

1 **I. BACKGROUND**

2 **A. Factual Allegations**

3 Since October 26, 1995, Plaintiffs have owned the single family residence located at 497
4 River View Drive, San Jose, CA 95111 (the “Property”). FAC ¶¶ 1, 16. On September 25, 2007,
5 Plaintiffs refinanced their home mortgage loan with World Savings Bank, FSB (“World
6 Savings”),¹ and a deed of trust was recorded on the Property. *Id.* ¶ 17; Ex. C to ECF No. 20-1.²
7 Eventually, Plaintiffs defaulted on the loan. FAC ¶ 18.³ On January 5, 2011, Defendant’s trustee,
8 Cal-Western Reconveyance Corporation (the “trustee”), recorded a Notice of Default (“NOD”),
9 indicating that Plaintiffs were \$14,914.25 in debt. *Id.* ¶ 19; Ex. D to ECF No. 20-1.⁴ On May 20,
10 2011, the trustee recorded a Notice of Trustee’s Sale (“NTS”). FAC ¶ 20.

11 Since that time, Plaintiffs allege that they have been trying in good faith to obtain a loan
12 modification from Defendant. FAC ¶ 21. On May 12, 2014, Plaintiffs received a letter from
13 Defendant denying Plaintiffs’ request for a loan modification. *Id.* ¶ 22; ECF No. 14-1 (“Denial
14 Letter”). Plaintiffs allege that this denial was in error. FAC ¶¶ 22-24.

15 A trustee’s sale was scheduled for August 6, 2014. FAC ¶ 26. According to Plaintiffs,
16 Defendant requested that Plaintiffs resubmit their loan modification application, which Plaintiffs
17 did on June 23, 2014. *Id.* ¶ 25. Even though Plaintiffs’ renewed application was “under review,”
18 Plaintiffs allege that Defendant refused to postpone the trustee’s sale. *Id.* ¶ 26. On August 5, 2014,
19 the day before the scheduled sale, counsel for Plaintiffs allegedly phoned the trustee, who informed
20 Plaintiffs’ counsel that Defendant had given the trustee “a direct order to sell the Property.” *Id.*
21 ¶ 31 n.4. To prevent the trustee’s sale from taking place, Foronda filed for Chapter 13 bankruptcy
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24 ¹ Defendant acquired World Savings in 2008. FAC ¶ 17 n.2; Mot. at 1 n.1.

25 ² The deed of trust is subject to a judicial notice request, which the Court grants in Part III,
infra.

26 ³ Plaintiffs variously allege that the loan was “predatory” and that they were not provided
27 the requisite disclosures under the federal Truth in Lending Act (“TILA”) or Real Estate Settlement
28 Procedures Act (“RESPA”). FAC ¶¶ 17-18. Plaintiffs, however, do not allege any liability on the
basis of either statute.

⁴ The NOD is subject to a judicial notice request, which the Court grants in Part III, *infra.*

1 at 8:01 a.m. on August 6, 2014, which automatically stayed the foreclosure proceedings. *Id.* ¶ 27;
2 ECF No. 14-2.⁵

3 **B. Procedural History**

4 On July 2, 2014, Plaintiffs filed a lawsuit against Defendant in Santa Clara County Superior
5 Court. Ex. A to ECF No. 1. Defendant removed the case to federal court on August 4, 2014. ECF
6 No. 1. On August 11, 2014, Defendant moved to dismiss Plaintiffs' complaint. ECF No. 10.
7 Rather than oppose the motion, Plaintiffs filed their FAC on August 21, 2014. In the FAC,
8 Plaintiffs asserted four causes of action under California law: (1) violation of the prohibition on
9 "dual tracking" contained in the Homeowner Bill of Rights ("HBOR"), Cal. Civ. Code § 2923.6(c);
10 (2) failure to comply with the HBOR's written notice requirements, Cal. Civ. Code § 2923.6(f); (3)
11 violations of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; and
12 (4) negligence. FAC ¶¶ 29-73.

13 On August 29, 2014, Defendant withdrew its prior motion and filed the instant Motion to
14 Dismiss. Mot. at 12. Plaintiffs opposed the motion on September 7, 2014. Opp. at 22. Defendant
15 replied on September 16, 2014. Reply at 12.

16 **II. LEGAL STANDARDS**

17 **A. Motion to Dismiss Under Rule 12(b)(6)**

18 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a
19 short and plain statement of the claim showing that the pleader is entitled to relief." A complaint
20 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
21 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to
22 state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
23 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the
24 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

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26 ⁵ Defendant requests that the Court take judicial notice of the bankruptcy docket indicating
27 that Foronda previously filed for bankruptcy on August 19, 2011, and received her discharge on
28 January 18, 2012. *See* Ex. E to ECF No. 20-1. The Court grants Defendant's request in Part III,
infra.

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability
2 requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
3 *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court
4 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light
5 most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
6 1025, 1031 (9th Cir. 2008).

7 The Court, however, need not accept as true allegations contradicted by judicially
8 noticeable facts, *see Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look
9 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
10 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
11 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in
12 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
13 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted
14 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
15 (9th Cir. 2004).

16 **B. Requests for Judicial Notice**

17 The Court generally may not look beyond the four corners of a complaint in ruling on a
18 Rule 12(b)(6) motion, with the exception of documents incorporated into the complaint by
19 reference, and any relevant matters subject to judicial notice. *See Swartz v. KPMG LLP*, 476 F.3d
20 756, 763 (9th Cir. 2007); *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). Under the
21 doctrine of incorporation by reference, the Court may consider on a Rule 12(b)(6) motion not only
22 documents attached to the complaint, but also documents whose contents are alleged therein,
23 provided the complaint “necessarily relies” on the documents or their contents, and the documents’
24 authenticity and relevance are uncontested. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038
25 (9th Cir. 2010); *accord Lee*, 250 F.3d at 688-89. The purpose of this rule is to “prevent plaintiffs
26 from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon which their claims
27 are based.” *Swartz*, 476 F.3d at 763 (alterations and internal quotation marks omitted).

1 In addition, the Court may take judicial notice of matters that are either (1) generally known
2 within the trial court’s territorial jurisdiction or (2) capable of accurate and ready determination by
3 resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Proper
4 subjects of judicial notice when ruling on a motion to dismiss include legislative history reports,
5 *see Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); court documents already in the
6 public record and documents filed in other courts, *see Holder v. Holder*, 305 F.3d 854, 866 (9th
7 Cir. 2002); and publicly accessible websites, *see Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992,
8 998-99 (9th Cir. 2010).

9 **C. Leave to Amend**

10 If the Court determines that the complaint should be dismissed, it must then decide whether
11 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend
12 “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule
13 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” *Lopez v.*
14 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks
15 omitted). When dismissing a complaint for failure to state a claim, “a district court should grant
16 leave to amend even if no request to amend the pleading was made, unless it determines that the
17 pleading could not possibly be cured by the allegation of other facts.” *Id.* at 1130 (internal
18 quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing
19 amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the
20 moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532
21 (9th Cir. 2008).

22 **III. REQUESTS FOR JUDICIAL NOTICE**

23 In connection with the instant Motion to Dismiss, Defendant asks the Court to take judicial
24 notice of a number of documents. *See* ECF No. 20. The Court GRANTS Defendant’s request to
25 take judicial notice of copies of records from the Office of Thrift Supervision (“OTS”), including
26 World Savings’ certificate of corporate existence, a letter from OTS authorizing World Savings’
27 name change to Wachovia Mortgage, FSB (“Wachovia”), and Wachovia’s charter, as well as
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1 copies of the certification from the Comptroller of Currency showing that Wachovia converted to
2 Wells Fargo Bank Southwest, N.A., and a printout from the Federal Deposit Insurance Corporation
3 showing the history of World Savings. Ex. A to ECF No. 20-1. These documents are true and
4 correct copies of government records and public documents not subject to reasonable dispute. *See*
5 Fed. R. Evid. 201(b); *see also Carley v. Wells Fargo Bank*, No. C 14-03147 JSW, 2014 WL
6 5830146, at *2-3 (N.D. Cal. Nov. 10, 2014) (taking judicial notice of the same documents).

7 The Court GRANTS Defendant’s request for judicial notice of the adjustable rate mortgage
8 note dated September 18, 2007. Ex. B to ECF No. 20-1. The FAC “necessarily relies” on the
9 document, and the document’s relevance and authenticity are uncontested. *Coto*, 593 F.3d at 1038.

10 The Court GRANTS Defendant’s request for judicial notice of the deed of trust and NOD.
11 Exs. C-D to ECF No. 20-1. These documents are true and correct copies of government records
12 and public documents not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *see also Carley*,
13 2014 WL 5830146, at *2-3 (taking judicial notice of similar documents).

14 The Court GRANTS Defendant’s request for judicial notice of the bankruptcy docket for
15 petition No. 11-57797, the summary of schedules for that petition, and the petition itself, as well as
16 the bankruptcy docket for petition No. 14-53296 and the petition itself. Exs. E-I to ECF No. 20-1.
17 These documents are true and correct copies of court filings already in the public record and
18 documents filed in other courts. *See Holder*, 305 F.3d at 866; *see also Hayes v. Wells Fargo Bank*,
19 N.A., No. 3:13-CV-0420 KAW, 2013 WL 4117050, at *3-4 (N.D. Cal. Aug. 12, 2013) (taking
20 judicial notice of the plaintiffs’ bankruptcy docket).

21 **IV. DISCUSSION**

22 Defendant argues that all of Plaintiffs’ claims should be dismissed because Foronda’s filing
23 for bankruptcy protection deprives Plaintiffs of standing to sue and because Plaintiffs should be
24 judicially estopped from asserting claims Foronda failed to disclose in her pending bankruptcy
25 petition. Mot. at 3-5; Reply at 1-3. Defendant also argues that Plaintiffs have failed to adequately
26 plead any of their individual causes of action. Mot. at 5-12; Reply at 3-11. For the reasons stated
27 below, the Court GRANTS in part and DENIES in part Defendant’s Motion to Dismiss.

1 *v. Wells Fargo Bank, N.A.*, No. CV 13-201-ABC PLA, 2013 WL 3467215, at *8 (C.D. Cal. July 9,
2 2013) (internal quotation marks omitted).

3 Although the Ninth Circuit has yet to address the question whether a Chapter 13 debtor
4 maintains standing to prosecute a pre-petition non-bankruptcy cause of action on behalf of the
5 bankruptcy estate, every other circuit to address the question has found standing. *See, e.g., Wilson*
6 *v. Dollar Gen. Corp.*, 717 F.3d 337, 343 (4th Cir. 2013) (“[U]nlike a Chapter 7 debtor, a Chapter
7 13 debtor possesses standing—concurrent with that of the trustee—to maintain a non-bankruptcy
8 cause of action on behalf of the estate.”); *Smith v. Rockett*, 522 F.3d 1080, 1082 (10th Cir. 2008)
9 (“Plaintiff, as a Chapter 13 debtor, had standing to file this complaint on behalf of the bankruptcy
10 estate.”); *Crosby v. Monroe Cnty.*, 394 F.3d 1328, 1331 n.2 (11th Cir. 2004) (“[B]ecause Crosby
11 filed under Chapter 13 of the Bankruptcy Code, he retains standing to pursue legal claims on behalf
12 of the estate.”); *Cable v. Ivy Tech State Coll.*, 200 F.3d 467, 470 (7th Cir. 1999) (holding “that a
13 debtor-in-possession has standing to file, prosecute and appeal a chose in action belonging to the
14 estate under Chapter 13”), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965 (7th
15 Cir. 2013); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515 (2d Cir. 1998) (per
16 curiam) (“[A] Chapter 13 debtor, unlike a Chapter 7 debtor, has standing to litigate causes of action
17 that are not part of a case under title 11.”); *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194,
18 1209 n.2 (3d Cir. 1991) (“Chapter 13 debtors are empowered to maintain suit even after a
19 bankruptcy trustee has been appointed in their case.”).

20 Other courts within the Ninth Circuit agree. *See, e.g., Edwards*, 2013 WL 3467215, at *8;
21 *Becker v. Wells Fargo Bank, Nat’l Ass’n*, No. CIV. 2:12-1742 WBS, 2012 WL 3277130, at *3
22 (E.D. Cal. Aug. 9, 2012) (holding that the “Chapter 13 debtor plaintiff retains possession of the
23 claims at issue here and thus his Chapter 13 bankruptcy does not deprive him of standing”);
24 *Gaudin v. Saxon Mortg. Servs., Inc.*, 820 F. Supp. 2d 1051, 1052-53 (N.D. Cal. 2011) (“[T]he mere
25 fact of Gaudin’s [Chapter 13] bankruptcy filing is an insufficient basis on which to conclude this
26 suit cannot go forward.”); *In re Chavez*, No. 09-26400-D-13L, 2009 WL 9085565, at *2 (Bankr.
27 E.D. Cal. Aug. 27, 2009) (holding that the Chapter 13 debtor “has standing to pursue her causes of
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1 action against the bank” (citing *In re Cohen*, 305 B.R. 886, 891 (B.A.P. 9th Cir. 2004)); *Donato v.*
2 *Metro. Life Ins. Co.*, 230 B.R. 418, 425 (N.D. Cal. 1999) (“Donato has concurrent standing with the
3 Chapter 13 trustee to litigate her prepetition causes of action against MetLife.”); cf. *McGuire v.*
4 *United States*, 550 F.3d 903, 914 (9th Cir. 2008) (“For this reason, only bankruptcy trustees,
5 *debtors-in-possession*, or bankruptcy court authorized entities have standing to sue on behalf of the
6 estate.” (emphasis added)). In light of this considerable weight of authority, the Court finds that
7 Foronda, as a Chapter 13 debtor-in-possession, retains standing to prosecute this action on behalf
8 of the bankruptcy estate.

9 Defendant’s citations to the contrary are unavailing. See *Dodd v. Fed. Home Loan Mortg.*
10 *Corp.*, 2012 U.S. Dist. LEXIS 16337, at *1-2 (E.D. Cal. Feb. 9, 2012); *Rader v. Teva Parenteral*
11 *Meds., Inc.*, 276 F.R.D. 524, 529 (D. Nev. 2011); *Tangonan v. World Sav. Bank FSB*, 2011 U.S.
12 Dist. LEXIS 93192, at *4-5 (N.D. Cal. Aug. 19, 2011). Although these courts dismissed Chapter
13 13 debtors for lack of standing, they did so by citing cases involving Chapter 7 debtors. Because
14 none of these courts grappled with the material distinction between Chapter 13 debtors and Chapter
15 7 debtors, the Court does not find their rulings persuasive.

16 Accordingly, the Court DENIES Defendant’s Motion to Dismiss on standing grounds.

17 **B. Judicial Estoppel**

18 “Judicial estoppel is an equitable doctrine invoked by a court at its discretion.” *Ah Quin v.*
19 *Cnty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013) (brackets omitted) (quoting
20 *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). The purpose of this doctrine “is to protect
21 the integrity of the judicial process by prohibiting parties from deliberately changing positions
22 according to the exigencies of the moment.” *Id.* (quoting *New Hampshire*, 532 U.S. at 749-50).
23 “In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised
24 in a reorganization plan or otherwise mentioned in the debtor’s schedules or disclosure statements.”
25 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

26 Defendant asserts that Foronda failed to mention the instant lawsuit in her Chapter 13
27 bankruptcy petition. Mot. at 4-5. When asked on her Schedule B form whether she had any
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1 “[o]ther contingent and unliquidated claims of every nature,” Foronda marked an “X” in the
2 column labeled “NONE.” *Id.* at 4; *see* Ex. I to 20-1, at 10. In addition, Defendant maintains,
3 Foronda failed to indicate in her Schedule D form that her home mortgage loan was “DISPUTED.”
4 Mot. at 4; *see* Ex. I to 20-1, at 14. Due to these omissions, Defendant argues that Plaintiffs should
5 be judicially estopped from prosecuting claims that were not disclosed to the bankruptcy court.
6 Mot. at 5.

7 The Court disagrees. *Hamilton* suggests that judicial estoppel applies when a plaintiff has
8 failed to raise the cause of action in either her “schedules or disclosure statements.” 270 F.3d at
9 783 (emphasis added). As Plaintiffs correctly point out, *see* Opp. at 7, Foronda disclosed the
10 instant lawsuit to the bankruptcy court in both her Statement of Financial Affairs and Chapter 13
11 Plan, *see* Ex. I to 20-1, at 25 (disclosing the instant lawsuit in her Statement of Financial Affairs);
12 ECF No. 14-3, at 2 (disclosing the instant lawsuit in her Chapter 13 Plan continuation sheet).
13 Although Foronda initially failed to list the instant lawsuit on her Schedule B form, Foronda’s
14 explicit inclusion of the lawsuit in her Statement of Financial Affairs provided the bankruptcy court
15 and the trustee with adequate notice. *See* 11 U.S.C. § 521(a)(1)(iii) (including “a statement of the
16 debtor’s financial affairs” among the proper means for disclosure); *cf. Davis v. ReconTrust Co.*,
17 No. 2:12-CV-00212-KJD, 2014 WL 3514992, at *3 & n.1 (D. Nev. July 16, 2014) (applying
18 judicial estoppel where plaintiff had failed to list lawsuit in both her bankruptcy schedules and her
19 Statement of Financial Affairs). Defendant does not contend otherwise in its Reply.

20 As a result, the Court DENIES Defendant’s Motion to Dismiss on grounds of judicial
21 estoppel.

22 **C. Section 2923.6(c) Claim**

23 California’s HBOR, which took effect January 1, 2013, reformed aspects of the state’s
24 nonjudicial foreclosure process by amending the California Civil Code to prohibit deceptive and
25 abusive home foreclosure practices. *See Flores v. Nationstar Mortg. LLC*, No. CV 13-3898-PLA,
26 2014 WL 304766, at *3 (C.D. Cal. Jan. 6, 2014). One of those practices is “dual tracking,” which
27 occurs when a financial institution “continue[s] to pursue foreclosure even while evaluating a
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1 borrower's loan modification application." *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d
2 1110, 1149 (N.D. Cal. 2013) (citing *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 904
3 (2013)). The prohibition on dual tracking is codified at section 2923.6(c), which provides in
4 relevant part:

5 If a borrower submits a complete application for a first lien loan modification
6 offered by, or through, the borrower's mortgage servicer, a mortgage servicer,
7 mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of
default or notice of sale, or conduct a trustee's sale, while the complete first lien
loan modification application is pending.

8 Cal. Civ. Code § 2923.6(c). Additionally, section 2924.12 provides a private cause of action for
9 violations of section 2923.6. *See* Cal. Civ. Code. § 2924.12.

10 Plaintiffs do not allege any violation arising out of the recording of the NOD or NTS, both
11 of which were recorded in 2011. FAC ¶¶ 19-20. The only issue, then, is whether Plaintiffs have
12 plausibly alleged that Defendant "conduct[ed] a trustee's sale" while Plaintiffs' "complete first lien
13 loan modification application [was] pending." Cal. Civ. Code § 2923.6(c). The Court finds that
14 Plaintiffs have. No trustee's sale, it is true, was ever actually held. However, Plaintiffs claim to
15 have filed, at Defendant's request, a renewed loan modification application on June 23, 2014. FAC
16 ¶ 25. According to Plaintiffs, Defendant acknowledged that the application was "under review."
17 *Id.* ¶ 26. Notwithstanding this pending application, Plaintiffs allege that Defendant scheduled a
18 trustee's sale for August 6, 2014, and refused to postpone it. *Id.* In support of this contention,
19 Plaintiffs claim that on August 5, 2014, the day before the sale was to take place, Plaintiffs'
20 counsel telephoned the trustee, who stated that Defendant had given the trustee "a direct order to
21 sell the property." *Id.* ¶ 31 n.4. The only way, Plaintiffs allege, to stop the trustee's sale was for
22 Foronda to file a Chapter 13 bankruptcy petition, which she did at 8:01 a.m. on August 6, 2014, the
23 morning of the scheduled sale. *Id.* ¶ 27; ECF No. 14-2. Viewing these allegations in the light most
24 favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that Defendant
25 continued to "conduct a trustee's sale" while Plaintiffs had a loan modification application
26 pending. Cal. Civ. Code § 2923.6(c).

1 None of Defendant’s arguments for dismissal is convincing. First, Defendant argues that
2 because “there was no trustee’s sale,” Defendant cannot be held liable for dual tracking. Mot. at 6-
3 7. Defendant’s interpretation of section 2923.6(c) is too narrow. As the legislative history
4 suggests, section 2923.6(c)’s ban on dual tracking was enacted to force mortgage servicers to “give
5 a borrower a clear answer on an application before the servicer may *proceed with foreclosure.*”
6 Sen. Floor Analysis of Assemb. Bill No. 278 (“AB 278 Analysis”), Conf. Rep. No. 1, Reg. Sess., at
7 26 (Cal. July 2, 2012) (emphasis added), *available at* [http://leginfo.legislature.ca.gov/faces/](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml)
8 [billAnalysisClient.xhtml](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml). California courts interpreting the dual tracking ban have used similarly
9 broad language. *See, e.g., Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 86
10 n.14 (2013) (“The California Homeowner Bill of Rights prohibits, among other things, ‘dual track’
11 foreclosures, which occur when a servicer *continues foreclosure proceedings* while reviewing a
12 homeowner’s application for a loan modification.” (emphasis added)). As a result, the Court has
13 little trouble finding that Plaintiffs have stated a plausible claim for relief. Without question,
14 Plaintiffs have alleged that Defendant continued to “proceed with foreclosure.” AB 278 Analysis
15 at 26. As stated above, Plaintiffs claim that Defendant scheduled a trustee’s sale, refused to
16 postpone it, ordered the trustee to sell the property as of the day before the scheduled sale, and did
17 not complete the sale only because Foronda filed a Chapter 13 bankruptcy petition the morning the
18 sale was to take place. FAC ¶¶ 25-27, 31 n.4. Defendant, for its part, provides no authority
19 establishing that a trustee’s sale must be completed in order for a mortgage servicer to “conduct a
20 trustee’s sale” under the meaning of section 2923.6(c). Consequently, the Court cannot conclude
21 as a matter of law that Defendant escapes liability for dual tracking.⁶

22 Defendant’s remaining arguments fail because Plaintiffs have sufficiently alleged that their
23 June 23, 2014, loan modification application was pending at the time Defendant was proceeding
24 with the trustee’s sale. That Defendant may have scheduled the trustee’s sale thirty days after

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26 ⁶ Defendant protests that such a conclusion creates a catch-22: Defendant would be liable
27 under section 2923.6(c) whether it had postponed the scheduled sale or not. Reply at 4. Not so.
28 Had Defendant scheduled the sale before Plaintiffs had resubmitted their loan modification
application and then postponed the sale indefinitely while that application was pending, there
would be no colorable claim that section 2923.6(c) was violated.

1 issuing the letter denying Plaintiffs’ initial loan modification application is of no moment. *See*
2 Mot. at 7. It is the June 23, 2014, application that Plaintiffs allege was pending, not the application
3 that was denied on May 12, 2014. *See* FAC ¶ 25. Similarly, Defendant’s reliance on section
4 2923.6(g), which requires a “material change in the borrower’s financial circumstances” before
5 submitting a second loan modification application, is misplaced. Mot. at 7-8 (quoting Cal. Civ.
6 Code § 2923.6(g)). Plaintiffs do not allege that they submitted a new loan modification application
7 per se; rather, Plaintiffs claim that they resubmitted the same application at *Defendant’s* request.
8 FAC ¶ 25. Although Defendant disputes that allegation, Reply at 5, the Court must assume its truth
9 for purposes of a motion to dismiss absent judicially noticeable facts to the contrary, *see Manzarek*,
10 519 F.3d at 1031. Defendant has provided no such facts. Finally, to the extent Defendant argues
11 that section 2923.6(g) shields mortgage servicers from dual tracking liability so long as they
12 “request” that borrowers resubmit loan modification applications, Reply at 5, the Court rejects that
13 line of reasoning as inconsistent with the HBOR’s purpose, *see* Cal. Civ. Code § 2923.4(a)
14 (explaining that the “purpose of the act . . . is to ensure that” borrowers “have a meaningful
15 opportunity to obtain . . . loan modifications”).

16 Consequently, the Court DENIES Defendant’s Motion to Dismiss Plaintiffs’ cause of action
17 under section 2923.6(c).⁷

18 **D. Section 2923.6(f) Claim**

19 “Following the denial of a first lien loan modification application,” the HBOR requires the
20 mortgage servicer to “send a written notice to the borrower identifying the reasons for denial.”
21 Cal. Civ. Code § 2923.6(f). That written notice must also conform to a series of requirements. *See*
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23 ⁷ The Court notes that because the trustee’s sale has yet to occur, and thus “a trustee’s deed
24 upon sale has not been recorded,” Plaintiffs may only “bring an action for injunctive relief to
25 enjoin” the alleged violation of section 2923.6(c). Cal. Civ. Code § 2924.12(a)(1); *see also Stokes*
26 *v. CitiMortgage, Inc.*, No. CV 14-00278 BRO SHX, 2014 WL 4359193, at *10 (C.D. Cal. Sept. 3,
27 2014) (explaining that “Plaintiff Brummel cannot seek monetary damages [for a violation of
28 section 2923.6] because no sale has occurred on her home”). Plaintiffs’ claims under section
2923.6(c) for “actual damages, including but not limited to, the imminent loss of [Plaintiffs’]
Property to foreclosure; unnecessary loan arrears, late fees, penalties; and damage to their credit”
are therefore inapposite. FAC ¶ 34. Plaintiffs’ request for “injunctive relief,” however, is proper.
Id. ¶ 35.

1 *id.* § 2923.6(f)(1)-(6). As relevant here, the written notice must include “the monthly gross income
2 and property value used to calculate the net present value,” but only “[i]f the denial is the result of
3 a net present value calculation.” *Id.* § 2923.6(f)(3). “If applicable,” the written notice must also
4 contain “a description of other foreclosure prevention alternatives for which the borrower may be
5 eligible, and a list of the steps the borrower must take in order to be considered for those options.”
6 *Id.* § 2923.6(f)(5).

7 Plaintiffs allege that, “[w]ith regard to the most recent (June 23, 2014) complete loan
8 modification application,” Defendant “failed to provide a proper NPV calculations denial letter,” in
9 violation of section 2923.6(f)(3), and “failed to provide Plaintiff with a list of foreclosure
10 prevention alternatives,” in violation of section 2923.6(f)(5). FAC ¶¶ 39-40. Plaintiffs’ allegations
11 fail, however, because Plaintiffs’ June 23, 2014, loan modification application remains “pending.”
12 *Id.* ¶¶ 25-26. Plaintiffs cannot have it both ways: they cannot argue that their application is
13 pending for purposes of section 2923.6(c) dual tracking liability but then argue that their
14 application was erroneously denied for purposes of section 2923.6(f) liability. As Plaintiffs’ June
15 23, 2014, loan modification application remains “under review,” *id.* ¶ 26, and thus has not yet been
16 denied, Plaintiffs’ claims under section 2923.6(f) are not ripe for adjudication, *see Texas v. United*
17 *States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon contingent
18 future events that may not occur as anticipated, or indeed may not occur at all.” (internal quotation
19 marks omitted)); *see also Marino v. Countrywide Fin. Corp.*, No. SACV 14-46-JLS ANX, 2014
20 WL 3349188, at *3-4 (C.D. Cal. July 7, 2014) (dismissing mortgagor’s claims seeking “to hold
21 Defendants liable for any deficiency judgment on his second mortgage” where there had not yet
22 been a deficiency judgment as to the second mortgage).

23 To the extent Plaintiffs’ section 2923.6(f) claims are based on the Denial Letter of May 12,
24 2014, the Court finds that Plaintiffs have failed to allege sufficient facts to support a plausible
25 claim for relief. The Denial Letter, Plaintiffs claim, conveyed contradictory information in
26 violation of section 2923.6(f)(3) because it purported to deny Plaintiffs’ application on the basis
27 that Defendant could not reduce the monthly mortgage payment by ten percent or more, while at
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1 the same time proposing a modified monthly payment that was twenty-two percent lower than
2 Plaintiffs' current monthly payment. FAC ¶¶ 22-24, 51. The Court is not persuaded. As
3 Defendant explains, Plaintiffs appear to have misunderstood the Denial Letter's contents. *See* Mot.
4 at 10-11. It is not that the letter said Defendant could not possibly reduce Plaintiffs' monthly
5 mortgage payments by ten percent; of course Defendant could have done so. What the letter meant
6 was that Defendant could not have imposed a ten percent reduction "and still have the net present
7 value of the loan payments be worth more than the proceeds from a foreclosure sale." *Id.* at 10; *see*
8 Denial Letter at 1. Confronted with this reality, Plaintiffs allege only that Defendant "should have
9 at least explained" the matter to Plaintiffs. *Opp.* at 17. Plaintiffs, however, never explain why they
10 failed to correct their own misunderstanding, whether they even attempted to do so, or how
11 Defendant's failure to correct Plaintiffs' misimpression amounts to a violation of section
12 2923.6(f)(3). Furthermore, the Denial Letter appears to have provided Plaintiffs with foreclosure
13 alternatives under the heading "Talk to me about your other options." Denial Letter at 3. In
14 particular, the letter describes a "short sale" and a "deed in lieu of foreclosure" as possible "options
15 available to help [the borrower] avoid a foreclosure sale." *Id.* Plaintiffs have not alleged how or
16 why the letter's presentation of these options violates section 2923.6(f)(5).

17 Consequently, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' cause of
18 action under section 2923.6(f). Because Plaintiffs may be able to cure the deficiencies in the FAC
19 by alleging additional facts in support of this claim, the Court grants leave to amend. *See Lopez*,
20 203 F.3d at 1127 (holding that "a district court should grant leave to amend . . . unless it determines
21 that the pleading could not possibly be cured by the allegation of other facts" (internal quotation
22 marks omitted)).⁸

23 ⁸ Defendant argues that all of Plaintiffs' claims under section 2923.6 fail as a matter of law
24 because Plaintiffs are not "borrower[s]" under the meaning of the HBOR. Reply at 7. This is so,
25 Defendant asserts, because Foronda filed for and remains in Chapter 13 bankruptcy. *See* Cal. Civ.
26 Code § 2920.5(c)(2)(C) (excluding from the definition of "borrower" for purposes of section
27 2923.6 individuals who have "filed a case under Chapter 7, 11, 12, or 13 of Title 11 of the United
28 States Code and the bankruptcy court has not entered an order closing or dismissing the bankruptcy
case, or granting relief from a stay of foreclosure"). This argument is waived, however, because
Defendant raised it for the first time in its Reply. *See Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th
Cir. 1990); *see also In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1035 (N.D. Cal. Aug. 12, 2014)

1 **E. UCL Claims**

2 The UCL broadly prohibits “any unlawful, unfair or fraudulent business act or practice.”
3 Cal. Bus. & Prof. Code § 17200. The UCL, thus, “establishes three varieties of unfair
4 competition—acts or practices which are unlawful, or unfair, or fraudulent.” *Podolsky v. First*
5 *Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996). A claim based on the UCL must be brought
6 “by a person who has suffered injury in fact and has lost money or property as a result of the unfair
7 competition.” Cal. Bus. & Prof. Code § 17204. Private individuals “are limited to injunctive relief
8 and restitution” under the UCL. *California v. IntelliGender, LLC*, No. 13-56806, — F.3d —, 2014
9 WL 5786718, at *3 (9th Cir. Nov. 7, 2014).

10 **1. Unlawful Prong**

11 “By proscribing any unlawful business practice, the UCL borrows violations of other laws
12 and treats them as unlawful practices that the unfair competition law makes independently
13 actionable.” *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 n.8 (9th Cir. 2011) (alteration and
14 internal quotation marks omitted). As indicated above, Plaintiffs have plausibly alleged that
15 Defendant violated section 2923.6(c)’s prohibition on dual tracking. *See supra* Part IV.C. This
16 alleged violation suffices to state a claim under the UCL’s unlawful prong. *See, e.g., Rosenfeld v.*
17 *Nationstar Mortg., LLC*, No. 2:13-CV-04830-CAS, 2014 WL 457920, at *6 (C.D. Cal. Feb. 3,
18 2014) (holding that Plaintiffs had “state[d] a claim under the ‘unlawful’ prong of the UCL based on
19 the violation of Civil Code § 2923.6”); *Hosseini v. Wells Fargo Bank, N.A.*, No. C-13-02066 DMR,

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22 (“[A]rguments raised for the first time in Reply briefs are waived.”). Even if the argument were
23 not waived, it would still fail. Foronda did not file her Chapter 13 bankruptcy petition until August
24 6, 2014. ECF No. 14-2. Consequently, at the time when the alleged misconduct took place,
25 neither Foronda nor Divina had a pending Chapter 13 petition and thus Plaintiffs were not excluded
26 from the definition of borrowers under section 2920.5(c)(2)(C). *See Colom v. Wells Fargo Home*
27 *Mortg., Inc.*, No. C-14-2410 MMC, 2014 WL 5361421, at *2 (N.D. Cal. Oct. 20, 2014)
28 (“§ 2923.7(c) was not applicable to plaintiff on said date, given that he had *at such time* a Chapter
13 petition pending in bankruptcy court.” (emphasis added)); *Withers v. J.P. Morgan Chase Bank*
N.A., No. C 14-0351 SBA, 2014 WL 3418367, at *5 (N.D. Cal. July 11, 2014) (rejecting section
2920.5(c)(2)(C) argument “because Plaintiff did not have a bankruptcy case pending when the
Notice of Trustee’s Sale was recorded”).

1 2013 WL 4279632, at *8 (N.D. Cal. Aug. 9, 2013) (finding that “Plaintiffs’ [unlawful business
2 practices] claim based on dual-tracking may be an appropriate predicate offense for a UCL claim”).

3 Defendant argues that Plaintiffs lack standing under the UCL “because there is no
4 allegation that [Defendant] obtained money through an unfair business practice, and therefore there
5 is no basis for restitution.” Mot. at 9. Nor is there any allegation, according to Defendant, that
6 Defendant “has actually caused the loss of any money or property, which is essential to state a
7 claim under § 17204.” Reply at 8. Defendant argues further that “Plaintiffs have no basis for an
8 award of injunctive relief under the UCL” because Plaintiffs have failed to allege that the
9 “wrongful acts in this litigation will be repeated in the future.” Mot. at 9.

10 The Court disagrees. First of all, Defendant ignores Plaintiffs’ allegations that, as a result
11 of Defendant’s “unlawful business acts,” Plaintiffs “have suffered actual damages and are subject
12 to imminent foreclosure of their property.” FAC ¶ 53. In addition, Defendant makes no attempt to
13 rebut any of the cases cited by Plaintiffs in their Opposition, which hold that the threat of
14 foreclosure is sufficient to establish standing under the UCL. *See, e.g., Stokes*, 2014 WL 4359193,
15 at *12 (“[A] party need not have her property foreclosed upon in order to bring a UCL claim.”);
16 *Rosenfeld*, 2014 WL 457920, at *6 (“[T]he threat of a foreclosure is sufficient to establish standing
17 to assert a UCL claim.”); *Saber v. JPMorgan Chase Bank, N.A.*, No. SACV 13-00812-DOC, 2014
18 WL 255700, at *4 (C.D. Cal. Jan. 23, 2014) (declining “to dismiss the case for a lack of standing”
19 because “some California district courts have held that the initiation of foreclosure proceedings
20 sufficiently jeopardizes a plaintiff’s property interest to satisfy the standing requirement”); *Sullivan*
21 *v. Wash. Mut. Bank, FA*, No. C-09-2161 EMC, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23, 2009)
22 (finding UCL standing because “foreclosure proceedings have been initiated which puts
23 [plaintiff’s] interest in the property in jeopardy”). Lastly, as stated above, *see supra* note 7,
24 Plaintiffs have alleged that they are “entitled to injunctive relief” arising out of Defendant’s alleged
25 violation of section 2923.6(c), FAC ¶ 35.

26 For the reasons stated above, the Court finds that Plaintiffs have standing to proceed under
27 the UCL. Because Plaintiffs have stated a claim under section 2923.6(c), which prohibits dual
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1 tracking, the Court DENIES Defendant’s Motion to Dismiss Plaintiffs’ UCL unlawful prong claim
2 based on Defendant’s alleged violation of section 2923.6(c). Because Plaintiffs have failed to state
3 a claim under section 2923.6(f), which specifies the written notice requirements for a loan
4 modification denial, the Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ UCL unlawful
5 prong claim to the extent the claim is based on Defendant’s alleged violation of section 2923.6(f).
6 *See Stokes*, 2014 WL 4359193, at *11 (“If a plaintiff cannot state a claim under the predicate law,
7 however, [the UCL] claim also fails.”). Since Plaintiffs may be able to cure the deficiencies in the
8 FAC by alleging additional facts in support of the section 2923.6(f) claim, the Court grants leave to
9 amend. *See Lopez*, 203 F.3d at 1127.

10 **2. Unfair Prong**

11 “[T]he statutory language of the UCL makes clear that a practice may be deemed unfair
12 even if not specifically proscribed by some other law.” *Alvarez*, 656 F.3d at 933 n.8 (alterations
13 and internal quotation marks omitted). “An unfair business practice is one that either offends an
14 established public policy or is immoral, unethical, oppressive, unscrupulous or substantially
15 injurious to consumers.” *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008)
16 (internal quotation marks omitted). Since Plaintiffs have plausibly alleged that Defendant engaged
17 in dual tracking, the Court concludes that Plaintiffs have stated a claim under the UCL for an unfair
18 business practice. *See* FAC ¶¶ 51, 54-55. Indeed, other courts have found that dual tracking may
19 satisfy the unfair prong of the UCL. *See, e.g., Flores*, 2014 WL 304766, at *5 (“Thus, the Court
20 finds that plaintiffs have alleged potentially unfair business practices by stating that defendant
21 violated Section 2923.6(c) by engaging in ‘dual tracking’ and, thus, improperly foreclosing on the
22 subject property.”); *Ware v. Bayview Loan Servicing, LLC*, No. 13-CV-1310 JLS NLS, 2013 WL
23 6247236, at *8 (S.D. Cal. Oct. 29, 2013) (holding that “Plaintiffs have alleged potentially unfair
24 business practices in suggesting that Defendant violated the HB[O]R via dual tracking”); *Murfitt v.*
25 *Bank of Am. NA*, No. EDCV 13-01182 JGB, 2013 WL 7098636, at *10 (C.D. Cal. Oct. 22, 2013)
26 (explaining that “courts have found [dual tracking] ‘unfair’ for purposes of the UCL” (citing *Jolley*,
27 213 Cal. App. 4th at 907-08)).

1 N.A., No. EDCV 13-02075 JVS, 2014 WL 1568857, at *8 (C.D. Cal. Jan. 27, 2014) (dismissing
2 plaintiffs’ “UCL claim based upon misrepresentations purportedly made by Defendants regarding
3 the loan modification process” because plaintiffs did not “describe these alleged misrepresentations
4 with particularity as to who, what, when, and where the statements were made”); *Ware*, 2013 WL
5 6247236, at *8 (dismissing UCL fraudulent prong claim where plaintiffs failed to “provide details
6 such as the time, place and nature of the alleged fraudulent activities” (alterations and internal
7 quotation marks omitted)); *Rodriguez v. JP Morgan Chase & Co.*, 809 F. Supp. 2d 1291, 1297
8 (S.D. Cal. 2011) (dismissing a plaintiff’s UCL fraudulent prong claim where “Plaintiff has
9 presented only conclusory allegations of fraud in his complaint”).

10 As such, the Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ UCL fraudulent
11 prong claim. Because Plaintiffs may be able to cure the deficiencies in the FAC by alleging
12 additional facts in support of this claim, the Court grants leave to amend. *See Lopez*, 203 F.3d at
13 1127.

14 **F. Negligence Claim**

15 The elements of negligence in California are well established: (1) defendant had a legal
16 duty to use due care towards the plaintiff; (2) the defendant breached that duty; and (3) the breach
17 was the proximate or legal cause of (4) the resulting injury. *Ladd v. Cnty. of San Mateo*, 911 P.2d
18 496, 498 (Cal. 1996).

19 In this case, Plaintiffs allege that Defendant was negligent in processing Plaintiffs’
20 application for a loan modification. FAC ¶¶ 60-73. Defendant, for its part, argues that it owed no
21 duty to Plaintiffs to approve the application. *See Mot.* at 11-12 (citing *Lueras*, 221 Cal. App. 4th at
22 67). Plaintiffs respond that Defendant nevertheless had a duty to use reasonable care in reviewing
23 Plaintiffs’ loan modification application. *See Opp.* at 17-21 (citing *Alvarez v. BAC Home Loans*
24 *Servicing, L.P.*, 228 Cal. App. 4th 941, 944-51 (2014)).

25 At this stage, however, the Court need not address the duty question for two reasons. First,
26 Plaintiffs’ negligence claim is premature because the loan modification application remains
27 pending. *See supra* Part IV.D; *see also Marino*, 2014 WL 3349188, at *3-4. Second, even if
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1 Plaintiffs’ negligence claim were ripe, Plaintiffs have not sufficiently alleged a breach of whatever
2 duty might exist. As detailed above, *see supra* Part IV.D, all Plaintiffs have shown is that they
3 misunderstood the Denial Letter. Plaintiffs have not plausibly alleged any actual calculation error
4 in that letter. Consequently, Plaintiffs’ assertion that they “were helpless in their attempt to correct
5 [Defendant’s] error” is unavailing. *Opp.* at 20. Not only is there no evidence of any error, but
6 Plaintiffs never explain why they failed to remedy their own misimpression or why it would fall on
7 Defendant to do so for them. Because Plaintiffs have not adequately alleged a breach of duty,
8 Plaintiffs’ negligence claim founders.

9 The Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ cause of action for
10 negligence. Because Plaintiffs may be able to cure the deficiencies in the FAC by alleging
11 additional facts in support of this claim, the Court grants leave to amend. *See Lopez*, 203 F.3d at
12 1127.

13 **V. CONCLUSION**

14 For the foregoing reasons, the Court rules on Defendant’s Motion to Dismiss as follows:

- 15 • The Court DENIES Defendant’s Motion to Dismiss on standing grounds;
- 16 • The Court DENIES Defendant’s Motion to Dismiss on grounds of judicial estoppel;
- 17 • The Court DENIES Defendant’s Motion to Dismiss Plaintiffs’ cause of action under
18 section 2923.6(c), which prohibits dual tracking;
- 19 • The Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ cause of action under
20 section 2923.6(f), which specifies the written notice requirements for a loan
21 modification denial, with leave to amend;
- 22 • The Court DENIES Defendant’s Motion to Dismiss Plaintiffs’ UCL unlawful prong
23 claim based on Defendant’s alleged violation of section 2923.6(c). The Court
24 GRANTS Defendant’s Motion to Dismiss Plaintiffs’ UCL unlawful prong claim based
25 on Defendant’s alleged violation of section 2923.6(f) with leave to amend;
- 26 • The Court DENIES Defendant’s Motion to Dismiss Plaintiffs’ UCL unfair prong claim
27 based on Defendant’s alleged dual tracking. The Court GRANTS Defendant’s Motion
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to Dismiss Plaintiffs' UCL unfair prong claim based on Defendant's alleged failure to properly evaluate Plaintiffs' loan modification application with leave to amend;

- The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' UCL fraudulent prong claim with leave to amend; and
- The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' cause of action for negligence with leave to amend.

Should Plaintiffs elect to file an Amended Complaint curing the deficiencies identified herein, Plaintiffs shall do so within thirty (30) days of the date of this Order. Failure to meet the thirty-day deadline to file an amended complaint or failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice of Plaintiffs' claims dismissed with leave to amend in this Order. Plaintiffs may not add new causes of actions or parties without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure 15.

IT IS SO ORDERED.

Dated: November 26, 2014


LUCY H. KOH
United States District Judge