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15 *Attorney for Plaintiffs WILLIAM KIVETT and*
16 *BERNARD and LISA BRAVO*
17 *for themselves and persons similarly situated*

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 WILLIAM KIVETT, individually and,
21 BERNARD and LISA BRAVO, husband and
22 wife, on behalf of themselves and others
23 similarly situated,

24 Plaintiffs,

25 v.

26 FLAGSTAR BANK, FSB, a federal savings
27 bank, and DOES 1-100, inclusive,

28 Defendant.

) Case No. 3:18-CV-05131-WHA

) **CLASS ACTION**

) SECOND AMENDED COMPLAINT FOR
) VIOLATION OF UNFAIR
) COMPETITION LAW (CAL. BUS. &
) PROF. CODE § 17200 *ET SEQ.*)

) **JURY TRIAL DEMANDED**

29 Plaintiffs WILLIAM KIVETT and BERNARD and LISA BRAVO, husband and wife, by
30 and through their attorneys, bring this action on behalf of themselves and all others similarly
31

1 situated against the above named defendants, demand a trial by jury on all claims so triable, and
2 allege on information and belief as follows:

3 **INTRODUCTION**

4 1. This class action addresses Defendant Flagstar Bank’s policy and practice of
5 failing to pay interest on money it routinely holds in mortgage escrow accounts for California
6 borrowers.

7 2. The policy and practice is contrary to California Civil Code § 2954.8(a) (“Section
8 2954.8(a)”), which requires the following:

9 Every financial institution that makes loans upon the security of
10 real property containing only a one- to four-family residence and
11 located in this state or purchases obligations secured by such
12 property and that receives money in advance for payment of taxes
13 and assessments on the property, for insurance, or for other
14 purposes relating to the property, shall pay interest on the amount
15 so held to the borrower. The interest on such amounts shall be at
16 the rate of at least 2 percent simple interest per annum. Such
17 interest shall be credited to the borrower’s account annually or
18 upon termination of such account, whichever is earlier.

19 3. Section 2954.8(a) is not preempted by federal law. *Lusnak v. Bank of America*,
20 *N.A.*, 883 F.3d 1185 (9th Cir. 2018).

21 **PARTIES**

22 4. Plaintiffs BERNARD and LISA BRAVO (the “Bravos”) are residents of Los
23 Angeles County, California.

24 5. Plaintiff WILLIAM KIVETT (“Mr. Kivett”) is a resident of Ventura County,
25 California.

26 6. Defendant FLAGSTAR BANK, FSB. (“Flagstar”) is a federal savings bank doing
27 business throughout California. Flagstar’s headquarters and principle place of business is 5151
28 Corporate Drive, Troy, Michigan.

FACTS

The Bravos

12. On or about December 1, 2017, the Bravos obtained a mortgage loan secured by their home in Los Angeles County, California. Their mortgage loan agreement with the lender is memorialized and secured by a promissory note and deed of trust (the “Bravo DOT”).

13. The Bravo DOT is a standard Fannie Mae/Freddie Mac form. Its Uniform Covenants include paragraph 3, entitled “Funds For Escrow Items,” which provides for the lender’s establishment of an escrow account for the payment of property taxes and insurance premiums and other potential charges related to the property in accordance with the Real Estate Settlement Procedures Act (“RESPA”). 12 U.S.C. § 2609; 12 C.F.R. § 1024.17.

14. Under Section 2954.8(a), the loan servicer, on behalf of the lender, was required to pay interest on the Bravos’ escrow account funds.

15. Under paragraph 3 of the Smith DOT, the loan servicer, on behalf of the lender, was required to pay interest on the escrow account funds if doing so was required by applicable law.

16. Flagstar serviced the Bravos’ mortgage account at all relevant times through the present.

17. During the period that it serviced the Bravos’ mortgage, Flagstar created an escrow account pursuant to paragraph 3 of the DOT, and held their money in that escrow account, but did not pay them interest on those funds as required by Section 2954.8(a).

18. On July 24, 2019, the Bravos gave written notice and demand for cure of their grievance pursuant to paragraph 20 of the Smith DOT. Flagstar has not cured or offered to cure.

Mr. Kivett

19. On September 19, 2012, Mr. Kivett obtained a mortgage loan from Flagstar secured by his home at 1873 Love Circle, Simi Valley, Ventura County, California, 93063-4322. His mortgage loan agreement with the lender was memorialized and secured by a promissory note and deed of trust (the “Kivett DOT”).

20. The Kivett DOT is a standard FHA California Deed of Trust form. Its Uniform

1 Covenants, in paragraph 2, provide for the lender’s establishment of an escrow account for the
2 payment of property taxes and insurance premiums and other potential charges related to the
3 property in accordance with the RESPA.

4 21. Under Section 2954.8(a), the loan servicer, on behalf of the lender, was required
5 to pay interest on Mr. Kivett’s escrow account funds.

6 22. Flagstar serviced Mr. Kivett’s mortgage, assigning it the loan number 503667220,
7 from its inception in 2012 until he refinanced about April 2015.

8 23. During the period that it serviced Mr. Kivett’s mortgage, Flagstar created an
9 escrow account as provided for in the Kivett DOT, and held his money in that escrow account,
10 but did not pay him interest on those funds as required by Section 2954.8(a).

11 24. On September 20, 2018, Mr. Kivett gave written notice and demand that Flagstar
12 pay him and persons similarly situated interest on their escrow accounts as required by Section
13 2954.8(a).

14 25. On October 3, 2018, Flagstar responded by letter stating that it did not pay interest
15 on escrow in connection with any accounts where Flagstar held the master servicing rights
16 “because of a preemption we are currently exercising” and only started paying interest on
17 accounts in its subserviced portfolio in January 2017.

18 **CLASS ALLEGATIONS**

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

22 **The Class**

23 All persons who on or after April 18, 2014 had mortgage loans serviced by
24 Flagstar Bank FSB (“Flagstar”) on 1-4 unit residential properties in California
25 and paid Flagstar money in advance to hold in escrow for the payment of taxes
26 and assessments on the property, for insurance, or for other purposes relating to
27 the property, but did not receive interest on the amounts held by Flagstar in their
28 escrow accounts (excluding, however, any such persons whose mortgage loans
originated on or before July 21, 2010) (the “Class”).

1 27. Plaintiffs reserve the right under Rule 23 to amend or modify the Class definition
2 or add further division into subclasses or limitation to particular issues based on the results of
3 discovery.

4 28. Plaintiffs do not know the exact size or identities of the proposed Class because
5 that information is in the control of defendants. Plaintiffs allege on information and belief that
6 the Class encompasses thousands of members, whose identities are readily ascertainable based
7 on defendants' records.

8 29. Common questions of fact and law predominate over any questions affecting only
9 individual members because all putative Class members are subject to the same California law
10 and, on information and belief, were subject to the same policies and practices by defendants.

11 30. Plaintiffs' claims are typical of the claims of the Class members, and Plaintiffs
12 do not have any conflicts with the interests of any other Class members.

13 31. Plaintiffs will fairly and adequately represent the interests of the Class members.
14 Plaintiffs are committed to the vigorous prosecution of the class claims and have retained
15 attorneys who are qualified to pursue this litigation and have experience in class action and
16 consumer mortgage matters such as this.

17 32. A class action is superior to other methods for the fast and efficient adjudication
18 of this controversy and to avoid the risk of disparate and inconsistent rulings throughout the
19 state. The amounts of money at stake for the individual Class members are too small to justify
20 and support litigation of this sort on an individual basis.

21 **1ST CLAIM FOR RELIEF**
22 **Unfair Competition Law**

23 33. The preceding paragraphs are incorporated by reference.

24 34. California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*
25 (the "UCL"), defines unfair competition to include any "unlawful, unfair, or fraudulent" business
26 act or practice.

27 35. Defendants engaged in "unlawful" business practices under the UCL based on
28 the violation of Section 2954.8(a) alleged above.

1 36. Defendants also engaged in “unfair” business practices under the UCL because
2 their conduct was substantially harmful to consumers and lacked any legitimate utility.

3 37. Plaintiffs and Class members were injured in fact and lost money and property as
4 a result of defendants’ violations of the UCL as alleged herein.

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

6 **DEMAND FOR JURY TRIAL**

7 43. Plaintiffs request a jury trial on all claims so triable.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs pray for relief and judgment as follows:

10 A. An order certifying the proposed Class, appointing the named Plaintiffs as the
11 representatives of the Class, and appointing the law firms representing the named Plaintiffs as
12 counsel for the Class.

13 B. An award of monetary damages and/or restitution in the amount of all the
14 interest due to Class members under section 2954.8(a).

15 C. Attorneys’ fees, costs, and expenses pursuant to section 1021.5 of the California
16 Code of Civil Procedure and the deed of trust contract.

17 G. And such other and further relief as the Court may deem proper, including an
18 injunction prohibiting Flagstar from future violations of section 2954.8.
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20
21 DATE: August 20, 2019

HAGENS BERMAN SOBOL SHAPIRO

22 By: _____
23 THOMAS E. LOESER (SBN 202724),

24 LAW OFFICE OF PETER FREDMAN PC

25 By: _____
26 PETER FREDMAN (SBN 189097),

27 Attorneys for Plaintiffs
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