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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Calvin L. Raup and Angela J. Raup,  
husband and wife,

No. CV-13-00137-PHX-GMS

10 Plaintiffs,

**ORDER**

11 v.

12 Wells Fargo Bank, NA; et al.,

13 Defendants.  
14

15  
16 Pending before the Court is the Motion to Dismiss of Defendant Wells Fargo  
17 Bank, N.A. (“Wells Fargo”). (Doc. 14.) For the reasons discussed below, the Motion is  
18 granted in part and denied in part.

19 **BACKGROUND**

20 Plaintiffs Calvin and Angela Raup are husband and wife who obtained a loan from  
21 Wells Fargo in March 2006 in the amount of \$975,000. (Doc. 14 at 1.) The loan was  
22 secured by real property located at 7333 N. 2nd Drive, Phoenix, Arizona. (Docs. 7 at 1;  
23 14 at 1.) After Plaintiffs defaulted on the payment obligation, Wells Fargo appointed  
24 Michael A. Bosco, Jr. as successor trustee. Bosco subsequently recorded a Notice of  
25 Trustee’s Sale on the Phoenix property on February 10, 2012. (Doc. 14 at 2.) The  
26 property has since foreclosed. (Doc. 25 at 6.)

27 Plaintiffs filed suit on January 22, 2013, before the foreclosure sale occurred.  
28

1 (Doc. 1-1 at 1.) They then filed a First Amended Complaint on February 5, 2013,  
2 asserting a total of eleven claims against Wells Fargo and other unknown parties. (Doc.  
3 7.) Plaintiffs also moved for a Preliminary Injunction, which this Court denied on  
4 February 13, 2013. (Doc. 16.)

5 Plaintiffs allege that Wells Fargo entered into a Consent Judgment with the United  
6 States and other parties in April 2012 that required Wells Fargo to abide by certain  
7 standards relating to “loss mitigation, loan modification, and foreclosure of Arizona  
8 consumers’ homes.” (Doc. 7 ¶ 6.) They further allege that Wells Fargo “widely  
9 promoted” its adherence to the conduct guidelines set out in the Consent Judgment. (*Id.* at  
10 ¶ 9.)

11 Plaintiffs claim that they contacted Wells Fargo seeking a loan modification on  
12 September 6, 2011, on the basis of Wells Fargo’s above “promises” regarding loan  
13 modifications. (*Id.* ¶¶ 12–13.) They assert that Wells Fargo, through its representatives,  
14 made a number of statements to Plaintiffs, all of which they allege are untrue. Such  
15 statements include telling Plaintiffs that they were “qualified for assistance,” that  
16 corrected monthly billing statements would be provided, that their mortgage was not in  
17 active foreclosure, that they should ignore letters telling them to make regular mortgage  
18 payments and setting forth their rights relating to home ownership, and generally  
19 reassuring Plaintiffs that their request for assistance would be taken care of. (*Id.* ¶¶ 14–  
20 36.) Plaintiffs assert that in spite of their efforts and the various statements made by  
21 Wells Fargo representatives, their home has gone into foreclosure and a trustee’s sale has  
22 been scheduled. (*Id.* ¶¶ 28–37.)

23 Plaintiffs assert the following causes of actions against Wells Fargo: (1) violation  
24 of the Arizona Consumer Fraud Act (“CFA”) by conduct, (2) violation of the CFA by  
25 concealment or suppression of facts, (3) breach of contract, (4) violation of A.R.S. Title  
26 33 Chapter 6.1, (5) negligent misrepresentation, (6) fraudulent concealment, (7) failure to  
27 hire, train, or supervise employees, (8) breach of consent judgment, (9) constructive  
28 fraud, (10) equitable estoppel, and (11) breach of the duty of good faith and fair dealing.

1 (*Id.* ¶¶ 38–72.) Wells Fargo moves to dismiss the First Amended Complaint in its  
2 entirety. (Doc. 14.)

### 3 DISCUSSION

#### 4 I. Legal Standard

5 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil  
6 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a  
7 “formulaic recitation of the elements of a cause of action”; it must contain factual  
8 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*  
9 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain  
10 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is  
11 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.  
12 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the  
13 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
14 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
15 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a  
16 sheer possibility that a defendant has acted unlawfully.” *Id.* When a complaint does not  
17 “permit the court to infer more than the mere possibility of misconduct, the complaint has  
18 alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal  
19 quotation omitted).

20 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll  
21 allegations of material fact are taken as true and construed in the light most favorable to  
22 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,  
23 legal conclusions couched as factual allegations are not given a presumption of  
24 truthfulness, and “conclusory allegations of law and unwarranted inferences are not  
25 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
26 1998).

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1 **II. Analysis**

2 **A. CFA Violations (Counts One and Two)**

3 The Arizona CFA grants an implied private right of action against persons who  
4 violate its provisions. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 342, 666  
5 P.2d 83, 87 (Ct. App. 1983). To prevail on a CFA claim in Arizona, the plaintiff must  
6 show “(1) a false promise or misrepresentation made in connection with sale or  
7 advertisement of merchandise, and (2) consequent and proximate injury.” *Stratton v. Am.*  
8 *Med. Sec., Inc.*, No. CV-07-1491-PHX-SMM, 2008 WL 2039313 at \*7 (D. Ariz. May 12,  
9 2008) (quoting *Kuehn v. Stanley*, 208 Ariz. 124, 129, 91 P.3d 346, 351 (Ct. App. 2004)).  
10 Because claims brought under the CFA involve allegations of fraud, they must be pled  
11 with particularity. *Silving v. Wells Fargo Bank, NA*, 800 F. Supp. 2d 1055, 1075 (D. Ariz.  
12 2011).

13 Wells Fargo first contends that dismissal of these counts is appropriate under Rule  
14 8(a), which requires “a short and plain statement of the claim showing that the pleader is  
15 entitled to relief.” Fed. R. Civ. P. 8(a). It argues that Plaintiffs have failed to comply with  
16 Rule 8(a) because they do not specify which statements in the body of the Complaint  
17 form the basis of their CFA claims. (Doc. 14 at 6.) It cites cases that have dismissed  
18 complaints that had “the factual elements of a cause of action present but scattered  
19 throughout the complaint and not organized into a ‘short and plain statement of the  
20 claim.’” *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988); *Daghlán v.*  
21 *TBI Mortg. Co.*, No. CV-12-01415-PHX-NVW, 2013 WL 179452 at \*3 (D. Ariz. Jan. 17,  
22 2013). Here, Plaintiffs specifically set out numerous statements allegedly made by Wells  
23 Fargo representatives and allege that they were false or misleading. The counts in the  
24 Complaint asserting CFA violations incorporate those allegations. In addition, they assert  
25 that they were damaged by those acts and that their home was foreclosed on despite  
26 assurances by Wells Fargo representatives. The Court does not find their allegations so  
27 scattered and disorganized as to warrant dismissal under Rule 8(a).

28 Wells Fargo further asserts that Plaintiffs fail to allege fraud with the requisite

1 particularity under Rule 9(b). Rule 9(b) has been interpreted in this Circuit to require the  
2 pleader to “state the time, place, and specific content of the false representations as well  
3 as the identities of the parties to the misrepresentation.” *Schreiber Distrib. Co. v. Serv-*  
4 *Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). In addition, the plaintiff  
5 must “set forth . . . an explanation as to why the disputed statement was untrue or  
6 misleading when made.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999).  
7 However, the state of mind or scienter of the defendants may be alleged generally.  
8 *Richardson v. Bury*, No. CV06-283-TUC-HCE, 2009 WL 1749688 at \*7 n.7 (D. Ariz.  
9 June 19, 2009) (citing *Schreiber*, 806 F.2d at 1401).

10 Here, Plaintiffs have alleged the dates and specific contents of the claimed  
11 misrepresentations, as well as specifying whether the statements occurred by letter or by  
12 phone. However, each of these alleged misstatements is accompanied merely by an  
13 assertion that the statement was false, without “an explanation as to why [it] was untrue  
14 or misleading when made.” *Yourish*, 191 F.3d at 993. The only exception is Paragraph 27  
15 of the Complaint, in which Plaintiffs allege that Wells Fargo sent them letters advising  
16 them to make regular mortgage payments, but a Wells Fargo representative told them to  
17 ignore those letters. (Doc. 7 at ¶ 27.) Construed in the light most favorable to Plaintiffs,  
18 this allegation sufficiently implies a misrepresentation, as the two statements contradict  
19 one another—either the statement in the letter or the statement by the Wells Fargo  
20 representative was false. No other allegation in the complaint explains why the alleged  
21 misstatements were false.

22 Plaintiffs argue in their Response that Wells Fargo “intentionally misrepresent[s]”  
23 the claims in the Complaint. Thus, for example, they assert that their allegation of the  
24 falsity of Wells Fargo’s promise to supply corrected billing statements is supported by  
25 the fact that Wells Fargo in fact never provided any billing statements. (Doc. 22 at 7.)  
26 While Wells Fargo may have failed to provide billing statements, this fact was not  
27 alleged in the First Amended Complaint, and thus is not an assertion that the Court must  
28 accept or consider in deciding the Motion to Dismiss. Plaintiffs’ allegation in their

1 Response that Wells Fargo knew that those statements had never been provided is of no  
2 avail—in deciding a Motion to Dismiss, the Court looks at the Complaint, not other  
3 pleadings. Thus, Wells Fargo’s Motion to Dismiss is granted on Plaintiffs’ CFA claim for  
4 failure to comply with Rule 9(b) for all allegations except the ones set forth in Paragraph  
5 27 of the First Amended Complaint.

6 Wells Fargo further argues that Plaintiffs failed to adequately plead reliance,  
7 which is an element of the CFA claim. *Peery v. Hansen*, 120 Ariz. 266, 269, 585 P.2d  
8 574, 577 (Ct. App. 1978). However, Plaintiffs do allege that they relied on the numerous  
9 false statements by Wells Fargo set out in the Complaint, albeit not specifically in the  
10 sections asserting their CFA claims. Plaintiffs assert that they relied on Wells Fargo’s  
11 representations in Paragraphs 53 and 57 of the Complaint. (Doc. 7 ¶¶ 53, 57.) Though  
12 these paragraphs are found in sections pleading negligent misrepresentation and  
13 fraudulent concealment, respectively, they assert reliance on the same statements that  
14 form the basis of Plaintiffs’ CFA claims. Thus, Plaintiffs have plausibly alleged that they  
15 relied on Wells Fargo’s representations so that they may overcome the Motion to Dismiss  
16 on this ground.

17 Finally, Wells Fargo asserts that Plaintiffs’ CFA claims should be dismissed  
18 because they do not assert that the alleged misstatements were made in connection with  
19 “the sale or advertisement of merchandise.” (Doc. 14 at 8.) However, under Arizona law,  
20 a loan is construed as a “sale” for the purposes of the CFA. *Villegas v. Transamerica Fin.*  
21 *Services, Inc.*, 147 Ariz. 100, 102, 708 P.2d 781, 783 (Ct. App. 1985). Plaintiffs have  
22 pled that Wells Fargo’s misstatements were made in relation to their loan. (*See generally*  
23 Doc. 7 ¶¶ 14–36.) In addition, they specifically pled that Wells Fargo “widely promoted”  
24 their new practices pursuant to the consent judgment relating to loan modification and  
25 foreclosure. (*Id.* ¶ 9.) Under Arizona law, this qualifies as an “advertisement” for the  
26 purposes of the CFA. *Villegas*, 708 P.2d at 783–84. Plaintiffs’ pleadings are thus  
27 sufficient to overcome a Motion to Dismiss on this ground.

28 Plaintiffs’ conclusory allegations that Wells Fargo’s statements were false fail to

1 state a claim under the CFA for all misstatements except those set out in Paragraph 27 of  
2 the First Amended Complaint. Thus, Plaintiffs' CFA claims are dismissed under Rule 9  
3 as to all except for those predicated on the statements described in Paragraph 27.

4 **B. Breach of Contract (Count Three)**

5 Under Arizona law, a breach of contract claim contains three elements: "an  
6 agreement, the right to seek relief, and breach by a defendant." *Narramore v. HSBC Bank*  
7 *USA, N.A.*, No. 09-CV-635-TUC-CKJ, 2010 WL 2732815 at \*4 (D. Ariz. July 7, 2010).  
8 A plaintiff must also allege that it was damaged as a result of the breach. *Id.* Wells Fargo  
9 asserts that Plaintiffs' claim should be dismissed because it fails to allege any agreement  
10 with specificity.

11 Plaintiffs' Complaint alleges a general "contractual relationship which  
12 incorporated all aspects of Plaintiffs' financial life." (Doc. 7 ¶ 46.) This allegation fails to  
13 state with specificity which agreement forms the basis of Plaintiffs' breach of contract  
14 claim or how Wells Fargo breached such an agreement. Combing through the facts  
15 alleged in the "Background" section of the Complaint reveals two potential contracts on  
16 which Plaintiffs could base their allegation, but Plaintiffs fail to adequately state a claim  
17 for either of them.

18 The Complaint states that the Deed of Trust is "the controlling contractual  
19 document." (*Id.* ¶ 26.) The Court will treat the Deed of Trust as a document within the  
20 Complaint for the purposes of this Motion to Dismiss because the Complaint specifically  
21 refers to it, it is central to Plaintiffs' breach of contract claim, and the parties do not  
22 question its authenticity. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Plaintiffs  
23 claim that the Deed of Trust sets out in Paragraphs 19 and 22 "the various rights and  
24 duties of the parties relating to loss mitigation and foreclosure." Plaintiffs allege that  
25 Wells Fargo violated all of these "rights and duties." (Doc. 7 ¶ 26.)

26 Paragraph 19 sets out the borrower's right to reinstate after acceleration if certain  
27 conditions are met. The right is conditioned on the borrower paying off all sums due  
28 under the Deed of Trust and Note, curing any other defaults under the agreements, and

1 paying all expenses incurred in the enforcement of the Deed of Trust. (Doc. 14-A ¶ 19.)  
2 Plaintiffs do not allege that Wells Fargo violated this right in their Complaint. The  
3 Complaint alleges that Plaintiffs attempted to obtain information about the reinstatement  
4 amount from third party Tiffany & Bosco, but that this information was not provided.  
5 This does not state a claim against Wells Fargo. Plaintiffs do not allege that Wells Fargo  
6 committed any wrongdoing in connection with the reinstatement information.  
7 Furthermore, nothing in Paragraph 19 of the Deed of Trust places a duty on Wells Fargo  
8 to provide information regarding reinstatement after acceleration. As such, Plaintiffs have  
9 failed to adequately allege that Wells Fargo breached Paragraph 19 of the Deed of Trust.

10 Paragraph 22 requires the lender to provide the borrower with notice prior to  
11 acceleration. (*Id.* ¶ 22.) It also requires the lender to give written notice to the trustee, and  
12 requires the trustee to record a notice of sale in the county where the property is located.  
13 (*Id.*) However, the Complaint does not allege that Wells Fargo failed to provide notice to  
14 either Plaintiffs or the trustee as required by the Deed of Trust. Nor does it allege that the  
15 trustee failed to record a notice of sale. Thus, Plaintiffs have failed to state a claim on the  
16 ground that Wells Fargo violated Paragraph 22 of the Deed of Trust.

17 The Complaint also alleges that Wells Fargo offered, and Plaintiffs accepted, a  
18 loan modification “relating to loss mitigation and foreclosure” and that this modification  
19 was incorporated into the “existing contractual relationship of the parties.” Plaintiffs do  
20 not set out the terms of the alleged loan modification or explain how Wells Fargo  
21 breached it. Plaintiffs’ bare allegation that “[t]he subsequent breach of the modified terms  
22 of the contract by [Wells Fargo] caused damage to Plaintiffs” is a legal conclusion that  
23 need not be accepted as true on a motion to dismiss. Lacking any factual allegations  
24 setting out the terms of the loan modification or how Wells Fargo violated them, the  
25 Complaint fails to “permit the court to infer more than the mere possibility of  
26 misconduct.” *Iqbal*, 556 U.S. at 679. Plaintiffs have thus failed to state a breach of  
27 contract claim on these allegations.

28 Plaintiffs argue in their Response that Wells Fargo also breached Paragraph 16 of

1 the Deed of Trust, which incorporates Arizona state law’s requirement that a lender  
2 “must attempt to contact the borrower to explore options to avoid foreclosure.” A.R.S. §  
3 33-807.01. However, Plaintiffs fail to make such allegations in the Complaint. Moreover,  
4 Plaintiffs allege throughout their Complaint that Wells Fargo communicated with them  
5 repeatedly regarding a potential loan modification to avoid foreclosure. Plaintiffs have  
6 thus failed to state breach of contract claim against Wells Fargo. Wells Fargo’s Motion to  
7 Dismiss Count Three of the First Amended Complaint is granted.

8 **C. Violation of A.R.S. Title 33 Chapter 6.1 (Count Four)**

9 Chapter 6.1 of Title 33 of the Arizona Revised Statutes contains twenty-four  
10 sections relating to Deeds of Trust. These sections cover everything from appointing  
11 successor trustees to the disposition of proceeds from a trustee’s sale. *See* A.R.S. § 33-  
12 801 et seq. Plaintiffs do not specify which section of Chapter 6.1 Wells Fargo violated.  
13 As such, there can be no claim, as the Court cannot discern whether Plaintiffs have  
14 adequately plead the elements of the cause of action when Plaintiffs do not specify which  
15 cause of action they bring. Thus, Plaintiffs have failed to set forth factual allegations  
16 sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at  
17 555.

18 Plaintiffs argue that the Complaint’s specific reference to “requirements as to  
19 notice and procedure for loss mitigation and foreclosure” are sufficient to put Wells  
20 Fargo and the Court on notice of the section of Chapter 6.1 on which Plaintiffs base their  
21 claim. In fact, the language referred to by Plaintiffs is general and vague, and Chapter 6.1  
22 contains multiple provisions that might encompass Plaintiffs’ allegations. Plaintiffs  
23 further argue that it is “ludicrous” for Wells Fargo to suggest that it does not have fair  
24 notice of their Chapter 6.1 claim, and point to an article published by Wells Fargo’s  
25 counsel in which they discuss A.R.S. § 33-807.01, the section on which Plaintiffs  
26 apparently rely (though they failed to specify this in their Complaint). However, the fact  
27 that a defendant’s counsel is aware of a statute does not mean that the defendant is placed  
28 on sufficient notice of all possible claims that may be brought against it pursuant to that

1 statute. Plaintiffs’ argument that their general reference to Chapter 6.1 is sufficient to put  
2 Wells Fargo and the Court on notice of the specific section on which they intend to rely is  
3 without merit. They have failed to state a claim under Title 33, Chapter 6.1 of the  
4 Arizona Revised Statutes, and Count Four of their Complaint is dismissed.

5 **D. Negligent Misrepresentation (Count Five)**

6 Arizona recognizes the tort of negligent misrepresentation as set out in the  
7 Restatement (Second) of Torts. *McAlister v. Citibank (Ariz.), a Subsidiary of Citicorp*,  
8 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (Ct. App. 1992). Negligent misrepresentation is  
9 defined as supplying “false information for the guidance of others in their business  
10 transactions” in the course of the tortfeasor’s business, profession, employment, or any  
11 other transaction in which he has a pecuniary interest. *St. Joseph’s Hosp. & Med. Ctr. v.*  
12 *Reserve Life Ins. Co.*, 154 Ariz. 307, 312, 742 P.2d 808, 813 (1987). Recovery is limited  
13 to the persons or limited group of persons “for whose benefit and guidance [the  
14 tortfeasor] intends to supply the information.” *Id.* Liability is limited in scope “because it  
15 is premised on the reasonable expectations of a foreseeable user of information supplied  
16 in connection with commercial transactions.” *Id.* at 813–14.

17 As discussed above, Plaintiffs allege a number of false statements throughout the  
18 body of the Complaint, and the count of negligent misrepresentation incorporates these  
19 allegations. The allegations are set forth succinctly in apparently chronological order.  
20 Thus, this count will not be dismissed for failure to set forth “a short and plain statement  
21 of the claim.” Nevertheless, for the same reasons as discussed above, Plaintiffs have  
22 failed to allege anything more than conclusory statements regarding the falsity of the  
23 majority of the enumerated statements. However, as before, Plaintiffs have plausibly pled  
24 the falsity of the statements set out in Paragraph 27, alleging that Wells Fargo advised  
25 them by letter to keep making payments on their mortgage while telling them via  
26 representative to ignore those letters. Plaintiffs’ negligent misrepresentation claims are  
27 thus dismissed as to all allegations except those set out in Paragraph 27.

28 Wells Fargo also argues that Plaintiffs failed to allege that they justifiably relied

1 on the misstatements. However, the Complaint expressly states that “Plaintiffs justifiably  
2 relied upon the Bank’s representations.” (Doc. 7 ¶ 53.) Wells Fargo points to no authority  
3 stating that reliance must be more specifically pled. Their Motion to Dismiss on this  
4 ground is therefore denied.

5 Wells Fargo finally argues that Plaintiffs have failed to allege that they were  
6 harmed by the alleged misrepresentations. However, the Complaint states that the  
7 misrepresentations “resulted in damage to Plaintiffs.” (*Id.* ¶ 54.) Plaintiffs further allege  
8 that Wells Fargo has begun foreclosure proceedings on their home, presumably due to the  
9 conflicting statements Plaintiffs received regarding whether to continue making regular  
10 payments. (*Id.* ¶¶ 27, 30, 37.) Wells Fargo asserts, without authority, that this cannot  
11 constitute harm because Plaintiffs allege that the foreclosure has not yet occurred. (Doc.  
12 14 at 11.) However, in its Reply, Wells Fargo acknowledges that the foreclosure has  
13 since occurred. Plaintiffs have thus sufficiently pled damages for the purposes of their  
14 negligent misrepresentation claim. The Motion to Dismiss is therefore denied, but only as  
15 to the claim supported by the allegations set forth in Paragraph 27 of the Complaint. The  
16 negligent misrepresentation claim is otherwise dismissed.

17 **E. Fraudulent Concealment (Count Six)**

18 Arizona recognizes the tort of fraudulent concealment as set out in the  
19 Restatement (Second) of Torts. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement*  
20 *Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 496, 38 P.3d 12, 34 (2002).  
21 The tort is defined as concealing or by other action intentionally preventing a party to a  
22 transaction from acquiring material information. *Id.*

23 Though Plaintiffs describe a number of allegedly false statements throughout the  
24 Complaint, they do not allege that Wells Fargo intentionally concealed any material fact  
25 from them. Plaintiffs’ argue in their Response that Wells Fargo failed to fulfill a number  
26 of duties set out in the Consent Judgment. (Doc. 22 at 12.) The only duty they  
27 specifically allege is the duty to communicate. (*Id.*) Plaintiffs incorrectly state that the  
28 existence of a duty to communicate, in and of itself, is sufficient to give rise to liability

1 for fraudulent concealment. However, as discussed above, the tort of fraudulent  
2 concealment contains several elements, including concealment of a material fact.  
3 Plaintiffs' First Amended Complaint does not allege that Wells Fargo intentionally  
4 concealed any information, or that any such information was material. Thus, their  
5 fraudulent concealment claim is dismissed.

6 **F. Failure to Hire, Train, or Supervise Employees (Count Seven)**

7 In Arizona, the "failure to hire" tort has only been discussed in the context of job  
8 applicants bringing suits against prospective employers, and Arizona courts have  
9 specified that the Arizona Civil Rights Act does not create common law action for  
10 wrongful failure to hire. *Burris v. City of Phoenix*, 179 Ariz. 35, 43, 875 P.2d 1340, 1348  
11 (Ct. App. 1993). Plaintiffs do not cite to any case law that supports a failure to hire claim  
12 on the facts of this case. Because a wrongful failure to hire claim does not apply to this  
13 context, Plaintiffs' claim on that theory is dismissed.

14 "For an employer to be held liable for the negligent hiring, retention, or  
15 supervision of an employee, a court must first find that the employee committed a tort."  
16 *Kuehn v. Stanley*, 208 Ariz. 124, 130, 91 P.3d 346, 352 (Ct. App. 2004). Here, Plaintiffs  
17 have not alleged that any individual employee of Wells Fargo committed a tort. Though  
18 the allegations set out in Paragraph 27 indicate that a false statement was made, either in  
19 the letter or in the Wells Fargo's employee's statement, the Complaint does not specify  
20 which of the two was false. Thus, Plaintiffs have failed to allege with sufficient  
21 specificity which Wells Fargo employee committed a tort, much less what tort it was, or  
22 how Wells Fargo was negligent in hiring, training, or supervising the unidentified  
23 employee. As such, their claim that Wells Fargo failed to properly hire, train, or supervise  
24 employees fails. Count Seven is dismissed in its entirety.

25 **G. Violation of Consent Judgment (Count Eight)**

26 Plaintiffs attach to their Complaint a copy of the Consent Judgment entered into  
27 by Wells Fargo, the United States, the fifty states, and the District of Columbia. (Doc. 7-  
28 1.) The Court will consider this external document on the Motion to Dismiss without

1 converting it into a motion for summary judgment because it was attached to the  
2 Complaint and also because it was incorporated by reference in the Complaint. *United*  
3 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Consent Judgment also  
4 incorporates in its terms a separate document called the Enforcement Terms. (Doc. 7-1 at  
5 4, ¶ 6.) Plaintiffs do not attach the Enforcement Terms to their Complaint, but rely on its  
6 terms and do not contest its authenticity in making their argument in Response. (*See* Doc.  
7 22 at 13.) As such, the Court will also analyze the Enforcement Terms in deciding this  
8 Motion, without converting it to a summary judgment motion.

9 Plaintiffs allege that they are entitled to damages because of Wells Fargo's  
10 violation of the Consent Judgment. However, the Consent Judgment expressly limits  
11 enforcement of its terms to the parties to the consent judgment and provides that suit may  
12 only be brought in the U.S. District Court for the District of Columbia. (Doc. 14-E at E-  
13 14, ¶¶ J-1, J-2.) Plaintiffs are not a party to the consent judgment, and thus do not have  
14 standing to enforce it against Wells Fargo.

15 Plaintiffs point to a section in the Consent Judgment that states that “[n]othing in  
16 this Section shall limit the availability of remedial compensation to harmed borrowers as  
17 provided in Section E.5.” (*Id.* at E-14, ¶ J-3.) However, Section E.5 does not provide that  
18 any harmed borrower can bring suit against Wells Fargo to enforce the Consent  
19 Judgment. (*Id.* at E-11, ¶ E-5.) Rather, Section E.5 places the burden on Wells Fargo to  
20 “remediate any material harm to particular borrowers identified through work conducted  
21 under the Work Plan.” (*Id.*) It does not give Plaintiffs the right to sue to Wells Fargo for  
22 violations of the Consent Judgment. As such, Wells Fargo's Motion to Dismiss is granted  
23 for Count Eight of the First Amended Complaint.

#### 24 **H. Constructive Fraud (Count Nine)**

25 Arizona defines the tort of constructive fraud as “a breach of legal or equitable  
26 duty which, irrespective of the moral guilt or intent of the party charged, the law declares  
27 fraudulent because of its tendency to deceive others, to violate public or private  
28 confidence, or to injure public interests.” *Rhoads v. Harvey Publications, Inc.*, 145 Ariz.

1 142, 148, 700 P.2d 840, 846 (Ct. App. 1984). For the cause of action to arise, “a  
2 relationship, akin to a fiduciary relationship must exist.” *McAlister*, 829 P.2d at 1261.  
3 The requisite relationship approximates “business agency, professional relationship, or  
4 family tie.” *Rhoads*, 700 P.2d at 847. If a “relationship of trust and confidence exists  
5 between [the] two parties so that one of the places a peculiar reliance in the  
6 trustworthiness of another, the latter is under a duty to make a full and truthful disclosure  
7 of all material facts and is liable for misrepresentation or concealment.” *Id.* at 846–47.

8 Here, Plaintiffs allege that the requisite relationship existed between themselves  
9 and Wells Fargo by citing to four sources of trust and confidence: “the initial contractual  
10 relationship between the parties, the parties [sic] joint venture at avoiding a foreclosure . .  
11 . . , the Arizona statutes . . . , [and] the conduct remedies [from the Consent Judgment].”  
12 (Doc. 7 at ¶ 65.) Plaintiffs further allege that Wells Fargo’s breach of the duty “would  
13 tend to deceive and cause injury to the public interest.” (*Id.*)

14 As an initial matter, neither Arizona law nor the Consent Judgment provides that a  
15 heightened relationship, akin to a fiduciary relationship, exists between lenders and  
16 mortgagors. *See Gould v. M & I Marshall & Isley Bank*, 860 F. Supp. 2d 985, 989 (D.  
17 Ariz. 2012) (“[I]t is well settled in Arizona that a mortgage lender does not owe a  
18 fiduciary duty to a borrower.). Nor do mere contractual relationships, without more, give  
19 rise to fiduciary duties. *Cook v. Orkin Exterminating Co., Inc.*, 227 Ariz. 331, 334, 258  
20 P.3d 149, 152 (Ct. App. 2011) (“[C]ommercial transactions do not create a fiduciary  
21 relationship unless one party agrees to serve in a fiduciary capacity.”). Plaintiffs have not  
22 alleged that Wells Fargo ever agreed to serve in a fiduciary capacity.

23 Plaintiffs allege that they and Wells Fargo were in a joint venture for the purpose  
24 of avoiding foreclosure. “Joint venture” is a technical legal term—it is defined under  
25 Arizona law as “when two or more parties agree to pursue a particular enterprise in the  
26 hope of sharing a profit.” *Ellingson v. Sloan*, 22 Ariz. App. 383, 386, 527 P.2d 1100,  
27 1103 (1974). Five elements must be present to establish a joint venture: (1) a contract, (2)  
28 a common purpose, (3) a community of interest, (4) an equal right of control, and (5)

1 participation in both profits and losses. *Id.* Plaintiffs’ allegation that they were in a joint  
2 venture with Wells Fargo is a legal conclusion that need not be accepted as true on a  
3 Motion to Dismiss. Further, the factual allegations set forth in the body of the Complaint  
4 do not support the existence of a joint venture. Plaintiffs allege that they entered into a  
5 contract to modify the contract terms of their loan. (Doc. 7 at ¶ 26.) They do not,  
6 however, allege that the contract was entered into for the common purpose of pursuing a  
7 profit. Nor do any of the allegations support the conclusion that Plaintiffs and Wells  
8 Fargo would both participate and share profits and losses in the joint venture of avoiding  
9 a foreclosure. As such, Plaintiffs have failed to allege facts that would support the  
10 existence of a joint venture.

11 Plaintiffs also seem to contend that a special relationship exists between them and  
12 Wells Fargo because Wells Fargo’s alleged breach would injure the public interest. This  
13 argument conflates two elements of the constructive fraud claim—in order for a duty to  
14 arise, a special relationship must exist, and in order for that duty to be breached and the  
15 breach to constitute fraud, the action must harm the public interest. The allegation that  
16 Wells Fargo’s actions harm the public interest does not support the claim that Wells  
17 Fargo owed a special, fiduciary duty to Plaintiffs.

18 Plaintiffs argue in their Response that by supplying loan-related information and  
19 telling Plaintiffs to ignore legal notices, Wells Fargo formed a de facto attorney-client  
20 relationship with them. (Doc. 22 at 13–14.) An attorney-client relationship can be formed  
21 without express mutual consent between the parties. *Paradigm Ins. Co. v. Langerman*  
22 *Law Offices, P.A.*, 200 Ariz. 146, 148, 24 P.3d 593, 595 (2001). The relationship arises  
23 when: “(1) a person manifests to a lawyer the person’s intent that the lawyer provide  
24 legal services for the person; and . . . (2) the lawyer manifests to the person consent to do  
25 so.” *Id.* (quoting Restatement (Third) of the Law Governing Lawyers § 14). Here,  
26 however, Plaintiffs have alleged neither of the two elements. Plaintiffs have not even  
27 alleged that any of the Wells Fargo representatives with whom they communicated were  
28 lawyers or that Plaintiffs believed them to be lawyers. Nor have they alleged that they

1 manifested intent for any of the representatives to provide legal services and the  
2 representatives consented. As such, Plaintiffs’ assertion that a de facto attorney-client  
3 relationship formed is not supported by factual allegations in the Complaint.

4 Plaintiffs have not alleged any facts that would plausibly support the element of  
5 the heightened, fiduciary relationship necessary to the constructive fraud cause of action.  
6 Thus, they have failed to state a constructive fraud claim and Wells Fargo’s Motion to  
7 Dismiss is granted on Count Nine.

8 **I. Equitable Estoppel (Count Ten)**

9 Arizona defines equitable estoppel as “an affirmative misrepresentation of a  
10 present fact or state of facts and detrimental reliance by another thereon.” *Tiffany Inc. v.*  
11 *W. M. K. Transit Mix, Inc.*, 16 Ariz. App. 415, 419, 493 P.2d 1220, 1224 (1972). In  
12 Arizona, equitable estoppel “is available only as a defense, while promissory estoppel can  
13 be used as a cause of action for damages.” *Id.* However, Arizona courts have allowed  
14 claims based on equitable estoppel to continue as promissory estoppel claims if the  
15 plaintiffs adequately alleged the elements of promissory estoppel. *Gorman v. Pima Cnty.*,  
16 230 Ariz. 506, 287 P.3d 800, 804 n.4 (Ct. App. 2012). “The critical distinction between  
17 the two is that equitable estoppel refers to reliance on a misrepresentation of some present  
18 or past fact, whereas ‘promissory estoppel rests upon a promise to do something in the  
19 future.’” *Id.* (citing *Trollope v. Koerner*, 106 Ariz. 10, 18, 470 P.2d 91, 99 (1970)).  
20 Otherwise, “promissory estoppel includes all elements of equitable estoppel.” *Id.*

21 Estoppel as a cause of action contains three elements: “(1) the party to be estopped  
22 commits acts inconsistent with a position it later adopts; (2) reliance by the other party;  
23 and (3) injury to the latter resulting from the former’s repudiation of its prior conduct.”  
24 *Id.* Here, Plaintiffs allege reliance and injury in the section of their Complaint asserting  
25 equitable estoppel as a cause of action. (Doc. 7 at ¶ 69.) However, in alleging the first  
26 element, they refer generally to the factual allegations made in the Background section of  
27 their Complaint. (*Id.*)

28 The only factual allegations in the Complaint that set out inconsistent acts by

1 Wells Fargo are in Paragraph 27, where Plaintiffs allege that they received letters from  
2 Wells Fargo advising them to continue making regular mortgage payments, while also  
3 receiving advice from a Wells Fargo representative to ignore those letters. (*Id.* at ¶ 27.)  
4 The rest of the Complaint conclusorily alleges that Wells Fargo representatives made  
5 statements that were false, without specifying subsequent inconsistent actions or  
6 positions taken by Wells Fargo. As such, Plaintiffs have stated a claim of promissory  
7 estoppel only as to the factual allegations set out in Paragraph 27 of the Complaint. Wells  
8 Fargo’s Motion to Dismiss is granted to the extent the action for estoppel relies on other  
9 factual allegations in the Complaint.

10 **H. Breach of Duty of Good Faith and Fair Dealing (Count Eleven)**

11 The duty of good faith and fair dealing is implied in every contract. *Rawlings v.*  
12 *Apodaca*, 151 Ariz. 149, 726 P.2d 565, 569 (1986). That duty prohibits either party from  
13 acting “to impair the right of the other to receive the benefits which flow from their  
14 agreement or contractual relationship.” *Id.* “[B]ecause a party may be injured when the  
15 other party to a contract manipulates bargaining power to its own advantage, a party may  
16 nevertheless breach its duty of good faith without actually breaching an express covenant  
17 in the contract.” *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons*  
18 *Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 491, 38 P.3d 12, 29 (2002).

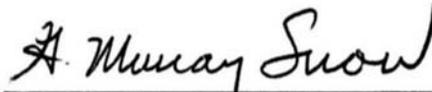
19 Here, Plaintiffs have failed to identify any benefit under the Deed of Trust or the  
20 alleged loan modification contract that was impaired by Wells Fargo. The closest that  
21 they come is their allegations regarding their right to reinstatement as set forth in the  
22 Deed of Trust. As discussed above, however, Plaintiffs did not allege that Wells Fargo  
23 impaired this right—they alleged that the trustee, Tiffany & Bosco, failed to provide  
24 information regarding the reinstatement amount. (Doc. 7 at 33.) They do not allege that  
25 Wells Fargo had anything to do with this failure to provide information.

26 Plaintiffs’ assertions throughout the Complaint generally allege that Wells Fargo  
27 made a wealth of false statements to them regarding the status of their loan modification  
28 application (though they do not specify how those statements were false). Nothing in the

1 Deed of Trust or the alleged loan modification contract, however, guarantees Plaintiffs  
2 the right to receive truthful information about the loan modification process. Thus,  
3 Plaintiffs have failed to state a claim that Wells Fargo breached of the duty of good faith  
4 and fair dealing.

5 **IT IS THEREFORE ORDERED** that the Motion to Dismiss of Defendant Wells  
6 Fargo Bank, N.A. (Doc. 14) is **GRANTED** as to Counts 3, 4, 5, 6, 7, 8, 9, and 11 of the  
7 First Amended Complaint. However, the Motion to Dismiss is **DENIED** as to Counts 1,  
8 2, and 10, but only to the extent that those Counts rely on the allegations set forth in  
9 Paragraph 27 of the First Amended Complaint.

10 Dated this 25th day of June, 2013.

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14 G. Murray Snow  
15 United States District Judge  
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