

UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT

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No. 12-56892

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HELEN GALOPE, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE UNDER  
POOLING AND SERVICING AGREEMENT DATED AS OF MAY 1, 2007  
SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR4;  
WESTERN PROGRESSIVE, LLC; BARCLAYS BANK PLC, BARCLAYS  
CAPITAL REAL ESTATE INC. d/b/a HOMEQ SERVICING; OCWEN LOAN  
SERVICING, LLC, and DOES 4 through 10, Inclusive,

Defendants-Appellees.

Appeal from the U.S. District Court for Central California, Santa Ana  
The Honorable Cormac J. Carney  
District Court Case 8:12-cv-00323-CJC-RNB

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**APPELLEES' PETITION FOR  
PANEL REHEARING OR REHEARING *EN BANC***

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Appellee Barclays Bank PLC hereby states that it is a wholly owned subsidiary of Barclays PLC and that no publicly held corporation owns more than 10% of Barclays Bank PLC's stock. Appellee Barclays Capital Real Estate Inc., d/b/a HomEq Servicing, hereby states that it is a wholly owned subsidiary of Barclays Capital Real Estate Holdings Inc. and that its ultimate parent is Barclays PLC, a publicly held company.

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## INTRODUCTION

Over a dissent by Judge Nguyen, the Panel Majority held that a purchaser who received the benefit of her bargain and sustained no injury has constitutional and statutory standing to sue. If left undisturbed, the decision will invite meritless lawsuits from countless litigants with buyer's remorse. Appellant Helen Galope purchased a mortgage loan which employed an interest rate that was initially fixed for a two-year term and scheduled to later adjust using a formula linked to the London Interbank Offered Rate ("LIBOR"). But Appellant defaulted on her loan payments long before the rate adjusted. Accordingly, she did not suffer the slightest injury from any alleged manipulation of LIBOR, as both the Dissent and the District Court correctly recognized. Nevertheless, the Majority held that Appellant has standing because she "alleged that she would not have purchased her loan had she known that Defendants were manipulating the LIBOR rate." (Memorandum ("Mem."), attached as Appendix A, at 2.)

This ruling warrants rehearing *en banc* because it conflicts with well-established law by expanding Article III and statutory standing beyond their prescribed limits. Both the Supreme Court and this Court have said time and again that a plaintiff must show a "distinct and palpable injury" to have cause to be heard in federal court. *See, e.g., Birdsong v. Apple, Inc.*, 590 F.3d 955, 959-60 (9th Cir. 2009); *see also Schmier v. U.S. Ct. of Appeals for the Ninth Circuit*, 279 F.3d 817,

822 (9th Cir. 2002) (“federal courts do not have the constitutional authority to adjudicate” mere “metaphysical injuries”). The cases cited by the Majority reaffirm this fundamental requirement. *See, e.g., Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (plaintiff must allege “concrete and particularized injury”).

Appellant purchased a mortgage loan and that is precisely what she received. Appellant alleged no facts to establish that she was injured in connection with this purchase by any supposed misrepresentations or omissions regarding LIBOR. While she might have been harmed, and hence had standing to sue, had she ever made a LIBOR-linked interest payment, her default before the end of the fixed-rate term of her loan ensured that this hypothetical harm never materialized. Thus, the Majority decision opens a vast loophole for consumers looking to escape purchase contracts, of any kind, that prove unfavorable in hindsight: plaintiffs will contend that they would not have purchased the subject product or service absent some alleged extraneous misconduct, even if the product or service at issue functioned as intended, and the supposed misconduct never affected plaintiffs in any concrete and particularized way.

The Panel, however, could obviate the need for *en banc* review by granting rehearing to correct a factual mistake on which its decision rests. As the Complaint makes clear, Appellant did not purchase her loan from Barclays Bank



PLC or Barclays Capital Real Estate Inc. d/b/a HomeEq Servicing (collectively “Barclays” or “Appellees”). Appellant bought the loan from New Century Mortgage Company (“New Century”). The Majority was misled into believing—based on false assertions made by Appellant’s counsel for the first time at oral argument—that New Century sold the loan on behalf of Barclays. *See* Mem. at 3 n.1. But no facts in the Complaint support this conclusion. Indeed, Appellant pleads the opposite: the Complaint and documents of record show that Barclays had no involvement with Appellant’s loan until months after Appellant purchased it from New Century.

The Panel therefore should rehear this case, but if it does not, the Court should grant rehearing *en banc*.

### **BACKGROUND**

In December 2006, Appellant borrowed \$522,000 from New Century and executed an Adjustable Rate Note (“Note”). (ER 656 ¶ 15.) Under the terms of the Note, Appellant agreed to “pay interest at a yearly rate of 8.775%.” (ER 2083; *see also* ER 9.) The Note provided that Appellant’s interest rate “may change on the first day of *January, 2009* and on the same day of every 6th month thereafter.” (ER 2084 (emphasis added).) Beginning on January 1, 2009, Appellant’s new interest rate would be calculated by adding 6.150% to the six-month LIBOR published in *The Wall Street Journal*. (*Id.*) Appellant agreed in

writing that the interest rate on the Note would (i) be fixed at 8.775% for the first two years, and (ii) adjust on January 1, 2009 to a rate that referenced LIBOR. (ER 2084; *see also* ER 659 ¶¶ 43-45.)

Five months after purchasing her mortgage from New Century, in April 2007, HomEq began to service the loan. (ER 287 ¶ 5, 656 ¶ 18.) By April 2008, Appellant was delinquent in her loan obligations. (ER 9-10, 660 ¶ 53.) To cure her default, Appellant obtained a loan modification agreement on April 7, 2008. (ER 10, 660 ¶¶ 54-57, 695-97.) The modification agreement provided that Appellant would pay a lower fixed rate of 5.500% until April 1, 2013, at which time the rate would adjust and become a floating rate linked to LIBOR. (ER 695.) But Appellant again defaulted on her monthly payments (ER 664 ¶¶ 87-88) and, on July 31, 2009, a Notice of Default was recorded on the subject property (*id.*). In January 2010, Appellant filed for Chapter 7 bankruptcy protection. (ER 665 ¶ 89.) Because Appellant defaulted long before April 1, 2013, Appellant never made a single payment at an interest rate linked to LIBOR.

After several failed attempts to secure relief in bankruptcy court, Appellant instituted the instant action on March 1, 2012. (ER 33.) On October 11, 2012, the District Court dismissed all of Appellant's claims based on alleged LIBOR manipulation for failure to plead Article III standing, and dismissed Appellant's claims under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof.

Code § 17200, and False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, for failure to plead Article III and statutory standing. (ER 13-16.) The District Court held that Appellant did not allege an injury in fact that was traceable to Barclays’ alleged LIBOR-related conduct due to the “simple fact that her interest rate, both in her original loan and the Loan Modification Agreement, have not been affected by LIBOR.” (ER 13; *see also* ER 15-16.)

On March 27, 2014, a divided Panel of this Court reversed the District Court’s dismissal of Appellant’s claims against Barclays related to the manipulation of LIBOR. The Majority reasoned that Appellant pled Article III and statutory standing because she “alleged that she would not have purchased her loan had she known that the Defendants were manipulating the LIBOR rate.” (Mem. at 2.) The Majority also indicated in a footnote that Appellant “adequately alleged in her complaint that Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product.” (Mem. at 3 n.1.) In arriving at its conclusions, the Majority relied on this Court’s decisions in *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013) and *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), which Appellant never raised with the District Court or this Panel, and *Maya*,

which Appellant improperly raised for the first time in her reply brief on appeal. (Docket No. 39 at 9.)<sup>1</sup>

Judge Nguyen dissented from the Majority's finding, recognizing that, although Appellant "allege[d] that she would not have purchased the loan but for Barclays' alleged manipulation of the LIBOR rate," she failed to "allege that she suffered any loss due to [Barclays'] purported deceptive conduct," or "allege that any loss is traceable to a misrepresentation related to the LIBOR-rate manipulation or to the LIBOR-rate manipulation itself." (Dissent at 1-2.)

## ARGUMENT

### **I. THE MAJORITY DECISION IS CONTRARY TO WELL-ESTABLISHED LAW REGARDING ARTICLE III STANDING AND STATUTORY STANDING UNDER THE UCL AND FAL.**

Appellant failed to establish standing to bring her claims against Barclays. "This is not a case in which the defendant's alleged misrepresentation caused a consumer to purchase a product that he or she would not have bought but for the misrepresentation *and* the product was worth less than represented by the defendant *or* was different from what the consumer wanted and expected to buy." *Bower v. AT&T Mobility, LLC*, 127 Cal. Rptr. 3d 569, 578 (Ct. App. 2011) (emphasis added). Appellant alleged no facts in the Complaint stating that

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<sup>1</sup> On January 29, 2014, the Panel issued an order directing the parties to be ready to discuss these cases at oral argument. (Docket No. 51.)

Barclays' alleged LIBOR-related conduct adversely affected Appellant's contractual rights, or the parties' performance of their contractual obligations under the agreements. Put simply, Appellant lacks standing because the "purchaser of a product who receives the benefit of [her] bargain has not suffered [an] Article III injury-in-fact." See *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 2014 WL 211462, at \*5-6 (C.D. Cal. Jan. 9, 2014) (plaintiffs lacked standing when their cars did not "fail[] to work as described").

Article III standing requires that a "plaintiff must have sustained a 'concrete' injury, distinct and palpable ... as opposed to merely abstract." *Schmier*, 279 F.3d at 822 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The UCL and FAL incorporate the federal injury in fact standard, and these statutes are even "more restrictive" because they also require plaintiff to allege an "economic injury." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 885-86 (Cal. 2011).

This Court frequently invokes the injury in fact requirement to dispose of meritless suits brought by consumers who suffer no cognizable injury as a result of purportedly harmful transactions. See, e.g., *Birdsong*, 590 F.3d at 961 (no standing to sue over supposed "loss in value" caused by "hypothetical risk"); *Gonzalez v. Kinro, Inc.*, 473 F. App'x 768, 769 (9th Cir. 2012) (same); *Lee v. Am. Express Travel Related Servs., Inc.*, 348 F. App'x 205, 208 (9th Cir. 2009) (no

standing because “no event” had “yet occurred to deprive [plaintiffs] of the benefit of their bargain”). This case is no different. The Majority erred by disregarding Appellant’s failure to allege facts suggesting that she suffered any injury as a result of her purchase of the mortgage loan. Appellant failed to allege that she ever paid “LIBOR-affected interest” (Mem. at 2-3), or otherwise suffered any discernable loss as a result of entering into the loan, regardless of Barclays’ alleged LIBOR-related conduct.

Standing requires more than a bare allegation that a plaintiff would not have purchased a product but for a defendant’s allegedly unlawful conduct,<sup>2</sup> misstatements or omissions.<sup>3</sup> The defendant’s alleged misconduct must have resulted in “concrete and particularized” injury, *Gonzalez*, 473 F. App’x at 769, and plaintiff must “be himself among the injured,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). Though Appellant can claim that some “money is ‘no longer in [her] possession’” as a result of her purchasing the loan, the same can be

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<sup>2</sup> See *Peterson v. Cellco P’ship*, 80 Cal. Rptr. 3d 316, 318, 322-23 (Ct. App. 2008) (purchaser of illegally sold insurance lacked UCL standing because he alleged no “actual economic injury”); *Medina v. Safe-Guard Prods. Int’l, Inc.*, 78 Cal. Rptr. 3d 672, 678 (Ct. App. 2008) (same).

<sup>3</sup> See *Herrington v. Johnson & Johnson Consumer Cos., Inc.*, 2010 WL 3448531, at \*1, 4-5 (N.D. Cal. Sept. 1, 2010) (plaintiffs lacked standing to sue despite allegations that plaintiffs would not have purchased products if “Defendants disclosed the contaminants” in them because plaintiffs pled no “substantial threat to ... health”).

said after “every purchase or transaction where a person pays with money.” *Peterson*, 80 Cal. Rptr. 3d at 321. Under clear Ninth Circuit precedent, the purchase is not enough, without more, to plead an injury in fact. Appellant has alleged no facts showing that she suffered any concrete and particularized injury resulting from the transactions at issue.

As the Dissent explains, the cases on which the Majority relies—*Hinojos*, *Maya*, and *Mazza*—actually demonstrate that Appellant has failed to establish standing. (Dissent at 1.) In each of those cases, plaintiffs alleged *both* that they were induced by a defendant’s misrepresentations into transacting with that defendant, *and* that they suffered a concrete and particularized injury as a result of entering into the transaction. In *Hinojos*, plaintiff alleged he suffered injury when he purchased goods that a retailer falsely represented were worth more than the prices he paid for them. 718 F.3d at 1102 & n.1. The Court found that plaintiff had adequately alleged loss represented by the difference in value between the retailer’s falsely advertised “regular” prices, which were inflated, and “sale” prices, which were the prices at which the goods were routinely sold. *Id.* at 1102, 1104-05.

In *Maya*, plaintiffs alleged that defendant developers’ misstatements about their sales practices caused plaintiffs to purchase homes that were, immediately upon purchase, less valuable than the developers’ representations

suggested they were. 658 F.3d at 1065-66. Plaintiffs alleged losses that could be measured by the difference in value between homes in stable neighborhoods—like those the developers advertised they were building—and homes in neighborhoods filled with unqualified buyers and abandoned homes. *Id.* at 1066, 1069-70.

Lastly, in *Mazza*, plaintiffs alleged that, when purchasing cars, they each paid an extra \$4,000 for a package of safety features that did not perform as promised. 666 F.3d at 585-87, 595. The Court found that plaintiffs adequately alleged they had been induced by defendants' misrepresentations to purchase the safety package, and were injured because they surrendered \$4,000 they otherwise would have retained but for the misrepresentations. *Id.* at 595.

In stark contrast to the allegations in *Hinojos*, *Maya*, and *Mazza*, Appellant alleged no facts showing that she suffered any discernable loss as a result of her purchasing the mortgage loan at issue. Appellant cannot establish standing by insisting that she made payments on a loan that was “less valuable than what [she was] promised” without alleging how she was harmed by entering into the loan or making payments pursuant to it. *Burdick v. Union Sec. Ins. Co.*, 2009 WL 4798873, at \*4-5 (C.D. Cal. Dec. 9, 2009).

The Complaint concedes that Appellant defaulted on her loan obligations years before they were to adjust to a LIBOR-linked interest rate. Thus, Appellant did not suffer a cognizable injury; she never made a single LIBOR-



linked payment pursuant to the loan, and she alleges no facts to demonstrate any other concrete injury. For example, the Complaint does not plead facts showing that Appellant was somehow harmed by purchasing the loan in the first instance. Appellant nowhere alleges that she purchased the loan instead of a different one because it was advertised as having properties that competing loans lacked. *Compare Kwikset*, 246 P.3d at 890 (purchaser of lockset not “Made in U.S.A.” as advertised had standing), *with Peterson*, 164 Cal. App. 4th at 1591 (purchaser of illegally sold insurance lacked standing because he alleged no “actual economic injury”).

Finally, the possibility that Appellant *could have been* injured under the terms of the loan—later in time, had she not defaulted and had the interest rate changed to one linked to LIBOR—does not establish standing. Appellant purchased her loan in December 2006, but she could not have been injured by Barclays’ alleged LIBOR-related conduct until years later, when her interest rate was to become linked to LIBOR. (ER 2084.) The hypothetical risk that wrongdoing may cause future harm is insufficient to establish standing. *See, e.g., Market Trading, Inc. v. AT&T Mobility, LLC*, 388 F. App’x 707, 709 & n. 2 (9th Cir. 2010); *Fineman v. Sony Network Entm’t Int’l LLC*, 2012 WL 424563, at \*3 (N.D. Cal. Feb. 9, 2012). Because Appellant was never obligated to make LIBOR-linked payments, she could not have been deprived of any alleged contractual

rights because of Barclays' LIBOR-related conduct. *See Burdick*, 2009 WL 4798873 at \*4-5 (insurance policyholders who never made certain benefits claims lacked standing to sue regarding the underpayment of such benefits). “[N]o event” ever “occurred to deprive [Appellant] of the benefit of [her contractual] bargain.” *See Lee*, 348 F. App'x at 207. Unlike the plaintiffs in *Hinojos*, *Maya*, and *Mazza*, Appellant has alleged no injury in fact.<sup>4</sup>

To hold that Appellant has established standing without alleging a concrete injury transforms buyer's remorse into a cognizable legal injury, and invites meritless lawsuits in derogation of this basic standing requirement. This Circuit, and other Circuits, have repeatedly avoided that result by making clear that consumers cannot establish standing merely by insisting that they would not have purchased a product, or would have paid less for it, had they known of some allegedly concealed fact. *See, e.g., Koronthaly v. L'Oreal USA, Inc.*, 374 F. App'x 257, 259 (3d Cir. 2010); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

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<sup>4</sup> Other courts have applied *Kwikset* to find standing where a plaintiff has adequately alleged that defendant's misrepresentations caused concrete and particularized injury. *See, e.g., In re LinkedIn User Privacy Litig.*, 2014 U.S. Dist. LEXIS 42696, at \*20 (N.D. Cal. Mar. 28, 2014) (plaintiff adequately alleged injury in fact where she purchased a premium service from defendant website operator based on its promise of “industry standard” security, which it failed to deliver, and thereby paid money she otherwise would not have paid). Such decisions illustrate the deficiencies in Appellant's allegations.

**II. THE MAJORITY DECISION IS INCORRECT BECAUSE APPELLANT ALLEGED NO FACTS SHOWING THAT SHE SUFFERED ANY INJURY FAIRLY TRACEABLE TO BARCLAYS' ALLEGED CONDUCT.**

Article III and statutory standing require Appellant to allege facts showing that she sustained a loss that is “fairly traceable” to the Appellees’ alleged misconduct. *Lujan*, 504 U.S. at 560-61; *see also Kwikset*, 246 P.3d at 885 (UCL and FAL require that “the economic injury was the result of, *i.e.*, *caused by*, the unfair business practice or false advertising that is the gravamen of the claim”). Appellant lacks standing because she alleged no facts showing a “causal connection” between her alleged injury and Barclays’ LIBOR-related conduct. *See Lujan*, 504 U.S. at 560-61.

Appellant’s pleadings affirmatively show that Barclays could not have caused Appellant injury under the theory articulated by the Majority because, by Appellant’s own allegations, Barclays had no contact whatsoever with Appellant when she entered into the mortgage loan, let alone induced Appellant into purchasing the loan by misrepresenting relevant facts upon which she relied. *See In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009) (UCL statutory standing requires “actual reliance”).

The Majority cited nothing from the Complaint or the record to support its conclusion that Appellant “adequately alleged” that “Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product that is

the subject of this litigation,” thus “satisfy[ing] the traceability requirement” for Article III and statutory standing. (Mem. at 3 n.1.)<sup>5</sup> That is unsurprising, because Appellant alleges no facts showing that Barclays contracted with any other entity, let alone New Century, to sell Appellant her loan. (*Contra* Mem. at 3 n.1.)<sup>6</sup> Indeed, the Majority appears to have been misled to its conclusion by false assertions made by Appellant’s counsel at oral argument.<sup>7</sup> The Complaint states that, “[t]wo years after plaintiff acquired the Premises, she signed a secured loan

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<sup>5</sup> Although the Majority states that Appellees raised a traceability argument for the first time at oral argument (Mem. at 3 n.1), Appellees were responding to a question of whether it was correct under *Maya*—which Appellant first raised in her reply papers—that Appellant “allege[d] ... that but for Barclays’ failure to disclose its ability to manipulate LIBOR she would have done business with somebody else?” (Certified Hearing Transcript (“Hr’g Tr.”), attached as Appendix B, 12:22-13:1.) As discussed *infra*, the allegations of the Complaint show that Appellant did not conduct any business with Barclays when she purchased her loan from New Century. And there are no alleged facts suggesting that New Century was acting as Barclays’ agent when New Century transacted business with Appellant.

<sup>6</sup> Appellant’s conclusory allegations that Barclays “contract[ed] with others to sell mortgage loans based on LIBOR” (ER 671 ¶ 130; *see also* ER 671 ¶ 128, 674 ¶ 138(e)) are wholly unsupported by any facts alleged in the Complaint or of record. Such allegations, which fail to meet the most basic pleading requirements under the Federal Rules, provide no basis for the Majority’s finding.

<sup>7</sup> At argument, Appellant’s counsel stated that New Century was “not a lender” but, rather, sold loans into a securitized trust in which Barclays was involved and, thus, representations made to Appellant about LIBOR were “made by the people in that mortgage-backed securitized trust. That’s the whole point of these trusts.” (Hr’g Tr. 27:9; 29:12-14.) Not only did Appellant’s counsel misrepresent the lending and securitization process, but it is simply not possible that a trust created in May 2007 (ER 1409) could have made any representation about LIBOR to Appellant when she bought her loan from New Century in 2006.

agreement and promissory note whereby *New Century Mortgage Corporation, the loan seller, sold plaintiff a LIBOR interest only adjustable rate mortgage* in the sum of \$522,000.00.” (ER 656 ¶ 15 (emphasis added).) Further, the Complaint makes clear that Barclays Bank PLC was not involved with Appellant’s loan until it was later securitized. (ER 656 ¶¶ 16-19, 666-67 ¶¶ 105-07.) The record also contains evidence, including an affirmation from Karen L. Stacy of HomEq, that “[i]n April 2007, HomEq began to service the Loan.” (ER 287 ¶ 5.) Appellant does not allege that Barclays became involved with Appellant’s loan until five months *after* it was sold to Appellant by New Century. (See ER 287, 656.)

Numerous other portions of the record make clear that Appellant purchased her loan from New Century, not Barclays:

- In her original Complaint, Appellant acknowledged that, “[t]o secure payment of the principal and interest provided in the note ... plaintiff, as trustor delivered to New Century Mortgage, as beneficiary, a deed of trust dated on or about December 28, 2006 [sic].” (ER 37 ¶ 17.) Appellant also admitted that, “[a]fter entering into the Deed of Trust, New Century Mortgage Corporation sent Ms. Galope a notice that the servicing of her loan had been transferred to HomEq.” (*Id.* (emphasis added).)<sup>8</sup>

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<sup>8</sup> These facts, confirmed by documentary evidence, were contradicted by Appellant’s counsel at oral argument. (See Hr’g Tr. 27:7-12 (“With regard to New Century Mortgage, they were considered a loan [seller]. *They were never alleged to be a lender. They’re not a lender.*”) (emphasis added).) New Century was a lender, and the Court may consider that fact. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (“A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic (footnote continued)

- In an affidavit dated March 1, 2012, Appellant stated that, “[o]n or about December 16, 2006, I signed a secured loan agreement and promissory note whereby *New Century Mortgage Corporation loaned me* the sum of \$522,000.00 secured by the Premises as my principal residence.” (ER 59 ¶ 5 (emphasis added).)
- The Notice of Default that Appellant received in March 2011 explained that Appellant had executed a Deed of Trust on December 16, 2006 “in favor of New Century Mortgage Corporation.” (ER 125.)

Further, Appellant’s counsel admitted to the Court that the Complaint lacks facts establishing that New Century was acting as Barclays’ agent when it sold Appellant her loan. (Hr’g Tr. 30:14-16.) Absent any misrepresentation by Barclays to Appellant, there is no alleged loss that is “fairly traceable” to Barclays. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 961-62 (9th Cir. 2004) (borrowers of second mortgage loans had no standing to sue those investment trusts that did not hold a named plaintiff’s note because they could not trace the alleged injury to those defendants); *Frison v. Accredited Home Lenders, Inc.*, 2011 WL 2729241, at \*4 (S.D. Cal. July 13, 2011) (plaintiff lacked standing where she did not allege

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evidence.”). Similarly, the Court may consider facts that contradict Appellant’s assertion during oral argument that Barclays is “listed in the mortgage-backed securitized trust as one of their loan sellers.” (Hr’g Tr. 27:18-21.) The Prospectus Supplement for the Securitized Asset Backed Receivables LLC Trust 2007-BR4, to which Appellant’s counsel referred, lists the “loan sellers” as “NC Capital Corporation ... and its affiliates” including “New Century Mortgage Corporation.” (ER 1407.) None of those entities was affiliated with Barclays, and Appellant has not alleged any contrary facts.

facts showing defendant “was involved, either directly or indirectly, in [co-defendant’s] acts at the time the loan agreement was executed”).

Regardless, even if New Century was acting as Barclays’ agent when Appellant purchased her loan (and it was not), Appellant makes no allegation that New Century made any representation to her regarding LIBOR, let alone that she relied upon such a representation in making her purchase. Those facts are fatal to Appellant’s alleged standing, even under the Majority’s view of the case. *See Wood v. Motorola Mobility, Inc.*, 2012 WL 892166, at \*7 (N.D. Cal. Mar. 14, 2012) (dismissing claims because plaintiffs “do not allege that they relied upon any affirmative representation” giving rise to duty to disclose omitted facts). At bottom, Appellant has failed to allege a causal connection between her supposed losses and Barclays’ alleged conduct. *See Daro v. Superior Court*, 61 Cal. Rptr. 3d 716, 729 (Ct. App. 2007); *Hall v. Time Inc.*, 70 Cal. Rptr. 3d 466, 473 (Ct. App. 2008).

## CONCLUSION

For the reasons set forth above, panel rehearing or rehearing *en banc* should be granted.

Dated: April 10, 2014

Respectfully submitted,

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**Form Must be Signed by Attorney or Unrepresented Litigant  
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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

Proportionately spaced, has a typeface of 14 points or more and contains 4,200 words (petitions and answers must not exceed 4,200 words).

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Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

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In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Adam S. Paris

Signature of Attorney or  
Unrepresented Litigant

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# Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 27 2014

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

<p>HELEN GALOPE, an individual,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of May 1, 2007 Securitized Asset Backed Receivables LLC Trust 2007-BR4; et al.,</p> <p style="text-align: center;">Defendants - Appellees.</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

No. 12-56892

D.C. No. 8:12-cv-00323-CJC-  
RNB

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Cormac J. Carney, District Judge, Presiding

Argued and Submitted February 11, 2014  
Pasadena, California

Before: D.W. NELSON, PAEZ, and NGUYEN, Circuit Judges.

Helen Galope appeals the district court’s grant of summary judgment in  
favor of Deutsche Bank National Trust Company (“DBNTC”), Ocwen Loan

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Servicing, and Western Progressive, LLC (“WPT”) (collectively, “DBNTC Defendants”) and dismissal of her claims against Barclays Bank PLC and Barclays Capital Real Estate Inc. d/b/a HomeEq Servicing (collectively, “Barclays Defendants”). We affirm in part, reverse in part, and remand for further proceedings.

1. We reverse the district court’s ruling that Galope failed to establish injury-in-fact necessary for Article III standing on her LIBOR-based claims. Galope adequately alleged that she would not have purchased her loan had she known that the Defendants were manipulating the LIBOR rate. Article III standing exists when a plaintiff purchases a product she would not have otherwise purchased but for the alleged misconduct of the defendant. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). Contrary to the dissent’s assertion, Galope’s standing does not turn on whether she actually made interest payments that were adjusted in response to the allegedly manipulated LIBOR rate. Galope’s cognizable injury occurred when she

purchased the loan, not upon payment of LIBOR-affected interest.<sup>1</sup> *Maya*, 658 F.3d at 1069.

We therefore reverse and remand for further proceedings on Galope’s LIBOR claims against the Barclays Defendants under the Sherman Antitrust Act, 15 U.S.C. §§ 1–2, and her state law claims for breach of the covenant of good faith and fair dealing, and fraud. However, we conclude that the district court properly granted summary judgment on all LIBOR-based claims against the DBNTC Defendants because Galope failed to present any evidence that DBNTC was involved in, or conspired in, the alleged LIBOR manipulation.

2. We reverse the district court’s ruling that Galope lacks statutory standing to pursue her LIBOR-based Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, and False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, claims against the Barclays Defendants and remand for further proceedings. Galope has statutory standing to pursue these claims because she alleged that she

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<sup>1</sup> At oral argument, the Barclays Defendants argued for the first time that Galope’s LIBOR-based claims were not traceable to their misconduct because they did not actually sell the loan to Galope. Galope, however, adequately alleged in her complaint that Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product that is the subject of this litigation. At the motion-to-dismiss stage, Galope’s allegations are sufficient to satisfy the traceability requirement of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

purchased a loan that she would not have otherwise purchased but for the Barclays Defendants' alleged misconduct. *See Kwikset Corp. v. Superior Court*, 246 P.3d 877, 890 (Cal. 2011); Cal. Bus. & Prof. Code §§ 17204, 17535.

3. We affirm the district court's rulings on all claims associated with the "missing-fax-page scheme." Galope stated in her Third Amended Complaint ("TAC") that the portions of the fax transmission that she received put her on notice that her payments would increase. This admission directly undermines her allegations that the Barclays Defendants and DBNTC deceived her into believing that the initial payment amounts were fixed throughout the term of the loan.

4. We reverse the district court's rulings that Galope's wrongful foreclosure<sup>2</sup> and UCL claims based on the DBNTC Defendants' violation of the bankruptcy court's automatic stay are not justiciable. Although rescission of the sale—almost seven months after the violation—mooted Galope's claims for injunctive and declaratory relief, it did not affect her claim for damages. *See Wilson v. State of Nev.*, 666 F.2d 378, 380-81 (9th Cir. 1982). Further, regardless of whether Galope

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<sup>2</sup> Although Galope's seventh claim in her TAC is styled as a "wrongful foreclosure" claim, the content of the claim is exclusively focused on violation of the automatic stay under 11 U.S.C. § 362. The panel thus construes this as a claim for damages under 11 U.S.C. § 362(k)(1).

has equity in the home, 11 U.S.C. § 362(k)(1) provides a statutory basis for damages.<sup>3</sup>

5. We reverse the district court's grant of summary judgment on Galope's claim for breach of the covenant of good faith and fair dealing associated with violation of the automatic stay. The covenant of good faith and fair dealing "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." *Hicks v. E.T. Legg & Associates*, 108 Cal. Rptr. 2d 10, 19 (Ct. App. 2001). Discretionary power of this kind "must be exercised in good faith." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 826 P.2d 710, 726 (Cal. 1992). The power of sale in the deed of trust provided the DBNTC Defendants with discretionary authority to foreclose upon Galope's home in the event of default. Contrary to the DBNTC Defendants' argument, there is sufficient evidence in the record to support a reasonable inference that the DBNTC Defendants had notice of the automatic stay when they

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<sup>3</sup> The DBNTC Defendants' alternative argument that Galope released her right to pursue her UCL claim when she signed her loan modification agreement fails, in part, because the release only purports to apply to "claims, damages or liabilities . . . existing *on the date of this Agreement* . . ." The loan modification agreement is dated April 17, 2008. The alleged violation of the automatic stay did not occur until September 1, 2011.



executed the trustee's sale, and that they refused to rescind it upon Galope's request.

6. Galope argues on appeal that the district court erred because it did not provide her with leave to amend her complaint. On remand, Galope may seek further leave to amend at the district court's discretion. However, leave to amend is foreclosed on all claims associated with the alleged missing-fax-page scheme. No additional allegations will change the fact that the portion of the document Galope received and signed provided her with notice that her payments were subject to change after five years and would increase. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.").

7. The parties shall bear their own costs on appeal.

**REVERSED, IN PART, AFFIRMED, IN PART, AND REMANDED.**

FILED

*Galope v. Deutsche Bank*, 12-56892

MAR 27 2014

NGUYEN, Circuit Judge, dissenting in part:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

Because I conclude that Galope failed to establish standing on her LIBOR-based claims, I respectfully dissent from the majority’s decision reversing these claims as to the Barclays Defendants. Galope does not allege that she suffered any loss due to the Barclays Defendants’ purported deceptive conduct, nor does she allege that any loss is traceable to a misrepresentation related to the LIBOR-rate manipulation or to the LIBOR-rate manipulation itself. *See, e.g., Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (concluding that the plaintiff adequately had alleged standing where, “because of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend” (quoting *Kwikset Corp. v. Superior Court*, 120 Cal. Rptr. 3d 741, 757 (2011))); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (“To the extent that class members were relieved of their money by Honda’s deceptive conduct—as Plaintiffs allege—they have suffered an ‘injury in fact’” under Article III (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011))); *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (“To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a ‘line of causation’ between defendants’ action and their alleged harm that is more than ‘attenuated.’” (citing *Allen v. Wright*, 468 U.S. 737,

757 (1984))). Indeed, as the majority concedes, Galope’s payments never were affected—she paid a fixed interest rate and defaulted before the allegedly manipulated LIBOR rate went into effect on her loan; she then was granted a loan modification with a (lower) fixed interest rate that likewise was unrelated to the LIBOR rate and defaulted again. Although Galope alleges that she would not have purchased the loan but for the Barclays Defendants’ alleged manipulation of the LIBOR rate, Galope alleges no loss from the alleged manipulation—or any related misrepresentation or omission. Therefore, Galope’s alleged injury is far too attenuated to establish Article III standing.<sup>1</sup>

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<sup>1</sup> For the same reasons, Galope lacks statutory and antitrust standing. *See, e.g., Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995) (“To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant’s behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition.” (citation omitted)). The interest rates on Galope’s loan were unaffected by the Barclays Defendants’ anticompetitive behavior.

# Appendix B

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Helen Galope v. Deutsche Bank National Trust, et  
al  
12-56892 (9th Cir. Feb. 11, 2014)

Page 2

1 LENORE ALBERT: Good morning, Your  
 2 Honors. My name is Lenore Albert and I represent  
 3 the Appellant Helen Galope. I'd like to reserve  
 4 five minutes for rebuttal.  
 5 I received the Court's order and I have  
 6 looked at the three cases with regard to Article  
 7 III standing and the issue of LIBOR in this case.  
 8 When you look at Hinojos case they clearly said  
 9 and we cited to the case of Mazza that if the  
 10 borrower either would not have purchased the  
 11 product in question or if the product was more  
 12 expensive than Article III standing would be met  
 13 because we are talking about the injury in fact  
 14 prong which was that issue in the District Court.  
 15 Here we do have the allegation by Miss  
 16 Galope which is in the third amended complaint,  
 17 which would be at page 684 of the fourth volume  
 18 of the excerpts of transcript, where she alleged  
 19 she would have never taken out the loan under the  
 20 FAL cause of action. Then we also had her  
 21 declaration with regard to the motion for Summary  
 22 Judgment where she had said the same thing. That  
 23 can be found in the record on page 2,070.  
 24 Third, we had an expert, Mr. Motts, who  
 25 had also declared in his expert capacity that no

Page 4

1 very commonsensical proposition that if you pay  
 2 for something based on a misrepresentation or  
 3 bought something based on a misrepresentation  
 4 that you otherwise wouldn't have purchased then  
 5 you have a claim or if you paid more for  
 6 something based on a misrepresentation or false  
 7 advertising then you wouldn't have a claim.  
 8 In this case I'm trying to understand  
 9 how she was injured if she defaulted before the  
 10 fixed loan adjusted under LIBOR. Doesn't she have  
 11 to allege some nexus between the product that she  
 12 claims she wouldn't have bought--? In other words  
 13 if you had a fixed rate and she never ties the  
 14 LIBOR rate manipulation to her fixed rate loan  
 15 then where is the injury there for purposes of  
 16 Article III standing?  
 17 LENORE ALBERT: Even though it was a  
 18 fixed rate it still was a LIBOR loan. The loan  
 19 was still accruing interest at the LIBOR rate.  
 20 What she was paying has no relation to what she  
 21 owed. So, although you have these exotic loan  
 22 products that might have an initial two-year  
 23 period rate lock, like this one did and it was an  
 24 interest-only note, her note was still accruing.  
 25 It was still a LIBOR note. It was still a LIBOR

Page 3

1 reasonable consumer would take out a loan knowing  
 2 that the lender was actually manipulating the  
 3 LIBOR rate against them on a LIBOR loan.  
 4 Just as some background, this case was  
 5 a LIBOR loan case where Miss Galope and potential  
 6 others similarly situated received loans during  
 7 the mid-2000s and that loan was based on the  
 8 LIBOR rate. At the time, unbeknownst to the  
 9 consumers--  
 10 JUDGE JACQUELINE H. NGUYEN: Let me make  
 11 sure I understand that correctly because she had  
 12 started with a fixed rate loan, correct? Her loan  
 13 was fixed, right, and then eventually it would  
 14 then adjust?  
 15 LENORE ALBERT: Yes, it was locked.  
 16 That's a lock rate. The first year is a lock.  
 17 JUDGE JACQUELINE H. NGUYEN: And did she  
 18 default prior to the end of that lock period?  
 19 LENORE ALBERT: The default did occur  
 20 before that lock period ended, correct.  
 21 JUDGE JACQUELINE H. NGUYEN: So with  
 22 regard to the cases that the Court had asked you  
 23 to discuss, Hinojos, Mazza and Maya, those are  
 24 all false advertising claims, misrepresentation  
 25 type cases basically standing for what, to me, is

Page 5

1 rate note.  
 2 However, the conjunction here is or and  
 3 the conjunction here on standing is whether you  
 4 pay more or whether you wouldn't have purchased  
 5 it but for the fact if you had known whatever  
 6 that misrepresentation was. Here the  
 7 misrepresentation was that this loan was based on  
 8 an independent market rate. This loan was not  
 9 based on some third independent market rate. It  
 10 was actually being manipulated by the very lender  
 11 that was giving them the loan. This was not a  
 12 fixed rate loan on the life of the loan. It was  
 13 just a rate lock meaning you will pay the same  
 14 amount of dollars allegedly for the first two  
 15 years. However, when you look at these exotic  
 16 loan products they can actually accelerate within  
 17 that type period which then changes what you  
 18 actually pay in that period of time.  
 19 What was interesting about this loan  
 20 product is that the mortgage-backed securitized  
 21 trust that this went into was also a Barclays  
 22 made trust vehicle. So, Barclays not only lent  
 23 the money and fixed the rate and manipulated the  
 24 rate, they put it into their own trust which then  
 25 they bet against the same homeowners. So what

1 happened--  
 2 JUDGE DOROTHY WRIGHT NELSON: I'm  
 3 interested in what kind of relief are you seeking  
 4 from Barclays.  
 5 LENORE ALBERT: We have the FAL cause of  
 6 action, the UCL, the fraud and so they each give  
 7 different relief. The first one gives restitution  
 8 under the UCL in the FAL, but the fraud also  
 9 gives damages and you also can get obviously  
 10 injunctive relief under UCL too.  
 11 JUDGE DOROTHY WRIGHT NELSON: All right  
 12 and would you have to give back the money that--  
 13 you would need to tender the principal balance  
 14 back to Barclays?  
 15 LENORE ALBERT: We never did get to  
 16 that. The Court never ruled on that tender issue  
 17 in the Court below. It would appear here that  
 18 what would occur, if we apply the reasoning it  
 19 isn't like buying keys in Kwikset that says made  
 20 in the USA where you would get just the money  
 21 back. No one ever gives the home back. But what  
 22 occurred here was if you take away the  
 23 manipulation, because we're talking about a long-  
 24 term investment. You're talking about someone's  
 25 home. It isn't a product that you would readily

1 either consume or give back. Everybody wants to  
 2 keep their homes. But restitution to put them  
 3 back in the same place that they would be would  
 4 be whatever money that they loaned they would be  
 5 put back either into a proper vehicle, which then  
 6 would be a loan modification which you've seen a  
 7 lot of in other scenarios the government  
 8 contrived devices for that and you've seen other  
 9 lawsuits where that device has been employed.  
 10 JUDGE DOROTHY WRIGHT NELSON: The reason  
 11 for my question I'm concerned about your  
 12 standing.  
 13 LENORE ALBERT: Right.  
 14 JUDGE DOROTHY WRIGHT NELSON: And  
 15 whether you satisfy the redressability  
 16 requirement.  
 17 LENORE ALBERT: Correct. Then there's a  
 18 second option. So there can be this modification  
 19 of the loan or you can, as we've shown, you could  
 20 give back the money that was paid because when  
 21 you're looking at a false advertising claim  
 22 that's usually what is given in any other type of  
 23 product scenario. Here we had almost--it was like  
 24 approximately \$100,000 in interest-only payments  
 25 that was paid towards this rigged LIBOR market

1 interest, because it didn't go towards the  
 2 principal of her home. So hers was easy and most  
 3 of these are. As a matter of fact the whole  
 4 mortgage-backed securitized trust in this case  
 5 was set up to have it interest-only until 2012  
 6 and we know the rigging ended around 2009 so for  
 7 everybody it would be the same. It would be that  
 8 same mortgage interest rate because most of these  
 9 people were foreclosed upon. You only had in this  
 10 trust approximately 15 percent of the homeowners  
 11 that could even sustain this type of exotic  
 12 vehicle. This trust was truly set up to fail.  
 13 The market rigging was set up  
 14 purposefully to only make money for the banks and  
 15 they made it on every single side in this case.  
 16 There was no way that the average homeowner could  
 17 succeed no matter what they did in this loan.  
 18 Even if you were going to pay your interest rate  
 19 under these types of vehicles you would still  
 20 default. The loan was created, this mortgage-  
 21 backed securitized trust, was created to default.  
 22 How the 15 percent survived it's just more of an  
 23 anomaly than what would be expected.  
 24 JUDGE JACQUELINE H. NGUYEN: Can you  
 25 talk about your claim based on violation of the

1 automatic stay and before you answer that clarify  
 2 for me which defendant you're going against with  
 3 regard to those claims and whether there was  
 4 notice? There's evidence in the record of notice  
 5 that there was an automatic stay in place.  
 6 LENORE ALBERT: With regard to the claim  
 7 of violating the automatic stay, that goes to  
 8 Western Progressive, the trustee, and Ocwen who  
 9 was the current servicer. Both of them had notice  
 10 through the Bankruptcy Court that there was a  
 11 bankruptcy petition filed.  
 12 During that course the Bankruptcy Court  
 13 dismissed it for lack of filing something. The  
 14 debtor was able to get that bankruptcy stay  
 15 reinstated before the sale. There was a courtesy  
 16 notice that was filed by the bank's attorneys  
 17 themselves so they received notice as soon as  
 18 that vacate order came through which was a few  
 19 days before the actual day of the sale.  
 20 Then the debtor, as alleged, had also  
 21 given notice after she learned of the sale that  
 22 the bankruptcy stay was--the bankruptcy was back  
 23 in place and that they had violated the stay. Yet  
 24 the bank continued to hold onto the title and  
 25 refused to give the title back. Neither the

Page 10

1 servicer Ocwen nor Western Progressive would give  
 2 the title back until after this case was filed.  
 3 The Court found it to be moot because once they  
 4 were facing the TRO and possible preliminary  
 5 injunction they sent in a declaration that the  
 6 banks were going to go ahead and give title back  
 7 to Miss Galope.  
 8 My point is that standing occurs at the  
 9 date that the lawsuit is filed. If you do that  
 10 then most defendants could moot out almost every  
 11 single action. It's an involuntary settlement and  
 12 there is some case law that is cited in the brief  
 13 with that proposition.  
 14 Here at the time the lawsuit was filed  
 15 she still did not have title to her home. She was  
 16 entitled, since she went that route, to receive  
 17 damages that she incurred because she still  
 18 incurred attorney's fees, she still incurred  
 19 other costs and other time and expense. Her title  
 20 was clouded for I believe it was almost six  
 21 months, maybe nine months and where she couldn't  
 22 use her equity, she couldn't use her home, she  
 23 couldn't use it for any credit purposes so there  
 24 was a real damage there.  
 25 Back to the standing, under the three

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1 LENORE ALBERT: Thank you.  
 2 JUDGE RICHARD PAEZ: Okay.  
 3 MATTHEW PORPORA: Good morning, Your  
 4 Honors. May it please the Court, my name is  
 5 Matthew Porpora of Sullivan & Cromwell appearing  
 6 on behalf of the Barclays Appellees.  
 7 Your Honors, I've consulted with  
 8 counsel for the other Appellees and agreed to  
 9 split our time in half so I'll be taking seven  
 10 and a half minutes and then counsel for the other  
 11 Appellees will round out the argument.  
 12 Your Honors, in a well-reasoned  
 13 decision the District Court dismissed each of the  
 14 Appellant's six claims against the Barclays  
 15 Appellees and it did so for several reasons. Most  
 16 fundamentally though it dismissed because the  
 17 Appellant has failed to adequately allege that  
 18 she suffered any injury whatsoever as a result of  
 19 the conduct she alleges against the Barclays  
 20 Appellees.  
 21 JUDGE DOROTHY WRIGHT NELSON: What about  
 22 the case of Maya v. Centex? Doesn't she allege  
 23 and declare that but for Barclays' failure to  
 24 disclose its ability to manipulate LIBOR she  
 25 would have done business with somebody else?

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1 cases it shouldn't make a difference because this  
 2 is a long-term loan. I know it's different  
 3 because it is a long-term loan, but because the  
 4 injury is--it's actually more severe. Because  
 5 it's so injurious doesn't mean now you lack  
 6 standing. It should mean now there is some  
 7 redressability here. It isn't like a political  
 8 question. Usually when you're talking about  
 9 Article III standing you're asking am I usurping  
 10 another branch of the government. I get it that  
 11 all courts are struggling with the concept in  
 12 this foreclosure crisis what kind of damages  
 13 because the damages seem like they're so large,  
 14 but yes they are and we're seeing settlements  
 15 like that all the time. We're seeing settlements  
 16 in the billions of dollars and even with these  
 17 billions of dollars of settlements, the economic  
 18 reality is the financial institutions have grown  
 19 enormously during this period. It's only a  
 20 portion of their profits that they're even losing  
 21 in these settlements. So although damages are  
 22 enormous they're justified. There is  
 23 redressability here.  
 24 JUDGE RICHARD PAEZ: Did you want to  
 25 save about three minutes for rebuttal?

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1 MATTHEW PORPORA: She does allege that,  
 2 Your Honor. Let me draw a distinction between  
 3 Maya and the other cases that this Court brought  
 4 to the attention of the parties--the Mazza case  
 5 and the Hinojos case.  
 6 In each of those three cases the  
 7 Plaintiff had adequately alleged number one that  
 8 he or they were induced into entering into  
 9 transactions as a direct result of  
 10 misrepresentations made by the Defendant to the  
 11 Plaintiff that induced the Plaintiff to enter  
 12 into the transaction. The Plaintiff also  
 13 adequately alleged that by entering into that  
 14 transaction they were injured at the moment they  
 15 entered into the contract. They suffered a real  
 16 injury in fact.  
 17 In Maya for instance, they paid more  
 18 for the homes than those homes were worth because  
 19 they believed they were paying for homes that  
 20 actually were in stable neighborhoods. Neither of  
 21 those two circumstances, the inducement by the  
 22 Defendant or injury, in fact are present here,  
 23 Your Honors and I'll explain why.  
 24 JUDGE RICHARD PAEZ: Well, she signed  
 25 her name to a--she committed herself to a long-



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1 term note.  
 2 MATTHEW PORPORA: She did, Your Honor.  
 3 JUDGE RICHARD PAEZ: Having done that  
 4 why isn't that injury, economic injury?  
 5 MATTHEW PORPORA: Well, Your Honor--  
 6 JUDGE RICHARD PAEZ: She said she  
 7 wouldn't have done it had she known.  
 8 MATTHEW PORPORA: You're correct, Your  
 9 Honor. But number one, with regard to her saying  
 10 she wouldn't have engaged in the loan  
 11 transaction, she didn't transact with either of  
 12 the Barclays Appellees. She transacted with New  
 13 Mortgage Corporation, Your Honors, and that's  
 14 expressly alleged at paragraph 15 of the third  
 15 amended complaint--the complaint that the  
 16 District Court properly dismissed. She expressly  
 17 alleges that she purchased the loan from New  
 18 Century, that New Century was the seller of the  
 19 loan, that it sold her the loan.  
 20 The only entity that could have made  
 21 any representations that would have induced her  
 22 to enter into that transaction was New Century  
 23 and she doesn't allege that New Century made any  
 24 such allegations.  
 25 Now, getting back to your question,

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1 Hinojos case rely on similar facts. They all  
 2 require that there be a misrepresentation from  
 3 the Defendant to the Plaintiff inducing the  
 4 Plaintiff to enter into the transaction. That  
 5 didn't occur here. They all required that the  
 6 Plaintiff allege adequately that he suffered an  
 7 injury in fact. That did not occur here.  
 8 JUDGE RICHARD PAEZ: Barclays stepped in  
 9 as a servicer, right?  
 10 MATTHEW PORPORA: Yes, Your Honor.  
 11 Barclays stepped in as a servicer actually months  
 12 after the Appellant even entered into the loan.  
 13 It's undisputable, Your Honors, from the  
 14 allegations of the complaint and also from the  
 15 loan documentation submitted by the Appellant  
 16 that--  
 17 JUDGE RICHARD PAEZ: Was it known at the  
 18 time of the transaction that Barclays was going  
 19 to be the servicer?  
 20 MATTHEW PORPORA: The record's not clear  
 21 on that and certainly the Appellant doesn't  
 22 allege it. The Appellant alleges that she entered  
 23 into the loan with New Century and that months  
 24 later, in April of 2007, Barclays took over as  
 25 the servicer. In any event, the Barclays Appellee

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1 Judge Paez, about whether there was actually any  
 2 injury, regardless of the fact that any  
 3 misrepresentation could not have been made by a  
 4 Barclays Appellee, this Appellant did not suffer  
 5 injury when she entered into the loan. As Judge  
 6 Nguyen pointed out previously, this was a loan  
 7 that employed a fixed interest rate on the front  
 8 end. It was undeniably a fixed interest rate of  
 9 8.775 percent. She contracted to get that fixed  
 10 interest rate. She got that fixed interest rate.  
 11 Now, she contracted also to get a loan  
 12 that would at some point in the future, January  
 13 1, 2009 to be precise, would switch from a fixed  
 14 interest rate loan to a floating interest rate  
 15 loan that would be calculated in accordance with  
 16 LIBOR. But, Your Honors, any claim that she would  
 17 have been injured if and when the loan actually  
 18 did link to LIBOR if she had not defaulted on her  
 19 payments, any allegation that she would have been  
 20 injured is absolutely speculative. It's  
 21 hypothetical. There's nothing in the complaint  
 22 that suggests that she would have suffered injury  
 23 if and when that loan did link to LIBOR.  
 24 Your Honors, each one of the three  
 25 cases, the Maya case, the Mazza case and the

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1 that took over as services was HomEq Servicing  
 2 and HomEq Servicing is a corporate affiliate of  
 3 Barclays Capital Real Estate Incorporated. That  
 4 entity does not sit on the dollar LIBOR panel, on  
 5 any LIBOR panel. It's not responsible for making  
 6 LIBOR submissions.  
 7 To the extent that the Appellant is  
 8 making any suggestion whatsoever that the HomEq  
 9 Servicing could have made a representation,  
 10 there's nothing in the complaint that suggests  
 11 that HomEq Servicing would have had any knowledge  
 12 whatsoever about any LIBOR manipulation and it's  
 13 well-established under black letter law that you  
 14 cannot impute the knowledge of a parent company  
 15 to a subsidiary merely because of the corporate  
 16 form. There's nothing in the allegation that  
 17 suggests even if she had alleged that HomEq made  
 18 any representations whatsoever that it would have  
 19 done so in a knowingly false manner.  
 20 Your Honors, going back to the reasons  
 21 that the District Court correctly dismissed the  
 22 claim, the Appellant has not alleged that she  
 23 ever made a single payment based on LIBOR. Again,  
 24 a review of the Appellant's own allegations and  
 25 the loan agreement show unequivocally that she

1 made only fixed interest rate payments both on  
2 the December 2006 loan and also on the modified  
3 2008 loan.

4 It is also undisputed that the  
5 Appellant defaulted on each of those loans long  
6 before they were set to recalculate in accordance  
7 with LIBOR. Again, to the extent that there's any  
8 suggestion whatsoever that this Appellant could  
9 have suffered any kind of injury as a result of  
10 LIBOR manipulation, that can't be. It's not a  
11 factual possibility and therefore the District  
12 Court correctly determined she had neither  
13 Article III nor statutory standing to bring her  
14 claims.

15 There is a separate set of allegations,  
16 that I'll refer to as the fact scheme  
17 allegations, that the Appellant presents. Those  
18 allegations essentially boil down to a simple  
19 claim that HomEq Servicing in April of 2008 faxed  
20 the Appellant a copy of the modified loan  
21 agreement and did so in a purposefully misleading  
22 way so as to obfuscate certain terms on the  
23 agreement. I think the common sense way to put  
24 this is the Appellant alleges that when the fax  
25 was transmitted through, the bottom three inches

1 was lopped off of the one or two pages of the  
2 agreement.

3 The Appellant alleges that as a result  
4 of that she was falsely led into believing that  
5 she was achieving terms that were more favorable  
6 than those that were employed by the initial loan  
7 agreement. But, Your Honors, that is precisely  
8 what happened. By entering into the modified loan  
9 agreement the Appellant was materially benefited.  
10 She most certainly did not suffer any injury  
11 whatsoever. She achieved a significantly  
12 decreased monthly interest rate. It went down  
13 from 8.775 percent to 5.5 percent and that  
14 immediately translated into roughly \$800 of  
15 savings on her monthly loans. In addition to  
16 that, as the Appellant herself alleges at  
17 paragraph 54 of the third amended complaint, by  
18 entering into the modified loan agreement she  
19 staved off foreclosure. She herself expressly  
20 states that she cured the then existing default  
21 on her December 2006 loan by entering into the  
22 modified loan agreement.

23 In short, Your Honors, there is nothing  
24 that the Appellant alleges that establishes any  
25 injury in fact. She does not have Article III nor

1 statutory standing to bring any of her claims  
2 against the Barclays Appellees and we would ask  
3 that the District Court affirm. I'm sorry, that  
4 this Court affirm the District Court's decision.

5 JUDGE RICHARD PAEZ: Okay, thank you.  
6 Let's see, who's next?

7 ROBERT NORMAN: Good morning. May it  
8 please the Court, my name is Robert Norman. I  
9 represent the Defendants Deutsche Bank National  
10 Trust Company as trustee, Ocwen Loan Servicing  
11 and Western Progressive.

12 Your Honors, I do want to avoid some of  
13 the overlap because we share a lot of the  
14 arguments with Barclays. But there are a few  
15 important distinctions that I would like to make  
16 and focusing on the LIBOR standing claims. In  
17 particular, Deutsche Bank National Trust Company,  
18 or DBNTC, that entity, like the HomEq Servicing  
19 entity, was not a LIBOR company that sat on the  
20 panel submitting rates. That's Deutsche Bank AG,  
21 a separate legal entity organized in the Republic  
22 of Germany who was never a party to this case. I  
23 think that's an important distinction to make for  
24 Deutsche Bank National Trust Company.

25 Focusing on the injury in fact, again

1 there are some similarities, but as Judge Nguyen  
2 pointed out, the original loan was not tied to  
3 LIBOR. This was a fixed rate from New Century,  
4 another entity not before this Court. There is an  
5 allegation that she would not have obtained this  
6 loan, but there has to be misrepresentation from  
7 the Defendant Appellees I believe to rely on,  
8 let's say, the Hinojos, Mazza or Maya cases and  
9 that didn't happen in this case.

10 With respect to the causation type  
11 argument under Article III and could this injury  
12 be traceable to any of the challenged conduct,  
13 again there's some overlap with the fact that  
14 there was no actual injury and that there could  
15 be no causation because Deutsche Bank National  
16 Trust Company was not on the LIBOR panel.  
17 Deutsche Bank National Trust Company, there's no  
18 evidence, there's no allegations that that entity  
19 ever made a single allegation to Ms. Galope and  
20 that makes sense because they were a trustee for  
21 a trust. Communications are going to start with  
22 either your original lender, which in this case  
23 was New Century, and then eventually transition  
24 to perhaps a loan servicer. That's the way the  
25 industry is set up. So there would have been no

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1 communications or a link to show some sort of  
 2 causation.  
 3 JUDGE JACQUELINE H. NGUYEN: With regard  
 4 to the violation of the automatic stay, can you  
 5 tell us why it took so long for the sale to be  
 6 rescinded?  
 7 ROBERT NORMAN: Yes, Your Honor. There  
 8 are a few reasons. Number one, and I think the  
 9 opening brief was a little misleading in that  
 10 there wasn't this notice to Western Progressive,  
 11 who is the foreclosure trustee, and what had  
 12 happened in this case is when the second  
 13 bankruptcy was filed it was dismissed shortly  
 14 thereafter because the proper schedules weren't  
 15 filed. Ms. Galope moved to reinstate that. That  
 16 happens on August 30th.  
 17 There is an allegation that notice was  
 18 provided to other entities, but not the  
 19 foreclosure trustee Western Progressive and  
 20 that's in the record, the declaration from Miss  
 21 Spurlock indicates that they had not received  
 22 notice the bankruptcy had been reinstated. Once  
 23 the bankruptcy--  
 24 JUDGE JACQUELINE H. NGUYEN: Did Ocwen  
 25 get notice?

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1 fancy labels. If you look at the factual  
 2 allegations she alleges there was a violation of  
 3 the automatic stay which resulted in an improper  
 4 foreclosure.  
 5 ROBERT NORMAN: Well, I believe the way  
 6 the District Court had focused its analysis was  
 7 that it was a wrongful foreclosure claim--  
 8 JUDGE JACQUELINE H. NGUYEN: Well, it's  
 9 styled as a wrongful foreclosure claim, but all  
 10 of the allegations focus on the violation of the  
 11 automatic stay so I think it's a fair  
 12 construction of the claim that the claim is based  
 13 on an allegation that there was a violation of  
 14 the automatic stay which could give rise to the  
 15 claim for damages. I don't see how the damages  
 16 claim really goes away given those allegations.  
 17 So, what evidence would contravene that  
 18 claim for damages?  
 19 ROBERT NORMAN: Well, Ms. Galope had an  
 20 opportunity at the trial court to oppose a  
 21 Summary Judgment to bring forth evidence of  
 22 damages and I don't believe that she did that. I  
 23 believe that the focus that was there was that  
 24 there was no equity in the property so there  
 25 could not have been any damages and that because

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1 ROBERT NORMAN: There's an allegation  
 2 that notice was provided to counsel for Ocwen,  
 3 but still not the foreclosure trustee. But I  
 4 think what was more important for the District  
 5 Court's reasoning is that the sale was rescinded.  
 6 The other fact that's a little bit unique, and  
 7 one you have to look at from the industry's  
 8 perspective, after the foreclosure sale--  
 9 JUDGE RICHARD PAEZ: That may eliminate  
 10 the need for injunctive and declaratory relief,  
 11 but that doesn't eliminate her claim for damages.  
 12 ROBERT NORMAN: But her claim for  
 13 damages, Your Honor, was under wrongful  
 14 foreclosure and the District Court looked at--  
 15 JUDGE RICHARD PAEZ: Well, what she's  
 16 essentially claiming is a violation of the  
 17 automatic stay which results in the wrongful  
 18 foreclosure. That's the core of her claim.  
 19 ROBERT NORMAN: Your Honor, I would  
 20 think that the difference here is that she did  
 21 not allege a violation of the automatic stay as a  
 22 borrower or a debtor could have done so and I  
 23 think that changes--  
 24 JUDGE RICHARD PAEZ: Well, she  
 25 essentially--you don't have to use all these

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1 the sale--  
 2 JUDGE RICHARD PAEZ: Well, she's not  
 3 just limited to equity in the property as the  
 4 only basis for damages.  
 5 ROBERT NORMAN: I think under a pure 362  
 6 violation I think there could be other damages.  
 7 There could be emotional distress, potentially  
 8 other claims.  
 9 JUDGE RICHARD PAEZ: Correct.  
 10 ROBERT NORMAN: But I just don't think  
 11 that was the way it was fashioned before the  
 12 trial court. That's not how it was pled and this  
 13 was her third amended complaint. I mean if she  
 14 wanted to allege a specific claim for violation--  
 15 JUDGE RICHARD PAEZ: We're dealing with  
 16 so many claims here I can't remember, was this  
 17 claim knocked out on Summary Judgment or on a  
 18 motion to dismiss?  
 19 ROBERT NORMAN: All of the claims, Your  
 20 Honor, for my client Deutsche Bank National Trust  
 21 Company, Ocwen and Western Progressive were done  
 22 on Summary Judgment where she had to come forward  
 23 with the evidence to create the triable issue and  
 24 the District Court didn't find that she did so.  
 25 JUDGE DOROTHY WRIGHT NELSON: She was

1 seeking attorney's fees also, was she not?  
 2 ROBERT NORMAN: She was generally  
 3 seeking attorney's fees. There wasn't a showing--  
 4 I think again the Court focused here that it  
 5 didn't view this in the scope of a 362 claim, and  
 6 I appreciate the Court saying that that was sort  
 7 of the genesis of a why a wrongful foreclosure,  
 8 but she didn't couch it as a violation of 362. It  
 9 was a wrongful foreclosure claim and her other  
 10 claims against my clients wouldn't allow for  
 11 attorney's fees. For example, the UCL claims. I  
 12 mean that's a restitution-based remedy where  
 13 she's not going to get attorney's fees.  
 14 JUDGE RICHARD PAEZ: Thank you.  
 15 ROBERT NORMAN: Your Honor, just to  
 16 conclude, on the redressability by an order,  
 17 Judge Nelson, you asked about that. I think that  
 18 there would be a problem here back to the  
 19 standing argument because what would there be to  
 20 redress where none of the Appellees were involved  
 21 in making the communications to Ms. Galope which  
 22 was the exact opposite in the Hinojos, Mazza and  
 23 Maya. There were those representations, a direct  
 24 involvement. Here there is just not that  
 25 connection to that nexus so I don't know what the

1 redressability would be.  
 2 Your Honor, I have nothing further  
 3 unless there are any other questions.  
 4 JUDGE RICHARD PAEZ: Nothing further.  
 5 Okay. You have a few minutes for rebuttal.  
 6 LENORE ALBERT: Thank you, Your Honors.  
 7 With regard to New Century Mortgage, they were  
 8 considered a loan center. They were never alleged  
 9 to be a lender. They're not a lender. They're  
 10 listed in the mortgage-backed securitized trust.  
 11 They're in the record. The panel can judicially  
 12 recognize that fact.  
 13 JUDGE RICHARD PAEZ: They were a what?  
 14 LENORE ALBERT: They were a loan seller,  
 15 not a lender. A loan seller is someone that--  
 16 JUDGE RICHARD PAEZ: Well, is it clear  
 17 that they were selling on behalf of Barclays?  
 18 LENORE ALBERT: Yes, they are listed in  
 19 the mortgage-backed securitized trust as one of  
 20 their loan sellers, one of the people that would  
 21 be peddling their loans. Traditionally banks used  
 22 to have their own desks and their own sellers  
 23 inside their banks.  
 24 JUDGE RICHARD PAEZ: So they make a  
 25 distinction between Barclays, I forget what they

1 call that, the local one as opposed to the  
 2 Barclays that sat on the LIBOR panel.  
 3 LENORE ALBERT: There is a Deutsche Bank  
 4 in America, Barclays in America and then there's  
 5 a Deutsche Bank in Germany and a Deutsche Bank in  
 6 England. They're just subsidiaries of each other.  
 7 Although they're subsidiaries and affiliates  
 8 they're still agents of each other, they just  
 9 have different units.  
 10 When the LIBOR scandal broke we have at  
 11 least 16 banks approximately that make up the  
 12 LIBOR loan. That would be Deutsche Bank AG and  
 13 Barclays PLC London and Germany. They have  
 14 subsidiaries. So they have all their little  
 15 financial institutions spread out throughout the  
 16 world.  
 17 What they're saying is that they're  
 18 trying to break the nexus between their  
 19 subsidiaries and between Barclays proper.  
 20 Barclays PLC in London is the same Barclays in  
 21 this mortgage-backed securitized trust. Deutsche  
 22 Bank National Trust Company, Deutsche Bank Trust  
 23 Company of the Americas are the two American-  
 24 created entities of actually the subsidiaries of  
 25 Deutsche Bank in Germany. But that doesn't cut

1 off the nexus.  
 2 That would be like saying, for example  
 3 in the other case, somehow you have a subsidiary  
 4 of Ford Motor Company or GM and Chrysler, you  
 5 don't cut off from each other unless if there's  
 6 some legal reason to do so and there wouldn't be  
 7 in this case. But New Century is listed in the  
 8 mortgage-backed securitized trust. They're a loan  
 9 seller. They're just a seller for that loan pool.  
 10 So you would have New Century Mortgage or a  
 11 couple of other peddlers on the papers, but it  
 12 doesn't mean that it wasn't representation made  
 13 by the people in that mortgage-backed securitized  
 14 trust. That's the whole point of these trusts.  
 15 As far as the faxing goes, there were  
 16 damages because the material term was anything  
 17 past a certain year was not disclosed in the  
 18 bottom three inches and therefore she stopped  
 19 paying after advice of counsel to stop paying  
 20 because they weren't giving her all the material  
 21 terms of her loan modification which resulted in  
 22 the second default.  
 23 And then finally, on the automatic stay  
 24 there was a declaration from page 2,067 to 70  
 25 where she does allege her damages. So the damages

1 were in the record for the Court with regard to  
 2 the type of damages that resulted with regard to  
 3 the automatic stay and everything else. But going  
 4 back to standing, this is redressable. It is  
 5 redressable. Barclays is getting away with this  
 6 whole LIBOR rigging across the board. This is the  
 7 last stand. These are the direct purchasers. If  
 8 the direct purchasers don't have standing then  
 9 who does? We see the kind of financial crisis and  
 10 the greed that occurred here and how the rest of  
 11 the economy and everyone else has to live with  
 12 it.

13 If there is something technical it's  
 14 just a technical pleading error. If you need to  
 15 plead that New Century Mortgage is an agent of  
 16 Barclays that can be pled and it can be proven  
 17 through their own mortgage-backed securitized  
 18 trust agreement. Thank you, Your Honors.

19 JUDGE RICHARD PAEZ: Thank you, counsel.  
 20 We appreciate your arguments in this interesting  
 21 case. The matter is submitted and that will end  
 22 our session for today.  
 23  
 24  
 25

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