



1 BACKGROUND

2 Plaintiff Julia Gerard commenced this action on May 27, 2014, by filing a complaint in  
3 the El Dorado County Superior Court alleging causes of action for violation of the California  
4 Homeowner Bill of Rights, promissory estoppel, intentional misrepresentation, “declaratory  
5 relief” and wrongful foreclosure. (Dkt. No. 2-1 at 1.) Defendant Well Fargo Bank, N.A. (“Wells  
6 Fargo”) removed the matter to this court on July 7, 2014, based on diversity jurisdiction. (Dkt.  
7 No. 1.)

8 On July 28, 2014, defendant Wells Fargo filed a motion to dismiss pursuant to Rule  
9 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. No. 5.) The motion, however, was  
10 improperly noticed for hearing before the assigned District Judge. (Dkt. No. 7.) On July 29,  
11 2014, defendant re-noticed the motion to dismiss for hearing before the undersigned. (Dkt. No.  
12 10.) On August 11, 2014, plaintiff filed an opposition to defendant’s motion to dismiss, (Dkt. No.  
13 11), and defendant filed a reply on August 25, 2014. (Dkt. No. 12.)

14 STANDARDS

15 I. Legal Standards Applicable to Motions to Dismiss Pursuant to Rule 12(b)(6)

16 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
17 sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578, 581 (9th Cir.  
18 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
19 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901  
20 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to  
21 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A  
22 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
23 the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.  
24 Iqbal, 556 U.S. 662, 678 (2009).

25 In determining whether a complaint states a claim on which relief may be granted, the  
26 court accepts as true the allegations in the complaint and construes the allegations in the light  
27 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.  
28 United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less

1 stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519,  
2 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the  
3 form of factual allegations. United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
4 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than  
5 an unadorned, the defendant-unlawfully-harmed-me accusation.” Iqbal, 556 U.S. at 678. A  
6 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
7 elements of a cause of action.” Twombly, 550 U.S. at 555. See also Iqbal, 556 U.S. at 676  
8 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
9 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
10 facts which it has not alleged or that the defendants have violated the . . . laws in ways that have  
11 not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,  
12 459 U.S. 519, 526 (1983).

13 In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted  
14 to consider material which is properly submitted as part of the complaint, documents that are not  
15 physically attached to the complaint if their authenticity is not contested and the plaintiff’s  
16 complaint necessarily relies on them, and matters of public record. Lee v. City of Los Angeles,  
17 250 F.3d 668, 688-89 (9th Cir. 2001).

## 18 ANALYSIS

### 19 I. California’s Homeowner Bill of Rights

20 The complaint’s first cause of action alleges that the defendant’s actions violated  
21 California’s Homeowner Bill of Rights. (Compl. (Dkt. No. 2-1) at 10.) The Homeowner Bill of  
22 Rights, (“HBOR”) which took effect January 1, 2013, reformed aspects of California’s non-  
23 judicial foreclosure process by amending the California Civil Code to prohibit deceptive and  
24 abusive home foreclosure practices. See Flores v. Nationstar Mortgage LLC, No. CV 13-3898-  
25 PLA, 2014 WL 304766 at \*3 (C.D. Cal. Jan. 6, 2014).

26 However, HBOR is only applicable to owner-occupied homes. See Corral v. Select  
27 Portfolio Servicing, Inc., No. 14-cv-2251-MEJ, 2014 WL 3900023, at \*5 (N.D. Cal. Aug. 7,  
28 2014) (“Section 2924.15 of the HBOR limits its application to owner-occupied homes, meaning

1 that the home is ‘the principal residence of the borrower and is security for a loan made for  
2 personal, family, or household purposes.’”); Penermon v. Wells Fargo Bank, N.A., --- F. Supp.2d  
3 ---, ---, Case No. 14-cv-0065-KAW, 2014 WL 2754596, at \*7 (N.D. Cal. June 11, 2014)  
4 (“HBOR, however, is limited in that it only applies to foreclosures of first liens on owner-  
5 occupied, one-to-four unit properties.”); Masson v. Selene Finance LP, No. 12-05335 SC, 2013  
6 WL 271256, at \*3 (N.D. Cal. Jan. 24, 2013) (dismissing HBOR claim in part for failure to meet  
7 the owner-occupied requirement).

8 Here, plaintiff alleges in her complaint, (Compl. (Dkt. No. 2-1) at 5), and in her opposition  
9 to defendant’s motion to dismiss, (Pl.’s Opp.’n (Dkt. No. 11) at 10), that the property at issue is  
10 not owner-occupied but is instead a rental property.<sup>3</sup> The complaint also alleges that as a “result  
11 of Defendants’ conduct” plaintiff has “suffered the loss of the rents and profits of the Subject  
12 Property.” (Compl. (Dkt. No. 2-1) at 13.)

13 Accordingly, defendant’s motion to dismiss should be granted as to the complaint’s  
14 HBOR claim.

## 15 II. Promissory Estoppel

16 The complaint’s first cause of action also asserts, in the alternative, a claim for promissory  
17 estoppel. (Compl. (Dkt. No. 2-1) at 10.) “‘The elements of promissory estoppel are: (1) a clear  
18 promise, (2) reliance, (3) substantial detriment, and (4) damages measured by the extent of the  
19 obligation assumed and not performed.’” Quinteros v. Aurora Loan Servs., 740 F.Supp.2d 1163,  
20 1171 (E.D. Cal. 2010) (quoting Poway Royal Mobilehome Owners Ass’n v. City of Poway, 149  
21 Cal. App.4th 1460, 1471 (2007)).

22 Here, plaintiff’s complaint fails to state the elements of a promissory estoppel claim  
23 plainly or succinctly. Moreover, the allegations found in the complaint are devoid of any alleged  
24 clear promise made by defendant Wells Fargo that caused plaintiff damages. In this regard, the  
25 complaint alleges as follows. Plaintiff defaulted on the loan sometime in 2013, and “began  
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27 <sup>3</sup> Defendant has also requested that the court take judicial notice of the deed of trust which  
28 indicates that the property was purchased by way of a non-owner occupied loan. (RJN (Dkt. No.  
6-1) at 15.)

1 negotiating a modification of the loan” with the defendant. (Compl. (Dkt. No. 2-1) at 5.)  
2 Although the defendant “had not made a written determination,” the defendant did inform  
3 plaintiff “that she may qualify for a modification on her rental property.” (Id.) (emphasis added).  
4 On May 22, 2014, plaintiff made a request to “reinstate her mortgage loan account” and was  
5 informed that “she could come into the Wells Fargo Bank” branch. (Id. at 4.) On May 23, 2014,  
6 plaintiff “went to the West Hollywood Wells Fargo branch, on Santa Monica Blvd . . . to see  
7 which account Plaintiff was going to pull the funds from necessary to reinstate the mortgage  
8 loan.” (Id. at 3.) Plaintiff was informed by a “Wells Fargo employee named Ivan,” that “a  
9 bankruptcy [was] showing up connected to the property,” and that plaintiff could not “pay the  
10 arrearage” or reinstate the mortgage “until the bankruptcy stay is lifted.” (Id. at 3-4.) “Plaintiff  
11 offered the full amount necessary to reinstate her mortgage loan” but the defendant refused to  
12 accept plaintiff’s tender.<sup>4</sup> (Id. at 4.)

13 However, even accepting these allegations as true, plaintiff has failed to allege that the  
14 defendant made a clear promise to plaintiff that caused her any damage. Accordingly,  
15 defendant’s motion to dismiss should be granted as to the complaint’s promissory estoppel claim.

### 16 III. Intentional Misrepresentation

17 The complaint’s second cause of action asserts a claim for intentional misrepresentation.  
18 In this regard, the complaint alleges that on May 22, 2013, the defendant “made a promise . . . to  
19 induce Plaintiff to come into the Wells Fargo Branch in person for the specific purpose of  
20 tendering . . . the entire amount necessary to reinstate Plaintiff’s mortgage loan . . . .” (Compl.  
21 (Dkt. No. 2-1) at 13.) Plaintiff did appear at the Wells Fargo Branch but the defendant refused to  
22 accept plaintiff’s payment. (Id. at 14.) According to the complaint, “[w]hen defendant . . . made  
23 these representations that [defendant] would accept Plaintiff’s proper tender of her funds  
24 necessary to cure the mortgage default and reinstate Plaintiff’s loan in good standing [defendant]  
25 knew them to be false . . . .” (Id.)

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26 <sup>4</sup> Although not relevant to resolution of the pending motion to dismiss, the undersigned notes that  
27 at the October 1, 2014 telephonic Status Conference counsel for defendant stated that plaintiff  
28 was welcome to reinstate her loan. Plaintiff responded that she would be willing to do so if at the  
same time there was an agreed-upon modification of her the subject loan.

1           “Under California law, the elements for an intentional-misrepresentation, or actual-fraud,  
2 claim are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce  
3 reliance; (4) justifiable reliance; and (5) resulting damage.” UMG Recording, Inc. v. Bertelsmann  
4 AG, 479 F.3d 1078, 1096 (9th Cir. 2007). Intentional misrepresentation is a species of fraud and  
5 therefore subject to the Rule 9(b)’s heightened pleading requirement. See Neilson v. Union Bank  
6 of Cal., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003). This means the plaintiff must allege the  
7 “who, what, when, where and how” supporting the intentional misrepresentation claim. Vess v.  
8 Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003). “Moreover, merely attributing a  
9 misrepresentation to a corporate entity is inadequate; a specific person must be named, or at least  
10 identified.” Celebrity Chefs Tour, LLC v. Macy’s, Inc., 16 F.Supp.3d 1123, 1134 (S.D. Cal.  
11 2014).

12           Here, the complaint fails to allege the specific person who made the misrepresentation to  
13 plaintiff and, therefore, the complaint’s intentional misrepresentation claim fails to satisfy Rule  
14 9(b). Moreover, the allegations found in the complaint fail to allege reliance and damages  
15 stemming from a fraudulent misrepresentation.

16           In this regard, the complaint alleges that the defendant knowingly misrepresented to  
17 plaintiff that if she would appear in person at a Wells Fargo Branch the defendant would accept  
18 her tender of payment. Ignoring that the complaint also alleges that the reason the defendant  
19 could not accept plaintiff’s payment was because there was “a bankruptcy showing up connected  
20 to the property,” (Compl (Dkt. No. 2-1) at 3), and accepting as true the allegations that the  
21 defendant informed plaintiff that if she came into a Wells Fargo Branch that the defendant would  
22 accept her tender and that the defendant knew that statement to be false when the statement was  
23 made, plaintiff has not alleged that she relied on that misrepresentation to her detriment. Thus,  
24 it cannot be said that this the allegedly false misrepresentation altered plaintiff’s legal position to  
25 the defendant or her willingness to tender the money to the defendant. See Alliance Mortgage  
26 Co. v. Rothwell, 10 Cal.4th 1226, 1239 (Cal. 1995) (“Reliance exists when the misrepresentation  
27 or nondisclosure was an immediate cause of the plaintiff’s conduct which altered his or her legal  
28 relations, and when without such misrepresentation or nondisclosure he or she would not, in all

1 reasonable probability, have entered into the contract or other transaction.”).

2 Accordingly, defendant’s motion to dismiss should be granted as to the complaint’s  
3 intentional misrepresentation claim.

4 IV. Declaratory Relief

5 The complaint’s third cause of action asserts a purported claim for declaratory relief.  
6 (Compl. (Dkt. No. 2-1) at 16.) However, declaratory relief is not an independent claim but is  
7 instead a form of relief. See Lane v. Vitek Real Estate Industries Group, 713 F.Supp.2d 1092,  
8 1104 (E.D. Cal. 2010).

9 Accordingly, defendant’s motion to dismiss should be granted as to the complaint’s claim  
10 for declaratory relief.

11 V. Wrongful Foreclosure

12 The complaint’s final claim for relief attempts to assert a claim for wrongful foreclosure.  
13 (Compl. (Dkt. No. 2-1) at 17.) The complaint, however, does not allege that the property at issue  
14 has been sold.<sup>5</sup> “A lender or foreclosure trustee may only be liable to the mortgagor or trustor for  
15 wrongful foreclosure if the property was fraudulently or illegally sold under a power of sale  
16 contained in a mortgage or deed of trust.” Rosenfeld v. JPMorgan Chase Bank, N.A., 732  
17 F.Supp.2d 952, 961 (N.D. Cal. 2010). See also Pugh v. JPMorgan Chase Bank, N.A., No. 2:13-  
18 cv-1141 MCE DAD, 2013 WL 5739147, at \*3 (E.D. Cal. Oct. 22, 2013) (“Plaintiffs do not allege  
19 their property has already been foreclosed. Accordingly, Plaintiffs’ wrongful foreclosure claim  
20 must be dismissed.”); Ramirez v. Kings Mortg. Services, Inc., No. 1:12-cv-1109 AWI SKO, 2012  
21 WL 5464359, at \*6 (E.D. Cal. Nov. 8, 2012) (“Unless the foreclosure sale has already taken  
22 place, Plaintiff’s claim for wrongful foreclosure is premature even to the extent there are,  
23 theoretically, ground upon which the claim could be predicated.”); Pey v. Wachovia Mortg.  
24 Corp., No. 11-2922 SC, 2011 WL 5573894, at \*8 (N.D. Cal. Nov. 15, 2011) (“A claim for

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26 <sup>5</sup> In her opposition to defendant’s motion to dismiss, plaintiff stated that after she filed her  
27 complaint, she received a notice that the defendant had “agreed to re-review [her] loan  
28 modification in connection with the property” at issue in this action. (Pl.’s Opp.’n (Dkt. No. 11)  
at 3.) Moreover, at the October 1, 2014, telephonic Status Conference plaintiff stated that the  
defendant was at that time evaluating plaintiff for a loan modification.

1 wrongful foreclosure requires the occurrence of a foreclosure sale.”); Vega v. JPMorgan Chase  
2 Bank, N.A., 654 F.Supp.2d 1104, 1113 (E.D. Cal. 2009) (“a purported wrongful foreclosure claim  
3 is premature given there has been no foreclosure of the property”).

4 Accordingly, defendant’s motion to dismiss should be granted as to the complaint’s  
5 wrongful foreclosure claim.

6 LEAVE TO AMEND

7 For the reasons explained above, defendant’s motion to dismiss should be granted and  
8 plaintiff’s complaint dismissed for failure to state a claim upon which relief may be granted. The  
9 court has carefully considered whether plaintiff may amend her complaint to state a claim upon  
10 which relief can be granted. “Valid reasons for denying leave to amend include undue delay, bad  
11 faith, prejudice, and futility.” California Architectural Bldg. Prod. v. Franciscan Ceramics, 818  
12 F.2d 1466, 1472 (9th Cir. 1988). See also Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv.  
13 Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to amend shall be freely  
14 given, the court does not have to allow futile amendments).

15 Here, in light of the allegations found in the complaint and the legal principles set forth  
16 above, the undersigned finds that granting leave to amend would be futile in this case.<sup>6</sup> See  
17 Chaset v. Fleer/Skybox Int’l, 300 F.3d 1083, 1088 (9th Cir. 2002) (there is no need to prolong the  
18 litigation by permitting further amendment where the “basic flaw” in the underlying facts as  
19 alleged cannot be cured by amendment); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th  
20 Cir. 2002) (“Because any amendment would be futile, there was no need to prolong the litigation  
21 by permitting further amendment.”).

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25 <sup>6</sup> Of the complaint’s asserted causes of action, it appears that under the facts alleged therein the  
26 only claim that could, under any circumstances, be amended to state a cognizable claim is the  
27 claim for wrongful foreclosure. Nothing before the court, however, suggests that the property at  
28 issue has been sold, in which case a wrongful foreclosure claim would fail on its face. If that is  
no longer the case and the property has been sold, plaintiff should address that fact along with any  
offer to tender on her part in objections she may elect to file to these findings and  
recommendations.



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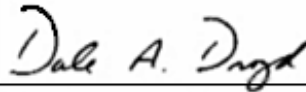
CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendant's July 28, 2014 motion to dismiss (Dkt. No. 5), re-noticed for hearing before the undersigned (Dkt. No. 10) be granted;
2. Plaintiff's complaint (Dkt. No. 2-1) be dismissed without leave to amend; and
3. This action be closed.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, plaintiff may file written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: January 23, 2015



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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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