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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MICHAEL MCELDERY,

a Portland resident,

Plaintiff,

v.

NATIONSTAR MORTGAGE LLC,

a Delaware limited liability company,

Defendant.

Case No. 3:14-cv-01598-SI

ELDER ABUSE AMENDED COMPLAINT

ORS 124.100

ORS 646.638

DEMAND FOR JURY TRIAL

1.

INTRODUCTION

Mr. McEldery alleges that between *January 31, 2014* and *September 26, 2014*, Nationstar acted in bad faith, wrongfully took mortgage payments from him under false pretenses, and ultimately breached its own settlement agreement in hopes of illegally profiting.

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2.

JURISDICTION

The United States District Court for the District of Oregon has jurisdiction of this action pursuant to 28 U.S.C. § 1332 because Mr. McEldery's claims for economic loss, emotional harm, punitive damages, attorney fees, and costs exceed \$75,000 and complete diversity of the parties exists.

3.

The United States District Court for the District of Oregon also has jurisdiction of this action pursuant to 28 U.S.C. §§ 1334 and 1367 because Mr. McEldery's breach of contract claim relates to Oregon chapter 7 bankruptcy case number 11-38361-el7 (In re McEldery) and his state law claims form part of the same controversy.

4.

Mr. McEldery's claims in this complaint arise independent of the discharge order entered in his bankruptcy case and require no bankruptcy-laden determinations.

5.

This action is not a core proceeding under 28 U.S.C. § 157 and Mr. McEldery consents to a jury trial in bankruptcy court and entry of final orders and judgment by the bankruptcy judge.

6.

Mr. McEldery would have preferred to reduce costs by filing this complaint as an adversary proceeding and trying the case with the pending contempt proceeding in bankruptcy court but Nationstar refused to consent to final adjudication in bankruptcy court.

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7.

THE PARTIES

Plaintiff Michael McEldery was born February 28, 1947 and resided in his home at 433 NE Sacramento St. in Portland, Oregon at all times.

8.

Mr. McEldery and his family live in one of the few remaining African-American-owned stately homes in Portland's Irvington neighborhood.

9.

Mr. McEldery's home has been in the family for over 40 years.

10.

Mr. McEldery uses the wages he earns at the McMenamins Kennedy School as a maintenance worker to pay his mortgage each month.

11.

Defendant Nationstar Mortgage LLC ("Nationstar") is a Delaware limited liability company and is regularly engaged in its mortgage services business in Oregon at all times.

12.

Nationstar is a "mortgage loan servicer" as that term is defined at OAR 137-020-0800 because it serviced Mr. McEldery's residential mortgage loan in Oregon.

13.

The venue and division of this Honorable Court are proper because the contract subject to this complaint was entered in Portland, Nationstar conducts its business in Portland, and Mr. McEldery lives in Portland.

14.

THE DUTY OF GOOD FAITH

Nationstar is Mr. McEldery's mortgage company and he is its customer.

15.

In addition to their mortgage agreement, Nationstar and Mr. McEldery entered into a legally binding settlement agreement and loan modification agreement in late 2013.

16.

As such, Nationstar and Mr. McEldery are bound under Oregon law by a duty of good faith when dealing with each other, meaning they must act honestly, and in observance of reasonable standards of fair dealing.

17.

NATIONSTAR'S BAD FAITH CONDUCT IN 2013

On July 23, 2013, Mr. McEldery alleged Nationstar committed contempt of the discharge order entered in his bankruptcy case by collecting payments under false pretenses and initiating a wrongful foreclosure lawsuit behind his back.

18.

Specifically, Mr. McEldery alleged Nationstar delayed applying his March 2013 payment as a pretext to justify its wrongful foreclosure lawsuit.

19.

Mr. McEldery also alleged Nationstar intentionally gave him the run around over the phone and refused to respond to his desperate calls for help.

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20.

After Nationstar was ordered to show cause why it shouldn't be held in contempt, it dismissed the foreclosure lawsuit it had filed against Mr. McEldery.

21.

On October 20, 2013, after Nationstar agreed to dismiss its lawsuit, Mr. McEldery brought additional claims against Nationstar, including elder abuse, unlawful trade practices, and breach of contract.

22.

On November 8, 2013, Nationstar agreed to apologize to Mr. McEldery, compensated Mr. McEldery \$20,000, and promised to modify Mr. McEldery's mortgage in order to settle his claims.

23.

Specifically, Nationstar promised the loan modification would bring Mr. McEldery's mortgage balance current as of January 2014.

24.

SETTLEMENT AGREEMENT AND LOAN MODIFICATION

The signatures of Mr. McEldery and Nationstar's Vice President on the settlement agreement are dated December 18, 2013.

25.

Mr. McEldery signed the loan modification agreement on December 18, 2013 and Nationstar's Vice President's signature on the loan modification agreement is dated January 31, 2014.

26.

Nationstar's conduct prior to December 18, 2013 does not form the basis of the claims in the instant complaint but instead is alleged to prove the intent, motive, knowledge, patterns, practices, habits, and routine practices of Nationstar's conduct occurring after January 31, 2014.

27.

MR. MCELDERY FAITHFULLY MADE HIS PAYMENTS

When Mr. McEldery eventually received Nationstar's apology letter, he was disappointed to see it was just a form letter, and carelessly co-addressed to his deceased mother-in-law.

28.

Regardless, starting in January 2014, Nationstar began taking payments from Mr. McEldery based solely on the pretense that his loan had been brought current through modification.

29.

Mr. McEldery faithfully made his payments each month in reliance on Nationstar's settlement agreement and loan modification agreement.

30.

Mr. McEldery would not have continued to make payments if his loan was not modified.

31.

In the summer of 2014, Mr. McEldery noticed Nationstar appeared to be manipulating the timing of its application of his mortgage payments.

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32.

Based on Nationstar's prior conduct, Mr. McEldery was concerned it might use the manipulation to justify another wrongful foreclosure lawsuit.

33.

NATIONSTAR'S MALICIOUS BAD FAITH CONDUCT IN 2014

When Mr. McEldery and his wife called in to express concerns about the timing of Nationstar's application of their mortgage payments, Nationstar gave them the run around over the phone and ultimately refused to address the issue with them.

34.

As a result of Nationstar's conduct, Mr. McEldery was required to hire an attorney to enforce his rights under the provisions of the settlement agreement and loan modification agreement.

35.

After receiving a letter from Mr. McEldery's attorney in July 2014, Nationstar declared his mortgage over \$45,000 in arrears and refused to accept his August 2014 payment.

36.

Nationstar returned Mr. McEldery's August 2014 payment to his attorney's office but took and applied Mr. McEldery's September 2014 payment.

37.

Nationstar's conduct as alleged above constitutes a malicious bad faith material breach of the settlement agreement and loan modification agreement it entered with Mr. McEldery.

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38.

When Mr. McEldery submitted payments from January 2014 to August 2014, Nationstar intentionally failed to correctly post the payments to his loan balance.

39.

When Mr. McEldery submitted payments from January 2014 to August 2014, Nationstar intentionally failed to correctly adjust his loan balance.

40.

Nationstar's conduct as alleged above resulted in the assessment of illegal wrongful erroneous late charges against Mr. McEldery.

41.

Nationstar's conduct as alleged above resulted in the assessment of illegal wrongful erroneous interest amounts against Mr. McEldery.

42.

Nationstar's conduct as alleged above resulted in the assessment of an illegal wrongful erroneous interest rate against Mr. McEldery.

43.

Nationstar's conduct as alleged above resulted in its representation of an illegal wrongful erroneous loan balance to Mr. McEldery.

44.

Nationstar's conduct as alleged above wrongfully sent Mr. McEldery down the path to foreclosure.

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45.

Nationstar materially misrepresented and breached its settlement agreement and loan modification agreement with Mr. McEldery by wrongfully taking payments from him in 2014 based on the false pretense that his loan had been brought current.

46.

Mr. McEldery was not legally obligated to make payments to Nationstar and only made payments in 2014 to Nationstar in reliance on its contractual obligation to bring his mortgage current through modification.

47.

Nationstar's conduct was malicious because the 2013 contempt proceeding and complaint gave Nationstar actual knowledge that continuing to wrongfully take mortgage payments from Mr. McEldery caused him severe ongoing frustration, stress, and anxiety.

48.

Nationstar's conduct was malicious because the 2013 contempt proceeding and complaint gave Nationstar actual knowledge that continuing to give Mr. McEldery the run around on the phone caused him severe ongoing frustration, stress, and anxiety.

49.

Nationstar's conduct was malicious because the 2013 contempt proceeding and complaint gave Nationstar actual knowledge that continuing to wrongfully demand excessive loan balances caused Mr. McEldery severe ongoing frustration, stress, and anxiety.

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50.

Nationstar's intentional conduct (returning payments, giving the run around on the phone, demanding excessive balances, etc.) was in bad faith because its own apology letter proves it had actual heightened notice of its obligations under the loan modification agreement.

51.

Nationstar's intentional conduct (returning payments, giving the run around on the phone, demanding excessive balances, etc.) was in bad faith because it constituted the same pattern and practice that gave rise to the 2013 contempt proceeding and complaint.

52.

Nationstar's intentional conduct (returning payments, giving the run around on the phone, demanding excessive balances, etc.) was in pursuit of profit because it allowed Nationstar to assess illegal wrongful erroneous fees, interest, and other charges that Nationstar was not otherwise entitled to assess.

53.

REQUEST FOR COMPENSATION

Mr. McEldery requests fair and just compensation from Nationstar in an amount to be determined by the jury.

54.

Nationstar's settlement agreement and loan modification agreement with Mr. McEldery provide that a prevailing party shall be entitled to recover its reasonable attorney fees from the other party in any complaint to enforce its provisions.

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55.

As a direct result of Nationstar's conduct, Mr. McEldery suffered actual damages including economic losses including monthly payments collected under false pretenses and not applied to the loan balance from January to August 2014, illegal fees, expenses, attorney fees, costs, postage, etc., and emotional harm, including severe ongoing stress, anxiety, high blood pressure, loss of time, and other harm consistent with unfair debt collection and elder abuse.

56.

REQUEST FOR PUNITIVE DAMAGES AND SANCTIONS

Mr. McEldery requests Nationstar pay punitive damages in an amount to be determined by the jury, and sanctions, in an amount to be determined by this Honorable Court.

57.

Nationstar's conduct shocked and outraged the local Irvington neighborhood, as evidenced by the dozens of community members who attended Nationstar's 2013 contempt proceedings and participated in a community march against Nationstar.

58.

Nationstar's conduct also shocked and outraged the Portland community as a whole, as evidenced by the negative treatment Nationstar's conduct has received from local press, including Portland's African American newspaper, The Skanner, The Portland Business Journal, The Oregonian, and KATU Channel 2 News.

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59.

Despite apologizing to Mr. McEldery, Nationstar's pattern and practice of malicious bad faith conduct in 2014 giving rise to this complaint is shockingly similar to its conduct giving rise to the 2013 contempt proceeding and complaint.

60.

Nationstar's choices to intentionally breach its contracts and break the law stand to give it an unfair advantage over other mortgage companies that choose to follow the law.

61.

Nationstar's repeated malicious bad faith conduct continued to jeopardize the ability of the McEldery Family to remain in their home and intentionally interfered with their peace of mind.

62.

Nationstar's conduct as alleged above constitutes extraordinary transgressions of socially tolerable behavior based on the social standards in Mr. McEldery's community.

63.

Nationstar is one of the largest mortgage servicers in the United States, with a market value of over \$2 billion and a portfolio of over \$375 billion in unpaid principal balance.

64.

Nationstar should pay punitive damages and sanctions in accordance to the harm it caused Mr. McEldery, in an amount that will make it profitable for Nationstar to follow the law in the future.

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65.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

(Elder Abuse)

Mr. McEldery re-alleges the above paragraphs by reference.

66.

Mr. McEldery suffered injury directly caused by Nationstar's wrongful taking in violation of the Oregon Elderly Persons and Persons with Disabilities Abuse Prevention Act and is entitled to recover: (a) an amount equal to three times his economic loss or \$500, whichever is greater, and (b) an amount equal to three times his emotional harm damages, in amounts to be determined by the jury, and (c) reasonable attorney fees and costs under ORS 124.120(1).

67.

SECOND CLAIM FOR RELIEF

(Unlawful Trade Practices)

Mr. McEldery re-alleges the above paragraphs by reference.

68.

Mr. McEldery suffered ascertainable losses as a result of Nationstar's violation of the Oregon Unlawful Trade Practices Act (646.608(1)(t),(u) unfair practices, deception, etc.) and related OARs (137-020-0805, failure deal in good faith, material misrepresentation of a loan modification, etc.) and is entitled to recover his economic losses, emotional harm damages, and punitive damages, in amounts to be determined by the jury, and attorney fees and costs under ORS 646.638(1).

69.

THIRD CLAIM FOR RELIEF

(Breach of Contract)

Mr. McEldery re-alleges the above paragraphs by reference.

70.

Nationstar maliciously breached its settlement agreement and loan modification agreement with Mr. McEldery in bad faith, in hopes of illegally profiting through assessment of wrongful erroneous fees, interest, and other charges that Nationstar was not otherwise entitled to assess.

71.

Mr. McEldery is entitled to recover the foreseeable economic loss that Nationstar's breach directly and foreseeably caused him, in amounts to be determined by the jury, including the attorney fees and costs he incurred to enforce the agreements.

72.

FOURTH CLAIM FOR RELIEF

(Sanctions)

Mr. McEldery re-alleges the above paragraphs by reference.

73.

Nationstar's 2013 settlement agreement with Mr. McEldery was court-sponsored and judge-mediated, in an effort to resolve the contempt proceeding and complaint.

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74.

Nationstar's intentional failure to abide by its settlement agreement constituted bad faith conduct.

75.

Pursuant to this Honorable Court's inherent power, Mr. McEldery requests sanctions against Nationstar based on its bad faith conduct.

76.

FIFTH CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress)

Mr. McEldery re-alleges the above paragraphs by reference.

77.

Nationstar knew, as any reasonable company would, that its conduct in 2014 as alleged above would be substantially certain to cause Mr. McEldery severe emotional distress. Nationstar had heightened notice that Mr. McEldery was particularly susceptible to the emotional harm he suffered because (a) Nationstar knew multiple generations of the McEldery family were living in Mr. McEldery's home, (b) Nationstar knew Mr. McEldery's home had been in the McEldery family for decades, (c) Nationstar had notice that its similar conduct in 2013 caused Mr. McEldery severe emotional distress, which Nationstar's Vice President previously apologized for, and (d) based on Nationstar's special debtor-creditor relationship with Mr. McEldery.

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78.

Nationstar's conduct in 2014 did in fact cause Mr. McEldery severe emotional distress, as alleged above, in the same way a reasonable elderly patriarch of ordinary sensibilities would have suffered if their mortgage payments were improperly returned, they were given the run around over the phone, they were assessed with illegal fees and interest, and they were wrongfully told they needed to pay over \$45,000 to avoid foreclosure, despite being current on their mortgage.

79.

Nationstar's conduct as alleged above, from January 2014 to August 2014, was unlawful, socially intolerable, and offensive to Mr. McEldery's local community, as evidenced by Nationstar's negative treatment in the local press, and its attempt to prohibit its videotaped deposition from being made public, which resulted in a \$1,000 sanction against it by Judge Perris in December 2014.

80.

As a result of Nationstar's intentional infliction of emotional distress, Mr. McEldery is entitled to recover compensation for his emotional harm and punitive damages from Nationstar, in amounts to be determined by the jury.

81.

DEMAND FOR JURY TRIAL.

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WHEREFORE, Mr. McEldery seeks orders and judgments against Nationstar as follows:

1. An award of treble damages;
2. An award of punitive damages;
3. An award of sanctions;
4. An award of reasonable attorney fees and costs;
5. Any other equitable relief this Honorable Court may determine to be fair and just.

DATED: March 20, 2015

RESPECTFULLY FILED,

s/ Michael Fuller

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CERTIFICATE OF SERVICE

I certify that I caused this document to be served on the following parties by ECF:

**Nationstar Mortgage LLC
c/o attorney Adam Hughes
AHughes@bwmlegal.com**

DATED: March 20, 2015

s/ Michael Fuller

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