

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

YOLANDA BUMATAY MULATO,  
ZOSIMA BUMATAY MULATO,  
  
Plaintiffs,  
  
v.  
  
WELLS FARGO BANK, N.A., et al.,  
  
Defendants.

Case No.14-cv-00884-NC

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS WITHOUT  
LEAVE TO AMEND**

Re: Dkt. No. 148

Yolanda and Zosima Mulato allege that Wells Fargo fraudulently denied their request for a loan modification because the Mulatos are Filipino. The Court previously dismissed the first amended complaint and provided guidance as to which facts were lacking. The Court finds that few facts were added to the second amended complaint, and the facts that were added are insufficient to state a claim. Thus, the Court GRANTS defendant's motion to dismiss without leave to amend.

**I. BACKGROUND**

**A. Facts Alleged**

The complaint is 39 pages of mixed argument, legislative history, law, and fact. The Court has attempted to sift out the facts asserted that are relevant to the Mulatos' claims and summarizes them below.

Plaintiffs Yolanda and Zosima Mulato are joint tenants in a single-family residence in San Francisco. Second Amended Complaint ("SAC"), Dkt. No. 147 ¶ 18. Plaintiffs

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1 are 71 and 60 year-old Filipino women, never married or divorced. SAC ¶ 16. Yolanda  
2 acquired the subject property in 2001, and Zosima has lived there continuously with her  
3 children to the present.<sup>1</sup> SAC ¶ 18. In 2014, Yolanda gifted an equal undivided joint  
4 tenancy interest in the property to Zosima. SAC ¶ 18.

5 Yolanda’s acquisition of the property was financed in 2006 by a pic-a-payment  
6 adjustable rate loan made by the World Savings Bank in the amount of \$551,000, with an  
7 adjustable interest rate of 6.510%. SAC ¶ 19. World Savings Bank merged twice,  
8 ultimately becoming Wells Fargo Bank, N.A. SAC ¶ 19.<sup>2</sup>

9 Yolanda was the chief operating room nurse at San Francisco General Hospital and  
10 San Mateo General Hospital for over 25 years until her retirement in 2013. SAC ¶ 18.  
11 Yolanda operated a senior care home from 2003 to 2013 in Pacifica. SAC ¶ 20. In 2013,  
12 she surrendered her state and local licenses to operate the home because she could no  
13 longer physically manage the 6-bed facility nor operate at a profit. SAC ¶ 20. As a result,  
14 Yolanda experienced declining monthly income. SAC ¶ 20. Around 2006, Yolanda sold  
15 her residence in Daly City, and used the sale proceeds for down payments on three single  
16 family homes in Elk Grove that she rented as an investment for retirement. SAC ¶ 20.  
17 When the housing bubble burst, the tenants left, and Yolanda “lost her entire investment  
18 through foreclosure by Wells Fargo.” SAC ¶ 20. Yolanda inquired with a Wells Fargo  
19 representative whether she was eligible for mortgage assistance on the San Francisco  
20 property through HAMP, and a representative informed her that the foreclosure of the Elk  
21 Grove properties made her ineligible. SAC ¶ 21.

22 Yolanda applied to Wells Fargo for mortgage assistance in June 2013, stating she  
23 was at imminent risk of default. SAC ¶ 23. A Wells Fargo agent, Cory Moeller,  
24 responded on July 18, 2013 with the following:

25 \_\_\_\_\_  
26 <sup>1</sup> The Court will refer to the Mulatos by first name in order to be specific. The Court  
intends no disrespect in doing so.  
27 <sup>2</sup> The defendants in this case are Wells Fargo Bank, N.A. and Wells Fargo Home  
Mortgage, a division of Wells Fargo Bank, N.A. Defendant Wells Fargo Bank, N.A. has  
28 indicated that these are the same entity, and thus the Court refers to them together as  
defendant Wells Fargo.

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\*If you are eligible and your modification requires a trial period plan, you will receive instructions regarding your new trial payment amount. Once you meet all requirements of the trial (period plan), you will receive a final loan modification agreement adjusting the terms of your mortgage.

\*If you are eligible and your modification does not require a trial period plan, you will receive a final loan modification agreement adjusting the terms of your mortgage.

\*If you're not eligible for a loan modification program, we'll look at other options to help you avoid foreclosure. As a reminder, it's important for you to continue making your regular mortgage payments until you hear from us.

Yolanda interpreted the offer as a "trial period plan." SAC ¶ 23. On July 23, 2013, Yolanda completed her request for mortgage assistance application and sent the completed, signed, and certified application to Moeller. SAC ¶ 23. Yolanda had a housing debt to income payment ration greater than 31% of monthly pre-tax income. SAC ¶ 26. On August 7, 2013, Yolanda's counsel and Moeller had a telephone conference and discussed specific terms of a loan modification. SAC ¶ 28. On September 19, 2013, Moeller sent a letter denying Yolanda's request for mortgage assistance application, stating that "you have not sufficiently established 'hardship.'" SAC ¶ 30.

On September 25, 2013, Yolanda requested further information from Moeller as to the decision. SAC ¶ 32. Moeller sent a second letter dated October 14, 2013, and stated that Yolanda has the ability to pay current mortgage payments using cash reserves or assets. SAC ¶ 32. Counsel requested further information from Moeller on October 24, 2013, but did not receive a response. SAC ¶ 34. Between July 18 and October 14, 2013, Moeller represented to Yolanda in more than one writing, "I'm here for you..." SAC ¶ 62. Yolanda alleges that "the representation implied and led plaintiff to conclude and rely on the representation that Moeller and Krahn [another Wells Fargo representative] intended to make their best efforts to provide plaintiff with meaningful, accurate mortgage assistance." SAC ¶ 62. Yolanda alleges that her denial was a policy by Wells Fargo that "constitutes a pattern or practice of disparate impact discrimination on the basis of race (Asian) national origin (Filipino) age (71), sex (woman) and marital status (never married)." SAC ¶ 42.

1 Wells Fargo served Yolanda with foreclosure notices on April 1, 2014, and May 4,  
2 2015. SAC ¶ 7. Yolanda “sought HUD’s assistance through the Office of Fair Housing  
3 and Equal Opportunity Region IX in January 2015, but HUD concluded it lacked  
4 jurisdiction.” SAC ¶ 7. For the past fourteen years until June 2014, Yolanda timely made  
5 each loan contract payment. SAC ¶ 19. Yolanda was rejected for a HOPE refinancing  
6 loan because she is delinquent. SAC ¶ 16.

7 On May 21, 2015, Yolanda alleges that a Wells Fargo attorney represented to  
8 Yolanda without reasonable ground for believing the representation to be true that Wells  
9 Fargo “discussed foreclosure prevention alternatives with you or your third party  
10 representative.” SAC ¶ 61.

11 **B. Procedural History**

12 Yolanda filed this action in February 2014, alleging a variety of causes of actions  
13 against Wells Fargo and its employees, stemming from Yolanda’s rejected loan  
14 modification applications and potential foreclosure of her home. Dkt. No. 1.

15 On April 14, 2014, Yolanda filed an ex parte motion for a temporary restraining  
16 order seeking to enjoin Wells Fargo from foreclosing on the San Francisco property, after  
17 receiving a “Notice of Intent to Foreclose” on April 1. Dkt. No. 6. On April 30, 2014, the  
18 Court denied the ex parte motion for failure to show irreparable harm justifying the relief  
19 sought in light of the status of the foreclosure proceedings, and ordered Yolanda to file a  
20 regularly noticed motion for a preliminary injunction. See Dkt. No. 21. On May 2, 2014,  
21 Wells Fargo filed a motion to dismiss all the causes of action in the complaint for failure to  
22 state a claim. Dkt. No. 24. In lieu of opposing Wells Fargo’s motion, Yolanda filed her  
23 first amended complaint on May 12, 2014. Dkt. No. 27. On the same day, Yolanda also  
24 filed a motion for preliminary injunction. Dkt. No. 28.

25 In the first amended complaint, Yolanda asserted ten causes of action against all  
26 defendants. On May 29, 2014, Wells Fargo moved to dismiss all the causes of action in  
27 the first amended complaint under Rule 12(b)(6) for failure to state a claim. Dkt. No. 40.  
28 On the same day, the employee defendants moved to dismiss all causes of action under

1 Federal Rule of Civil Procedure 12(b)(2) on the basis that this Court lacks personal  
2 jurisdiction. Dkt. No. 42. The Court granted the employee defendants' motion to dismiss  
3 in its entirety. Dkt. No. 106. The Court also dismissed the complaint as to Wells Fargo on  
4 all claims, except the Equal Credit Opportunity Act claim, and granted Yolanda leave to  
5 amend. Dkt. No. 106. On January 12, 2015, Yolanda submitted a second amended  
6 complaint, which still named the employee defendants in the action. Dkt. No. 108. After  
7 the employee defendants moved to dismiss the complaint for lack of jurisdiction, Yolanda  
8 voluntarily dismissed them. Dkt. Nos. 110, 117. Defendant Wells Fargo moved to dismiss  
9 the second amended complaint. Dkt. No. 112. On January 29, 2015, Yolanda moved to  
10 file a supplemental complaint. Dkt. No. 115. On May 27, 2015, Yolanda moved for a  
11 preliminary injunction and to advance trial based on her ninth cause of action in the second  
12 amended complaint under the Homeowner's Bill of Rights. Dkt. No. 136.

13 The Court struck the second amended complaint because, at 96 pages, it was  
14 excessively lengthy and confusing. Dkt. No. 139. Yolanda moved for leave to file a  
15 renewed second amended complaint, which the Court permitted in part. Dkt. Nos. 140,  
16 143. The Court did not permit Yolanda to add government defendants and the claims  
17 related to them. Dkt. No. 143. However, Yolanda's six claims against Wells Fargo were  
18 permitted.

19 Now, Wells Fargo moves to dismiss the second amended complaint. Dkt. No. 148.  
20 Prior to hearing the motion, the Court issued a tentative ruling, putting plaintiffs on notice  
21 that the Court intended to dismiss the complaint without leave to amend and advising  
22 plaintiffs to proffer additional facts. Dkt. No. 155. The Court held a hearing on October 7,  
23 2015.

## 24 **II. LEGAL STANDARD**

25 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
26 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a  
27 motion to dismiss, all allegations of material fact are taken as true and construed in the  
28 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-

1 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are  
2 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” In re  
3 Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need  
4 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as  
5 true, to “state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly,  
6 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw  
7 the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft  
8 v. Iqbal, 556 U.S. 662, 678 (2009).

9 If a court grants a motion to dismiss, leave to amend should be granted unless the  
10 pleading could not possibly be cured by the allegation of other facts. Lopez v. Smith, 203  
11 F.3d 1122, 1127 (9th Cir. 2000).

12 **III. DISCUSSION**

13 Yolanda sues for: (A) housing discrimination under the Fair Housing Act;  
14 (B) breach of contract and the implied covenant; (C) negligent misrepresentation; and  
15 (D) intentional fraud. Yolanda additionally seeks declaratory relief, and both Yolanda and  
16 Zosima request a preliminary and a permanent injunction.

17 **A. Housing Discrimination**

18 Disparate treatment under the Fair Housing Act requires a plaintiff to allege: (1) she  
19 is a member of a protected class; (2) she applied for and met the qualifications for a loan;  
20 (3) the lender refused to enter into such a transaction despite the plaintiff’s qualifications;  
21 and (4) around the same time, defendant approved such loans for other people with the  
22 same qualifications. Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997). If  
23 the plaintiff does not adequately allege that defendant approved loans for other people,  
24 then the claim fails. Id.

25 Yolanda alleges that she was denied mortgage assistance because she is Filipino,  
26 while “similarly situated white borrowers received TPPs under more favorable terms.”  
27 SAC ¶ 54. Yolanda does not allege that she applied for and met the qualifications of the  
28 loan. Yolanda also does not allege with any further particularity that Wells Fargo

1 approved loans for similarly situated white borrowers. Even taking all factual allegations  
2 as true and drawing all inferences in favor of Yolanda, she has failed to plausibly state a  
3 claim for discrimination from which the Court could draw the reasonable inference that  
4 Wells Fargo is liable under the FHA.

5 In the caption, this claim is titled as “Fair Housing and ECOA,” and at the hearing,  
6 Yolanda’s counsel represented that this claim encompassed an ECOA claim. However,  
7 nothing within the claim addresses ECOA, or points to a specific claim under ECOA. The  
8 Court previously considered Yolanda’s ECOA claim as alleged in the first amended  
9 complaint and found that it was sufficiently pled. The claim now presented in the second  
10 amended complaint is different and deficient. Thus, this claim is DISMISSED.

11 **B. Breach of Contract and the Implied Covenant**

12 Wells Fargo argues that Yolanda’s claims for breach of contract and breach of the  
13 implied covenant fail to state a claim because: (1) Wells Fargo had no obligation under  
14 California law to offer a loan modification; (2) Wells Fargo had no obligation under  
15 HAMP to offer a loan modification; and (3) Yolanda failed to allege facts showing that she  
16 entered into a modification agreement with Wells Fargo, what its terms were, how Wells  
17 Fargo breached them, and what damages resulted. These are the same arguments Wells  
18 Fargo made in its first motion to dismiss, which the Court granted.

19 The standard elements of a claim for breach of contract are (1) the contract, (2)  
20 plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4)  
21 damage to plaintiff therefrom. *Abdelhamid v. Fire Ins. Exch.*, 182 Cal. App. 4th 990, 999  
22 (2010). “A claim for breach of the implied covenant of good faith and fair dealing requires  
23 the same elements [as a claim for breach of contract], except that instead of showing that  
24 defendant breached a contractual duty, the plaintiff must show, in essence, that defendant  
25 deprived the plaintiff of a benefit conferred by the contract in violation of the parties’  
26 expectations at the time of contracting.” *Levy v. JP Morgan Chase*, No. 10-cv-01493,  
27 2010 WL 4641033, at \*3 (S.D. Cal. Nov. 5, 2010).

28 The Court previously found that the July 18, 2013, letter does not qualify as an

1 offer, creating a contract, nor could Wells Fargo’s oral representations or assurances  
2 qualify as an offer creating a contract. Dkt. No. 106. The Court finds that no additional  
3 facts have been alleged in this complaint, and thus, this claim is DISMISSED.

4 **C. Negligent Misrepresentation**

5 Under California law, to state a claim for negligent misrepresentation, the plaintiff  
6 must allege: (1) a misrepresentation of a past or existing material fact; (2) without  
7 reasonable ground for believing it to be true; (3) with intent to induce another’s reliance on  
8 the misrepresentation; (4) ignorance of the truth and justifiable reliance on the  
9 misrepresentation by the party to whom it was directed; and (5) resulting damage.  
10 *Hosseini v. Wells Fargo Bank, N.A.*, No. 13-cv-02066 DMR, 2013 WL 4279632, at \*7  
11 (N.D. Cal. Aug. 9, 2013). In addition, Yolanda must allege the existence of a duty of care  
12 owed to her by Wells Fargo. *Ditto v. McCurdy*, 510 F.3d 1070, 1078 (9th Cir. 2007)  
13 (finding that negligent misrepresentation requires the same elements as negligence,  
14 including a duty of care).

15 As a general rule, under California law, “a financial institution owes no duty of care  
16 to a borrower when the institution’s involvement in the loan transaction does not exceed  
17 the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Sav.  
18 & Loan Ass’n*, 231 Cal. App. 3d 1089, 1095-96 (1991) (citation omitted). The Court  
19 previously determined that “[t]o the extent Yolanda premises her fraud-based claims on the  
20 representations made by Wells Fargo in the July 18, 2013, letter and the telephone call  
21 between Yolanda’s counsel and Moeller on August 7, 2013, these communications do not  
22 show that Wells Fargo exceeded its role as money lender and thus assumed a duty of care.”  
23 Dkt. No. 106. The Court finds that no additional facts have been pled with sufficient  
24 particularity to sustain a claim for negligent misrepresentation, and DISMISSES this  
25 claim.

26 **D. Intentional Fraud**

27 To plead fraud or mistake under Rule 9(b), “a party must state with particularity the  
28 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Under California law,



1 the “indispensable elements of a fraud claim include a false representation, knowledge of  
2 its falsity, intent to defraud, justifiable reliance, and damages.” *Vess v. Ciba-Geigy Corp.*  
3 *USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). “The complaint must specify such facts as the  
4 times, dates, places, benefits received, and other details of the alleged fraudulent activity.”  
5 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (citations omitted).

6 Yolanda argues that Wells Fargo agents had knowledge that Wells Fargo had a  
7 policy of denying loan modifications, and thus, intentionally misrepresented that they  
8 would consider Yolanda’s application. Even taken as true, Yolanda fails to plead her  
9 justifiable reliance on Wells Fargo’s misrepresentations, and her resulting damages. See  
10 *Casault v. Fed. Nat. Mortgage Ass’n*, 915 F. Supp. 2d 1113, 1122 (C.D. Cal. 2012)  
11 (finding that plaintiff’s reliance on loan modification offers was not reasonable, and thus  
12 plaintiff did not adequately state a claim for fraud under California law). Thus, this claim  
13 is DISMISSED.

14 **E. Declaratory Relief**

15 Yolanda’s first cause of action is for declaratory relief. Dkt. No. 147 at 22.  
16 However, declaratory relief requires an actual controversy between the parties, and is a  
17 form of relief, not a cause of action. *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983)

18 “The appropriate inquiry for a district court in a Declaratory Judgment Act case is  
19 to determine whether there are claims in the case that exist independent of any request for  
20 purely declaratory relief, that is, claims that would continue to exist if the request for a  
21 declaration simply dropped from the case.” *Snodgrass v. Provident Life & Acc. Ins. Co.*,  
22 147 F.3d 1163, 1167–68 (9th Cir. 1998). “Federal courts do not have a duty to grant  
23 declaratory judgment; therefore, it is within a district court’s discretion to dismiss an action  
24 for declaratory judgment.” *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 533 (9th  
25 Cir. 2008).

26 Here, the Court has determined that Yolanda has failed to state a claim for relief on  
27 her underlying causes of action. Therefore, no claims in the case exist independent of any  
28 request for declaratory relief, so this “claim” is also DISMISSED.

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**F. Preliminary and Permanent Injunction**

Similarly, injunctive relief is a remedy, not a cause of action. See *Castellanos v. Countrywide Bank NA*, No. 15-cv-00896 BLF, 2015 WL 3988862, at \*4 (N.D. Cal. June 30, 2015); *McDowell v. Watson*, 59 Cal.App.4th 1155, 1159 (1997). Here, no causes of action remain, and therefore, injunctive relief also fails. Additionally, a plaintiff seeking injunctive relief must establish that she is likely to succeed on the merits, which here, the Mulatos cannot do. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This “claim” is also DISMISSED.

**IV. CONCLUSION**

Although leave to amend the complaint is generally preferred, “futile amendments should not be permitted.” *Klamath-Lake Pharmaceutical Ass’n v. Klamath Med. Serv. Bur.*, 701 F.2d 1276, 1292 (9th Cir. 1983) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

The Court dismissed Yolanda’s first amended complaint, and in that order, provided a detailed explanation of the appropriate law and why the facts alleged in the complaint were not sufficient. After reviewing the second amended complaint and hearing the Mulatos’ oral arguments, the Court concludes that the Mulatos have no further facts in their possession that would cure the deficiencies outlined in this order. This case is about the Mulatos’ frustration that Wells Fargo denied Yolanda’s application for a loan modification. Taken as true, the facts of this case do not plausibly give rise to the conclusion that Wells Fargo is in violation of the common or statutory law alleged. Therefore, the motion to dismiss is GRANTED without leave to amend.

**IT IS SO ORDERED.**

Dated: October 28, 2015

  
NATHANAEL M. COUSINS  
United States Magistrate Judge