

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TROY L. McNEIL and TRICIA A. McNEIL,	)	Case No. 13-5519 SC
	)	
Plaintiffs,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART DEFENDANTS'
	)	<u>MOTION TO DISMISS</u>
v.	)	
	)	
WELLS FARGO BANK, N.A., U.S. BANK,	)	
N.A., CAL-WESTERN RECONVEYANCE,	)	
LLC, and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

---

**I. INTRODUCTION**

Now before the Court is Defendants Wells Fargo Bank, N.A. ("Wells Fargo") and U.S. Bank, N.A.'s ("U.S. Bank") (collectively, "Defendants") motion, ECF No. 26 ("Mot."), to dismiss Plaintiffs Troy and Tricia McNeil's first amended complaint, ECF No. 24 ("FAC"). Plaintiffs oppose the motion, ECF No. 29 ("Opp'n"), and Defendants have declined to file a reply brief. The Court finds the motion suitable for determination without oral argument per

1 Civil Local Rule 7-1(b). For the reasons set forth below, the  
2 Motion is GRANTED in part and DENIED in part.

3

4 **II. BACKGROUND**

5 This is a mortgage foreclosure dispute. Plaintiffs are  
6 residents of the property at issue in this case, which is located  
7 in Livermore, California (the "subject property"). FAC ¶¶ 1, 17.  
8 Plaintiffs borrowed \$536,000 from Wells Fargo in 2004. The loan  
9 was secured by a deed of trust on the subject property. FAC Ex. A.  
10 Wells Fargo subsequently transferred its beneficial interest in the  
11 deed of trust to U.S. Bank. FAC Ex. C. In December 2011, a notice  
12 of default was recorded against the subject property, indicating  
13 that Plaintiffs were \$24,848.53 in arrears. FAC Ex. B. In March  
14 2012, the trustee on the deed of trust recorded a notice of  
15 trustee's sale, scheduling the sale for April 4, 2012. FAC Ex. D.  
16 The notice indicates that the total unpaid balance on the loan was  
17 \$522,493.45. Id.

18 In May 2012, Plaintiffs entered into a loan modification  
19 agreement with Wells Fargo. FAC ¶ 28. The modification agreement  
20 created a secondary principal balance of \$34,212.59, on which no  
21 interest accrues, and dropped the interest rate on the remaining  
22 balance to 2.5 percent for six years. ECF No. 14 ("RJN") Ex. 6 ¶¶  
23 1-2. Pursuant to the agreement, Plaintiffs promised to make  
24 monthly principal and interest payments of \$2,424.62 starting on  
25 July 1, 2012. Id. ¶ 2. Plaintiffs also promised to make monthly  
26 escrow deposits "as defined in the Note." Id. The agreement  
27 states that escrow deposits may be subject to change in the future.  
28 Id.

1 Plaintiffs allege that the monthly escrow charges initially  
2 amounted to \$800, bringing Plaintiffs' total monthly payments to  
3 \$3,224.62. FAC ¶ 30. Defendants subsequently assessed Plaintiffs  
4 for additional charges, increasing the total monthly payments to  
5 \$4,400. Id. ¶ 31.

6 On February 4, 2013, the substituted trustee on the deed of  
7 trust recorded another notice of default against the subject  
8 property, indicating that Plaintiffs were \$29,644.95 in arrears.  
9 FAC Ex. F. Another notice of trustee's sale was recorded on May 6,  
10 2013, setting the sale date for May 28, 2013. Plaintiffs allege  
11 that the foreclosure was the direct result of the unauthorized  
12 charges assessed by Defendants after they executed the first loan  
13 modification agreement. FAC ¶ 39.

14 In June 2013, Wells Fargo agreed to a loan modification  
15 review. FAC ¶ 42. However, Wells Fargo subsequently declined to  
16 conduct the review because "Plaintiffs had exceeded the number of  
17 modifications allowed by the investor." FAC ¶ 43. According to  
18 Wells Fargo, the "investor" lacked contractual authority to modify  
19 the loan, and Plaintiffs had exceeded the number of modifications  
20 allowed by the investor. Id. Plaintiffs contend that no  
21 modification was "properly given," and therefore Wells Fargo's  
22 refusal to conduct a modification review was improper. Id. Wells  
23 Fargo subsequently denied Plaintiffs' appeal of the denial of the  
24 modification request. Id. ¶ 45.

25 The trustee's sale was apparently delayed during the  
26 application process for the second loan modification, and a new  
27 notice of trustee's sale was later recorded, setting the sale date  
28

1 for October 16, 2013. RJN Ex. 11. According to Defendants, the  
2 trustee's sale was postponed yet again to April 14, 2014.

3 Based on these facts, Plaintiffs asserted seven causes of  
4 action related to Defendants' alleged misrepresentations during the  
5 loan issuance and foreclosure processes. On July 1, 2014, the  
6 Court granted in part and denied in part Defendants' motion to  
7 dismiss for failure to state a claim and granted Plaintiffs leave  
8 to amend their complaint to rectify certain defects. ECF No. 23  
9 ("Prior Order"). Plaintiffs filed their FAC on July 31, asserting  
10 claims for (1) intentional misrepresentation, (2) negligent  
11 misrepresentation, (3) promissory estoppel, (4) violation of  
12 California Civil Code Section 2923.55, (5) breach of the implied  
13 covenant of good faith, (6) wrongful foreclosure, (6) cancellation  
14 of instruments, and (7) unfair and deceptive acts and practices.

15 Defendants now move to dismiss the FAC pursuant to Federal  
16 Rule of Civil Procedure 12(b)(6).

17  
18 **III. LEGAL STANDARD**

19 A motion to dismiss under Federal Rule of Civil Procedure  
20 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
21 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
22 on the lack of a cognizable legal theory or the absence of  
23 sufficient facts alleged under a cognizable legal theory."  
24 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
25 1988). "When there are well-pleaded factual allegations, a court  
26 should assume their veracity and then determine whether they  
27 plausibly give rise to an entitlement to relief." Ashcroft v.  
28 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court

1 must accept as true all of the allegations contained in a complaint  
2 is inapplicable to legal conclusions. Threadbare recitals of the  
3 elements of a cause of action, supported by mere conclusory  
4 statements, do not suffice." Id. (citing Bell Atl. Corp. v.  
5 Twombly, 550 U.S. 544, 555 (2007)).

6 Claims sounding in fraud are subject to the heightened  
7 pleading requirements of Federal Rule of Civil Procedure 9(b),  
8 which requires that a plaintiff alleging fraud "must state with  
9 particularity the circumstances constituting fraud." See Kearns v.  
10 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy  
11 Rule 9(b), a pleading must identify the who, what, when, where, and  
12 how of the misconduct charged, as well as what is false or  
13 misleading about [the purportedly fraudulent] statement, and why it  
14 is false." United States ex rel. Cafasso v. Gen. Dynamics C4 Sys.,  
15 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quotation marks and  
16 citations omitted).

17

18 **IV. DISCUSSION**

19 **A. Intentional Misrepresentation**

20 The elements of intentional misrepresentation, also known as  
21 fraud, are: "(1) misrepresentation (false representation,  
22 concealment, or nondisclosure), (2) knowledge of falsity (or  
23 'scienter'), (3) intent to defraud (i.e., to induce reliance), (4)  
24 justifiable reliance, and (5) resulting damage." Lazar v. Super.  
25 Ct., 12 Cal. 4th 631, 638 (Cal. 1996). Plaintiffs allege several  
26 misrepresentations: (1) Defendants represented that the loan had a  
27 fixed rate for 30 years when it actually had an adjustable rate;  
28 (2) Wells Fargo represented that the loan modification agreement

1 ("LMA") provided for monthly escrow deposits of approximately \$100  
2 and included no hidden fees when, in fact, the LMA called for  
3 escrow deposits and fees that totaled around \$1,200 monthly; (3)  
4 Defendants told Plaintiffs that Defendants would "resolve the  
5 discrepancies on the loan balance and default amount," but that  
6 Defendants did not make any corrections; (4) Defendants represented  
7 that Plaintiffs qualified for the Home Affordable Modification  
8 Program ("HAMP") and that Defendants would conduct a loan  
9 modification review to address issues with the LMA, but Defendants  
10 never conducted such a review; (5) Defendants represented that no  
11 review could be conducted because the loan had already been  
12 modified when, in fact, "there was never a true modification of the  
13 loan;" and (6) Defendants represented that Plaintiffs could appeal  
14 the denial, but Defendants never permitted an appeal. FAC ¶¶ 51-  
15 54.

16 Defendants argue that each of these claims is insufficiently  
17 specific to meet the heightened pleading standards of Rule 9(b).  
18 Defendants are correct. Plaintiffs allege that Defendants  
19 represented that the loan had a fixed rate for 30 years at the loan  
20 origination. Id. ¶ 51. However, Plaintiffs do not specify the  
21 dates or persons who made that representation. Id. Plaintiffs'  
22 loan documents included an adjustable rate rider specifying (in all  
23 capital, bolded letters) that the loan provided for an initial  
24 period of monthly payments at a certain rate, but that after the  
25 initial period, both the interest rate and monthly payments could  
26 be changed. FAC Ex. 2. Given this explanation in the loan  
27 documents, it must be presumed that Plaintiffs allege that one of  
28 Defendants' agents made an oral representation about a fixed rate.

1 But Plaintiffs do not specify who made such a representation, that  
2 person's relationship to Defendants, or when the alleged  
3 representation was made. Plaintiffs have failed to add the  
4 necessary specificity to meet the pleading standards of Rule 9(b).

5 Plaintiffs' claims regarding Defendants' representations about  
6 their payments following the LMA are also insufficient. Once  
7 again, Plaintiffs fail to specify who made the representation or  
8 even to identify that person's relationship to Defendants. Once  
9 again, the written agreement supports Defendants: the LMA states  
10 that Plaintiffs must make monthly escrow deposits, which were  
11 subject to change. FAC Ex. 6 at 2. The LMA also includes a  
12 "notice of no oral agreements" stating that the written agreement  
13 represents the final agreement between the parties and that there  
14 are no oral agreements between them. Id. at 5.

15 The remaining alleged misrepresentations are also  
16 insufficiently specific. Again, Plaintiffs fail to allege the who,  
17 where, and (in most cases) when of the allegedly false statements.  
18 The remaining statements are also even vaguer than the two  
19 discussed previously; it is unclear from the FAC exactly what  
20 Plaintiffs allege Defendants said. In some cases -- for example,  
21 Defendants' statements that they would conduct a modification  
22 review or that a modification had already occurred -- Plaintiffs  
23 fail to explain why the statements were false. None of the alleged  
24 misrepresentations are pled with sufficient specificity. The Court  
25 directed Plaintiffs to plead this claim with additional specificity  
26 when granting leave to amend the original complaint. Plaintiffs  
27 have failed to do so. Therefore, their intentional  
28 misrepresentation claim is DISMISSED WITH PREJUDICE.

1           **B. Negligent Misrepresentation**

2           Plaintiffs did not bring a claim for negligent  
3 misrepresentation in their original complaint. In ruling on  
4 Defendants' motion to dismiss the original complaint, the Court  
5 granted Plaintiffs leave to amend only to rectify certain problems  
6 with their existing claims, not to add new ones. Accordingly,  
7 Defendants are correct that Plaintiffs' new negligent  
8 misrepresentation claim must be dismissed. Even were the Court to  
9 consider the merits of this claim, though, it would still be  
10 dismissed.

11           The elements for a cause of action for negligent  
12 misrepresentation are (1) a misrepresentation of a material fact,  
13 (2) without reasonable grounds for believing it to be true, (3)  
14 with intent to induce another's reliance on the fact  
15 misrepresented, (4) reasonable reliance by the plaintiff, and (5)  
16 damages. Fox v. Pollack, 181 Cal. App. 3d 954, 962 (Cal. Ct. App.  
17 1986).

18           There is a split among district courts in the Ninth Circuit as  
19 to whether claims for negligent misrepresentation must always meet  
20 the Rule 9(b)'s specificity requirements. See, e.g., Petersen v.  
21 Allstate Indem. Co., 281 F.R.D. 413, 416-18 (C.D. Cal. 2012).  
22 However, the Ninth Circuit's general guidance is that a claim  
23 sounds in fraud where a plaintiff "allege[s] a unified course of  
24 fraudulent conduct and rel[ies] entirely on that course of conduct  
25 as the basis of a claim." Vess v. Ciba-Geigy Corp. USA, 317 F.3d  
26 1097, 1103 (9th Cir. 2003). Here, Plaintiffs allege negligent  
27 misrepresentation and intentional misrepresentation for precisely  
28 the same course of conduct which they claim amounts to intentional



1 misrepresentation. The FAC repeatedly alleges that Defendants  
2 acted intentionally. Additionally, the manner of Plaintiffs'  
3 pleadings indicates that the negligent misrepresentation claim is  
4 really just an attempt to repackage the intentional  
5 misrepresentation claim: Plaintiffs did not initially allege  
6 negligent misrepresentation at all, and they added the claim only  
7 after the Court found their intentional misrepresentation claims to  
8 be insufficiently specific. Therefore, the Court finds that  
9 Plaintiffs' negligent misrepresentation claim sounds in fraud and  
10 is subject to the Rule 9(b). For the same reasons that their  
11 intentional misrepresentation claim fails, Plaintiffs' negligent  
12 misrepresentation claim also fails. This claim, too, is DISMISSED  
13 WITH PREJUDICE.

14 **C. Promissory Estoppel**

15 "Promissory estoppel applies whenever a promise which the  
16 promissor should reasonably expect to induce action or forbearance  
17 on the part of the promisee or a third person and which does induce  
18 such action or forbearance would result in an injustice if the  
19 promise were not enforced." Lange v. TIG Ins. Co., 68 Cal. App.  
20 4th 1179, 1185 (Cal. Ct. App. 1998). "To be binding, the promise  
21 must be clear and unambiguous." Id.

22 Again, Plaintiffs allege that Defendants broke numerous  
23 promises. First, Plaintiffs allege that Defendants promised that  
24 the original loan would be held at a fixed interest rate for thirty  
25 years, but then adjusted the interest rate. FAC ¶ 57. As  
26 discussed above, the adjustable rate rider attached to the loan  
27 contradicts that allegation. This claim is DISMISSED WITH  
28

1 PREJUDICE to the extent that it is premised on a promise not to  
2 adjust the interest rate.

3 Plaintiffs also allege that Defendants promised that  
4 Plaintiffs' monthly payments under the LMA would be around \$3,300,  
5 including the escrow deposits. Id. ¶ 58. However, Plaintiffs  
6 allege that Defendants charged them additional fees that were not  
7 included among those specified in the LMA. Id. ¶¶ 31-32. After a  
8 hearing on the original motion to dismiss, the Court found the  
9 promissory estoppel claim, as it related to the allegedly  
10 undisclosed charges after execution of the LMA, adequately pled so  
11 as to survive a motion to dismiss. Prior Order at 10-11. Nothing  
12 in the FAC or Defendants' motion papers alters that conclusion.  
13 Accordingly, Defendants' motion is DENIED with respect to that  
14 particular claim.

15 **D. Civil Code Section 2923.55**

16 Section 2923.55 provides that a mortgage servicer may not  
17 record a notice of default until a number of requirements are met  
18 and sets forth a list of information that the mortgage servicer  
19 must send to the borrower in writing. The Court previously  
20 dismissed Plaintiffs' Section 2923.55 claim because Plaintiffs  
21 failed to "specify how Defendants ran afoul of the statute or which  
22 particular provisions are at issue." Prior Order at 8-9.  
23 Plaintiffs have clarified their allegations somewhat. Plaintiffs  
24 claim that, after recording the first notice of default in December  
25 2011, Defendants failed to provide Plaintiffs with a copy of the  
26 Note, identity of the beneficiary, and assignment and accounting of  
27 the loan -- as required by law -- even after Plaintiffs requested  
28 that information. FAC ¶ 65. Plaintiffs also allege that

1 Defendants failed to provide the required advanced notice before  
2 recording the second notice of default in February 2013.

3 The Court has already rejected that second argument, finding  
4 that the loan modification discussions constituted sufficient  
5 notice as required by statute. See Prior Order at 8-9. However,  
6 Defendants apparently find no fault with Plaintiffs' allegations  
7 regarding Defendants' failure to provide the required information.  
8 See Mot. at 8-10. Accordingly, Plaintiffs' claim for violation of  
9 2923.55 remains undisturbed as it relates to the allegation that  
10 Defendants failed to provide the required documents after  
11 Plaintiffs requested them. This claim is DISMISSED WITH PREJUDICE  
12 in all other respects.

13 **E. Breach of the Implied Covenant of Good Faith and Fair**  
14 **Dealing**

15 Plaintiffs' next claim is for breach of the implied covenant  
16 of good faith and fair dealing. "A typical formulation of the  
17 burden imposed by the implied covenant of good faith and fair  
18 dealing is 'that neither party will do anything which will injure  
19 the right of the other to receive the benefits of the agreement.'" Andrews v. Mobile Aire Estates, 125 Cal. App. 4th 578, 589 (Cal.  
20 Ct. App. 2005) (quoting Gruenberg v. Aetna Ins. Co., 9 Cal.3d 566,  
21 573 (Cal. 1973)). The implied covenant of good faith and fair  
22 dealing "cannot impose substantive duties or limits on the  
23 contracting parties beyond those incorporated in the specific terms  
24 of their agreement." Lane v. Vitek Real Estate Indus. Grp., 713 F.  
25 Supp. 2d 1092, 1102 (E.D. Cal. 2010) (quoting Agosta v. Astor, 120  
26 Cal. App. 4th 596, 607 (Cal. Ct. App. 2004)).

27  
28 ///

1 In its prior order, the Court permitted Plaintiffs' claim to  
2 remain undisturbed to the extent it is "premised on the theory that  
3 Defendants assessed them for additional charges in violation of the  
4 executed loan modification agreement . . . ." Prior Order at 11.  
5 However, Plaintiffs have amended their claim to make it less  
6 specific. Compare ECF No. 1-1 Ex. 2 ("Compl.") ¶¶ 80-98, with FAC  
7 ¶¶ 74-81. Nonetheless, Plaintiffs still manage to state a claim in  
8 this respect. In every other respect, Plaintiffs fail to state a  
9 claim because Plaintiffs have "not identified an express provision  
10 or even the underlying purpose giving rise to [their] claim[s] of  
11 an implied covenant." Moenig v. Bank of Am., N.A., No. 2:14-CV-  
12 01399-KJM, 2014 WL 5473554, at \*7 (E.D. Cal. Oct. 23, 2014).  
13 Plaintiffs' claim for breach of the implied covenant of good faith  
14 and fair dealing remains undisturbed as to the allegation that  
15 Defendants charged Plaintiffs fees beyond those permitted by the  
16 loan modification agreement. This claim is DISMISSED WITH  
17 PREJUDICE in all other respects.

18 **F. Wrongful Foreclosure**

19 Next, Plaintiffs bring a claim for wrongful foreclosure, in  
20 lieu of their claim (asserted in the original complaint) that  
21 Defendants lacked standing to foreclose on the subject property.  
22 Plaintiffs again assert that "Defendants failed to perfect any  
23 security interest in the subject property." FAC ¶ 83. However,  
24 the FAC fails to explain why Plaintiffs believe that is the case.  
25 None of the facts asserted provide any basis for Plaintiffs'  
26 assertion that Defendants failed to perfect their security  
27 interest. In their opposition brief, Plaintiffs fail to  
28 distinguish this claim from their cancellation of interests claim,

1 and they provide no argument to separately support a wrongful  
2 foreclosure claim. Accordingly, this claim is DISMISSED WITH  
3 PREJUDICE.

4 **G. Cancellation of Instruments**

5 In its order on Defendants' motion to dismiss the original  
6 complaint, the Court dismissed Plaintiffs' cancellation of  
7 instruments claim with prejudice to the extent that it was premised  
8 on Defendants' violation of a pooling services agreement.<sup>1</sup> The  
9 Court held that Plaintiffs' cancellation of instruments claim  
10 survived to the extent that it is based on the allegation that  
11 Defendants assessed Plaintiffs' monthly charges in violation of the  
12 LMA. Nothing in the FAC or Defendants' motion alters the Court's  
13 prior ruling. Plaintiffs' cancellation of instrument claim remains  
14 undisturbed to the extent that it is premised on Defendants'  
15 violation of the LMA.

16  
17 **V. CONCLUSION**

18 Defendants' motion to dismiss is GRANTED in part and DENIED in  
19 part:

- 20 • The motion to dismiss is GRANTED with respect to Plaintiffs'  
21 claim for intentional misrepresentation.  
22 • The motion to dismiss is GRANTED with respect to Plaintiffs'  
23 claim for negligent misrepresentation.  
24

25 \_\_\_\_\_  
26 <sup>1</sup> In the original complaint, Plaintiffs alleged that Wells Fargo  
27 transferred its beneficial interest in the deed of trust to U.S.  
28 Bank through a Corporate Assignment Deed of Trust (the "Corporate  
Assignment"). They further alleged that the Corporate Assignment  
shows that the deed of trust was transferred to a mortgage backed  
security trust, and that this trust was governed by a Pooling  
Services Agreement. Compl. ¶ 21, Ex. B.

- 1 • The motion to dismiss is GRANTED in part and DENIED in part  
2 with respect to Plaintiffs' claim for promissory estoppel.  
3 The motion is DENIED as to Plaintiffs' claim that Defendants  
4 assessed fees beyond those permitted in the LMA. The motion  
5 is GRANTED as to Plaintiffs' claims regarding all other  
6 promises Defendants' allegedly made.
- 7 • The motion to dismiss is GRANTED in part and DENIED in part  
8 with respect to Plaintiffs' claim for violation of Section  
9 2923.55. The motion is DENIED as to Plaintiffs' claim that  
10 Defendants violated the LMA. The motion is GRANTED as to  
11 Plaintiffs' other Section 2923.55 claims.
- 12 • The motion to dismiss is GRANTED in part and DENIED in part  
13 with respect to Plaintiffs' claim for breach of the implied  
14 covenant. The motion is DENIED as to Plaintiffs' claim that  
15 Defendants violated the LMA. The motion is GRANTED as to  
16 Plaintiffs' other breach of implied covenant claims.
- 17 • The motion to dismiss is GRANTED with respect to Plaintiffs'  
18 claim for wrongful foreclosure.
- 19 • The motion to dismiss is GRANTED in part and DENIED in part  
20 with respect to Plaintiffs' claim for cancellation of  
21 instruments. The motion is DENIED as to Plaintiffs' claim  
22 that Defendants breached the LMA. The motion is GRANTED as to  
23 Plaintiffs' other cancellation of instrument claims.
- 24 ///
- 25 ///
- 26 ///
- 27 ///
- 28 ///

1 All claims dismissed by this order are DISMISSED WITH PREJUDICE.

2

3 IT IS SO ORDERED.

4

5 November 25, 2014

6

---

UNITED STATES DISTRICT JUDGE

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28