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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MAXINE SHOOK EGHTESADI,
Plaintiff,
v.
WELLS FARGO BANK, N.A. et al.,
Defendants.

) Case No. 3:12-cv-1978-GPC-JMA
)
) **ORDER GRANTING**
) **DEFENDANT WELLS FARGO**
) **BANK, N.A.’S MOTION TO**
) **DISMISS**
) **(ECF NO. 4)**

Plaintiff, through counsel, commenced this action in the San Diego Superior Court, asserting various claims related to the origination and modification of a re-finance loan secured by a deed of trust on Plaintiff’s home. (ECF No. 1-1.) Defendants thereafter removed the action to federal court, asserting diversity jurisdiction. (ECF No. 1.) Currently before the Court is defendant Wells Fargo Bank, N.A.’s motion to dismiss Plaintiff’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ (ECF No. 4.) Wells Fargo’s motion to dismiss has been fully briefed.² (ECF Nos. 7, 8.) The Court finds Wells Fargo’s motion to dismiss suitable

¹ Wells Fargo Bank, N.A. is sued as successor by merger to Wells Fargo Home Mortgage, Inc. (See ECF No. 4.)

² Along with its motion to dismiss, Wells Fargo filed a request for judicial notice. Because the Court does not rely on any facts contained therein, however, Wells Fargo’s request for judicial notice is denied as moot.

1 for disposition without oral argument. See CivLR 7.1.d.1. For the reasons that follow,
2 the Court hereby **GRANTS** Wells Fargo’s motion to dismiss in its entirety. Plaintiff’s
3 first, fourth, and fifth causes of action are dismissed without leave to amend, and
4 Plaintiff’s second, third, sixth, seventh, and eighth causes of action are dismissed with
5 leave to amend.

6 BACKGROUND

7 Plaintiff alleges that, in 2003, she purchased certain real property that is
8 commonly known as: 1301 Verbena Court, Carlsbad, CA 92011 (“Property” or
9 “Subject Property”). Plaintiff alleges she was having financial difficulties in May 2009
10 and that, around the same time, she received solicitations from Wells Fargo regarding
11 various mortgage assistance options. Plaintiff alleges she thereafter visited a Wells
12 Fargo branch to discuss those options.

13 Plaintiff claims that, after discussing her financial situation with a Wells Fargo
14 representative named Jon Tucker (“Tucker”), she “highlighted the fact that her current
15 loan was set to increase in principal in [sic] interest payments in the next few years and
16 that she would not be able to afford it.” Plaintiff alleges she therefore “inquired into
17 the availability of a modified loan as advertised in the solicitations she had received.”

18 Plaintiff alleges that “Tucker represented to Plaintiff that a re-finance of her then
19 existing loan would be the best option available to her.” Plaintiff alleges, however, that
20 “after a brief consultation, it appeared to [her] that a re-finance was not an option to her
21 as Tucker represented that she may want to consider a loan modification instead and
22 that he knew someone that could assist her.” Plaintiff claims that, before she left the
23 meeting, Tucker left the office for a short period and, upon returning, “represented to
24 Plaintiff that ‘she qualified for a re-finance and that the process was close to
25 completion.’” Plaintiff alleges that, in response to her request for clarification, she
26 “was informed to ‘not question the man behind the curtain.’” Plaintiff claims she was
27 therefore “unsure if she was being offered a re-finance or a modification and was left
28 in the dark as to what had resulted in her suddenly being approved.”

1 Plaintiff alleges “she later learned that she had been placed in a 4.95% 30 year
2 fixed interest loan,” but that Wells Fargo never explained the terms of that loan to her
3 and that, indeed, she did not “even know she was being put in a re-finance transaction
4 until the date the loan was set to close.” Plaintiff alleges that, in an effort to close the
5 re-finance transaction and obtain the commission and fees associated with closing the
6 loan, Tucker falsified Plaintiff’s income. Plaintiff asserts the “re-finance on the Subject
7 Property was completed in June 2009, secured by a Deed of Trust in the amount of
8 \$354,500.”

9 Plaintiff asserts she “was intentionally placed into a non-affordable loan
10 designed for her to fail,” as “it was the intent of Wells Fargo to steal the subject
11 property through an inevitable foreclosure.” Plaintiff alleges she had no time to review
12 the loan documents, as they were not given to her until the day the loan was set to
13 close. Plaintiff thus claims that she “did not realize the deception with the loan
14 application until it was too late.” Plaintiff asserts she was forced into the re-finance
15 transaction, that she received no benefit from the re-finance transaction, and that her
16 monthly principal and interest payment actually increased from \$2,695 to \$2,753 per
17 month.

18 Plaintiff alleges her financial situation worsened up through 2011 and that, in
19 October 2011, Plaintiff had to choose between fixing her car and paying her mortgage.
20 Plaintiff alleges “[s]he was left with no choice but to choose to fix her car so she could
21 continue to work.” Plaintiff asserts that, as a result of her financial hardship, she
22 contacted Wells Fargo’s mortgage modification department.

23 Plaintiff claims that, in June 2011, she spoke with a Wells Fargo representative
24 named Alex who “directed Plaintiff to the ‘Loss Mitigation Department’ for further
25 information regarding a modification of her loan.” Plaintiff alleges that, “[u]pon
26 reaching the Loss Mitigation department, Plaintiff was informed that she was ‘pre-
27 qualified’ for a Fannie Mae Modification, and was asked to submit the following: (1)
28 Financial Worksheet; (2) Hardship Letter; (3) 2 Paystubs as proof of income; (4) Bank

1 statements showing deposit of spousal support as income.” Plaintiff alleges she
2 thereafter faxed the requested documentation to the number provided by the Loss
3 Mitigation Department. Plaintiff claims she was “notified that as long as the
4 documentation was being gathered and reviewed, the Subject Property would not
5 proceed to foreclosure.”

6 Plaintiff alleges that, on June 20, 2011, she received a letter from Wells Fargo
7 “requesting that ‘required items be sent to Wells Fargo Home Mortgage’” – despite the
8 fact that Plaintiff had done so three days prior.

9 Plaintiff claims that, also on June 20, 2011, she “received a letter from a
10 Lakeysha Mayo (‘Mayo’), a representative of [Wells Fargo], who introduced herself
11 as part of a ‘special team’ assigned to Plaintiff for mortgage payment assistance.”
12 Plaintiff claims Mayo requested the same documentation Plaintiff had already faxed
13 to Wells Fargo to determine Plaintiff’s eligibility for payment assistance. Plaintiff
14 alleges Mayo promised Plaintiff’s loan would not be referred to foreclosure while
15 Plaintiff’s eligibility for payment assistance was being assessed. Plaintiff alleges that,
16 “[f]rom this point forward, [Wells Fargo], through its representative Mayo, repeatedly
17 asked for the same documentation over and over again in an effort to deceive Plaintiff
18 into believing she would be offered a modification on her loan.”

19 Plaintiff alleges the following sequence of events occurred:

- 20 • June 20, 2011 – Plaintiff faxes all documents and income verification
21 requested by Mayo and Wells Fargo.
- 22 • August 9, 2011 – Plaintiff resubmits the same application with updated
23 financials.
- 24 • August 26, 2011 – Plaintiff resubmits the same application with updated
25 financials.
- 26 • November 13, 2011 – Plaintiff receives a letter from Wells Fargo stating
27 “more documents needed to determine eligibility.”
- 28 • November 13, 2011 – Plaintiff receives a letter from Mayo asking for a

1 “Request for Modification and Affidavit” (“RMA”).

- 2 • November 20, 2011 – Mayo tells Plaintiff on the phone that Plaintiff’s
3 documents “went stale,” assuring Plaintiff there would be no foreclosure
4 while the review proceeded. Mayo requests updated documents and
5 represents there would be a decision within 60 days.
- 6 • November 30, 2011 – Plaintiff leaves a message with Mayo to check the
7 status of submitted materials.
- 8 • December 5, 2011 – Mayo informs Plaintiff she must submit another
9 RMA, a current hardship letter, and a current financial worksheet. Mayo
10 informs Plaintiff it will take approximately two weeks to get a response.
- 11 • December 27, 2011 – Plaintiff calls Mayo to follow up on the status of her
12 modification request and is told that “her loan modification has reached
13 review by the Underwriters” and that Plaintiff would have to submit her
14 most recent pay stubs and bank statements. Plaintiff immediately supplies
15 the requested documentation via fax.
- 16 • February 3, 2012 – Plaintiff calls Mayo to follow up on the status of her
17 modification request.
- 18 • February 6, 2012 – Plaintiff calls Mayo to follow up on the status of her
19 modification request.
- 20 • February 27, 2012 – Plaintiff receives a letter from Wells Fargo stating,
21 “investor has declined the request to modify your mortgage.”

22 Plaintiff asserts she was “repeatedly assured that a decision was forthcoming,”
23 and that, “[i]n reliance on [Wells Fargo’s] representations that the review was being
24 conducted in good faith,” she “forewent other alternatives to foreclosure such as listing
25 the property for sale, entertaining short-sale offers procured by her broker, as well as
26 seeking bankruptcy relief.”

27 Plaintiff alleges that, even after being notified that her modification request had
28 been denied, Wells Fargo sent Plaintiff three letters stating Plaintiff qualified for a

1 review of the same modification that had already been denied. Plaintiff thus alleges
2 that Wells Fargo never intended to review, nor did they review, Plaintiff's modification
3 request. Plaintiff claims that, as early as August 2011, Wells Fargo had numerous
4 opportunities to inform Plaintiff her modification request would be denied per a
5 decision by the "investor." Plaintiff asserts that, instead, Wells Fargo "continued to
6 make misrepresentations that the modification review was pending and close to
7 completion, giving Plaintiff false hope" of avoiding foreclosure. Plaintiff alleges that,
8 had she known sooner that her request would be denied, "she could have pursued other
9 options to avoid foreclosure such as a re-finance, sale of the property, or other available
10 remedies."

11 Plaintiff asserts that, on March 1, 2012, Wells Fargo recorded a "Notice of
12 Default and Election to Sell under Deed of Trust" ("NOD"). Plaintiff claims the NOD
13 did not include a "Declaration of Compliance." Plaintiff also claims she was never
14 contacted by anyone from Wells Fargo to discuss options to avoid foreclosure.
15 Plaintiff asserts that, on June 22, 2012, she received an un-dated and un-signed "Notice
16 of Trustee's Sale" ("NOTS"), setting a trustee's sale for July 12, 2012.

17 Plaintiff thereafter commenced this action on July 9, 2012, asserting eight causes
18 of action for (1) declaratory relief; (2) fraud; (3) negligent misrepresentation; (4)
19 wrongful foreclosure; (5) violation of California Civil Code section 2924 et seq.; (6)
20 promissory estoppel; (7) negligence; and (8) violation of California Business and
21 Professions Code section 17200.

22 DISCUSSION

23 **I. Legal Standard**

24 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
25 sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
26 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable
27 legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.
28 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes

1 a court to dismiss a claim on the basis of a dispositive issue of law.”). Alternatively,
2 a complaint may be dismissed where it presents a cognizable legal theory yet fails to
3 plead essential facts under that theory. Robertson, 749 F.2d at 534. While a plaintiff
4 need not give “detailed factual allegations,” a plaintiff must plead sufficient facts that,
5 if true, “raise a right to relief above the speculative level.” Bell Atlantic Corp. v.
6 Twombly, 550 U.S. 544, 545 (2007).

7 “To survive a motion to dismiss, a complaint must contain sufficient factual
8 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
9 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547).
10 A claim is facially plausible when the factual allegations permit “the court to draw the
11 reasonable inference that the defendant is liable for the misconduct alleged.” Id. In
12 other words, “the non-conclusory ‘factual content,’ and reasonable inferences from that
13 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss
14 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a
15 complaint states a plausible claim for relief will . . . be a context-specific task that
16 requires the reviewing court to draw on its judicial experience and common sense.”
17 Iqbal, 129 S. Ct. at 1950.

18 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
19 truth of all factual allegations and must construe all inferences from them in the light
20 most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th
21 Cir. 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Legal
22 conclusions, however, need not be taken as true merely because they are cast in the
23 form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003);
24 W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

25 Generally, courts “should freely give leave [to amend] when justice so requires.”
26 Fed. R. Civ. P. 15(a)(2).

27 **II. Analysis**

28 Plaintiff concedes that her fourth and fifth causes of action for violations of

1 California Civil Code sections 2923.5 and 2924 et seq. should be dismissed.
2 Accordingly, Wells Fargo's motion to dismiss is granted as to those causes of action
3 without leave to amend. The Court will thus only address Plaintiff's first through third,
4 and sixth through eighth, causes of action. Before the Court reaches those claims,
5 however, the Court first addresses whether Plaintiff's claims are barred by her failure
6 to allege the ability to tender the entire balance due on the underlying loan.

7 **A. Tender**

8 Wells Fargo argues Plaintiff has inadequately pled the ability to tender the entire
9 amount due on the underlying loan: \$364,745.76. Wells Fargo thus asserts that each
10 of Plaintiff's claims fails because they are all related to the process of foreclosing on
11 the Property. In opposition, Plaintiff argues she is not required to allege the ability to
12 tender because that would be an affirmation of the validity of the underlying loan,
13 which she alleges is an invalid debt.

14 A defaulted borrower who seeks to set aside a trustee's sale is required to do
15 equity before a court may disturb the trustee's sale. Lona v. Citibank, N.A., 202 Cal.
16 App. 4th 89, 112 (2011). Before a borrower may proceed with an action to set aside
17 a trustee's sale because of irregularities in the sale notice or procedure, the borrower
18 must pay or plausibly allege the ability to pay the entire underlying debt. Id. The
19 tender requirement may also apply to any cause of action that is "implicitly integrated"
20 with an irregular trustee's sale. Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d
21 575, 579 (1984).

22 There are, however, exceptions to the tender requirement. Lona, 202 Cal. App.
23 4th at 112. Those exceptions apply where (1) the borrower's action attacks the validity
24 of the underlying debt; (2) the person challenging the trustee's sale has a counterclaim
25 or set-off against the beneficiary, such that the tender and the counterclaim offset one
26 another; (3) it would be inequitable to impose such a condition on the party challenging
27 the sale; (4) the trustor is not required to rely on equity to attack the deed of trust
28 because the deed is void on its face. Id. at 112-13.

1 Here, each of Plaintiff's remaining causes of action relates to the origination of
2 the underlying loan and/or the modification process that Plaintiff alleges she engaged
3 in from June 2011 through February 2012. Plaintiff's first cause of action for
4 declaratory relief seeks a declaration of the parties' rights and duties as to (1) whether
5 the underlying loan "was intentionally created to cause Plaintiff lose her property" and,
6 (2) whether Wells Fargo "deceptively drug out the loan modification as part of the
7 overall scheme to obtain the Subject Property through foreclosure to generate excess
8 profits for Wells Fargo."³ Plaintiff states that "[s]uch a judicial determination is
9 necessary to prevent the future unlawful foreclosure sale of the Subject Property."
10 Thus, while Plaintiff may ultimately desire to halt the trustee's sale, Plaintiff's first
11 cause of action does not directly attack the trustee's sale because of irregularities in the
12 sale or notice procedure. It instead focuses on the origination of the underlying loan
13 and on the modification process. That is, it is not "implicitly integrated" with an
14 irregular trustee's sale. Accordingly, the tender requirement does not apply to
15 Plaintiff's first cause of action as currently pled.

16 Similarly, Plaintiff's second and third causes of action for intentional and
17 negligent misrepresentation relate to the loan origination and modification processes.
18 Thus, neither are those causes of action subject to the tender requirement as currently
19 pled.

20 Plaintiff's sixth and seventh causes of action for promissory estoppel and
21 negligence relate exclusively to the alleged promises that Wells Fargo made to Plaintiff
22 in connection with the loan modification process. Thus, Plaintiff's sixth and seventh
23 causes of action, as currently pled, are not subject to the tender requirement either.

24 Plaintiff's eighth cause of action for unfair competition relates to the loan
25

26
27 ³ Plaintiff also claims an actual controversy exists concerning Wells Fargo alleged failure to
28 comply with the statutory requirements applicable to the trustee's sale as set forth in Plaintiff's fourth
and fifth causes of action. Because Plaintiff concedes her fourth and fifth causes of action should be
dismissed, however, the Court does not consider the facts alleged thereunder for purposes of
determining whether Plaintiff's first cause of action is subject to the tender requirement.

1 origination process, which Plaintiff asserts was fraudulent, unfair, and unlawful.⁴ Thus,
2 because Plaintiff is not attacking the trustee’s sale for irregularities in the notice or sale
3 procedure, Plaintiff’s eighth cause of action is not subject to the tender requirement as
4 currently pled..

5 In sum, none of Plaintiff’s remaining causes of action are subject to the tender
6 requirement as currently pled. The Court will thus determine whether Plaintiff has
7 sufficiently stated her remaining claims.

8 **B. Declaratory Relief**

9 Wells Fargo moves to dismiss Plaintiff’s claim for declaratory relief, arguing
10 Plaintiff cannot establish the existence of an actual and present controversy and that,
11 in any event, the relief requested is duplicative of Plaintiff’s other causes of action. In
12 response, Plaintiff argues that, even though Plaintiff’s request for declaratory relief
13 refers to past actions, there exists an actual controversy in that Wells Fargo still claims
14 an interest in the Property and continues to seek collection of Plaintiff’s mortgage
15 payments. Plaintiff thus asserts there is an actual and present controversy that will
16 affect the parties’ prospective rights.

17 The Declaratory Judgment Act (“DJA”) provides that, “[i]n a case of actual
18 controversy within its jurisdiction . . . any court of the United States, upon the filing
19 of an appropriate pleading, may declare the rights and other legal relations of any
20 interested party seeking such declaration, whether or not further relief is or could be
21 sought.” 28 U.S.C. § 2201. “A declaratory judgment offers a means by which rights
22 and obligations may be adjudicated in cases ‘brought by any interested party’ involving
23 an actual controversy that has not reached a stage at which either party may seek a
24 coercive remedy and in cases where a party who could sue for coercive relief has not

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26 ⁴ Some of the alleged acts of fraudulent, unfair, and/or unlawful conduct described under
27 Plaintiff’s eighth cause of action are the same foreclosure related acts described under Plaintiff’s fourth
28 and fifth causes of action. Because Plaintiff has conceded to the dismissal of her fourth and fifth
causes of action, however, the Court considers only Plaintiff’s allegations regarding the loan
origination process for purposes of determining whether the tender requirement applies to Plaintiff’s
eighth cause of action.

1 yet done so.” Seattle Audubon Soc. v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996).

2 The DJA’s operation “is procedural only” in that it provides a remedy and
3 defines procedure in relation to cases and controversies in the constitutional sense. See
4 Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). Thus, a “claim” for
5 declaratory relief does not by itself state a claim. Audette v. Int’l Longshoremen’s &
6 Warehousemen’s Union, 195 F.3d 1107, 1111 n.2 (9th Cir. 1999); Realty Experts Inc.
7 v. RE Realty Experts, Inc., 2012 WL 699512, at *2 (S.D. Cal. Mar. 1, 2012). As such,
8 Plaintiff’s cause of action for declaratory relief does not state a claim. Accordingly,
9 Wells Fargo’s motion to dismiss Plaintiff’s cause of action for declaratory relief is
10 granted without leave to amend.

11 **C. Intentional & Negligent Misrepresentation**

12 **1. Statute of Limitations**

13 Wells Fargo argues Plaintiff’s claims for intentional and negligent
14 misrepresentation must be dismissed because they are time barred.

15 In response, Plaintiff argues her misrepresentation claims are not time barred
16 because the delayed discovery rule tolled the applicable statute of limitations up until
17 the time she filed her complaint. Plaintiff claims she was ignorant of her right to sue
18 through no fault of her own.

19 California Code of Civil Procedure section 338(d) provides that an action for
20 relief on the ground of fraud or mistake must be commenced within three years from
21 the time the aggrieved party discovers the facts constituting the fraud or mistake. “In
22 general, a plaintiff’s ignorance of a cause of action does not toll the running of the
23 statute.” Hogar Dulce Hogar v. Cmty. Dev. Comm’n of City of Escondido, 110 Cal.
24 App. 4th 1288, 1297 (2003). An exception to the general rule is the delayed discovery
25 rule, which tolls the statute of limitations until the date the plaintiff knew or should
26 have known the factual basis of its fraud claim. Id.

27 “Delayed discovery has been adopted to protect plaintiffs who are ignorant of
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1 their right of action through no fault of their own.” Id.; see also Bernson v. Browning-
2 Ferris Indus., 7 Cal. 4th 926, 931-32 (1994) (“It has long been established that the
3 defendant’s fraud in concealing a cause of action against him tolls the applicable
4 statute of limitations, but only for that period during which the claim is undiscovered
5 by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence,
6 should have discovered it.”)

7 In the context of fraud in the execution of contracts, “it is not reasonable to fail
8 to read a contract.” Brown v. Wells Fargo Bank, NA, 169 Cal. App. 4th 938, 959
9 (2008) (emphasis in original). “[T]his is true even if the plaintiff relied on the
10 defendant’s assertion that it was not necessary to read the contract.” Id. “Reasonable
11 diligence requires a party to read a contract before signing it.” Id. (citing Brookwood
12 v. Bank of America, 45 Cal. App. 4th 1667, 1674 (1996)).

13 The Court first notes that Plaintiff does not dispute that California Code of Civil
14 Procedure section 338(d) applies to her misrepresentation claims. Plaintiff only asserts
15 the statute of limitations should be tolled because she was ignorant of her right to sue
16 through no fault of her own. Indeed, Plaintiff alleges generally that “[a]ny applicable
17 statutes of limitations have been tolled by the Defendant’s continuing, knowing, and
18 active concealment of the facts alleged herein.”

19 With regard to the loan origination process, the Court finds Plaintiff has failed
20 to adequately allege she engaged in the reasonable diligence required for tolling to
21 apply. Plaintiff alleges Wells Fargo intentionally omitted material terms of the loan
22 (including that it was a re-finance loan), intentionally omitted the fact that it offered
23 incentives to Tucker to “sell” Plaintiff a high-interest loan, and intentionally
24 misrepresented Plaintiff’s income on the re-finance loan application.

25 Regarding the material terms of the loan, Plaintiff asserts she is an
26 unsophisticated borrower, that she relied on Wells Fargo’s expertise, and that she was
27 rushed through the loan origination process. No where, however, does Plaintiff allege
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1 that she even read the loan documents. Indeed, while Plaintiff claims she did not know
2 she was re-financing her loan until closing, Plaintiff does not allege that she, for
3 example, attempted to cancel or delay the closing so she could at least read the loan
4 documents. Instead, Plaintiff alleges she went through with the closing to obtain the
5 re-finance loan.

6 With regard to the incentives Wells Fargo allegedly offered Tucker to ratchet up
7 the interest on Plaintiff's loan, Plaintiff does not allege any diligence with regard to
8 discovering how much Tucker was paid in connection Plaintiff acquiring a re-finance
9 loan if such information was as important to Plaintiff as she now seems to claim.

10 As to Plaintiff's allegedly misreported income, Plaintiff alleges she signed the
11 loan application knowing her income was misreported. Thus, not only did Plaintiff
12 know of that fact at the time she executed the re-finance loan documents, but she failed
13 to exercise any diligence. Indeed, Plaintiff's admittedly unclean hands bar any fraud
14 claim based on the misreporting of her income. See Peregrine Funding, Inc. v.
15 Sheppard Mulin Richter & Hampton LLP, 133 Cal. App. 4th 658, 681 (2005).

16 In sum, the Court finds Plaintiff has failed to adequately allege that Wells Fargo
17 concealed the facts underlying her misrepresentation claims in a way that prevented
18 Plaintiff from discovering them through reasonable diligence. Plaintiff has failed to
19 adequately allege that she was reasonably diligent in connection with the loan
20 origination process, which precludes application of tolling. As such, Plaintiff's second
21 and third causes of action are dismissed to the extent they are based on omissions or
22 misrepresentations made in connection with the loan origination process.

23 Plaintiff's second and third causes of action, however, are also based partly on
24 the loan modification process. Plaintiff alleges Wells Fargo intentionally and
25 negligently misrepresented that Plaintiff qualified for a modification review and that
26 Wells Fargo would review Plaintiff's loan modification application. Because Plaintiff
27 alleges the loan modification process began in 2011, and because Plaintiff filed suit in
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1 2012, Plaintiff's second and third causes of action are not time barred to the extent they
2 are based on misrepresentations made in connection with the loan modification
3 process. As such, the Court goes on to address the sufficiency of Plaintiff's
4 misrepresentation claims as they relate to the loan modification process.

5 **2. Sufficiency of Claims**

6 Wells Fargo argues Plaintiff cannot allege that Wells Fargo made any
7 misrepresentation – much less so with the degree of specificity required under Federal
8 Rule of Civil Procedure 9(b). Wells Fargo asserts the only promise Plaintiff alleges
9 that Wells Fargo made was a promise to review Plaintiff's loan modification
10 application. Wells Fargo asserts that Plaintiff's allegations demonstrate that Wells
11 Fargo did indeed review Plaintiff's loan modification application over several months,
12 ultimately sending her a denial letter in February 2012. Wells Fargo further argues
13 Plaintiff's claim for negligent misrepresentation must be dismissed because lenders do
14 not generally owe borrowers any legal duty. Wells Fargo lastly argues that Plaintiff's
15 tort claims should be dismissed in favor of contractual claims given the contractual
16 relationship between the parties.

17 In response, Plaintiff argues she has satisfied Rule 9's heightened pleading
18 requirement in stating her misrepresentation claims. Plaintiff asserts Wells Fargo's
19 arguments misstate Plaintiff's allegations. Plaintiff asserts the crux of her
20 misrepresentation claims is that "she was subject to fraud and/or negligent
21 misrepresentations beginning with the origination of her loan and continuing
22 throughout the servicing of her loan with Wells Fargo's deceptive loan modification
23 practices." Plaintiff asserts Wells Fargo "never intended to offer Plaintiff a
24 modification of her loan, and that it was their intention to give Plaintiff [a] false sense
25 of hope that a modification was forthcoming and to prevent her from seeking other
26 available remedies to avoid the foreclosure of the Subject Property." Plaintiff claims
27 "there never was a review being conducted and the ultimate intention of Defendant was
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1 to foreclose on the Subject Property.” Regarding the duty owed, Plaintiff argues Wells
2 Fargo stepped beyond the role of a traditional lender and therefore owed Plaintiff a
3 duty of care.

4 “The well-established common law elements of fraud which give rise to the tort
5 action for deceit are: (1) misrepresentation of a material fact (consisting of false
6 representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3)
7 intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation;
8 and (5) resulting damage. . . . It is essential . . . that the person complaining of fraud
9 actually have relied on the alleged fraud, and suffered damages as a result.” Bower v.
10 AT & T Mobility, LLC, 196 Cal. App. 4th 1545, 1557 (2011). Further, Rule 9
11 provides: “In alleging fraud or mistake, a party must state with particularity the
12 circumstances constituting fraud or mistake.”

13 Negligent misrepresentation shares all the elements of fraud except for the
14 element regarding mental state. In lieu of knowledge of falsity, negligent
15 misrepresentation requires that the defendant “lacked any reasonable ground for
16 believing [its] statement to be true.” Charnay v. Cobert, 145 Cal. App. 4th 170, 184
17 (2006). With regard to application of Rule 9 to negligent misrepresentation claims,
18 however, “the tide of precedent is turning.” Petersen v. Allstate Indem. Co., 281
19 F.R.D. 413, 418 (C.D. Cal. 2012). Recent decisions by the Fifth, Seventh, and Ninth
20 Circuits hold that negligent misrepresentation claims are not subject to Rule 9’s
21 heightened pleading requirement. Id. (citing Tricontinental Indus. v. Pricewaterhouse
22 Coopers, LLP, 475 F.3d 824, 833 (7th Cir. 2007); GE Capital Corp. v. Posey, 415 F.3d
23 391, 394 & n.2 (5th Cir. 2005); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105-
24 06 (9th Cir. 2003)).

25 The Court finds Plaintiff has failed to sufficiently allege either intentional or
26 negligent misrepresentation. Plaintiff claims her misrepresentation claims are based
27 on an alleged scheme to convince borrowers to acquire home loans they cannot afford
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1 with the hope that borrowers will default on the loans so that Wells Fargo can
2 ultimately foreclose on the property. Plaintiff’s second and third causes of action,
3 however, provide specific representations and/or omissions as discussed above, e.g.,
4 failure to disclose loan terms, Tucker’s compensation, misreporting Plaintiff’s income,
5 promise to review request for loan modification. Thus, as currently pled, the basis for
6 Plaintiff’s misrepresentation claims is unclear. As such, the Court cannot determine
7 whether Plaintiff has adequately alleged an actual misrepresentation or omission of a
8 material fact or that Wells Fargo had the requisite mental state. Further, Plaintiff has
9 failed to adequately allege that any reliance on Wells Fargo’s misrepresentations and/or
10 omissions was reasonable – especially in light of the fact that Plaintiff has failed to
11 allege reasonable diligence in connection with the loan origination process as discussed
12 above.

13 In sum, Plaintiff’s allegations are vague, conclusory, confusing, and – with
14 regard to Plaintiff’s fraud claim – do not satisfy Rule 9.⁵ Accordingly, Wells Fargo’s
15 motion to dismiss Plaintiff’s second and third causes of action for intentional and
16 negligent misrepresentation is granted with leave to amend.

17 **D. Promissory Estoppel**

18 Wells Fargo argues Plaintiff’s promissory estoppel claim fails because Plaintiff
19 “has not, and cannot, plead a cognizable promise.” Wells Fargo asserts that Plaintiff
20 alleges she was promised only that Wells Fargo would review her loan modification
21 application and that Wells Fargo did actually review Plaintiff’s loan modification
22 application. Wells Fargo further argues that Plaintiff “cannot avoid that she has not
23 reasonably relied to her detriment.” (Emphasis in original.)

24 In response, Plaintiff argues she has alleged that Wells Fargo “promis[ed] that
25 she was qualified for and would be receiving a Fannie Mae modification, and that the

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27 ⁵ The Court moreover notes that Plaintiff did not respond to Wells Fargo’s argument that
28 Plaintiff’s tort claims should be dismissed given the contractual relationship between the parties.

1 process was actually ongoing during the nine month period that she spent repeatedly
2 submitting documents.”

3 “In California, under the doctrine of promissory estoppel, ‘A promise which the
4 promisor should reasonably expect to induce action or forbearance on the part of the
5 promisee or a third person and which does induce such action or forbearance is binding
6 if injustice can be avoided only by enforcement of the promise. The remedy granted
7 for breach may be limited as justice requires.’” Toscano v. Greene Music, 124 Cal.
8 App. 4th 685, 692 (2004).

9 Here, the Court finds Plaintiff has failed to adequately allege a claim for
10 promissory estoppel. Despite Plaintiff’s assertion that she alleged that Wells Fargo
11 made a promise that “she was qualified for and would be receiving a Fannie Mae
12 modification,” Plaintiff’s complaint alleges no such promise. Indeed, Plaintiff’s
13 promissory estoppel claim refers the reader to paragraph 43 of the complaint for a list
14 of Wells Fargo’s alleged promises, but paragraph 43 contains only the alleged time line
15 of the modification process, which the Court has set forth under the Background
16 section above.

17 At most, Plaintiff alleges Wells Fargo promised “to conduct a good faith review
18 of Plaintiff’s loan” and that Wells Fargo’s promise induced Plaintiff to forego all other
19 options to avoid foreclosure. As currently pled, however, Plaintiff’s complaint alleges
20 that Wells Fargo did ultimately deny her request for a loan modification, which implies
21 that Wells Fargo did review her modification request. Moreover, Plaintiff’s allegations
22 do not demonstrate that it was reasonable for her to forgo other options to avoid
23 foreclosure based on a promise to merely review her loan modification request.
24 Accordingly, Wells Fargo’s motion to dismiss Plaintiff’s sixth cause of action for
25 promissory estoppel is granted with leave to amend.

26 **E. Negligence**

27 Wells Fargo argues Plaintiff’s negligence claim fails because Plaintiff, as a
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1 borrower, cannot allege Wells Fargo, as a lender, owed Plaintiff any legal duty.

2 Plaintiff argues Wells Fargo does owe a legal duty to Plaintiff because Wells
3 Fargo stepped out of the traditional role of a lender when it offered Plaintiff an
4 opportunity to seek a loan modification.

5 “The elements of a cause of action for negligence are well established. They are
6 (a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the breach as
7 the proximate or legal cause of the resulting injury.” Ladd v. Cnty. of San Mateo, 12
8 Cal. 4th 913, 917 (1996) (internal quotation omitted).

9 With regard to a legal duty, “California courts have stated that ‘a financial
10 institution owes no duty of care to a borrower when the institution’s involvement in the
11 loan transaction does not exceed the scope of its conventional role as a mere lender of
12 money.’” Ottolini v. Bank of America, 2011 WL 3652501, at *5 (N.D. Cal. Aug. 19,
13 2011) (citing Nymark v. Heart Fed. Savs. & Loan Ass’n, 231 Cal. App. 3d 1089, 1096
14 (1991)). Several courts have determined that a lender that offers a borrower an
15 opportunity to seek a loan modification does not exceed the scope of a lender’s
16 conventional role and therefore does not owe a legal duty to the borrower in connection
17 with the opportunity to seek a loan modification. See, e.g., Sullivan v. JP Morgan
18 Chase Bank, NA, 725 F. Supp. 2d 1087, 1094 (E.D. Cal. 2010) (finding allegations that
19 a lender misrepresented that a loan modification would be made insufficient to form
20 basis of negligence claim); Karimi v. Wells Fargo, 2011 U.S. Dist. LEXIS 47902, at
21 *7 (C.D. Cal. May 4, 2011) (finding loan modification to be “intimately tied” to bank’s
22 lending role); Ottolini, 2011 WL 3652501, at *7. The Court finds the reasoning of
23 these cases persuasive.⁶

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25 ⁶ Plaintiff cites Ansanelli v. JP Morgan Chase Bank, NA, 2011 WL 1134451 (N.D. Cal. Mar.
26 28, 2011) in support of her position that Wells Fargo owed her a legal duty when it offered to review
27 her loan modification request. Ansanelli is, however, distinguishable because, there, the borrower
28 alleged that the lender actually agreed to engage the borrower on a trial loan modification plan.
Moreover, the court in Ansanelli provided no support for its conclusion that activity related to a loan
modification went beyond the domain of a usual money lender.

1 Here, Plaintiff alleges Wells Fargo “had a duty to exercise reasonable care and
2 skill in giving Plaintiff advice about how she could receive assistance with her loan and
3 properly carrying out the loan modification process.” Thus, Plaintiff has failed to
4 allege that Wells Fargo was acting outside the scope of a lender’s conventional role.
5 As such, Plaintiff has failed to adequately allege that Wells Fargo owed her any legal
6 duty. Accordingly, Wells Fargo’s motion to dismiss Plaintiff’s seventh cause of action
7 for negligence is granted with leave to amend.

8 **F. Unfair Competition**

9 Wells Fargo argues Plaintiff’s claim for unfair competition fails because Plaintiff
10 has failed to “allege with the requisite particularity that Defendant violated any law, or
11 committed any unfair or deceptive business practices.” Wells Fargo further asserts that
12 Plaintiff lacks standing to assert an unfair competition claim.

13 In response, Plaintiff argues her complaint sufficiently states an unfair
14 competition claim. Plaintiff argues her complaint is “chalk [sic] full of allegations that
15 would lead reasonable members of the public ‘likely to be deceived’ [sic] thus fulfilling
16 the ‘fraudulent’ prong of § 17200, it is also full of allegations of wrongdoing carried
17 out by Defendant, which harmed Plaintiff while conferring absolutely no benefit and
18 thus fulfilling the ‘unfair’ prong of this Code.” Plaintiff then goes on to state that her
19 allegations concerning Wells Fargo’s alleged scheme of “putting Plaintiff into a re-
20 finance transaction they knew was not appropriate for her and was designed to result
21 in foreclosure” are sufficient to state an unfair competition claim. Plaintiff lastly
22 argues she has standing to assert an unfair competition claim because she has been
23 damaged by Wells Fargo’s allegedly fraudulent and unfair scheme.

24 California’s unfair competition law (“UCL”) “does not proscribe specific
25 activities, but broadly prohibits ‘any unlawful, unfair or fraudulent business act or
26 practice.” Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 643-44
27 (2008). Unlawful business practices are those that constitute violations of other laws,
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1 such that the UCL “borrows” such violations to establish liability under the UCL. Id.
2 The California Supreme Court has defined unfair business practices to mean “conduct
3 that threatens an incipient violation of an antitrust law, or violates the policy or spirit
4 of one of those laws because its effects are comparable to or the same as a violation of
5 the law, or otherwise significantly threatens or harms competition. Id. at 646 (citing
6 Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187
7 (1999). Fraudulent business practices are those that are likely to deceive reasonable
8 members of the public. Puentes, 160 Cal. App. 4th at 645.

9 While Plaintiff asserts her complaint is replete with instances of Wells Fargo’s
10 unlawful, unfair and fraudulent conduct, the Court disagrees. As set above in
11 discussing the adequacy of Plaintiff’s remaining causes of action, Plaintiff has failed
12 to adequately allege any unlawful conduct that would serve as a predicate violation for
13 liability under the UCL. Plaintiff does not allege unfair conduct as defined by the
14 California Supreme Court in Cel-Tech, as Plaintiff does not allege any violation of
15 anti-trust laws or other laws related to the preservation of competition. Lastly, Plaintiff
16 does not adequately allege any fraudulent conduct. While Plaintiff asserts that Wells
17 Fargo engaged in a scheme to induce her into acquiring a loan that would lead to
18 foreclosure, Plaintiff has failed to plausibly allege such a scheme as discussed above.
19 Accordingly, Wells Fargo’s motion to dismiss Plaintiff’s eighth cause of action for
20 unfair competition is granted with leave to amend.

21 CONCLUSION

22 For the foregoing reasons, Wells Fargo’s motion to dismiss is **GRANTED** in its
23 entirety. Plaintiff is denied leave to amend her first, fourth, and fifth causes of action.
24 Plaintiff is granted leave to amend her second, third, sixth, seventh, and eighth causes
25 of action. Plaintiff shall have until **April 26, 2013**, to file an amended complaint. The

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1 hearing on Wells Fargo's motion to dismiss, currently set for April 12, 2013, is
2 **VACATED.**

3 **SO ORDERED.**

4 DATED: April 11, 2013

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6 HON. GONZALO P. CURIEL
7 United States District Judge
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