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

)	Case No. 13-0272 SC
)	
BING TING REN,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANTS'
Plaintiff,)	<u>MOTION TO DISMISS</u>
)	
v.)	
)	
WELLS FARGO BANK, N.A. and DOES)	
1-100, inclusive,)	
)	
Defendants.)	
)	
)	

I. INTRODUCTION

This is a foreclosure dispute. Now before the Court is Defendant Wells Fargo Bank, N.A.'s ("Defendant") motion to dismiss Plaintiff Bing Ting Ren's ("Plaintiff") first amended complaint. ECF Nos. 12 ("MTD"),¹ 14 ("FAC"). The motion is fully briefed, ECF Nos. 18 ("Opp'n"), 19 ("Reply"), and suitable for decision without oral argument, Civ. L.R. 7-1(b). As discussed below, Defendant's motion to dismiss is GRANTED in part and DENIED in part. The Court

¹ Defendant moves in the alternative for a more definite statement under Rule 12(e). See MTD at 13-14. The Court DENIES this motion as moot, since the Court grants Plaintiff leave to amend (partly for reasons of clarification) the claims that Defendant alleges were defectively pled.

1 GRANTS Defendant's request for judicial notice, ECF No. 17, under
2 Federal Rule of Evidence 201.

3
4 **II. BACKGROUND**

5 Plaintiff obtained two mortgages from Defendant around June
6 27, 2007. FAC ¶ 7. Each is governed by a separate promissory note
7 (the "note") and deed of trust (the "DOT") (collectively the "loan
8 agreements"). Id. Plaintiff alleges that she was current on her
9 second mortgage and, in fact, paid more than the monthly minimum on
10 it so she could pay it off before its maturity date. Id. ¶ 7-8.
11 However, Plaintiff asserts that instead of applying the second
12 mortgage's payments to interest owed and then to the principal, as
13 the DOT allegedly requires, Defendant applied each monthly payment
14 solely to the principal. Id. ¶ 9. As a result, Plaintiff's second
15 mortgage entered default around December 2011. Id.

16 When this happened, Plaintiff contacted Defendant, whose
17 agents told her that she could fix the mistake by applying for a
18 loan modification. Id. ¶ 10. Plaintiff could only obtain such a
19 modification by being late on the first mortgage. Id. As
20 Defendant's agents purportedly promised, if Plaintiff went late,
21 she could begin the loan modification process, and Defendant would
22 not take any action against her even though the loan agreements
23 said it could. Id. Plaintiff reluctantly agreed to this
24 arrangement. Id. ¶ 11. She began missing payments in January
25 2012. Id. ¶ 12. Throughout the process, she sent all of the
26 necessary documents to Defendant, but she had to re-submit most of
27 them because Defendant repeatedly claimed that it either lost the
28 documents or never received them. Id. ¶¶ 11-12. Sometime around

1 October 2012, while the loan modification process was ongoing,
2 Defendant sent Plaintiff notice that it intended to accelerate her
3 first mortgage. Id. ¶ 13. It also demanded that she tender the
4 entire balance of her loans. Id. At this time, Defendant also
5 reported Plaintiff as delinquent to the credit reporting agencies.
6 Id. Plaintiff maintains that Defendant previously promised that it
7 would not take such actions. See id. ¶ 10.

8 Plaintiff's credit is ruined. Id. ¶ 14. It is not clear at
9 this point whether a foreclosure sale has occurred, though a full
10 reconveyance of Plaintiff's second loan was recorded on February 8,
11 2013, and that loan is no longer at issue in this case. See RJN
12 Ex. G ("Notice of Reconveyance"). Plaintiff asserts the following
13 causes of action against Defendant, based on the facts described
14 above: (i) breach of the implied covenant of good faith and fair
15 dealing; (ii) promissory estoppel; (iii) the privacy tort of false
16 light; (iv) negligent misrepresentation; and (v) violations of the
17 California Unfair Competition Law ("UCL"), Cal. Civ. Code § 17200
18 et seq. Defendant now moves to dismiss Plaintiff's FAC.

19

20 **III. LEGAL STANDARD**

21 **A. Motions to Dismiss**

22 A motion to dismiss under Federal Rule of Civil Procedure
23 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
24 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
25 on the lack of a cognizable legal theory or the absence of
26 sufficient facts alleged under a cognizable legal theory."
27 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
28 1988). "When there are well-pleaded factual allegations, a court

1 should assume their veracity and then determine whether they
2 plausibly give rise to an entitlement to relief." Ashcroft v.
3 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
4 must accept as true all of the allegations contained in a complaint
5 is inapplicable to legal conclusions. Threadbare recitals of the
6 elements of a cause of action, supported by mere conclusory
7 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
8 Twombly, 550 U.S. 544, 555 (2007)). The court's review is
9 generally "limited to the complaint, materials incorporated into
10 the complaint by reference, and matters of which the court may take
11 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,
12 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor
13 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

14 **B. Rule 9(b)**

15 Claims sounding in fraud are subject to the heightened
16 pleading requirements of Federal Rule of Civil Procedure 9(b),
17 which requires that a plaintiff alleging fraud "must state with
18 particularity the circumstances constituting fraud." See Kearns v.
19 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy
20 Rule 9(b), a pleading must identify the who, what, when, where, and
21 how of the misconduct charged, as well as what is false or
22 misleading about [the purportedly fraudulent] statement, and why it
23 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
24 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
25 and citations omitted).

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1 **IV. DISCUSSION**

2 **A. Breach of the Covenant of Good Faith and Fair Dealing**

3 "The covenant of good faith and fair dealing, implied by law
4 in every contract, exists merely to prevent one contracting party
5 from unfairly frustrating the other party's right to receive the
6 benefits of the agreement actually made." Guz v. Bechtel Nat.
7 Inc., 24 Cal. 4th 317, 349 (Cal. 2000). The covenant "cannot
8 impose substantive duties or limits on the contracting parties
9 beyond those incorporated in the specific terms of their
10 agreement." Id. at 349-50. The elements of a claim for breach of
11 the covenant of good faith and fair dealing are:

12 (1) the plaintiff and the defendant entered
13 into a contract; (2) the plaintiff did all
14 or substantially all of the things that the
15 contract required him to do or that he was
16 excused from having to do; (3) all
17 conditions required for the defendant's
18 performance had occurred; (4) the defendant
19 unfairly interfered with the plaintiff's
20 right to receive the benefits of the
21 contract; and (5) the defendant's conduct
22 harmed the plaintiff.

23 Woods v. Google, Inc., 889 F. Supp. 2d 1182, 1194 (N.D. Cal. 2012)
24 (citing Judicial Counsel of California Civil Jury Instructions §
25 325 (2011)).

26 Plaintiff's alleges that Defendant's promise to forego action
27 against her if she went late on her payments impeded her
28 contractual obligation to pay her loans, which interfered with her
rights to receive the benefits of those agreements. Plaintiff
relies mainly on the Court's holding on a similar issue from Harvey
v. Bank of America N.A., No. 12-3238 SC, 2013 WL 632088 (N.D. Cal.
Feb. 20, 2013). In Harvey the Court found that a defendant's
active hindrance of plaintiff's obligation to pay his loans could

1 be the basis for a breach of implied covenant claim. Id. (citing
2 Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 824 (Cal. 1942)).

3 While Harvey supports Plaintiff's claim for promissory
4 estoppel, it does not help her claim for breach of the implied
5 covenant. As Defendant points out, it never actively interfered
6 with Plaintiff's payments. It told Plaintiff that she could enter
7 the loan modification process by going late on her payments, but
8 that was a choice only Plaintiff could make. See Franczak v.
9 Suntrust Mortgage, Inc., No. 5:12-cv-01453 EJD, 2013 WL 843912, at
10 *3 (N.D. Cal. Mar. 6, 2013) ("Being left with an impression that a
11 particular action is encouraged is something very different than
12 actually being required to do something.") (quotations omitted).
13 Plaintiff did not plead that Defendant actively frustrated her
14 ability to perform under the loan agreements. This claim is
15 accordingly DISMISSED. Plaintiff has leave to amend it if she can
16 plead facts indicating that Defendant actively hindered her payment
17 under the loan agreements.

18 **B. Promissory Estoppel**

19 "Promissory estoppel requires: (1) a promise that is clear and
20 unambiguous in its terms; (2) reliance by the party to whom the
21 promise is made; (3) the reliance must be reasonable and
22 foreseeable; and (4) the party asserting the estoppel must be
23 injured by his or her reliance." Boon Rawd Trading Int'l Co., Ltd.
24 v. Paleewong Trading Co., Inc., 688 F. Supp. 2d 940, 953 (N.D. Cal.
25 2010). "The purpose of this doctrine is to make a promise that
26 lacks consideration (in the usual sense of something bargained for
27 and given in exchange) binding under certain circumstances." Id.

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1 Plaintiff alleges that "in or around December 2011 and
2 thereafter," Defendant's agents Bobby Mata and William Speed told
3 her that she could be eligible for a loan modification if she
4 ceased her loan payments, and that if she did, Defendant would not
5 take any action against her during the loan modification process.
6 FAC ¶¶ 10-11, 26. Plaintiff states that though she was reluctant
7 to go late on her payments because of her excellent credit, she
8 believed Defendant's agents' assurances and began to miss payments
9 so she could qualify for a loan modification. Id. ¶¶ 12, 26.
10 Finally, Plaintiff alleges that she was injured by her reliance
11 because of the destruction of her credit and the cost of fees
12 related to this lawsuit. Id. ¶¶ 26-29. Defendant disputes
13 Plaintiffs' allegations about the promise, her reliance, and her
14 damages, claiming that they are insufficiently pled or are refuted
15 by the loan agreements. Defendant also argues that this cause of
16 action is barred by the statute of frauds because it would amount
17 to a modification of the loan agreement but was not in writing.
18 MTD at 5, 7; Reply at 4-7.

19 The Court finds that Plaintiff's allegations set forth a prima
20 facie promissory estoppel claim arising from her conversation with
21 Defendant's agents. While the specificity of Plaintiff's pleading
22 about the alleged promise is not perfect, the Court finds that
23 Plaintiff's complaint is sufficiently detailed and plausible to
24 state a claim and subject Defendant to discovery on it. See Starr,
25 633 F.3d at 1204.

26 The Court is not convinced by Defendant's arguments that
27 Plaintiff failed to plead reasonable reliance and, consequently,
28 damages. See Reply at 4-6. Those arguments are essentially that

1 the loan agreements put Plaintiff on notice of what would happen if
2 she went late on her mortgage payments (including the risk that
3 Defendant would accelerate her loans). Defendant misses the point
4 of Plaintiff's promissory estoppel claim: Plaintiff relied on
5 Defendant's agents' promises that the loan agreements' requirements
6 would apparently not apply. This promise was separate from any
7 contractual provision. For similar reasons, the Court does not
8 find Defendant's statute of frauds argument compelling. The
9 promise at issue here was not a modification of the contract,
10 subject to the statute of frauds: it was a separate matter
11 altogether.

12 Accordingly, the Court DENIES Defendant's motion to dismiss
13 Plaintiff's promissory estoppel claim. The claim is undisturbed.

14 **C. False Light**

15 To state a claim for the privacy tort of false light, a
16 plaintiff must plead (1) public disclosure of information about the
17 plaintiff that was presented as factual but was actually false or
18 created a false impression about the plaintiff; (2) the information
19 was understood by one or more persons to whom it was disclosed as
20 stating or implying something highly offensive that would have a
21 tendency to injure the plaintiff's reputation; (3) by clear and
22 convincing evidence, that the defendant acted with constitutional
23 malice; and (4) damages. Solano v. Playgirl, Inc., 292 F.3d 1078,
24 1082 (9th Cir. 2002).

25 Plaintiff alleges that because she was never really in default
26 and any suggestion otherwise was due to Defendant's accounting
27 errors and broken promises, Defendant's recklessly or negligently
28 reporting her to credit agencies was false, highly offensive, and

1 harmful. FAC ¶¶ 35-36. Defendant argues that Plaintiff's false
2 light claim is preempted by the Fair Credit Reporting Act ("FCRA"),
3 15 U.S.C. § 1681 et seq., and that in any event, Defendant's
4 reports to the credit agencies were both truthful and privileged by
5 law. MTD at 9-10; Reply at 7-8.

6 Defendant's preemption argument is right. FCRA includes an
7 explicit preemption provision: "[n]o requirement or prohibition may
8 be imposed under the laws of any State . . . with respect to the
9 subject matter regulated under . . . section 1681s-2 of [FCRA],
10 relating to the responsibilities of persons who furnish information
11 to consumer reporting agencies." Howard v. Blue Ridge Bank, 371 F.
12 Supp. 2d 1139, 1143 (N.D. Cal. 2005) (citing 15 U.S.C. §
13 1681(b)(1)(F)). Specifically, FCRA precludes claims for false
14 light based on alleged reporting of false credit information to
15 credit reporting agencies. See Carson v. Bank of America, N.A.,
16 No. 2:12-cv-04187-MCE-CMK, 2012 WL 5041359, at *9 (E.D. Cal. Oct.
17 17, 2012) ("[T]he FCRA preempts Plaintiffs' common law claim for
18 false light invasion of privacy, as the claim is based on Defendant
19 allegedly reporting false credit information to a credit reporting
20 agency."). Since it is preempted, the Court declines to consider
21 the parties' further arguments as to Plaintiff's false light claim,
22 except to say that they are not plausible. Nor does the Court
23 address Plaintiff's arguments about whether she has stated a claim
24 under California Civil Code section 1785.25, since Plaintiff pled
25 no such a claim in her complaint and cannot add it now.
26 Accordingly, Plaintiff's false light claim is DISMISSED WITH
27 PREJUDICE.

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1 **D. Negligent Misrepresentation**

2 The elements for a cause of action for negligent
3 misrepresentation are (1) a misrepresentation of a material fact,
4 (2) without reasonable grounds for believing it to be true, (3)
5 with intent to induce another's reliance on the fact
6 misrepresented, (4) reasonable reliance by the plaintiff, and (5)
7 damages. Fox v. Pollack, 181 Cal. App. 3d 954, 962 (Cal. Ct. App.
8 1986). Since this claim sounds in fraud, it must be pled with
9 particularity per Rule 9(b), though intent may be alleged
10 generally.

11 Plaintiff alleges that Defendant's agents' made their
12 representations about the loan modification process with no
13 reasonable grounds for believing that the representations were
14 true, since Defendant alone (not its agents) knew whether the loan
15 modification process would work as explained. FAC ¶¶ 40-42.
16 Plaintiff adds that she was unaware of the statements' falsity and
17 would not have gone late on her payments if Defendant's agents had
18 not made those representations. Id. ¶¶ 40-45. She states that as
19 a result of her believing what Defendant's agents said, she was
20 harmed by fees and a damaged credit score. Id.

21 Plaintiff's misrepresentation claim fails for insufficient
22 pleading. Plaintiff's allegations of the purported promises made
23 to her by Defendant's agents are substantially the same as those
24 underlying her promissory estoppel claim. Leaving aside the issue
25 of whether the economic loss rule prohibits Plaintiff from seeking
26 tort damages for what appears to be a contract claim, see, e.g.,
27 JMP Sec. LLP v. Altair Nanotechnologies Inc., 880 F. Supp. 2d 1029,
28 1042-43 (N.D. Cal. 2012), Plaintiff's allegations are not

1 sufficient to support a fraud claim. Plaintiff identifies, at
2 best, the thrust of what was said and in what month it was said.
3 Though this is enough (barely) to satisfy the relatively relaxed
4 pleading standard required for promissory estoppel, see supra
5 Section IV.B, it is not enough to plead fraud. Plaintiff's
6 negligent misrepresentation claim is accordingly DISMISSED.
7 Plaintiff has leave to amend this claim, but must plead her facts
8 with greater specificity, especially with reference to the relevant
9 dates, Defendant's agents' authority, and Defendants' agents'
10 grounds for believing their statements.

11 **E. UCL**

12 The UCL prohibits unfair competition, including, inter alia,
13 "any unlawful, unfair or fraudulent business act." Cal. Bus. &
14 Prof. Code § 17200. "Because [section 17200] is written in the
15 disjunctive, it establishes three varieties of unfair competition--
16 acts or practices which are unlawful, or unfair, or fraudulent."
17 Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554
18 (Cal. Ct. App. 2007).

19 Plaintiff appears to bring her UCL claim under the
20 "unfairness" prong. California courts and the legislature have not
21 specified which of several possible "unfairness" standards is the
22 proper one, but this Court recently found that the California
23 Supreme Court would likely adopt the approach to unfairness
24 provided in Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th
25 1394, 1402 (Cal. Ct. App. 2006), which incorporated the three
26 factors constituting unfairness under the Federal Trade Commission
27 Act: "(1) the injury must be substantial; (2) the injury must not
28 be outweighed by any countervailing benefits to consumers or

1 competition; and (3) the injury must be one that the consumer could
2 not reasonably have avoided." Lyons v. Bank of America, N.A., No.
3 11-01232 CW, 2011 WL 3607608, at *10 (N.D. Cal. Aug. 15, 2011)
4 (citing Camacho, 12 Cal. App. 4th at 1402).

5 Plaintiff asserts that the conduct underlying her claims for
6 breach of the implied covenant of good faith, false light,
7 promissory estoppel, and negligent misrepresentation "constitute[]
8 unfair competition" under the UCL. FAC ¶¶ 48-51. However, as
9 discussed supra, three of these claims fail as insufficiently pled,
10 with only the promissory estoppel claim surviving. Consequently,
11 Plaintiff's UCL claims as to the other causes of action are
12 DISMISSED. Plaintiff's UCL claim for unfair business practices
13 survives because her properly pled promissory estoppel claim
14 suffices to state a claim under the UCL as well: the injury was
15 substantial, no countervailing benefits to consumers or competition
16 exist, and Plaintiff's pleading of reasonable reliance under her
17 promissory estoppel claim also serves to show that she could not
18 reasonably have avoided the injury in this case.

19
20 **V. CONCLUSION**

21 As explained above, Defendant's motion to dismiss is GRANTED
22 in part and DENIED in part. Plaintiff's claims for promissory
23 estoppel and unfair business practices under the UCL are
24 undisturbed. Plaintiff's false light claim is DISMISSED WITH
25 PREJUDICE. All remaining claims are DISMISSED with leave to amend
26 to correct the factual deficiencies described in this Order.
27 Plaintiff may file an amended complaint within thirty (30) days of
28 this Order's signature date. Failure to do so may result in the

1 deficient claims being dismissed with prejudice.

2 Plaintiff does not have leave to add any new causes of action
3 to her complaint as a result of this Order, but she may file a Rule
4 15 motion or request Defendant's leave to add new claims.

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6 IT IS SO ORDERED.

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8 Dated: June ⁷____, 2013



UNITED STATES DISTRICT JUDGE

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