



1 made on-time monthly payments until August 2012, when losses at her nail-salon  
2 business rendered her unable to make the payments. (*Id.* at ¶¶ 24, 26.) From August  
3 2012 through March 2013, Plaintiff repeatedly requested assistance from Bank of  
4 America, which was denied in part because the loan was being transferred to Defendant  
5 Green Tree. (*Id.* at ¶ 26.)

6 In April 2013, Defendant became the servicer of Plaintiff's loan. (*Compl.* at ¶ 26;  
7 *RJN* [Doc. 6], Ex. C [Doc. 6-4].) On May 6, 2013, following a request from Plaintiff,  
8 Defendant offered her a Trial Period Plan ("TPP") which increased her monthly  
9 payments from \$1,683.83 to \$2,103.94. (*Compl.*, ¶¶ 26-27.) Despite multiple requests  
10 from Plaintiff, Defendant offered her no further options. (*Id.* at ¶ 27.)

11 On December 6, 2013, Plaintiff filed a civil action in the San Diego County  
12 Superior Court alleging the following six causes of action: (1) breach of contract;  
13 (2) constructive fraud; (3) promissory estoppel; (4) negligence; (5) negligent  
14 misrepresentation; and (6) violation of Business and Professions Code §§ 17200, et seq.  
15 Defendant subsequently removed the case to this Court based on federal diversity  
16 jurisdiction. (*Removal Notice* [Doc. 1], ¶ 7.) Defendant now moves to dismiss the  
17 Complaint. Plaintiff opposes.

## 18 19 **II. LEGAL STANDARD**

20 The court must dismiss a cause of action for failure to state a claim upon which  
21 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule  
22 12(b)(6) tests the complaint's sufficiency. See N. Star Int'l v. Ariz. Corp. Comm'n., 720  
23 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if  
24 doubtful in fact," are assumed to be true. *Id.* The court must assume the truth of all  
25 factual allegations and must "construe them in light most favorable to the nonmoving  
26 party." Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v.  
27 Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

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1 As explained by the Supreme Court, “[w]hile a complaint attacked by a Rule  
2 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s  
3 obligation to provide the grounds of his entitlement to relief requires more than labels  
4 and conclusions, and a formulaic recitation of the elements of a cause of action will not  
5 do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted).  
6 Instead, the allegations in the complaint “must be enough to raise a right to relief above  
7 the speculative level.” Id. A complaint may be dismissed as a matter of law either for  
8 lack of a cognizable legal theory or for insufficient facts under a cognizable theory.  
9 Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

10 Generally, courts may not consider material outside the complaint when ruling  
11 on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d  
12 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically  
13 identified in the complaint whose authenticity is not questioned by parties. Fecht v.  
14 Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other  
15 grounds). Moreover, courts may consider the full text of those documents, even when  
16 the complaint quotes only selected portions. Id. Courts may also consider material  
17 properly subject to judicial notice without converting the motion into one for summary  
18 judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. S. Bay  
19 Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds  
20 by Astoria Fed. Sav. and Loan Ass’n v. Solimino, 501 U.S. 104 (1991)).

### 21 22 **III. DISCUSSION**

#### 23 **A. Plaintiff has failed to state a claim for breach of contract.**

24 Plaintiff’s first cause of action alleges Defendant Green Tree breached the  
25 Servicer Participation Agreement (“SPA”) to which Plaintiff claims to be a third-party  
26 beneficiary, by failing to follow the Home Affordable Refinance Program (“HAMP”)  
27 guidelines allegedly required therein. (*Compl.*, ¶¶ 13, 30.) Plaintiff also claims that  
28

1 under California Civil Code § 1549, she can enforce the SPA contract as a third-party  
2 beneficiary. (*Id.* at ¶ 31.) Plaintiff is mistaken for at least two reasons.

3 First, numerous district courts have considered whether borrowers are intended  
4 beneficiaries of contracts entered pursuant to HAMP. The vast majority of cases have  
5 found that borrowers are not third-party beneficiaries. See *Orcilla v. Bank of America,*  
6 *N.A.*, 2010 WL 5211507, \*3 (N.D. Cal., 2010) (citing *Hoffman v. Bank of America,*  
7 *N.A.*, 2010 WL 2635773, \*3 (N.D. Cal., 2010); *Morales v. Chase Home Finance LLC,*  
8 2011 WL 1670045, \*9 (N.D. Cal., 2011).) This Court agrees with those cases, and thus  
9 the breach of contract claim fails as a matter of law.

10 Second, Plaintiff misconstrues the HAMP requirements. By her own admission,  
11 HAMP only requires a servicer to “determine which loans meet HAMP eligibility  
12 criteria,” and does not require offering a loan modification. (*Compl.*, ¶ 15.) HAMP  
13 simply provides guidelines in the decision-making process for loan modifications.  
14 *Escobedo v. Countrywide Home Loans, Inc.*, WL 4981618, \*3 (S.D. Cal., 2009). Only  
15 when a borrower is offered and successfully completes a TPP, does the obligation to  
16 offer a permanent loan modification arise. *Corvello v. Wells Fargo Bank, NA et al.*, 728  
17 F.3d 878 (9th Cir. 2013). However, that duty arises from the TPP (i.e., contract)  
18 between the homeowner and servicer, and not from the SPA between the U.S. Treasury  
19 and the servicer. *Id.* And here, Plaintiff pleads no facts that she accepted and  
20 completed the TPP. (*Compl.*, ¶¶ 26-28.)

21 For these reasons, Plaintiff’s claim for breach of the SPA fails.

22  
23 **B. Plaintiff has failed to state a claim for constructive fraud.**

24 The second cause of action alleges that Defendant Green Tree was deceitful by  
25 offering Plaintiff a TPP that charged her more than her original mortgage payments.  
26 (*Compl.*, ¶ 38.) “Constructive fraud is a unique species of fraud applicable only to a  
27 fiduciary or confidential relationship.” *Assilzadeh v. California Federal Bank*, 82 Cal.  
28 App. 4th 399, 415 (2000). In California, a fiduciary duty exists when a party

1 “knowingly undertake[s] to act on behalf and for the benefit of another, or must enter  
2 into a [special] relationship which imposes that undertaking as a matter of law.” City  
3 of Hope National Medical Center v. Genentech, Inc., 43 Cal. App. 4th 375, 385  
4 (2008).

5 Here, Defendant is the servicer of Plaintiff’s loan. Plaintiff admits that when  
6 Defendant “was merely the [s]ervicer of Plaintiff’s loan, . . . the traditional lender  
7 borrower relationship [existed], which d[id] not impose a duty of care.” (*Compl.*, ¶ 45.)  
8 Then, without citing any authority, Plaintiff alleges that “[b]y offering a Trial Period  
9 Plan, [Defendant] stepped outside its role as a traditional lender and created a duty to  
10 deliver a modification of the original note and Deed of Trust.” (*Id.* at ¶ 38.) Plaintiff  
11 refers to the alleged duty as requiring Defendant to “save Plaintiff’s home from  
12 foreclosure.” (*Id.*)

13 While there is some disagreement regarding whether offering a loan modification  
14 is outside the scope of a traditional money-lender relationship, several district courts  
15 and one recent California appellate decision have found that “offering loan  
16 modifications is sufficiently entwined with money lending so as to be considered within  
17 the scope of typical money lending activities. . . .” Aspiras v. Wells Fargo Bank, N.A.,  
18 219 Cal. App. 4th 948 (2013); Alvarado v. Aurora Loan LLC, 2012 WL 4475330 (C.D.  
19 Cal. 2012) (holding a servicing company owed no duty to plaintiff for offering a loan  
20 modification); Settle v. World Sav. Bank, F.S.B., 2012 WL 1026103 (C.D. Cal. 2012)  
21 (characterizing loan modifications as a traditional money lending activity); Johnston v.  
22 Ally Fin. Inc., 2011 WL 3241850 (S.D. Cal. 2011) (same). This Court agrees with  
23 these cases, and finds that Defendant did not owe Plaintiff a fiduciary relationship by  
24 offering her a TPP.

25 Although the Court finds the Complaint lacks facts demonstrating that  
26 Defendant owed Plaintiff a fiduciary duty, the Court will give Plaintiff an opportunity  
27 to plead other facts demonstrating that Defendant went above and beyond a traditional  
28 servicer-borrower role.

1           **C. Plaintiff has failed to state a claim for promissory estoppel.**

2           Plaintiff's third cause of action alleges promissory estoppel. Promissory estoppel  
3 requires: (1) a clear promise; (2) reasonable reliance; (3) substantial detriment; and  
4 (4) damages. Toscano v. Greene Music, 124 Cal. App. 4th 685, 692 (2004).

5           Plaintiff's promissory estoppel cause of action is based on the theory that  
6 Defendant promised her that a lower payment would be forthcoming, but instead  
7 ultimately offered her a higher payment. (*Compl.*, ¶ 42.) Plaintiff further alleges that  
8 she "justifiably and actually relied on" Defendant's promise of forthcoming lower  
9 payments "to her detriment such that one years' worth of arrears accumulated." (*Id.*,  
10 ¶ 42.) There are at least two problems with this claim.

11           According to the Complaint, in August 2012, Plaintiff stopped making mortgage  
12 payments due to "her continued loss of income from her self-employment of a nail  
13 salon." (*Id.* at ¶ 26.) Plaintiff further alleges that at the time (and through "late 2012"),  
14 Bank of America was still the servicer of the loan (not Defendant). (*Id.*) Indeed, the  
15 Complaint and Deed of Trust confirm that Defendant did not become the servicer of  
16 the loan until April 2013. (*See RJN* [Doc. 6], Ex. C [Doc. 6-4].) Based on these  
17 allegations, the only reasonable inference is that Plaintiff stopped making payments  
18 because of her financial hardship, and not because of anything Defendant did or did not  
19 do.

20           Moreover, Plaintiff also alleges that she did not request a loan modification from  
21 Defendant until it became the servicer:

22           In April 2013, after GREEN TREE became the servicer, [] Plaintiff  
23 requested that GREEN TREE follow the HAMP and FDIC guidelines, as  
24 well as the California statutes, and allow her to save her home from  
foreclosure.

25 (*Compl.*, ¶ 26.) Plaintiff also concedes that on "May 6, 2013," approximately one  
26 month later, "GREEN TREE offered Plaintiff a . . . TPP that *increased*, not reduced, her  
27 monthly mortgage . . . ." (*Id.*, ¶ 27.) Based on these allegations, it is not reasonable to  
28 infer that Plaintiff's accrual of one-year's worth of payments was the result of her  
reliance on Defendant's alleged promise of lower future payments.

1           Because Plaintiff's allegations suggest that she stopped making payments as a  
2 result of her financial hardship and that she did not accrue one-year's worth of arrears  
3 as a result of Defendant's conduct, Plaintiff has failed to establish reasonable reliance,  
4 and substantial detriment. For these reasons, the Court finds Plaintiff has failed to state  
5 a claim for promissory estoppel.

6  
7           **D. Plaintiff has failed to state a claim for negligence.**

8           The fourth cause of action in Plaintiff's Complaint is for negligence. Negligence  
9 requires the Plaintiff to show there is a legal duty owed to her. Wiener v. Southcoast  
10 Childcare Centers, Inc., 32 Cal. 4th 1138 (2004). Plaintiff makes the same arguments  
11 here as she did under her constructive fraud claim— that Defendant stepped outside  
12 its traditional role when it offered her a TPP, thus creating a duty. (*Compl.*, ¶ 45.) For  
13 the reasons discussed with respect to the claim for constructive fraud, the Court finds  
14 Plaintiff has failed to plead facts establishing the existence of a duty.

15  
16           **E. Plaintiff has failed to state a claim for negligent misrepresentation.**

17           Plaintiff's fifth cause of action alleges negligent misrepresentation, which requires  
18 (1) a misrepresentation of a material fact; (2) made without reasonable grounds for  
19 believing it to be true; (3) made to induce reliance on the fact misrepresented;  
20 (4) plaintiff's justifiable reliance; and (5) resulting damages. Wells Fargo Bank, N.A.  
21 v. FSI, Financial Solutions, Inc., 196 Cal. App. 4th 1559, 1573 (2011).

22           Plaintiff's negligent misrepresentation claim suffers from the same deficiencies as  
23 Plaintiff's promissory-estoppel claim. In short, the Complaint's allegations strongly  
24 suggest that Plaintiff stopped making payments and accrued a year's worth of arrears  
25 because of her financial hardship and not because of any promise by Defendant.  
26 Accordingly, Plaintiff has failed to plead facts demonstrating justifiable reliance and  
27 resulting damages.

28

1           Additionally, the Complaint’s factual allegations provide insufficient notice to  
2 Defendant regarding the alleged misrepresentation. Plaintiff alleges that Defendant’s  
3 “employees misrepresented that a lower payment would be offered . . . without  
4 reasonable grounds for believing it to be true.” (*Compl.*, ¶ 51.) More is required to  
5 assert a claim for deceit. For purposes of this case, Plaintiff must also identify who,  
6 when and how the misrepresentation was made. Accordingly, for this additional reason,  
7 the Court finds the misrepresentation claim is deficient.

8  
9           **F. Plaintiff has failed to state a claim for violation of the UCL.**

10           Plaintiff’s sixth cause of action alleges that Defendant’s business conduct  
11 constitutes a violation of California’s UCL, which prohibits “any unlawful, unfair or  
12 fraudulent business act or practice and unfair, deceptive, untrue or misleading  
13 advertising.” Cal. Bus. & Prof. Code § 17200. Because section 17200 is written in the  
14 disjunctive, it establishes three varieties of unfair competition: acts or practices that are  
15 (1) unlawful, (2) unfair, or (3) fraudulent. *Cel-Tech Commc’ns, Inc. v. L.A. Cellular*  
16 *Tel. Co.*, 20 Cal. 4th 163, 180 (1999).

17           To pursue a section 17200 claim, plaintiffs are required to establish that they  
18 “suffered an injury in fact and [] lost money or property as a result of the unfair  
19 competition.” Cal. Bus. & Prof. Code § 17204. Economic injury is a classic form of  
20 injury in fact, and exists where the plaintiff is deprived of property or money to which  
21 he or she has a cognizable claim. *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 323  
22 (2011).

23           Defendant argues that Plaintiff’s UCL claim should be dismissed because she  
24 lacks standing to pursue the claim, and she has failed to plead facts demonstrating that  
25 Defendant violated any of the UCL’s three prongs. The Court agrees.

26           Plaintiff appears to allege two types of damages caused by Defendant. First she  
27 alleges that Defendant “caus[ed] one year of missed payments to occur. . . .” (*Compl.*,

28



1 ¶ 56.) For the reasons stated above, the Court finds the allegations in the factual  
2 background portion of the Complaint establish that the missed payments were due to  
3 her own financial hardship and not Defendant's conduct.

4 Second, Plaintiff alleges that as a result of Defendant's conduct, she faces the  
5 "prospect of losing her home forever to a trustee's sale." (Compl., ¶ 62.) As  
6 Defendant's point out, this allegation is insufficient because it is based on the possibility  
7 Plaintiff may lose her home, and thus she has failed to allege the deprivation of property  
8 or money.

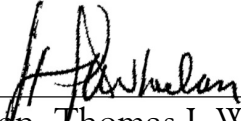
9 Finally, the Complaint's factual allegations indicate that within a month of  
10 becoming the servicer of Plaintiff's loan and receiving her request for a modification,  
11 Defendant allegedly offered a TPP that would increase her payments. These allegations  
12 are simply insufficient to establish that Defendant engaged in unlawful, unfair, or  
13 fraudulent conduct.

14  
15 **IV. CONCLUSION AND ORDER**

16 For the foregoing reasons, the Court **GRANTS** Defendant Green Tree's motion  
17 [Doc. 5] and **DISMISSES** this case. Although unclear whether Plaintiff can amend the  
18 Complaint to state a claim, because leave to amend should be freely given, the Court  
19 will give Plaintiff an opportunity to amend her claims. However, any amended  
20 complaint must be filed on or before **April 2, 2014**.

21  
22 **IT IS SO ORDERED.**

23  
24 DATED: March 13, 2014

25   
26 \_\_\_\_\_  
27 Hon. Thomas J. Whelan  
28 United States District Judge