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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LA TOYA C WARD,
Plaintiff,

v.

WELLS FARGO HOME MORTGAGE,
Defendant.

Case No. 14-cv-00887-JCS

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

Re: Dkt. No. 7

I. INTRODUCTION

Plaintiff La Toya C. Ward (“Plaintiff”) brought suit for rescission of a deed of trust and related claims against Defendant Wells Fargo Home Mortgage (“Wells Fargo”).¹ Wells Fargo removed the action to federal court on the basis of diversity. *See* 28 U.S.C. § 1332; Dkt. No. 1 at 1–2. Presently before the Court is Wells Fargo’s motion to dismiss Plaintiff’s Complaint (“Motion”). All parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The Court finds this matter appropriate for decision without oral argument and the hearing set for May 9, 2014 is VACATED. *See* Civ. L. R. 7-1(b). For the reasons set out below, the Motion is GRANTED. The Complaint is DISMISSED with leave to amend as described below.

II. BACKGROUND

On March 12, 2004, Plaintiff took out loans from Wells Fargo for \$471,062 and \$28,938, both of which were secured by deeds of trust against a single-family home located at 62 Sarcedo Way in American Canyon, California (“Property”). *See* Def.’s Req. for Judicial Notice in Supp. of

¹ According to Wells Fargo, Wells Fargo Bank, N.A. is the successor by merger to Wells Fargo Home Mortgage. *See* Dkt. No. 7.

1 Def.'s Mot. to Dismiss ("RJN"), Exs. B, C. On or about March 9, 2005, Plaintiff refinanced those
2 loans with a loan from World Savings Bank for \$584,000, which was also secured by a deed of
3 trust against the Property. *See id.* Ex. D; Compl. Ex. G. On April 6, 2005, substitutions of trustee
4 were recorded in both of Plaintiff's March 2004 loans, removing Chicago Title Insurance
5 Company as the trustee and substituting in Wells Fargo Bank, N.A. *See* RJN Exs. E–F. On
6 December 21, 2005, Plaintiff refinanced again with a loan from Wells Fargo of \$630,000, which
7 was also secured by a deed of trust against the Property. *See id.* Ex. A. These documents were all
8 recorded in the Official Records of the County of Napa. *Id.* Exs. A–G.

9 At some point, Plaintiff began having difficulty making her loan payments and apparently
10 sought assistance from Wells Fargo. What followed was a series of communications between
11 Wells Fargo and Plaintiff regarding potential modifications of her loans.²

12 On August 7, 2009, Plaintiff and Wells Fargo entered into a "Special Forbearance
13 Agreement" that required Plaintiff to make monthly payments of \$2,553.07 from August to
14 October 2009. *See* Compl. Ex. C at 1–2.

15 On December 22, 2009, Plaintiff and Wells Fargo entered into a "Loan Modification
16 Agreement," which required Plaintiff to make monthly payments of \$2,533.07 from January 2010
17 to January 2011, after which "the original terms regarding the determination of the Interest rate
18 and monthly payment will change in accordance with the terms of the Note." *See id.* at 3–6. *See*
19 *also id.* Ex. B at 1. That agreement also included a "Notice of No Oral Agreements." *See id.*

20 On June 27, 2011, Wells Fargo sent Plaintiff a letter with the subject "Payment
21 arrangement agreement" stating that "[a]s discussed we have granted you the payment
22 arrangement listed below," which required Plaintiff to make monthly payments of \$4,082.55 from
23 August 2011 to January 2012, with a balloon payment of \$11,722.38 in February 2012. *See id.* Ex.
24 D. Attached to this agreement was a "Special Forbearance Agreement," which Plaintiff signed on
25

26 _____
27 ² Although certain documents that appear to be written forbearance agreements or loan
28 modification agreements are attached to the Complaint and Plaintiff's reply, it is not entirely clear
whether each agreement applies to one of Plaintiff's March 2004 loans, both of those loans, the
December 2005 refinance loan, or some other loan.

1 July 6, 2011. *See id.*

2 On November 10, 2011, Wells Fargo sent a letter to Plaintiff discussing her loan
3 modification file. *See id.* Ex. B. The letter described the review of Plaintiff’s file that had occurred
4 leading up to the execution of the June 2011 Special Forbearance Agreement. *See id.* The letter
5 also acknowledged Plaintiff’s statement that someone at Wells Fargo had instructed her to stop
6 remitting payments while a “piggy back modification approved on [her] loan was in the
7 ‘finalization’ process,” but stated that it was not Wells Fargo’s policy to instruct borrowers not to
8 make payments. *See id.* The letter also stated that Wells Fargo had received Plaintiff’s request to
9 submit additional information due to changed financial circumstances, but Plaintiff’s case was
10 being closed because she had indicated to a Wells Fargo representative that she would not be able
11 to provide the financial information in the timeframe requested by Wells Fargo. *See id.*

12 On May 18, 2012, Wells Fargo initiated a review of one of Plaintiff’s loans. *See Compl.*
13 Ex. A at 3. However, the documentation was apparently incomplete and Wells Fargo did not
14 receive further documentation until October 30, 2012. *See id.* The result of this review was that
15 Wells Fargo was “unable to approve another modification . . . in accordance with investor
16 limitations.” *See id.*

17 On October 30, 2012, Wells Fargo initiated a review for workout options for another one
18 of Plaintiff’s loans. *See id.* at 2. The next day, Wells Fargo informed Plaintiff that her loan was not
19 eligible for the Home Affordable Modification Program because her loan was in a mortgage
20 backed security pool that did not allow permanent changes. *See id.* Wells Fargo reviewed
21 Plaintiff’s financial documentation and completed a workout review on December 24, 2012. *See*
22 *id.* Wells Fargo concluded that because Plaintiff was not “in imminent default,” Wells Fargo was
23 prevented by investor guidelines from offering her a loan modification. *See id.* Accordingly, Wells
24 Fargo denied the modification request. *See id.*

25 On April 1, 2013, Wells Fargo assigned its interest in Plaintiff’s December 2005 loan to
26 HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation,
27 Mortgage Pass-Through Certificates Series 2006-AR10 (“HSBC”). *See RJN Ex. G*
28 (“Assignment”). The Assignment was executed by Alissa Doepp, “Vice President Loan

1 Documentation” for Wells Fargo, and it was recorded on April 4, 2013. *See id.*

2 On October 16, 2013, Wells Fargo sent a letter to Plaintiff indicating her loan was in
3 default for failure to make payments due. *See* Compl. Ex. J; Pl.’s Opp’n (“Opp’n”), Ex. A. The
4 letter stated that Plaintiff’s default was in the amount of \$19,012.95. *Id.* The letter further stated
5 that to avoid the possibility of acceleration of her loan, Plaintiff would need to pay the amount due
6 on or before November 20, 2013. *Id.* The letter also explained that if acceleration occurred,
7 foreclosure proceedings would follow. *Id.*

8 On October 30, 2013, Wells Fargo sent a letter to the “Office of the Comptroller of the
9 Currency” that apparently responded to a request for additional information on Plaintiff’s loans,
10 including what steps Wells Fargo had taken to try to reach an agreement with Plaintiff regarding
11 her apparent default. *See* Compl. Ex. A.

12 On December 31, 2013, Wells Fargo sent a letter to Plaintiff indicating that her loan file
13 had been referred to an attorney with instructions to begin foreclosure proceedings. Opp’n Ex. B.
14 The letter further indicated that the entire amount of the loan was due and payable. *Id.*

15 Plaintiff’s Complaint alleges: (1) rescission, mistake, and void agreement, (2) fraudulent
16 inducement, (3) fraudulent concealment, (4) intentional misrepresentation, (5) negligent
17 misrepresentation, (6) violation of section 2923.5 of the California Civil Code, (7) violation of the
18 Unfair Competition Law, section 17200 of the California Business and Professions Code *et seq.*,
19 (8) breach of contract, (9) slander of title, (10) declaratory relief, (11) promissory estoppel, (12)
20 breach of implied covenant of good faith and fair dealing, and (13) institutional bad faith. Wells
21 Fargo moves to dismiss all claims asserted against it.

22 **III. JUDICIAL NOTICE**

23 The standard for judicial notice is set forth in Rule 201 of the Federal Rules of Evidence,
24 which allows a court to take judicial notice of an adjudicative fact not subject to “reasonable
25 dispute,” either because it is “generally known within the territorial jurisdiction of the trial court”
26 or it is “capable of accurate and ready determination by resort to sources whose accuracy cannot
27 reasonably be questioned.” Fed. R. Evid. 201. As a general rule, the court “may not consider any
28 material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *United States v. Corinthian*

1 *Colls.*, 655 F.3d 984, 998–99 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668,
2 688 (9th Cir. 2001)). However, the court may consider unattached evidence on which the
3 complaint “necessarily relies” if: “(1) the complaint refers to the document; (2) the document is
4 central to plaintiff’s claim; and (3) no party questions the authenticity of the document.”
5 *Corinthian Colls.*, 655 F.3d at 999 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). In
6 addition, the court may take judicial notice of “matters of public record,” but not facts that may be
7 “subject to reasonable dispute.” *Corinthian Colls.*, 655 F.3d (citing *Lee*, 250 F.3d at 689).

8 Defendant requests judicial notice of seven publicly recorded documents: the deeds of trust
9 secured by the Property, substitutions of trustee related to those previous deeds of trust, and the
10 Assignment. *See generally* RJN. Plaintiff does not object to judicial notice of the documents.

11 Judicial notice of the existence and content of these documents, but not the truth of any
12 facts stated therein, is proper under Federal Rule of Evidence 201(b) because the authenticity of
13 the documents is capable of accurate and ready determination by resort to sources whose accuracy
14 cannot reasonably be questioned. *See Zapata v. Wells Fargo Bank, N.A.*, C 13-04288 WHA, 2013
15 WL 6491377, at *5 (N.D. Cal. Dec. 10, 2013) (citing *Castillo v. Wachovia Mortg.*, No. 12-0101
16 EMC, 2012 WL 1213296, at *1 n.2 (N.D. Cal. Apr. 11, 2012)).

17 **IV. LEGAL STANDARD**

18 A complaint may be dismissed for failure to state a claim upon which relief can be granted
19 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). “The
20 purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the
21 complaint.” *N. Star. Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). In ruling on a
22 motion to dismiss under Rule 12(b)(6), the Court takes “all allegations of material fact as true and
23 construe[s] them in the light most favorable to the nonmoving party.” *arks Sch. of Bus., Inc. v.*
24 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

25 The complaint need not contain “detailed factual allegations,” but must allege facts
26 sufficient to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662,
27 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Complaints drafted by
28 *pro se* plaintiffs are construed liberally to give the plaintiff the benefit of any doubt. *Hebbe v.*

1 *Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted). Nonetheless, the factual allegations
2 of a complaint must be definite enough to “raise a right to relief above the speculative level on the
3 assumption that all of the complaint’s allegations are true.” *Twombly*, 550 U.S. at 545.

4 “Dismissal with prejudice and without leave to amend is not appropriate unless it is clear
5 . . . that the complaint could not be saved by amendment.” *Eminence Capital, LLC v. Aspeon, Inc.*,
6 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)).
7 However, “[l]eave to amend need not be granted when an amendment would be futile.” *In re*
8 *Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1097 (9th Cir. 2002).

9 **V. ANALYSIS**

10 Plaintiff brings thirteen causes of action in her Complaint. Wells Fargo moves to dismiss
11 the Complaint under Rule 12(b)(6). For the reasons explained below, the Motion is GRANTED
12 and the Complaint is DISMISSED with leave to amend as described below.

13 **A. Rescission, Mistake, and Void Agreement**

14 Section 1989(b)(1) of the California Civil Code allows a party to rescind a contract under
15 certain circumstances, including mistake or fraud. Section 1691 requires that a party give notice of
16 his or her intent to rescind and “[r]estore to the other party everything of value which he has
17 received from him under the contract or offer to restore the same upon condition that the other
18 party do likewise.” Cal. Civ. Code § 1691. In the mortgage context, a plaintiff “must at least allege
19 that she has offered to tender to support a claim for equitable rescission under section 1691.”
20 *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 880 (N.D. Cal. 2010).

21 Here, Plaintiff alleges that the loans into which she entered with Wells Fargo were “based
22 on the mistaken belief that they would remain in a borrower/lender relationship.” Compl. ¶ 117.
23 Plaintiff alleges that she received far fewer benefits from her loan agreement than she thought she
24 would receive because “[i]nstead of a lender who had full authority to deal with the contractual
25 relationship and the economic value to the lender, the Plaintiff received a relationship with a party
26 who lacked the full authority of the lender and lacked the economic incentive to permanently
27 modify the loan rather than pursue foreclosure.” *Id.* ¶ 119. Plaintiff alleges that she “lost the right
28 to even know who had the right to collect on the [note] and to foreclose since securitization and

1 the use of MERS [Mortgage Electronic Registration Systems, Inc.] makes it impossible to
2 determine who [Plaintiff's] 'lender' really is" *Id.* ¶ 121. Plaintiff alleges that this constitutes a
3 material mistake in the formation of her contract and demands rescission of the loan or a
4 declaration that it is unenforceable. *Id.* ¶ 123.

5 Wells Fargo argues that the December 2005 deed of trust expressly provides that Wells
6 Fargo could sell the underlying note, or a partial interest in the note, one or more times without
7 prior notice to Plaintiff. *See* Mot. at 4–5 (citing RJN Ex. A ¶ 20). Wells Fargo also argues that the
8 claim is time-barred because, in California, a rescission claim based on a written contract has a
9 four-year statute of limitations. *See* Mot. at 5 (citing Cal. Code Civ. Proc. § 337). Wells Fargo also
10 argues that Plaintiff has not proffered tender as required to rescind a deed of trust. *See id.*

11 In her opposition, Plaintiff argues that even if she agreed that Wells Fargo could sell the
12 interest in the loan, "Plaintiff deserves notice of this transaction." Opp'n at 3. She argues that she
13 "only found out about this transaction when deciding on a loan modification," and that "[t]his type
14 of predatory lending practice carries merit." *Id.* Plaintiff argues that her claim is not time-barred
15 because she "was not aware there was ever a breach of contract" and when she was entered into
16 the loan, she was not put "on notice that the note or security interest would be sold to a pool of
17 investors that would deny her rights afforded to her from government programs." *Id.*

18 The Court agrees with Wells Fargo. The December 2005 deed of trust provides that the
19 note may be sold without notice to Plaintiff. *See* RJN Ex. A ¶ 20. Plaintiff appears to concede this
20 fact. *See* Pl.'s Opp'n at 3. Her assertions that she nonetheless "deserve[d]" notice of such
21 transactions are contrary to the express terms of the deed of trust, and they are not supported by
22 any authority. *See id.* Similarly, Plaintiff's argument that she was not ever aware of a breach of
23 contract is insufficient to toll the statute of limitations. *See* Cal. Code Civ. Proc. § 337. Further,
24 although Plaintiff invokes the Restatement of Contracts (Second) rather than California law, the
25 Court notes that she has not proffered tender as required for rescission under the California Civil
26 Code. *See Davenport*, 725 F. Supp. 2d at 880. The Court also notes that Plaintiff's allegations
27 regarding MERS are irrelevant because MERS is not a party to this action, nor does Plaintiff
28 allege that MERS was ever a party to any of her deeds of trust. *See* Compl. ¶ 120; Mot. at 4.

1 Finally, to the extent that this cause of action intends to challenge the propriety of securitization
2 generally, the Court notes that “[t]heories that securitization undermines the lender’s right to
3 foreclose on a property have been rejected by the courts.” See *McGough v. Wells Fargo Bank,*
4 *N.A.*, C12-0050 TEH, 2012 WL 2277931, at *4 (N.D. Cal. June 18, 2012)) (citing *Sami v. Wells*
5 *Fargo Bank*, No. 12-cv-00108 DMR, 2012 WL 967051, at *4–*6 (N.D. Cal. March 21, 2012)
6 (some citations omitted).

7 Plaintiff’s claims are based on fundamental misunderstandings of the law, and they are
8 time-barred. Thus, the Court finds that amendment would be futile. See *In re Vantive Corp.*, 283
9 F.3d at 1097. Accordingly, the first cause of action for “rescission, mistake, and void agreement”
10 is DISMISSED WITH PREJUDICE.

11 **B. Fraudulent Inducement, Fraudulent Concealment, Intentional**
12 **Misrepresentation, and Negligent Misrepresentation**

13 The elements of fraud are “(a) a misrepresentation (false representation, concealment, or
14 nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable
15 reliance; and (e) resulting damage.” *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 294
16 (2005) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)). Further, the heightened
17 pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure apply in federal court.
18 Rule 9(b) requires a party to “state with particularity the circumstances constituting fraud or
19 mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged
20 generally.” Fed. R. Civ. P. 9(b). “It is well-established in the Ninth Circuit that both claims for
21 fraud and negligent misrepresentation must meet Rule 9(b)’s particularity requirements.” *Neilson*
22 *v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (quoting *Glen*
23 *Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999); *U.S.*
24 *Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1058 (N.D. Cal. 1991)).

25 Here, Plaintiff makes various arguments in its claims for fraudulent inducement, fraudulent
26 concealment, intentional misrepresentation, and negligent misrepresentation. As to the fraudulent
27 inducement claim, Plaintiff alleges that Wells Fargo’s “predecessors in interest ha[d] exclusive
28 knowledge not accessible to Plaintiffs . . . pertaining to its mortgage lending activities that it did

1 not disclose to Plaintiff at the time it was entering into contracts with Plaintiff,” such as “false
2 appraisals, violation of underwriting guidelines, the intent to sell Plaintiffs’ mortgage above their
3 actual values to investors and knowledge that the scheme would result in a liquidity crisis that
4 would gravely damage Plaintiff.” Compl. ¶ 126. As to the fraudulent concealment claim, Plaintiff
5 alleges that Wells Fargo “knew that within a foreseeable period, its investors would discover that
6 mortgagors could not afford their loans and the result would be denial of government home
7 preservation programs and foreclosures and ultimately, economic devastation” and that such
8 information was hidden from “the public, including Plaintiff to Plaintiff’s detriment.” *Id.* ¶ 137–
9 38. As to the intentional misrepresentation claim, Plaintiff alleges that Wells Fargo’s “entire
10 scheme was to sell loans to Plaintiff and immediately sell those loans to a trust, transferring the
11 risk to investors” and that “Plaintiff at all times was wrongly induced to believe they were entering
12 a lender/borrower relationship with a lender that would retain their loan.” *Id.* ¶ 151. Plaintiff
13 alleges that Wells Fargo accomplished this deception through a campaign of “misinformation and
14 disinformation” described in the fraudulent concealment claim. *Id.* ¶ 152. Plaintiff also alleges that
15 Wells Fargo represented to Plaintiff that it “would be assisted with a loan modification.” *Id.* ¶ 159.
16 As to the negligent misrepresentation claim, Plaintiff alleges that the misrepresentations described
17 in the fraudulent concealment claim were false, and Wells Fargo intended for Plaintiff to rely upon
18 them to induce her into entering into a loan contract. *Id.* ¶¶ 165–68.

19 Wells Fargo argues that Plaintiff’s allegations are not pled with the requisite particularity
20 because “Plaintiff does not describe the time, place, or specific content of the supposedly
21 fraudulent representations.” Mot. at 6. Wells Fargo also argues that Plaintiff does not allege any
22 facts regarding her reasonable reliance on any statements. *Id.* Wells Fargo points out that to the
23 extent she is alleging that she believed the loan would not be securitized, she was provided notice
24 to the contrary by the express terms of the December 2005 deed of trust. *Id.* at 7, Ex. A. Wells
25 Fargo also argues that the claims are time barred because, in California, such claims have a three-
26 year statute of limitations. *Id.* (citing Cal. Civ. Proc. § 338(d)).

27 In her opposition, Plaintiff alleges that Wells Fargo “knew that the mortgage would be
28 pooled and securitized and yet concealed the fact.” Opp’n at 4. Plaintiff also argues that Wells

1 Fargo engaged in “double dipping,” which allegedly “occurs when a bank converts a mortgage
2 into a security (unsecured debt) and receives the concurrent tax benefits of a REMIC and then
3 attempts to also claim that it exists as a mortgage (secured debt).” *Id.* at 4–5. Further, Plaintiff
4 argues that she is relieved from meeting the Rule 9(b) pleading standard because Wells Fargo
5 concealed facts from her. *Id.* at 5. Plaintiff also alleges that she was never given a loan
6 modification. *Id.*

7 The Court agrees with Wells Fargo. Plaintiff’s fraud and misrepresentation claims fail
8 because they fall far short of the Rule 9(b) pleading standard. As Wells Fargo points out, it is
9 impossible to discern the time, place, or specific content of any representations, whether these are
10 regarding Wells Fargo’s alleged representations that it would not securitize or sell the loan, or that
11 it would offer her a loan modification. The most specific allegations that the Court has
12 identified—that statements were made “in public releases, on [Wells Fargo’s] web site, in their
13 literature and at their branch offices”—is still insufficient because of a lack of specificity. *See*
14 *Compl.* ¶¶ 127, 131. For example, Plaintiff does not allege that she actually visited any web sites
15 or branch offices, let alone when they were visited or what representations were made. Plaintiff is
16 not excused from complying with Rule 9(b) simply because she argues, as a general matter, that
17 Wells Fargo concealed facts.

18 To the extent that these claims are based on alleged representations by Wells Fargo that it
19 would not securitize or sell the loan, these claims also fail because they are time-barred. *See Perez*
20 *v. Am. Home Mortgage Servicing, Inc.*, C 12-00932 WHA, 2012 WL 1413300, at *4 (N.D. Cal.
21 Apr. 23, 2012) (citing Cal. Code Civ. Proc. § 338(d)) (finding that where loan was executed in
22 December 2006 and action was initiated in January 2012, statute of limitations precluded fraud
23 claims). Additionally, Plaintiff does not allege sufficient facts to show that “double-dipping”
24 occurred in this case, nor does she explain how she might have standing to challenge this practice.

25 The Court notes that a fraud claim based on a misrepresentation to forestall foreclosure or
26 consider a loan modification application may be viable but, as currently pled, the Court cannot
27 discern from the pleadings who made the misrepresentations, when the misrepresentations were
28 made, or the contents of such misrepresentations, as required by Rule 9(b). *Cf., e.g., Rockridge Tr.*

1 v. *Wells Fargo NA*, Case No. 13-cv-1457 JCS, 2014 WL 688124, at *16 (N.D. Cal. Feb.19, 2014)
2 (denying motion to dismiss claim for fraud where plaintiff alleged an oral misrepresentation that,
3 in light of a pending loan modification application, lender would postpone a foreclosure sale by a
4 specific person on a specific day).

5 Accordingly, the second, third, fourth, and fifth causes of action for fraudulent inducement,
6 fraudulent concealment, intentional misrepresentation, and negligent misrepresentation are
7 **DISMISSED WITH LEAVE TO AMEND**. Any amendments to these claims must satisfy the
8 heightened pleading standard of Rule 9(b).

9 **C. Injunctive Relief for Violation of Cal. Civil Code § 2923.5**

10 Section 2923.5 of the California Civil Code provides certain requirements related to the
11 recording of notices of default. *See* Cal. Civ. Code § 2923.5.

12 Plaintiff seeks injunctive relief under section 2923.5 of the California Civil Code based on
13 her allegation that Wells Fargo was prohibited from recording a notice of default without first
14 contacting Plaintiff. Compl. ¶¶ 165–71. The alleged notice of default is not attached to the
15 Complaint. Plaintiff alleges that she is entitled to injunctive relief as set forth in the California
16 Homeowner Bill of Rights. *See id.* ¶ 179.

17 Wells Fargo argues that no notice of default was ever recorded and that injunctive relief is
18 not a claim. Mot. at 7 (citing *Caovilla v. Wells Fargo Bank, N.A.*, No. 13-cv-1003 JSC, 2013 WL
19 2153855, at *7 (N.D. Cal. May 16, 2013)) (some citations omitted)).

20 In her opposition, Plaintiff points to a letter from Wells Fargo to Plaintiff informing her
21 that her loan is in default. *See* Opp’n at 6, Ex. A. This letter explains the steps that Plaintiff would
22 need to take to avoid acceleration and foreclosure proceedings. *See id.* Ex. A.

23 The Court agrees with Wells Fargo. The document that Plaintiff identifies as the notice of
24 default is plainly not a notice of default under section 2923.5. It is merely a letter from Wells
25 Fargo that warns Plaintiff of the possibility of eventual foreclosure which, if it occurs, will likely
26 involve a formal recording of a notice of default. There is no indication that this letter has been
27 recorded and, without a recordation, section 2923.5 is inapplicable. *See, e.g.*, Cal. Civ. Code
28 § 2923.5(a)(1) (“mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not

1 *record* a notice of default pursuant to Section 2924 until” certain requirements are met) (emphasis
2 added).

3 The Court finds that amendment would be futile. *See In re Vantive Corp.*, 283 F.3d at
4 1097. Accordingly, the sixth cause of action for “injunctive relief for violation of Cal. Civil Code
5 § 2923.5” is DISMISSED WITH PREJUDICE.

6 **D. Violation of Cal. Bus. & Prof. Code § 17200 *et seq.***

7 The California Unfair Competition Law (“UCL”) prohibits “unfair competition,” which is
8 defined as any “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code
9 § 17200. To establish standing under the UCL, a plaintiff must “(1) establish a loss or deprivation
10 of money sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the
11 economic injury was the result of, i.e., *caused by*, the unfair business practice” *Lawther v.*
12 *OneWest Bank, FSB*, No. C-10-00054 JCS, 2012 WL 298110, at *23 (N.D. Cal. Feb. 1, 2012)
13 (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 337 (2011)) (emphasis in original).

14 Here, Plaintiff alleges that Wells Fargo’s actions violated California’s Unfair Competition
15 Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (“UCL”) by

16 implementing, perpetrating and then extending their fraudulent scheme of inducing
17 Plaintiff to purchase mortgage [sic] for which [she was] not truly qualified based on the
18 inflated property valuations and undisclosed disregard of their own underwriting standards
19 and the sale of overpriced collateralized mortgage pools while taking the Plaintiff[’]s
20 down-payment and costing Plaintiff her equity in her homes and other damages, violates
[sic] numerous federal and state statutes and common law protections enacted for
consumer protection, privacy, trade disclosure, and fair trade and commerce.

21 Compl. ¶ 181. Plaintiff also alleges that she is “entitled to the issuance of a temporary restraining
22 order, a preliminary injunction, and a permanent injunction restraining and enjoining [Wells
23 Fargo] from any further concealment with respect to the Sale of NOTES and mortgages, or from
24 any further acts of misconduct of the kind alleged herein.” *Id.* ¶ 188 (capitalization in original).

25 Plaintiff also alleges that Wells Fargo engaged in improper “robo-signing” as to the loan
26 origination in December 2005 and the Assignment to HSBC in April 2013. *Id.* ¶ 189. Plaintiff
27 seeks \$200,000 in “restitution,” including “interests payments [sic] made by Plaintiff, fees paid to
28 [Wells Fargo], excessive fees paid at [Wells Fargo’s] demand, premiums received upon selling the

1 mortgages at an inflated value and moneys received from government agencies for ‘losses’
2 incurred by [Wells Fargo].” *Id.* ¶ 187.

3 Wells Fargo argues that the UCL claim fails because it is derivative of other failing claims.
4 Mot. at 10. Wells Fargo also argues that Plaintiff fails to plead damages and, as a result, she has no
5 standing to pursue an UCL claim. *Id.* (citing Cal. Bus. & Prof. Code § 17204).

6 In her opposition, Plaintiff argues that she does have standing to bring a UCL claim
7 because she suffered injury by “purchas[ing] a mortgage for which she was not truly qualified for
8 based the [sic] inflated property valuations and undisclosed disregard of [Wells Fargo’s]
9 underwriting standards” Opp’n at 7.

10 The Court agrees with Wells Fargo. Here, all of Plaintiff’s other claims are dismissed for
11 failure to state a claim and, as a result, the UCL claim also fails. The UCL claim fails for the
12 additional reason that Plaintiff fails to plausibly plead damages. Plaintiff seeks “restitution” of up
13 to \$200,000 but this is not supported by any factual allegations that make this amount plausible.
14 As to the robo-signing argument, the Court notes that courts in this district “have consistently
15 refused to find that a plaintiff can state a claim on the basis of a conclusory allegation of robo-
16 signing, absent some factual support.” *Baldoza v. Bank of America, N.A.*, C-12-05966 JCS, 2013
17 WL 978268, at *13 (N.D. Cal. Mar. 12, 2013) (collecting cases).

18 Accordingly, the seventh cause of action for violation of the UCL is DISMISSED WITH
19 LEAVE TO AMEND.

20 **E. Breach of Contract**

21 The elements of a cause of action for breach of contract are: (1) the existence of the
22 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the
23 defendant; and (4) damages. *First Comm. Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 745, (2001).
24 To allege the existence of a contract, a plaintiff must plead mutual assent, sufficiently definite
25 contractual terms, and consideration. *See* Cal. Civ. Code § 1550.

26 Here, Plaintiff alleges that Wells Fargo breached contracts that it had entered into with the
27 United States; namely, contracts created by the acceptance of Troubled Asset Relief Program
28 (“TARP”) funds. Compl. ¶ 198. Plaintiff alleges that under these alleged contracts with the United

1 States, Plaintiff is a third-party beneficiary and that Wells Fargo is obligated to modify Plaintiff's
2 loan. *Id.* ¶¶ 199–200. Plaintiff alleges that Wells Fargo breached these contracts, causing Plaintiff
3 “equal to or less than \$200,000.” *Id.* ¶¶ 201–202. Plaintiff alleges that she will be able to discover
4 that her note and deed of trust were not transferred to a Pooling and Servicing Trust within “the
5 required 90 days of opening and closing of the various trust [sic] including . . . The Wells Fargo
6 Mortgage Backed Securities Certificate 2006-AR10.” *See* ¶ 222.

7 Wells Fargo argues that Plaintiff is not a third-party beneficiary to any alleged contract
8 between Wells Fargo and the United States. Mot. at 11. Wells Fargo argues that similar arguments
9 have been dismissed by other courts. *Id.* (citing *Maguca v. Aurora Loan Servs.*, No. SACV 09-
10 1086 JVS (ANx), 2009 WL 3467750, at *3 (C.D. Cal. Oct. 28, 2009); *Kamp v. Aurora Loan*
11 *Servs.*, No. SACV 09-00844-CJC(RNBx), 2009 WL 3177636, at *4 (C.D. Cal. Oct. 1, 2009)).

12 In her opposition, Plaintiff insists that she is a third-party beneficiary to the alleged
13 contracts, and that “[i]t does not matter that similar claims have been rejected on this basis.”
14 Opp’n at 7. Plaintiff argues that “what matters is that this claim will not be labeled as ‘nonsensical
15 and baseless’ because it has merit.” *Id.* She argues that “[m]ost banks did what they were obligated
16 to do,” but Wells Fargo did not. *Id.* at 8. Plaintiff argues that “Wells Fargo is a large entity and
17 could very well afford to help their customers by affording them and not depriving Plaintiff of her
18 rights under the legislative government programs.” *Id.*

19 The Court agrees with Wells Fargo. Plaintiff’s policy arguments are inapposite to the
20 Court’s task at hand, which is to determine whether the claims made in the Complaint are legally
21 sufficient to survive the standard set forth in Rule 12(b)(6) of the Federal Rules of Civil
22 Procedure. The Court concludes that Plaintiff has failed to allege plausibly that such contracts
23 between Wells Fargo and the United States exist and, even if they do, Plaintiff’s allegation that
24 she is a third party to such contracts is not plausible on its face. *See Iqbal*, 556 U.S. at 663.

25 Additionally, to the extent that Plaintiff may be trying to allege that the Assignment of the
26 note and deed of trust violated a pooling and servicing agreement or some other contract, courts
27 have consistently rejected this argument when borrowers cannot show that they are parties or
28 third-party beneficiaries to the agreement. *See, e.g., Bergman v. Bank of Am.*, C-13-00741 JCS,

1 2013 WL 5863057, at *16–*17(N.D. Cal. Oct. 23, 2013) (citing *Aniel v. GMAC Mortg., LLC*, No.
2 C 12–04201 SBA, 2012 WL 5389706, at *4 (N.D. Cal. Nov. 2, 2012)) (some citations omitted)
3 (“the majority position is that plaintiffs lack standing to challenge noncompliance with a pooling
4 and service agreement or other similar agreement unless they are parties to the agreement or third
5 party beneficiaries thereto”).

6 Plaintiff’s Complaint and her reply fail to provide any factual allegations that “raise a right
7 to relief above the speculative level.” *See Twombly*, 550 U.S. at 545. It is apparent to the Court
8 that Plaintiff cannot cure the fact that she is not a third-party beneficiary to any alleged agreements
9 between Wells Fargo and the United States, and amendment would be futile. *See In re Vantive*
10 *Corp.*, 283 F.3d at 1097. Accordingly, the eighth cause of action for breach of contract is
11 DISMISSED WITH PREJUDICE.

12 **F. Slander of Title**

13 The required elements of a claim for slander of title are “(1) a publication, (2) without
14 privilege or justification, (3) falsity, and (4) direct pecuniary loss.” *Sumner Hill Homeowners’*
15 *Ass’n Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1030 (2012). “Direct pecuniary
16 loss” is restricted to:

- 17 (a) the pecuniary loss that results directly and immediately from the
18 effect of the conduct of third persons, including impairment of
19 vendibility or value caused by disparagement, and (b) the expense of
20 measures reasonably necessary to counteract the publication,
including litigation to remove the doubt cast upon vendibility or
value by disparagement.

21 *Ryan v. Editions Ltd. W., Inc.*, No. C-06-4812-PVT, 2007 WL 4577867, at *12 (N.D. Cal. Dec.
22 27, 2007) (quoting *Appel v. Burman*, 159 Cal. App. 3d 1209, 1215 (1984); Rest. 3d Torts § 633).

23 Here, Plaintiff alleges that Wells Fargo slandered title to the Property when it recorded a
24 notice of default against the Property. Compl. ¶ 206. Plaintiff alleges that such recording was with
25 malice, and that it has impaired her credit and vendibility of the Property. *Id.* ¶¶ 206–207.

26 Wells Fargo argues that no notice of default has been recorded at all. Mot. at 11. Wells
27 Fargo further argues that even if a notice had been recorded, such conduct would be privileged. *Id.*
28 at 11–12 (citing Cal. Civ. Code §§ 47(c)(1), 2924(d)) (some citations omitted).

1 In her opposition, Plaintiff argues that a notice of default “was mailed against the property
2 and that is what prompted Wells Fargo to finally record the Substitution of Assignment.” Opp’n at
3 8.

4 The Court agrees with Wells Fargo. A notice of default has not been recorded, and this
5 alleged basis for relief fails. To the extent that the letter sent by Wells Fargo to Plaintiff regarding
6 potential acceleration and foreclosure proceedings is a publication, Plaintiff has not alleged
7 plausibly that Wells Fargo acted with malice. Moreover, Plaintiff has failed to allege prejudice.
8 Plaintiff does not appear to dispute that she is in default on her loan. Plaintiff’s allegations of
9 impaired credit and vendibility fail because she does not allege any facts to support these “bare
10 assertion[s].” *See Ogilvie v. Select Portfolio Servicing*, 12-CV-001654-DMR, 2012 WL 3010986,
11 at *4 (N.D. Cal. July 23, 2012) (dismissing slander of title claim in foreclosure context for failure
12 to make proper allegations of, *inter alia*, pecuniary harm based on impaired vendibility); *Cerezo v.*
13 *Wells Fargo Bank, N.A.*, 13-1540 PSG, 2013 WL 4029274, at *6 (N.D. Cal. Aug. 6, 2013)
14 (dismissing slander of title claim for failure to make proper allegations of, *inter alia*, pecuniary
15 harm based on impaired vendibility because plaintiffs had not alleged existence of any impending
16 sale).

17 Accordingly, the ninth cause of action for slander of title is DISMISSED WITH LEAVE
18 TO AMEND.

19 **G. Declaratory Relief**

20 The Declaratory Judgment Act authorizes district courts to “declare the rights and other
21 legal relations of any interested party seeking such a declaration,” but only if there is an actual
22 controversy between the parties in the court’s jurisdiction. 28 U.S.C. § 2201(a); *Principal Life Ins.*
23 *Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir.2005).

24 Here, Plaintiff seeks a declaration that Wells Fargo does not have standing to foreclose
25 upon the Property because it has “improperly prepared, separated, lost or destroyed, and then
26 subsequently falsified the assignments of the notes thereby calling into question the validity of the
27 expected interest in the security of the claimed note holder.” Compl. ¶¶ 210–11. Plaintiff argues
28 that “[a] party seeking to foreclose bears the burden of demonstrating standing and must plead its

1 components with specificity and must demonstrate that it was the holder and owner” of the loan
2 and deed of trust.” *Id.* ¶ 213.

3 Wells Fargo argues that Plaintiff’s claim fails because there is no “actual controversy”
4 between the parties. Mot. at 7 (citing 28 U.S.C. § 2201(a)) (some citations omitted). Wells Fargo
5 further alleges that the alleged securitization of Plaintiff’s loan is not relevant to non-judicial
6 foreclosure. Mot. at 9 (citing *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099
7 (E.D. Cal. 2010)) (some citations omitted).

8 In her opposition, Plaintiff does not provide any substantive argument on this claim.
9 Rather, she repeats that she seeks a declaration that Wells Fargo “may not foreclose or deny
10 governmental programs on the loan due to the alleged securitization and improper assignment of
11 the loan.” Opp’n at 6.

12 The Court generally agrees with Wells Fargo. A notice of default has not been recorded,
13 and this alleged basis for relief fails. Further, Plaintiff’s claim for declaratory relief is based on the
14 allegation that Wells Fargo lacks standing to foreclose upon the Property. *See* Compl. ¶ 210. This
15 allegation is duplicative of Plaintiff’s challenges to the propriety of securitization generally, which
16 the Court has already noted have been consistently rejected by the courts. *See* Part. V.A., *supra*.
17 *See, e.g., McGough*, 2012 WL 2277931, at *4; *Sami*, 2012 WL 967051, at *4–*6. Plaintiff relies
18 on *Vogan v. Wells Fargo Bank, N.A.*, No. 2:11-CV-02098-JAM-KJN, 2011 WL 5826016, at *7
19 (E.D. Cal. Nov. 17, 2011), for the proposition that a plaintiff has standing to challenge foreclosure
20 based on allegations that an assignment was executed after the closing date of the securities pool.
21 *See* Compl. ¶ 229. However, as Wells Fargo correctly points out, that case represents the minority
22 position. *See* Mot. 9; *Bergman*, 2013 WL 5863057, at *16–*17 (explaining that *Vogan* represents
23 minority position). Thus, Plaintiff has not sufficiently alleged an actual controversy that would
24 entitle him to declaratory relief. *See Karimi v. GMAC Mortgage*, 11-CV-00926-LHK, 2011 WL
25 5914006, at *6 (N.D. Cal. Nov. 28, 2011) (citing *Permpoon v. Wells Fargo Bank Nat’l Ass’n*, No.
26 09-CV-01140-H (BLM), 2009 WL 3214321, at *5 (S.D. Cal. Sept. 29, 2009)) (dismissing
27 declaratory judgment claim where claim was duplicative of other invalid claims)).

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1 **H. Promissory Estoppel**

2 A claim for promissory estoppel requires: “(1) a promise clear and unambiguous in its
3 terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both
4 reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his
5 reliance.” *Laks v. Coast Fed. Sav. & Loan Ass’n*, 60 Cal. App. 3d 885, 890 (1976).

6 Here, Plaintiff alleges that Wells Fargo is “trying to foreclose on Plaintiffs’ property via
7 non-judicial process even though Defendants do not have standing and have not demonstrated the
8 proper chain of title to do so” because the loan has been securitized. *See* Compl. ¶ 239. Plaintiff
9 also alleges that Wells Fargo did not comply with the foreclosure requirements of sections 2923.5,
10 2924, and 2932.5 of the California Civil Code and therefore it lacks standing to foreclose. *Id.*
11 Plaintiff alleges that “[a]s a proximate result of the misrepresentations by Wells Fargo . . . Plaintiff
12 has been threatened with the loss of her home and her credit ratings have been diminished.” *Id.*

13 Wells Fargo construes Plaintiff’s claim as one based on an alleged forbearance agreement
14 and representation that Plaintiff would be offered a loan modification if she complied with the trial
15 terms. *See* Mot. at 12, 12 n.12 (citing Compl. ¶ 245). Wells Fargo argues that Plaintiff has not
16 sufficiently pled the terms of any alleged promise, nor does she allege justifiable reliance or
17 injury. *See* Mot. at 13. Wells Fargo points out that Plaintiff received a “temporary modification”
18 and that Plaintiff argues only that she did not receive a second modification after the loan was
19 sold. *See* Def.’s Reply at 6.

20 In her opposition, Plaintiff alleges that she was “offered a forbearance agreement and told
21 that a modification would be offered is [sic] she complied with trial terms.” Opp’n at 8–9. She
22 alleges that “[o]nly a temporary modification was granted and Wells Fargo specifically stated that
23 they do not have the authority to grant permanent modifications because they only service the
24 loan,” and that “[t]his [wa]s not the contract” that she agreed to. *See* Opp’n at 8. Plaintiff alleges
25 that she participated fully in the loan modification application process and Wells Fargo would lead
26 her to believe that a modification was possible, only to disappoint her by saying that it had no
27 contractual authority to modify the loan because of investor guidelines. *See id.* at 10.

28 The Court agrees with Wells Fargo. Although it is not entirely clear, Plaintiff appears to be

1 making two separate arguments. First, to the extent that the promissory estoppel claim relies on
2 Wells Fargo’s alleged promise that it would not sell or securitize Plaintiff’s loan, this argument
3 fails because Plaintiff has not alleged plausibly that such a promise was made, or how she
4 reasonably relied on such a promise.

5 Second, Plaintiff also appears to allege that Wells Fargo made misrepresentations to her
6 regarding an offer for a permanent loan modification, despite the fact that it did not actually have
7 the ability to grant a permanent loan modification. The Court notes that a promissory estoppel
8 claim based on a promise to forestall foreclosure or consider a loan modification application may
9 be viable but, as currently pled, the Court cannot discern from the pleadings who made the
10 promises, when the promises were made, or why any reliance on such promises was reasonable.
11 *Cf., e.g., Rockridge Tr.*, 2014 WL 688124, at *16 (denying motion to dismiss plaintiff’s claim for
12 promissory estoppel where plaintiff alleged an oral promise to postpone a foreclosure sale by a
13 specific person on a specific day).

14 Accordingly, the eleventh cause of action for promissory estoppel is DISMISSED WITH
15 LEAVE TO AMEND. Any amendment to this claim should identify which individuals made the
16 alleged promises, when these promises were made, the content of these promises, and how
17 Plaintiff reasonably relied on such promises.

18 **I. Breach of Implied Covenant of Good Faith and Fair Dealing**

19 “There is implied in every contract a covenant by each party not to do anything which will
20 deprive the other parties thereto of the benefits of the contract.” *Harm v. Frasher*, 181 Cal. App.
21 2d 405 (1960). However, “[w]here there is no underlying contract there can be no duty of good
22 faith arising from the implied covenant.” *Horn v. Cushman & Wakefield W., Inc.*, 72 Cal. App. 4th
23 798, 804 (1999).

24 Here, Plaintiff appears to allege that she entered into an oral contract with Wells Fargo to
25 modify her loan. Compl. ¶ 244. Plaintiff alleges that “in reliance of this offer,” she entered into a
26 forbearance agreement with Wells Fargo and that she was told that a modification would be
27 offered if she complied with the trial terms. *Id.* ¶ 245. Plaintiff alleges that she and Wells Fargo
28 “made new promises which were separate and beyond the promises in the original contract.” *Id.*

1 ¶ 247. Specifically, Plaintiff alleges that after she and Wells Fargo “reached an agreement that
2 Plaintiff[’]s loans would be modified if [she] complied with trial period plan [sic], Plaintiff
3 expended time and energy and made financial disclosures in furtherance of the agreement, which
4 [she] was not required to under the original contract.” *Id.* Plaintiff alleges that “after receiving a
5 temporary modification and a repayment plan, Defendants informed Plaintiff they did not have the
6 authority to offer any permanent modification because Wells Fargo . . . w[as] on the servicer of
7 her loan and according to investor guidelines of the PSA, there were restrictions on these types of
8 options.” *Id.* Plaintiff alleges that in expending this additional effort, she provided an additional
9 benefit to Wells Fargo by making it “potentially eligible for incentive payments from the federal
10 government for pretentiously [sic] modifying loans.” *Id.* ¶ 248. Plaintiff alleges that despite her
11 efforts, Wells Fargo refused to modify her loan in good faith. *Id.* ¶¶ 254–55.

12 Wells Fargo argues that Plaintiff has failed to plead the existence of a contract provision
13 that was frustrated, as required. *See* Mot. at 14. Wells Fargo further argues that to the extent that
14 this claim is based on an alleged oral contract, it is not clear when the promise occurred or what
15 was promised. *See id.* at 15. Wells Fargo points out that the Loan Modification Agreement that it
16 entered into with Plaintiff in December 2009 specifically advised her that subsequent oral
17 agreements were unenforceable. *Id.*; Compl. Ex. C at 6.

18 In her opposition, Plaintiff alleges that on many occasions, she has “written to Wells Fargo
19 and filled out all necessary paperwork as a requirement for Mortgage Assistance.” Opp’n at 10.
20 She alleges that “[i]n the beginning, [Wells Fargo] did not tell Plaintiff her home was owned by
21 anyone else besides Wells Fargo” and “[o]nly upon seeking mortgage assistance, then Plaintiff
22 was told she did not qualify for these governmental programs because her loan is owned by a pool
23 of investors who according to the investor guidelines will not allow you these options.” *Id.*

24 The Court generally agrees with Wells Fargo. Plaintiff has failed to identify with
25 particularity the contract provision that was frustrated by Wells Fargo’s behavior. Plaintiff fails to
26 allege plausibly any agreements to offer a permanent loan modification, whether written or oral.

27 First, Plaintiff does not allege plausibly the existence of any written agreement that
28 Plaintiff would receive a permanent loan modification if she made compliant payments. Both the

1 August 2009 and the July 2011 Special Forbearance Agreements expressly state that Wells Fargo
2 was “under no obligation to enter into any further agreement, and this forbearance shall not
3 constitute a waiver of the lender’s right to insist upon strict performance in the future.” Compl.
4 Exs. C at 1–2, D at 3. The December 2009 Loan Modification Agreement, which both parties
5 appear to agree was validly executed, is silent as to any permanent modification and it contains a
6 provision that any contemporaneous or subsequent oral agreements are invalid. *See* Compl. Ex. C
7 at 3–6; Mot. at 15 (Wells Fargo referring to Loan Modification Agreement as executed
8 agreement). The Court notes that a breach of the implied covenant of good faith and fair dealing
9 claim based on a written promise to offer a loan modification may be viable but, as currently pled,
10 no written terms appear to give rise to such a promise. *Cf., e.g., Corvello v. Wells Fargo Bank, NA,*
11 *728 F.3d 878, 883 (9th Cir. 2013), as amended on reh’g in part (Sept. 23, 2013)* (holding that
12 bank was contractually obligated under express terms of trial payment plan (“TPP”) to offer a
13 permanent loan modification to borrowers who complied with TPP).

14 Second, Plaintiff does not allege plausibly the existence of any oral agreement that
15 Plaintiff would receive a permanent loan modification if she made compliant payments. It is
16 impossible to determine when any underlying contract was formed, who formed it, or the contents
17 of such a contract. The Court notes that a breach of the implied covenant of good faith and fair
18 dealing claim based on an oral agreement to offer a loan modification may be viable but, as
19 currently pled, the Court cannot discern any particular conversations that would give rise to such
20 promises. *Cf., e.g., Rockridge Tr., 2014 WL 688124, at *14* (denying motion to dismiss claim for
21 breach of implied covenant of good faith and fair dealing where plaintiff alleged oral contracts
22 formed by specific people on specific days in which plaintiff would make monthly payments and
23 submit financial information, and borrower promised to consider plaintiff’s loan modification
24 application).

25 Accordingly, the twelfth cause of action for breach of the implied covenant of good faith
26 and fair dealing is **DISMISSED WITH LEAVE TO AMEND**. Any amendment to this claim
27 should identify the contractual provisions that were frustrated by Wells Fargo’s actions, as well as
28 the time, place, and individuals involved in the creation of any oral contracts.

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J. Institutional Bad Faith

Plaintiff alleges that Wells Fargo committed institutional bad faith that “amounts to reprehensible conduct because the conduct is part of a repeated pattern of unfair practices . . . and not an isolated occurrence.” Compl. ¶¶ 257–58. Plaintiff alleges that Wells Fargo “acted with actual malice by engaging in this Institutional Bad Faith, failing to cure the same, and concealing the magnitude of the problem.” *Id.* ¶ 261. Plaintiff seeks punitive damages. *Id.* ¶ 262.

Wells Fargo argues that institutional bad faith is not a cause of action. Mot. at 15 (citing *Taft v. Am. Mut. Ins. Co.*, No. CV-11-2599-PHX-SMM, 2013 WL 5498226, at *6 (D. Ariz. Oct. 1, 2013) (declining to recognize institutional bad faith as cause of action in Arizona). In her opposition, Plaintiff does not provide any argument or authority to the contrary. *See* Opp’n at 11.

The Court agrees with Wells Fargo. Institutional bad faith appears to be a concept used in litigation involving the Internal Revenue Service. *See, e.g., United States v. Dahlstrum*, 493 F. Supp. 966, 971 (C.D. Cal. 1980) (discussing application of institutional bad faith defense to enforcement of Internal Revenue Service summons). Plaintiff has not identified any authority supporting the proposition that institutional bad faith is a cause of action in California.

This claim is based on a fundamental misunderstanding of the law and, as a result, it cannot be cured by amendment. *See In re Vantive Corp.*, 283 F.3d at 1097. Accordingly, the thirteenth cause of action for “institutional bad faith” is DISMISSED WITH PREJUDICE.

VI. CONCLUSION

For the foregoing reasons, Plaintiff’s Complaint is DISMISSED in its entirety with leave to amend as described above. Any amended complaint must be filed within thirty days. If an amended complaint is not filed, the Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: May 6, 2014



JOSEPH C. SPERO
United States Magistrate Judge