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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
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8 SALMA H. KHAN,

CASE NO. CV F 13-1378 LJO JLT

9 Plaintiff,

ORDER ON DEFENDANTS' F.R.Civ.P. 12
MOTION TO DISMISS
(Doc. 6.)

10
11 vs.
12

13 CITIMORTGAGE INC., et al.,

14 Defendants.
15
16 _____/

17 **PRELIMINARY STATEMENT TO THE PARTIES AND COUNSEL**

18 Judges in the Eastern District of California carry the heaviest caseload in the nation,
19 and this Court is unable to devote inordinate time and resources to individual cases and
20 matters. This Court cannot address all arguments, evidence and matters raised by parties and
21 addresses only the arguments, evidence and matters necessary to reach the decision in this
22 order given the shortage of district judges and staff. The parties and counsel are encouraged to
23 contact United States Senators Diane Feinstein and Barbara Boxer to address this Court's
24 inability to accommodate the parties and this action.

25 **INTRODUCTION**

26 Defendants CitiMortgage, Inc. ("CMI") and Wilmington Trust Company
27 ("Wilmington") seek to dismiss as insufficiently pled and legally barred plaintiff Salma Khan's
28 ("Ms. Khan's") claims arising from failed modification of her loan for her Bakersfield property

1 ("property") and foreclosure of the property. Ms. Khan filed neither papers to oppose
2 dismissal of her claims nor an amended complaint as a matter of course, pursuant to F.R.Civ.P.
3 15(a)(1). This Court considered CMI and Wilmington's (collectively "defendants") F.R.Civ.P.
4 12(b)(6) motion to dismiss on the record and VACATES the October 7, 2013 hearing, pursuant
5 to Local Rule 230(g). For the reasons discussed below, this Court DISMISSES this action.

6 **DISCUSSION**¹

7 **Ms. Khan's Property Loan And Default**

8 On January 13, 2003, Mr. Khan borrowed from Golden Empire Mortgage \$648,500, the
9 promissory for which was secured by a deed of trust ("DOT") on the property. In March 2010,
10 Golden Empire Mortgage assigned the promissory note and DOT to CMI which later assigned
11 its interests in the promissory note and DOT to Wilmington. CMI acted as the loan's servicer
12 and holder of the promissory note.

13 In September 2009, Ms. Khan failed to make loan payments and defaulted. CMI
14 recorded a notice of default on March 8, 2010 and a notice of trustee's sale on June 9, 2010 to
15 set a June 30, 2010 sale.

16 **Loan Modification Attempts And Property Foreclosure**

17 After her default, Ms. Khan applied to CMI to modify her loan during which CMI
18 repeatedly postponed the trustee's sale. During the loan modification process, CMI:

- 19 1. Asked Ms. Khan routinely for documents she had submitted previously and
20 repeatedly;
- 21 2. Lost documents and claimed their non-receipt;
- 22 3. Imposed deadlines for document submission which Ms. Khan could not meet
23 due to CMI's fault; and
- 24 4. Closed the file to require Ms. Khan to reinitiate loan modification.

25 During February 10, 2012 to May 14, 2012, CMI informed Ms. Khan that her
26 application was in "underwriting" although no "underwriting" occurred. During that same
27

28 ¹ The factual recitation generally summarizes Ms. Khan's operative complaint ("complaint").

1 period and specifically on May 14, 2012, CMI representatives responded to Ms. Khan's at least
2 weekly telephone inquiries that her loan modification was "open and under review" and that
3 the May 15, 2012 foreclosure sale will be postponed.

4 CMI purchased the property at a May 15, 2012 trustee's sale and later transferred its
5 interest in the property to Wilmington. CMI informed Mr. Khan that the sale was a mistake
6 and promised to rescind it.

7 In January 2013, an unlawful detainer proceeding was initiated against Ms. Khan.

8 On May 24, 2012, CMI assigned its interest in the DOT to Wilmington by an
9 assignment of deed of trust recorded on May 29, 2012.

10 In February 2013, unlawful detainer proceedings against Ms. Khan resumed. Ms. Khan
11 vacated the property after she was served with a notice to vacate prior to June 26, 2013.

12 **Ms. Khan's Claims**

13 The complaint alleges breach of contract, fraud, negligence and related claims which
14 will be discussed below.

15 **DISCUSSION**

16 **F.R.Civ.P. 12(b)(6) Motion to Dismiss Standards**

17 Defendants challenge the complaint's claims as insufficiently pled and conclusory.

18 A F.R.Civ.P. 12(b)(6) dismissal is proper where there is either a "lack of a cognizable
19 legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory."
20 *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Graehling v. Village of*
21 *Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995). A F.R.Civ.P. 12(b)(6) motion "tests the legal
22 sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

23 In addressing dismissal, a court must: (1) construe the complaint in the light most
24 favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3)
25 determine whether plaintiff can prove any set of facts to support a claim that would merit
26 relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a
27 court is not required "to accept as true allegations that are merely conclusory, unwarranted
28 deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig.*, 536

1 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court “need not assume the truth of legal
2 conclusions cast in the form of factual allegations,” *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d
3 638, 643, n. 2 (9th Cir.1986), and must not “assume that the [plaintiff] can prove facts that it
4 has not alleged or that the defendants have violated . . . laws in ways that have not been
5 alleged.” *Associated General Contractors of California, Inc. v. California State Council of*
6 *Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt to
7 amend if “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings*
8 *Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

9 A plaintiff is obliged “to provide the ‘grounds’ of his ‘entitlement to relief’ [which]
10 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
11 of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 127 S. Ct. 1955, 1964-65
12 (2007) (internal citations omitted). Moreover, a court “will dismiss any claim that, even when
13 construed in the light most favorable to plaintiff, fails to plead sufficiently all required
14 elements of a cause of action.” *Student Loan Marketing Ass’n v. Hanes*, 181 F.R.D. 629, 634
15 (S.D. Cal. 1998). In practice, a complaint “must contain either direct or inferential allegations
16 respecting all the material elements necessary to sustain recovery under some viable legal
17 theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc. v. Ford*
18 *Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

19 In *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009), the U.S. Supreme
20 Court explained:
21

22 . . . a complaint must contain sufficient factual matter, accepted as true, to
23 “state a claim to relief that is plausible on its face.” . . . A claim has facial plausibility
24 when the plaintiff pleads factual content that allows the court to draw the reasonable
25 inference that the defendant is liable for the misconduct alleged. . . . The plausibility
26 standard is not akin to a “probability requirement,” but it asks for more than a sheer
27 possibility that a defendant has acted unlawfully. (Citations omitted.)

28 After discussing *Iqbal*, the Ninth Circuit summarized: “In sum, for a complaint to
survive [dismissal], the non-conclusory ‘factual content,’ and reasonable inferences from that

1 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S.*
2 *Secret Service*, 572 F.3d 962, 989 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. 662, 129 S.Ct. at
3 1949).

4 The U.S. Supreme Court applies a “two-prong approach” to address dismissal:

5 First, the tenet that a court must accept as true all of the allegations contained in
6 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of
7 a cause of action, supported by mere conclusory statements, do not suffice. . . . Second,
8 only a complaint that states a plausible claim for relief survives a motion to dismiss. . . .
9 Determining whether a complaint states a plausible claim for relief will . . . be a
10 context-specific task that requires the reviewing court to draw on its judicial experience
and common sense. . . . But where the well-pleaded facts do not permit the court to
infer more than the mere possibility of misconduct, the complaint has alleged – but it
has not “show[n]” – “that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

11 In keeping with these principles a court considering a motion to dismiss can
12 choose to begin by identifying pleadings that, because they are no more than
13 conclusions, are not entitled to the assumption of truth. While legal conclusions can
14 provide the framework of a complaint, they must be supported by factual allegations.
When there are well-pleaded factual allegations, a court should assume their veracity
and then determine whether they plausibly give rise to an entitlement to relief.

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16 *Iqbal*, 556 U.S. 662, 129 S.Ct. at 1949-1950.

17 With these standards in mind, this Court turns to defendants' challenges to the
18 complaint's claims.

19 **Promissory Estoppel**

20 The complaint's (first) promissory estoppel claim alleges that:

21 1. During February 2012 to May 14, 2012, defendants as least once a week
22 promised Ms. Khan that her loan modification application "was open, active and under
23 review," and that the May 15, 2012 trustee's sale "will be postponed";

24 2. On May 14, 2012, Ms. Khan was "promised one last time that the next day's
25 sale would be postponed"; and

26 3. Ms. Khan reasonably relied on "these promises" and "would have taken
27 protective action to save her house from foreclosure" by, for instance, filing an action seeking
28 injunctive relief, borrowing reinstatement funds from relatives, or filing bankruptcy.

1 *Oral Agreement*

2 Defendants contend that an oral agreement to postpone foreclosure is unenforceable to
3 defeat the promissory estoppel claim.

4 "As a general rule, a gratuitous oral promise to postpone a foreclosure sale or to allow a
5 borrower to delay monthly mortgage payments is unenforceable." *Garcia v. World Sav., FSB*,
6 183 Cal.App.4th 1031, 1039, 107 Cal.Rptr.3d 683 (2010). In *Clark v. Countrywide Home*
7 *Loans, Inc.*, 732 F.Supp.2d 1038, 1043-1044 (E.D. Cal. 2010), a fellow judge of this Court
8 addressed oral representations as to real property:

9 Certain types of contracts are invalid unless memorialized
10 by a written document signed by the party against whom the
11 contract is being enforced. Cal. Civ. Code § 1624. Mortgages and
12 deeds of trust are subject to the statute of frauds. *Secrest v. Sec.*
13 *Nat'l Mortg. Loan Trust 2002-2*, 167 Cal.App.4th 544, 552, 84
14 Cal.Rptr.3d 275 (2008). "An agreement to modify a contract that is
15 subject to the statute of frauds is also subject to the statute of
16 frauds" and must be in writing. *Id.* at 553, 84 Cal.Rptr.3d 275; *see*
17 *also Basham v. Pac. Funding Group*, 2010 WL 2902368 (E.D. Cal.
18 July 22, 2010) (dismissing a claim that defendant breached an oral
19 contract to provide plaintiffs with a loan modification because,
20 under the statute of frauds, "absent a writing, there can be no
21 contract, much less a breach of contract."); *Justo v. Indymac*
22 *Bancorp, et al.*, 2010 WL 623715 (E.D. Cal. Feb. 19, 2010)
23 (plaintiff's claim that defendants breached an oral contract to
24 modify his loan and cancel the foreclosure sale was barred by the
25 statute of frauds). A written contract may not be modified by an
26 oral agreement, unless that oral agreement is memorialized in
27 writing and signed by the parties. Cal. Civ. Code § 1698.

21 Here, the alleged promise for a loan modification is subject
22 to the statute of frauds. Absent a written agreement to modify the
23 loan, **any claim based upon an oral contract to modify the loan**
24 **is barred** by the statute of frauds. *See Secrest*, 167 Cal.App.4th at
25 552, 84 Cal.Rptr.3d 275. (Bold added.)

26 "A modification of a contract is a change in the obligations of a party by a subsequent
27 mutual agreement of the parties." *Secrest v. Security Nat. Mortg. Loan Trust 2002-2*, 167
28 Cal.App.4th 544, 553, 84 Cal.Rptr.3d 275 (2008). "A contract coming within the statute of

1 frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or
2 by the party's agent.” *Secrest*, 167 Cal.App.4th at 552, 84 Cal.Rptr.3d 275 (citing Cal. Civ.
3 Code, § 1624)). An “agreement by which a lender agreed to forbear from exercising the right
4 of foreclosure under a deed of trust securing an interest in real property comes within the
5 statute of frauds.” *Secrest*, 167 Cal.App.4th at 547, 84 Cal.Rptr.3d 275. “An agreement to
6 modify a contract that is subject to the statute of frauds is also subject to the statute of frauds.”
7 *Secrest*, 167 Cal.App.4th at 5553, 84 Cal.Rptr.3d 275; *see Karlsen v. American Sav. & Loan*
8 *Assn.*, 15 Cal.App.3d 112, 121, 92 Cal.Rptr. 851 (1971) (“The purported oral agreement is
unenforceable. No damages can arise as a consequence of its alleged breach.”)

9 The record reveals no written agreement to modify Ms. Khan's loan or to forego
10 foreclosure of the property. The complaint's facts and inferences are that no more than oral
11 statements were made to Ms. Khan. In the absence of a written agreement to modify her loan
12 or to forego foreclosure, the statute of fraud bars the promissory estoppel claim. This Court
13 construes the absence of Ms. Khan's opposition as her concession that the promissory estoppel
14 claim is barred.

15 *Justifiable Reliance*

16 Defendants further contend that the complaint lacks sufficient facts to support
17 promissory estoppel elements.

18 Under the promissory estoppel doctrine, “a promisor is bound when he should
19 reasonably expect a substantial change of position, either by act or forbearance, in reliance on
20 his promise, if injustice can be avoided only by its enforcement.” *Youngman v. Nevada*
21 *Irrigation Dist.*, 70 Cal.2d 240, 249, 74 Cal.Rptr. 398 (1969). Promissory estoppel elements
22 are “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the
23 promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party
24 asserting the estoppel must be injured by his reliance.” *Laks v. Coast Fed. Sav. & Loan Assn.*,
25 60 Cal.App.3d 885, 891, 131 Cal.Rptr. 836 (1976); *see Toscano v. Greene Music*, 124
Cal.App.4th 685, 692, 21 Cal.Rptr.3d 732 (2004).

26 Promissory estoppel is “a doctrine which employs equitable principles to satisfy the
27 requirement that consideration must be given in exchange for the promise sought to be
28 enforced.” *Raedeke v. Gibraltar Sav. & Loan Assn.*, 10 Cal.3d 665, 672, 111 Cal.Rptr. 693
(1974). “[P]romissory estoppel claims are aimed solely at allowing recovery in equity where a

1 contractual claim fails for a lack of consideration, and in all other respects the claim is akin to
2 one for breach of contract” *US Ecology, Inc. v. State*, 129 Cal.App.4th 887, 904, 28
3 Cal.Rptr.3d 894 (2005). “The vital principle is that he who by his language or conduct leads
4 another to do what he would not otherwise have done shall not subject such person to loss or
5 injury by disappointing the expectations upon which he acted.” *Garcia v. World Sav., FSB*,
6 183 Cal.App.4th 1031, 1041, 107 Cal.Rptr.3d 683 (2010).

7 Defendants fault the complaint's absence of facts to support that Ms. Khan relied on
8 CMI's "purported statements concerning the postponement of the foreclosure sale."
9 Defendants point to complaint allegations that CMI closed its file or denied modification to
10 suggest Ms. Khan's "actual knowledge" of the upcoming foreclosure sale. Defendants
11 characterize Ms. Khan to have foregone "action she deemed necessary to avoid the foreclosure
12 sale" to render unreasonable or unjustified her alleged failure to reinstate the loan after receipt
13 of multiple denials of modification.

14 Defendants raise valid points. Nothing in the record suggests that Ms. Khan's reliance
15 on a loan modification or postponement of foreclosure was merited. She remained obligated
16 on her promissory and DOT. The complaint reveals that she remained on the property without
17 making payments for more than three years. The complaint lacks facts to invoke equitable
18 principles to grant Ms. Khan a further windfall in connection with her default. The promissory
19 estoppel claim is subject to dismissal with prejudice.

20 Fraud

21 The complaint's (second) fraud claim alleges that:

22 1. Defendants' practice as to instruct "employees to respond to telephone status
23 inquiries from borrowers with standard answers irrespective of whether those answers were or
24 were not true";

25 2. The responses included: "You are missing documents"; "You are under review";
26 and "You are in underwriting."

27 3. Such misrepresentations were intended "to delay and drag out the modification
28 process" to accomplish CMI's goals "to modify as few loans as possible" and to avoid
government regulators' scrutiny; and

4. Ms. Khan "never received denial of her loan modification, demonstrating that
[her] modification application never was in underwriting and the statement "you are in

1 underwriting and under review" was false.

2 Defendants fault the complaint's failure to allege fraud elements with sufficient
3 particularity.

4 ***Elements***

5 Fraud elements for deceit are “(a) misrepresentation (false representation, concealment,
6 or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce
7 reliance; (d) justifiable reliance; and (e) resulting damage.” *Engalla v. Permanente Medical*
8 *Group, Inc.*, 15 Cal.4th 951, 974, 64 Cal.Rptr.2d 843 (1997).

9 “[T]o establish a cause of action for fraud a plaintiff must plead and prove in full,
10 factually and specifically, all of the elements of the cause of action.” *Conrad v. Bank of*
11 *America*, 45 Cal.App.4th 133, 156, 53 Cal.Rptr.2d 336 (1996). There must be a showing “that
12 the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon
13 the false representation” and “that the plaintiff actually and justifiably relied upon the
14 defendant’s misrepresentation in acting to his detriment.” *Conrad*, 45 Cal.App.4th at 157, 53
15 Cal.Rptr.2d 336. “The absence of any one of these required elements will preclude recovery.”
16 *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal.App.3d 1324, 1332, 231 Cal.Rptr. 355
17 (1986).

18 ***Particularity Pleading Standard***

19 F.R.Civ.P. 9(b) requires a party to “state with particularity the circumstances
20 constituting fraud.”² In the Ninth Circuit, “claims for fraud and negligent misrepresentation
21 must meet Rule 9(b)'s particularity requirements.” *Neilson v. Union Bank of California, N.A.*,
22 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003). A court may dismiss a claim grounded in fraud
23 when its allegations fail to satisfy F.R.Civ.P. 9(b)’s heightened pleading requirements. *Vess*,
24 317 F.3d at 1107.³ A motion to dismiss a claim “grounded in fraud” under F.R.Civ.P. 9(b) for

25 ² F.R.Civ.P. 9(b)’s particularity requirement applies to state law causes of action: “[W]hile a
26 federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to
27 state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with
28 particularity is a federally imposed rule.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)
(quoting *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1995)(italics in original))

1 failure to plead with particularity is the “functional equivalent” of a F.R.Civ.P. 12(b)(6) motion
2 to dismiss for failure to state a claim. *Vess*, 317 F.3d at 1107. As a counter-balance, F.R.Civ.P.
3 8(a)(2) requires from a pleading “a short and plain statement of the claim showing that the
4 pleader is entitled to relief.”

5 F.R.Civ.P. 9(b)’s heightened pleading standard “is not an invitation to disregard Rule
6 8’s requirement of simplicity, directness, and clarity” and “has among its purposes the
7 avoidance of unnecessary discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).
8 F.R.Civ.P. 9(b) requires “specific” allegations of fraud “to give defendants notice of the
9 particular misconduct which is alleged to constitute the fraud charged so that they can defend
10 against the charge and not just deny that they have done anything wrong.” *Semegen v.*
11 *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). “A pleading is sufficient under Rule 9(b) if it
12 identifies the circumstances constituting fraud so that the defendant can prepare an adequate
13 answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir. 1993)
14 (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,
15 866 (9th Cir. 1997)). The Ninth Circuit has explained:

16 Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud.
17 The time, place and content of an alleged misrepresentation may identify the statement
18 or the omission complained of, but these circumstances do not “constitute” fraud. The
19 statement in question must be false to be fraudulent. Accordingly, our cases have
20 consistently required that circumstances indicating falseness be set forth. . . . [W]e
21 [have] observed that plaintiff must include statements regarding the time, place, and
22 *nature* of the alleged fraudulent activities, and that “mere conclusory allegations of
fraud are insufficient.” . . . The plaintiff must set forth what is false or misleading
about a statement, and why it is false. In other words, the plaintiff must set forth an
explanation as to why the statement or omission complained of was false or misleading.
...

23 In certain cases, to be sure, the requisite particularity might be supplied with
24 great simplicity.

26 ³ “In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely
27 on that course of conduct as the basis of a claim. In that event, the claim is said to be ‘grounded in fraud’ or to
28 ‘sound in fraud,’ and the pleading of that claim as a whole must satisfy the particularity requirement of Rule
9(b).” *Vess*, 317 F.3d at 1103-1104.

1 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc)
2 (italics in original) *superseded by statute on other grounds as stated in Marksman Partners,*
3 *L.P. v. Chantal Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996); *see Cooper v. Pickett*, 137
4 F.3d 616, 627 (9th Cir. 1997) (fraud allegations must be accompanied by “the who, what, when,
5 where, and how” of the misconduct charged); *see Neubronner*, 6 F.3d at 672 (“The complaint
6 must specify facts as the times, dates, places, benefits received and other details of the alleged
7 fraudulent activity.”); *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d
8 1393, 1401 (1986) (“the pleader must state the time, place, and specific content of the false
9 representations as well as the identities of the parties to the misrepresentation”).

10 In a fraud action against a corporation, a plaintiff must “allege the names of the persons
11 who made the allegedly fraudulent representations, their authority to speak, to whom they
12 spoke, what they said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut.*
13 *Auto. Ins. Co.*, 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991).

14 F.R.Civ.P. 9(b) “does not allow a complaint to merely lump multiple defendants
15 together but ‘require[s] plaintiffs to differentiate their allegations when suing more than one
16 defendant . . . and inform each defendant separately of the allegations surrounding his alleged
17 participation in the fraud.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-765 (9th Cir. 2007)
18 (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D. Fla.1998)). In
19 the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum,
20 “identif[y] the role of [each] defendant[] in the alleged fraudulent scheme.” *Moore v. Kayport*
21 *Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989). “To state a claim of fraudulent
22 conduct, which carries substantial reputational costs, plaintiffs must provide each and every
23 defendant with enough information to enable them ‘to know what misrepresentations are
24 attributable to them and what fraudulent conduct they are charged with.’” *Pegasus Holdings v.*
25 *Veterinary Centers of America, Inc.*, 38 F.Supp.2d 1158, 1163 (C.D. Cal. 1998) (quoting *In re*
26 *Worlds of Wonder Sec. Litig.*, 694 F.Supp. 1427, 1433 (N.D. Cal.1988)).

27 **Misrepresentation**

28 Defendants point to the complaint's absence of facts of their misrepresentations in that

1 the complaint alleges that CMI postponed foreclosure, that Ms. Khan was denied modification,
2 and that the foreclosure sale occurred after denial of her applications. Defendants further fault
3 the complaint's failure to identify CMI representatives who made misrepresentations, their
4 authority to speak, the date of misrepresentation, and similar required details.

5 Defendants are correct that the complaint lacks sufficient facts to support the
6 misrepresentation element. The complaint fails to support with facts a misrepresentation and
7 merely concludes that representations as her modification application are false. The complaint
8 identifies no person making alleged misrepresentations with required specificity to hold
9 defendants accountable. The complaint fails to substantiate the misrepresentation element.

10 ***Intent To Defraud***

11 Defendants challenge the absence of facts to support defendants' intent to defraud in
12 that the complaint alleges that CMI foreclosed on the property after three years of loan
13 modification applications and multiple denials. Defendants further question an intent to
14 defraud give that Ms. Khan was allowed to remain on the property for three years without
15 making a payment during the loan modification process.

16 The complaint lacks facts of defendant's intent to defraud, and Ms. Khan offers nothing
17 to support intent to defraud. Allegations of delay and avoiding regulators' scrutiny fail to
18 substantiate intent to defraud. The complaint lacks facts to satisfy F.R.Civ.P. 9(b) specificity
19 as to intent.

20 ***Justifiable Reliance***

21 Defendants fault the absence of facts to support Ms. Khan's reliance on CMI's
22 statements of foreclosure sale postponement. Defendants point to complaint allegations that
23 CMI closed its file or denied modification to suggest Ms. Khan's "actual knowledge" of the
24 upcoming foreclosure sale. Defendants characterize Ms. Khan to have foregone "action she
25 deemed necessary to avoid the foreclosure sale" to render unreasonable or unjustified her
26 alleged failure to reinstate the loan after receipt of multiple denials of modification. *See*
27 *Cameron v. Cameron*, 88 Cal.App.2d 585, 594, 199 P.2d 443 (1948) ("If [one] becomes aware
28 of facts that tend to arouse his suspicion, or if he has reason to believe that any representations
made to him are false or only half true, it is his legal duty to complete his investigation and he

has no right to rely on statements of the other contracting party.”)

Similar to the discussion on promissory estoppel, nothing suggests that Ms. Khan's reliance on a loan modification or postponement of foreclosure was justified, especially since she remained obligated on her promissory and DOT. The complaint's allegations that Ms. Khan was under review or in underwriting coupled with delay demonstrate grounds to arouse suspicion or to disbelieve the potential for loan modification or foreclosure sale postponement. The complaint suggests that Ms. Khan was on notice of problems to frustrate the notion of her justifiable reliance. The complaint lacks facts alleged with sufficient specificity to support Ms. Khan's justifiable reliance.

In short, the complaint lacks a viable fraud claim to warrant its dismissal with prejudice.

Breach Of The Implied Covenant Of Good Faith And Fair Dealing

The complaint's (third) breach of the implied covenant of good faith and fair dealing ("implied covenant") claim alleges that Ms. Khan's promissory note and DOT imposed on CMI the duty of good faith and fair dealing. The implied covenant claims accuses CMI of:

1. Not assisting Ms. Khan with loan modification;
2. Delaying "the modification for two years during which time it falsely represented to [Ms. Khan] that her application was in underwriting and under review when it was not";
3. Engaging in further delay by "claiming that necessary documents were missing from the file" although Ms. Khan timely "provided all requested documents";
4. Lacking ability to honor its agreement with Wilmington to assign CMI's interests in the DOT and its agreement with Ms. Khan in that CMI negotiated the assignment during the loan modification process;
5. Agreeing implicitly to evaluate honestly and fairly Ms. Khan's loan modification application to impose on CMI "all obligations and duties incumbent upon any party to a contract to honestly and fairly treat [Ms. Khan] in good faith under the obligations provided in the Note and Deed of Trust"; and
6. Foreclosing without making a final decision on loan modification.

Defendants challenge the absence of facts to support an implied covenant claim.

“There is an implied covenant of good faith and fair dealing in every contract that

1 neither party will do anything which will injure the right of the other to receive the benefits of
2 the agreement.” *Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal.4th 390, 400, 97
3 Cal.Rptr.2d 151 (2000) (quoting *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658,
4 328 P.2d 198 (1958)). “The covenant of good faith and fair dealing is implied in every
5 contract as a method to protect the interests of the parties in having the contractual promises
6 and purposes performed.” *Love v. Fire Ins. Exchange*, 221 Cal.App.3d 1136, 1147, 271
7 Cal.Rptr. 246 (1990).

8 “The implied covenant of good faith and fair dealing rests upon the existence of some
9 specific contractual obligation.” *Racine & Laramie, Ltd. v. Department of Parks &
10 Recreation*, 11 Cal.App.4th 1026, 1031, 14 Cal.Rptr.2d 335 (1992). “There is no obligation to
11 deal fairly or in good faith absent an existing contract.” *Racine & Laramie*, 11 Cal.App.4th at
12 1032, 14 Cal.Rptr.2d 335. The “implied covenant is a supplement to an existing contract, and
13 thus it does not require parties to negotiate in good faith prior to any agreement.” *McClain v.
14 Octagon Plaza, LLC*, 159 Cal.App.4th 784, 799, 71 Cal.Rptr.3d 885 (2008).

15 A breach of implied covenant of good faith and fair dealing claim “must show that the
16 conduct of the defendant . . . demonstrates a failure or refusal to discharge contractual
17 responsibilities, prompted . . . by a conscious and deliberate act, which unfairly frustrates the
18 agreed common purposes and disappoints the reasonable expectations of the other party
19 thereby depriving that party of the benefits of the agreement.” *Careau & Co. v. Security
20 Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1395, 272 Cal.Rptr. 387 (1990).

21 The “implied covenant of good faith and fair dealing is limited to assuring compliance
22 with the express terms of the contract, and cannot be extended to create obligations not
23 contemplated by the contract.” *Pasadena Live, LLC v. City of Pasadena*, 114 Cal.App.4th
24 1089, 1093-1094, 8 Cal.Rptr.3d 233 (2004) (citation omitted). The “scope of conduct
25 prohibited by the covenant of good faith is circumscribed by the purposes and express terms of
26 the contract.” *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2
27 Cal.4th 342, 373, 6 Cal.Rptr.2d 467 (1992). “[T]he implied covenant will only be recognized
28 to further the contract's purpose; it will not be read into a contract to prohibit a party from
doing that which is expressly permitted by the agreement itself.” *Wolf v. Walt Disney Pictures
and Television*, 162 Cal.App.4th 1107, 1120, 76 Cal.Rptr.3d 585 (2008). “The covenant
‘cannot impose substantive duties or limits on the contracting parties beyond those

1 incorporated in the specific terms of their agreement.”” *Agosta v. Astor*, 120 Cal.App.4th 596,
2 607, 15 Cal.Rptr.3d 565 (2004) (quoting *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 349-350, 100
3 Cal.Rptr.2d 352 (2000)). Moreover, although the implied covenant particularly applies when a
4 party has discretionary power affecting rights of another party, “the implied covenant does not
5 trump an agreement's express language.” *Steiner v. Thexton*, 48 Cal.4th 411, 419-420, 226
6 P.3d 359 (2010).

7 Defendants fault the complaint's absence of allegations that "the loan requires CMI to
8 agree to the modification." Defendants note CMI's contractual right to foreclose under the
9 DOT and Ms. Khan's admitted default.

10 The complaint lacks a specific contractual obligation on which to premise an implied
11 covenant claim. In the absence of a tangible breach of contract claim, the complaint lacks facts
12 to demonstrate defendants' failure or refusal to discharge contractual responsibilities, prompted
13 by a conscious and deliberate act. The implied covenant claim improperly seeks to impose on
14 defendants obligations beyond the scope of a purported agreement to modify Ms. Khan's loan
15 or to forego foreclosure. The DOT permits foreclosure and thus no implied covenant
16 prohibited defendants from doing that which the DOT permitted to remedy Mr. Khan's default.
17 The implied covenant claim is subject to dismissal with prejudice in the absence of Ms. Khan's
18 attempt to support it.

19 **Unlawful Business Practices**

20 The complaint's fourth claim proceeds under California's Unfair Competition Law
21 ("UCL"), Cal. Bus. & Prof. Code, §§ 17200, et seq., to allege that defendants "have committed
22 acts of unfair competition" by:

23 1. Leading borrowers "to believe that they were being fairly considered for loan
24 modifications when in fact [CMI] had an internal policy to deny loan modifications whenever
25 possible;

26 2. Promising borrowers routinely "that their loans were in underwriting and under
27 review and then . . . foreclosing without even rendering an underwriting decision"; and

28 3. "[T]racking all defaulted borrowers for foreclosure at the same time they were
being considered for loan modifications with the intent to eventually foreclose whenever
possible rather than providing borrowers the ability to repay their loans under modified terms."

The UCL claim characterizes such practices as unlawful and unfair to deny borrowers "the

1 opportunity to fairly and honestly repay their debt" to CMI.

2 ***Standing***

3 The complaint fails to allege that Ms. Khan suffered an injury cognizable under the
4 UCL to establish her standing.

5 California Business and Professions Code section 17204 limits standing to bring a UCL
6 claim to specified public officials and a private person "who has suffered injury in fact and has
7 lost money or property as a result of the unfair competition." "This provision requires
8 [plaintiff] to show that she has lost 'money or property' sufficient to constitute an 'injury in
9 fact' under Article III of the Constitution, *see Birdsong v. Apple, Inc.*, 590 F.3d 955, 959–60
10 (9th Cir.2009), and also requires a 'causal connection' between [defendant's] alleged UCL
11 violation and her injury in fact, *Hall v. Time Inc.*, 158 Cal.App.4th 847, 70 Cal.Rptr.3d 466,
12 471–72 (2008)." *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204-1205 (9th Cir. 2010), *cert.*
denied, 131 S.Ct. 1817 (2011).

13 Business and Professions Code section 17203 addresses UCL relief and provides in
14 pertinent part:

15 Any person who engages, has engaged, or proposes to engage in unfair
16 competition may be enjoined in any court of competent jurisdiction. The court
17 may make such orders or judgments . . . as may be necessary to restore to any
18 person in interest any money or property, real or personal, which may have been
19 acquired by means of such unfair competition. (Bold added.)

20 "In a suit under the UCL, a public prosecutor may collect civil penalties, but a private
21 plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Kasky v. Nike,*
22 *Inc.*, 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296 (2002) (quoting *Cel-Tech Communications, Inc.*
v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 83 Cal.Rptr.2d 548 (1999)).

23 The complaint lacks facts of Ms. Khan's money or property allegedly lost in that she
24 was obligated to pay her loan and faced foreclosure if she failed to meet her obligations.
25 Foreclosure of the property fails to support a UCL claim in the absence of allegations of the
26 Ms. Khan's performance to avoid default. The complaint lacks facts to support Ms. Khan's
27 standing to seek UCL relief to warrant dismissal of the UCL claim.

28 ***Unlawful, Unfair Or Fraudulent Practice***

Defendants further fault the complaint's failure to allege a predicate violation of law to

1 support a UCL claim.

2 “Unfair competition is defined to include ‘unlawful, unfair or fraudulent business
3 practice and unfair, deceptive, untrue or misleading advertising.’” *Blank v. Kirwan*, 39 Cal.3d
4 311, 329, 216 Cal.Rptr. 718 (1985) (quoting Cal. Bus. & Prof. Code, § 17200). The UCL
5 establishes three varieties of unfair competition – “acts or practices which are unlawful, or
6 unfair, or fraudulent.” *Shvarts v. Budget Group, Inc.*, 81 Cal.App.4th 1153, 1157, 97
7 Cal.Rptr.2d 722 (2000). An “unlawful business activity” includes anything that can properly
8 be called a business practice and that at the same time is forbidden by law. *Blank*, 39 Cal.3d at
9 329, 216 Cal.Rptr. 718 (citing *People v. McKale*, 25 Cal.3d 626, 631-632, 159 Cal.Rptr. 811,
10 602 P.2d 731 (1979)). “A business practice is ‘unlawful’ if it is ‘forbidden by law.’” *Walker*
11 *v. Countrywide Home Loans, Inc.*, 98 Cal.App.4th 1158, 1169, 121 Cal.Rptr.2d 79 (2002)
12 (quoting *Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487
(1992)).

13 The UCL prohibits “unlawful” practices “forbidden by law, be it civil or criminal,
14 federal, state, or municipal, statutory, regulatory, or court-made.” *Saunders v. Superior Court*,
15 27 Cal.App.4th 832, 838, 33 Cal.Rptr.2d 548 (1999). The UCL “thus creates an independent
16 action when a business practice violates some other law.” *Walker*, 98 Cal.App.4th at 1169,
17 121 Cal.Rptr.2d 79. According to the California Supreme Court, the UCL “borrows”
18 violations of other laws and treats them as unlawful practices independently actionable under
19 the UCL. *Farmers Ins.*, 2 Cal.4th at 383, 6 Cal.Rptr.2d 487.

20 A fellow district court has explained the borrowing of a violation of law other than the
21 UCL:

22 To state a claim for an “unlawful” business practice under the UCL, a
23 plaintiff must assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v.*
24 *Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548,
25 973 P.2d 527 (1999) (stating, “By proscribing ‘any unlawful’ business practice,
26 section 17200 ‘borrows’ violations of other law and treats them as unlawful
27 practices that the unfair competition law makes independently actionable.”)
28 (citation omitted). Where a plaintiff cannot state a claim under the “borrowed”
law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual*
Automobile Ins. Co., 93 Cal.App.4th 700, 718, 113 Cal.Rptr.2d 399 (2001).
Here, Plaintiff has predicated her “unlawful” business practices claim on her
TILA claim. However, as discussed above, Plaintiff's attempt to state a claim
under TILA has failed. Accordingly, Plaintiff has stated no “unlawful” UCL
claim.

1
2 *Rubio v. Capital One Bank*, 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008), *affirmed in part*,
3 *reversed in part*, 613 F.3d 1195 (2010).

4 Moreover, "a plaintiff may not bring an action under the unfair competition law if some
5 other statutory provision bars such an action or permits the underlying conduct." *Rothschild v.*
6 *Tyco Internat. (US), Inc.*, 83 Cal.App.4th 488, 494, 99 Cal.Rptr.2d 721 (2000).

7 "Unfair" under the UCL "means conduct that threatens an incipient violation of an
8 antitrust law, or violates the policy or spirit of one of those laws because its effects are
9 comparable to or the same as a violation of the law, or otherwise significantly threatens or
10 harms competition." *Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone*, 20
11 Cal.4th 163,187, 83 Cal.Rptr.2d 548 (1999). A business practice is unfair when it "offends an
12 established public policy or when the practice is immoral, unethical, oppressive, unscrupulous
13 or substantially injurious to consumers." *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th
14 632, 647, 58 Cal.Rptr.2d 89 (1996) (internal quotations and citations omitted). The
15 "unfairness" prong of the UCL "does not give the courts a general license to review the
16 fairness of contracts." *Samura v. Kaiser Found. Health Plan*, 17 Cal.App.4th 1284, 1299 & n.
17 6, 22 Cal.Rptr.2d 20 (1993).

18 The "fraudulent" prong under the UCL requires a plaintiff to "show deception to some
19 members of the public, or harm to the public interest," *Watson Laboratories, Inc. v. Rhone-*
20 *Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001), or to allege that "members of
21 the public are likely to be deceived," *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144, 1167, 93
22 Cal.Rptr.2d 439 (2000); *Medical Instrument Development Laboratories v. Alcon Laboratories*,
23 2005 WL 1926673, at *5 (N.D. Cal. 2005). A UCL "plaintiff need not show that he or others
24 were actually deceived or confused by the conduct or business practice in question." *Schnall*,
25 78 Cal.App.4th at 1167, 93 Cal.Rptr.2d 439.

26 "A plaintiff alleging unfair business practices under these statutes [UCL] must state
27 with reasonable particularity the facts supporting the statutory elements of the violation."
28 *Khoury v. Maly's of California, Inc.*, 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993).

Defendants argue that the complaint lacks a UCL claim in the absence of facts of
violation of law, unfairness or fraud. Defendants challenge the complaint's failure "to establish
a predicate unlawful, unfair or fraudulent business practice."

1 The FAC lacks facts of an unlawful, unfair or fraudulent business practices to support a
2 UCL claim, despite Ms. Khan's unsubstantiated claims of misleading borrowers and denying
3 opportunity to repay their debt. As demonstrated throughout this order, the complaint's claims
4 fail and thus cannot serve as a predicate violation for a UCL claim. The complaint's UCL
5 claim fails with its other claims and is subject to dismissal with prejudice.

6 Negligence

7 The complaint's (fifth) negligence claim alleges that defendants:

8 1. Negligently handled Ms. Khan's loan modification application "when they acted
9 in contravention of their promises to rescind the foreclosure sale";

10 2. Breached their duty to handle fairly and honestly Ms. Khan's loan modification
11 application "by stringing [Ms. Khan] along throughout the loan modification approval process,
12 requesting duplicative documentation, losing documentation and all the while following a
13 policy that is geared toward denying loan modification applications";

14 3. Breached the "duty to evaluate [Ms. Khan's] loan modification swiftly so as to
15 avoid the pending Trustee's sales"; and

16 4. "[F]ailed in its duty to [Ms. Khan] by delaying the underwriting procedure" that
17 had been promised.

18 Defendants challenge the complaint's failure to allege an actionable duty to support a
19 negligence claim.

20 "The elements of a cause of action for negligence are (1) a legal duty to use reasonable
21 care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the
22 plaintiff's injury." *Mendoza v. City of Los Angeles*, 66 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d
23 525 (1998) (citation omitted). "The existence of a duty of care owed by a defendant to a
24 plaintiff is a prerequisite to establishing a claim for negligence." *Nymark v. Heart Fed. Sav. &*
25 *Loan Assn*, 231 Cal.App.3d 1089, 1095, 283 Cal.Rptr. 53 (1991). "[A]bsent a duty, the
26 defendant's care, or lack of care, is irrelevant." *Software Design & Application, Ltd. v. Hoefer*
27 *& Arnett, Inc.*, 49 Cal.App.4th 472, 481, 56 Cal.Rptr.2d 756 (1996). "The existence of a legal
28 duty to use reasonable care in a particular factual situation is a question of law for the court to
decide." *Vasquez v. Residential Investments, Inc.*, 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d
846 (2004) (citation omitted).

"The 'legal duty' of care may be of two general types: (a) the duty of a person to use

1 ordinary care in activities from which harm might reasonably be anticipated [, or] (b) [a]n
2 affirmative duty where the person occupies a particular relationship to others. . . . In the first
3 situation, he is not liable unless he is actively careless; in the second, he may be liable for
4 failure to act affirmatively to prevent harm.” *McGettigan v. Bay Area Rapid Transit Dist.*, 57
5 Cal.App.4th 1011, 1016-1017, 67 Cal.Rptr.2d 516 (1997).

6 There is no actionable duty between a lender and borrower in that loan transactions are
7 arms-length. A lender “owes no duty of care to the [borrowers] in approving their loan.
8 Liability to a borrower for negligence arises only when the lender ‘actively participates’ in the
9 financed enterprise ‘beyond the domain of the usual money lender.’” *Wagner v. Benson*, 101
10 Cal.App.3d 27, 35, 161 Cal.Rptr. 516 (1980) (citing several cases). “[A]s a general rule, a
11 financial institution owes no duty of care to a borrower when the institution's involvement in
12 the loan transaction does not exceed the scope of its conventional role as a mere lender of
13 money.” *Nymark*, 231 Cal.App.3d at 1096, 283 Cal.Rptr. 53; *see Myers v. Guarantee Sav. &*
14 *Loan Assn.*, 79 Cal.App.3d 307, 312, 144 Cal.Rptr. 616 (1978) (no lender liability when lender
15 did not engage “in any activity outside the scope of the normal activities of a lender of
16 construction monies”).

17 “Public policy does not impose upon the Bank absolute liability for the hardships which
18 may befall the [borrower] it finances.” *Wagner*, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516. The
19 success of a borrower’s investment “is not a benefit of the loan agreement which the Bank is
20 under a duty to protect.” *Wagner*, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516 (lender lacked duty
21 to disclose “any information it may have had”). “It is simply not tortious for a commercial
22 lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid.”
23 *Sierra-Bay Fed. Land Bank Assn. v. Superior Court*, 227 Cal.App.3d 318, 334, 277 Cal.Rptr.
24 753 (1991). Moreover, “loan servicers do not owe a duty to the borrowers of the loans they
25 service.” *Shepherd v. American Home Mortg. Services, Inc.*, 2009 WL 4505925, at *2 (E.D.
26 Cal. 2009); *see Huerta v. Ocwen Loan Servicing, Inc.*, 2010 WL 728223, at *4 (N.D. Cal.
27 2010) (“a loan servicer has no fiduciary duty to a borrower when its involvement in the
28 transaction does not exceed the scope of its conventional role as a loan servicer”).

Turning to loan modification, “[n]umerous cases have characterized a loan modification
as a traditional money lending activity, warranting application of the rule articulated in *Nymark*
v. Heart Fed. Savings & Loan Assn., 231 Cal.App.3d 1089, 283 Cal.Rptr. 53 (1991), that a

1 financial institution in general owes no duty of care to a borrower.” *Settle v. World Sav. Bank*,
2 F.S.B., 2012 WL 1026103, at *8 (C.D. Cal. 2012). In *Alvarado v. Aurora Loan Services, LLC*,
3 2012 WL 4475330, at *6 (C.D. Cal. 2012), a fellow district judge explained:

4 . . . offering loan modifications is sufficiently entwined with money lending so
5 as to be considered within the scope of typical money lending activities. If money
6 lending institutions were held to a higher standard of care by offering a service that
7 could benefit borrowers whose circumstances have changed, the money lender[s] would
8 be discouraged from leniency and would assert their rights to reclaim the property upon
9 the borrower's default. The conventional-moneylender test shall be sufficient to
10 determine that there is no duty of care owed in servicing Plaintiff's mortgage loan and
11 loan modification. As the Plaintiff is unable to establish a duty, it is unnecessary to
12 discuss the elements of breach, causation, and damages.

13 Defendants fault the complaint's absence of facts to support its actionable duty owed to
14 Ms. Khan and in turn breach of such duty to cause damage. Defendants note that Ms. Khan's
15 "mere desire to obtain a loan modification cannot serve as a basis" to support a negligence
16 claim.

17 The complaint insufficiently attempts to allege defendants' cognizable duty of care let
18 alone its breach. Ms. Khan lacks a negligence claim based on defendants' lender and/or
19 servicer roles, particularly in the absence of a duty to forego foreclosure or to provide loan
20 modification. “No such duty exists . . . to determine the borrower's ability to repay the loan. . .
21 . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are
22 for the lender's protection, not the borrower's.” *Renteria v. United States*, 452 F.Supp.2d 910,
23 922-923 (D. Ariz. 2006) (borrowers “had to rely on their own judgment and risk assessment to
24 determine whether or not to accept the loan”). “A commercial lender is not to be regarded as
25 the guarantor of a borrower's success and is not liable for the hardships which may befall a
26 borrower.” *Sierra-Bay Fed.*, 227 Cal.App.3d at 334, 277 Cal.Rptr. 753. CMI had “no interest
27 in the loan” in its role as loan servicer. *See Cleveland v. Deutsche Bank Nat. Trust Co.*, 2009
28 WL 250017, at *3 (S.D. Cal. 2009).

Defendants owed no actionable duty of care to Ms. Khan arising from her
dissatisfaction with a loan modification. The complaint lacks facts of special circumstances to
impose duties on defendants in that the complaint depicts an arms-length transaction, nothing

1 more. The complaint fails to substantiate a special lending or other relationship or an
2 actionable breach of duty to substantiate a negligence claim. The negligence claim fails and is
3 subject to dismissal with prejudice.

4 Quiet Title

5 The complaint's (sixth) quiet title claim seeks to quiet the property's title in favor of Ms.
6 Khan over Wilmington. The quiet title claim alleges that the May 15, 2012 trustee's sale is
7 "voidable" in that CMI as Wilmington's agent and predecessor "engaged in unfair competition
8 by routinely acting in bad faith in evaluating [Ms. Khan] for a loan modification while
9 following an internal policy to foreclose on [Ms. Khan's] Property instead of fairly and
10 honestly considering [Ms. Khan] for a loan modification."

11 Defendants challenge the quiet title claim as legally barred in the absence of Ms.
12 Khan's legitimate tender of amounts owed on her loan.

13 California Code of Civil Procedure section 760.010 provides for an action "to establish
14 title against adverse claims to real or personal property or any interest therein." California
15 Code of Civil Procedure section 761.020 mandates a "verified" complaint for a quiet title
16 action to include:

- 17 1. A legal description and street address of the subject real property;
- 18 2. The title of plaintiff as to which determination is sought and the basis of the
19 title;
- 20 3. The adverse claims to the title of the plaintiff against which a determination is
21 sought;
- 22 4. The date as of which the determination is sought; and
- 23 5. A prayer for the determination of the title of the plaintiff against the adverse
24 claims.

25 The quiet title remedy "is cumulative and not exclusive of any other remedy, form or right of
26 action, or proceeding provided by law for establishing or quieting title to property." Cal. Code
27 Civ. Proc., § 760.030.

28 The complaint lacks facts as to the title of which Ms. Kham is legally entitled to
determination and the basis of Ms. Khan's purported title given her inability to tender amounts
due on their loan. A quiet title claim requires an allegation that the plaintiffs "are the rightful
owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust."

1 *See Kelley v. Mortgage Electronic Registration Systems, Inc.*, 642 F.Supp.2d 1048, 1057 (N.D.
2 Cal. 2009). The complaint lacks facts that Ms. Khan is the property's rightful owner and has
3 satisfied DOT obligations. The complaint alleges Ms. Khan made no loan payments for three
4 years. The complaint lacks a properly pled quiet title claim.

5 Moreover, a purported quiet title claim is doomed in the absence of tender of amounts
6 owed. "It is settled in California that a mortgagor cannot quiet his title against the mortgagee
7 without paying the debt secured." *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673
8 (1934). "A party may not without payment of the debt, enjoin a sale by a trustee under a power
9 conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even
10 though the statute of limitations has run against the indebtedness." *Sipe v. McKenna*, 88
11 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948); *see Mix v. Sodd*, 126 Cal.App.3d 386, 390, 178
12 Cal.Rptr. 736 (1981) ("a mortgagor in possession may not maintain an action to quiet title,
13 even though the debt is unenforceable"); *Aguilar v. Bocci*, 39 Cal.App.3d 475, 477, 114
14 Cal.Rptr. 91 (1974) (trustor is unable to quiet title "without discharging his debt. The cloud
upon his title persists until the debt is paid.").

15 "A valid and viable tender of payment of the indebtedness owing is essential to an
16 action to cancel a voidable sale under a deed of trust." *Karlsen v. American Sav. & Loan*
17 *Ass'n*, 15 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1971). An "action to set aside the sale,
18 unaccompanied by an offer to redeem, would not state a cause of action which a court of equity
19 would recognize." *Copsey v. Sacramento Bank*, 133 Cal. 659, 662, 66 P. 7 (1901). "[I]t is a
20 debtor's responsibility to make an unambiguous tender of the entire amount due or else suffer
21 the consequence that the tender is of no effect." *Gaffney v. Downey Savings & Loan Ass'n*, 200
Cal.App.3d 1154, 1165, 246 Cal.Rptr. 421 (2003).

22 Ms. Khan is unable to re-acquire good title to the foreclosed property without paying or
23 tendering her outstanding indebtedness. With the complaint's absence of a meaningful ability
24 or willingness to tender the indebtedness, a purported quiet title claim fails. This Court is not
25 in a position to award Ms. Khan a windfall.

26 Lastly, defendants are correct that the foreclosure sale extinguished Ms. Kham's
27 interest in the property. "A properly conducted nonjudicial foreclosure sale constitutes a final
28 adjudication of the rights of the borrower and lender." *Moeller*, 25 Cal.App.4th at 831, 30
Cal.Rptr.2d 777. "As a general rule, a trustee's sale is complete upon acceptance of the final

1 bid.” *Nguyen*, 105 Cal.App.4th 428, 440-441, 129 Cal.Rptr.2d 436. In the absence of alleged
2 facts to support quieting title in favor of Ms. Khan, the quiet title claim fails and is subject to
3 dismissal with prejudice.

4 **CONCLUSION AND ORDER**

5 The complaint's claims are insufficiently pled and legally barred. Ms. Khan neither
6 attempts to oppose dismissal of the complaint's claims nor suggests additional facts to attempt
7 to support the claims. Nothing is apparent to resurrect the complaint's claims. As such, this
8 Court:

- 9 1. DISMISSES this action with prejudice; and
10 2. DIRECTS the clerk to enter judgment in favor of defendants CitiMortgage, Inc.
11 and Wilmington Trust Company and against plaintiff Salma H. Khan and to close this action.

12 IT IS SO ORDERED.

13 Dated: **September 30, 2013**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE