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**United States District Court
Central District of California**

CYNTHIA CASTANEDA
Plaintiff,

v.
WELLS FARGO HOME MORTGAGE,
CAL-WESTERN CORPORANTION
WELLS FARGO BANK, N.A., and DOES
1 to 100, inclusive
Defendants.

Case № 2:15-cv-08870-ODW-KS

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS [9]**

I. INTRODUCTION

After falling behind on her mortgage payments, Plaintiff Cynthia Castaneda attempted to modify her loan with Defendant Wells Fargo Bank, N.A. (“Wells Fargo”)—the ultimate successor of World Savings Bank, FSB (“World Savings Bank”).¹ Castaneda alleges that Wells Fargo recorded a Notice of Trustee’s Sale prematurely; that it failed to provide her with a written denial of her third loan

¹ National Bankruptcy Services, LLC, (“NBS”) was named as a defendant but is a nominal party to this lawsuit. NBS replaced Cal-Western Reconveyance Corporation as the trustee in the deed of trust encumbering the party at issue. Plaintiff fails to state any facts that materially tie NBS to any alleged wrongdoing. (ECF No. 1, p. 6.)

1 modification application; that it added unfair and duplicative fees for default-related
2 services; and that it was negligent. Castaneda also makes a claim for accounting.
3 Wells Fargo removed the case and now moves to dismiss. For the reasons stated
4 below, the Court **GRANTS** Wells Fargo's Motion to Dismiss.

5 **II. FACTUAL BACKGROUND**

6 In September 2004, Castaneda obtained a \$223,300.00 loan from World
7 Savings Bank which was secured with a Deed of Trust against the real property at
8 8231 Quoit Street, Downey, California. (ECF No 10-1, Ex. A.)² World Savings Bank
9 was a federal savings bank, regulated at the time by the Office of Thrift Supervision.
10 (*Id.*, Ex. G.) After several mergers, Wells Fargo became the legal successor to World
11 Savings Bank. (ECF No. 9.)

12 Castaneda defaulted on her loan and on August 3, 2012, Wells Fargo recorded a
13 Notice of Default and Election to Sell Under Deed of Trust. (ECF No. 1-1, Ex. A
14 (Compl.) ¶¶ 37-38.) On or around September 19, 2013, Castaneda submitted a
15 complete application for a loan modification, and in December 2013 she received two
16 letters from Wells Fargo indicating that she did not qualify. (*Id.* ¶¶ 39-41.) Around
17 July 2014, she submitted a second complete application for a loan modification,
18 naming her husband as a contributor. (*Id.* ¶ 42.) On August 13, 2014, while
19 Castaneda's second complete loan application was under review, Wells Fargo
20 recorded a Notice of Trustee's Sale. (*Id.* ¶ 43.) In October 2014, Wells Fargo sent
21 Castaneda a written denial of her second loan modification application and indicated
22 that she did not qualify for any modification program with \$4,100 of monthly income.
23 (*Id.* ¶ 44.) Castaneda filed a timely appeal, which was denied. (*Id.*)

24 Castaneda soon retained counsel to assist her with the loan modification
25 process. Her counsel requested information from Wells Fargo relating to Castaneda's
26 loss mitigation options and transaction history. (*Id.* ¶ 46.) Wells Fargo responded

27
28 ² The Court **GRANTS** Defendant's Request for Judicial Notice to the extent that the Court uses the documents adduced in this Order. (ECF No. 10.)

1 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550
2 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual matter,
3 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
4 *Iqbal*, 556 U.S. 662, 678 (2009).

5 The determination whether a complaint satisfies the plausibility standard is a
6 “context-specific task that requires the reviewing court to draw on its judicial
7 experience and common sense.” *Id.* at 679. A court is generally limited to the
8 pleadings and must construe all “factual allegations set forth in the complaint . . . as
9 true and . . . in the light most favorable” to the plaintiff. *Lee v. City of L.A.*, 250 F.3d
10 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory allegations,
11 unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden*
12 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

13 As a general rule, a court should freely give leave to amend a complaint that has
14 been dismissed. Fed. R. Civ. P. 15(a). But a court may deny leave to amend when
15 “the court determines that the allegation of other facts consistent with the challenged
16 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*
17 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986); *see Lopez v. Smith*, 203 F.3d
18 1122, 1127 (9th Cir. 2000).

19 IV. DISCUSSION

20 Wells Fargo contends that Castaneda’s causes of action fail to state a claim on
21 their allegations. The Court will address each issue in turn.

22 A. HBOR Claims

23 Castaneda’s first cause of action asserts claims under the California
24 Homeowner Bill of Rights (“HBOR”). Specifically, she alleges that Wells Fargo
25 violated California Civil Code section 2923.6(c) while handling her second loan
26 modification application, section 2923.6(g) while handling her third loan modification
27 application, and, as a consequence, also violated sections 2923.6(d) and 2923.6(f).

28 a. *Cal. Civ. Code* § 2923.6(c)

1 Castaneda alleges that Wells Fargo violated California’s law against dual
2 tracking. The HBOR forbids a mortgage servicer from “dual tracking,” or
3 “record[ing] a notice of default or notice of sale . . . while the [borrower’s] complete
4 first lien loan modification is pending.” Cal. Civ. Code § 2923.6(c).

5 Her allegation of dual tracking under section 2923.6(c) occurred when: (1)
6 Castaneda submitted her second loan modification application to Wells Fargo in July
7 2014, and (2) Wells Fargo recorded a Notice of Trustee’s Sale on August 13, 2014
8 without providing Castaneda with a determination on her pending application.

9 Wells Fargo claims that Castaneda’s allegation of dual tracking is moot because
10 it subsequently provided her with written notice denying both her application and
11 appeal in October and November 2014, respectively, thus remedying the violations.
12 The Court agrees. If a mortgage servicer corrects and remedies a violation prior to the
13 recordation of a trustee’s deed upon sale, it is not liable for violating section
14 2923.6(c). Cal. Civ. Code § 2924.12(c). *See Jerviss v. Select Portfolio Servicing,*
15 *Inc.*, No. 2:15-cv-01904-MCE-KJN, 2015 WL 7572130, at *5 (N.D. Cal. Nov. 25,
16 2015) (holding a dual tracking claim was moot after defendant sent written denial of
17 plaintiff’s application before a sale was recorded); *Diamos v. Specialized Loan*
18 *Servicing LLC*, No. 13-CV-04997 NC, 2014 WL 3362259, at *5 (N.D. Cal. July 7,
19 2014) (holding that a cause of action for dual tracking is moot when defendant
20 rescinded notice of default); *Jent v. N. Trust Corp.*, No. 13-cv-01684 WBS, 2014 WL
21 172542, at *5 (E.D. Cal. Jan. 15, 2014) (holding that liability was precluded when
22 defendants had rescinded the notice of default and no trustee’s deed upon sale had
23 been recorded); *see also Pearson v. Green Tree Servicing, LLC*, No. 14-CV-04524-
24 JSC, 2015 WL 632457, at *2 (N.D. Cal. Feb. 13, 2015) (explaining that if the *servicer*
25 takes action to correct the HBOR violation before proceeding to foreclosure, no
26 liability results) (emphasis added).

27 Here, Castaneda does not allege that a trustee’s deed upon sale has been
28 recorded. Furthermore, the Complaint shows that Wells Fargo cured the alleged

1 violation of section 2923.6(c) by delivering a written denial to Castaneda’s second
2 loan application in October 2014. (Compl. ¶ 44.) Accepting Castaneda’s allegations
3 as true, Wells Fargo cured any purported violation of section 2923.6(c) by complying
4 with 2924.12(c). As such, the Court **GRANTS** Defendant’s Motion as to section
5 2923.6(c).

6 *b. Cal. Civ. Code § 2923.6(g)*

7 Castaneda next alleges that Wells Fargo violated section 2923.6(g), which
8 requires a mortgage servicer to evaluate applications from borrowers who have
9 already been evaluated for a first lien loan modification if “there has been a material
10 change in the circumstances since the date of the borrower’s previous application . . .
11 .” Cal. Civ. Code § 2923.6(g). Castaneda claims that her husband’s monthly income
12 at the time of her third loan modification application in April 2015 was \$5,200—a
13 \$1,100 increase from her second application in July 2014—and that Wells Fargo
14 failed to evaluate her application despite this material change. (Compl. ¶¶ 65, 66.)

15 Wells Fargo argues that Plaintiff’s second application included her husband’s
16 income; therefore it had already considered the change in circumstance Castaneda
17 argues is relevant here. (ECF No. 9, p. 5.) Additionally, Wells Fargo argues that
18 Castaneda has not provided the requisite documentation for her third application
19 showing a material change in circumstance.³ (*Id.* at p. 14.)

20 Indeed, Castaneda must do more than plausibly plead a material change in
21 circumstance to state a claim under section 2923.6(g). Castaneda must allege that she
22 provided documentation of her updated circumstances to Wells Fargo. *Salazar v. U.S.*
23 *Bank Nat. Ass’n*, No. ED CV 14-514-GHK (DTBx), 2015 WL 1542908, at *4 (C.D.
24 Cal. Apr. 6, 2015). Construing the facts in Plaintiff’s favor as is required at this stage,
25 the Court finds that Castaneda has not met her burden. In her Complaint, Castaneda
26 alleges that she faxed a loan modification application noting that her husband was

27 ³ Plaintiff provides documentation for a fourth loan modification application filed in October 2015,
28 but did not provide documentation for her third loan modification application. (ECF No. 11, Ex. A,
pp. 14-64.)

1 working more overtime, resulting in the \$1,100 increase in income from the second
2 loan modification application. (Compl. ¶ 65.) “[A]lthough the precise nature of the
3 documentation required under this code is not clear, the plaintiff must do more than
4 submit a new loan modification with different financial information.” *Saber v.*
5 *JPMorgan Chase Bank, N.A.*, 2014 WL 255700, at *2 (C.D. Cal. Jan. 23, 2014); *see*
6 *also Salazar*, 2015 WL 1542908, at *4. To find otherwise would be to defeat the
7 intent of subsection (g), which is to “relieve mortgage servicers from evaluating
8 multiple loan applications submitted for the purpose of delay.” *Winterbower v. Wells*
9 *Fargo Bank, N.A.*, 2013 WL 1232997, at *3 (C.D. Cal. Mar. 27, 2013).

10 As such, Castaneda must allege what, if any, proper documentation she
11 submitted to Wells Fargo to support her material change in circumstance for the third
12 loan modification application. *See Winterbower*, 2013 WL 1232997 at *3
13 (documenting and submitting a material change in circumstance “means more than
14 simply stating one’s [income] has increased and then providing two numbers”). The
15 Court **GRANTS** Defendant’s motion to dismiss Plaintiff’s 2923.6(g) claim with leave
16 to amend.

17 *c. Cal. Civ. Code §§ 2923.6(d), 2923.6(f)*

18 Castaneda alleges other HBOR violations stemming from Wells Fargo’s
19 decision not to review her third loan modification application. She alleges a violation
20 of section 2923.6(f), which requires a servicer to provide written notice to the
21 borrower that includes the reason for denial, and a violation of 2923.6(d), which
22 grants the borrower thirty days after the written denial to file an appeal. Cal. Civ.
23 Code §§ 2923.6(d), 2923.6(f).

24 These claims are premised on the assumption that Wells Fargo had any
25 obligation to review Castaneda’s third application under section 2923.6(g). Because
26 Castaneda has not adequately stated a claim for relief under 2923.6(g), the Court
27 **GRANTS** Defendant’s Motion to Dismiss these derivative claims with leave to
28 amend.

1 **B. Negligence**

2 Castaneda’s next cause of action is for negligence. Wells Fargo contends that
3 Castaneda failed to state a claim for negligence because lenders do not generally owe
4 their borrowers a duty of care.

5 Under California law, the “existence of a duty of care owed by a defendant to a
6 plaintiff is a prerequisite to establishing a claim for negligence.” *Nymark v. Heart*
7 *Fed. Sav. & Loan Ass’n*, 231 Cal. App. 3d 1089, 1095 (1991). Generally, a financial
8 institution does not owe its borrower a duty of care “when the institution’s
9 involvement in the loan transaction does not exceed the scope of its conventional role
10 as a mere lender of money.” *Id.* at 1096. A lender exceeds its “conventional role” as
11 a money lender when it “actively participates” in the financed enterprise “beyond the
12 domain of the usual money lender.” *Wagner v. Benson*, 101 Cal. App. 3d 27, 35
13 (1980) (quoting *Connor v. Great W. Sav. & Loan Ass’n*, 69 Cal. 2d 850, 864 (1968)).

14 Castaneda does not allege in her Complaint any facts suggesting that Wells
15 Fargo exceeded the normal role of a lender during the default/foreclosure process; she
16 simply reiterates that it failed to comply with the procedures set forth in section
17 2923.6, as stated above. (Compl. ¶¶ 75–77.)

18 While Castaneda’s allegations under section 2923.6 may make out statutory
19 violations if sufficiently pled, they still do not establish that Wells Fargo “actively
20 participate[d]” in Castaneda’s loan “beyond the domain of the usual money lender.”
21 *See Wagner*, 101 Cal. App. 3d at 35. Rather, these actions—or inactions such as they
22 are—fall squarely within the class of conduct a lender might take during the default
23 process. The Court thus **GRANTS** Defendant’s Motion on this claim.

24 **C. Unfair Competition Law**

25 Castaneda next brings a claim against Wells Fargo for violating the California
26 Unfair Competition Law (“UCL”). The UCL prohibits “any unlawful, unfair or
27 fraudulent business act or practice and unfair, deceptive, untrue or misleading
28 advertising.” Cal. Bus. & Prof. Code § 17200. Wells Fargo contends that Castaneda

1 both lacks standing to bring a UCL claim and fails to adequately plead allegations of
2 unlawful, fraudulent, or unfair conduct. (ECF No. 9, pp. 19–20.)

3 1. *UCL standing*

4 To have standing to sue under the UCL, a plaintiff must have “suffered injury in
5 fact and [have] lost money or property as a result of the unfair competition.” *Id.* §
6 17204. The California Supreme Court held that to satisfy this requirement, the
7 plaintiff must “(1) establish a loss or deprivation of money or property sufficient to
8 qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury
9 was the result of, i.e., *caused by*, the unfair business practice or false advertising that
10 is the gravamen of the claim.” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322
11 (2011).

12 Wells Fargo argues that Castaneda has not alleged any injury or a loss of money
13 or property that was caused by its conduct because the foreclosure sale has not
14 occurred yet. (ECF No. 9, p. 19.) Instead, it contends that any of Castaneda’s injuries
15 would be due to her *own* failure to pay her mortgage as she promised. *Id.*

16 But Castaneda does allege that she suffered economic injury as a result of Wells
17 Fargo’s conduct, namely the loss of home equity. (Compl. ¶ 102.) Castaneda asserts
18 that Wells Fargo’s decision to charge marked up and excess fees caused her to lose
19 title to, and interest in, her home. (*Id.* ¶ 103.) These economic detriments easily
20 satisfy the California Supreme Court’s interpretation of section 17204. *See Kwikset*,
21 51 Cal. 4th at 323 (interpreting the phrase “lost money or property”).

22 The Court therefore finds that the Castaneda has standing to sue under the UCL.

23 2. “*Unlawful*” *conduct*

24 UCL’s “unlawful” prong “borrows” violations of other laws such that a
25 “defendant cannot be liable under § 17200 for committing unlawful business practices
26 without having violated another law.” *Ingels v. Westwood One Broad. Servs., Inc.*,
27 129 Cal. App. 4th 1050, 1060 (2005) (internal quotation marks omitted); *see also*
28 *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992).

1 Wells Fargo attacks Castaneda’s allegations that it violated various provisions
2 of section 2923.6 or was otherwise unlawful in its dealings with Plaintiff.

3 *a. 18 U.S.C. §§ 1341, 1343, 1962*

4 Castaneda alleges, rather vaguely, that Wells Fargo’s decision to omit material
5 facts with respect to her third loan modification application constitutes “unlawful”
6 conduct because it violates 18 U.S.C. section 1341 (mail fraud), section 1343 (wire
7 fraud), and section 1962 (criminal racketeering). Even after sifting through the
8 Complaint with a fine-toothed comb, the Court cannot find enough facts to support
9 any cognizable violation under the aforementioned sections of Title 18.

10 *b. Cal. Civ. Code § 2923.6*

11 Further, because the Court has already found that Castaneda did not adequately
12 plead a violation of the HBOR, any alleged violations under section 2923.6 cannot
13 serve as a predicate for a UCL claim. *See Martinez v. Wells Fargo Home Mortg., Inc.*,
14 598 F.3d 549, 558 (9th Cir. 2010).

15 *3. “Fraudulent” conduct*

16 A “fraudulent” business act or practice is one which is likely to deceive
17 members of the public. *Weinstat v. Dentsply Intern., Inc.*, 180 Cal. App. 4th 1213,
18 1223 (2010). UCL claims premised on fraudulent conduct trigger the heightened
19 pleading standard under Rule 9(b) of the Federal Rules of Civil Procedure. *Kearns v.*
20 *Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

21 Here, the Complaint fails to meet the heightened pleading standard required for
22 fraud claims because Castaneda only vaguely alleges how members of the public are
23 likely to be deceived by Wells Fargo’s actions. She alleges that Wells Fargo instituted
24 improper or premature foreclosure proceedings to generate fees for default-related
25 services, all while concealing the true character, quality and nature of the fees—or
26 simply put, the fees themselves were marked-up and unwarranted. (*E.g.*, Compl. ¶¶
27 94, 99.) She jumps to the conclusion that these practices are likely to deceive the
28

1 public. However, these allegations are insufficient to meet the heightened pleading
2 standard required to plead a fraudulent business act.

3 4. “Unfair” conduct

4 In interpreting the UCL’s “unfair” term, the California Supreme Court held that
5 “the word ‘unfair’ in that section means conduct that threatens an incipient violation
6 of an antitrust law, or violates the policy or spirit of one of those laws because its
7 effects are comparable to or the same as a violation of the law, or otherwise
8 significantly threatens or harms competition.” *Cel-Tech Commc’ns, Inc. v. L.A.*
9 *Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).

10 Castaneda has not alleged how Defendant’s actions rose anywhere near the
11 mandatory level of anticompetitive activity.

12 Accordingly, the Court **GRANTS** Defendant’s Motion as to the UCL claim
13 with leave to amend the unlawful prong only.

14 **D. Implied Covenant of Good Faith and Fair Dealing**

15 Castaneda alleges that Wells Fargo breached the implied covenant of good faith
16 and fair dealing by denying her request for a loan modification and by imposing
17 unnecessary and marked up fees in conjunction with its default-related services. This
18 allegation suggests that Castaneda’s loan agreement contained an implicit promise that
19 Wells Fargo would assist her as she attempts to obtain a loan modification or pursue
20 other loss mitigation alternatives. Castaneda tried with the section 2923.6 claim to
21 persuade the Court that Wells Fargo is legally obligated to accept her request for a
22 loan modification, and with the UCL claim to argue certain fees were imposed
23 incorrectly and inconsistently onto her. The implied covenant approach is different in
24 form, but not in substance.

25 The covenant of good faith and fair dealing is implied to protect the express
26 covenants of a contract, not a general public policy interest indirectly tied to the
27 contract’s purpose. *Racine & Laramie, Ltd. v. Cal. Dep’t of Parks and Recreation*, 11
28 Cal. App. 4th 1026, 1031 (1992). The covenant is implied as a supplement to the

1 express contractual covenants “to prevent a contracting party from engaging in
2 conduct” that does not technically breach the express covenants, but otherwise
3 “frustrates the other party’s rights to the benefits of the contract.” *Id.* at 1028.

4 The obvious purpose of the mortgage loan is to memorialize the terms on which
5 Castaneda will pay back the money borrowed. There is no reason to believe that
6 somewhere in the agreement is an implicit promise to permit Plaintiff to change the
7 terms of repayment due to her default. Such an implied promise would directly
8 undermine, not protect, the contract’s express terms. Regarding the fees for Well
9 Fargo’s default-related services, Castaneda has failed to identify how they were
10 improperly assessed, or how the charges themselves undermine, rather than protect, the
11 terms of the loan agreement. Therefore, the Court **GRANTS** Wells Fargo’s Motion as
12 to this cause of action.

13 **E. Accounting**

14 Lastly, Castaneda makes a demand for accounting based on the fees alleged to
15 be improper and unnecessary. For her to be entitled to accounting, Castaneda must
16 demonstrate a relationship between the plaintiff and defendant exists that requires an
17 accounting, and that some balance is due to the plaintiff that can only be ascertained
18 by an accounting. *See Teselle v. McLaughlin*, 173 Cal. App. 4th 156, 179 (2009).

19 Other than merely concluding that Wells Fargo owes her a duty, Castaneda has
20 not demonstrated why that is the case. As stated once before, a mortgage lender or
21 trustee under a deed of trust generally does not owe a fiduciary duty to the borrower.
22 *See Nymark*, 231 Cal. App. 3d 1089, 1093 n. 1 (1991). Castaneda claims, however,
23 that a relationship for accounting exists because Wells Fargo collected money that it
24 actually did not have forthcoming. This notwithstanding, Castaneda has failed to
25 plead sufficient facts regarding these fees to survive a motion to dismiss. *See*
26 *Williams v. Wells Fargo Bank, NA*, No. EDCV 13-02075 JVS (DTBx), 2014 WL
27 1568857, *9 (C.D. Cal. Jan. 27, 2014) (“The [c]omplaint is devoid of any factual
28 details regarding when these charges were assessed, the vendors involved, or why


1 [Plaintiff] . . . concluded that these charges were excessive.”). Thus, the Court
2 **GRANTS** Wells Fargo’s Motion on the demand for accounting.

3 **V. CONCLUSION**

4 For the reasons discussed above, the Court **GRANTS** Defendant’s Motion to
5 Dismiss. (ECF No. 9.) Castaneda may amend her Complaint within 14 days with
6 respect to the HBOR claims and the UCL’s unlawful prong only.

7
8 **IT IS SO ORDERED.**

9 February 26, 2016

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12 _____
13 **OTIS D. WRIGHT, II**
14 **UNITED STATES DISTRICT JUDGE**