and emotional distress damages are not recoverable under the UTPA. The claim for elder abuse failed because it was based on his claim that the foreclosure was wrongful, and it was too late for debtor to challenge the foreclosure. The claim for intentional infliction of emotional distress failed, because much of the conduct of which debtor complained occurred prepetition, and debtor is judicially estopped from seeking those damages, and the alleged postpetition conduct was not an extraordinary transgression of the bounds of socially tolerable conduct that would be actionable under state law.

The court remanded the wrongful eviction and counterclaim for ejectment to state court.

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9 UNITED STATES BANKRUPTCY COURT  
10 FOR THE DISTRICT OF OREGON

11 In Re: )  
12 JAMES E. HARRIS, ) Bankruptcy Case No.  
13 Debtor. ) 09-39428-elp7  
14 \_\_\_\_\_ )  
15 JAMES E. HARRIS, ) Adversary No. 12-3113  
16 Plaintiff, ) MEMORANDUM OPINION  
17 v. )  
18 WELLS FARGO BANK, N.A.; SAND CANYON )  
19 CORPORATION; AMERICAN HOME MORTGAGE )  
20 SERVICING, INC.; FIDELITY NATIONAL )  
21 TITLE INSURANCE COMPANY; and )  
22 EVERETT CUSTOM HOMES, INC., )  
23 Defendants. )

24 Debtor James Harris ("debtor") brought this action, originally in  
25 state court and then removed to bankruptcy court, seeking damages and  
26 other relief related to what he alleges was a wrongful foreclosure of his  
property. The Fourth Amended Complaint ("FAC") alleges eleven causes of

1 action arising under state and federal law.<sup>1</sup> Defendants, who are the  
2 lender, its successors, the trust deed trustee, the title company, and  
3 the purchaser at the foreclosure sale, all move for judgment on the  
4 pleadings on all claims.<sup>2</sup> Debtor seeks partial summary judgment on some  
5 of the claims on the issues of whether the foreclosure was wrongful,  
6 reserving for trial other allegations and the determination of damages.

#### 7 FACTS

8 The documents attached to the FAC show the following.

9 In 2005, debtor borrowed \$160,000 from eHome Credit Corp. ("eHome")  
10 to refinance residential real property. The loan was evidenced by a  
11 promissory note ("the note"), FAC Exh. 1, and was secured by a deed of  
12 trust. FAC Exh. 2.

13 Shortly thereafter, Popular Warehouse Lending, LLC ("PWL") sent a  
14 Bailee Letter to Option One Mortgage Corporation ("Option One"), in which  
15 it, at the request of eHome, offered to sell the note to Option One.  
16 Option One purchased the note, and eHome issued a Corporation Assignment

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18 <sup>1</sup> Debtor alleges claims for declaratory relief, quiet title,  
19 unlawful foreclosure, violations of the bankruptcy stay and relief from  
20 stay and confirmation orders, breach of contract, federal and state  
21 unlawful debt collection practices, unlawful business and trade  
22 practices, elder abuse, wrongful eviction, and intentional infliction of  
23 emotional distress.

24 <sup>2</sup> Defendant Sand Canyon Corporation, the successor in interest to  
25 Option One Mortgage Corporation, filed a motion for judgment on the  
26 pleadings. Debtor has resolved his claims with Sand Canyon, and the  
claims against that defendant have been dismissed. Sand Canyon  
accordingly withdrew its motion for judgment on the pleadings and debtor  
withdrew his motion for partial summary judgment as to Sand Canyon.  
Therefore, any reference to "defendants" in this memorandum opinion will  
refer to all defendants except Sand Canyon.

1 of Deed of Trust to Option One. That trust deed, dated September 19,  
2 2005, was recorded on April 9, 2007. FAC Exh. 5.

3 Early in 2006, debtor's loan was pooled with other loans and  
4 securitized in the Option One Mortgage Loan Trust 2006-1. In connection  
5 with the securitization, Option One entered into a Pooling and Servicing  
6 Agreement with Option One Mortgage Acceptance Corporation ("OOMAC") and  
7 Wells Fargo Bank, N.A. ("Wells Fargo"). That agreement provided that  
8 OOMAC assigned to Wells Fargo as trustee the pool of mortgage notes,  
9 including debtor's. FAC Exh. 6. On January 20, 2006, Option One and  
10 OOMAC entered into a Mortgage Loan Purchase Agreement ("Purchase  
11 Agreement") through which Option One sold and assigned to OOMAC all of  
12 its right, title and interest in the mortgage loans contained on a  
13 schedule of loans, including debtor's mortgage loan. FAC Exh. 6 at 6.  
14 That agreement also provided that Option One would, on behalf of OOMAC,  
15 deliver to the trustee the original mortgage notes that were being sold.  
16 Two years later, on July 23, 2008, Option One executed an Assignment of  
17 Deed of Trust transferring debtor's trust deed to Wells Fargo as trustee  
18 for the Option One Mortgage Loan Trust 2006-1. FAC Exh. 7. That  
19 assignment was recorded a week later. Id.

20 In the meantime, debtor defaulted on the loan and, in June 2007,  
21 First American Title Insurance Company ("First American") began the non-  
22 judicial foreclosure process. FAC Exh. 8 at 5. Debtor alleges that he  
23 filed a state court action to stop the foreclosure. In any event, in  
24 late 2008, debtor entered into a loan modification agreement with  
25 American Home Mortgage Servicing, Inc. ("AHMSI") as servicer on the loan.  
26 Debtor alleges that his state court action was settled or dismissed.

1 In July 2009, debtor again defaulted, and non-judicial foreclosure  
2 proceedings were again initiated. Before the foreclosure sale could  
3 occur, debtor filed a chapter 13 petition in November 2009 to stop the  
4 foreclosure. His chapter 13 plan, which provided for cure of the  
5 mortgage default through the plan, was confirmed in March 2010.

6 In December 2010, after debtor failed to make required adequate  
7 protection payments, debtor stipulated to relief from the automatic stay  
8 in this court to allow Wells Fargo to foreclose on the property. FAC  
9 Exh. 17, 18. Fidelity National Title Insurance Company ("Fidelity") as  
10 successor trustee sold the property on May 9, 2011, at a foreclosure sale  
11 to Everett Custom Homes, Inc. ("Everett") for \$195,000, a bona fide  
12 purchaser.<sup>3</sup> The trustee's deed was issued and was recorded on May 18,  
13 2011. FAC Exh. 21.

14 Debtor alleges various types of misconduct by Wells Fargo, AHMSI,  
15 and Fidelity in connection with the servicing of the loan and the  
16 foreclosure of the property. Among other things, he alleges that,  
17 throughout the life of the loan (both pre- and postpetition) and  
18 including in connection with the loan modification, defendants provided  
19 improper customer service, and improperly added interest, fees, and costs  
20 that were not authorized under the loan documents. He also alleges that  
21 the attempted and completed foreclosures were improper because there were  
22 unrecorded assignments of the trust deed in violation of Oregon law, and  
23 because the foreclosures were based on falsely recorded assignments of  
24 the trust deed.

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25  
26 <sup>3</sup> Debtor does not allege or argue that Everett was not a bona fide purchaser.

1 On May 20, 2011, debtor converted his chapter 13 case to chapter 7.  
2 In his conversion documents, he stated his intention to surrender the  
3 real property that had been foreclosed. He did not list in his schedules  
4 any claims against any of the defendants in this case.

5 The bankruptcy case was closed in August 2011 without entry of  
6 discharge, because debtor failed to file his financial management  
7 certificate.

8 Three months later (and six months after the foreclosure sale), on  
9 November 14, 2011, debtor filed a wrongful foreclosure action in state  
10 court. The next day, debtor moved to reopen his bankruptcy case. The  
11 case was reopened, debtor filed his financial management certificate, and  
12 discharge was entered and the case closed again on November 15, 2011.

13 In late 2011, Everett commenced a forcible entry and detainer  
14 ("FED") action to evict debtor. The wrongful foreclosure and FED actions  
15 were consolidated in state court. On motion of Fidelity, the bankruptcy  
16 case was reopened and debtor's complaint removed to this court. After  
17 the pleadings were completed, defendants moved for judgment on the  
18 pleadings on all claims, and debtor moved for partial summary judgment.

#### 19 LEGAL STANDARDS FOR MOTIONS

20 A party may move for judgment on the pleadings after the pleadings  
21 are closed. Fed. R. Civ. P. 12(c); Fed. R. Bankr. P. 7012. The court  
22 shall not grant a motion under this rule "unless the movant clearly  
23 establishes that no material issue of fact remains to be resolved and  
24 that [the movant] is entitled to judgment as a matter of law." 5C Wright  
25 & Miller, Federal Practice and Procedure § 1368 at p. 223 (3d ed. 2004).

26 Where a motion under Fed. R. Civ. P. 12(c) is used to raise the

1 defense of failure to state a claim, "the motion for judgment on the  
2 pleadings faces the same test as a motion under [Fed. R. Civ. P.]  
3 12(b)(6)." McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir.  
4 1988). In ruling on a motion to dismiss for failure to state a claim,  
5 the court must accept as true all of the allegations in the complaint and  
6 construe them in the light most favorable to the plaintiff. NL  
7 Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

8 Matters outside the scope of the complaint are not generally  
9 considered; however, a document is not outside the scope of the complaint  
10 if the complaint specifically refers to the document and if there is no  
11 question as to its authenticity. Branch v. Tunnell, 14 F.3d 449, 453  
12 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of  
13 Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

14 A party is entitled to summary judgment on a claim or part of a  
15 claim "if the movant shows that there is no genuine dispute as to any  
16 material fact and the movant is entitled to judgment as a matter of law."  
17 Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056.

## 18 DISCUSSION

### 19 I. REQUEST FOR JUDICIAL NOTICE

20 In connection with debtor's Motion for Partial Summary Judgment and  
21 his response to Fidelity's Motion for Judgment on the Pleadings, he asks  
22 that the court take judicial notice of a number of documents: (1) the  
23 September 6, 2005, deed of trust; (2) the Pooling and Servicing Agreement  
24 for the Option One Mortgage Trust 2006-1; (3) the Mortgage Loan Purchase  
25 Agreement for the Option One Trust; (4) the deed of trust assignment from  
26 eHome Credit Corp. to Sand Canyon Corp. dated September 19, 2005; (5) the



1 deed of trust assignment from Sand Canyon to Wells Fargo, dated July 23,  
2 2008; (6) the Notice of Default and Election to Sell dated July 2, 2009;  
3 (7) the Affidavit of Mailing recorded on November 10, 2009; (8) documents  
4 from debtor's bankruptcy case, Case No. 09-39428, including Docket #1, 2,  
5 23, 25, 27, and 29; (9) the Affidavit of Mailing recorded on January 24,  
6 2011; and (10) the trustee's deed recorded on May 18, 2011. He seeks  
7 judicial notice only that the documents were filed or recorded and that  
8 they say what they say. He does not seek judicial notice that the  
9 statements in those documents are true.

10 In connection with defendants' Motion for Judgment on the Pleadings,  
11 debtor asks for judicial notice of Docket #77 from debtor's bankruptcy  
12 case, which is the trustee's Motion and Notice of Intent to Settle and  
13 Compromise.

14 The only opposition to the requests for judicial notice was filed by  
15 Fidelity, which is really an opposition to the characterization of the  
16 bankruptcy trustee's Motion and Notice of Intent to Settle and Compromise  
17 as an abandonment of any interest in the claims set out in the FAC.

18 Federal Rule of Evidence 201 provides that the court may take  
19 judicial notice of facts that are not subject to a reasonable dispute  
20 because they either are "generally known within the trial court's  
21 territorial jurisdiction" or are facts that "can be accurately and  
22 readily determined from sources whose accuracy cannot reasonably be  
23 questioned." Fed. R. Evid. 201(b). The court must take judicial notice  
24 if requested by a party who supplies the court with the necessary  
25 information. Fed. R. Evid. 201(c)(2).

26 The documents of which debtor seeks judicial notice are not subject

1 to a reasonable dispute; the fact of filing and recording and that the  
2 documents contain the information that they contain can be accurately and  
3 readily determined. Fidelity's argument that debtor mischaracterizes the  
4 effect of the trustee's Motion and Notice of Intent to Settle and  
5 Compromise does not defeat judicial notice; it relates to the  
6 significance the court should give to the document. Debtor's Requests  
7 for Judicial Notice are granted, with the limitation that they establish  
8 that the documents were either filed or recorded and that they say what  
9 they say.

10 II. FIDELITY'S MOTION FOR JUDGMENT ON THE PLEADINGS

11 Fidelity seeks judgment on the pleadings on various grounds.  
12 Because its arguments that it did not breach any duty to debtor are  
13 disposed of by my later determination that debtor cannot now attack the  
14 foreclosure sale, I will not discuss those arguments separately.

15 1. Standing

16 Defendants<sup>4</sup> argue that debtor lacks standing to pursue these claims,  
17 because the claims belong to the bankruptcy estate, not to debtor.  
18 Debtor responds that, to the extent the claims belonged to the estate,  
19 the trustee has released those claims to debtor. In support, he points  
20 to the bankruptcy trustee's Motion and Notice of Intent to Settle and  
21 Compromise and Order Thereon, entered in debtor's bankruptcy case on  
22 December 13, 2012.

23 The order approving debtor's settlement with the bankruptcy trustee  
24 confirms that the bankruptcy trustee has released to debtor any interest

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25  
26 <sup>4</sup> The argument was originally raised only by Fidelity, but the other defendants have joined in Fidelity's argument.

1 he had in the claims in this adversary proceeding, reserving only a right  
2 to payment of \$15,000 if debtor prevails in this litigation.<sup>5</sup> Debtor has  
3 standing to pursue the claims.

4 2. Judicial Estoppel

5 Defendants next argue that debtor is judicially estopped from  
6 pursuing these wrongful foreclosure claims, because he failed to disclose  
7 them in his bankruptcy case.

8 "Judicial estoppel is an equitable doctrine that precludes a party  
9 from gaining an advantage by asserting one position, and then later  
10 seeking an advantage by taking a clearly inconsistent position."  
11 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir.  
12 2001). The doctrine is applied "not only to prevent a party from gaining  
13 an advantage by taking inconsistent positions, but also because of  
14 'general consideration[s] of the orderly administration of justice and  
15 regard for the dignity of judicial proceedings,' and to 'protect against  
16 a litigant playing fast and loose with the courts.'" Id. (citations  
17 omitted).

18 In considering whether to apply judicial estoppel, the court looks  
19 at whether the party's later position is clearly inconsistent with its  
20 earlier position, whether the court accepted the party's earlier  
21 position, and whether the party asserting the inconsistent position would  
22 gain an unfair advantage or impose an unfair detriment on the opposing  
23 party if not estopped. Id. at 782-783. In a bankruptcy case, "a party  
24 is judicially estopped from asserting a cause of action not raised in a

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25  
26 <sup>5</sup> The trustee has now sold whatever interest he retained in this  
adversary proceeding to Fidelity. Case No. 09-39428, Doc. #79.

1 reorganization plan or otherwise mentioned in the debtor's schedules or  
2 disclosure statements." Id. at 783.

3 Accurate and complete disclosure is of paramount importance in  
4 bankruptcy cases.

5 "The courts will not permit a debtor to obtain relief from the  
6 bankruptcy court by representing that no claims exist and then  
7 subsequently to assert those claims for his own benefit in a  
8 separate proceeding. *The interests of both the creditors, who plan  
9 their actions in the bankruptcy proceeding on the basis of  
information supplied in the disclosure statements, and the  
bankruptcy court, which must decide whether to approve the plan of  
reorganization on the same basis, are impaired when the disclosure  
provided by the debtor is incomplete.*"

10 Id., 270 F.3d at 785 (quoting In re Coastal Plains, Inc., 179 F.3d 197,  
11 208 (5th Cir. 1999) (alteration in original; quoting Rosenshein v.  
12 Kleban, 918 F.Supp. 98, 104 (S.D.N.Y. 1996)).

13 A "debtor's duty to disclose potential claims as assets does not end  
14 when the debtor files schedules, but instead continues for the duration  
15 of the bankruptcy proceeding." Hamilton at 785. "Judicial estoppel will  
16 be imposed when the debtor has knowledge of enough facts to know that a  
17 potential cause of action exists during the pendency of the bankruptcy,  
18 but fails to amend his schedules or disclosure statements to identify the  
19 cause of action as a contingent asset." Id. at 784.

20 The basic rule applying judicial estoppel when a debtor fails to  
21 disclose a claim in the bankruptcy case might not apply when the omission  
22 was inadvertent or a result of a mistake. Quin v. County of Kauai Dep't  
23 of Transp., 2013 WL 3814916 at \*3 (9th Cir. July 24, 2013). Where a  
24 debtor fails to disclose an asset in the schedules and obtains a  
25 discharge, "it makes sense to apply a presumption of deliberate  
26 manipulation" of the bankruptcy system. Id. at \*4. Where, however, a

1 debtor who failed to disclose an asset and received a discharge later  
2 reopens the closed case to amend the schedules to include the omitted  
3 asset, "and allows the bankruptcy court to re-process the bankruptcy with  
4 the full and correct information, a *presumption* of deceit no longer"  
5 applies, and the court must determine whether the debtor had the  
6 subjective intent to conceal. Id. at \*4 and \*7.

7 In this case, debtor took positions in the bankruptcy case that are  
8 inconsistent with the prepetition claims he asserts here. He did not  
9 list his claims against defendants in the original schedules he filed in  
10 his bankruptcy case, despite the fact that much of the conduct about  
11 which debtor now complains occurred prepetition. He was aware at that  
12 time of the servicing issues of which he complains; he alleges that he  
13 had sued AHMSI prepetition about those issues. He knew that defendants  
14 had commenced foreclosure proceedings, and he also knew that defendants  
15 were adding fees and charges to his balance, because the two notices of  
16 foreclosure included the charges. He knew that he had entered into a  
17 loan modification and that he was in the alleged vulnerable state he now  
18 says made the loan modification agreement unconscionable.

19 Upon conversion of the case to chapter 7 after the nonjudicial  
20 foreclosure was completed, debtor was instructed to file a complete set  
21 of schedules, "detailing the debtor(s)' status as of [the] conversion  
22 date[.]" Order Converting Chapter 13 Case to Case Under Chapter 7 (Case  
23 No. 09-39428, Doc. 36). Despite the fact that all of the conduct of  
24 which debtor complains in this adversary complaint occurred before  
25 conversion, he failed to list any potential claims against defendants in  
26 the conversion documents.

1 Debtor's case was closed without discharge. The day before he moved  
2 to reopen the case to obtain his discharge, he had filed the state court  
3 action challenging the foreclosure sale. Yet he still did not disclose  
4 the claims he had already asserted in state court. In fact, he never has  
5 sought to reopen this case to amend his schedules to include those  
6 claims. This complaint came to this court because defendant Fidelity  
7 removed the state court action to this court.

8 Debtor's failure at any time during the bankruptcy case to list any  
9 of the claims he asserts here is inconsistent with his claims in this  
10 adversary proceeding, filed in state court the day before he reopened his  
11 bankruptcy case to obtain his bankruptcy discharge, that he is entitled  
12 to invalidate the foreclosure sale and to an award of damages, including  
13 \$10 million in punitive damages.<sup>6</sup> Filing the state court complaint  
14 demonstrates that he was aware of the claims before he obtained his  
15 discharge.

16 The court "accepted" debtor's position that he had no prepetition  
17 claims when it granted a discharge, based on the representation that this  
18 was a no-asset case. The court's acceptance by granting a discharge does  
19 not apply to the postpetition conduct of which debtor complains, which  
20 was not property of the bankruptcy estate, see § 348(f) (upon conversion,

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21  
22 <sup>6</sup> The original state court complaint, filed pro se six months  
23 after the foreclosure sale, sought to enjoin transfer of the property.  
24 Although debtor did not initially seek damages, the complaint alleged  
25 that defendants had engaged in fraud and misrepresentation and that their  
26 loan servicing was defective, including a failure to provide an  
accounting, which caused debtor stress. Debtor filed an amended and  
second amended complaint alleging the same claims that were restated in a  
third amended complaint filed after debtor obtained the assistance of  
counsel.

1 property of the estate includes property of the estate that remains in  
2 debtor's possession or control as of the date of conversion).

3 It would be unfair for debtor to be able to represent to the court,  
4 the bankruptcy trustee, and creditors that he did not have any  
5 prepetition claims against defendants, while obtaining a discharge of his  
6 debts and pursuing the claims on his own behalf instead of for the  
7 benefit of his creditors.

8 Debtor argues that his failure to disclose the claims was  
9 inadvertent and that failing to disclose them was not a strategic  
10 decision to seek an advantage over the creditors. These arguments are  
11 not persuasive. Debtor's complaint seeks damages for prepetition conduct  
12 in loan servicing conduct, adding unauthorized charges, commencing  
13 foreclosure actions, and entering into a loan modification agreement.  
14 This is conduct about which he would have been aware at the time he filed  
15 his bankruptcy petition to stop the foreclosure. He certainly knew about  
16 the claims by the time he asked for his discharge, because he had already  
17 filed his lawsuit in state court alleging much of the same alleged  
18 misconduct. He never sought to reopen his case to disclose the claims;  
19 instead, he reopened his case to allow him to obtain a discharge  
20 immediately after he had asserted the claims in state court.

21 I agree with debtor that judicial estoppel should not apply to  
22 postpetition claims, because those claims were not property of the  
23 estate. Debtor did not gain a bankruptcy advantage by failing to  
24 disclose postpetition claims. Debtor will be estopped from pursuing any  
25 of the claims that arose prepetition; he will not be estopped from  
26 pursuing postpetition claims.

1 Debtor also argues that applying judicial estoppel in this case  
2 would create a shield for creditors' unlawful behavior, because claims  
3 are often unknown or not accrued when a debtor files bankruptcy. The  
4 court should not, he says, bar the claims as a matter of law.

5 Application of judicial estoppel in this case is a matter of  
6 discretion and equity, not a matter of law. Debtor's conduct throughout  
7 the bankruptcy case belies any argument that his failure to disclose  
8 prepetition claims against these defendants was inadvertent or mistaken.  
9 Further, it is appropriate to apply the presumption of deliberate  
10 manipulation, in light of debtor's failure ever to make a voluntary  
11 disclosure of these claims to the court, the trustee, and his creditors.  
12 Even without the presumption, there is no evidence from which the court  
13 could conclude that debtor's failure to disclose was an innocent mistake  
14 or occurred through inadvertence.

15 Contrary to debtor's argument, applying judicial estoppel here will  
16 not create malpractice traps for bankruptcy attorneys. If counsel or the  
17 debtor knows that there are potential claims against lenders or  
18 servicers, the claims must be listed in the schedules. If the claims are  
19 not listed initially because of an emergency filing, the schedules must  
20 be amended to add those claims. It is not the failure to disclose the  
21 claims in the initial filing that results in the application of judicial  
22 estoppel here; it is debtor's failure to disclose once he knew he had the  
23 claims. This was, at the latest, the day before he received his  
24 discharge, when he filed his state court action.

25 Debtor also argues that failure to disclose these claims should not  
26 bar him from pursuing those claims later, because a trustee would have



1 little interest in pursuing such claims against creditors. Whether the  
2 trustee would be interested in pursuing the types of claims debtor  
3 asserts here is for the trustee to decide, and the information on which  
4 the trustee relies to make that decision comes from the debtor's  
5 schedules. If the claims are disclosed, the trustee can make an  
6 assessment of whether to pursue them on behalf of the estate and can  
7 abandon those claims to the debtor if the trustee determines that they  
8 are not worth pursuit. The only way for the trustee to make that  
9 determination is if the debtor discloses the existence of the potential  
10 claims, as the Bankruptcy Code requires.

11 Application of judicial estoppel in this case will not result in the  
12 creditors losing out on any potential recovery. See Quin, at \*6, \*7  
13 (raising concern that application of judicial estoppel in bankruptcy case  
14 would detrimentally affect innocent creditors). The trustee entered into  
15 a settlement with debtor, obtaining a payment in return for a release of  
16 his claims. The trustee has now sold his interest to Fidelity.  
17 Therefore, the creditors did benefit through the trustee's settlement.

18 The documents in this case demonstrate that debtor was seeking  
19 relief from the state court at the same time he was seeking and obtained  
20 a discharge in bankruptcy. Whether he knew of potential wrongful  
21 foreclosure claims when he filed his case in 2009, he certainly knew of  
22 those claims by the time he obtained his discharge, as he had already  
23 filed his state court action. Because debtor failed to disclose any of  
24 his prepetition claims in his bankruptcy schedules and obtained a  
25 discharge of his debts, I conclude that he is estopped from asserting the  
26 prepetition claims alleged in his FAC.

1 3. Collateral Attack

2 Fidelity argues that debtor's action is a collateral attack on or a  
3 request for reconsideration of this court's order granting relief from  
4 stay to allow foreclosure. I disagree. Debtor argues that the order  
5 granting relief from stay, FAC Exh. 18 p.2, allowed defendants to  
6 foreclose "to the extent permitted by applicable nonbankruptcy law," and  
7 that the foreclosure was not permitted by applicable nonbankruptcy law.  
8 His argument is that defendants violated the order, not that the order  
9 granting relief was incorrect or should be set aside.

10 III. DEFENDANTS'<sup>7</sup> MOTION FOR JUDGMENT ON THE PLEADINGS

11 1. Wrongful foreclosure

12 Debtor alleges that defendants' foreclosure was wrongful, and  
13 therefore the foreclosure sale can be set aside, because there were  
14 assignments of the deed of trust that were not recorded as required by  
15 the Oregon Trust Deed Act ("OTDA"). Defendants argue that they did not  
16 wrongfully foreclose but, even if they did, once the trustee's deed is  
17 recorded, a nonjudicial foreclosure sale is final and a borrower can no  
18 longer challenge the sale. Debtor argues that the sale may be set aside,  
19 because the failure to record deprived the trustee of the authority to  
20 sell the property.

21 Because I conclude that debtor cannot challenge a foreclosure after  
22 the foreclosure sale to a bona fide purchaser has occurred and the  
23 trustee's deed has been recorded, because the sale is final under state  
24 law, I need not reach the question of whether any assignments of the

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25  
26 <sup>7</sup> This section addresses the arguments raised by defendants Wells  
Fargo, AHMSI, and Everett.

1 trust deed were properly recorded as required in the OTDA.<sup>8</sup>

2 In the absence of a statute that expressly voids an agreement of  
3 sale that was the result of a nonjudicial foreclosure sale conducted in  
4 violation of the foreclosure statutes, the court looks at the intent of  
5 the legislature to determine the effect of the sale. Staffordshire  
6 Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or. App. 528,  
7 540 (2006).

8 The legislature has provided guidance about the finality of such a  
9 sale after the trustee's deed is recorded. ORS 86.780 provides:

10 When the trustee's deed is recorded in the deed records of the  
11 county or counties where the property described in the deed is  
12 situated, the recitals contained in the deed and in the affidavits  
13 required under ORS 86.750 (3) and (4) shall be prima facie evidence  
in any court of the truth of the matters set forth therein, but the  
recitals shall be conclusive in favor of a purchaser for value in  
good faith relying upon them.

14 In other words, as to a good faith purchaser for value, a recorded  
15 trustee's deed following a nonjudicial foreclosure sale is final.

16 Consistent with this declaration of finality is ORS 86.770(1), which  
17 provides that, if "a trustee sells property covered by a trust deed, the  
18 trustee's sale forecloses and terminates the interest in the property  
19 that belongs to a person to which notice of the sale was given[.]" Thus,  
20 under the OTDA, the sale forecloses the debtor's interest, and the  
21 recorded trust deed is final as to a bona fide purchaser for value.

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22  
23  
24 <sup>8</sup> I note, however, that since these motions were argued, the  
25 Oregon Supreme Court has held that the statutory nonjudicial foreclosure  
26 requirement of ORS 86.735(1) that any assignments of the deed of trust  
must be recorded does not apply to assignments that occur by operation of  
law (as debtor alleges here). See Brandrup v. ReconTrust Co., 353 Or.  
668 (2013); Niday v. GMAC Mortg., LLC, 353 Or. 648 (2013).

1 Debtor argues that the bona fide purchaser statute does not apply,  
2 because the defect alleged here, the lack of recording of assignments of  
3 the trust deed, deprived the trustee of the authority to sell and thus,  
4 under Staffordshire Investments, the sale is invalid.

5 In Staffordshire Investments, the buyer at a non-judicial  
6 foreclosure sale sued for breach of contract, seeking to require the  
7 trustee of the trust deed to deliver the trustee's deed. The deed had  
8 not yet been recorded.

9 The defendant (the trustee that had conducted the foreclosure sale)  
10 argued that it could not deliver the deed because it had learned that,  
11 before the sale occurred, the debtor had entered into a forbearance  
12 agreement and thus was not in default on the loan. Because one of the  
13 requirements for sale under ORS 86.735 is that there is a default by the  
14 grantor, ORS 86.735(2), it argued that the sale agreement was invalid and  
15 it could not deliver the trustee's deed to the buyer.

16 The Court of Appeals held that, "[b]ecause the preconditions to [the  
17 trustee's] exercise of the power of sale under ORS 86.735(2) were not  
18 satisfied, we conclude that [the trustee] lacked the statutory authority  
19 to sell the property." Id. at 540.

20 The question then became the effect of the trustee's lack of  
21 authority on its agreement with the purchaser at the sale. The court  
22 concluded that the lack of sale authority meant that the sale agreement  
23 was invalid. The OTDA, the court said,

24 confers upon a trustee the power to sell property securing an  
25 obligation under a trust deed in the event of default, without the  
26 necessity for judicial action. However, the trustee's power of sale  
is subject to strict statutory rules designed to protect the  
grantor, including provisions relating to notice and reinstatement.

1 Id. at 542. Voiding the sale agreement under the circumstances of that  
2 case would not, the court said, "frustrate the legislature's objective to  
3 provide a quick and efficient remedy for creditors against defaulting  
4 buyers." Id.

5 The court, however, also went on to explain and limit its decision:

6 First, there is nothing in the language of that section [ORS  
7 86.735(2)] or, indeed, elsewhere in the Act, to indicate that the  
8 legislature intended the auction to be final *in the absence of legal*  
9 *authority to sell the property*. Moreover, although certainty is an  
10 important component of the nonjudicial foreclosure sale remedy, we  
11 do not agree with plaintiff's statement, based on ORS 86.755(3),  
12 that "[t]he Oregon statutory scheme \* \* \* provide[s] that the  
13 auction is final with the close of that auction[.]" Plaintiff  
14 correctly notes that ORS 86.755(3) provides that the trustee shall  
15 execute and deliver the trustee's deed within 10 days following  
16 payment of the price bid; however, under ORS 86.780, the statutory  
17 presumption of finality does not arise until the trustee's deed is  
18 issued and recorded. We have not had occasion to squarely confront  
19 the question of the significance of the execution and recording of  
20 the trustee's deed on the finality of a nonjudicial sale, and it is  
21 not necessary for us to do so here, except to note that, if the  
22 agreement to postpone the sale is discovered before the trustee's  
23 deed is executed, voiding the contract furthers the purpose of the  
24 Act to protect the grantor from unauthorized sales without unduly  
25 prejudicing the creditor's remedy envisioned by the Act.

26 Id. at 542-43 (emphasis in original; footnotes omitted). Where the  
defect in the foreclosure sale "goes to the substance of the challenged  
agreement[,]" and that defect is discovered before the trustee's deed is  
executed, the contract of sale between the trustee and the buyer is void.

Id. at 543.

Staffordshire Investments did not discuss what would have happened  
if the trustee's deed in that case had been recorded. In fact, the court  
specifically distinguished the situation where the trustee's deed has not  
been recorded from one where it has been recorded. 209 Or. App. at 543-  
44. Given the language of ORS 86.780, that the recital in the trustee's

1 deed required by ORS 86.775 "of the facts concerning the default" is  
2 conclusive as to a good faith purchaser for value, it is apparent that,  
3 if the trustee's deed had been issued to a good faith purchaser for value  
4 and recorded in Staffordshire Investments, the result in that case would  
5 have been different; the sale would have been final, despite the mistake  
6 about default.

7 ORS 86.780 provides for finality as to the bona fide purchaser at  
8 the time the trustee's deed is recorded. It provides that the recitals  
9 in the trustee's deed are conclusive as to a bona fide purchaser for  
10 value. This gives clear indication that the legislature recognizes that  
11 foreclosure sales must become final at some point, and that the point of  
12 finality is the recording of the trustee's deed.

13 I recognize that the recitals contained in the trustee's deed do not  
14 cover all four of the preconditions for sale set out in ORS 86.735. The  
15 trustee's deed must describe the property conveyed, recite the facts  
16 concerning the default, the notice given, the conduct of the sale, and  
17 receipt of the purchase price from the buyer. ORS 86.775. The deed need  
18 not recite that all assignments of the trust deed have been recorded.  
19 Nonetheless, I conclude that the combination of ORS 86.770(1) and ORS  
20 86.780 indicates that the legislature intends that the nonjudicial  
21 foreclosure sale be final when there is a sale to a bona fide purchaser  
22 for value and the trustee's deed is recorded, even if it be shown that  
23 there were defects in the sale.

24 The parties cite a number of cases that have considered the effect  
25 of alleged defects in a nonjudicial foreclosure sale. None of those  
26 cases involved a completed sale to a bona fide purchaser for value in

1 which the trustee's deed had been recorded. Most of the cases that allow  
2 a challenge to a foreclosure sale involve actions to stop the sale before  
3 it occurs. See, e.g., James v. ReconTrust Co., 845 F.Supp.2d 1145 (D.  
4 Or. 2012); Hooker v. Northwest Trustee Serv., Inc., 2011 WL 2119103 (D.  
5 Or. 2011); Niday v. GMAC Mortgage, LLC, 353 Or. 648 (2013). Other cases  
6 involve challenges to a foreclosure after the sale, but the sale was not  
7 to a bona fide purchaser. E.g., U.S. Bank Nat'l Assoc. v. Wright, 253  
8 Or. App. 207 (2012) (debtor could challenge foreclosure sale after it  
9 occurred because the trustee's deed was prima facie evidence but not  
10 conclusive for non-bona fide purchaser); Celestino v. Reconstrust Co.,  
11 N.A., 2012 WL 1805495 (D. Or. 2012); Option One Mortg. Corp. v. Wall, 159  
12 Or. App. 354 (1999); Domingo v. Anderson, 138 Or. App. 521 (1996), aff'd  
13 in part, rev'd in part 325 Or. 385 (1997).

14 In a recent decision from the Oregon District Court, Judge Panter  
15 considered and rejected the plaintiff's argument that a nonjudicial  
16 foreclosure sale was invalid because there were unrecorded transfers of  
17 the trust deed. Mikityuk v. Northwest Trustee Serv., Inc., 2013 WL  
18 3388536 (D. Or. 2013). In that case, as in this one, the plaintiff had  
19 waited until after the foreclosure sale had occurred and the trustee's  
20 deed had been recorded to challenge the sale. Judge Panter considered  
21 the OTDA, including its purposes, and concluded that, after the sale and  
22 recording of a trustee's deed, the need for finality and certainty  
23 prevails over the need to protect homeowners from wrongful foreclosures.<sup>9</sup>

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24  
25 <sup>9</sup> It is not clear from the opinion whether the purchaser at the  
26 foreclosure sale was a bona fide purchaser for value. Judge Panter  
(continued...)

1 I agree. The OTDA provides "a well-coordinated statutory scheme to  
2 protect grantors from the unauthorized foreclosure and wrongful sale of  
3 property, while at the same time providing creditors with a quick and  
4 efficient remedy against a defaulting grantor." Staffordshire  
5 Investments, 209 Or. App. at 542. That scheme's protections for debtors  
6 are extensive, including a detailed notice of the sale at least 120 days  
7 before the scheduled sale date, explaining the right to reinstate and  
8 avoid the sale, ORS 86.740(1); 86.745, and the right to cure the default  
9 and avoid the sale up to five days before the scheduled sale. ORS  
10 86.753. These protections give borrowers ample time and opportunity to  
11 cure the default and avoid the sale, or to challenge the sale if it has  
12 been commenced improperly or without authority. At some point, however,  
13 foreclosure sales to bona fide purchasers for value must become final, in  
14 order to provide stability and certainty in the real estate market.  
15 Given the legislature's direction that a trustee's sale forecloses any  
16 interest in the property of a person to whom notice was given and that  
17 the recitations in a recorded trustee's deed are conclusive as to a bona  
18 fide purchaser for value, I conclude that, upon recording of a trustee's  
19 deed to a bona fide purchaser for value, the foreclosed party can no  
20 longer challenge the sale on the basis of lack of recorded assignments of  
21 the trust deed. Accord Mikityuk, 2013 WL 3388536.

22 Debtor does not allege nor argue that Everett had notice of any  
23

24 \_\_\_\_\_  
25 <sup>9</sup>(...continued)

26 relied primarily on ORS 86.770, which provides that the trustee's sale  
forecloses and terminates the interest of any person with notice of the  
sale. That statute does not refer to bona fide purchasers.



1 defenses to the sale and is not a bona fide purchaser for value.<sup>10</sup>

2 Therefore, the sale is final, and debtor cannot have the sale set aside.

3 I now turn to each of the claims alleged in the complaint to  
4 determine which, if any, survive in light of my conclusion that debtor is  
5 estopped from bringing prepetition claims and that the sale cannot be set  
6 aside.

7 2. Claims

8 A. Claim #1 - Declaratory Judgment (against all defendants)

9 Debtor seeks a declaration that the foreclosure actions were  
10 unlawful and the sale void because of the unrecorded assignments of the  
11 trust deed, as well as that certain charges assessed or collected over  
12 the life of the loan were unlawful. The determination that the  
13 foreclosure sale is not void and cannot be set aside disposes of the  
14 portions of this claim seeking declarations relating to wrongful  
15 foreclosure.

16 When an action for declaratory relief merely duplicates the relief  
17 sought under another cause of action, it is proper to dismiss the  
18 declaratory judgment claim. Swartz v. KPMG LLP, 476 F.3d 756, 766 (9th  
19 Cir. 2007); Dental v. City of Salem, 196 Or. App. 574, 580 (2004). To  
20 the extent the finality of the sale does not dispose of all of this  
21 claim, the other declarations that debtor seeks are merely duplicative of  
22 other relief he seeks based on the same facts. Therefore, defendants'

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23  
24 <sup>10</sup> Defendants argued in their briefs that Everett was a bona fide  
25 purchaser, so the foreclosure sale was final and could not be challenged.  
26 Debtor's response did not deny that Everett was a bona fide purchaser for  
value; his response was that the trustee did not have the authority to  
conduct the foreclosure sale.

1 motion for judgment on the pleadings will be granted and debtor's motion  
2 for partial summary judgment will be denied on this claim.

3 B. Claim #2 - Quiet title (against all defendants)

4 This claim is based on the wrongful foreclosure theory. Defendants'  
5 motion will be granted as to this claim.

6 C. Claim #3 - Unlawful foreclosure (against Wells Fargo, AHMSI,  
7 Fidelity)

8 Defendants' motion for judgment on the pleadings will be granted and  
9 debtor's motion for partial summary judgement will be denied, because the  
10 foreclosure sale is final and cannot be set aside.

11 D. Claim #4 - Violation of the stay, relief from stay order, and  
12 confirmation order (against AHMSI and Wells Fargo)

13 Debtor alleges that defendants violated the automatic stay, the  
14 order granting relief from stay, and the confirmation order in various  
15 ways. These include assessing undisclosed, unauthorized, or unreasonable  
16 charges to debtor's account both pre- and postpetition; misapplying  
17 payments made by the chapter 13 trustee; misapplying postpetition  
18 payments to prepetition arrearages, to a suspense account, to undisclosed  
19 and unauthorized charges, to interest on prepetition arrearages, and to  
20 prepetition escrow balances; improperly increasing debtor's payment  
21 amount; assessing and charging debtor an inconsistent payment amount; and  
22 applying payments from debtor and the chapter 13 trustee in violation of  
23 the order required by the note, trust deed, and modification. All of  
24 this, he alleges, resulted in a miscalculation of the amounts debtor owed  
25 and caused a deficiency in his postpetition balance.

26 As to allegations of prepetition misconduct, that alleged conduct

1 was not subject to the automatic stay, the order granting relief from  
2 stay, or the confirmation order, all of which apply or were entered after  
3 the bankruptcy petition was filed. Therefore, the prepetition conduct  
4 could not have violated either the automatic stay or the orders granting  
5 relief from stay or confirming the plan.

6 As to the allegations of postpetition misconduct, it is not possible  
7 to tell from the complaint which conduct is alleged to have violated  
8 which order or the automatic stay. Therefore, by necessity this  
9 discussion will deal with generalities.

10 a. Violation of the automatic stay

11 Debtor alleges that defendants' conduct in assessing improper  
12 charges and misapplying payments postpetition, among other things,  
13 violated the automatic stay.

14 Section 362(k) provides that an individual injured by a willful stay  
15 violation shall recover actual damages. Here, even assuming that some of  
16 defendants' conduct violated the automatic stay, debtor has not alleged  
17 any actual damage that could support an award of sanctions.

18 The \$106,000 that he seeks for violation of the automatic stay is  
19 presumably made up of the \$55,000 he alleges was lost equity and \$51,000  
20 that he alleges was unlawful charges. See FAC ¶ 79. Any such loss was  
21 the result of the foreclosure, which in turn was caused by debtor's  
22 default. Debtor has not alleged that he could have cured the default and  
23 avoided the foreclosure sale had defendants not violated the automatic  
24 stay, the confirmation order, or the order granting relief from stay.  
25 Although he alleges that defendants' conduct "resulted in miscalculation  
26 of the amounts owed by Plaintiff and caused a deficiency in Plaintiff's

1 post-petition balance," FAC ¶ 61, he does not allege that he would not  
2 have defaulted postpetition if not for defendants' improper assessment of  
3 fees and charges, or that he could have cured any default and avoided  
4 foreclosure had those fees and charges not been assessed or had the  
5 trustee's and debtor's post-confirmation payments been applied correctly.  
6 See FAC ¶ 31 (alleging that amount of default stated in motion for relief  
7 from stay was incorrect, but does not allege that there was no  
8 postpetition default). Therefore, any loss of equity was caused by the  
9 foreclosure sale, not by any violations of the automatic stay.

10 For the same reason, the alleged improper assessment of fees and  
11 charges does not support an award of damages for violations of the  
12 Bankruptcy Code after the foreclosure sale is final. There is no  
13 deficiency judgment in a nonjudicial foreclosure. ORS 86.770(2).  
14 Because defendants were entitled to foreclose based on debtor's default,  
15 they cannot seek a judgment against debtor for any fees or charges that  
16 were not recovered through the foreclosure, and debtor does not allege  
17 that his default was caused by any improperly assessed charges or fees,  
18 he has not alleged damage that he could recover for violation of the  
19 stay.<sup>11</sup>

20 b. Violation of the order granting relief from stay

21 The order granting relief from stay allowed defendants to foreclose

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22  
23 <sup>11</sup> Debtor also alleges that he is entitled to \$300,000 under  
24 § 105(a) or Fed. R. Bankr. P. 9011, for the violations of the automatic  
25 stay, the order granting relief from stay, and the order confirming plan.  
26 Violation of the automatic stay is governed by § 362(k), and I have  
explained that debtor is not entitled to damages under that provision;  
§ 105(a) and Rule 9011 cannot be used to award different sanctions for  
conduct covered by § 362(k).

1 "to the extent permitted by applicable nonbankruptcy law." FAC, Exh. 18.  
2 As I have explained, debtor waited too long to challenge the foreclosure  
3 sale. Therefore claims for violation of the relief from stay order based  
4 on wrongful foreclosure come too late.

5 c. Violation of the confirmation order

6 Debtor alleges, without pointing to precisely what conduct did so,  
7 that defendants' conduct violated the order confirming debtor's chapter  
8 13 plan. The chapter 13 plan did not make any adjustments to the note or  
9 trust deed; debtor's and defendants' rights continued to be governed by  
10 those documents. Debtor does not explain how any of defendants' conduct  
11 violated the order confirming the plan.

12 Defendants' motion for judgment on the pleadings will be granted and  
13 debtor's motion for partial summary judgment will be denied as to Claim  
14 #4.

15 E. Claim #5 - Breach of Contract (against AHMSI, Wells Fargo,  
16 Fidelity)

17 Debtor alleges that defendants breached the note, trust deed, and  
18 loan modification by improperly assessing and collecting excessive  
19 charges and interest; misapplying payments; offering the loan  
20 modification; and unlawfully foreclosing, causing debtor to lose the  
21 equity in his house.

22 It is not clear from the pleadings what alleged breaches occurred  
23 prepetition. As I have said, debtor is estopped from bringing any  
24 prepetition claims. Therefore, debtor cannot pursue damages for any  
25 prepetition alleged improper assessment or collection of excessive  
26 charges and interest, misapplication of payments, or issues relating to

1 the execution of the loan modification agreement.

2 To the extent some of the alleged breaches occurred postpetition,  
3 defendants argue that debtor cannot claim a breach of contract because he  
4 was in breach himself. See Slover v. Or. State Bd. of Clinical Soc.  
5 Workers, 144 Or. App. 565, 570 (1996) (to allege breach of contract,  
6 plaintiff must allege that plaintiff has fully performed).

7 Debtor admits that he defaulted on the loan, but responds that this  
8 claim is for breach of the duty of good faith and fair dealing, in that  
9 defendants failed to correctly and legally pursue their remedies under  
10 the contracts (including wrongfully foreclosing), failed to cooperate  
11 with debtor in performance of the contract, and assessed and collected  
12 improper fees.

13 Defendants' motion for judgment on the pleadings will be granted.  
14 Debtor seeks damages for the lost equity in his house. However, debtor  
15 has not alleged that he could have cured the default and avoided the  
16 foreclosure sale had defendants not breached the contract or improperly  
17 exercised their remedies for default. Therefore, any loss of equity was  
18 caused by the foreclosure sale, a remedy that defendants were entitled to  
19 exercise in the face of debtor's default.

20 Nor can debtor show that he is entitled to damages for improperly  
21 assessed fees and charges. There is no deficiency judgment in a  
22 nonjudicial foreclosure. ORS 86.770(2). Because defendants were  
23 entitled to foreclose based on debtor's default, they cannot seek a  
24 judgment against debtor for any fees or charges that were not recovered  
25 through the foreclosure. Debtor does not allege that his default was  
26 caused by any improperly assessed charges or fees, therefore he has not

1 alleged damage that he could recover for breach of contract.

2 F. Claims #6 and 7 - Fair Debt Collection Practices Act ("FDCPA")  
3 (against Wells Fargo, AHMSI, Fidelity)

4 Defendants move for judgment on the pleadings on debtor's claims  
5 under the state and federal FDCPAs. Debtor alleges that defendants  
6 violated the debt collection laws by wrongfully foreclosing and by making  
7 false representations about the amount of the debt, the amount of the  
8 payments, application of the payments, and assessment and collection of  
9 improper fees and charges. He moves for partial summary judgment on  
10 these claims to the extent they are based on wrongful foreclosure.

11 The FDCPA forbids a debt collector from taking certain actions in  
12 connection with the collection of a debt. 15 U.S.C. § 1692; ORS 646.639.  
13 As I have already explained, it is too late for debtor to complain about  
14 the foreclosure. Therefore, to the extent these claims are based on  
15 wrongful foreclosure, defendants' motion for judgment on the pleadings  
16 will be granted. Debtor's motion for partial summary judgment will be  
17 denied.

18 However, to the extent the claims are based on other conduct, such  
19 as misrepresentations about the amount of debt or payments or  
20 misapplication of payments and collection of improper fees and charges,  
21 defendants have not argued that the complaint does not state a claim.  
22 Therefore, I will not dismiss the portions of the claim alleging  
23 misconduct other than wrongful foreclosure. However, debtor may only  
24 rely on postpetition conduct. Further, he is not entitled to the  
25 economic damages of \$106,000 that he claims, because those damages arose  
26 from the foreclosure brought on by his default, not by the alleged

1 unlawful debt collections practices.

2 Debtor also claims \$96,000 as compensation for defendants' wrongful  
3 conduct, based on \$1,000 per known instance. To the extent those  
4 instances occurred postpetition, debtor will need to replead facts to  
5 support his allegation of multiple instances. Defendant's motion for  
6 judgment on the pleadings will be granted except to the extent the claim  
7 alleges statutory damages; debtor's motion for partial summary judgment  
8 will be denied. Debtor shall replead to limit his FDCPA claims to  
9 postpetition conduct, and to plead facts to support his allegation of  
10 damages for multiple known instances of wrongful conduct.

11 G. Claim #8 - Oregon Unlawful Trade Practices Act ("UTPA")  
12 (against Wells Fargo, AHMSI, Fidelity)

13 Defendants move for judgment on the pleadings and debtor moves for  
14 partial summary judgment on Claim #8, which asserts violation of Oregon's  
15 UTPA. Debtor alleges a number of unlawful trade practices, essentially  
16 repeating the allegations contained in the previous claims, relating to  
17 defendants' conduct in servicing the loan, in conducting the three  
18 foreclosure proceedings, in its actions during the bankruptcy case, and  
19 in imposing what debtor alleges was an unconscionable loan modification,  
20 which he says caused him damages.

21 Defendants argue that this claim fails for the same reasons the  
22 other claims based on these allegations fail. In addition, they argue  
23 that debtor's alleged damages were not caused by any alleged unfair trade  
24 practice.

25 "[A]ny person who suffers any ascertainable loss of money or  
26 property, real or personal, as a result of willful" use of an unlawful



1 trade practice may bring an action for damages. ORS 646.638(1). To  
2 prevail on an UTPA claim, the plaintiff must show "(1) the existence of  
3 an unfair trade practice; (2) causation; and (3) damages." Feitler v.  
4 Animation Celection, Inc., 170 Or. App. 702, 708 (2000).

5 Much of the conduct about which debtor complains occurred  
6 prepetition, and claims based on that conduct are barred by judicial  
7 estoppel.

8 As to the postpetition conduct, and assuming that defendants'  
9 conduct constituted unlawful trade practices, as I have already  
10 explained, any economic damages debtor suffered were as a result of the  
11 foreclosure, which was due to his default on the loan and failure to cure  
12 the default before the foreclosure. See Gemignani v. Pete, 187 Or. App.  
13 584, 591 (2003) (misrepresentation that property was free and clear of  
14 liens was not cause of loss of home to undisclosed lienholder; loss was a  
15 result of the existence of the prior lien). Debtor does not allege that  
16 the foreclosure would not have occurred but for the alleged unlawful  
17 trade practices. Nor does he allege that, but for the conduct that he  
18 alleges to be unlawful trade practices, he would have been able to cure  
19 the default.<sup>12</sup> Therefore, he cannot show that his damages were caused by  
20 an unlawful trade practice.

21 Further, to the extent he seeks damages for emotional distress based  
22 on the alleged unlawful trade practices, those damages are not

---

24 <sup>12</sup> He alleges that defendants' conduct rendered him unable to cure  
25 any default and left him with no option other than to accept the  
26 prepetition loan modification. FAC at ¶ 90. This allegation relates to  
the prepetition modification; debtor is estopped from challenging that  
modification.

1 "ascertainable loss of money or property" that the statute provides may  
2 be recovered. An "ascertainable loss" is one that "is 'capable of being  
3 discovered, observed, or established.'" Scott v. Western Int. Surplus  
4 Sales, Inc., 267 Or. 512, 515 (1973). Actual damages are intended to  
5 provide "restitution for economic loss suffered by a consumer as the  
6 result of a deceptive trade practice." Gross-Haentjens v. Leckenby, 38  
7 Or. App. 313, 317 (1979). Although "any loss will satisfy" the  
8 requirement of ascertainable loss, Feitler v. Animation Celection, Inc.,  
9 170 Or. App. 702, 712 (2000), that loss must be of "money or property."  
10 ORS 646.638(1). Emotional distress damages are neither ascertainable nor  
11 are they loss of money or property.

12 Defendants' motion for judgment on the pleadings will be granted on  
13 this claim; debtor's motion for partial summary judgment will be denied.

14 H. Claim # 9 - Elder Abuse (against Wells Fargo, AHMSI, Fidelity)

15 Defendants move for judgment on the pleadings and debtor moves for  
16 partial summary judgment on Claim #9 for Elder Abuse.

17 A claim for elder abuse under ORS 124.100(2) based on financial  
18 abuse has four elements:

19 (1) a taking or appropriation (2) of money or property (3) that  
20 belongs to an elderly or incapacitated person, and (4) the taking  
must be wrongful.

21 Church v. Woods, 190 Or. App. 112, 117 (2003).

22 Debtor's claim for elder abuse is based on his allegations that the  
23 nonjudicial foreclosure of his property was wrongful. As I have  
24 explained, the foreclosure sale is final and debtor is precluded from  
25 challenging it. Further, the loss of the property was a result of  
26 debtor's default and defendants' exercise of their remedies on default,

1 not of the allegedly improper foreclosure. Defendants are entitled to  
2 judgment on the pleadings on this claim; debtor's motion for partial  
3 summary judgment will be denied.

4 I. Claim #10 - Wrongful Eviction; Everett's Counterclaim for  
5 Ejectment

6 Everett moves for judgment on the pleadings on debtor's claim for  
7 wrongful eviction and its counterclaim for ejectment. I have concluded  
8 that debtor cannot challenge the foreclosure sale. This case came to  
9 bankruptcy court by removal from state court. Everett's motion will be  
10 granted with regard to the wrongful eviction claims. I will remand the  
11 counterclaim for ejectment to state court to allow the ejectment action  
12 to proceed in that court, which is best suited for determining a right to  
13 ejectment.

14 J. Claim #11 - Intentional Infliction of Emotional Distress  
15 (against Wells Fargo, AHMSI, Fidelity)

16 Defendants move for judgment on the pleadings on debtor's claim for  
17 intentional infliction of emotional distress.

18 In order to state a claim for intentional infliction of emotional  
19 distress, the plaintiff must allege that

20 (1) the defendant intended to inflict severe emotional distress on  
21 the plaintiff, (2) the defendant's acts were the cause of the  
22 plaintiff's severe emotional distress, and (3) the defendant's acts  
constituted an extraordinary transgression of the bounds of socially  
tolerable conduct.

23 McGanty v. Staudenraus, 321 Or. 532, 543 (1995) (quoting Sheets v.  
24 Knight, 308 Or. 220, 236 (1989), overruled on other grounds in McGanty,  
25 321 Or. at 549-40). "Whether conduct constitutes an extraordinary  
26 transgression of the bounds of socially tolerable conduct is a question

1 of law." Harris v. Pameco Corp., 170 Or. App. 164, 171 (2000).

2 "Liability has been found only where the conduct has been so outrageous  
3 in character, and so extreme in degree, as to go beyond all possible  
4 bounds of decency, and to be regarded as atrocious, and utterly  
5 intolerable in a civilized community." House v. Hicks, 218 Or. App. 348,  
6 357 (2008) (quoting Restatement (Second) of Torts § 46 comment d).

7 "Conduct that is 'rude, boorish, tyrannical, churlish and mean' does not  
8 support liability for IIED." Schoen v. Freightliner, LLC, 224 Or. App.  
9 613, 627 (2008).

10 Debtor alleges that defendants' conduct in connection with his loan,  
11 including among other things inadequate servicing, filing false  
12 documents, bullying him to enter into the modification agreement, and  
13 misleading statements, which led to the foreclosure, caused him emotional  
14 distress, and that defendants knew or should have known that their  
15 conduct would cause that distress.

16 Much of the conduct complained of occurred prepetition; debtor is  
17 estopped from pursuing a claim based on that conduct. To the extent the  
18 alleged conduct occurred postpetition, the allegations do not rise to the  
19 level of conduct that is atrocious or utterly intolerable in a civilized  
20 society. Although defendants' conduct no doubt caused debtor distress,<sup>13</sup>  
21 it is not the type of conduct that is an extraordinary transgression of  
22 the bounds of socially tolerable conduct. Defendants are entitled to  
23 judgment on the pleadings on this claim.

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24 <sup>13</sup> Although debtor alleges that he experienced difficulty making  
25 his mortgage payments after contracting cancer in 2006, FAC ¶ 20, he does  
26 not allege that defendants were aware of his illness at the time they  
took any of the actions that he alleges were outrageous.

1 CONCLUSION

2 Debtor alleges that defendants engaged in extensive misconduct in  
3 relation to the servicing and collection of his mortgage loan. The  
4 problem with his complaint is that he simply waited too long to obtain  
5 relief for most of the alleged misconduct. He failed to disclose his  
6 claims during his bankruptcy case, leading to application of judicial  
7 estoppel against him for any prepetition claims. As for the foreclosure,  
8 which occurred postpetition, had debtor challenged the foreclosure sale  
9 or sued for damages before the sale was completed, his allegations might  
10 have supported one or more claims for relief. However, having waited  
11 until after the foreclosure sale to a bona fide purchaser was completed  
12 and became final, he cannot now challenge that sale or obtain damages  
13 relating to the sale.

14 For the reasons outlined in my discussion above, defendants' motion  
15 for judgment on the pleadings will be granted on Claims #1, 2, 3, 4, 5,  
16 8, 9, 10, and 11. Their motion will be granted in part on Claims #6 & 7;  
17 debtor may replead to limit his claims to postpetition conduct and  
18 statutory damages. Defendants' motion for judgment on the pleadings on  
19 Everett's counterclaim for ejectment will be denied and the matter  
20 remanded to state court. Debtor's motion for partial summary judgment  
21 will be denied.

22 Debtor seeks leave to replead. This is the fourth amended  
23 complaint. Most of the allegations relate either to prepetition claims,  
24 which debtor is estopped from pursuing, or to wrongful foreclosure, which  
25 claims fail as a matter of law. The complaint will be dismissed with  
26 leave to replead only the postpetition claims under the FDCPA as outlined

1 above.

2 Counsel for defendants should submit the order.

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