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UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

RAHILA KHAN,

Plaintiff,

v.

RECONTRUST COMPANY, et al.,

Defendants.

No. C 12-01107 LB

**ORDER GRANTING SPS'S MOTION
TO DISMISS AND GRANTING IN
PART AND DENYING IN PART
RECONTRUST AND BANK OF
AMERICA'S MOTION TO DISMISS**

[Re: ECF Nos. 94 & 97]

INTRODUCTION

Plaintiff Rahila Khan, proceeding *pro se*, filed this action against defendants ReconTrust Company ("ReconTrust"), Bank of America, N.A. ("Bank of America"), and Select Portfolio Servicing, Inc. ("SPS") (collectively, "Defendants") for claims based on the circumstances surrounding her mortgage loans and her subsequent default on those loans. (*See* Second Amended Complaint ("SAC"), ECF No. 84.¹) Defendants move to dismiss Ms. Khan's Second Amended Complaint. Upon consideration of the papers submitted and the applicable legal authority, the court grants SPS's motion and grants in part and denies in part ReconTrust and Bank of America's

¹ Record citations are to documents in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 motion.²

2 **STATEMENT**

3 **I. MS. KHAN'S ALLEGATIONS**

4 Ms. Khan alleges that in September 2006, she entered into two mortgage loans (hereinafter,
5 referred to as the "First Loan" and the "Second Loan"), which she used to purchase property at
6 39959 Michelle Street, Fremont, California. (See First Amended Complaint ("FAC"), ECF No. 22,
7 ¶ 2; SAC ¶ 2; SPS RJN, Exs. A, B, ECF No. 95.³) In January 2009, Ms. Khan began falling behind
8 on her mortgage payments "because the interest rates were exorbitant and it was financially
9

10 ² All parties have consented to the undersigned's jurisdiction. Consent (ReconTrust and
11 Bank of America), ECF No. 8; Consent (Ms. Khan), ECF No. 9; Consent (SPS), ECF No. 107.
12 Pursuant to Civil Local Rule 7-1(b), the court finds this matter to be suitable for determination
13 without oral argument and vacates the March 5, 2015 hearing.

14 ³ SPS asks the court to take judicial notice of the deeds of trust relating to Ms. Khan's two
15 loans, namely, (1) a Deed of Trust that was recorded with the Alameda County Recorder's Office on
16 September 18, 2006 as Document No. 2006351807, and (2) a Deed of Trust that was recorded with
17 the Alameda County Recorder's Office on September 18, 2006 as Document No. 2006351808. (SPS
18 RJN, ECF No. 95.) And ReconTrust and Bank of America ask the court to take judicial notice of the
19 following documents: (1) a Deed of Trust that was recorded with the Alameda County Recorder's
20 Office on September 18, 2006 as Document No. 2006351807; (2) an Assignment of Deed that was
21 that was recorded with the Alameda County Recorder's Office on June 28, 2011 as Document No.
22 2011183101; (3) a Notice of Default that was recorded with the Alameda County Recorder's Office
23 on September 21, 2011 as Document No. 2011268436; (4) a Notice of Trustee's Sale that was
24 recorded with the Alameda County Recorder's Office on December 27, 2011 as Document No.
2011375533; (5) an Assignment of Deed that was recorded with the Alameda County Recorder's
Office on August 17, 2012 as Document No. 2012271539; (6) a Substitution of Trustee that was
recorded with the Alameda County Recorder's Office on September 24, 2012 as Document No.
2012311867; (7) a Notice of Rescission that was recorded with the Alameda County Recorder's
Office on July 1, 2013 as Document No. 2013227770; and (8) the parties' joint case management
conference statement that was filed in this action on December 4, 2014. (ReconTrust and Bank of
America RJN, ECF No. 97-1.)

25 The court may take judicial notice of matters of public record. *Lee v. City of Los Angeles*,
26 250 F.3d 668, 689 (9th Cir. 2001). Because the documents listed above are public records, the court
may take judicial notice of the undisputed facts contained in them. *See Hotel Employees & Rest.*
27 *Employees Local 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 978 (N.D. Cal. 2005); Fed. R. Evid.
201(b); *see also Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 264-67 (2011). The
28 court does so now.

1 impossible for her to [make them].” (SAC ¶ 13.)

2 Thereafter Ms. Khan sought, and/or thought she received, trial or permanent loan modifications
3 of the First Loan on three occasions from Bank of America. (See SAC ¶¶ 7, 14.) On the first
4 occasion, Ms. Khan alleges that she obtained a temporary loan modification in September 2009,
5 made modified payments in October and November 2009, received a permanent loan modification
6 contract in January 2010, and signed and returned the permanent loan modification contract and
7 provided evidence of her income that same month, but Bank of America nevertheless cancelled the
8 modification, stating that it never received proof of her income (a claim she denies). (*Id.* ¶ 14(A).)
9 On the second occasion, Ms. Khan alleges that she obtained another loan modification in January
10 2010 and that she made modified payments in February and March 2010, but Bank of America
11 cancelled the modification without giving any reason for its doing so. (*Id.* ¶ 14(B).) On the third
12 occasion, Ms. Khan alleges that she obtained a loan modification in April 2010. (*Id.* ¶ 14(C).) She
13 alleges that she was required to supply additional information, which she did, and that she believed
14 the modification was in place until she received a Notice of Default from ReconTrust. (*Id.*) Ms.
15 Khan alleges that, despite Bank of America’s representations to the contrary, it turns out that Bank
16 of America never actually had authority to modify her First Loan because of Bank of America’s
17 duties under the pooling and service agreement (“PSA”) to which her First Loan had been assigned.
18 (*Id.* ¶ 14(E).)

19 A Notice of Default, which was recorded by ReconTrust on September 21, 2011, states that Ms.
20 Khan was behind on her mortgage payments by \$151,302.53 as of September 20, 2011. (*Id.* ¶ 15;
21 ReconTrust and Bank of America RJN, Ex. C, ECF No. 97-1.) Attached to the Notice of Default is
22 a declaration of Chamkiri Miller, a Mortgage Servicing Specialist II at Bank of America, who
23 marked a box indicating that Bank of America “tried with due diligence to contact [Ms. Khan] in
24 accordance with California Civil Code § 2923.5.” (SAC ¶ 18; ReconTrust and Bank of America
25 RJN, Ex. C, ECF No. 97-1.) The box indicating that Bank of America “has contacted [Ms. Khan] to
26 assess [her] financial situation and explore options for [her] to avoid foreclosure” was not marked.
27 (ReconTrust and Bank of America RJN, Ex. C, ECF No. 97-1.) In any event, Ms. Khan alleges Ms.
28 Miller did not initiate any attempt to try to contact” her. (SAC ¶ 19.)

1 SPS became the servicer of her loans in June 2012. (*Id.* ¶ 4(C)). Ms. Khan alleges that SPS “has
2 been refusing to accept mortgage payments on the loans, have not recognized the modifications, and
3 continue[s] to add illegal and unexplained charges to the loan payment amount.” (*Id.*)

4 In addition to the allegations summarized above, Ms. Khan also alleges that Defendants, along
5 with others, failed to properly “securitize” her loan pursuant to the applicable PSA and therefore
6 have no right to foreclose on her property. (*See id.* ¶¶ 8-9, 25-26.) She also alleges that Defendants
7 failed to properly substitute the trustee under the deed of trust for the First Loan and therefore
8 Defendants have wrongfully foreclosed on her property. (*See id.* ¶¶ 11, 16-17, 20-24.) For reasons
9 explained below, these additional allegations fail to support Ms. Khan’s sole remaining fraud claim.

10 **II. PROCEDURAL HISTORY**

11 Ms. Khan filed this action against ReconTrust and Bank of America on March 6, 2012. The
12 court dismissed her original complaint on July 2, 2012, but allowed her to file an amended one.
13 (7/2/2012 Order, ECF No. 16.) She did so on September 6, 2012, and as she did in her original
14 complaint, she alleged claims for (1) fraud, (2) violation of TILA, (3) violation of RESPA, and (4)
15 wrongful foreclosure in violation of California Civil Code §§ 2923.5 and 2924. (FAC, ECF No. 22.)
16 ReconTrust and Bank of America moved to dismiss her First Amended Complaint, and on October
17 23, 2012, the court granted in part their motion. (10/23/2012 Order, ECF No. 26.) The court
18 dismissed with prejudice Ms. Khan’s TILA, RESPA, and wrongful foreclosure claims, but ruled that
19 her fraud claim survived. (*Id.*) ReconTrust and Bank of America then answered the First Amended
20 Complaint. (Answer, ECF No. 30.)

21 After this, the parties engaged in nearly two years of mediation, with the assistance of the court’s
22 ADR program and pro bono counsel. After those negotiations finally failed, Ms. Khan filed a
23 motion asking for permission to file a second amended complaint. (Motion for Leave to File SAC,
24 ECF No. 73.) She sought permission to do two things: (1) add SPS as a defendant to her surviving
25 fraud claim, and (2) add a new fraud claim against Bank of America, ReconTrust, and SPS with
26 respect to a completely separate property that had not been at issue in this action. On November 3,
27 2014, the court granted her motion insofar as she wanted to add SPS to her surviving fraud claim but
28 denied her motion insofar as she wanted to add claims regarding a separate property. (11/3/2014

1 Order, ECF No. 82.) She filed her Second Amended Complaint on December 4, 2014. (SAC, ECF
2 No. 84.) She brings a single fraud claim against ReconTrust, Bank of America, and SPS. (*Id.* ¶¶ 27-
3 31.)

4 On December 30, 2014, Ms. Khan filed a motion for leave to file a third amended complaint.
5 (Motion for Leave to File TAC, ECF No. 90.) The court denied her motion on January 7, 2015.
6 (1/7/2015 Order, ECF No. 92.)

7 On January 14, 2015, SPS filed a motion to dismiss Ms. Khan’s Second Amended Complaint.
8 (SPS Motion, ECF No. 94.) The next day, ReconTrust and Bank of America did so, too.
9 (ReconTrust Motion, ECF No. 97.) Ms. Khan filed oppositions to both motions, and Defendants
10 filed replies. (Opposition to ReconTrust Motion, ECF No. 98; Opposition to SPS Motion, ECF No.
11 99; SPS Reply, ECF No. 104; ReconTrust Reply, ECF No. 105.)

12 ANALYSIS

13 I. LEGAL STANDARD

14 Rule 8(a) requires that a complaint contain a “short and plain statement of the claim showing that
15 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a
16 defendant with “fair notice” of the claims against it and the grounds for relief. *See Bell Atlantic*
17 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted).

18 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does
19 not contain enough facts to state a claim to relief that is plausible on its face. *See Twombly*, 550
20 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the
21 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
22 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a
23 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
24 unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While a complaint attacked by a Rule
25 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to
26 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
27 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be
28 enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (internal

1 citations and parentheticals omitted).

2 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true
3 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551
4 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). In
5 addition, courts may consider documents attached to the complaint. *Parks School of Business, Inc.*
6 *v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted). If the court dismisses the
7 complaint, it should grant leave to amend even if no request to amend is made “unless it determines
8 that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203
9 F.3d 1122, 1127 (9th Cir. 2000) (*quoting Cook, Perkiss and Liehe, Inc. v. Northern California*
10 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)). But when a party repeatedly fails to cure
11 deficiencies, the court may order dismissal without leave to amend. *See Ferdik v. Bonzelet*, 963
12 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where district court had
13 instructed *pro se* plaintiff regarding deficiencies in prior order dismissing claim with leave to
14 amend).

15 **II. APPLICATION**

16 **A. Ms. Khan Lacks Standing to Enforce the Terms of the PSA**

17 Before addressing her fraud claim, the court notes that Ms. Khan alleges that Defendants, along
18 with others, failed to properly “securitize” her loan pursuant to the applicable PSA and therefore
19 have no right to foreclose on her property. (*See SAC ¶¶ 8-9, 25-26.*) Bank of America and
20 ReconTrust argue that Ms. Khan does not have standing to pursue such a claim. They are right. As
21 this court previously explained in a different action:

22 “Ninth Circuit district courts have come to different conclusions when analyzing
23 a plaintiff’s right to challenge the securitization process . . .” *Johnson v. HSBC*
Bank USA, N.A., No. 3:11-cv-2091-JM-WVG, 2012 WL 928433, at *2 (S.D. Cal.
24 March 19, 2012) (collecting cases). The majority position is that plaintiffs lack
25 standing to challenge noncompliance with a pooling and service agreement or other
26 similar agreement unless they are parties to or third-party beneficiaries of the
27 agreement. *See Aniel v. GMAC Mortg., LLC*, No. C 12-04201 SBA, 2012 WL
28 5389706, at *4 (N.D. Cal. Nov. 2, 2012) (collecting cases); *Almutarreb v. Bank of*
New York Trust Co., N.A., No. C-12-3061 EMC, 2012 WL 4371410, at *2 (N.D. Cal.
Sept. 24, 2012) (disagreeing with *Vogan* and finding that because plaintiffs were
neither parties nor third party beneficiaries to pooling and service agreement, they
lacked standing to challenge whether loan transfer occurred outside time limits in
agreement); *Madlaing v. JPMorgan Chase Bank, N.A.*, No. CV F 12-2069 LJO SMS,

1 2013 WL 2403379, at *8 (E.D. Cal. May 31, 2013) (plaintiff lacked standing to
2 enforce pooling and service agreement because he was neither party to nor intended
3 third-party beneficiary of agreement); *but see Vogan v. Wells Fargo Bank, N.A.*, No.
4 2:11-CV-02098-JAM-KJN, 2011 WL 5826016, at *7 (E.D. Cal. Nov. 17, 2011)
(allowing UCL claim when plaintiffs alleged that assignment was executed after the
closing date of securities pool, “giving rise to a plausible inference that at least some
part of the recorded assignment was fabricated”). The court follows the majority approach.

5 Plaintiff urges the court to follow *Glaski v. Bank of America, N.A.*, 218 Cal. App.
6 4th 1079 (2013), in which the court held that a borrower may have standing to
7 challenge a foreclosure where the note holder acquired the note from a party who had
8 been assigned it in a void transaction (under New York law). *Id.* at 1095. There, the
9 note was assigned to a securitized trust after the date that the trust was closed for
10 purposes of acquiring additional assets. *Id.* The trust in *Glaski* was formed under
11 New York law, which the court interpreted to confer standing in the specific
12 situation. *See id.* at 1097. The court noted that “some federal district courts sitting in
13 California have rejected the post-closing date theory of invalidity on the grounds that
14 the borrower does not have standing to challenge an assignment between two other
15 parties.” *Id.* at 1098. The court distinguished those cases, however, because “they do
16 not apply New York trust law to the operation of the securitized trusts in question.”
Id. at 1098.

17 Every court in this district that has evaluated *Glaski* has found it unpersuasive.
18 *See Zapata v. Wells Fargo Bank, N.A.*, No. C 13-04288 WHA, 2013 WL 6491377, at
19 *2 (N.D. Cal. Dec. 10, 2013) (collecting cases). The court follows those cases and
20 concludes that plaintiffs lack standing to challenge noncompliance with a PSA in
21 securitization unless they are parties to the PSA or third party beneficiaries of the
22 PSA. Accordingly, to the extent Plaintiff’s claims are based on violation of a PSA,
23 the court dismisses them with leave to amend facts showing that Plaintiff is a party to
24 or third-party beneficiary of that PSA.

25 *Rubio v. U.S. Bank, N.A.*, No. C 13-05752 LB, 2014 WL 1318631, at *7-8 (N.D. Cal. Apr. 1, 2014).

26 Here, Ms. Khan has given no indication that she is a party to or a third-party beneficiary of the PSA,
27 and the court cannot see how she would be. Accordingly, the court concludes that Ms. Khan lacks
28 standing to enforce the terms of the PSA.

B. Ms. Khan’s Wrongful Foreclosure Allegations Are Improper

Ms. Khan also alleges that Defendants failed to properly substitute the trustee under the deed of
trust for the First Loan and therefore Defendants have wrongfully foreclosed on her property. (*See*
SAC ¶¶ 11, 16-17, 20-24.) The court already dismissed with prejudice Ms. Khan’s wrongful
foreclosure claim in its 12/23/2012 Order. It thus is improper for her to try to reallege such a claim.
Even so, the court notes that the Notice of Default was rescinded, making her claim moot. (*See*
ReconTrust and Bank of America RJN, Ex. G, ECF No. 97-1 at 42.)

C. Ms. Khan’s Fraud Claim against SPS Must Be Dismissed

1 Ms. Khan adds SPS to her fraud claim in the Second Amended Complaint. She does not,
2 however, even mention SPS’s name in any of the paragraphs within the claim. (See SAC ¶¶ 27-31.)
3 Instead of describing anything that SPS did, Ms. Khan’s claim focuses entirely on Bank of
4 America’s failure to permanently modify her loan. (See *id.*) In fact, the only time Ms. Khan
5 mentions SPS in her Second Amended Complaint is when she first identifies SPS as a Defendant.⁴
6 There, she alleges that “SPS became the servicer of her loans in June 2012” and that SPS “has been
7 refusing to accept mortgage payments on the loans, have not recognized the modifications, and
8 continue[s] to add illegal and unexplained charges to the loan payment amount.” (*Id.* ¶ 4(c).)

9 Ms. Khan does not sufficiently allege a fraud claim against SPS. As the court explained in its
10 10/23/2012 Order, “[a] cause of action for fraud [under California law] requires the plaintiff to prove
11 (a) a knowingly false misrepresentation by the defendant, (b) made with the intent to deceive or to
12 induce reliance by the plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting damages.”
13 *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192 (9th Cir. 2001) (quoting *Wilkins v. Nat’l Broadcasting*
14 *Co., Inc.*, 71 Cal. App. 4th 1066, 1082 (1999)); see also Cal. Civ. Code § 1572. Ms. Khan’s
15 allegations about SPS do not satisfy these elements. Most glaringly, she does not allege that SPS
16 has made any false misrepresentation—the hallmark of any fraud claim. Her claim against SPS,
17 then, must be dismissed for this reason.⁵

18 The real issue is whether to let Ms. Khan try again. On one hand, Ms. Khan is proceeding pro
19 se, this was her first attempt to allege a claim against SPS, and she did put forth some SPS-related
20 facts in her opposition, which she presumably could include in an amended complaint. On the other
21 hand, this action has been going on for over three years, the court is fully aware of the factual

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23 ⁴ In other places in her Second Amended Complaint, Ms. Khan has marked out references to
24 the “PSA” relating to her loans and replaced it with “SPS.” (See SAC ¶¶ 8, 14(E).) Inserting SPS’s
25 name in place of “PSA,” however, does not make sense in the context of the sentences.

26 ⁵ SPS also argues that Ms. Khan’s claim is barred by the applicable three-year statute of
27 limitations because she alleges that she did not receive a loan modification in 2009 and 2010 but she
28 did not bring her claim against SPS until 2015. The argument, however, relates to her allegations
against Bank of America. Her allegations, such as they are, against SPS presumably refer to SPS’s
conduct that occurred after SPS became the servicer of her loans in 2012, so the application of the
statute of limitations is not so clear.

1 context for her claim, and her allegations against SPS do not even seem to suggest a fraud claim.
2 All of the fraud-related allegations relate to Bank of America's conduct regarding the loan
3 modification attempts, and SPS was not even in the picture when those occurred. Upon considering
4 these points, the court believes that Ms. Khan should have another chance to allege a claim against
5 SPS. Accordingly, Ms. Khan's fraud claim against SPS is dismissed without prejudice.

6 **D. Ms. Khan's Fraud Claim against ReconTrust Must Be Dismissed, Too**

7 Ms. Khan also names ReconTrust as a Defendant to her fraud claim, but, like with SPS, she fails
8 to mention it in that claim. (*See* SAC ¶¶ 27-31.) Her fraud claim is based on Bank of America's
9 failure to permanently modify her loans, but the only thing ReconTrust is alleged to have done is to
10 have served and recorded a notice of default. (*Id.* ¶ 15.) ReconTrust, then, has nothing to do with
11 her fraud claim. The court notes that this is the third time that Ms. Khan has unsuccessfully tried to
12 bring a fraud claim against ReconTrust. In light of her failure to remedy the deficiencies of her
13 claim, and ReconTrust's lack of involvement in the conduct on which her fraud claim is based, the
14 court dismisses with prejudice her fraud claim against ReconTrust.

15 **E. Ms. Khan's Fraud Claim against Bank of America Survives**

16 Ms. Khan also once again bring a fraud claim against Bank of America. (*See* SAC ¶¶ 27-31.)
17 Bank of America argues that it fails for three reasons.

18 First, and as it did previously, it argues that Ms. Khan has not alleged any fraudulent conduct
19 with the level of specificity required by Federal Rule of Civil Procedure 9(b). (*See* ReconTrust and
20 Bank of America Motion, ECF No. 97 at 9-10.) The fraud claim in the Second Amended
21 Complaint, like the one in her First Amended Complaint, alleges that Bank of America committed
22 fraud by telling her that she would receive a permanent loan modification but then denying her that
23 modification. The court previously found that the fraud claim in her First Amended Complaint was
24 sufficiently alleged. It stated:

25 The court disagrees that Ms. Khan's fraud allegations are not pled with sufficient
26 particularity. While she does not allege the names of the individuals with whom she
27 spoke or corresponded with, *see* FAC, ECF No. 22, ¶¶ 14(A)-(C), documents
28 attached to her complaint do show that she was offered a loan modification and
include the names of several individuals involved in the process. *See* FAC, ECF No.
22 at 32-38; FAC Exhibits, ECF No. 22-1 at 1-23. These documents, paired with her
allegations that she was offered loan modifications at other times and that she never

1 actually received one, are sufficient at this point. In other words, the court finds that
2 her allegations against Bank of America are ““specific enough to give defendants
3 notice of the particular misconduct which is alleged to constitute the fraud charged so
4 that they can defend against the charge and not just deny that they have done
5 anything wrong.” *Vess*, 317 F.3d at 1106 (quoting *Bly-Magee*, 236 F.3d at 1019).

6 (10/23/2012 Order, ECF No. 26 at 5-6.) The allegations in the Second Amended Complaint are just
7 as specific as those in the First Amended Complaint, and the court already found that the ones in the
8 First Amended Complaint met the heightened pleading requirements of Rule 9(b). The court sees no
9 reason to reconsider that decision or any meaningful difference between the allegations in the First
10 Amended Complaint and those in the Second Amended Complaint. Bank of America has sufficient
11 notice of the claim against it.

12 Second, Bank of America argues that Ms. Khan has not sufficiently alleged that she justifiably
13 relied on Bank of America’s misrepresentations. The court disagrees. Ms. Khan alleges that she
14 relied on Bank of America’s statements that she would receive a loan modification to her detriment
15 by not seeking other remedies, such as bankruptcy, to save her home. (*See* SAC ¶ 30.) Bank of
16 America says that this is not sufficient as a matter of law, but the opinion it cites for this point says
17 only that continuing to make payments on a loan does not constitute justifiably reliance. (*See*
18 *ReconTrust and Bank of America Motion*, ECF No. 97 at 1 (quoting *Lueras v. BAC Home Loans*
19 *Servicing, LP*, 221 Cal. App. 4th 49, 79 (Cal. Ct. App. 2013)).) That is not the reliance she alleges.

20 Third, Bank of America argues that Ms. Khan does not sufficiently allege damages. It points out
21 that Bank of America actually did offer her a permanent loan modification—during the negotiations
22 that it and Ms. Khan engaged in with the court’s ADR department after this action was filed. To
23 support this claim, it points to the parties’ statement in a case management conference statement
24 suggesting that Ms. Khan has accepted loan modifications from both Bank of America and SPS.
25 This is not enough. It is not clear to the court whether these loan modification in fact were accepted
26 and that Ms. Khan’s loans in fact have been modified. Bank of America has provided the court with
27 no evidence to show that this is true. Moreover, on a motion to dismiss, a court generally is
28 confined to the allegations in the complaint, and here Ms. Khan alleges that Bank of America did not
29 modify her loans despite telling her that they would be modified.

30 For these reasons, the court finds that Ms. Khan’s fraud claim against Bank of America once

1 again survives.

2 **CONCLUSION**

3 Based on the foregoing, the court grants SPS's motion to dismiss and grants in part and denies in
4 part ReconTrust and Bank of America's motion to dismiss. Ms. Khan's fraud claim against SPS is
5 dismissed without prejudice. Her fraud claim against ReconTrust is dismissed with prejudice. Her
6 fraud claim against Bank of America survives. If she chooses to do so, Ms. Khan must file a Third
7 Amended Complaint by March 9, 2015.

8 **IT IS SO ORDERED.**

9 Dated: February 23, 2015



10 LAUREL BEELER
11 United States Magistrate Judge

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