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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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RANDY BLANKENCHIP and SUSAN
BLANKENCHIP,

Plaintiffs,

v.

CITIMORTGAGE, INC.; CAL-
WESTERN RECONVEYANCE, LLC;
and DOES 1-50, inclusive,

Defendants.

CIV. NO. 2:14-02309 WBS AC

MEMORANDUM AND ORDER RE: MOTION
FOR SUMMARY JUDGMENT

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Plaintiffs Randy and Susan Blankenchip initiated this suit against defendants CitiMortgage, Inc. ("Citi") and Cal-Western Reconveyance, LLC, alleging that defendants breached a loan modification agreement and wrongfully foreclosed on their home. Presently before the court is Citi's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Docket No. 72.)

I. Factual and Procedural History

Plaintiffs' allegations concern a residential mortgage loan they took out for their home in Suisun City, California.

1 (Blankenchip Decl. ¶ 6 (Docket No. 74-2); Cohoon Decl. Exs. 1-4
2 (Docket No. 72-3).) The loan had an adjustable interest rate
3 that decreased from 6.625% to 3% on June 1, 2011. (Cohoon Decl.
4 ¶ 13, Exs. 1, 4.) Due to a reduction in their income, plaintiffs
5 struggled to maintain their monthly loan payments. (Blankenchip
6 Decl. ¶¶ 10-11.) In 2009, plaintiffs defaulted on their loan.
7 (Cohoon Decl. ¶ 12.) A notice of default was issued on May 3,
8 2011 and Citi initiated foreclosure proceedings. (Id. ¶¶ 16-17,
9 Ex. 6.)

10 In April 2011, in response to plaintiffs' request for a
11 loan modification, Citi sent plaintiffs a letter inviting them to
12 apply for a loan modification through the Home Affordable
13 Modification Program ("HAMP") by submitting forms and income
14 documentation. (Cohoon Decl. ¶ 14; Blankenchip Decl. ¶ 12, Ex.
15 A.) Plaintiffs submitted bank statements, pay stubs, a bonus
16 check, the HAMP Hardship Affidavit, and a signed IRS Form 4506T.
17 (Id. ¶¶ 15-16.) On June 13, 2011, Citi sent plaintiffs a letter
18 notifying them that they were approved to enter into a trial
19 period plan ("TPP") under HAMP. (Id. ¶ 20, Ex. G.) The letter
20 explained that in order to accept this offer, plaintiffs must
21 make their first monthly trial period payment. (Id.) It further
22 explained that to qualify for a permanent modification,
23 plaintiffs must make three trial period payments of \$2,758.08 "in
24 a timely manner." (Id.) The first payment was due by July 1,
25 2011, the second by August 1, 2011, and the third by September 1,
26 2011. (Id.) The TPP stated, "After all trial period payments
27 are timely made and you have submitted all the required
28 documents, your mortgage will be permanently modified." (Id.)

1 Despite providing payment deadlines on the first of the
2 month, the same letter also provided that “[i]f each payment is
3 not received by CitiMortgage, Inc. in the month in which it is
4 due, this offer will end and your loan will not be modified under
5 the Making Home Affordable Program.” (Id.) A reminder letter
6 regarding plaintiffs’ August TPP payment similarly stated: “If
7 you fail to make a Trial Payment by the last day of the month in
8 which it is due, you will be considered to have failed the trial
9 period and will not be eligible for a HAMP modification.”

10 (Cphoon Decl. Ex. 13.)

11 The additional information attached to the offer letter
12 stated that the “terms of your trial period plan below are
13 effective on the day you make your first trial period payment,
14 provided you have paid it on or before 7/1/11.” (Blankenchip
15 Decl. Ex. G.) The terms stated that Citi would “not proceed to
16 foreclosure sale during the trial period, provided you are
17 complying with the terms of the trial plan.” (Id.) “Any pending
18 foreclosure action or proceeding that has been suspended may be
19 resumed if you are notified in writing that you failed to comply
20 with the terms of the trial period plan or do not qualify for a
21 permanent modification.” (Id.)

22 Plaintiffs paid their trial period payments on July 15,
23 2011, August 11, 2011, and September 15, 2011. (Id. ¶¶ 23, 27,
24 33; Cphoon Decl. ¶¶ 29, 37, 41, Ex. 11 at 29-30.) Plaintiffs
25 could not pay their TPP payments by the first of the month
26 because the exact days of the month on which Mr. Blankenchip gets
27 paid as the Managing Partner of a Texas Roadhouse restaurant vary
28

1 and he gets his bonus in the middle of the month. (Blankenchip
2 Decl. ¶¶ 7-8, 21.)

3 On August 5, 2011, Citi issued and recorded a notice of
4 trustee's sale. (Cohon Decl. ¶ 33, Ex. 14.) Citi postponed the
5 sale several times while plaintiffs were under review for both
6 the HAMP modification and a traditional modification. (Id.
7 ¶¶ 35-36, Ex. 3, Servicing Notes at 48, 53-56, 60-62.) On
8 September 12, 2011, Citi sent plaintiffs a letter stating that,
9 "[b]ecause you have not kept the terms of the Forbearance Plan
10 with us, we have cancelled it." (Blankenchip Decl. Ex. M.) Mr.
11 Blankenchip states that he called their assigned Homeowner
12 Support Specialist, Mahagony Burris, after receiving this letter
13 and she "told me not to worry about the September 12, 2011
14 letter, that CITI had received all three of my TPP payments and
15 that she would be working with other departments at CITI to get
16 the final modification documents together and sent out to me."
17 (Id. ¶ 37.)

18 On October 10, 2011, Citi contends it determined that
19 plaintiffs were ineligible for a permanent HAMP modification
20 because the interest rate on plaintiffs' loan would have
21 increased from 3% to 3.75% if their loan was modified. (Cohon
22 Decl. ¶ 43, Ex. 3, Servicing Notes at 48.) Citi also determined
23 that plaintiffs did not qualify for a traditional loan
24 modification because of insufficient income. (Id. ¶ 44, Ex. 3,
25 Servicing Notes at 42.) Citi nonetheless initiated a re-review
26 of plaintiffs for a loan modification and requested updated
27 paystubs and an updated Workable Solutions Packet from plaintiffs
28 on October 14, 2011. (Id. ¶¶ 45-47, Ex. 16.) On November 3,

1 2011, Citi sent plaintiffs another letter stating that the
2 "deadline for you to return the required documentation for the
3 Home Affordable Modification Act has been extended" and
4 requesting that plaintiffs submit their documents by December 5,
5 2011. (Id. Ex. 17.) The letter explained that plaintiffs were
6 "at risk and will be removed from the program If [sic] we do not
7 receive your documents by the deadline." (Id.) Citi now
8 contends that this letter was issued and sent by Citi's vendor in
9 error. (Id. ¶ 49; Citi's Mot. for Summ. J. ("Citi's Mot.") at 5
10 n.1 (Docket No. 72).)

11 On November 10, 2011, before the documents deadline had
12 passed, Citi conducted a nonjudicial foreclosure sale of
13 plaintiffs' home. (Cohon Decl. Ex. 18.) Plaintiffs vacated the
14 house that month. (Blankenchip Decl. ¶¶ 54-55.)

15 In their First Amended Complaint ("FAC"), plaintiffs
16 allege seven causes of action against defendants: (1) wrongful
17 foreclosure; (2) breach of contract; (3) promissory estoppel; (4)
18 breach of the implied covenant of good faith and fair dealing;
19 (5) fraud; (6) unlawful business practices in violation of
20 California Business Professions Code section 17200; and (7)
21 intentional infliction of emotional distress. (FAC (Docket No.
22 11).) On February 19, 2016, this court approved a stipulation
23 between Ms. Blankenchip and Citi dismissing with prejudice her
24 claim for intentional infliction of emotional distress and
25 agreeing that Citi will not be permitted to conduct any mental
26 examination of Ms. Blankenchip. (Docket No. 49.)

27 Presently before the court is Citi's motion for summary
28 judgment on each of plaintiffs' claims.

1 II. Evidentiary Objections

2 On a motion for summary judgment, “[a] party may object
3 that the material cited to support or dispute a fact cannot be
4 presented in a form that would be admissible in evidence.” Fed.
5 R. Civ. P. 56(c)(2). Further, “[a]n affidavit or declaration
6 used to support or oppose a motion must be made on personal
7 knowledge, set out facts that would be admissible in evidence,
8 and show that the affiant or declarant is competent to testify on
9 the matters stated.” Id. R. 56(c)(4).

10 Citi raises forty-four evidentiary objections to
11 plaintiffs’ evidence submitted in opposition to Citi’s motion for
12 summary judgment. (Citi’s Evidentiary Objs. (Docket No. 78).)
13 Citi objects to portions of Mr. Blankenchip’s declaration on the
14 grounds of hearsay, lack of personal knowledge, and the best
15 evidence rule; to plaintiffs’ expert witness report and the
16 expert’s deposition on the grounds that her opinion does not
17 qualify as admissible expert opinion and constitutes extrinsic
18 evidence that cannot modify the written TPP agreement under the
19 parol evidence rule; and to the HAMP and Freddie Mac guidelines
20 on the grounds that they are also extrinsic evidence that cannot
21 modify the written TPP agreement under the parol evidence rule.
22 (Id.)

23 As this court explained at length in Burch v. Regents
24 of the University of California, 433 F. Supp. 2d 1110 (E.D. Cal.
25 2006), “[a]s a practical matter, the court finds this entire
26 exercise of considering evidentiary objections on a motion for
27 summary judgment to be futile and counter-productive.” Id. at
28 1122. Not only does deciding excessive numbers of objections

1 begin "to defeat the objectives of modern summary judgment
2 practice--namely, promoting judicial efficiency and avoiding
3 costly litigation," it is often difficult to address even
4 seemingly appropriate objections based on hearsay or failure to
5 authenticate "away from the dynamics of a trial," where "the
6 opposing party will have an opportunity to present the evidence
7 in an alternative and admissible form" or a question can be
8 rephrased if an objection is sustained. Id.

9 Further, with respect to hearsay objections to evidence
10 submitted by the non-moving party, "the court cannot ignore the
11 fact that a non-movant in a summary judgment setting is not
12 attempting to prove its case, but instead seeks only to
13 demonstrate that a question of fact remains for trial." Id. at
14 1121. "Objections to the form in which the evidence is
15 presented" by a non-moving party "are particularly misguided."
16 Id. at 1119. "As the Ninth Circuit has held, 'to survive summary
17 judgment, a party does not necessarily have to produce evidence
18 in a form that would be admissible at trial, as long as the party
19 satisfies the requirements of Federal Rules of Civil Procedure
20 56.'" Id. at 1120 (citing Fraser v. Goodale, 342 F.3d 1032,
21 1036-37 (9th Cir. 2003)). "In other words, when evidence is not
22 presented in an admissible form in the context of a motion for
23 summary judgment, but it may be presented in an admissible form
24 at trial, a court may still consider that evidence." Id.

25 Citi filed an unruly number of evidentiary objections
26 with little explanation of the basis for each and, as the non-
27 moving party, plaintiffs are arguably entitled to more leniency.
28 Further, the record suggests that plaintiffs will be capable of

1 presenting their evidence in an admissible form at trial. For
2 example, Citi objects to several paragraphs of Mr. Blankenchip's
3 declaration pursuant to the best evidence rule, arguing that his
4 description is inadmissible to prove the contents of letters sent
5 by Citi. (See Citi's Evidentiary Objs. ¶¶ 1-4, 6, 9, 11-12, 15,
6 18, 22, 25, 27-28, 32-33.) It is clear, however, from
7 plaintiffs' exhibits that they would be able to prove the
8 contents with copies of the letters themselves and this
9 evidentiary issue would be easily resolved at trial. Similarly,
10 Citi objects to the portions of Mr. Blankenship's declaration in
11 which he describes statements made to him by Citi representatives
12 as hearsay. (See id. ¶¶ 5, 8, 10, 13-14, 16, 17, 19-21, 23-24,
13 26, 29, 31, 34-35.) First, these statements would likely be
14 admissible as admissions by a party-opponent under Federal Rule
15 of Evidence 801(d)(2). Second, as with the letters, the record
16 suggests plaintiffs would be able to cure any possible hearsay
17 prior to trial by, for example, relying on Citi's servicing notes
18 where Citi representatives recorded what was communicated to
19 plaintiffs. The court therefore overrules Citi's objections.¹

20 III. Discussion

21 Summary judgment is proper "if the movant shows that
22 there is no genuine dispute as to any material fact and the

23 ¹ Citi also contends plaintiffs should not be permitted
24 to present any oral argument and that the court should deem
25 Citi's material facts set forth in its separate statement as
26 undisputed because plaintiffs' opposition was untimely. (Citi's
27 Reply at 1 n.1 (Docket No. 77).) Plaintiffs were required to
28 file their opposition by midnight on August 8, 2016 and they
instead filed at 5:48 a.m. on August 9, 2016. The court will not
decide this motion for summary judgment based on such a
procedural technicality.

1 movant is entitled to judgment as a matter of law." Fed. R. Civ.
2 P. 56(a). A material fact is one that could affect the outcome
3 of the suit, and a genuine issue is one that could permit a
4 reasonable jury to enter a verdict in the non-moving party's
5 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
6 (1986). The party moving for summary judgment bears the initial
7 burden of establishing the absence of a genuine issue of material
8 fact and can satisfy this burden by presenting evidence that
9 negates an essential element of the non-moving party's case.
10 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).
11 Alternatively, the moving party can demonstrate that the non-
12 moving party cannot produce evidence to support an essential
13 element upon which it will bear the burden of proof at trial.
14 Id.

15 Once the moving party meets its initial burden, the
16 burden shifts to the non-moving party to "designate 'specific
17 facts showing that there is a genuine issue for trial.'" Id. at
18 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden,
19 the non-moving party must "do more than simply show that there is
20 some metaphysical doubt as to the material facts." Matsushita
21 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
22 "The mere existence of a scintilla of evidence . . . will be
23 insufficient; there must be evidence on which the jury could
24 reasonably find for the [non-moving party]." Anderson, 477 U.S.
25 at 252.

26 In deciding a summary judgment motion, the court must
27 view the evidence in the light most favorable to the non-moving
28 party and draw all justifiable inferences in its favor. Id. at

1 255. "Credibility determinations, the weighing of the evidence,
2 and the drawing of legitimate inferences from the facts are jury
3 functions, not those of a judge . . . ruling on a motion for
4 summary judgment" Id.

5 A. Breach of Contract and of the Implied Covenant of Good
6 Faith and Fair Dealing

7 A claim for breach of contract requires (1) the
8 existence of a contract, (2) the plaintiff's performance or
9 excuse for nonperformance, (3) the defendant's breach, and (4)
10 resulting damages to the plaintiff. Reichert v. Gen. Ins. Co. of
11 Am., 68 Cal. 2d 822, 830 (1968). Further, "[i]mplied in every
12 contract is a covenant of good faith and fair dealing that
13 neither party will injure the right of the other to receive the
14 benefits of the agreement." Wolkowitz v. Redland Ins. Co., 112
15 Cal. App. 4th 154, 162 (2d Dist. 2003). "A cause of action for
16 tortious breach of the covenant of good faith and fair dealing
17 requires the existence and breach of an enforceable contract as
18 well as an independent tort." Innovative Bus. P'ships, Inc. v.
19 Inland Cntys. Reg'l Ctr., Inc., 194 Cal. App. 4th 623, 631-32
20 (4th Dist. 2011).

21 The United States Department of the Treasury started
22 the HAMP program in 2009 in response to the financial crisis to
23 incentivize banks to refinance mortgages of distressed homeowners
24 so they could stay in their homes. Corvello v. Wells Fargo Bank,
25 NA, 728 F.3d 878, 880 (9th Cir. 2013). HAMP aims to assist
26 homeowners who have defaulted or are in imminent danger of
27 defaulting on their home mortgages. Inman v. Suntrust Mortg.,
28 Inc., Civ. No. 1:10-1031 AWI GSA, 2010 WL 3516309, at *1 n.2

1 (E.D. Cal. Sept. 3, 2010).

2 Eligible borrowers who wish to permanently modify their
3 loan through HAMP must first enter a TPP, which is a period of
4 three or more months during which the borrower must make timely
5 trial payments of the modified amount and provide required
6 documentation to the loan servicer. Corvello, 728 F.3d at 880-
7 81. If the servicer concludes that the borrower is not eligible
8 for HAMP after reviewing the documents submitted or the borrower
9 does not make the required trial payments, the servicer must
10 promptly communicate the ineligibility determination to the
11 borrower in writing. Id. at 881. If the borrower complies with
12 the terms of the TPP, the servicer must offer the borrower a
13 permanent loan modification. Id.

14 Home loan servicers receive financial incentives from
15 the United States Department of the Treasury for completing a
16 HAMP loan modification: servicers are entitled to \$1,000 for each
17 permanent modification they make. Id. at 880. There are, at the
18 same time, financial incentives for allowing a borrower to
19 participate in a TPP but then proceeding to foreclosure rather
20 than offering a permanent modification. As Citi's representative
21 Jeanne Pezold explained, "each time a payment is made by the
22 borrower the servicer retains a servicing fee." (See Yap Decl.
23 Ex. B, Pezold Dep. at 106:18-20.) Once a borrower defaults and
24 stops making payments, the servicer cannot collect its servicing
25 fees until the foreclosure sale. At that time, the lender pays
26 the servicer the total fees owed for servicing the loan after the
27 date of default. (Id. at 107:1-25, 108:2-10.) If the servicer
28 offers a TPP before proceeding to foreclosure, it is able to

1 extend the number of months between default and the foreclosure
2 sale, thereby increasing its own servicing fees.

3 “[A] trial loan modification under HAMP constitutes a
4 valid, enforceable contract under state law” West v.
5 JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 799 (4th Dist.
6 2013) (citing Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556-
7 57 (7th Cir. 2012)); see also Corvello, 728 F.3d at 883-84
8 (citing West with approval); Meixner v. Wells Fargo Bank, N.A.,
9 101 F. Supp. 3d 938, 947 (E.D. Cal. Apr. 24, 2015) (Nunley, J.)
10 (“The Ninth Circuit has recently held that, . . . a TPP Agreement
11 offered pursuant to HAMP is a contract, and a party to that
12 contract may sue for breach if the lender violates a term
13 contained within the four corners of the TPP.” (citing Corvello,
14 728 F.3d at 880) (internal quotation marks omitted)). While the
15 modification is not complete until all of the conditions are met,
16 banks are contractually obligated under the terms of the TPP to
17 offer a permanent modification to borrowers who comply with the
18 TPP by (1) timely making the required trial payments and (2)
19 submitting accurate documentation. Corvello, 728 F.3d at 883.
20 The Ninth Circuit has explained that this “interpretation of the
21 TPP avoids the injustice that would result were . . . [banks]
22 allowed to keep borrowers’ trial payments without fulfilling any
23 obligations in return.” Id. at 884.

24 1. Timely Trial Payments

25 The first question is therefore whether plaintiffs
26 timely made the required trial payments. The court concludes for
27 the following reasons that they did.

28 “The interpretation of a written instrument, even

1 though it involves what might properly be called questions of
2 fact, is essentially a judicial function to be exercised
3 according to the generally accepted canons of interpretation so
4 that the purposes of the instrument may be given effect. . . . It
5 is therefore solely a judicial function to interpret a written
6 instrument unless the interpretation turns upon the credibility
7 of extrinsic evidence.'" Greater Middleton Ass'n v. Holmes
8 Lumber Co., 222 Cal. App. 3d 980, 989 (1st Dist. 1990) (quoting
9 Parsons v. Bristol Dev. Co., 62 Cal. 2d 861, 865 (1965)); see
10 also Oceanside 84, Ltd., 56 Cal. App 4th at 1448 ("[T]he
11 interpretation of the contract is a question of law for the trial
12 court and for this court."); Titan Grp., Inc. v. Sonoma Valley
13 Cnty. Sanitation Dist., 164 Cal. App. 3d 1122, 1127 (1st Dist.
14 1985) ("In the absence of conflicting extrinsic evidence, the
15 interpretation of a contract becomes a question of law and an
16 appellate court 'must make an independent determination of the
17 meaning of the contract.'" (citation omitted)).

18 While the TPP required three timely payments by the
19 first of July, August, and September 2011 and plaintiffs did not
20 pay until July 15, August 11, and September 15, 2011,
21 respectively, the TPP also stated that "[i]f each payment is not
22 received by CitiMortgage, Inc. in the month in which it is due,
23 this offer will end and your loan will not be modified under the
24 Making Home Affordable Program." (Blankenchip Decl. Ex. G
25 (emphasis added).)

26 This end of month language was also emphasized in an
27 August 5, 2011 letter Citi sent plaintiffs to notify them that it
28 had not yet received their August 1, 2011 TPP payment. (Cohoon

1 Decl. Ex. 13.) The letter stated, "If you fail to make a Trial
2 Payment by the last day of the month in which it is due, you will
3 be considered to have failed the trial period and will not be
4 eligible for a HAMP modification." (Id.) That Citi included
5 this language in a reminder sent on the fifth of August--after
6 the second payment was supposedly due--and sought payment despite
7 plaintiffs' having made their first trial payment after the first
8 of July, all suggest that Citi intended to accept payment after
9 the first of the month and still considered plaintiffs to be
10 eligible for a HAMP loan modification.

11 At the August 22, 2016 hearing, Citi argued that the
12 TPP "could not be more clear" in stating that Citi was obligated
13 to suspend foreclosure proceedings only if plaintiffs made their
14 first payment by July 1, 2011, but if plaintiffs paid after the
15 first of the month, Citi had the option of offering plaintiffs a
16 permanent loan modification but no obligation to permanently
17 modify or suspend foreclosure. Citi representative Jeanine
18 Cohoon stated: "For them to be able to be considered for the
19 modification they were pursuing, they just had to make the
20 payment within the month it's due. To get any additional
21 protections regarding the foreclosure process, they had to make
22 their first payment by the first of July." (Id. Ex. E, Cohoon
23 Dep. Volume II at 151:16-22; see also id. Ex. D, Cohoon Dep.
24 Volume II at 95:5-22.)

25 This distinction with regard to Citi's obligations is
26 not at all clear from the face of the TPP or Citi's conduct
27 throughout the loan modification process. The offer letter did
28 not explicitly state that if plaintiffs paid after the first of

1 the month, their loan might be modified and no foreclosure
2 protection would be provided. Rather, it stated that if
3 plaintiffs did not pay by the end of the month, their loan "will
4 not be modified under the Making Home Affordable Program."

5 (Blankenchip Decl. Ex. G (emphasis added).) It defies logic to
6 claim that plaintiffs could still be participating in the loan
7 modification program under HAMP and yet have no protection
8 against foreclosure. In fact, Citi's own 2010 HAMP policies and
9 procedures for government sponsored enterprises ("GSE") loans
10 stated that "Receipt of the first payment due under the trial
11 period plan on or before the last day of the month in which the
12 first payment is due is evidence of the borrower's acceptance of
13 the trial period plan and its terms and conditions." (Hymanson
14 Decl. Ex. C at 10 (emphasis added).) One term of the TPP is that
15 Citi will not proceed to foreclosure sale during the trial
16 period.

17 Even assuming Citi's interpretation could be reconciled
18 with the terms stated in the TPP, its interpretation would at
19 most render the TPP terms ambiguous. "If a contract is capable
20 of two different reasonable interpretations, the contract is
21 ambiguous. A well-settled maxim states the general rule that
22 ambiguities in a form contract are resolved against the drafter."
23 Oceanside 84, Ltd. v. Fid. Fed. Bank, 56 Cal. App. 4th 1441, 1448
24 (2d Dist. 1997); see also Cal. Civ. Code § 1654 ("In cases of
25 uncertainty not removed by the preceding rules, the language of a
26 contract should be interpreted most strongly against the party
27 who caused the uncertainty to exist."). Citi is not only the
28 drafter of the agreement but also the more sophisticated party

1 and any ambiguity in the TPP agreement should be interpreted
2 against it. The court therefore finds that, properly
3 interpreted, the TPP agreement provided plaintiffs a grace period
4 until the end of the month for their three trial payments.
5 Accordingly, the court will not grant Citi's motion for summary
6 judgment based on the fact that plaintiffs paid their trial
7 payments after the first of the month but before the end of the
8 month.

9 2. Required Documents

10 The next question is whether plaintiffs submitted all
11 the required documents under the TPP and, if not, if Citi
12 properly informed plaintiffs that it was cancelling the TPP due
13 to a failure to comply. For the following reasons, the court
14 finds that there are triable issues of fact regarding both
15 plaintiffs' submission of documents and Citi's notice of
16 cancellation.

17 Citi's representative, Sinner, stated in his deposition
18 that plaintiffs did not get a permanent loan modification because
19 "they were still missing documents from what the underwriter
20 requested." (Yap Decl. Ex. A, Sinner Dep. at 127:23-25.) Sinner
21 also admitted, however, that the Homeowner Support Specialist
22 assigned to work with plaintiffs, Burris, told plaintiffs
23 otherwise. (Id. at 121:16-25, 128:1-10.) Sinner stated: "It
24 looks like Miss Burris may have missed asking for" the missing
25 documents "or may have misinformed the Blankenchips" that their
26 file was in order. (Id. at 128:8-10.)

27 Citi's servicing notes for plaintiffs' loan indicate
28 that on September 21, 2011, Mr. Blankenchip called and reported

1 that he had just been told by Burriss that their file was "in
2 order" but then received a letter stating the Forbearance Plan
3 was cancelled. (Cohoon Decl. Ex. 3, Servicing Notes at 58
4 ("RANDY BLANKENCHIP called in std spoke with counselor this week
5 was adv file in order then rec letter date 9/12 stating [plan]
6 cancelled due to nonpymt . . . asked that counselor call using
7 cell number.").) The notes further indicate that Burriss called
8 Mr. Blankenchip back on September 22, 2011 and advised him that
9 he received the letter because his TPP was completed and Burriss
10 would be working with the closer to have the final permanent
11 modification documents sent out. (Id. ("RANDY BLANKENCHIP had
12 beena dvthat he rcvd the for term letter b/c his tpp has been
13 completed and that I will be working with the closer to have
14 final docs sent out.").)

15 Citi accepted plaintiffs' three trial payments, even
16 the payment received two days after the cancellation letter was
17 mailed, and provided plaintiffs conflicting information about the
18 documents required to proceed. Plaintiffs have therefore
19 established genuine issues of material fact as to whether they
20 submitted the required documents and whether Citi properly
21 notified them that they failed to comply with the terms of the
22 TPP.

23 Lastly, Citi argues that even if plaintiffs timely made
24 the TPP payments and submitted the required documents, Citi
25 determined on October 10, 2011 that they were no longer eligible
26 for a permanent modification because a permanent modification
27 would have increased their interest rate from 3% to 3.75%, which
28 Citi contends is not allowed under HAMP. (Citi's Mot. at 5, 7;

1 Cohoon Decl. Ex. 3, Servicing Notes at 48-49, Ex. 4, Apr. 20,
2 2011 Letter from Citi.) According to the TPP offer letter,
3 however, plaintiffs' eligibility did not depend on the interest
4 rate of their loan. This was not part of the contract Citi
5 drafted and invited plaintiffs to accept, despite plaintiffs'
6 note making clear that the loan had an adjustable interest rate
7 that would change on June 1, 2011, (Cohoon Decl. Ex. 1), and
8 Citi's knowledge that the rate would drop to 3% as early as April
9 20, 2011, when it sent plaintiffs a letter notifying them of the
10 new interest rate, (id. Ex. 4). Accordingly, Citi cannot claim
11 that plaintiffs were ineligible for a permanent modification
12 because of an interest rate adjustment that Citi was aware of
13 before it even mailed the TPP offer letter.

14 In addition, plaintiffs' expert witness, Tara Twomey,
15 explained that "there's a provision in the . . . [HAMP]
16 guidelines that requires . . . at least a one-eighth of a percent
17 reduction in the interest rate" through a HAMP loan modification.
18 (Hymanson Decl. Ex. A, Twomey Dep. at 72:16-21 (Docket No. 74-
19 3).) Twomey stated, however, that "under the HAMP guidelines and
20 under the Freddie Mac guidelines, when you have an adjustable
21 rate loan," if "the new interest rate, is not determined at the
22 time the TPP underwriting is done, then the servicer assumes
23 essentially a flat line, so the interest rate stays the same, and
24 they can issue the TPP on that basis." (Id. at 71:24-25, 72:1-
25 11.) Twomey therefore believes that Citi offered plaintiffs a
26 TPP based on their verified income and original interest rate of
27 6.625% and had no reason to conduct a "rereview at the end" of
28 the trial period. (Id. at 74:9-25.)

1 This is corroborated by the United States Department of
2 the Treasury's Supplemental Directive 09-07, which provides that
3 "[w]ith respect to adjustable rate loans where there is a rate
4 reset scheduled within 120 days after the date of the evaluation
5 . . . the monthly mortgage payment used to determine eligibility
6 will be the greater of (i) the borrower's current scheduled
7 monthly mortgage payment or (ii) a fully amortizing monthly
8 mortgage payment based on the note reset rate using the index
9 value as of the date of the evaluation."² (Pls.' Req. for
10 Judicial Notice ("RJN") Ex. A (Docket No. 75-1).) Viewing the
11 evidence in the light most favorable to the non-moving party,
12 plaintiffs have established a genuine issue of fact as to whether
13 they were eligible for a permanent HAMP modification despite
14 Citi's realization four months after offering plaintiffs a TPP
15 that their interest rate would decrease to 3%.

16 For all the above reasons, the court will deny Citi's
17 motion for summary judgment on plaintiffs' breach of contract and
18 breach of good faith and fair dealing claims.

19 B. Promissory Estoppel

20 The elements of promissory estoppel are: "(1) a promise
21 clear and unambiguous in its terms; (2) reliance by the party to
22 whom the promise is made; (3) [the] reliance must be both
23 reasonable and foreseeable; and (4) the party asserting the
24 estoppel must be injured by his reliance." U.S. Ecology, Inc. v.
25 State, 129 Cal. App. 4th 887, 901 (4th Dist. 2005) (citation and

26 ² Freddie Mac servicers are required to comply with the
27 Department of the Treasury's Supplemental Directives. (See Pls.'
28 RJN Ex. D at 1.) Citi serviced plaintiffs' loan on behalf of
Freddie Mac.

1 internal quotation marks omitted) (alteration in original); see
2 West, 214 Cal. App. 4th at 803. "Because promissory estoppel is
3 an equitable doctrine to allow enforcement of a promise that
4 would otherwise be unenforceable, courts are given wide
5 discretion in its application." U.S. Ecology, Inc., 129 Cal.
6 App. 4th at 902 (citing C & K Eng'g Contractors v. Amber Steel
7 Co., 23 Cal. 3d 1, 7-8 (1978)).

8 "[A]llegations that the plaintiff undertook new
9 obligations or forewent other options can establish reliance for
10 purposes of a promissory estoppel claim." Meadows v. First Am.
11 Tr. Servicing Sols., LLC, Civ. No. 11-5754 YGR, 2012 WL 3945491,
12 at *4 (N.D. Cal. Sept. 10, 2012); see also West, 214 Cal. App.
13 4th at 805 (finding the plaintiffs adequately alleged detrimental
14 reliance where the plaintiffs alleged they lost opportunities,
15 including selling their home or finding a co-signer). "'Except
16 in the rare case where the undisputed facts leave no room for a
17 reasonable difference of opinion, the question of whether a
18 plaintiff's reliance is reasonable is a question of fact.'" All.
19 Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1239 (1995) (quoting
20 Blankenheim v. E. F. Hutton & Co., 217 Cal. App. 3d 1463, 1475
21 (6th Dist. 1990)). "'However, whether a party's reliance was
22 justified may be decided as a matter of law if reasonable minds
23 can come to only one conclusion based on the facts.'" Id.
24 (quoting Guido v. Koopman, 1 Cal. App. 4th 837, 843 (1st Dist.
25 1991)).

26 At the August 22, 2016 hearing, plaintiffs conceded
27 that their promissory estoppel claim is barred by the statute of
28 limitations to the extent it is based on oral promises.

1 Accordingly, the court will grant Citi's motion for summary
2 judgment of plaintiffs' promissory estoppel claim as to any
3 alleged oral promises.

4 With respect to plaintiffs' promissory estoppel claim
5 based on the promises Citi made in the written TPP agreement,
6 Citi argues that plaintiffs fail to demonstrate that their
7 reliance on the TPP was reasonable or justifiable because (1) the
8 TPP stated that Citi would not proceed to foreclosure sale if
9 plaintiffs paid the first trial payment by July 1, 2011 and
10 plaintiffs failed to pay by July 1, 2011, and (2) the TPP
11 provided that any pending foreclosure action could be resumed if
12 plaintiffs were notified in writing that they failed to comply
13 with the TPP or did not qualify for a permanent modification and
14 Citi sent plaintiffs a letter on September 12, 2011 notifying
15 them the TPP had been cancelled. (Citi's Mot. at 13-14.)

16 As discussed above, the contract, properly interpreted,
17 provided plaintiffs a grace period for trial payments until the
18 end of the month. Given that plaintiffs thus continued to
19 participate in the HAMP loan modification process by making
20 payments in the middle of the month, they were entitled to
21 receive the same foreclosure protections regardless of whether
22 they paid on the first or fifteenth of the month. A jury could
23 therefore find that their reliance on the TPP foreclosure
24 protections was reasonable.

25 Though Citi sent a letter on September 12, 2011 stating
26 that plaintiffs' "Forbearance Plan" had been cancelled, Mr.
27 Blankenchip claims he did not know what Citi meant by this letter
28 as Citi had never used the term "Forbearance Plan" before.

1 (Blankenchip Decl. ¶ 35.) When he called Citi for clarification,
2 Burriss did not explain that his TPP had been cancelled but rather
3 told him his file was in order and final permanent modification
4 documents would be sent out shortly. There is therefore a
5 dispute as to whether Citi properly communicated its
6 ineligibility determination to plaintiffs. Accordingly, the
7 question of whether plaintiffs reasonably relied on the TPP is
8 one that must be decided by the factfinder at trial and cannot be
9 decided on a motion for summary judgment.

10 Citi further argues that plaintiffs cannot establish
11 they reasonably relied on Citi's November 3, 2011 correspondence
12 to plaintiffs. (Citi's Mot. at 14.) The November 3, 2011 letter
13 informed plaintiffs that the "deadline for you to return the
14 required documentation for the Home Affordable Modification
15 Program has been extended" to December 5, 2011. (Cohon Decl.
16 Ex. 17.) It further stated, "The deadline is real--don't risk
17 being dropped from the program. You are at risk and will be
18 removed from the program If [sic] we do not receive your
19 documents by the deadline." (Id.) Citi nonetheless went ahead
20 with a foreclosure sale on November 10, 2011--prior to the
21 deadline set in this letter. While Citi argues both that its
22 November 3, 2011 correspondence did not clearly or unambiguously
23 promise the foreclosure sale would be postponed and that it was
24 sent to plaintiffs in error, (Citi's Mot. at 5 n.1, 14), Mr.
25 Blankenchip states that no one ever informed him it was sent in
26 error, (Blankenchip Decl. ¶ 45). He also represents that, while
27 he believed he had already submitted all the required documents,
28 he was willing and ready to send any additional documents

1 necessary for a modification. (Id. ¶ 46.) The letter seemed to
2 suggest that plaintiffs were still eligible for a modification
3 and participating in the "Home Affordable Modification Program."
4 Plaintiffs have therefore sufficiently established a dispute as
5 to whether they reasonably relied on this letter.

6 Accordingly, the court will deny Citi's motion for
7 summary judgment on plaintiffs' promissory estoppel claim based
8 on Citi's written promises.

9 C. Wrongful Foreclosure

10 The elements of wrongful foreclosure are: "(1) the
11 trustee or mortgagee caused an illegal, fraudulent, or willfully
12 oppressive sale of real property pursuant to a power of sale in a
13 mortgage or deed of trust; (2) the party attacking the sale
14 suffered prejudice or harm; and (3) the trustor or mortgagor
15 tenders the amount of the secured indebtedness or was excused
16 from tendering." West, 214 Cal. App. 4th at 800.

17 Citi first argues it is entitled to summary judgment
18 because plaintiffs failed to tender the full amount due under
19 their loan. (Citi's Mot. at 8.) "Tender is not required,"
20 however, "where the foreclosure sale is void, rather than
21 voidable, such as when a plaintiff proves that the entity lacked
22 the authority to foreclose on the property." Glaski v. Bank of
23 Am., Nat'l Ass'n, 218 Cal. App. 4th 1079, 1100 (2013); see also
24 McGarvey v. JP Morgan Chase Bank, N.A., Civ. No. 2:13-01099 KJM
25 EFB, 2013 WL 5597148, at *11 (E.D. Cal. Oct. 11, 2013) ("Tender
26 is required only when foreclosure has already occurred and the
27 plaintiff alleges irregularities in the foreclosure process
28 itself."). As this court explained in its December 3, 2014 Order

1 denying Citi's motion to dismiss plaintiffs' wrongful foreclosure
2 claim on this same ground, "[h]ere, plaintiffs are not seeking to
3 set aside a foreclosure sale that was procedurally flawed" but
4 rather are seeking "damages based on the alleged invalidity of
5 the foreclosure sale in the first place." (Dec. 3, 2014 Order at
6 8.) Because plaintiffs contend the foreclosure was wrongful
7 because it was void, the court once again finds that plaintiffs
8 need not have tendered.

9 Citi next argues that it is entitled to summary
10 judgment because plaintiffs cannot produce evidence to establish
11 prejudice because they defaulted on their loan, would not have
12 qualified for a permanent HAMP modification or traditional
13 modification under any circumstances, and the trustee's sale was
14 therefore unavoidable. As discussed above, however, there is a
15 genuine issue of fact as to whether plaintiffs qualified for a
16 permanent HAMP modification and the foreclosure was avoidable.
17 Accordingly, the court must deny Citi's motion for summary
18 judgment on plaintiffs' wrongful foreclosure claim.

19 D. Fraud

20 "The elements of a cause of action for fraud in
21 California are: '(a) misrepresentation (false representation,
22 concealment, or nondisclosure); (b) knowledge of falsity (or
23 "scienter"); (c) intent to defraud, i.e., to induce reliance; (d)
24 justifiable reliance; and (e) resulting damage.'" Kearns v. Ford
25 Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009) (citation and
26 emphasis omitted); see Stansfield v. Starkey, 220 Cal. App. 3d
27 59, 72-73 (2d Dist. 1990). To maintain an action for fraud
28 "based on a false promise, one must specifically allege and

1 prove, among other things, that the promisor did not intend to
2 perform at the time he or she made the promise and that it was
3 intended to deceive or induce the promisee to do or not do a
4 particular thing." Tarmann v. State Farm Mut. Auto. Ins. Co., 2
5 Cal. App. 4th 153, 159 (6th Dist. 1991). "[M]aking a promise
6 with an honest but unreasonable intent to perform is wholly
7 different from making one with no intent to perform and,
8 therefore, does not constitute a false promise." Id.

9 Plaintiffs argue Citi falsely promised to provide a
10 permanent loan modification and suspend foreclosure proceedings
11 during the TPP without ever intending to honor these promises.
12 (Pls.' Opp'n at 21.) The TPP offer letter in and of itself--with
13 its contradicting first of the month and end of the month
14 deadlines--is enough to call into question whether Citi ever
15 intended to fulfill its promises. Cohoon's explanation that the
16 two deadlines meant Citi had an obligation to provide foreclosure
17 protection and a permanent loan modification only if plaintiffs
18 made their first payment by July 1, 2011 and discretion if they
19 paid within the month, (see Yap Decl. Ex. E, Cohoon Dep. Volume
20 II at 151:16-22), suggests that Citi wanted to be able to leave
21 both the pathway to foreclosure and the pathway to modification
22 open at all times. While the TPP offer letter may simply have
23 been negligently drafted, a reasonable jury could also find that
24 Citi intentionally wrote its offer in such a fashion to best
25 position Citi to retract its promises if it so decided. Even if
26 Citi suspended the foreclosure sale on multiple occasions and
27 made some efforts towards modifying plaintiffs' loan, it was also
28 simultaneously exploring the possibility of foreclosure--always

1 looking for whichever option better benefited it and never fully
2 committing to honoring its promises to plaintiffs. As discussed
3 above, a reasonable jury could also find that Citi had a
4 financial incentive to take plaintiffs through the loan
5 modification process rather than immediately foreclosing, even if
6 it never intended to offer them a permanent loan modification.
7 Though the trustee's sale resulted in a deficiency of
8 \$217,576.79, (Cphoon Decl. ¶ 59, Ex. 19), the investor--Freddie
9 Mac--bore this loss and still paid Citi \$997.16 in servicing fees
10 at the time of foreclosure, (id. ¶ 62, Ex. 21; Yap Decl. Ex. B,
11 Pezold Dep. at 106-110).

12 Further, as discussed above in the context of
13 plaintiffs' promissory estoppel claim, plaintiffs have also
14 established the element of justifiable reliance. Accordingly,
15 the court must deny Citi's motion for summary judgment on
16 plaintiffs' fraud claim.

17 E. Intentional Infliction of Emotional Distress

18 The statute of limitations for a claim of intentional
19 infliction of emotional distress in California is two years.
20 Cal. Civ. Code § 335.1. "Generally, a limitations period begins
21 to run upon the occurrence of the last fact essential to the
22 cause of action." Pugliese v. Superior Ct., 146 Cal. App. 4th
23 1444, 1452 (2d Dist. 2007). At the August 22, 2016 hearing,
24 plaintiffs conceded that their intentional infliction of
25 emotional distress claim is barred by the statute of limitations.
26 Accordingly, the court must find that plaintiffs' intentional
27 infliction of emotional distress claim is time barred and grant
28 Citi's motion for summary judgment on this claim.

1 F. Unfair Competition Law

2 California's UCL prohibits "any unlawful, unfair or
3 fraudulent business act or practice." Cal. Bus. & Prof. Code
4 § 17200. "The UCL's purpose is to protect both consumers and
5 competitors by promoting fair competition in commercial markets
6 for goods and services." Kasky v. Nike, Inc., 27 Cal. 4th 939,
7 949 (2002) (citing Barquis v. Merchs. Collection Ass'n, 7 Cal. 3d
8 94, 110 (1972)). Under this statute, a prevailing plaintiff is
9 generally limited to injunctive relief and restitution of any
10 interest acquired by means of unfair competition. See Cal. Bus.
11 & Prof. Code § 17203; Cel-Tech Commc'ns, Inc. v. L.A. Cellular
12 Tel. Co., 20 Cal. 4th 163, 179 (1999).

13 Citi first contends that plaintiffs do not have
14 standing to assert a UCL claim. A private person has standing to
15 sue under the UCL if he can "(1) establish a loss or deprivation
16 of money or property sufficient to qualify as injury in fact,
17 i.e., economic injury, and (2) show that that economic injury was
18 the result of, i.e., caused by, the unfair business practice or
19 false advertising that is the gravamen of the claim." Kwikset
20 Corp. v. Superior Ct., 51 Cal. 4th 310, 322 (2011). The purpose
21 of the UCL standing requirement is to "eliminate standing for
22 those who have not engaged in any business dealings with would-be
23 defendants and thereby strip such unaffected parties of the
24 ability to file 'shakedown lawsuits,' while preserving for actual
25 victims of deception and other acts of unfair competition the
26 ability to sue and enjoin such practices." Id. at 317.
27 Plaintiffs clearly had a business relationship with Citi and
28 suffered injury due to a loss of real property through

1 foreclosure and poor credit ratings.

2 To establish that the economic injury was the result of
3 an unfair business practice, a plaintiff must show a "causal
4 connection or reliance on the alleged misrepresentation." Id. at
5 326 (citation and internal quotation marks omitted). "A
6 plaintiff fails to satisfy the causation prong of the statute if
7 he or she would have suffered 'the same harm whether or not a
8 defendant complied with the law.'" Jenkins v. JP Morgan Chase
9 Bank, N.A., 216 Cal. App. 4th 497, 522 (4th Dist. 2013) (quoting
10 Daro v. Superior Ct., 151 Cal. App. 4th 1079, 1099 (1st Dist.
11 2007)).

12 For example, in Jenkins, the court found the plaintiff
13 lacked standing under the UCL because she could not establish a
14 causal link between the foreclosure of her home and the
15 defendant's six unlawful or unfair acts, all of which occurred
16 after the plaintiff defaulted on her loan. Id. at 523. Even if
17 the defendant had not acted unfairly, the plaintiff still would
18 have defaulted and suffered the same economic injury.

19 Unlike in Jenkins, plaintiffs entered into a TPP
20 agreement with Citi to cure their initial default and reinstate
21 the loan. Plaintiffs have established a genuine issue of fact
22 with respect to whether they qualified for a permanent HAMP
23 modification and, as a result, whether a trustee's sale was
24 inevitable. A reasonable jury could therefore find that
25 plaintiffs did not suffer injury due to their own inability to
26 pay but rather because of Citi's unfair or unlawful conduct
27 despite plaintiffs having made the three trial period payments
28 within the month in which they were due. Accordingly, the court

1 must deny Citi's motion for summary judgment of plaintiffs' UCL
2 claim for lack of standing.

3 The UCL "establishes three varieties of unfair
4 competition--acts or practices which are unlawful, or unfair, or
5 fraudulent." Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 180. "Each
6 prong of the UCL is a separate and distinct theory of liability"
7 and offers an "independent basis for relief." Kearns v. Ford
8 Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009) (citing S. Bay
9 Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861
10 (4th Dist. 1999)).

11 As discussed above, a question of fact remains for
12 trial as to whether Citi made false promises with fraudulent
13 intent. Accordingly, the court must also find there is a genuine
14 dispute of fact as to plaintiffs' fraud claim under the UCL based
15 on this same allegation.

16 Plaintiffs also contend Citi engaged in unlawful
17 business practices by breaching its obligations under the TPP
18 agreement and selling plaintiffs' home at a foreclosure auction.
19 "An action is unlawful under the UCL and independently actionable
20 if it constitutes a violation of another law, 'be it civil or
21 criminal, federal, state, or municipal, statutory, regulatory, or
22 court-made.'" Cooksey v. Select Portfolio Servicing, Inc., Civ.
23 No. 2:14-1237 KJM KJN, 2014 WL 4662015, at *7 (E.D. Cal. Sept.
24 18, 2014); see also McKell v. Wash. Mut., Inc., 142 Cal. App. 4th
25 1457, 1474-75 (2d Dist. 2006) ("By extending to business acts or
26 practices which are 'unlawful,' 'the UCL permits violations of
27 other laws to be treated as unfair competition that is
28 independently actionable.'" (citation omitted)). Given that

1 plaintiffs have established a genuine dispute of material fact
2 regarding Citi's breach of contract, promissory estoppel, and
3 wrongful foreclosure, plaintiffs have also established a dispute
4 regarding Citi's unlawful business acts or practices under the
5 UCL.

6 Accordingly, the court will deny Citi's motion for
7 summary judgment on plaintiffs' UCL claim.

8 G. Punitive Damages

9 Plaintiffs seek punitive damages with respect to their
10 claims for fraud and unlawful business practices under the UCL.
11 (FAC at 19-20.) Citi moves for summary judgment on the ground
12 that plaintiffs are not entitled to punitive damages as a matter
13 of law. (Citi's Mot. at 22.)

14 Pursuant to California Civil Code section 3294, a
15 plaintiff may recover punitive damages "[i]n an action for the
16 breach of an obligation not arising from contract, where it is
17 proven by clear and convincing evidence that the defendant has
18 been guilty of oppression, fraud, or malice." Cal. Civ. Code
19 § 3294(a). Punitive damages are "for the sake of example and by
20 way of punishing the defendant." Id. Subsection (c) defines
21 fraud as "an intentional misrepresentation, deceit, or
22 concealment of a material fact known to the defendant with the
23 intention on the part of the defendant of thereby depriving a
24 person of property or legal rights or otherwise causing injury."
25 Id. § 3294(c).

26 Given that the court has already found a genuine issue
27 of material fact regarding Citi's fraudulent conduct, the court
28 must deny Citi's motion for summary judgment on plaintiffs'

1 punitive damages request and leave it for a jury to determine
2 whether Citi's actions reach the requisite level of intent.

3 IT IS THEREFORE ORDERED that Citi's motion for summary
4 judgment (Docket No. 72) be, and the same hereby is, GRANTED on
5 plaintiffs' intentional infliction of emotional distress claim
6 and promissory estoppel claim as to any alleged oral promises,
7 and DENIED in all other respects.

8 Dated: August 26, 2016



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10 **WILLIAM B. SHUBB**
11 **UNITED STATES DISTRICT JUDGE**
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