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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

KARY BRINSON,
Plaintiff,
vs.
BANK OF AMERICA, N.A., and DOES
1 to 10,
Defendants.

3:12-CV-00169 JWS
ORDER AND OPINION
[Re: Motion at docket 8]

I. MOTION PRESENTED

At docket 8, defendant Bank of America (“defendant” or “BOA”) moves the court for an order dismissing each of the claims asserted in plaintiff’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff Kary Brinson (“plaintiff” or “Brinson”) opposes the motion at docket 12, and defendant replies at docket 21. Oral argument was heard on November 27, 2012.

II. BACKGROUND

Plaintiff brought this action against BOA alleging violations of Alaska contract and tort law and Alaska’s Unfair Trade Practices Act based on BOA’s refusal to modify her home loan pursuant to a Home Affordable Modification Trial Period Plan (“TPP”) that

1 BOA's loan servicer and subsidiary company BAC Home Loans Servicing, LP
2 (collectively referred to as "BOA") sent plaintiff in December of 2009. The TPP was sent
3 to plaintiff as part of the federal government's Home Affordable Mortgage Program
4 (HAMP), which was a result of the Emergency Economic Stabilization Act of 2008 and
5 implemented by the United States Department of the Treasury to help qualified
6 homeowners avoid foreclosure by reducing monthly payments to sustainable levels.¹

7 Plaintiff's TPP set up a trial loan modification whereby plaintiff would send in
8 reduced payments of \$1,173.97 for three months and provide various financial
9 documents, and BOA would, in turn, permanently modify the loan if Brinson qualified
10 under HAMP guidelines.² The introductory paragraphs of the TPP explain the process
11 for obtaining a loan modification:

12 If I am in compliance with this Trial Period Plan (the "Plan") and my
13 representations in Section 1 continue to be true in all material respects, then
14 the Servicer will provide me with a Home Affordable Modification Agreement
15 ("Modification Agreement"), as set forth in Section 3, that would amend and
16 supplement (1) the Mortgage on the Property, and (2) the Note secured by
17 the Mortgage. . . . If I have not already done so, I am providing . . .
18 documents to permit verification of all my income . . . to determine whether
19 I qualify for the offer described in this Plan (the "Offer"). I understand that
20 after I sign and return two copies of this Plan to the Servicer, *the Servicer will*
21 *send me a signed copy of this Plan if I qualify for the Offer or will send me*
22 *written notice that I do not qualify for the Offer. This plan will not take effect*
23 *unless and until both I and the Servicer sign it and Servicer provides me with*
24 *a copy of this Plan with the Servicer's signature.*³

19 The TPP contains four sections addressing: (1) the borrower's representations;
20 (2) the terms of the trial plan; (3) the modification; and (4) additional agreements.

21 Section 2 sets forth the revised payment amounts and provides in relevant part:

22 During the period (the "Trial Period") commencing on the Trial Period
23 Effective Date [2/1/10 in this case] and ending on the earlier of: (i) the first
24 day of the month following the month in which the last Trial Period Payment

25 ¹See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 554-55 (7th Cir. 2012).

26 ²Doc. 1-3. For detailed background information regarding HAMP and how loans are
27 modified under the program see *Wigod*, 673 F.3d at 556-57.

28 ³ TPP, doc. 1-3 (italics added).

1 is due (the "Modification Effective Date") or (ii) termination fo this Plan, I
2 understand and acknowledge that: . . .

3 F. If prior to the Modification Effective Date, (i) the Servicer does not provide
4 me a fully executed copy of the Plan and the Modification Agreement . . . the
5 Loan Documents will not be modified and this Plan will terminate. In this
6 event, the Servicer will have all the rights and remedies provided by the Loan
7 Documents, and any payment I make under this Plan shall be applied to
8 amounts I owe under the Loan Documents and shall not be refunded to me;
9 and

10 G. I understand that the Plan is not a modification of the Loan Documents
11 and that the Loan Documents will not be modified unless and until (i) I meet
12 all of the conditions required for modification, (ii) I receive a fully executed
13 copy of a Modification Agreement, and (iii) the Modification Effective Date
14 has passed. I further understand and agree that the Servicer will not be
15 obligated or bound to make any modification of the Loan Documents if I fail
16 to meet any one of the requirements under this Plan.

17 Section 3 sets forth details about the proposed modification, providing in part:

18 I understand that once Servicer is able to determine the final amounts of
19 unpaid interest and any other delinquent amounts (except late charges) to be
20 added to my loan balance and after deducting from my loan balance any
21 remaining money held at the end of the Trial Period under Section 2.D.
22 above, the Servicer will determine the new payment amount. If I comply with
23 the requirements in Section 2 and my representations in Section 1 continue
24 to be true in all material respects, the Servicer will send me a Modification
25 Agreement for my signature which will modify my Loan Documents as
26 necessary to reflect this new payment amount and waive any unpaid later
27 charges associated with overdue loan payments remaining unpaid as of the
28 date immediately before the modification.

Brinson signed the TPP on January 5, 2010 and returned copies to defendant.⁴

The TPP attached to the complaint does not show that BOA signed the document, and
plaintiff does not allege that she ever received an executed TPP from BOA.

Brinson alleges that the TPP was an offer for a permanent loan modification that
she accepted when she signed the document, and thus, if she met all the requirements
listed in the TPP, BOA was obligated to provide her with a permanent modification. She
alleges that she met all the requirements by providing BOA with the requested financial
documents and by timely tendering the three payments of \$1,173.97. Furthermore, she
alleges that she continued making such payments every month through January of

⁴*Id.*

1 2011, well over the three-month requirement in the TPP, and that BOA accepted her
2 payments. She also alleges that she qualified for a loan modification under HAMP.
3 Because she complied with all the requirements listed in the TPP and qualified under
4 HAMP, she alleges BOA was obligated to grant her a permanent loan modification but
5 that it failed to do so. Her complaint raises a breach-of-contract claim, a breach of the
6 duty of good faith and fair dealing claim, a promissory estoppel claim, an intentional
7 misrepresentation claim, and an Unfair Trade Practices claim under AS 45.40.471(a)
8 and (b)(14).

9 Defendant argues that the breach-of-contract and bad faith claims cannot survive
10 because she cannot bring a private action to enforce BOA's obligations under HAMP,
11 and because the TPP was not an offer and Brinson's participation did not create a
12 contract between the parties. Similarly, defendant argues that plaintiff's promissory
13 estoppel claim should be dismissed because it did not make a promise to Brinson, and
14 she did not allege a substantial change in position. BOA alleges that plaintiff's fraud
15 claim must fail because it does not allege actionable conduct and that Brinson cannot
16 state a claim under Alaska's Unfair Trade Practices Act because she lacks standing and
17 because its actions were lawful.

18 **III. STANDARD OF REVIEW**

19 A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil
20 Procedure 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a
21 motion, "[a]ll allegations of material fact in the complaint are taken as true and
22 construed in the light most favorable to the nonmoving party."⁵ Dismissal for failure to
23 state a claim can be based on either "the lack of a cognizable legal theory or the
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28 ⁵*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

1 absence of sufficient facts alleged under a cognizable legal theory.”⁶ “Conclusory
2 allegations of law . . . are insufficient to defeat a motion to dismiss.”⁷

3 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief
4 that is plausible on its face.”⁸ “A claim has facial plausibility when the plaintiff pleads
5 factual content that allows the court to draw the reasonable inference that the defendant
6 is liable for the misconduct alleged.”⁹ “The plausibility standard is not akin to a
7 ‘probability requirement’ but it asks for more than a sheer possibility that a defendant
8 has acted unlawfully.”¹⁰ “Where a complaint pleads facts that are ‘merely consistent’
9 with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of
10 entitlement to relief.’”¹¹ “In sum, for a complaint to survive a motion to dismiss, the non-
11 conclusory ‘factual content,’ and reasonable inferences from that content, must be
12 plausibly suggestive of a claim entitling the plaintiff to relief.”¹²

13 In deciding whether to dismiss a claim under Rule 12(b)(6), the court is generally
14 limited to reviewing only the complaint, but it may review materials that are properly
15 submitted as part of the complaint and may take judicial notice of undisputed matters of
16 public record that are outside the pleadings.¹³ Furthermore, documents whose contents
17 are alleged in a complaint and whose authenticity no party questions, but which are not
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19 ⁶*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

20 ⁷*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

21 ⁸*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

22 ⁹*Id.*

23 ¹⁰*Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

24 ¹¹*Id.* (quoting *Twombly*, 550 U.S. at 557).

25 ¹²*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

26 ¹³See *Gonzalez v. First Franklin Loan Services*, 2010 WL 144862, at *3
27 (E.D. Cal. Jan. 11, 2010) (citing *Lee*, 250 F.3d at 688-89); *Campanelli v. Bockrath*, 100 F.3d
28 1476, 1479 (9th Cir. 1996); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

1 physically attached to the pleading, may be considered when ruling on a Rule 12(b)(6)
2 motion to dismiss.¹⁴ Thus, the court has properly considered the TPP, which was
3 attached to plaintiff's complaint, as well as the recorded public documents related to
4 plaintiff's loan, which were provided to the court at docket 9 and of which the court took
5 judicial notice during oral argument.

6 **IV. DISCUSSION**

7 To begin, the court addresses BOA's argument that plaintiff's breach-of-contract
8 and bad faith claims must fail because HAMP provides no private right of action against
9 the participating banks. Whether HAMP creates a private right of action is not the issue
10 presented by plaintiff's complaint. As plaintiff concedes, she is not alleging that
11 defendant violated HAMP or any other federal statute, nor is she bringing a claim as a
12 third-party beneficiary of any agreement between BOA and the federal government.
13 Instead, she brought suit on the theory that the TPP constituted a contract between
14 BOA and herself, and that BOA breached that contract. While the TPP may have been
15 created in the context of HAMP, her claims arise exclusively under state contract and
16 tort law.¹⁵

17 **A. Breach of contract**

18 Plaintiff's primary allegation against BOA is that the TPP became a contract and
19 BOA failed to meet its obligations to her under that contract. As a federal court sitting in
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22 ¹⁴*Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) *overruled on other grounds by*
23 *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

24 ¹⁵ Defendant did not raise the argument that plaintiff's state law claims are an
25 impermissible attempt to enforce the HAMP guidelines through state law, and thus the court
26 need not address it here, but notes that numerous courts have addressed and rejected such an
27 argument. See *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 581-82 (7th Cir. 2012) ("The
28 absence of a private right of action from a federal statute provides no reason to dismiss a claim
under a state law just because it refers to or incorporates some element of the federal law.");
Sutcliffe v. Wells Fargo Bank, N.A., 283 F.R.D. 533, 553 (N.D. Cal. 2012) (listing the cases that
have rejected such preclusion arguments).

1 diversity, the court must apply Alaska substantive law.¹⁶ Under Alaska law, the
2 existence of a contract requires an offer including all essential terms, an unequivocal
3 acceptance of those terms by the offeree, consideration, and an intent to be bound by
4 the contract.¹⁷ “The objective of contract interpretation is to determine and enforce the
5 reasonable expectations of the parties.”¹⁸ To ascertain the parties’ intent, the court
6 looks to the language of the document and any extrinsic evidence presented to
7 determine if the wording of the contract is ambiguous.¹⁹ “An ambiguity exists only
8 where the disputed terms are reasonably subject to differing interpretation after viewing
9 the contract as a whole.”¹⁹

10 Whether a TPP can be the basis for a breach of contract is not a settled issue. It
11 appears that the majority of district courts considering the issue have concluded that
12 TPPs are not contracts.²⁰ However, some courts have found it at least plausible that
13 TPPs are enforceable contracts for permanent loan modifications, denying defendants’
14 motions to dismiss.²¹ Plaintiff primarily relies on *Turbeville v. JPMorgan Chase Bank*²²
15 to oppose the motion to dismiss. In *Turbeville*, the court held that at the pleading stage,
16 the plaintiff’s allegations were sufficient to establish the existence of an enforceable

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18 ¹⁶*Zamani v. Carnes*, 491 F.3d 990, 995 (9th Cir. 2007).

19 ¹⁷*Davis v. Dykman*, 938 P.2d 1002, 1006 (Alaska 1997).

20 ¹⁸*Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1004 (Alaska 2004).

21 ¹⁹*Wessells v. State Dept. of Highways*, 562 P.2d 1042, 1046 (Alaska 1977).

22 ¹⁹*Id.*

23 ²⁰See *Rackley v. JPMorgan Chase Bank, N.A.*, 2011 WL 2971357, at *3 (W.D. Tex.
24 July 21, 2011) (collecting cases).

25 ²¹See, e.g., *Alimena v. Vericrest Fin., Inc.*, 2012 WL 6651201, at *6-*8 (E.D. Cal.
26 Dec. 20, 2012); *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 549-52 (N.D. Cal. 2012);
27 *Turbeville v. JPMorgan Chase Bank*, 2011 WL 7163111, at *2-*4 (C.D. Cal. April 4, 2011);
Kennedy v. Wells Fargo Bank, N.A., 2011 WL 4526085, at *2-*3 (C.D. Cal. Sept. 28, 2011);
Durmic v. J.P. Morgan Case Bank, N.A., 2010 WL 4825632, at *3-*4 (D. Mass. Nov. 24, 2010).

28 ²²2011 WL 7163111, at *2-*4 (C.D. Cal. April 4, 2011).

1 contract based on the TPP, rejecting the defendant's argument that it had unfettered
2 discretion as to whether to grant a permanent loan modification. The court in *Turbeville*,
3 however, did not consider the provision present in the TPP at issue in this case which
4 provides that the lender will send a signed copy of the TPP to the borrower if the
5 borrower is found to qualify for the offer and thus did not consider whether such a
6 provision prevents the TPP from ripening into an offer until the lender countersigns the
7 TPP.

8 As noted above, while the TPP states that the lender will provide the borrower
9 with a Home Affordable Modification Agreement if the borrower is in compliance with the
10 TPP, it also unequivocally states that the TPP will not take effect unless and until both
11 the borrower and the lender sign it and the lender provides the borrower with a copy of
12 the signed TPP. It also clearly states that the lender will send the borrower a signed
13 copy of the TPP if the borrower qualifies for the offer or will send the borrower written
14 notice that the borrower does not qualify for the offer.²³ More recent cases have
15 focused on this signature provision when determining whether a TPP is an enforceable
16 contract, including cases from two circuit courts.

17 In *Wigod v. Wells Fargo Bank, N.A.*, a Seventh Circuit case, the court held that
18 the plaintiff raised a valid breach-of-contract claim based on a TPP similar to the one
19 BOA sent plaintiff.²⁴ Like the case at hand, the plaintiff in *Wigod* alleged that she had
20 complied with all of the TPP's requirements by submitting documentation, making all of

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22 ²³At the time plaintiff received the TPP, banks were not required to verify eligibility prior
23 to sending out a TPP. See *Morales v. Chase Home Fin. LLC*, 2011 WL 1670045, at * 8 (N.D.
24 Cal. April 11, 2011). Loan servicers had the option of placing a borrower into a trial period plan
25 based on verbal financial information obtained from the borrower, subject to later verification
26 during the trial period. *Id.* That practice was allowed as part of a decision to roll out HAMP
27 quickly. *Wigod*, 673 F.3d at 557. Supplemental directive SD 10-01 changed that practice,
28 requiring that a loan servicer fully verify a borrower's eligibility prior to providing a TPP.
Supplemental directive SD 10-01, available at www.hmpadmin.com; *Wigod*, 673 F.3d at 557.
That change went into effect for any TPPs with effective dates on or after June 1, 2010.
Supplemental directive SD 10-01, available at www.hmpadmin.com.

²⁴673 F.3d 547, 561-63 (7th Cir. 2012).

1 the payments, and returning signed copies of the TPP to the lender. Unlike the case at
2 hand, however, the lender in *Wigod* returned an executed copy of the TPP to the
3 plaintiff. The court acknowledged that the lender could condition the permanent
4 modification offer on its further approval, and in such a situation there would be no
5 binding offer. It concluded, however, that once the lender signed the TPP agreement
6 and returned it to the plaintiff, the lender had no more discretion as to whether to offer
7 the plaintiff a permanent loan modification.²⁵ The court found that after the lender
8 signed the TPP, the only conditions were to be satisfied by the borrower and noted that
9 when a promise is conditioned on the performance of some act by the promisee (in this
10 case, the borrower) there can be a valid offer that the promisor is obligated to follow
11 through on in the event the promisee fulfills the conditions.²⁶ Thus, the court held that
12 once the plaintiff satisfied the conditions listed in the TPP, the lender was obligated to
13 provide the loan modification.²⁷ In *Pennington v. HSBC Bank USA, N.A.*,²⁸ the TPP at
14 issue contained similar language regarding the lender's signature. The Fifth Circuit
15 concluded that because the plaintiffs did not allege that they received a signed copy of
16 the TPP, the TPP never ripened into an offer and thus the plaintiffs' breach-of-contract
17 claim failed.

18 Other district courts have similarly distinguished *Wigod*. For example, in *Soin v.*
19 *Federal National Mortgage Ass'n*,²⁹ the court applied the reasoning in *Wigod* and found
20 that because there was no indication the lender returned an executed copy of the TPP,
21 there was never an offer to modify the plaintiff's loan; instead, the court concluded that
22 the TPP merely invited plaintiffs to apply for a loan modification. Similarly, in *Rummell*

23 ²⁵673 F.3d at 561-63.

24 ²⁶*Id.* at 562.

25 ²⁷*Id.* at 563.

26 ²⁸2012 WL 4513333, at *4 (5th Cir. Oct. 3, 2012)

27 ²⁹2012 WL 1232324, at *5 (E.D. Cal. April 12, 2012).

1 *v. Vantium Capital, Inc.*,³⁰ the court noted that the requirement that the TPP be signed
2 by the lender meant that, in order for a valid offer to exist, the lender needed to show
3 further manifestation of assent, and because the lender never countersigned the TPP,
4 there was no offer and no binding contract.³¹

5 Unlike the situation in *Wigod*, Brinson makes no allegation that BOA sent her a
6 signed copy of the TPP, and the copy of the TPP attached to the complaint only has her
7 signature on it. While the TPP uses some misleading language in stating that BOA will
8 provide plaintiff with a loan modification if she is in compliance with the TPP, the court
9 must look at the document as a whole, and the document unambiguously states that the
10 TPP does not take effect unless the lender signs it and provides a copy to plaintiff,
11 signifying that BOA did not intend to be bound by the TPP until it had determined if
12 Brinson actually qualified for the offer and sent her a signed copy.³² The TPP, however
13 inartfully or clumsily, merely invites plaintiff to apply for a loan modification.³³ The
14 requirement that the TPP be countersigned indicates that BOA planned to make a
15 further manifestation of assent before there could be a valid offer, and “[a]
16 manifestation of willingness to enter into a bargain is not an offer if the person to whom
17 it is addressed knows or has reason to know that the person making it does not intend
18 to conclude a bargain until he has made a further manifestation of assent.”³⁴ Because
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20 ³⁰2012 WL 2564846, at *7 (E.D. Mich. July 2, 2012).

21 ³¹*See also Brady v. Chase Home Fin., LLC*, 2012 WL 1900606, at *5-*7 (W.D. Mich. May
22 24, 2012) (holding that plaintiff failed to state a breach-of-contract claim because the lender
23 never sent the plaintiff a signed copy of the TPP, and thus the TPP never ripened into an offer
24 that the plaintiff could accept); *Pool v. Wells Fargo Bank, N.A.*, 2012 WL 3264294, at *5 (D.
25 Colo. Aug. 10, 2012) (granting defendant’s motion to dismiss based in part on the fact that the
26 TPP was not fully executed).

27 ³²*See supra* note 22.

28 ³³*Soin*, 2010 WL 1232324, at *5.

³⁴*Copper River School Dist. v. Traw*, 9 P.3d 280, 283 (Alaska 2000) (quoting
Restatement (Second) of Contracts § 26 (1981)).

1 BOA never sent plaintiff a signed copy of the TPP, the court cannot conclude that BOA
2 intended to be bound, and thus the TPP never ripened into an offer.

3 As the court in *Pennington* noted, “[a]lthough the bank’s acceptance of the trial
4 payments from [the plaintiffs] lends some support to finding that the parties intended to
5 be bound, that weight is reduced, because [the plaintiffs] already owed regular
6 payments.”³⁵ While BOA deposited plaintiff’s money, she owed that money under the
7 terms of the original loan. Therefore, even if BOA refused to assent to the terms of the
8 TPP, it could nonetheless take the money in partial satisfaction of the amount already
9 owed. Accordingly, plaintiff fails to state a breach-of-contract claim because defendant
10 did not intend to be bound by the TPP.

11 **B. Breach of covenant of good faith and fair dealing**

12 Plaintiff claims that BOA breached its duty to act in good faith under the TPP. All
13 contracts in Alaska include the implied covenant of good faith and fair dealing,³⁶ but the
14 TPP did not ripen into a contract, and thus there was no implied duty of good faith and
15 fair dealing associated with the TPP. Plaintiff fails to state a claim for a breach of the
16 duty of good faith and fair dealing.

17 **C. Promissory estoppel**

18 Promissory estoppel is intended to enable courts to enforce contract-like
19 promises made unenforceable by technical defects.³⁷ In Alaska, a promissory estoppel
20 claim has four requirements: “(1) The action induced amounts to a substantial change of
21 position; (2) it was either actually foreseen or reasonably foreseeable by the promisor;
22 (3) an actual promise was made and itself induced the action or forbearance in reliance
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25 ³⁵*Pennington*, 2012 WL 4513333, at *4.

26 ³⁶*Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 992
27 (Alaska 2009) (citing *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997)).

28 ³⁷*Brady v. Alaska*, 965 P.2d 1, 10 (Alaska 1997).

1 thereon; and (4) enforcement is necessary in the interest of justice.”³⁸ As the Alaska
2 Supreme Court noted, “[w]hen a promissory estoppel claim is made in conjunction with
3 a breach of contract claim, the ‘actual promise’ element of promissory estoppel is
4 analytically identical to the acceptance required for a contract.”³⁹ If it were otherwise,
5 “promissory estoppel . . . would become a device by which parties could be held to
6 contracts they did not accept.”⁴⁰ The court has already determined that the TPP was not
7 an offer in this case because of the provision requiring BOA’s signature before the TPP
8 could take effect. Therefore, BOA did not make any promise, and plaintiff’s promissory
9 estoppel claim must fail.

10 **D. Fraud**

11 Plaintiff alleges that BOA made a promise in the TPP to permanently modify her
12 loan, that the promise was false or at least misleading, and that BOA knew that it was
13 false. In Alaska, “[c]ommon law fraud claims require a showing of (1) a false
14 representation of fact; (2) knowledge of the falsity of the representation; (3) intention to
15 induce reliance; (4) justifiable reliance; and (5) damages.”⁴¹ Plaintiff’s fraud claim is only
16 based on the terms of the TPP, not on any alleged statement made by an agent of
17 defendant. Because the court found that BOA had to sign the document for it to take
18 effect, plaintiff’s allegations of fraud are contradicted by the terms of the TPP. It was not
19 reasonable or justifiable for plaintiff to believe that she was guaranteed a permanent
20 loan modification. Thus, plaintiff’s fraud claim must also fail.

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24 ³⁸ *Valdez Fisheries Dev. Ass’n, Inc. v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657, 668
25 (Alaska 2002) (quoting *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1284 (Alaska
1985)).

26 ³⁹ *Id.* (citing *Brady*, 965 P.2d at 11) (internal quotations omitted).

27 ⁴⁰ *Id.*

28 ⁴¹ *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

1 **F. Alaska’s Unfair Trade Practice Act**

2 Plaintiff’s last claim against defendant is based on Alaska’s Unfair Trade
3 Practices Act, AS 45.50.471 (“UTPA”). Specifically, plaintiff alleges that defendant
4 violated AS 45.50.471(a), which states that “[u]nfair methods of competition and unfair
5 or deceptive acts or practices in the conduct of trade or commerce are declared to be
6 unlawful.” Plaintiff alleges that defendant’s practice of leading borrowers to believe that
7 it will permanently modify their mortgage loans constitutes an unfair or deceptive act.
8 Plaintiff also alleges that defendant violated AS 45.50.471(b)(14), which states that an
9 unfair or deceptive act or practice includes “representing that an agreement confers or
10 involves rights, remedies, or obligations which it does not confer or involve” Plaintiff
11 asserts that BOA, through the TPP, represented that the agreement conferred rights,
12 remedies, and obligations that it did not.

13 The parties dispute whether plaintiff’s UTPA claim is valid. Defendant cites to
14 *Barber v. National Bank of Alaska*,⁴² where the Supreme Court held that UTPA did not
15 apply to mortgages. Plaintiff points out, however, that the statute was subsequently
16 amended to specifically include mortgages by the addition of AS 45.50.471(b)(52). That
17 section makes it a violation of UTPA to engage in certain mortgage acts, specifically any
18 act or practice prohibited in the Mortgage Lending Regulation Act, AS 06.60.340.
19 Defendant responds that plaintiff’s claim does not allege a violation of AS
20 45.50.471(b)(52), the Mortgage Lending Act, and thus UTPA does not apply to the
21 situation at hand. Regardless of whether UTPA applies to all mortgage actions given
22 the addition of AS 45.50.471(b)(52), plaintiff’s claim nonetheless fails. The crux of
23 plaintiff’s case is that BOA offered her a loan modification, which she accepted.
24 However, the court has concluded that there was no offer in the first place, and any
25 purported acceptance was ineffective. BOA therefore did not engage in any deceptive
26 practices or represent that the TPP conferred rights that it did not.

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28 ⁴²815 P.2d 857, 861 (Alaska 1991).

