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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES BRADLEY MOORE and
COLLETTE L.S. MOORE,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

NO. 1:22-CV-3045-TOR

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 4).

This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein, the completed briefing, and is fully informed.

For the reasons discussed below, Defendant's Motion to Dismiss (ECF No. 4) is granted in part and denied in part.

BACKGROUND

This case concerns a dispute over loan modification offers and related interest rates. ECF No. 1-1. On March 2, 2022, Plaintiffs served Defendant with

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION TO DISMISS ~ 1

1 the present the complaint bearing the caption of the Superior Court of Yakima.
2 ECF No. 1 at 2, ¶¶ 1-2. On April 1, 2022, Defendant removed the action to this
3 Court. *Id.* at 1. The Complaint raises the following causes of action: violation of
4 Washington’s Consumer Protection Act (“CPA”) and negligent misrepresentation.
5 ECF No. 1-1 at 9-10, ¶¶ 5.1-6.5. The following facts are drawn from Plaintiffs’
6 complaint and are accepted as true for the purposes of the present motion. *Chavez*
7 *v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

8 In January 2018, Plaintiffs purchased a residential property by executing a
9 promissory note and deed of trust. ECF No. 1-1 at 5, ¶ 4.3. The terms of the note
10 were as follows: \$448,400.00 principal, 4.750% interest rate, and a \$2,339.07
11 monthly payment. *Id.* at 5-6, ¶ 4.3. Subsequently, the ownership of the note and
12 deed was transferred to Fannie Mae and servicing of the note was assigned to
13 Wells Fargo. *Id.* at 6, ¶ 4.4. For two years, Plaintiffs made timely mortgage
14 payments to Wells Fargo. *Id.*

15 In February 2020, Plaintiff Mr. Moore lost his job due to the COVID-19
16 pandemic. *Id.*, ¶ 4.5. On March 23, 2020, Plaintiffs contacted Wells Fargo to
17 inquire about COVID-19 related hardship programs. *Id.* On March 31, 2020,
18 Plaintiffs contacted Wells Fargo regarding a refinance of the mortgage. *Id.*
19 Plaintiffs were approved for a three-month COVID-19 pandemic related

1 forbearance, but Plaintiffs submitted several payments during this time in order to
2 not fall behind on the mortgage. *Id.*, ¶¶ 4.5-4.6.

3 In May 2020, Mr. Moore secured a new job and Plaintiffs requested to be
4 taken out of forbearance. *Id.*, ¶ 4.6. Wells Fargo told Plaintiffs they could not
5 cancel the forbearance. *Id.* Plaintiffs then requested a refinance. *Id.*, ¶ 4.7. Wells
6 Fargo told Plaintiffs they were ineligible due to the forbearance status on the loan,
7 but that Plaintiffs could apply for a loan modification. *Id.*

8 On July 13, 2020, Plaintiffs submitted a loan modification application. *Id.*, ¶
9 4.8. On July 23, 2020, Plaintiffs received a letter from Wells Fargo stating that
10 their automated valuation model calculated Plaintiffs' property value at \$480,000.
11 *Id.*, ¶ 4.9.

12 On August 6, 2020, Wells Fargo contacted Plaintiffs, approving the loan
13 modification and asking whether Plaintiffs accepted the modification. *Id.*, ¶ 4.10.
14 Plaintiffs told Wells Fargo they would need to review the documentation before
15 agreeing. *Id.* at 7, ¶ 4.10. On or about the same date¹, Plaintiffs received the letter
16 with the loan modification offer of a \$2,528.94 monthly payment with a 3.250%

17
18 ¹ Plaintiffs states the letter was received one day before the phone call on
19 August 5, 2020. There are also two paragraphs labeled 4.10. These appear to be
20 typographical errors.

1 interest rate. *Id.*, ¶ 4.10. Plaintiffs were concerned the modification extended the
2 loan's term by 10 years and did not remove the Private Mortgage Insurance. *Id.*, ¶
3 4.10. Plaintiffs repeatedly tried and failed to get ahold of their single point of
4 contact for Wells Fargo to discuss these concerns. *Id.*

5 On or about November 4, 2020, Plaintiffs received a letter from Wells Fargo
6 stating that their automated valuation model calculated the property value at
7 \$577,600. ECF No. 1-1 at 7, ¶ 4.11. On or about November 6, 2020, Plaintiffs
8 received a letter from Wells Fargo with a loan modification offer for a trial period
9 plan for monthly payments of \$2,974.86 with a 4.75% interest rate. ECF No. 1-1
10 at 7, ¶ 4.12.

11 On or about December 23, 2020, Plaintiffs received a loan modification
12 offer from Wells Fargo for a trial period plan for monthly payments of \$2,940.16
13 with a 4.75% interest rate. ECF No. 1-1 at 7, ¶ 4.14.

14 On or about April 6, 2021, Plaintiffs received a letter from Wells Fargo
15 stating that their automated valuation model calculated the property value at
16 \$622,100. ECF No. 1-1 at 7, ¶ 4.15. On or about April 7, 2021, Plaintiffs received
17 a loan modification offer from Wells Fargo for a trial period plan for monthly
18 payments of \$2,995.21 with a 4.75% interest rate. ECF No. 1-1 at 8, ¶ 4.16.

19 On or about June 8, 2021, Plaintiffs sent a Notice of Error letter to Wells
20 Fargo stating that the valuations of their home were grossly overinflated and

1 requesting that Wells Fargo obtain an exterior BPO, appraisal, or other more
2 accurate method than the computer-generated value. ECF No. 1-1 at 8, ¶ 4.17. On
3 or about July 6, 2021, Plaintiffs received a response from Wells Fargo declining
4 their request to order a new appraisal. ECF No. 1-1 at 8, ¶ 4.18.

5 On or about October 2021, Plaintiffs sent another Notice of Error letter to
6 Wells Fargo that included two comparable market analyses from local Yakima
7 realtors listing the property in October 2021 as \$528,915 and \$575,000. ECF No.
8 1-1 at 8, ¶ 4.19.

9 The Fannie Mae Servicing Guide provides that if borrower's loan-to-value
10 ratio is higher than 80%, the borrower will be offered an interest rate at the lesser
11 of the Fannie Mae Modification Interest Rate and the contractual interest rate in the
12 loan modification. ECF No. 1-1 at 8, ¶ 4.20. If the loan-to-value ratio is less than
13 80%, the borrower will be offered the contractual interest rate in the loan
14 modification. *Id.* During the relevant period, Plaintiffs had a loan-to-value ratio
15 greater than 80%. ECF No. 1-1 at 9, ¶ 4.22.

16 Plaintiffs believe Wells Fargo overinflated the value of the home resulting in
17 Plaintiffs not being offered the Fannie Mae Modification Interest Rate in the
18 Servicing Guide. ECF No. 1-1 at 9, ¶ 4.23. Plaintiffs received damage to their
19 credit, lost money disputing Wells Fargo's valuations, and incurred other monetary
20 damages. ECF No. 1-1 at 9, ¶ 4.24.

1 **DISCUSSION**

2 **A. Motion to Dismiss Standard**

3 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may
4 move to dismiss the complaint for “failure to state a claim upon which relief can be
5 granted.” A motion to dismiss for failure to state a claim will be denied if the
6 plaintiff alleges “sufficient factual matter, accepted as true, to ‘state a claim to
7 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
8 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

9 While the plaintiff’s “allegations of material fact are taken as true and
10 construed in the light most favorable to the plaintiff” the plaintiff cannot rely on
11 “conclusory allegations of law and unwarranted inferences ... to defeat a motion to
12 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
13 1403 (9th Cir. 1996) (citation and brackets omitted). That is, the plaintiff must
14 provide “more than labels and conclusions, and a formulaic recitation of the
15 elements.” *Twombly*, 550 U.S. at 555.

16 When deciding, the Court’s review is limited to the complaint, documents
17 incorporated into the complaint by reference, and judicial notice. *Metzler Inv.*
18 *GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing
19 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). Defendant
20 requests the Court take judicial notice of three documents: the note, deed, and

1 assignment of the deed of trust. ECF No. 5. While these documents appear to be
2 subject to judicial notice, the Court need not consider them where the documents
3 are not relevant to resolving the issues presented in this motion.

4 **B. Consumer Protection Act**

5 Defendant asserts Plaintiffs failed to state a claim under the CPA by failing
6 to allege an unfair or deceptive act, causation, and any act that would affect the
7 public interest. ECF No. 4 at 4-6.

8 The Washington Consumer Protection Act (“CPA”) prohibits “[u]nfair
9 methods of competition and unfair or deceptive acts or practices in the conduct of
10 any trade or commerce.” RCW 19.86.020. “Any person who is injured in his or
11 her business or property by a violation of RCW 19.86.020 ... may bring a civil
12 action” to recover actual damages. RCW 19.86.090. To establish a non-*per se*
13 CPA claim, the plaintiff need not have a contractual or non-adversarial relationship
14 with the defendant. *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27,
15 41-42 (2009).

16 To prevail on such a CPA claim, “the plaintiff must prove an (1) unfair or
17 deceptive act or practice; (2) occurring in trade or commerce; (3) public interest
18 impact; (4) injury to plaintiff in his or her business or property; [and] (5)
19 causation.” *Klem v Washington Mut. Bank*, 176 Wash. 2d 771, 782 (2013)
20 (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.

1 2d 778, 780 (1986)). The “trade or commerce” and “injury” elements are not in
2 dispute. *See* ECF No. 4 at 5-6.

3 *1. Unfair or Deceptive Act or Practice*

4 Under the first element, the plaintiff can demonstrate a deceptive act if the
5 “alleged act had the capacity to deceive a substantial portion of the public” even if
6 there was no intent to deceive. *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 198
7 Wash. App. 594, 628 (2017) (quoting *Hangman Ridge*, 105 Wash. 2d at 785). A
8 plaintiff can demonstrate an unfair act if the act “(1) causes or is likely to cause
9 substantial injury which (2) consumers cannot avoid, and (3) is not ‘outweighed by
10 countervailing benefits.’” *Id.* (quoting *Klem*, 176 Wash. 2d at 787). Whether an
11 act constitutes an unfair or deceptive practice is a question of law. *Columbia*
12 *Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168
13 Wash. 2d 421 (2010).

14 Defendant asserts Plaintiffs allege no unfair or deceptive act where Plaintiffs
15 cannot assert a contractual right to which Plaintiffs are entitled. *See* ECF Nos. 4, 9
16 (arguing Defendant is not required to offer a loan modification under any specific
17 terms and Plaintiffs are unable to enforce rights under Fannie Mae servicing
18 guidelines). Plaintiffs need not assert a contractual right to state a claim under the
19 CPA. Plaintiffs’ allegation that Defendant overinflated the property value,
20 rendering them ineligible for lower interest rates for which they would otherwise

1 be eligible, has the capacity to deceive a substantial portion of the public and/or is
2 likely to cause substantial injury that Plaintiffs could not avoid without any clear
3 countervailing benefits. *Merriman*, 198 Wash. App. at 628. Defendant dismisses
4 Plaintiffs’ over-inflation allegation as a bare assertion. ECF No. 9 at 4. To the
5 contrary, Plaintiffs allege they provided Defendant with two comparable market
6 analyses that list the property value well under Defendant’s valuations, thereby
7 supporting their claim that Defendant over-inflated the property value. ECF No. 1-
8 1 at 8, ¶ 4.19. The Court finds that Plaintiffs adequately allege an unfair or
9 deceptive act to support their CPA claim.

10 2. *Public Interest*

11 Under the third element, “[o]rdinarily, a breach of a private contract
12 affecting no one but the parties to the contract is not an act or practice affecting the
13 public interest.” *Hangman Ridge*, 105 Wash. 2d at 790. However, a plaintiff can
14 establish that the private “lawsuit would serve the public interest by showing a
15 likelihood that other plaintiffs have been or will be injured in the same fashion.”
16 *Trujillo v. Nw. Tr. Servs.*, 183 Wash. 2d 820, 835 (2015) (internal citations
17 omitted). To assess the public interest in a private dispute, courts are guided by
18 “(1) whether the defendant committed the alleged acts in the course of his/her
19 business, (2) whether the defendant advertised to the public in general, (3) whether
20 the defendant actively solicited this particular plaintiff, and (4) whether the

1 plaintiff and defendant have unequal bargaining positions.” *Id.* at 836. No one
2 factor is dispositive. *Id.*

3 Defendant’s relevant services affects homeowners in Washington. ECF No.
4 1-1 at 9, ¶ 5.5. Plaintiffs can establish public interest under the aforementioned
5 factors in a private dispute; the allegations show the acts were committed within
6 the course of Defendant’s business and it appears based on the allegations that
7 Plaintiffs and Defendant have unequal bargaining power. *Trujillo*, 183 Wash. 2d at
8 836. The Court finds that Plaintiffs adequately allege a public interest to support
9 their CPA claim.

10 *3. Causation*

11 A plaintiff can establish causation by showing “the deceptive act or practice
12 proximately caused injury to the plaintiff’s ‘business or property.’” *Panag*, 166
13 Wash. 2d at 63-64. “Where a more favorable loan modification would have been
14 granted but for [wrongful conduct], the borrower may have suffered an injury to
15 property within the meaning of the CPA.” *Frias v. Asset Foreclosure Servs., Inc.*,
16 181 Wash. 2d 412, 431-32 (2014).

17 Plaintiffs allege they received damage to their credit, lost money disputing
18 the valuations, and incurred other monetary damages during the loan modification
19 process that would not have occurred but for Defendant’s valuations. ECF No. 1-1

1 at 8-10, ¶¶ 4.17-4.24, 5.7. The Court finds that Plaintiffs adequately allege
2 causation to support their CPA claim.

3 In sum, accepting the allegations as true, Plaintiffs have stated a claim for
4 relief under the CPA that is plausible on its face. *Iqbal*, 556 U.S. at 678.
5 Defendant's motion to dismiss the CPA claim is denied.

6 **C. Negligent Misrepresentation**

7 Defendant asserts Plaintiffs failed to state a claim for negligent
8 misrepresentation on the grounds that the complaint fails to plead the existence of a
9 false statement, Plaintiffs did not rely on any false statement, there are no
10 allegations Defendant negligently transmitted the results of the valuations, and
11 there is no proximate causation as a matter of law. ECF No. 4 at 8-9.

12 To prove a claim for negligent misrepresentation, a plaintiff must show by
13 clear, cogent, and convincing evidence that (1) the defendant in the course of its
14 business, profession, or employment, supplies false information for the guidance of
15 others in their business transactions, (2) the defendant knew or should have known
16 the information supplied was to guide the plaintiff in their business transaction, (3)
17 the defendant was negligent in obtaining or communicating the false information,
18 (4) the plaintiff reasonably relied on the information, and (5) the false information
19 proximately caused the plaintiff damages. *Ross v. Kirner*, 162 Wash. 2d 493, 499-
20 500 (2007) (internal citation omitted).

1 Plaintiffs adequately allege Defendant supplied Plaintiffs with false
2 information about the valuations of their property and their qualification for a
3 lower interest rate, knew it was supplied for loan modification offer, was negligent
4 in obtaining or communicating the information, and the information proximately
5 caused their damages. ECF No. 1-1 at 10, ¶¶ 4.23-4.24, 6.1-6.5. However, beyond
6 a bare assertion, Plaintiffs do not allege they reasonably relied on the valuations, as
7 evidenced by the allegations that Plaintiffs did not accept any of the loan
8 modification offers and Plaintiffs' damages arose in part by disputing the
9 valuations. *Id.* at 7-8, ¶¶ 4.10-4.19. Accepting the allegations as true, the lack of
10 reasonable reliance is fatal to Plaintiffs' negligent misrepresentation claim.
11 Defendant's motion to dismiss this claim is granted.

12 **D. Leave to Amend**

13 Rule 15(a)(2) instructs courts to "freely give leave [to amend] when justice
14 so requires." "This policy is to be applied with extreme liberality." *Eminence*
15 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal citation
16 and quotation marks omitted). However, a court may deny leave to amend "due to
17 undue delay, bad faith or dilatory motive on the part of the movant, repeated
18 failure to cure deficiencies by amendments previously allowed, undue prejudice to
19 the opposing party..., and futility of amendment." *Zucco Partners, LLC v.*
20 *Digimarc Ltd.*, 552 F.3d 981, 1007 (9th Cir. 2009) (internal citation and quotation

1 marks omitted). Federal Rule of Civil Procedure 15(a) governs amendment of the
2 pleadings prior to the court's filing of a pretrial scheduling order. *Johnson v.*
3 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992).

4 Here, Rule 15(a) applies where the Court has yet to file a pretrial scheduling
5 order in this case. As this case is in its early stages, the Court finds that justice
6 requires that Plaintiffs be able to freely amend their complaint.

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 8 1. Defendant's Motion to Dismiss (ECF No. 4) is **GRANTED in part** and
9 **DENIED in part**. Count Two for Negligent Misrepresentation is
10 **DISMISSED**.
11 2. Plaintiffs are granted leave to **AMEND** their complaint **within 21 days**
12 of this Order.

13 The District Court Executive is directed to enter this Order and furnish
14 copies to counsel.

15 DATED May 20, 2022.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

20
THOMAS O. RICE
United States District Judge