

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MINA HA,)	Case No. 5:14-cv-00120-PSG
)	
v.)	ORDER GRANTING-IN-PART
)	BANA’S MOTION TO DISMISS AND
BANK OF AMERICA, N.A., et al.)	MOTION TO STRIKE
)	
Defendants.)	(Re: Docket Nos. 37 and 39)

Before the court are Defendant Bank of America, N.A.’s (“BANA”) motions to dismiss and strike Plaintiff Mina Ha’s second amended complaint.¹ Ha opposes. The parties appeared for a hearing. After considering the arguments, the court GRANTS BANA’s motion, but only IN-PART as explained below.

I. BACKGROUND

A. Diversity Jurisdiction Lies Over the Case

Ha is a California resident raising California state law claims in this court pursuant to diversity jurisdiction.² BANA “is a diversified financial marketing and/or services company engaged primarily in residential mortgage banking and/or related” businesses domiciled in

¹ See Docket Nos. 37 and 39. There is a stay on litigation involving Defendants Bank of New York Mellon and Resurgent Capital Services, LP while Ha’s loan modification application is being reviewed. See Docket No. 35.

² See Docket No. 36 at ¶¶ 2-4.

1 North Carolina.³ “BNY is a diversified financial marketing and/or service company engaged
2 primarily in residential mortgage banking and/or related” businesses domiciled in New York.⁴
3 Resurgent “is a diversified financial marketing and/or services company engaged primarily in
4 residential mortgage banking and/or related” businesses domiciled in South Carolina.⁵

5 **B. Factual Background**

6 Ha owns real property located at 20972 Greenleaf Dr., Cupertino, CA 95014.⁶ Ha
7 “purchased the Property on August 26, 2005.”⁷ In late November of 2006, Ha refinanced her loan
8 with Countrywide Financial executing a promissory note and deed of trust in favor of Countrywide
9 Financial on November 22, 2006.⁸ Countrywide was purchased by BANA in 2008 and BANA
10 “became the beneficiary of Plaintiff’s loan, as well as the servicer.”⁹ Ha stayed current on her loan
11 until mid-2008.¹⁰

12
13 “In or around mid-September 2008” Ha inquired about a possible loan modification.¹¹ A
14 female representative of BANA “told Plaintiff, because she was current on her mortgage payments,
15 she was ineligible for a loan modification.”¹² Ha “inquired about other options and was told that
16 she was otherwise qualified for a loan modification, however, in order to receive the modification,
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18 ³ *Id.* at ¶¶ 2 and 4.

19 ⁴ *Id.*

20 ⁵ *Id.*

21 ⁶ *See id.* at ¶ 12.

22 ⁷ *Id.* at ¶ 13.

23 ⁸ *See id.*

24 ⁹ *Id.*

25 ¹⁰ *See id.* at ¶ 14 (“Between November 2006 and September 2008, Plaintiff fully performed under
26 her contract by making a timely mortgage payment each month.”); *But see* Docket No. 40-1, Ex. B
at 2 (indicating Ha fell behind on her payments in June 2008).

27 ¹¹ *Id.* at ¶ 15.

28 ¹² *Id.*

1 she would have to miss three months of payments.”¹³ Ha “was concerned about the effect of
2 missing payments and expressed such concern to the female representative” of BANA.¹⁴ In
3 response:

4 [A BANA] female representative promised Plaintiff that, if Plaintiff missed payments in
5 pursuit of a loan modification, [BANA] would not initiate foreclosure proceedings as long
6 as Plaintiff was being reviewed for a loan modification. In fact, the representative stated
7 that it was [BANA’s] policy to not initiate foreclosure proceedings against any borrowers
8 as long as they were in the process of applying for a loan modification or were being
9 reviewed for a loan modification. Thus, in reliance on the representative’s statements,
10 Plaintiff, who was ready, willing, and able to make her mortgage payments, did not make
11 her October 2008 [payment].¹⁵

12 “In or around October 2008, Plaintiff contacted [BANA] once more to inquire about the effect of
13 missed” payments and

14 [Ha] spoke to another female representative of [BANA and was told] the same promise to
15 Plaintiff, regarding [BANA’s] policy regarding the initiation of foreclosure proceedings
16 while a borrower was in the process of applying for, and being reviewed for, a loan
17 modification. Further, Plaintiff asked if she should resume making payments on the loan
18 following the three months of missed payments. The female representative stated that
19 Plaintiff should not begin to make payments on the loan until she received a permanent
20 modification, because any missed payments would be taken care of in the permanent
21 modification. Thus, the female representative told Plaintiff to continue missing payments,
22 following the three initial months, and stated that Plaintiff did not risk the initiation of
23 foreclosure proceedings for doing so.¹⁶

24 By January, Ha had “missed three mortgage payments” and “submitted a complete loan
25 modification application.”¹⁷ Ha “always complied” with “repeated request[s]” to submit additional
26 documentation.¹⁸ On May 1, 2009, while Ha was “was in the process of submitting a loan
27 modification application, and while her application was pending review, Defendant [BANA]
28 caused to be recorded a Notice of Default against Plaintiff’s Property, thereby initiating foreclosure

29 ¹³ *Id.*

30 ¹⁴ *Id.* at ¶ 16.

31 ¹⁵ *Id.*

32 ¹⁶ *Id.* at ¶ 17.

33 ¹⁷ *Id.* at ¶ 18.

34 ¹⁸ *Id.*

1 proceedings against Plaintiff's Property."¹⁹ Ha contacted BANA about the notice of default and
2 spoke to another BANA representative who "told Plaintiff to disregard the Notice of Default and to
3 continue applying for a loan modification."²⁰ Ha "continued to seek a loan modification, rather
4 than make arrangements to reinstate her loan."²¹

5 From June 2009 through April 2011, Ha "continued to submit all requested documents" to
6 BANA in pursuit of a loan modification and "spoke to several representatives who reiterated the
7 same promises made to Plaintiff in September and October 2008 - that a loan modification was
8 forthcoming and that she need not worry about the risk of foreclosure while awaiting the final loan
9 modification."²² In April 2011, Ha spoke to a BANA representative "to confirm that they had
10 received the latest documents that she had submitted" as BANA "requested additional documents
11 to support Plaintiff's January 2009 loan modification" application,²³ but the BANA representative
12 "stated that Plaintiff's loan modification application had been misplaced and, thus, Plaintiff would
13 need to send in a complete new application."²⁴

14
15 Ha expressed her concern over the missing documents and "was told that she would still
16 receive a permanent modification, however, she needed to submit a new application."²⁵ The
17 BANA representative "further stated that Plaintiff need not be concerned about foreclosure, if she
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22 ¹⁹ *Id.* at ¶ 19.

23 ²⁰ *Id.* at ¶ 20.

24 ²¹ *Id.*

25 ²² *Id.* at ¶ 21.

26 ²³ *Id.*

27 ²⁴ *Id.*

28 ²⁵ *Id.*

1 submitted a new application.”²⁶ In April 2011, Ha submitted “a complete new loan modification”
2 application.²⁷

3 In October 2011, Ha was informed her loan modification application was denied because
4 “her husband’s income was too great to qualify for a loan modification, however, the income relied
5 upon by BANA in coming to this decision was inaccurate and her husband’s income was actually
6 less than BANA had determined.”²⁸ Ha contacted BANA to contest the income determination and
7 the BANA representative “acknowledged the mistake in her husband’s income, however, he
8 indicated that he could not fix it on his system.”²⁹ Ha was told “that she would have to submit an
9 entirely new application, which Plaintiff immediately did.”³⁰

10
11 Between October 2011 and February 2012, Ha continued contacting BANA to follow up on
12 her application and BANA’s representatives assured Ha “that her application was complete and
13 was under review.”³¹ When Ha “inquired about the growing arrears on her loan, she was told that
14 she need not worry about the arrears as the permanent modification would take the arrears into
15 consideration.”³² Despite the fact that Ha’s loan modification application was under review,
16 BANA “caused a Notice of Trustee’s Sale to be recorded against Plaintiff’s Property on February
17 10, 2012 with a sale date of May 8, 2012.”³³ “When Plaintiff received the Notice of Trustee’s
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²⁶ *Id.*

22 ²⁷ *Id.*

23 ²⁸ *Id.* at ¶ 23.

24 ²⁹ *Id.*

25 ³⁰ *Id.*

26 ³¹ *Id.* at ¶ 24.

27 ³² *Id.*

28 ³³ *Id.*

1 Sale, she phoned BANA and was told to disregard the notice. The representative stated that,
2 because her loan modification application was under review, no foreclosure sale would proceed.”³⁴

3 In August 2012, Ha’s application for a loan modification was denied for a second time.³⁵

4 In August 2012, BANA appointed Ha “a designated point of contact within the company” –
5 Antonio Guevara.³⁶ Ha worked with “Mr. Guevara on her loan modification application” until
6 February 2013, but “Mr. Guevara constantly gave her conflicting information.”³⁷ “Between March
7 2013 and May 2013, Plaintiff called Mr. Guevara weekly to check on the status of her application.
8 Mr. Guevara consistently reassured Plaintiff that her application was complete and was still under
9 review.”³⁸

10
11 In May 2013, Ha “received a letter indicating that her Deed of Trust and Promissory Note
12 had been transferred to Defendant BNY, and that Defendant Resurgent would be the servicer of
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³⁴ *Id.* at ¶ 25.

16 ³⁵ *See* Docket No. 1 at ¶ 25.

17 In August 2012, [BANA] denied Plaintiff’s application on the basis that Plaintiff’s
18 income was insufficient. Plaintiff was puzzled about her applications being denied for her
19 income being too low, and then later too high, so she called her CRM, Antonio Guevara, for
clarification. Mr. Guevara had no information for Plaintiff. However, Mr. Guevara
recommended that Plaintiff submit another application.

20 *See also* Docket No. 13 at ¶ 25

21 In August 2012, Defendant [BANA] denied Plaintiff’s application on the basis that
22 Plaintiff’s income was insufficient. Plaintiff was puzzled about her applications being
denied for her income being too low, and then later too high, so she called her CRM,
23 Antonio Guevara, for clarification. Mr. Guevara had no information for Plaintiff. However,
Mr. Guevara recommended that Plaintiff submit another application.

24 ³⁶ *Id.* at ¶ 26.

25 ³⁷ *Id.* (“For instance, on one day, Mr. Guevara would confirm receipt of documents that he had
26 requested. Then, the following day, he would state that he never received the documents and
would require Plaintiff to resubmit them. Finally, however, on February 28, 2013, Mr. Guevara
confirmed that Plaintiff’s application was complete and under review.”).

27 ³⁸ *Id.* at ¶ 27. Ha also alleges that on “May 1, 2013, Plaintiff called Mr. Guevara as she had been
28 doing for months, but this time Mr. Guevara told Plaintiff that her application was incomplete
because it was lacking a tax form. This was wrong, because Plaintiff’s tax form had been
submitted with her application. Nonetheless, Plaintiff resubmitted the requested tax form.” *Id.*

1 Plaintiff's loan."³⁹ Plaintiff called Resurgent "to ask about the status of her loan modification
2 application that Plaintiff had sent to Defendant [BANA] in August 2012, as she still had not
3 received a final determination."⁴⁰ Plaintiff's "new point of contact with Resurgent, Chris Burger,
4 told Plaintiff that he had no record of a loan modification on file" for her account and that Ha
5 "would have to reapply for a loan modification with Resurgent."⁴¹

6 In "June 2013, Plaintiff submitted a timely and complete loan modification to Defendant
7 Resurgent."⁴² "On June 14, 2013, Plaintiff called to check on the status of her application, and
8 Mr. Burger confirmed that Plaintiff's application was complete and was under review. However, a
9 week later, Mr. Burger retracted and told Plaintiff that her application had never been under review
10 because Resurgent was missing documents."⁴³ Ha submitted the missing documents.⁴⁴

11 "Between July 2013 and November 2013, Plaintiff contacted Mr. Burger frequently to
12 check on the status" of her application and "Mr. Burger would first tell Plaintiff that her application
13 was complete and was under review, only to later tell Plaintiff that Resurgent had never been
14 reviewing her for a loan modification because she was, purportedly, missing documents."⁴⁵ Each
15 time Resurgent requested additional documents, Ha complied with the request.⁴⁶

16 On December 24, 2013, Ha received a letter "stating that she would not be considered for a
17 loan modification because the Property had been scheduled for a foreclosure on
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³⁹ *Id.* at ¶ 28.

22 ⁴⁰ *Id.*

23 ⁴¹ *Id.*

24 ⁴² *Id.* at ¶ 29.

25 ⁴³ *Id.* at ¶ 29.

26 ⁴⁴ *See id.*

27 ⁴⁵ *Id.* at ¶ 30.

28 ⁴⁶ *See id.*

December 23, 2013.”⁴⁷ The foreclosure sale set for December 23, 2013 remains postponed in perpetuity.⁴⁸

C. Procedural Posture

For clarity, the court charts the amended pleadings and asserted claims:

Date	DN	Complaint	Claims Raised
1.8.14	1	Original Complaint	<ol style="list-style-type: none"> 1. Violation of California Civil Code §§ 2924 and 2923.5 2. Violation of California Civil Code §§ 2923.6 and 2923.7 3. Breach of the Implied Covenant of Good Faith and Fair Dealing 4. Unfair Competition
2.24.14	13	First Amended Complaint	<ol style="list-style-type: none"> 1. California Civil Code §§ 2924 and 2923.5 2. California Civil Code §§ 2923.6 and 2923.7 3. Breach of the Implied Covenant of Good Faith and Fair Dealing 4. Unfair Competition
7.16.14	36	Second Amended Complaint	<ol style="list-style-type: none"> 1. Violation of California Civil Code § 2924 2. Violation of California Civil Code § 2923.5 3. Violation of California Civil Code § 2924g 4. Violation of California Civil Code § 2923.7 5. Fraud 6. Negligent Misrepresentation 7. Breach of the Implied Covenant of Good Faith and Fair Dealing 8. Unfair Competition

II. LEGAL STANDARDS

A. Fed. R. Civ. P. 12(b)(6)

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴⁹ When a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon which relief may be granted.⁵⁰ A claim is facially plausible “when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁵¹ Under

⁴⁷ *Id.* at ¶ 31.

⁴⁸ *See id.*

⁴⁹ Fed. R. Civ. P. 8(a)(2).

⁵⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁵¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

1 Fed. R. Civ. P. 12(b)(6), “dismissal can be based on the lack of a cognizable legal theory or the
2 absence of sufficient facts alleged under a cognizable legal theory.”⁵² Dismissal with prejudice and
3 without leave to amend is appropriate if it is clear that the complaint could not be saved by
4 amendment.⁵³

5 **B. Request for Judicial Notice**

6 The court may take judicial notice of a “fact that is not subject to reasonable dispute
7 because it is generally known” or “can be accurately and readily determined from sources whose
8 accuracy cannot reasonably be questioned.”⁵⁴

9
10 **III. DISCUSSION**

11 **A. Request for Judicial Notice**

12 BANA requests the Court take judicial notice of loan-related, publicly recorded documents:
13 (1) the 2006 deed of trust, (2) the 2009 notice of default, (3) the 2010 substitution of trustee and
14 assignment of deed of trust, (4) the 2010 notice of trustee’s sale, (5) the 2012 corrective
15 corporation assignment of deed of trust and (6) the 2012 notice of trustee’s sale.⁵⁵ The authenticity
16 of these documents is not in dispute and may be verified by the public record. Although the court
17 will not rely on facts contained within the documents that reasonably may be subject to dispute, the
18 court takes judicial notice of these six documents.

19
20 **B. Violation of Cal. Civ. Code § 2924**

21 Ha’s first claim alleges that BANA’s conduct violates Cal. Civ. Code § 2924, which
22 requires that a mortgagor be in breach of the obligation securing the mortgage before the
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25 ⁵² *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

26 ⁵³ *See Eminence Capital, LLC v. Asopeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

27 ⁵⁴ Fed. R. Evid. 201(b).

28 ⁵⁵ *See* Docket No. 40.

1 mortgagee can invoke its power of sale.⁵⁶ Ha cites to Cal. Civ. Code § 1511 and argues that her
2 duty to make timely payments was excused because BANA did “some act naturally tending to
3 induce the plaintiff not to perform, the plaintiff’s failure to perform is excused. When this occurs,
4 according to California Civil Code § 1512, the plaintiff is entitled to all the benefits of the contract
5 had it been performed by both parties.”⁵⁷

6 Ha’s allegations do not provide an adequate basis to sustain a Section 2924 claim.

7
8 First, the alleged statements made by BANA were responsive to Ha’s inquiries into a
9 possible loan modification and other options.⁵⁸ BANA is not alleged to have told Ha to stop
10 making her mortgage payments. Ha instead claims an unnamed BANA representative stated that
11 “in order to receive the modification, she would have to miss three months of payments.”⁵⁹
12 BANA’s representative’s statement does not constitute an explicit instruction or demand to stop
13 making payments – they were merely responsive to Ha’s request for information about her
14 eligibility for a loan modification review.⁶⁰

15
16 Second, Ha was not excused from her obligations under the loan based on BANA’s alleged
17 instruction to “stop making payments in order to obtain a loan modification”⁶¹ because acts of
18 forbearance, including activities of a loan modification, do not waive the lender’s right to enforce
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21 ⁵⁶ See Docket No. 36 at ¶¶ 36-39.

22 ⁵⁷ *Id.* at ¶ 37.

23 ⁵⁸ See *id.* at ¶ 15.

24 ⁵⁹ *Id.*

25 ⁶⁰ *Cf. Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 37 (1941) (“The act of inducing the breach must
26 be an intentional one. If the actor had no knowledge of the existence of the contract or his actions
27 were not intended to induce a breach, he cannot be held liable though an actual breach results from
his lawful and proper acts.” (citations omitted).

28 ⁶¹ Docket No. 36 at ¶ 37.

1 the terms of the DOT.⁶² As such, any information provided by BANA regarding loan modification
2 eligibility did not extinguish Ha's ongoing obligation to continue making payments on the loan.
3 Ha had a preexisting duty to meet her contractual obligations under the terms of the loan. Given
4 Ha's preexisting duty to make payments and her default on that debt, BANA was authorized to
5 initiate foreclosure proceedings under Section 2924.⁶³

6 Third, the NOD, recorded on May 1, 2009, evidences that Ha on her own was already in
7 default several months before she contacted BANA in or around September 2008.⁶⁴ Ha thus
8 breached her loan obligations before any alleged statement by BANA.⁶⁵
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⁶² See Docket No. 40-1, Ex. A, at ¶ 12.

12 Extension of time for payment or modification of amortization of the sums secured by this
13 Security Instrument granted by Lender to Borrower or any Successor in Interest of
14 Borrower shall not operate to release the liability of Borrower or any Successors in Interest
15 of Borrower. Lender shall not be required to commence proceedings against any Successor
16 in Interest of Borrower or to refuse to extend time for payment or otherwise modify the
17 amortization of the sums secured by this Security Instrument by reason of any demand
18 made by the original Borrower or Successors in Interest of the Borrower. Any forbearance
19 by Lender in exercising any right or remedy, including, without limitation, Lender's
20 acceptance of payments from third persons, entities or Successors in Interest of Borrower in
21 amounts less than the amount then due, shall not be a waiver of the exercise of any right or
22 remedy.

18 ⁶³ Cf. *Bohnhoff v. Wells Fargo Bank, N.A.*, 853 F. Supp. 2d 849, 857 (D. Minn. 2012).

19 Bohnhoff argues that the [trial payment plan] is a promise to provide a permanent loan
20 modification. As already explained, the TPP was not a promise. Moreover, Bohnhoff
21 pleaded no facts that support a finding of detrimental reliance; instead, she had a legal duty
22 to make payments on the Note. Further, Bohnhoff does not show that enforcing the alleged
23 promises is necessary to prevent injustice. Wells Fargo was entitled to receive payments
24 under the Note, and once Bohnhoff ceased making payments, Wells Fargo was entitled to
25 foreclose the mortgage and sell the home. See *Brisbin v. Aurora Loan Servs., LLC*,
26 Case No. 10-cv-2130, 2011 WL 1641979, at *4 (D.Minn. May 2, 2011). Therefore,
27 dismissal of the promissory estoppel claim is warranted.

23 ⁶⁴ See Docket No. 40-1, Ex. B at 2.

24 That a breach of, and default in, the obligations for which such Deed of Trust is security has
25 occurred in that payment has not been made of: FAILURE TO PAY THE INSTALLMENT
26 OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 06/0112008 AND ALL
27 SUBSEQUENT INSTALLMENTS OF PRINCIPAL AND INTEREST, TOGETHER
28 WITH ALL LATE CHARGES; PLUS ADVANCES MADE AND COSTS INCURRED
BY THE BENEFICIARY INCLUDING FORECLOSURE FEES AND COSTS AND/OR
ATTORNEYS' FEES. IN ADDITION, THE ENTIRE PRINCIPAL AMOUNT WILL
BECOME DUE ON 12/0112036 AS A RESULT OF THE MATURITY OF THE
OBLIGATION ON THAT DATE.

1 Ha also claims BANA violated Section 2924a(1)(C) because the NOD allegedly contains an
2 inaccurate arrearages amount.⁶⁶ The gist of Ha’s argument is that performance under the DOT was
3 excused pursuant to Section 1511 because she was allegedly told that “any missed payments would
4 not be a default but would simply be included in a permanent loan modification.”⁶⁷ At bottom, Ha
5 urges the arrearages indicated on the NOD were waived. But the DOT is explicit:

6 Lender may charge Borrower fees for services performed in connection with Borrower’s
7 default, for the purpose of protecting Lender’s interest in the Property and rights under this
8 Security Instrument, including, but not limited to, attorneys’ fees, property inspection and
valuation fees.⁶⁸

9 Because Ha was not excused from performing under the DOT, and the DOT explicitly provides for
10 the accrual of arrears (including attorneys’ fees) following Ha’s default, the NOD properly reflects
11 an arrearages amount.

12 Overall, the undersigned shares Judge Illston’s take on such matters: Ha’s “duty to make
13 monthly payments was not extinguished by [Defendants’] alleged promises that modifications
14 could only be sought upon default.”⁶⁹ The “decision to default was [Ha’s] alone.”⁷⁰ Because Ha’s
15 allegations fail to state a claim for a violation of Section 2924, dismissal is warranted. Because Ha
16 has amended her complaint thrice already, the court is persuaded further amendment to this claim
17 would be futile such that leave to amend is not warranted.
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20 ⁶⁵ Ha’s allegation that she remained current is not assumed to be true in light of the judicially
21 noticed evidence. *See Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1284
22 (9th Cir. 1977) (noting that a “we may not assume the truth of allegations in a pleading which are
contradicted” by the record).

23 ⁶⁶ *See* Cal. Civ. Code § 2924 (“A statement setting forth the nature of each breach actually known
24 to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that
obligation and any other obligation secured by the deed of trust or mortgage that is in default.”).

25 ⁶⁷ Docket No. 36 at ¶ 38.

26 ⁶⁸ *See* Docket No. 40-1. Ex. A at ¶ 14.

27 ⁶⁹ *Pacini v. Nationstar Mortgage, LLC*, Case No. 3:12-cv-04606-SI, 2013 WL 2924441, at *8
28 (N.D. Cal. June 13, 2013).

⁷⁰ *Id.*

1 **C. Violation of Cal. Civ. Code § 2923.5**

2 Ha next alleges BANA ran afoul of the detailed requirements of Cal, Civ. Code § 2923.5
3 that provide guidelines that must be adhered to before a notice of default may be recorded. Absent
4 compliance with Section 2923.5, the “available, existing remedy” is “to postpone the sale until
5 there has been compliance with section 2923.5.”⁷¹ Because the latest foreclosure sale date set by
6 Resurgent was postponed⁷² and no foreclosure sale materialized while BANA serviced the loan, Ha
7 cannot show prejudice from BANA’s notice of default. Dismissal of this claim without leave to
8 amend is warranted.

9 **D. Violation of Cal. Civ. Code § 2923.7**

10 Ha also alleges BANA failed to comply with California Civil Code Section 2923.7.⁷³
11 Section 2923.7 requires mortgage servicer to provide a single point of contact with the borrower.
12 Ha does not dispute that BANA tendered a single point of contact: Antonio Guevara. Ha instead

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15 ⁷¹ *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 223 (2010); *see also Roberts v. JP Morgan*
16 *Chase Bank, N.A.*, Case No. 5:09-cv-01855-LHK, 2011 WL 864949, at *5
17 (N.D. Cal. Mar. 11, 2011) (“However, the remedy for a Section 2923.5 violation is limited to
18 postponement of the foreclosure sale to allow compliance.”).

19 ⁷² *See* Docket No. 36 at ¶ 38.

20 ⁷³ The relevant code section provides:

- 21 (a) Upon request from a borrower who requests a foreclosure prevention alternative, the
22 mortgage servicer shall promptly establish a single point of contact and provide to the
23 borrower one or more direct means of communication with the single point of contact.
- 24 (b) The single point of contact shall be responsible for doing all of the following:
- 25 (1) Communicating the process by which a borrower may apply for an available
26 foreclosure prevention alternative and the deadline for any required submissions to
27 be considered for these options.
 - 28 (2) Coordinating receipt of all documents associated with available foreclosure
prevention alternatives and notifying the borrower of any missing documents
necessary to complete the application.
 - (3) Having access to current information and personnel sufficient to timely, accurately,
and adequately inform the borrower of the current status of the foreclosure
prevention alternative.
 - (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives
offered by, or through, the mortgage servicer, if any.
 - (5) Having access to individuals with the ability and authority to stop foreclosure
proceedings when necessary.

1 takes issue with Guevara’s substantive compliance with the statute. But Ha’s own allegations
2 indicate that Guevara confirmed receipt of documents and also notified Ha of missing documents
3 needed for her loan modification review.⁷⁴ Dismissal of this claim without leave to amend is
4 warranted.⁷⁵

5 **E. Fraud**

6 BANA urges the court to strike or dismiss Ha’s claims for fraud and negligent
7 misrepresentation that were raised for the first time in her second amended complaint, without
8 leave of the court. Fed. R. Civ. P. 15 permits a party to amend its pleadings “as a matter of course”
9 early on in a case but deeper into a case, “a party may amend its pleading only with the opposing
10 party’s written consent or the court’s leave.”⁷⁶ Because the court agrees with BANA that leave to
11 amend is claim-specific,⁷⁷ and Ha never sought leave, dismissal appears warranted.

12 To short-circuit additional motion practice – at additional expense to the parties – the court
13 will nevertheless address the substance of Ha’s fraud and negligent misrepresentation claims.

14 “Under California law, the indispensable elements of a fraud claim include a false
15 representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.”⁷⁸ The
16 nub of Ha’s fraud claim is that she was misled about the substance of BANA’s loan modification
17 policies. That intentional misrepresentation caused her to run up debt that she ultimately could not
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⁷⁴ See Docket No. 36 at ¶ 47.

23 ⁷⁵ The court also notes that BANA’s alleged violation of Section 2923.7 has been remedied through
24 the postponement of the foreclosure sale scheduled for December 23, 2014.

⁷⁶ Rule 15 also advises that courts “should freely give leave when justice so requires.”

25 ⁷⁷ See *Yau v. Duetsche Bank Nat. Trust Co. Americas*, Case No. 11-cv-00006-JVS,
26 2011 WL 8326579, at *2 (C.D. Cal. Aug. 31, 2011) (“In order to assert claims that were not
27 asserted in the FAC, Plaintiffs would have had to obtain Defendants’ consent or the Court’s leave.
See Fed. R. Civ. P. 15(a)(2). Plaintiffs did not do so. Accordingly, the first, third, fourth, fifth,
seventh, and eighth claims are dismissed without prejudice.”).

28 ⁷⁸ *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (layered quotations and
citations omitted).

1 pay down. In the process she accrued fees associated with falling into default. Ha now seeks to
2 recoup those damages through her fraud claim.

3 Ha adequately alleges what false representation was made: BANA told Ha that it would not
4 initiate foreclosure proceedings while Ha's loan modification application was pending.⁷⁹ Although
5 Rule 9(b) requires Ha to "state the time, place, and specific content of the false representations as
6 well as the identities of the parties" to the misrepresentation,⁸⁰ the Ninth Circuit has explained that
7 where a defendant will not "be hampered in their defense" and it is otherwise "unrealistic to
8 expect" a plaintiff to "remember the name" of BANA's representative dismissal at the pleading
9 stage may not always be required.⁸¹ Ha's best argument is that BANA either knows or possesses
10 unique knowledge of how to determine, which of its representatives were in contact with Ha. That
11 specialized knowledge, paired with the detailed allegations set forth in Ha's complaint, overcomes
12 Rule 9(b).
13

14 The parties have not identified, nor has the undersigned's research unearthed, an extension
15 of *Odom* to the facts of this case. Indeed, the Ninth Circuit explicitly limited *Odom* to its facts.⁸²
16

17 ⁷⁹ See Docket No. 36 at ¶ 87.

18 In the case at hand, beginning in or around September 2008 and continuing through
19 February 2012, Defendant [BANA] made several misrepresentations through various
20 representatives whose names are not now known but as easily ascertainable through
21 discovery as [BANA's] servicing notes will indicate the names of the employees that
22 Plaintiff spoke to on each occasion. Specifically, [BANA's] employees repeatedly told
23 Plaintiff that [BANA] would not initiate foreclosure proceedings as long as Plaintiff was
24 being reviewed for a loan modification. In fact, the representatives stated that it was
25 [BANA's] policy to not initiate foreclosure proceedings against any borrowers as long as
26 they were in the process of applying for a loan modification or were being reviewed for a
27 loan modification. Further, the representatives stated that Plaintiff should not be concerned
28 with missing payments because any missed payments would be taken care of in the
permanent modification.

⁸⁰ *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986)
("We have interpreted Rule 9(b) to mean that the pleader must state the time, place, and specific
content of the false representations as well as the identities of the parties to the misrepresentation.")
(citing *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.1985)).

⁸¹ *Odom v. Microsoft Corp.*, 486 F.3d 541, 554-55 (9th Cir. 2007).

⁸² *Id.* at 554 ("We hold for two reasons that, in the circumstances of a retail transaction whose full
consequences are realized only months later, the employee of the store need not be named.").

1 At least one other trial court also has declined to extend *Odom* beyond its facts⁸³ and, when that
2 case reached the Ninth Circuit on appeal, the panel affirmed the trial court's finding that Rule 9(b)
3 had not been satisfied.⁸⁴ Nor, too, do the allegations in the complaint justify an extension of *Odom*.
4 Ha's complaint spells out whether the misrepresentations were "made in person" or "over the
5 phone." The factual details alleged also have matured with iterative amendments to the complaint.
6 The incomplete, shifting allegations obscure "the context of the alleged fraud and ultimately
7 deprive[s] [BANA] of the specific notice required under Rule 9(b)."⁸⁵ However, because the court
8 cannot say here that amendment would be futile, dismissal of this claim with leave to amend is
9 warranted.
10

11 **F. Negligent Misrepresentation**

12 As "as a general rule, a financial institution owes no duty of care to a borrower when the
13 institution's involvement in the loan transaction does not exceed the scope of its conventional role
14

15 ⁸³ See *Goodwin v. Executive Tr. Servs., LLC.*, 3:09-CV-306-ECR-PAL, 2010 WL 5056192, at *3
16 (D. Nev. Dec. 2, 2010) *aff'd sub nom. Goodwin v. Countrywide Home Loans, Inc.*, 11-17667,
2014 WL 2611072 (9th Cir. June 12, 2014).

17 Plaintiffs cite *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), for the
18 proposition that they need not identify the individual who made the allegedly fraudulent
19 representations. *Odom*, however, involved a consumer purchase at a Best Buy store.
20 *Id.* at 554. Fraud was pleaded with particularity with the exception that the plaintiff did not
21 name the individual cashier who conducted the allegedly fraudulent transaction. *Id.* Under
22 those narrow circumstances the Ninth Circuit created a limited exception to the general rule
23 that the alleged maker of a fraudulent representation must be identified: "[I]n the
24 circumstances of a retail transaction whose full consequences are realized only months
25 later, the employee of the store need not be named." *Id.* This case does not involve a
26 routine retail transaction like the kind at issue in *Odom* and the logic of *Odom* does not
27 apply with the same force.

28 ⁸⁴ See *Goodwin v. Countrywide Home Loans, Inc.*, Case No. 11-17667, 2014 WL 2611072, at *1
(9th Cir. June 12, 2014).

On remand from the MDL Court, Plaintiffs' claims for fraud in the inducement fail
because the SAC does not plead fraud with particularity. See Fed. R. Civ. P. 9(b). The
SAC does not identify the agent or agents who made the alleged misrepresentations, what
type of employee the alleged agents were, or whether the alleged misrepresentations were
made by one or multiple agents. They do not identify the date, location, manner, or
frequency of any alleged misrepresentation. They therefore fall short of the particularity
required by Rule 9(b). See *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.
2004).

⁸⁵ See *Goodwin v. Executive Tr. Servs., LLC.*, 2010 WL 5056192, at *3 (D. Nev. Dec. 2, 2010).

1 as a mere lender of money.”⁸⁶ Because “a loan modification is the renegotiation of loan terms,
2 which falls squarely within the scope of a lending institution’s conventional role as a lender of
3 money,” BANA owes Ha no duty of care.⁸⁷ Because the court is persuaded that amendment of this
4 claim would be futile, this claim is dismissed without leave to amend.

5 **G. Breach of the Implied Covenant of Good Faith and Fair Dealing**

6 “The covenant of good faith and fair dealing, implied by law in every contract, exists
7 merely to prevent one contracting party from unfairly frustrating the other party’s right to receive
8 the benefits of the agreement actually made.”⁸⁸ The covenant “cannot impose substantive duties or
9 limits on the contracting parties beyond those incorporated in the specific terms of their
10 agreement.”⁸⁹ The elements of a claim for breach of the covenant of good faith and fair dealing
11 are:
12

- 13 (1) the plaintiff and the defendant entered into a contract;
- 14 (2) the plaintiff did all or substantially all of the things that the contract required him to do
or that he was excused from having to do;
- 15 (3) all conditions required for the defendant’s performance had occurred;
- 16 (4) the defendant unfairly interfered with the plaintiff’s right to receive the benefits of the
contract; and
- 17 (5) the defendant's conduct harmed the plaintiff.⁹⁰

18 Ha’s theory under this claim is that BANA “breached the covenant of good faith and fair
19 dealing and interfered with Plaintiff’s ability to perform under the contract by inducing Plaintiff to
20

21
22 ⁸⁶ *Nymark v. Heart Fed. Sav. & Loan Assn.*, 231 Cal. App. 3d 1089, 1096 (1991)

23 ⁸⁷ *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 67 (2013) (“A lender’s
24 obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives
25 are created solely by the loan documents, statutes, regulations, and relevant directives and
announcements from the United States Department of the Treasury, Fannie Mae, and other
governmental or quasi-governmental agencies.”).

26 ⁸⁸ *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349 (2000).

27 ⁸⁹ *Id.* at 349-50.

28 ⁹⁰ *Woods v. Google, Inc.*, 889 F. Supp. 2d 1182, 1194 (N.D. Cal. 2012) (citing Judicial Counsel of
California Civil Jury Instructions § 325 (2011)).

1 stop making payments on her mortgage loan, through the promise that Plaintiff would not face
2 foreclosure proceedings for doing so.”⁹¹

3 This argument has been rejected by this court. BANA merely responded to Ha’s inquiries
4 and explained how she could enter the loan modification process by going late on her payments.
5 Ha’s election to skip payments was Ha’s alone to make.⁹² The “core of her pleadings on this cause
6 of action remains the contention that Defendant told her she could obtain a loan modification by
7 going late on her payments. This does not rise above the level of encouragement. The choice to
8 pay or not to pay remained with Plaintiff. Plaintiff therefore fails to state a claim for breach of the
9 implied covenant.”⁹³

10
11 Because Ha’s allegations clearly show that Ha never actively interfered with Ha’s
12 payments, dismissal of this claim is warranted. The court will permit amendment of this claim
13 only to show the active interference currently absent from the complaint.

14 **H. Unfair Competition**

15 The UCL prohibits unfair competition, including, inter alia, “any unlawful, unfair or
16 fraudulent business act.”⁹⁴ “Because [section 17200] is written in the disjunctive, it establishes
17 three varieties of unfair competition – acts or practices which are unlawful, or unfair, or
18 fraudulent.”⁹⁵

19
20
21 ⁹¹ See Docket No. 36 at ¶ 108.

22 ⁹² See *Ren v. Wells Fargo Bank, N.A.*, Case No. 3:13-cv-0272 SC, 2013 WL 5340388, at *2
23 (N.D. Cal. Sept. 24, 2013) (“The Court dismissed this claim in Plaintiff’s FAC because Defendant
24 never actively interfered with Plaintiff’s payments. It told Plaintiff that she could enter the loan
25 modification process by going late on her payments, but that was a choice only Plaintiff could
26 make.”); *Franczak v. Suntrust Mortgage, Inc.*, Case No. 5:12-cv-01453-EJD, 2013 WL 843912,
27 at *3 (N.D. Cal. Mar. 6, 2013) (“Being left with an impression that a particular action is
28 encouraged is something very different than actually being required to do something.”) (quotations
omitted).

⁹³ *Ren*, 2013 WL 5340388, at *2.

⁹⁴ Cal. Bus. & Prof. Code § 17200.

⁹⁵ *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007).

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Ha alleges a common UCL theory: the predicate claims support a UCL claim under the unfairness prong. Because Ha’s predicate claims fail, they cannot support a UCL claim. Accordingly Ha’s UCL claims also fail. Because the court is not persuaded that amendment of this claim would be futile, leave to amend is warranted.

Any amended complaint addressing the pleading issues identified within this order shall be filed within fourteen days.

IT IS SO ORDERED.

Dated: July 22, 2014


PAUL S. GREWAL
United States Magistrate Judge