

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA M. CHANG,)	Case No. C-11-1951 SC
)	
Plaintiff,)	ORDER GRANTING MOTION TO
)	DISMISS AND DENYING MOTION
v.)	<u>TO STRIKE</u>
)	
WACHOVIA MORTGAGE, FSB, a national)	
association; WELLS FARGO BANK,)	
N.A., a national association; and)	
DOES 1 through 50, inclusive,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiff Cynthia M. Chang ("Plaintiff") brings this action against Wachovia Mortgage, FSB ("Wachovia") and Wells Fargo Bank, N.A. ("Wells Fargo") (collectively, "Defendants"), pleading five causes of action arising from loan modification discussions between Plaintiff and Defendants and the May 2010 foreclosure sale of Plaintiff's San Francisco, California residence. ECF No. 22 ("FAC"). Now before the Court is Wells Fargo's fully briefed Motion to Dismiss and Motion to Strike Plaintiff's First Amended Complaint ("FAC"). ECF Nos. 28 ("MTD"), 29 ("MTS"), 31 ("Opp'n"), 35 ("MTD Reply"), 36 ("MTS Reply"). For the following reasons, the Court GRANTS Wells Fargo's Motion to Dismiss Plaintiff's second through fifth causes of action and DENIES Wells Fargo's Motion to Strike as moot.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 As it must on a motion brought under Federal Rule of Civil
4 Procedure 12(b)(6), the Court assumes the truth of the well-pleaded
5 facts in Plaintiff's Complaint. Plaintiff is a resident of San
6 Francisco, and from 1996 until around May 12, 2010, she was the
7 owner of a residence located at 80 Collingwood Street, Number 302,
8 San Francisco, California, Block 2648, Lot 056 ("the residence").
9 FAC ¶¶ 1, 7. Around May 18, 2006, Plaintiff refinanced the
10 residence with World Savings Bank ("WSB").¹ Id. ¶ 8. The
11 refinance consisted of two loans: the first in the principal amount
12 of \$380,000 ("the first loan") and the second, an equity line of
13 credit, in the amount of \$50,000 ("the second loan"). Id.

14 Plaintiff alleges that she made all payments on her loans
15 until sometime in 2008, when she lost her job. Id. ¶ 7. Around
16 this time, Plaintiff contacted Defendants to inquire into loan
17 modification. Id. ¶ 9. Plaintiff claims that these discussions
18 continued through May 2010, and that Defendants "made statements,
19 promises and assurances to plaintiff that her requests for a loan
20 modification or a new loan would be reasonably considered in good
21 faith." Id.

22 On July 24, 2009, and again on September 1, 2009, Defendants
23 recorded a Notice of Default and Election to Sell Under Deed of
24 Trust ("NOD") with respect to the second loan on Plaintiff's home.
25 Id. ¶ 10. Plaintiff claims that upon receiving the NOD, she

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27 ¹ Plaintiff alleges, and Wells Fargo concedes, that Wachovia is
28 WSB's successor in interest, and that Wells Fargo is Wachovia's
successor in interest. Id. ¶¶ 2-6.

1 "immediately contacted defendants and was assured that her requests
2 and applications for a loan modification and new loan were being
3 considered and that she would not be hurt by the NOD so long as
4 such negotiations continued." Id. ¶ 11.

5 On or about January 11, 2010, Wachovia recorded a Notice of
6 Trustee's Sale setting for February 1, 2010 a private sale under
7 the Deed of Trust securing the second loan. Id. ¶ 12. Plaintiff
8 continued to discuss modification of both loans with Defendants.
9 Id. The sale date was postponed on more than one occasion, but
10 Plaintiff allegedly did not receive notice of this postponed sale
11 date. Id. Plaintiff claims that Defendants promised and assured
12 her that "so long as plaintiff and defendants were working on a
13 loan modification or new loan, any foreclosure or trustee's sale
14 would be postponed." Id.

15 Plaintiff specifically describes many of her communications
16 with Defendants concerning a loan modification in early 2010. On
17 January 21, 2010 she had a telephone conversation with a Wachovia
18 representative in which there was a discussion of the "Home
19 Affordable Modification Plan" ("HAMP"). Id. ¶ 13a. On March 4 and
20 and 5, 2010, Plaintiff faxed to "Melissa" at Wells Fargo a
21 "hardship letter," financial statement, tax return and other
22 information. Id. ¶ 13b. On March 5, 2010 Plaintiff received a
23 letter from Wachovia thanking her for her response to the Mortgage
24 Assistance Plan and requesting "current sources of income
25 immediately" "[i]n order to move forward with modification
26 process." Id. ¶ 13c. Plaintiff also alleges that around this time
27 she "was assured" by someone at phone number 800-282-3458 "that the
28 foreclosure had been or was being postponed." Id. ¶ 13b. The FAC

1 is not clear on when this assurance was made or how long the
2 foreclosure was to be postponed.

3 Plaintiff claims that, in April 2010, Defendants informed her
4 that they were "unable to proceed" with the modification. Id. ¶
5 14. By two letters dated April 12, 2010, Wachovia stated that the
6 foreclosure process would resume. Id. On May 12, 2010, the
7 residence was sold by a Trustee at public auction. Id.; RJN Ex. J
8 ("Trs. Deed Upon Sale").² Plaintiff alleges that the sale deprived
9 her of substantial equity in the Residence, estimated to be between
10 \$250,000 and \$300,000. FAC ¶ 14.

11 Plaintiff alleges that, even after Defendants resumed the
12 foreclosure process, Defendants continued to lead Plaintiff to
13 believe that she could obtain a loan modification. Id. ¶ 15. In
14 an April 9, 2010 letter, Wachovia stated that, even though
15 Plaintiff was ineligible for assistance under the Mortgage
16 Assistance Plan Modification, she could still be eligible for other
17 loss mitigation options. Id. ¶ 15a. In an April 15, 2010
18 telephone conversation with an unidentified Wachovia
19 representative, "it was discussed that plaintiff could receive
20 temporary payment assistance and, if not possible, she could

21 ² Wells Fargo asks the Court to take judicial notice of a number of
22 documents. ECF No. 30 ("RJN"). Under Rule 201 of the Federal
23 Rules of Evidence, a court may take judicial notice of facts
24 generally known within the territorial jurisdiction of the trial
25 court or capable of accurate and ready determination by resort to
26 sources whose accuracy cannot reasonably be questioned. A court
27 may also take judicial notice of a document if the plaintiff's
28 claim depends on the contents of the document, and the parties do
not dispute the authenticity of the document. Kniesel v. ESPN, 393
F.3d 1068, 1076 (9th Cir. 2005). However, the Court may not take
judicial notice of the truth of the facts recited within a
judicially noticed document. Lee v. City of Los Angeles, 250 F.3d
668, 688-90 (9th Cir. 2001). The Court GRANTS Wells Fargo's RJN,
but limits its review of the exhibits accordingly.

1 reinstate the loan." Id. ¶ 15c. Plaintiff complains that in April
2 16 and 20, 2010 telephone conversations, Defendants failed to
3 inform her that the foreclosure was proceeding. Id. ¶¶ 15c, 15d.
4 Plaintiff alleges that Wachovia again failed to mention the
5 impending foreclosure in a May 5, 2010 letter notifying her that it
6 was unable to offer her credit on the terms requested. Id. ¶ 16.

7 Plaintiff also alleges that Defendants acted "inconsistently
8 and recklessly" after the May 12, 2010 foreclosure sale. Id. ¶ 18.
9 For example, in a May 12, 2010 conversation, Wachovia's Bernice
10 Hernandez ("Hernandez") told Plaintiff that her loans could not be
11 reinstated and that the trustee was selling and foreclosing on the
12 second loan. Id. ¶ 17. Defendants later informed plaintiff that
13 the loan could be reinstated.³ Id. ¶ 18. Plaintiff also points to
14 a June 23, 2010 letter from Wachovia stating that failure to cure
15 default on one of her loans could result in foreclosure and that
16 Plaintiff may be eligible for Home Ownership counseling. Id. ¶ 18.
17 Finally, Plaintiff refers to two August 3, 2010 letters from
18 Wachovia, one requesting documents for the Mortgage Assistance Plan
19 and another stating that Wachovia was unable to offer her a
20 modification. Id. This letter also stated that Plaintiff had
21 thirty days to contact Wachovia about its decision and that "no
22 foreclosure sale will be conducted and you will not lose your home"
23 during that thirty day period. Id.

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27 ³ Plaintiff specifically refers to telephone conversations with
28 "Rachel," "Richard" and "Ron." Id. ¶ 18. However, it is not clear
what these individuals told Plaintiff, when these conversations
took place, or what positions these individuals held.

1 **B. Procedural History**

2 Plaintiff brought this action in California state court on
3 March 21, 2011, alleging nine causes of action. ECF No. 1 ("Not.
4 of Removal") Ex. A. ("Compl."). First, she alleged a claim for
5 promissory estoppel based on Defendants' statements that they would
6 not proceed with a foreclosure sale so long as Plaintiff's
7 modification negotiations continued. Id. ¶ 18-24. Second, she
8 alleged fraud, misrepresentation, and reckless disregard, asserting
9 that Defendants' conduct "constituted material misrepresentations,
10 omissions . . . and actions in reckless disregard of plaintiff's
11 rights and remedies to retain and preserve her Residence." Id. ¶
12 26. Third, Plaintiff alleged Defendants committed negligent
13 misrepresentation. Id. ¶ 30. Fourth, Plaintiff alleged
14 negligence. Id. ¶¶ 31-33. Fifth, Plaintiff alleged Defendants
15 breached the implied covenant of good faith and fair dealing by
16 secretly continuing the foreclosure sale while continuing
17 modification negotiations with Plaintiff. Id. ¶ 26. Sixth,
18 Plaintiff alleged a claim for unconscionability. Id. ¶ 40.
19 Seventh, Plaintiff alleged Defendants waived their right to
20 foreclosure by continuing loan modification negotiations. Id. ¶
21 41. Eighth, Plaintiff alleged a claim for violation of
22 California's Unfair Competition Law, Cal. Bus. & Profs. Code §
23 17200 ("UCL"), claiming Defendants engaged in deceptive business
24 practices by "failing to provide plaintiff with accurate and proper
25 information as to loan status and steps of foreclosure in
26 accordance with the requirements of the California Civil Code,"
27 concealing from Plaintiff information about the ongoing
28 foreclosure, and "[i]nducing plaintiff to not resume her payments

1 or otherwise cure alleged defaults by falsely promising and stating
2 that a modification . . . would reasonably be considered in good
3 faith based on plaintiff's circumstances." Id. ¶ 46. Ninth,
4 Plaintiff alleged intentional infliction of emotional distress
5 ("IIED"), asserting: "Defendants' conduct was outrageous and beyond
6 the bounds of decency and in reckless disregard of causing
7 plaintiff mental and emotional distress." Id. ¶ 51.

8 Wells Fargo moved to dismiss the Complaint on April 28, 2011.
9 ECF No. 6. On July 21, 2011, the Court granted in part and denied
10 in part the motion. ECF No. 21 ("July 21, 2011 Order"). Of
11 Plaintiff's original nine causes, the Court dismissed four with
12 prejudice, and left one, Plaintiff's claim for promissory estoppel,
13 undisturbed. Id. at 15-16. The Court dismissed the remaining four
14 causes of action with leave to amend. Id. Specifically, Plaintiff
15 was granted leave to amend her causes of action for: fraud,
16 misrepresentation, and reckless disregard; breach of the implied
17 covenant of good faith and fair dealing; a UCL violation; and IIED.
18 Id. With respect to Plaintiff's fraud claim, the Court found that
19 more detail was required as to what false and misleading statements
20 were made, when they were made, and who said them. Id. at 11.
21 Plaintiff's claim for breach of the implied covenant of good faith
22 and fair dealing failed because Plaintiff failed to identify the
23 contract at issue and the benefits deprived by Defendants. Id. at
24 12. The Court found that Plaintiff's UCL claim was not pleaded
25 with the required specificity. Id. at 13. Finally, as to
26 Plaintiff's IIED claim, Plaintiff failed to state what about
27 Defendants' conduct rendered it so extreme as to "exceed all bounds
28 of that usually tolerated in a civilized community." Id. at 15.

1 Plaintiff filed her FAC on August 16, 2011, asserting five
2 causes of action for (1) promissory estoppel; (2) fraud,
3 misrepresentation, and reckless disregard; (3) breach of the
4 implied covenant of good faith and fair dealing; (4) violation of
5 the UCL; and (5) IIED. FAC ¶¶ 22-50. The gravamen of the FAC
6 appears to be that Plaintiff would have sold her residence or
7 obtained alternative financing had she not been misled by
8 Defendants' statements and actions concerning a loan modification
9 or had adequate notice of the trustee's sale. See id. ¶¶ 12, 14.
10 The FAC includes additional facts not alleged in the Complaint.
11 Defendants contend these new facts are insufficient to cure the
12 defects identified in the Court's July 21, 2011 Order. Defendants
13 now move to dismiss the second, third, fourth, and fifth causes of
14 action in the FAC. Defendants have also moved to strike various
15 paragraphs from the FAC.

16

17 **III. LEGAL STANDARD**

18 A motion to dismiss under Federal Rule of Civil Procedure
19 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
20 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
21 on the lack of a cognizable legal theory or the absence of
22 sufficient facts alleged under a cognizable legal theory."
23 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
24 1988). "When there are well-pleaded factual allegations, a court
25 should assume their veracity and then determine whether they
26 plausibly give rise to an entitlement to relief." Ashcroft v.
27 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
28 court must accept as true all of the allegations contained in a

1 complaint is inapplicable to legal conclusions. Threadbare
2 recitals of the elements of a cause of action, supported by mere
3 conclusory statements, do not suffice." Id. (citing Bell Atl.
4 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made
5 in a complaint must be both "sufficiently detailed to give fair
6 notice to the opposing party of the nature of the claim so that the
7 party may effectively defend against it" and "sufficiently
8 plausible" such that "it is not unfair to require the opposing
9 party to be subjected to the expense of discovery." Starr v. Baca,
10 633 F.3d 1191, 1204 (9th Cir. 2011).

11
12 **IV. DISCUSSION**

13 **A. Fraud**

14 Wells Fargo argues that Plaintiff has not properly pleaded her
15 second claim for "fraud, misrepresentation, reckless disregard" in
16 light of Federal Rule of Civil Procedure 9(b)'s heightened pleading
17 standard for claims sounding in fraud.⁴ MTD at 2-3. The Court
18 agrees. "To satisfy Rule 9(b), a pleading must identify the who,
19 what, when, where, and how of the misconduct charged, as well as
20 what is false or misleading about [the purportedly fraudulent]
21 statement, and why it is false." Cafasso, U.S. ex rel. v. Gen.
22 Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011)
23 (internal quotation marks omitted). In its July 21, 2011 Order,
24 the Court found that Plaintiff's fraud claim failed because more
25 detail was required than what was supplied. July 11, 2011 Order at
26 11. Despite alleging new facts, Plaintiff's fraud claim still

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28 ⁴ Plaintiff does not dispute that her second cause of action sounds
in fraud.

1 fails to meet the pleading requirements of Rule 9(b).

2 Plaintiff's claim does not point to any specific conduct,
3 statements, or misrepresentations, leaving Defendants and the Court
4 to guess at which of her general allegations constitute the basis
5 for her claim. See FAC ¶¶ 29-32. Construing the FAC liberally,
6 the crux of the claim appears to be that Defendants falsely
7 represented that they would postpone the trustee's sale so long as
8 Plaintiff and Defendants were working on a loan modification or a
9 new loan.⁵ See id. ¶ 12. The FAC offers new details concerning
10 Plaintiff's communications with Defendants in the months preceding
11 and following the trustee's sale. See id. ¶¶ 13-18. However,
12 taken together and construed in the light most favorable to
13 Plaintiff, these allegations are still insufficient to state
14 plausible claim for fraud, misrepresentation, and reckless
15 disregard.

16 While Plaintiff alleges the "who," "what," and "when"
17 concerning many of her communications with Defendants in March and
18 April 2010, those communications simply do not support her theory
19 of fraud. Plaintiff alleges that she spoke with several of
20 Defendants' representatives about loan modification alternatives in
21 March 2010. See id. ¶ 13. However, she does not allege particular
22 facts showing that, during this time, Defendants promised or
23 otherwise represented that they would postpone the trustee's sale
24 while these discussions were ongoing. Plaintiff does allege that
25 she was "assured" by someone at phone number 800-282-3458 "that the

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27 ⁵ Plaintiff confirms this theory in her opposition brief. See
28 Opp'n at 5 ("plaintiff is alleging that in the course of loan
modification dialogue and process, defendants made new independent
promises, relied on by plaintiff to her detriment in not seeking a
sale of her property").

1 foreclosure had been or was being postponed." Id. ¶ 13b. However,
2 Plaintiff does not identify the date on which this statement was
3 made or, critically, how long the sale was to be postponed.

4 Plaintiff's allegations concerning her April 2010
5 communications with Defendants are also unhelpful. Plaintiff
6 alleges that, during April 2010, Defendants informed her that they
7 would be unable to proceed with her modification request; the
8 foreclosure process would resume; Plaintiff was ineligible for the
9 Mortgage Assistance Plan Modification; Plaintiff was ineligible for
10 the Home Affordable Modification Program; and Plaintiff did not
11 have enough income to qualify for short-term assistance.⁶ Id. ¶
12 14-15. Once again, none of these allegations evidence a promise or
13 representation by Defendants that the trustee's sale would be
14 postponed while loan modification discussions were ongoing.
15 Further, the allegation that Defendants informed Plaintiff that the
16 foreclosure process would resume tend to undercut rather than
17 bolster Plaintiff's theory that Defendants led her to believe that
18 the trustee's sale was being postponed.⁷

19 The FAC also suggests that Defendants are liable for
20 fraudulent concealment because they failed to inform Plaintiff

21 _____
22 ⁶ Defendants also allegedly informed Plaintiff that she "may still
23 be eligible for other loss mitigation options." FAC ¶ 15a.
24 However, Plaintiff does not allege that Defendants promised or
25 represented that the sale would be postponed while Plaintiff
26 applied for these programs.

27 ⁷ Plaintiff also alleges that Defendants falsely represented that
28 the loan could be reinstated after the date of the trustee's sale.
See FAC ¶ 18. Defendants argue that these post-sale statements are
not actionable with respect to the fraud claim because Plaintiff
did not rely on such statements. MTD at 5. The Court agrees.
Once the trustee's sale occurred, Plaintiff no longer owned the
property and could not have plausibly relied on Defendants' loan
modification offers.

1 about the status of the foreclosure sale. See id. ¶ 15-16.
2 Defendants argue that Plaintiff has not alleged facts establishing
3 that Wells Fargo had a duty to disclose the postponed date of the
4 foreclosure sale. MTD at 7-8. Citing Perlas v. GMAC Mortgage,
5 LLC, 187 Cal. App. 4th 429, 436 (Cal. Ct. App. 2010), Wells Fargo
6 points out that loan transactions generally do not give rise to a
7 fiduciary or confidential relationship. Id. at 7. Wells Fargo
8 also argues that, under California Civil Code section 2924g, notice
9 of postponement is to be given "by public declaration by the
10 trustee" and "[n]o other notice of postponement need be given."
11 Id. at 7-8 (quoting Cal. Civ. Code § 2924g(d)). Plaintiff responds
12 by citing to language from the Court's July 21, 2011 Order stating
13 that "defendants are responsible for statements they make to
14 borrowers." Opp'n at 4. This language is inapposite as the Court
15 was referring to whether the Home Owner's Loan Act ("HOLA")
16 preempts claims for fraud premised on affirmative statements made
17 by lenders. July 21, 2011 Order at 9. The July 21, 2011 Order did
18 not create a new duty requiring lenders to disclose a postponed
19 sale date.

20 The Court finds that, despite the new allegations in the FAC,
21 Plaintiff has not pled sufficient facts to state a plausible claim
22 for fraud. Accordingly, the Court DISMISSES Plaintiff's second
23 cause of action for "fraud; misrepresentation; reckless disregard"
24 WITH LEAVE TO AMEND.

25 **B. Implied Covenant of Good Faith and Fair Dealing**

26 The Court initially dismissed Plaintiff's claim for breach of
27 the implied covenant of good faith and fair dealing because the
28 Complaint did not specify what contract was at issue. Id. at 11-

1 12. Plaintiff now identifies the contract as the Line of Credit
2 Agreement, Note, and Deeds of Trust. FAC ¶ 35. Specifically,
3 Plaintiff alleges that Defendants "did not act in good faith under
4 the terms of the Deeds of Trust when they secretly continued the
5 foreclosure sale from the February 1, 2010 date and continued to
6 negotiate with plaintiff for a modification of the First Loan and
7 Second Loan without informing plaintiff of the new secretly
8 determined date." Id. ¶ 36. Wells Fargo argues that the claim
9 fails as a matter of law since the implied covenant of good faith
10 and fair dealing cannot prohibit Defendants from foreclosing on the
11 property, an act which the Deed of Trust expressly permits. MTD at
12 12-14. The Court agrees.

13 "It is universally recognized [that] the scope of conduct
14 prohibited by the covenant of good faith is circumscribed by the
15 purposes and express terms of the contract." Carma Developers,
16 Inc. v. Marathon Dev. California, Inc., 2 Cal. 4th 342, 373 (1992).
17 "[T]he implied covenant of good faith is read into contracts in
18 order to protect the express covenants or promises of the contract,
19 not to protect some general public policy interest not directly
20 tied to the contract's purpose." Id. (internal quotation marks and
21 citation omitted). Accordingly, "[t]he implied covenant cannot be
22 stretched to prohibit a party from doing that which the agreement
23 expressly permits." Schuck v. Fannie Mae, No. 11-cv-691 OWW JLT,
24 2011 U.S. Dist. LEXIS 69257, at *15 (E.D. Cal. June 28, 2011); see
25 also Dooks v. Fed. Home Loan Mortg. Corp., No. CV F 11-0352 LJO
26 DLB, 2011 U.S. Dist. LEXIS 38550, at *22-23 (E.D. Cal. Mar. 30,
27 2011).

28 In the instant action, the Deed of Trust provides that, if

1 Plaintiff failed to make payment on her loans, "[l]ender may
2 exercise the power of sale, take action to have the Property sold
3 under applicable law, and invoke such other remedies as may be
4 permitted under any applicable law." RJN Ex. B ("DOT") at 13.
5 Plaintiff does not deny that she was in default in repaying the
6 loans. See FAC ¶ 7. Accordingly, the implied covenant does not
7 impose a duty on Defendants that would prevent them from exercising
8 their right to sell the property.

9 In her opposition brief, Plaintiff argues that her action is
10 different from others in which district courts rejected claims for
11 breach of the implied covenant because "defendants acted on
12 plaintiff's requests for a loan modification and undertook acts and
13 communications to plaintiff in regard thereto, such that then it
14 was a breach of the implied covenant to proceed to the trustee's
15 sale without further notice to plaintiff and opportunity for her to
16 protect herself." Opp'n at 7. Plaintiff's argument here is not
17 altogether clear to the Court. To the extent that Plaintiff is
18 arguing that her claim for breach of the implied covenant is
19 premised on new, independent duties created by the acts and
20 communications of Defendants, this theory is inconsistent with the
21 cause of action pleaded in the FAC. In any event, Plaintiff does
22 not point to any express terms of the Deed of Trust, Line of Credit
23 Agreement, or Note which would have been frustrated by the sale of
24 the residence.

25 For the foregoing reasons, the Court DISMISSES Plaintiff's
26 third claim for breach of the implied covenant of good faith and
27 fair dealing WITHOUT LEAVE TO AMEND.

28 ///

1 C. UCL

2 Plaintiff's UCL claim is based on four categories of deceptive
3 business practices. First, Plaintiff cites Defendants' "[f]ailure
4 to provide Plaintiff with accurate and proper information as to
5 loan status and steps of foreclosure in accordance with the
6 requirements of [] Sections 2924, 2924b, 2924f, and 2924g of the
7 California Civil Code." FAC ¶ 42. Wells Fargo argues that
8 Plaintiff has failed to properly allege an unlawful act or practice
9 because she has not identified specific defects in the notice of
10 default, notice of sale, or how the sale was conducted. MTD at 16.
11 Further, Wells Fargo complains that the Civil Code sections cited
12 by Plaintiff encompass dozens of requirements, and Plaintiff has
13 not specified which particular requirements were not met. Id.
14 Plaintiff does not provide a coherent response. The Court agrees
15 with Wells Fargo and finds that Plaintiff has not pled sufficient
16 facts to put Defendants on notice as to what requirements they
17 allegedly violated.

18 The last three categories of deceptive business practices
19 sound in fraud and, consequently, are subject to the heightened
20 pleading standards of Rule 9(b). Plaintiff alleges that Defendants
21 violated the UCL by: making statements to Plaintiff and concealing
22 information relating to the ongoing foreclosure sale; "[e]ngaging
23 in misleading statements and omissions as to the foreclosure sale,
24 depriving plaintiff of the opportunity to object and stop the
25 foreclosure sale"; and "[i]nducing plaintiff to not resume her
26 payments or otherwise cure alleged defaults by falsely promising
27 and stating that a modification of the First Loan and Second Loan
28 would be reasonably considered in good faith based on plaintiff's

1 circumstances." FAC ¶ 42. Wells Fargo argues that these
2 allegations fail to meet the heightened pleading standards of Rule
3 9(b). MTD at 15-16. The Court agrees. Plaintiff's underlying UCL
4 allegations are substantially similar to, if not exactly the same
5 as, those underlying Plaintiff's claim for "fraud,
6 misrepresentation, reckless disregard." Like the other fraud
7 allegations, Plaintiff's UCL allegations fail to specify "the who,
8 what, when, where, and how of the misconduct charged." See section
9 IV.A., supra.

10 Accordingly, the Court DISMISSES Plaintiff's claim for
11 violation of the UCL WITH LEAVE TO AMEND.

12 **D. Intentional Infliction of Emotional Distress**

13 Plaintiff's fifth cause of action for IIED alleges that
14 "Defendants' conduct was outrageous and beyond the bounds of
15 decency and in reckless disregard of causing plaintiff mental and
16 emotional distress." FAC ¶ 47. Plaintiff alleges this conduct
17 included "misleading telephone conferences promising and
18 representing defendants' willingness to consider a modification of
19 plaintiff's loans when, in fact, another department or division of
20 defendants was proceeding with a private trustee's sale of
21 foreclosure of plaintiff's Second Loan." Id. Defendants'
22 allegedly outrageous conduct also included representations that
23 they would consider and grant Plaintiff a home equity loan or
24 reinstate Plaintiff's first loan, even after Plaintiff's residence
25 had been sold through a trustee's sale. Id.

26 To plead a claim for IIED, Plaintiff must allege: "(1) extreme
27 and outrageous conduct by the defendant with the intention of
28 causing, or reckless disregard of the probability of causing,

1 emotional distress; (2) the plaintiff's suffering severe or extreme
2 emotional distress; and (3) actual and proximate causation of the
3 emotional distress by the defendant's outrageous conduct."

4 Christensen v. Super. Ct., 54 Cal. 3d 868, 903 (1991) (quotations
5 and citations omitted). Conduct is only "extreme and outrageous"
6 when it was "so extreme as to exceed all bounds of that usually
7 tolerated in a civilized community." Davidson v. City of
8 Westminster, 32 Cal. 3d 197, 185 (1982).

9 As pointed out by Wells Fargo, several district courts in this
10 circuit have held that conduct similar to that alleged by Plaintiff
11 was insufficient to support a claim for IIED. See Ottolini v. Bank
12 of Am., No. C-11-0477 EMC, 2011 U.S. Dist. LEXIS 92900, at *32-35
13 (N.D. Cal. Aug. 19, 2011); Mehta v. Wells Fargo Bank, N.A., 737 F.
14 Supp. 2d 1185, 1204 (S.D. Cal. 2010). The Court agrees with the
15 reasoning of those decisions and finds that Plaintiff has not
16 alleged conduct "so extreme as to exceed all bounds of that usually
17 tolerated in a civilized society." Plaintiff has merely pled that,
18 on multiple occasions, Defendants communicated the possibility of a
19 loan modification or other loss mitigation options. The fact that
20 Defendants ultimately found Plaintiff ineligible for a modification
21 and exercised their legal right to sell the property does not
22 render this conduct outrageous.

23 Accordingly, Plaintiff's fifth claim for IIED is DISMISSED
24 WITHOUT LEAVE TO AMEND.

25 **E. Motion to Strike**

26 Wells Fargo moves to strike allegations in Plaintiff's second
27 and fifth causes of action relating to punitive damages and certain
28 portions of Plaintiff's prayer for relief as they relate to

1 Plaintiff's fourth cause of action. MTS at 2. As this Order
2 dismisses Plaintiff's last four causes of action, Wells Fargo's
3 Motion to Strike is DENIED as moot.⁸

4

5 **V. CONCLUSION**

6 Plaintiff Cynthia M. Chang's first cause of action for
7 promissory estoppel remains undisturbed. The Court GRANTS
8 Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss Plaintiff's
9 second, third, fourth, and fifth causes of action. Specifically:

- 10 • The Court DISMISSES WITHOUT LEAVE TO AMEND Plaintiff's third
11 cause of action for breach of the implied covenant of good
12 faith and fair dealing and fifth cause of action for
13 intentional infliction of emotional distress.
- 14 • The Court DISMISSES WITH LEAVE TO AMEND Plaintiff's second
15 cause of action for fraud, misrepresentation, reckless
16 disregard and fourth cause of action for violation of
17 California Business and Professions Code Section 17200, et
18 seq.

19 Plaintiff is granted thirty (30) days leave to file an amended
20 complaint. If Plaintiff fails to file an amended complaint within
21 this time frame, her second and fourth causes of action will be
22 dismissed WITHOUT LEAVE TO AMEND. The Court also DENIES Wells

23 _____
24 ⁸ Wells Fargo also moves to strike paragraph 6 of Plaintiff's
25 prayer for relief. MTS at 2. Wells Fargo describes this paragraph
26 as a prayer for "exemplary and punitive damages," id., but the
27 paragraph actually relates to attorney's fees, FAC at 16. The
28 Court assumes Wells Fargo intended to move to strike paragraph 5 of
Plaintiff's prayer, which refers to exemplary or punitive damages.
Id. Regardless of which paragraph Wells Fargo intended to move to
strike, the Court DENIES the motion. Wells Fargo has offered no
explanation as to why Plaintiff's prayer for attorney's fees is
inappropriate and Plaintiff's prayer for punitive damages is now
moot.

1 Fargo Bank, N.A.'s Motion to Strike as moot. The hearing scheduled
2 for November 18, 2011 is hereby VACATED.

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IT IS SO ORDERED.

Dated: November 15, 2011


UNITED STATES DISTRICT JUDGE