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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TRISHA HINES, an individual
and borrower,

Plaintiff,

v.

WELLS FARGO HOME MORTGAGE,
INC., a division of Wells
Fargo Bank N.A., as successor
to WACHOVIA CORPORATION,

Defendant.

No. 2:14-CV-01386 JAM-KJN

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS**

Defendant Wells Fargo ("Defendant") seeks to dismiss Plaintiff Trisha Hines' ("Plaintiff") first amended complaint ("FAC" Doc. #10) alleging that Defendant's agent deceived her into agreeing to a loan modification with unfavorable terms. Plaintiff opposes the motion (Doc. #13).

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff Trisha Hines secured a mortgage for her home in 2003. FAC ¶ 10. Unable to keep up with the monthly payments,

1 Plaintiff sought refinancing in 2006. FAC ¶ 11. In 2009, she
2 sought a further loan modification due to her "fluctuating
3 income." FAC ¶ 12. Plaintiff secured a broker, West Coast
4 Financial, to negotiate the modification. FAC ¶¶ 8, 12. She
5 also retained West Coast Financial to explain the modification
6 terms to her, because she did not have the knowledge to
7 understand them on her own. FAC ¶ 19.

8 In informing Plaintiff about the loan terms Defendant was
9 offering, West Coast Financial advised Plaintiff that the
10 modification was to include a fixed interest rate. FAC ¶ 14.
11 Plaintiff alleges that based on the broker's reassurances about
12 the terms of the loan, she signed a loan modification agreement.
13 FAC ¶ 19; see RJN Exh. G.

14 But the true terms of the loan were different. They
15 included monthly payments starting at \$791.08, increasing
16 annually from September 2009 to September 2014. FAC ¶ 15; RJN
17 Exh. G. The interest rate started at 2.500% and increased
18 annually by 0.500% throughout the same five-year period. FAC
19 ¶ 15. Thereafter, the monthly payments and interest rates were
20 "set to skyrocket to \$2,221.58 with an interest rate of 6.148%."
21 FAC ¶ 16. Although Plaintiff requested a copy of the agreement,
22 she claims she never received one. FAC ¶ 18. It was only in
23 2012, when Plaintiff again attempted to modify her loan that she
24 allegedly learned the true terms. Id.

25 Plaintiff alleges that West Coast Financial misrepresented
26 the true terms to induce her to enter into the highly unfavorable
27 modification. See FAC ¶¶ 20, 40. Plaintiff claims that
28 Defendant is responsible for this wrongdoing because West Coast

1 Financial "worked closely with" Defendant "as [Defendant's]
2 agent." FAC ¶ 13.

3 Due to the loan modification's "usurious and continuously
4 escalating interest rate," Plaintiff has been unable to keep up
5 with the payments. FAC ¶ 21. The interest-only payments caused
6 the principal balance of the loan to increase such that Plaintiff
7 now owes more on the loan than the house is worth. FAC ¶ 22. As
8 of the date of filing her complaint, Plaintiff was in default on
9 her mortgage, but remained in her home. See id.

10 Plaintiff brings seven causes of action: (1) Fraud in the
11 Inducement, (2) Fraud in the Concealment, (3) Unfair Business
12 Practices (Violation of Cal. Bus. & Prof. Code § 17200 et seq.)
13 ("UCL"), (4) Violation of the Covenant of Good Faith and Fair
14 Dealing, (5) Negligence, (6) Promissory Estoppel, and
15 (7) Intentional Misrepresentation. The Court dismissed
16 Plaintiff's original complaint for failure to adequately plead
17 tolling of the statutes of limitations (Doc. #9). Defendant now
18 seeks to dismiss Plaintiff's first amended complaint.

19 When briefing on the motion was complete, Plaintiff filed a
20 "Request to terminate counsel; Request for continuance." The
21 Court then scheduled a hearing to address both Defendant's motion
22 to dismiss and Plaintiff's requests. Counsel for Defendant
23 failed to appear despite the docket entry setting the hearing
24 date on this motion. See Doc. #16.

25 At the January 21, 2015 hearing, the Court relieved
26 Plaintiff's counsel and granted her 45 days to find a new
27 attorney. Due to defense counsel's absence, the Court heard no
28 argument about the motion to dismiss and instead took it under

1 submission. As described below, the Court grants the motion in
2 part with leave to amend.

3
4 II. OPINION

5 A. Statute of Limitations

6 The Court previously ruled that each of Plaintiff's seven
7 causes of action were precluded by the respective statute of
8 limitations. See id. But the Court granted leave to amend to
9 allow Plaintiff a chance to properly plead delayed discovery.
10 See id. In its renewed motion to dismiss, Defendant argues that
11 the FAC's new allegation still fail to establish delayed
12 discovery, because Plaintiff has not fully explained her lack of
13 understanding of the modification agreement's written terms or
14 her failure to realize the increase in interest rates in 2010
15 and 2011. Mot. at 5. Plaintiff counters that her allegations
16 are sufficient in claiming that West Coast Financial precluded
17 her knowledge of the interest rate increase by misrepresenting
18 the contract terms. Opp. at 9.

19 The Court cannot dismiss the FAC "unless it is clear from
20 the face of the complaint that the statute has run and that no
21 tolling is possible." Brocade Commc'ns Sys., Inc. v. A10
22 Networks, Inc., 2011 WL 1044899, at *3 (N.D. Cal. Mar. 23, 2011)
23 (citing Conerly v. Westinghouse Electric Corp., 623 F.2d 117,
24 119 (9th Cir. 1980)); see also Jablon v. Dean Witter & Co., 614
25 F.2d 677, 682 (9th Cir. 1980) ("When a motion to dismiss is
26 based on the running of a statute of limitations, it can be
27 granted only if the assertions of the complaint, read with the
28 required liberality, would not permit the plaintiff to prove

1 that the statute was tolled."). Whether a plaintiff is entitled
2 to delayed discovery is a factual question. E-Fab, Inc. v.
3 Accountants, Inc. Servs., 153 Cal.App.4th 1308, 1320 (2007).

4 To survive a motion to dismiss, a plaintiff must "plead
5 facts to show (1) the time and manner of discovery and (2) the
6 inability to have made an earlier discovery despite reasonable
7 diligence." See id. at 1319-20 (emphasis omitted); Rey v.
8 OneWest Bank, FSB, 2013 WL 127839, at *5 (E.D. Cal. Jan. 9,
9 2013). But a plaintiff's duty to diligently investigate is only
10 triggered when the plaintiff "has reason to suspect an injury
11 and some wrongful cause[.]" E-Fab, 153 Cal.App.4th at 1319. If
12 a plaintiff fails to suspect such an injury because she relied
13 on a misrepresentation, she may invoke the delayed discovery
14 doctrine unless her reliance, "in light of [her] own information
15 and intelligence, is preposterous and irrational." Broberg v.
16 Guardian Life Ins. Co. of Am., 171 Cal.App.4th 912, 922-23
17 (2009) (citation and quotation marks omitted) (reversing
18 dismissal where plaintiff relied on misrepresentations by
19 defendant despite having access to a document that - had
20 plaintiff read it - would have revealed the misrepresentations);
21 see also Dias v. Nationwide Life Ins. Co., 700 F. Supp. 2d 1204,
22 1223 (E.D. Cal 2010) ("[I]n cases involving a fiduciary
23 relationship, facts which would ordinarily require investigation
24 may not excite suspicion, and [] the same degree of diligence is
25 not required.") (citation and quotation marks omitted).

26 Taking the FAC's allegations as true, Plaintiff here lacked
27 the ability to understand the terms of her prospective loan
28 modification, so she relied on West Coast Financial to explain

1 them to her. FAC ¶ 19. West Coast Financial represented that
2 the loan terms on offer included a fixed interest rate. FAC
3 ¶ 14. The company assured her that the fixed interest rate was
4 included in the written agreement, which induced her to sign
5 that agreement. FAC ¶ 19. In these circumstances, Plaintiff
6 had no obligation to investigate whether a misrepresentation had
7 occurred, because she had no reason to suspect that one had.
8 West Coast Financial, as her broker, had a duty to explain the
9 terms of the loan modification accurately, and Plaintiff was
10 entitled to rely on that representation. See Moreno v. Sanchez,
11 106 Cal.App.4th 1415, 1424 (2003) ("Delayed accrual of a cause
12 of action is viewed as particularly appropriate where the
13 relationship between the parties is one of special trust such as
14 that involving a fiduciary . . . relationship."); cf. Wyatt v.
15 Union Mortg. Co., 24 Cal.3d 773, 783-84 (1979) ("[Plaintiffs]
16 were persons of modest means and limited experience in financial
17 affairs They retained a mortgage loan broker to
18 negotiate for them highly complex loan terms and they may be
19 assumed to have justifiably relied on the latter's expertise.
20 . . . [T]he broker's failure to disclose orally the true rate of
21 interest [and to draw plaintiffs' attention to the true terms in
22 the loan contract they signed] . . . constituted a breach of the
23 broker's fiduciary obligations.").

24 Over the next two years, Plaintiff's monthly payment
25 increased, but Plaintiff did not realize it because the
26 increases were not substantial to her. FAC ¶ 15. Whether these
27 increases were in fact insubstantial and whether Plaintiff's
28 failure to detect the change was reasonable are questions of

1 fact that cannot be resolved on a motion to dismiss. See E-Fab,
2 153 Cal.App.4th at 1321. The Court must therefore reject
3 Defendant's arguments on these points.

4 Under these circumstances, it is not "clear" that Plaintiff
5 had reason to suspect the increasing interest rate before 2012.
6 See Brocade Commc'ns Sys., 2011 WL 1044899, at *3. Therefore,
7 the Court denies the motion to dismiss the FAC based on
8 Defendant's statute of limitations argument.

9 B. Agency Relationship

10 Turning to the substance of Plaintiff's causes of action,
11 the Court notes that the bulk of her claims hinge on Defendant's
12 alleged relationship with West Coast Financial. As discussed
13 below, Plaintiff has failed to plead any facts evidencing such a
14 relationship. Her claims resting on this relationship must
15 therefore fail.

16 Each of Plaintiff's claims centers on alleged wrongdoing by
17 West Coast Financial while acting as her broker to negotiate a
18 loan modification with Defendant. Specifically:

- 19 • The fraud and misrepresentation claims (first, second,
20 and seventh causes of action) allege that West Coast
21 Financial concealed and misrepresented the true terms
22 of the loan modification and thereby induced Plaintiff
23 to enter into the agreement. FAC ¶¶ 27-28, 40-41, 44,
24 99-100.
- 25 • The third, fourth, and fifth causes of action assert
26 that this fraud constituted an unfair business
27 practice, a breach of an implied covenant, and
28 negligence. FAC ¶¶ 51, 56, 67, 69, 72, 79-80. Only

1 one allegation - which relates to the UCL claim -
2 implicates Defendant independently of West Coast
3 Financial. That allegation is considered separately
4 below.

- 5 • Under promissory estoppel (sixth cause of action),
6 Plaintiff states that she is entitled to different
7 loan terms based on West Coast Financial's
8 misrepresentations. FAC ¶¶ 91-92.

9 Unable to sue West Coast Financial as the company no longer
10 exists, see FAC ¶ 8, Plaintiff pins her claims on Defendant.
11 She alleges that Defendant is liable for West Coast Financial's
12 actions because West Coast Financial acted as Defendant's agent.
13 FAC ¶¶ 2-3, 8.

14 Defendant argues that the FAC is insufficient because
15 Plaintiff failed to put forth "a single allegation demonstrating
16 any relationship" between West Coast Financial and Defendant.
17 Mot. at 6:15-16. Plaintiff argues that she sufficiently alleged
18 an agency relationship by stating that West Coast Financial
19 "worked closely with" and "was acting as an agent on behalf of"
20 Defendant. Opp. at 17:14-15.

21 Where a plaintiff alleges that her broker is the agent of
22 her lender, she must "allege more than conclusory allegations
23 regarding an agency relationship[,] [because] as a matter of
24 law, a broker is the agent of the borrower not the lender."
25 Abels v. Bank of Am., N.A., 2012 WL 691790, at *7 (N.D. Cal.
26 Mar. 2, 2012) (citation omitted); see Bhinder v. Bank of Am.,
27 N.A., 2013 WL 4010583, at *2 (E.D. Cal. Aug. 5, 2013) (finding
28 allegations of agency relationship insufficient where complaint

1 referred to broker as lender's "agent" and stated that the
2 lender "engaged its own mortgage broker to assist" plaintiff).

3 Here, the FAC contains insufficient factual allegations
4 concerning the relationship between Defendant and West Coast
5 Financial. Plaintiff repeatedly states that West Coast
6 Financial "act[ed] as an agent" of Defendant. E.g., FAC ¶¶ 2-3,
7 8, 13, 18, 27, 30, 34, 46. But simply referring to West Coast
8 Financial as an agent is conclusory and therefore insufficient.
9 See Bhinder, 2013 WL 4010583, at *2; Sinclair v. Fox Hollow of
10 Turlock Owners Ass'n, 2010 WL 5330481, at *2 n.3 (E.D. Cal. Dec.
11 20, 2010).

12 The FAC also alleges that West Coast Financial "worked
13 closely with" and "in concert with" Defendant. FAC ¶¶ 8, 13.
14 These statements - even if the Court, as it must, takes them as
15 true - do not establish an agency relationship. That two
16 companies worked together does not necessarily mean that one
17 company was the agent of the other. See, e.g., Imageline, Inc.
18 v. CafePress.com, Inc., 2011 WL 1322525, at *4 (C.D. Cal. Apr.
19 6, 2011) ("To sufficiently plead an agency relationship, a
20 plaintiff must allege facts demonstrating the principal's
21 control over its agent.") (citation omitted).

22 Because Plaintiff failed to properly plead an agency
23 relationship, the Court must dismiss the FAC to the extent it
24 relies on this relationship. Plaintiff alleges wrongdoing by
25 West Coast Financial - a separate company from Defendant.
26 Without a showing of agency, Plaintiff cannot hold Defendant
27 liable for this wrongdoing.

28 ///

1 C. Non-Agency-Related UCL Allegation

2 In addition to the acts allegedly committed by West Coast
3 Financial, the third cause of action in the FAC states that
4 Defendant violated the UCL by "intentionally fail[ing] to
5 explore foreclosure alternatives with Plaintiff and instead
6 proceed[ing] with the foreclosure process" and "failing and
7 refusing to offer a reasonable loan modification without just or
8 legal cause." FAC ¶¶ 54, 57.

9 Defendant argues for dismissal of these claims because
10 Plaintiff cannot show that its actions were either unlawful or
11 deceptive. Mot. at 10; Reply at 6. Plaintiff responds by
12 pointing out that there are three prongs of actionable behavior
13 under the UCL: "practices which are unlawful, unfair or
14 fraudulent." Opp. at 15:26.

15 Plaintiff is correct that a defendant is liable under the
16 UCL if it engages in business practices that are unlawful,
17 unfair, or fraudulent. Prakashpalan v. Engstrom, Lipscomb &
18 Lack, 223 Cal.App.4th 1105, 1133 (2014). Defendant failed to
19 include an argument in its motion about the unfairness prong, so
20 it is not entitled to dismissal of the UCL claim. See Jolley v.
21 Chase Home Finance, LLC, 213 Cal.App.4th 872, 907 (2013)
22 (reversing summary adjudication because "the trial court
23 concluded that 'the undisputed evidence shows that Chase has not
24 violated any law, or committed a deceptive or fraudulent
25 act/misrepresentation to fall within § 17200[,]' " but "there was
26 no reference to 'unfair' conduct").

27 Defendant next argues that Plaintiff lacks standing to
28 bring a UCL claim, because she did not suffer an economic

1 injury. Mot. at 9-10; Reply at 5-6. In response, Plaintiff
2 points to allegations that Defendant's behavior increased the
3 principle on her loan while increasing her monthly payments in a
4 way that she would not have agreed to if she had known the true
5 terms. Opp. at 15.

6 Plaintiff has sufficiently pled an economic injury. In
7 addition to the allegations Plaintiff stresses in her
8 opposition, the FAC also includes statements that she suffered
9 "falling behind on payments, . . . reduced credit scores,
10 unavailability of credit, increased costs of credit, reduced
11 availability of goods and services tied to credit ratings,
12 increased costs of those services," "unwarranted late fees[,] []
13 other improper fees and charges[,] " "possible loss of
14 property[,] " and increased principal and interest rates which
15 placed her home "at risk for foreclosure[.]" FAC ¶¶ 49, 60,
16 100, 101. Many cases have found similar allegations sufficient.
17 See, e.g., Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 575
18 (7th Cir. 2012) (concluding that plaintiff sufficiently pleaded
19 "actual pecuniary injury" where complaint alleged "she incurred
20 costs and fees, lost other opportunities to save her home, [and]
21 suffered a negative impact to her credit"); Jordan v. Paul Fin.,
22 LLC, 285 F.R.D. 435, 455 (N.D. Cal. 2012) ("[T]he plaintiffs
23 have shown that the documents at issue may contain
24 misrepresentations that caused them to obtain a loan that . . .
25 led to lost equity in their home. [citation omitted] The
26 deleterious effects of guaranteed negative amortization as well
27 as the additional interest owed on a ballooning principal
28 balance constitute injury in fact [under the UCL]."); Witriol v.

1 LexisNexis Grp., 2006 WL 4725713, at *6 (N.D. Cal. Feb. 10,
2 2006) (holding that alleging "costs associated with monitoring
3 and repairing credit" is sufficient to establish economic
4 injury). See also Sutcliffe v. Wells Fargo Bank, N.A., 283
5 F.R.D. 533, 553 (N.D. Cal. 2012) (stating that "adverse credit
6 consequences in an increase in the principal amount owed on the
7 loan" are cognizable damages); Kouzine v. Countrywide Home
8 Loans, Inc., 2014 WL 1696289, at *5 (Cal. Ct. App. Apr. 30,
9 2014) ("It cannot be factually disputed that [plaintiff] began
10 to suffer measurable financial injury from The Bank's alleged
11 fraud immediately upon the issuance of [plaintiff's] loan
12 because interest on the principal began being incurred at a
13 considerably higher rate than the two percent fixed rate which
14 he alleged he had been promised."). The Court therefore finds
15 Plaintiff's allegations of injury adequate.

16 Defendant cites five cases to support its argument, but
17 none are persuasive. Defendant's first case, DeLeon v. Wells
18 Fargo Bank, N.A., 729 F. Supp. 2d 1119 (N.D. Cal. 2010), does
19 not contain the quote Defendant attributes to it, see Mot. at
20 10:3-8, nor does it discuss economic injury or standing under
21 the UCL.

22 Next, Defendant mischaracterizes Jenkins v. JP Morgan Chase
23 Bank, N.A., 216 Cal.App.4th 497 (2013). See Reply at 5:24-27.
24 That case held that a plaintiff adequately pled economic injury
25 by stating that she "suffered . . . the impending foreclosure of
26 her home." Id. at 522. The court then concluded that the
27 plaintiff had not pled a causal connection between that injury
28 and Defendant's unfair practices, because the alleged unfair

1 practices occurred after the plaintiff had already defaulted on
2 the loan. Id. at 523. Thus, it was the plaintiff's default
3 that triggered foreclosure, not the defendant's actions. Id.
4 Similarly, in Hamilton v. Greenwich Investors XXVI, LLC, 195
5 Cal.App.4th 1602 (2011), the plaintiffs claimed that the
6 defendant had violated the UCL by failing to comply with a
7 statute requiring a lender to contact the borrower before
8 initiating foreclosure. Id. at 1616. The court held that the
9 plaintiff failed to show that her economic injury was caused by
10 violation of the statute, so she lacked standing. Id. at 1617.

11 Here, in contrast to both Jenkins and Hamilton, Plaintiff
12 alleges that Defendant violated the UCL in 2009 during the loan
13 modification process. This modification preceded and allegedly
14 caused her injuries of higher principal, increasing interest
15 rates, and damaged credit. Indeed, Plaintiff did not default on
16 the loan until 2014 - almost five years after the alleged
17 wrongdoing. See RJN Ex. H. The Court therefore cannot credit
18 Defendant's argument that Plaintiff "did not suffer economic
19 injury based on the modification agreement." Reply at 5:14.

20 Defendant's final two cases are also unhelpful. Sutcliffe,
21 283 F.R.D. at 553, in fact goes against Defendant's argument in
22 stating that "adverse credit consequences in an increase in the
23 principal amount owed on the loan" are sufficient damages
24 allegations. And Reyes v. Wells Fargo Bank, N.A., 2011 U.S.
25 Dist. LEXIS 2235 (N.D. Cal. Jan. 3, 2011) is distinguishable.
26 That court held that money owed under a prior agreement did not
27 constitute damages. Id. at *48. As enumerated above, Plaintiff
28 does not attempt to claim injury in the form of money owed under

1 her preexisting mortgage; rather she has alleged other valid
2 economic injuries.

3 Because Plaintiff has alleged cognizable economic injury,
4 Defendant is not entitled to dismissal of the UCL claim on this
5 ground. The Court therefore denies the motion to dismiss as it
6 relates to the non-agency-related UCL allegations.

7 D. Defendant's Remaining Arguments

8 Defendant devotes much of its briefing to separating itself
9 from West Coast Financial's alleged representations. Many of
10 Defendant's points boil down to an argument that if it is not
11 liable for West Coast Financial's representations to Plaintiff,
12 it engaged in no other illegal behavior. Regardless of whether
13 these arguments are correct, they are moot because - with the
14 exception of the one UCL allegation discussed above - Plaintiff
15 has not actually alleged that Defendant engaged in wrongdoing
16 independent of West Coast Financial's misrepresentations and
17 aggressive tactics. The Court therefore declines to reach
18 Defendant's other argument about its theoretical liability
19 outside of the alleged agency relationship, including that a
20 lender generally owes no duty to a borrower and does not
21 guarantee a borrower's ability to repay a loan, that the
22 contract contained "no . . . provision that [P]laintiff be
23 placed in an 'affordable' loan," that the modification agreement
24 was not itself misleading, and that no Wells Fargo employee made
25 any other misrepresentation. See Mot. at 5-8, 10, 12-15; Reply
26 at 7-9.

27 Because the Court dismisses Plaintiff's FAC other than the
28 single UCL allegation, it does not reach Defendant's other

1 arguments for dismissal. These include arguments that the FAC
2 does not plead fraud with the specificity required by Federal
3 Rule of Civil Procedure 9(b), that the FAC fails to plead
4 detrimental reliance or damages, and that the covenant of good
5 faith and fair dealing claim is precluded by the statute of
6 frauds. Mot. at 8, 11-12, 15-16.

7 E. Conclusion

8 Plaintiff has alleged delayed discovery in a manner
9 sufficient to avoid dismissal on the pleadings. But as
10 currently pled, Plaintiff has sued the wrong institution.
11 Plaintiff claims wrongdoing by her broker, West Coast Financial,
12 but her allegations do not establish that Defendant directed
13 that wrongdoing or is otherwise liable for it. The Court must
14 therefore dismiss each of Plaintiff's claims to the extent they
15 rely on a relationship between West Coast Financial and
16 Defendant. But the Court allows Plaintiff a chance to elaborate
17 on the alleged agency relationship in an amended complaint. To
18 the extent that the UCL claim alleges Defendant's independent
19 wrongdoing, the Court denies the motion to dismiss.

20
21 III. ORDER

22 For the reasons set forth above, the Court GRANTS IN PART
23 WITH LEAVE TO AMEND and DENIES IN PART Defendant's motion to
24 dismiss. As indicated at the hearing, the Court also grants
25 Plaintiff 45 days from the date of this Order to retain an
26 attorney. Plaintiff's amended complaint must be filed within 20
27 days after that 45-day period expires. Defendant's responsive
28 pleading is due within 20 days thereafter. Finally, the Court

1 directs defense counsel Anglin, Flewelling, Rasmussen, Campbell &
2 Trytten LLP to pay \$400 to the Clerk of this Court within ten
3 days as sanctions for failure to appear at the hearing.

4 IT IS SO ORDERED.

5 Dated: January 23, 2015

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7 JOHN A. MENDEZ,
8 UNITED STATES DISTRICT JUDGE
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