No. 16-56480

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REX and SEDA NATAN, husband and wife,

Plaintiffs-Appellants,

vs.

CITIMORTGAGE, INC., a New York corporation,
and DOES 1 through 100, inclusive,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:14-cv-05779-DSF-PLA
The Honorable Dale S. Fischer

ANSWERING BRIEF OF DEFENDANT-APPELLEE CITIMORTGAGE, INC.

Andrew Z. Edelstein, SBN 218023
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-5156
Facsimile: (213) 625-0248

Lucia Nale
Debra Bogo-Ernst
Stephen J. Kane
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606-4637
Telephone: (312) 782-0600
Facsimile: (312) 706-7711

Attorneys for Defendant-Appellee
CitiMortgage, Inc.

CORPORATE DISCLOSURE STATEMENT

70% of the shares of CitiMortgage, Inc. are owned by Citibank, N.A., and the remaining 30% are owned by Citi Retail Services LLC.

80% of the shares of Citi Retail Services LLC are owned by Citicorp USA; the remaining 20% of the shares of Citi Retail Services LLC are owned by CFNA Receivables (MD), Inc.

Citicorp USA, and CFNA Receivables (MD), Inc. are each wholly-owned subsidiaries of Citibank, N.A.

Citibank, N.A. is a wholly-owned subsidiary of Citicorp LLC.

Citicorp LLC is a wholly owned subsidiary of Citigroup Inc.

Citigroup Inc. is a publicly traded corporation.

No single shareholder currently owns more than 10% of Citigroup Inc. stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

Defendant-Appellee CitiMortgage, Inc. ("Citi") accepts Plaintiffs-Appellants' Jurisdictional Statement.

ISSUES PRESENTED

Plaintiffs Rex and Seda Natan asked Citi, the servicer of Plaintiffs' mortgage, to modify Plaintiffs' loan because Plaintiffs could not afford their monthly payments. Citi sent Plaintiffs a Trial Period Plan ("TPP") that temporarily allowed them to make reduced mortgage payments and avoid foreclosure while Citi determined whether Plaintiffs qualified for a permanent loan modification under the federal government's Home Affordable Modification Program ("HAMP"). In January 2010, Citi denied Plaintiffs' application for a HAMP modification because Plaintiffs did not qualify under HAMP rules.

Plaintiffs filed this lawsuit in July 2014. Plaintiffs' contract-based claims alleged that although Plaintiffs did not qualify for HAMP, Citi nevertheless breached the TPP by declining to modify Plaintiffs' loan under HAMP. Plaintiffs' misrepresentation-based claims alleged that Citi induced Plaintiffs' participation in the TPP by representing that Plaintiffs qualified for HAMP. The district court granted summary judgment for Citi on all claims. The issues presented are:

1. Did the district court correctly grant summary judgment for Citi on Plaintiffs' contract-based claims because the TPP allowed Citi to deny Plaintiffs' application for a HAMP modification based on Plaintiffs' ineligibility for HAMP?

2. Should the judgment on Plaintiffs' contract-based claims be affirmed on the alternative grounds that: (a) Plaintiffs breached the TPP by failing to timely submit required documents; and (b) the four-year statute of limitations expired?

3. Did the district court correctly grant summary judgment for Citi on Plaintiffs' misrepresentation-based claims because the governing one- and three-year statutes of limitations expired where Plaintiffs filed this lawsuit more than four years after Citi denied Plaintiffs' application for a HAMP modification?

4. Should the judgment on Plaintiffs' misrepresentation-based claims be affirmed on the alternative grounds that: (a) Citi did not represent that Plaintiffs qualified for HAMP; and (b) there is no evidence that Plaintiffs relied on any misrepresentation?

5. Should the judgment be affirmed on the alternative ground that a state-court order dismissing with prejudice five claims that Plaintiffs asserted in a prior lawsuit against Citi arising out of the same facts, combined with Plaintiffs' voluntary dismissal of their remaining claim, is res judicata to this lawsuit?

6. Should the case be reassigned to a different district judge if the case is remanded for further proceedings?

STATEMENT OF THE CASE

I. Overview Of HAMP And The Citi Program

The Department of the Treasury created HAMP in early 2009 to address the surge in mortgage foreclosures. ER126. HAMP used taxpayer dollars to incentivize mortgage servicers to modify loans held by a subset of struggling borrowers. ER147-50. To avoid unnecessarily spending taxpayer dollars, Treasury established a multi-step process that servicers were required to follow.

HAMP first required the servicer to verify that the loan satisfied 13 threshold criteria. ER127-28. Of relevance here, a loan on a single-family home was eligible for HAMP only if the principal balance did not exceed $729,750. ER128. HAMP next required the servicer to attempt to reduce the mortgage payment to 31% of the borrowers' monthly income. ER133-35. Finally, HAMP required the servicer to employ a net-present-value test to determine if it was more profitable to modify the loan or foreclose. ER129-30.

HAMP "strongly encouraged" servicers to use government-authored TPPs, cover letters, and other forms. ER140; *see* ER128. During HAMP's "stated-income" period from April 2009 to June 2010, Treasury encouraged servicers to offer TPPs based on unverified representations that borrowers made about their income. SER199-200. If borrowers wanted to apply for a HAMP modification, they would sign and return the TPP along with documents that the servicer needed

to verify the borrowers' eligibility. ER130. It was not until after the borrowers "return[ed] the [TPP]" that the servicer would conclusively determine, based on the borrowers' documents, whether the borrowers qualified for a permanent modification. *Id.*

Treasury encouraged servicers to use their own loan-modification programs to help borrowers who were ineligible for HAMP. ER129, ER140. Citi designed its First Lien Supplemental Modification Program ("Citi Program") "for loans which are ineligible for [HAMP]." SER253. For example, borrowers who were ineligible under HAMP because their principal balance exceeded HAMP limits could qualify for the Citi Program. *Id.*

Treasury expected servicers to use HAMP tools as part of their proprietary programs. SER204-05. Citi used the TPP for both HAMP and the Citi Program. ER76-80. Ed Nass—the lawyer who represented Plaintiffs in seeking a loan modification—knew that servicers used the TPP for their proprietary programs and "did not think [this] was improper." SER174-75.

II. Plaintiffs' Application For A Loan Modification

In April 2008, Plaintiffs obtained a $1.3 million adjustable-rate mortgage loan from Citi on a single-family home in Pacific Palisades. SER64-86. The loan required initial monthly payments of $6364.58 in principal/interest plus about $1300 in taxes/insurance. SER57; ER172. Mr. Natan was at all relevant times a

self-employed insurance salesman. ER166; SER8, SER245. Mrs. Natan did not work outside the home. SER159-60.

In December 2008, Mr. Natan called Citi asking about a loan modification. SER250-52. A Citi representative told Mr. Natan that Plaintiffs' loan must be one-year old before Plaintiffs could apply for a modification. SER249. The Citi representative suggested a short sale, but Mr. Natan declined. *Id.*

In April 2009, Citi received Plaintiffs' authorization for Ed Nass (an attorney) and Shawn Anvar (a non-attorney) of the Nass Law Firm to represent Plaintiffs in seeking assistance. ER163. Using a Citi checklist of documents needed to process loan-modification applications, the Nass Law Firm faxed documents to Citi in April and May 2009. ER162; SER87. Although the checklist required a profit-and-loss statement for self-employed borrowers like Mr. Natan, the Nass Law Firm did not submit such a statement. *Id.*; SER9.

On or about July 6, 2009, Citi sent Plaintiffs a package that included a cover letter, a TPP, and a Hardship Affidavit. ER158-59. The cover letter invited Plaintiffs to return specified documents to "see **if you qualify** for a Home Affordable Modification." ER159 (emphasis added). The letter explained that Plaintiffs' compliance with the TPP would not guarantee a loan modification: Citi would modify Plaintiffs' loan only "[i]f you qualify under the federal government's Home Affordable Modification Program **and** comply with the terms

of the Trial Period Plan." ER158 (emphasis added). The letter repeatedly cautioned that Citi had not decided if Plaintiffs qualified. *Id.* ("If you do not qualify"); ER160 (Citi needed "to confirm your income and eligibility for the program").

The cover letter instructed Plaintiffs to submit the required documentation by August 13, 2009, providing a checklist of documents that Citi needed. ER159. For self-employed borrowers like Mr. Natan, the checklist included "the most recent quarterly or year-to-date profit/loss statement" and "the most recent filed federal tax return." *Id.*

The TPP likewise made clear that Citi had not decided whether Plaintiffs qualified under HAMP. It stated: "If I have not already done so, I am providing confirmation of the reasons I cannot afford my mortgage payment and documents to permit verification of all of my income … to determine **whether I qualify** for the offer described in this Plan." ER155 (emphasis added). "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan **if I qualify** for the Offer or will send me written notice that **I do not qualify** for the Offer." *Id.* (emphasis added). By signing the TPP, Plaintiffs acknowledged that "the Loan Documents will not be modified unless … I meet all of the conditions required for modification." ER156.

The TPP (as corrected) required Plaintiffs to make monthly payments of $4050.82 by August 13, September 13, and October 14, 2009—about $3613 less

than the payment required by Plaintiffs' loan. ER156; *see* Appellants' Opening Brief ("Br.") at 12 n.2. The TPP cautioned that if Citi did not modify Plaintiffs' loan, "any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me." ER156.

The Hardship Affidavit required Plaintiffs to explain why they needed help. SER88-91. It noted that Plaintiffs needed "to qualify" for "an agreement to modify my loan." SER88. By signing the Affidavit, Plaintiffs acknowledged that Citi "will use this information to evaluate my/our eligibility for a loan modification." SER90.

On July 28, 2009, Citi received Plaintiffs' signed copies of the TPP and Hardship Affidavit as well as various financial documents. SER248. Plaintiffs again omitted the required profit-and-loss statement. *Id.*; SER14. Plaintiffs also did not provide their 2008 tax return, instead including their 2007 return and a form seeking more time to file their 2008 return. SER14.

On July 30, 2009, Citi told Anvar that it needed Plaintiffs' 2008 tax return and certain other documents. SER247-48. Plaintiffs submitted more documents in August 2009, but again omitted a profit-and-loss statement and stated that they had not yet filed their 2008 tax return. SER247, SER15. Although Citi apparently told Plaintiffs in late August 2009 that it had received all of their documents, Citi also said that it would notify Plaintiffs if it needed more documents. SER246. Citi did just that on October 20, 2009, telling Anvar that Citi needed Plaintiffs' profit-and-

loss statement. SER245. The next day, Anvar faxed Plaintiffs' profit-and-loss statement and unsigned 2008 tax return. *Id.*; SER15. On October 23, 2009, pursuant to Citi's request, Anvar faxed a signed copy of Plaintiffs' 2008 tax return. SER245, SER 15. Citi forwarded Plaintiffs' file to its underwriting department on November 14, 2009. SER244.

On December 19, 2009, a Citi underwriter found that Plaintiffs did not qualify for a loan modification. SER235-43. Plaintiffs did not qualify under HAMP because their loan's $1.3 million principal balance exceeded HAMP's limit. SER235. Plaintiffs did not qualify under the Citi Program because their loan failed the net-present-value test. *Id.*

Citi repeatedly told Plaintiffs and their representatives that Plaintiffs were ineligible for a modification. Citi's servicing notes show that during a phone call on December 28, 2009, Citi told Mr. Natan that Plaintiffs' loan was ineligible and identified the basis for that decision. *Id.* Plaintiffs' purported expert testified that this entry in Citi's servicing notes reflected Mr. Natan learning that Citi had denied Plaintiffs' request for a modification. SER226-28.

Anvar called Citi the next day. SER235. Citi told Anvar that Plaintiffs' loan was ineligible for a modification, but that Citi would send Plaintiffs' application to management for "further review." *Id.* On January 7, 2010, Anvar called to check

on the review. *Id.* Citi told Anvar that Plaintiffs' application "was denied," citing "the princip[al] balance" and factors relevant to the NPV result. *Id.*

On January 12, 2010, Anvar asked that Plaintiffs' application be "resubmitted" to Citi's underwriter "due to [the] denial." SER234. Anvar called again on January 19, 2010, and Citi again told Anvar that Plaintiffs were ineligible for HAMP because Plaintiffs' principal balance exceeded HAMP's limit. *Id.* Nass confirmed this in a letter to Citi: "on January 19, 2010, we spoke with a manager at Citibank" who "explained to us that our Client's permanent loan modification was denied." ER153. On January 26, 2010, Citi again told Anvar that Plaintiffs were "declined for HAM[P] and supp[lemental] mod[ification]." ER37 (capitalization altered). Anvar thus conceded in his deposition that Citi told him that it "denied" Plaintiffs' application. ER116-17; SER184-85.[1]

On April 20, 2010, Mr. Natan called Citi "to see if his mod[ification application] was in review due to dispute letter." SER233. Citi told Mr. Natan that Plaintiffs' loan-modification application was "closed." *Id.*

[1] Plaintiffs invoked the attorney-client privilege in instructing Nass and Anvar not to answer deposition questions regarding whether they told Plaintiffs about Citi's denial. SER176-80, SER186-90. Plaintiffs' objections were meritless. Whether and when Plaintiffs learned that Citi denied their application is factual information outside the scope of the privilege. Plaintiffs also waived the privilege on this question by putting their communications with Nass/Anvar at issue, suggesting in the complaint that they first "learned" in 2012 that Citi had told the Nass Law Firm about its denial. ER174. Regardless, as explained below, Nass and Anvar's knowledge is imputed to Plaintiffs.

In May 2010, Citi transferred the servicing of Plaintiffs' loan to PennyMac Loan Services. SER92. PennyMac foreclosed on Plaintiffs' mortgage in 2011 and evicted Plaintiffs in 2013. ER108.

III. Plaintiffs' Litigation History

In February 2011, Plaintiffs (represented by counsel) sued Citi and others in state court, asserting improprieties in the foreclosure proceedings ("*Natan I*"). SER95-105. The state court denied Plaintiffs' request to enjoin the foreclosure because "plaintiffs are not likely to prevail." SER106. Plaintiffs later dismissed *Natan I* without prejudice. SER107.

Less than two weeks after dismissing *Natan I*, Plaintiffs sued Citi in a different state court, represented by new counsel ("*Natan II*"). SER108-26. The complaint asserted six claims, including promissory estoppel and fraud. *Id.* The complaint alleged that Citi "sent Plaintiffs a HAMP Trial Period Plan Application," and that Citi breached its purported promises by accepting Plaintiffs' TPP payments without modifying Plaintiffs' loan. SER114-15, SER123-25. Although alleging that Citi provided conflicting information, the complaint conceded that on "some occasions" from June 2009 through April 2010, "Plaintiffs were told that … their loan modification had been denied." SER115.

The state court sustained Citi's demurrer without leave to amend as to five of Plaintiffs' six claims and with leave to amend as to the remaining fraud claim.

SER140. The court allowed Plaintiffs to file an amended complaint asserting only "one cause of action for fraud." *Id.*

Plaintiffs filed an amended complaint alleging a single fraud count. SER143-52. In November 2012, one week before a hearing on Citi's demurrer and represented by new counsel, Plaintiffs dismissed *Natan II* without prejudice. SER155-57, SER153.

IV. The District Court's Decision

Plaintiffs filed this lawsuit on July 24, 2014, represented by new counsel. ER188. The case was transferred to Judge Dale Fischer based on Plaintiffs' representation that their lawsuit is related to two TPP-based putative class actions against Citi pending before Judge Fischer. SER229, SER232 (citing *King v. CitiMortgage, Inc.*, Case No. 10-cv-3792 (C.D. Cal.); *In re CitiMortgage, Inc. Home Affordable Modification Program (HAMP) Contract Litig.*, Case No. 11-ml-2274 (C.D. Cal.) ("HAMP MDL")).

As amended, Plaintiffs' complaint alleged claims for fraud, negligent misrepresentation, breach of contract, promissory estoppel, and violation of California's Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"). ER177-85. The fraud and negligent-misrepresentation claims alleged that the TPP misrepresented that Plaintiffs were eligible for HAMP. ER177-82. The breach-of-contract and promissory-estoppel claims alleged that Citi breached the TPP by

declining to modify Plaintiffs' loan. ER182-84. The Rosenthal Act claim asserted both theories. ER184-85.

The complaint alleged that *King* and the HAMP MDL tolled the statute of limitations on Plaintiffs' claims under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), because Plaintiffs were purportedly members of classes asserted in those actions. ER175-77. *King* was filed on May 19, 2010, and was later consolidated with other TPP-based class actions in the HAMP MDL assigned to Judge Fischer. *See* Plaintiffs' Motion to Take Judicial Notice ("Plaintiffs' MJN"), Exs. 2, 4. On October 7, 2013, Judge Fischer denied class certification in the HAMP MDL. *In re CitiMortgage, Inc. Home Affordable Modification Program (HAMP) Litig.*, 2013 WL 8844095 (C.D. Cal. Oct. 7, 2013). This Court affirmed. *Bernard v. CitiMortgage Inc.*, 637 F. App'x 471 (9th Cir. 2016).

After extensive discovery, briefing, and oral argument, Judge Fischer granted summary judgment for Citi. The court held that California's three-year statute of limitations barred Plaintiffs' fraud and negligent-misrepresentation claims. ER1. "Those claims accrued in 2010, when Plaintiffs admittedly learned of the denial of the requested modification," but Plaintiffs did not sue until 2014. *Id.* The court rejected Plaintiffs' tolling theory because the complaints in *King* and the HAMP MDL did not assert fraud or negligent-misrepresentation claims. *Id.* Although "there is some flexibility in the application of this rule in situations

where the same basic claim or claims are broadened or altered slightly," *American Pipe* does not permit tolling "for completely different claims with elements different from those pleaded in the class action." ER2.

The court held that California's one-year statute of limitations barred Plaintiffs' Rosenthal Act claim. ER2. The court explained that Plaintiffs' claim accrued "at the very latest" on April 20, 2010, when Citi told Plaintiffs directly that they "would not receive a modification." ER3. Ninety-one days passed until the first class action asserting a TPP-based Rosenthal Act claim against Citi was filed on July 20, 2010. ER2-3 (citing *Betancourt v. CitiMortgage, Inc.*, Case No. 10-7049 (C.D. Cal.)). "At most," *Betancourt* (later consolidated in the HAMP MDL) tolled the limitations period until October 7, 2013, when class certification was denied in the HAMP MDL. ER2. Plaintiffs then waited 290 days before filing this lawsuit on July 14, 2014. *Id.* Combining (a) the 91 days between accrual and *Betancourt* with (b) the 290 days between the class-certification denial and this lawsuit, the one-year limitations period expired. ER2-3.

The court rejected Plaintiffs' breach-of-contract and promissory-estoppel claims "on the merits," holding that the TPP "require[d] a modification only for borrowers who qualified for the HAMP program." ER3-4. The court cited TPP provisions stating that Citi would execute Plaintiffs' TPP only "'if I qualify,'" and that Plaintiffs would receive a HAMP modification only if "'I meet all of the

conditions required for modification.'" ER4. The TPP cover letter "further supports this conclusion, identifying qualification/eligibility under [HAMP] as a prerequisite to receiving a modification at least three times." *Id.* Accordingly, because it was "undisputed" that Plaintiffs did not qualify for HAMP due to their loan's principal balance, Citi did not breach the TPP by denying Plaintiffs' application for a HAMP modification. ER3-4.

SUMMARY OF ARGUMENT

Plaintiffs' breach-of-contract and promissory-estoppel claims alleged that the TPP required Citi to modify Plaintiffs' loan under HAMP because, even though Plaintiffs admit that they did not qualify under HAMP rules, Plaintiffs purportedly performed their obligations under the TPP. The district court correctly rejected that theory. The TPP repeatedly indicated that Citi could modify Plaintiffs' loan only if they qualified for HAMP. The cover letter that came with the TPP confirmed that to obtain a HAMP modification, Plaintiffs needed to perform their obligations ***and*** qualify for HAMP. That makes sense. The government—which authored the TPP documents—could not have intended to spend taxpayer dollars on loan modifications that violated the eligibility criteria that the government established.

Plaintiffs' brief principally relies on two decisions in support of their theory: *Corvello v. Wells Fargo Bank*, 728 F.3d 878 (9th Cir. 2013), and *Wigod v. Wells Fargo Bank*, 673 F.3d 547 (7th Cir. 2012). But *Corvello* and *Wigod* both held that

the TPP allowed the servicer, after the borrowers returned the signed TPP and financial documents that the servicer needed to determine eligibility, to deny a HAMP modification if the borrowers "do not qualify." *Corvello*, 728 F.3d at 884; *accord Wigod*, 673 F.3d at 562. Indeed, *Corvello* noted that it could not resolve the servicer's argument that "plaintiffs were not qualified" only because the case was "'at the motion to dismiss stage.'" 728 F.3d at 885. By contrast, this case was decided on summary judgment, and Plaintiffs concede that they did not qualify for HAMP. *Corvello* and *Wigod* thus support the district court's ruling, not Plaintiffs.

Plaintiffs' remaining claims are untimely. A three-year limitations period bars Plaintiffs' fraud and negligent-misrepresentation claims: Plaintiffs' claims accrued in 2010, but they did not file this lawsuit until 2014. Plaintiffs seek to evade dismissal by arguing that *King* and the HAMP MDL tolled the limitations period under California's version of *American Pipe*. The district court correctly rejected that theory because neither *King* nor the HAMP MDL asserted fraud or negligent-misrepresentation claims. And under California law, *American Pipe* applies "only where the class action and the later individual action … are based on the ***same claims*** and subject matter and similar evidence." *Perkin v. San Diego Gas & Elec. Co.*, 225 Cal. App. 4th 492, 504 (2014) (emphasis added).

A one-year limitations period bars Plaintiffs' Rosenthal Act claim even if *American Pipe* tolling applies. As the district court explained, more than one year

elapsed when combining (a) the period between when Plaintiffs' claim accrued and when any tolling began with (b) the period between when class certification was denied and when Plaintiffs filed this lawsuit. Even if that determination were incorrect, any tolling ended in 2012, when Judge Fischer dismissed the HAMP MDL plaintiffs' Rosenthal Act claim and those plaintiffs dropped the claim. Because more than one year elapsed between 2012 and when Plaintiffs filed this lawsuit in 2014, *American Pipe* cannot salvage Plaintiffs' Rosenthal Act claim.

The judgment can also be affirmed on numerous alternative grounds. First, the state-court order in *Natan II* dismissing all but one of Plaintiffs' claims with prejudice, combined with Plaintiffs' dismissal of his remaining fraud claim, is res judicata to Plaintiffs' claims here. Second, Plaintiffs' claims are all untimely absent *American Pipe* tolling, but California has not adopted the cross-jurisdictional tolling that Plaintiffs need here—i.e., tolling state-law claims based on a federal class action. Third, Plaintiffs' contract-based claims fail because Plaintiffs did not timely return all required documents, breaching their obligations under the TPP. Finally, Plaintiffs' misrepresentation-based claims fail because there is no evidence of a misrepresentation, much less one upon which Plaintiffs reasonably relied.

STANDARD OF REVIEW

This Court reviews orders granting summary judgment "de novo." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 665 (9th Cir. 2017). The Court may

affirm summary judgment "'if it is supported by any ground in the record, whether or not the district court relied upon that ground.'" *Id.* at 670.

ARGUMENT

I. Plaintiffs' Contract-Based Claims Fail As A Matter Of Law.

A. The District Court Correctly Held That The TPP Authorized Denials Based On Borrower Ineligibility.

Plaintiffs' breach-of-contract and promissory-estoppel claims alleged that Citi breached the TPP by declining to modify Plaintiffs' loan under HAMP. ER182-83. Plaintiffs concede, however, that they did not qualify for HAMP. SER16. The only remaining question is purely legal: Did the TPP allow servicers to decline HAMP modifications due to borrower ineligibility? The answer is "yes."

1. The TPP documents support the district court's decision.

The TPP stated that Plaintiffs' loan "will not be modified unless and until … I meet all of the conditions required for modification." ECF156. It required Plaintiffs to submit documents to enable Citi "to determine whether I qualify" for a modification. ER155. And it provided that Citi would send Plaintiffs a countersigned TPP only "if I qualify." *Id.* This language refutes Plaintiffs' theory that they were entitled to a loan modification solely "if they complied with the TPP" (ER183), even though they did not qualify for HAMP.

As described more fully above, the TPP cover letter and Hardship Affidavit confirmed that Plaintiffs needed to qualify for HAMP in addition to complying

with the TPP. Critically, the cover letter stated that Citi would modify Plaintiffs' loan only "**[i]f you qualify** under [HAMP] **and** comply with the terms of the [TPP]." ER158 (emphasis added). This language makes clear that the TPP's compliance requirement was distinct from its qualification requirement, and that both requirements must be satisfied to obtain a HAMP modification.

In an attempt to avoid this result, Plaintiffs cite (at 32) the TPP's preamble: "If I am in compliance with this [TPP] … and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification." ER155. But courts interpret contracts "as a whole and interpret the language in context, rather than interpret a provision in isolation." *Am. Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1245 (2006). Other statements in the TPP, the cover letter, and the Hardship Affidavit clarify that Plaintiffs needed to qualify under HAMP to receive a HAMP modification.

Plaintiffs do not address the cover letter's requirement that they qualify for HAMP **and** comply with the TPP. Plaintiffs instead argue that the district court erred by considering the letter. Citing *Walsh v. Walsh*, 18 Cal. 2d 439 (1941), Plaintiffs contend that summary judgment is improper if a contract's meaning "'is uncertain or doubtful and parol evidence is introduced.'" Br. 34-35. Because Plaintiffs did not make this argument below (SER31-56), it is waived. *See In re Mortg. Elec. Registration Sys.*, 754 F.3d 772, 780 (9th Cir. 2014).

Beyond waiver, *Walsh* is inapplicable. The TPP's requirement that Plaintiffs qualify for HAMP is not "uncertain or doubtful." Even if it were, the cover letter is not parol evidence; it is part of the contract. Citi "enclosed" the TPP with the cover letter. ER158. The government—which authored the TPP and cover letter (ER128)—made clear that the documents should be read together. The TPP required Plaintiffs to return documents (ER155), but did not specify which ones. The cover letter did, providing Plaintiffs with "instructions" about how to apply "to see if you qualify for a Home Affordable Modification." ER158-59. Under similar circumstances, courts have held that considering a "cover letter would not … violate the parol evidence rule because the cover letter was a part of the contract." *Brown v. Fin. Serv. Corp.*, 489 F.2d 144, 150 (5th Cir. 1974); *accord Mid-Am Builders, Inc. v. Federated Mut. Ins. Co.*, 194 F. Supp. 2d 822, 827 (C.D. Ill. 2002) (collecting cases).

Plaintiffs also err in asserting that the district court could consider the cover letter only if the TPP were "ambiguous." Br. 35. "Even if the written agreement is clear and unambiguous on its face, the trial judge must receive relevant extrinsic evidence that can prove a meaning to which the language of the contract is 'reasonably susceptible.'" *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 871 (9th Cir. 1979). "If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic

evidence is then admitted to aid in … interpreting the contract." *Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1992). Thus, even if the cover letter were parol evidence, the district court properly considered it in granting summary judgment. *See Wedeck v. Unocal Corp.*, 59 Cal. App. 4th 848, 862-63 (1997).

Finally, "[t]he interpretation of a contract, including the resolution of any ambiguity, is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence." *Am. Alternative*, 135 Cal. App. 4th at 1245. The TPP cover letter does not raise "credibility" issues. Accordingly, even if the TPP were ambiguous and the cover letter were parol evidence, the district court correctly considered the letter.

2. *Corvello* and *Wigod* support the district court's decision.

Plaintiffs argue that *Corvello* and *Wigod* interpreted the TPP to promise a HAMP modification if borrowers performed their obligations, regardless of whether borrowers qualified for HAMP. Br. 28-29. In fact, *Corvello* and *Wigod* refute Plaintiffs' theory.

This Court held in *Corvello* that "[t]he TPP gives the bank a chance, after borrowers submit the completed TPP, to notify them if they do not qualify." 728 F.3d at 884. In other words, the TPP gives the servicer an "'opportunity to determine whether [the borrower] qualified'" **after** receiving the borrower's signed TPP and supporting documents. *Id.* If the borrower did not qualify, the servicer

"could have and should have denied … a modification on that basis.'" *Id. Corvello* repeatedly emphasized this point. *See, e.g.*, *id.* at 881 (TPP allowed servicer to deny modification if "borrower does not qualify"); *id.* at 883 (TPP allowed servicer to deny modification if servicer "timely notified … borrowers that they did not qualify").

In fact, *Corvello* previewed exactly what the district court did here. The Court stated that "'at the motion to dismiss stage,'" it was unable to resolve Wells Fargo's argument that "plaintiffs were not qualified." *Id.* at 885; *see also Bushell v. JPMorgan Chase Bank*, 220 Cal. App. 4th 915, 926 (2013) (denying motion to dismiss where plaintiffs "alleged that they 'qualif[ied] for the modification under HAMP'"). This case, by contrast, was decided on summary judgment. The district court thus properly resolved the case based on Plaintiffs' ineligibility.

Plaintiffs err in arguing that the district court's reasoning "mirrors" arguments that *Corvello* rejected. Br. 30. Plaintiffs find a contradiction between (a) the district court's reliance on the TPP preamble's statement that Citi would send a countersigned TPP to Plaintiffs only "'if I qualify,'" and (b) *Corvello*'s statement that "'[t]he TPP gives the bank a chance, after the borrowers submit the completed TPP, to notify them if they do not qualify.'" Br. 31. There is no contradiction. The TPP preamble indicates that the servicer may deny a modification if the borrower does not qualify, and *Corvello* makes clear that the servicer may invoke this right

by telling the borrowers that they do not qualify. That is exactly what happened here. After Plaintiffs returned a completed TPP by signing the TPP and completing their document submission, Citi notified Plaintiffs that they did not qualify. ER3.

Plaintiffs next find a contradiction between (a) the district court's reliance on paragraph 2F's statement that the TPP terminates if the servicer does not countersign it, and (b) *Corvello*'s conclusion that the countersignature requirement does not apply if the servicer "'fail[s] to tell the borrowers that they did not qualify.'" Br. 31. Again, there is no contradiction. Although *Corvello* held that the TPP need not be countersigned to form a contract, it also held that the servicer may deny a modification by telling the borrowers that they do not qualify, rather than countersigning the TPP. That is what Citi did.

Plaintiffs finally find a contradiction between (a) the district court's reliance on paragraph 2G's statement that "'the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification,'" and (b) *Corvello*'s point that paragraph 2G "'cannot convert a purported agreement setting forth clear obligations into a decision left to the unfettered discretion of the loan servicer.'" Br. 32. *Corvello* was addressing a different part of paragraph 2G. In asserting that "there can be no contract unless the servicer sends the borrower a signed Modification Agreement," Wells Fargo cited paragraph 2G's statement that "'the Loan Documents will not be modified unless and until … (ii) [the borrower]

receive[s] a fully executed copy of a Modification Agreement.'" *Corvello*, 728 F.3d at 883. Although that interpretation would give the servicer unfettered discretion to deny a modification, paragraph 2G's separate requirement that the borrower satisfy "all of the conditions required for modification" does not. Rather, Citi may deny a modification on this basis only if the borrower does not qualify for HAMP or violates one of the other required "conditions."

Wigod also supports the district court's decision. The Seventh Circuit held that the TPP's proviso "if I qualify" means, "of course, that [the borrower] qualified under HAMP." 673 F.3d at 565. The court stated that this qualification requirement was **in addition to** the requirement that borrowers "compl[y] with the terms of the TPP." *Id.* The court explained that when plaintiff returned the signed TPP and required "documentation," "that moment was Wells Fargo's opportunity to determine whether [plaintiff] qualified. If she did not, it could have and should have denied her a modification on that basis." *Id.* at 562 (quoted in *Corvello*, 728 F.3d at 884). By instead "countersign[ing]" the TPP, "Wells Fargo communicated to [plaintiff] that she qualified for HAMP and would receive a permanent 'Loan Modification Agreement'" if plaintiff "was 'in compliance with this Loan Trial Period and her representations … continued to be true.'" *Id.* (alterations omitted).

Wigod repeatedly emphasized that by countersigning the TPP, Wells Fargo communicated that it had found plaintiff qualified for HAMP. Having done so,

Wells Fargo could no longer challenge plaintiff's qualifications, and the TPP became an agreement to modify plaintiff's loan if plaintiff complied with the TPP. *See id.* ("when Wells Fargo executed the TPP, its terms included a unilateral offer to modify [plaintiff's] loan conditioned on her compliance with the [TPP]"); *id.* at 563 ("Once Wells Fargo signed the TPP Agreement and returned it" to plaintiff, it became "an offer to provide a permanent modification agreement if she fulfilled its conditions"); *id.* at 569 (TPP "require[d] Wells Fargo to offer [plaintiff] a permanent modification once it determined she was qualified and sent her an executed copy, and she satisfied the conditions precedent").

Citi did not countersign Plaintiffs' TPP. Under *Wigod*, therefore, the TPP did not become a unilateral offer to modify Plaintiffs' loan if Plaintiffs performed their obligations. Rather, Citi retained its right to deny Plaintiffs based on ineligibility—which is exactly what Citi did.

3. HAMP supports the district court's decision.

HAMP's structure and purpose confirm that the TPP allowed servicers to deny modifications based on borrower ineligibility. During HAMP's stated-income period, Treasury encouraged servicers to send TPPs to borrowers before obtaining the documents needed to determine whether borrowers qualified under HAMP. SER199-201. Treasury thus structured HAMP to allow servicers to deny modifications when borrowers' documents showed that they did not qualify.

ER130, ER140. Moreover, HAMP used taxpayer dollars to modify a specified subset of delinquent loans. Treasury obviously did not intend to use taxpayer dollars to modify loans that violate the eligibility criteria that Treasury established.

Plaintiffs suggest that HAMP allowed Citi to analyze whether Plaintiffs satisfied HAMP's "threshold requirements" only before sending the TPP. Br. 6-7, 31-32. That is incorrect. Among other threshold requirements, HAMP mandated that the borrower's "monthly mortgage payment ratio" (the ratio between the borrower's monthly income and mortgage payment) exceed 31% (ER127), stating that borrowers would not "qualify" otherwise. ER131. Citi could not conclusively make that determination until after receiving the borrowers' income documentation. And during the stated-income period, Citi did not receive borrowers' documents until after sending the TPP.

As Plaintiffs note, Citi did not need Plaintiffs' documents to determine Plaintiffs' principal balance. But the TPP did not distinguish between "threshold eligibility" requirements. Rather, the TPP allowed servicers to deny modifications if borrowers did not "qualify" (ER155)—regardless of which eligibility requirement the borrowers failed.

4. Plaintiffs' parol evidence does not defeat summary judgment.

In an attempt to support their reading of the TPP, Plaintiffs cite parol evidence: their understanding of the TPP and the parties' course of conduct. Br. 35.

But the TPP is a form document. ER128. Courts "apply special principles for interpreting uniform contract language" to "give it one uniform meaning." *Kolbe v. BAC Home Loans Servicing*, 738 F.3d 432, 436 (1st Cir. 2013) (equally divided court). "Extrinsic evidence of the parties' unique intentions regarding a uniform clause is generally uninformative because unlike individually tailored contracts, uniform clauses do not derive from the negotiations of the specific parties to a contract." *Id.* Plaintiffs thus cannot avoid summary judgment based on their "specific understanding" of the TPP "or the actions of the parties." *Id.* at 437. That is all the more true because the government "strongly encouraged" use of the form TPP (ER140), thereby "enacting a policy that all parties … should be subject to identical obligations." *Kolbe*, 738 F.3d at 442. "If such contracts were subjected to different meanings depending merely on whether a particular party's interpretation was plausible, it would … undermine the federal policy that motivated the United States to impose uniform contractual obligations on parties in the first place." *Id.*

Moreover, "parol evidence is admissible only to prove a meaning to which the language is 'reasonably susceptible,' not to flatly contradict the express terms of the agreement." *Winet*, 4 Cal. App. 4th at 1167 (citation omitted). Thus, "the mere existence of extrinsic evidence supporting an alternative meaning does not foreclose summary judgment where the extrinsic evidence is insufficient to render the contract susceptible to the non-movant's proffered interpretation." *Barris*

Indus., Inc. v. Worldvision Enters., Inc., 875 F.2d 1446, 1450 (9th Cir. 1989). Indeed, courts have repeatedly affirmed summary judgment despite parol evidence offered by the non-movant. *E.g.*, *Sullivan v. Mass. Mut. Life Ins. Co.*, 611 F.2d 261, 264-65 (9th Cir. 1979); *Brobeck*, 602 F.2d at 873-75; *Winet*, 4 Cal. App. 4th at 1165-69.

Plaintiffs' parol evidence does not make the TPP reasonably susceptible to Plaintiffs' interpretation. Plaintiffs cite testimony about a June 2009 call between Mr. Natan, Anvar, and a Citi customer-service representative. Br. 10-11, 35. Natan testified that the Citi representative said that "if I make the [TPP] payments … , I will receive a final agreement." ER107. Anvar remembered the conversation differently, testifying that the Citi representative said that Plaintiffs' loan would be modified "[a]s long as he makes the payments **and** there's no drastic change to his income." ER119 (emphasis added).

Regardless, this Court has held that a servicer's oral representations "prior to the signing of the TPP … are not admissible under the parol evidence rule." *Jensen v. U.S. Bank N.A.*, 615 F. App'x 870, 872 (9th Cir. 2015). And the testimony about the June 2009 call contradicts numerous requirements set forth by the TPP—e.g., that Plaintiffs "qualify" for HAMP, that they return authentic "documentation," and that they continue to "live in the Property as [their] principal residence." ER155. Indeed, Plaintiffs' testimony about the June 2009 call does not interpret the

TPP's qualification requirement at all—it asserts an entirely different oral agreement. That is prohibited by not just the parol-evidence rule, but also the statute of frauds. *See In re Marriage of Shaban*, 88 Cal. App. 4th 398, 405 (2001).

Plaintiffs' other parol evidence fares no better. Br. 35. Plaintiffs cite Mr. Natan's "understanding" of the TPP, but that is not "*competent* extrinsic evidence." *Winet*, 4 Cal. App. 4th at 1166 n.3. Plaintiffs observe that Citi accepted TPP payments through May 2010 and did not send a written denial, but it is "undisputed" that Citi told Plaintiffs that they were ineligible. ER3; *see* SER17-21. Plaintiffs finally note that they submitted some documents before receiving a TPP. But HAMP required profit-and-loss statements for self-employed borrowers like Mr. Natan (ER132), and it is undisputed that Plaintiffs did not submit a profit-and-loss statement in 2009 until long after receiving the TPP. SER9, SER15. Plus, the TPP cover letter's request for documents is irreconcilable with Plaintiffs' suggestion that Citi had already verified their eligibility. In all events, none of this evidence can contradict the qualification requirement set forth in the TPP and cover letter.

5. *West* and *Oskoui* do not support Plaintiffs' position.

Plaintiffs argue that the TPP's language is "irrelevant" because "the law" independently required Citi to modify Plaintiffs' loan. Br. 35-37 (citing *West v. JPMorgan Chase Bank*, 214 Cal. App. 4th 780 (2013); *Oskoui v. JPMorgan Chase*

Bank, 2017 WL 957206 (9th Cir. 2017)). The complaint alleged, and Plaintiffs' summary-judgment opposition argued, that the **TPP** entitled Plaintiffs to a loan modification. ER182-83; SER55. Plaintiffs may not change theories on appeal.

Plaintiffs are also incorrect on the merits. The "Trial Plan Agreement" at issue in *West* bears no resemblance to the TPP. *See* CitiMortgage's Motion for Judicial Notice ("Citi's MJN"), Ex. A at Ex. 8. *West* thus did not address the issue here: whether TPPs allow servicers to deny modifications based on borrower ineligibility. In fact, the complaint in *West* alleged that the servicer's eligibility determination was incorrect because the servicer used "outdated" financial information, violating HAMP. *Id.* ¶ 19. Because *West* was decided on the pleadings, the court was bound to accept that allegation as true.

The March 2010 letter at issue in *Oskoui* also bears no resemblance to the TPP. *See* Citi's MJN, Ex. B. The *Oskoui* letter stated: "After successful completion of the Trial Period Plan, CHASE will send you a Modification Agreement … ." *Id.* at 1. Unlike the TPP, the *Oskoui* letter did not indicate that the borrower would receive a loan modification only if she qualified. For good reason: the *Oskoui* letter stated that the servicer had "received and reviewed your verification of income documentation." *Id.* In other words, unlike this case, the servicer in *Oskoui* sent the letter only after conclusively finding the borrower eligible for a modification.

Moreover, both *West* and *Oskoui* relied principally on *Wigod* as "'the leading federal appellate decision'" on the TPP. *Oskoui*, 2017 WL 957206, at *5; *see West*, 214 Cal. App. 4th at 786-88, 796-98. As noted above, *Wigod* held that the TPP allows servicers to deny modifications based on borrower ineligibility.

6. Citi did not waive its rights.

Plaintiffs argue that even if the TPP allowed Citi to deny modifications based on borrower ineligibility, Citi waived its right to do so by denying Plaintiffs' application after the Modification Effective Date ("MED") identified in the TPP. Br. 29-30. Plaintiffs did not argue waiver below (SER31-56), and thus may not raise it here.

Beyond this, Plaintiffs' argument depends on the notion that the MED was a deadline for Citi's decisions. The TPP defined the MED as "the first day of the month following the month in which the last [TPP] Payment is due" (i.e., November 1, 2009). ER156. The TPP explained that Plaintiffs' loan "will not be modified unless and until … the [MED] has passed." *Id.* The MED was thus the first day that Citi **could** modify Plaintiffs' loan. It was not a deadline for Citi's decisions.

In rejecting Plaintiffs' theory, courts have explained that "nothing in the TPP agreement requires Citi … to send plaintiffs a denial letter by a date certain." *Seller v. CitiMortgage, Inc.*, 2013 WL 6162982, at *7 (N.Y. Sup. Ct. Jan. 29, 2013),

aff'd, 988 N.Y.S.2d 32 (App. 2014). In the HAMP MDL, this Court affirmed Judge Fischer's ruling that "determination of the deadline by which Citi was allegedly required to grant or deny permanent modification could not be made 'simply by identifying the MED.'" *Bernard*, 637 F. App'x at 472. "'The deadline may also have been affected by,'" among other things, "'documentation still needed.'" *Id.*

The MED could not have been a deadline here. Citi sent Plaintiffs the TPP in July 2009, and instructed Plaintiffs to return the required documents by August 13, 2009. ER158-59. Plaintiffs did not return all required documents until October 23, 2009. SER245-48, SER15. After taking nearly four months to return documents, Plaintiffs are in no position to insist that Citi decide in the eight days between October 23 and the MED.

Corvello stated that servicers should "'promptly communicate'" a denial after the borrower "submit[ted] the completed TPP" and the servicer made its "eligibility determination." 728 F.3d at 881, 884. Plaintiffs submitted a "completed TPP" on October 23, 2009, when they finished their document submission. SER245-48, SER15. Citi made its eligibility determination on December 19, 2009. SER235-43. It is undisputed that Citi told Plaintiffs' counsel about the denial in January 2010. SER18-20. And as the district court noted, "Plaintiffs never deny that [the Nass Law Firm] informed them of the denial decision at or around the

time that counsel learned of it." ER3 n.2. Citi therefore promptly communicated the denial.

Although the TPP provided for written rather than oral notice of denials, courts are not "hypertechnical in their interpretation of notice provisions … where there is actual notice." *Berry v. Carnaco Transport, Inc.*, 1994 WL 697571, at *1 (9th Cir. Dec. 13, 1994). Thus, "an agreement that a termination be in writing … does not preclude a termination by oral notice." *Id.*; *see Gilmore v. Hoffman*, 123 Cal. App. 2d 313, 320 (1954). As the district court found, it is "undisputed" that Citi notified Plaintiffs and their counsel about the denial decision. ER3 & n.2.

Even if the MED were a deadline, there is no "'clear and convincing evidence'" that Citi "'intentional[ly]'" abandoned its right to deny a modification by deciding after the MED. *Stewart v. Seward*, 148 Cal. App. 4th 1513, 1524 (2007). As the court overseeing the Bank of America HAMP MDL explained, this theory "would 'render large swaths of the TPP nugatory.'" *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 2013 WL 4759649, at *12 (D. Mass. Sept. 4, 2013). "It would mean plaintiffs were not actually required to perform *any* of their obligations under Section 1, as long as [the servicer] failed to discover the nonperformance before the [MED]." *Id.* That interpretation "raise[s] serious practical problems" because "[a] borrower might not comply with his obligations … until the day before the [MED]," giving the

servicer "no time to determine if the borrower's obligations had been met." *Id.* at *12 n.14.

Moreover, "waiver is restricted to conditions that are relatively minor." 2 FARNSWORTH ON CONTRACTS § 8.5. Citi's ability to analyze whether Plaintiffs qualified for HAMP is not "minor"—it goes to the very heart of the TPP.

Plaintiffs' waiver theory also depends on Citi's "accept[ance]" of Plaintiffs' "performance" (i.e., TPP payments) after the MED. Br. 30. Accepting TPP payments "in partial satisfaction of the amount owed" does not suggest intent to do so permanently. *Pennington v. HSBC Bank*, 493 F. App'x 548, 555 (5th Cir. 2012). The TPP stated that Citi's acceptance of TPP payments "will not be deemed a waiver of" Citi's rights. ER156. Plaintiffs' mortgage—which "remain[ed] in full force and effect" during the TPP (ER157)—also allowed Citi to accept "partial payment[s] … without waiver of any rights." SER67. Otherwise, servicers would immediately foreclose after default rather than risk waiver by accepting reduced payments. *See Hersch v. Citizens Sav. & Loan Ass'n*, 146 Cal. App. 3d 1002, 1009 (1983) (enforcing no-waiver provision).

B. Plaintiffs' Claims Fail For Additional Reasons.

Plaintiffs' contract-based claims fail for two other reasons. First, the TPP provided that Citi could modify Plaintiffs' loan only if their "representations in Section 1 continue to be true." ER155. In Section 1D, Plaintiffs represented that "I

am providing or already have provided documentation for **all** income that I receive." *Id.* The TPP cover letter instructed: "You must send in … all required income documentation"—including a profit-and-loss statement—by August 13, 2009. ER159 (emphasis removed). Plaintiffs concede that they did not submit the profit-and-loss statement until October 21, 2009. SER15. Plaintiffs' Section 1D representation was thus inaccurate, allowing Citi to deny Plaintiffs' application. *See Nungaray v. Litton Loan Servicing*, 200 Cal. App. 4th 1499, 1504-05 (2011) (affirming summary judgment for servicer on breach-of-TPP claim because borrowers failed to return required documents).

Second, Plaintiffs' claims are barred by the four-year statute of limitations. Cal. Code Civ. P. § 337(1). Even under Plaintiffs' view that their claims did not accrue until May 2010 (Br. 43)—after which Citi could not have cured any breach due to the servicing transfer—the claims are untimely because Plaintiffs filed this lawsuit in July 2014. ER188. The complaint sought to avoid this problem by alleging that under *American Pipe*, the *King* and HAMP MDL class actions tolled the limitations period. ER175-77. *American Pipe* does not, however, apply here.

American Pipe "allows tolling within the federal court system in federal question class actions." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008). Here, by contrast, Plaintiffs seek to use a federal class action to toll the limitations period on state-law claims. "California law controls" in determining

whether tolling applies. *Anderson v. Michaels Stores Inc.*, 655 F. App'x 573, 574 (9th Cir. 2016); *see Clemens*, 534 F.3d at 1025. The question is thus whether California courts would toll the limitations period applicable to Plaintiffs' California-law claims based on federal class actions.

This Court has indicated that the answer is "no." Although the California Supreme Court has suggested that a class action filed in California state court can toll the limitations period on class members' claims (*Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1118-26 (1988)), "California has not adopted such *American Pipe* tolling where the class action was filed in a foreign jurisdiction." *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1187 (9th Cir. 2009). Among other problems caused by this "cross-jurisdictional" tolling, "'forum-shopping plaintiffs from out of state would swell the dockets'" of California courts to take advantage of its tolling rules after a class action in another forum is dismissed. *Clemens*, 534 F.3d at 1025.

In district court, Plaintiffs asserted that they are not requesting cross-jurisdictional tolling because *King* and this lawsuit were both filed by California plaintiffs asserting California-law claims in California federal court. SER34. Two judges in this Circuit faced these same facts; both found *American Pipe* inapplicable. Cross-jurisdictional tolling "includes all situations where a class action is filed outside the California state court system, irrespective of whether the class claims are made under California law." *Centaur Classic Convertible*

Arbitrage Fund v. Countrywide Fin. Corp., 878 F. Supp. 2d 1009, 1015-17 (C.D. Cal. 2011). And "California does not recognize *American Pipe* tolling in cases where a plaintiff pursues claims afforded by the law of one jurisdiction (i.e., California state court), in the courts of another jurisdiction (i.e., federal district court)." *Williams v. Countrywide Fin. Corp.*, 2017 WL 986517, at *8 (C.D. Cal. Mar. 13, 2017).

Plaintiffs also argued that absent tolling, class members pursuing California-law claims would "file protective actions." SER49. That is a result of this Court's decision "not to import the doctrine of cross-jurisdictional tolling into California law." *Clemens*, 534 F.3d at 1025. *Clemens* held that a nationwide class action filed in Illinois did not toll the limitations period on a California class member's state-law claims. *Id. Clemens* thus makes clear that the California plaintiff should have filed his own action despite the pendency of the class action.

Plaintiffs finally argued that tolling is proper under *Hatfield*. SER49. Conceding that *Clemens* "foreclose[d] application of *American Pipe*" to toll the limitations period on California plaintiffs' claims based on a New Jersey class action, *Hatfield* applied equitable tolling instead. 564 F.3d at 1187-88. Equitable tolling is improper because Plaintiffs have not acted in "good faith" (*id.* at 1188), engaging in forum-shopping in state court and here. Plus, "a long line of California precedents" holds that "a plaintiff who wishes to benefit from equitable tolling

must have actually relied on the use of some other legal mechanism to vindicate his rights." *Hendrix v. Novartis Pharm. Corp.*, 975 F. Supp. 2d 1100, 1114 (C.D. Cal. 2013), *aff'd*, 647 F. App'x 749 (9th Cir. 2016). Plaintiffs did not delay suing because of the HAMP MDL. On the contrary, Plaintiffs filed two state-court suits after *King* was filed and litigated them while the HAMP MDL was pending.

II. Plaintiffs' Misrepresentation Claims Fail As A Matter Of Law.

A. The District Court Correctly Found Plaintiffs' Claims Untimely.

A three-year statute of limitations governs Plaintiffs' fraud and negligent-misrepresentation claims. Cal. Code Civ. P. § 338(d). It is undisputed that these claims accrued no later than 2010. ER1. Plaintiffs filed this lawsuit in 2014. ER188. Plaintiffs' misrepresentation claims are therefore untimely.

Plaintiffs argue that under *American Pipe*, the limitations period was tolled from May 2010 (when *King* was filed) until October 2013 (when class certification was denied). Br. 37. That argument fails because, as explained above, California does not recognize cross-jurisdictional tolling. Plaintiffs' argument also fails for three additional reasons.

First, the *King* and HAMP MDL complaints did not assert fraud or negligent-misrepresentation claims. ER1. *American Pipe* held that a class action asserting antitrust claims tolled the limitations period on identical claims filed by class members who intervened in the action. 414 U.S. at 551. In later ruling that an

employment-discrimination charge filed under Title VII did not toll the limitations period on a section 1981 claim "based on the same facts," the Court found *American Pipe* inapplicable. *Johnson v. Ry. Express Agency*, 421 U.S. 454, 455 (1975). The Court explained: "the tolling effect given to the timely prior filings in *American Pipe* … depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted." *Id.* at 467; *see Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 355 (1983) (Powell, J., concurring) ("It is important to make certain … that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit"). Accordingly, as this Court observed, "[t]he Supreme Court has … not extended tolling due to class litigation beyond *American Pipe*'s narrow allowance for identical causes of action." *Card v. Duker*, 122 F. App'x 347, 349 (9th Cir. 2005).

The California Supreme Court has similarly stated that *American Pipe* "'should not be read … as leaving a plaintiff free to raise different or peripheral claims following denial of class status.'" *Jolly*, 44 Cal. 3d at 1124; *accord Williams v. Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008). Rather, "tolling is to be allowed only where the class action and the later individual action … are based on the **same claims** and subject matter and similar evidence." *Perkin*, 225 Cal. App. 4th at 504 (emphasis added). *Perkin* follows the rule adopted by most circuits: *American Pipe* is "limited to claims filed in a later action that are the same

as those pleaded in the putative class action." *Zarecor v. Morgan Keegan & Co.*, 801 F.3d 882, 888 (8th Cir. 2015) (collecting cases).

Requiring an identity of claims is critical to the policy underlying *American Pipe* and statutes of limitations generally. *American Pipe*'s "concern was that without tolling, putative class members would needlessly bring … a multiplicity of actions raising identical claims." *Id.* "But where a putative class member wishes to pursue a claim that is outside the scope of the class action, his separate timely lawsuit is not needless, because the class action would not prosecute his different claim." *Id.* "A class action also does not notify defendants of substantive claims that are different from those pleaded in the action, so tolling of the time limits applicable to those different claims does not safeguard 'essential fairness to defendants.'" *Id.*

Plaintiffs contend that the class claims were "similar" to Plaintiffs' claims and thus gave Citi "fair notice." Br. 27, 38. Even if the claims shared a "functional equivalence," that would not be "enough to trigger tolling." *In re Copper Antitrust Litig.*, 436 F.3d 782, 796 (7th Cir. 2006). In *In re Copper*, the Seventh Circuit held that a class action asserting state-law antitrust claims did not toll the limitations period on federal antitrust claims filed by absent class members, even though both cases were based on the same facts. The claims "might be 'similar,'" but "mere similarity is a murky standard for a matter as needful of certainty as the statute of

limitations." *Id.* Indeed, any class member can read a class complaint to see if it asserts claims that the class member wishes to raise. Determining whether a class complaint asserts claims that are "close enough" to a class member's claims, by contrast, requires judgment calls in an area where "bright-line rule[s]" are essential. *United States v. Colvin*, 204 F.3d 1221, 1226 (9th Cir. 2000).

Moreover, although notice is essential, "notice alone is certainly not enough to toll the statute of limitations." *In re Copper*, 436 F.3d at 796. If it were, "there would be no reason to resume the running of the statute when a plaintiff opts out of the class." *Id.* Plaintiffs' notice argument ignores "one of the main purposes of the statute of limitations"—"to allow a defendant to be free of stale claims in due time." *Id.* at 797.

As the district court recognized (ER2), a class member's lawsuit need not be identical to the class action in every respect: the "claims and subject matter" must be the "same," but the "evidence" need only be "similar." *Perkin*, 225 Cal. App. 4th at 504. Cases cited by Plaintiffs (at 27) are consistent with this rule. In *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1486-87, 1489 (9th Cir. 1985), plaintiff asserted the same 14th Amendment and section 1983 claims asserted in the class action based on "the same allegations that were made in the class suit." In *Becker v. McMillin Construction Co.*, 226 Cal. App. 3d 1493, 1496, 1502 (1991), plaintiff asserted the same strict-liability and negligence claims asserted in the class action

based on construction defects in the same housing development at issue in the class action. And in *Falk v. Children's Hospital*, 237 Cal. App. 4th 1454, 1467-68 (2015), plaintiff asserted "the same substantive claims" under the Labor Code and UCL asserted in the class action based on the same type of labor practices challenged in the class action.

Second, even if the claims need not be identical, tolling would not apply under the rule advocated by Plaintiffs because Plaintiffs' misrepresentation claims lack "'a common factual basis and legal nexus'" with the class claims. Br. 37. As for the "legal nexus," Plaintiffs compare their misrepresentation claims to the promissory-estoppel and UCL claims asserted in *King*. Br. 38. "Actual falsehood, the perpetrator's knowledge of falsity, and … the victim's reliance"—all "elements of common-law fraud claims—are not required to show a violation of California's UCL." *Berger v. Home Depot USA*, 741 F.3d 1061, 1068 (9th Cir. 2014). And although promissory estoppel requires reliance, it does not require knowledge, fraudulent intent, or duty. *Laks v. Coast Fed. Sav. & Loan Ass'n*, 60 Cal. App. 3d 885, 890 (1976). The elements of the claims therefore differ.

As for the "factual nexus," Plaintiffs' misrepresentation claims allege that Citi induced Plaintiffs to enter into the TPP by suggesting that "Plaintiffs were eligible for HAMP." ER179-80, ER182. Although the class complaints alleged that Citi inadequately screened TPP applicants for HAMP eligibility, the crux of the

class claim was that Citi breached "its obligations to permanently modify [borrowers'] loans." Plaintiffs' MJN, Ex. 3 ¶ 1. And the HAMP MDL plaintiffs sought to certify a class based on the notion that "Citi breached the TPP by failing to provide a permanent modification or a written denial by the [MED]." 2013 WL 8844095, at *4. The HAMP MDL plaintiffs thus did not pursue on a classwide basis the factual theory underlying Plaintiffs' misrepresentation claims here.

In fact, Plaintiffs concede that their common-law misrepresentation claims "are not conducive to class treatment." Br. 38. Plaintiffs therefore could not have relied on the HAMP MDL to prosecute those claims on a classwide basis.

Third, California courts examine "the equities" in determining whether to apply *American Pipe*. *Perkin*, 225 Cal. App. 4th at 507. *Perkin* declined to apply *American Pipe* in part because many class members filed their own lawsuits while the class action was pending. *Id.* at 508. Tolling thus "would not protect the class action device." *Id.* Here, Plaintiffs themselves sued Citi twice while class allegations were pending in the HAMP MDL. Equity thus weighs against tolling.[2]

[2] Citi acknowledges this Court's holding that under federal law, *American Pipe* "permits tolling for a plaintiff who files a separate action pending class certification." *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008-09 (9th Cir. 2008). But California law governs, and *Perkin* suggests agreement with the Sixth Circuit's conclusion that *American Pipe* is inapplicable "when plaintiffs file independent actions before decision on the issue of class certification." *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005).

B. Plaintiffs' Claims Fail For Additional Reasons.

Even if Plaintiffs' claims were timely, the judgment should be affirmed because there is no evidence of a misrepresentation upon which Plaintiffs relied. The complaint alleged that Citi misrepresented in the TPP that Plaintiffs (a) were eligible for HAMP and (b) would receive a HAMP modification if they made TPP payments. ER177-82. The latter allegation—that Citi would modify Plaintiffs' loan if Plaintiffs made TPP payments—is a breach-of-contract claim. Plaintiffs "may not ordinarily recover in tort for breaches of duties that merely restate contractual obligations." *Aas v. Superior Court*, 24 Cal. 4th 627, 643 (2000), *superseded on other grounds*, *Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070 (2003).

Regardless, the district court's conclusion that the TPP allowed Citi to deny Plaintiffs' HAMP application based on Plaintiffs' ineligibility also refutes Plaintiffs' theory that the TPP represented that Plaintiffs were eligible. As explained above, the district court was correct: the TPP and cover letter made clear that Citi had not determined whether Plaintiffs qualified for HAMP, and that Plaintiffs could receive a HAMP modification only if they qualified.

Plaintiffs also must show reasonable reliance. *See Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182, 196, 200 (2012). There is no evidence to support the complaint's allegation that in deciding to participate in the TPP, Plaintiffs relied on representations that they were eligible for HAMP. ER180-81.

Plaintiffs needed to participate in the TPP not just to pursue a HAMP modification, but also to apply for the Citi Program. ER76-80. Plaintiffs wanted a modification under the Citi Program: they asked about a modification before HAMP was created (SER249), and continued to pursue relief after Citi told them that their principal balance made them ineligible for HAMP. SER233-35. Plaintiffs thus would have participated in the TPP even if they had known that they were ineligible for HAMP.

Furthermore, "a plaintiff's particular knowledge and experience should be considered in determining whether the reliance … was justified." *Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178, 1194 (2014). Plaintiffs' knowledge includes that of the Nass Law Firm because "'an attorney's knowledge is imputed to his client.'" *Strong v. Sutter Cnty. Bd. of Sup'rs*, 188 Cal. App. 4th 482, 498 (2010). And "an attorney is 'presumed to know the laws and rules of procedure which govern the forms of litigation, the legal remedies, which he selects.'" *Id.* Nass specialized in helping borrowers apply for loan modifications, testifying that he and Anvar were well-versed in HAMP. SER162-68. It should thus be presumed that Nass knew that Plaintiffs' loan exceeded HAMP's principal-balance limit. Because Plaintiffs are charged with the Nass Law Firm's knowledge, Plaintiffs could not have relied on their receipt of the TPP to mean that they qualified for HAMP.

Beyond presumptions, Nass suggested he ***knew*** that Plaintiffs did not qualify. Although he was uncertain, Nass testified: "Chances are I" knew "about HAMP's limitation on the size of principal balance … when the Natans applied." SER172. Nass explained that "lenders would ask us to fill out a HAMP application … even though the dollar amount wouldn't qualify, and then they would decide as to whether or not the client would … qualify for an in-house loan mod." SER182. Nass thus "would send in a HAMP loan modification package even for borrowers whose mortgages were over 729,000 [sic] because the bank would use that information to evaluate whether or not the borrower would qualify for a loan modification under their in-house program." SER173.

In district court, Plaintiffs principally based reliance on Mr. Natan's declaration, stating that Plaintiffs would have sold their property had they known of their ineligibility. ER68. But there is no evidence that Citi knew that Plaintiffs were ineligible for the Citi Program when Citi sent the TPP. And Mr. Natan's declaration did not contest Citi's point that Plaintiffs would have participated in the TPP in an attempt to obtain a modification under the Citi Program—even if Plaintiffs knew about their ineligibility for HAMP.

In addition to the complaint's TPP-based theory, Plaintiffs' summary-judgment opposition asserted that Citi orally told Plaintiffs that they would receive a modification if they made TPP payments and their income did not change

materially. SER52. Although the complaint references this conversation, the complaint's list of purported misrepresentations focuses solely on the TPP. ER179-80. Plaintiffs cannot pursue a theory that they did not plead.

In any event, Plaintiffs' oral-misrepresentation theory suffers from the same reliance problems as their TPP-based theory. Plus, the purported conversation occurred before Plaintiffs received the TPP. As explained above, the TPP package made clear that Citi had not found Plaintiffs eligible for HAMP. Plaintiffs "may not, as a matter of law, reasonably rely on an oral promise that contradicts the plain terms of a written agreement." *Sussex Fin. Enters. v. Bayerische Hypo-Und Vereinsbank AG*, 460 F. App'x 709, 712 (9th Cir. 2011) (citing cases).

III. Plaintiffs' Rosenthal Act Claim Fails As A Matter Of Law.

A. The District Court Correctly Found Plaintiffs' Claim Untimely.

A one-year statute of limitations governs the Rosenthal Act. Cal. Civ. Code § 1788.30(f). Plaintiffs' claim accrued no later than 2010. ER1. Because Plaintiffs filed this lawsuit in 2014 (ER188), their Rosenthal Act claim is untimely.

Plaintiffs again argue that *American Pipe* tolled the limitations period from May 19, 2010 (when *King* was filed) to October 7, 2013 (when class certification was denied). Br. 40-42. That argument fails for five independent reasons.

First, tolling did not start in May 2010 because the initial *King* complaint did not assert a Rosenthal Act claim. Plaintiffs' MJN, Ex. 2. Plaintiffs respond that

King added a Rosenthal Act claim via amendment in November 2010, and that the amended complaint related back to the initial *King* complaint. Br. 40-41. Even if Plaintiffs were right, *American Pipe* tolling would not begin when the original complaint was filed. The district court noted that Plaintiffs offered "no authority" for this proposition (ER2)—a failure that Plaintiffs have not rectified on appeal. The court observed that *American Pipe* "is premised on the defendant being apprised of the plaintiff's claim and the absent class members' reasonable reliance on the class action." ER2. Based on the initial *King* complaint, Citi "had no reason to expect a class-wide Rosenthal Act claim," and Plaintiffs "had no reason to rely" on *King* to prosecute their Rosenthal Act claim. *Id.* The district court's reasoning—which Plaintiffs ignore—is correct.

Tolling could not have started until July 20, 2010, when the *Betancourt* plaintiffs asserted a TPP-based Rosenthal Act class claim against Citi. *Id.* Assuming that tolling extended through the denial of class certification on October 7, 2013, 290 days then elapsed before Plaintiffs filed this lawsuit. Plaintiffs' Rosenthal Act claim is therefore untimely if it accrued more than 75 days before July 20, 2010. The district court held that Plaintiffs' claim accrued "at the very latest" on April 20, 2010 (ER3), when Citi told Mr. Natan that it had "closed" his loan-modification application. SER233. "Because April 20 is more than 75 days before July 20, the Rosenthal Act claim is time-barred." ER3.

Second, Plaintiffs took more than one year to sue after any tolling ended. Although tolling generally runs through the date when class certification is denied, the district court dismissed the HAMP MDL plaintiffs' Rosenthal Act claim without leave to amend in April 2012. *In re CitiMortgage, Inc. Home Affordable Modification Program (HAMP) Litig.*, 2012 WL 1931030, at *5-*6 (C.D. Cal. Apr. 17, 2012). The HAMP MDL plaintiffs thus did not assert Rosenthal Act claims in amended complaints filed in 2012 and did not seek certification of a Rosenthal Act class in their class-certification motion filed in April 2013. *See* HAMP MDL, Case No. 11-ml-2274, ECF 81, 111, 316 (C.D. Cal.). Plaintiffs note that the dismissal order was interlocutory (Br. 41), but absent class members could not have relied on the HAMP MDL to prosecute a claim that the court dismissed with prejudice and that plaintiffs stopped pursuing. Accordingly, because more than one year elapsed before Plaintiffs filed this lawsuit in 2014, Plaintiffs' claim is untimely.

Third, even if tolling began in May 2010 and ended in October 2013, Plaintiffs' claim would still be untimely because it accrued no later than January 2010. Plaintiffs based their Rosenthal Act claim on allegations that the TPP entitled Plaintiffs to a HAMP modification, and that Citi misrepresented Plaintiffs' eligibility for HAMP. ER184-85. Citi made the alleged misrepresentations in July 2009, when Citi sent the TPP. ER158. Plaintiffs assert that "Citi breached … the TPP on November 1, 2009"—the MED—because Citi did not modify Plaintiffs'

loan on that date. Br. 43. Under Plaintiffs' own theory, therefore, their claim accrued in November 2009.

Alternatively, it is undisputed that Citi told the Nass Law Firm by January 2010 that Plaintiffs were ineligible for HAMP. SER17-20. An "attorney's knowledge is imputed to the client" in determining when a statute of limitations begins to run. *Bennett v. Shahhal*, 75 Cal. App. 4th 384, 390 n.3 (1999); *see* ER3 n.2 (citing cases). That rule applies with particular force here because, as Nass testified, an attorney should "[o]f course" tell the client if the servicer denies the client's application for a loan modification. SER169-70. And as the district court noted, "Plaintiffs never deny that [the Nass Law Firm] informed them of the denial decision at or around the time that counsel learned of it." ER3 n.2. But even if the Nass Law Firm did not tell Plaintiffs, that would "not prevent operation of the rule" of imputed knowledge (*McIntosh v. Mills*, 121 Cal. App. 4th 333, 350 (2004)), because the attorney's notice "'is irrebutable.'" *Powell v. Goldsmith*, 152 Cal. App. 3d 746, 751 (1984).

Four months elapsed between January 2010 and May 2010, when *King* was filed. Another nine-plus months elapsed between October 2013 (when class certification was denied) and July 2014 (when Plaintiffs filed in this lawsuit). The Rosenthal Act's one-year limitations period therefore expired.

Fourth, Plaintiffs were not members of the *King* classes. The *King* complaints limited the putative classes to borrowers who "complied with Citi's requests for documentation." Plaintiffs' MJN, Ex. 3 ¶ 155(a); *see* Plaintiffs' MJN, Ex. 2 ¶ 37 (limiting class to borrowers who "complied with their obligation under [TPP]"). As explained above, Plaintiffs did not timely comply with Citi's request for documents. Plaintiffs thus cannot rely on *King* to toll their claim.

Fifth, as noted above, California has not adopted the cross-jurisdictional tolling that Plaintiffs request.

Plaintiffs alternatively argue that a reasonable jury could find that their claim accrued when Citi transferred servicing of Plaintiffs' loan on May 22, 2010. Br. 42-43; *see* SER92. That argument could help Plaintiffs only if tolling extended from May 2010 through October 2013, Plaintiffs were members of the *King* class, **and** cross-jurisdictional tolling applied. Beyond this, the evidence cited by Plaintiffs does not create an issue of fact regarding the date of accrual. Br. 42-43.

Plaintiffs cite alleged representations that Citi would modify Plaintiffs' loan, made before Citi sent the TPP in July 2009. ER68, ER107, ER118-20. But as the district court stated, once Citi told Plaintiffs that it had denied their application, Plaintiffs were "on notice that any prior representations to the contrary were misleading." ER3. Plaintiffs also cite an undated call in which Citi allegedly told Anvar that it "denied" Plaintiffs' application but would "see if there is anything

else we can do" (ER117), a May 2010 call in which Citi told Anvar that Plaintiffs' application was being reviewed for a non-HAMP program (ER32), and Citi's acceptance of TPP payments through May 2010. The district court correctly rejected these arguments: "Even if Plaintiffs could continue to fight the denial decision through appeals of one kind or another, they cannot claim that they were being misled to believe that they would get a modification" after Citi "told them directly that there would be no modification." ER3. Otherwise, borrowers could delay the date of accrual simply by filing repetitive appeals. Moreover, Plaintiffs allege that the TPP promised a **HAMP** modification. ER179-80. No appeal could have changed Citi's HAMP decision given Plaintiffs' principal balance.

Plaintiffs also suggest that they were not injured until May 2010, delaying accrual. Br. 43. The complaint alleges, however, that "Plaintiffs forwent selling their home in the Summer-Fall of 2009 … in reliance on the misrepresentations." ER181. Plaintiffs assert that their property value decreased $400,000 from June 2009 to January 2010. Br. 16. Under Plaintiffs' theory, therefore, they incurred injury long before May 2010. *See Magpali v. Farmers Group, Inc.*, 48 Cal. App. 4th 471, 484 (1996). Moreover, the complaint alleged that Plaintiffs made TPP payments in reliance on Citi's purported misrepresentations, leaving Plaintiffs "in a worse position." ER181. Thus, under Plaintiffs' theory, they incurred injury by making TPP payments beginning in August 2009.

B. Plaintiffs' Claim Fails For Additional Reasons.

Plaintiffs based their Rosenthal Act claim on the same theories underlying their contract- and misrepresentation-based theories. ER184. The Rosenthal Act claim therefore fails for the same reasons described above: the TPP did not represent that Plaintiffs were eligible for HAMP, and Citi did not breach the TPP by declining to modify Plaintiffs' loan.

IV. The Res-Judicata Doctrine Bars Plaintiffs' Claims.

Res judicata applies if: (1) the party to be precluded was a party to the first lawsuit; (2) the two lawsuits involve the same cause of action; and (3) the first lawsuit resulted in a final judgment on the merits. *Boeken v. Philip Morris USA*, 48 Cal. 4th 788, 797 (2010). The state court's order dismissing five of Plaintiffs' six claims with prejudice in *Natan II*, combined with Plaintiffs' voluntary dismissal of their remaining claim, precludes the claims asserted here.

The first two res-judicata requirements are undisputed. Plaintiffs were parties to *Natan II*. *Natan II* and this case involve the same cause of action because Plaintiffs "seek compensation for the same harm" for which they sought relief in *Natan II*. *Boeken*, 48 Cal. 4th at 798.

Natan II also satisfies the "final judgment on the merits" requirement. Plaintiffs disputed this point below for two reasons. Plaintiffs first noted that *Natan II* did not result in a final judgment because Plaintiffs dismissed the case without

prejudice. SER46-47. But Plaintiffs voluntarily dismissed *Natan II* only after the state court dismissed five of Plaintiffs' six claims with prejudice. SER140, SER155. Once the state court sustained Citi's demurrer to the non-fraud claims without leave to amend, Plaintiffs' "'power to voluntarily dismiss those five causes of action was terminated.'" *Gutkin v. Univ. of S. Cal.*, 101 Cal. App. 4th 967, 974 (2002). An order sustaining a demurrer to some claims "without leave to amend" and a plaintiff's voluntary dismissal of the remainder of the complaint without prejudice "combine[]" to create "a **final**, appealable **judgment**," even if the court did not "enter judgment following [the] voluntary dismissal." *Id.* (emphasis added).

In *Wong v. Smith*, 961 F.2d 1018 (1st Cir. 1992), the First Circuit applied Maine preclusion law to affirm dismissal under similar facts. There, the state court granted summary judgment on plaintiff's fraud claim, but gave plaintiff leave to amend his complaint to add contract and warranty claims. Plaintiff then voluntarily dismissed his suit without prejudice. Plaintiff later sued the same defendant in federal court, asserting claims for fraudulent concealment, misrepresentation, breach of contract, and breach of warranty.

Despite "the apparent absence of a technically 'final' judgment," the First Circuit held that plaintiff's "fraud claim was adjudicated with sufficient finality in [state court] to give the grant of summary judgment on the fraud count preclusive effect." *Id.* at 1020. By "dismissing the remains of his state court action, [plaintiff]

did no more than acknowledge the adverse decision on his fraud count and give notice that he did not intend to contest it any further. The summary judgment on the fraud count, though interlocutory when rendered, became final in fact if not in form when [plaintiff] abandoned his state court case." *Id.* at 1020-21.

Moreover, plaintiff "should have litigated to a conclusion [in state court] all of the legal theories he thought supported recovery on his single cause of action. Instead, he attempted to bite the apple twice by 'splitting' his claim—litigating different manifestations of the same cause of action in two different courts." *Id.* at 1021. The First Circuit thus held that res judicata barred the entire suit. *See also Muhammad v. Oliver*, 547 F.3d 874, 876 (7th Cir. 2008) ("when a suit is abandoned after an adverse ruling against the plaintiff, the judgment ending the suit, whether or not it is with prejudice, will generally bar bringing a new suit that arises from the same facts").

Similarly, Plaintiffs' voluntary dismissal after the state court's order dismissing the non-fraud claims "had no significance other than to evidence acquiescence in the ruling." *Warren v. Lawler*, 343 F.2d 351, 357 (9th Cir. 1965). The state court's order "became final in fact if not in form" as to the non-fraud claims when Plaintiffs "abandoned [their] state court case." *Wong*, 961 F.2d at 1021. Moreover, Plaintiffs "should have litigated to a conclusion" their fraud claim in *Natan II* as well as any other legal theories that they wished to raise. *Id.*; *see*

Gonzales v. Cal. Dep't of Corr., 739 F.3d 1226, 1233 (9th Cir. 2014) (res judicata "'bars consideration not only of all matters actually raised in the first suit but also all matters which *could have been raised*'"). Plaintiffs "'may not split up a single cause of action and make it the basis of separate suits.'" *Id.* at 1231.

Plaintiffs also argued below that res judicata does not apply because their federal complaint made allegations absent from *Natan II*. SER47-48. Plaintiffs cited *Keidatz v. Albany*, 39 Cal. 2d 826, 828 (1952), which stated that if "new or additional facts are alleged that cure the defects in the original pleading, … the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint." *Keidatz* is distinguishable for three reasons.

First, *Keidatz* involved a prior action "in which a demurrer was sustained with leave to amend." *Moore v. Navarro*, 2004 WL 783104, at *6 n.7 (N.D. Cal. Mar. 31, 2004); *see Keidatz*, 39 Cal. 2d at 828 ("the former judgment was entered after a general demurrer had been sustained with leave to amend"). Plaintiffs did not cite below, and Citi has not found, any case invoking *Keidatz* to deny res-judicata effect to an order sustaining a demurrer **without** leave to amend where the cause of action in the second case remained the same. On the contrary, in applying res judicata based on orders sustaining demurrers without leave to amend, many modern courts have not even addressed whether the complaint in the second case

cured the defects in the first. *E.g.*, *Ojavan Investors, Inc. v. Cal. Coastal Comm'n*, 54 Cal. App. 4th 373, 383-84 (1997).

Second, *Keidatz* involved two actions that apparently were filed in the same court. *See Keidatz v. Albany*, 243 P.2d 552, 554 (Cal. Ct. App. 1952) (defendants' answer in second case stated that first action was filed "in said court"). The forum-shopping concerns underlying res judicata are absent where, unlike here, the two cases are filed in the same court and can be assigned to the same judge.

Third, in *Keidatz*, the first suit was dismissed under the laches doctrine. 39 Cal. 2d at 829. Unlike the *Natan II* order sustaining Citi's demurrer for failure to state a claim, "laches has nothing to do with the merits" and thus cannot support res judicata. *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 77 (2000).

Furthermore, Plaintiffs' interpretation of *Keidatz* would create the very problems that res judicata is designed to prevent. Res judicata promotes "comity between state and federal courts," "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and … prevent[s] inconsistent decisions." *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980). As the district court noted, Plaintiffs' tactics "indicate[] a lack of respect for the state court decision." ER22. Indeed, under Plaintiffs' view, they may evade an order sustaining a demurrer without leave to amend simply by filing an amended complaint in a different forum, repeating the process over and over until they receive the desired

result or the statute of limitations expires. This procedure invites forum shopping, unnecessarily consumes judicial resources, imposes duplicative suits against defendants, and delays resolution of litigation.

Alternatively, the Court may certify to the California Supreme Court the question whether an order sustaining a demurrer without leave to amend is res judicata to a successive lawsuit asserting the same cause of action. *See* Cal. R. Ct. 8.548. As the district court noted, "there's something really wrong with an approach that basically moots all the work that the state court did." ER20. Moreover, Judge Hall questioned whether the *Keidatz* dicta cited by Plaintiffs "is still applicable today." *Santos v. Todd Pac. Shipyards Corp.*, 585 F. Supp. 482, 484 n.4 (C.D. Cal. 1984). Indeed, *Keidatz* relied in part on comments c and e to the RESTATEMENT (FIRST) OF JUDGMENTS § 50. 39 Cal. 2d at 829. The Second Restatement deleted those comments, stating without qualification that res judicata "is applicable to a judgment for the defendant on demurrer." RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. d. When there is "uncertainty in the most applicable California precedents as applied to the present circumstances," certification may be warranted. *Verdugo v. Target Corp.*, 704 F.3d 1044, 1049 (9th Cir. 2012).

V. The Case Should Not Be Reassigned If It Is Remanded.

Plaintiffs ask that, if this Court reverses, the case be reassigned to a different judge on remand. Br. 43-46. "Reassignment, however, is reserved for 'rare and extraordinary circumstances.'" *Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013). In determining whether these "'unusual circumstances'" exist, this Court considers:

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Id. at 1111-12.

In an attempt to satisfy the first factor, Plaintiffs assert that Judge Fischer "disregard[ed]" her pleadings decisions and *Corvello*. Br. 45. Judge Fischer did not disregard *Corvello*; she explained why *Corvello* is distinguishable. E4. In fact, as explained above, *Corvello* supports Judge Fischer's decision. As for Judge Fischer's own decisions, Plaintiffs ignore the difference between pleadings decisions and summary judgment. On summary judgment, Judge Fischer considered evidence (such as the TPP cover letter) that was outside the pleadings. Even if Plaintiffs were right, that would suggest that Judge Fischer can change her "previously-expressed views"—refuting the first *Krechman* factor.

In an attempt to satisfy the second factor, Plaintiffs speculate that the "brevity" of Judge Fischer's summary-judgment decision "suggests" "frustration" with Plaintiffs, their lawyers, or the case. Br. 45. Judge Fischer's pleadings decision was slightly shorter than her summary-judgment decision. *Compare* E1-4 *with* ER5-8. That does not suggest that Judge Fischer was frustrated with Citi any more than the summary-judgment decision's length suggests frustration with Plaintiffs. Regardless, this Court does not measure "the appearance of justice" by the number of pages that district judges write.

Finally, reassignment would waste judicial resources. Judge Fischer has presided over the HAMP MDL for six years, giving her substantial expertise in the issues presented here. Throughout their state and federal lawsuits, Plaintiffs have responded to defeat by seeking a new judge. Plaintiffs should not be permitted to do so again.

CONCLUSION

The judgment should be affirmed.

Dated: April 17, 2017

Respectfully submitted,

s/ Lucia Nale

Lucia Nale
Debra Bogo-Ernst
Stephen J. Kane
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600

Facsimile: (312) 701-7711

Andrew Z. Edelstein, SBN 218023
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-5156
Facsimile: (213) 625-0248

Attorneys for Defendant CitiMortgage, Inc.

STATEMENT OF RELATED CASES

This case is related to *Bernard v. CitiMortgage, Inc.*, Case No. 13-57158 (9th Cir.), because the two actions raise "closely related issues." Cir. R. 28-2.6.

Bernard was an appeal from an order by Judge Dale Fischer, denying class certification in a multidistrict litigation consolidating class actions asserting that Citi breached TPPs by declining to modify borrowers' loans under HAMP. *See In re CitiMortgage, Inc. Home Affordable Modification Program HAMP Contract Litig.*, Case No. 11-ml-2274 (C.D. Cal.) ("HAMP MDL"). Like the HAMP MDL, the complaint here alleged that Citi breached a TPP by declining to modify Plaintiffs' loan under HAMP. ER182-83. The complaint also alleged that the HAMP MDL tolled the statute of limitations on Plaintiffs' claims. ER176-77.

Thus, in the Civil Cover Sheet that Plaintiffs filed with their complaint, Plaintiffs represented that this case is related to the HAMP MDL because the two actions "[c]all for determination of the same or substantially related or similar questions of law and fact." SER232. Relying on Plaintiffs' representation, the Central District of California transferred this case to Judge Fischer. SER229.

s/Lucia Nale
Lucia Nale

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,750 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Stephen J. Kane
Stephen J. Kane

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Answering Brief of Defendant-Appellee CitiMortgage, Inc. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 17, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen J. Kane
Stephen J. Kane