

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 DENYING MOTION FOR
	)	LEAVE TO AMEND AND GRANTING
v.	)	<u>MOTION FOR SUMMARY JUDGMENT</u>
	)	
WACHOVIA MORTGAGE, FSB, a national	)	
association; WELLS FARGO BANK,	)	
N.A., a national association; and	)	
DOES 1 through 50, inclusive,	)	
	)	
Defendants.	)	

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**I. INTRODUCTION**

Plaintiff Cynthia M. Chang ("Plaintiff" or "Chang") brings this action for promissory estoppel against Defendants Wachovia Mortgage, FSB ("Wachovia") and Wells Fargo Bank, N.A. ("Wells Fargo") (collectively, "Defendants") in connection with the foreclosure of her home. The crux of Plaintiff's case is that Defendants promised to postpone foreclosure while they were considering Plaintiff's application for a loan modification. In reliance on this promise, Plaintiff refrained from selling her home and recovering her equity in the property. Defendants allegedly broke their promise by selling Plaintiff's home without notice while loan modification discussions were ongoing. Defendants'

1 action allegedly caused Plaintiff to lose over \$250,000 in equity  
2 and adversely affected her credit score.

3 Plaintiff now moves for leave to file a second amended  
4 complaint ("SAC") so as to add new causes of action for "negligent  
5 performance of an assumed duty" and "damage to credit." ECF No. 46  
6 ("SAC Mot."). The motion is fully briefed. ECF Nos. 47 ("SAC Mot.  
7 Opp'n"), 50 ("Reply ISO SAC Mot."). Also before the Court is  
8 Defendants' fully briefed motion for summary judgment. ECF Nos. 48  
9 ("MSJ"), 51 ("MSJ Opp'n"), 54 ("Reply ISO MSJ"). Pursuant to Civil  
10 Local Rule 7-1(b), the Court finds this matter appropriate for  
11 determination without oral argument. For the reasons set forth  
12 below, the Court DENIES Plaintiff's motion for leave to file a SAC  
13 and GRANTS Defendants' motion for summary judgment.

14  
15 **II. BACKGROUND**

16 **A. Factual Background**

17 Plaintiff was the owner of a residence located at 80  
18 Collingwood Street, Number 302, San Francisco, California, Block  
19 2648, Lot 056 ("the Property") from 1996 through 2010. ECF No. 45-  
20 2 ("Chang Decl. ISO SAC") ¶ 2. Around May 18, 2006, Plaintiff  
21 refinanced the Property with World Savings Bank ("WSB"), Wells  
22 Fargo's predecessor-in-interest.<sup>1</sup> Defs.' Exs. 2-5.<sup>2</sup> The refinance

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24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiff alleges, and Wells Fargo concedes, that Wachovia is  
26 WSB's successor-in-interest, and that Wells Fargo is Wachovia's  
27 successor-in-interest. ECF No. ("FAC") ¶¶ 2-6. The Court refers  
28 to all three entities as Wells Fargo, the latest successor-in-  
interest.

<sup>2</sup> Defendants filed an appendix of exhibits in support of their  
motion for summary judgment. ECF Nos. 45-5 - 45-11 ("Defs.'  
Exs."). Plaintiff also filed an appendix of exhibits. ECF Nos.  
52, 53 ("Pl.'s Exs.").

1 consisted of two loans: the first in the principal amount of  
2 \$380,000 ("the First Loan") and the second, an equity line of  
3 credit, in the amount of \$50,000 ("the Second Loan"). Id. Both  
4 loans were secured by deeds of trust recorded against the Property.  
5 Id.

6 In 2008, Plaintiff was laid off from her teaching position at  
7 San Francisco State University. Chang Decl. ISO SAC ¶ 3; ECF No.  
8 22 ("FAC") ¶ 7. Sometime thereafter, Plaintiff fell behind on her  
9 loan payments. Id. In September 2009, Wells Fargo initiated  
10 foreclosure proceedings on the Second Loan by recording and mailing  
11 a notice of default. Defs.' Ex. 8. According to the notice,  
12 Plaintiff was \$4,525.97 in arrears. In November 2009, Plaintiff's  
13 financial problems worsened. She suffered a wrist injury from a  
14 dog assault which interfered with her ability to work. Chang Decl.  
15 ISO SAC ¶ 3; Defs.' Ex. 6 ("Chang Dep.") at 29. On January 11,  
16 2010, a notice of trustee's sale was recorded and mailed to  
17 Plaintiff in connection with the Second Loan. Defs.' Ex. 10. The  
18 trustee's sale on the Second Loan was initially scheduled for  
19 February 1, 2010. Id. Unhelpfully, neither party has submitted  
20 any information indicating whether Defendants initiated foreclosure  
21 proceedings against the First Loan during this period.

22 Due to her financial difficulties, Plaintiff attempted to  
23 obtain a loan modification on both her First Loan and Second Loan.  
24 In September 2009, Plaintiff initiated loan modification  
25 discussions with Wells Fargo. Chang Dep. at 40. Wells Fargo then  
26 reviewed Plaintiff's loans under the Mortgage Assistance Program  
27 ("MAP") and the Home Affordable Modification Program ("HAMP").  
28

1 Dolan Decl. ¶ 12.<sup>3</sup> During the review process, the foreclosure sale  
2 was postponed four times. Defs.' Ex. 18. The final postponement,  
3 dated April 12, 2010, set the foreclosure sale for May 12, 2010.

4 Id.

5 Underwriters ultimately determined that Plaintiff was  
6 ineligible for a modification under either MAP or HAMP. Dolan  
7 Decl. ¶ 13. Wells Fargo notified Plaintiff that she was ineligible  
8 for MAP and HAMP programs in four separate letters sent between  
9 April 9, 2010 and April 16, 2010. Defs.' Exs. 14-17. An April 9  
10 letter stated that the First Loan was ineligible for modification  
11 under MAP. Defs.' Ex. 14. That message was repeated in a letter  
12 dated April 12. Defs.' Ex. 15. Another letter dated April 12  
13 stated that the Second Loan was ineligible for modification under  
14 MAP. Defs.' Ex. 16. The two April 12 letters also stated: "Please  
15 note that during our review of your situation, we suspended the  
16 foreclosure process. The foreclosure process against the property  
17 will now resume." Defs.' Ex. 15-16. An April 16 letter stated  
18 that the First Loan was also ineligible for modification under  
19 HAMP. Defs.' Ex. 17.

20 Plaintiff states that, following receipt of the April 9 and  
21 April 12, 2010 letters, she immediately and repeatedly called Wells  
22 Fargo and requested that it explain the status of her pending loan  
23 modification applications. ECF No. 51-1 ("Chang MSJ Decl.") ¶ 24.  
24 Plaintiff also states that "[a]t no time in my telephone  
25 conversations with defendant in April and May[] 2010[] did  
26 defendant tell me that the Trustee's sale was still pending or that

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27 <sup>3</sup> Michael Dolan ("Dolan"), who is employed in Wells Fargo's Loss  
28 Mitigation Support Group, filed a declaration in support of  
Defendants' motion for summary judgment. ECF No. 48-1 ("Dolan  
Decl.")

1 there was a Trustee's sale date set." Id. ¶ 25. There is no  
2 indication that Plaintiff requested this information during her  
3 telephone conversations with Wells Fargo. Plaintiff claims that it  
4 was her understanding that both the First Loan and Second Loan were  
5 still being considered for modification in April and May of 2010  
6 and that "defendant more than once confirmed that there would be no  
7 foreclosure while loan modification was being considered." Id. ¶  
8 27.

9 On May 12, 2010, the Property was sold at a trustee's sale to  
10 a third party. Defs.' Ex. 20. Plaintiff states that the sale took  
11 her by "complete surprise" because she thought she was still being  
12 considered for a loan modification. Chang MSJ Decl. ¶ 13. She  
13 also states that, had she been aware of the status of the  
14 foreclosure process, she would have sought a private sale of the  
15 Property so that she could recover her equity. Id. ¶ 14.  
16 Plaintiff claims that the foreclosure sale caused her to lose  
17 equity in excess of \$250,000. Id. ¶ 15. Additionally, Plaintiff  
18 claims that Defendant's conduct has materially and adversely  
19 affected her credit score. Id.

20 **B. Procedural History**

21 Plaintiff brought this action in California state court on  
22 March 21, 2011, alleging nine causes of action, including a claim  
23 for promissory estoppel. ECF No. 1, Ex. A. After the action was  
24 removed to federal court, Defendants moved to dismiss. ECF No. 13.  
25 On July 21, 2011, the motion was granted in part and denied in  
26 part. ECF No. 21. The promissory estoppel claim remained  
27 undisturbed, but four of Plaintiff's claims were dismissed with  
28 prejudice, and the remainder were dismissed with leave to amend.

1 Id. at 15-16. Plaintiff subsequently amended a number of her  
2 claims and Defendants again moved to dismiss them. ECF Nos. 22,  
3 28. On November 15, 2011, the Court dismissed the amended claims,  
4 leaving only Plaintiff's claim for promissory estoppel undisturbed.  
5 ECF No. 37.

6 On April 20, 2012, the Court issued a scheduling order,  
7 setting trial for September 10, 2012 and the discovery cut-off for  
8 July 10, 2012. ECF No. 44 ("4/20/2012 Scheduling Order"). The  
9 Court also set August 10, 2012 as the last date for dispositive  
10 motions to be heard. Id. On June 5, 2012, Plaintiff filed her  
11 motion for leave to file a SAC. Plaintiff seeks to add new causes  
12 of action for negligent performance of an assumed duty and damage  
13 to credit. SAC Mot., Ex A. On June 22, 2012, Defendants filed  
14 their motion for summary judgment.

15

16 **III. DISCUSSION**

17 **A. Plaintiff's Motion for Leave to Amend**

18 Federal Rule of Civil Procedure 15(a)(1) allows a party to  
19 amend its pleading once as a matter of course during a certain  
20 period of time. Fed. R. Civ. P. 15(a)(1). In all other cases,  
21 including this one, "a party may amend its pleading only with the  
22 opposing party's written consent or the court's leave." Fed. R.  
23 Civ. P. 15(a)(2). "The court should freely give leave when justice  
24 so requires." Id. Thus, in cases such as this, "[t]he standard  
25 for granting leave to amend is generous." Balistreri v. Pacifica  
26 Police Dept., 901 F.2d 696, 701 (9th Cir. 1988). "The court  
27 considers five factors in assessing the propriety of leave to  
28 amend--bad faith, undue delay, prejudice to the opposing party,

1 futility of amendment, and whether the plaintiff has previously  
2 amended the complaint." United States v. Corinthian Colleges, 655  
3 F.3d 984, 995 (9th Cir. 2011).

4 Here there is no evidence of bad faith.<sup>4</sup> As to undue delay,  
5 Plaintiff could have brought her two proposed claims earlier, as  
6 they do not rest on new facts uncovered through discovery. "Undue  
7 delay by itself, however, is insufficient to justify denying a  
8 motion to amend." Bowles v. Reade, 198 F.3d 752, 758 (9th Cir.  
9 1999). Also weighing against Plaintiff's motion is the fact that  
10 she has amended her complaint twice before. Additionally,  
11 amendment would prejudice Defendants to a certain extent since they  
12 may need additional discovery to respond to Plaintiff's new claims.  
13 See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1388 (9th Cir. 1990).  
14 The discovery cut-off has already passed and trial is set to  
15 commence in one month. See 4/20/2012 Scheduling Order. However,  
16 pre-trial dates and deadlines can be re-scheduled and it is  
17 doubtful that additional discovery would be excessively burdensome  
18 since Plaintiff's new causes of action are based on many of the  
19 same facts as her existing claim for promissory estoppel. The  
20 dispositive factor here is futility of amendment. As Plaintiff's  
21 proposed claims for negligent performance of an assumed duty and  
22 damage to credit cannot possibly succeed, granting Plaintiff leave  
23 to amend would not help her case.

24 Plaintiff's proposed claim for negligent performance of an  
25 assumed duty is predicated on the theory that once Defendants  
26 assumed the obligation of reviewing Plaintiff's loan modification

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28 <sup>4</sup> Defendants make the implausible argument that Plaintiff's bad  
faith is evidenced by the fact that she moved to amend before  
Defendant moved for summary judgment. See Opp'n to SAC Mot. at 5.

1 applications, they owed Plaintiff a duty of care in carrying out  
2 the task. SAC Mot. at 4. Plaintiff contends that Defendants  
3 breached that duty by failing to promptly notify Plaintiff of the  
4 scheduled date for the foreclosure sale. Id.

5 The Court disagrees. Under California law, "a financial  
6 institution owes no duty of care to a borrower when the  
7 institution's involvement in the loan transaction does not exceed  
8 the scope of its conventional role as a mere lender of money."  
9 Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096  
10 (1991). Plaintiff asserts that Defendants stepped outside their  
11 conventional roles by committing to review Plaintiff's application  
12 for a loan modification. SAC Opp'n at 3-4. However, assessing a  
13 borrower's eligibility for a loan modification is intimately tied  
14 to a financial institution's lending role. See DeLeon v. Wells  
15 Fargo Bank, N.A., 10-CV-01390-LHK, 2011 U.S. Dist. LEXIS 8296, \*26-  
16 27 (N.D. Cal. Jan. 28, 2011). Further, even if Defendants owed  
17 Plaintiff some kind of tort duty by accepting her loan modification  
18 application, that duty was limited to processing and reviewing the  
19 application with due care. Plaintiff offers no authority which  
20 would suggest this narrow duty encompasses an obligation to ensure  
21 that a borrower is aware of the date of a postponed foreclosure  
22 sale.

23 Amending the pleadings to add Plaintiff's proposed cause of  
24 action for damage to credit would also be futile. Even if damage  
25 to credit constitutes an independent cause of action -- and it is  
26 not clear that it does -- it must be predicated on some culpable  
27 conduct on the part of the defendant. Here, Plaintiff argues that  
28 Defendant engaged in culpable conduct by "foreclos[ing] on



1 plaintiff's residence without giving her proper notice and  
2 opportunity to receive her equity." SAC Mot. at 5. However, as  
3 set forth in this Order and the Court's prior orders on Defendants'  
4 motions to dismiss, the Court cannot conclude that Defendant  
5 engaged in any wrongdoing when they foreclosed on the Property.  
6 Accordingly, Plaintiff could not possibly state a claim for damage  
7 to credit.

8 For these reasons, the Court DENIES Plaintiff's motion for  
9 leave to file a SAC.

10 **B. Defendants' Motion for Summary Judgment**

11 Entry of summary judgment is proper "if the movant shows that  
12 there is no genuine dispute as to any material fact and the movant  
13 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
14 56(a). Summary judgment should be granted if the evidence would  
15 require a directed verdict for the moving party. Anderson v.  
16 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]  
17 mandates the entry of summary judgment . . . against a party who  
18 fails to make a showing sufficient to establish the existence of an  
19 element essential to that party's case, and on which that party  
20 will bear the burden of proof at trial." Celotex Corp. v. Catrett,  
21 477 U.S. 317, 322 (1986).

22 Here, the evidence before the Court cannot support Plaintiff's  
23 claim for promissory estoppel, even when viewed in the light most  
24 favorable to her. The elements of a claim for promissory estoppel  
25 are: "(1) a promise clear and unambiguous in its terms; (2)  
26 reliance by the party to whom the promise is made; (3) [the]  
27 reliance must be both reasonable and foreseeable; and (4) the party  
28 asserting the estoppel must be injured by his reliance." Aceves v.

1 U.S. Bank, N.A., 192 Cal. App. 4th 218, 225 (Cal. Ct. App. 2011)  
2 (internal quotations omitted). "The vital principle is that he who  
3 by his language or conduct leads another to do what he would not  
4 otherwise have done shall not subject such person to loss or injury  
5 by disappointing the expectations upon which he acted." Wilson v.  
6 Bailey, 8 Cal. 2d 416, 423 (Cal. 1937) (quoting Dickerson v.  
7 Colgrove, 100 U.S. 578, 580 (1880)).

8 Plaintiff alleges that Defendants promised they would not  
9 proceed with the foreclosure sale so long as they were considering  
10 Plaintiff's application for a loan modification. FAC ¶ 24. The  
11 undisputed facts show that Defendants honored that promise.  
12 Defendants denied Plaintiff's application for a loan modification  
13 on April 12, 2010, and did not foreclose on the Property until one  
14 month later. See Defs.' Exs. 15, 16. The April 12, 2010 denial  
15 letters informed Plaintiff that Defendants were "unable to proceed  
16 with [Plaintiff's] loan modification request." Id. The letters  
17 also stated: "Please note that during our review of your situation,  
18 we suspended the foreclosure process. The foreclosure process  
19 against the property will now resume." Id. If, after receiving  
20 these letters, Plaintiff believed that her modification application  
21 was still under review and the foreclosure sale would be postponed  
22 further, her belief was unforeseeable and unreasonable. Such  
23 reliance cannot support a claim for promissory estoppel.

24 In her declaration, Plaintiff suggests that Defendants later  
25 resumed their consideration of her loan modification application  
26 and indicated that they would continue to postpone the foreclosure  
27 sale. See Chang MSJ Decl. ¶¶ 18-29. The Court finds that the  
28 declaration does not create a triable issue of fact. The

1 declaration describes Plaintiff's understanding of the status of  
2 her loans based on her telephone conversations with Defendants'  
3 representatives, as well as what Defendants' representatives did  
4 not say during those conversations. See id. Absent from the  
5 declaration is any indication that Defendants affirmatively stated  
6 that Plaintiff's loan was still under review after April 12, 2010.

7 Plaintiff also makes much of the confusion created by the fact  
8 that, in April 2010, her First Loan was in active foreclosure while  
9 her Second Loan was not. See MSJ Opp'n at 4. Plaintiff states:  
10 "Often when I called, I was asked for a loan number and in several  
11 instances I provided the loan number for the First Loan, Loan No.  
12 1394. Defendant was not in fact foreclosing on this loan." Chang  
13 MSJ Decl. ¶ 27. It appears that Plaintiff took this to mean that  
14 the Property would not be subject to a foreclosure sale.  
15 Plaintiff's confusion about her loans cannot save her claim for  
16 promissory estoppel. There is no evidence that Defendants made a  
17 clear and unambiguous promise that they would refrain from  
18 foreclosing on one loan if the other was not in active foreclosure.

19 Additionally, Plaintiff has not offered any evidence to  
20 suggest that her First Loan was under review during the relevant  
21 period. In the April 12 denial letter, Defendants informed  
22 Plaintiff that the First Loan was ineligible for a loan  
23 modification and that foreclosure proceedings would resume on that  
24 loan. See Defs.' Ex. 15. Plaintiff points to a number of  
25 documents pertaining to the First Loan which purportedly contradict  
26 the April 12 denial letter. See MSJ Opp'n at 4-5 (citing Pl.'s  
27 Exs. A, D, E, F). The Court sees no contradiction.

28

1 Plaintiff first refers to a delinquency record maintained by  
2 Wells Fargo, dated April 19, 2010, which states: "GATHERING DETAILS  
3 ON RFD & FNCLS TO FURTHER RVEW SITUATION . . . . NO FCL SCHEDULED  
4 SALE DATE." Pl.'s Ex. A. However, Plaintiff has offered no  
5 evidence to suggest that these statements were actually conveyed to  
6 her or that this record shows that Defendant had committed to  
7 reconsidering her modification application. See ECF NO. 54-1 Ex. A  
8 ("Dolan Dep.") at 136-37. Second, Plaintiff points to the April 9,  
9 2010 denial letter, which states: "Even though you are ineligible  
10 for assistance under [MAP], the [First] loan may still be eligible  
11 for other loss mitigation options . . . ." Defs.' Ex. 14.<sup>5</sup> This  
12 statement is irrelevant. The fact that the First Loan was eligible  
13 for other loss mitigation options does not mean that it was still  
14 under review by Defendants. Third, Plaintiff points to a letter  
15 from Defendants dated August 3, 2010, which states that Plaintiff  
16 was again denied for the HAMP program. Pl.'s Ex. E. The letter  
17 goes on to say: "You have 30 calendar days from the date of this  
18 notice to contact [Defendants] to discuss the reason for non-  
19 approval . . . no foreclosure sale will be conducted and you will  
20 not lose your home during this 30-day period . . . ." Id.  
21 Plaintiff could not have relied on the representations in this  
22 letter since it was sent months after the foreclosure sale took  
23 place. Finally, Plaintiff refers to a letter from Wells Fargo,  
24 dated May 5, 2010, thanking Plaintiff for her "home equity  
25 application." Pl.'s Ex. F. But Plaintiff's application for a home  
26 equity loan is irrelevant to the status of her application for a  
27 loan modification.

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28 <sup>5</sup> Plaintiff also filed a copy of this document as Plaintiff's  
Exhibit D.

1 For these reasons, the Court GRANTS Defendants' Motion for  
2 Summary Judgment as to Plaintiff's sole remaining claim for  
3 promissory estoppel.

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5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court DENIES Plaintiff Cynthia  
7 Chang's motion for leave to file a second amended complaint and  
8 GRANTS Defendants Wachovia Mortgage and Well Fargo Bank, N.A.'s  
9 motion for summary judgment. The Court will enter a separate  
10 judgment on Plaintiff's sole remaining claim for promissory  
11 estoppel.

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13 IT IS SO ORDERED.

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15 Dated: August 6, 2012



UNITED STATES DISTRICT JUDGE

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