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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL J. BELL *et al.*,  
  
Plaintiffs,  
  
vs.  
  
FEDERAL HOME LOAN MORTGAGE  
CORPORATION *et al.*,  
  
Defendants.

CASE NO. 11-CV-2514-MMA(RBB)

**ORDER:  
GRANTING DEFENDANT  
LITTON LOAN SERVICING LP'S  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT; and**

[Doc. No. 30]

**DENYING DEFENDANT  
AMERICAN EAGLE REAL  
ESTATE INC.'S MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT**

[Doc. No. 31]

Pending before the Court are Defendants Litton Loan Servicing LP's and American Eagle Real Estate, Inc.'s (respectively, "Litton" and "American Eagle," and collectively "Defendants") motions to dismiss Plaintiffs' Second Amended Complaint ("SAC"). The Court previously granted Defendants' motions to dismiss the First Amended Complaint and dismissed Plaintiffs' fraud-based claims for failure to satisfy Federal Rule of Civil Procedure 9(b)'s particularity requirement. The Court also dismissed Plaintiffs' fraudulent concealment and negligent misrepresentation claims against Litton because Plaintiffs did not allege Litton owed them a duty

1 of disclosure or care. Plaintiffs have since filed the SAC, and the instant pending motions ensued.  
2 The Court now **GRANTS** Litton’s motion, **DISMISSES** the claims against Litton without leave to  
3 amend, and **DENIES** American Eagle’s motion.

#### 4 **I. BACKGROUND**

5 The Court previously set out the facts of this case in its Order granting Litton’s and  
6 American Eagle’s motions to dismiss. [See Doc. No. 28.] After the Court dismissed Plaintiffs’  
7 claims against Litton and American Eagle, Plaintiffs filed the SAC, re-alleging claims against  
8 these Defendants for (1) Fraudulent Inducement (to enter contract); (2) Fraud – Intentional  
9 Misrepresentation; (3) Fraudulent Concealment; and (4) Fraud – Negligent Misrepresentation.

#### 10 **II. LEGAL STANDARDS**

##### 11 **A. Motions to Dismiss**

12 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block*,  
13 250 F.3d 729, 732 (9th Cir. 2001). “While a complaint attacked by a Rule 12(b)(6) motion to  
14 dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of  
15 his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the  
16 elements of a cause of action will not do. Factual allegations must be enough to raise a right to  
17 relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal  
18 quotations, brackets, and citations omitted).

19 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of  
20 all factual allegations and must construe them in the light most favorable to the nonmoving party.  
21 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions need not  
22 be taken as true merely because they are cast in the form of factual allegations. *Roberts v.*  
23 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624  
24 (9th Cir. 1981). Similarly, “conclusory allegations of law and unwarranted inferences are not  
25 sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699  
26 (9th Cir. 1998). In determining the propriety of a Rule 12(b)(6) dismissal, generally, a court may  
27 not look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903, 908  
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1 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998).

2 **B. Federal Rule of Civil Procedure 9(b)**

3 Federal Rule of Civil Procedure 9(b) requires that allegations of “fraud or mistake must  
4 state with particularity the circumstances constituting fraud.” The “circumstances” required by  
5 Rule 9(b) are the “who, what, when, where, and how” of the fraudulent activity. *Vess v.*  
6 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Neubronner v. Milken*, 6 F.3d 666,  
7 672 (9th Cir. 1993). In addition, the allegation “must set forth what is false or misleading about a  
8 statement, and why it is false.” *Vess*, 317 F.3d at 1106 (quoting *In re Glenfed, Inc. Secs. Litig.*, 42  
9 F.3d 1541, 1548 (9th Cir. 1994)). However, “intent, knowledge, and other conditions of a  
10 person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b); *see also Neubronner*, 6 F.3d at  
11 672. This heightened pleading standard ensures that “allegations of fraud are specific enough to  
12 give defendants notice of the particular misconduct which is alleged to constitute the fraud charged  
13 so that they can defend against the charge and not just deny that they have done anything wrong.”  
14 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

15 In cases involving multiple defendants, “Rule 9(b) does not allow a complaint to merely  
16 lump multiple defendants together but require[s] plaintiffs to differentiate their allegations . . . and  
17 inform each defendant separately of the allegations surrounding his alleged participation in the  
18 fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765-66 (9th Cir. 2007); *see also Pegasus Holdings v.*  
19 *Veterinary Ctrs. of Am., Inc.*, 38 F. Supp. 2d 1158, 1163 (C.D. Cal. 1998) (where an action  
20 involves multiple defendants, a plaintiff “must provide each and every defendant with enough  
21 information to enable them to know what misrepresentations are attributable to them and what  
22 fraudulent conduct they are charged with.”) (citations omitted).

23 Rule 9(b)’s heightened pleading requirement “protects potential defendants—especially  
24 professionals whose reputations in their fields of expertise are most sensitive to slander—from the  
25 harm that comes from being charged with the commission of fraudulent acts.” *Semegen*, 780 F.2d  
26 at 731. Providing detailed notice to defendants also prevents plaintiffs from filing complaints “as  
27 a pretext for the discovery of unknown wrongs.” *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018 (9th Cir.

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1 2001) (quoting *In re Stac Elecs. Secs. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

2 **C. Plaintiffs’ Fraud-Based Claims**

3 **1. Intentional Misrepresentation**

4 To state a claim for fraud, also known as intentional misrepresentation, a plaintiff must  
5 plead “(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge  
6 of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and  
7 (e) resulting damage.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (quoting  
8 *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 917 (Cal. 1997)); *see generally* Cal. Civ.  
9 Code §§ 1709-10.

10 **2. Negligent Misrepresentation**

11 To state a claim for negligent misrepresentation, Plaintiffs must allege the following: “1) a  
12 representation as to a material fact; 2) that the representation is untrue; 3) that the defendant made  
13 the representation without a reasonable ground for believing it true; 4) an intent to induce reliance;  
14 5) justifiable reliance by the plaintiff who does not know that the representation is false; and,  
15 6) damage.” *Bear Stearns & Co. v. Daisy Sys. Corp.*, 97 F.3d 1171, 1180 (9th Cir. 1996) (citation  
16 omitted). The existence of a duty of care is necessary to support a negligent misrepresentation  
17 claim. *Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511, 1523 (N.D. Cal. 1990) (“Liability for  
18 negligent misrepresentation may attach only where plaintiff establishes that defendants breached a  
19 duty owed to him”); *Garcia v. Superior Court*, 268 Cal. Rptr. 779, 782-83 (Cal. 1990); *see also*  
20 *Settle v. World Sav. Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 4215, \*31-32 (C.D. Cal. Jan. 11, 2012).<sup>1</sup>

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23 <sup>1</sup> The Ninth Circuit has not yet determined whether Rule 9(b)’s heightened pleading standard applies to a  
24 claim for negligent misrepresentation, but the general consensus among district courts in California is that it applies.  
25 *See Errico v. Pac. Capital Bank, N.A.*, 753 F. Supp. 2d 1034, 1049 (N.D. Cal. 2010) (“[N]egligent misrepresentation  
26 ‘sounds in fraud’ and is subject to Rule 9(b)’s heightened pleading standard . . . .”); *Neilson v. Union Bank of Cal.*,  
27 *N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003); *see also In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159,  
28 1176 (S.D. Cal. 2010) (Anello, J.) (applying Rule 9(b) to negligent misrepresentation claim); *Kennedy v. Lehman Bros.*  
*Bank, FSB*, 2011 U.S. Dist. LEXIS 88784, \*11-12 (S.D. Cal. Aug. 10, 2011) (Sammartino, J.) (same); *Young v.*  
*Fluorotronics, Inc.*, 2010 U.S. Dist. LEXIS 117362, \*22-25 (S.D. Cal. Nov. 3, 2010) (Hayes, J.) (same); *but see*  
*Petersen v. Allstate Indem. Co.*, 2012 U.S. Dist. LEXIS 32968, \*8-9 (C.D. Cal. Mar. 12, 2012) (finding that Rule 9(b)  
does not apply to negligent misrepresentation claims; criticizing *Neilson* opinion).

1           **3.       Fraudulent Inducement to Enter Contract**

2           The tort of fraudulent inducement to enter a contract, also known as promissory fraud, is a  
3 “subspecies of the action for fraud and deceit” and lies “where a defendant fraudulently induces a  
4 plaintiff to enter into a contract.” *Lazar v. Superior Court*, 909 P.2d 981, 985 (Cal. 1996). “The  
5 action is one of deceit, which requires proof that the defendant made a misrepresentation of fact or  
6 a promise without any intention of performing it.” *Serv. by Medallion, Inc. v. Clorox Co.*, 52 Cal.  
7 Rptr. 2d 650, 655 (Cal. Ct. App. 1996).

8           **4.       Fraudulent Concealment**

9           To state a claim for fraudulent concealment, Plaintiffs must allege that “(1) the defendant  
10 concealed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff;  
11 (3) the defendant concealed or suppressed the fact with an intent to defraud; (4) the plaintiff was  
12 unaware of the fact and would have acted if he or she had known about it; and (5) the concealment  
13 caused the plaintiff to sustain damage.” *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1156  
14 n.3 (9th Cir. 2000).

15           “There are four circumstances in which a duty to disclose may arise such that  
16 nondisclosure or concealment constitutes actionable fraud: (1) when a fiduciary relationship exists  
17 between the parties; (2) when the defendant has exclusive knowledge of material facts not known  
18 to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4)  
19 when the defendant makes a partial representation to the plaintiff while suppressing other material  
20 facts.” *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997) (citations omitted).  
21 “The first circumstance requires a fiduciary relationship; each of the other three ‘presupposes the  
22 existence of some other relationship *between the plaintiff and defendant* in which a duty to  
23 disclose can arise.” *Deteresa v. Am. Broad. Cos.*, 121 F.3d 460, 467 (9th Cir. 1997) (quoting  
24 *LiMandri*, 60 Cal. Rptr. 2d at 543) (emphasis added). Such relationships “‘are created by  
25 transactions between parties from which a duty to disclose facts material to the transaction arises  
26 under certain circumstances.’ Examples are ‘seller and buyer, employer and prospective  
27 employee, doctor and patient, or parties entering into any kind of contractual agreement.’” *Id.*

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1 (quoting *LiMandri*, 60 Cal. Rptr. 2d at 543-44).

2 Fraud claims based on concealment are grounded in fraud and are therefore subject to Rule  
3 9(b)'s heightened pleading requirement. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir.  
4 2009); *Settle*, 2012 U.S. Dist. LEXIS 4215 at \*29-30 (collecting cases).

### 5 III. DISCUSSION

6 American Eagle and Litton again seek dismissal of Plaintiffs' four fraud-based claims on  
7 the basis that Plaintiffs fail to satisfy Rule 9(b)'s particularity requirement. Specifically, they  
8 argue Plaintiffs fail to plead facts regarding the "who, what, when, where, and how" of Litton's  
9 and American Eagle's alleged fraudulent conduct. Plaintiffs argue they have satisfied rule 9(b).  
10 Litton also seeks dismissal of Plaintiffs' claims on the additional basis that Plaintiffs have not  
11 alleged that Litton owed them a duty of disclosure or care.

#### 12 A. Plaintiffs' Claims Continue to Fail to Allege Litton Owed Plaintiffs a Duty of 13 Disclosure or Care

14 The Court previously granted Plaintiffs leave to amend the FAC to allege Litton owed  
15 them a duty of disclosure or care. In doing so, the Court explained that these duties could not exist  
16 without an allegation of "some relationship" between Litton and Plaintiffs. The SAC continues to  
17 fail to allege any relationship between Litton and Plaintiffs. As a result, Plaintiffs are unable to  
18 allege Litton owed them a duty of disclosure or care.

19 Under California tort law, an agent is liable to a third party for the agent's own acts or  
20 omissions "when his acts are wrongful in their nature." Cal. Civ. Code § 2343; *see also* Rest.  
21 (Third) Agency § 7.01 ("An agent is subject to liability to a third party harmed by the agent's  
22 tortious conduct."). "Section 2343(3) only makes an agent liable for affirmative misfeasance."  
23 *Nasrawi v. Buck Consultants, LLC*, 713 F. Supp. 2d 1080, 1091 (E.D. Cal. 2010) (citing *Ruiz v.*  
24 *Herman Weissker, Inc.*, 29 Cal. Rptr. 3d 641 (Cal. Ct. App. 2005)). Because Plaintiffs allege  
25 Litton engaged in affirmative misfeasance—i.e., actively concealing material facts—they must allege  
26 Litton owed them a duty of disclosure independent of any such duty Freddie Mac may have owed  
27 them. *See LiMandri*, 60 Cal. Rptr. 2d at 543 ("[W]here material facts are known to one party and  
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1 not to the other, failure to disclose them is not actionable fraud unless there is *some relationship*  
2 *between the parties* which gives rise to a duty to disclose such known facts.”) (emphasis added;  
3 citation omitted).

4 Plaintiffs appear to assume that Litton owed them a duty solely because Litton acted as  
5 Freddie Mac’s “agent.” [See FAC at ¶ 54.] However, the Court previously explained that

6 [T]he mere fact of an agency relationship [between Litton and Freddie Mac] is  
7 *ipso facto* insufficient to give rise to such a duty. While Plaintiffs allege they  
8 purchased the property from Freddie Mac, they have not alleged they entered into  
9 any transaction with Litton. Nor have they alleged that they had any other  
10 relationship, communication, or interaction such that Litton would owe them a  
11 duty. Moreover, Plaintiffs never allege that Litton had knowledge of Plaintiffs’  
12 existence or participated in the sales transaction in any way. Without such  
13 allegations, Plaintiffs fail to plead the existence of “some relationship” with  
14 Litton and therefore fail to allege that Litton owed them a duty of disclosure or  
15 care.

16 The Court also explained the differences between the duties of real estate agents and the type of  
17 agency relationship Plaintiffs allege Litton is engaged in here. [Doc. No. 28 at 10-11.] Plaintiffs  
18 continue to fail to allege facts that Litton owed them a duty of disclosure, as there is no indication  
19 in the SAC that any Litton employee ever met or interacted with either plaintiff. Moreover, as  
20 Litton has pointed out all along, Plaintiffs fail to allege any facts that suggest that anyone from  
21 Litton even knew of either plaintiff’s existence. Ultimately, there is no indication in the SAC that  
22 there was any relationship whatsoever *of any kind* between Litton and Plaintiffs. As a result,  
23 Plaintiffs’ claims for fraudulent concealment and negligent misrepresentation against Litton fail.<sup>2</sup>

24 **B. American Eagle’s Motion to Dismiss**

25 In its previous Order, the Court found Plaintiffs successfully alleged the existence of a duty  
26 of disclosure by American Eagle in accordance with *Cooper* and *Lingsch*. However, the Court  
27 found Plaintiffs had not satisfied Rule 9(b)’s heightened pleading requirement. The Court  
28 provided the following as examples of deficiencies in the FAC:

For example, Plaintiffs do not allege when American Eagle first discovered the  
existence of the unpermitted additions or whether the company had the requisite

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<sup>2</sup> Plaintiffs’ remaining claims against Litton continue to fail to satisfy Rule 9(b)’s particularity requirement. Having reviewed the SAC, the Court sees no new allegations that can support Plaintiffs’ claims for fraudulent inducement to enter contract and fraud (intentional misrepresentation).

1 knowledge during sales negotiations with Plaintiffs. Furthermore, it is unclear  
2 whether Litton ever informed American Eagle of the first citation, which did not  
3 impose a fine. American Eagle's knowledge of the second citation is also unclear  
4 because that citation issued and was sent to Litton on September 9, 2009, [Doc. No.  
5 17-4], and the Grant Deed to the Property was recorded a mere two days later, on  
6 September 11, 2009, [Doc. No. 18-1 at 3]. Thus, it is equally unclear whether  
7 American Eagle had knowledge of the unpermitted additions before title passed.

8 The Court instructed Plaintiffs to “allege the ‘who, what, when, where, and how’ of American  
9 Eagle’s alleged fraudulent conduct.” In response, Plaintiffs allege the following facts:

- 10 • On or about June 15, 2009, Earl Gervais . . . , on behalf of AMERICAN EAGLE, signed an  
11 Agent Visual Inspection Disclosure (the “Agent’s Visual Inspection”), based on an  
12 inspection of the Property that occurred on June 5, 2009. The Agent’s Visual Inspection  
13 refers to “addition,” but fails to describe, or otherwise define, what is meant by “additions.”  
14 [SAC, Doc. No. 29 at ¶ 14.]
- 15 • On or about July 15, 2009, THE BELLS signed a Residential Purchase Agreement and  
16 joint Escrow Instructions (the “RP Agreement”). . . . The Listing Real Estate Broker, Mr.  
17 Gervais of AMERICAN EAGLE, also signed the RP Agreement on August 4, 2009.  
18 [*Id.* ¶ 15.]
- 19 • On or about July 30, 2009, six calendar days before Mr. Johnson (on behalf of FREDDIE  
20 MAC) and Mr. Gervais (on behalf of AMERICAN EAGLE) sign the RP Agreement, the  
21 San Diego County Department of Planning and Land Use . . . properly mailed and  
22 addressed a warning to FREDDIE MAC c/o LITTON. Once received, and as admitted in  
23 LITTON’s Motion to Dismiss the First Amended Complaint . . . , LITTON “passed [the  
24 Warning] on to a separate and distinct” agent of FREDDIE MAC. [*Id.* ¶ 16.]<sup>3</sup>
- 25 • On or about August 25, 2009, twenty-six calendar days after the DPLU mailed the Warning  
26 to FREDDIE MAC c/o LITTON, Mr. Gervais of AMERICAN EAGLE, signed a Real  
27 Estate Transfer Disclosure Statement (the “Disclosure Statement”), which included an  
28 Addendum and incorporated the Agent’s Visual Inspection. That same day, August 25,  
29 Mr. Gervais again signed the Agent’s Visual Inspection. THE BELLS signed the  
30 Disclosure Statement and the Agent’s Visual Inspection the following day, August 26,  
31 2009. The Disclosure Statement’s Addendum states “Demolition of Unpermitted Guest  
32 House” and “Cap off all utilities servicing unpermitted Guest House.” No reference is  
33 made to the Unpermitted Additions to the family home. [*Id.* ¶ 20 (emphasis in original).]

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38 <sup>3</sup> In its motion to dismiss the First Amended Complaint, Litton stated: “After receiving *these* citations  
39 [referring to the first warning and second citation imposing a \$100 fine], Litton simply passed *them* on to a separate  
40 and distinct agent of Freddie Mac [*i.e.*, American Eagle].” [Doc. No. 19-1 at 2:7-8 (emphasis added).] Plaintiffs  
41 incorporate this statement by Litton in support of their allegation that American Eagle had knowledge of both citations  
42 before close of escrow.

- 1 • On or about September 9, 2009, the DPLU properly addressed and mailed a 1st Citation to  
2 FREDDIE MAC c/o LITTON. LITTON then “passed [1st Citation] on to a separate and  
3 distinct agent” of FREDDIE MAC. [*Id.* ¶ 21 (alteration in original).]
- 4 • On or about September 11, 2009, forty-three days after the DPLU mailed the Warning to  
5 FREDDIE MAC c/o LITTON and two days after the DPLU mailed the 1st Citation to  
6 FREDDIE MAC c/o LITTON, th Grant Deed was recorded with the San Diego County  
7 Recorder’s Office . . . . [*Id.* ¶ 23 (emphasis in original).]

8 Taken together, these allegations are sufficient to satisfy Plaintiffs’ burden under Rule 9. The  
9 Court recognizes that Plaintiffs’ claims are based in omission of fact, not affirmative  
10 misrepresentations of fact, and that as a result, Plaintiffs may not be able to identify fraudulent  
11 statements that possibly were never made. As the California Supreme Court has recognized, the  
12 “misrepresentation” element of fraud claims includes “false representation, *concealment*, or  
13 *nondisclosure*.” *Lazar v. Super. Ct.*, 909 P.2d 981, 984 (Cal. 1996) (emphasis added); *see also*  
14 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (quoting *Engalla v. Permanente*  
15 *Med. Grp., Inc.*, 938 P.2d 903, 917 (Cal. 1997)). American Eagle’s laser focus on the lack of any  
16 affirmative false statements ignores the other species of misrepresentation that Plaintiffs allege  
17 here. Ultimately, the Court is satisfied that Plaintiffs’ fraud-based claims are now not “couched in  
18 general pleadings.” *See Kearns*, 567 F.3d at 1125-27. The new allegations above sufficiently  
19 plead Plaintiffs’ fraud claims to survive a motion to dismiss.<sup>4</sup>

20 **IV. CONCLUSION**

21 For the reasons set forth above, the Court **GRANTS** Litton’s motion to dismiss and  
22 **DENIES** American Eagle’s motion to dismiss. Accordingly, given that Plaintiffs had three  
23 opportunities to allege viable claims against Defendant Litton, all claims against Litton are  
24 **DISMISSED with prejudice and without leave to amend**. Defendant American Eagle shall  
25 answer within 14 days of the date of this Order. Finally, Plaintiffs’ cursory request for leave to  
26 amend the SAC to add a negligence claim against all defendants in this case is **DENIED**.  
27 Plaintiffs provide no reason why the Court should allow them to add a negligence claim after

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28 <sup>4</sup> The Court notes that much of American Eagle’s briefing essentially asks the Court to apply a standard of review more appropriate for summary judgment proceedings.

1 granting them *two* prior opportunities to amend their complaint and after 12 months of initially  
2 filing this case.

3 **IT IS SO ORDERED.**

4 DATED: September 28, 2012



Hon. Michael M. Anello  
United States District Judge

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