

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

3  
4 HERMELINDA VALENCIA and EMELITA  
5 DEGUZMAN,

6                                    Plaintiffs,

7                                    v.

8 WELLS FARGO HOME MORTGAGE INC.,  
9 and DOES 1-10, Inclusive,

10                                   Defendants.

No. C 14-3354 CW

ORDER GRANTING  
MOTION TO DISMISS  
(DOCKET NO. 24)

11  
12                                    Plaintiffs Hermelinda Valencia and Emelita DeGuzman assert  
13 various mortgage-related claims against Defendant Wells Fargo Home  
14 Mortgage Inc. (Wells Fargo). Defendant now moves to dismiss the  
15 first amended complaint. The Court took the motion under  
16 submission on the papers. Having considered the arguments  
17 presented by the parties, the Court GRANTS the motion and grants  
18 Plaintiffs leave to amend.

19                                    BACKGROUND

20 I. Facts

21                                    The following facts are taken from the first amended  
22 complaint and from certain documents of which the Court takes  
23 judicial notice.<sup>1</sup>

24                                    <sup>1</sup> Defendant asks, and there is no record of Plaintiffs  
25 opposing, that the Court take judicial notice of various recorded  
26 documents associated with Plaintiffs' purchase of the property,  
27 the refinancing loan secured by a deed of trust, and subsequent  
28 appointment of trustees and beneficiaries: (A) July 12, 2005  
Adjustable Rate Mortgage Note; (B) July 12, 2005 Deed of Trust;  
(C) June 30, 2009 Notice of Default and Election to Sell under  
Deed of Trust; (D) August 14, 2009 Substitution of Trustee;

1 Plaintiffs own real property consisting of a single-family  
2 residence located at 1469 Southgate Avenue, Daly City, San Mateo  
3 County, California (the property), which they acquired in August  
4 2003. 1AC ¶¶ 1, 18 (Docket No. 22). Plaintiffs refinanced the  
5 property through Wells Fargo's predecessor in interest, World  
6 Savings Bank, FSB,<sup>2</sup> in July 2005;<sup>3</sup> however, they allege that they  
7 "were not advised of the pertinent terms of this loan" and were  
8 not provided with the required truth-in-lending documents.

9 Id. ¶ 19. They stopped making payments and defaulted on their

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12  
13 (E) November 27, 2013 Notice of Trustee's Sale; (F) April 21, 2006  
14 Certificate of Corporate Existence; (G) November 19, 2007 Letter  
15 from the U.S. Department of Treasury, Office of Thrift  
16 Supervision; (H) November 1, 2009, Official Certification of the  
17 Comptroller of the Currency. Request for Judicial Notice, Exs. A-  
18 H (Docket Nos. 25, 25-1). When considering a motion to dismiss  
19 under Rule 12(b)(6), courts "are permitted to consider documents  
20 that were not physically attached to the complaint where the  
21 documents' authenticity is not contested, and the plaintiff's  
22 complaint necessarily relies on them." Sams v. Yahoo! Inc., 713  
23 F.3d 1175, 1179 (9th Cir. 2013). Thus, the Court GRANTS  
24 Defendant's request with regard to its Exhibit A. In addition, "a  
25 court may take judicial notice of 'matters of public record.'" Sami v. Wells Fargo Bank, 2012 WL 967051, at \*4 (N.D. Cal.)  
26 (citation omitted). The Court GRANTS this request with regard to  
27 Defendant's Exhibits B-H.

28  
29 <sup>2</sup> World Savings Bank was renamed Wachovia Mortgage, FSB, on  
30 December 31, 2007. Def.'s Ex. G. On November 1, 2009, Wachovia  
31 Mortgage was converted into a national bank under the name Wells  
32 Fargo Bank Southwest, N.A., and merged into Wells Fargo Bank, N.A.  
33 Def's. Ex. H.

34  
35 <sup>3</sup> Plaintiffs provide the date as July 18, 2005. 1AC ¶ 19.  
36 However, the Adjustable Rate Mortgage Note is dated July 12, 2005.  
37 Def.'s Ex. A. The precise date is immaterial for purposes of this  
38 motion.

1 mortgage in early 2009,<sup>4</sup> and a Notice of Default and Election to  
2 Sell under Deed of Trust was recorded in San Mateo County on July  
3 1, 2009. Id. ¶ 20; Def.'s Ex. C.

4 Plaintiffs allege that they contacted Defendant on an  
5 unspecified date in 2011 to request a loan modification review, at  
6 which time Defendant advised them that if they qualified for the  
7 federal Home Affordable Modification Program (HAMP), Defendant  
8 would offer them a Trial Payment Plan (TPP), followed by a  
9 modification of their loan. 1AC ¶ 21. However, although  
10 Plaintiffs qualified for a HAMP modification, Defendant never  
11 offered them one.

12 Plaintiffs sued in California state court, filing their  
13 complaint on or about June 22, 2014. Notice of Removal, Ex. 1  
14 (Docket No. 1-1). Defendant removed on July 24, 2014. Notice of  
15 Removal (Docket No. 1). A week later, Defendant made its first  
16 motion to dismiss. (Docket No. 9). Plaintiffs filed the present  
17 First Amended Complaint (1AC) on August 13, 2014, rendering moot  
18 the initial motion to dismiss.

19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the  
21 claim showing that the pleader is entitled to relief." Fed. R.  
22 Civ. P. 8(a). The plaintiff must proffer "enough facts to state a  
23 claim to relief that is plausible on its face." Ashcroft v.  
24 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.

25  
26 \_\_\_\_\_  
27 <sup>4</sup> Plaintiffs provide the month of default as March 2009. 1AC  
28 ¶ 20. Defendant asserts that Plaintiffs defaulted in February  
2009; however, it provides no evidence to support this assertion.  
Mot. Dismiss 1 (Docket No. 24).

1 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule  
2 12(b)(6) for failure to state a claim, dismissal is appropriate  
3 only when the complaint does not give the defendant fair notice of  
4 a legally cognizable claim and the grounds on which it rests.  
5 Twombly, 550 U.S. at 555. A claim is facially plausible "when the  
6 plaintiff pleads factual content that allows the court to draw the  
7 reasonable inference that the defendant is liable for the  
8 misconduct alleged." Iqbal, 556 U.S. at 678.

9 In considering whether the complaint is sufficient to state a  
10 claim, the court will take all material allegations as true and  
11 construe them in the light most favorable to the plaintiff.  
12 Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061  
13 (9th Cir. 2008). The court's review is limited to the face of the  
14 complaint, materials incorporated into the complaint by reference,  
15 and facts of which the court may take judicial notice. Id. at  
16 1061. However, the court need not accept legal conclusions,  
17 including "threadbare recitals of the elements of a cause of  
18 action, supported by mere conclusory statements." Iqbal, 556 U.S.  
19 at 678 (citing Twombly, 550 U.S. at 555).

20 When granting a motion to dismiss, the court is generally  
21 required to grant the plaintiff leave to amend, even if no request  
22 to amend the pleading was made, unless amendment would be futile.  
23 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
24 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
25 amendment would be futile, the court examines whether the  
26 complaint could be amended to cure the defect requiring dismissal  
27 "without contradicting any of the allegations of [the] original  
28

1 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
2 Cir. 1990).

3 DISCUSSION

4 I. First Cause of Action: Negligent Misrepresentation

5 Plaintiffs allege that, by failing to offer them a TPP and  
6 HAMP loan modification, Defendant engaged in negligent  
7 misrepresentation.

8 The elements of negligent misrepresentation are  
9 "(1) misrepresentation of a past or existing material fact,  
10 (2) without reasonable ground for believing it to be true,  
11 (3) with intent to induce another's reliance on the  
12 misrepresentation, (4) ignorance of the truth and justifiable  
13 reliance on the misrepresentation by the party to whom it was  
14 directed, and (5) resulting damage." Lincoln Alameda Creek v.  
15 Cooper Indus., Inc., 829 F. Supp. 325, 330 (N.D. Cal. 1992). "The  
16 elements of negligent misrepresentation are similar to intentional  
17 fraud except for the requirement of scienter; in a claim for  
18 negligent misrepresentation, the plaintiff need not allege the  
19 defendant made an intentionally false statement, but simply one as  
20 to which he or she lacked any reasonable ground for believing the  
21 statement to be true." Charnay v. Colbert, 145 Cal. App. 4th 170,  
22 184-85 (2006) (citing Bily v. Arthur Young & Co., 3 Cal. 4th 370,  
23 407-08 (1992)); see also Alliance Mortg. Co. v. Rothwell, 10 Cal.  
24 4th 1226, 1239 fn. 4 (1995) (negligent misrepresentation is a  
25 species of the tort of deceit and, like fraud, requires a  
26 misrepresentation, justifiable reliance and damage).

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1 A. Rule 9(b)

2 1. Application of Rule 9(b)

3 "The Ninth Circuit has not yet decided whether Rule 9(b)'s  
4 heightened pleading standard applies to a claim for negligent  
5 misrepresentation, but most district courts in California hold  
6 that it does." Villegas v. Wells Fargo Bank, N.A., 2012 WL  
7 4097747, at \*7 (N.D. Cal.); see, e.g., Errico v. Pac. Capital  
8 Bank, N.A., 753 F. Supp. 2d 1034, 1049 (N.D. Cal. 2010)  
9 ("[N]egligent misrepresentation 'sounds in fraud' and is subject  
10 to Rule 9(b)'s heightened pleading standard"); In re Easysaver  
11 Rewards Litig., 737 F. Supp. 2d 1159, 1176 (S.D. Cal. 2010);  
12 Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141  
13 (C.D. Cal. 2003); but see Petersen v. Allstate Indem. Co., 281  
14 F.R.D. 413 (C.D. Cal. 2012) (finding that Rule 9(b) does not apply  
15 to negligent misrepresentation claims); Howard v. First Horizon  
16 Home Loan Corp., 2013 WL 6174920, at \*5 (N.D. Cal.) ("negligent  
17 misrepresentation requires a showing that a defendant failed to  
18 use reasonable care -- 'an objective standard [that] does not  
19 result in the kind of harm that Rule 9(b) was designed to  
20 prevent'" (quoting Petersen, 281 F.R.D. at 417-18); Bernstein v.  
21 Vocus, Inc., 2014 WL 3673307, at \*5 (N.D. Cal.) ("The Court finds  
22 the reasoning of [Petersen and Howard] persuasive, and joins in  
23 their holdings that negligent misrepresentation claims are not  
24 subject to the heightened pleading standards of Rule 9(b).").

25 Here, Plaintiffs acknowledge that they must meet the  
26 heightened pleading requirements of Rule 9(b). Pls.' Opp. at 11  
27 (Docket No. 26) (citing, among others, Harvey v. Bank of Am.,  
28 N.A., 906 F. Supp. 2d 982, 995 (N.D. Cal. 2012)).

1           2.     Rule 9(b) Standard

2            "In all averments of fraud or mistake, the circumstances  
3 constituting fraud or mistake shall be stated with particularity."  
4 Fed. R. Civ. P. 9(b).  "Therefore, in an action based on state  
5 law, while a district court will rely on state law to ascertain  
6 the elements of fraud that a party must plead, it will follow Rule  
7 9(b) in requiring that the circumstances of the fraud be pleaded  
8 with particularity."  Marolda v. Symantec Corp., 672 F. Supp. 2d  
9 992, 996 (N.D. Cal. 2009); see also Kearns v. Ford Motor Co., 567  
10 F.3d 1120, 1125 (9th Cir. 2009).  "[W]hen the claim is 'grounded  
11 in fraud,' the pleading of that claim as a whole is subject to  
12 Rule 9(b)'s particularity requirement."  Marolda, 672 F. Supp. 2d  
13 at 997 (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104  
14 (9th Cir. 2003)).  Rule 9(b) requires the plaintiff to allege "the  
15 who, what, when, where, and how" of the alleged fraudulent  
16 conduct.  Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).  A  
17 plaintiff must describe the alleged fraud in specific enough terms  
18 "to give defendants notice of the particular misconduct so that  
19 they can defend against the charge."  Kearns, 567 F.3d at 1124.  
20 Rule 9(b) requires a plaintiff to allege "the who, what, when,  
21 where, and how" of the alleged fraudulent conduct.  Cooper v.  
22 Pickett, 137 F.3d 616, 627 (9th Cir. 1997).  "The requirement of  
23 specificity in a fraud action against a corporation requires the  
24 plaintiff to allege the names of the persons who made the  
25 allegedly fraudulent representations, their authority to speak, to  
26 whom they spoke, what they said or wrote, and when it was said or  
27 written."  Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App.  
28 4th 153, 157 (1991).

1 B. Plaintiffs failed sufficiently to plead negligent  
2 misrepresentation

3 1. Plaintiffs failed to meet the heightened Rule 9(b)  
4 pleading standard

5 Plaintiffs only generally allege that at some time during  
6 2011 they contacted Defendant concerning a possible loan  
7 modification and were told by Defendant that a loan modification  
8 was possible if they qualified. Plaintiffs fail to specify  
9 (1) the name or any other information that would identify the  
10 person to whom they spoke; (2) what, precisely, that person told  
11 them (verbally or in writing); or (3) the date (or dates) on which  
12 they spoke with that person. Accordingly, Plaintiffs have failed  
13 to state with particularity facts sufficient to sustain their  
14 negligent misrepresentation claim.

15 2. Plaintiffs' allegations are insufficient even to  
16 survive Rule 8 review

17 Even if their claim was not subject to the heightened Rule  
18 9(b) pleading standard, Plaintiffs have not plead facts sufficient  
19 to sustain their negligent misrepresentation claim. In  
20 particular, a claim for negligent misrepresentation must allege,  
21 among other elements, that the defendant made a misrepresentation  
22 of a past or existing material fact, that the plaintiff  
23 justifiably relied upon that misrepresentation, and that the  
24 plaintiff suffered damages as a result. Lincoln Alameda Creek,  
25 829 F. Supp. at 330. Plaintiffs' amended complaint alleges no  
26 such facts.

27 First, Plaintiffs fail to allege a misrepresentation of a  
28 past or existing material fact. In Tarmann, the court found that  
a promise to pay money in the future was not actionable as



1 negligence because it was a misrepresentation of intention rather  
2 than a misrepresentation of fact. 2 Cal. App. 4th at 158-59.  
3 Here, Plaintiffs allege that Defendant promised to offer them a  
4 TPP and a loan modification if they qualified, and then failed to  
5 follow through on that promise. Such a promise is not an  
6 actionable past or existing material fact.

7 In addition, even if Plaintiffs' claim that Defendant reneged  
8 on its promise was sufficient, they fail to allege any action that  
9 they took in justifiable reliance on that claim. "California  
10 courts have recognized that, to establish liability for negligent  
11 misrepresentation, the plaintiff must make a showing of 'actual  
12 reliance' on the defendant's misrepresentation." FDIC v. Warren,  
13 2013 U.S. Dist. LEXIS 31848, at \*13 (N.D. Cal.) (citing Mirkin v.  
14 Wasserman, 5 Cal. 4th 1082, 1088 (1993) (citing, in turn, Garcia  
15 v. Superior Court, 50 Cal. 3d 728, 737 (1990))). "Actual reliance  
16 occurs when a misrepresentation is an immediate cause of [a  
17 plaintiff's] conduct, which alters his legal relations, and when,  
18 absent such representation, he would not, in all reasonable  
19 probability, have entered into the contract or other transaction."  
20 Conroy v. Regents of Univ. of Calif., 45 Cal. 4th 1244, 1256  
21 (2009) (internal quotations omitted). Plaintiffs' amended  
22 complaint makes no such allegation specific to Defendant; instead,  
23 it merely cites national statistics concerning the low number of  
24 HAMP applicants who actually received loan modifications. 1AC ¶  
25 31, n.4.<sup>5</sup>

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26 <sup>5</sup> In their Opposition brief, Plaintiffs argue that they  
27 "(1) worked diligently and tirelessly to satisfy Wells Fargo's  
28 repetitive and redundant document requests; (2) they spent  
countless hours negotiating with Wells Fargo; and (3) Plaintiffs

1 Finally, Plaintiffs generally allege, "As a direct and  
2 proximate result of Defendants' Negligent Misrepresentation,  
3 Plaintiffs have suffered three years of unnecessary mortgage  
4 arrears, late fees, penalties and damage to their credit." Id. ¶  
5 32. However, Plaintiffs allege no facts to suggest that the  
6 damages they articulate are the result of Defendant's actions, as  
7 opposed to being merely the result of their default.

8 For these reasons, the motion to dismiss Plaintiffs' first  
9 cause of action, negligent misrepresentation, is GRANTED.

10 II. Second Cause of Action: Promissory Estoppel

11 Relying on the same facts that they asserted in their first  
12 cause of action, Plaintiffs make a claim for promissory estoppel.

13 "The purpose of [promissory estoppel] is to make a promise  
14 that lacks consideration (in the usual sense of something  
15 bargained for and given in exchange) binding under certain  
16 circumstances." Cockrell v. Wells Fargo Bank, N.A., 2013 WL  
17 3830048, at \*4 (N.D. Cal.) (citation omitted). "Promissory  
18 estoppel requires: (1) a promise that is clear and unambiguous in  
19 its terms; (2) reliance by the party to whom the promise is made;  
20 (3) the reliance must be reasonable and foreseeable; and (4) the  
21 party asserting the estoppel must be injured by his or her  
22 reliance." Id. "Under this doctrine a promisor is bound when he

23  
24  
25 lost the opportunity to pursue other methods to avoid  
26 foreclosure." Pls.' Opp. at 12-13. However, the amended  
27 complaint contains no allegations whatsoever concerning burdensome  
28 document production or any negotiations with Defendant, and merely  
states in a conclusory manner that Plaintiffs might have filed for  
bankruptcy in 2011, but that now bankruptcy would be impractical.  
1AC ¶ 42.

1 should reasonably expect a substantial change of position, either  
2 by act or forbearance, in reliance on his promise, if injustice  
3 can be avoided only by its enforcement." Panaszewicz v. GMAC  
4 Mortg., LLC, 2013 WL 2252112, at \*4 (N.D. Cal.) (citation  
5 omitted).

6 As plead, the alleged promise to provide a TPP and a HAMP  
7 loan modification if Plaintiffs qualified does not constitute a  
8 "clear and unambiguous" promise. Such a statement might qualify  
9 as a promise if the qualifications for a loan modification in  
10 Plaintiffs' circumstances were so clear and unambiguous that  
11 Plaintiffs could plead specific facts demonstrating the  
12 qualifications and their ability to meet them given the loan  
13 amount, their income, and arrears. Plaintiffs' promissory  
14 estoppel claim fails for other reasons as well. First, as set  
15 forth above, Plaintiffs have not alleged any facts that would tend  
16 to demonstrate their reliance on such a promise. Plaintiffs cite  
17 Bushell v. JP Morgan Chase Bank, N.A., 220 Cal. App. 4th 915, 930  
18 (2013), for the proposition that plaintiffs who "alleged that they  
19 repeatedly contacted defendant, repeatedly prepared documents at  
20 defendant's request, discontinued efforts to pursue a refinance  
21 from other financial institutions, or to pursue other means of  
22 avoiding disclosure, and lost their home," had sufficiently  
23 alleged detrimental reliance. Pls.' Opp. at 16 (citing Bushell).  
24 However, Plaintiffs' amended complaint contains no such factual  
25 allegations.

26 Even if it did, Plaintiffs' damage claim is insufficient.  
27 Plaintiffs allege that they "incurred three additional years of  
28 loan arrears, late fees, penalties, credit damage, and [are]

1 facing imminent foreclosure of their home," and that they might  
2 have avoided these damages had they filed for bankruptcy in 2011  
3 instead of pursuing a HAMP loan modification. 1AC ¶¶ 41-43.  
4 Again, as above, Plaintiffs fail to articulate why any loan  
5 arrears, late fees, penalties, and credit damage are the result of  
6 any promise made by Defendant, and not the result of Plaintiffs'  
7 default. In addition, although Plaintiffs suggest that they might  
8 have received more favorable treatment had they applied for  
9 bankruptcy in 2011, they allege no specific facts to suggest that  
10 they would have filed for bankruptcy and obtained a favorable  
11 outcome but for Defendant's alleged promises. See Gerbery v.  
12 Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 107744, at \*6 (S.D.  
13 Cal.) (plaintiffs' claim that "they gave up opportunities to  
14 obtain an alternative loan with more favorable terms . . . is a  
15 hypothetical injury, since the FAC provides no details of other  
16 loans available to them, whether they sought quotes from other  
17 lenders, or whether other lenders had offered more favorable loan  
18 terms to borrowers with credit ratings similar to Plaintiffs'.").

19 Accordingly, the Court GRANTS Defendant's motion to dismiss  
20 Plaintiffs' promissory estoppel claim.

21 III. Third Cause of Action: Violation of California Business and  
22 Professions Code Section 17200 et seq. (the Unfair  
23 Competition Law, or UCL)

24 Plaintiffs allege that Defendant's "practice of deliberately  
25 refusing to provide qualified borrowers such as Plaintiffs with  
26 HAMP TPP's is an 'unfair' business practice under the UCL.  
27 Furthermore, issuing the subject toxic loan without the requisite  
28

1 Truth-in-Lending / RESPA disclosures is unfair as well." 1AC  
2 ¶ 47.

3 The UCL prohibits "any unlawful, unfair or fraudulent  
4 business act." Cal. Bus. & Prof. Code § 17200 et seq. Plaintiffs  
5 only allege an "unfair business practice" claim. 1st Am. Compl.  
6 ¶¶ 47-49.

7 The California Supreme Court has not established a definitive  
8 test to determine whether a business practice is unfair under the  
9 UCL. See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20  
10 Cal 4th 163, 187 n.12 (1999) (stating that the test for unfairness  
11 in cases involving business competitors is "limited to that  
12 context" and does not "relate[] to actions by consumers").  
13 California courts of appeal have applied three different tests to  
14 evaluate claims by consumers under the UCL's unfair practices  
15 prong. Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th  
16 247, 256 (2010).

17 Under one test, a consumer must allege a "violation or  
18 incipient violation of any statutory or regulatory provision, or  
19 any significant harm to competition." Id. The "public policy  
20 which is a predicate to a consumer unfair competition action under  
21 the 'unfair prong' of the UCL must be tethered to specific  
22 constitutional, statutory, or regulatory provisions." Id.

23 Under the second test, the "unfair prong" requires a consumer  
24 to plead that (1) a defendant's conduct "is immoral, unethical,  
25 oppressive, unscrupulous or substantially injurious to customers,"  
26 and (2) "the utility of the defendant's conduct" is outweighed by  
27 "the gravity of the harm to the alleged victim." Id. at 257  
28

1 (citing Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th  
2 700, 718-19 (2001)).

3 The third test, which is based on the Federal Trade  
4 Commission's definition of unfair business practices, requires  
5 that, as a result of unfair conduct, "(1) the consumer injury must  
6 be substantial; (2) the injury must not be outweighed by any  
7 countervailing benefits to consumers or competition; and (3) it  
8 must be an injury that consumers themselves could not have  
9 reasonably avoided." Id. (citation and internal quotation marks  
10 omitted).

11 In Lozano v. AT&T Wireless Serv., Inc., 504 F.3d 718, 736  
12 (9th Cir. 2007), the Ninth Circuit endorsed the tethering test or  
13 the balancing test and declined "to apply the FTC standard in the  
14 absence of a clear holding from the California Supreme Court."  
15 See also Ferrington v. McAfee, Inc., 2010 WL 2910169, at \*12 (N.D.  
16 Cal.) ("[p]ending resolution of this issue by the California  
17 Supreme Court, the Ninth Circuit has approved the use of either  
18 the balancing or tethering tests in consumer actions, but has  
19 rejected the FTC test") (citation omitted); I.B. ex rel. Fife v.  
20 Facebook, Inc., 905 F. Supp. 2d 989, 1010-11 (N.D. Cal. 2012).

21 Under either the tethering test or the balancing test,  
22 Plaintiffs fail to plead sufficient facts to support a claim under  
23 the unfairness prong of the UCL. Plaintiffs have not sufficiently  
24 "tethered" their UCL claim to any "specific constitutional,  
25 statutory, or regulatory provisions." Plaintiffs also have failed  
26 to show how Defendant's actions were "immoral, unethical,  
27 oppressive, unscrupulous or substantially injurious to consumers,"  
28 especially because, as set forth above, they to allege sufficient

1 facts to support the allegation that they were harmed due to  
2 reliance upon Defendant's alleged promises. In their opposition  
3 brief, Plaintiffs expressly state that their UCL claim has its  
4 grounds in their negligent misrepresentation and promissory  
5 estoppel claims. Pls.' Opp. at 18-19. The Court has already  
6 determined that those claims must be dismissed, and, therefore,  
7 they cannot serve as the grounds for a UCL claim.

8 In addition, to the extent that Plaintiffs' claim arises from  
9 the alleged failure of Defendant's predecessor-in-interest to  
10 provide required truth-in-lending forms,<sup>6</sup> such a claim would be  
11 time-barred. A UCL claim is subject to a four-year statute of  
12 limitations. Cal. Bus. & Prof. Code § 17208. Plaintiffs obtained  
13 the loan at issue in July 2005, but did not bring the present  
14 action until June 2014, almost nine years later. Plaintiffs do  
15 not argue that the statute of limitations is subject to tolling,  
16 and they have plead no facts that would warrant such tolling.  
17 They appear to concede that their claims are not based on the 2005  
18 loan. Consequently, any failure to provide Plaintiffs with  
19 required paperwork in 2005 cannot give rise to their present UCL  
20 claim.

21 Consequently, with regard to Plaintiffs' UCL claim,  
22 Defendant's motion to dismiss is GRANTED.

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24 //

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26 <sup>6</sup> See 1AC ¶ 47 ("[I]ssuing the subject toxic loan without the  
27 requisite Truth-in-Lending / RESPA disclosures is unfair as  
28 well.").

1 IV. Fourth Cause of Action: Negligence

2 Plaintiffs claim that Defendant owed them a duty of care to  
3 offer them a TPP and HAMP loan modification,<sup>7</sup> that its failure to  
4 do so was a breach of that duty, and that they suffered damages as  
5 a consequence of that breach. 1AC ¶¶ 63-65.

6 A cause of action for negligence must allege (1) the  
7 defendant's legal duty of care to the plaintiff; (2) the  
8 defendant's breach of that duty; (3) injury to the plaintiff as a  
9 result of the breach; and (4) damage to the plaintiff. Hoyem v.  
10 Manhattan Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978). "The  
11 legal duty of care may be of two general types: (a) the duty of a  
12 person to use ordinary care in activities from which harm might  
13 reasonably be anticipated, or (b) an affirmative duty where the  
14 person occupies a particular relationship to others." McGettigan  
15 v. Bay Area Rapid Transit Dist., 57 Cal. App. 4th 1011, 1016-17  
16 (1997).

17 "[A]s a general rule, a financial institution owes no duty of  
18 care to a borrower when the institution's involvement in the loan  
19 transaction does not exceed the scope of its conventional role as  
20 \_\_\_\_\_

21 <sup>7</sup> Plaintiffs also claim, albeit in a parenthetical, that  
22 Defendant breached its duty to Plaintiffs by "issuing the subject  
23 loan." 1AC ¶ 64. Even assuming for the sake of argument that  
24 Defendant had a duty to Plaintiffs when issuing the subject loan,  
25 such a claim is time-barred. As noted above, the subject loan was  
26 issued in July 2005. The statute of limitations for a negligence  
27 claim is two years. Cal. Civ. Proc. Code § 339. Thus, the  
28 deadline for Plaintiffs to bring a negligence claim arising from  
the subject loan passed in July 2007. Plaintiffs did not bring  
the current action until June 2014, more than seven years after  
the statute of limitations passed, and they neither argue nor  
assert facts that would demonstrate that this deadline has not run  
or should be tolled in the present case.



1 a mere lender of money." Nymark v. Heart of Fed. Savings & Loan  
2 Ass'n, 231 Cal. App. 3d 1089, 1095 (1991); see also Kinner v.  
3 World Savings & Loan Ass'n, 57 Cal. App. 3d 724, 732 (1976)  
4 (holding no duty of care owed by lender to borrower to ensure  
5 adequacy of construction loan); Wagner v. Benson, 101 Cal. App. 3d  
6 27, 35 (1980) (finding no duty owed by lender to borrower where  
7 lender is not involved extensively in borrower's business).

8 Here, Plaintiffs allege no facts that would support a finding  
9 that Defendant owed them a duty of care in considering their  
10 application for a HAMP loan modification. Plaintiffs ask the  
11 Court to follow Alvarez v. BAC Home Loans Servicing, L.P., 228  
12 Cal. App. 4th 941 (2014), in which the court held that the lender  
13 defendant owed a duty of care to the plaintiffs. Id. at 948.  
14 However, Alvarez is not applicable in the present case. In  
15 Alvarez, the plaintiffs alleged that the defendants breached their  
16 duty "by (1) failing to review plaintiffs' applications in a  
17 timely manner, (2) foreclosing on plaintiffs' properties while  
18 they were under consideration for a HAMP modification and  
19 (3) mishandling plaintiffs' applications by relying on incorrect  
20 information." Id. at 945. No such allegations are at issue in  
21 the present case.<sup>8</sup> In the absence of any circumstances that would  
22 impose a duty of care on Defendant, Defendant had no duty of care  
23

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24 <sup>8</sup> Plaintiffs do allege that Defendant "t[ook] more than three  
25 years to review something [the HAMP application] that should not  
26 have taken more than six months." 1AC ¶ 29. However, this is a  
27 cursory and conclusory allegation. Plaintiffs do not explain when  
28 they applied, what documentation was requested and when they  
provided it, or what other response they received and when.  
Further, Plaintiffs allege no specific harm that they suffered as  
a result of the alleged delay.

1 to Plaintiffs in reviewing their application for a HAMP  
2 modification.

3 Accordingly, the Court GRANTS Defendant's motion to dismiss  
4 Plaintiffs' negligence claim.

5 CONCLUSION

6 When granting a motion to dismiss, the court is generally  
7 required to grant the plaintiff leave to amend, even if no request  
8 to amend the pleading was made, unless amendment would be futile.  
9 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
10 F.2d 242, 246-47 (9th Cir. 1990). Here, Plaintiffs have not  
11 sought leave to amend if the motion is granted.

12 Further, Defendant made the same arguments in its first  
13 motion to dismiss, and Plaintiffs failed to cure the defects in  
14 their amended complaint. Nonetheless, the Court will grant  
15 Plaintiffs leave further to amend their complaint to remedy these  
16 deficiencies if they can do so truthfully and without  
17 contradicting the allegations in their prior pleadings. Within  
18 fourteen days of the date of this order, Plaintiffs may file an  
19 amended complaint to remedy the deficiencies identified above.  
20 They may not add further claims or allegations not authorized by  
21 this order. If Plaintiffs file a second amended complaint,  
22 Defendant shall respond without fourteen days after it is filed.  
23 If Defendant files a motion to dismiss, Plaintiffs shall respond  
24 to the motion within fourteen days after it is filed. Defendant's  
25 reply, if necessary, shall be due seven days thereafter. Any  
26 motion to dismiss will be decided on the papers.

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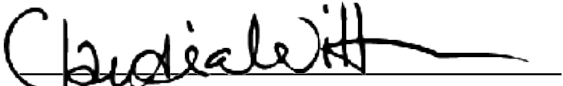
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For the reasons set forth above, the Court GRANTS Defendant's motion to dismiss (Docket No. 24), and Plaintiffs' complaint is DISMISSED.

IT IS SO ORDERED.

Dated: November 7, 2014

  
CLAUDIA WILKEN  
United States District Judge