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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

DAVID CURLEY,  
  
                                  Plaintiff,  
  
                                  v.  
  
WELLS FARGO & CO., and others,  
  
                                  Defendants.

Case No. 13-cv-03805 NC

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

Re: Dkt. Nos. 93

Plaintiff David Curley alleges that Wells Fargo, along with Freddie Mac, fraudulently deprived him of a permanent loan modification, despite Curley’s compliance with the terms of a trial period payment plan. According to Curley, he justifiably relied upon Wells Fargo’s promise not to start foreclosure proceedings so long as he fulfilled his contractual obligations under the plan. He claims to have suffered damages when Wells Fargo foreclosed on his home. Wells Fargo and Freddie Mac seek to dismiss all of Curley’s causes of action, as alleged in the First Amended Complaint. For the reasons discussed below, the Court DENIES Wells Fargo’s motion to dismiss Curley’s claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional fraud. The Court DENIES in part and GRANTS in part Well’s Fargo’s motion

Case No. 13-cv-03805 NC  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT

1 to dismiss Curley’s constructive fraud claim. The Court GRANTS Freddie Mac’s motion  
2 to dismiss Curley’s claims for intentional interference with contract, and intentional  
3 interference with prospective economic advantage.

## 4 I. BACKGROUND

### 5 A. Facts

6 This case stems from Curley’s failed attempt to secure a loan modification and the  
7 subsequent foreclosure sale of his home. The following relevant facts come from Curley’s  
8 First Amendment Complaint. Dkt. No. 92.

9 In 2006, Curley obtained a \$356,000 fixed-rate loan from Wells Fargo Bank, secured  
10 by his home in Burlingame, California. Dkt. No. 92 at 4. As a result of the economic  
11 downturn in 2008 and 2009, Curley’s coin-operated amusement and vending business  
12 struggled, and Curley’s income declined. *Id.* Curley defaulted on his loan. *Id.* A notice of  
13 default was recorded on November 2, 2009. *Id.* Pursuant to the Home Affordable  
14 Modification Program (“HAMP”), Wells Fargo agreed to review Curley for a loan  
15 modification by offering him a trial period plan (“TPP”). *Id.*

16 According to the complaint, the offer stated, “If you qualify under the federal  
17 governments [sic] Home Affordable Modification program and comply with the terms of  
18 the Trial Period Plan (TPP) we will modify your mortgage loan and you can avoid  
19 foreclosure.” *Id.* at 5. Another part of the offer states: “As long as you comply with the  
20 terms of the Trial Period Plan we will not start foreclosure proceedings or conduct a  
21 foreclosure sale if foreclosure proceedings have started . . . .” *Id.*

22 This TPP offer further stated: “To accept this offer, and see if you qualify for a Home  
23 Affordable Modification, fax items 1, 3, 4 and 5 listed below . . . and use the enclosed  
24 return envelope to return your 1st payment no later than 01/30/2010.” *Id.* Notably, item 5  
25 of the TPP offer required “documentation to verify all of the income of each borrower[,]”  
26 including a “[c]opy of the most recent filed federal tax return with all schedules[.]” *Id.* To  
27 accept the offer, Curley was required to “send in both signed copies of the Trial Period  
28 Plan, all required income documentation, and [his] first trial period payment by . . .

1 02/01/2010.” *Id.* The TPP provided that Wells Fargo would permanently modify Curley’s  
2 loan if (1) Curley was qualified for a loan modification under HAMP’s guidelines, and (2)  
3 Curley accepted the offer, submitted all necessary documentation, and made all TPP  
4 payments. *Id.* According to the complaint, “the TPP offer stated that Wells Fargo would  
5 send plaintiff either a copy of the proposed loan modification or a notification that he did  
6 not qualify for the offer after he returned signed copies of the TPP.” *Id.* at 4.

7 According to Curley, he timely accepted this TPP offer on January 3, 2010, and  
8 formed a contract with Wells Fargo. *Id.* Curley alleges that he made three loan payments  
9 of \$1,836.75 under the TPP on the first of each month beginning February 1, 2010, through  
10 April 1, 2010. *Id.* He made an additional payment in May, but his additional payment for  
11 June 1, 2010, was rejected without explanation from Wells Fargo. *Id.* Curley states that he  
12 also submitted a hardship application, his most recent tax return, profit and loss statements,  
13 and proof of income and expenses. *Id.* at 5-6.

14 According to Curley, Wells Fargo and Freddie Mac had an agreement that “permitted  
15 Freddie Mac to abrogate at its discretion Wells Fargo’s promise to suspend or postpone  
16 foreclosure even if [Curley] fulfilled the TPP requirements entitling him to a permanent  
17 loan modification.” *Id.* at 6. Curley claims that Wells Fargo “concealed” from plaintiff this  
18 agreement with Freddie Mac. *Id.*

19 On July 1, 2010, a notice of sale was recorded. *Id.* at 6. On July 21, 2010, Wells  
20 Fargo’s agent, Cal-Western Reconveyance Corporation, conducted a trustee’s sale  
21 and KMA Properties, LLC purchased Curley’s home. *Id.* According to Curley, the sale  
22 took place despite the fact that he “provided all required documentation and otherwise  
23 complied with his obligations under the TPP.” *Id.* Moreover, Wells Fargo neither provided  
24 Curley with a copy of the proposed loan modification nor a notification that he did not  
25 qualify. *Id.* at 4.

## 26 **B. Procedural History**

27 On July 17, 2013, Curley filed this action in the San Francisco Superior Court. Dkt.  
28 No. 1 at 2. Defendants removed to this Court on August, 16, 2013. Dkt. No. 1. Defendants

1 then moved to dismiss Curley's claims. Dkt. No. 4. Curley moved to remand the action to  
2 state court and responded to the motion to dismiss. Dkt. Nos. 25, 27. Because the parties  
3 asked the Court to rely on evidence not properly before the Court on a motion to dismiss,  
4 the Court converted the motion to dismiss into a motion for summary judgment pursuant to  
5 Federal Rule of Civil Procedure 12(d). Dkt. No. 48.

6 The Court denied Curley's motion to remand the case to state court as well as a request  
7 by Curley for Rule 56(d) discovery. Dkt. No. 67. Additionally, the Court granted  
8 defendants' motion for summary judgment on Curley's wrongful foreclosure, fraud,  
9 intentional infliction of emotional distress, and declaratory judgment claims. The Court  
10 granted summary judgment as to Freddie Mac on the breach of implied covenant of good  
11 faith and fair dealing claim, but denied summary judgment on that claim with respect to  
12 Wells Fargo.

13 Since that summary judgment order, the Court granted Curley's motion for leave to  
14 amend his complaint to add claims for breach of contract, as well as intentional and  
15 constructive fraud against Wells Fargo, and claims for interference with contract and  
16 interference with prospective economic advantage claims against Freddie Mac. Dkt. No.  
17 89. Curley had submitted a proposed amended complaint with his motion. Dkt. No. 79.  
18 Curley subsequently filed a First Amended Complaint, alleging these claims, in addition to  
19 the claim for breach of the implied covenant of good faith and fair dealing, which survived  
20 summary judgment. Dkt. No. 92. Defendants now move to dismiss all of Curley's claims  
21 alleged in the amended complaint. Dkt. No. 93. The Court vacated the hearing on the  
22 motion. Dkt. No. 103.

23 Both parties have consented to the jurisdiction of a magistrate judge under 28 U.S.C.  
24 § 636(c). Dkt. Nos. 21, 23.

## 25 **II. LEGAL STANDARD**

26 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
27 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a  
28 motion to dismiss, all allegations of material fact are taken as true and construed in the light

1 most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th  
2 Cir. 1996). The Court, however, need not accept as true “allegations that are merely  
3 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis.*  
4 *Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). While a complaint need not allege  
5 detailed factual allegations, it must contain sufficient factual matter, accepted as true, to  
6 “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
7 544, 570 (2007). A claim is facially plausible when it “allows the court to draw the  
8 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
9 *Iqbal*, 556 U.S. 662, 678 (2009). If a court grants a motion to dismiss, leave to amend  
10 should be granted unless the pleading could not possibly be cured by the allegation of other  
11 facts. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

### 12 III. DISCUSSION

#### 13 A. Request for Judicial Notice

14 As a preliminary matter, the Court addresses Wells Fargo’s request for judicial notice  
15 of documents submitted in connection with its motion to dismiss. Dkt. No. 94.

16 Generally, a court may not look to matters beyond the complaint without converting a  
17 motion to dismiss into one for summary judgment. *Datel Holdings Ltd. v. Microsoft Corp.*,  
18 712 F. Supp. 2d 974, 983 (N.D. Cal. 2010) (citations omitted). However, a court may take  
19 judicial notice of material that is submitted as part of the complaint, or is necessarily relied  
20 upon by the complaint, as well as matters of public record. *Lee v. City of L.A.*, 250 F.3d  
21 668, 688-89 (9th Cir. 2001). Under Federal Rule of Evidence 201(b), “a judicially noticed  
22 fact must be one not subject to reasonable dispute that is either (1) generally known within  
23 the territorial jurisdiction of the trial court; or (2) capable of accurate determination by  
24 resort to sources whose accuracy cannot reasonably be questioned.” *Datel Holdings*, 712 F.  
25 Supp. 2d at 983. A court may “take judicial notice of undisputed matters of public record,  
26 including documents on file in federal or state courts.” *Harris v. Cnty. of Orange*, 682 F.3d  
27 1126, 1132 (9th Cir. 2012) (internal citation omitted).

28 Here, the Court did not rely upon the documents for which Wells Fargo requested

1 judicial notice in reaching its conclusion in this order. Thus, its request for judicial notice is  
2 denied.

3 Yet Wells Fargo asserts that this Court already took judicial notice of certain  
4 documents—namely a document entitled “Retention Workout Option Checklist”—at a  
5 hearing on October 9, 2013, concerning defendants’ motion to dismiss Curley’s initial  
6 complaint. Dkt. No. 93 at 11. In that hearing the Court asked, “Does the plaintiff object to  
7 the defendants’ request for judicial notice?” Dkt. No. 36 at 4:4-5. The plaintiff did not  
8 object. *Id.* at 4:9. The Court stated, “All right. So the request for judicial notice as part of  
9 the motion to dismiss is granted. And that’s as to the state court proceedings that . . . were  
10 not disputed as to what took place.” *Id.* at 4:10-13. Thus, the Court specifically limited its  
11 judicial notice to undisputed documents that demonstrated the state court proceedings took  
12 place (e.g., official docket from the state court action). The Court did not take judicial  
13 notice of the myriad underlying exhibits that may have accompanied various motions in  
14 those state court proceedings. In its current motion to dismiss, Wells Fargo does not submit  
15 a request for judicial notice of the “Retention Workout Option Checklist.”

16 In short, the Court did not then, and does not now take judicial notice of the  
17 “Retention Workout Option Checklist,” Dkt. No. 10 at 50. Wells Fargo also did not request  
18 for the Court to take judicial notice of this or other documents in its current request for  
19 judicial notice. *See* Dkt. No. 94.

## 20 **B. Breach of Contract and Breach of Implied Covenant (Claim 1)**

21 Curley brings claims against Wells Fargo for breach of contract and breach of the  
22 implied covenant of good faith and fair dealing. Because these two causes of actions do not  
23 consist of the same elements, the Court will separate its analysis of each claim.

### 24 **i. Breach of Contract**

25 The elements to be pleaded in an action for breach of contract are: (1) the existence of  
26 a contract; (2) plaintiff’s performance of the contract or excuse for nonperformance; (3)  
27 defendant’s breach; and (4) the resulting damage to plaintiff. *Lortz v. Connell*, 273 Cal.  
28 App. 2d 286, 290 (1969); *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp.

1 2d 928, 954 (N.D. Cal. 2012).

2 **a. Existence of Contract**

3 Here, Curley contends that he accepted the TPP offer on January 3, 2010, and thus  
4 entered into a contract with Wells Fargo. Dkt. No. 92 at ¶ 10. This Court already stated  
5 that “[i]f Curley accepted the TPP, the ‘existence of a contract’ claim is satisfied.” Dkt. No.  
6 67 at 11 (citing *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883-84 (9th Cir. 2013)  
7 (holding that Wells Fargo’s TPP may be an enforceable contract)). And indeed, for the  
8 purposes of its motion, Wells Fargo accepts that the TPP was a valid contract. Dkt. No. 93  
9 at 19. The first element for a breach of contract action is therefore satisfied.

10 **b. Plaintiff’s Performance of Contract**

11 As to plaintiff’s performance, on the one hand, Curley contends that he performed  
12 under the terms of the contract by providing all of the required documentation, including his  
13 most recent filed tax return and three different monthly loan payments under the TPP. Dkt.  
14 No. 92 at 7. On the other hand, Wells Fargo argues that Curley failed to perform under the  
15 TPP “because he did not provide the requisite proof of income.” Dkt. No. 93 at 18. In  
16 addition to the three trial plan payments, Wells Fargo contends that Curley at a minimum  
17 had to submit his 2008 or 2009 tax returns, a requirement under the “Retention Workout  
18 Option Checklist.” *See id.* at 18-19. But as stated above, the Court does not take judicial of  
19 this document. Furthermore, Wells Fargo’s defense that Curley failed to submit all the  
20 correct paperwork and did not fulfill his obligations under the TPP “presents a factual  
21 dispute that cannot be resolved [at the motion to dismiss stage].” *Corvello*, 728 F.3d at 885  
22 (internal quotation marks omitted) (quoting *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d  
23 547, 579 (7th Cir. 2012)). Taking the allegations of material fact as true and construing  
24 them in a light most favorable to non-movant Curley, the Court finds that Curley has  
25 satisfied the element of performance. *See Cahill*, 80 F.3d at 337-38.

26 **c. Defendant’s Breach of Contract**

27 As to the third element of breach, Curley alleges that Wells Fargo failed to either  
28 “send plaintiff a copy of the proposed loan modification or a notification that he did not

1 qualify for the offer after he returned signed copies of the TPP.” Dkt. No. 92 at ¶ 7; Dkt.  
2 No. 99 at 12 (opposition brief). Because the TPP contractually required Wells Fargo to take  
3 one of these two actions, Wells Fargo’s failure to perform constitutes a breach. *See*  
4 *Corvello*, 728 F.3d at 883-84 (finding that where borrowers fulfilled obligations under a  
5 TPP, and loan servicer failed to abide by terms of TPP entitling borrower to loan  
6 modification or timely notification that they do not qualify, “borrowers have valid claims  
7 for breach of the TPP agreement”); *see also Wigod*, 673 F.3d at 562-63 (banks required to  
8 offer permanent modifications to borrowers who completed obligations under TPPs, unless  
9 banks timely notified borrowers that they did not qualify for a HAMP modification).  
10 Furthermore, Curley does allege that the TPP states Wells Fargo would not initiate  
11 foreclosure proceedings so long as the borrower complied with the TPP. By foreclosing on  
12 Curley’s home, even though Curley complied with the terms of the TPP, Curley sufficiently  
13 alleged that Wells Fargo breached the TPP agreement.

14 Still, the amended complaint lists several dozen allegations against Wells Fargo that  
15 are not tied to specific terms of the contract and would not constitute a breach on Wells  
16 Fargo’s part. Dkt. No. 92 at ¶ 17 (e.g., failure to provide adequate staffing, failure to  
17 perform proper loan modification underwriting). For instance, the allegation that Wells  
18 Fargo “wrongfully den[ied] plaintiff’s permanent loan modification though he substantially  
19 performed all covenants on his part” will not serve as a basis for a breach of contract claim.  
20 Curley has not alleged that the TPP states compliance with the TPP alone will result in a  
21 permanent loan modification. Similarly, Curley states that Wells Fargo wrongfully  
22 concealed from him an agreement between Wells Fargo and Freddie Mac that gave Freddie  
23 Mac the power to decide when to honor the TPP. As Wells Fargo correctly points out,  
24 however, Curley has not alleged a section of the TPP that Wells Fargo breached in allegedly  
25 failing to disclose information about Freddie Mac. Dkt. No. 93 at 19.

26 **d. Damages**

27 Finally, as to the final element in a breach of contract claim, Curley has sufficiently  
28 alleged that Wells Fargo’s breach resulted in damage to him. Curley alleges that the TPP



1 states, “As long as you comply with the term of the Trial Period Plan we will not start  
2 foreclosure proceedings[.]” Dkt. No. 92 at ¶ 10. Curley alleges that he fully complied with  
3 the TPP by making timely payments to Wells Fargo and submitted all of the necessary  
4 paperwork. *Id.* at ¶ 12. Yet Wells Fargo initiated foreclosure proceedings, and Curley  
5 suffered the damages of losing his home.

6 In sum, to the extent that Curley’s allegations for breach of contract involve Well’s  
7 Fargo’s promise not to foreclose so long as Curley complied with the TPP terms, or Well’s  
8 Fargo’s failure to provide notification that Curley did not qualify for a permanent loan  
9 modification, the motion to dismiss is DENIED.

10 **ii. Breach of the Implied Covenant of Good Faith and Fair Dealing**

11 The duty of good faith and fair dealing is implied by law into every contract,  
12 functioning “as a supplement to the express contractual covenants, to prevent a contracting  
13 party from engaging in conduct which (while not technically transgressing the express  
14 covenants) frustrates the other party’s rights to the benefits of the contract.” *Gonzalez v. JP*  
15 *Morgan Chase Bank, N.A.*, No. 14-cv-2558 EMC, 2014 U.S. Dist. LEXIS 152674, \*19-20  
16 (N.D. Cal. Oct. 28, 2014) (quoting *Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218  
17 Cal. App. 4th 1230, 1244 (2013)).

18 In the foreclosure context, violations of this duty involve specific contract terms.  
19 These terms can relate to a loan servicer’s decision to foreclose despite a borrower’s  
20 compliance with specific provisions of a trial modification plan, *Erickson v. PNC*  
21 *Mortgage*, 2011 WL 1743875, at \*2 (D. Nev. May 6, 2011) (denying motion to dismiss  
22 breach of good faith and fair dealing claim), or a servicer’s decision to foreclose despite the  
23 existence of a servicer participation agreement prohibiting foreclosure while a loan  
24 modification application was pending, *Blackwood v. Wells Fargo Bank, N.A.*, 2011 WL  
25 1561024, at \*5 (D. Mass. Apr. 22, 2011) (same).

26 “A claim for breach of the implied covenant of good faith and fair dealing requires  
27 the same elements [as a claim for breach of contract], except that instead of showing that  
28 defendant breached a contractual duty, the plaintiff must show, in essence, that defendant

1 deprived the plaintiff of a benefit conferred by the contract in violation of the parties’  
2 expectations at the time of contracting.” *Levy v. JP Morgan Chase*, No. 10-cv-01493 DMS  
3 BLM, 2010 WL 4641033, at \*3 (S.D. Cal. Nov. 5, 2010).

4 Here, in addition to finding that Curley has sufficiently alleged facts supporting the  
5 elements for a claim of breach of contract, the Court also finds that Curley alleged facts that  
6 Wells Fargo “deprived [him] of a benefit conferred by the contract in violation of the  
7 parties’ expectations[.]” *Levy*, 2010 WL 4641033, at \*3. For instance, the TPP offer stated  
8 that Wells Fargo would send Curley either a copy of the proposed loan modification or a  
9 notification that he did not qualify for the offer after he returned signed copies of the TPP.  
10 Dkt. No. 92 at ¶ 7. Curley alleges that Wells Fargo failed to do so. *Id.* Curley also alleged  
11 that Wells Fargo “accelerated his loan after accepting four TPP payments, indicating that  
12 Wells Fargo was benefiting from the TPP without giving plaintiff the benefit of the  
13 bargain.” *Id.* at ¶ 8.

14 Accordingly, the Court DENIES Wells Fargo’s motion to dismiss the breach of the  
15 implied covenant of good faith and fair dealing claim.

16 **C. Constructive Fraud Claim Against Wells Fargo (Claim 2)**

17 “Constructive fraud is a unique species of fraud applicable only to a fiduciary or  
18 confidential relationship. [A]s a general principle constructive fraud comprises any act,  
19 omission or concealment involving a breach of legal or equitable duty, trust or confidence  
20 which results in damage to another even though the conduct is not otherwise fraudulent.”  
21 *Assilzadeh v. Cal. Fed. Bank*, 82 Cal. App. 4th 399, 415 (2000). Much like other fraud  
22 claims, a claim of constructive fraud is subject to heightened pleading requirements under  
23 Rule 9(b) of the Federal Rules of Civil Procedure. *Guerrero v. Greenpoint Mortgage*  
24 *Funding, Inc.*, 403 Fed. App’x 154, 156 (9th Cir. 2010). “In alleging fraud or mistake, a  
25 party must state with particularity the circumstances constituting fraud or mistake.” Fed.  
26 R. Civ. P. 9(b).

27 As a general rule, under California law, “a financial institution owes no duty of care  
28 to a borrower when the institution’s involvement in the loan transaction does not exceed

1 the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Sav.*  
2 & *Loan Ass’n*, 231 Cal. App. 3d 1089, 1095-96 (1991) (citation omitted). The test for  
3 determining whether a financial institution exceeded its role as money lender and thus  
4 owes a duty of care to a borrower-client involves “the balancing of various factors, among  
5 which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the  
6 foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury,  
7 (4) the closeness of the connection between the defendant’s conduct and the injury  
8 suffered, (5) the moral blame attached to the defendant’s conduct, and (6) the policy of  
9 preventing future harm.” *Id.* at 1098.

10 Curley alleges that by offering a TPP, Wells Fargo stepped outside the scope of a  
11 traditional moneylender relationship and thus created a fiduciary duty. Dkt. No. 92, ¶ 22.  
12 California courts are squarely divided on this issue. *See Rijhwani v. Wells Fargo Home*  
13 *Mortg., Inc.*, No. 13-cv-05881 LB, 2014 WL 890016, at \*17 (N.D. Cal. Mar. 3, 2014)  
14 (gathering cases). But several cases in our District have recently found that a lender may  
15 have a special duty of care when engaging in the loan modification process. *See id.*  
16 (“While a lender may not have a duty to modify the loan of any borrower who applies for a  
17 loan modification, a lender surely has a duty to submit a borrower’s loan modification  
18 application once the lender has told the borrower that it will submit it[.]”); *Faulks v. Wells*  
19 *Fargo & Co.*, No. 13-cv-02871 MEJ, 2014 WL 1922185, at \*8 (N.D. Cal. May 13, 2014)  
20 (“the Court is inclined to find that Wells Fargo owed Plaintiff a duty of care in processing  
21 his loan modification application”); *Rowland v. JP Morgan Chase Bank, N.A.*, No. 14-cv-  
22 0036 LB, 2014 WL 992005 (N.D. Cal. Mar. 12, 2014) (same).

23 **i. Terms of the TPP**

24 Here, Wells Fargo owed Curley a duty of care because it formed a contract with  
25 Curley that involved the loan modification process. Indeed, the TPP offered to  
26 permanently modify Curley’s loan if he qualified under the HAMP’s guidelines, submitted  
27 the required paperwork, and made all TPP payments. Moreover, under the TPP, Wells  
28 Fargo explicitly committed not to begin foreclosure proceedings as long as Curley

1 complied with the terms of the TPP. Taking Curley’s allegations as true and construing  
2 them in the light most favorable to him, Curley complied with all of the requirements under  
3 the TPP. Nonetheless, Wells Fargo began foreclosure proceedings; doing so constituted an  
4 “act . . . involving a breach of legal or equitable duty, trust or confidence which result[ed]  
5 in damage [to Curley].” *See Assilzadeh*, 82 Cal. App. 4th at 415; *see also Rijhwani*, 2014  
6 WL 890016, at \*17 (lender had “a duty not to foreclose upon a borrower’s home while the  
7 borrower’s loan modification is being considered once the lender has told the borrower that  
8 it won’t foreclose during this time and to ignore all foreclosure-related notices.”). Curley  
9 sufficiently alleges damages in the form of loss of his home through foreclosure  
10 proceedings, attorney’s fees and costs and expenses spent in defending two unlawful  
11 detainer actions, and his timely payments under the TPP. Dkt. No. 92 at ¶ 25.

12 Because Wells Fargo owed Curley a duty not to foreclose on his home so long as  
13 Curley complied with the terms of the TPP, the Court DENIES Wells Fargo’s motion to  
14 dismiss as to the constructive fraud claim.

15 **ii. Failure to Disclose Information About Freddie Mac**

16 Curley, however, has not established how Wells Fargo’s duty of care as to the loan  
17 modification process creates a duty to disclose Freddie Mac’s involvement in the loan  
18 modification process. Curley claims that Wells Fargo concealed information that Freddie  
19 Mac was the owner of the loan and that Freddie Mac had decision-making authority over  
20 the modification application. Dkt. No. 92 at ¶¶ 21, 23. Yet Curley does not explain why  
21 Wells Fargo possessed an obligation to disclose this information to Curley while processing  
22 the loan modification application. He also does not cite to any authority that states the  
23 actual owner of the loan—as opposed to the loan servicer—must be disclosed to the  
24 borrower in order to ensure proper processing of a loan modification request.

25 Accordingly, the Court GRANTS Wells Fargo’s motion to dismiss Curley’s  
26 constructive fraud claim to the extent Curley alleges that Wells Fargo’s failure to disclose  
27 Freddie Mac’s involvement in the loan modification process constitutes fraud.

28 //

1                   **D. Intentional Fraud Claim Against Wells Fargo (Claim 3)**

2                   To bring a claim for the tort of fraudulent misrepresentation, a plaintiff must allege:  
3 (1) a misrepresentation; (2) knowledge of falsity (or ‘scienter’); (3) intent to defraud, i.e.,  
4 to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior*  
5 *Court*, 12 Cal. 4th 631, 638 (1996).

6                   In the amended complaint under the intentional fraud cause of action, Curley alleged  
7 that on December 31, 2009, Wells Fargo made false representations in the TPP that as long  
8 as Curley complied with the terms of the agreement, Wells Fargo would not start  
9 foreclosure proceedings. Wells Fargo argues that Curley failed to allege (1) the  
10 misrepresentation with specificity, (2) justifiable reliance, and (3) that Curley’s reliance on  
11 Wells Fargo’s misrepresentations caused him to suffer damages. Dkt. No. 93 at 21-25.

12                   **i. Specificity**

13                   Fraud must be pleaded with specificity rather than with “general and conclusory  
14 allegations.” *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 184 (2003). “This  
15 particularity requirement necessitates pleading facts which “show how, when, where, to  
16 whom, and by what means the representations were tendered.” *Lazar*, 12 Cal. 4th at 645  
17 (internal quotation marks and citation omitted). “In the case of a corporate defendant, the  
18 plaintiff must allege the names of the persons who made the representations, their authority  
19 to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and  
20 when the representation was made.” *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App.  
21 4th 780, 793 (2013) (citing *Lazar*, 12 Cal. 4th at 645). The specificity requirement’s  
22 purpose is to give defendants notice of sufficiently definite charges, and permit the court to  
23 weed out meritless fraud claims. *Id.*

24                   Here, Curley meets the specificity requirement. He alleged that Wells Fargo made  
25 misrepresentations in the TPP, a written agreement, on December 31, 2009. Dkt. No. 92 at  
26 ¶¶ 9-12. Curley includes the specific language from the TPP in his complaint that details  
27 what documents Wells Fargo required him to submit, and the exact payments amounts he  
28 needed to make in order to accept the TPP offer. *Id.* Curley also includes in his complaint

1 the specific language of the TPP stating that “[a]s long as you comply with the terms of the  
2 Trial Period Plan we will not start foreclosure proceedings or conduct a foreclosure sale if  
3 foreclosure proceedings have started . . . .” *Id.* at ¶ 10.

4 While Curley does not identify who prepared the TPP, Curley did not have to plead  
5 that information because it was uniquely within Wells Fargo’s knowledge. *West*, 214 Cal.  
6 App. 4th at 793 (finding that plaintiff in foreclosure case did not have to identify who  
7 prepared letter sent to plaintiff that contained alleged misrepresentation because “it was  
8 uniquely within [defendant] Chase Bank’s knowledge) (citing *Boschma v. Home Loan*  
9 *Center, Inc.*, 198 Cal. App. 4th 230, 248 (2011) (“While the precise identities of the  
10 employees responsible . . . are not specified in the loan instrument, defendants possess the  
11 superior knowledge of who was responsible for crafting these loan documents.”) (internal  
12 quotation marks omitted)). Curley’s allegation that the misrepresentations were made in  
13 writing through the TPP is sufficient to give notice to Wells Fargo of the charges.

#### 14 **ii. Justifiable Reliance**

15 “Besides actual reliance, [a] plaintiff must also show justifiable reliance, i.e.,  
16 circumstances were such to make it *reasonable* for [the] plaintiff to accept [the] defendant’s  
17 statements without an independent inquiry or investigation. The reasonableness of the  
18 plaintiff’s reliance is judged by reference to the plaintiff’s knowledge and experience.” *Id.*  
19 at 794 (internal quotation marks and citations omitted).

20 Here, Wells Fargo argues that Curley’s alleged reliance claims are too vague to  
21 sustain a misrepresentation claim. Dkt. No. 93 at 22. But Curley specifically alleges that  
22 his “reliance made him forego other alternatives such as filing [for] Chapter 13  
23 [bankruptcy] and submitting a plan with a mortgage ‘cram down,’ private financing or  
24 simply selling [the house] on the open market.” Dkt. No. 92, ¶ 29. This Court had  
25 previously held that “[t]his set of facts could sufficiently allege that Curley was harmed by  
26 relying on Wells Fargo’s promise to offer him a loan modification if he complied with the  
27 TPP, because Curley did enter into the TPP and forewent other options that may have  
28 saved his home.” Dkt. No. 89 at 4.

1 Thus, Curley properly alleges that he justifiably relied on Wells Fargo’s  
2 representation that it would not foreclose on his home so long as he performed his  
3 contractual obligations.

4 **iii. Causation**

5 Wells Fargo argues that Curley’s allegations do not show that any damages he  
6 suffered resulted from Wells Fargo’s conduct. Dkt. No. 93 at 24. Curley claims that in  
7 reliance on Wells Fargo’s alleged misrepresentations—that it would not conduct foreclosure  
8 proceedings as long as he complied with the terms of the TPP, and would send him a  
9 notification if he did not qualify for a loan modification—he suffered damages. Dkt. No. 92  
10 at ¶¶ 28-30. These damages include “loss of his house for 30 years through the foreclosure  
11 proceeding, attorneys fees costs and expenses defending two unlawful detainer actions to  
12 remove him, [and] his timely payments under the TPP[.]” *Id.* Wells Fargo argues that  
13 Curley already owed the mortgage payments and had to make them regardless of the  
14 alleged misrepresentations. Dkt. No. 93 at 24.

15 Curley also alleged, however, that Wells Fargo made him forgo other alternatives  
16 such as filing for bankruptcy or pursuing other types of financing. The amended complaint  
17 may be reasonably construed to allege that Curley’s reliance on Wells Fargo’s alleged  
18 misrepresentations—including the promise that he would at least receive notification if he  
19 did not qualify for a loan modification—caused Curley to forgo taking action to avoid  
20 foreclosure.

21 In short, the Court finds that Curley sufficiently alleged a claim for intentional fraud  
22 and DENIES Wells Fargo’s motion to dismiss as to this claim.

23 **E. Interference With Contract Claim Against Freddie Mac (Claim 4)**

24 A plaintiff bringing a claim for the tort of intentional interference with contractual  
25 relations must allege: “(1) the existence of a valid contract between plaintiff and a third  
26 party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional acts  
27 designed to induce a breach or disruption of the contractual relationship; (4) actual breach  
28 or disruption of the contractual relationship; and (5) resulting damage. *Reeves v. Hanlon,*

1 33 Cal. 4th 1140, 1148 (2004). To prevail, a plaintiff must show that the defendant “knew  
2 the interference was certain or substantially certain to occur as the result of its action.” *Id.*

3 Here, Curley does not sufficiently allege that Freddie Mac intentionally acted to  
4 induce a breach or disruption of the contractual relationship between Curley and Wells  
5 Fargo. Curley claims that Wells Fargo expert Julia Greenfield testified in a deposition that  
6 the decision not to postpone foreclosure of Curley’s house was an “investor decision”;  
7 Curley alleges this “investor” was Freddie Mac. Dkt. No. 92 at ¶ 34. But in that same  
8 paragraph Curley alleges that Greenfield also testified that the decision to move forward  
9 with the foreclosure was “[b]ased on investor guidelines” and that “the guidelines of the  
10 investor would dictate that they could (or would) not postpone the sale at that point.” *Id.*

11 Contrary to Curley’s assertion, this testimony does not constitute a sufficient  
12 allegation of fact that would establish a reasonable inference that Freddie Mac intentionally  
13 acted to induce Wells Fargo’s alleged breach. From Greenfield’s testimony, the decision to  
14 foreclose may just well have been Well’s Fargo’s. In other words, Wells Fargo’s decision  
15 may have resulted from its adherence to “investor guidelines” that “dictate[d] that [it] could  
16 not postpone the sale,” and not from an intentional act by Freddie Mac to induce Well’s  
17 Fargo’s alleged breach. In any case, Greenfield’s testimony that it “*looks to me* like it was  
18 an investor decision,” Dkt. No. 92 at ¶ 34 (emphasis added), is too vague to “allow[] the  
19 [C]ourt to draw a reasonable inference that [Freddie Mac] is liable for the misconduct  
20 alleged,” *Iqbal*, 556 U.S. at 678. The pleading also fails to identify who Greenfield is other  
21 than a “Wells Fargo expert.”

22 In this Court’s prior order, it stated it would grant leave to amend this claim “if  
23 plaintiff can allege facts sufficient to support each element of the tort [of intentional  
24 interference with contract].” Dkt. No. 89 at 8. Because Curley has failed to do so on his  
25 first amended complaint, the Court GRANTS Freddie Mac’s motion to dismiss. *See*  
26 *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (affirming district court  
27 decision to deny leave to amend Second Amended Complaint because plaintiff had “ample  
28 opportunity” to properly plead case and failed to comply with district court’s instructions



1 on how to amend complaint); *see also Sisseton-Wahpeton Sioux Tribe v. United States*, 90  
2 F.3d 351, 355 (9th Cir. 1996) (district court’s discretion to deny leave to amend is  
3 “particularly broad” where the plaintiff has previously amended) (quoting *Ascon Props.,*  
4 *Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

5 **i. Statute of Limitations**

6 In California, the statute of limitations is two years for interference with contract or  
7 interference with prospective business advantage claims. Code Civ. Proc. § 339(1); *Tu-Vu*  
8 *Drive-In Corp. v. Davies*, 66 Cal.2d 435, 437 (1967). The interference claim accrues from  
9 the date of the wrongful act, which can be no later “than the actual breach of the contract  
10 by the party who was wrongfully induced to breach.” *Trembath v. Digardi*, 43 Cal. App.  
11 3d 834, 836 (1974).

12 Here, the date the statute of limitations began to run was, at the very latest, July 21,  
13 2010—the date that Curley’s home was sold in a trustee’s sale. Dkt. No. 89 at 10. Curley  
14 filed this action on August 17, 2013, more than two years after the date of the sale. *Id.*  
15 Freddie Mac contends that Curley’s claims for intentional interference with contract is time  
16 barred. Dkt. No. 93 at 27.

17 However, in California, “[t]he discovery rule protects those who are ignorant of their  
18 cause of action through no fault of their own. It permits delayed accrual until a plaintiff  
19 knew or should have known of the wrongful conduct at issue.” *Korea Supply Co. v.*  
20 *Lockheed Martin Corp.*, 109 Cal. Rptr. 2d 417, 428 (Ct. App. 2001), *rev’d in part on other*  
21 *grounds*, 29 Cal. 4th 1134 (2003). California courts have applied the discovery rule to  
22 claims for interference with contract. *See, e.g., Forcier v. Microsoft Corp.*, 123 F. Supp. 2d  
23 520, 531 (N.D. Cal. 2000).

24 Curley argues that the statute of limitations should be tolled, because he could not  
25 have discovered the interference until a deposition on May 17, 2013, when a witness  
26 revealed Freddie Mac’s role in the loan modification decision. Dkt. No. 99 at 17. To  
27 support this proposition, Curley alleges in his amended complaint that “the power to  
28 determine compliance with or override the TPP agreement under the circumstances at issue

1 was held by Freddie Mac . . . was *confirmed* . . . on May 17, 2013.” Dkt. No. 92, ¶ 34  
2 (emphasis added). Curley asserts that this date really is the time of discovery of the claim  
3 against Freddie Mac. Dkt. No. 99 at 17. However, the term “confirmed” is not tantamount  
4 to “discovered.” Indeed, Curley admits in his response to Freddie Mac’s motion that the  
5 word “learned” would be a better substitute for the word “confirmed” in the complaint. *Id.*  
6 at 17-18.

7 Because the complaint does not allege that Curley first *discovered* the claims against  
8 Freddie Mac in 2013, the claims against Freddie Mac are time barred and Freddie Mac’s  
9 motion as to this claim is GRANTED on this ground as well.

10 **F. Interference With Prospective Economic Advantage Claim Against**  
11 **Freddie Mac (Claim 5)**

12 A plaintiff bringing a claim for the tort of intentional interference with prospective  
13 economic advantage must allege: “(1) an economic relationship between the plaintiff and  
14 some third party, with the probability of future economic benefit to the plaintiff; (2) the  
15 defendant’s knowledge of the relationship; (3) intentional acts on the part of the defendant  
16 designed to disrupt the relationship; (4) actual disruption of the relationship; and (5)  
17 economic harm to the plaintiff proximately caused by the acts of the defendant.” *Korea*  
18 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153-54 (2003) (internal quotation  
19 marks omitted). A plaintiff seeking to recover for intentional interference with prospective  
20 economic relations must “prove as part of its case-in-chief that the defendant not only  
21 knowingly interfered with the plaintiff’s expectancy, but engaged in conduct that was  
22 wrongful by some legal measure other than the fact of interference itself.” *Della Penna v.*  
23 *Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995). An act is independently  
24 wrongful “if it is unlawful, that is, if it is proscribed by some constitutional, statutory,  
25 regulatory, common law, or other determinable legal standard.” *Korea Supply Co.*, 29 Cal.  
26 4th at 1159.

27 In this Court’s prior order granting Curley’s motion for leave to amend based on a  
28 proposed amended complaint, it stated that Curley still “does not state facts sufficient to

1 establish a reasonable inference that Freddie Mac intentionally acted to disrupt the  
2 economic relationship between plaintiff and Wells Fargo.” Dkt. No. 89 at 9 (citing *Iqbal*,  
3 556 U.S. at 633). The Court further explained that Curley “insufficiently alleges facts to  
4 support the proposition that Freddie Mac ‘engaged in conduct that was wrongful by some  
5 legal measure other than the fact of interference itself.’” *Id.* (quoting *Della Penna*, 11 Cal.  
6 4th at 393). This Court gave leave to amend to the extent Curley can allege facts to support  
7 his assertions. *Id.* at 9-10.

8 Here, Curley’s claim for intentional interference with prospective economic  
9 advantage remains almost identical to his claim in his proposed amended complaint.  
10 *Compare* Dkt. No. 79 at 16-18 (Proposed Amended Complaint), *with* Dkt. No. 92 at 16-18  
11 (First Amended Complaint). Curley does add two new paragraphs alleging that he suffered  
12 damage as a “direct and proximate result” of Freddie Mac’s conduct. Dkt. No 92 at ¶¶ 38,  
13 42. But just as in the proposed amended complaint, Curley still does not allege facts to  
14 demonstrate that Freddie Mac intentionally acted to disrupt the economic relationship  
15 between Curley and Wells Fargo. Curley also again fails to allege facts in the paragraph  
16 asserting independent wrongful conduct by Freddie Mac; instead, Curley merely cites the  
17 same statutes and caselaw in the prior complaint, and makes the same conclusory assertion  
18 that “Defendant’s actions were independently wrongful.” Dkt. No. 92 at ¶ 41.

19 Because Curley has already had one opportunity to properly plead this claim, and  
20 failed to comply with the Court’s order instructing him on how to amend the complaint, the  
21 Court GRANTS Freddie Mac’s motion. *See Salameh*, 726 F.3d at 1133 (affirming district  
22 court decision to deny leave to amend Second Amended Complaint because plaintiff had  
23 “ample opportunity” to properly plead case and failed to comply with district court’s  
24 instructions on how to amend complaint).

25 **i. Statute of Limitations**

26 As stated in the previous section, the statute of limitations is two years for  
27 interference with prospective business advantage claims. Code Civ. Proc. § 339(1); *Tu-Vu*  
28 *Drive-In Corp.*, 66 Cal.2d at, 437. The interference claim accrues from the date of the

1 wrongful act, unless California's "discovery rule" applies. *Korea Supply Co.*, 109 Cal.  
2 Rptr. 2d at 428.

3 Here, just like in his interference with contract claim, Curley fails to allege that he  
4 first *discovered* Freddie Mac's alleged interference with prospective economic advantage  
5 in 2013. Without such an allegation, the Court treats the date that Curley's home was sold  
6 in a trustee's sale, July 21, 2010, as the date the statute of limitations began to run.  
7 Accordingly, the Court GRANTS Freddie Mac's motion as to this claim on this ground as  
8 well.

#### 9 IV. CONCLUSION

10 For the reasons stated above, the Court DENIES Wells Fargo's motion to dismiss  
11 Curley's claims for breach of contract, breach of the implied covenant of good faith and  
12 fair dealing, and intentional fraud. As to the constructive fraud claim, the Court DENIES  
13 Well's Fargo's motion in part, but GRANTS it to the extent Curley alleges that Wells  
14 Fargo's failure to disclose Freddie Mac's involvement in the loan modification process  
15 constitutes constructive fraud. The Court GRANTS Freddie Mac's motion to dismiss  
16 Curley's claims for intentional interference with contract, and intentional interference with  
17 prospective economic advantage. Because the Court did not rely on the documents in  
18 defendants' request for judicial notice, the Court DENIES the request for judicial notice.

19 Curley must file his Second Amended Complaint within 14 days of this order.  
20

21 IT IS SO ORDERED.

22 Date: December 23, 2014



23  
24 Nathanael M. Cousins  
United States Magistrate Judge